No. 91-10

In The

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC. and
KENNETH B. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF ON THE MERITS BY RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

In deciding a claim for attempt to monopolize under section 2 of the Sherman Act, may the jury be permitted to infer the dangerous probability of success element from either or both (a) conduct which plainly injures competition and has no procompetitive justification, or (b) direct proof of injury to competition?

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OPINION BELOW

The Memorandum Decision of the Ninth Circuit Court of Appeals is included in the Appendix to the Petition for Writ of Certiorari at page A1.

JURISDICTION

Respondents do not disagree with Petitioners' Statement of Jurisdiction.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any one person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3. Section 4 of the Clayton Act (15 U.S.C. § 15) provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor

> . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Procedural Background.

Shirley and Larry McQuillan[1] d/b/a Sorboturf Enterprises commenced this action by filing a complaint for violations of state and federal antitrust laws, RICO violations, state law unfair competition and interference with prospective advantage. The jury found against petitioners[2] under section 2 of the Sherman Act as well as on multiple RICO and state law claims. The other defendants were also found liable on two section 1 claims. All defendants appealed. In a Memorandum Decision, the Ninth Circuit Court of Appeals affirmed each of the antitrust verdicts. In light of these affirmances, the Ninth Circuit did not specifically address the RICO or state law verdicts.

The jury found Spectrum not liable for resale price maintenance under Sherman Act section 1, but liable in a general verdict for claims of monopolization, attempted

[1] Since Shirley McQuillan was the central actor in the events leading to this lawsuit, "McQuillan" refers to her unless the context indicates otherwise.

[2] Petitioners include Spectrum Sports, Inc. and Kenneth B. Leighton. Except where the context indicates otherwise, "Spectrum" will refer to the petitioners collectively.

monopolization, and conspiracy to monopolize under section 2. The Ninth Circuit memorandum opinion addressed only the adequacy of the evidence of attempted monopolization.

B. Factual Background.

1. BTG Grants BTR a Non-Exclusive License for Manufacture and Distribution of Sorbothane Worldwide.

Sorbothane is a shock absorbent solid polymer that can "absorb energy like a liquid." R. 1670. It was invented by Dr. Maurice Hiles under the auspices of British Technology Group ("BTG"), an agency of the British government. R. 1666; 1670-1672.[3] BTG holds both the United States and British patents on sorbothane. R. 1672, 1675. BTG granted BTR Development Services, Ltd. a non-exclusive license to manufacture and sell sorbothane worldwide. J.A. 216.[4]

2. Kenneth M. Leighton Brings Sorbothane to United States.

In 1978, BTR, Inc., a holding company ultimately owned by BTR, plc, a UK public company ("BTR"),

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[3] Some documents reflect "National Research and Development Corporation," or "N.R.D.C.," BTG's former name. R. 1671.

[4] The company is also referred to as "B.T.R. Central Development." See R. 1680.

purchased Hamilton Kent ("HK"), a United States rubber extruding company. R. 3020; 3170. Kenneth M. Leighton ("Sr") was the president of HK at that time. R. 1230. His son, Kenneth B. Leighton ("Jr"), was also an HK employee. R. 3170.

Accompanied by Jr, Sr went to England, met Dr. Hiles and became very enthusiastic about bringing sorbothane to the United States. R. 1682; 3173. In August 1980, BTR Development Services Ltd. and HK signed a "Sorbothane Agreement," whereby HK was given an unrestricted sublicense to sell sorbothane "in all world markets."[5] J.A. 222. HK also hired Dr. Hiles as a consultant. R. 1684-1686. A United Kingdom company, Birmingham and Leyland ("Leyland"), also had a license to sell sorbothane. That license did not restrict Leyland from selling sorbothane in the United States. J.A. 221-222; R. 3280-81.

3. McQuillan Becomes a Sorbothane Distributor.

After reading a magazine article about sorbothane, Shirley McQuillan became interested in developing a sorbothane horseshoe pad. R. 161-163. After meeting McQuillan, and based on her ideas, Dr. Hiles filed a patent application for a sorbothane horseshoe pad in December, 1980. R. 1696-1697. McQuillan then began

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[5] In 1982, BTR President John Cahill created a separate company for Sr to manufacture and sell sorbothane. That company was first called "Sorbo, Inc." and later "Sorbothane Inc." R. 3177. For simplicity, this brief will refer to HK, Sorbothane, Inc., and Sorbo, Inc., simply as "HK."

developing a marketable horseshoe pad for HK. R. 192; 1739. Sr assured McQuillan she would have national distribution rights to the pad when it was marketable. R. 205.

HK focused on marketing other sorbothane products, including shock absorbing shoe inserts. R. 793. HK decided in early 1981 to hire regional distributors to sell sorbothane. R. 1238. In mid-1981, HK awarded McQuillan and her company, Sorboturf, the sorbothane distributorship for the southwest territory. R. 212. HK also awarded a distributorship to McQuillan's father, Myron McCone, and his company, Rocking Horse Ranch. R. 1239. Jr resigned from HK in the summer of 1981 and formed Ohio Cushions to become the midwest sorbothane distributor. Ohio Cushions later changed its name to Spectrum Sports. R. 484; 777; 794-795.

4. HK Maintains Sorbothane Prices with Price Fixing Agreements.

BTG refused to give BTR an exclusive license in the United States. J.A. 345; 350. BTR's internal documents from late 1980, however, reflect a verbal promise from BTG not to grant another United States license as long as BTG was getting a good royalty return from BTR. J.A. 344-45. While BTG later denied having made any such promise[6] (E.R. 86), HK was in fact the only manufacturer of sorbothane in the United States in 1981.

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[6] Notwithstanding this denial by BTG in late 1981, HK represented to Nike in 1982 that BTG had made such a verbal promise. J.A. 315.

BTR believed that sorbothane was unique and that there were no competitors "unless they have broken a patent." R. 2276. Thus, as the only sorbothane manufacturer in the U.S., HK could dictate high prices unhampered by any competitive threat. In January 1982, BTR President John Cahill boasted to Sr: " . . . we are in a seller's market. This means we can, at the moment, at least write our own terms, make our own price, and establish our own marketplace." J.A. 266. He further exulted: "This tells us that like it or not they can only get this product from us. The product we are offering is something that they don't want – they *need* it – and therefore they are prepared to bend their rules to comply with our requirements." (Emphasis in original.) J.A. 266. After a price increase for insoles in mid-1982 to achieve Cahill's arbitrary 40% profit before taxes target (J.A. 308), Cahill wrote with satisfaction "the market seems to have digested this without trouble (no need for Digel yet)." J.A. 310. In commenting on this "pricing policy" Cahill urged "We have a super product here. Let's milk it NOW." J.A. 308. Cahill, however, also cautioned: " . . . our success will breed competitors. We must keep our antennas out and make sure that we are aware as soon as possible of any competitive movement in the marketplace in order that we can stifle it by threatening to take legal action because of infringement of our patent." J.A. 322.[7]

Eager to maximize its profits, provide a high return to BTG to maintain its exclusivity, and exploit its control

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[7] Of course, a mere licensee or sub-licensee cannot sue for patent infringement. *K-Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281 (1988).

of a unique product, HK entered into price fixing agreements with each regional distributor requiring each to sell to retailers at a fixed mark-up. Moreover, regional distributors had to "police" retailers to ensure a fifty percent mark-up at the retail level. R. 230; 824-825. The agreement also precluded the regional distributors from selling sorbothane to discount stores. R. 298. HK marketing manager, Laurene Heinsohn ("Heinsohn"), instructed regional distributors to stop shipping sorbothane to any retailer caught discounting. She threatened to terminate distributors who violated the pricing agreements. R. 299; 828-829; 1094.

