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Clarifying the Attempt to Monopolize Offense as an Alternative to Protectionist Legislation: The Conditional Relevance of "Dangerous Probability of Success"

*James F. Ponsoldt**

The wounded condition of several major American industries, including steel and textiles, resulting from foreign "predatory" conduct has generated much commentary.¹ At the same time, private spokesmen for our institutionalized business interests, including the financial community, have bemoaned American balance of trade figures, blaming them on such "impediments" to our export trade as foreign trade barriers and domestic antitrust laws.² The two trade problems suggest a common theme: foreign governments have been unfairly aiding their business interests by protecting monopolized or cartelized foreign markets from American business penetration while also subsidizing, directly or indirectly, foreign invasion of certain targeted American markets.³

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1 See, e.g., *Senate O.K.s Bill That Curbs Textile Imports*, Atlanta J., Nov. 14, 1985, at 1E. In that article, Senator Strom Thurmond, Chairman of the Senate Judiciary Committee, is quoted as follows: "Unless something is done to stop these massive imports coming in here, you won't have a textile industry. What I'm talking about is jobs. Jobs for Americans." *Id.* Senator Daniel Evans, an opponent of the legislation, is quoted as responding, "If the prices [of domestic goods] were lower here, we wouldn't have any imports." *Id.* President Reagan subsequently vetoed the legislation, N.Y. Times, Dec. 18, 1985, at A1.

2 See, e.g., editorial by Secretary of Commerce Malcolm Baldrige, calling for the repeal of section 7 of the Clayton Antitrust Act, Wall St. J., Oct. 15, 1985, at 28, col. 3.

3 See *Mitsui & Co. v. Western Concrete Structures Co.*, 760 F.2d 1013 (9th Cir.), cert. denied, 106 S. Ct. 230 (1985), where the Ninth Circuit held that importers of Japanese steel strand at below government import price control levels and in violation of the Antidumping Acts may have violated the Sherman Act, even where the product was sold at prices above cost. *Id.* at 1016.

What has happened, in general, is that the relevant geographic market for competition among most manufactured products has expanded beyond national borders. American big business and its labor union constituency, suffering from the effects of mergers and market concentration, were simply unprepared for the change from relatively benign competitive conditions, engendered in part by lax antitrust enforcement. Business and labor have sought relief in the nature of industry wide cooperation and government protection from the demands of a world-wide free market system. This article suggests an alternative to the proposed protectionist legislation which would insulate our markets from competition and unduly involve the federal government in private commercial conduct. The alternative involves heightened sensitivity toward the Sherman Antitrust Act and use of the Act by domestic manufacturers, as "private attorneys general," as a legitimate defensive weapon

While recognizing subsidized imports and the resulting foreign trade imbalances as trade policy problems, scholars, judges, and governmental officials⁴ have also expressed interest in resolving a related domestic competition issue which could help to eliminate predatory conduct in international as well as domestic trade. Through a modest judicial or, if necessary, legislative route, these people seek a clarification of the attempt offense in section 2 of the Sherman Act⁵ to bring the law defining attempt to monopolize in line with the common law and Model Penal Code definitions of criminal attempt.⁶ Many circuit courts currently require a showing that the defendant is dangerously close to monopolization before finding an attempt to monopolize.⁷ A clarification of the attempt offense would emphasize that victimized American corporations may bring private attempt to monopolize cases against state controlled or subsidized foreign manufacturers that have penetrated American markets through predatory means while their domestic markets remain monopolized. These suits should be allowed even

against foreign predation, as occurred in *Mitsui & Co., supra*, and in *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom.*, *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

4 See REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 144 (1979); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 137-38 (1977); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 375, 380 (1974); Ponsoldt, *Antitrust: Alternative to Protectionism*, Legal Times, Oct. 17, 1983, at 8, 10. The clarification is opposed by Halverson, Kalinowski, Lifland & Rosch, *Joint Statement on Simplification of Standards for Attempted Monopolization*, 48 ANTITRUST L.J. 813, 816 (1979). See also Jakobs & Hove, *Remedies for Unfair Import Competition in the United States*, 13 CORNELL INT'L L.J. 1, 27 (1980).

5 15 U.S.C. § 2 (1982). The statute provides, in relevant 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"

6 See notes 8, 153-54 *infra* and accompanying text. See generally Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 COLUM. L. REV. 571 (1961).

7 See, e.g., text accompanying notes 76, 92-93. In *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), however, the court reversed the dismissal of a complaint which did not allege that the defendant's conduct posed a dangerous probability of establishing a monopoly over the prepared spaghetti sauce market. The court stated:

It is apparent that each situation will present different problems that mandate a flexible approach toward the "mix" of conduct, actor, and market conditions that make up the offense. In some cases of clearly exclusionary conduct, the conduct itself, along with the exclusionary intent that can be inferred from it, poses such a danger to competition that it may be condemned regardless of the market power of the actor Such clearly exclusionary behavior, even though it poses no immediate measurable danger to the market, presents the potential for mischief. To the extent that such conduct inevitably harms competition, there is little reason to tolerate it.

627 F.2d at 925.

where, as a practical matter, the foreign competitors are not "dangerously close" to monopolizing American markets.⁸

This article, in Part I, will review the background and existing state of the law of attempt to monopolize in the Supreme Court and lower federal courts, with particular attention given to the prevailing requirement that the plaintiff show that the defendant is dangerously close to successful monopolization. Part II will focus upon the two major attempt to monopolize cases brought in the last decade by the Department of Justice.⁹ The practices challenged in those cases constitute domestic counterparts of some of the alleged predatory practices of foreign competitors, and the cases make clear that the Department has, as a matter of domestic antitrust enforcement, been strongly supportive of the clarification of the attempt offense advocated herein.¹⁰ Part III will review the common law of criminal attempt, which the Supreme Court seems to have recognized as applicable to the Sherman Act,¹¹ and suggest that it is parallel to the proposal contained in the 1979 National Commission Report to the President concerning the attempt to monopolize provision. That proposal does not require independent proof that a defendant is likely to achieve monopoly power.¹²

The article will conclude that a clarification¹³ of the attempt to

8 See *Mitsui Co. v. Western Concrete Structures, Inc.*, 706 F.2d 1013 (9th Cir.), *cert. denied*, 106 S. Ct. 230 (1985); *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir.), *rev'd sub nom.*, *Matsushita Elec. Ind. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986). Of course, allegations of predatory conduct and intent would have to be backed up with proof. As a general matter, the Model Penal Code law of criminal attempt requires proof that a defendant committed an overt act with the specific intent of achieving the ultimate criminal result, constituting a substantial step toward that result. MODEL PENAL CODE § 5.01(1)(c) (official draft 1962). Intervening events which interfered with the actor's goal, rendering his success unlikely or even impossible, provide no defense. Thus, evidence that a foreign corporation with substantial market power or a monopoly in its domestic market has either engaged in or subsidized below cost pricing in U.S. markets, withheld needed supplies, attempted to control prices, or blocked channels of distribution with the intent to eliminate competitors, should, without more, be probative of an attempt to monopolize under generally recognized criminal law standards.

9 *United States v. American Airlines, Inc.*, 570 F. Supp. 654 (N.D. Tex. 1983), *rev'd*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 106 S. Ct. 420 (1985); *United States v. Empire Gas Corp.*, 393 F. Supp. 903 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

10 Perhaps the clearest expression of the position of the United States with respect to the attempt to monopolize provision is the Memorandum to the Solicitor General submitted by the Assistant Attorney General for the Antitrust Division in the *Empire Gas* case in 1976. The Memorandum recommended that a petition for certiorari be filed in that case. The resulting petition for certiorari was filed on November 23, 1976. Petition for Writ of Certiorari at 1, *United States v. Empire Gas Corp.*, 393 F. Supp. 903 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). The author of this article represented the United States in the *Empire Gas* case as a Justice Department attorney.

11 See notes 34-40 *infra* and accompanying text.

12 See note 153 *infra* and accompanying text.

13 In *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), the court spelled out the basis for the clarification as follows:

monopolize provision, which would not require independent proof that a defendant is dangerously close to successful monopolization, will resolve an issue of glaring ambiguity in our domestic competition law. The clarification could provide a legitimate weapon for our domestic industries to use against truly predatory foreign competition, while not directly involving United States foreign trade policy and avoiding traditional forms of economic retaliation damaging to world markets.

I. Judicial Interpretations of Attempt to Monopolize

A. *Background: The Scope and Elements of the Offense*

In recent years, few areas of antitrust law have produced wider disagreement among courts and commentators than the proscription against attempts to monopolize contained in section 2 of the Sherman Act.¹⁴ Fueling this controversy is the consistent and apparently calculated refusal of the United States Supreme Court to grant certiorari and clearly delineate the required elements of the attempt offense.¹⁵ Consequently, the lower federal courts' treatment of attempt to monopolize claims continues to reflect the confusion that exists in the area.

The courts disagree about both the general scope and specific

A prima facie case of attempt to monopolize is made out by evidence of a specific intent to monopolize "any part" of commerce, plus anticompetitive conduct directed to the accomplishment of that unlawful purpose 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 percent 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. These are not abstract hypotheses. A market share approaching monopoly is not required to enable one concern seriously to impede the capacity of others to compete by use of abusive trade practices. A construction of the Sherman Act that would immunize such practices would be contrary to the purposes of the Act; it is not required by the Act's language or legislative history.

¹⁴ See *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). *Cf.* *United States v. Chas. Pfizer & Co.*, 245 F. Supp. 737 (E.D.N.Y. 1965). See also 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); Cooper, *supra* note 4; Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956); 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); 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).

¹⁵ See, e.g., *Bravman v. Bassett Furniture Indus.*, 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977). *Pacific Eng'g & Prods. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

elements of the attempt offense. The prevailing definition of attempt to monopolize gives the offense meaning only as an appendage to the completed offense of monopolization.¹⁶ When so analyzed, the only business practices which can constitute an attempt to monopolize are those creating a “dangerous probability” that the actor will achieve monopoly power.¹⁷ This conceptualization of the scope of the offense is consistent with the criminal law attempt doctrine, which provides that a defendant may be punished only when his intent and conduct combine to create a danger that the statutorily identified harm to society will occur.¹⁸ An attempt is defined, therefore, in terms of the completed offense. Thus limited, section 2’s prohibition on attempts to monopolize, considered together with the inability of section 1 to reach conduct which does not involve concerted action, has often left the Sherman Act incapable of regulating single firm, anticompetitive behavior where the firm possesses neither monopoly power nor market power close to monopoly power.

An alternative approach to attempt to monopolize posits that the attempt offense should be distinguished in scope from monopolization—that the concept of monopoly be “attenuated” in attempt cases.¹⁹ The premise of this argument is that anticompetitive conduct which otherwise would fall into the gap between sections 1 and 2 of the Sherman Act should not go unchallenged. Thus, although the Act is overtly a criminal statute, its nature is similar to that of a constitutional provision—something to be flexibly construed, considering the needs and the times, in light of the congressional mandate to preserve competition and prevent the abuse of economic power.²⁰ Congress extended an invitation to the federal judiciary to develop a federal common law of antitrust based upon these policy objectives. Any contemporary judicial evaluation of the Sherman Act should be guided accordingly.

