Antitrust for the AI Era

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Monopolization in Three-Part Harmony

- *Viamedia* (2020)
- *Chase Manufacturing* (2023)
- *Duke Energy* (2024)

Viamedia (2020)

"Comcast takes the position that after the Supreme Court's 2003 *Trinko* decision, any "antitrust claims based on a duty to deal with rivals **'bit the dust.'**" (emphasis added)

"…we must reject that argument about what the law should be. *Trinko* itself said just the opposite: "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate Section 2," and the "leading case for § 2 liability based on refusal to cooperate with a rival … is *Aspen Skiing*."

Viamedia (2020)

"A comparison of Viamedia's allegations to the facts found by the jury in *Aspen Skiing* (and which the Supreme Court considered significant to its analysis) is instructive:

- Long-term business relationship that created joint offering
- Relationship existed absent any statutory obligation/duty
- Can presume prior relationship was thus mutually advantageous
- Sudden course reversal
- Course reversal came at a monetary loss for defendant
- Refused to sell service/product at retail price
- Sold product at retail price to others in the relevant market
- Unhappy customers
- Discouraged customers from doing business with its smaller rival
- Defendant continued to deal with competitors in other competitive markets
- Exclusionary conduct aimed at the only other competitor in the market "

Viamedia (2020)

"Comcast next cites *Novell* in support of its argument that a factual dispute regarding the existence of procompetitive justifications is appropriate for resolution on the pleadings."

"Comcast proposes that if a defendant merely postulates "a valid business purpose"—apparently including any business purpose a defendant could dream up, regardless of feasibility or value—that "ends the inquiry." "[T]here is no 'balancing' of benefits and harms," Comcast declares."

Viamedia (2020)

"However formulated, this test is aimed in part at the potential overweighting of the *Aspen Skiing* factor of a defendant forsaking short-term profits."

"Thus, balancing anticompetitive effects against hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings, at least where the plaintiff has alleged conduct similar to that in *Aspen Skiing* the calculation of procompetitive benefits net of anticompetitive harms does not easily lend itself to a *pleading* standard."

Chase Manufacturing (2023)

"[A]nticompetitive conduct comes in too many forms and shapes to permit a comprehensive taxonomy." *Novell*, 731 F.3d at 1072 (citation omitted)."

"The district court concluded otherwise, borrowing a standard from refusal-to-deal-with-rivals caselaw…and concluding that TPS failed to meet that standard."

"TPS, JM, and the United States (as amicus) all agree that the court applied the wrong legal standard. And so do we."

We have never extended a refusal-to-deal-with-rivals analysis outside that situation, nor have we mandated analyzing § 2 exclusionary conduct under any solitary framework."

Chase Manufacturing (2023)

- “Indeed, as the United States points out, a refusal-to-deal framework applies to narrow situations often remedied by monopolists sharing their technology **with rivals**. [Emphasis added]”

Duke Energy (2024)

"Duke maintains that "NTE cannot string together a series of acts — all lawful in themselves under the relevant tests — and claim that the whole is more than the sum of the parts."

"It is foundational that alleged anticompetitive conduct must be considered as a whole. Section 2 focuses on anticompetitive conduct, not on court-made subcategories of that conduct."

"Thus, when a court is faced with allegations of a complex or atypical exclusionary campaign, the individual components of which do not fit neatly within pre-established categories, its application of such specific conduct tests would prove too rigid."

"Thus, when a plaintiff alleges that a scheme or course of conduct was anticompetitive, the scheme or conduct must be considered as alleged, not in manufactured subcategories."

Duke Energy (2024)

Justice Holmes *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905) (emphasis added):

> "The constituent elements . . . are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. **It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. <u>The plan may make the parts unlawful.</u>"**

Monopolization in Practice:

A Tale of Two Approaches

Monopolization For Unsophisticated People Who Don’t Live in the Real World

- Define a market
- Calculate Share
- Conduct
  - Tying
  - Exclusive deals
  - RTD
  - Predatory Pricing
- Effects
- Rebuttal

Monpolization for Sophisticated People Who Live in the Real World

- What is the source of power
- What makes the source of power durable.
- Is it cumulative?
- What are the economics? Capex? Valuation/multiples? Cross Subsidization
- What are the moats?
- What threatens the source of power and its durability
- What actions has the company taken to repel the threats
- How has that obtained or maintained the power
- Could benefits have been achieved another way?
- …then apply the elements of a claim after establishing an anchor in the real world (see previous slide)