

1986

The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize

Daniel J. Gifford

University of Minnesota Law School, giffo001@umn.edu

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles



Part of the [Law Commons](#)

Recommended Citation

Daniel J. Gifford, *The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize*, 61 NOTRE DAME L. REV. 1021 (1986), available at https://scholarship.law.umn.edu/faculty_articles/331.

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize

Daniel J. Gifford*

The attempt clause¹ of the Sherman Antitrust Act deals with unilateral behavior which produces or is likely to produce significant anticompetitive consequences. Justice Holmes, in his classic statement of the attempt offense in *Swift & Co. v. United States*,² identified the elements of the offense as the defendant's intent to monopolize and the dangerous probability that the defendant would succeed. In the classic model of the offense, the defendant's intent resolves the ambiguity of the defendant's present behavior by showing that it is instrumental to the forbidden goal of monopolization.

The Ninth Circuit has never been reticent when expressing opinions about matters of antitrust law. Twenty-two years ago the Circuit contributed its opinion in *Lessig v. Tidewater Oil Co.*³ to the corpus of antitrust law. The decision simplified the bringing of attempt to monopolize cases and has long symbolized an expansionary approach to the interpretation of the attempt clause.⁴ *Lessig* has had a profound and unsettling effect on section 2 actions and the impact of the decision is still being felt. *Lessig* gave rise to the so-called "double-inference" method of proving an attempt violation. The opinion also provided support for construing the section 2 attempt clause as a residual prohibition of anticompetitive behavior which is not covered by other provisions of the antitrust laws.

More recently, in *Greyhound Computer Corp. v. IBM Corp.*,⁵ a panel of the Ninth Circuit, following in the footsteps of *Lessig*, strongly reasserted an expansionary view of the attempt clause on the explicit ground that the Sherman Act needed such a residual prohibition. Yet other less expansionary strains can also be found

* Professor of Law, University of Minnesota; A.B., 1953, Holy Cross College; LL.B., 1958, Harvard University; J.S.D., 1981, Columbia University.

1 15 U.S.C. § 2 (1982).

2 196 U.S. 375 (1905).

3 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964).

4 See, e.g., Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1352 (1982); Kaye, *Attempt to Monopolize in the Ninth Circuit: The Legacy of Lessig*, 12 WILLAMETTE L.J. 331 (1976); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373, 419 (1974); 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, 216 (1969).

5 559 F.2d 488, 504 (9th Cir. 1977), cert. denied, 434 U.S. 1040 (1978).

in the Ninth Circuit's case law on the attempt clause. Some early decisions of that court had openly expressed disagreement with *Lessig* while other decisions had tamed and qualified it.⁶

This article is an interpretation and evaluation of the Ninth Circuit's work on attempt. It traces, in broad outline, that court's approach to the attempt clause from *Lessig* in 1964 through the complexities of the case law of the 1970s to the present.

This article will argue that at least one aspect of the *Lessig* decision has been turned on its head into a constraint on plaintiffs, helping to discourage the bringing of nonmeritorious attempt claims.⁷ The article will also argue that the series of predatory pricing cases which have come before the Ninth Circuit, beginning with *Hanson v. Shell Oil Co.*⁸ in 1976, have ultimately exerted a profound effect, not just upon the disposition of predatory pricing claims, but upon the law of attempt generally. This impact has been a conservative one, which has provided basic guidelines for evaluating attempt claims and has helped to integrate the law of attempt into antitrust law generally. In the process, the cases have rationalized attempt law both in an economic sense and in the sense of fitting the attempt clause into a coherent place in relation to section 1 and the monopolization clause of section 2. Thus, the Ninth Circuit's opinion in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*⁹ has exerted a major effect on the interpretation of the attempt offense, although in a direction more consistent with the legitimate purposes of that clause than the earlier decisions in *Lessig* and *Greyhound*.

I. The Attempt Clause and the Ninth Circuit's Decisional Law

A. *The Ninth Circuit's Case Law on Attempt*

The Ninth Circuit's various struggles with the role of the attempt clause of section 2 reflect the profound changes which have overtaken antitrust law in the period since *Lessig* was decided. Indeed, that Circuit's struggles with *Lessig*'s significance and with the role of the attempt clause in the Sherman Act schema ultimately paved the way for a more mature and judicially responsible attitude towards the attempt offense.

The Ninth Circuit's troubles with the attempt offense devel-

6 See, e.g., *Hallmark Indus. v. Reynolds Metals Co.*, 489 F.2d 8, 12 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974); *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). See also Part II, sections C and D *infra*.

7 See Part V *infra* for an assessment of *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

8 541 F.2d 1352 (9th Cir. 1976).

9 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

oped partly from the court's willingness, in defining that offense, to tolerate ambiguity about the defendant's goal and, therefore, about the intent accompanying the defendant's behavior. If the defendant's goal is something other than the acquisition of market power, then the defendant's specific intent, to the extent that it is revealed, will necessarily be an intent to achieve some objective other than market power. The court's toleration of ambiguity concerning the defendant's goal and intent necessarily have fostered considerable uncertainty about the parameters of the offense. Intent cannot be used as a criterion with which to resolve ambiguity about the lawfulness of the defendant's behavior when the criterion itself is opened.

The Ninth Circuit has also been plagued repeatedly by its expressed willingness to allow an attempt claim to rest upon inferences from the defendant's behavior, even absent proof of the defendant's market power. That approach has been a mistake and has subjected the court and numerous defendants to the scourge of forced participation in unmeritorious litigation.

B. *The Judicial Process Illustrated by the Ninth Circuit*

1. Institutional Constraints on Coherent Decisionmaking

The Ninth Circuit became enmeshed in complex and contradictory decisional law because, as a court, it lacked a coherent view of the attempt clause. This lack of understanding was compounded by the fact that the membership of the panels which decided attempt cases over the years varied from case to case. Each panel approached the construction of the attempt clause in a slightly different way, and yet each panel was bound to reconcile its own decision with earlier precedents. The result was a body of decisional law which was unnecessarily complicated and which engendered widespread uncertainty about how the law would be applied.

Over the years, the Ninth Circuit tried to write new content into the attempt clause without any clear vision of its objectives or of the evaluative criteria which it would employ in deciding attempt cases. The court tried to dispense with proof of the defendant's market power by permitting attempt cases to be based upon sets of inferences drawn from the defendant's behavior. The validity of this approach depended upon whether unilateral behavior by a firm without market power could ever produce significant anticompetitive effects. Yet for years the court failed to inquire seriously into the actual or potential effects of such behavior.

The Ninth Circuit's law of attempt began to develop in a coherent fashion only after two scholars developed a thorough analysis of

predatory pricing which the court found useful.¹⁰ The intellectual power of this predatory pricing analysis carried over into attempt analysis generally, providing the court with the conceptual framework it needed for deciding all attempt cases.

The Ninth Circuit's struggle with its own attempt to monopolize case law illustrates something about the judicial process. Cases arise one at a time, and a court necessarily looks at a problem in the context of a particular case. Although there are many advantages to this narrow and concrete focus, it does not facilitate the development of the kind of understanding of a multi-faceted issue that comes from a broad overview and a thorough examination of the ramifications of its resolution in differing contexts.¹¹ A broad issue whose resolution requires extensive and careful analysis is not easily handled by the judiciary whose tasks require it to decide large numbers of dissimilar cases with relative speed. This is particularly true when the ideal resolution of that broad issue involves selecting a set of relatively stable decisional criteria which can be used repeatedly over a sustained period.¹²

2. A Regulatory Agency Analogue

The Ninth Circuit's experience in handling attempt to monopolize cases is similar to the experience attributed to regulatory agencies as they have proceeded through their life cycles.¹³ In a regulatory agency's early years, it acts confidently and coherently, because the problems which it has to remedy have been fairly well delineated in the legislation establishing the agency, the legislative hearings, and in the various committee reports. The agency knows where it is going, and that knowledge guides its decisions. Later in its life cycle, when the original problems have been solved or have changed their configuration, the agency can no longer look to the statute and its legislative history for guidance. The agency then begins to flounder. It has no clearly defined objectives and it loses direction.

When the Ninth Circuit decided to rewrite the law of attempt to monopolize, it put itself into a position like that of a regulatory agency late in its life cycle. The court set itself adrift from older precedent with no coherent idea of where it wanted to go. It

¹⁰ See note 14 *infra*.

¹¹ See Gifford, *Discretionary Decisionmaking in the Regulatory Agencies: A Conceptual Framework*, 57 S. CAL. L. REV. 101 (1983).

¹² See, e.g., Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 799, 815 (1967).

