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ANTITRUST LAW—BERKEY PHOTO AND ALASKA AIRLINES: DIFFERENT APPROACHES TO MONOPOLY LEVERAGING CLAIMS

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INTRODUCTION

In 1890 Congress enacted the Sherman Act[1] which sought to limit unlawful monopolies or any organizations which operate to restrict competition in the American economy.[2] Section 1 of the Sherman Act generally applies to allegations of concerted conduct between two or more entities which results in anti-competitive practices.[3] Section 2 also applies to concerted conduct, but more importantly, it is the only section in the Sherman Act which provides a remedy for monopoly violations caused by unilateral conduct. Section 2 condemns the following three categories of activity: monopolizing, attempting to monopolize, and combining or conspiring to monopolize.[4] As discussed in Section IB of this Note, the courts have defined these terms and expanded the definitions where appropriate. This Note focuses on the "monopolizing" and "attempting to monopolize" aspects of section 2 and evaluates whether monopoly leveraging is a type of "attempt" or a whole new offense. It ultimately examines whether monopoly leveraging[5] should be considered an offense under section 2 of the Sherman Act.[6]

The first expressly stated offense under section 2 is monopolizing. To bring a successful monopolization claim, a plaintiff must

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1. 1 EARL KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 7 n.1.1 (1978).

2. *Id.* at 11-12.

3. 15 U.S.C. § 1 (1988 & Supp. IV 1992). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

4. 15 U.S.C. § 2 (1988 & Supp. IV 1992). "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . . ." *Id.*

5. Monopoly leveraging occurs when a competitor holds a lawful monopoly in one market and wields that monopoly power to gain a competitive advantage in a separate market. *See infra* note 13.

6. For another treatment of this issue, see Joseph M. Callow, Jr., Note, *Cut-Throat Competition in the Friendly Skies:* Alaska Airlines v. United Airlines, *948 F.2d 536 (9th Cir. 1991), cert. denied, 112 S. Ct. 1603 (1992)*, 61 U. CIN. L. REV. 681 (1992).

prove "possession of monopoly power in the relevant market"[7] and "the *willful* acquisition or maintenance of that power"[8] by the alleged monopolist. The relevant market is generally the market in which the plaintiff and defendant are competing. The scope or size of the relevant market (as determined by the court) is extremely important in determining whether a company possesses monopoly power.[9] To be liable under the above formula, the actor must possess monopoly power in the specific relevant market and willfully acquire or maintain such power.

An "[a]ttempt to monopolize" is the second expressly stated offense under the Sherman Act. The Supreme Court has set forth three elements to aid lower courts in defining an attempt to monopolize claim. First, the monopoly holder must intend to monopolize the relevant market.[10] Second, the monopoly holder must engage in conduct that is designed to carry out such intent.[11] Third, not only must a plaintiff prove intent on the part of the allegedly unfair competitor, but also that a dangerous probability of success exists.[12]

In addition to the explicit section 2 claims of monopolization and attempt to monopolize, this section also forms the basis for a line of cases developing the doctrine of "monopoly leveraging." "Leveraging" normally occurs when an entity possesses a monopoly in one market and uses that monopoly power to gain a competitive advantage in a separate market.[13] Some courts have recognized

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7. United States v. Grinnell Corp., 384 U.S. 563, 570 (1966).

8. *Id.* at 570-71 (emphasis added).

9. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956). The Court had to determine whether cellophane constituted its own market or was part of a broader market for wrapping products. If the former market analysis was applied, DuPont would have possessed monopoly power. The Court stated that "where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market." *Id.* at 394.

10. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 n.28 (1985) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945)).

11. *Id.* The intent required for a successful "attempt" claim is specific whereas that required for a "monopolization" claim is the general intent to do the act.

12. Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993); Swift and Co. v. United States, 196 U.S. 375, 396 (1905); *see also* American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946) ("The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a *dangerous probability* of it . . . .") (emphasis added).

13. *See* Barry E. Hawk, *Attempts to Monopolize - Specific Intent as Antitrust's Ghost in the Machine*, 58 CORNELL L. REV. 1121, 1156 (1973). "[T]he defendant has

monopoly leveraging as an offense under section 2 while other courts have held that leveraging does not conform to any of the enumerated offenses. In *Berkey Photo, Inc. v. Eastman Kodak Co.*,[14] the Court of Appeals for the Second Circuit endorsed monopoly leveraging and noted its requirements.[15] Twelve years later the Court of Appeals for the Ninth Circuit, in *Alaska Airlines, Inc. v. United Airlines, Inc.*,[16] became the first circuit court to openly refute the leveraging doctrine, setting the stage for the present controversy.[17]

This Note will attempt to resolve the controversy between these two circuits. Section I of this Note analyzes the legislative history behind the Sherman Act with particular emphasis on section 2 of the Act as well as the cases prior to *Berkey Photo*.[18] Section II will look at the *Berkey Photo* decision itself including Judge Kaufman's synthesis of the leveraging doctrine.[19] The cases following *Berkey Photo*, especially the Supreme Court cases which influenced the *Alaska Airlines* court, are examined in Section III.[20] Section IV presents the facts and analysis of the *Alaska Airlines* opinion.[21] Finally, Section V explores the validity of the two approaches to monopoly leveraging, especially in light of recent Supreme Court precedent.[22] This Note ultimately concludes that monopoly leveraging cannot constitute an offense under the Sherman Act.

I. BACKGROUND

Although previous cases had indicated the existence of the leveraging doctrine,[23] *Berkey Photo, Inc. v. Eastman Kodak Co.*[24]

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monopoly power in one of the markets or on one level of the distribution chain. A violation of section 2 occurs when this monopoly power is misused in a second market, usually to gain a competitive advantage through the leverage resulting from its dominance in the primary monopoly market." *Id.* *See also* Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 516 (1985). "Traditional leverage theory claims that a monopolist's use of its power in its own market to control activities in another market typically represents an attempt to spread its power to the other market." *Id.*

14. 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).
15. *Id.* at 276.
16. 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992).
17. *Id.* at 547.
18. *See infra* notes 23-73 and accompanying text.
19. *See infra* notes 76-110 and accompanying text.
20. *See infra* notes 111-42 and accompanying text.
21. *See infra* notes 143-85 and accompanying text.
22. *See infra* notes 186-263 and accompanying text.
23. *See* United States v. Griffith, 334 U.S. 100 (1948); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

was the first case to clearly express[25] the requirements for a monopoly leveraging claim.[26] The *Berkey Photo* court held that "the use of monopoly power attained in one market to gain a competitive advantage in another market is a violation of section 2 [of the Sherman Act], even if there has not been an attempt to monopolize the second market."[27] Simply stated, under the monopoly leveraging theory, if a firm has a lawful monopoly[28] in one market and uses it to gain some type of competitive advantage in a second market, the firm would be in violation of section 2 regardless of the lack of any intent to monopolize the second market.

The monopoly leveraging rule articulated in *Berkey Photo* arguably made it easier for a firm to fall within the violative scope of the Sherman Act. As mentioned above, monopoly power in the relevant shared market was traditionally required to complete a violation under the Sherman Act. The monopoly leveraging doctrine, however, created an offense for monopoly held outside the relevant market that merely influenced this secondary market.[29] The leveraging doctrine moved away from the stricter requirements of the expressly stated section 2 offenses.[30] Other cases had indicated that proceeding beyond the traditional offenses would facilitate the policing of anti-competitive conduct,[31] but *Berkey Photo* was the first case to express clearly the elements of the leveraging doctrine.

The doctrine developed in *Berkey Photo* received considerable

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24. 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

25. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 546 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992).

26. *Berkey Photo*, 603 F.2d at 275-76.

27. *Id.* at 276. The Ninth Circuit, however, has taken issue with the "clearness" of this doctrine, stating disparagingly that the "doctrine has only two rather loose elements." *Alaska Airlines*, 948 F.2d at 546.

28. Lawful monopolies generally arise when a company, through superior skill and efficiency, gains a monopoly over competitors. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392-93 (1956). The Court stated:

> A retail seller may have in one sense a monopoly on certain trade because of location, as an isolated country store or filling station, or because no one else makes a product of just the quality or attractiveness of his product, as for example in cigarettes. Thus one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power . . . is not the power that makes an illegal monopoly.

Id. (footnote omitted).

29. *Berkey Photo*, 603 F.2d at 275-76.

30. *Id.*

31. *See* United States v. Griffith, 334 U.S. 100, 107 (1948); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

treatment in the courts of appeals and district courts.[32] Some courts responded favorably to the doctrine[33] while others decided to reserve judgment until a fact pattern presented itself that more closely fit the paradigm for leveraging.[34] When the Court of Appeals for the Ninth Circuit finally spoke decisively upon the issue[35] in *Alaska Airlines, Inc. v. United Airlines, Inc.*,[36] it became the first circuit to reject the *Berkey Photo* doctrine.[37] The *Alaska Airlines* court cited numerous policy considerations, which are discussed in detail later,[38] as a justification for the holding. The Ninth Circuit also noted that the *Berkey Photo* methodology was overbroad because it exceeded the previously outlined traditional offenses.

A. *Legislative History*

The lawmakers who debated the Sherman Act never explicitly considered the doctrine of monopoly leveraging or many of the other doctrines which have subsequently developed under the Sherman Act. They were more concerned with the "big picture."[39] This fact, however, does not invalidate monopoly leveraging *per se*. Instead, monopoly leveraging must be examined in the context of the judicially created guidelines as sanctioned by Congress.

Most laws enacted by Congress require some level of interpretation by the courts to determine the meaning of specific language. The broad language of the Sherman Act, however, mandates even greater intervention on the part of the courts in defining an unlawful monopoly because so many "gaps" were left in the text.[40] The broad interpretive approach taken by certain courts finds support in the remarks of Senator John Sherman of Ohio, the chief proponent of the Sherman Act. Senator Sherman explained to his colleagues

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32. *See infra* notes 123-42 and accompanying text.

33. *See infra* notes 123-30 and accompanying text.

34. *See, e.g., infra* notes 131-36 and accompanying text.

35. Originally, the Ninth Circuit had been partial to the doctrine as established in *Berkey Photo*. *See, e.g.*, M.A.P. Oil Co. v. Texaco Inc., 691 F.2d 1303 (9th Cir. 1982); *cf.* Catlin v. Washington Energy Co., 791 F.2d 1343 (9th Cir. 1986) (indicating, however, that the court was unsure because it reserved judgment on the issue of leveraging).

36. 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992).

37. The Third Circuit has recently followed the Ninth Circuit in rejecting *Berkey Photo*'s monopoly leveraging. *See* Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 206 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993). The court stated that "[i]n concert with the Court of Appeals for the Ninth Circuit, we hold that in order to prevail upon a theory of monopoly leveraging, a plaintiff must prove threatened or actual monopoly in the leveraged market." *Id.*

38. *See infra* notes 170-84 and accompanying text.

39. *See infra* note 41 and accompanying text.

40. *See infra* notes 41-42 and accompanying text.

as follows: "[I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case."[41] He continued, stating "[a]ll that we, as lawmakers can do is to declare general principles."[42] This was certainly a broad delegation of power to the courts.

