The duPont Titanium Dioxide Case

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Excellent paper.

This is indeed a pleasure to have a student who can write so well and who can penetrate the mass of facts and arguments in such a case and come up with a concise statement of the legal issues.

There remain some interesting questions of economic theory raised by the case. A illumination of duPont's pricing and material decision processes and their interrelation. I may write something on this myself.
In April of 1978, E.I. duPont de Nemours and Company was charged with violation of section 2 of the Sherman Act and section 5 of the FTC act.¹ The complaint charged duPont with attempting to monopolize the production of titanium dioxide pigment. The pigment is used in paper and paint to increase the degree of whiteness. There are no close substitutes for the product, although fillers can be used in some applications to decrease the amount used.²

In August of 1979, Administrative Law Judge Brown found duPont did not violate the antitrust statutes and that they had achieved their market position as "the result of business foresight, intelligent planning ..., [and] the taking of economic risk."³

The Federal Trade Commission upheld the ALJ's decision on November 20, 1980. The commission relied primarily on the rationale stated in the *Alcoa* case that a monopolist may have had monopoly "thrust upon it:"

"persons may unwittingly find themselves in possession of a monopoly, automatically so to say .... they may become monopolists by force of accident. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose

¹ In re E.I. duPont de Nemours and Company, Dkt. No. 9108, F.T.C., 4/10/78.

² Ibid., ALJ Decision.

³ Ibid.
the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster."4 (emphasis added)

The geographic and product markets in this case is the nation.5 From 1972 to 1977 DuPont's market share increased from 30% to 42%. DuPont projects a 55% market share by 1985.6

DuPont has a distinct technological advantage over its competitors. There are three processes that can be used to manufacture TiO2. The least efficient is the sulfate process. Since 1960, this process has been replaced by a technique that uses rutile ore. DuPont, however, has developed a technique using ilmenite ore. Prior to 1970, the costs of manufacturing TiO2 using the last two processes were roughly equal. In 1970, soaring rutile ore prices gave DuPont a substantial cost advantage (16¢/lb. for DuPont versus 21¢/lb. for its competitors). DuPont is the only company with the technological capability to use the ilmenite process.7

Complaint counsel did not charge DuPont with anyone specific practice. Rather, they charged that DuPont's action

4U.S. v. Aluminum Co. of America 148 F.2d 415 (CA2 1945).
5In re E.I. duPont de Nemours and Company, Dkt. No. 9108, F.T.C., 4/10/78, commission decision.
6Ibid.
7Ibid.
In its entirety violated antitrust law. Four specific practices were charged, each one in itself legal, that combined were meant to show an attempt to monopolize:

1. Expansion of capacity was premature and designed to exclude competitors from expansion.
2. The expansion was designed to capture all the projected growth in demand, foreclosing any opportunities for competitors.
3. Exploitation of its cost advantage to keep prices low so competitors couldn't expand.
4. Refusal to license its technology.

By relying on the overall effects of duPont's actions, Complaint Counsel was attempting to expand the circumstances in which an attempt to monopolize charge will be successful. In Bergans Farms an attempt to monopolize was found from an overall course of conduct. However, Bergan's employed many clearly illegal tactics including price discrimination and price-fixing. Other cases lacking such clear-cut evidence have not been successful.

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DuPont admits that they attempted to capture all increases in future demand. However, duPont claims to have based their decision not as an attempt to monopolize but because: a) the economy was recovering from the 1972 recession; b) a tariff on imports; c) scale economies attributable to increased capacity; and d) a decrease in capacity on the part of the industry using the sulfate and rutile processes. DuPont further contends that the allegations that its cost advantage was "fortuitous" are false, citing its costly research and development efforts (are responsible).

DuPont said they were under no obligation to license their technology to their competitors, there being no reason the other companies couldn't develop their own technologies.

As for the allegations of predatory pricing, duPont said Complainant had failed to show below-cost pricing. Complainant alleged that duPont priced low enough so competitors wouldn't have sufficient funds to expand, but high enough to finance their own expansion plans. DuPont adjusted their prices periodically to market forces.

In its decision, the Commission examined the economic literature available to determine if any economic rationale could be found for complainants charges. The commission was unable to find literature adequately supporting the charges.
Most of the literature examined focused on predatory pricing. Professors Areeda and Turner suggested that an objective standard would be to see if the firm is pricing below marginal or average costs. This approach was criticized by the complainant because it focused on short-run effects and ignores long-term behavior such as preemptive output expansion. It should be noted that no effort was made to prove that DuPont's prices were below cost.

As an alternative, complainant suggested the approaches of Professors Scherer and Williamson. Scherer is concerned with the range where a firm's prices were below marginal cost, but above average cost. Again, no evidence was shown that DuPont fell within this range. Scherer also expressed concern over expansion meant to "replace the output of excluded output or restrict supply," DuPont's strategy was meant to capture future demand increases, not to capture a larger share of present demand.

Professor Williamson focused on building excess capacity

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12 Ibid., p. 890.
in order to turn back new entries in the market. 13 But, the Commission objected to the applicability of Williamson's analysis because it dealt with short-term behavior.

Finally, complaintant referred to an article by Professor Spence. Again, the analysis did not fit the facts of this case. Spence is concerned with maintaining long-term excess capacity. 14 DuPont's expansion was found to meet demand estimates and thus did not constitute excess capacity.

