Monopolization under the Sherman Act: the third wave and beyond

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Like Gaul, monopolization litigation under section 2 of the Sherman Act has been divided into three parts: A first part beginning with the *Northern Securities* case of 1904[1] and ending with the *U.S. Steel* case in 1920;[2] a second part, the Thurmond Arnold era, beginning in the late 30's with the filing of the *ALCOA* case[3] and ending in the early 50's with the decision in the *United Shoe Machinery* case;[4] and a third part beginning in the late 60's with the filing of the *IBM* case by the Department of Justice.[5] Part three has been kept rolling by a marked increase in

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1 Northern Securities Co. v. United States, 193 U.S. 197 (1904).

2 United States v. United States Steel Corp., 251 U.S. 417 (1920).

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

4 United States v. United Shoe Machinery Corp., 110 F.Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954). Later opinions on remedy 391 U.S. 244 (1968); 1969 Trade Cases ¶ 72,688 (D. Mass.) (consent decree). *See* discussion, *infra* note 34.

5 United States v. IBM Corp., 4 TRADE REG.REP. (CCH) ¶ 45,070 Case 2039 (filed S.D.N.Y. 1969) (No. 69-200). For an analysis of the IBM case, see L. Weiss, *The Structure-Conduct-Performance Paridigm and Antitrust,* 127 U.PA.L.REV. 1104 (1979).

private treble damage litigation alleging monopolization, the filing of a renewed attempt to dissolve A.T.&T. under section 2 by the Antitrust Division[6] and monopolization cases brought against Exxon,[7] du Pont[8] and the cereal companies[9] by the F.T.C. In other forums, wave III has gained added impetus from legislative proposals aimed at economic concentration,[10] and the recommendations of the National Commission for the Review of Antitrust

6 United States v. American Telephone & Telegraph Co., [1970-79 Transfer Binder] TRADE REG.REP. (CCH) ¶ 45,074, Case 2416 (D.D.C. 1974). The case seeks divestiture of Western Electric and the Long Lines Division. A similar prior case against A.T.&T. was settled by a consent decree short of divestiture. United States v. Western Electric Co., 1956 Trade Cases ¶ 68,246 (D.N.J. 1956). The procedure for settling the case and the relief achieved are examined and severely criticized in REPORT TO THE PRES. AND THE ATTORNEY GENERAL OF THE ANTITRUST SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE (1959).

7 Exxon Corp., [1973-76 Transfer Binder] TRADE REG.REP. (CCH) § 20,388 (1973).

8 E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (1980) (final order and opinion dismissing complaint). The *du Pont* opinion is a significant attempt to monopolize decision by the Commission. The opinion was issued after completion of this manuscript. While the violations charged in the complaint justify treating the case as beyond the scope of this article, the opinion deals extensively with monopolization precedent and many of the conduct issues discussed elsewhere in this article. Appropriate footnote references to *du Pont* have been inserted where relevant to the text analysis of other leading wave III decisions.

9 Kellogg Co., [1970-73 Transfer Binder] TRADE REG.REP. (CCH) ¶ 19,898 (1972).

10 *See* S. 1167, 93d Cong. 1st Sess. (1973); *Hearings on the Industrial Reorganization Act Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.* 93d-94th Cong. (1973-76); GOLDSCHMID, MANN & WESTON (eds.), INDUSTRIAL CONCENTRATION: THE NEW LEARNING ch. 7 (1974); Note, *The Industrial Reorganization Act: An Antitrust Proposal to Restructure the American Economy,* 73 COLUM.L.REV. 635 (1973); Comment, *A Legislative Approach to Market Concentration: The Industrial Reorganization Act,* 24 SYRACUSE L.REV. 1100 (1973).

Laws and Procedures suggesting relaxation of the traditional legal test for attempts to monopolize and congressional study of no conduct monopolization proposals.[11]

Some have called these distinct periods of section 2 monopolization activity "waves,"[12] thereby invoking the analogy of distinct oscillations of a large mass surging to and fro. Monopolization litigation might also be likened to separate and distinct "eruptions" of a volcano—which then subsides to a period of peaceful slumber when everyone enjoys its presence, ignores its potential, and occasionally meditates about the consequences should a new eruption ensue. Whether they be called "waves" or "eruptions," each period of monopolization litigation has been followed by a relative calm where little or no monopolization litigation takes place.[13] The ensuing storm after the calm, usually leads doctrine off in a new direction, presents new procedural and remedial difficulties, and has a unique quality all its own. It shall be the purpose of this article to survey the three distinct waves of monopolization litigation which have taken place under the Sherman Act, with emphasis upon the current wave and its new directions, its peculiar difficulties, and its unique qualities.

11 I National Commission for the Review of Antitrust Laws and Procedures, ch. 8 (1979) (hereinafter cited NCRALP). The papers submitted to NCRALP on section 2 by various witnesses are reprinted in 48 ANTITRUST L.J. 813-905 (1979). See also, Applebaum, Shenefield, Blecher & Bork, *Debate: Should the Sherman Act Be Amended to Broaden the Offense of Attempt to Monopolize,* 48 ANTITRUST L.J. 1433 (1979).

12 Shepherd, *The Economics: A Pep Talk,* 41 ANTITRUST L.J. 595, 598 (1972).

13 *Id.* at 595. Surveys of the evolution of monopolization standards and analysis of the current status of the law may be found in 3 P. AREEDA & D. TURNER, ANTITRUST LAW chs. 6 & 7 (1978); L. SULLIVAN, ANTITRUST ch. II (1977).

I. Waves I and II: establishing doctrinal parameters

A. Wave I: attacking the "trusts"

The first wave of section 2 monopolization litigation broke out in the second and third decades of the Sherman Act, after some early litigation grappling with the commerce standard of the Act[14] and the Act's application to the railroads.[15] Following the great merger movement in the late 19th century, many of the leading firms of the era found themselves involved in government-initiated section 2 litigation. United States Steel, Standard Oil, American Tobacco, International Harvester, American Sugar, Corn Products, American Can, du Pont, Swift & Co., and others found themselves enmeshed in section 2 litigation.[16] Out of the welter of early litigation, some general standards were developed and still provide the analytical framework for approaching a section 2 case as well as the suggestion of issues to trouble subsequent courts in defining when a section 2 violation should or should not be found.

In *Northern Securities Co. v. United States,*[17] a Sherman Act case contesting the merger of the Great Northern and Union

[14] *See* United States v. E. C. Knight Co., 156 U.S. 1 (1895) holding regulation of the manufacturing of goods was not within the commerce power and limiting the Sherman Act to economic activity in the physical flow of goods across state lines. The lack of enthusiasm for prosecutions early in the life of the Sherman Act has, in part, been attributed to the restrictive commerce standard adopted by the *Knight* case. *See* Corwin, *The Anti-Trust Acts and the Constitution,* 18 Va.L.Rev. 355 (1932).

[15] Northern Sec. Co. v. United States, 193 U.S. 197 (1904); United States v. Trans-Mo. Freight Ass'n., 166 U.S. 290 (1897).

[16] For surveys of early monopolization litigation, see Shepherd, *supra* note 12, at 598; Levi, *The Antitrust Laws and Monopoly,* 14 Univ.Chi.L.Rev. 153 (1947); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?* 43 Ill.L.Rev. 745 (1949).

[17] 193 U.S. 197 (1904).

Pacific railways, the Court read the Sherman Act as establishing competition as the rule of trade and section 2 as outlawing a combination of competitors by merger eliminating competition between them in *any part* of commerce. The combination of two railroads through the device of a holding company was found to have both restrained and monopolized railroad traffic in northern Minnesota and transcontinental traffic north of the Union Pacific's line to the west coast. Justice Holmes, in dissent would have upheld the combination under section 1 "until something is done with the intent to exclude strangers to the combination from competing with it."[18] Furthermore, Holmes suggested that conduct excluding competitors was also required before a violation of section 2 could be found. The majority and dissent implicitly saw the essence of the offense as the obtaining or maintaining of overwhelming market power but differed over the definition of markets (in this case geographic) and whether the defendant's monopoly structure conferred by merger was sufficient to constitute a violation of the Act or whether exclusionary behavior toward third parties was required before it could be held that one possessing monopoly power could be said to have unlawfully monopolized.

In *Standard Oil Co. v. United States*[19] and *United States v. American Tobacco Co.,*[20] the "rule of reason" was read into the otherwise literal language of section 1 of the Sherman Act, while section 2 was construed as supplementing section 1 by prohibiting every act aimed at achieving a monopoly.[21] Section 2 of the Act was subordinated to section 1 by holding that section 2 is violated by achieving or maintaining a monopoly through section 1 violations. In *American Tobacco,* the Court undermined the broad rule of *Northern Securities,* by indicating that it was "not alone"

[18] *Id.* at 409.

[19] 221 U.S. 1 (1911).

[20] 221 U.S. 106 (1911).

[21] Standard Oil Co. v. United States, 221 U.S. 1, 60-62 (1911).

because of the mergers establishing American Tobacco's "dominion and control" over tobacco trade that section 2 was violated, but because the combinations were done with the purpose and effect of restraining trade and injuring competitors that a violation of section 2 could be found.[22]

The *Northern Securities* structural standard, suggesting that section 2 may be violated by mergers establishing monopoly power even though not accompanied by anticompetitive behavior, was more directly rejected in *United States v. United States Steel.*[23] The government claimed the merger of 180 independent firms in various phases of steelmaking resulting in the control of 80%-90% of national steel production constituted monopolization in violation of section 2. Noting that U.S. Steel's market share had declined substantially by the time of suit and that its position had not been obtained by predatory acts in violation of section 1, the Court held that no violation of section 2 could be found because of the absence of monopoly power or any evidence of its exercise during the period U.S. Steel dominated the market.[24] The Court rejected the argument that size alone, even size with a potential for abuse, is sufficient to show a violation of section 2. The Court held the government must show an unlawful exercise of that power, either by fixing prices or excluding competitors, before a violation of section 2 would be found. The Court stated without citation to authority or examination of the legislative history of the Act:

> The corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affeced by it or to exaggerate its influence. But we must adhere to the law and the law does not make mere size an offense or the existence of unasserted power an offense. It, we repeat, requires overt acts. . . . It does not compel competition, nor require all that is possible.[25]

Justice Day, dissenting, embraced the view that section 2 is only violated where monopoly power is gained by section 1 violations, differing only in interpretation of the facts as to whether the mergers were done with an unlawful section 1 purpose and effect of eliminating competition or were done with the objective of realizing economies of scale and integration in steelmaking.[26]

With the exception of a few railroad merger cases and *Eastman Kodak Co. v. Southern Photo Materials Co.,*[27] the first wave or eruption of monopolization litigation, for all practical purposes, ended with the *United States Steel* case. Although World War I, the laissez-faire policies of the presidency of Calvin

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22 221 U.S. at 181-83.