Debate surrounding the original bill reinforced the notion that the Act would cover unilateral conduct. Senator George Gray of Delaware proposed amending the bill so that it would have condemned only concerted conduct while exempting unilateral conduct. Had his proposed amendment passed, pure monopoly and attempts to monopolize would not have been violations.[43] Senator Gray was concerned that the courts would have too much difficulty in defining monopoly on a case by case basis.[44] The Gray amendment was quickly defeated, however, thereby fortifying the Judiciary's power to interpret and shape violations under the Sherman Act.[45] The Supreme Court has reinforced this legislative decision, and in fact has established section 2 as the sole basis for evaluating unilateral conduct.[46]

Sections 1 and 2 of the Sherman Act address distinctly different types of conduct. Under section 1, there must be concerted action evidenced by a "contract" or "combination."[47] When such a combination is found, a mere "restraint of trade" will constitute a violation.[48] On the other hand, a single actor must possess a monopoly or have a dangerous probability of possessing a monopoly to violate section 2.[49] This constitutes the primary difference between section 1 and section 2 of the Sherman Act.

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41. 21 CONG. REC. 2460 (1890), *reprinted in* KINTNER, *supra* note 1, at 122.

42. *Id.*

43. 21 CONG. REC. 3152 (1890), *reprinted in* KINTNER, *supra* note 1, at 292-93.

44. *Id.*, *reprinted in* KINTNER, *supra* note 1, at 293.

45. *Id.*, *reprinted in* KINTNER, *supra* note 1, at 294.

46. See *infra* notes 111-14 for a discussion of the proposition in Copperweld Corp. v Independence Tube Corp., 467 U.S. 752 (1984).

47. 15 U.S.C. § 1 (1988 & Supp. IV 1992). See *supra* note 3 for the relevant text of the statute.

48. *Id.*

49. 15 U.S.C. § 2 (1988 & Supp. IV 1992). See *supra* note 4 for the relevant text of the statute. The Supreme Court recently stated that "[m]onopoly power under § 2 requires, of course, something greater than market power under § 1." Eastman Kodak, Co. v. Image Technical Servs., 112 S. Ct. 2072, 2090 (1992). Under § 1, because the combining of firms almost certainly evidences anti-competitive behavior, less disruption of the market is required by the courts to constitute a violation. *Id.* The courts consequently demand a greater showing of market impact when a firm acts alone. *Id.* ("Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to

The Senate debate also indicated that Congress desired to remove "efficient" monopolies from the scope of the Sherman Act.[50] These monopolies are marked by the "acquisition of monopoly power through success in fair competition."[51] The United States Supreme Court agreed with Congress that monopoly gained through fair competition is an entirely permissible activity.[52] Natural monopoly receives similar permissive treatment. Natural monopoly occurs in "a market in which efficiencies of size are such that the entire output of the market can be most efficiently produced by a single firm."[53] Establishing the fine line between lawful and unlawful monopolies is most difficult in the area of efficient monopolies.

B. *Pre*-Berkey Photo *Supreme Court Cases*

United States v. Griffith[54] could be considered the first monopoly leveraging case.[55] The defendant theater owners possessed single theater monopolies in some towns and allegedly used this power to eliminate competition in towns in which other theaters competed with the defendants'.[56] In *Griffith*, the Supreme Court held, "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."[57] In an even more sweeping statement, the

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95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard of § 2.").

50. 21 CONG. REC. 3151-52 (1890), *reprinted in* KINTNER, *supra* note 1, at 292.

51. II EARL KINTNER, FEDERAL ANTITRUST LAW § 12.14, at 376 (1980).

52. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 390 n.15 (1956).

53. KINTNER, *supra* note 51, § 12.14, at 374. Another antitrust treatise states:

> In the economic sense, natural monopoly is monopoly resulting from economies of scale, a relationship between the size of the market and the size of the most efficient firm such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering the business. In this situation, competition may exist for a time but only until bankruptcy or merger leaves the field to one firm; in a meaningful sense, competition here is self-destructive.

CARL KAYSEN & DAVID F. TURNER, ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS 191 (1959).

54. 334 U.S. 100 (1948).

55. See *supra* note 13 and accompanying text for a definition of leveraging.

56. The complaint alleged that the defendant theater companies had agreements with the film distributors which prevented "their competitors from obtaining enough first- or second-run films from the distributors to operate successfully." *Griffith*, 334 U.S. at 103 (footnote omitted).

57. *Id.* at 107.

Court proclaimed "monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under [section] 2 [of the Sherman Act]."[58] Although the Court's language is broad, later decisions appear to restrict it to a point where some type of intent is necessary to find a violation.[59]

Eighteen years later, the Supreme Court, in *United States v. Grinnell Corp.*,[60] defined the elements of a section 2 offense more specifically as "(1) the possession of monopoly power in the relevant market and (2) the *willful acquisition* or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[61] Although this language has generated significant debate over the meaning of "willful," the *Grinnell* elements have become the standard by which courts judge monopoly power under section 2.[62]

The exclusion of "growth or development" from the reach of the Sherman Act was examined more fully in *United States v. E.I. du Pont de Nemours & Co.*[63] While discussing monopoly power in *Dupont* the Supreme Court explained that an efficient monopoly, one marked by "extraordinary commercial success,"[64] was excluded from the violative scope of the Sherman Act.[65] The Court further held "control of price or competition establishes the existence of monopoly power under [section] 2."[66] In *Dupont*, E.I. du Pont de Nemours & Co. ("Dupont") possessed seventy-five percent of the market share for cellophane.[67] However, Dupont did not violate section 2 because it did not have the power to control competition.[68] By requiring willful conduct and exempting natural monop-

58. *Id.*

59. *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

60. 384 U.S. 563 (1966).

61. *Id.* at 570-71 (emphasis added).

62. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2090 (1992); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

63. 351 U.S. 377 (1956). The exclusion of growth or development was also examined in the legislative history section of this Note. *See supra* notes 50-52 and accompanying text.

64. *Id.* at 390.

65. *Id.* at 390-91 n.15. The Supreme Court quoted the Congressional Record where Senator Hoar explained to his colleagues that "a man who merely by superior skill and intelligence, . . . got the whole business because nobody could do it as well as he could was not a monopolist." *Id.* at 391 n.15 (quoting 21 CONG. REC. 3151 (1890)).

66. *Id.* at 393.

67. *Id.* at 379.

68. *Id.* at 392.

oly, these later cases limited the applicability of the facially broad rule originally announced in *Griffith*.

C. United States v. Aluminum Company of America[69]

Judge Learned Hand wrote perhaps the most important and widely cited United States Court of Appeals decision regarding the question of monopoly power in *United States v. Aluminum Company of America* ("Alcoa").[70] Praised and criticized by commentators[71] and relied upon by the *Berkey Photo* Court, it provides some interesting insights for evaluating monopoly power. In what appears to be a pronouncement about legislative intent, the court stated, "[i]t is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."[72] Such an interpretation advocates a much harsher approach toward potential monopolists.

Judge Hand also discussed the definition of "intent" for the purposes of section 2. With regard to a *monopolization* claim, Judge Hand described the demand for specific intent as "nonsense"[73] and stated "no monopolist monopolizes unconscious of what he is doing."[74] However, specific intent is still widely recognized as a requirement for an attempt claim[75] because there is no established monopoly upon which to focus. With the necessity for specific intent eliminated, it becomes easier to find violations of the Sherman Act because courts can merely focus upon the market in-

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69. 148 F.2d 416 (2d Cir. 1945). When the Alcoa litigation was appealed to the Supreme Court, four justices disqualified themselves and a quorum was not met. Consequently, the Supreme Court certified the case and allowed it to be heard by the three most senior circuit judges. The opinion is therefore similar to a Supreme Court opinion, in terms of its precedential value. PHILLIP AREEDA, ANTITRUST ANALYSIS 154 (3d ed. 1981).

70. 148 F.2d 416 (2d Cir. 1945).

71. *See* 2 MILTON HANDLER, ANTITRUST IN TRANSITION 828-31 (1991). Milton Handler has suggested that many of the principles were sound but that the language went too far. Although the decision stood for over 30 years, it was not applied and clarified until the *Berkey Photo* decision. *Id.* In *Berkey Photo*, Judge Kaufman softened some of the language suggesting that it must be read in context.

72. *Aluminum Co. of Am.*, 148 F.2d at 427.

73. *Id.* at 432.

74. *Id.* Although Professor Robert Bork disagreed with much of Judge Hand's analysis, he did agree that there is no need for specific intent. ROBERT BORK, THE ANTITRUST PARADOX 160 (1978).

75. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

fluence. The preceding decisions became the building blocks for the monopoly leveraging doctrine as articulated in *Berkey Photo*.

II. THE *BERKEY PHOTO* DECISION - FACTS AND ANALYSIS

Due to its size and innovation, Eastman Kodak has sometimes been targeted for antitrust activities under the Sherman Act.[76] Many of the charges in *Berkey Photo, Inc. v. Eastman Kodak Co.* can be traced back to the introduction, in 1972, of the 110 "Pocket Instamatic" camera, now a trademark of Kodak's manufacturing.[77] Kodak had the power to manufacture the only film that would work with this particular variety of camera and this power lasted for many months before any other companies could even compete.[78]

To fully understand the case, one must first recognize the relevant markets as follows: cameras, conventional film, photofinishing equipment, photofinishing services, and color print paper.[79] Kodak was involved in all these markets, although it did not possess monopoly power in all of them.[80] Kodak controlled about sixty percent of the camera market and over eighty percent of the film market evidencing its tremendous power in these areas.[81] The plaintiff, Berkey Photo, competed with Kodak primarily in the photofinishing services market in which Kodak clearly did not possess a monopoly.[82] Berkey also owned a camera company which it sold during the litigation.[83] Berkey conceded that Kodak did not "attempt to monopolize" these markets in the traditional section 2 sense.[84] Instead, Berkey argued that Kodak utilized its power in the film, color paper and camera markets to gain an unfair advantage in the photofinishing equipment and services markets.[85] The primary issue was whether Kodak had violated section 2 of the Sherman Act by gaining a competitive advantage in the photofin-

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76. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072 (1992); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

77. *Berkey Photo*, 603 F.2d at 268.

78. *Id.* at 269.

79. *Id.*

80. *Id.* at 269-71.

81. *Id.* at 269-70.

82. *Id.* at 271. Although Berkey brought numerous antitrust charges, for the purpose of this Note only those charges relating to the photofinishing services and photofinishing equipment markets will be examined.

83. *Id.* at 269-70.

84. *Id.* at 270-71.

85. *Id.* at 267-68.

ishing market (in which they admittedly did not possess a monopoly) through the use of their monopoly in the film market.

While interpreting the background of the Sherman Act, the Second Circuit asserted that section 2 gave the courts "a new jurisdiction to apply a common law against monopolizing."[86] The court further noted that it had the latitude to decide what constitutes a monopoly, although it recognized that "it has been difficult to synthesize the parts [of the Sherman Act] into a coherent and consistent whole."[87] This difficulty in evaluating potential monopoly offenses would later be referred to as the "tension" that underlies the entire Sherman Act.[88] Conscious of the need to protect the competitive spirit, the court proceeded carefully in specifying a new doctrine.