HK, however, soon discovered it could not rely on five independent regional distributors to enforce the price fixing agreements. McQuillan, for example, agreed to police retailers but did not do so. R. 300; 827. She also sought permission from Sr (unsuccessfully) to sell sorbothane to a discount sporting goods store. R. 298. Heinsohn had to warn another distributor about allowing retailers to violate the pricing agreement. J.A. 175-177. She also was asked to investigate a West Virginia retailer who was selling below the "recommended price." J.A. 177; R. 1837. Unlike the other distributors, however, Jr was an enthusiastic price fixer who devised his own methods of policing retailers. R. 830.

5. Jr, Sr and John Burne Agree to Terminate Regional Distributors to Maintain High Prices.

HK's target retailers for sorbothane insoles were athletic stores and medical supply outlets.[8] Other than

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[8] HK's markets specifically excluded the mass market (i.e. drug stores and discount stores) because the mass market was more price sensitive and would not allow the desired profit margins. J.A. 260-263.

packaging, there was no difference in 1982 between the "athletic" insole and the "medical" insole. R. 1753-1755. The regional distributors sold to both types of outlets. R. 819.

In January 1982, Sr decided to appoint a national medical distributor, IEM, a company owned and operated by John Burne ("Burne"). J.A. 346. Within weeks of his appointment, Burne arranged a meeting with Jr, Sr and Heinsohn at Jr's office to discuss pricing. J.A. 178. Burne pointed out that he could sell "medical" insoles for twice the price of "athletic" insoles. The regional distributors, however, presented a "problem of control" because they could not be counted on to act in unison with Burne to maintain and raise prices. J.A. 179-180. Burne argued he needed a single national athletic distributor so that price fixing agreements could be enforced. J.A. 180. As Heinsohn explained it: "It would be easier for him (Burne) to enter into an agreement with one person, perhaps entice that person to also raise their prices, or at least not infringe on his market." J.A. 180. The group agreed that Jr would become that "one person." J.A. 180.

Sr and Burne wanted to terminate the regional distributors outright. J.A. 181. However, when Heinsohn stated she believed HK needed good cause for any such termination, the group decided to try another approach. J.A. 181.

HK first tried to persuade the regional distributors to relinquish their distributorships by inflating Jr's performance figures to portray him as the national leader. J.A. 181-183. When that failed, HK terminated two of the regional distributors for minor credit and payment problems.[9] R. 864-865; 871-872. McQuillan, however, had a perfect credit and payment history. R. 869.

6. HK Enters Into a "Harmonious Marketing Agreement" With Leyland.

HK's ability to dictate high prices depended upon excluding other sorbothane manufacturers from making sales into the United States. Cahill believed competition "degraded" the market. J.A. 296. As long as HK controlled the sale of sorbothane in the U.S., it could "write [its] own terms, make [its] own price, and establish [its] own marketplace." J.A. 266-267. Leyland posed a competitive threat because its license did not restrict it from selling sorbothane in the United States. J.A. 221-222. HK would pose a similar threat to Leyland if HK sold into the European market. These two companies therefore entered into what Heinsohn described as a "harmonious marketing relationship." J.A. 300.[10] Under this agreement, HK

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[9] A BTR audit conducted shortly thereafter revealed that Jr's account was far more delinquent than those of the terminated distributors. R. 866-867.

[10] BTR attempted to argue at the Ninth Circuit Court of Appeals and on its Petition for Writ of Certiorari that HK and Leyland were related corporations that could not conspire under *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). As the United States pointed out in its first amicus curiae brief, however, BTR did not present evidence of any relationship between Leyland and HK that would give rise to a *Copperweld* situation. (See Brief For the United States as Amicus Curiae pp. 13-14.)

would not sell into Europe and Leyland would not sell into the United States. R. 1845-1846.

HK and Leyland honored their agreement. For example, HK objected immediately when Leyland agreed to supply Frelen U.S. with sorbothane. HK told Leyland "the import of finished sorbo parts to a U.S. customer is in direct opposition to a harmonious marketing relationship between our two companies." J.A. 300-301. Leyland immediately apologized and requested "please advise if you feel we are guilty of any further infringements at any time." J.A. 302. Similarly, Sr told Leyland "please don't get involved with Nike" if Nike wanted to produce in the U.S. J.A. 314. HK also put pressure on potential North American sorbothane customers not to buy from Leyland. See, e.g., J.A. 313; 294. The obvious effect of the market allocation agreement between Leyland and HK was to allow HK to remain the sole U.S. supplier of sorbothane, and to maintain its supra-competitive price structure.

7. BTR Attempts to Persuade BTG to Make BTR's Sorbothane License Exclusive.

HK eliminated the competitive threat from Leyland, but greatly feared BTG would license another U.S. sorbothane manufacturer who would destroy HK's monopoly. Therefore, as early as 1981, BTR aggressively solicited an exclusive license from BTG. J.A. 291. This campaign continued into 1983 notwithstanding BTG's repeated refusals to grant exclusivity to BTR. J.A. 285 ("we are again pressing BTG hard to convert our present sorbothane licence [sic] into an exclusive licence [sic] for U.S.A."), J.A. 350. The campaign included giving BTG forecasts for future sales of sorbothane by HK that Sr later claimed were inflated. J.A. 338-339; J.A. 201-202; R. 1479-1484. Sr also asked Dr. Hiles (a BTG consultant for years) to use his influence with BTG to help eliminate the threat of competition. R. 1846-1847.

BTR became quite concerned in early 1983 that an unidentified U.S. company had applied to BTG for a license. J.A. 324. Sr discovered the company was Goodyear and complained bitterly that it might "start a price war." He proposed a meeting to convince BTG to reject Goodyear's proposal. J.A. 328. Two months later, Sr reported to Cahill that BTG had to "go through motions" (sic) with the Goodyear request to prevent criticism from the U.K. government. J.A. 334. Sr suggested that increasing BTR's royalties to BTG "would be a better solution than inviting competition." J.A. 335.

Cahill and Sr also became concerned that Dr. Hiles was conspiring with Goodyear to assist in it's licensing efforts. J.A. 296. Cahill met with Dr. Hiles to warn him against making any "clandestine arrangement" with Goodyear "which will promote another license by BTG in the Americas. . . . " J.A. 268-269.

8. HK Terminates McQuillan's Distributorship.

As discussed above, Sr, Jr, and Burne all agreed the regional distributors would be a fatal impediment to a unified, national, and enforceable pricing scheme. HK, however, could not terminate McQuillan for credit problems because she had none. Therefore, Sr and Jr tried to wrest McQuillan's distributorship from her with other tactics and threats. In March 1982, for example, a national television show, "That's Incredible," prominently featured sorbothane as the new "wonder product" for runners and other athletes. Jr gave the show's producer his own telephone number to prevent McQuillan from receiving any of the 14,000 telephone calls prompted by the broadcast. Jr also intercepted all the mail. R. 330-332.

In April 1982, Sr and Heinsohn both told McQuillan she could be the national equestrian sorbothane distributor (which she had already been promised as a result of her work developing a sorbothane horseshoe pad) only if she would relinquish to Jr her athletic distributorship. R. 880-881. Jr told McQuillan she could either come to an agreement with him or she would be "looking for work." R. 363.

When McQuillan would not agree to Jr's terms, Sr appointed another national equestrian distributor. R. 427. The same day as an unsuccessful and unpleasant negotiation session between McQuillan and Jr, HK suddenly imposed on McQuillan new and onerous credit limits. R. 384.[11] HK also raised the prices of sorbothane without giving McQuillan notice. R. 899. In June 1982, HK appointed a new national distributor for the "box shoe"[12] and military trades which had been part of McQuillan's market. R. 924-925. HK also forced McQuillan to surrender her customer list on a "confidential" basis. HK later gave

[11] HK imposed on McQuillan a $5,000 limit. R. 894. During the same period, Jr had a limit of $100,000. R. 878-879.