This article does not propose a judicial “attenuation” of the monopoly concept in deciding attempt to monopolize cases, whether involving domestic or international predation. Confining the scope of the attempt offense to cases in which a defendant’s overtly predatory conduct indicates an intention to “monopolize,” as that term is defined by the courts,²¹ is necessary to prevent over-

16 Cooper, *supra* note 4, at 379; Note, *supra* note 14, 31 VAND. L. REV. at 334.

17 See, e.g., *Panotex Pipe Line Co. v. Phillips Petroleum Co.*, 457 F.2d 1279 (5th Cir.), *cert. denied*, 409 U.S. 845 (1972); *Bernard Food Indus. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

18 See W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 438 (1972).

19 “I think the attenuation of the monopoly concept in attempt and conspiracy cases can easily be justified” Turner, *supra* note 14, at 305.

20 *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936).

21 The offense of monopolization has been defined to consist of the willful acquisition

involvement of the government in the free market and overreaching treble-damages litigation by inefficient private competitors.

The attempt offense should remain tied to the monopoly concept, but ambiguity concerning the specific elements of an attempt to monopolize offense must be clarified. The lower federal courts are divided on the issue,²² and the Supreme Court has not explicitly addressed the question. A consensus exists that, in an attempted monopolization case, the plaintiff must prove the defendant's specific intent to monopolize a part of interstate or foreign commerce, plus an overt act constituting an unfair method of competition,²³ which "tends" or is a "substantial step" toward the acquisition of monopoly power. This consensus derives from the Supreme Court's decision in *Swift & Co. v. United States*,²⁴ in which Justice Holmes first outlined the elements of the attempt to monopolize offense:

Intent is . . . essential to such an attempt [to monopolize]. 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 that intent and the consequent dangerous probability exists, this statute [the Sherman Act], like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.²⁵

The ambiguity surrounds the question of whether the dangerous probability of successful monopolization is an element which the plaintiff must prove independently, or whether it is a necessary consequence of the intent, so that only intent plus the overt act must be proved. Closely related is the question of whether, in order to demonstrate a specific intent to monopolize, the plaintiff must allege and prove the relevant market which the defendant is attempting to dominate and the defendant's power within that mar-

or maintenance of the power to control price or exclude competition in a relevant market when it is desired to do so. *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966).

22 See, e.g., *Agrashell, Inc. v. Hammons Prod. Co.*, 479 F.2d 269 (8th Cir.) (requiring proof of specific intent and proof of market power as two separate elements), *cert. denied*, 414 U.S. 1022 (1973); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.) (requiring only proof of specific intent), *cert. denied*, 377 U.S. 993 (1964); *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962) (requiring proof of specific intent to monopolize a defined market, but not a demonstration of market power), *aff'd*, 323 F.2d 134 (4th Cir. 1963).

23 See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 94 (1953); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *United States v. Griffith*, 334 U.S. 100 (1948).

24 196 U.S. 375 (1905).

25 *Id.* at 396.

ket. The Ninth Circuit has explicitly disavowed the latter requirement in *Lessig v. Tidewater Oil Co.*²⁶ and subsequent decisions²⁷ but, as will be discussed below, the majority of circuit courts have adopted the requirement in varying forms.

Currently, the courts or commentators have given some support to four alternative positions regarding the elements of attempted monopolization. The first approach requires only that the plaintiff show the defendant's specific intent to monopolize, which can be inferred from evidence of a blatantly and unambiguously predatory act. The plaintiff need not independently prove either a relevant market or a dangerous probability of successful monopolization as objective elements. This approach assumes, in effect, that a defendant would not engage in unambiguously predatory conduct unless he believed he would obtain some monopolistic advantage. The defendant's belief would constitute sufficient evidence of his intention and the danger to competition.²⁸

The second approach requires that the plaintiff show, through independent but not necessarily exclusive evidence, that the defendant specifically intended to acquire monopoly power and engaged in overt conduct constituting a substantial step toward the acquisition of such power. In order to prove an intention to monopolize, the plaintiff must identify and prove the objectively relevant market in question. However, the fact that a defendant could not realistically have achieved a monopoly due to intervening circumstances is irrelevant; there is no requirement that the plaintiff prove a dangerous probability of success. Evidence demonstrating the anticompetitive consequences as the defendant perceived them, suggesting a monopolistic intent, would suffice.²⁹

A third approach requires that the plaintiff prove the defendant's specific intent to monopolize an objectively defined market, an overt act tending toward monopoly, and the probability that monopoly would be achieved if the defendant's predatory practices were allowed to continue or were successfully consummated. Thus defined, a "dangerous probability" of successful monopolization is a separate element of the attempt offense, but evidence of such dangerous probability often overlaps with evidence of the predatory practices and the market structure. Under such a test, a defendant's theoretical capacity to monopolize can be dispositive of the "dangerous probability," and evidence of intervening events

26 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

27 *See, e.g.*, *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983), *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970).

28 *See* 327 F.2d at 474-75; *Turner, supra* note 14, at 305.

29 *See* *Petition for Writ of Certiorari, supra* note 10, at 13. *See also* *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

which preclude the achievement of a monopoly provides no defense.³⁰

Finally, utilizing a fourth approach, a number of courts have further refined the "dangerous probability of success" requirement in the third approach above. They hold that the plaintiff must show that the defendant engaged in practices which, if successfully consummated, would achieve a monopoly, and also, that the defendant was, as a practical matter, on the brink of success.³¹ Under this last approach, legal or factual impossibility would bar successful prosecution. Moreover, the application of Chicago School economic theory,³² suggesting that *de facto* entry barriers are fictional, would also preclude a finding of an actual probability of monopolization.³³

Judicial or legislative acceptance of any of the first three approaches, but particularly the second, would allow the practical application of the attempt offense in the context of foreign predation. The premise of this article is that the second approach, which is most closely aligned with the general criminal law of attempt, would allow American businesses confronted with truly predatory activity by foreign competitors to defend themselves through private Sherman Act litigation.

B. *The Supreme Court Precedents*

The Supreme Court could adopt the second—or criminal law—approach described above in attempt to monopolize cases without overruling any of its own precedents. The Court has never held that "dangerous probability of success" is an element of an attempt to monopolize case.

In *Swift & Co. v. United States*,³⁴ the Supreme Court held that a scheme whereby a dominant proportion of meat dealers agreed, among other things, to fix prices and restrict shipments of meat was illegal under the Sherman Act and could be enjoined.³⁵ In discuss-

30 See *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972); *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1117-18 (5th Cir. 1984), *rev'g* 570 F. Supp. 654 (N.D. Tex. 1983), *cert. dismissed*, 106 S. Ct. 420 (1985).

31 See *Agrashell, Inc. v. Hammons Prod. Co.*, 479 F.2d 269 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973); *United States v. Empire Gas Corp.*, 393 F. Supp. 903 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

32 See, e.g., Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

33 Such was the principal holding of the court of appeals in *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *aff'g* 393 F. Supp. 903 (W.D. Mo. 1975), *cert. denied*, 429 U.S. 1122 (1977).

34 196 U.S. 375 (1905).

35 *Id.* at 394, 398.

ing the meat dealers' arrangement for lower railroad shipping rates, Justice Holmes said:

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. The distinction between mere preparation and attempt is well known in the criminal law. *Commonwealth v. Peaslee*, 177 Massachusetts 267, 272. The same distinction is recognized in cases like the present.³⁶

Swift is the only Supreme Court decision which can accurately be described as containing a holding regarding the nature of the act requirement in an attempt to monopolize case.

The reference to *Peaslee* suggests that Justice Holmes thought that proof of some kind of proximity to a completed monopoly was necessary. In a dissenting opinion in a land fraud case which he wrote a few years later, he did say that an "attempt" requires a "dangerous proximity to success."³⁷ The *Swift* opinion, however, need not be interpreted as requiring some kind of showing of proximity to monopoly. The preparation-attempt discussion appears in the context of an analysis of the sufficiency of a charge that the defendants had attempted to monopolize by obtaining rebates from railroads. The opinion concludes that the rebate allegations of the complaint were sufficient without stopping to analyze the effects of the practice. The opinion does not say that the complaint alleged that the practice had produced any effects. Justice Holmes simply said: "We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation."³⁸

Justice Holmes' observation and the Court's holding mean that an intent to monopolize coupled with the use of a powerful instrument of monopoly in furtherance of that intent is sufficient to establish an attempt to monopolize. Such a test is essentially equivalent to the Model Penal Code "substantial step" test.³⁹ Thus, predatory international trade practices, such as engaging in subsidized, below-cost pricing while monopolizing a domestic market, or communicating threats of price retaliation to competitors for the purpose

³⁶ *Id.* at 402. *Peaslee* was an attempted arson case. The evidence indicated that the defendant had no immediate intention of lighting the candle when he assembled the combustible materials in his shop. Peaslee subsequently decided to return to the shop to light the candle and arranged for his assistant to drive him to the shop from a hotel in another town. Peaslee changed his mind and turned back when they were about a quarter of a mile from the shop. The Massachusetts Supreme Judicial Court concluded that Peaslee never came close enough to completing the criminal act to warrant an attempt prosecution.

³⁷ *Hyde v. United States*, 225 U.S. 347, 384, 388 (1912).

³⁸ 196 U.S. at 402.

³⁹ See note 155 *infra* and accompanying text.

of inducing them to adhere to particular prices or to forego certain customers, should be more than sufficient to satisfy the *Swift* test. The threats and below-cost pricing constitute substantial steps in furtherance of the scheme, and the use of such threats by a multi-market, deep pocket company against small, single-market firms is a powerful instrument of monopoly.⁴⁰

The *Swift* and *Peaslee* opinions do not, in any event, use the phrase "dangerous probability of success" to describe the type of proof which is required in an attempt case.⁴¹ A careful reading of the passage where that phrase appears reveals not only that Justice Holmes did not say that the plaintiff must prove a specific intent *plus* a dangerous probability of success, but also that he said the defendants could be liable even though they had not yet performed acts which would be sufficient to produce a monopoly.⁴² The reference to the "intent and the consequent dangerous probability"⁴³ means that the intent rather than the past acts creates the danger that monopoly will result. The Court assumed that a would-be monopolist who has the requisite intent is likely to perform further acts which will result in monopoly.

The notion that a "dangerous probability of success" is a separate element of the attempt to monopolize offense apparently did not arise until long after the *Swift* decision.⁴⁴ In particular, no opinion of any court prior to the mid-1940s even suggested that such a requirement existed. The error of including "dangerous probability of success" as a separate element probably originated with the district judge's jury instruction in the second *American Tobacco* case,⁴⁵ which the Supreme Court quoted in its opinion in *American Tobacco Co. v. United States*.⁴⁶ The district judge assumed that a de-

40 *Cf.* Reynolds Metal Co. v. FTC, 309 F.2d 223, 229 (D.C. Cir. 1962).

41 Justice Holmes did, of course, use the phrase "dangerous proximity to success" in *Hyde*. 225 U.S. at 388. Proximity is not synonymous with probability. In any event, Justice Holmes was not speaking for the Court. The Court has never held that a "dangerous proximity" is essential in an attempt to monopolize case or any other kind of attempt case.

42 See 196 U.S. at 396. See also Justice Holmes' description of the *Swift* case in *Hyde*. 225 U.S. at 387.

43 196 U.S. at 396.

44 See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), in which Judge Learned Hand restated the *Swift* description of the attempt to monopolize offense as follows:

Although the primary evil was monopoly, the Act also covered preliminary steps, which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves in a plan or scheme which, carried out, will result in monopoly, they are dangerous and the law will nip them in the bud.

Id. at 431.

45 147 F.2d 93 (6th Cir. 1944).