With its role clarified, the court examined the previous judicial treatment of monopoly power in general. Taking the lead from Judge Learned Hand,[89] Judge Kaufman, writing for the Second Circuit, stated that the "[c]onsiderations of political and social policy form a major part of our aversion to monopolies, for concentration of power in the hands of a few obstructs opportunities for the rest."[90] The court added that "monopoly power is 'inherently evil'"[91] primarily "because it tends to damage the very fabric of our economy and our society."[92]

Before addressing the issue of monopoly power in the two market situation and the monopoly leveraging issue, the court developed a working definition of unlawful monopoly. To formulate

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86. *Id.* at 272 (quoting 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 40 (1978) (quotations omitted from original)).

87. *Id.* at 272.

88. *Id.* at 273. Before arriving at the actual leveraging analysis, the *Berkey Photo* court addressed at length what was earlier referred to as the tension behind section 2 of the Sherman Act. *Id.* Although monopoly power is recognized as inherently evil, "courts have declined to take what would have appeared to be the next logical step—declaring monopolies unlawful *per se*." *Id.* The court noted that this apparent contradiction indicates that the courts walk a fine discretionary line in handling monopolies. If preservation of competition underlies the Sherman Act, then courts must not push the scope of violations too far because eventually the lazy and weak competitor will use the laws as a shield against its more powerful and efficient competitors. *Id.* Judge Kaufman observed that at this point the antitrust laws become self-defeating and "would thus compel the very sloth they were intended to prevent." *Id.* The antitrust laws are designed to protect competition and not competitors.

89. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

90. *Berkey Photo*, 603 F.2d at 273.

91. *Id.* (quoting United States v. United States Shoe Mach. Corp., 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954)).

92. *Id.*

this definition, Judge Kaufman combined the principles of *Griffith*[93] and *Grinnell*[94] to state "that the mere existence of monopoly power 'whether lawfully or unlawfully acquired' is in itself violative of [section] 2, 'provided it is coupled with the purpose or intent to exercise that power.'"[95] This last phrase reinforces the point that all monopolies cannot be condemned "*ipso facto*"[96] because the law does not want to punish the competitor who is merely more efficient. However, the court emphasized that "[e]ven if that power has been legitimately acquired, the monopolist may not wield it to prevent or impede competition."[97]

With a working definition of unlawful monopoly established, the court next framed the issue precisely as "whether a firm violates [section] 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market."[98] The court concluded that such conduct constituted a violation even if competition in the second, non-monopoly market was "merely distorted" as opposed to being destroyed.[99] In support of its holding, the court analogized the case before it to tying arrangements, where a customer is forced to buy an additional product along with the original product, although the additional product is not desired.[100] Purchase of the two products is therefore tied together and the customer is economically coerced into buying an unwanted product, especially if the manufacturer has

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93. United States v. Griffith, 334 U.S. 100 (1948); *see supra* notes 54-59 and accompanying text.

94. United States v. Grinnell Corp., 384 U.S. 563 (1966); *see supra* notes 60-62 and accompanying text.

95. *Berkey Photo*, 603 F.2d at 274 (quoting *Griffith*, 334 U.S. at 107).

96. *Id.* at 275.

97. *Id.* at 274.

98. *Id.* at 275.

99. *Id.*

100. *Id.* at 275-76. The Supreme Court has condemned tying as a violation of § 1 because it is "unreasonable" per se. Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072, 2079 (1992); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609 (1953). Section 1 of the Sherman Act contains language that calls for the elimination of all unreasonable restraints of trade. See *supra* note 3 for the relevant text of the statute.

For a criticism of holding tying unlawful per se, *see* Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957) (suggesting that courts re-evaluate their view of tying because it is not always used for monopolistic exploitation); Richard S. Markovits, *Tie-Ins, Leverage, and the American Antitrust Laws* (pt. 2), 80 YALE L.J. 195, 205 (1970) (suggesting that the exclusive function of tie-ins is not to impede competition). *But see*, Harlan M. Blake & William K. Jones, *Toward a Three Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965) (criticizing the singular focus of Bowman upon economic efficiency).

a monopoly in the original market.[101] Thus, instead of focusing on section 2 precedent alone, the opinion focused on the overall policy considerations of the Sherman Act.

The court clarified that "a large firm does not violate [section] 2 simply by reaping the competitive rewards attributable to its efficient size."[102] The court stressed that the focus should be upon the use of monopoly power.[103] By excluding large firms with more efficient operations, the court made it difficult to determine what uses of monopoly power were ultimately prohibited.

Upon completing an analysis of the law, the court proceeded to apply its interpretations of the case law to the facts before it. While the court noted that Kodak's treatment of independent photofinishers was "shoddy,"[104] it determined that a new trial would be necessary on these issues if the parties did not reach an agreement.[105] Because only Kodak produced the Kodacolor II film and 110 cameras, independent photofinishers could not process this film "until they bought new equipment and received instruction in and supplies for . . . processing."[106] In addition, Kodak failed to provide prior notice of the introduction of the 110 Instamatic to its competitors.[107] The court did not decide whether this competitive advantage was merely a product of superior skill or a result of Kodak's monopoly power in other markets.[108] The court's application of the doctrine to the facts, therefore, was left somewhat ambiguous be-

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101. Although this succeeds as a reinforcing argument it must be remembered that "tying" is a § 1 offense; as such, the argument in the text merely provides persuasive support in this particular instance.

102. *Berkey Photo*, 603 F.2d at 276.

103. *Id.* at 276.

104. *Id.* at 291.

105. *Id.* at 292.

106. *Id.* at 290.

107. *Id.* The court stated:

> Kodak refused to divulge the formulae for chemicals used in the C-41 process. Large photofinishers like Berkey preferred to buy these compounds from chemical suppliers in bulk, both to save money and to gain flexibility. But to be able to process Kodacolor II, they were forced to buy pre-mixed "kits" from Kodak at twice the price.

Id.

108. *Id.* at 292. The court stated in pertinent part:

> Kodak's ability to gain a rapidly diminishing competitive advantage with the introduction of the 110 system may have been attributable to its innovation of a new system of photography, and not to its monopoly power. On the other hand, we cannot dismiss the possibility that Kodak's monopoly power in other markets was at least a partial root of its ability to gain an advantage over its photofinishing competitors and to sell them overpriced equipment.

Id. The court concluded by saying "[w]e cannot resolve this ambiguity." *Id.*

cause the court held that a new trial would be necessary to fully resolve the controversy.

The court spent a great of deal of time articulating the policy arguments in favor of monopoly leveraging. What may drive the doctrine is an underlying belief that monopoly is "inherently evil."[109] Although the court stated that large firms wielding power based on efficiency are acceptable, the court was also wary of large firms in certain situations. As evidence of this, the court stated that "many anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals."[110] The warning in this language regarding larger firms provided much of the foundation for the monopoly leveraging doctrine.

III. POST-*BERKEY PHOTO* JUDICIAL DEVELOPMENTS

A. *Post*-Berkey Photo *Supreme Court Cases*

Prior to examining the cases that deal directly with *Berkey Photo*, it is helpful to consider subsequent United States Supreme Court decisions. These cases do not specifically address the question of leveraging but, instead, provide evidence of the Court's approach to section 2 of the Sherman Act.

To resolve any doubt left open in *Berkey Photo*, the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*[111] made it clear that unilateral conduct is to be analyzed under section 2 of the Sherman Act.[112] The Supreme Court reasoned that "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote,"[113] and consequently "the [Sherman] Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct."[114] This relatively recent language by the Supreme Court suggests a certain amount of deference for those firms that act unilaterally.

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[115] the Supreme Court discussed the necessity for "predatory" conduct to

109. *Id.* at 273 (quoting United States v. United States Shoe Mach. Corp., 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954)).
110. *Id.* at 274-75.
111. 467 U.S. 752 (1984).
112. *Id.* at 767 n.13.
113. *Id.* at 775.
114. *Id.*
115. 472 U.S. 585 (1985).

maintain a successful monopolization claim under section 2 of the Sherman Act.[116] The Court endorsed the necessity of "exclusionary" or "anticompetitive" conduct.[117] These requirements appear to be lacking in monopoly leveraging as articulated by the Second Circuit.[118] More specifically, the Supreme Court had previously indicated that courts should view the Sherman Act narrowly without overemphasizing the general purpose of the Act.[119]

Most recently, the Supreme Court reinforced the principles of *Grinnell* and *Aspen Skiing* in *Eastman Kodak Co. v. Image Technical Services, Inc.*[120] In *Image Technical Services*, competitors had accused Kodak of using its monopoly in the parts market for its photocopiers to try to gain a monopoly in the service market.[121] The Court asserted that "[i]f Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated [section] 2."[122] The Court found a determination of willful conduct necessary for a conviction under section 2 of the Sherman Act.

B. *Post*-Berkey Photo *Circuit and District Court Cases*

The Court of Appeals for the Second Circuit reaffirmed *Berkey Photo* in subsequent cases[123] and district courts within that cir-

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116. *Id.* at 602.

117. *Id.*

118. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

119. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 776 (1984).

120. 112 S. Ct. 2072, 2090-91 (1992).

121. *Id.* at 2091.

122. *Id.* at 2090. The Court cited a string of cases to support this proposition including *Grinnell*, *Aspen Skiing*, and *Aluminum Co. of Am.*

123. *See* Grand Light & Supply Co., Inc. v. Honeywell, Inc., 771 F.2d 672, 681 (2d Cir. 1985) (stating the three elements of leveraging as follows: "monopoly power in one market," the *Griffith* requirement of foreclosing competition or gaining a competitive advantage, and "injury caused by the challenged conduct").

The court asserted that monopoly leveraging was now an embedded and established legal doctrine. Consequently, for the purposes of this discussion, the *Grand Light* case provides little additional insight to that already propounded in *Berkey Photo*.

See also Twin Lab., Inc. v. Weider Health & Fitness, 900 F.2d 566 (2d Cir. 1990). Twin Labs was a growing producer in the nutritional supplement market competing with the giant, Weider Health & Fitness. *Id.* at 567. Weider Corporation also owned the two most popular magazines dealing with health and fitness. *Id.* Twin Labs placed the largest percentage of its advertisements in these magazines because they reached the widest group of interested parties. *Id.* When Twin Labs' market share began to increase, Weider denied them further advertising space in their magazines forcing them to rely upon less popular competing magazines. *Id.*

Twin Labs subsequently initiated a lawsuit and the complaint alleged in part mo-

cuit have, of necessity, followed the rule.[124]

Following the Second Circuit's lead, the Court of Appeals for the Sixth Circuit also adopted the monopoly leveraging doctrine. In 1983, the Sixth Circuit referred to the doctrine favorably, analogizing it to tying.[125] The court concluded that the only difference between tying and leveraging is that, with tying, the second item is forced upon the buyer, while with leveraging the non-monopoly market is merely distorted.[126] Subsequent to this tangential discussion of the leveraging doctrine, the same court openly endorsed monopoly leveraging in *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*[127] Relying primarily on *Berkey Photo* and *Griffith*, the court held that a theater owner had a valid claim against a competing theater owner who attempted to use its monopoly in another geographical market to prevent competition in the shared market.[128] The court first noted that the defendant possessed lawful monopoly power in an outside market.[129] The question before the court was whether the defendant theater owner had violated the Sherman Act despite the absence of monopoly power in the shared market. Although the defendant did not possess mo-

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nopolization and attempted monopolization. The court mentioned *Berkey Photo* in analyzing the attempted monopolization claim and mistakenly claimed that *Berkey Photo* involved a tying claim. *Id.* at 570-71. It is crucial to remember that tying is a § 1 offense focusing more on the nature of the defendant's conduct than on the market impact. *See* Anthony E. DiResta et al., *"Monopoly Leveraging": Irrelevant Dicta or a New Section 2 Challenge For Integrated Firms*, *in* 695 A.L.I.-A.B.A. COURSE OF STUDY, MONOPOLIZATION AND TYING CASES IN THE 90's, 57, 71-72 (1991) (questioning the *Twin Labs* analysis saying: "It must be pointed out, however, that such analysis by the Second Circuit of Berkey is inaccurate. A claim of tying falls within Section 1 of the Sherman Act — with the focus of the inquiry on the defendant's conduct, not on the market impact."). Although this case reaffirms the *Berkey Photo* holding, it does so with some confusion.

