

2002

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Recommended Citation

Jennifer M. Clarke-Smith, *The Development of the Monopolistic Leveraging Theory and Its Appropriate Role in Antitrust Law*, 52 Cath. U. L. Rev. 179 (2003).

Available at: <https://scholarship.law.edu/lawreview/vol52/iss1/6>

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THE DEVELOPMENT OF THE MONOPOLISTIC LEVERAGING THEORY AND ITS APPROPRIATE ROLE IN ANTITRUST LAW

Jennifer M. Clarke-Smith⁺

Monopolistic leveraging is “the use of monopoly power¹ in one market to strengthen a monopoly share in another market.”² Historically, courts and commentators have applied the theory of monopolistic leveraging in two ways³ in the context of Section 2 of the Sherman Act (Section 2).⁴ In some instances, courts have used monopolistic leveraging as a description of the way in which actual or attempted monopolization is pursued.⁵ When monopolistic leveraging is used in this manner, courts typically agree that it is a violation of Section 2.⁶ In other cases, courts have found that leveraging monopoly power in one market to gain a competitive

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1. “Monopoly power” is the ability to control prices and output or to exclude competitors from the market. F.T.C. Commissioner Mary L. Azcuenaga, Remarks Before the Japanese Fair Trade Commission: Panel Discussion on Technological Innovation, International Trade and Competition Policy, (Dec. 1, 1997), 1997 WL 778602 (F.T.C.). Market share is an essential factor in ascertaining whether a firm has monopoly power. *Id.* Generally, a market share greater than seventy percent indicates monopoly power, while a market share less than fifty percent is evidence against a finding of monopoly power. *Id.*

2. *Virgin Atlantic Airways, Ltd. v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001); *see also* *United States v. Griffith*, 334 U.S. 100, 107 (1948); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979); William F. Dolan, *Developments in Private Antitrust Enforcement in 2000*, 1252 PLI/CORP 891, 978 (2001); Daniel L. Rubinfeld, *Antitrust Enforcement in Dynamic Network Industries*, 43 ANTITRUST BULL. 859, 877 (1998) (explaining that leveraging occurs “when a firm uses its advantage from operating in one market to gain an advantage in selling into one or more other, generally related markets”).

3. Roger D. Blair & Amanda K. Esquibel, *Some Remarks on Monopoly Leveraging*, 40 ANTITRUST BULL. 371, 373 (1995).

4. 15 U.S.C. § 2 (2000). While the leveraging theory is relevant under both Section 1 of the Sherman Act and Section 3 of the Clayton Act, this Comment will only explore its relation to Section 2 of the Sherman Act. *See* Rubinfeld, *supra* note 2, at 879 (stating that leveraging may be achieved through a variety of methods, including tying, bundling, exclusive dealing, and low pricing).

5. Blair & Esquibel, *supra* note 3, at 373-74, 395.

6. *Id.* (noting that “[m]onopoly leveraging is often used to describe the way in which a monopolist . . . monopolizes or attempts to monopolize a second market” and that there is little disagreement among courts on that issue).

advantage in a secondary market is a violation of Section 2.⁷ Against this backdrop, conflicting views have surfaced as economists debate whether leveraging of monopoly power to gain economic benefit is even possible.⁸

The judicial struggle to determine what degree of leveraging is required to substantiate a Section 2 violation has divided the circuits.⁹ While the split has existed for more than ten years, courts are now declining to decide the issue.¹⁰ The Supreme Court's view is unclear at best. Within the course of a year, the Court appeared to adopt conflicting perspectives. In one case, the Court seemed to confirm that monopolistic leveraging is a violation of Section 2 of the Sherman Act.¹¹ In a subsequent case, the Court held that unilateral action only amounts to a violation if it rises to the level of attempted or actual monopolization.¹² Instead of removing the confusion among the circuits,

7. *Kerasotes Michigan Theatres v. Nat'l Amusements*, 854 F.2d 135, 138 (6th Cir. 1988); *Berkey Photo*, 603 F.2d at 275; Blair & Esquibel, *supra* note 3, at 373-75 (concluding that the legality of monopoly leveraging is controversial when it refers to a monopolist's use of its market power to achieve a competitive advantage in a second market without creating a substantial probability of successful monopolization in the second market).

8. Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2081-87 (1999) (outlining the debate among economists as to whether leveraging can be economically beneficial); Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 515-17 (1985); see also Richard O. Zerbe, Jr. & Michael T. Mumford, *Does Predatory Pricing Exist? Economic Theory and the Courts After Brooke Group*, 41 ANTITRUST BULL. 949, 981 (1996) (discussing the different standard used in evaluating leveraging claims and acknowledging criticism that suggests that leveraging claims are groundless).

9. *Eleven Line, Inc. v. N. Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 206 n.16 (5th Cir. 2000) (declining to rule on the application of the monopoly leveraging theory of liability and noting the split among courts on the issue); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1359-60 (Fed. Cir. 1999) (discussing the use of the monopoly leveraging theory and the various standards courts have used to evaluate such claims); see also Patrick Lynch, *Monopolization, Attempted Monopolization and Joint Ventures*, 1251 PLI/CORP 279, 301 (2001).

10. *Virgin Atlantic Airways, Ltd. v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001) (noting that the viability of the leveraging doctrine as articulated in *Berkey* is questionable and deciding the case on other grounds); *Eleven Line, Inc.*, 213 F.3d at 206 n.16 (declining to rule on the monopoly leveraging issue).

11. *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451, 483 (1992) (holding that the use of monopoly power in a market to strengthen its monopoly share of another market is a violation of Section 2 and stating that "[t]he second element of a §2 claim is the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor" (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948))). The Court found that Kodak used its parts monopoly to increase its monopoly share of the Kodak service market. *Id.* at 483.

12. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (holding that Section 2 of the Sherman Act "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so").

the Court's inconsistent statements on the issue have left this area of law unsettled.¹³

The Sherman Antitrust Act (the Act) was passed in 1890 to limit monopoly power and protect competition.¹⁴ The Act is divided into two main sections. Section 1 prohibits concerted activity of two or more entities that combine, contract, or conspire in restraint of trade.¹⁵ Section 2 addresses unilateral actions and prohibits monopolization or attempted monopolization in restraint of trade.¹⁶ As a result of the different approaches of Sections 1 and 2, a "gap" exists in the law.¹⁷ Concerted activity violates the Act by unreasonably restraining trade, while single firm activity is a violation only if it actually monopolizes or attempts to monopolize a given market.¹⁸ Thus, some unilateral acts that are allowed under the Act would be considered violations if performed through a combination of two or more firms.¹⁹

13. See *supra* note 7 and accompanying text.

14. See *Berkey Photo*, 603 F.2d at 275 (stating that the purpose of the Sherman Act is to ensure an efficient market and prevent firms with monopoly power from disrupting that market); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (acknowledging "Congress' desire to promote competition through the protection of viable, small, locally owned businesses"); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958) (stating that "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade"); see also *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570-71 (2d Cir. 1990) (noting that *Berkey Photo* required "tangible harm to competition").

15. 15 U.S.C. § 1 (2000). Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* Section 1 violations have included practices such as price fixing, allocation of territory or customers among firms, and tying arrangements. See generally William C. Holmes, 1987 ANTITRUST LAW HANDBOOK 35-138 (1987) (analyzing Section 1 of the Sherman Act). For an example of an early Section 1 case, see *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

16. 15 U.S.C. § 2 (2000). Section 2 of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony." *Id.*; see also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69, 774-77 (1984) (indicating that Section 2 requires less scrutiny of single firm actions than that required by Section 1 of conduct by multiple firms working together and that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct).

17. *Copperweld Corp.*, 467 U.S. at 775.

18. *Id.* at 767-68, 774-75.

19. *Id.* at 774. The Supreme Court recognized the gap in liability for anticompetitive conduct, stating:

It cannot be denied that [Section] 1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same

This “gap” has been used to argue that monopolistic leveraging, in and of itself, is not a violation of the Act.²⁰ To recover under a Section 2 claim of monopolization, the plaintiff must show that a company possesses monopoly power in a relevant market and that such power was willfully acquired or maintained, rather than the result “of a superior product, business acumen, or historic accident.”²¹ A claim of attempted monopolization includes three elements: (1) specific intent to monopolize, (2) predatory or anti-competitive conduct to monopolize that market, and (3) a high probability that the firm will succeed in achieving monopoly power.²² In contrast, the elements of a Section 2 monopolistic leveraging claim include: “(1) monopoly power in one market, (2) the use of that power. . . to gain a competitive advantage in another distinct market, and (3) injury caused by the challenged conduct.”²³ The controversial difference between monopolization, attempted monopolization, and monopolistic leveraging — when asserted as a violation in itself — is that leveraging requires a goal of gaining only a *competitive advantage*, whereas the other two claims

extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such — but only restraints effected by a contract, combination, or conspiracy — it leaves untouched a single firm’s anti-competitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to [Section] 1 liability.