46 328 U.S. 781, 785 (1946). That instruction stated, "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful,

defendant must approach dangerously close to achieving a monopoly before he could be convicted of an attempt to monopolize.

The Supreme Court quoted the jury instructions with respect to monopoly, attempt, and conspiracy in full.⁴⁷ The opinion does not, however, contain any discussion of the attempt instructions as such because the Court had no reason to discuss attempt requirements. The jury had returned guilty verdicts on the actual monopoly and attempt to monopolize charges, and the district judge had declined to impose sentence on the attempt count because it had merged with the monopoly count.⁴⁸

In discussing the attempt to monopolize charges in subsequent cases, the Supreme Court has neither mentioned the *American Tobacco* instruction nor attempted to analyze the probability of success as a separate element. The decisions are based upon an analysis of the evidence of intent and suggest that neither proof of the defendant's market power nor evidence of a dangerous probability of monopolization are elements of the attempt offense.

In *United States v. Columbia Steel Co.*,⁴⁹ the government challenged United States Steel's acquisition of a competing West Coast steel fabricator as a violation of Sherman Act sections 1 and 2 as an attempt to monopolize the market in fabricated steel products. In affirming the dismissal of the government's suit, the Court explained that "even though the restraint effected may be reasonable under [section] 1, it may constitute an attempt to monopolize forbidden by [section] 2 if a specific intent to monopolize may be shown."⁵⁰ The Court made no mention of any requirement of proof of the defendant's market power or of a dangerous probability of monopolization. The decision indicates, however, that the Court was aware of the defendant's relative market strength.

The Supreme Court dealt with an attempt to monopolize case again in *Lorain Journal v. United States*.⁵¹ The Court affirmed a judgment that the defendant had attempted to monopolize. The district court opinion did not contain any finding that the defendant's conduct had created a probability of monopoly. The Supreme Court did not specifically address that question or whether the plaintiff, a newspaper, competed within the same objectively defined market as its target, a radio station. The district court had said: "Where that is the purpose and design with which the defendants act, it is legally

accomplish monopolization and which, though falling short, nevertheless approach so close as to create a dangerous probability of it"

47 328 U.S. at 784-86.

48 *Id.* at 783.

49 334 U.S. 495 (1948).

50 *Id.* at 531-32 (emphasis added).

51 342 U.S. 143 (1951).

immaterial whether the course of action is or might be successful."⁵² The Supreme Court did not indicate that the district judge had applied the wrong test.⁵³

Subsequently, in *Times-Picayune Publishing Co. v. United States*,⁵⁴ the Court seemed to reiterate the position it appeared to have taken in *Columbia Steel*: that proof of a specific intent to monopolize suffices to prove an attempt to monopolize. In holding that the defendant had not violated section 2 by requiring advertisers to buy space in both its morning and evening papers, the Court announced that a violation of the attempt prohibition required "a specific intent to destroy competition or build a monopoly"⁵⁵ Once again, the Court failed to explicitly state whether proof of the defendant's market power or of a dangerous probability of monopolization was required for an attempt to monopolize.⁵⁶

Thus, a majority of the circuits have adopted the premise that attempt to monopolize requires a showing of intent *plus* a dangerous probability of success, although the Supreme Court has not decided that this is the case. The lower courts may find an implied endorsement of the "dangerous probability" requirement in Justice Clark's opinion in *Walker Process Equipment, Inc. v. Food Machinery Corp.*⁵⁷ Although the opinion does not use that term, Justice Clark did say:

To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy

⁵² 92 F. Supp. 794, 798 (N.D. Ohio 1950), *aff'd*, 342 U.S. 143 (1951).

⁵³ Nevertheless, a defendant in *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957), which was decided after *Columbia Steel* and *Lorain Journal*, contended in his appeal to the Eighth Circuit that his attempt to monopolize conviction should be reversed because the district court failed to give the instruction which the Supreme Court had "approved" in *American Tobacco*. The Eighth Circuit rejected his contention because the instruction was substantially the same as the "approved" instruction. *Id.* at 663. The net effect of the *Kansas City Star* decision was to implant the idea that some showing of "dangerous probability of success" is essential in an attempt to monopolize case. All of the subsequent Eighth Circuit decisions have taken that premise as a given.

⁵⁴ 345 U.S. 594 (1953).

⁵⁵ *Id.* at 626.

⁵⁶ See also *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949), involving an appeal from a dismissal of a charge of conspiracy to monopolize rather than of attempt to monopolize. Some courts have cited it as authority for the view that the plaintiff does not have to prove either a relevant market or a dangerous probability of success in an attempt case. The *Yellow Cab* Court ruled that a defined market and defendant's share thereof were irrelevant to a conspiracy to monopolize charge and that a conspiracy may be proved so long as an appreciable amount of commerce is affected. The § 2 language "any part of the trade or commerce," it is argued, is equally applicable to attempt to monopolize.

⁵⁷ 382 U.S. 172 (1965).

competition. It may be that the device—knee-action swing diffusers—used in sewage treatment systems does not comprise a relevant market. There may be effective substitutes for the device which do not infringe the patent⁵⁸

The trial court had dismissed a counterclaim alleging that the plaintiff had monopolized by obtaining a patent through fraud. The trial court held that the Sherman Act did not cover such conduct. The Supreme Court held that obtaining a patent by fraud may violate section 2 if the other elements are present. In Justice Clark's opinion, the counterclaim did not adequately allege the other elements, since it did not allege that the patent would give the plaintiff a monopoly of a market nor did it demonstrate that the patented article was a distinct product market when the case was tried.⁵⁹

The *Walker* opinion focuses primarily upon the proof of relevant market question rather than the nature of the act requirement. A court could hold that markets must be identified as part of the intent showing because intent to monopolize necessarily means an intent to achieve monopoly in some market. However, the courts which have insisted upon proof of well-defined markets in attempt to monopolize cases have generally insisted upon proof that the defendant's efforts produced a dangerous probability of success.⁶⁰

⁵⁸ *Id.* at 177-78.

⁵⁹ The *Walker* opinion was issued after the Ninth Circuit opinion in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), which held that a plaintiff is not required to demonstrate a dangerous probability of success and that the relevant market is "not in issue" in an attempt to monopolize case. The Justice Department's *Hiland Memorandum* (*Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968)) was filed about three years after the *Walker* decision. After endorsing the *Lessig* statement that relevant market is "not in issue" in an attempt to monopolize case, the *Hiland Memorandum* said:

We recognize that this Court expressed a seemingly contrary view of the "attempt to monopolize" provision in *Walker Process Equipment, Inc. v. Food Machinery Corp.*, 382 U.S. 172, 177-178. We do not believe the issue is foreclosed by that decision, however, since only monopolization, and not attempt to monopolize, was alleged in the complaint in that case, and neither in the brief nor in oral argument was there any effort to deal with the proper construction of the "attempt to monopolize" provision.

Hiland Memorandum at 11-12.

The effort to distinguish *Walker* is not entirely convincing. The discussion of the need to define a market and "to appraise the exclusionary power of the illegal patent claim" within that market is more than pure dictum. The district court had dismissed the counterclaim for failure to state a claim and the Supreme Court was attempting to determine whether that action should be affirmed. Of course, the statement that it would also be necessary to define the market if the complainant proceeded on an attempt to monopolize theory may technically be dictum inasmuch as the counterclaim apparently alleged that the patent holder had obtained a monopoly. However, an alternative attempt to monopolize claim would probably be implicit in such a complaint. In any event, Justice Clark did say that the complainant would have to identify a market if it proceeded on an attempt to monopolize theory in that case and a majority of the Court did join in the opinion.

⁶⁰ *See, e.g.*, *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547,

The assumption that market definition is to be required if, but only if, some appraisal of actual or potential competitive effects is necessary, is logical and parallels the dual approach in section 1 cases.

Justice Clark did, in any event, associate market definition with some kind of appraisal of actual or potential competitive effects. He found it necessary "to appraise" the exclusionary power of the patent, and there is no way to measure "ability to lessen or destroy competition" without defining a market. He did not say that the appraisal must demonstrate a "dangerous probability" of monopolization or that it must demonstrate that the patent has already produced some impact upon the market. But he obviously thought the claimant must demonstrate that the patent could have some kind of adverse effect upon the level of competition in some market in order to establish an attempt to monopolize.⁶¹

Considered together, the Supreme Court opinions discussing attempt to monopolize are inconclusive on the issue of "dangerous probability of success." The Court has never discussed the conceptual relationship between monopolization and attempt. Neither has the Court examined the role of the attempt offense in the framework of contemporary antitrust policy. Accordingly, the Court could now hold that an appraisal of the actual and likely effects of a defendant's attempt to monopolize conduct is unnecessary, while at the same time distinguishing *Walker*. *Walker* does not modify the *Swift* rule that attempt to monopolize is established if a defendant utilizes a potential instrument of monopoly with the requisite specific intent to monopolize. Thus, the applicable Supreme Court precedents do not foreclose the Court from adopting the approach suggested by this article—the traditional criminal law rule.

C. *Attempt to Monopolize in the Lower Courts*

Relying upon the Supreme Court's dicta in *Swift & Co. v. United States* and *American Tobacco Co. v. United States*, the majority of lower federal courts⁶² construe the attempt to monopolize prohibition of

550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Agrashell, Inc. v. Hammons Prods. Co.*, 479 F.2d 269, 284 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973); *Acme Precision Prods., Inc. v. American Alloys Corp.*, 479 F.2d 1237 (8th Cir. 1973).

61 382 U.S. at 177-78. The paragraph which follows the discussion of the need to identify a relevant market and appraise the effect of the patent provided:

As respondent points out, *Walker* has not clearly articulated its claim. It appears to be based on a concept of per se illegality under § 2 of the Sherman Act. But in these circumstances, the issue is premature. As the Court summarized in *White Motor Co. v. United States*, 372 U.S. 253 (1963), the area of per se illegality is carefully limited. We are reluctant to extend it on the bare pleadings and absent examination of market effect and economic consequences.

Id. at 178.

62 *See, e.g.*, notes 64, 76, and 82 *infra* and accompanying text.

section 2 of the Sherman Act to impose a two-part burden of proof on the plaintiff.⁶³ The plaintiff must first prove that the defendant had a specific intent to monopolize.⁶⁴ This intent is generally inferred from a showing that the defendant engaged in illegal or predatory conduct.

The plaintiff must next demonstrate as an independent element that the defendant's activities created a dangerous probability of it obtaining monopoly power in the relevant market.⁶⁵ This requirement reflects the belief that the attempt prohibition is merely an appendage of the monopolization offense. Thus, the plaintiff in an attempt case faces the same procedural and substantive burdens he would face in a monopolization case.⁶⁶ The plaintiff must first identify the relevant product and geographic markets and then prove the defendant's share of the combined relevant market. Once this market share is determined, the plaintiff must then demonstrate, and the factfinder must find, that it is "dangerously probable" that the defendant will achieve a monopoly position in the relevant market as a result of its anticompetitive conduct. A majority of the circuit courts, therefore, utilize approaches three or four, as described above, with respect to the elements of attempt to monopolize. The opinions, however, do not sufficiently distinguish between those two alternatives.