23 251 U.S. 417 (1920).

24 A survey of the steel industry of that era indicates that rugged competition accompanied by predatory tactics excluding competitors and exploiting consumers had been replaced with consolidation of the industry by merger, gentlemen's agreements to limit production and fix prices, and use of government powers to facilitate production limitations and stabilize prices. See Shaffer, *Responses to Competition in the Steel Industry, 1918-1935,* 10 Sw.U.L.Rev. 835 (1978).

25 251 U.S. at 451. This is the source of the proposition that "size alone does not violate the Sherman Act" frequently expressed in the meaningless cliche that "bigness is not necessarily bad." Bigness is not necessarily good, either. Judge Wyzanski has observed: "Fundamentally, the Sherman Act's greatest importance is that it attempts to deal with Acton's disease. That is to say, it deals with the problem of power and the tendency that all power has to corrupt, and absolute power corrupting absolutely." *Antitrust Symposium: Morning Panel Discussion,* 10 Sw.U.L.Rev. 80, 81 (1978). Another meaningless antitrust cliche, "the antitrust laws protect competition, not competitors," is also often encountered in monopolization litigation. *E.g.,* California Computer Products, Inc. v. IBM Corp., 613 F.2d 727, 742 (9th Cir. 1979). There, of course, can be no competition without competitors, and the courts have, in per se cases, presumed an injury to competition because of a proven injury to a competitor. *See* Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

Cliches in antitrust appear to be even less useful than they may be elsewhere in law, serving only to confuse or to avoid rational analysis rather than further it.

26 251 U.S. at 457.

27 273 U.S. 359 (1927).

Coolidge, the 20's infatuation with stock speculation, a growing antitrust sophistication in the business community, and the plunge into a depression in the 30's may all have contributed to the decline of monopolization litigation, the state of the law post-*United States Steel* probably did more to limit the effectiveness of section 2 than any other factor.[28]

It appeared clear that a charge of monopolization could only be sustained by proof of a defendant's overwhelming power coercing others and gained or maintained by violations of section 1 of the Act. The post-*United States Steel* lull in monopolization litigation was extended by the national preoccupation with World War II, despite the filing of the *ALCOA* case[29] in 1937 and the TNEC studies of 1939–1941 urging greater antitrust activism as the way to bring the economy out of the post-depression doldrums.[30] The end of World War II, however, signalled a new surge in monopolization litigation with substantial shifts in doctrinal development initiated by Judge Hand's opinion in *ALCOA*[31] and a renewed interest in antitrust enforcement as a basic tool of government management of the economy in the post-war era.

B. Wave II: refining the standards and directions of monopolization litigation

The second wave or eruption of section 2 litigation, which has dominated the training and thinking of today's generation of judges, lawyers and economists, must also be placed in its historical context. Wave II evolved after the shattering experience of the depression and national flirtation with cartelization early in the New Deal as a remedy for collapse of the economy.[32] Wave II also developed against the backdrop of a significant expansion of governmental involvement in and regulation of the economy in order to counter the effects of the depression and contain abuses perceived as factors contributing to it, including relative inaction on the monopolization front. Most of the monopolization litigation during wave II was government initiated, reflected a growing use of economic theory as a tool for analysis, was aimed at the middle-sized to insignificant range of companies on the post-depression industrial horizon,[33] had to contend with the ambiguous but narrow precedent from the different era of wave I, and uncovered the complexity of remedies and the inability of enforcement officials and the courts to deal efficiently with structural remedies.[34] Phase two, lasting roughly from the *ALCOA* opinion to the *United Shoe* case[35] and petering out with the Court's application of a narrow market test in *du Pont Cel-*

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28 *See,* Levi, *supra* note 16, at 160; Rostow, *supra* note 16, at 748.

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

30 The Temporary National Economic Committee (T.N.E.C.) published 43 monographs between 1938 and 1941 on specific economic problems including antitrust enforcement. The work of the T.N.E.C. is summarized in D. Lynch, The Concentration of Economic Power (1946).

31 148 F.2d 416 (2d Cir. 1945).

32 *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), invalidating the National Industrial Recovery Act.

33 Shepherd, *supra* note 12, at 598.

34 For an explicit discussion of factors constraining judicial liberality in fashioning remedies in structural monopolization litigation, *see* United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 347-48 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954). The limited injunctive relief granted by Judge Wyzanski failed to dissipate United Shoe's monopoly power, thereby necessitating further proceedings. *See* United States v. United Shoe Machinery Corp., 266 F.Supp. 328 (D. Mass. 1967) (modification denied), *rev'd* 391 U.S. 244 (1968). Modification of the decree, requiring partial divestiture, was finally arrived at by consent decree. See United States v. United Shoe Machinery Corp., 1969 Trade Cases ¶ 72,688 (D. Mass. 1969).

35 *Supra* note 4.

lophane[36] and the questionable settlement of the *A.T.&T.* case,[37] was doctrinally significant yet economically insignificant.

The highlight decision was, of course, Judge Hand's opinion in *ALCOA*,[38] a case which ended up in the Second Circuit for final decision because of the lack of a quorum in the Supreme Court. Although Judge Hand's opinion was not subject to further review, he was cabined by trial court findings dismissing the complaint,[39] previous antitrust actions against ALCOA attacking its conduct and patent practices in obtaining a monopoly over the production of virgin ingot,[40] and the Supreme Court precedent of wave I monopolization litigation seemingly restricting the test for illegality in section 2 cases to proof of overwhelming market share obtained or maintained by section 1 violations of the Sherman Act.

In the course of circumventing these constraints, Judge Hand's opinion in *ALCOA* established the methodology and analytical framework by which modern monopolization cases are analyzed: (1) proof of relevant product and geographic markets; (2) a showing of monopoly power (in the sense of power not subject to the discipline of competition) to fix prices or exclude competition in the markets defined; and (3) some additional element of conduct in either acquiring, exercising or maintaining monopoly power in the affirmative sense of conduct with a purpose or effect to acquire or maintain a monopoly or in the

[36] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

[37] United States v. Western Electric Co., 1956 Trade Cases ¶ 68,246 (D.N.J. 1956).

[38] 148 F.2d 416 (2d Cir. 1945).

[39] United States v. Aluminum Co. of America, 44 F.Supp. 97 (S.D.N.Y. 1942).

[40] The history of previous actions against ALCOA is surveyed in Judge Hand's opinion in *ALCOA*. 148 F.2d at 422-23.

negative sense of an unexplained and unjustified possession of persistent substantial monopoly power which competition might otherwise be expected to erode. Judge Hand's now familiar manipulation of factors relied upon for product market tests,[41] the dicta suggesting a quantitative monopoly power test of 90% yes, 64% maybe, and 33% no,[42] and the ambiguity regarding what conduct over and above the mere existence of a monopolist with overwhelming market power would be sufficient to prove unlawful monopolization and who carries the burden of proof on this issue,[43] have provided a generation of examination questions for antitrust teachers and conundrums for all concerned with subsequent monopolization cases.

Viewed in its historical framework, *ALCOA* represented a sharp substantive departure from the 1920 *United States Steel* opinion by suggesting the unexplained and long standing maintenance of an overwhelming market share, as well as the formation and unlawful behavior of one possessing monopoly power, could constitute proof of unlawful monopolization. In further departures from wave I monopolization litigation, the Hand opinion broadened section 2 policy objectives from those assumed by the Court in *United States Steel* to include social and political goals as well as economic ones[44] and shifted the relationship of

[41] *Id.* at 424-25.

[42] *Id.* at 424. The court's more elaborate analysis of the monopoly power issue appears *id.* at 425-29.

[43] *Id.* at 429-45.

[44] "Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It 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. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes." *Id.* at 427.

section 1 and section 2 from a dependency of section 2 upon proof of section 1 violations to that of an independent prohibition upon displacement of competition where achieved by the unexplained or unjustified acquisition or possession of monopoly power.[45]

Two other opinions staked out new ground in wave or eruption II monopolization litigation. In *American Tobacco Co. v. United States,*[46] the Court upheld a charge of combination and conspiracy to monopolize against the leading cigarette manufacturers based upon evidence of a joint program of buying up cheaper grades of tobacco with the purpose of excluding competitors manufacturing low priced cigarettes. In one of the few cases exploring the meaning of the combination or conspiracy to monopolize offense of section 2,[47] the Court endorsed a reading of these offenses as outlawing joint action by which the conspirators acquire power to exclude actual or potential competition with an intent or purpose to exercise that power.[48] The Court stressed that the acts done in forming or executing the conspiracy might be wholly innocent acts; that the combination or conspiracy could be proved from circumstantial evidence; and, that: "[n]either proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act."[49]

45 "Perhaps, it has been idle to labor the point at length; there can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition. To repeat, if the earlier stages are proscribed, when they are parts of a plan, the mere projecting of which condemns them unconditionally, the realization of the plan itself must also be proscribed." *Id.* at 428.

46 328 U.S. 781 (1946).

47 See AREEDA & TURNER, *supra* note 13, at 359-90; SULLIVAN, *supra* note 13, at 132-34 (1977).

48 328 U.S. at 809.

49 *Id.* at 810.

Stating what is *not* required for proof of a violation, of course, does not help much in furthering one's understanding of what *is* required to prove a violation. The Court however, endorsed and embraced Judge Hand's *ALCOA* test and concluded that joint action to acquire monopoly power—whether done by fair means or foul—with an intent to acquire or maintain that power—whether exercised or not—is sufficient to prove a violation of section 2's prohibition of combinations or conspiracies to monopolize.

United States v. Griffith[50] established the proposition that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."[51] *Griffith* is often cited for the proposition that the use of monopoly power from one market to injure or destroy competition in another market constitutes a violation of the monopolization prohibition of section 2 of the Sherman Act even if monopoly power in the first market is lawfully acquired or maintained.[52]

By the end of wave or eruption II monopolization litigation, several potential theories for proof of a section 2 monopolization violation were available. Judge Wyzanski distilled them into three distinct tests, summarizing the law in his opinion in *United States v. United Shoe Machinery Corp.*:[53]

> [1] An enterprise has monopolized in violation of § 2 of the Sherman Act if it has acquired or maintained a power to exclude others as a result of using an unreasonable "restraint of trade" in violation of § 1 of the Sherman Act. . . .

50 334 U.S. 100 (1948).

51 *Id.* at 107.