Id. at 774-75 (citation omitted); *see also* Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 541 (9th Cir. 1991); Blair & Esquibel, *supra* note 3, at 376 (asserting that Section 2 liability traditionally required more than predatory actions and anticompetitive intent); Joseph M. Callow, Jr., *Cut-Throat Competition in the Friendly Skies: Alaska Airlines v. United Airlines*, 61 U. CIN. L. REV. 681, 686 (1992) (noting that concerted activity that merely restrains trade is prohibited under Section 1, while individual conduct must reach the level of monopolization or attempted monopolization for it to be a violation of Section 2).

20. Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 205 (3rd Cir. 1992) (noting that Sections 1 and 2 do not make all anticompetitive conduct unlawful and arguing that “*Berkey Photo’s* formulation of monopoly leveraging to proscribe unilateral restraints of trade does violence to the text of the Sherman Act and decimates this “gap” in liability”).

21. *Alaska Airlines*, 948 F.2d at 541 (citing *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966) as quoted in *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 596 n.19 (1985)). *See generally* Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693 (2000) (discussing the elements required for a monopolization claim).

22. *Alaska Airlines*, 948 F.2d at 542; Callow, *supra* note 19, at 687. *See generally* Muris, *supra* note 21 (discussing the elements required for attempted monopolization claims and the evidence used by the FTC in establishing them).

23. *Willman v. Heartland Hospital East*, 34 F.3d 605, 613 (8th Cir. 1994); Callow, *supra* note 19, at 686.

require a purpose of gaining or maintaining *monopoly power*.²⁴ The monopolistic leveraging claim extends the reach of Section 2 to situations in which the firm may not be seeking to monopolize and may not even control a significant percentage of the second market.²⁵

This Comment examines the history of the monopolistic leveraging doctrine and its place in antitrust law. It first discusses the origin and development of the doctrine in case law. Next, this Comment analyzes the rationale used by courts to both sustain and reject the leveraging theory and examines the debate over the theory's economic viability. Finally, this Comment asserts that the Supreme Court should settle this area of antitrust law by holding that leveraging is a violation under Section 2 only when it is a means by which a firm attempts to monopolize or maintain its current monopoly. Additionally, this Comment argues that special consideration must be made when applying the leveraging theory in dynamic network markets.

I. THE HISTORY OF THE MONOPOLISTIC LEVERAGING DOCTRINE

A. *The Birth and Development of the Leveraging Theory*

The monopolistic leveraging doctrine dates back to the Supreme Court's 1948 decision in *United States v. Griffith*.²⁶ In *Griffith*, the Court held that a monopoly could not be used "to beget monopoly."²⁷ The strongest support for the leveraging doctrine came in the Court's dictum, where it stated that it is a violation to use even lawfully acquired monopoly power to restrain competition, gain a competitive advantage, or eliminate a competitor.²⁸

It was not until *Berkey Photo, Inc. v. Eastman Kodak Co.*²⁹ that the monopolistic leveraging doctrine was recognized as a separate claim

24. Willow A. Sheremata, *Barriers to Innovation: A Monopoly, Network Externalities, and the Speed of Innovation*, 42 ANTITRUST BULL. 937, 945 (1997) (acknowledging that monopoly leveraging to gain a competitive advantage, as opposed to monopolization or attempted monopolization, is a "contentious area of antitrust law").

25. *Ass'n for Intercollegiate Athletics for Women v. N.C.A.A.*, 735 F.2d 577, 586 (D.C. Cir. 1984).

26. 334 U.S. 100, 107-09 (1948) (finding that a movie exhibitor violated Section 2 by acquiring exclusive distribution rights for a group of cities, including some in which it had a significant market share); see James P. Puhala, III, Note, *Berkey Photo and Alaska Airlines: Different Approaches to Monopoly Leveraging Claims*, 16 W. NEW ENG. L. REV. 111, 117-18 (1994) (discussing *Griffith* in the context of monopoly leveraging).

27. *Griffith*, 334 U.S. at 108.

28. *Id.* at 107.

29. 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

under Section 2.³⁰ In *Berkey Photo*, the Second Circuit acknowledged that using monopoly power in one market to gain a competitive advantage in another is a violation of Section 2, notwithstanding that no attempt was made to monopolize the second market.³¹ Berkey, a small company in the camera industry, brought suit against its competitor Kodak, claiming that Kodak used its monopoly in the film, color paper, and camera markets to gain an advantage in the photofinishing and services markets.³² The allegations stemmed from Kodak's introduction of the 110 "Pocket Instamatic" camera and the fact that only Kodak produced film compatible with the camera.³³ Berkey argued that independent photofinishers could not compete until they purchased new equipment and received training from Kodak on the new processing.³⁴ The court did not decide the question of whether Kodak engaged in monopolistic leveraging, but, after stating that such leveraging is a violation of Section 2, it held that a new trial was necessary to fully resolve the issue.³⁵

The court reasoned that because it was a violation of the Act to use monopoly power to further existing monopolies, it would also be a violation for Kodak to use its market power to achieve a competitive advantage in a second market.³⁶ In the court's view, the issue was the improper use of monopoly power, as opposed to the fear of monopolization of a second market.³⁷ The court's decision extended the

30. See *id.* at 267-68, 276.

31. *Id.* at 276.

32. *Id.* at 267-69. Berkey operated in both the camera and photofinishing markets but relied heavily on Kodak for supplies and equipment. *Id.* at 267. Berkey argued that Kodak leveraged its monopoly power in the film market to manufacture film that was only compatible with Kodak's cameras and that Kodak refused to provide competitors with information to produce similar film. *Id.* at 267-68.

33. *Id.* at 268-69; Puhala, *supra* note 26, at 120.

34. *Berkey Photo*, 603 F.2d at 290.

35. *Id.* at 291-92. The court stated that Kodak's competitive advantage may have been the result of innovation, rather than its monopoly power, but it could not dismiss the possibility that Kodak's monopoly power in other markets was the source of its ability to gain an advantage over its competitors. *Id.* at 292. The court concluded by saying that it was unable to resolve the ambiguity. *Id.*

36. *Id.* at 275.

37. See *id.* The court stated:

We tolerate the existence of monopoly power, we repeat, only insofar as necessary to preserve competitive incentives and to be fair to the firm that has attained its position innocently. There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other. That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable. Social and economic effects of an extension of monopoly power militate against such conduct.

reach of the Act to include unilateral acts that did not rise to the level of monopolization or attempted monopolization, thereby narrowing the aforementioned “gap.”³⁸ Prior to this decision, a Section 2 violation required general intent for a monopolization claim³⁹ and specific intent for an attempted monopolization claim.⁴⁰ The *Berkey Photo* court removed the element of intent that is required for a monopolization or attempted monopolization claim, thus making it easier for a firm to violate the Sherman Act.⁴¹

B. The Circuit Split on the Monopolistic Leveraging Issue

Courts have understood *Berkey Photo* as creating a distinct monopolistic leveraging claim under Section 2 of the Sherman Act.⁴² The monopolistic leveraging claim has received both approval and criticism from courts and commentators.⁴³ A split⁴⁴ resulted among the federal

Id.

38. See *supra* notes 19-20 and accompanying text.

39. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 417 (2d Cir. 1945) (stating that the demand for specific intent was nonsense). The opinion of the Second Circuit, written by Judge Hand, carries the weight of a Supreme Court case, in terms of its precedential value. See PHILIP AREEDA, *ANTITRUST ANALYSIS* 77-78 (1967). When the case was appealed to the Supreme Court, four justices recused themselves, preventing a quorum; therefore, the Court certified the case and allowed it to be heard by the three most senior circuit judges. *Id.* Judge Hand’s analysis regarding the intent requirement for monopolization claims was criticized by Professor Robert Bork. ROBERT H. BORK, *THE ANTITRUST PARADOX* 165-69 (1978); see also Puhala, *supra* note 26, at 119-20 (arguing that requiring only general intent makes it easier for a court to find a violation of the Sherman Act because the court can concern itself with only market influence).

40. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (requiring specific intent to monopolize for a finding of attempted monopolization); see also *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985); Puhala, *supra* note 26, at 119-20 (noting that “because there is no established monopoly upon which [the analysis can] focus, specific intent is required for a finding of attempted monopolization”).