124. *See, e.g.*, Viacom Int'l Inc. v. Time Inc., 785 F. Supp. 371, 379 (S.D.N.Y. 1992) (recognizing the *Berkey Photo* doctrine but not applying it because the facts did not warrant such action); Carleton v. Vermont Dairy Herd Improvement Ass'n, Inc., 782 F. Supp. 926, 934 (D. Vt. 1991) (following the doctrine saying that "[t]he Second Circuit's seminal decision in *Berkey Photo* is instructive").

125. White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 506 (6th Cir. 1983). See *supra* note 100 and accompanying text for an explanation of tying.

126. *Id.*

127. 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom*; G.K.C. Michigan Theatres, Inc. v. National Amusements, Inc., 490 U.S. 1087 (1989).

128. *Id.* at 136-37. National and Kerasotes competed vigorously in the Flint, Michigan area. Kerasotes attempted to avoid competition by splitting the first run movies with National. National claimed that when this attempt failed "Kerasotes began to use its monopoly position in other geographical markets to obtain films in the Flint market, films Kerasotes would not have otherwise been able to obtain." *Id.* at 136.

129. *Id.* at 136-37.

nopoly power in the shared market, the court held that merely gaining an advantage in this market allowed the plaintiff to maintain a claim.[130]

The Court of Appeals for the District of Columbia reserved judgment on the issue of monopoly leveraging in *Association for Intercollegiate Athletics for Women v. N.C.A.A.*[131] For years, the National Collegiate Athletic Association ("NCAA") was the governing body for men's collegiate sports and the Association for Intercollegiate Athletics for Women ("AIAW") was the governing body for women's collegiate sports. In 1981, the NCAA began sanctioning women's sports and, being the more powerful organization, drove AIAW into financial hardship.[132] AIAW's complaint alleged that the NCAA had violated section 2 of the Sherman Act "by using its monopoly power in men's college sports to facilitate its entry into women's college sports and to force AIAW out of existence."[133] The court, in language that appeared somewhat disapproving, said "[i]n light of the substantial academic criticism cast upon the leveraging concept, we reserve [judgment] for a case in which decision of the question is necessary."[134] The court held that even if leveraging doctrine was applied, it could find no economic injury based upon a "use" in women's sports of the monopoly power held by the NCAA in men's sports.[135] The Courts of Appeals for the Fourth and Eleventh Circuits have also withheld judgment on the monopoly leveraging doctrine.[136]

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130. *Id.* at 137. The similarity in fact patterns to *Griffith* (competing theater owners) may have led the court to this result, since it relied as much upon *Griffith* as *Berkey Photo*.

131. 735 F.2d 577 (D.C. Cir. 1984).

132. *Id.* at 580.

133. *Id.*

134. *Id.* at 586 n.14.

135. *Id.* at 586-88.

136. *See, e.g.*, Advanced Health-Care Servs., Inc. v. Radford Community Hosp., 910 F.2d 139 (4th Cir. 1990). Advanced Health Care Services ("AHCS") was a company providing durable medical equipment ("DME") largely to discharged patients of Radford Community Hospital. Radford subsequently entered the DME market and AHCS sales dropped off sharply, because many discharged patients used Radford sponsored DME. AHCS alleged "discharge personnel unduly influenced patients to discontinue relations with AHCS, [and] that they steered or referred patients to Southwest solely for the financial gain of Radford." *Id.* at 143. Applying leveraging analysis to the facts of the case the court held that the leveraging claim could withstand the motion to dismiss. *Id.* at 149-50. However, because the case was at an "undeveloped stage," with respect to monopoly leveraging as an offense, the court noted that "[w]e reserve definitive resolution of that issue for a case in which the issue is squarely presented." *Id.* at 149 n.17.

See also Key Enters. of Del., Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990),

Finally, the Court of Appeals for the Ninth Circuit struggled with the monopoly leveraging issue before deciding not to adopt the *Berkey Photo* holding. In *M.A.P. Oil Co., Inc. v. Texaco Inc.*,[137] the court recited theories of monopoly under section 2 stating "[a]mong those forms is the theory that a firm violates [section] 2 by using its monopoly power in one market to gain an *unwarranted* competitive advantage in another."[138] Although this language is somewhat ambiguous, at least one district court read it as a clear endorsement of *Berkey Photo* explaining "[t]he *Berkey Photo* opinion, by virtue of its adoption in *Mapp* [sic], seems to have settled the question in this circuit of whether a 'pure' monopoly leveraging theory exists."[139] Thus the district court recognized the viability of the monopoly leveraging doctrine within the Ninth Circuit.

However, four years later in *Catlin v. Washington Energy Co.*,[140] the Court of Appeals for the Ninth Circuit dispelled the notion that *M.A.P. Oil Co.* was an endorsement of *Berkey Photo*. The *Catlin* court stated *M.A.P. Oil* still required an "unwarranted" competitive advantage, thus distinguishing it from *Berkey Photo*,[141] which did not impose such a requirement. Furthermore, the court questioned whether *Berkey Photo* itself really intended to go as far as some people had suggested.[142] The real difficulty comes in determining when the "use" crosses the line between mere efficiency and unfair competitive advantage. The Ninth Circuit obviously struggled with that fundamental issue and the reservation in *Catlin* set

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vacated, 979 F.2d 806 (11th Cir. 1992). The plaintiff in this case was a supplier of durable medical equipment ("DME") whose business dropped off significantly when the Venice Hospital entered the DME market. The hospital had a special patient equipment coordinator who had no training in follow-up health care. *Id.* at 1554. The bottom line was that 85% of Venice Hospital patients needing DME obtained it from the hospital's own company. *Id.* at 1555. After addressing traditional attempt and conspiracy claims, the court moved on to the leveraging claims saying "[w]hile we harbour some reservation about the Second Circuit's conclusion that no attempt to monopolize the leveraged market need be proved, that aspect of the monopoly leveraging theory is not problematic in this case." *Id.* at 1567. At trial, the judge had actually charged the jury upon attempted monopolization using words such as "willfully" and "conscious objective." *Id.* Although the court appeared to endorse the leveraging doctrine, it was merely dicta because it held that "[a]ll the other elements of an attempt to monopolize under Section 2 are present in this case." *Id.*

137. 691 F.2d 1303 (9th Cir. 1982).

138. *Id.* (emphasis added).

139. Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1516 (E.D. Cal. 1983), *cert. denied*, 474 U.S. 1103 (1986).

140. 791 F.2d 1343 (9th Cir. 1986).

141. *Id.* at 1346.

142. *Id.*

the stage for the decision in *Alaska Airlines, Inc. v. United Airlines, Inc.*

IV. THE *ALASKA AIRLINES* DECISON - FACTS AND ANALYSIS[143]

In 1974, American Airlines attempted to gather support among the major airlines to form a jointly owned computer reservation service ("CRS").[144] This plan failed, however, and United Airlines and American Airlines each formed their own CRS.[145] Smaller airlines would then join these services at a per booking rate.[146] Because American Airlines and United Airlines were the two largest

143. 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992). The district court that heard *Alaska Airlines* issued an opinion based on Ninth Circuit precedent. Continental Airlines, Inc. v. American Airlines, Inc. (*In re* Air Passenger Computer Reservation Sys. Antitrust Litig.), 694 F. Supp. 1443 (C.D. Cal. 1988). The district court began by establishing that the Ninth Circuit had rejected a pure monopoly leveraging doctrine where any competitive advantage gained in the second market would be actionable. *Id.* at 1472. The court also cited Ninth Circuit precedent that clearly delineated between "aggressive competition on the merits" and "anticompetitive abuse" of monopoly power. Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 545-46 (9th Cir. 1983). This crucial distinction became the fulcrum upon which the case turns and where the district court apparently disagreed with *Berkey Photo*.

In contrast to the Second Circuit's leveraging doctrine, the district court offered different elements for a successful leveraging claim. First, "the activity complained of must entail an abuse of monopoly power itself, as opposed to the mere use of competitive advantages . . . ." *Air Passenger*, 694 F. Supp. at 1473 (quoting Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1517 (E.D. Cal. 1983), *cert. denied*, 474 U.S. 1103 (1986).). Second, the advantage must be "unwarranted," a term that generated significant analysis later in the opinion. *Id.* Finally, the plaintiff must define both the original monopoly market and the market in which the defendant is allegedly intruding. *Id.* The strict requirements for abuse of monopoly power and "unwarranted advantage" distinguish this from the Second Circuit's analysis. "Unwarranted advantage" may parallel the Second Circuit requirement of a competitive advantage, but it could also be seen as requiring a stronger showing.

In struggling with definitions, the district court explained that "unwarranted should be interpreted in light of existing antitrust learning pertaining to 'willful acquisition or maintenance.'" *Id.* (quoting *Grason*, 571 F. Supp. at 1518). The court further defined "willful acquisition or maintenance" based upon a test of unreasonableness. *Id.* at 1473. If an actor's conduct involves an unreasonable restraint of trade, it constitutes willful acquisition or maintenance and is therefore a violation, provided the other elements are satisfied. Armed with this definition, the district court held that display biasing (the primary monopoly leveraging complaint in this case) could be construed as unreasonable. *Id.* at 1474. It unreasonably injured consumers by harnessing them with more expensive flights because the reservation attendant did not realize that other less expensive flights were available. *Id.*

144. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 538 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992). A CRS is a group of on-line terminals containing booking information to which travel agents subscribe based upon a per booking fee.

145. *Id.*

146. *Id.*

services (by having the most travel agent subscribers), they were also the most desirable.[147] Initially, the services charged extremely high rates, but they subsequently became subject to government regulation, leading to much more reasonable and uniform rates.[148] As a rule, smaller airlines would subscribe to every CRS in order to receive maximum exposure.[149] Because the services charged a per booking rate, as opposed to a flat rate, it was not financially burdensome for airlines to subscribe to multiple services.[150] Although the per booking charges were minimal, the smaller airlines were unhappy that the larger airlines could demand any fee. Consequently, they brought an antitrust action claiming that the larger airlines were "leveraging" their dominance in the CRS market in order to gain an advantage in the air travel market.[151] The plaintiff small airlines argued that by having control over the smaller airlines' information in the CRS market, the larger airlines could mold and control the plaintiffs' place in the air travel market.[152] The smaller airlines charged that the larger airlines engaged in display biasing. Display biasing involved giving the defendant's own flights more desirable positions on the terminal screens, thereby cheating customers out of potentially less expensive flights.[153] The plaintiffs also charged that the defendants were denying them access to an "essential facility,"[154] another antitrust claim which the court dismissed, but which overlaps slightly with the monopoly leveraging claim.[155]

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 539.