[12] "Box shoe trade" refers to stores carrying a variety of types of shoes as opposed to a specialty shop. R. 924.

the list to Jr. J.A. 200. Finally, on August 1, 1983, HK notified McQuillan in writing it would no longer accept her orders. J.A. 257. It also terminated her father's distributorship. E.R. 79.

After her termination, McQuillan wanted to continue as a sorbothane distributor. Because of HK's "harmonious marketing relationship" with Leyland, however, there was no other source of sorbothane in the United States. Thus, McQuillan's distributorship was destroyed. R. 506.[13] Pursuant to the plan Sr, Jr, and Burne had developed in January 1982, Jr became the new national sorbothane athletic distributor. R. 504-505.

SUMMARY OF ARGUMENT

1. The Jury Instructions For Attempt to Monopolize Were Correct.

"Dangerous probability of success" is the element of an attempt to monopolize claim under Sherman Act section 2 that ensures the defendant's conduct poses a threat to competition, not merely to competitors.[14] The issue

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[13] Jr's claim that McQuillan was terminated for her association with Goodyear was pretextual and obviously disbelieved by the jury. Although Sr was deposed twice and specifically asked why he terminated McQuillan's distributorship, he never claimed until trial it resulted from her Goodyear association. R. 3126-3131.

[14] *See, e.g., United States* v. *American Airlines,* 743 F.2d 1114, 1119 (5th Cir. 1984), *cert. dismissed,* 474 U.S. 1001 (1985) ("the requirement that an accused's conduct have a dangerous probability of success expresses a significant antitrust principle that the antitrust laws protect competition, not competitors").

before the Court is how the dangerous probability of success element may be proved.

Petitioners and amicus curiae overstate the inference of dangerous probability of success permitted by the Ninth Circuit generally, and by the trial court in this case. The Ninth Circuit does not permit the imposition of liability without considering the actual probability of monopolization. Rather, the Ninth Circuit has diverged from the other circuits on the evidence required to prove dangerous probability of success.

Like the other circuits, the Ninth Circuit permits the jury to infer dangerous probability of success from the defendant's market power and anticompetitive conduct, and permits the defendant to disprove dangerous probability through market analysis and through evidence of procompetitive purpose and effect. Unlike the other circuits, the Ninth Circuit also permits the jury to infer dangerous probability of success from evidence of the defendant's conduct or the anticompetitive effects of that conduct. In this case, there was evidence sufficient to infer dangerous probability of success from market analysis or from anticompetitive conduct and its effects.

The Ninth Circuit approach to dangerous probability of success is consistent with analysis of injury to competition under section 1 of the Sherman Act. In *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986), the Court held that since market power is merely a surrogate for direct evidence of injury to competition, where plaintiff shows injury to competition, there is no need for the arduous process of market definition and analysis. Likewise, the Court has repeatedly affirmed that certain conduct, found over time to injure competition, may be condemned under per se rules without proof of market power.

This reasoning should apply to proof of dangerous probability of success – the injury to competition component of the attempt to monopolize offense. The jury instructions in this case correctly permitted the jury to infer dangerous probability of success only from evidence of conduct, and its effects on price and competition, that demonstrated a dangerous probability of monopolization.

2. Should the Court Find Reversible Error In the Jury Instructions, It Should Remand the Section 2 Verdict For Consideration By the Ninth Circuit and Dismiss the Related Petition.

Spectrum was found liable on a general verdict for monopolization, attempt to monopolize, and conspiracy to monopolize. Spectrum does not assign any error in the monopolization or conspiracy to monopolize instructions. Should the Court find error in the attempt to monopolize instructions, McQuillan requests the Court remand the general verdict for consideration of the effect of that error, if any, on the general verdict, in light of the evidence of monopolization and conspiracy to monopolize. McQuillan also requests the Court dismiss petition 91-32 (the related petition filed by HK, et al) which raises a similar *Lessig* issue, since the petitioners in that case were also found liable on two section 1 claims.

ARGUMENT

1. Spectrum Was Not "Exonerated" of the Conduct Supporting the Section 2 Verdict.

Before challenging the jury instructions for attempted monopolization, Spectrum claims there was insufficient evidence to support the section 2 verdict because Spectrum was not found liable for resale price maintenance under section 1.[15] From this, Spectrum incorrectly concludes it did not participate in the resale price maintenance scheme as a matter of law, and must have been found liable under section 2 based solely on "unfair" or "unkind" conduct.

Spectrum was found liable for attempt to monopolize based on all of its anticompetitive conduct, including resale price maintenance. Spectrum was not found liable for resale price maintenance under section 1 only because the jury instruction precluded such a verdict. The instructions provided:

> Resale price fixing is illegal under Section 1 of the Sherman Act and Cartwright Acts. *It is an Agreement between firms at different levels of a chain of distribution* to set the resale prices or price ranges for production.
>
> . . .
>
> In order to win this claim, plaintiffs must prove each of the following by a preponderance of the

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[15] Although there was evidence of a horizontal price fixing and market allocation agreement between Spectrum and IEM, the only section 1 claim asserted against Spectrum was for resale price maintenance.

> evidence: first, *that the defendant entered into the agreement with another distributor of the defendants' or with the plaintiff, to fix resale prices . . . .* (emphasis added).

R.T. 4328-4329. These instructions properly required the jury to find a resale price maintenance agreement between firms at different levels in the chain of distribution, but then unnecessarily required the defendant's agreement to be with "another distributor of defendants' or with the plaintiff." Since Spectrum's resale price fixing agreement was with HK, the jury could not find Spectrum liable.[16]

The section 1 instruction, however, did not preclude the jury from considering Spectrum's participation in the resale price fixing scheme as anticompetitive conduct from which to infer dangerous probability of success under section 2.[17] The Court should indulge every reasonable inference from this price fixing evidence in its consideration of the section 2 verdict.

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[16] The jury could and did find against HK, since HK also reached an agreement with IEM, a non-defendant distributor at another level of distribution.

[17] Spectrum also participated in a horizontal price fixing and market allocation agreements with IEM. These agreements, under well-settled law, are always anticompetitive and never justified. Spectrum and amicus curiae ignore this evidence.

2. Permitting The Jury to Infer, Under Certain Circumstances, Dangerous Probability of Monopolization, Is Consistent With Well Established Law Under Section 1 and the Purposes of the Sherman Act.

a. Sherman Act Sections 1 and 2 Both Require A Showing of Injury To Competition, Ordinarily Based on Market Power.

The antitrust laws were enacted for the protection of competition, not competitors. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). Therefore, antitrust analysis, particularly in the past decade, has carefully considered whether the alleged conduct could cause injury to competition.[18]

The extent to which a particular restraint alleged to violate section 1 causes injury to competition is ordinarily determined under the rule of reason. *Business Electronics Corp.*, 485 U.S. at 723. Under the rule of reason, only restraints imposed by parties shown to have "market power" are deemed to injure competition.[19]

To show injury to competition under section 2, plaintiff must show either monopolization – the virtual elimination of competition in a relevant market – or the threat

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[18] *See, Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990); *Business Electronics Corp.* v. *Sharp Electronics*, 485 U.S. 717 (1988); *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *United States* v. *Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990).