41. Puhala, *supra* note 26, at 114.

42. *Callow*, *supra* note 19, at 697; see, e.g., *Kerasotes Michigan Theatres v. Nat’l Amusements*, 854 F.2d 135, 136-37 (6th Cir. 1988); *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 681 (2d Cir. 1985); *M.A.P. Oil Co. v. Texaco, Inc.*, 691 F.2d 1303, 1305-06 (9th Cir. 1982); *Soap Opera Now, Inc. v. Network Publ’g Corp.*, 737 F. Supp. 1338, 1348-49 (S.D.N.Y. 1990); *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 571 F. Supp. 1504, 1512-15 (E.D. Cal. 1983), *rev’d on other grounds*, 770 F.2d 883 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).

43. *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 463-66 (S.D.N.Y. 1996) (outlining the split in the courts on the issue of monopoly leveraging); Dolan, *supra* note 2, at 978 (noting that courts disagree about whether a firm can violate Section 2 through leveraging for a competitive advantage or whether proof of a traditional claim of monopolization or attempted monopolization is required); see PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 652 (2002). For a discussion of differing approaches by the courts, see *infra* notes 50-85 and accompanying text.

appellate courts: some endorsed the claim,⁴⁵ some rejected it,⁴⁶ and other courts evaded the issue altogether.⁴⁷

In *Association for Intercollegiate Athletics for Women v. N.C.A.A.*,⁴⁸ the first major decision addressing monopolistic leveraging after the *Berkey* decision, the District of Columbia Circuit refused to rule on the issue.⁴⁹ The court referenced the “substantial academic criticism” surrounding the leveraging theory and opted to reserve the issue for a case in which a decision as to the legal sufficiency of such a claim was essential.⁵⁰

In *Kerasotes Michigan Theatres v. National Amusements, Inc.*,⁵¹ the Sixth Circuit followed the Second Circuit’s lead in *Berkey Photo* and acknowledged the existence of the leveraging doctrine as a separate and distinct theory of recovery under the Sherman Act.⁵² National Amusements brought suit alleging that the defendant used its dominance in other geographical areas to gain a competitive advantage.⁵³ While there was no claim of monopolization or even attempted monopolization, the court reversed the lower court’s dismissal.⁵⁴ Reasoning that leveraging market power to gain a competitive advantage in a second market may allow inferior products to gain prominence and

44. See, e.g., *Eleven Line, Inc. v. N. Texas State Soccer Ass’n*, 213 F.3d 198, 206 n.16 (5th Cir. 2000) (stating in a footnote that the monopolistic leveraging theory is the subject of a circuit split); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1359-60 (Fed. Cir. 1999) (commenting that monopoly leveraging arose out of the Supreme Court’s decision in *United States v. Griffith* and was endorsed by the Second Circuit, but it was later rejected by other circuits); J. Neil Lombardo, *Resuscitating Monopoly Leveraging: Strategic Business Behavior and Its Implications for the Proper Treatment of Unilateral Anticompetitive Conduct Under Federal Antitrust Laws*, 41 ST. LOUIS L.J. 387, 406-08 (1996) (discussing the disagreement among the circuits as to whether leveraging is a Section 2 violation).

45. See *infra* notes 51-55 and accompanying text.

46. See *infra* notes 60-65 and accompanying text; Patrick Lynch, *Monopolization, Attempted Monopolization and Joint Ventures*, 1251 PLI/CORP 279 (2001) (noting that some circuits have rejected the monopoly leveraging theory when the monopoly was lawfully achieved and the element of “dangerous probability” had not been met for an attempted monopolization claim).

47. See *infra* notes 56-59, 80-87, 100-07 and accompanying text.

48. 735 F.2d 577 (D.C. Cir. 1984).

49. *Id.* at 586 n.14.

50. *Id.*; see also RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 802-10, 870-71 (2d ed. 1981); BORK, *supra* note 39, at 372-75; Richard S. Markovits, *Tie-ins, Leverage, and the American Antitrust Laws*, 80 YALE L.J. 195, 199-205 (1970); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 21-29 (1957).

51. 854 F.2d 135 (6th Cir. 1988).

52. *Id.* at 136-37.

53. *Id.* at 136.

54. *Id.* at 137-38.

disrupt competition, the court found that such acts are a violation of Section 2.⁵⁵

In its most recent decision addressing the leveraging question, *M&M Medical Supplies and Service, Inc. v. Pleasant Valley Hospital, Inc.*,⁵⁶ the Fourth Circuit assumed that the claim is proper for the sake of argument but reserved judgment on the issue for a later case.⁵⁷ The court referenced an earlier decision in which it upheld a leveraging claim but, at the same time, expressly reserved judgment for an opportunity in which the “the issue is squarely presented.”⁵⁸ However, while the court avoided judgment on this issue, it instructed that for purposes of remand, the assumption is that monopoly leveraging is a separate violation of Section 2.⁵⁹

The Ninth and Third Circuits rejected the leveraging theory outright. In *Alaska Airlines, Inc. v. United Airlines, Inc.*,⁶⁰ the Ninth Circuit held that in order to establish a violation of Section 2 the plaintiff must prove that the defendant “used its monopoly power in one market to obtain or attempt to attain a monopoly in the downstream, or leveraged, market.”⁶¹ In doing so, the Ninth Circuit limited Section 2 violations to the traditional monopolization and attempted monopolization claims, and it refused to recognize the monopolistic leveraging claim established in *Berkey Photo*.⁶²

In its most recent leveraging case, *Fineman v. Armstrong World Industries, Inc.*,⁶³ the Third Circuit stated that the *Berkey* decision relied on dictum in the Supreme Court’s *Griffith* decision and that the broad statement articulated in *Griffith* should not control its decision in *Fineman*.⁶⁴ Accordingly, the court sided with the Ninth Circuit and held that in order to succeed in a leveraging claim, the plaintiff must establish

55. *Id.* (“Products that may be inferior should not be allowed to prosper in a particular market as a result of its producer’s exploitation of its monopoly position in a second market.”).

56. 981 F.2d 160 (4th Cir. 1992).

57. *Id.* at 169.

58. *Id.* (quoting *Advanced Health-Care Serv., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 149-50 (4th Cir. 1990)).

59. *Id.*

60. 948 F.2d 536 (9th Cir. 1991).

61. *Id.* at 547-49 (rejecting a monopolistic leveraging claim); *see also* Callow, *supra* note 19, at 713.

62. *Alaska Airlines*, 948 F.2d at 547, 549; *see also* Puhala, *supra* note 26, at 133 (describing the court’s treatment of traditional Section 2 claims and the rejection of the monopoly leveraging claim articulated in *Berkey*).

63. 980 F.2d 171 (3rd Cir. 1992).

64. *Id.* at 205-206.

either a threatened or actual monopoly — the standard required for monopolization or attempted monopolization.⁶⁵

C. *The Supreme Court Adds to the Confusion*

The Supreme Court encountered the leveraging issue for the second time in *Eastman Kodak Co. v. Image Technical Services, Inc.*⁶⁶ The plaintiff claimed that Kodak used its dominance in the manufacturing of replacement copier parts to gain a monopoly in the market of copier repair.⁶⁷ While it was not discussed in the body of the opinion, the Court endorsed the *Berkey* articulation of the leveraging doctrine.⁶⁸ The Court stated that antitrust liability may result when a firm uses its monopoly power in one market “to achieve a competitive advantage in another.”⁶⁹

However, in *Spectrum Sports v. McQuillan*,⁷⁰ decided only a year after *Eastman Kodak*, the Court expressed a view that appears to contradict its previous comments on leveraging. The plaintiffs alleged that the defendant violated both Section 1 and Section 2 of the Sherman Act by granting one distributor a monopoly on the distribution of sorbothane, a foam padding used in sports equipment.⁷¹ Although the Court did not address leveraging in its holding, in dictum it seemed to reject the theory.⁷² The Court stated that the conduct of a single firm only violates Section 2 when it actually monopolizes or dangerously threatens to monopolize the second market.⁷³ Clearly influenced by the Chicago School’s approach to antitrust policy,⁷⁴ the Court reasoned that the Sherman Act’s purpose was to prohibit activities that unfairly restrain competition rather than to protect businesses from competition entirely.⁷⁵ The Court’s concern was that reading the Act more broadly might result

65. *Id.* at 206.

66. 504 U.S. 451 (1992).

67. *Id.* at 459.

68. *See id.* at 479-80 n.29 (stating that a firm’s market power can give rise to liability if it is exploited for the purpose of “expand[ing] . . . [the firm’s] empire into the next”).

69. *See id.*; *see also* Lombardo, *supra* note 44, at 408.

70. 506 U.S. 447 (1993).

71. *Id.* at 449-51.

72. *Id.* at 459. The Court held that Spectrum could not be liable for attempted monopolization without proof of a “dangerous probability” that it would achieve monopolization and that it had the specific intent to do so. *Id.*

73. *Id.*

74. *See generally* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976). Chicago School economists claim that because there is no net gain from monopolistic leveraging, firms engaging in leveraging activities do so for pro-competitive or neutral reasons. *See infra* notes 144-49 and accompanying text.