52 See *e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973).

53 110 F.Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

[2] [A]n enterprise has monopolized in violation of § 2 if it (a) has the power to exclude competition, and (b) has exercised it or has the purpose to exercise it. . . . [I]t is a violation of § 2 for one having effective control of the market to use, or plan to use, any exclusionary practice, even though it is not a technical restraint of trade. . . .

[3] Judge Hand said [in *Alcoa*] that one who has acquired an overwhelming share of the market "monopolizes" whenever he does business, . . . apparently even if there is no showing that his business involves any exclusionary practice. . . . [T]his doctrine is softened by Judge Hand's suggestion that the defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages, . . . economic or technological efficiency, . . . low margins of profit maintained permanently and without discrimination, or licenses conferred by and used within, the limits of the law, (including patents on one's own inventions, or franchises granted directly to the enterprise by a public authority).[54]

Judge Wyzanski found *United Shoe* violated tests two and three. His analysis of the facts giving rise to those conclusions contain interesting harbingers of issues which appear to dominate wave III litigation. In determining whether the defendant possessed monopoly power, Judge Wyzanski found United Shoe had "75 plus percentage" of the market for shoe manufacturing machinery. While purporting not to base a finding of monopoly power on market share alone, the opinion notes that:

[A] bold, original court mindful of what legal history teaches about the usual, if not invariable relationship between overwhelming percentage of the market and control of the market, and desirous of enabling trial judges to escape the morass of economic data in which they are now plunged, might, on the basis of considerations of experience and judicial convenience, announce that an enterprise having an overwhelming percentage of the market was presumed to have monopoly power, that a plaintiff bore its burden of proof under § 2 of the Sherman Act if it satisfied the trier of fact that defendant had the prohibited percentage, and that defendant, to escape liability, must bear the burden of proving that its share of the market was attributable to its ability, natural advantage, legal license, or, perhaps to others' lack of interest in entering the market.[55]

[54] 110 F.Supp. at 342.

Whether the Court was, in fact, being "bold" and "original" or not is open to speculation since the additional factors relied upon to conclude United Shoe possessed monopoly power consisted of United's practice of leasing and not selling machines, charging different rental prices for different machines, the superiority of its products and services, and United's size giving it the ability to attract offers of new inventions and inventors' services in the industry. Judge Wyzanski noted these activities were "natural and normal," but were not practices that could be described as "inevitable consequences of ability, natural forces, or law."[56] Finding these practices not economically inevitable and the root of United's control of the market—even though not illegal, immoral or unnatural—the Court concluded: "the law does not allow an enterprise that maintains control of a market through practices not economically inevitable, to justify that control because of its supposed social advantage."[57] The upshot of this analysis is to apply the test of a "bold and original" court by inferring monopoly power from an overwhelming market share and then shifting the burden of proof to the defendant to show the power was obtained and maintained solely through superior efficiency, patents or other government franchise, or praiseworthy, pure and untainted competitive superiority in product, innovation or service.[58]

Wave or eruption II thus appeared to establish expansive substantive tests paving the way for section 2 becoming a broad

[55] *Id.* at 343, n.1.

[56] *Id.* at 344.

[57] *Id.* at 345.

[58] A test Judge Wyzanski adopted in United States v. Grinnell Corp., 236 F.Supp. 244 (D.R.I. 1964), *aff'd on other grounds and modified as to the decree,* 384 U.S. 563 (1966). For an elaboration on this aspect of the *Grinnell* case, *see* Note, *Section 2 of the Sherman Act—Is a Per Se Test Feasible?* 50 Iowa L.Rev. 1196 (1965).

and flexible weapon for attacking firms with an unexplainably large market share, a common course of action by dominant firms excluding smaller competitors, and the use of lawfully held monopoly power to fix prices or exclude competitors from other markets. Like wave I however, wave II probably ended as a result of a combination of external factors plus some limiting judicial decisions.

The early 50's witnessed the advent of and preoccupation with the Korean War, a relatively less activist Eisenhower administration and at least three significant legal decisions contributing to the demise of wave II monopolization litigation. The first decision weakening the implications of wave II was the *United Shoe Machinery* case and its treatment of the remedy phase of the case. The court noted how little effort the government had devoted to the remedy issue and the practical and theoretical constraints upon a trial judge dictating the fashioning of conservative remedies in structural monopolization cases.[59] No radical surgery to extirpate the monopoly power found would be ordered absent a clear and convincing case for it, supported by a carefully worked out plan. Relief in *United Shoe* was limited to injunctive relief restricting United's leasing practices; relief later found inadequate after a decade of experience and therefore requiring a reopening of the remedy phase of the case.[60] This result tended to confirm the observation about structural antitrust cases: that the government often won the battle but usually lost the war in significant monopolization cases since it seldom either requested, made a viable argument for or received from hesitant courts meaningful structural relief in the form of dissolution or divestiture.[61]

Thus the reality that the wave II court decisions eased the standards for proof of a section 2 monopolization violation must be tempered by the corresponding reality that the government by default and the courts by preference appeared unwilling to seek effective relief for the violations found. Even the most ardent trustbuster, after realizing the practical consequences of the *United Shoe* case, must have had some pause in advocating widespread use of section 2 with its liberalized substantive standards in view of the difficult problems with fashioning effective yet fair remedies that had a chance of approval by hesitant courts.

Two other decisions, one judicial and the other administrative, also may have contributed to the end of wave II. In *United States v. E.I. du Pont de Nemours & Co.*,[62] the Court became enamored with but superficially applied the economic concept of cross-elasticity of demand for defining markets to the degree that it appeared to make the concept itself, superficially applied, the sole test for defining relevant markets in which to measure the presence or absence of monopoly power. Du Pont and its licensees were the only domestic manufacturers of cellophane, a clear, flexible and moistureproof wrapping material. The Court saw the problem as one of defining the "market" in which to determine whether du Pont had monopoly power. The choices advocated by the combatants were cellophane or all flexible wrapping materials. Noting the interrelationship between market definitions and power in differentiated or non-standardized products and therefore that "power must be appraised in terms of the competitive market for the product,"[63] the Court held the determination of the market depended on "how far buyers will go to substitute one commodity for another."[64] The Court appeared to settle upon cross-elasticity of demand as the sole test for determining the relevant market,[65] even though its application of the test ignored

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59 110 F.Supp. at 348.

60 *See* note 34, *supra*.

61 See I NCRALP, *supra* note 11, at ch. 7; GREEN, MOORE & WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM ch. 6 (1972).

62 351 U.S. 377 (1956).

63 *Id.* at 393.

64 *Id.*

65 "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared

the supply side of cross-elasticity and other potential sources of insight for determining the appropriate arena in which to measure the presence or absence of monopoly power.[66]

While demand cross-elasticity may be useful in defining some contours of a "market," the Court's superficial opinion in *du Pont* set back intelligent analysis of market definitions by hypostatizing, "thingifying," a concept that does not have physical properties.[67] The purpose of market definitions is not to measure some concrete and existing physical thing, but to conceptualize an appropriate arena of economic activity for determining whether one has accumulated or maintained undue power or discretion to fix prices or exclude competition in "any part" of trade or commerce.[68] The way the Court used the concept of cross-elasticity suggested it was seeking and it was possible to discover tangible metes and bounds on the concept of a market; a concept with material properties in economic analysis but not in legal analysis.

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than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal." *Id.* at 395.

66 For criticisms of the *du Pont* opinion *see* SULLIVAN, *supra* note 13, at 53-58; Marcus, *Antitrust Bugbears: Substitute Products—Oligopoly,* 105 U.PA.L.REV. 185 (1956); Stocking & Mueller, *The Cellophane Case and the New Competition,* 45 AM.ECON.REV. 29 (1955); Turner, *Antitrust Policy and the Cellophane Case,* 70 HARV.L.REV. 281 (1956). For an analysis of "supply substitutability" *see* Note, *The Role of Supply Substitutability in Defining the Relevant Market,* 65 VA.L.REV. 129 (1979).

67 "Economic theory does not seem to be employed by courts in deciding antitrust cases in the way that students of economics are taught to emply it. . . . In antitrust decisions, the terminology of economic theory is more often used to classify than to analyze." Schmalensee, *On the Use of Economic Models in Antitrust: The* ReaLemon *Case,* 127 U.PA.L.REV. 994, 996 (1979).

68 15 U.S.C. § 2.

Common law adjudication is an inductive process,[69] and, where properly used in monopolization litigation, the concept of markets—if relevant at all[70]—is a means to an end rather than an end itself. The end sought involves intangible judgments of whether it is fair, practical and economically sensible to determine whether a defendant has exercised, obtained or possesses undue economic power or discretion not subject to the discipline of the competitive process and in a manner inconsistent with the social, political and economic goals of antitrust policy. Stating the goal of section 2 structural litigation and the function of market definitions in the course of analysis in this way, will not appeal to courts seeking to hide discretion behind a seemingly immutable rule, litigants seeking certainty in outcome, and economists claiming certainty in their models. The legal process is, however, an art—not a simple-minded "science."[71]

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69 See Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM.L.REV. 809 (1935).

70 *See* Marcus, *supra* note 66; Schmalensee, *supra* note 67, at 1004.

71 Artificial economic models are useful for limited insights so long as one is sensitive to the underlying metaphysical assumptions of the model; to the fact that the model is theoretical while the controversy is not; and, to the subtle distinction that the reasoning used to understand the application of the model within the constraints of its assumptions is deductive while legal analysis is primarily inductive; a process of drawing inferences. *See* Flynn, *The Use of Economic Models, if Any, in Antitrust Litigation—A Reply,* 12 SW.L.REV. ____ (1980); Wiles, *Ideology, Methodology and Neoclassical Economics,* 2 J. POST KEYNESIAN ECON. 155 (1979). For example, the neoclassical model is predicated upon psychological assumptions about individual human behavior, transfers those assumptions to group behavior in the firm, and constructs a rigidly coherent model purporting to explain economic behavior in conformity with the assumptions of the model. M. HOLLIS & E. NELL, RATIONAL ECONOMIC MAN (1975). If the assumptions inaccurately or incompletely reflect reality, use of the model as the major premise of a syllogism will inexorably lead to distortion or misuse of the minor premise and a false conclusion. Facts not consistent with the model will be ignored and values inconsistent with the premises of the model will not be accounted for even though the purpose of the law mandates

The Court's misuse of the cross-elasticity concept and its methodology in *du Pont* plunged section 2 analysis into a process that opened monopolization litigation to a potentially endless struggle over drawing physical lines within what is essentially an intellectual and non-tangible concept. Pursuit of such a task, subsequently undermined by the Court's rejection of cross-elasticity of demand as the sole test for markets in *Brown Shoe Co. v. United States,*[72] can produce a mental cramp similar to that experienced when one is asked: "What is length?" It is probable that the *du Pont* opinion's superficial reliance on demand cross-elasticity and the way the Court employed the concept produced a similar mental cramp by attempting to quantify an intangible concept for wave II enforcement officials in exploring new vistas where section 2 litigation was practical, justifiable and intellectually defensible under the Court's *du Pont* standard for defining markets.[73]

The third decision signalling the end of wave II was an administrative one by the Attorney General in 1956 to settle the monopolization suit against American Telephone & Telegraph Co. and Western Electric Co. by a consent decree.[74] The suit was filed in 1949 and sought separation of the regulated communications

otherwise. Many of the assumptions of neoclassical economic theorizing are under substantial attack. See HOLLIS & NELL, *supra;* A. EICHNER (ed.), A GUIDE TO POST KEYNESIAN ECONOMICS (1980), reviewed by R. Heilbroner, 27 N.Y.REV. OF BOOKS 19 (Feb. 21, 1980). As new insights and ways of thinking about economic behavior come and go courts should consider economic theorizing only as an artificial and potential source for limited insights and as one beginning place for analysis and not the end of analysis. The function of law is too important to base its analysis upon the flimsy evidence produced by "science." *Cf.*, Cahn, *Jurisprudence,* 30 N.Y.U. L.REV. 150 (1955) (discussing the use of "scientific" evidence to find segregated schools unconstitutional).