The Eighth Circuit has not followed a consistent pattern in defining the content of the "dangerous probability" requirement. The Eighth Circuit's decision in *Kansas City Star Co. v. United States*⁶⁷ effectively required that the plaintiff make a showing of some "dangerous probability" in attempt cases. This decision was based on the belief that the jury instruction in the case was the same as the jury instruction in *American Tobacco*.⁶⁸ However, the jury instruction in *Kansas City Star*⁶⁹ differed substantially from the *American Tobacco* instruction. The *American Tobacco* instruction required that the defendant do something which would produce monopoly if it succeeded *and* which approached success close enough to produce a

63 See note 60 *supra*.

64 See, e.g., *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969).

65 See *Cooper*, *supra* note 4, at 384-88; Note, *supra* note 14, 73 COLUM. L. REV. at 1459-64; Note, *supra* note 14, 31 VAND. L. REV. at 335-37. See, e.g., *Agrashell, Inc. v. Hammons Prods. Co.*, 479 F.2d 269, 284 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

66 See *Cooper*, *supra* note 4, at 384-88.

67 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957).

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

69 See note 53 *supra*.

dangerous probability of monopoly.⁷⁰ The *Kansas City Star* instruction required only that the defendant do something "which, if successful, would be likely to accomplish such monopolization."⁷¹

The *Kansas City Star* instruction did not require that the plaintiff prove that the acts were likely to succeed or that unsuccessful acts had produced a dangerous probability, or even a substantial possibility, of monopoly. Several subsequent Eighth Circuit opinions described the dangerous probability requirement in terms comparable to the *Kansas City Star* instruction. In 1968 that court said that "[a]n attempt to monopolize is established when there is a 'dangerous probability' of monopolization *if the attempt is successful*."⁷²

A shift apparently occurred with the issuance of the opinion in *Agrashell, Inc. v. Hammons Products Co.* in 1973.⁷³ Judge Ross, writing for the court, quoted the *American Tobacco* instruction in full and declared: "Thus in this case we must determine whether Hammons presented sufficient evidence from which the jury could properly conclude that Agrashell approached 'so close [to monopolization] as to create a dangerous probability of it'"⁷⁴ It is evident from Judge Ross' later opinion in *Empire Gas*⁷⁵ that the *Agrashell* standard, unlike *Kansas City Star*, required proof of actual proximity to monopolization. The Eighth Circuit thus requires that the plaintiff in an attempt case show that the defendant is dangerously close to monopolization.⁷⁶

The Ninth Circuit has also followed a somewhat wavering path with regard to the attempt to monopolize offense. In *Lessig v. Tide-*

70 See note 46 *supra*.

71 240 F.2d at 663.

72 *TV Signal Co. of Aberdeen v. A.T.&T. Co.*, 462 F.2d 1256, 1261 (8th Cir. 1968) (emphasis added).

73 479 F.2d 269 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973).

74 479 F.2d at 285 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946)).

75 *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *aff'g* 393 F. Supp. 903 (W.D. Mo. 1975), *cert. denied*, 429 U.S. 1122 (1977). See notes 101-12 *infra* and accompanying text. The court in *Empire Gas* analyzed evidence with respect to the effects of the defendant's actions in order to determine whether certain local markets were on the brink of monopolization and concluded that the evidence was too inconclusive, even though the court found that the defendant specifically intended to monopolize.

76 More recent Eighth Circuit attempt to monopolize cases include: *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985) (On appeal by U.S. Tax Court Reporting Service from a finding of liability for monopolization and attempted monopolization, the court reversed the finding of attempted monopolization and held that there was no dangerous probability of success because the defendant was not in a position to raise prices in light of the bidding process involved in court-reporting contracts and because of the presence of competition in the market); *Trace X Chemical, Inc. v. Canadian Indus.*, 738 F.2d 261 (8th Cir. 1984) (the court rejected the lower court's finding of anticompetitive conduct under the Sherman Act by a manufacturer of TNT, finding instead that defendant's behavior constituted valid business conduct).

water Oil Co.,⁷⁷ the court stated, "We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize."⁷⁸ The opinion acknowledged that the likelihood of monopolization may be relevant circumstantial evidence of intent, but concluded that it is logical to assume "that the actor is better able than others to judge the practical possibility of achieving his illegal objective."⁷⁹ Later Ninth Circuit cases, however, appeared to retreat from the *Lessig* rule.⁸⁰ The Ninth Circuit finally reexamined all of its prior decisions in *Hallmark Industry v. Reynolds Metals Co.*,⁸¹ and reaffirmed the *Lessig* rule.⁸²

77 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 933 (1964).

78 *Id.* at 474.

79 *Id.*

80 See *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1977); *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

81 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

82 *Id.* at 12-13. More recent Ninth Circuit attempt to monopolize cases include the following: *Blanton v. Mobile Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983) (the court followed the modified interpretation of the *Lessig* doctrine enunciated in *Grough*), *cert. denied*, 105 S. Ct. 1874 (1985); *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978) (the court held, modifying the *Lessig* doctrine, that where plaintiff did not prove a relevant market or market power, it must prove either predatory conduct or a per se violation of the Sherman Act under § 1), *cert. denied*, 440 U.S. 936 (1979).

In his dissent from denial of certiorari in *Blanton*, Justice White criticized the modified *Lessig* doctrine, stating that *Lessig* "allows a violation of § 2 . . . without regard to the effect of a defendant's conduct in any relevant market." 105 S. Ct. at 1875 (White, J., dissenting).

Other Ninth Circuit cases have required the traditional elements of the offense: *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013 (9th Cir. 1985) (Plaintiff brought an antitrust suit against a competitor based on allegations that defendant had conspired and attempted to monopolize. In upholding the district court's finding that plaintiff had stated a claim for attempted monopolization, the court stated that conduct which is competitive under § 1 may be anticompetitive under § 2 if its purpose is to monopolize. In this case, plaintiff's allegations of defendant's violation of import restrictions so it could underbid competitors stated a claim for attempted monopolization when combined with an allegation of 70% market share of the defendant.), *cert. denied*, 106 S. Ct. 230 (1985); *Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983) (The court affirmed the lower court finding that, among other things, plaintiff had failed to state a claim for monopolization or attempted monopolization. Addressing attempted monopolization, the court stated that, while both specific intent and dangerous probability can be inferred from anticompetitive or predatory conduct, plaintiff had not alleged such conduct. Rather, defendant's conduct was permissible, innovative, and competitive behavior.), *cert. denied*, 465 U.S. 1038 (1984); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981) (The court analyzed attempted monopolization claim as follows: (1) specific intent may be inferred from conduct which may be the basis for a claim of restraint of trade, but evidence of intent alone, without evidence of conduct, cannot sustain a claim of attempted monopolization; (2) dangerous probability may also be inferred from the existence of overt acts and specific intent or from evidence of conduct alone, but it is always relevant in an attempt case; (3) proof of conduct is important to both of the other elements, and the type of conduct which must be proven depends on how extensively or sufficiently the plaintiff has been able to prove the other elements. In general, however, the required conduct is such that it only makes sense in that it eliminates *competition, i.e.*, it is not legitimate competition.), *cert. denied*, 459 U.S. 825 (1982).

Thus, the Ninth Circuit does not require a "dangerous probability of success" in an attempted monopolization case.

The Seventh Circuit has adopted an intermediate position. Although it has accepted the proposition that a plaintiff must make some kind of "dangerous probability" showing, that court has effectively equated "dangerous probability" with proof that the defendant has the capacity to monopolize. The Seventh Circuit had endorsed the idea that a "dangerous probability" requirement exists even before the Eighth Circuit decision in *Kansas City Star*. That court affirmed the dismissal of an antitrust complaint in *Mackey v. Sears, Roebuck & Co.*⁸³ The court noted several deficiencies in the complaint and added: "Furthermore, the complaint does not allege a dangerous probability that defendant may achieve a monopoly."⁸⁴ The *Mackey* opinion did not elaborate on the nature of the "dangerous probability" allegation which would be required. In 1969 the court stated that a monopolist must have both the intent and power to monopolize and there was no "evidentiary basis for holding that the defendant possessed the power to monopolize."⁸⁵

The emphasis upon "power to monopolize" seems to equate "dangerous probability" with a showing that the defendant has the capacity to monopolize, rather than a showing that the past acts of the defendant have already created a dangerous probability of monopolization. The opinion in *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*⁸⁶ appears to confirm that this is the case. While noting that the defendant on the counterclaim had an approximate one-third market share, the court went on to discuss the significance of that fact and the elements of the offense as follows:

Plaintiff's actual position in the industry is not, however, the sole test of violation of § 2. By condemning attempts to monopolize, that section directs itself against dangerous probabilities as well as the completed result.

A reliable or accurate measure of the actual likelihood that plaintiff would have achieved monopoly status . . . is, of course, not possible. However, we do not understand the "dangerous probability" test to involve an evaluation of the actual likelihood that an attempt would have succeeded if not frustrated by an appraisal of the alleged offender's ability to achieve the forbidden result, his intent, and the nature of his overt actions. In an antitrust context we must consider the firm's capacity to commit the offense, the scope of its objective, and the character of its

83 237 F.2d 869 (7th Cir. 1956), *cert. denied*, 355 U.S. 865 (1957).

84 *Id.* at 873.

85 *Bernard Food Indus. v. Dietene Co.*, 415 F.2d 1279, 1284 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

86 452 F.2d 579, 597-99 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

conduct. The ultimate concern is the firm's actual or threatened impact on competition in the relevant market.⁸⁷

The court went on to hold that all three elements of the offense were satisfied on the facts of the case: (1) the "impressive size" of the defendant on the counterclaim, its strong patent position, and its "highly profitable" arrangements gave it "the *capacity* to make a serious attempt to acquire monopoly status" in the narrowly defined relevant market to which the parties had stipulated; (2) defendant's undeniable *intent* "to acquire the power to exclude competition from [a] portion of the market" was given substance by the fact that "[f]ulfillment of its objectives would have significantly enhanced its market position"; and (3) defendant's *conduct* in the prosecution of its patent application was "appropriately characterized as 'predatory.'"⁸⁸

The Seventh Circuit approach is arguably closer to the Ninth Circuit rule than it is to the Eighth Circuit rule. The only difference appears to be that the Seventh Circuit would always require some evaluation of capacity, while the Ninth Circuit would assume that a defendant who engages in blatantly anticompetitive conduct is the best judge of his own capacity.⁸⁹

The law is somewhat less clear in the remaining circuits. The Third Circuit rule appears to be essentially the same as the Seventh Circuit. That court has held that an "essential element of the offense is that the actor have sufficient market power to come dangerously close to success."⁹⁰ This sounds like a capacity requirement

⁸⁷ *Id.* at 598 (footnotes omitted).

⁸⁸ *Id.* at 598-99.

⁸⁹ For more recent cases, see *Lectro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982), in which plaintiff appealed from a lower court decision that certain noncompetition contracts between the parties did not violate the antitrust laws. With respect to the charge of attempted monopolization, the court found that: (1) Because of defendant's declining market share, there was no dangerous probability of success. The court acknowledged that attempted monopolization does not require that the attempt ripen into monopoly, and that a subsequent failure to achieve monopoly cannot vitiate a claim of attempted monopoly where other evidence supports an attempt. The court stated, however, that subsequent market performance can be considered as evidence of existence of the alleged attempt; (2) The noncompetition contracts and defendant's acquisition of other vending companies did not constitute anticompetitive conduct because they were motivated by legitimate business purposes, not by monopolistic intent; and (3) The defendant did not have the specific intent to monopolize because the evidence showed that its actions were taken for valid business reasons. Thus, no inference of specific intent could be made from the defendant's action.

See also *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (affirming a holding for plaintiff that defendant's conduct constituted an attempt to monopolize the "drive-thru retail photo processing submarket in Indianapolis").