75. *Spectrum Sports, Inc.*, 506 U.S. at 458.

in firms being found in violation of Section 2 for conduct that enhances, rather than prohibits, competition.⁷⁶

D. The Circuits Hesitate To Rule Amid Uncertainty

In its most recent discussion of the issue, the Eleventh Circuit, while not expressly endorsing the theory, recognized the plaintiff's claim of monopolistic leveraging under Section 2 in *Aquatherm Industries, Inc. v. Florida Power & Light Co.*⁷⁷ The court held that the plaintiff failed to show that the defendant sought a competitive advantage in the second market,⁷⁸ an element clearly established by the standard set forth in *Berkey*.⁷⁹

In *Intergraph Corp. v. Intel Corp.*,⁸⁰ the Federal Circuit, citing an earlier decision by the Eleventh Circuit and quoting from an earlier Supreme Court opinion,⁸¹ dismissed a claim of monopolistic leveraging because the second market was highly competitive and the leveraging conduct affected only one competitor.⁸² The Federal Circuit quoted the Supreme Court, which maintained that leveraging is not illegal unless "a significant fraction of buyers or sellers are frozen out of a market."⁸³ The Federal Circuit then accordingly held that, based on the standard set by the Supreme Court and the Eleventh Circuit, the instant claim was not supported.⁸⁴ The court avoided articulating its own position on the monopolistic leveraging issue.

In *Eleven Line, Inc. v. North Texas State Soccer Ass'n*,⁸⁵ the Fifth Circuit expressly declined to rule on the monopolistic leveraging theory and acknowledged the circuit split on the issue.⁸⁶ Recognizing the complexity and disagreement associated with the leveraging doctrine, the

76. *Id.* (noting that the courts have been cautious to avoid interpreting Section 2 of the Sherman Act in way that "might chill competition, rather than foster it").

77. 145 F.3d 1258, 1262 (11th Cir. 1998) (refusing to extend the monopolistic leveraging claim to include situations in which the monopolist uses its power in a market that it does not seek to monopolize or even compete against).

78. *Id.*

79. *See supra* notes 29-41 and accompanying text.

80. 195 F.3d 1346 (Fed. Cir. 1999).

81. *Id.* at 1360 (citing *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985) and quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring)).

82. *Intergraph Corp.*, 195 F.3d at 1360.

83. *Id.* at 1360 (citing *Jefferson Parish Hosp.*, 466 U.S. at 45 (O'Connor, J., concurring)).

84. *Id.*

85. 213 F.3d 198 (5th Cir. 2000).

86. *Id.* at 206 n.16.

court opted to rest its judgment on the issue of damages presented in the case and avoided the antitrust claims altogether.⁸⁷

E. Most Recent Approaches to the Leveraging Issue

While many circuits were avoiding the issue,⁸⁸ the United States Court of Appeals for the District of Columbia used the leveraging theory in a widely publicized case.⁸⁹ In *United States v. Microsoft Corp.*,⁹⁰ the court found that Microsoft leveraged its monopoly power in the market for operating systems⁹¹ to increase its browser⁹² market share and thus protect its operating systems monopoly in violation of Section 2 of the

87. *Id.* at 206.

88. *See supra* notes 56-59, 80-87 and accompanying text.

89. *See generally* David S. Evans, Albert L. Nichols & Richard Schmalensee, *An Analysis of the Government's Economic Case in U.S. v. Microsoft*, 46 ANTITRUST BULL. 163 (2001); Jonathan Krim, *Microsoft, U.S. Near Antitrust Settlement*, WASH. POST, Nov. 1, 2001, at A1.

90. 253 F.3d 34 (D.C. Cir. 2001). The case referred to in the text is the appellate decision in the case commonly known as "*Microsoft III*." *See* Thomas A. Piraino, Jr., *An Antitrust Remedy for Monopoly Leveraging by Electronic Networks*, 93 NW. U.L. REV. 1, 3 (1998). The U.S. Department of Justice (DOJ), the District of Columbia, and a coalition of states brought the cases, which were consolidated into *Microsoft III*. Evans, Nichols & Schmalensee, *supra* note 89, at 163 n.1. Previously, the DOJ had sued Microsoft in 1995 (*Microsoft I*) and again in 1998 (*Microsoft II*). *See id.* In *Microsoft I*, the DOJ charged that Microsoft had engaged in various practices constituting unlawful monopolization and unreasonable restraint of trade under Sections 1 and 2 of the Sherman Act. Piraino, *supra*, at 3. The suit was settled with a consent decree that was formulated to prevent Microsoft from engaging in leveraging its monopoly in the operating systems market to obtain an advantage over its competitors in the applications and browser markets. *United States v. Microsoft Corp.*, 159 F.R.D. 318, 324 (D.D.C. 1995). The decree barred Microsoft from requiring purchasers of operating systems licenses to also purchase licenses for Microsoft applications. *Id.* at 338. In *Microsoft II*, the DOJ charged that Microsoft violated the consent decree by requiring that computer manufacturers purchasing licenses to install Windows 95 also accept Microsoft's "Explorer" Internet browser. *United States v. Microsoft*, 980 F. Supp. 537, 539 (D.D.C. 1997). The DOJ argued that "[b]y tying the two products together, Microsoft would be able to extend its monopoly [in the market] for operating systems into the market for Internet browsers." Piraino, *supra*, at 4. The Court of Appeals for the District of Columbia determined that no illegal tying arrangement existed because the two products were integrated, precluding a finding that the supplier marketed two separate products, which was a requirement for such a violation. *United States v. Microsoft Corp.*, 147 F.3d 935, 950-52 (D.C. Cir. 1998). For a detailed discussion of the use of the tying theory in *Microsoft II*, see Piraino, *supra*, at 4-6.

91. An operating system "controls the computer hardware [by] send[ing] instructions to the microprocessor to perform calculations and to move information to the hard disks and other storage devices." Evans, Nichols & Schmalensee, *supra* note 89, at 171.

92. An internet browser is "software that enables users to navigate the World Wide Web and to display files in the HTML format that has become standard on the Web." *Id.*

Sherman Act.⁹³ Specifically, Microsoft used its power in the operating systems market through the integration of Internet Explorer (IE) into Windows,⁹⁴ the use of license restrictions,⁹⁵ the exclusion of IE from the “Add/Remove” utility,⁹⁶ and the commingling of the operating system

93. *Microsoft Corp.*, 253 F.3d at 71. Although the appellate court upheld the district court’s finding of unlawful monopoly maintenance in *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 35 (D.D.C. 2000), *cert. denied*, 530 U.S. 1301 (2000), the Court of Appeals for the District of Columbia overturned the trial court’s finding of attempted monopolization. *Microsoft Corp.*, 253 F.3d at 80, 84. The appellate court found that the government essentially made the same argument under both the monopolization charge and the attempt charge and the government had not carried its burden on the issue of whether there was a dangerous probability of success in Microsoft’s attempt to monopolize the browser market. *Id.* at 81. The Court of Appeals for the District of Columbia remanded the case on the tying allegation, holding that the rule of reason, rather than the per se rule, should have been applied. *Id.* at 94. The court vacated the divestiture remedy prescribed by the trial court, which specifically required that Microsoft be split into an operating systems organization and a browser organization. *Id.* at 97-100. In addition, the trial judge was found to have committed several ethical violations. *Id.* at 107. As a result, the case was remanded to the district court for reassignment to a different trial judge. *Id.* at 118-19. The Justice Department and Microsoft reached a settlement agreement that did not require a break up of the company, but rather forced it to “play nice and share.” Ariana Eunjung Cha, *Accord Called Win for Software Giant*, WASH. POST, Nov. 2, 2001, at E1. However, the District of Columbia and nine of the states that had joined the Department of Justice in the suit against Microsoft rejected the proposed settlement and stated that they intended to seek tougher sanctions. Jonathan Krim & Ariana Eunjung Cha, *9 States, D.C. Reject Microsoft Settlement*, WASH. POST, Nov. 7, 2001, at E1. Those efforts failed and the judge formally approved the settlement on November 12, 2002. Jonathan Krim, *Legal Wars Have Changed Microsoft, CEO Says*, WASH. POST, Nov. 13, 2002, at E6.

94. *Microsoft Corp.*, 253 F.3d at 64. The court noted that while Microsoft made some general claims as to the benefits of integrating the operating system and browser, the claims were not specific, nor were they substantiated. *Id.* at 62-63; *see also* Evans, Nichols & Schmalensee, *supra* note 89, at 172 (arguing that “[a] browser is a natural addition to an operating system” because its functionality relative to the web is similar to the way that an operating system obtains information from sources and storage media and, likewise, “it enables software developers to access files and . . . features that can be used in conjunction with the web”).