¹³ See M. BERSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 74-102 (1955). See also Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 314 (1983).

neither analyzed nor carefully delineated its objectives. The court had no vision and hence began to flounder. It was rescued only when it adopted a vision broad enough to provide it with guidance from one case to the next. The vision was one which the court was not institutionally equipped to create for itself. Fortunately, scholars developed an appropriate vision and a supporting analytical framework,¹⁴ and the court possessed the insight and receptivity to accept them.

II. An Expansionary Approach to the Attempt Clause: Filling a "Gap" in the Sherman Act from *Lessig* to *Greyhound*

A. *Lessig's Expansionary Approach to the Attempt Clause*

Until the Ninth Circuit decided *Lessig v. Tidewater Oil Co.*¹⁵ in 1964, it was generally understood that in order to state a claim for attempted monopolization, the plaintiff had to prove that the defendant possessed a "specific intent" to monopolize and that there was a "dangerous probability" the defendant might succeed in achieving the intended objective. Justice Holmes had set forth these elements of the plaintiff's case early in the century in his opinion in *Swift & Co. v. United States*.¹⁶ These two elements, which had been universally followed, presupposed a third element: a relevant market, since both the defendant's intent to monopolize and the dangerous probability of the defendant's success implied the existence of a market.

In *Lessig*, however, the Ninth Circuit eliminated both proof of "dangerous probability of success" and proof of a relevant market as necessary elements of the plaintiff's case. According to the decision in that case, the plaintiff needed only to prove the defendant's "specific intent" to monopolize in order to establish an attempt to monopolize case.

The *Lessig* case involved various antitrust claims by a former lessee and operator of a Tidewater gasoline station against his sup-

14 The reference is to Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Their analysis has been used extensively by the Ninth Circuit. See *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1384 (9th Cir.), cert. denied, 464 U.S. 955 (1983); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 887 (9th Cir. 1982), cert. denied, 460 U.S. 1085 (1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031-39 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982); *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 742-43 (9th Cir. 1979); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855-59 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358-59 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977); notes 75-80 *infra* and accompanying text. See also *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1193 (9th Cir. 1984), cert. denied, 105 S. Ct. 1184 (1985); *Marsann Co. v. Brammall, Inc.*, 788 F.2d 611, 613-15 (9th Cir. 1986).

15 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964).

16 196 U.S. 375, 396 (1905).

plier. Among them was the claim that Tidewater had attempted to monopolize by a series of steps designed to set its dealers' resale price for gasoline and by excluding other suppliers from those stations through a system of exclusive dealing contracts and tying arrangements.¹⁷ In reversing the judgment for the defendant, the Ninth Circuit ruled, *inter alia*, that the lower court had improperly withdrawn the attempt to monopolize claim from the jury. The court stated:

We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability that the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective. When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is “not in issue.”¹⁸

When *Lessig* was first decided, many observers viewed it as an unwarranted rewriting of the attempt offense. Moreover, the *Lessig* opinion seemed to be self contradictory. How could a defendant possess a specific intent to monopolize if that intent was not related to a market? If it was related to a market but that market need not be established by proof, then a defendant could be liable for intending to monopolize a sphere of activity which did not constitute an actual market. That was indeed what the court said when it related the defendant's intent to “an appreciable segment” of sales of petroleum products.

By eliminating the requirements of proving “dangerous probability of success” and a “relevant market,” the *Lessig* court took a highly expansionary approach to the attempt offense. The court believed that it was possible for a defendant to attempt to monopolize a “part” of interstate commerce which did not necessarily correspond to a relevant market.¹⁹ Moreover, the conduct in *Lessig*

¹⁷ 327 F.2d at 463.

¹⁸ *Id.* at 474 (citation omitted). The court continued:

Section 2 prohibits attempts to monopolize ‘any part’ of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products. If the jury found that Tidewater intended to fix the price at which 2,700 independent service station operators resold gasoline, and to exclude other suppliers of petroleum products and sponsored TBA items from competing for the patronage of these operators, and took steps to accomplish that purpose, it could properly conclude that Tidewater attempted to monopolize a part of interstate commerce in violation of Section 2 of the Sherman Act.

Id. at 474-75.

¹⁹ *Id.* at 475.

which gave rise to the attempt to monopolize claim was Tidewater's exclusion of rival firms from selling to its franchised dealers and its attempt to fix its dealers' resale prices. The "part" of commerce which Tidewater attempted to monopolize thus was the retail distribution of its own brand of gasoline, a part of commerce which could not have been monopolized in an economic sense. Moreover, Tidewater's offenses involved the exertion of vertical control over the distribution of its product, control which again can rarely increase the seller's market power.

B. *The Obscurity of the Lessig Opinion*

The *Lessig* opinion was written in almost delphic language. The court explicitly dispensed with the need for independent proof of a "dangerous probability of success" and of a relevant market and said that "the specific intent itself is the only evidence of dangerous probability the statute requires."²⁰ The language suggests that a plaintiff could prove an attempt case solely by proving specific intent to monopolize. Indeed, since the court related the attempt not to a relevant market, but to an "appreciable segment" of commerce, its words suggest that an intent to supply many customers could be an attempt to monopolize. That reading of the court's opinion underlay Tidewater's petition for rehearing. In its petition, Tidewater asserted that the court's opinion on attempt could be read as rendering illegal any competitive effort to gain a share of available business.²¹

Despite the apparent sweep of the *Lessig* opinion, the evidence which was before the court undercut the breadth of its language. That evidence consisted of Tidewater's use of requirements contracts and tying arrangements to exclude other suppliers from Tidewater dealerships and price fixing activities with regard to those dealerships. The court held that the requirements contracts and tying arrangements violated both section 1 of the Sherman Act and section 3 of the Clayton Act, while the price fixing violated section 1. The court thus ruled that Tidewater's attempt violation could be established by a showing of behavior which violated section 1 and section 3. A contemporary critic might have asked whether the *Lessig* case was an appropriate setting in which to announce an apparently revolutionary new interpretation of the attempt clause, since nothing turned upon Tidewater's section 2 liability. Indeed, for reasons set forth below, a contemporary critic might well have asked whether the sweeping language of the *Lessig*

20 *Id.* at 474.

21 *Id.* at 478.

opinion was misleading and if it had indeed announced the novel attempt doctrine which was being widely attributed to it.

The court appears to have written its opinion in a way designed to encourage disparate readings. In the body of its opinion, the court employed the apparently expansionary language previously quoted,²² emphasizing the importance of specific intent and the dispensibility of evidence on dangerous probability and the relevant market. However, the court may have significantly qualified these generalizations in accompanying footnotes. Although these footnotes are not models of clarity, the court seemed to be suggesting that its remand was premised on the ground that violations of section 1 (or at least per se violations of section 1) constituted violations of section 2.²³

C. *The Significance of Lessig as Precedent*

As precedent, *Lessig* has had a spotty history. In 1970, the Ninth Circuit was saying, in *Industrial Building Materials, Inc. v. Interchemical Corp.*,²⁴ that under the *Lessig* precedent, a former distributor suing its former supplier for attempt need not prove the existence of a relevant market.²⁵ Yet it made that statement in a context in which the plaintiff was alleging that the supplier held "monopoly power" in its industry and, alternatively, that the supplier's branded line of products was itself a relevant market. In that case, the supplier had integrated forward and had taken the distributor's customers away, allegedly by various unfair tactics.²⁶ The court had trouble in both excusing the plaintiff from proving a relevant market and still describing the admittedly required specific intent element of the attempt case. In its descriptions, the court always related that intent to an identified market. The following year another Ninth Circuit panel restated the requirements of an attempt case as if *Lessig* had never been decided.²⁷

22 See note 18 *supra* and accompanying text.

23 See 327 F.2d at 474 n.44, 475 n.49. In note 44, the court stated that a contract, combination, or conspiracy to fix prices, or to exclude competition from a substantial part of the market violates both § 1 and § 2. It then quoted *Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911) for the proposition that § 2 embraces all attempts to achieve objectives forbidden by the first section. In note 49, the court referred to per se violations of § 1.

24 437 F.2d 1336 (9th Cir. 1970).

25 *Id.* at 1344.

26 *Id.* at 1341. The allegedly "unfair" means apparently consisted of the supplier's hiring away the distributor's "top salesman" and undercutting the distributor's prices. *Id.* at 1337, 1342.

27 See *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). In a preliminary version of its opinion, the panel questioned the validity of *Lessig*, 1971 Trade Cas. (CCH) ¶¶ 73, 620, at 90,563 n.1. See Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373, 420-21 n.170 (1974).