[19] *See, e.g., Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 219 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Assam Drug Co.* v. *Miller Brewing Co.*, 798 F.2d 311, 315-16 (8th Cir. 1986); *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984).

of monopolization. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984). The defendant must possess "monopoly power" to be liable for monopolization, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), or "market power," (as under section 1) to be liable for attempt to monopolize. *See, e.g., Neumann* v. *Reinforced Earth Company*, 786 F.2d 424, 428 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 851 (1986) (dangerous probability must be proved through market power); *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986) (requiring "market strength that approaches monopoly power").

In economic terms, market power and monopoly power are the power to raise prices or exclude competition. *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 60 U.S.L.W. 4465 (1992), 1992 U.S. Lexis 3405, 10; *United States* v. *E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Monopoly power is simply a high degree of market power. *Eastman Kodak Co.*, 1992 U.S. Lexis 3405 at 22. Thus, the determination of injury to competition, under either section 1 or 2, generally depends on the degree of market power exercised by the defendants (section 1) or defendant (section 2). *See, e.g., Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1348-49 (5th Cir.) *reh'g denied*, 632 F.2d 894 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

b. Injury To Competition May Be Shown In Three Ways Under Section 1.

i. *The Rule of Reason – Inference From Market Analysis and Conduct.* Under a full "rule of reason" analysis, plaintiff must establish the defendant has market power through a complete market analysis. *See, e.g., Jefferson Parish Hosp. Dist. No.* 2 v. *Hyde,* 466 U.S. 2, 29 (1984) (market definition is an element in any rule of reason case); *Bahn* v. *NME Hosp., Inc.,* 929 F.2d 1404 (9th Cir.) *cert. denied,* 112 S.Ct. 617 (1991). Injury to competition may then be *inferred* from the defendants' market power (its *ability* to injure competition) plus its anticompetitive conduct. *See, e.g., Associated Radio Serv.,* 624 F.2d at 1353.

ii. *The Quick Look – Direct Proof of Injury to Competition.* Market definition and a full market analysis, however, are not always required under section 1:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as reduction of output, can obviate the need for an inquiry into market power, "which is but a surrogate for detrimental effects." 7 P. Areeda, Antitrust Law ¶ 1511, p.429 (1986).

Indiana Federation of Dentists, 476 U.S. at 460-61.[20] The defendant may rebut direct evidence of injury to competition with evidence of the procompetitive effects of its conduct. *Id.* at 460-465.

iii. *Per Se Rule – Irrebuttable Presumption From Conduct Alone.* Finally, specific types of concerted action, which, after "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it," are classified as per se unlawful without market analysis or a direct showing of injury to competition. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 (1982). "[P]er se rules are appropriate only for 'conduct that is manifestly anticompetitive,' that is, conduct that would always or almost always tend to restrict competition and decrease output."

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[20] In *Indiana Federation*, dentists agreed not to provide x-rays demanded by health insurers, thereby preventing the insurers from monitoring the cost of care. This was a naked restraint on competition. The Court held that while the agreement was not conduct previously classified as per se unlawful, a rigorous market analysis was not necessary. *See also, National Collegiate Athletic Ass'n.* v. *Board of Regents*, 468 U.S. 85, 109-110 (1984); *Bahn* v. *NME Hosp., Inc.*, 929 F.2d at 1413 (9th Cir.) ("If the plaintiff can make a showing of anticompetitive effects, a formal market analysis becomes unnecessary"); *Les Shockley Racing Inc.* v. *National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) (requiring proof of "injury to competition within a framework of market analysis" where the plaintiffs did not show "actual detrimental competitive effects such as output decreases or price increases"); *Reazin* v. *Blue Cross and Blue Shield, Inc.*, 899 F.2d 951, 966-968 (10th Cir.), *cert. denied*, 110 S.Ct. 3241 (1990), (while market share is convincing evidence of monopoly power, so is actual price control and exclusion of competitors).

Business Electronics, 485 U.S. at 723 (citations omitted). The per se rule is an irrebuttable presumption of injury to competition. *Maricopa*, 457 U.S. at 351 (refusing to consider procompetitive justifications). The per se rule has developed under section 1 in recognition of the enormous cost and delay of a full rule of reason analysis. *Maricopa*, 457 U.S. at 345; *Jefferson Parish*, 466 U.S. at 15-16, n.25.

c. The Majority of Circuits Require A Full Market Analysis to Prove Injury to Competition Under Section 2.

The issue before the Court is the evidence required, and inferences permitted, to show injury to competition sufficient to establish the dangerous probability element of a claim for attempt to monopolize. More specifically, was the evidence that Spectrum participated in resale price maintenance, horizontal price fixing, and market allocation agreements sufficient to support a rebuttable inference of dangerous probability of monopolization of the market for sorbothane athletic insoles?

The circuits agree that a showing short of monopolization is sufficient. The plaintiff need only show dangerous probability of success of achieving monopoly power – i.e., dangerous probability of control over price or output. All circuits also agree that the jury may infer dangerous probability of success from a showing of market power combined with anticompetitive conduct.[21] This

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[21] *See, e.g., Key Enterprises of Delaware, Inc.* v. *Venice Hosp.*, 919 F.2d 1550, 1565-66 (11th Cir. 1990); *Movie 1 & 2* v. *United Artists Communications, Inc.*, 909 F.2d 1245, 1255 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2852 (1991); *Volvo N. Amer. Corp.* v. *Men's Intern. Pro. Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988); *Kelco Disposal* v. *Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404, 408-09 (2d Cir. 1988); *American Airlines*, 743 F.2d at 1119.

is the same showing required under the rule of reason (section 1) to show injury to competition.[22]

Yet unlike under section 1, the majority of circuits require, in *every* case, a complete market analysis to show injury to competition. The plaintiff must define a relevant market, compute the defendant's market share, and analyze competitive conditions relevant to whether that market share connotes the power to control prices or exclude competition.[23] Defining the relevant market and the defendant's market share are elements of plaintiff's *prima facia* case.[24]

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[22] *Deauville Corp.* v. *Federated Dept. Stores, Inc.*, 756 F.2d 1183, 1192 (5th Cir. 1985) (comparing injury to competition under rule of reason and section 2); *Associated Radio Serv.*, 624 F.2d at 1348-54 (single analysis of market power for section 1 and section 2 claims); *Reazin*, 899 F.2d at 973 (adopting discussion of section 1 market power as showing of monopoly power for monopolization verdict); W. Holmes, *Antitrust Law Handbook*, § 203[1] at 294 (1992) ("the analysis of [attempt to monopolize] is much the same reasonableness seen under Sherman Act Section 1 rule of reason").

[23] *Quality Foods de Centro America* v. *Latin Amer. Agribusiness Devel. Corp.*, 711 F.2d 989, 996 (11th Cir. 1983); *Perington Wholesale, Inc.* v. *Burger King Corp.*, 631 F.2d 1369, 1376 (10th Cir. 1979); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 711-714 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 276 n.69 (5th Cir.), *reh'g denied*, 582 F.2d 41 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979).

[24] *See, e.g.*, *Neumann* v. *Reinforced Earth Company*, 786 F.2d 424, 429-30 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986); *Bell* v. *Dow Chemical Co.*, 847 F.2d 1179, 1184 (5th Cir. 1988); *FLM*

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d. The Ninth Circuit Permits a Rebuttable Inference of Dangerous Probability of Success Which Does Not Expand the Scope of Section 2 or Eliminate the Distinction Between Sections 1 and 2.