72 370 U.S. 294 (1962).

73 See Marcus, *supra* note 66.

74 United States v. Western Electric Co., 1956 Trade Cases ¶ 68,246 (D.N.J. 1956).

monopoly of A.T.& T. from the unregulated manufacturing operations of Western Electric charged with monopolizing sale of equipment to A.T.& T. The circumstances, wisdom, and propriety of settling the suit by relief short of divorcement or divestiture have been severely criticized;[75] apparently with justification, since the Antitrust Division has determined it is necessary that virtually the same case be refiled, litigated, and pursued to substantial structural remedies.[76]

For wave II monopolization litigation, the A.T.& T. settlement signaled an unwillingness or an inability to litigate a complex structural monopolization case or see it through to an effective remedy of divestiture. When coupled with the reluctance of courts to grant structural relief, growing complexity in proving a violation caused by decisions like *du Pont,* and the general non-activist temper of the times, the *A.T.& T.* settlement may be viewed as a statement impliedly confirming the passing of wave II rather than a cause of the passing.[77] Like wave I, wave II receded

75 REPORT OF THE ANTITRUST SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE (1959).

76 United States v. American Telephone & Telegraph Co., [1970-79 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074, Case 2416 (D.D.C. 1974) (Civ. No. 74-1698). The district court has held that the action is not barred by the doctrine of *res judicata,* United States v. American Telephone & Telegraph Co., 1976-2 Trade Cases ¶ 61,097 (D.D.C. 1976), nor is the action barred by exclusive or primary jurisdiction of the F.C.C., United States v. American Telephone & Telegraph Co., 1976-2 Trade Cases ¶ 61,163 (D.D.C. 1976), 1978-1 Trade Cases ¶ 61,859 (D.D.C. 1978).

77 The prevailing view of the health of competition and the state of antitrust doctrine in the mid-50's is reflected by the REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955). Dissenting from the report, committee member Professor Louis B. Schwartz aptly characterized its tone as follows: "The central thread of the Majority Report unwinds from a core of belief that the competitive situation in this country is satisfactory, and that the antitrust laws require modification chiefly to temper their rigor." Schwartz, *The Schwartz Dissent,* 1 ANTITRUST BULL. 37 (1955).

with a whimper and signaled a period of relative quiet on the monopolization front—a period so quiet, that Professor Shepherd has characterized it as a time when section 2 had "gone into hiding."[78]

II. Wave III: growing complexity, the use and misuse of economics, and private enforcement of section 2

A. The lull before the storm

Wave III will probably be said by future historians to have begun with the filing of the IBM complaint in 1969, a parting gift of the Johnson administration to the incoming Nixon administration.[79] That may not be totally accurate, since there were a few intervening Supreme Court opinions on monopolization of some note, private monopolization litigation had begun to increase substantially, the related areas of Clayton section 7 merger litigation and antitrust activity in the regulated industries had taken up considerable slack in structural antitrust concern and litigation, and the F.T.C. had been keeping its hand in monopolization litigation by pursuing monopolization cases in faternity pins,[80] baseball cards,[81] shrimp peeling machinery[82] and macaroni.[83]

[78] Shepherd, *supra* note 12, at 595.

[79] United States v. International Business Machines Corp., No. 69-200 (S.D.N.Y. 1969). The ongoing maneuvers in the *IBM* case are summarized in [1970-79 Transfer Binder] TRADE REG.REP. (CCH) ¶ 45,070, Case 2039.

[80] L. G. Balfour Co., 74 F.T.C. 345 (1968), *aff'd,* L. G. Balfour Co. v. F.T.C., 442 F.2d 1 (7th Cir. 1971).

[81] Topps Chewing Gum, Inc., 67 F.T.C. 744 (1965).

[82] Grand Caillou Packing Co., 65 F.T.C. 799 (1964), *aff'd, sub nom.* LaPeyre v. F.T.C., 366 F.2d 117 (5th Cir. 1966).

[83] Golden Grain Macaroni Co., [1970-73 Transfer Binder] TRADE REG.REP. (CCH) ¶ 19,521 (1971). For an analysis of these and other

Some general observations about wave III should be made in order to place the doctrinal evolution in perspective. The actual litigated judgments of wave III thus far have been primarily the result of private litigation and not government enforcement. Between waves II and III, there has been an explosive growth in private antitrust litigation, a widespread dissemination of antitrust knowledge and skills throughout the private bar, and a substantial development of antitrust doctrine taking place in the context of private litigation. Wave III is also characterized by increased reliance on economic analysis and theorizing, with contending schools of ideology seeking supremacy in the literature, in the classroom and in the courts.[84]

In all probability, wave III will also be viewed by historians as occurring at a time when the litigation process in the federal courts was breaking down under the sheer crush of all types of litigation. It will be viewed as a time characterized by the complexity of the issues encountered by the courts in antitrust and other business litigation, and the widespread abuse of discovery, pretrial motions and other devices of federal practice and procedure in litigating the cases.[85]

More broadly, wave III will be viewed as taking place in a time of increased integration, yet stress and strain in our national and international economic systems. The leading cases have been litigated during a time of decreased consumer activism and increased political power in the hands of corporations and gov-

F.T.C. monopolization cases, see Rockefeller, *Monopolization Under Section 5 of the Federal Trade Commission Act,* 41 ANTITRUST L.J. 635 (1972).

[84] *See* Barbash, *Big Corporations Bankroll Seminars for U.S. Judges,* Wash.Post, Jan. 20, 1980, at A-1.

[85] The first six chapters of NCRALP, *supra* note 11, consist of a discussion of judicial management of complex antitrust litigation and control of abuse of the litigation process. Several procedural remedies are proposed for abuse and misuse of the process by all sides in major antitrust litigation.

ernment bureaucracies and a willingness to use that power in the pursuit of corporate or bureaucratic goals and interests in the litigation process and in the political process.

Wave III may also be seen as a block of cases filed in the late 60's and early 70's heyday of consumer activism which were then litigated in the late 70's period of a general backlash against government regulation and intervention in the market and the rise of a conservation brand of neoclassical economic ideology in the courts and Congress.

Wave III monopolization litigation has been preceded by significant ripples altering the implications of some of the elements of wave II monopolization litigation. The *du Pont* test of cross-elasticity of demand as the sole test for defining markets in monopolization cases and the superficial methodology of applying it were cast in doubt by *International Boxing Club of New York, Inc. v. United States.*[86] There the Court took account of a broader number of factors than a narrow test of demand cross-elasticity based on price and the physical similarity of the product—including consumer preference, revenues and industry recognition—to find championship boxing matches a distinct market for section 2 purposes from other boxing matches, sporting events in general and other forms of entertainment.

In *Brown Shoe Co. v. United States,*[87] a Clayton Act section 7[88] merger case, the Court relegated the *du Pont* version of the cross-elasticity of demand test to one of defining the "outer boundaries" of markets and invoked the concept of "submarkets" which "in themselves, constitute product markets for antitrust purposes"[89] within the outer boundaries of the market.

[86] 358 U.S. 242 (1959).

[87] 370 U.S. 294 (1962).

[88] 15 U.S.C. § 18.

[89] 370 U.S. at 325.

"Submarkets," the Court held, can be identified by "examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[90]

The undermining of the *du Pont* cross-elasticity of demand test and its methodology, as the primary touchstone for defining markets in monopolization litigation was completed in *United States v. Grinnell Corp.,*[91] an important transition case between wave II and wave III. In *Grinnell* the Court cited *Brown Shoe* for the proposition that for section 2 purposes, as in section 7 cases, there may be "submarkets" which are considered separate economic entities for antitrust purposes.[92] The concept of "submarkets" is similar to the concept of "proximate cause" in torts:[93] a fiction bordering on a dangerous illusion, if taken literally, but necessary verbiage used by the law to circumvent some contrary legal proposition, to achieve policy goals not presently conceptualized by legal rules or to change the law without appearing to do so. Legal fictions are a device, as Maitland put it, "to get modern results out of medieval premises."[94] The risk of legal fictions is, of course, that the unwary will believe them and try to act accordingly. Invocation of the "submarket" concept in *Brown Shoe* and *Grinnell* permitted escape from the limitations of *du Pont.* The concept opened up analysis of relevant markets in merger and monopolization cases to a myriad of different tests

[90] *Id.*

[91] 384 U.S. 563 (1966).

[92] *Id.* at 572.

[93] *See* Green, *Duties, Risks, Causation Doctrines,* 41 TEXAS L.REV. 42 (1962); Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact,* 46 TEXAS L.REV. 423 (1968).

[94] Quoted in O. BARFIELD, FROM ESSAYS PRESENTED TO CHARLES WILLIAMS 124 (1947). *See also,* L. FULLER, LEGAL FICTIONS (1967).

and methodologies fractionating market definitions for defining the appropriate arena in which to measure competitive effects in merger cases or power to fix prices or exclude competition in monopolization cases in light of the goals of the statute involved.