⁹⁰ *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975). *See also* *Sunshine Books v. Temple Univ.*, 524 F. Supp. 479 (E.D. Pa. 1981), *vacated*, 697 F.2d 90 (3d Cir. 1982), in which plaintiff sued the University bookstore for attempted monopolization of the sale of undergraduate textbooks by means of predatory pricing. The court stated

rather than a showing that the past acts of a defendant have already created a great danger of monopoly.

The First Circuit may be in accord with the Eighth Circuit approach. In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*,⁹¹ it endorsed the *Agrashell* rule that proof of relevant product and geographic markets is a necessary predicate for success in any attempt to monopolize case. In explaining the rationale for that rule, the First Circuit stated: "To be successful, an attempt case must establish both an intent to monopolize and a dangerous probability of successful monopolization [T]hese elements take on meaning only with reference to an actual or potential exercise of power, which in turn must be assessed in the context of a relevant market."⁹²

The Fifth Circuit also appears to be in line with the Eighth Circuit. It has held: "In order to maintain a charge of attempt to monopolize under Section 2 of the Sherman Act, it is necessary to show, inter alia, that there is a dangerous probability that the attempt will be successful."⁹³

The Fourth Circuit apparently endorsed the proposition that some kind of "dangerous probability" is a separate element of the attempt offense in *McElhenney Co. v. Western Auto Supply Co.*⁹⁴ It held that a complaint was deficient because it was "bereft" of several essential allegations including "an intent to monopolize coupled with a dangerous possibility that a monopoly could be effectuated"⁹⁵ The opinion does not elaborate on the nature of the "dan-

that anticompetitive conduct is a necessary element of an attempted monopolization claim, since both intent and dangerous probability of success can be inferred from such conduct. The court concluded, however, that the University did not engage in predatory pricing or anticompetitive conduct of any other kind, and thus granted summary judgment for defendant.

91 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

92 *Id.* at 550. Plaintiff, a manufacturer of swimming pool equipment, charged defendant with attempted monopolization of the public swimming pool market by persuading engineers and architects to use its proprietary specifications in constructing the pools. As to intent, the court stated that defendant's intent, at most, was to eliminate plaintiff as a competitor. Similarly, while intent may be inferred from conduct, defendant's conduct was directed only at plaintiff. Since defendant possessed only a 2.7% share of the market, which would rise to 3% if plaintiff were eliminated, the court found no dangerous probability of successful monopolization. See also *C.R. Bard, Inc. v. Medical Elec. Corp.*, 529 F. Supp. 1382 (D. Mass. 1982). In *Bard*, a manufacturer of medical equipment brought suit to recover for the cost of goods sold to defendant distributor. Distributor defended by charging plaintiff with, among other things, attempted monopolization. The court held that defendant failed to allege facts showing relevant market or plaintiff's market power.

93 *Cliff Food Stores, Inc. v. Kroger Co.*, 417 F.2d 203, 207 (5th Cir. 1969). See also *United States v. American Airlines, Inc.*, 570 F. Supp. 654 (N.D. Tex. 1983), *rev'd*, 743 F.2d 1114 (5th Cir. 1984), *cert. denied*, 106 S. Ct. 420 (1985).

94 269 F.2d 332 (4th Cir. 1959).

95 *Id.* at 339. See also *Harris v. Atlantic-Richfield Co.*, 469 F. Supp. 759 (E.D.N.C. 1978) (Distributor of petroleum products sued oil company for, among other things, violations of

gerous possibility" requirement. However, the use of the word "possibility" in lieu of "probability" indicates something akin to a capacity requirement. Thus, the Fourth Circuit may be more in line with the Third and Seventh Circuits than it is with the First, Fifth, and Eighth Circuits.

The Tenth Circuit has also endorsed the view that some showing of dangerous probability is essential to the attempt offense. It has held that a district court should not have submitted an attempt to monopolize question to the jury because the plaintiff did not present facts "as to the market being considered, and the defendant's power in it."⁹⁶

II. The Justice Department's Interpretation of Attempt to Monopolize

The Department of Justice has consistently interpreted the attempt provision in section 2 of the Sherman Act as incorporating the common law of criminal attempt.⁹⁷ Generally, criminal law definitions of any attempt offense have never required independent proof that, literally, a dangerous probability exists that the defend-

the Sherman Act. In rejecting plaintiff's attempted monopolization claim, the court stated that defendant's 3% market share could not give rise to a dangerous probability of monopolization as a matter of law.).

96 *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). In *Delaney*, plaintiff brought suit against a cosmetic manufacturer alleging antitrust violations. Addressing the attempt to monopolize clause, the court stated that both specific intent and dangerous probability of success were required to prove attempt, and that proof of dangerous probability required proof of relevant market and market power. 525 F.2d at 305. The plaintiff failed to allege relevant market or market power, and therefore, the jury could not properly measure the parties' position in the relevant market; any damages awarded were thus the result of speculation. *Id.* at 306-07.

See also the recent attempt to monopolize decisions by the Second and Sixth Circuits, which appear to be consistent with Eighth Circuit precedent: *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495 (6th Cir. 1983) (Appeal by distributor of hospital supplies from a judgment in favor of the plaintiffs to an antitrust action. After establishing the elements of the attempt to monopolize offense as "1. Specific intent to monopolize; 2. Anticompetitive conduct; [and] 3. A dangerous probability of success," the court stated that while specific intent could be inferred from evidence of anticompetitive conduct, in this case the conduct in question was not an unreasonable restraint of trade, and therefore two of the three elements were absent. *Id.* at 506-07. In discussing dangerous probability of success, the court stated that a finding of that element required a finding that defendant possessed market strength approaching monopoly power. The court rejected the district court's finding that a market share of 25% presented a dangerous probability of success. The court reversed the lower court's finding of attempted monopolization.); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832 (2d Cir. 1980) (Plaintiff, a former supplier of frozen waffles to a grocery chain, sued the chain and its successor, Pet, Inc., alleging, among other things, violation of the antitrust laws. The court did not discuss specific intent, since it found that because defendant's market share declined significantly in the relevant time period (from 54.5% to 33% in five years), there was no probability that defendant could monopolize the relevant market. The court found no dangerous probability of success, as a matter of law, since monopolization was a legal impossibility.).

97 See *Petition for Writ of Certiorari*, *supra* note 10, at 11-12.

ant will achieve his goal, other than the danger naturally resulting from intention and conduct amounting to a substantial step.⁹⁸ Thus, the government has taken the position that it should not have to prove, through independent evidence, that an attempt to monopolize defendant is dangerously close to achieving monopoly power.⁹⁹ Rather, the government has contended that once it proves that a defendant has engaged in unambiguously monopolistic conduct, without economic justification, the defendant's specific intent to monopolize can be inferred from such conduct, and the factfinder may conclude that the plaintiff has satisfied its burden of proof.¹⁰⁰

A premise of this article is that since the Sherman Act is facially a criminal statute with criminal sanctions, the appropriate model for judicial clarification of the attempt offense should be interpretations adopted in government enforcement proceedings. If section 2 is to be consistently applied, interpretations of the statute thereafter should not vary in private treble-damages actions, particularly those challenging predatory conduct in import trade.

A. *The Empire Gas Case*

In *United States v. Empire Gas Corp.*,¹⁰¹ the government brought an antitrust action against Empire Gas, a retailer and wholesaler of liquid petroleum (LP) gas,¹⁰² alleging in part that Empire Gas had attempted to monopolize the retail sale of LP gas in the Lebanon, Wheaton, and other local Missouri markets. On appeal, the Eighth Circuit agreed with the government that the evidence regarding the defendant's activities was sufficient to demonstrate that it had spe-

98 See generally Wechsler, Jones & Korn, *supra* note 6.

99 See Petition for Writ of Certiorari, *supra* note 10, at 8-9, 12-14.

100 *Id.* at 13.

101 393 F. Supp. 903 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

102 Empire, a Missouri corporation, was incorporated in 1963 and was headquartered in Lebanon, Missouri. Through and in conjunction with its wholly-owned subsidiaries, Empire was engaged in purchasing, transporting, and selling LP gas and selling and leasing LP gas equipment.

LP gas is produced by crude oil refineries and natural gas plants. It is compressed into a liquid state and is regularly and continuously shipped and sold in interstate commerce to LP gas distributors located throughout the United States. Because of the high transportation costs associated with the distribution of LP gas, the effective marketing area of a LP gas distributor is confined to an area within a short distance of his bulk storage plant. Distributors usually limit their sales to customers located within a radius of 20 to 30 miles of each of their plants. Empire began operations with a few bulk plants in Missouri and experienced rapid growth. Ten years later, its operations had expanded to 24 other states. Empire's gross revenues increased from \$1.2 million in 1964 to \$44.8 million in 1973, and its pre-tax income increased from \$212,042 to \$7.5 million during the same period. Its total assets grew from about \$3.6 million in June 1965 to about \$48.3 million in June 1972. Most of Empire's growth was attributable to acquisitions. During the first 10 years of its existence, it acquired 81 LP gas retailers with close to 400 bulk plants.

cific intent to control prices and therefore to monopolize relevant markets. The court also agreed that the defendant's conduct was sufficiently predatory to constitute a specific intent to monopolize. However, despite local market shares of approximately fifty percent, the court affirmed the district court's conclusion that the evidence was insufficient to demonstrate a dangerous probability that Empire Gas would be able to continue to exert control over prices or exclude its competitors in any geographic market.¹⁰³

The Justice Department filed a civil complaint against Empire in 1972 alleging that Empire's activities, including the destruction of competitors' property, constituted an attempt to monopolize in violation of section 2 of the Sherman Act.¹⁰⁴ Criminal charges under the Sherman Act were dismissed in April 1973. The government then filed an amended complaint in June 1973, which alleged that Empire had attempted to monopolize the retail sale of LP gas in "various local marketing areas within the State of Missouri and other states in which the defendant operates" ¹⁰⁵ The amended complaint also added allegations that Empire had violated section 1 of the Sherman Act by price fixing, market allocation, reciprocal dealing, obtaining covenants not to compete which unreasonably restrained trade, and resorting to vexatious litigation.¹⁰⁶

103 537 F.2d at 307.

104 In early 1969, two men were apprehended in Southern Missouri with a dynamite bomb. After being convicted for possession of an illegal and unregistered bomb, one of those individuals advised federal authorities that Empire had hired him to destroy a competitor's truck. Three grand jury investigations of Empire's business activities followed. The third grand jury returned a four count indictment on August 14, 1972, in the Western District of Missouri, which charged Empire with aiding and abetting in the possession of an illegally made and unregistered firearm and attempting to monopolize the retail distribution of LP gas. Much of the foregoing description of the background of the case is taken from the 1976 Memorandum to the Solicitor General, *supra* note 10, at 3.

The antitrust charges were not based solely on the bomb incident. The grand jury had received testimony from a large number of competitors, former competitors, and former employees indicating that Empire had resorted to a variety of means in pressuring other LP gas dealers to sell their businesses, raise their prices, or restrict their operations. Empire had also obtained covenants not to compete from sellers of businesses and all of its employees which were extremely broad in scope. Empire also filed, or threatened to file, a number of lawsuits against former employees.

105 Memorandum to the Solicitor General, *supra* note 10, at 7.

106 Defense counsel agreed to supply the government with Empire's own estimate of some of its marketing areas and the market shares of Empire and its competitors. The reasons for doing so are somewhat unclear, but defendant apparently hoped that the relatively low market shares would demonstrate that it would be impossible to prove a "dangerous probability" that Empire would achieve a monopoly in any of the local markets. Defendant supplied a total of 23 maps which represented the areas served by particular Empire subsidiaries together with a list of companies who sold LP gas in each area and Empire's best guess with respect to the market share of each.