Only the Ninth Circuit permits the plaintiff – under certain circumstances – to forego full market definition and analysis to prove injury to competition sufficient to constitute an attempt to monopolize.

i. *The Lessig* Case. The divergence by the Ninth Circuit began with *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964),

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Collision Parts, Inc. v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

It is unclear what effect *NCAA* and *Indiana Federation* will have on section 2 analysis in circuits requiring market power analysis to prove injury to competition. Under the reasoning of *Indiana Federation*, where there is direct proof of injury to competition, it is unnecessary to perform market analysis. Courts have at least recognized the *relevance* of direct evidence of higher prices or exclusion of competitors. *See, e.g.*, *Advanced Health-Care Serv., Inc.* v. *Radford Comm. Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990); *Reazin*, 899 F.2d at 973; *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 305-07 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). Professor Holmes recommends that section 2 injury to competition analysis conform to the Court's analysis in *Indiana Federation of Dentists*, and not be based on "ritualistic [market power] analysis." W. Holmes, *Antitrust Handbook*, § 2.03[1], at 281 (1992). It is unclear, however, whether the majority of circuits would forego market analysis where there is such direct evidence of detrimental effects on competition.

but has evolved significantly.[25] In *Lessig*, the trial court entered summary judgment for the defendant because the plaintiff failed to prove a relevant market or the defendant's market share, and thus could not prove dangerous probability of success. The Ninth Circuit reversed. Focusing on the wording of section 2 (which requires only an attempt to monopolize "any part" of commerce), the court concluded market power is "not in issue." *Id.* at 474. The court stated that if in reaching its verdict on plaintiffs' section 1 claims, the jury concluded defendant intended to fix prices and exclude competitors from the market, and took steps to accomplish that purpose, the jury could properly conclude the defendant attempted to monopolize a part of interstate commerce in violation of section 2. *Id.* at 475.

ii. *The Present Lessig* Inference. To the extent *Lessig* holds dangerous probability of success is not an element of a claim for attempt to monopolize, it indeed violates basic antitrust principles. *See Mobil Oil Corp.* v. *Blanton,* 471 U.S. 1007 (White, J., dissenting), *reh'g denied,* 471 U.S. 1120 (1985). That portion of the *Lessig* opinion, however, has been implicitly overruled by numerous later Ninth Circuit opinions.[26]

Dangerous probability of success is, and has been for many years, an element of a claim for attempt to

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[25] For a discussion of the evolution of the *Lessig* inference, see ABA Antitrust Section, *Antitrust Law Developments,* pp. 142-144. (1984)

[26] Thus, most of Spectrum's criticisms of the *Lessig* rule, which focus on the elimination of the dangerous probability element, are inapposite. Spectrum Brief at 18-19.

monopolize.[27] The current (rebuttable) "*Lessig*" inference simply provides an alternative means (other than a full rule-of-reason-like market analysis) to show dangerous probability of success, and then only under certain circumstances.

Thus, in the Ninth Circuit, the jury may infer dangerous probability of success from (1) market power and anticompetitive conduct (as in every circuit), or (2) conduct that is predatory or clearly in restraint of competition, such as a per se violation of section 1.[28] The plaintiff may also prove dangerous probability directly by showing ongoing injury to competition, i.e., effect on price or exclusion of competitors. *Thurman Industries, Inc.*, 875 F.2d at 1373; *United States* v. *Syufy Enterprises*, 903 F.2d 659, 664-71 (9th Cir. 1990).[29]

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[27] *See, e.g.*, *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 925 (1980), *cert. denied*, 450 U.S. 921 (1981); *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 390-91 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *Janich Bros., Inc.* v. *American Distillers Co.*, 570 F.2d 848, 853-54 (9th Cir. 1978), *cert. denied*, 439 U.S. 829 (1977).

[28] *See, e.g.*, *Thurman Industries* v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1378 (9th Cir. 1989).

[29] Petitioners also criticize the Ninth Circuit for permitting an inference of specific intent from anticompetitive conduct. That portion of the *Lessig* inference, however, conforms with the law of all circuits. Since clear and direct evidence of specific intent to monopolize is seldom available, specific intent may be inferred from conduct. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 627 (1953); *Volvo N. American Corp.*, 857 F.2d at 74; *Shoppin' Bag of Pueblo, Inc.*, 783 F.2d at 163; *Multiflex, Inc.* v. *Samuel Moore & Co.*, 709 F.2d 980, 992 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Photovest*, 606 F.2d at 714-720; *Northwestern Tel. Co.* v. *American Tel. & Tel.*, 651 F.2d 76, 85 (2nd Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

iii. *The Lessig Inference Does Not Improperly Extend The Reach Of Section 2.* Several courts and commentators have misconstrued the *Lessig* inference as extending section 2 to reach conduct not shown to threaten competition. *See, e.g., International Distribution Centers, Inc.* v. *Walsh Trucking Co.*, 812 F.2d 786, 791 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987). Permitting a rebuttable inference of injury to competition by means other than a full market analysis merely recognizes that market analysis is a surrogate for direct proof of injury to competition. *See Indiana Federation of Dentists*, 476 U.S. at 461. If the plaintiff shows either (1) actual injury to competition, or (2) conduct found over time to lead to the acquisition of market power by destroying the competitive process, the plaintiff has shown dangerous probability of success.

McQuillan showed direct injury to competition by proving Spectrum guilty of conduct that always destroys the competitive process.[30] Spectrum cooperated with Burne in limiting competition in the "medical" and "athletic" insole market. Spectrum, IEM and HK agreed to fix prices in the two insole markets. The only way this arrangement could succeed was through the elimination of regional distributors as competitors with Burne in the medical market.

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[30] The Court has approved a definition of monopolization as having the following elements: (1) the possession of monopoly power in a relevant market, and (2) "the willful acquisition, maintenance, **or use of that power** by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.* 472 U.S. 585, 596 (1985). Spectrum clearly used the defendant's monopoly control of sorbothane for anticompetitive purposes.

iv. *The Lessig Inference Does Not Deter Pro-Competitive Conduct.* The Ninth Circuit has repeatedly limited the *Lessig* inference to conduct that constitutes a per se violation of section 1 or is otherwise clearly in restraint of competition. As a result, the Ninth Circuit has invoked the inference rarely, and only where the conduct was plainly injurious to competition.[31] Where the alleged restraint is not plainly injurious to competition, the Ninth Circuit requires a complete market analysis.[32]

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[31] Inference based on per se violation of section 1: *Blanton* v. *Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985); *Aurora Enterprises, Inc.* v. *National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982); *California Steel and Tube* v. *Kaiser Steel Corp.*, 650 F.2d 1001 (9th Cir. 1981). Inference based on anticompetitive acts not in per se violation of section 1: *see, e.g., Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983) (course of conduct clearly without legitimate business purpose might support inference, as might market power).

[32] *Thurman Industries*, 875 F.2d at 1378-80; *Rutman Wine Co.* v. *E & J Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987); *Rickards* v. *Canine Eye Registration Foundation Inc.*, 783 F.2d 1329, 1335-36 (9th Cir. 1986), *cert. denied*, 479 U.S. 851 (1986); *Catlin* v. *Washington Energy Co.*, 791 F.2d 1343, 1348 (9th Cir. 1986); *General Business Systems* v. *North Amer. Philips Corp.*, 699 F.2d 965, 976 (9th Cir. 1985); *Mesirow* v. *Pepperidge Farm, Inc.*, 703 F.2d 339, 345 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983); *Carpet Seaming Tape Licensing* v. *Best Seam, Inc.*, 694 F.2d 570, 580 (9th Cir. 1982); *Zoslaw* v. *MCA Distributing Corp.*, 693 F.2d 870, 888 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Forro Precision, Inc.* v. *International Business Machines*, 673 F.2d 1045, 1059, 1061-62 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *M.A.P. Oil Co.* v. *Texaco, Inc.*, 691 F.2d 1303, 1308-09 (9th Cir. 1982); *Blair Foods, Inc.* v. *Ranchers Cotton Oil*, 610 F.2d 665, 668-69 (9th Cir. 1980); *Hunt-Wesson Foods, Inc.* v. *Ragu Foods*, 627 F.2d at 925-26; *Gough*, 585 F.2d at 390; *Janich Bros.*, 570 F.2d at 854 n.4.