The ramifications of the most expansive reading of *Lessig* as precedent forced an explicit qualification of that case in *Bushie v. Stenocord Corp.*,²⁸ a case brought by a distributor of dictating machines who had been terminated by his supplier when the supplier decided to integrate forward to perform the distribution function itself. Under the most expansive reading of *Lessig*, the defendant's intent to exclude rivals from an appreciable segment of commerce would be sufficient to establish a prima facie case of attempt to monopolize. Taking the Ninth Circuit at its word, *Bushie* (the terminated distributor) claimed that its supplier, Stenocord, was attempting to monopolize the retail market for Stenocord dictating machines in Phoenix, Arizona. Retreating markedly from *Lessig*, the Ninth Circuit rejected *Bushie*'s claim on the ground that there was no " 'dangerous probability' of monopolization . . . in a properly defined market,"²⁹ since normally a single brand cannot constitute a relevant market. The two previously discarded elements of dangerous probability of success and relevant market reappeared in the court's analysis of attempted monopolization because the facts of *Bushie* brought home with a vengeance some of the sweeping ramifications of *Lessig*'s approach to the attempt offense. Stenocord undoubtedly intended to take over all of the retail distribution of its product in Phoenix. If the retail distribution of Stenocord machines in Phoenix was an "appreciable segment" of commerce, the intent requirements of *Lessig* were fulfilled. Under such an approach to specific intent, therefore, every manufacturer or supplier of any size would be in jeopardy of violating the attempt clause when it integrated forward into distribution.

The court's decision in *Bushie* was ordained by common sense. A manufacturer decides to replace independent distributors with branch distributors in order to obtain a more effective distribution system, the ultimate effect of which is to further competitive goals. *Bushie*'s result was also mandated by the Ninth Circuit's prior decision in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*,³⁰ in which the court ruled that a supplier's agreement with a potential distributor to replace the supplier's existing distributor was almost always a reasonable one.³¹ *Hawaiian Oke* was a leading precedent for the lawfulness of such agreements under section 1, and hence that a supplier's control of its distribution system is generally consistent with competitive goals. An application of *Lessig* to hold Stenocord liable in the *Bushie* case would have made a manufacturer's exercise of ultimate control over its distribution system

28 460 F.2d 116 (9th Cir. 1972).

29 *Id.* at 121.

30 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

31 *Id.* at 78.

illegal under section 2, a result which would have conflicted with the premises underlying *Hawaiian Oke*.

D. *The Transmutation of Lessig*

In the cases following *Bushie*, the court confined *Lessig*'s dispensation with proof of dangerous probability and relevant market to situations in which the attempt claim was "founded upon a substantial claim of restraint of trade."³² In *Hallmark Industry v. Reynolds Metals Co.*,³³ decided the year after *Bushie*, the court used that phrase to describe a case in which there was an intent "to set prices or exclude competition in a portion of the market without legitimate business purpose," and in which that intent was corroborated by proof of "predatory" conduct directed to that end.³⁴ Later panels of the Ninth Circuit employed that same ambiguous phrase to mean that an attempt claim could be founded upon any violation of section 1. This approach to the attempt clause finally mutated into one under which an attempt violation could be established without proof of a relevant market or dangerous probability, if it were founded upon a per se violation of section 1 or upon "anticompetitive or predatory" conduct.

This last variation describes the so-called "double inference" method of proving an attempt case. Under this short-cut method, the Ninth Circuit requires only proof of "anticompetitive or predatory" conduct to establish a prima facie case of attempt. From proof of that conduct, the trier of fact is permitted to infer specific intent to monopolize; and from the specific intent to monopolize so established, the trier of fact is permitted to draw the further inference of dangerous probability of success. Drawing the latter inference completes the case.

The double inference method of proving an attempt to monopolize case eases the plaintiff's burden substantially. The double inference method of proof can be found in a narrow reading of the *Lessig* opinion: the reading in which the sweeping language of the text is taken to be qualified by the footnote references to underlying violations of section 1. A violation of section 1 shows the attempt.

Lessig, therefore, turns out not to be a case that allows a plaintiff to prove an attempted monopolization by evidence of an imprecisely defined intent alone, as its text superficially implied. Rather, *Lessig* has become a major support for proof of an attempt case by

³² That phrase was used in *Bushie* in distinguishing *Lessig* and *Industrial Building Materials*. 460 F.2d at 121.

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

³⁴ *Id.* at 12.

evidence of conduct. Intent becomes merely a fiction, and it is the "anticompetitive or predatory" character of the defendant's conduct which is the short-cut method for proving an attempt case. This double inference method of proof could itself constitute a major route to an expansionary application of the attempt clause. Such an application would, however, depend upon the circumstances in which use of the double inference method of proof is permitted. Further ramifications of this approach are explored in Part III below.

E. *Greyhound as the Successor to Lessig*

In 1977, the Ninth Circuit reaffirmed the broad approach it had taken to attempted monopolization in the text of the *Lessig* opinion in *Greyhound Computer Corp. v. IBM Corp.*³⁵ This time the court explicitly set forth its rationale for dispensing with the elements of dangerous probability of success and relevant market:

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, or destructive of competition and without business justification.³⁶

In *Greyhound*, the court's approach to the attempt clause was based upon a careful analysis of the structure of section 2 of the Sherman Act and upon a reasoned assessment of the place of the attempt clause within the structure of the entire Sherman Act. Although the *Lessig* decision may have been based on such an analysis,³⁷ the court did not explicitly set forth such analysis in that opinion.

The Ninth Circuit's approach in *Greyhound* was explicitly influ-

³⁵ 559 F.2d 488 (9th Cir. 1977), *cert denied*, 434 U.S. 1040 (1978).

³⁶ *Id.* at 504.

³⁷ In *Lessig*, the court pointed out that § 2 prohibits attempts to monopolize "any part" of commerce and equated a "part" of commerce with "an appreciable segment" of interstate sales in petroleum products. 327 F.2d at 474-75. Although § 2's prohibition of monopolization is also stated in terms of the monopolization of a "part" of commerce (under the case law, monopolization of a "part" of commerce means the monopolization of a relevant market), the court may have thought that the different kinds of intent attributable to the attempt and monopolization offenses provided a basis for differentiating the meaning of "part" of commerce for the two offenses. Because specific intent was not a necessary element of the monopolization offense, the court had a basis for defining that offense in objective terms that included proof of an economic market. Conversely, because specific intent was an element of the attempt offense, there was more room for leaving the definition of the affected "part" of commerce to the defendant itself. *See also* text accompanying notes 38-42 *infra*.

enced by its opinion two years earlier in *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*³⁸ In that case, the court (harkening back to Judge Hand's musings in *United States v. Aluminum Co. of America*³⁹) indicated that a fifty percent market share was probably insufficient to support a case of monopolization.⁴⁰ The court broadened the coverage of the attempt clause in order to close the gap which would otherwise exist in the Sherman Act's coverage of anticompetitive behavior. In the court's view, unless the attempt clause was read expansively, the Act would not cover anticompetitive conduct unilaterally performed by a firm with a small market share. This approach was reinforced by the court's belief that a nonexpansionary reading of the attempt clause would make it redundant. If proof of market power was essential to establishing both attempt and the completed offense of monopolization, then the question arose as to what the attempt clause covered that was not also covered by the monopolization clause. Decisions such as *United States v. Griffith*⁴¹ suggested that a firm using the power arising from a large market share against its competitors might be guilty of the completed offense of monopolization. Such an approach would leave the attempt clause, in the court's words, without "independent significance."⁴² This redundancy could be avoided, however, if the attempt clause were given the apparently useful role of prohibiting anticompetitive behavior by firms with market shares too small to fall under the monopolization clause.

Greyhound's reaffirmation of the *Lessig* approach, however, was almost immediately qualified. In the year following its decision in *Greyhound*, the court decided *Gough v. Rossmoor Corp.*⁴³ In *Gough*, the court first restated the elements of the attempt offense as specific intent, "predatory or anticompetitive conduct directed to accomplishing the unlawful purpose," and dangerous probability of success.⁴⁴ Although *Gough* endorsed the so-called "double inference" method of proving the offense, it expressly limited the expansionary construction of the attempt clause contained in *Greyhound*.

In *Gough*, an independent carpet dealer (Rosen) had been denied advertising space in a newspaper for residents of a cooperative housing development for retired adults. Rosen thus suffered a disadvantage in his efforts to compete with a carpet dealer (Crestmark) situated within the housing development grounds. Rosen sued,

38 512 F.2d 1264 (9th Cir. 1975).

39 148 F.2d 416 (2d Cir. 1945).

40 512 F.2d at 1274.

41 334 U.S. 100 (1948).

42 *Greyhound*, 559 F.2d at 504.

43 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).