Government trial counsel decided to use 7 of those 23 areas as geographic markets, but combined or modified others to produce 6 additional geographic markets. The ques-

Empire had various responses to price competition and the loss of some of its customers. An Empire officer or employee would contact competitors and inform them that Empire wanted a specific retail price in a particular area and did not want to lose any customers. When such advice was ignored, the threat was made more specific: either the competitor would raise its price to that charged by Empire and would stop soliciting Empire's customers or Empire would reduce its price well below that charged by the competitor and would solicit all the competitor's customers. Some competitors who refused to comply were asked if they wished to sell their business to Empire and were told that they could not possibly compete against Empire; at least one did sell after such a warning and solicitation. On at least one occasion, Empire purchased the supplier of its retail competitor and "put the squeeze" on that competitor. On several occasions, Empire carried through with its economic threats and drastically and selectively reduced its retail prices to solicit customers of recalcitrant competitors.¹⁰⁷

tionnaires were mailed to the LP gas dealers listed by Empire and to all other companies which might have been selling LP gas in any of those 13 markets, asking them to supply 1972 sales data for the area described in an accompanying map. The government then prepared market share tables for each of the 13 markets based on the survey data. Those tables showed that Empire had 50.43% of the Lebanon market and its nearest competitor had 13.09%. Empire had 47.08% of the Wheaton market and the nearest competitor had 13.01%. It ranked first with 30-40% in the four markets, first with less than 20% in four markets, second with 27.09% in one market, and third with less than 20% in the remaining market.

107 The Arthur Gas Company incident is somewhat typical. Robert Plaster, Empire's President, telephoned William Arthur of Arthur Gas, a competitor in the Lebanon and Niangua areas, and asked Mr. Arthur to raise his price. Arthur responded: "I could take care of my business and he could take care of his." Plaster said he was going to put Arthur out of business. Empire then sent a truck labeled "Arthur Gas Company" to solicit Arthur customers at a very low price. The driver told customers that they had bought out Arthur Gas Company.

On another occasion, Plaster told a competitor who declined to raise his price that he was going to play "burnout" with him. A short time later Empire rented space in a town served by that competitor which Empire had not previously served. Empire attempted to hire some of the competitor's employees and offered gas to his customers at substantially reduced prices.

The documentary evidence included all of the acquisition agreements and related covenants not to compete, 3239 covenants not to compete signed by Empire employees, maps showing the government's 13 geographic markets, the market share tables, and price and profit studies by a government economist.

The market performance evidence included a study of pricing patterns in the Lebanon, Wheaton, Niangua, and Springfield markets. Those graphs indicated that Lebanon and Wheaton prices were considerably higher than Niangua and Springfield prices. Lebanon prices tended upward and Wheaton prices tended to be extremely stable with price fluctuations within a narrow band. Niangua and Springfield prices showed greater fluctuations.

The government economist testified that the Lebanon and Wheaton pricing patterns were precisely what an economist would expect to find in a market in which monopoly power was present. In a highly competitive market, the prices tend to be low and to fluctuate with supply and demand. He also said that he selected those four markets for study

The district court found that Empire did not enter into any agreement to fix prices¹⁰⁸ or allocate markets,¹⁰⁹ that the covenants not to compete were not shown to be unreasonable restraints of trade,¹¹⁰ and that the litigation to enforce the covenants was not vexatious.¹¹¹ The district court also concluded that Empire did not attempt to monopolize. It held that the plaintiff in an attempt to monopolize case must establish (1) that relevant product and geographic markets existed, (2) that the defendant had a specific intent to achieve a monopoly, and (3) that the defendant had a dangerous probability of success in achieving a monopoly.¹¹² The district court concluded that the retail distribution of LP gas was not a relevant product market, and that none of the thirteen areas shown on the government's maps were relevant geographic markets.¹¹³ Even if the court accepted the government's markets, the government could not prevail because it failed to demonstrate that Empire "possessed a specific intent to achieve monopoly" or "at any time had a dangerous probability of success in achieving a monopoly"¹¹⁴

The government contended on appeal to the Eighth Circuit that the district court's specific intent and dangerous probability conclusions were based on the unstated premise that a defendant must have a large market share to have a monopoly. According to the government, if the court had realized that a company can achieve monopoly power, *i.e.*, the power to control prices by coercing competitors to adhere to its prices, it would have found that Empire intended to achieve that result whenever and wherever possible and had come close to succeeding in some of its markets.

The court of appeals accepted the government's theory of monopoly. It held that the district court's finding that Empire did not threaten competitors was "clearly erroneous" because it disregarded the uncontradicted testimony of a number of government witnesses.¹¹⁵ The opinion recited in some depth the evidence of Empire's attempt to control prices by threatening competitors with

because Empire had a 50% share in Lebanon and 47% in Wheaton, while it had only 19% in Springfield and 16% in Niangua.

108 393 F. Supp. at 913.

109 *Id.* at 910.

110 *Id.* at 913.

111 *Id.* at 914.

112 *Id.* at 909.

113 The district court would not accept the government's geographic markets because the government did not present evidence "to establish this methodology and underlying data used in drawing these lines" and the court "does not know how, why, and by whom the lines were drawn." *Id.* at 906.

114 *Id.*

115 *United States v. Empire Gas Corp.*, 537 F.2d 296, 301 (8th Cir. 1976), *aff'g* 393 F. Supp. 903 (W.D. Mo. 1975), *cert. denied*, 429 U.S. 1122 (1977).

predatory pricing, and held that such evidence demonstrated a specific intention to monopolize.¹¹⁶ The court of appeals concluded: “[A]n attempt to control price, competition or both demonstrates specific intent to monopolize. We find the government has proved both and has thus met the burden of showing that intent here.”¹¹⁷

The court of appeals also concluded that the district court committed clear error in rejecting LP gas as a relevant product market.¹¹⁸ The court accepted the government’s Lebanon and Wheaton geographic markets for purposes of the case, but concluded that the district court’s refusal to accept the sufficiency of the “dangerous probability of success” evidence was not “clearly erroneous.”¹¹⁹

In particular, the court concluded that the evidence of market impact did not demonstrate a dangerous probability of monopolization in the Lebanon and Wheaton markets. The fifty and forty-seven percent market shares for the particular submarkets, according to the court, were “not alone sufficient to demonstrate a dangerous probability of success,”¹²⁰ and the record did not demonstrate that Empire’s coercive practices had any effect upon the actions of any actual or potential competitor in those areas. The court of appeals held that “the district court was not clearly erroneous when it found that the government failed to prove dangerous probability of success in its attempt to control competition or its attempt to raise prices by price intimidation.”¹²¹

The Solicitor General’s petition for a writ of certiorari argued that Eighth Circuit decisions holding that a “dangerous probability of success” was an essential element of an attempt to monopolize offense were erroneous, and that the common law of criminal attempt had never contained such a requirement.¹²² It also argued that the rigorous requirements which the court imposed in the case with respect to proof of proximity to successful monopolization were inconsistent with some decisions which do hold that “dangerous probability of success” is an element of attempt to monopo-

116 *Id.* at 299-301.

117 *Id.* at 302.

118 *Id.* at 303-04.

119 *Id.* at 307. The court of appeals observed that a sales area “is not necessarily the same as the relevant geographic market for antitrust analysis,” noted that the Lebanon and Wheaton markets were considerably smaller than a circle with a 20-mile radius, and declared that “we have misgivings about the government’s method, or lack of method, of designating Wheaton and Lebanon as relevant geographic markets or submarkets.” *Id.* at 304-05. Nevertheless, that court said it would “accept them for purposes of this appeal.” *Id.* at 305.

120 *Id.* at 305.

121 *Id.* at 307.

122 *See* note 10 *supra*.

lize.¹²³ The Supreme Court denied the petition for certiorari.

B. American Airlines

A recent Fifth Circuit decision, *United States v. American Airlines, Inc.*,¹²⁴ illustrates the judicial struggle with the attempted monopolization offense and the dangerous probability requirement in particular. The result in *American Airlines* suggests the manner in which predatory trade practices may be vulnerable to antitrust challenge. Whereas *Empire Gas* challenged repeated efforts by the defendant to fix prices, *American Airlines* focused upon a single incident of the same nature. In that case, the government alleged that the Chief Executive Officer of American, Robert L. Crandall, "unlawfully attempted to monopolize airline passenger service to a number of cities served from the Dallas/Fort Worth Regional Airport by requesting that Howard Putnam, Chief Executive Officer of Braniff Airlines, Inc. . . . , raise Braniff's prices . . . , while assuring Putnam that American would follow suit."¹²⁵

The district court granted defendant's motion to dismiss on two grounds.¹²⁶ First, it found that the government had failed to allege the existence of an agreement, an essential element for a claim of attempted joint monopolization.¹²⁷ Second, the court rejected the government's allegation that defendant's solicitation could be reached by the statute governing attempts.¹²⁸

On appeal, the Fifth Circuit Court of Appeals reversed,¹²⁹ holding that proof of an agreement is not a prerequisite to prove attempted monopolization,¹³⁰ and that the government had alleged facts which, if proven, would support a finding of attempted mo-

123 *Id.*

124 743 F.2d 1114 (5th Cir. 1984), *rev'g* 570 F. Supp. 654 (N.D. Tex. 1983), *cert. dismissed*, 106 S. Ct. 420 (1985).

125 570 F. Supp. at 656. The government based its claims on a taped telephone conversation which took place on February 1, 1982. In that conversation, the following exchange took place:

Crandall: . . . I have a suggestion for you. Raise your * * * fares twenty percent.

I'll raise mine the next morning.

Putnam: Robert, we—

Crandall: You'll make more money and I will, too.

Putnam: We can't talk about pricing.

Crandall: Oh, bull * * *, Howard. We can talk about any * * * thing we want to talk about.

743 F.2d at 1116. Based on this conversation, the government sought an injunction against American for an alleged violation of § 2 of the Sherman Act.

126 570 F. Supp. at 663.

127 *Id.* at 657-59.

128 *Id.* at 659-63.

129 743 F.2d at 1122.

130 *Id.* at 1119-20.

nopolization.¹³¹ Additionally, the court found that solicitation accompanied by a specific intent to monopolize may constitute attempted monopolization, even where there is no probability of monopolization because the solicitation was rejected.¹³²

In addressing the government's section 2 claim, the court of appeals initially noted that the role of section 2 of the Sherman Act is "to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by [section 1], that is, restraints of trade, by any attempt to monopolize"¹³³ After finding that if Putnam had accepted Crandall's offer, the offense of joint monopolization would have been complete,¹³⁴ the court analyzed the requirements for the attempted monopolization offense. Relying on the traditional definition by Justice Holmes in *Swift & Co. v. United States*, the court identified two elements of the offense: (1) a specific intent to accomplish the illegal result, and (2) a dangerous probability that the attempt to monopolize could be successful.¹³⁵ Although previous Fifth Circuit cases had listed these two elements, those decisions had also required proof of the relevant market¹³⁶ and evidence of overt acts in furtherance of a scheme to monopolize.¹³⁷

The court noted that the government's allegations concerning

131 *Id.* at 1121-22.