151. *Id.*

152. *Id.*

153. *See* Continental Airlines, Inc. v. American Airlines, Inc. (*In re* Air Passenger Computer Reservation Sys. Antitrust Litig.), 694 F. Supp. 1443, 1474 (C.D. Cal. 1988). For a detailed discussion of CRS problems, see Larry Locke, *Flying the Unfriendly Skies: The Legal Fallout Over the Use of Computer Reservation Systems as a Competitive Weapon in the Airline Industry*, 2 HARV. J.L. & TECH. 219 (1989).

154. *Alaska Airlines*, 948 F.2d at 539.

155. For an example of a classic essential facilities case, see Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). In that case, Otter Tail Power Company provided "retail" electrical services to towns. Some towns requested that they receive "wholesale" services and provide the retail aspect themselves. Otter Tail denied such requests and the Supreme Court held that this was a denial of essential facilities because Otter Tail's services could not be duplicated. With respect to Otter Tail's denial of wholesale services, the Supreme Court held that "[t]he record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws." *Id.* at 377. The *Alaska Airlines* court dismissed the applicability of *Otter Tail* to

The Court of Appeals for the Ninth Circuit, in *Catlin*, had already reserved judgment on the question of monopoly leveraging.[156] In *Alaska Airlines*, the court moved one step further and refuted the *Berkey Photo* decision, declaring it irreconcilable with the expressly stated section 2 offenses.[157] Although *Griffith* provided major support for the reasoning in *Berkey Photo*, the *Alaska Airlines* court began by dismissing it in a footnote.[158] The court noted that because *Griffith* concerned a section 1 offense, it contained broad language which was not controlling.[159] The court then cited to *Copperweld v. Independence Tube Corp.*,[160] decided after *Berkey*, to reinforce the distinction between section 1 and section 2 offenses.[161] In the same footnote, the court also dismissed the Sixth Circuit's opinion in *Kerasotes*[162] "for the same reasons"[163] it rejected *Berkey Photo*.[164]

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the case at hand. The court stated "[a]s the Supreme Court indicated, Otter Tail Power had both attempted to monopolize and had succeeded in monopolizing the downstream market for 'retail' electric services." *Alaska Airlines*, 948 F.2d at 543 (citing *Otter Tail Power Co.*, 410 U.S. at 377-79).

Prior to examining the leveraging claims the court addressed the essential facilities claims. This part of the court's discussion merits attention in order to demonstrate the link between "essential facilities" and the "monopoly leveraging" doctrines. The court stated that "the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first." *Id.* at 542. Like monopoly leveraging, this represents a § 2 offense because it applies to the unilateral conduct of an actor and it involves two distinct markets.

Primarily because the defendants did not possess the requisite power to eliminate downstream competition (in the court's estimation), the court dismissed this initial claim. *Id.* at 546. In this case, airline flights were the downstream market because they flowed from or were downstream from the CRS market. Because the smaller airlines could have withdrawn from the questionable CRS networks and still have survived, the larger airlines were therefore not in control of the air travel market. Such a condition precludes an essential facilities claim. The court noted that the ability of the smaller airlines to pull out of the given CRS "severely limited" United or American in their ability to abuse the downstream market. *Id.* at 545.

Furthermore, the court asserted that without the power to eliminate competition the plaintiff must show either monopoly or attempted monopoly, a theme which carries over into the court's analysis of monopoly leveraging. *Id.* at 546.

156. Catlin v. Washington Energy Co., 791 F.2d 1343, 1346 (9th Cir. 1986).

157. *Alaska Airlines*, 948 F.2d at 549.

158. *Id.* at 547 n.16.

159. *Id.*

160. 467 U.S. 752 (1984); *see supra* notes 111-14 and accompanying text.

161. *Alaska Airlines*, 948 F.2d at 547 n.16.

162. Kerasotes Mich. Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom.*, G.K.C. Mich. Theatres, Inc. v. National Amusements, Inc., 490 U.S. 1087 (1989); *see supra* notes 127-30 and accompanying text.

163. *Alaska Airlines*, 948 F.2d at 547 n.16.

164. Although this appears to be relatively terse treatment for such important

The Court of Appeals for the Ninth Circuit relied quite heavily upon *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[165] which was also decided after *Berkey Photo*. Most importantly, *Aspen Skiing* reinforced the notion that the presence of "predatory" conduct was necessary for a violation under section 2 of the Sherman Act.[166] The court used *Aspen Skiing* to strengthen the proposition that "the Sherman Act does not attack every monopoly."[167] The *Alaska Airlines* court emphasized the conduct which survives scrutiny under the Sherman Act.[168] Conversely, the *Berkey Photo* court merely stated that some monopolies are tolerated, but not cherished.[169]

While *Berkey Photo* began with the proposition that monopoly power is "'inherently evil,'"[170] no such language exists in the *Alaska Airlines* opinion. The court actually praised the efficient monopoly, downplaying its danger by explaining it "will continue only so long as the monopolist sustains a level of efficiency or innovation such that its rivals cannot effectively compete."[171] The court explained that efficient monopolies would police themselves and that they were beyond the reach of the Sherman Act due to their economic efficiency.[172] The *Alaska Airlines* court stressed that these "efficient monopolies" exist absent the predatory practices described in *Aspen Skiing*.[173]

The Ninth Circuit strengthened this discussion of acceptable monopolies by pointing to "natural monopolies."[174] The court suggested that governmental regulation, as opposed to judicial intervention, is the best way to deal with natural monopolies because the legislature is better suited to making decisions regarding price con-

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precedent, the case did not add much to the reasoning already propounded in *Berkey Photo*. The Sixth Circuit merely accepted the doctrine with little analysis. Also, Sixth Circuit precedent is not binding on the Ninth Circuit.

165. 472 U.S. 585 (1985).

166. *Alaska Airlines*, 948 F.2d at 547 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985)).

167. *Id.* The court also used another case from the Ninth Circuit, United States v. Syufy Enters., 903 F.2d 659 (9th Cir. 1990), to fortify its position.

168. *Alaska Airlines*, 948 F.2d at 547.

169. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

170. *Id.* (quoting United States v. United States Shoe Mach. Corp., 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954)); *see supra* notes 91-92 and accompanying text.

171. *Alaska Airlines*, 948 F.2d at 547.

172. *Id.* at 549.

173. *Id.* at 547.

174. *Id.* at 548.

trols.[175] Throughout this discussion, the court made no reference to the "evils" of monopoly. In fact, the court's statement that "[t]he antitrust laws tolerate both efficient monopolies and natural monopolies,"[176] is the harshest anti-monopoly tone in the entire *Alaska Airlines* opinion. Instead of dwelling on the negative aspects of monopolies, the *Alaska Airlines* court emphasized permissible monopolies and their positive aspects.

The court further explained that the elements of "attempted monopolization" and "monopolization" were developed specifically to differentiate between lawful and unlawful monopoly.[177] The court noted that any attempt to circumvent these requirements certainly misinterprets the spirit of the law and wrongfully punishes those who are undeserving of punishment. By concluding monopoly leveraging is not anti-competitive conduct, but merely a benefit of possessing an efficient monopoly, the *Alaska Airlines* court disagreed fundamentally with the *Berkey Photo* court.[178] According to the *Alaska Airlines* court, when natural and efficient monopolies are permitted to continue, which is the effect of the Sherman Act scheme, society must deal with any unpleasant side effects without banning them outright.[179] The court attempted to equate monopoly leveraging with the other monopoly consequences which are permitted, such as setting a high price, which is not anti-competitive in and of itself.[180] The court also appeared reluctant to stray from settled Ninth Circuit precedent and the Supreme Court cases decided after *Berkey Photo*.[181]

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175. *Id.* The Ninth Circuit cited *Berkey Photo*'s own language regarding pricing to arrive at this conclusion. "[J]udicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us." Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979) (citations omitted), *cert. denied*, 444 U.S. 1093 (1980).

176. *Alaska Airlines*, 948 F.2d at 548.

177. *Id.* The court had relied upon this same basic argument in its discussion of essential facilities. *Id.* at 546. It is apparent that the court was satisfied with the reach of the traditionally established offenses.

178. *Id.*

179. *Id.* at 549. The *Alaska Airlines* court asserted that concerns for efficiency outweighed any possible harm in this particular case. Another case where a regulated monopolist "seeks to evade regulations which limit profits in the monopoly market by creeping into adjacent, unregulated markets" would provide a wholly different scenario. *Id.* at 549 n.17.

180. *Id.* at 548-49.

181. The court used Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), to refute *United States v. Griffith*, although *Griffith* was fundamental to *Berkey Photo*. *Alaska Airlines*, 948 F.2d at 547 n.16. The court also used *Aspen Skiing* to

Finally, the court declared that monopoly leveraging has the inherent potential to backfire on the supposed monopolist.[182] By pushing customers in the leveraged market too hard with these techniques, the monopolist will only force the customer to look elsewhere, thereby providing encouragement to competing firms.[183] In the wake of this dissatisfaction, competing firms will be rejuvenated with the belief that they can successfully challenge the holder of monopoly power.[184]

Other courts have approached the validity of monopoly leveraging somewhat differently. The majority of courts, however, have recognized that leveraging marks a departure from the expressly stated offenses outlined in the Sherman Act.[185] The *Berkey Photo* court and its progeny opined that certain forms of unilateral conduct deserved greater scrutiny. Conversely, the *Alaska Airlines* court sought to provide certain protections for large corporations acting unilaterally.

V. ANALYSIS

The challenge in reconciling *Berkey Photo* and *Alaska Airlines* lies in the lack of definitive precedent from the Supreme Court. Citing a gap of twenty years between *Grinnell* and *Aspen Skiing*, one commentator has remarked upon the shortage of section 2 decisions by the high court.[186] Whatever the reasons for this lack of precedent, legal practitioners are left with little guidance in evaluating the status of possible section 2 offenses.[187]

Deference should be given to those firms acting unilaterally. Furthermore, monopoly leveraging cannot possibly be a species of an attempt to monopolize claim due to its failure to meet the strict

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reinforce the need for predatory conduct which it noted was lacking in the case before it. *Id.* at 547.

182. *Alaska Airlines*, 948 F.2d at 549.

183. *Id.*

184. *Id.*

185. Most recently, the Third Circuit, in Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993) followed the *Alaska Airlines* holding. The Third Circuit relied most heavily upon the differences between §§ 1 and 2 outlined in the Supreme Court's *Copperweld* opinion to support its holding. *Id.* at 206.

186. 3 Michael Malina, *Supreme Court Update—1985, in* ANTITRUST IN TRANSITION 1073, 1074 (Milton Handler ed. 1991).

187. *Id.*; *see also* Lawrence A. Sullivan, *Section 2 of the Sherman Act and Vertical Strategies by Dominant Firms*, 21 SW. U. L. REV. 1227, 1230 (1992) (noting the difficulty in formulating antitrust policy).

attempt requirements.[188] Finally, leveraging not only fails to meet the market power requirements for a monopoly claim, but it also espouses a "use" element which is too strict for the vertically integrated competitor.