44 *Id.* at 390.

claiming violations of section 1 and the attempt to monopolize clause of section 2 of the Sherman Act, and won a jury verdict. The Ninth Circuit set aside the judgment entered on that verdict on the ground that Rosen could not establish a relevant market based on the evidence. Although the court acknowledged that, under *Lessig*, in an attempt case "the relevant market is 'not in issue,'"⁴⁵ it restricted the application of *Lessig's* dispensation of proof of a relevant market and retracted much of the expansionary language which it had employed in *Greyhound*:

[I]n the absence of proof of relevant market and market power, the plaintiff must prove either predatory conduct or a *per se* violation of section 1 to prove an attempt to monopolize. Without these limitations the door to a section 2 attempt would be open far wider than necessary to meet the concerns expressed by this court in *Greyhound Computer* . . . and could permit treble damage recovery where no remote possibility of monopolization would appear to exist and where the impact on competition of the conduct in question is limited to its impact on the plaintiff.⁴⁶

Although *Gough* placed sharp limits on the expansionary approach to the attempt clause which the court had taken in *Greyhound*, the opinion was not free from ambiguities. In *Gough*, the court conceded in principle that the concerns about the attempt clause expressed in *Greyhound* were valid ones; its differences with the *Greyhound* opinion were expressed in terms of the extent to which the scope of the attempt clause should be enlarged. Additionally, the court in *Gough* reaffirmed the *Lessig* ruling that proof of dangerous probability of success could be inferred from proof of specific intent.⁴⁷

III. The Evolution of a Conduct Requirement and the Double Inference Method of Proof

A. *Conduct Giving Rise to an Inference of Specific Intent*

In retrospect, *Lessig's* principal significance for an expansionary approach to the attempt clause was not to facilitate the bringing of attempt claims by permitting proof of specific intent alone to substitute for proof of the other traditional elements of the offense. Rather, *Lessig's* expansionary significance was as a precedent for dispensing with proof of specific intent itself. Under the *Lessig* approach, an attempt case could be established by proving anticompetitive conduct. Using the double inference method of proof, proof of anticompetitive conduct permitted the court to draw an

⁴⁵ *Id.* (quoting *Lessig*, 327 F.2d at 474).

⁴⁶ *Id.*

⁴⁷ *Id.*

inference of specific intent; and this intent so established then permitted the court to draw an inference of dangerous probability of successful monopolization. Thus, the only element which a plaintiff had to prove under this short-cut method was anticompetitive conduct. The definition of anticompetitive conduct, therefore, became the crucial focus of this line of development under *Lessig*.

In *Lessig* itself, the court permitted an inference of specific intent and then of dangerous probability of success to be drawn from conduct which constituted a violation of section 1 of the Sherman Act and section 3 of the Clayton Act. Later cases explained *Lessig* as holding that proof of a relevant market and dangerous probability of success could be dispensed with when the plaintiff's attempt claim was premised upon "a substantial claim of restraint of trade,"⁴⁸ a phrase whose meaning has evolved significantly over time.

In 1973, the *Hallmark* court used that phrase to describe *Lessig* as having involved a claim of intended price setting or exclusion of competitors from a portion of the market. *Hallmark* reaffirmed the legitimacy of the double inference method of proof, holding that since specific intent is difficult to prove, it can be inferred from anticompetitive conduct directed to achieving such price setting or exclusion.⁴⁹ The pregnant aspect of this approach, as so stated, was that part of *Lessig* which was described as the exclusion of competitors from a portion of the market, a phraseology broad enough to encompass any seller's attempt to divert business away from its rivals to itself. As applied to *Lessig*, that phrase described Tidewater's attempt to sell exclusively to its own distributors and dealers.

Clearly, therefore, the Ninth Circuit's case law on attempt needed clarification to remove lingering doubts that a seller's attempts to sell to its own dealers, to integrate forward into distribution, or to divert business away from rivals to itself could not be characterized as exclusionary and form the basis for a claim of attempt to monopolize. *Bushie* clarified the law on forward integration. *Hallmark* described the conduct necessary to raise the double inference as "predatory," but left the definition of that term wide open. Later courts described the proof necessary to support the double inference as proof of a section 1 Sherman Act violation or proof of anticompetitive or predatory conduct.

⁴⁸ See, e.g., *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972); *Hallmark Indus. v. Reynolds Metals Co.*, 489 F.2d 8, 12 (9th Cir. 1973), cert. denied, 417 U.S. 932 (1974).

⁴⁹ 489 F.2d at 12.

B. *Conduct as Corroboration of Specific Intent*

A second development emerged from the Ninth Circuit cases grappling with *Lessig's* significance as a precedent governing attempt to monopolize cases. Beginning with *Hallmark* in 1973, the Ninth Circuit began to include the requirement that predatory or anticompetitive behavior corroborate specific intent, at least where specific intent is used as a basis for inferring dangerous probability of success.⁵⁰ *Hallmark*, therefore, substantially mitigated the worst dangers of *Lessig*. It is commonplace that shrewdly designed discovery requests against many business firms may unearth memoranda, letters, and other documents cast in language which, in a courtroom, can create a false impression of anticompetitive motives.⁵¹ *Lessig's* apparent expansionary approach to the attempt clause was especially mischievous, so long as an attempt case could be made out on evidence of intent alone and so long as that intent could be established from such misleading sources. *Hallmark* implicitly recognized this danger and sought to reduce it by requiring corroboration of intent by evidence of behavior. Under *Hallmark*, the definition of anticompetitive or predatory behavior again became critical. *Hallmark's* weakness lay in its use of an open-ended definition of predatory behavior.

C. *The Behavior Requirement*

The *Hallmark* court had no trouble establishing the requirement of behavior to corroborate specific intent. A plaintiff who sought to make out an attempt case by the double inference method would have to show predatory behavior or a section 1 violation. One could expect many cases to be based upon both a double inference method of proof and independent evidence of specific intent. Carrying over the requirement of showing predatory behavior (or a section 1 violation) from the double inference cases to cases involving independent proof of specific intent may not have appeared as unduly constraining the proof of attempt cases by the latter method. Moreover, the Ninth Circuit's expressed view that evidence of specific intent was often difficult to obtain may have reflected the court's growing skepticism about the reliability of purported evidence of intent. Such skepticism may have moved the court to recognize the need for corroborating that evidence with evidence of behavior.⁵²

⁵⁰ *Id.*

⁵¹ See, e.g., R. POSNER, *ANTITRUST LAW—AN ECONOMIC PERSPECTIVE* 189-90 (1976).

⁵² In *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982), the court acknowledged that the reason direct evidence of intent alone could not sustain a charge of attempt to monopolize was because of the propensity of intent evidence to be ambiguous and misleading.

The conduct which corroborated specific intent as well as the conduct which gave rise to a double inference in *Hallmark* was described as "predatory conduct directed to accomplishing the unlawful purpose."⁵³ Such a definition of the conduct requirement did not close the open-endedness of the attempt offense created by *Lesig*. If the unlawful purpose could be the exclusion of competitors from an appreciable part of the market, as both *Hallmark* and *Lessig* suggested, then defining the conduct which supported an attempt claim in instrumental terms related to that goal only transfers the ambiguity surrounding the intent element to the definition of the conduct. Although *Hallmark* included a requirement that the conduct had to be "predatory," that court did not provide any definition of predatory acts. The possibility that any unlawful or unfair trade practice could be predatory received support in the court's 1976 opinion in *Knutson v. Daily Review, Inc.*,⁵⁴ where a newspaper's efforts to misrepresent its circulation as larger than it was were evaluated for predatoriness. The possibility thus remained that an attempt offense could be established by evidence of substandard business behavior designed to divert sales away from a rival in an "appreciable" part of the market.

D. Section 1 as a Reference for Evaluating Behavior

In *Gough v. Rossmoor Corp.*,⁵⁵ the Ninth Circuit not only sharply limited the expansionary language of the *Greyhound* case, but also defined the kind of conduct which would give rise to an inference of specific intent for purposes of the double inference method of proof. While the Circuit's earlier decisions had indicated that conduct which violated section 1 would give rise to an inference of specific intent,⁵⁶ *Gough* employed more enigmatic language in its use of section 1 as a guide to the predatoriness of conduct. The court refused to permit an inference of specific intent to be drawn from the defendants' barring of Rosen (the independent carpet dealer) from advertising in the development newspaper because it found no indication that the captive carpet dealer intended to put Rosen out of business. The court, however, went on to describe the kinds of conduct which would raise such an inference:

While conduct which would, in the case of a conspiracy, amount to a *per se* violation of section 1 would constitute an unreasonable restraint of trade without proof of market or market power, under the rule of reason market definition is required to establish a section 1 violation Thus, in the absence of proof of

53 489 F.2d at 12.

54 548 F.2d 795, 814 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

55 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).