The Ninth Circuit employs a more flexible approach only to reach conduct that poses a clear threat to competition. In *Hunt-Wesson Foods*, 627 F.2d 919, the court provides an excellent explanation of the advantages of the Ninth Circuit approach:

> To understand the reason for requiring proof of dangerous probability of success, one must keep in mind the central purpose of the attempt offense – to discourage unilateral activity that poses a threat to competition and that, if left alone, could result in the acquisition of monopoly power. P. Areeda & D. Turner, *supra*, at 312. The focus must be on the danger to competition posed by the activity and by the actor. 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. In a sense, the conduct carries an inherent "dangerous probability of success." Such clearly exclusionary behavior, even though it poses no immediate measurable danger to the market, present the potential for mischief. To the extent that such conduct inevitably harms competition, there is little reason to tolerate it.
>
> On the other hand, in circumstances involving ambiguous conduct, the requisite degree of danger may not exist in the absence of appreciable market power because market power increases the potential for harm. What may be

> legal for the company lacking substantial market power may be illegal for the firm with such power. And where the conduct is ambiguous, the market power of the firm may help clarify the intent of the actor.

627 F.2d at 925. The Ninth Circuit has repeatedly affirmed the importance of market power analysis absent a direct showing of injury to competition or conduct that inevitably leads to monopolization.[33]

v. *The Lessig Inference Does Not Eliminate the Distinction Between Sections 1 and 2.* In criticizing the *Lessig* inference, courts and commentators point to the axiom that concerted action under section 1 is more threatening to competition than unilateral conduct.[34] Justice White, in dissenting from the denial of certiorari in *Mobil Oil Co.* v. *Blanton,* 471 U.S. 1007 (1985), articulated this criticism of the *Lessig* inference:

> Section 1 proscribes concerted action . . . in restraint of trade. Such concerted action is so inherently threatening to competition that in certain instances it is forbidden without regard to whether it has actually damaged competition in a particular market. Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, "[t]he conduct of a single firm is governed by § 2 alone

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[33] See, footnote 32, *supra.*

[34] This criticism would presumably not apply to direct proof of injury to competition, as was presented in this case.

and is unlawful only when it threatens actual monopolization." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

Because the *Lessig* doctrine allows a violation of § 2 to be found on the basis of a per se violation of § 1, without regard to the effect of a defendant's conduct in any relevant market, it appears to be in tension with these principles.

This criticism, however, creates an unnecessary distinction between the methods to achieve the common purposes of sections 1 and 2. Section 1 per se rules do not forbid certain concerted action without regard to whether that action has actually damaged competition. Rather, "[b]oth per se rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.'" *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85, 103 (1984) (quoting *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978)). "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition." 468 U.S. at 104. Per se rules merely recognize that certain types of conduct have been found to always, or almost always, injure competition, and thus the interests of judicial economy and certainty are served by per se presumptions. *Maricopa*, 457 U.S. at 343-44.

The same costs and uncertainties plague market definition and market share calculations under section 2, and therefore limit the deterrent effect Congress intended. While even in the Ninth Circuit, these costs and uncertainties are generally unavoidable, the Ninth Circuit has adopted a flexible approach that properly eliminates these obstacles to enforcement where the claim involves conduct that, with experience, the court can predict with certainty will lead to monopolization. A flexible approach also permits *direct* proof of injury to competition, which is more probative than market analysis.

Proper application of the *Lessig* inference does not weaken the distinction between sections 1 and 2. For example, the jury instructions here required the jury to find conduct, the benefits of which were "dependent upon its tendencies to discipline or eliminate competition and enable the defendant to reap the benefits of monopoly power in the future." Proper limitations on the types of conduct sufficient to support the *Lessig* inference preserve the requirement of dangerous probability of success in section 2 attempt cases.

This case certainly raises none of the concerns expressed by Justice White in *Blanton*. All of Spectrum's anticompetitive conduct was pursuant to agreement with HK and, later, Burne. This case thus presents an example of the *Lessig* inference reaching plainly anticompetitive conduct, of a type that would also have been reached by section 1 but for an unusual circumstance (i.e., the erroneous instruction that unnecessarily restricted the jury's ability to find Spectrum liable under section 1).

In any event, the *Lessig* inference is also simply that – a rebuttable inference. The defendant may always rebut the inference of dangerous probability through evidence of its lack of market power, or pro-competitive justifications.[35] The instructions in this case permitted Spectrum to show that its conduct was not anticompetitive, or was the least drastic means to achieve a procompetitive purpose:

> An offense of an attempt to monopolize is concerned only with the unreasonable acts or practices that have the actual or reasonable or (sic)[36] foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way, or of destroying competition.
>
> The antitrust laws encourage vigorous and honest competition and the mere fact that one

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[35] *Oahu Gas Serv., Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360, 368-69 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988); *Catlin*, 791 F.2d at 1348; *Drinkwine* v. *Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied*, 475 U.S. 1087 (1986); *De Modena* v. *Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388, 1395 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985); *Forro Precision, Inc.*, 673 F.2d at 1059-61; *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1029-30 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *Janich Bros.*, 570 F.2d at 853. Amicus curiae repeatedly refers to the *Lessig* inference as if it were an absolute presumption. *See, e.g.*, Amicus brief at p.23. Thus, amicus curiae describes the defendant's right to present procompetitive justifications to rebut the inference as an "inconsistency in application." Amicus curiae brief, p. 13, n. 6. Yet even the *Lessig* opinion does not create a per se rule, and virtually all post-*Lessig* decisions include consideration of evidence to rebut the inference.

[36] The words "reasonable or" appear to be an erroneous transcription of "reasonably."

> company is successful in winning sales or market shares from competitors does not mean that its conduct is exclusionary or anticompetitive.
>
> Conduct that involves the introduction of superior product, the lowering of production costs, the exercise of superior business judgment, or reasonably responding to competition should never be found to be exclusionary or restrictive, but some practices that promote competition in the short run may be illegal under the Sherman Act if they impair competition in an unnecessarily restrictive way or are used to obtain monopoly by eliminating competition.

J.A. pp. 253-254. While HK and Spectrum presented considerable evidence on market definition, market power, and pro-competitive justifications, the jury found there was no pro-competitive justification for Spectrum's price fixing and market allocation.

vi. *The Requirement of Specific Intent Limits the Reach of Section* 2. A further restriction on the scope of the attempt to monopolize offense is the unique requirement that plaintiff prove specific intent to monopolize. *Times Picayune Publishing Co.,* 345 U.S. at 626 ("[w]hile the completed offense of monopolization under section 2 demands only a general intent to do the act, . . . a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt . . . ."). Thus, a more flexible standard of proof of one element of the attempt offense hardly creates the dangers of over-enforcement predicted by critics.

vii. *There Is Considerable Reasoned Support For A Flexible Standard of Proof of Dangerous Probability Outside the Ninth Circuit.* Amicus Curiae argues that the *Lessig* inference has been "roundly criticized by commentators." Amicus Curiae brief, p. 15, n. 8. To the extent the *Lessig* opinion purports to eliminate the dangerous probability element, it has been criticized.[37] The *Lessig* inference as currently applied by the Ninth Circuit, however, has not.