A. Unilateral vs. Concerted Conduct

Unilateral conduct involves the conduct of a single firm whereas concerted conduct involves multiple firms. The plain language of the Sherman Act indicates that concerted action receives greater scrutiny because any "contract, combination in the form of trust or otherwise"[189] which results in a "restraint of trade"[190] constitutes a violation under section 1. Even without a finding of actual monopoly or intent to monopolize, *concerted* action which merely restrains trade violates section 1. Under the section 2 formulation, however, unilateral activity may constitute a violation, but only if the actor actually monopolizes or attempts to monopolize a market.[191]

The Supreme Court has addressed the different treatment of unilateral and concerted conduct under the Sherman Act. Analyzing the language of the statute, the Court stated the Sherman Act "leaves untouched a single firm's anticompetitive conduct . . . [even though that conduct] may be indistinguishable in economic effect from the conduct of two firms subject to [section] 1 liability."[192] The Court further stated "that Congress left this 'gap' [between sections 1 and 2] for eminently sound reasons."[193] The Supreme Court noted that Congress made a "purposeful choice" to treat unilateral and concerted conduct differently.[194] The clear distinction between

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188. *See supra* notes 10-12 and accompanying text.

189. 15 U.S.C. § 1 (1988 & Supp. IV 1992). For the relevant text of this statute, see *supra* note 3.

190. *Id.*

191. Section 2 reads "[e]very person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty." 15 U.S.C. § 2 (1988 & Supp. IV 1992). The attempt to monopolize requires a specific intent coupled with a "dangerous probability" of success making it a far more difficult standard to meet than the § 1 "restraint of trade" formulation. Swift and Co. v. United States, 196 U.S. 375, 396 (1905). *See supra* note 12 and accompanying text. The plaintiff in a § 2 case must present stronger evidence of market power. Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072, 2090 (1992). Congress apparently displayed deference toward unilateral conduct by requiring this more difficult showing.

192. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984).

193. *Id.*

194. *Id.*; *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) (stating "there is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts").

unilateral and concerted action raises concerns about analogizing between multiple and single firm conduct. The Supreme Court clearly expressed a desire to show deference to single firm conduct but has accorded no such deference to concerted conduct.[195]

Despite the differences in treatment between unilateral and concerted conduct articulated by the Supreme Court, for purposes of a monopoly leveraging violation under the Sherman Act, it appears that unilateral conduct and concerted conduct need to be treated in the same manner. At least one commentator has suggested the soundness of such an approach.[196] This theory asserts that the "gap" between sections 1 and 2 needs bridging. When a monopolist possesses monopoly power in one market and is involved in other markets, the monopoly leveraging approach assumes that the monopolist should be held to a standard similar to the "restraint of trade" in section 1. This methodology, however, contradicts Supreme Court precedent and uses the logic that if not for the differences in sections 1 and 2 these situations would certainly constitute offenses. The Supreme Court in *Copperweld Corp. v. Independence Tube Corp.* refuted that logic by recognizing the validity and necessity of the gap.[197] The language of the Sherman Act[198] and recent Supreme Court pronouncements[199] indicate that courts should proceed cautiously and not attempt to eliminate the deferential treatment of single firms in contravention of the statute. Any attempt at bridging the "gap" contravenes the Sherman Act as interpreted by the Supreme Court.

Both the *Berkey Photo* and the *Alaska Airlines* courts appear

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195. *Copperweld*, 467 U.S. at 775.

196. *See* Hawk, *supra* note 13, at 1156-59. Professor Hawk distinguishes carefully between what he calls "*Griffith*" situations and "non-*Griffith*" situations. A *Griffith* situation involves an entity which has monopoly power in one market and misuses that power in a second market (basically the same situation as *Berkey Photo*). He contends that the *Griffith* operator should be held to a higher standard than a two market competitor that does not have a monopoly in either market. In his view, courts had already been eager to attack such situations and establishing this new "*Griffith*" standard would eliminate haggling over traditional "attempt" terms such as "specific intent" and "dangerous probability." *Id.* at 1158. He finally rationalizes this position by explaining that "if not" for the differences in §§ 1 and 2, this would certainly be a violation of the Sherman Act. *Id.* at 1159; *see also* 2 Michael Malina, *The Antitrust Jurisprudence of the Second Circuit, in* ANTITRUST IN TRANSITION, *supra* note 186 at 817, 831 (praising the soundness of Judge Kaufman's opinion).

197. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984).

198. 15 U.S.C. §§ 1-2 (1988 & Supp. IV 1992). For the relevant text of these sections, see *supra* notes 3-4.

199. *Copperweld*, 467 U.S. at 769; Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

to agree that if the conduct in question were performed by multiple entities, it would clearly violate the Sherman Act.[200] However, courts and commentators have noted that Congress consciously placed a gap between monopoly power based on concerted conduct and monopoly power based on unilateral conduct.[201] The court in *Alaska Airlines* proceeded on the premise that the gap between sections 1 and 2 requires preserving, as evidenced by its reliance on the expressly stated section 2 offenses.[202] Judge Kaufman in *Berkey Photo*, on the other hand, suggested that the gap may need bridging to fulfill the overall intent of eliminating anti-competitive monopoly.[203]

From the *Alaska Airlines* opinion, it appears that the Court of Appeals for the Ninth Circuit relied heavily upon the differences between the treatment of unilateral and concerted conduct suggested by *Copperweld* to reach the conclusion that monopoly leveraging is not an offense under section 2 of the Sherman Act. One commentator has suggested that the Ninth Circuit's reliance on *Copperweld* was misplaced because that case dealt with a section 1 violation.[204] Regardless of whether this is true, the *Alaska Airlines* court used the recently expressed differences between sections 1 and 2 to quickly dismiss *Griffith*.[205] Because *Copperweld* was

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200. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

201. *See, e.g.*, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984) (explaining that the gap between §§ 1 and 2 should be allowed to continue); Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1513 (1983), *cert. denied*, 474 U.S. 1103 (1986) (recognizing the theoretical gap in the Sherman Act). *But see*, Hawk, *supra* note 13, at 1156-59 (asserting that the gap should be closed in certain situations).

202. *Alaska Airlines*, 948 F.2d at 549. In rejecting the *Berkey Photo* leveraging doctrine the Third Circuit relied heavily upon *Copperweld* saying "we have the benefit of *Copperweld's* [sic] explication of the Sherman Act's purposeful 'gap' in liability." Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 206 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993).

203. *Berkey Photo*, 603 F.2d at 272, 274.

204. Sullivan, *supra* note 187, at 1255. Professor Sullivan stated:

> nothing in the [*Copperweld*] opinion implies that a blatant, anticompetitive attack by a monopolist on a related market passes scrutiny unless it creates a new monopoly. Indeed, the Court in *Copperweld* did not evaluate the challenged conduct to decide whether it would have been bad enough to run afoul of section 2. The whole point of *Copperweld* was that defendant's conduct, however bad, was not subject to antitrust evaluation; section 1 did not apply because it was single firm conduct, and section 2 did not apply because there was no showing of power.

Id.

205. *Alaska Airlines*, 948 F.2d at 547 n.16 (citing *Copperweld*, 467 U.S. at 774-77).

clearly a section 1 case, its use by the Ninth Circuit to dismiss *Griffith* appears logically inconsistent. The court had dismissed *Griffith* because it was a section 1 case, but it used *Copperweld*, also a section 1 case, to accomplish this end.[206] Although this complete dismissal of *Griffith* seems potentially overbroad, the *Alaska Airlines* court was following sound logic in recognizing the differences between sections 1 and 2. By interweaving section 1's focus on the actor's conduct (as opposed to market effect) into a section 2 offense, leveraging, as propounded in *Berkey Photo*, oversteps the bounds established in *Copperweld*. Consequently, the Court of Appeals for the Ninth Circuit correctly realized that leveraging fails to consider adequately the question of market power in the relevant market.[207]

B. *New Section 2 Offense?*

A critical question exists as to whether *Berkey Photo*'s monopoly leveraging was meant to be a completely new offense or just a species of an "attempt" claim.[208] Arguments on both sides revert back to the discussion on legislative intent concerning the role of the courts in shaping new doctrine.[209] If Congress merely intended for the courts to define the elements for each of the three enumerated offenses of section 2, the appropriateness of the *Berkey Photo* doctrine should be challenged because leveraging exceeds the specific requirements for any of the enumerated offenses.[210]

In Senate debate, Senator Sherman asserted that deciding between lawful and unlawful *combinations* "must be left for the courts to determine in each particular case."[211] This language bestows liberal linedrawing power upon the courts, but it addresses combina-

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Griffith contained some very broad language with regard to the use of monopoly power. United States v. Griffith, 334 U.S. 100, 107 (1948). The *Griffith* Court stated "monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 [of the Sherman Act]." *Id.*

206. *Alaska Airlines*, 948 F.2d at 547 n.16 (citing *Copperweld*, 467 U.S. at 774-77).

207. *Id.* at 548.

208. One case suggested the importance of this question by stating, "[i]t is in this light [the type of offense being created] that the question of whether 'monopoly leveraging' is a 'new' [s]ection 2 offense - as opposed to being some variant on one of the original three offenses - may be of greatest significance." Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1515 n.14 (E.D. Cal. 1983), *cert. denied*, 474 U.S. 1103 (1986).

209. *See supra* notes 41-42 and accompanying text.

210. *See* Stanley D. Robinson, *Recent Antitrust Developments-1979*, 80 COLUM. L. REV. 1, 9 n.61 (1981).

211. 21 CONG. REC. 2455 (1890), *reprinted in* KINTNER, *supra* note 1, at 122.

tions and not single firm conduct. In light of the recognized differences between unilateral and concerted conduct,[212] this language loses some of its persuasiveness as a grant of discretion to the courts. In section 2, Congress enumerated three specific offenses[213] and the courts should not circumvent this formulation.[214] It is one thing to interpret what fits within a certain category, but it is quite another to create an entirely new category of offense.

Generally, the United States Supreme Court adheres strictly to the three offense format explicitly outlined in the Sherman Act and has refrained from discussing specific doctrines such as monopoly leveraging.[215] Therefore, it is helpful to examine monopoly leveraging in terms of the expressly stated offenses. The offense of monopoly under section 2 contains the requirements of possession of monopoly power in the relevant market and "the willful acquisition or maintenance of that power."[216] The monopoly leveraging doctrine fails to meet the first requirement because the attacked monopolist admittedly does not possess monopoly power in the relevant leveraged market. The Supreme Court has also defined the necessary elements for an attempt claim. Unlike straight monopolization which only requires that the actor have the intent to perform the act which results in monopolization, "attempt" claims require that the actor have a "'specific intent' to accomplish the forbidden objective."[217] This accepted rule[218] establishes a more difficult hurdle for attempt claims because the market itself has not yet been monopolized. The courts therefore focus more closely upon the actor's conduct to find the violation rather than focusing solely on market impact. To view monopoly leveraging as a species

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212. *See supra* notes 41-43 and accompanying text.

213. 15 U.S.C. § 2 (1988 & Supp. IV 1992). For the relevant text of the statute, see *supra* note 4.

214. *See* Robinson, *supra* note 210.

> As a matter of antitrust policy, such a conclusion [leveraging as an offense] is not difficult to accept; leveraging of monopoly power to gain an edge in a second market shares the vice of unlawful tying arrangements in that it introduces an alien factor into the competitive milieu in the second market. But it is difficult to reconcile such a theory with the language of § 2, which condemns only monopolizing, attempting to monopolize, or conspiring to monopolize any part of commerce . . . .