95. *Microsoft Corp.*, 253 F.3d at 59-62. The court found that Microsoft’s license restriction that prohibited Original Equipment Manufacturers (OEMs) “from removing visible means of user access to [Internet Explorer] . . . prevents many OEMs from pre-installing a rival browser and therefore protects Microsoft’s [operating system] monopoly from competition that middleware might otherwise present. *Id.* at 61. The court rejected Microsoft’s justifications for the restrictions and determined that the restrictions had anti-competitive effects and Microsoft had used its monopoly power to maintain its monopoly in violation of Section 2 of the Sherman Act. *Id.* at 62-64.

96. *Id.* at 65. Microsoft included Internet Explorer in the “Add/Remove Programs” utility in Windows 95, but omitted it in Windows 98. *Id.* at 65. The court found that the change “discourag[ed] original equipment manufacturers] from distributing rival products.” *Id.*

and the browser code.⁹⁷ In a separate claim, the government asserted that Microsoft had leveraged its operating system monopoly in an attempt to monopolize the browser market.⁹⁸ While the appellate court reversed the district court's determination of liability under Section 2 on that claim, the Court of Appeals acknowledged that the argument was essentially the same as the one asserted in the monopoly maintenance claim.⁹⁹

In the most recent discussion of leveraging, in *Virgin Atlantic Airways, Ltd. v. British Airways PLC*, the Second Circuit recognized uncertainty surrounding the scope and legitimacy of a monopolistic leveraging claim as an independent cause of action.¹⁰⁰ After recognizing that some doubt existed as to the continued applicability of the leveraging theory in *AD/SAT v. Associated Press*,¹⁰¹ the *Virgin Atlantic Airways* court acknowledged the detrimental impact of the Supreme Court's decision in *Spectrum Sports*¹⁰² on the monopolistic leveraging theory.¹⁰³ The court stated that *Spectrum Sports* raises the standard for a Section 2 violation beyond gaining a competitive advantage because it requires actual, or a

97. *Id.* at 65-66. The government alleged, and the district court found, that Microsoft included "code specific to Web browsing in the same files as code that provided operating system functions." *Id.* at 65. This mechanism prevented the removal of Microsoft's browser because doing so would effectively cripple the operating system. *Id.* at 65-66. Microsoft argued that the code was essential to both the operating system and the browser; thus, its location was essential. *Id.* at 66. The appellate court rejected Microsoft's argument and upheld the finding that the commingling of code had anti-competitive effects. *Id.*

98. *Microsoft*, 253 F.3d at 47. The government claimed that Microsoft engaged in predatory behavior by compensating AOL to encourage its use of Internet Explorer, by proposing to divide the market with competitor Netscape, by offering consideration to Internet Service Providers that distribute Internet Explorer, and by providing the browser at no cost. Evans, Nichols & Schmalensee, *supra* note 89, at 163, 166, 181, 183. The district court found that Microsoft's actions, which also formed the basis for the monopolization liability, "warrant[ed] additional liability as an illegal attempt to amass monopoly power in 'the browser market.'" *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 45 (D.D.C. 2000).

99. *Microsoft*, 253 F.3d at 80-81.

100. *Virgin Atlantic Airways, Ltd. v. British Airways, PLC*, 257 F.3d 256, 272 (2d Cir. 2001) (referencing the *Berkey Photo* monopoly leveraging standard and noting that the court has questioned this proposition since its inception).

101. 181 F.3d 216, 230 (2d Cir. 1999).

102. *Spectrum Sports v. McQuilliam*, 506 U.S. 447 (1993).

103. *Virgin Atlantic Airways*, 257 F.3d at 272. *Virgin Atlantic* brought suit against *British Airways* under both Section 1 and Section 2 of the Sherman Act. *Id.* at 259. *Virgin* argued that *British Airways* engaged in predatory anti-competitive conduct through the use of its incentive agreements with travel agencies and corporate customers, and as a result, *Virgin's* efforts to extend its services to routes between the United Kingdom and the United States were inhibited. *Id.* at 259.

dangerous threat of, monopolization.¹⁰⁴ The court then went on to specify the elements of a claim for monopoly leveraging¹⁰⁵ and determined that the plaintiffs did not meet the required burden.¹⁰⁶ In the end, the Second Circuit, which once championed the monopoly leveraging theory as a claim under Section 2, declined to decide its continued viability.¹⁰⁷

II. AN ANALYSIS OF THE LEVERAGING THEORY CASE LAW AND THE ENSUING ECONOMIC DEBATE

A. *The Courts' Rationale*

The monopoly leverage doctrine developed as a distinct Section 2 claim when plaintiffs found themselves victims of a monopolist's use of its power to harm or destroy a competitor in another market.¹⁰⁸ In response to this development, the courts often turned to the purpose of the Sherman Act to either promote or criticize the theory.¹⁰⁹

The rationale of the court in *Berkey Photo*, the first case to delineate the elements of a Section 2 monopolistic leveraging claim,¹¹⁰ was based on the idea that regulation of monopoly power itself was the aim of

104. *Id.* at 272 (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979)).

105. *Id.* The Second Circuit required proof of: (1) monopoly power in one market, (2) use of that power to gain competitive advantage in a separate market, and (3) injury resulting from the anticompetitive conduct. *Id.* (citing *AD/SAT*, 181 F.3d at 230).

106. *Id.* at 272-73.

107. *Id.* at 272. The Second Circuit held that Virgin lacked proof as to the markets in which British Airways actually possessed monopoly power and as to the markets in which British Airways sought a competitive advantage. *Id.* at 273. The court then affirmed the lower court's grant of summary judgment on the issue. *Id.*

108. *Blair & Esquibel*, *supra* note 3, at 377 (suggesting that plaintiffs with no traditional Section 2 remedy sought to fashion a new, independent theory that excused the traditional requirement of monopoly power or the dangerous probability of achieving it in the leveraged market).

109. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991) (noting that the Sherman Act exists to punish a firm using predatory means to attain or perpetuate a monopoly); *Kerasotes Michigan Theatres v. Nat'l Amusements, Inc.*, 854 F.2d 135, 137-38 (6th Cir. 1988) (stating that the Sherman Act was formulated to prohibit conduct tending to create a monopoly, even if the tendency is only a "creeping one"); *Berkey Photo*, 603 F.2d at n.15 (asserting that "monopoly power itself is the target of [Section] 2").

110. *Berkey Photo*, 603 F.2d at 276 ("Accordingly, the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market."); Puhala, *supra* note 26, at 124 (attributing the foundation of the monopoly leveraging doctrine to the Second Circuit's decision in *Berkey Photo*, specifically citing the court's warning that some anti-competitive activities are only possible if taken by a firm in a dominant market position).

Section 2.¹¹¹ In a footnote, the Second Circuit made this “revolutionary” argument very clear:

We cannot accept Kodak’s argument that, read literally, section 2 prevents a plaintiff from recovering unless there was at least an attempt to monopolize the market in which it claims to have been injured. Since monopoly power itself is the target of §2, it is unreasonable to suggest that a firm that possesses such power in one market and uses it to damage competition in another does not “monopolize” within the meaning of the statute.¹¹²

This statement was a divergence from earlier case law, which found that only monopolization and attempted monopolization violate Section 2.¹¹³

When monopoly leveraging was accepted as a distinct Section 2 claim, it was because Section 2 was interpreted as completely prohibiting conduct that tends toward creating a monopoly.¹¹⁴ Courts used the monopolistic leveraging doctrine to distinguish fair competition, which is taking advantage of efficient operations and technological innovations, from unfair competition, which is monopolizing or attempting to monopolize through predatory means.¹¹⁵ The distinction the courts sought to draw was a fine one, and their inherent distrust of the use of monopoly power led to the fashioning of the new, less stringent claim of monopolistic leveraging.¹¹⁶

The Ninth Circuit was the first circuit to reject explicitly the monopolistic leveraging doctrine.¹¹⁷ After first trying to evade the issue, the court was squarely presented with it in *Alaska Airlines*.¹¹⁸ The Ninth Circuit examined the purpose of Section 2 and its traditional claims before coming to the conclusion that a monopolistic leveraging claim was inappropriate and unnecessary.¹¹⁹

111. *Berkey Photo*, 603 F.2d at 276 n.15.

112. *Id.* See generally Blair & Esquibel, *supra* note 3, at 371.

113. See Puhala, *supra* note 26, at 114 (discussing the history of Section 2 interpretation and acknowledging that *Berkey Photo* “made it easier for a firm to fall within the violative scope of the Sherman Act”).

114. *Kerasotes Michigan Theatres*, 854 F.2d at 137.

115. PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 652a (2002).

116. See Azcuenaga, *supra* note 1, at *5 (noting that less rigorous proof is required to establish a monopolistic leveraging claim).