56 See text following notes 21 and 34 *supra*.

relevant market and market power, the plaintiff must prove either predatory conduct or a *per se* violation of section 1 to prove an attempt to monopolize.⁵⁷

In *Gough*, the court was straining to say that section 1 is a guide to the type of conduct which must be shown to establish a violation of the attempt clause.⁵⁸ Because the establishment of a relevant market is generally required in section 1 cases as a means of demonstrating an adverse impact on competition in the market, proof of a relevant market is required in a section 2 attempt case as a means of demonstrating the defendant's market power (and hence the dangerous probability of its successful monopolization). In stating all this, the court was restricting the scope of the double inference method of proving an attempt.

According to the court, a plaintiff in an attempt case could use a double inference to dispense with proof of a relevant market and of market power when he proved that the defendant had engaged in certain kinds of conduct which the court referred to as predatory.⁵⁹ That was nothing new; the Ninth Circuit had been saying as much at least since *Hallmark* in 1973. What was new in *Gough* was that the court used the section 1 reasonableness standard as a crite-

⁵⁷ 585 F.2d at 390. The passage is not a model of clarity. If full grammatical effect were given to the court's punctuation, this passage seems to say that conduct which would constitute a *per se* violation of § 1 if performed pursuant to a conspiracy would, if performed unilaterally, constitute the basis for proof of an attempt to monopolize through the double inference method of proof.

Such a reading of the court's language would surely be overly literalistic. The categories of offenses illegal *per se* under § 1 are illegal because they are conspiratorial. These categories would be radically open-ended if translated into analogous categories of unlawful unilateral behavior. A refusal to deal used for purposes of enforcing vertical price fixing, for example, is lawful when performed unilaterally, but is illegal *per se* when performed pursuant to an agreement. Compare *United States v. Colgate & Co.*, 250 U.S. 300 (1919) with *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). See also *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). The court could not have intended to carry over the illegal *per se* categories of conspiratorial behavior under § 1 into corresponding categories of unilateral behavior under § 2. Moreover, this panel of the Ninth Circuit was writing the quoted language as it was in the process of correcting another panel's overly expansionistic *Greyhound* opinion. *Greyhound* was premised on the view that a nonexpansionistic interpretation of the attempt clause would make it redundant. But if *Gough* were "narrowing" the attempt clause to cover unilaterally performed behavior which would be illegal under § 1 if conspiratorially performed, then § 1 would become redundant! Concerted action would become unimportant because the same conduct which was illegal under § 1 with a conspiracy would be illegal under the § 2 attempt clause without a conspiracy.

⁵⁸ See, e.g., *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 737 (9th Cir. 1979) (articulating the same point):

Additionally, "[s]ection 1 also prohibits 'contracts' that restrain trade," . . . and since individual actions may violate § 2, no contractual agreement is required. Nonetheless, under § 2 attempt—as with § 2 monopolization—individual conduct is measured against the same "reasonableness" standard governing concerted and contractual activity under § 1.

⁵⁹ 585 F.2d at 390.

tion for predatoriness. This was the beginning of a new effort to link predatoriness with actual or expected market effects. Conversely, it was also a backhanded way of saying that mere unethical behavior by a firm without market power could not give rise to an inference of specific intent.⁶⁰ This negative statement was a significant contribution to the Ninth Circuit's case law on attempt. The court also made a more problematic affirmative statement: Behavior will give rise to an inference of specific intent when it is inherently likely to produce an anticompetitive effect on the market.⁶¹ That statement is troublesome because its meaning is unclear and perhaps unclarifiable.

Except on a highly abstract level, the court never bothered to ask what type of behavior by a firm without market power could be inherently anticompetitive. It offered no concrete illustrations of the kind of behavior it had in mind. The court referred to *per se* violations of section 1 as conduct which would be taken to be anticompetitive without proof of a relevant market or an assessment of market effects. The court then assumed that an analogous class of unilateral conduct existed which could properly be taken as inherently anticompetitive without evaluating the effects of that conduct on the market.

Other decisions of the Ninth Circuit confirm this interpretation. In *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*,⁶² the court again referred to this behavior in abstract terms: "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."⁶³ Similar language appeared in *A.H. Cox & Co. v. Star Machinery Co.*⁶⁴ and, even before *Gough* was decided, in *Janich Brothers, Inc. v. American Distilling Co.*⁶⁵

The court wrapped itself in a contradiction in that part of the *Gough* opinion where it affirmatively asserted that predatory or anticompetitive behavior could give rise to an inference of specific in-

60 There had been a danger that the Ninth Circuit would fall into the trap of allowing behavior that was merely unfair or unethical to give rise to an inference of specific intent. That would have created a doctrine under the attempt clause analogous to the so-called *Pick-Barth* rule. Under the *Pick-Barth* rule, a conspiracy to injure a business firm by unfair means was said to violate § 1 of the Sherman Act. See *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932). The Ninth Circuit rejected a *per se* treatment of unfair competitive practices in *A.H. Cox & Co. v. Star Machinery Co.*, 653 F.2d 1302, 1308 (9th Cir. 1981).

61 This is the assumption underlying the court's ruling that an attempt case can be established by proof of "predatory conduct or a *per se* violation of § 1." 585 F.2d at 390.

62 627 F.2d 919 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

63 *Id.* at 925.

64 653 F.2d 1302, 1308 (9th Cir. 1981).

65 570 F.2d 848, 854 n.4 (9th Cir. 1977), *cert. denied*, 539 U.S. 829 (1978).

tent (and hence to the attempt offense) in the absence of market power. By using section 1 as a guide, the court adopted a market-oriented criterion for evaluating the predatoriness of a firm's behavior. Yet the court also asserted, unwisely, that some unilateral conduct was inherently predatory, regardless of the actor's market power. The court gave no examples of such inherently predatory conduct. Section 1, which the court looked to for guidance, gives no indication as to what kind of unilateral conduct engaged in by an actor without market power would be anticompetitive. Indeed, section 1 analysis suggests that the only kind of unilateral conduct which could be anticompetitive would be conduct engaged in by an actor possessing market power.⁶⁶

E. *Market Power as a Factor in Evaluating Conduct*

The Ninth Circuit had previously expressed the view that the presence or absence of market power was an important factor in evaluating a firm's behavior under the attempt clause. In its 1977 decision in *Janich Brothers, Inc. v. American Distilling Co.*,⁶⁷ for example, the court cautioned the trial court that the intent which may be inferred from conduct will depend upon the circumstances in which the conduct occurs, and that market power is a highly relevant circumstance: "[T]he same aggressive conduct which is seen only as a reaction to competition by a small firm may suggest intent to monopolize where carried out by a firm with a significant market power."⁶⁸ Yet this advice was given where the court was discussing the double inference method of proof, a method used to avoid proof of market power. The Ninth Circuit's advice to the trial court in *Janich* thus was that, most of the time, specific intent can be inferred from conduct only when that conduct is performed by a firm with market power. In short, the plaintiff will generally have to prove the relevant market and the defendant's power within that market. The only exception is when the defendant has engaged in the kind of conduct (described above in the quoted passages from *Gough* and *Hunt-Wesson Foods*) which is inherently anticompetitive. The *Janich* court thus explicitly limited the situations in which an inference of intent from conduct would be permissible. In the absence of market power, that inference could be drawn only from conduct which was inherently anticompetitive.

66 This is suggested by § 1's concerted action requirement. Concerted action is more dangerous than unilateral behavior because it unites the power of several firms and thus may create the potential for affecting the conditions of competition in the general market. See Justice Harlan's analysis in his dissenting opinion in *Albrecht v. Herald Co.*, 390 U.S. 145, 160-61 (1968).

67 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

68 *Id.* at 854 n.4.

Janich differs from the other cases discussed so far because the claims of attempt to monopolize involved alleged predatory pricing. When the *Janich* court referred to behavior which was inherently anticompetitive (or in the court's words, "clearly threatening to competition or clearly exclusionary"),⁶⁹ it had at its disposal a seminal analysis of predatory pricing which had been published two years earlier and which the Ninth Circuit had already employed in the *Hanson v. Shell Oil Co.*⁷⁰ decision of the preceding year.

IV. The Predatory Pricing Cases

In 1975 the Harvard Law Review published *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*⁷¹ by Professors Philip Areeda and Donald Turner. The article proposed an approach towards the evaluation of predatory pricing claims based upon economic analysis: prices challenged as predatory would be evaluated under a marginal cost or average variable cost test. Prices above marginal cost should be deemed nonpredatory, because a firm could not drive any equally efficient rival from the market by selling at or above marginal cost. Conversely, prices below marginal cost should be deemed predatory because there is no apparent legitimate short-run goal which is attainable by such pricing. Since marginal cost is difficult or impossible to discover, average variable cost should be used as a surrogate for marginal cost in applying the marginal-cost criterion.⁷² The Areeda-Turner proposal has been endorsed with various qualifications in almost every circuit.⁷³

Although the Fifth Circuit first used the Areeda-Turner proposal in a Robinson-Patman context shortly after the publication of

69 *Id.* at 854 n.3.