Id. at 9 n.61.

215. Sullivan, *supra* note 187, at 1233.

216. Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2089 (1992); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

217. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

218. *See, e.g., id.*; Swift and Co. v. United States, 196 U.S. 375, 396 (1905).

of an attempt claim merely places the relaxed requirements[219] of leveraging claims sharply at odds with the heightened standard provided for attempt claims.

Since the *Berkey Photo* opinion, a number of courts have addressed the issue of monopoly leveraging as a distinct offense under section 2.[220] Because the *Berkey Photo* discussion of section 2 was general in nature, one court has suggested that this indicated the *Berkey Photo* court's desire to create a new offense,[221] and that if the *Berkey Photo* court had meant for leveraging to fall within one of the existing groups it would have examined those traditional offenses more carefully.[222] More recently, the Court of Appeals for the Second Circuit discussed monopoly leveraging under the rubric of an "attempt" claim, suggesting that it was merely a variation of existing doctrine.[223] Other courts' determinations have not been dispositive of the issue and leave doubt as to whether leveraging should be considered a new section 2 offense.[224] The *Berkey Photo* court's failure to specify the approach it took towards monopoly leveraging leaves open the question of what must be proved to make out a successful claim.[225]

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219. *See* Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 681 (2d Cir. 1985). For a list of the requirements, see *supra* note 123.

220. *See infra* notes 223-27 and accompanying text.

221. Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1516 (E.D. Cal. 1983), *cert. denied*, 474 U.S. 1103 (1986). The court stated:

> The [*Berkey Photo*] court evinces from its discussion a general rule regarding the legal limitation on monopoly power, and announces that that rule is violated any time monopoly power is used to gain a competitive advantage. This analytical process clearly speaks to the purpose of the statute itself rather than the limits and possibilities of any pre-existing statutory offense, and thus seems to be describing a new and different way of proceeding under the Act—that is, a new [s]ection 2 offense.

Id.

222. *Id.*

223. Twin Lab., Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990).

224. See Kerasotes Mich. Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135, 137-38 (6th Cir. 1988), *cert. dismissed sub nom.* G.K.C. Mich. Theatres v. National Amusements, Inc., 490 U.S. 1087 (1989), where the court noted that the plaintiffs had made out a satisfactory "leveraging" claim. The court, however, failed to indicate whether this was a separate offense or merely a species of offense. *See also* Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 681 (2d Cir. 1985). Although the court outlined the elements for a leveraging claim based upon its Second Circuit predecessor, *Berkey Photo*, the court did not clearly indicate whether leveraging was a distinct offense. *Id.*

225. *Grason Electric*, 571 F. Supp. at 1516. The court suggested that leaving the determination ambiguous creates as many problems as it solves. Leveraging leaves open the question of what the defendant is charged with and what elements need to be proven to secure a conviction. *Id.*

Some courts have assumed that monopoly leveraging is a distinct offense.[226] Conversely, other courts have placed leveraging under the existing "attempt to monopolize" category of section 2.[227] The cases have split rather evenly on the issue. An examination of the cases reveals that generally those viewing the doctrine favorably either do not discuss the issue or place it in an existing category.[228] Conversely, those cases with a more skeptical view toward leveraging approach the doctrine as creating a new and distinct offense under section 2.[229] Several possible explanations exist for this polarity.

Perhaps the *Berkey Photo* court recognized that the leveraging doctrine would gain more widespread acceptance if it appeared to fall within one of the traditional monopoly categories. Other courts that eventually followed the doctrine may have also taken this position as a means of more easily defending their theoretical positions.

On the other hand, courts opposed to the monopoly leveraging doctrine are inclined to make it appear more divergent from the expressly stated offenses. A court which found the leveraging doctrine unacceptable on theoretical grounds could argue that leveraging creates a new offense in an attempt to fortify its position. Consequently, a court which disagreed with *Berkey Photo* would have an initial argument that serves to weaken the doctrine, prior to asserting other more substantive arguments. The Ninth Circuit's primary arguments for rejecting monopoly leveraging in *Alaska Airlines* centered around a reversion back to enumerated offenses,

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226. *See* Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577 (D.C. Cir. 1984). Here, the court stated "[a]ssuming *arguendo* that leveraging is a distinct section 2 offense." *Id.* at 586. This indicates that the court may have viewed leveraging as a separate offense. *See also* Advanced Health-Care Servs. v. Radford Community Hosp., 910 F.2d 139 (4th Cir. 1990). In language similar to that used in *NCAA* the court observed "we assume that monopoly leveraging is an independent § 2 violation separate from monopolization and attempted monopolization." *Id.* at 149 n.17. This indicates that the court desired to address leveraging as a distinct violation.

227. *See* Key Enters. of Del., Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990). The court addressed monopoly leveraging under the heading of "*Monopoly Leveraging as an Attempt to Monopolize*." *Id.* at 1566. The court noted that monopoly leveraging merged into attempt. This theory appears to be a misinterpretation by the court of pure leveraging. *But see* M.A.P. Oil Co. v. Texaco Inc., 691 F.2d 1303 (9th Cir. 1982). In mentioning the possible claims for monopoly the court said, "[a]mong those forms is the theory that a firm violates § 2 by using its monopoly power in one market to gain an unwarranted competitive advantage in another." *Id.* at 1305-06. The court did not explicitly state that leveraging was a separate offense and proceeded more as if it fell within a traditional category.

228. *See supra* notes 224 & 227.

229. *See supra* note 226 and accompanying text.

making it extremely effective to categorize leveraging as a distinct offense that wandered outside traditional boundaries.[230] The *Alaska Airlines* court correctly focused on the parameters of the traditional offenses under section 2.

The stringent requirements for attempt to monopolize claims preclude leveraging from falling within this traditional category.[231] Furthermore, under the strictest interpretation, leveraging also does not appear to meet both elements of a straight monopolization claim. The broad language in *United States v. Griffith* indicates that any use of monopoly power "to gain a competitive advantage . . . is unlawful."[232] However, when this language is read in the context of a necessity for monopoly power in the *relevant* market,[233] the possibilities for fitting leveraging into a section 2 offense are constricted. Without a clear niche, monopoly leveraging falls into a new category of offense and should therefore be rejected. Consequently, the *Alaska Airlines* court adopted the correct approach in relying upon the more traditional offenses. Even with the broad language of *Griffith*,[234] the *Berkey Photo* leveraging doctrine fails to satisfy any *one* traditional offense. Congress did not intend to allow the judiciary to create offenses outside the traditional ones.

C. *What Does Monopoly Mean?*

Finding a niche for leveraging in the statutory scheme is a difficult task. If leveraging is viewed as a monopoly (as opposed to an attempt) offense, interpretational difficulties still arise. The Sherman Act and its legislative history provide minimal guidance in determining what actions should constitute monopoly. The plain language of the statute uses only the generic term "monopoly."[235] During Senate consideration, Senator George Edmunds of Vermont read from the Webster's dictionary on the definition of "monopoly."[236] This discussion directly followed the interchange on

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230. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d, 536, 548 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992). The court retreated into § 2 offenses saying "[t]hus, the elements for . . . 'monopolization' and 'attempted monopolization' are vital to differentiate between efficient and natural monopolies on the one hand, and unlawful monopolies on the other." *Id.*

231. *See supra* notes 10-12 and accompanying text.

232. United States v. Griffith, 334 U.S. 100, 107 (1948).

233. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

234. *See* Sullivan, *supra* note 187, at 1253 (noting that *Berkey Photo* was based upon *Griffith*).

235. 15 U.S.C. § 2 (1988 & Supp. IV 1992). For the relevant text of the statute, see *supra* note 4.

236. 21 CONG. REC. 3152 (1890), *reprinted in* KINTNER, *supra* note 1, at 293-94.

efficient and natural monopolies.[237] Viewed as a whole, this interchange indicates the Senators knew "monopoly" was something beyond the dictionary definition and needed development in the courts.

The United States Supreme Court has established the requirement of "exclusionary" or "predatory" conduct for a finding of monopoly under the Sherman Act.[238] In *United States v. E.I. du Pont de Nemours & Co.*,[239] the Court defined monopoly power as the "power to control prices or exclude competition," reinforcing the requirement of exclusionary conduct.[240] The monopolist, then, must engage in conduct that is clearly anti-competitive in addition to possessing monopoly power in the relevant market to complete the violation. Setting "exclusionary" conduct as the boundary creates the correct amount of protection for the large integrated company that competes in many markets. It recognizes the difference between conduct based upon efficiency and that based upon unlawful activity. This relatively strict standard provides the proper balance and insures that innocent competitors will not fall prey to broadly construed standards.

Applying the stricter standard described above, it is apparent that the *Alaska Airlines* court had the better approach to leveraging. The *Berkey Photo* court prohibited the "wielding" or "exercise" of monopoly power even when that power was legitimately acquired.[241] Judge Kaufman asserted that only those activities which are performed by a monopolist would be subject to liability.[242] At least one commentator, however, has criticized this assertion contending that it creates an undesirable gray area of

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The dictionary definition given in the Senate was "2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district; as, to monopolize the India or Levant trade." *Id.* at 293.

237. *See supra* notes 50-53 and accompanying text.

238. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

239. 351 U.S. 377, 391 (1956).

240. *Id.*

241. *See supra* note 97 and accompanying text.

242. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093. The court noted:

> A classic illustration is an insistence that those who wish to secure a firm's services cease dealing with its competitors . . . . Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even "honestly industrial."

Id. at 275.

interpretation.[243] The strongest arguments presented by the Ninth Circuit addressed the rather loose requirements for anti-competitive conduct offered in *Berkey Photo*. The *Alaska Airlines* court attacked the differences between *Berkey*'s "exercise" of monopoly power and traditional "predatory" requirements.[244] The *Berkey*

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243. *See* Robinson, *supra* note 210.

> While [exercise of monopoly power] is not specifically addressed by Judge Kaufman, the whole thrust of his opinion seemingly requires a showing that monopoly power has been used in order for a lawful monopolist to be guilty of the offense of monopolization. On the other hand, the court at least leaves open the question of whether a monopolist "monopolizes" if he engages in false advertising to the detriment of his competitors—an act that obviously can be, and typically is, committed by companies lacking monopoly power. At another point the opinion indicates that a monopolist does not run afoul of § 2 simply by advertising his products "unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier." Since advertising by a large company that does not enjoy monopoly power can also erect barriers to entry, does this suggest that Judge Kaufman does not necessarily regard the use of monopoly power as an essential element in every monopolization case? Does he perhaps intend to apply a rule of anticompetitive use as the index of illegality only in a "leveraging" case such as *Berkey* where the claim is that the monopolist used his monopoly power in one market in order to gain a competitive advantage in another?

Id. at 11 n.64 (citations omitted).