117. See *Alaska Airlines v. United Airlines*, 948 F.2d 536 (9th Cir. 1991).

118. Callow, *supra* note 19, at 703. *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 998 n.10 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (stating that “the court need not enter into the debate concerning the anticompetitive effects of leveraging” because there was insufficient proof that the defendant used monopoly power).

119. *Alaska Airlines*, 948 F.2d at 548-49. The court emphasized that the Sherman Act sought to prevent creation, or attempted creation, of monopolies through monopoly

The court emphasized that the purpose of Section 2 was to prevent monopolization in a given market.¹²⁰ The court also noted that the Act does not prohibit all monopolies; instead, it allows monopolies deemed to be natural or acquired through superior skill and foresight.¹²¹ In the Ninth Circuit's view, while traditional claims of monopolization and attempted monopolization differentiate between allowable and prohibited monopolies, monopoly leveraging does not and is therefore inconsistent with the purpose of the Act.¹²²

While the Ninth Circuit rejected the notion that monopolistic leveraging constituted a separate claim under Section 2,¹²³ it agreed that leveraging was one way in which a monopolist could exercise its power and achieve additional benefits.¹²⁴ In doing so, the court implicitly rejected the economic theory asserted by the Chicago School analysts, who believed that it was impossible to gain additional benefits by leveraging monopoly power.¹²⁵ Rather, the court ruled that such

leveraging; if there is a dangerous probability that a monopoly would result from such activity, the conduct is circumscribed under traditional Section 2 claims. *Id.* at 549.

120. *See Alaska Airlines*, 948 F.2d at 546-47.

121. *Id.* at 547-48.

122. *Id.* at 548. The court stated:

Berkey Photo's monopoly leveraging doctrine fails to differentiate properly among monopolies. The anti-competitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in the second market. By definition, the monopolist has failed to gain, or attempt to gain, a monopoly in the second market. Thus, such activity fails to meet the second element necessary to establish a violation of Section 2. Unless the monopolist uses its power in the first market to acquire and maintain a monopoly in the second market, or attempt to do so, there is no Section 2 violation.

Id.

123. *Id.* at 547 (unequivocally rejecting the monopoly leveraging doctrine established in *Berkey Photo* as an independent theory of Section 2 liability); *see also* Callow, *supra* note 19, at 703-05.

124. *Alaska Airlines*, 948 F.2d at 548. The court stated that "[m]onopoly leveraging is just one of a number of ways that a monopolist can permissibly benefit from its position." *Id.*

125. *See infra* notes 144-49 and accompanying text; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 172-73 (1976) (presenting a hypothetical to demonstrate the view that a monopolist cannot gain additional profits from leveraging its monopoly in a second market; *see also* BORK, *supra* note 39, at 140 (referring to traditional leverage theory as "the fallacy of double counting"). For another example of a court following the logic of the Chicago School, *see Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1203 (3d Cir. 1995), suggesting that monopoly leveraging claims are economically questionable and based on analysis "akin to the myth that a monopolist can charge any price it wants."

activities are prohibited by traditional Section 2 claims; thus, an additional claim was unnecessary.¹²⁶

The Third Circuit also expressly rejected the doctrine, adopting a rationale similar to that of the Ninth Circuit.¹²⁷ The court held that as a matter of law, a leveraging claim could not stand without proof of actual monopolization or a dangerous probability of it in the second market.¹²⁸ Thus, the Third Circuit recognized only traditional Section 2 claims.

Courts that rejected the leveraging claim struggled with the foundation of the leveraging doctrine, many of them noting that it originated in dictum.¹²⁹ Essentially, the theory arose out of the Supreme Court's broad statements about monopoly power in an early antitrust case.¹³⁰ Nonetheless, proponents of the monopolistic leveraging claim continue to point to the Court's early and uncharacteristically broad language to support their argument.¹³¹

B. The Economic Debate

From its inception, leading economists debated the leveraging theory.¹³² Initially, they accepted the courts' rationale that the

126. *Alaska Airlines*, 948 F.2d at 549; see Callow, *supra* note 19, at 705.

127. *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 206 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993). The *Fineman* court referenced the Ninth Circuit's opinion in *Alaska Airlines*, which had also relied on a distinction between Section 1 and Section 2 liability, and stated that its decision was "in concert" with the Court of Appeals for the Ninth Circuit. *Id.*

128. *Id.* at 203.

129. *Id.* at 205-06 (stating that the *Berkey Photo* court relied on dicta in *United States v. Griffith* for the foundation of its monopoly leveraging rule); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1359 (Fed. Cir. 1999) (describing the statement in *Griffith* as "dictum"); *AD/SAT v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999) (referring to the court's statements in *Berkey Photo* as dictum); *Willman v. Heartland Hosp. E.*, 836 F. Supp. 1522, 1534 (W.D. Mo. 1993) (noting that the Second Circuit stated that the acknowledgement of a claim for monopoly leveraging was dictum); Joseph Kattan, *The Decline of the Monopoly Leveraging Doctrine*, in ANTITRUST 41 (1994) (characterizing the Court's statements in *Griffith* as dictum).

130. *Griffith*, 334 U.S. at 107-08 (explaining that monopoly power cannot be used "to beget monopoly" or "to gain a competitive advantage").

131. The language in *Griffith* and *Berkey Photo* followed from Judge Learned Hand's statements in *United States v. Aluminum Company of America*, 148 F.2d 416, 427 (2d Cir. 1945). Justice Hand asserted that it is preferable to have a system of small producers to one in which there are a few that can control the market, even at the expense of efficiency. *Id.* at 427. Courts that endorsed the theory that monopoly leveraging to gain competitive advantage is a Section 2 violation mirror this harsh approach.

132. BORK, *supra* note 39, at 372-73; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 10.10 (4th ed. 1992); Markovitz, *supra* note 50, at 196.

detrimental effects of leveraging were obvious.¹³³ However, the Chicago School¹³⁴ of economists challenged the theory as being presumptuous, if not impossible.¹³⁵ In recent years, however, economists have been returning to populist notions of economics, arguing that there may in fact be circumstances in which leveraging monopoly power may be both beneficial to the monopolist and detrimental to society.¹³⁶

The traditional leverage theory asserts that when a monopolist uses its power in its own market to control activities in a separate market, the monopolist is attempting to extend its power into the second market.¹³⁷ The traditional argument assumed that two monopolies create more monopoly profits than a single monopoly, resulting in more economic damage.¹³⁸ The economic view of such activities is that a firm with monopoly power in one market may, through certain practices in another market, be able to impose a “deadweight welfare loss” upon society from which they gain profits.¹³⁹ The basic argument is that a dominant firm may reduce output and increase price without actual or threatened

133. Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2079-80 (1999) (stating that in the first half of the century, monopoly leveraging was viewed as threatening to competition by courts, commentators, and legislators and suggesting that the assumption that two monopolies would create more economic damage than one seemed so intuitive that economists did not debate it initially).

134. The Chicago School has been described as “those who maintain that most behavior by firms is better explained as attempts to improve the efficiency of operations rather than as monopolizing, and who believe that where attained, market power erodes reasonably quickly.” Richard O. Zerbe and Michael T. Mumford, “Does Predatory Pricing Exist? *Economic Theory and the Courts After Brooke Group*,” 41 ANTITRUST BULL., 949, 983 (1996); see also Lombardo, *supra* note 44, at 387 nn. 2, 147, 193, 211 (describing the general teachings of the Chicago School, its history, and its views on monopoly leveraging); Rudolph J.R. Peritz, *Theory and Fact in Antitrust Doctrine: Summary Judgment Standards, Single-Brand Aftermarkets and the Clash of Microeconomic Models*, 45 ANTITRUST BULL., 887, 915-17 (2000) (outlining the foundations of the Chicago School).

135. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 932 (2001). Posner stated that the Chicago School approach is skeptical about the harm to competition posed by unilateral action. He noted that the Chicago School approach recognizes that it is difficult to eliminate competition through unilateral action and that rigid antitrust enforcement may suppress a practice that is actually efficient, rather than anti-competitive. *Id.*

136. Thomas A. Piraino, Jr., *Identifying Monopolists’ Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 844 (2000) (proposing that when a monopolist leverages market power from one market into another, it can achieve additional profits without providing consumers more efficiency benefits and therefore such conduct should be viewed as a violation of Section 2 as an attempt to monopolize).

137. Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 516 (1985).