70 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

71 Areeda & Turner, *supra* note 14. The article has spawned an extensive literature; see D. GIFFORD & L. RASKIND, FEDERAL ANTITRUST LAW CASES AND MATERIALS 406 n.** (1983). See also 3 P. AREEDA & D. TURNER, ANTITRUST LAW 150-94 (1978).

72 Areeda & Turner, *supra* note 14, at 716-18.

73 D.E. Rogers Assoc. v. Gardner-Denver Co., 718 F.2d 1431, 1437, 1439 (6th Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984); SuperTurf, Inc. v. Monsanto Co., 660 F.2d 1275 (8th Cir. 1981); O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1041 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); Northeastern Tel. Co. v. A.T.&T. Co., 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980); Pacific Eng. & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); International Air Indus. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). In MCI Communications Corp. v. A.T.&T. Co., 708 F.2d 1081, 1120 n.55 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), the Seventh Circuit applied a long-run incremental cost test to pricing in the capital-intensive telecommunications industry while reaffirming the use of the Areeda-Turner test generally.

the article in 1975,⁷⁴ the Ninth Circuit followed suit in the following year. In *Hanson v. Shell Oil Co.*,⁷⁵ the Ninth Circuit employed that test to uphold a directed verdict for the defendant on an attempt to monopolize claim. In *Hanson*, the court ruled that because the plaintiff gasoline dealer had introduced no evidence that the defendant oil company had been selling its products below marginal or average variable cost, it was not entitled to reach a jury on a claim of attempt to monopolize predicated on a claim of predatory pricing.⁷⁶ *Hanson* was followed by *Janich Brothers, Inc. v. American Distilling Co.*⁷⁷ in 1977, *California Computer Products, Inc. v. IBM Corp.*⁷⁸ in 1979, and qualified in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*⁷⁹ in 1981. Later cases have confirmed the basic *Inglis* approach.⁸⁰

The Ninth Circuit's endorsement of the Areeda-Turner proposals in *Hanson* effectively began the process of destroying much of *Lessig's* remaining vitality. The *Hanson* decision also undercut the premises on which the court's later decision in *Greyhound* rested. The Areeda-Turner proposals rested upon an intellectual approach to antitrust analysis which differed vastly from the approach which underlay both *Lessig* and *Greyhound*. Although this conflict was not recognized at the time and has never been explicitly acknowledged by the Ninth Circuit, the fact remains that the court made a major break with its past history in deciding *Hanson*.

The Areeda-Turner proposals are analytical tools devised to assist judges in disposing of nonmeritorious predatory pricing claims prior to trial. Their main proposal is the use of average variable cost as a bright line separating predatory from nonpredatory pricing. They make use of a number of simplifying assumptions and concessions to practicality in devising their average variable cost criterion. Thus, average variable cost is used as the measure of lawful pricing because the more accurate marginal cost is impossible to calculate in any given case. Additionally, fixed costs are distinguished from variable costs by an Areeda-Turner fiat: they name

74 *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

75 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

76 *Id.* at 1358.

77 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

78 613 F.2d 727 (9th Cir. 1979).

79 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

80 See *Marsann Co. v. Brammall Co.*, 788 F.2d 611 (9th Cir. 1986); *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1192-94 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1184 (1985); *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *Zoslaw v. MCA Dist. Corp.*, 693 F.2d 870, 988 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).

several fixed costs and define the remainder as variable.⁸¹ This is done to make the definition of variable costs a question of law which can be disposed of by the court on a motion for summary judgment.

Despite these simplifications, the Areeda-Turner proposals rest upon a base of microeconomic theory and also describe historic antitrust concerns. Thus, Areeda and Turner developed their proposed test for predatory pricing from an analysis of the presuppositions of predatory pricing behavior. Predatory pricing, at the time that Areeda and Turner wrote their article, was, by common consent, pricing unduly low in order to drive rivals from the market or to punish them for failing to cooperate in noncompetitive pricing.⁸² The elements which distinguished predatory from nonpredatory pricing, therefore, were its inappropriately low level and its objective of inflicting injury upon rivals other than through normal competitive interaction.

Areeda and Turner first reasoned that since the universally accepted goal of competition included pricing at marginal cost and the replacement of inefficient with efficient firms, any firm which priced at or above its own marginal cost could not drive any more efficient rival out of the market.⁸³ A marginal cost test of predatory pricing, therefore, would legitimize pricing which furthered competitive market goals.

Second, Areeda and Turner articulated the full context of predatory pricing as a basis for developing the analysis giving rise to their proposals. A predator incurs present losses in order to develop a future market position in which it can earn supracompetitive profits. Thus, its objective is to change a competitive market into a monopolistic or an oligopolistic one. Alternatively, it may be disciplining a recalcitrant rival which refuses to observe an oligopolistic price. In the latter case, the predator's present losses are incurred to maintain a system of oligopolistic pricing. In all cases, the predator intends to recoup its present losses from future monopoly or oligopoly prices. Without the expectation of such recoupment from future monopoly or oligopoly revenues, predatory pricing (in the sense of pricing below marginal cost) would make no

81 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* 173-74 (1978). *But cf.* Areeda & Turner, *supra* note 14, at 720.

82 The contemporary literature had not reached a consensus on a workable legal standard for separating the plausibly meritorious from the unmeritorious claims of predatory pricing. *See* Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 *ANTITRUST L. & ECON. REV.* 105 (1971); Koller, *On the Definition of Predatory Pricing*, 20 *ANTITRUST BULL.* 329, 331-32 (1975); Yamey, *Predatory Price Cutting: Notes and Comments*, 15 *J. L. & ECON.* 129, 133 (1972); Gifford, *Promotional Price-Cutting and Section 2(a) of the Robinson-Patman Act*, 1976 *WIS. L. REV.* 1045, 1048.

83 Areeda & Turner, *supra* note 14, at 709-12.

sense at all.⁸⁴

Areeda and Turner were not saying anything new when they pointed out that below marginal cost pricing would be disastrous for a firm unless those prices produced a future monopoly from which the firm could recoup its earlier losses. The necessity for such recoupment had always been understood in a general way. The legislative history of section 2 of the Clayton Act describes a pattern of predatory pricing in which Congress believed the old Standard Oil Company had engaged.⁸⁵ The description includes reimbursement for the losses which the Company incurred during the periods of predatory pricing. Moreover, in the years preceding the Areeda and Turner article, economists had been carrying on a lively debate in the scholarly journals about whether, in view of the limited circumstances in which the losses produced by below marginal cost prices could be recouped, predatory pricing ever actually occurred.⁸⁶

In developing proposals designed for judicial application, however, Areeda and Turner tied their proposed average variable cost criterion to the dynamics of predatory behavior with a clarity which the bench and bar could not escape. Although their proposal focused upon a measure of lawfulness for present prices which could be easily applied in litigation, their analysis focused upon the entire predatory scenario: the present behavior of the predator in relation to the predator's future goals. Their analysis—just because of its practical usefulness—helped to educate the legal profession about the full dynamics of predatory pricing: how present conduct had to be evaluated in the light of a future goal. Predatory pricing was not rational behavior unless the predator expected the losses which it imposed upon its rivals to bring about a restructuring of the market from a more-or-less competitive market to a monopolistic one.

This recognition and analysis of the defendant's anticompetitive goal is what was missing from the Ninth Circuit's *Lessig* opinion. Nowhere did the court focus upon a restriction of competition in an economically meaningful market. Tidewater's restrictive conduct was confined to the marketing of its own brand of product which was estimated to encompass five percent of the actual gasoline market.

In the immediate post-*Hanson* period, a panel of the Ninth Cir-

84 *Id.* at 698.

85 See *Committee on the Judiciary, Antitrust Legislation*, H.R. REP. NO. 627, 63d Cong., 2d Sess. 8 (1914).

86 Yamey, *supra* note 82, at 129; Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J. L. & ECON. 223 (1970); Telser, *Abusive Trade Practices: An Economic Analysis*, 30 LAW & CONTEMP. PROB. 488, 494-96 (1965); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & ECON. 137 (1958).

cuit stated in *Greyhound* that the attempt offense should be interpreted expansively because otherwise anticompetitive behavior by a single firm lacking a large market share would not be remediable under the antitrust laws. Yet that court failed to subject its concerns to any analysis. Of what kind of anticompetitive conduct is a firm with a small market share capable? Are the anticompetitive consequences present or future ones? It is exceedingly difficult for a single firm with a small market share to exert any significant anticompetitive impact on the market as a whole. Certainly it could not do anything with its various intrabrand restrictions which it could not lawfully do as a fully integrated seller. Tidewater, as a fully integrated seller with only five percent of the market, was constrained by that market. Even its price fixing activities were confined to its own brand. Unless it was part of a broader horizontal conspiracy, Tidewater could command, at most, only a price premium for its products which reflected consumer preference for its brand. It possessed no power to extract more than such a brand preference premium over the general market price.