244. In exploiting the perceived weaknesses in the *Berkey Photo* opinion, the Ninth Circuit quoted *Berkey Photo*'s defense of high prices as not constituting anti-competitive behavior. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 549 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992). Unlike the *Berkey Photo* court, the Ninth Circuit noted that monopoly leveraging, like setting high prices, is just one of the societal "cost[s] that we incur" by permitting monopolies to exist. *Id.* at 548. The syllogism proceeds as follows: The externalities associated with monopoly, like setting high prices, are acceptable; *Berkey Photo*, 603 F.2d at 275, monopoly leveraging is also one of these externalities; therefore monopoly leveraging is acceptable. The court finished the analysis by applying the same rationale for allowing high prices (incentive for new competitors to enter the market because the buyers are discontented). *Alaska Airlines*, 948 F.2d at 548-49. The court stated: "Every time the monopolist asserts its market dominance on a firm in the leveraged market, the leveraged firm has more incentive to find an alternative supplier, which in turn gives alternate suppliers more reason to think that they can compete with the monopolist." *Id.* at 549. *But see*, Sullivan, *supra* note 187, at 1237 ("Consumers in a monopolized market can observe the problem they face; consumers in a competitively structured market into which a monopolist leverages power cannot.") Of course this syllogism is only possible "in the absence of any meaningful, substantive distinction between monopoly leveraging and other consequences of lawful monopoly." *Alaska Airlines*, 948 F.2d at 549. On the other hand, the *Berkey* court agreed that high prices "invite[d] new competitors into the monopolized market" but felt that leveraging was "an exercise of power over the market" as opposed to a mere "consequence of size." *Berkey Photo*, 603 F.2d at 274-75 & n.12. It has been suggested that leveraging would be much easier to control than monopoly pricing because injunctions would provide the proper relief. *See* Sullivan, *supra* note 187, at 1237.

> To forbid leveraging does not present the severe problem of judicial administration that would arise if a court were to enjoin monopoly pricing. Courts can readily control leveraging through equitable relief and effectively deter lever-

Photo court, however, remarked that certain benefits "are a consequence of size and not an exercise of power over the market,"[245] indicating a realization that efficiency had long been recognized as one of the safe harbors of the Sherman Act. The *Berkey Photo* approach could be read to establish a presumption that the leveraging conduct is improper.[246] A competitor could then rebut this presumption by a showing of efficiency. For this theory to work, one must believe that monopoly is "'inherently evil'"[247] and any use thereof should be scrutinized.[248] On the other hand, the *Alaska Airlines* court correctly utilized a presumption of propriety absent a

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> aging by treble damages or criminal sanctions. . . . Courts hesitate to forbid conventional limit pricing due to problems in identifying and controlling it, and also because limit pricing forces the monopolist to give up some of its present "monopoly rents" in order to lengthen its tenure as a monopolist. However, none of these constraints applies to leveraging.

Id. Absent "predatory" conduct, however, ease of control does not necessarily justify granting relief. One must remember that the logical structure of the syllogism collapses instantly absent a strong similarity between leveraging and other uses of monopoly power.

Once again, the *Berkey Photo* view, drawing a distinction between pricing and leveraging, appears rooted in what the court saw as the parallel to tying cases. *Berkey Photo*, 603 F.2d at 275-76. Tying had been condemned by the Supreme Court as being unlawful per se. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072, 2079 (1992); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). Conversely, the Ninth Circuit viewed leveraging solely in its § 2 context allowing the court to conclude (through the syllogism) that it was merely another permissible use of monopoly power. *Copperweld*'s language seems to suggest that this approach was more faithful to the spirit of the divided sections of the Sherman Act although the policy arguments from *Berkey Photo* certainly are tenable. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984). The strict interpretation seems more sound in light of the Act's emphasis on separation and recent Supreme Court precedent, although the Ninth Circuit could be seen as elevating form over substance.

245. *Berkey Photo*, 603 F.2d at 274.

246. *Id.* at 276.

247. *Id.* at 273 (quoting United States v. United States Shoe Mach. Corp., 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954)). "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 market does not 'monopolize' within the meaning of the statute." *Id.* at 276 n.15.

248. For a discussion of an opinion critical toward the practice of leveraging, see Lawrence A. Sullivan & Anne I. Jones, *Monopoly Conduct, Especially Leveraging Power from One Product Market to Another in* ANTITRUST, INNOVATION, AND COMPETITIVENESS 165 (Thomas Jorde & David Teece eds. 1992). "When a firm leverages power held in one market into a different market, the initial inference ought to be that unreasonably restrictive and exploitive consequences will result." *Id.* at 174. *But see*, Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984). "No practice a manufacturer uses to distribute its products should be a subject of serious antitrust attention . . . . It should make no difference whether the manufacturer 'ties' products together in a bundle, employs full-line forcing or exclusivity clauses, or uses reciprocity." *Id.*

finding of "predatory" conduct.[249]

Berkey Photo also suggests a unique standard for judging conduct in a two market situation. When evaluating such a case, the *Berkey Photo* court required that competition be "merely distorted,"[250] a requirement clearly less stringent than any discussed above. The *Berkey Photo* court reinforced its desire to place extra restraint upon the holder of a monopoly, even if lawfully acquired. Although Judge Kaufman provided a disclaimer to this rule for the competitor who uses "efficient size,"[251] the Ninth Circuit noted that this gave little solace to the large and efficient competitor.[252] Because a competitor has a lawful monopoly in one market, it should not be held to a higher standard in another, related market.[253] Furthermore, the alleged monopolist's situation should be evaluated considering each market separately. If not, integrated competitors have a greater chance of suffering[254] because they reach many different markets and under the *Berkey Photo* rule their efficiency could actually be a Sherman Act violation.

The legislative history of the Sherman Act and subsequent case law indicate that the efficient monopolist should not be unduly burdened,[255] and therefore efficient monopolies should not be considered unlawful under sections 1 and 2.

D. *Effects of* Image Technical Services

Recently, the Supreme Court issued a decision which dealt with both section 1 and 2 claims. In *Eastman Kodak Co. v. Image Technical Services, Inc.*,[256] the Court shed more light on its position

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249. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 549 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992).

250. *Berkey Photo*, 603 F.2d at 275.

251. One commentator has remarked that "from the 1992 vantage point, *Berkey* reads as a generally sound opinion well within the mainstream. It acknowledges the importance of efficiency, even by monopolists, but does not suppose that courts must trade everything else of value in the antitrust tradition to attain efficiency." Sullivan, *supra* note 187, at 1256.

252. *Alaska Airlines*, 948 F.2d at 548. "The anticompetitive 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." *Id.*

253. *Id.*

254. Continental Airlines, Inc. v. American Airlines, Inc. (*In re* Air Passenger Computer Reservation Sys. Antitrust Litig.), 694 F. Supp. 1443, 1475 (C.D. Cal. 1988). "Monopoly leveraging is overly restrictive because it attacks unilateral conduct which does not threaten monopolization. The danger is that such scrutiny will inhibit vertically integrated firms from vigorously competing in complementary markets." *Id.*

255. *See supra* notes 63-65 and accompanying text.

256. 112 S. Ct. 2072 (1992).

towards monopolies, possibly helping to resolve the conflict between *Berkey Photo* and *Alaska Airlines*. Although "leveraging" was not raised specifically at the Supreme Court level,[257] the Court discussed some of the rules on monopoly power. The Supreme Court relied upon the "willful acquisition or maintenance"[258] requirement of *Grinnell* to disallow Kodak's motion for summary judgment. Furthermore, the court held that there was evidence "that Kodak took exclusionary action . . . and used its control over parts to strengthen its monopoly share of the Kodak service market."[259] Unlike *Berkey Photo* and *Alaska Airlines* where the plaintiffs admitted that the defendants lacked monopoly power in the second market,[260] the Supreme Court indicated here that Kodak already *had* a "monopoly share" in the second market.[261] The court did not approach this as a monopoly leveraging case. Instead, the court viewed this as a case of Kodak possessing *monopoly* power in two separate markets.[262] If anything, this decision serves to reinforce the guidelines established in earlier cases[263] by relying upon the traditional offense format. It also demonstrates that the Ninth

257. *Id.* At trial, the district court held that leveraging was not a "legally valid" doctrine within the Ninth Circuit. The court further proclaimed that "plaintiffs have not come forward with any facts to suggest that Kodak had attempted to leverage power in that [service] market to gain a competitive advantage in another market." Image Technical Servs., Inc. v. Eastman Kodak Co., No. C-87-1686-WWS, 1988 WL 156332, at *3 (N.D. Cal. Apr. 18, 1990). The Ninth Circuit failed to deal with the leveraging issue saying "[c]ertainly the focus of appellants' Section 2 claim has changed on appeal." Eastman Kodak Co. v. Image Technical Servs., Inc, 903 F.2d 612, 619-20 & n.7 (9th Cir. 1990); *see* DiResta et al., *supra* note 123, at 78-79 (examining this case, the authors stated that "[w]ith respect to the monopolization claims, the Ninth Circuit ignored the monopoly leveraging theory and analyzed the claims of Kodak's refusal to deal as a monopolization or attempted monopolization.").

258. *Image Technical Servs.*, 112 S. Ct. at 2090.

259. *Id.* at 2091. As opposed to the display biasing in *Alaska Airlines*, the conduct on Kodak's part in this case seems much more culpable. Kodak sold and serviced their own brands of copier with their own parts which fit only their copiers. Certain Independent Service Organizations (ISO) began competing with Kodak in the copier servicing aftermarket. As a result, Kodak adopted a policy of knowingly refusing to sell replacement parts to ISOs. *Image Technical Servs.*, 903 F.2d at 614. These policies are more obviously exclusionary than the mere distortion presented in *Alaska Airlines*.

260. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 271 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 546 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992).

261. *Image Technical Servs.*, 112 S. Ct. at 2091.

262. "Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard of § 2." *Image Technical Servs.*, 112 S. Ct. at 2090.

263. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); United States v. Grinnell Corp., 384 U.S. 563 (1966).

Circuit's terse dismissal of *Griffith* might have been misplaced as the Supreme Court still relied upon *Griffith*'s supposedly broad language. However, the Supreme Court was not truly called upon to apply the *Griffith* language to its fullest because the conduct in question was clearly anticompetitive.

CONCLUSION

Monopoly leveraging has been viewed as both a Sherman Act section 2 offense and beyond the scope of the Sherman Act. Both approaches to monopoly leveraging are relatively sound, but they are separated by a vast difference of opinion regarding monopoly power in general. However, in light of recent Supreme Court pronouncements, monopoly leveraging cannot correctly be considered a violation under section 2 of the Sherman Act.

The *Alaska Airlines* court noted that a certain amount of monopoly power was acceptable and indeed desirable to maintain efficiency. The *Berkey Photo* court, to the contrary, believed that monopoly was inherently "undesirable" and should only be allowed to exist when it was built upon efficiency. This initial difference molded the shape of the two opinions. The *Alaska Airlines* court focused correctly upon the inherent differences between the first two sections of the Sherman Act. The plain language of the Sherman Act indicates that the touchstone of section 2 conduct should be monopoly power, or a dangerous probability, in the relevant market. Leveraging fails to clearly recognize this market power requirement. Furthermore, if leveraging is viewed as a completely new offense, it oversteps the three offense format created by Congress. Although leveraging may seem sound as a matter of policy, it does not distinguish sharply enough between lawful and unlawful monopoly. The correct approach to monopoly requires power in the relevant market and a "predatory" use of that power. The *Alaska Airlines* court correctly noted that these requirements are necessary to avoid wrongfully punishing the efficient competitor and unnecessarily shielding the inefficient competitor.

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