Grinnell also suggested that tests for defining markets in Clayton Act section 7 analysis were interchangeable with tests used for defining markets in monopolization cases under section 2. The Court stated:

> We see no reason to differentiate between "line" of commerce in the context of the Clayton Act and "part" of commerce for purposes of the Sherman Act.[95]

A bit of reflection might suggest some reasons for sensitivity to potential circumstances for drawing a distinction between market definitions in monopolization and merger cases. The goals of the statutes differ—section 7 is concerned with incipient threats to the competitive ideal as a result of stock or asset acquisitions. Section 2 is concerned with the actual displacement, by market structure or unlawful conduct, of the competitive process as the mechanism for allocating resources, stimulating and determining the rate of innovation, establishing price, and establishing the terms and conditions for entry and exit from markets.

The tendency to "thingify" markets and believe they exist, rather than view market tests as an intellectual means for fairly and constructively engaging in the analytical process of determining whether or not to draw an inference from the facts that the policy of the particular law involved has been violated, can produce both confusion and error. Confusion and error occur where interchangeability of market tests takes place oblivious to the different policy goals of the laws involved from case to case. A mechanical jurisprudence replaces a sensitive and sensible analytical process.[96] The Clayton Act's concern with incipient

[95] 384 U.S. at 573.

[96] *See* Comment, *Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases Arising Under Section 2 of the*

threats to the competitive ideal may result in narrow market tests in light of the more clearly populist goals of the statute.[97] Moreover, the degree of incipiency, the facts of a particular case and the ideology of the decisionmaker trigger legal condemnation of an acquisition well short of monopoly. Actual displacement of competition by the persistent possession or use of monopoly power, the primary concern of section 2 of the Sherman Act, may occur through a variety of means ranging from abusive behavior, fixing prices or excluding competitors, to the structure of a firm, where structure itself is claimed to have the necessary effect of fixing prices or excluding competitors.[98] Each type of case is analyzed pursuant to the *ALCOA* formula of proof of markets, proof of power in the markets defined and proof of conduct even though behavioral cases emphasize the conduct element of the formula and structural cases emphasize the market-power part of the formula. Thus, the same verbal test for a market may produce different conceptualizations of a market, depending upon whether it is claimed competition has been displaced by behavioral means, structural effects or some combination of both. Viewing market tests as objective criteria capable of establishing physically identifiable products and places, rather than functional means for sensibly engaging the facts in the process of rationally achieving a judgment in conformity with the goals of the particu-

Sherman Act and Section 7 of the Clayton Act, 1979 DUKE L.J. 1152. For an analysis of "mechanical jurisprudence" see, R. Aldisert, *The Nature of the Judicial Process: Revisited,* 49 U.CINN.L.REV. 1, 4 (1980).

[97] "The dominant theme pervading Congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy." Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962). For a comprehensive review of the legislative history of the Clayton Act see D. MARTIN, MERGERS AND THE CLAYTON ACT 221-310 (1959).

[98] Judge Wyzanski's summary of the different legal tests for proving unlawful monopolization in *United Shoe,* quoted in text accompanying note 118 *infra,* is a reflection of the court's responding to different means perceived as displacing competition in violation of the goals of the Sherman Act.

lar statute involved and the theory of illegality, can generate confusion, misapplications of the law, mistaken remedies and, what is aptly described by Felix Cohen, as the "transcendental nonsense" of attempting to "thingify" abstract legal concepts.[99]

The majority in *Grinnell* purported to apply objective tests to define narrow local markets from which it could and should be inferred the defendant had obtained monopoly power. The result was called "procrustean" by the dissent;[100] *i.e.,* that the majority had tailored its market definitions to the defendant's business, rather than analyze the facts in light of economic criteria and the policy goals of the law for defining markets. In the dissenter's view, an objectively defined market was essential to a proper determination of whether a violation had occurred and in order to shape a decree "to deal with the consequences of the monopoly."[101] Confusion in the *Grinnell* market tests is attributable to the circumstance that the facts, at best, supported a behavioral theory of illegality,[102] while the Supreme Court chose to uphold the lower court's finding of behavioral monoplization on a structural theory of monopolization. The lower court finding of illegality clearly stressed anticompetitive behavior to obtain and maintain monopoly power as the predicate of section 2 illegality:

> In cases like this where the Sherman Act ban against monopolizing is invoked against defendants who have secured dominance of a small industry by imposing unlawful restraints of trade and by a steady stream of acquisitions of competitive enterprises, the usual rhetoric is out of place. All that is at stake here is the rooting out of a plant of minor importance in the rich forest of the American economy, not because it overshadows us, or even many of us, but because it represents an ultimate growth from seeds which have been declared unlawful. Congress in Section 1 of the Sherman Act outlawed the means and in Section 2 outlawed the end achieved by those means.[103]

By seeking to conform the facts of a behavorial theory of monopolization to a structural theory of unlawful monopolization, the Supreme Court's application of market criteria in *Grinnell* indeed appeared procrustean and confusing. Since the lower court viewed Grinnell's behavior and not its structure as the source of the displacement of the competitive process, market tests were given relatively short shrift by the trial court. In effect, the trial court adopted a market test similar to that proposed in a critical comment on the *du Pont* case: if a thing may be restrained in violation of section 1 of the Sherman Act, it may be monopolized within the meaning of section 2 of the Act.[104] This may be an appropriate test in a purely behavioral case under section 2, if one views the statute as banning unilateral as well as conspiratorial displacements of the competitive process.

Confusion in applying market tests can become manifest if one fails to recognize two strains of unlawful monopolization precedent: structural monopolization and behavioral monopolization. Confusion can be compounded by a methodology that views legal principles as operating with the machine-like logic of a

99 Cohen, *supra* note 69.

100 384 U.S. at 587. Judge Wyzanski, the trial judge in *Grinnell,* has recently stated that he now agrees with the dissent that the market was improperly defined in *Grinnell.* Wyzanski, *The Judicial View of Section 2 Litigation,* 10 Sw.U.L.Rev. 45, 48 (1978).

101 384 U.S. at 586.

102 Defendants were charged in the trial court with a conspiracy to restrain trade in violation of section 1 of the Sherman Act, an unlawful combination or conspiracy to monopolize trade in violation of section 2, an attempt to monopolize in violation of section 2, and monopolization in violation of section 2. United States v. Grinnell Corp., 236 F.Supp. 244, 248-49 (D.R.I. 1964).

103 *Id.* at 258.

104 Marcus, *supra* note 66, at 195. The trial court concluded its opinion on violation with the observation: "though the government may be barred from getting under Section 1 relief directly against the restraints, it may, nonetheless, under Section 2 get relief against the consequences of the restraints if, but, of course, only if, they have gone so far as to involve continuing monopolization. Having failed to nip the bud, the Government may still pluck the flower of evil." 236 F.Supp. at 258.

"gumball dispenser."[105] Wave III courts have continued to analyze both behavioral and structural cases pursuant to the general analytical scheme of *ALCOA* for monopolization cases and often by a methodology akin to a "gumball machine" model of the legal process: definition of markets, determination of monopoly power in the markets defined and some "plus" of conduct indicating the monopoly power identified has been obtained or maintained by conduct at odds with legitimate and acceptable competitive tactics. The facts are plugged into the model and out pops the "right answer" neatly packaged for consumption; a form of long-discredited legal positivism. Standards and policy are used to categorize facts, rather than being used as intellectual guides for a beginning place to inductively analyze facts. Thus, wave III courts are faced with a legacy from *ALCOA* and *Grinnell* requiring categorization of the facts into a market definition, power, and conduct sequence without regard to whether the thrust of the evidence is a behavioral theory of unlawful monopolization or a structural theory of illegality.

Categorizing the analysis in this way can mislead one into believing proof of the monopolization offense can proceed in a linear fashion much like the parsing of sentence structure in a grade school grammar class. Instead, the problem is a circular one of the interdependence of market definitions and monopoly power, since courts are seeking to define workable and predictable legal standards (with which to begin an analysis of the facts) prohibiting displacement of the competitive ideal by monopoly where achieved by a variety of different means. Moreover, untidy facts not fitting the formula are ignored and the interaction of the factors deemed relevant are not seen. Thus, the employment of market tests in primarily behavioral cases may bear only a verbal likeness to the employment of similar tests in structural cases or section 7 merger cases and vice versa, with a variety of changing meanings for the elements of the offense across the spectrum from behavioral to structural monopolization cases.

105 See Flynn, *The Role of Economic Analysis, If Any, In Antitrust Litigation—A Reply,* 12 Sw.U.L.Rev. ___, ___ (1980).

As the level of predation in a case rises, the level of judicial concern with market definition and the niceties of locating market power justifiably decreases; and, in some cases, concern about closely analyzing each becomes minimal or even nonexistent—although seldom expressly admitted. For example, in *Woods Exploration & Prod. Co. v. ALCOA,*[106] the Fifth Circuit upheld a market definition of natural gas production from a 4,000-acre gas field in Texas in a monopolization case. The court did so because the defendant's illegal and predatory actions, including the falsification of production information filed with regulatory authorities and designed to trigger regulatory action excluding the plaintiff from the gas field, warranted the imposition of antitrust liability. The traditional analytical model for structural monopolization litigation was conformed with in name only, while the goals of antitrust policy were served by punishing exlusionary behavior depriving the plaintiff of the right to succeed or fail by virtue of the competitive process and not the defendant's economic power.

In at least one monopolization case, *Denver Petroleum Corp. v. Shell Oil Co.,*[107] a district court held market analysis unnecessary in light of illegal practices (denying plaintiff access to a common carrier pipeline) specifically intended to and done with the purpose of excluding the plaintiff from the market. The court stated:

> When one must "look" for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously and essential first step. But when, with an illegal practice such as is present here in mind, one can look to an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears to be no real need to go further.[108]

The structural line of cases, on the other hand, involves an analytical process focusing on market structure or the unex-

106 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972).

107 306 F.Supp. 289 (D.Colo. 1969).

108 *Id.* at 304.

plained persistence of an overwhelming market share in a firm in the tradition of the *ALCOA* case. Litigation falling in this tradition confronts an ongoing process of extrapolating the meaning of the broad and vague categories of analysis in monopolization cases of market definitions, power and conduct in the context of factual circumstances exploring the persistence of a firm's large market share. Where the distinctiveness of the markets involved becomes clearer and power in those markets more pronounced in cases like *ALCOA* and *United Shoe,* judicial concern with the level of predation in the conduct element becomes less and even nonexistent in some cases. A sliding evidentiary scale appears to be employed; one which deemphasizes the conduct element where proof of persistent and significant monopoly power is present. An implicit recognition and assumption that the ideal of maintaining the competitive process as the rule of trade requires the fashioning of legal standards permitting the dissipation of persistent and substantial monopoly power, even where it is not obtained or maintained by predatory conduct, appears to underlie this line of analysis. The methodology is a confirmation of the inductive nature of legal analysis where the facts shape and give meaning to legal principles; rather than a primarily deductive process where the principles dictate the facts regardless of the circumstances of the case.