Professor Sullivan recommends a flexible approach to proof of dangerous probability, pointing to the requirement of specific intent as protection against over-deterrence. L. Sullivan, *Handbook of the Law of Antitrust*, § 51, pp. 137-138 (1977).[38] He also recommends a standard of proof identical to that employed by the Ninth Circuit:

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[37] It has also been praised. See Roszkowski and Brubaker, *Attempted Monopolization: Reuniting a Doctrine Divorced From Its Criminal Law Roots and the Policy of The Sherman Act*, 73 Marquette L. Rev., 355 (1990). Roszkowski argues that Justice Holmes's reference to the dangerous probability of success in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905) has been misinterpreted, and was never intended to create a separate element. Moreover, dangerous probability as a separate element conflicts with modern notions of criminal attempt, and creates a gap in antitrust enforcement against clearly anticompetitive unilateral conduct.

[38] Professor Sullivan interprets Justice Holmes's opinion in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905), out of which the dangerous probability element was drawn, as simply explaining the rationale for requiring specific intent, and not as requiring near monopolization. L. Sullivan, *supra*, at 137-138. He goes on to state:

> Neither is there reason to hesitate to condemn conduct short of close probability of success on the ground that such a rule would unduly discourage

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> If the conduct is blatantly a threat to competition, there is no need to be over-nice about the degree of power the actor has already attained. On the other hand, conduct may be ambiguous unless examined in its structural setting. It may be honestly industrial, when engaged in by the firm without power, yet exclusionary where engaged in by the firm at or near monopoly levels of power.

Ibid. at 139.

Professors Areeda and Turner (to whom petitioners and amicus curiae frequently turn for support) propose an easing of the requirement of market analysis, similar to that currently practiced in the Ninth Circuit, in two situations:

> First, where it is clear that the defendant's anticompetitive actions are by themselves likely to achieve monopoly, attention to initial market shares may be dispensed with. Second, where the defendant's conduct itself both indicates the possession of power or the hope of attaining it, and is so invidious as to be without redeeming value, we may again dispense with the "significant market share" rule.

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effective, though aggressive, competitive conduct. By requiring (under the intent test) that the conduct be of a kind plainly threatening competitive conditions, the rule already filters out any serious risk that desirable conduct will be inhibited. Conduct which constitutes an attempt is predatory, coercive, or calculated to heighten entry barriers; there is nothing which should make us hesitate to condemn it if the evidence leaves no doubt that the conduct has been properly characterized.

3 P. Areeda and D. Turner, *Antitrust Law*, ¶ 834c at 345 (1978). Areeda and Turner describe the second category as a "limited per se rule of attempted monopolization without proof of [market] power." *Ibid.*, ¶ 836a at 350. Under the limited per se rule, dangerous probability of success may be inferred without market analysis if the defendant engages in conduct:

> (1) which is totally unrelated to competition on the merits – that is, lacking any plausible claim to redeeming virtue; (2) which clearly implies the presence or prospect of some degree of durable market power – as, for example, conduct not likely to be rationally undertaken by a firm without such power or the hope of attaining it through the challenged conduct; and (3) which has potentially significant exclusionary effects in the generality of cases – in that there is a clear and direct causal connection between the conduct and the power.

Ibid., ¶ 836a, at 352.[39]

This definition closely resembles the jury instructions in this case, including:

> Specific intent may be inferred from conduct clearly threatening to competition or clearly

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[39] Professor Areeda refers to *Hunt-Wesson Foods, Inc.*, 627 F.2d at 925 as a "ray of hope" in defining the proper role of the dangerous probability element of attempt to monopolize. Areeda, *Monopolization, Mergers, and Markets: A Century Past and Future*, 75 California Law Review 959, 972-973 (1987). Professor Areeda is only critical of Ninth Circuit opinions where dangerous probability of success is inferred from ambiguous conduct. *Ibid.* To the extent courts have wrongly employed the *Lessig* inference, the proper remedy is not to eliminate the inference, but to further define it.

exclusionary. That is conduct whose anticipated benefits are dependent upon a tendency to discipline or eliminate competition and thereby enhance a firm's long-term ability to reap the benefits of monopoly power.

J.A. 252.

An offense of an attempt to monopolize is concerned only with the unreasonable acts or practices that have the actual or reasonable or foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way, or of destroying competition.

J.A. 253.

Although the exclusionary or restrictive acts need not be sufficient in themselves to bring about a monopoly, Plaintiffs must prove that the acts or practices engaged in by the Defendants had a significantly exclusionary or restrictive effect of a type which, if continued, are likely to result ultimately in a monopoly.

J.A. 254.

Furthermore, even in absence of direct evidence not (sic) [of] specific intent you may find for the Plaintiff if you conclude either that the Defendants engaged in conduct that formed the basis for substantial restraint of trade under Section 1 of the Sherman Act under the instructions you have received from (sic) [for] determining conspiracies or combinations in restraint of trade, or that the conduct was plainly harmful to the competition, or exclusionary. That is, that its benefits were dependent upon its tendencies to discipline or eliminate competition and enable

> the defendant to reap the benefits of monopoly power in the future.[40]

J.A. pp. 254-55.

Professor Hovenkamp, who criticizes the *Lessig* opinion, admits the fundamental point supporting the current *Lessig* inference: "The market power requirements in attempt cases vary with the conduct alleged to be an attempt. A firm that seeks to create a monopoly by dynamiting its competitors' plants does not need market power – only a saboteur and a match." H. Hovenkamp, *Economics and Federal Antitrust Law,* § 6.5, at 169 (1985). While Professor Hovenkamp uses an extreme example, the point is that some conduct is so harmful to competition it inevitably leads to monopolization regardless of present market share.

Professor Hovenkamp also recognizes that "in all cases it is important to remember that the attempt offense is designed to reach conduct likely to create a monopoly." He therefore recommends a middle course between "a universal market power requirement" and dispensing with dangerous probability. "At the very least, plaintiff should be required to identify some market in which the defendant's activities, if allowed to run their course, would have generated a monopoly." Ibid. at 169-170. McQuillan identified a market in which injury was occurring. R. 4332.[41]

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[40] Again, there appear to be minor transcription errors in the jury instructions.

[41] Other advocates of an expansionary treatment of attempt to monopolize are Ponsoldt, *Clarifying the Attempt to Monopolize Offense as an Alternative to Protectionist Legislation: The Conditional Relevance of "Dangerous Probability of Success,"* 61 Notre Dame L. Rev. 1109 (1986); Comment, *Attempt to*

(Continued on following page)

Ironically, the United States argued (not so long ago) for the total elimination of the dangerous probability element:

> In recent years, the Government has argued strongly against limiting the attempted monopoly doctrine to circumstances where there is a showing of dangerous probability of monopolization within a relevant market. In our *amicus* brief in *Highland Dairy Inc.* v. *Kroger,* we followed the Ninth Circuit's lead [in *Lessig* v. *Tidewater Oil Co.*] and argued that the Section 2 attempt prohibition "reaches acts by one competitor that exclude another from the market, when the acts in themselves are so predatory, unfair or clearly without legitimate business purpose as to be patently unreasonable restraints." [*Highland Dairy Inc.* v. *The Kroger Co.*, Oct. Term 1968 No. 986, Memorandum for United States as Amicus Curiae, filed May 26, 1969, pp. 10-11.] This approach seems perfectly sound from the overall antitrust standpoint. Monopolization is basically a structural offense and therefore relevant market and position in it are important considerations. Attempted monopoly is basically a conduct offense; and,

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Monopolize: Dangerous Probability of Success as an Obstacle to Enforcing Section 2 of the Sherman Act, 5 U. Puget Sound L. Rev. 289 (1982); Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Prerequisite to a Prima Facie Case,* 73 Colum. L. Rev. 1451 (1973).