No firm basis was found in the economic literature to declare duPont's conduct at the time of the suit. However, in the final footnote, the Commission left open the possibility of future charges if the expansion results in monopoly. The Commission also said that:

"DuPont's actions may make future competitive expansion more difficult, but that result is not the product of artificially induced conduct that is unrelated to market conditions, cost differences or scale economies." 15

In examining case law, the Commission rejected the argument that duPont's strategy "in its entirety" constituted an attempt to monopolize. Instead, the Commission examined each charge separately. Since complaintant was unable to


prove any one charge illegal, they were unable to prove an attempt to monopolize.

The first Supreme Court case dealing with attempts to monopolize, Swift & Co., set forth a two-fold test: 1) a specific intent to monopolize; and 2) a dangerous probability that the conduct, if left unchecked, will result in monopoly. Subsequent cases refined this test to include exclusionary conduct as well as a specific intent to achieve monopoly or destroy competition.

The Commission found that duPont's cost advantage and market dominance made it quite clear that there existed a "dangerous probability of success."

The issue of intent was not dealt with by the Commission, saying that they must look at the defendant's conduct. The Commission cited Transamerica as evidence of the interrelatedness of conduct and intent:

"There must be some element of unfairness in the conduct before an anticompetitive intent can be found, as distinguished from the benign intent to beat the opposition."

16Swift & Co. v. United States, 196 US 375 (1905)

17California Computer Products, Inc. v. IBM Corp., 613 F.2d 727, 736 (9th Cir. 1979).


Thus the central issue in the case is whether duPont's growth strategy was exclusionary conduct. By using rule-of-reason approach, the Commission examined each charge in light of the case law on that charge. They were unable to find anti-competitive conduct. If the Commission had used the "in its entirety" argument of the complainant, they would have been forced to adopt some sort of structural (i.e., per se) test. There is very little precedent for a per se rule on attempts to monopolize. Indeed, inherent in any attempt charge is the question of intent which would be difficult to apply to any firm per se rule based on structural grounds.

The Commission said a rule-of-reason approach was necessary to judge if duPont fell within the Alcoa exception. In US v. Grinnell, the Supreme Court reiterated the Alcoa exception but went on to say:

"Once monopoly power is shown to exist, the burden is on the defendant to show that their dominance is due to skill, acumen, and the like."20

These cases provided a basis for using a rule of reason, but they provided little guidance to the Commission on the specific circumstances in this case. United Shoe, Griffith and Grinnell all contained clearly anticompetitive behavior or behavior that heightened entry barriers with no benefits to competition. Likewise, in Alcoa, no scale economies were

examined and Alcoa repeatedly expanded their capacity.

Finding no basis for judging the facts of this case in light of the decisions suggesting a rule-of-reason approach, the Commission turned to recent attempt cases for guidance. In general, the decisions in these cases are couched in broad terms such as "legitimate business aims" and "independent economic justifications."

Where an intent to destroy competition is clear, and no independent justification can be found for the methods employed, the courts have found liability. However, duPont did have a justification: it expanded capacity to meet future demand. The Supreme Court, in Times-Picayune upheld a tying clause because it had a proper business purpose and confirmed to prevailing norms in the industry. Likewise in AFL v. NFL the courts upheld an expansion plan to meet demand.

In general, the attempt cases showed that the courts are reluctant to condemn expansion to meet demand. But, no clear


listing of the factors to be considered in judging if the conduct is exclusionary is provided. The Commission did find some guidance in recent cases involving IBM. Like IBM, duPont is a dominant firm in its industry with a technological edge over its competitors.

In Cal. Comp., the Court upheld IBM's price cuts because they were justified by a technological edge and "shrewdness in profitable price competition." In Greyhound the Court invalidated IBM's pricing plan because no justifications, especially cost justifications, were offered. In Memorex, IBM's prices were judged on a standard that looked at whether they recovered short-term (i.e., marginal) costs. Finally, in Telex, the courts upheld a pricing plan saying:

"it would seem that technical attainments were not intended to be inhibited or penalized [by] ... Section 2 of the Sherman Act."  

Using the IBM cases as justification, the Commission upheld duPont's actions because they were "justified by respondent's cost superiority over its rivals, demand forecasts and

23 California Computer Products v. IBM Corp. 613 F.2d 727 (9th Cir. 1979).

24 Greyhound Computer Corp. v. IBM Corp. 559 F.2d 488 (9th Cir. 1977).

25 ILC Peripherals v. IBM Corp., 555 F.2d 1379 (9th Cir. 1977).

26 Telex Corp. v. IBM Corp. 501 F.2d 897 (10th Cir. 1975).
scale economies." In other words, an independent justification for duPont's actions was present. No excess capacity was built by duPont and no predatory pricing (i.e., below cost) was shown. The refusal to license technology was also upheld as being duPont's prerogative.

In other words, complainant failed to show any illegal action by duPont. There is very little precedent for the "in its entirety" argument. It would seem that, to successfully argue a new theory such as this, the FTC staff might have been more successful if it had picked a firm without such a clear-cut technological advantage.

Another puzzling aspect of this case is complainants choice of economic literature as justification for its position. The literature attempted to provide an objective test: that is, a cost-based test. Yet, complainant failed to show any evidence of below-cost pricing.

In summary, this case is not a departure from Alcoa as has been suggested, but a logical extension. The circumstances of this case meet even the most stringent interpretation of the Alcoa exception. Cost- and demand-justified strategies provide no basis for an attempt to monopolize charges. It remains to be seen whether duPont's strategy will lead to a monopoly and provide a basis for future prosecution.

- 11 -