Wave III, therefore, has found itself left with a confusing state of affairs for litigating monopolization cases. The general analytical framework for identifying unlawful monopolization is well known, but its meaning and the interrelationship of the elements of the framework shifts and changes with the facts of each case. The resulting uncertainty may be disquieting to those whose world is predicated on a simple-minded and symmetrical model into which all recalcitrant facts must either be classified or ignored. It is not disturbing however, to pragmatic lawyers trained in the common law process and accustomed to dealing with facts and reality in light of policy and in the context of the limitations of the judicial process rather than subjecting reality to the dictates of a preordained theological model of what "ought" to be.

Despite legal positivist tendencies to treat law as a deductive process from fixed a priori models or rules and some significant academic clamor that the positivist model ought to be followed in antitrust analysis, legal analysis under a common law system of adjudication remains a process of drawing inferences from facts in light of general principles and not the jurisprudentially discredited process of deductive logic from fixed rules.[109] The distinction is of more than academic interest; since much of the confusion in wave III litigation stems from this ongoing difference in methodology and failure to distinguish between facts giving rise to a behavioral theory of monopolization and those giving rise to a structural theory of monopolization.

Wave III at this point in its evolution is characterized by the filing of a relatively minimal number of large government structural cases, the failure to litigate those government cases expeditiously, and a large number of private monopolization cases, primarily structurally based, which are producing the significant court opinions fashioning the wave III law of monopolization. Many of the leading private suits stress a structural theory of liability, but became heavily involved in conduct issues because of the necessity of proving the violation alleged caused the plaintiff measurable antitrust damage.

Conduct issues became involved at two levels of causation each often confused with the other. One level of "causation," causation in a legal sense, is the proof of conduct necessary to make out a violation of the law according to the traditional analytical scheme for section 2 cases. On a second level, causation in fact, conduct evidence is relied upon to link the violation of the law to measurable antitrust injury suffered by the plaintiff. Both forms of causation are present in a private suit seeking damages for unlawful monopolization and conduct evidence to prove the one is often relied upon to prove the other. But, as *Brunswick*

[109] *See* Flynn, *supra* note 105; Aldisert, *supra* note 96.

Corp. v. Pueblo Bowl-A-Mat, Inc.[110] demonstrates, proof of a violation of the antitrust laws does not necessarily supply proof that the violation caused antitrust injury or the particular injury a plaintiff's damage proof seeks to establish. Conversely, proof that a defendant's actions injured a plaintiff does not warrant an assumption that the antitrust laws have been violated. The court must still find that the defendant has violated antitrust policy by breaching duties imposed by the antitrust laws. The latter issue, posing the legal questions of the scope of the duties imposed by the antitrust laws and the standard of proof for demonstrating a breach of the duties, is one of determining the policy and goals of the statute. These issues are determined by the legislative history of the Sherman Act, experience in enforcing the antitrust laws, the limits of the judicial process, the wisdom that can be derived from related disciplines, the facts and circumstances of the case, and current perceptions of economic and business reality.[111]

Wave III monopolization litigation has also been faced with the ambiguity left by wave II of drawing an intelligible line between conduct the court may identify as monopolistic and that which can be identified as consistent with short-run and long-run goals of maintaining the ideal of a competitive process as the rule of trade.

Wave II monopolization litigation, particularly *ALCOA* and *United Shoe* left two issues unclear and ambiguous with regard to conduct in acquiring and maintaining monopoly power in such a way that it could be concluded that one with monopoly power in a relevant market had unlawfully "monopolized." The first issue is what kind of conduct in acquiring or maintaining a monopoly is "not honestly industrial"; not attributable to superior skill, foresight and industry, or not attributable to natural monopoly forces in the industry.

Judge Hand, it will be remembered, held some added element of conduct necessary in order to draw a line between monopoly power obtained or maintained as a result of praiseworthy competition and monopoly power gained or maintained by means other than praiseworthy competitive tactics. He did so on the premise that section 1 of the Act urges the firm to compete and "the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat.* The successful competitor having been urged to compete, must not be turned upon when he wins."[112] The logic of this analysis has always been quite attractive, so long as one does not question the premises on which it is based.

Section 1 of the Sherman Act, however, does not command one to compete but is a negative prohibition against one combining or conspiring *not* to compete. It is the statement of a basic public policy prohibiting the displacement of the competitive process by a contract, combination or conspiracy in unreasonable restraint of trade. Section 1 of the Act may more fairly be read as a statement of public policy mandating competition as the rule of trade by which whoever chooses to engage in trade governs their conduct and not as a specific instruction to individual competitors to compete to the death in a Spencerian struggle for survival.

In accord with this understanding of section 1, section 2 means that the unilateral displacement of competition by monopoly or by an attempt or conspiracy to fix prices or exclude competition as the rule of trade in an industry is prohibited, just as section 1 prohibits the displacement of competition by con-

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110 429 U.S. 477 (1977). *See, also,* Purex Corp. v. Procter & Gamble Co., 1979-1 Trade Cases ¶ 62,675 (9th Cir. 1979); Areeda, *Antitrust Violations Without Damage Recoveries,* 89 HARV.L.REV. 1137 (1976).

111 For an antitrust opinion following this form of duty-risk analysis, *see* Mulvey v. Samuel Goldwyn Prod., 433 F.2d 1073 (9th Cir. 1970). Duty-risk analysis has been applied explicitly, but not generally followed in federal securities litigation. *See* White v. Abrams, 495 F.2d 724 (9th Cir. 1974).

112 148 F.2d at 430.

tract, combination or conspiracy restraining trade.[113] The section 2 prohibitions on displacing competition extend to conspiratorial or unilateral conduct, and persistent possession of monopoly power fixing prices or excluding competitors as the result of behavior or structure unreasonably displacing competition as the rule of trade and not in conformity with the long-run promotion of the competitive process.[114] This reading of the statute views it

[113] This is the implication of Judge Wyzanski's reading of the Act in his *Grinnell* opinion, quoted *supra* note 104 and Judge Hand's statement in *ALCOA:* "[T]here can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition." 148 F.2d at 428.

[114] Sorting out joint action, unilateral predatory conduct, and industry structure which is antithetical to the maintenance of competition in an industry from that which is not, is a difficult but not insurmountable task. As in the case of tort litigation, it must be done on a case-by-case basis. Over time, recognizable categories of joint or unilateral conduct and industry structure in light of the characteristics of the industry provide a reasonable guide for litigation and industry activity. For example, the exchange of specific and current price information by competitors in a concentrated industry or joint buying programs should be understood as likely unlawful under section 1 or 2 of the Sherman Act. *See,* United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Container Corp., 393 U.S. 333 (1969); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Refusals to deal by a natural or regulated monopolist pose clear risks of antitrust liability. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Griffith, 334 U.S. 100 (1948); Byars v. Bluff City News Co., Inc., 609 F.2d 843 (6th Cir. 1980). Business practices by a persistent monopolist enhancing or maintaining entry barriers, even though normal business practices, may provide the bases for finding a monopolist has monopolized. *See* United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Machinery Corp., *supra* note 34. *But see,* Note, *The Conduct Standard for Legally Acquired Monopolies Under Section 2 of the Sherman Act,* 49 U.CINN.L.REV. 206 (1980).

On the other hand, merely intending to take advantage of innovation and efficiencies to attain a larger share of the market, without some added element of conduct inconsistent with the competitive process, is not sufficient evidence to support a finding that section 2 is violated. See E.I. du Pont de Nemours & Co., 3 TRADE REG.REP (CCH) ¶ 21,770 (F.T.C. 1980) (dismissing complaint charging an attempt to monopolize the titanium dioxide market).

as stating as public policy that the competitive process governs conduct in the sphere of private economic activity, not as a command to individuals to compete nor does the statute necessarily reward the successful competitor achieving a monopoly with the quiet life of a monopolist. Since this understanding does not command individuals to compete but mandates competition as the regime governing private conduct, the Hand premise finding unfair the prosecution of a monopolist obtaining monopoly power by fair means rather than foul does not pertain. The possibility of criminal penalties visited upon a violator however, supports a claim for proving moral blameworthiness before criminal sanctions for the prohibited conduct or structure are employed.[115]

Under this approach, the questions posed are: whether there is an unreasonable displacement of the competitive process; if there is, whether it is pursuant to conduct or structure which is anticompetitive and not procompetitive; and, what, if any, remedy is necessary to restore competition as the rule of trade in the industry. *ALCOA*'s use of conduct evidence for fairness purposes in a case of a persistent structural monopolist shifts section 2 from analyzing whether competition has been displaced to an analysis of the means by which the displacement was achieved or is maintained. Such a standard may be rational for behavioral cases, but the consequence has been to shift subsequent structural monopolization litigation into the void of sorting out conduct which is "honestly industrial" from that which is not in circumstances where the concern of the law is structural and not behavioral; a "black hole" which subsequent structural litigation has not escaped from but has become overwhelmed by.

The second issue left unclear and ambiguous by *ALCOA* and *United Shoe* is who bears the burden of proving or disproving the

[115] See United States v. United Gypsum Co., 428 U.S. 422 (1978); Garvey, *The Sherman Act and Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions,* 29 CATH.U.L.REV. 389 (1980).

requisite plus of conduct labeling the obtaining or possession of monopoly power unlawful monopolization? The answer remained ambiguous even after the Supreme Court's last generalization about the legal standards for unlawful monopolization in *United States v. Grinnell.*[116] In *Grinnell,* the Court defined the offense of monopolization as follows:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (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.[117]

The *Grinnell* trial judge, Judge Wyzanski, purported to adopt the structural monopolization test suggested by himself in *United Shoe* that a "bold, original court mindful of what legal history teaches about the usual" might follow in section 2 cases, namely:

> [O]nce the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of § 2. The Government need not prove, and in a well conducted trial ought not to be allowed to consume time in needlessly proving defendant's predatory tactics, if any, or defendant's pricing or production, or selling or leasing, or marketing, or financial policies while in this predominant role. If defendant does wish to go forward, it is free to do so and to maintain the burden of showing that its eminence is traceable to such highly respectable causes as superiority in means and methods which are "honestly industrial," as Judge Hand characterized the supposititious socially desirable monopolizer.[118]

The Supreme Court found it unnecessary to adopt or reject Judge Wyzanski's test in view of a record demonstrating that the monopoly power acquired was achieved "in large part by unlawful and exclusionary practices."[119] The Court however, stated, in a footnote, the following:

[116] 384 U.S. 563 (1966).

[117] *Id.* at 570-71.

[118] 236 F.Supp. at 248.

[119] 384 U.S. at 576.