Amicus curiae also cites to Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 Mich. L. Rev. 373 (1974). Professor Cooper indeed criticizes the *Lessig* opinion, but his "mildly expansionary" view is more expansionary than the present *Lessig* inference. Professor Cooper proposes a flexible approach to market power for attempt and actual monopolization. *Ibid* at 453.

> where we are dealing with conduct which is clearly predatory and unfair, there is no public policy reason for protecting it from judicial sanction. To eliminate the "dangerous probability" and "market" requirements from Section 2 attempt to monopolize cases would make it a much more effective tool for dealing with indefensible single firm conduct.

Baker, *Section 2 Enforcement – The View From the Trench*, 41 Antitrust L.J. 613, 620 (1972).

Other circuits have recognized, without adopting the *Lessig* presumption, that dangerous probability of success need not be defined in every case as market share approaching monopolization. For example, in *United States* v. *American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), *reh'g denied*, 756 F.2d 882 (5th Cir.), *cert. dismissed*, 474 U.S. 1001 (1985), American unsuccessfully solicited Braniff to fix prices out of Dallas, where airlines combined held a 67 percent market share. Although American never obtained near monopoly power, the court held American had attempted to monopolize because at the time it made its offer, it believed it would be able to injure competition, and took steps that, if successful, would have led to monopoly power. *Id.* at 1119.

Similarly, in *Multiflex, Inc.* v. *Samuel Moore & Co.*, 709 F.2d 980, 992 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), Moore took plainly anticompetitive steps to exclude Multiflex from the market, but failed to stop Multiflex from replacing Moore as the largest seller in the market. The court nevertheless affirmed the attempt verdict, on the ground that:

> "[T]he Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly. It is the attempt which is the offense." The time to examine "dangerous probability" is when the acts occur.

Id. at 992, quoting *Lectro-Vend Corp.* v. *Vendo Corp.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied,* 455 U.S. 921 (1982). Both cases condemn certain conduct that is so likely to injure competition it can be condemned even where with hindsight, the defendant never obtained a market share close to 100%.

In *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d 159, 163 (10th Cir. 1986), the plaintiff asked the court to adopt the current *Lessig* inference (as articulated in *William Inglis & Sons Baking*, 668 F.2d 1014). The Tenth Circuit held:

> [I]t is our view that the actual differences between the Ninth Circuit's position and the Tenth Circuit's position are not significant enough to conclude that one is preferable over the other for purposes of instructing the jury, because the actual result reached under either set of instructions will be similar.
>
> Often, no direct evidence of specific intent exists and inferences from conduct are necessary. Proving a dangerous probability of success by its very nature also demands proof of certain types of conduct . . . . In substance, the tests are very much alike.

783 F.2d at 163.

Certain types of conduct, although engaged in by a single firm, are sufficiently dangerous to competition, or indicative of substantial existing market power, to justify a rebuttable inference of dangerous probability. Again, these are rebuttable inferences; liability still depends on proof of specific intent to profit by injuring the competitive process. For example, horizontal price fixing is always dangerous to competition, and has no procompetitive justifications. Moreover, it indicates the conspirators believe they have market power, in that price fixing in a highly competitive market will simply send buyers to non-price fixers. Here, Spectrum, Burne and HK entered into agreements reflective of their conclusion (which the jury obviously accepted) that sorbothane was a unique product without effective competition.

Horizontal market allocation is also unlikely to occur in a highly competitive market, and has no procompetitive justification. The price differential employed in the medical and athletic markets enforced through agreements between Burne and Spectrum enabled Burne to charge higher prices than were possible under the regional distributor system.

Vertical price fixing is indicative of substantial existing market power, and has no pro-competitive justification. It should be considered sufficient (though not presumptive) evidence of dangerous probability without a full market analysis. Here, vertical price fixing was for the express purpose of exploiting the defendants' control of sorbothane, which at the time had no effective competition.

Fraudulent patent applications, sham litigation, and reckless patent infringement suits always injure competition, and have no procompetitive justification. A pattern of such conduct should be sufficient to support an inference of dangerous probability even without substantial market share.

As a final example, predatory pricing, (pricing below marginal cost for the purpose of raising prices above the competitive level after competition has diminished), makes sense only if it leads to monopolization, and should be sufficient to support an inference of dangerous probability regardless of market share.[42]

3. Should the Court Find Error in the Instruction on Attempt To Monopolize, It Should Remand the General Verdict to the Ninth Circuit, and Dismiss the Related Petition by HK.

As the United States advised the Court in recommending against plenary review, "the Spectrum petitioners were found liable for antitrust treble damages solely on the basis of section 2. The jury, however, was properly instructed on the elements of monopolization and conspiracy to monopolize, and it appears that the evidence on those theories may be sufficient to support a

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[42] Consider, for example, predatory pricing by a well-financed company with a small share of a market that lends itself to the exercise of market power (e.g., branded consumer goods). Provided there is sufficient evidence of specific intent, how is competition protected by waiting until most competitors have been eliminated before intervening?

section 2 verdict." Brief For The United States as Amicus Curiae, p. 16.[43]

Therefore, should the Court find error in the attempt to monopolize instruction, McQuillan requests the Court remand the section 2 general verdict for consideration by the Ninth Circuit as to whether the error was prejudicial.

As the Court is aware, HK filed its own petition for certiorari, which is being held pending resolution of Spectrum's petition. HK claims a similar error in the

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[43] For example, the jury was properly instructed that the elements of a section 2 claim for conspiracy to monopolize are (1) a conspiracy to monopolize an appreciable amount of interstate commerce, (2) specific intent to monopolize, (3) one or more acts in furtherance of the conspiracy. R.T. 4355-56. *See*, *United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), *overruled* (on intra-enterprise conspiracy issue) by *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). The jury was also properly instructed that plaintiffs need not establish a relevant market and the defendant's market share. R.T. 4356. *Yellow Cab*, 332 U.S. at 226; *Monument Builders of Greater Kansas City Inc.* v. *American Cemetery Ass'n*, 891 F.2d 1473, 1484 (10th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990); *Volvo N. Am. Corp.* v. *Men's Int'l Professional Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988); *United States* v. *National City Lines*, 186 F.2d 562-68 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951).

In finding HK liable for resale price maintenance, the jury clearly found that HK, IEM *and* Spectrum reached an agreement to terminate the regional distributors and create national distributors for the athletic and medical markets who would charge fixed prices and police retail sales. Leighton Junior was an active participant in this conspiracy from start to finish. In fact, the section 2 verdict against Spectrum makes the most sense as a conspiracy to monopolize verdict.

attempt to monopolize instruction.[44] The attempt instruction, however, is not even potentially dispositive of the antitrust claims against HK, which was also found liable on two section 1 claims. Thus, even if the Court finds reversible error in the attempt to monopolize instruction, McQuillan requests the HK petition be denied.[45]

CONCLUSION

Petitioners erroneously contend the Ninth Circuit's treatment of attempt to monopolize is radically different from the other circuits, permits liability without proof of injury to competition and eliminates the distinction between section 1 and section 2 of the Sherman Act. The only difference in the Ninth Circuit is the proof required for one of the elements of the attempt offense. The Ninth Circuit recognizes that although unilateral conduct poses less of a threat to competition than concerted activity, certain conduct engaged in by a single firm may be condemned without the rigors of a full market analysis. Market analysis is not precluded – it may always be introduced by the defendant to prove the absence of injury to competition. The Ninth Circuit approach strikes

[44] HK also challenges the market allocation verdict on the ground it is a sister company to Leyland, and urges that the jury should have been instructed as to antitrust injury.

[45] Of course, if the Court finds no error in the attempt instruction, the HK petition should also be denied.

an appropriate balance between deterring conduct that injures competition and protecting aggressive (but lawful) competition.

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