132 *Id.* at 1120-22. A petition for certiorari to review the Fifth Circuit's decision was filed in the Supreme Court, and was subsequently dismissed. The questions presented for certiorari were: "(1) Under § 2 of the Sherman Act, can a single firm, which lacks market power to monopolize unilaterally, attempt joint monopolization in the absence of agreement with its competitor?" and "(2) Under § 2 of the Sherman Act, can there be required dangerous probability of successful joint monopolization where neither competitor, acting alone, has the capacity to threaten monopolization, and there is no possibility of agreement between firms?" Petition for Certiorari, No. 85-180, 54 U.S.L.W. 3146 (Sept. 10, 1985), *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 106 S. Ct. 420 (1985).

133 743 F.2d at 1117 (quoting *Standard Oil of N.J. v. United States*, 221 U.S. 1, 61 (1911)).

134 743 F.2d at 1118.

135 *Id.* (citing *Swift & Co. v. United States*, 196 U.S. 375 (1904)).

136 *See, e.g.*, *Transource Int'l, Inc. v. Trinity Indus.*, 725 F.2d 274, 282 (5th Cir. 1984) ("Since section 2 is based on control of the 'relevant market,' our first task is to define that market for purposes of this case."); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 990 (5th Cir. 1983) ("The offense requires . . . a 'dangerous probability of success' in the relevant market."), *cert. denied*, 465 U.S. 1100 (1984); *Dimmitt Agri Indus. v. CPC Int'l Inc.*, 679 F.2d 516, 525 (5th Cir. 1982) ("Proof of relevant market in attempt cases is required in connection with the dangerous probability of success element of the attempt offense."), *cert. denied*, 460 U.S. 1082 (1983); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978) ("Because the relevant market provides the framework against which economic power can be measured, defining the product and geographic markets is a threshold requirement under § 2."), *cert. denied*, 440 U.S. 939 (1979).

137 *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 990 (5th Cir. 1983) ("the [attempted monopolization] charge demands evidence of overt acts in furtherance of the scheme to monopolize"), *cert. denied*, 465 U.S. 1100 (1984).

the specific intent element were sufficient.¹³⁸ Furthermore, the court found that because Crandall and Putnam together had the capacity to fix prices and because the two airlines allegedly possessed a substantial combined market share in a market with high entry barriers, the government had sufficiently alleged a dangerous probability of success.¹³⁹

The court's analysis of the dangerous probability of success element rejected the lower court finding that because there was no agreement between the parties, and because without joint action neither party possessed sufficient market power to monopolize the relevant market, there was no threat of attaining the monopoly power which would create a section 2 cause of action. In effect, the district court found the government's allegations insufficient because without Putnam's agreement, monopolization was a legal impossibility. Although not relied upon by the district court, the Fifth Circuit has previously used legal impossibility to thwart section 2 monopolization and attempted monopolization claims.¹⁴⁰

The court of appeals looked to the criminal law of attempt to define the dangerous probability element. To find criminal attempt, the court stated, the defendant must have been acting with the *mens rea* otherwise required to commit the crime he has attempted, and his conduct must have constituted a substantial step

138 743 F.2d at 1118.

139 *Id.* at 1118-19.

140 For example, in *Transource Int'l, Inc. v. Trinity Indus.*, 725 F.2d 274 (5th Cir. 1984), the plaintiff brought an antitrust suit against defendant after a joint venture attempt between the parties disintegrated. On appeal from a summary judgment for the defendant, the Fifth Circuit rejected plaintiff's monopolization and attempted monopolization claims because of defendant's lack of market power in the relevant market. *Id.* at 284. Relying on previous Fifth Circuit as well as Supreme Court precedent, the court rejected both claims, stating that when a defendant has undisputed low market shares, monopolization is impossible as a matter of law. *Id.*

The district court in *American Airlines* followed substantially the same reasoning in its decision, as is illustrated by its conclusion concerning the requirement of an agreement:

Prior to an agreement neither party possesses sufficient market strength to engage in conduct prohibited by Section 2. It is the agreement, and the consequent threat of the attainment of monopoly power, that creates a Section 2 cause of action.

Without an agreement or conspiracy, the government's case must fail.

570 F. Supp. at 659 (footnote omitted). For other Fifth Circuit decisions finding that low market shares make monopoly impossible, see *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1368 (5th Cir. 1976) (defendant not guilty of monopoly as a matter of law because its share of relevant ornamental plants market was only 20%), *cert. denied*, 429 U.S. 1094 (1977). *A.T.&T. v. Delta Communications Corp.*, 408 F. Supp. 1075, 1106 (S.D. Miss. 1976) (television networks did not monopolize, since they provided less than 50% of the network business), *aff'd per curiam*, 579 F.2d 972 (5th Cir.), *modified on other grounds*, 590 F.2d 100 (5th Cir. 1978), *cert. denied*, 444 U.S. 926 (1979).

The Fifth Circuit cases rely on *United States v. United States Steel Corp.*, 251 U.S. 417 (1920) (Court found no monopoly despite a market share of 50% where evidence tended to show presence of competition in relevant market).

toward commission of the crime.¹⁴¹ Comparing the substantial step element of common law attempt to the dangerous probability of success element developed in antitrust law, the court found important differences. The court stated, "The focus of dangerous probability of success is upon the likelihood of the prohibited result, whereas the focus of the substantial step toward commission is upon a defendant's intent."¹⁴² Thus, under the Sherman Act, the defendant's intent to commit the offense is necessary, but the court must also inquire as to the likely result if that intent was acted upon, focusing, in effect, upon the defendant's theoretical capacity to monopolize.

The Fifth Circuit relied on *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*¹⁴³ for support. The court stated that since Crandall's alleged conduct was "uniquely unequivocal" and its potential "uniquely consequential," the dangerous probability element was sufficiently alleged.¹⁴⁴ Additionally, the court rejected the legal impossibility defense dependent on market power: "If a defendant had the requisite intent and capacity, and his plan if executed would have had the prohibited market result, it is no defense that the plan proved to be impossible to execute."¹⁴⁵

In rejecting the legal impossibility defense, the court specified that it did not intend to create an "attempted price fixing" offense under section 1 of the Sherman Act.¹⁴⁶ American had argued that since Crandall's behavior sought to have American and Braniff fix prices, the offense was actually a section 1 offense, and section 1 did not reach attempts. The Fifth Circuit stated that under the facts alleged, Crandall wanted to attain joint monopoly power with Braniff and to engage in price fixing.¹⁴⁷ His inability to fix prices, the court stated, had no effect on whether he had committed the offense of attempted monopolization through his unsuccessful effort to monopolize.¹⁴⁸ The Fifth Circuit also concluded, contrary to the district court's finding, that a solicitation could constitute an attempt, stating, "a highly verbal crime such as attempted monopolization may be established by proof of a solicitation along with the requisite intent."¹⁴⁹

The *American Airlines* decision is flatly inconsistent with *Empire*

141 743 F.2d at 1119 (citing *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975)).

142 743 F.2d at 1119.

143 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

144 743 F.2d at 1119.

145 *Id.*

146 *Id.* at 1122.

147 *Id.*

148 *Id.*

149 *Id.* at 1121.

Gas. In effect, the Fifth Circuit interpreted the elements of attempt to monopolize in a manner consistent with the third approach identified above,¹⁵⁰ where a theoretical capacity to monopolize may be enough to show a “dangerous probability” of success. The Eighth Circuit, on the other hand, applied the fourth approach¹⁵¹ requiring that, in addition to proof that a defendant engaged in conduct which, if continued or successfully consummated, would lead to monopolization, the plaintiff must also demonstrate that the defendant is dangerously close to achieving monopoly power. In the context of foreign predation, the difference between the two interpretations is vital, for foreign competitors are unlikely to be found actually on the brink of monopolization in light of the availability of predictable protectionists and other intervening political events.

III. Applying Criminal Law Standards to Attempt to Monopolize

American Airlines is a particularly important case because the court applied criminal law standards for criminal attempt to the more ambiguous commercial context of attempted monopolization. As that decision suggests, a “dangerous probability” requirement may be useful in cases involving practices which may serve legitimate business purposes in some circumstances but may be instruments of monopoly in other circumstances. Such a requirement, rigorously applied, is not useful if the defendant engages in unilateral conduct which cannot serve any purpose other than restraining competition. Courts, as in *American Airlines*, should grant relief against such conduct without requiring the plaintiff to present elaborate economic evidence to demonstrate the actual impact of the conduct in a precisely defined market.

The dilemma can be resolved by viewing the likelihood or probability of monopolization as circumstantial evidence of intent. A showing of probable monopolization is essential to establish intent if the conduct involved is not blatantly anticompetitive. Such a showing is unnecessary if the conduct demonstrates the intent. This appears to be the position adopted by the Ninth Circuit.¹⁵² It

150 See text accompanying note 30 *supra*.

151 See text accompanying note 31 *supra*.

152 In *Hallmark Indus. v. Reynolds Metals Co.*, 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974), the court said:

Nonetheless, appellees in this case argue that dangerous probability must be shown through evidence of sufficient market power. Certainly market power may establish dangerous probability. However, *Lessig*, *Industrial Building Materials*, and *Moore*, *supra*, hold that dangerous probability may also be shown through proof of specific intent to set prices or exclude competition in a portion of the market without legitimate business purpose. This specific intent must be accompanied by predatory conduct directed to accomplishing the unlawful purpose. Ordinarily specific intent is difficult to prove and will be inferred from such anticompetitive

is also substantially the position adopted in the Competition Protection Act of 1979, proposed by the National Commission for the Review of Antitrust Laws and Procedures.¹⁵³

Notwithstanding the result in *American Airlines*, the Fifth Circuit reaffirmed and accepted the view that intent alone is not sufficient to establish an attempt to monopolize. This assumption appears to be universal in all kinds of attempt cases. The proposition that you do not send a man to jail for thinking about committing a crime is a fundamental principle of Anglo-American jurisprudence. Since section 2 is a criminal statute, it necessarily follows that the government could not obtain injunctive relief by merely demonstrating that a single defendant conceived a scheme to monopolize something. The attempt to monopolize offense necessarily requires

conduct. Therefore, evidence of market power may be relevant, but it is not indispensable where a substantial claim of restraint of trade is made.

Id. at 12.

¹⁵³ See REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 144, 165-66 (1979):

[T]his Act may be cited as the Competition Protection Act of 1979.

Findings.

. . . .

Sec. 2. Since the passage of the Sherman Act, the courts have not developed a consistent method for defining an attempt to monopolize. As a result of conflicting judicial approaches, the same business conduct may be held lawful in one jurisdiction and unlawful in another. Anticompetitive conduct has been held outside antitrust scrutiny by some courts solely on the grounds that such conduct did not imminently threaten the achievement of a monopoly position in a specific market. Even where conduct that is clearly and significantly anticompetitive has been involved, courts have frequently required lengthy inquiries into present and potential market positions of defendants. It is the conclusion of the Congress that a proviso to Section 2 of the Sherman Act is necessary to enable the statute, without deterring procompetitive behavior, to provide an effective remedy for conduct threatening to create a monopoly or otherwise to suppress competition.

Revision of Sherman Act Section 2.

Sec. 3. Section 2 of the Sherman Act, 15 U.S.C. § 2, is hereby amended to read as follows:

"Sec. 2. 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 a 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. Provided that, in determining whether a person has attempted to monopolize a part of trade or commerce, (1) a dangerous risk of monopoly shall be held to exist upon a showing that the conduct alleged to constitute the attempt significantly threatens competition in any relevant market, as determined after an evaluation of the defendant's intent, the defendant's present or probable market power, and the anticompetitive potential of the conduct undertaken; and (2) the fact that a defendant's prices were not below either average variable cost or marginal cost shall not be controlling, but may properly be considered, in assessing the defendant's intent and the conduct at issue."

proof of intent *plus* something more. The problem the courts face is to define the nature of the "something more."