138. Feldman, *supra* note 133, at 2080.

139. Blair & Esquibel, *supra* note 3, at 388.

monopoly.¹⁴⁰ The monopolistic behavior will trigger “a loss in consumer surplus because consumers value the lost output . . . more than the cost to society of producing that output.”¹⁴¹ Producer surplus is also reduced because the cost of producing the lost output is less than its market value.¹⁴² The net result is social welfare loss, which, according to some economists, may be substantial even absent a traditional Section 2 violation.¹⁴³

Leading Chicago School economists have criticized the leveraging theory.¹⁴⁴ The basis of their view is that a firm with monopoly power may be able to gain profits from its own market, a second market, or a combination of the two, “but the total amount of restriction that the monopolist will profitably be able to impose is fixed.”¹⁴⁵ Judge Posner, a leading member of the Chicago School,¹⁴⁶ questioned what incentive a firm with a monopoly in one market would have to extend that monopoly to additional products because without price discrimination, a monopolist will gain nothing by monopolizing a complementary market.¹⁴⁷ Proponents of this position showed that a monopolist cannot increase prices in a secondary market without losing profits in its primary market; thus, there is no net gain and no additional economic damage from leveraging.¹⁴⁸ The Chicago School believes, therefore, that a monopolist will leverage for pro-competitive or neutral reasons.¹⁴⁹

Post-Chicago School economic analysis¹⁵⁰ has turned away from broad generalizations and has focused instead on intricate fact finding.¹⁵¹ This

140. *Id.* at 388, 390. Blair and Esquibel provide a detailed analysis of traditional economic thought regarding the dangers of monopolistic leveraging. *Id.* at 388-95. They argue that without the leveraging doctrine, there is a gap in the protection of consumers in the antitrust laws. *Id.* at 395.

141. *Id.* at 390.

142. *Id.* For a detailed discussion on the economic arguments made in support of and in opposition to the leveraging theory, see generally Kaplow, *supra* note 137.

143. Blair & Esquibel, *supra* note 3, at 394-95; see Rubinfeld, *supra* note 2, at 2080 (arguing that leveraging can have anti-competitive effects if it enables a dominant firm to raise its competitors' economic costs of competing).

144. Feldman, *supra* note 133, at 2080.

145. Kaplow, *supra* note 137, at 517-18. Many proponents of this perspective were students of Aaron Director at the University of Chicago. *Id.* at 518 n.12.

146. Posner, *supra* note 135, at 932 (considering himself a member of the Chicago School).

147. Kaplow, *supra* note 137, at 518 (citing POSNER, *supra* note 74, at 173).

148. Feldman, *supra* note 133, at 2080.

149. *Id.*

150. See Michael S. Jacobs, *The New Sophistication in Antitrust*, 79 MINN. L. REV. 1, 36 n.151 (1994) (highlighting the leading post-Chicago scholarship); Lombardo, *supra* note 44, at 389 n.10 (including Louis Kaplow, Janusz Ordover, Stephen Salop, Daniel

school of thought believes that a monopolist may be able to gain additional profits through leveraging in certain circumstances.¹⁵² In addition, the argument has been made that presuming that a firm always acts to increase profits may be incorrect.¹⁵³ It has been suggested that the motivation behind monopoly leveraging activities may be a reduction in competition over time, rather than immediate profits.¹⁵⁴ This newly developed line of thought considers that many large firms are more intent on maximizing their total output, sales, or growth rates rather than their profits.¹⁵⁵ This theory is in direct opposition to that of Chicago School economists, who conclude that firms will not choose to pursue predatory practices when the losses outweigh potential gains.¹⁵⁶ However, courts have been hesitant to adopt post-Chicago theories due to the detailed, fact-intensive analysis that they require.¹⁵⁷

III. THE APPROPRIATE ROLE OF THE LEVERAGING THEORY IN ANTITRUST LAW

The two primary issues relating to the monopolistic leveraging doctrine today are whether leveraging to gain a competitive advantage violates Section 2 of the Sherman Act and whether the leveraging theory can be appropriately applied in industries with significant network externalities.¹⁵⁸ The first issue is a much easier one to resolve; it is clear that an independent claim of leveraging cannot be justified under Section

Scheffmen, and Oliver Williamson in a list of post-Chicago economists); Peritz, *supra* note 134, at 917-19 (discussing the new post-Chicago economics).

151. Rubinfeld, *supra* note 2, at 881 (asserting that “an evaluation of the anticompetitive effects of leveraging behavior will be fact-dependent”).

152. See Kaplow, *supra* note 137, at 520; Feldman, *supra* note 133, at 2086.

153. Kaplow, *supra* at note 137, at 555 (recognizing the possibility that management might be motivated by goals other than profit maximization).

154. *Id.* at 524. For a full discussion of Chicago and Post-Chicago theory on monopolistic leveraging, see Lombardo, *supra* note 44, at 417-39.

155. See Lombardo, *supra* note 44, at 422-25.; see also Harlan M. Blake & William K. Jones, *Towards a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 460-61 (1965). But see RICHARD A. POSNER, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 613 (1974) (noting that the best way to increase a firm’s size is not to enhance output but to maximize profits).

156. See BORK, *supra* note 39, at 151-52.

157. Feldman, *supra* note 133, at 2080 n.4; see Posner, *supra* note 135, at 937-39 (noting that judicial antitrust doctrine more or less follows changes in economic theory, but with a lag). See generally Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105 (1989).

158. See, e.g., *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 272 (2d Cir. 2001); David A. Balto, *Standard Setting in a Network Economy, Remarks at the Cutting Edge Antitrust Law Seminars International*, 2000 WL 641600 (F.T.C.).

2.¹⁵⁹ As for the second issue, the applicability of leveraging theory to dynamic industries, a considerable amount of debate among both courts and commentators remains.¹⁶⁰

A. Resolution of the Debate Over an Independent Leveraging Claim

Leveraging monopoly power to impact a second market can have anti-competitive effects.¹⁶¹ When those effects are combined with the intent to monopolize, the activity becomes a violation of Section 2, either because the firm is successful in achieving monopolization or because there is a dangerous probability of achieving monopolization.¹⁶² Therein lies the appropriate role of the leveraging theory in antitrust law, as a way by which a firm commits a traditional violation of Section 2. To find that leveraging monopoly power to gain a competitive advantage — without more — violates Section 2 would be wholly counter to the Act's purpose and to efficient and appropriate business strategies.

The Supreme Court asserted that the purpose of the Sherman Act could not be the protection of competitors against aggressive competition because competition is exactly what the Act seeks to foster.¹⁶³ While courts have clearly moved beyond the days in which they asserted that all monopolies are at least highly suspect, the circuit courts seem reluctant to eliminate the monopolistic leveraging claim, which is clearly based on

159. See Blair & Esquibel, *supra* note 3, at 372-74 (arguing that "monopoly leveraging is, from an economic perspective, theoretically bankrupt"); Kattan, *supra* note 129, at 41 (suggesting that "the doctrine's days are numbered").

160. See generally Balto, *supra* note 158; Piraino, *supra* note 90, at 1; Feldman, *supra* note 133, at 2079; Posner, *supra* note 135, at 925.

161. See Blair & Esquibel, *supra* note 3, at 373-76 (arguing that monopoly leveraging causes welfare losses); Lombardo, *supra* note 44, at 430 (stating that "strategic behavior . . . can be used by a firm with monopoly power in one market to place its rivals in a second market at a competitive disadvantage" and further that "this type of unilateral anticompetitive behavior stems from the abuse of the monopolist's power to control price in the first market"); see also Feldman, *supra* note 133, at 2106 (claiming that monopoly leveraging can damage competition because a monopolist may leverage "to prevent erosion of its primary monopoly").

162. See *supra* notes 21-22 and accompanying text.

163. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). The Court interpreted the purpose of the Sherman Act as being the protection of consumers from "the failure of the market," not the protection of businesses from a successful market. *Id.* The Court further stated that the Act does not seek to punish competitive behavior, or even behavior that is "severely" competitive, but rather it focuses on conduct that tends to eliminate competition itself. *Id.* The Court also noted an effort to avoid constructing Section 2 in a way that "might chill competition, rather than foster it." *Id.* See also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.").

that proposition.¹⁶⁴ The Act is concerned with monopoly power and seeks to prohibit firms from achieving that power through predatory means or from using it to eliminate competitors or harm consumers.¹⁶⁵ But to say that the Sherman Act seeks to prohibit firms, which have monopoly power, from obtaining a competitive advantage would mean that such firms could not operate at their highest level of efficiency for fear that doing so would result in a violation.

While it may be possible for a firm to profit or otherwise gain from leveraging monopoly power, the efficiencies created may also benefit consumers.¹⁶⁶ This is one of the primary responses to the government's accusations that Microsoft leveraged its operating system monopoly power to both maintain that monopoly and attempt to gain a monopoly in the browser market in violation of the Sherman Act.¹⁶⁷ It is argued that Microsoft's practices, such as integrating the two products, were

164. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) (quoting *United States v. United States Shoe Mach. Corp.*, 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd per curiam*, 247 U.S. 521 (1954)); Puhala, *supra* note 26, at 124.

165. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991) (stating that the traditional interpretation of the Sherman Act suggests that it punishes the use of predatory behavior to attain or maintain a monopoly and that the "ultimate victim" of such activity is the consumer); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602, 610-11 (1985); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945).

166. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548-49 (9th Cir. 1991) (noting that leveraging is a cost incurred because our antitrust laws permit efficient monopolies and that leveraging may actually undermine monopoly power and have pro-competitive effects); Kattan, *supra* note 129, at 41 (recognizing that monopoly leveraging may produce benefits from economic integration); Piraino, *supra* note 90, at 62 (noting that network monopolies can benefit consumers).

167. David Evans & Richard Schmalensee, *The Economics of the Microsoft Antitrust Case: An Updated Post-Trial Primer* (2000) at http://www.neramicrosoft.com/level_1/nera_au.html (last visited Oct. 12, 2002) (suggesting that Microsoft's activities "helped consumers by lowering prices, increasing quality and expanding output of Internet browsing software").

done to provide customers with a higher quality product.¹⁶⁸ The defendants in *Berkey Photo* made the same argument.¹⁶⁹

The Supreme Court should address this issue to remove the ambiguity faced by antitrust lawyers as they counsel their clients. The trend clearly implies that the leveraging doctrine as a distinct claim under Section 2 has met its demise.¹⁷⁰ Antitrust laws are concerned with protecting competition, not competitors.¹⁷¹ As one antitrust practitioner put it, “[i]n an era in which competitiveness in global markets is a key to national economic performance, a doctrine that quite consciously seeks to curb the competitive advantages of large companies seems out of sync with the times.”¹⁷² Although it may be clear that the popularity of the monopolistic leveraging doctrine is declining, at least in terms of a separate, less stringent Section 2 violation,¹⁷³ the fact that the circuit split remains is detrimental and contrary to an important tenet of our legal system — certainty. From the earliest days of our government, the idea that individuals should be aware of the law and its consequences has been fundamental.¹⁷⁴ To continue with the law in its current state would mean that a monopolist would not know whether it is violating antitrust law when it spends money to compete or when it improves its product.¹⁷⁵

168. See *id.* Evans and Schmalensee point out that the court seemingly acknowledged this point in its finding of facts:

The debut of Internet Explorer and its rapid improvement gave Netscape an incentive to improve Navigator's quality at a competitive rate. The inclusion of Internet Explorer with Windows at no separate charge increased general familiarity with the Internet and reduced the cost to the public of gaining access to it, at least in part because it compelled Netscape to stop charging for Navigator. These actions thus contributed to improving the quality of Web browsing, lowering its cost, and increasing its availability, thereby benefiting consumers.

Id. (citing Court's Findings of Fact, ¶ 408).

169. *Berkey Photo, Inc. v. Eastman Kodak, Co.*, 603 F.2d 263 (2d Cir. 1979); see Puhala, *supra* note 26, at 123-24.

170. Kattan, *supra* note 129, at 41.

171. *Id.* at 42.

172. *Id.*

173. Blair & Esquibel, *supra* note 3, at 387.

174. See *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997) (discussing the policy of *stare decisis* and the need for the law to be settled and predictable).

175. Evans & Schmalensee, *supra* note 167, at 8-9 (suggesting that the government's test for whether an activity is predatory would prohibit successful companies from trying to remain successful).

B. Monopoly Leveraging in Dynamic or Network Industries

The real challenge with regard to the leveraging theory is its application to markets with network externalities.¹⁷⁶ Some argue that leveraging poses an even greater threat in such markets.¹⁷⁷ Network externalities refer to the economies of scale in consumption – “the situation in which the larger the firm’s output is . . . the more valuable that output is to its consumers.”¹⁷⁸ When a network monopolizes a particular market, potential competitors “often cannot compete in a related market without access to the network.”¹⁷⁹ In the case of Microsoft, potential competitor application programs cannot operate without access to the Windows operating system. Therefore, Microsoft can leverage its power by simply refusing to give competitors access to Windows and thereby gaining a significant advantage in the applications market.¹⁸⁰ When monopoly power is leveraged in this way, a secondary impact is an increase in entry barriers in the monopolized market because the switching costs are high.¹⁸¹ The *Microsoft* court avoided using the language of “monopoly leveraging,” but the theory on which its decision was based is essentially that. Given the dispute over the legitimacy of the leveraging theory, the court’s avoidance of the term is certainly understandable.¹⁸² Commentators have also acknowledged the unique concerns that arise when leveraging occurs in dynamic network markets, suggesting that innovation incentives of competitors will be blunted if leveraging is practiced to decrease the likelihood of competitor entry.¹⁸³

176. See Piraino, *supra* note 136, at 824.

177. *Id.*

178. Posner, *supra* note 135, at 928. Posner provided the example of the telephone, explaining that a telephone is worthless unless there is more than one subscriber. The more subscribers, the more valuable the service is to each person. *Id.* Posner also noted that the value is not in the networks themselves; rather, the network is the “conduit” for valued services. *Id.* See also Muris, *supra* note 21, at 718.

179. Piraino, *supra* note 136, at 824.

180. *Id.*

181. Rubinfeld, *supra* note 2, at 877-78 (suggesting that the blunting of innovation incentives is particularly troubling).

182. See *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (2000). The *Microsoft* court acknowledged that there is considerable debate as to whether “(old economy) § 2 monopolization doctrines should apply to firms competing in dynamic technological markets characterized by network effects.” *Id.* The court further noted that there is a lack of consensus as to whether, and to what extent, current antitrust law should be amended to recognize the nature of such markets. *Id.*

183. Daniel L. Rubinfeld, *Competition, Innovation, and Antitrust Enforcement in Dynamic Network Industries*, Address Before the Software Publishers’ Association (Mar. 24, 1998), available at <http://www.usdoj.gov/atr/public/speeches/1611.htm>; cf. Lawrence A.

The counter-argument to the proposition that monopoly leveraging poses a greater danger in network markets is as follows: because there is an extraordinary amount of capital available for investment in technology and because new networks can be created quickly, network monopoly power is still vulnerable to competition.¹⁸⁴ However, even if a firm with network monopoly power loses its position to a new entrant, the firm had an opportunity to leverage its position prior to its demise, and it could do so more easily because of the network externalities.¹⁸⁵ Moreover, while the firm may lose its monopoly power in the network market, it may retain the competitive advantage gained in the secondary market.

A second counter-argument is that leveraging is more typically used in innovation industries as a defensive, rather than as an offensive, tool. Commentators have argued that a firm uses monopoly leveraging to maintain strength in its current market, to integrate products to produce demand in the primary market, and to compete vigorously in a related market and thereby decrease competition in the primary market because competitors must shift resources to the related market.¹⁸⁶ Microsoft is an example of a firm that has used leveraging as a defensive, rather than predatory, mechanism.¹⁸⁷

IV. CONCLUSION

The use of monopoly power to affect a second market can have anti-competitive effects. However, these effects result in liability under Section 2 of the Sherman Act only when they rise to the level of monopolization or attempted monopolization. The Supreme Court must step in, however, and prevent plaintiffs from continuing to assert Section 2 violations based on monopolistic leveraging. Acquiring a competitive advantage through the use of monopoly power is not the aim of Section 2 of the Sherman Act. The majority of the circuits addressing this issue

Sullivan & Ann I. Jones, *Monopoly Conduct, Especially Leveraging Power from One Product or Market to Another*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 165, 175 (1992) (discussing the way in which prohibiting leveraging will protect innovation).

184. Posner, *supra* note 135, at 930 (noting that Schumpeter's theory that temporary monopolies operate to maximize innovation that provides substantially more social benefits than the social costs of the resulting short-lived monopoly prices may be the reality of the new economy).

185. Lombardo, *supra* note 44, 421 (arguing that even if a monopolist could not indefinitely prevent new entrants into the market, it could delay such entry and thereby extend the time during which it could reap profits).

186. Feldman, *supra* note 133, at 2098.

187. *Id.*

have made similar findings; all that remains now is for the Supreme Court to make this same distinction and finally settle this area of law.

At the same time, the use of the leveraging theory to describe the way in which a firm might commit a traditional Section 2 violation is increasingly controversial in today's economy. While firms can and should seek the benefits of economic integration, those benefits cannot cross the line into harm for competition. In industries where separate products are closely related, the line between harmful and beneficial leveraging can be difficult to draw. *Microsoft* is a clear example of the problems that arise when the monopoly leveraging theory is applied to innovation or network industries. Although the court went to great lengths to justify the applicability of traditional antitrust doctrine to dynamic markets, it is clear that significant uncertainty remains in the minds of many economists and business leaders.