Similarly, the court in *Greyhound* expressly assumed, for the purpose of its attempt analysis, that IBM was not dangerously close to monopolizing the market for computer leases. It is clear from the court's opinion that it was inferring dangerous probability, or the lack thereof, from the defendant's market share. Yet, as in *Les-sig*, the court never analyzed the anticompetitive impact that IBM's behavior produced or was designed to produce in the general market. *Greyhound* was complaining of IBM's advantages in the computer leasing market which were derived entirely from IBM's control over the machines which it manufactured. IBM's advantages were those which any manufacturer has when competing with its customers for the resale or lease of its products. If IBM had really wanted a monopoly of leasing, it could have refused to sell to leasing companies and leased directly to those lease customers who wanted IBM machines. That route would have avoided all or most of the antitrust difficulties with which it had to deal. Yet, as in *Les-sig*, the court failed to inquire into the supposed anticompetitive consequences of the defendant's behavior. If the court had seriously inquired and asked the questions suggested above, it could not have so easily found the gap in the Sherman Act. Had the court in *Les-sig* and *Greyhound* asked how Tidewater's or IBM's behavior would affect the general market in which its products were sold, the court would have gained a better insight into the way the various provisions of the Sherman Act should interrelate.

The significant element in the court's predatory pricing analysis in *Hanson* was the relating of the defendant's present behavior to a likely or plausible future goal. That relationship helped to iden-

tify the antitrust significance of the behavior. If the defendant's behavior consisted of charging prices for its products which were at or above marginal cost, those prices enriched the defendant and could not bring about a result inconsistent with a competitive market. The court did not have to seek a goal beyond the short-run profits which those prices produced. If, however, the defendant's behavior consisted of charging prices below its marginal cost, it subjected itself to injury in the short-run. Such behavior would necessarily be designed to achieve some longer term goal, such as the restructuring of the market into a monopoly or oligopoly.

Justice Holmes employed an analogous approach in *Swift & Co. v. United States*.⁸⁷ In that case, Justice Holmes insisted upon intent as an essential element in the attempt offense. The intent of which he spoke was the "intent to bring it [a monopoly] to pass,"⁸⁸ *i.e.*, an intent to change the present state of affairs in which the defendant has no monopoly into a future state of affairs in which the defendant does possess a monopoly. Justice Holmes thus used intent as a bridge by which a likely future state would be employed to evaluate the defendant's behavior in the present.

In theory, the specific intent traditionally used in attempt cases can play such a bridging role: the ambiguity of the defendant's present behavior can be resolved if the defendant's goal is revealed. That is why a so-called "specific intent" is a required element in an attempt offense, but only a "general intent," or intent to do the act, is required for the completed offense of monopolization. In an attempt case, the lawfulness of the defendant's actions depend upon whether they are a means to an unlawful end. The defendant's goal is, therefore, essential in assessing the significance of its behavior.

In both *Lessig* and *Greyhound*, the Ninth Circuit neglected the relationship between the instrumental nature of present behavior and the goal to which it is directed. If the present behavior does not itself impose a significant restraint upon the general market, then its lawfulness should depend upon whether it is an instrument for the imposition of such a restraint, even at a later time.

V. The *Inglis* Synthesis

A. *The Decision*

In 1981 the Ninth Circuit decided *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*⁸⁹ In that case, a small bakery (Inglis) which had ceased production claimed that Continental had driven it out of business by predatory pricing of private label bread.

87 196 U.S. 375 (1905).

88 *Id.* at 396.

89 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

Inglis cast its antitrust claims both as attempts to monopolize under the Sherman Act and as primary-line price discrimination under the Robinson-Patman Act. Inglis won a jury verdict, but the district court set that judgment aside.⁹⁰ On review, the Ninth Circuit, through Judge Sneed, synthesized that Circuit's law governing attempts to monopolize.

Inglis drew from *Hanson* and *Janich* to define predatory pricing: "Pricing is predatory only where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits . . ." ⁹¹ The *Inglis* court repeatedly emphasized that the objective of predatory pricing was the creation of this future market position. Additionally, where the plaintiff's case is inferred from the defendant's conduct, the monopoly objective attributed to the defendant has to be reasonably attainable by the defendant from its present market position. The court's focus was on "what a rational firm would have expected its prices to accomplish."⁹² Moreover, that future monopolistic market goal was related to the defendant's present pricing behavior in a precise way because the defendant rationally must be able to expect that its present conduct will bring it the market position to recoup present losses. Thus, the defendant's present market position must be such that it can be transformed into a position which can earn monopoly profits in the future. The transformation of the market must also occur within a time frame in which the discounted present value of the future monopoly gains exceed the present losses incurred by the defendant.

Most of the court's analysis in *Inglis* had been contained in *Hanson* and *Janich*. Additionally, *Janich*, as well as *Inglis*, had reviewed the standards governing predatory pricing in the context of an overall review of the Circuit's law on attempt to monopolize. For several reasons, however, *Inglis* is best viewed as the new synthesis of Ninth Circuit attempt to monopolize law. First, the court's review of the prior case law and its various threads was more thorough in *Inglis*. Second, there is more evident judicial support within the Circuit for holding plaintiffs to *Inglis*' carefully articulated standards.⁹³ Third, *Inglis* provided a defensible framework

90 *Id.* at 1024.

91 *Id.* at 1031 (quoting *Janich*, 570 F.2d at 856; *Hanson*, 541 F.2d at 1358).

92 *Inglis*, 668 F.2d at 1034.

93 Judge Peck dissented from the *Inglis* majority's ruling that pricing below average variable cost is sufficient to establish a prima facie attempt to monopolize case by use of the double-inference method of proof. Judge Wallace dissented from the decision of the full court not to rehear en banc. He objected to the *Inglis* majority opinion on the ground that the use of the average variable cost criterion merely to shift the burden of proof on predation permitted the plaintiffs to reach the jury on inadequate evidence. In short, a majority of the full court did not wish to rehear *Inglis*, and the two judges who publicly disagreed

for incorporating the Circuit's previously paradoxical statements that an attempt to monopolize case could be built upon inherently anticompetitive conduct unilaterally performed by a defendant without market power. Finally, the *Inglis* framework may ultimately give rise to further reform.

Inglis drew heavily from Areeda and Turner, as had *Hanson* and *Janich*. The court followed the recommendation of those authors, as well as its own prior decisions in *Hanson* and *Janich*, by using a marginal cost approach to the evaluation of predatory pricing as well as by accepting average variable cost as a practical surrogate for marginal cost. *Inglis* struck out on new ground, however, in two important respects. *Inglis* used average variable cost as a standard for allocating the burden of proof, and it explicitly rejected the rigid definitions of fixed and variable costs proposed by Areeda and Turner in favor of a more economic definition. (The two earlier cases had employed economic definitions without discussion.) Each of these rulings in *Inglis* is controversial.

B. *The Burden of Proof Ruling*

Inglis' burden of proof ruling serves a functional role in the reform of the Ninth Circuit's attempt to monopolize law. The court described the burdens of the parties as follows: The plaintiff must prove that the defendant's pricing was predatory where the prices are above average variable cost but below average total cost. If the plaintiff can prove that the defendant's prices were below average variable costs, he has established a prima facie case of predatory pricing. The burden then shifts to the defendant to prove that its prices were justified.⁹⁴

By explicitly denoting average variable cost as the criterion for allocating the burdens of the parties, the court was casting a new light upon its own earlier statements that, even in the absence of proof of market power, conduct which was "predatory or anticompetitive" could give rise to an inference of specific intent (and, using the double inference approach, to dangerous probability and then to attempt). Read in the light of a burden of proof allocation, the court's earlier references to conduct which was so inherently

with the opinion did so on the ground that its standards were too tolerant of plaintiffs with weak cases.

⁹⁴ *Inglis*, 668 F.2d at 1035-36. Subsequently, the Ninth Circuit endorsed the technique of allocating the burden of proof for disposing of predatory pricing claims in which the defendant's prices exceeded average total cost. Unwilling to rule that a plaintiff could in no circumstances prove predatoriness in a defendant's above average total cost pricing, the Ninth Circuit left open the possibility that a plaintiff could make out such a case, but required proof by "clear and convincing evidence." *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1388 (9th Cir.), cert. denied, 464 U.S. 955 (1983). See also *Drinkwine v. Federated Pub., Inc.* 780 F.2d 735 (9th Cir. 1985), cert. denied, 106 S. Ct. 1523 (1986).

anticompetitive as to give rise to an inference of specific intent to monopolize in the absence of market power were not statements that a firm without market power could act anticompetitively. Rather, they were statements that in the case of certain kinds of conduct, the burden on the issue of market power and other related matters is best placed on the defendant.