That problem is not unique to antitrust cases. Courts have struggled with the question for decades in the context of other attempt offenses and have never succeeded in developing clear guidelines. The courts have usually held that the defendant must go beyond "mere preparation," but that formula is of little or no assistance in deciding actual cases. No meaningful line exists between the end of the preparation and the beginning of the attempt.¹⁵⁴

The draftsmen of the Model Penal Code discarded the preparation-attempt distinction and defined "attempt" to impose liability upon any person "acting with the kind of culpability otherwise required for commission of the crime" who "purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."¹⁵⁵ The Code also says "[c]onduct shall not be held to constitute a substantial step under subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose."¹⁵⁶

The authors of the draft Code have explained that the "substantial step" standard was selected because they believe the purpose of the act requirement is to identify persons who are sufficiently dangerous to warrant prosecution.¹⁵⁷ Such a standard does not differ substantially from the prevailing judicial view of criminal attempt, although, with special reference to the defenses of legal or factual impossibility, there remains a conflict in the holdings.¹⁵⁸

154 See, e.g., *United States v. Everett*, 700 F.2d 900 (3d Cir. 1983); *Regina v. Eagleton*, 169 Eng. Rep. 826 (Crim. App. 1855).

155 MODEL PENAL CODE § 5.01(1)(c) (official draft 1962).

156 *Id.* § 5.01(2).

157 Wechsler, Jones & Korn, *supra* note 6, at 584. The authors state: "The innocuous character of the particular conduct becomes relevant only if the futile endeavor itself indicates a harmless personality, so that immunizing the conduct from liability would not result in exposing society to a dangerous person." *Id.*

158 For example, state courts have labeled the following situations as involving legal impossibility, and concluded that there could be no attempt: (1) A person who accepts goods which he believes to be stolen, but which are not in fact stolen, is not guilty of attempting to receive stolen goods. *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906); (2) A person who offers a bribe to one whom he believes to be a juror, but who was not a juror, is not guilty of attempting to bribe a juror. *State v. Taylor*, 345 Mo. 325, 133 S.W.2d 336 (1939); (3) A hunter who shoots a stuffed deer, believing it to be alive, is not guilty of attempting to shoot a deer out of season. *State v. Guffey*, 262 S.W.2d 152 (Mo. App. 1953).

In other similar situations, courts have concluded that the impossibility is factual, and therefore no defense to a charge of attempt: (1) A person who fires a gun at a bed, thinking it to be occupied by a man, is guilty of attempted murder, even though the bed is empty. *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902); (2) A person who possesses a substance

The "substantial step" test would provide a satisfactory method for determining when a defendant should be subjected to liability in an attempt to monopolize case. Prosecuting individuals or corporations who conceive a monopolization scheme and take one or more steps to implement the plan is justified if those steps clearly indicate an unequivocal intent to pursue a particular course of conduct until the defendant achieves monopoly. Either the government or a private plaintiff should be entitled to obtain injunctive relief without demonstrating that total monopolization is imminent. Additionally, a private party who has been injured as a result of the preliminary steps should be entitled to recover damages when the conduct lacks any justification whatsoever.

The difficult problem in monopoly cases is to identify the type of conduct which clearly evidences an intent to monopolize. It is seldom possible to find direct evidence—such as memoranda or the testimony of a disgruntled business associate—which demonstrates an expressed purpose to achieve monopoly. Intent normally must be inferred from business practices. Many practices which might be used to achieve monopoly, however, can also be, and normally are, used for legitimate business purposes. Engaging in below-cost or so-called "predatory pricing," which is at the heart of current claims for protectionist legislation in our trade policy, is, without direct evidence of an exclusionary intent, particularly ambiguous.¹⁵⁹ There is a very real risk that an unduly lax standard of proof in attempt to monopolize cases could enable private plaintiffs to use section 2 as a device to inhibit vigorous competition by their competitors, including foreign competitors.

A "probability of success" requirement is not objectionable if the courts limit it to cases in which the conduct is ambiguous and a monopolistic intent cannot be established by direct evidence. However, there is no sound policy reason for making probable success an independent element of the offense. A court could achieve the same result by declaring that the requisite specific intent will not be inferred from conduct unless the defendant either (1) engages in conduct which cannot serve any purpose other than restricting

thinking it is narcotics, is guilty of attempted possession, notwithstanding that the substance is in fact talcum powder. *People v. Siu*, 126 Cal. App. 2d 41, 271 P.2d 575 (1954); (3) A person who introduces instruments into a woman for the purpose of producing an abortion is guilty of attempting an abortion, even though the woman is not pregnant. *People v. Cummings*, 141 Cal. App. 2d 193, 296 P.2d 610 (1956).

Other impossibility cases are collected in Annot., 37 A.L.R.3d 375. See *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976); R. PERKINS & R. BOYCE, *CRIMINAL LAW AND PROCEDURE* 309-40 (6th ed. 1975).

¹⁵⁹ See generally Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976).

competition, *i.e.*, barring entry or controlling prices, or (2) engages in conduct which comes very close to producing an actual monopoly. The latter would, of course, continue to require proof of relevant market.¹⁶⁰

In section 2 cases, certain types of conduct, such as communicating threats of economic reprisals to a competitor for the purpose of inducing him to adhere to a particular price or not to serve particular customers, should also be viewed as unlawful, without proof of surrounding market facts. Such an approach is justified as a matter of economic policy because that conduct can never serve any purpose which is socially or economically beneficial. It is justified as a matter of legal theory because the conduct satisfies the intent and act requirements for an attempt offense. It speaks for itself with respect to the actor's intent and it is clearly a substantial step toward the achievement of power to control price. Such conduct should, therefore, be viewed as an "attempt to monopolize" without any further inquiry into the actual or potential effect of the conduct in a particular case.¹⁶¹

Such a result-oriented approach would be entirely in accord with the basic objectives of the Sherman Act. The statute was enacted in order to prevent conduct which unduly restricts competition. There is every reason to suppose that Congress was equally

160 As a practical matter, such a formulation of the intent and act requirements would parallel the *per se vs. rule of reason* approach which the courts have long followed in § 1 cases. If a bilateral or multilateral agreement falls within one of the traditional *per se* categories such as price fixing, division of markets, or boycotts, the court does not analyze the actual or potential competitive effects of the agreement. However, if the multilateral activity involves some kind of restraint of trade which is governed by the "rule of reason," courts do examine the business purpose and probable economic effects in order to determine whether the particular restraint is or is not unreasonable.

161 Such a dual approach to unilateral conduct is essentially the same as the approach advocated by Professor Turner. See Turner, *The Scope of "Attempt to Monopolize,"* 30 REC. A.B. CITY N.Y. 487 (1975). TURNER ADVOCATES A RESULT-ORIENTED APPROACH WHICH WOULD TAILOR THE PROOF TO THE TYPE OF CONDUCT INVOLVED. IN PARTICULAR, HE STATES:

3. In parallel to a similar proposition regarding the monopolizing offense, an attempt charge properly lies against plainly invidious conduct, connoting the presence or likely achievement of some degree of market power, and primarily responsible for it. Predatory pricing is a good example. Such pricing is itself proof that the firm, if not already possessing a degree of market power, anticipates obtaining it—it anticipates that it will be able to recoup the losses by monopoly profits earned after the target firms are extinguished. There should be no need to define the market, or in other respects attempt to prove monopoly power, in correctly defined cases of predatory pricing.

4. An attempt charge is also properly directed against a course of conduct other than competition on the merits which, *if continued or successfully consummated*, would probably produce the degree of market power that would constitute monopoly for purposes of the monopolizing offense (*i.e.*, a substantial degree of market power). This is similar to the "dangerous probability" test in the traditional formulation of the attempt offense.

Id. at 503-04 (emphasis added; footnote omitted).

concerned with unilateral and multilateral conduct. Indeed, there are good reasons for concluding that the proof requirements in attempt to monopolize cases should be less stringent than the proof requirements in other types of attempt cases. In conventional criminal cases, harm usually does not result unless the offense is completed. An attempt to achieve monopoly can have an adverse effect upon competition even if the actor never succeeds in acquiring sufficient market power to achieve monopoly. Congress may well have been cognizant of this when it chose to prohibit both monopolization and attempts to monopolize.¹⁶²

IV. Conclusion

The 1978-79 National Commission for the Review of Antitrust Laws and Procedures, as a substantial part of its work, recommended that the attempt to monopolize provision of the Sherman Act be legislatively modified and defined. The Solicitor General, in a brief submitted to the Supreme Court in 1977 in support of certiorari in *Empire Gas*, advocated that the Court adopt the same rule.

Case law in the lower courts is in disarray, although most courts, notwithstanding *American Airlines*, now hold that a defendant is not guilty of attempted monopolization unless it is already dangerously close to controlling an entire market, regardless of the plainly predatory nature of the defendant's conduct and its clearly defined monopolistic goal. The Supreme Court has not decided an attempt to monopolize case since 1951, when it held in *Lorain Journal* that an Ohio newspaper had violated the attempt clause of section 2 by coercing local advertisers not to do business with a new radio station operating in the same area.

As an alternative to a new wave of protectionist legislation, our domestic business interests should be encouraged, through a clarification of the elements of the attempt to monopolize offense, to privately invoke this longstanding weapon against forms of economic imperialism. They will have a realistic chance of success, and

¹⁶² Chief Justice White's description of the history and purpose of the Sherman Act and the relationship between the first and second sections supports the view that the statute is not limited to preventing monopoly. His opinion in *Standard Oil Co. v. United States*, 221 U.S. 1 (1910), noted that the terms "monopoly," "engrossing," and "restraint of trade" originally had distinct meanings, but that these distinctions had become blurred by the time the Sherman Act was enacted. He concluded that the authors of the Act used those terms in the popular sense and deduced that the purpose of § 2 is

to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.

Id. at 61.

a real deterrent will be created. Such a private treble-damage threat would not directly implicate American foreign policy but would allow our free enterprise system to defend itself in our courts. On the other hand, the complaints of foreign predation would be subjected to rigorous factfinding to determine their validity. The reinforcement of private treble-damage plaintiffs as private attorneys general has long been central to the preservation of our market economy.¹⁶³

For too long our Commerce Department and its interests have been allowed to contend without criticism that our antitrust laws are only an impediment to foreign trade. Such an argument recently produced legislative results whose wisdom is yet to be tested.¹⁶⁴ It should be at least equally clear, however, that our antitrust laws, particularly the attempt to monopolize provision, if clarified as suggested both in this article and by others, can be used affirmatively as a private weapon to promote international trade and eliminate monopolistic impediments to a free market. Legislative or Supreme Court clarification of section 2 would be a timely alternative to protectionism.

163 The coordination of antitrust and foreign commerce policies is supported by the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1602-1611 (1982)), which, of course, was generally designed to allow our private commercial interests better access to our courts to redress grievances against the commercial arms of foreign governments. An amended, the § 2 attempt clause would dovetail nicely with the FSIA.

164 *See, e.g.*, Export Trading Company Act, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified at 12 U.S.C. § 371, 15 U.S.C. §§ 4001-4021 (1982)); National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (codified at 15 U.S.C. §§ 4301-4305 (Supp. II 1984)).