> Since the record clearly shows that this monopoly power was consciously acquired, we have no reason to reach the further position of the District Court that once monopoly power is shown to exist, the burden is on the defendants to show that their dominance is due to skill, acumen and the like.[120]

The consequences of these issues left ambiguous by wave II for wave III litigation include considerable controversy over what conduct will prove or disprove the additional element of conduct for unlawful monopolization; who bears the burden of proving or disproving that conduct; and, in private litigation, whether conduct evidence proving unlawful monopolization is interchangeable with or identical to evidence required to prove the causation element in treble damage litigation. These kinds of issues have come to predominate wave III litigation to date, along with confusion over the interrelationship, changing meanings, and application of the concepts of markets, monopoly power, and conduct in proving a violation and controversy over the basic policy goals of section 2 of the Sherman Act.

B. Analysis of the leading wave III monopolization cases

The leading wave III monopolization opinions, court decisions noteworthy for the novelty of the issues presented, changes in the doctrinal evolution of the law and quality or lack thereof of the analysis involved, may be divided into three categories: (1) the computer cases: *Telex Corp. v. IBM Corp.,*[121] *Greyhound Computer Corp. v. IBM Corp.,*[122] *California Computer Products, Inc. v. IBM Corp.,*[123] and, *Transamerica Computer Co. v. IBM Corp.;*[124] (2) the *Berkey* case: *Berkey Photo, Inc. v. Eastman*

[120] *Id.* at 576, n.7.

[121] 367 F. Supp. 258 (D.Okla. 1973), *rev'd,* 510 F.2d 894 (10th Cir. 1975), *cert. dismissed,* 423 U.S. 802 (1976).

[122] 559 F.2d 488 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978).

[123] 613 F.2d 727 (9th Cir. 1979).

[124] 481 F.Supp. 965 (N.D.Cal. 1979).

Kodak Co.;[125] and (3) the *"ReaLemon"* case, *Borden, Inc.*[126] It should be noted, that to date and with the exception of the *Borden* case and the *Reuben H. Donnelley Corp.* case,[127] to be

125 603 F.2d 263 (2d Cir. 1979), *cert. denied*, ___ U.S. ___ (1980).

126 [1976-79 Transfer Binder] TRADE REG.REP. (CCH) ¶ 21,490 (F.T.C. 1978).

127 3 TRADE REG.REP. (CCH) ¶ 21,650 (1979), *rev'd, sub nom.*, Official Airline Guides, Inc. v. F.T.C., 1980-2 Trade Cases ¶ 63,544 (2d Cir. 1980). In that case, the F.T.C. held that the "arbitrary" refusal by the sole publisher of a comprehensive listing of airline schedules to integrate the schedules of certificated carriers with commuter airlines constituted unlawful monopolization in violation of section 2 of the Sherman Act. The Commission found that the refusal to integrate schedules caused competitive injury to commuter lines where they competed with certificated carriers and that Donnelley's refusal to integrate schedules was without justification in view of less restrictive alternatives available for resolving any concerns Donnelley may have with misleading consumers on the quality and safety of commuter carriers. The Commission held that a monopolist had affirmative duties to the market it served, an issue discussed *infra*, part III.

The case raised unique issues which were creatively dealt with in an outstanding opinion by Commissioner Pitofsky; and then reversed by a curious opinion of the Second Circuit. In view of the uniqueness of the issues and the relevance of the case to the discussion in part III *infra*, it is not discussed in the main text at this point. In addition, the substantive issues of the case fall within the line of cases concerning refusals to deal by a monopolist, a well-defined area of monopolization litigation not generally dealt with in this analysis. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); City of Mishawaka v. American Electric Power Co., 616 F.2d 976 (7th Cir. 1980); Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1980); Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 HARV.L.REV. 1720 (1974).

After the completion of this manuscript, the F.T.C. issued its opinion in E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (1980). In that case du Pont was charged with attempting to monopolize the titanium dioxide market by consciously expanding the capacity of its plants to absorb new demand in circumstances likely to result in a significant increase in du Pont's market share. Drawing upon monopolization precedent and recent scholarly comment on predatory pricing

discussed *infra* in part III, the evolution of wave III legal standards in decided cases has been taking place in the context of private antitrust litigation.

This is a significant factor in assessing the meaning and implications of third wave legal standards for the monopolization offense of section 2 of the Sherman Act, since private litigation requires proof of "standing," causation and damages as well as proof of the substantive elements of a violation. Private damage actions, unlike most government litigation, usually entail a jury trial, further complicating the evolution of substantive standards by the need to separate judge and jury functions.[128] Doubts about these added factors or confusing them with proof of a violation in a private suit may influence or significantly alter assessment of the elements of the substantive offense, complications usually not present in the analysis of government cases charging a violation of section 2 of the Sherman Act.

1. THE COMPUTER CASES The series of computer industry cases selected for analysis does not include all the private computer cases;[129] but represents the leading opinions on substantive mono-

and other strategic conduct by firms with market power, the Commission unanimously rejected the complaint. Although an attempt to monopolize case, the discussion of conduct issues by Commissioner Clanton provides insights into the Commission's views on conduct issues for monopolization cases generally.

128 *See*, Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U.PA.L.REV. 829 (1980).

129 *See*, ILC Peripherals Leasing Corp. v. IBM Corp., 458 F.Supp. 423 (N.D.Cal. 1978), *aff'd per curiam*, ___ F.2d ___ (1980). The appeal in the Ninth Circuit presented many of the same issues as the other computer cases, but resulted in a per curiam panel affirmance on the basis of *CalComp*. The trial court analysis of market definitions, monopoly power and predatory pricing are less detailed and, in many respects, superficial when compared to the other computer cases. The significant controversy of the case was the trial court's ruling that, in the event of remand, the demand for a jury trial would be considered stricken in view of the complexity of the case. This holding has provoked considerable controversy, ably summarized, analyzed and

polization standards to date. The computer cases also illustrate well the difficulties of assessing the evolution of legal standards for proof of violation when the law evolves in the context of private litigation where proof of standing, causation in fact and damages are also present.

In *Telex,*[130] a manufacturer of peripheral equipment used in conjunction with computer "main frames" charged IBM with monopolization and attempts to monopolize the markets for peripheral equipment used with computers generally and in "submarkets" for peripheral equipment which was "plug compatible" with IBM computers. "Peripheral equipment" included magnetic tape products, memory products, impact printer products and communications products which are used by plugging them into a computer processing unit or "CPU." The compatibility of peripheral equipment with a CPU is determined by the electronic tolerances of the CPU and the design and configuration of the plug interface device between the CPU and the peripheral device. Consequently, peripheral devices are not readily interchangeable, without modification, between one manufacturer's CPU and another's nor between the different CPU's manufactured by a single firm.

In *Telex,* the trial court focused on what buyers could do in defining the market; rejecting IBM's claim that the market should be defined to include all peripherals and not just those plug compatible with IBM CPU's or the yet narrower claim of submarkets consisting of specific devices plug compatible with specific models of IBM CPU's. The trial court held:

> [A] manufacturer's product or product line may constitute a relevant product market for purposes of section 2 if in the realities of the market-place widespread competition has been developed around it as a separate economic entity recognized and acted upon by the manufacturer, competitors and end users as such.[131]

found wanting in Arnold, *supra* note 128. The brief opinion affirming the lower court decision added little to the law of monopolization or a reliable basis for predicting the views of the other judges on the Ninth Circuit.

130 *Supra* note 121.

IBM's argument that the market should be defined by "supply substitutability" or the ability of manufacturers to shift the compatibility of their peripherals from one brand of computer to another,[132] was rejected. This significant and central trial court finding was reversed by the court of appeals after a selective search of the record by the appellate court.[133]

The court of appeals agreed with IBM's contention that manufacturer ease in switching manufacturing of peripherals from those compatible with one brand of CPU to that of another required the market be defined to include all peripherals. Relying on *du Pont,* the court of appeals reasoned that peripherals plug compatible with other computers were interchangeable with peripherals plug compatible with IBM computers.[134] The trial court's factual inquiry into the cost and complexity of modifying CPU's to achieve compatibility resulted in a narrow definition of markets and submarkets of peripherals plug compatible with IBM CPU's dictated a finding of overwhelming market share and hence monopoly power in IBM. The appellate court's independent factfinding of peripheral manufacturer ease of switching peripheral compatibility to other CPU's and conclusion emphasizing "supply substitutability" as determinant of market diminished IBM's market share, thereby undermining the trial court's inference of monopoly power based on market share.

The Tenth Circuit opinion signaled a reversion to the *du Pont* methodology of deductive reasoning for a market definition based on a superficial application of cross-elasticity and a disin-

131 367 F.Supp. at 339.

132 *Id.* at 336-39.

133 Telex Corp. v. IBM Corp., 510 F.2d 894, 914-19 (10th Cir. 1975), *cert. dismissed,* 423 U.S. 802 (1976).

134 *Id.* at 918-19.

clination to look further by more refined market tests. The circuit relied solely on a superficial application of cross-elasticity of supply to define markets and ignored demand inflexibility caused by factors like IBM's large share of installed CPU's, widespread buyer unwillingness to switch, and the actual cost of changing over peripheral plug compatibility from one brand of CPU to another.[135] In these circumstances, competitors seeking to supply buyers with peripherals plug compatible with IBM main frames faced entry barriers; barriers IBM could further exploit by its leasing, pricing and "bundling" practices. The trial court obviously defined the relevant market in light of IBM's conduct and the nature of the industry; while the court of appeals treated the problem of market definition as an independent element of the offense and an element capable of objective isolation distinct from the dynamics of the industry and the unique status of IBM in the industry. In jurisprudential terms, the trial court analyzed the facts in light of the law by reasoning inductively from the particular to the general in light of the general principles of previous cases; while the court of appeals analyzed the law in light of the facts by reasoning deductively from the general to the particular. On another level and much like *Grinnell,* the trial court theory fell within the behavioral tradition of unlawful monopolization in view of substantial evidence of an intent to exclude peripheral manufacturers,[136] while the court of appeals treated the case as a structural one to be decided by the application of seemingly "objective" economic and legal tests.[137]

135 *See, Development,* Telex v. IBM: *Implications for the Businessman and the Computer Manufacturer,* 60 VA.L.REV. 884, 889-92 (1974).

136 367 F.Supp. at 299.