Even here *Inglis* was not stating a new doctrine. Other Ninth Circuit cases had indicated that although "dangerous probability of success" was not an essential element of the plaintiff's case, it was nonetheless a relevant matter on which evidence could be introduced.⁹⁵ These decisions suggested that the defendant could bring to bear evidence showing its lack of market power and hence its inability to succeed in any attempt to monopolize. Yet *Inglis* set forth the burden of proof allocation in a coherent, precise and easily understandable way: Under *Inglis*, the required proof was related to effects upon the market structure. If the plaintiff proves that the defendant sold below average variable cost, then the defendant must prove that its prices were not predatory as the court had defined that term, *i.e.*, as involving the sacrifice of present revenues for an anticipated future monopoly gain. *Inglis* thus made an exploration of the market structure and the defendant's place within the market a *sine qua non* of the proof in an attempt case. If, for example, there were no significant barriers to entry into the market in which the defendant was operating, then the defendant could never expect to "reap the benefits of monopoly power" in the future. And hence an evaluation of its present behavior as predatory would be ill-founded.

Under *Inglis*, pricing below average variable cost was the paradigmatic case of presumptively predatory behavior. *Inglis* implicitly recognized that such pricing is not inherently anticompetitive in the sense that a firm without market power could affect the general market by that conduct. Rather, *Inglis*, in effect, treats such pricing as sufficiently associated with predatory behavior to require the defendant to show that the pricing is not in fact predatory. As shown below, this analysis is broad enough to provide guidance in evaluating nonprice behavior alleged to be predatory.

C. *The Reconciliation of the Cases Applying the "Double Inference" Method of Proof*

As a result of the *Inglis* decision, the prior confusing Ninth Circuit case law could now be reconciled with an intellectually plausi-

⁹⁵ Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 669 (9th Cir. 1980); Hallmark Indus. v. Reynolds Metals Co., 489 F.2d 8, 12 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

ble approach to the attempt offense. The "double inference," which led from anticompetitive behavior to the establishment of the attempt offense, could rest on pricing which fell below average variable cost or upon nonpricing behavior which possessed the same potential to confer monopoly power on the defendant by bringing about a structural change in the market. But market power was not irrelevant; indeed, it was always relevant. Unless the defendant priced below its average variable cost or engaged in nonpricing behavior of a kind which posed similar dangers to the market structure, the plaintiff would have to prove the defendant's market power. If the plaintiff did prove such threatening conduct, then the defendant would have to prove that its behavior was not predatory by proving, *inter alia*, that it lacked market power.

Inglis confirmed earlier rulings that a plaintiff must introduce evidence of the defendant's conduct to establish a prima facie case of attempt to monopolize, whether or not the plaintiff possessed direct evidence of the defendant's intent. *Inglis*, however, made explicit what earlier courts had said only by implication: that evidence of conduct is required to corroborate direct evidence of intent because the latter is often ambiguous and misleading.⁹⁶ Whereas the focus of the textual part of the *Lessig* opinion was upon intent, the *Inglis* opinion provides a healthy corrective focusing upon the dangerously misleading nature of much evidence of intent.

D. *Economic Evidence of Fixed and Variable Costs: The Ramifications*

In their attempt to provide courts with an easily usable tool with which to dispose of unmeritorious predatory pricing claims on motion for summary judgment, Areeda and Turner proposed that all costs be considered variable except capital costs on land, plant and equipment, property taxes and other taxes unaffected by output, and depreciation on the plant.⁹⁷ *Inglis* rejected this approach in favor of one which determines on a case-by-case basis what costs actually fluctuate with output. The disadvantage of the *Inglis* approach, of course, is that the determination of what costs are variable and what costs are fixed becomes a question of fact. Because questions of fact are for the jury, it becomes more difficult for the court to use the average variable cost test in ruling upon a defendant's motion for summary judgment.

The *Inglis* formulation does, however, have some advantages. First, in an effort to provide a fixed definition of variable costs,

⁹⁶ *Inglis*, 668 F.2d at 1028. On this point, see the later decision of the Ninth Circuit in *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1192 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1184 (1985). Whether these safeguards have been undermined by *Syufy Enter. v. American Multicinema, Inc.*, 783 F.2d 878 (9th Cir. 1986), is unclear.

⁹⁷ 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* 173 (1978).

Areeda and Turner made many more costs variable than those which actually vary with output. General overhead, under the Areeda and Turner formulation, is a variable cost. In an industry in which plant and equipment are not large proportions of total cost, the method of cost determination advocated by Areeda and Turner overstates the predatory threshold, and would thereby penalize pricing which, under their own marginal cost rationale, ought to be characterized as pro-competitive. By rejecting this cost-determination aspect of Areeda and Turner, therefore, the Ninth Circuit in *Inglis* opted for a more market sensitive approach to the attempt offense. This choice thus reinforced the other aspects of that opinion which made market analysis an integral part of an attempt case.

Second, *Inglis*' rejection of Areeda and Turner's rigid definition of variable costs in favor of an economic definition of those costs helped to make the *Inglis* opinion a broad restatement of the law on attempt to monopolize. Had the court employed the Areeda and Turner definitions of variable costs, *Inglis* would have been decided upon criteria which were specific to the predatory pricing context. Because *Inglis* used economic definitions of variable costs, it defined predatory behavior in economically meaningful terms. *Inglis*, therefore, could speak to the law of attempt to monopolize generally, including attempt cases involving behavior other than pricing. The result is that *Inglis* has provided a framework for assessing all attempt to monopolize claims, including those based upon claims of improper pricing and those based upon claims of improper nonprice behavior. Accordingly, under *Inglis*, attempt claims involving nonprice behavior should be evaluated by the same market-oriented test as is used in the predatory pricing cases.⁹⁸

Finally, in making the determination of what costs are variable, a question of fact may not destroy the usefulness of the average variable cost test as a summary judgment tool in the many cases in which there is no serious dispute as to whether certain identified costs do or do not vary with output.⁹⁹ In most cases, it will be clear

98 The suggestion is that nonprice behavior must be nonprofit-maximizing in the short run and directed towards the defendant's acquisition of monopoly power in the market in order for the behavior to constitute evidence of specific intent. This general approach (of analogizing nonprice behavior to price behavior) for purposes of attempt to monopolize analysis was foreshadowed in that part of *California Computer* which dealt with design changes in the defendant's product. See *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 743-44 (9th Cir. 1979). See also *Airweld*, 742 F.2d at 1192 (no intent "to interfere with the competitive process"); *Supermarket of Homes Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1405 (9th Cir. 1986) (conduct which is nonexclusionary for monopolization clause cannot be "predatory" for attempt clause).

99 Recently, the Ninth Circuit has reaffirmed its economic approach to defining variable costs. In *Marsann Co. v. Brammall, Inc.*, 788 F.2d 611, 613-14 (9th Cir. 1986), the court

that no direct relationship exists between output and costs such as legal costs, accounting costs, administrative costs, many insurance costs, utility costs, and much of the payroll costs. If, as will be likely, the plaintiff will have no evidence of any such connection, the average variable cost criterion will remain useful for the judiciary in granting motions for summary judgment.

VI. Conclusion

The Ninth Circuit has traveled far since its 1964 decision in *Lessig*, where it sought to broaden the sweep of the attempt to monopolize offense. Although it reaffirmed a broad construction of the attempt clause as recently as its *Greyhound* decision of 1977, that approach is now in full retreat. The court was never able to articulate a defensible rationale for its various efforts to expand the scope of the attempt clause, and as a result, it floundered. Its efforts to expand the scope of the attempt clause illustrate the limitations of the judicial process. The Ninth Circuit undertook a task for which, as an institution, it lacked the background and the competence to bring to a successful completion.¹⁰⁰ It was able to recover its way by following the theoretical analysis of predatory pricing provided by Professors Areeda and Turner, and by weaving that analysis into a new synthesis of the law of attempt.

moved the definition of average variable costs as close as practicable to marginal costs, thus moving the legal test of predatoriness closer to the point identified by economic theory.

100 Cf. R. BORK, *THE ANTITRUST PARADOX* 423 (1978). Judge Bork observed that because federal judges are generalists, the leads in theoretical analysis must generally come from outside the courts themselves. In both *Lessig* and *Greyhound*, the Ninth Circuit acted without an adequate theoretical framework to guide it.