137 *See,* Note, *The Development of the Sherman Act Section 2 Market Share Test and Its Inapplicability to Dynamic Markets,* 49 So.CAL.L.REV. 154, 198-204 (1975), supporting the court of appeals rejection of narrow market tests in light of "the dynamics of the industry" and the inability of market tests to "adequately account for a time dimension over which dynamic market processes may operate to erode temporary market advantages." *Id.* at 205. The riddle of *Telex* includes the further inquiry of whether observed "dynamic market processes" were dictated or imposed by competition or by monopoly power, thereby requiring a definition of markets in light of conduct. Market tests are a means to an end, not an end unto themselves, and should be employed inductively in light of the goals of section 2 and not deductively in the sense of objective rules or in an effort to define tangible things in measurable space.

The *Telex* circuit court opinion also found itself entangled in the question of what conduct, assuming IBM did have monopoly power in a relevant market, would suffice as conduct "not honestly industrial" and therefore evidence that IBM had unlawfully monopolized. The trial court had found that IBM's pre-announcement of new equipment and pricing of competing peripheral equipment, fixed term leasing of peripheral equipment locking in lessees, and other marketing practices were not economically inevitable or honestly industrial but were done with an intent to exclude competition.[138] Here too the circuit court reversed the trial court and did so by rejecting the implication that only involuntary conduct by a monopolist was exculpatory for one holding monopoly power—a view of the conduct element many had read into *ALCOA* and *United Shoe.* The court rejected the standard that one possessing monopoly power was greatly circumscribed in following normal competitive tactics, since the normal would be not "honestly industrial" when done by a monopolist unless it was either involuntary or inevitable. The court observed:

> There must be some room to move for a defendant who sees his marked share acquired by research and technical innovations being eroded by those who market copies of its products. It would seem that technical attainments were not intended to be inhibited or penalized by a construction of Section 2 of the Sherman Act to prohibit the adoption of legal and ordinary marketing methods already used by others in the market, or to prohibit price changes which are within the "reasonable" range up or down.[139]

138 367 F.Supp. at 340-42.

139 510 F.2d at 927. This constitutes departure from wave II precedent and a reversion to the standards of wave I. *See,* Comment, *Draining the* ALCOA *"Wishing Well": The Section 2 Conduct Requirement After* Kodak *and* CalComp, 48 FORDHAM L.REV. 291, 294 (1980).

The circuit court discounted the trial court finding of not honestly industrial conduct by virtue of IBM aiming its introduction of new peripheral equipment, interface changes, favorable lease terms, and price cuts at peripheral markets where Telex had made its greatest inroads. The important lower court finding of fact that lost revenues from selective price cuts were offset by price increases in CPU's was ignored since the circuit court viewed IBM's conduct as "ordinary competition"[140] and for conduct to be found exclusionary it had to be "predatory." The Tenth Circuit concept of "predatory" apparently does not embrace ordinary competitive tactics specifically aimed at small competitors, including the support of low prices in a competitive market by high prices in a noncompetitive one, at least by a monopolist which gains monopoly power by means "honestly industrial." Rather, the court found that the monopolistic conduct must be shown to be predatory in the sense of "sinister"[141]—an unsupported and undefined modification of wave II conduct analysis—before a court can find a monopolist unlawfully monopolized by use of lawfully gained monopoly power.

Thus, *Telex* may be read as a retreat from wave II standards on the conduct front as well as the market analysis front; a pulling back from the negative standard of not honestly industrial conduct to one where the conduct proving monopolization must be affirmative conduct characterized by some sinister flavor beyond the lawful but exclusionary tactics found sufficient to prove monopolization in *ALCOA* and *United Shoe*. It would appear that the court may have arrived at this conclusion for an unarticulated reason; viz, the suit was a private one brought by a competitor whose claim for damages required proof that the conduct relied upon to prove legal causation in the sense that one with monopoly power had unlawfully "monopolized" was also the evidence relied upon to prove the causal nexus in fact between the violation and Telex's claimed injury to its business. In order to

140 510 F.2d at 927.

141 *Id.*

escape the risk of proving a violation without damage, a private litigant must prove that the conduct showing unlawful monopolization is also the conduct that caused the damage claimed to be suffered.[142] Because of this focus in private cases, sorting out conduct which is acceptably competitive from that which is not, particularly in structural cases, is far more difficult than in government cases. The touchstones for drawing lines between conduct which is competitive and that which is anticompetitive are limited by the competitive relationships of the plaintiff to the defendant. Thus a determination of whether a defendant has unlawfully monopolized, can become confused with the issue of whether the plaintiff has been injured by virtue of a violation of the law and that the injury is one compensable under the antitrust laws.

In *Telex,* IBM's marketing practices were relied upon to prove both that the law had been violated and that the violation "caused" the injury Telex claimed it had suffered. Viewed from the perspective of causation of a competitor's injury, conduct may appear to be normal and procompetitive behavior or difficult to characterize as "predatory." Viewed from the more general perspective of whether monopoly power has been obtained or maintained by displacing the competitive process, the issue usually involved in a government case, the same conduct may discount a finding of inevitability, superior skill or business acumen in explaining the existence or persistence of monopoly power. Consequently, acknowledging the enforcement purpose for which the question of "not honestly industrial" conduct is being asked is significant in treble damage monopolization litigation, as well as in evaluating the precedential value of a case like *Telex* for government enforcement of section 2 and in private injunction

142 In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) the Court held that a private damage plaintiff "must prove more than injury linked to an illegal presence in the market. Plaintiff must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful."

actions where the causation issue is principally one of legal causation and not factual causation.[143]

Telex, with its strict interpretation of the conduct element in private litigation, set wave III private damage litigation on a pursuit of more objective standards to determine the legitimate scope of a monopolist's conduct vis-a-vis competitors claiming damages which would both define conduct legally beyond the pale (displacing the competitive process) and establish factual causation for purposes of proving damages (injuring a competitor). One of the potential objective touchstones, a factor generally discussed in *Telex,* is an objective standard for measuring the competitive legitimacy of a monopolist's pricing practices; a standard which could draw a line between the competitive and the unreasonably exclusionary in conformity with business reality and a standard which is manageable by the judicial process. This, in turn, has provoked the academic debate over the use of neoclassical pricing theory to define predatory pricing, an issue that has become deeply involved in wave III litigation—particularly the subsequent "computer cases."

Telex was followed by the *Greyhound Computer* case,[144] a case in which the market alleged to be monopolized was the market for leasing general purpose computer systems. The market issues presented on appeal from the the trial court's directed verdict for IBM at the end of the plaintiff's case[145] included whether a method of marketing could be a "market" for section 2

[143] Section 16 of the Clayton Act providing for injunctive relief for private plaintiffs requires proof of "threatened loss or damage" (15 U.S.C. § 26) as opposed to proof of actual injury to "business or property" in treble damage actions under section 4 of the Clayton Act (15 U.S.C. § 15). *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 260 (1972).

[144] Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488 (9th Cir. 1977).

[145] Greyhound Computer Corp., Inc. v. IBM Corp., 1972 Trade Cases ¶ 74,205 (D.Ariz. 1972).

purposes; whether leasing was a market distinct from the other methods of distributing data processing services, viz sale of computer systems, time sharing, and contracting with computer service bureaus; and, whether leasing of IBM's products constituted a further submarket within the general market for leasing computer services.

The Ninth Circuit, in an intriguing and well-written opinion by Chief Judge Browning, held on the first issue: "No rule of law or economic principle bars application of Section 2 of the Sherman Act to alternative means of distributing a product."[146] Explicit recognition of methods of distribution as potential relevant markets for section 2 purposes may be a significant holding of wave III litigation if widely accepted, since it opens up new vistas for antitrust analysis of restricted channels of distribution at a time when section 1 strictures upon vertical market restraints are being loosened as a result of the *Sylvania* case.[147] Further, this holding may serve to detach the conceptualization of market analysis from concrete products and places and further a deeper understanding of the use of market tests as a means for intellectually assessing the intangible question of whether market power has unreasonably displaced the competitive process as the rule of trade in an arena of significant economic activity.

On the second issue, whether leasing computer services as distinguished from other methods of distributing the product should be considered a distinct "submarket" for section 2 purposes, the court found the question a close one but one where the

[146] 559 F.2d at 494.

[147] *Compare* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) *with* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). *See,* Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions,* 78 COLUM.L.REV. 1 (1978); Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and* Sylvania, 64 IOWA L.REV. 461 (1979).

evidence could support a jury conclusion in the affirmative.[148] Unlike the Tenth Circuit's superficial and mechanistic market analysis in *Telex*, Judge Browning probed along a number of lines of inquiry to determine whether a jury inference from the evidence concluding that leasing was a distinct market could withstand a motion for judgment notwithstanding the verdict. The court indicated that such an inference could be based on a number of factors, including: (1) leasing serves different needs of end users of the product; (2) the industry and its customers recognized leasing as distinct from other methods of distribution; (3) the capital requirements for leasing differed from those for other methods of distribution; and (4) customer advantages in lease terms justified distinguishing leasing from other methods of distribution for antitrust purposes.[149]

The court found unnecessary a further inquiry into whether the market should be fractionated further by treating the lease of IBM equipment as the relevant market since there was sufficient evidence for a jury to infer IBM had monopoly power in the leasing of general purpose computers even if non-IBM equipment were included. One of the least analytically developed and elusive factors in antitrust analysis is the determination of whether "monopoly power" is present or not. In estimating a firm's strength for section 2 purposes, for example, courts have not usually drawn short-term/long-term distinctions but have sought to estimate whether a firm possesses power to fix prices or exclude competition at a specific point in time or over a limited span of time by examining market share at a fixed point in time.[150] The

[148] "We conclude that the evidence was sufficient, though by no great margin, to permit the jury to find that the differences between leasing and selling general purpose computers were of sufficient significance to justify treatment of the two forms of distribution as distinct submarkets for competitive purposes." 559 F.2d at 495.

[149] *Id.* 494-95.

[150] *See*, Schmalensee, *supra* note 67, at 1005; Mason, *Monopoly in Law and Economics*, 47 YALE L.J. 34 (1937).

task of identifying monopoly power is inextricably bound up with market tests, since the configuration of the market selected can tend to magnify or diminish, as the case may be, market share, and hence the apparent strength of the defendant to achieve the goals prohibited by the law.[151] Identification of monopoly power should also seek to take account of short- and long-range time frames, since markets are dynamic and short-run benefits or detriments may turn out to be the converse in the long run. Economic models tend to view reality by snapshots rather than by long-term motion pictures of the evolution of specific practices and their consequences in the context of the industry. Insensitivity to time as a dimension of the analysis of monopoly power is one of the more serious limitations upon the reliability of economic models to sort out whether specific market structure or conduct indicates the presence of monopoly power or not.[152]

The dimension of time, however, has not generally been accounted for in monopoly power analysis. Ever since Judge Hand's numerical test of 90% yes, 64% maybe and 33% no in *ALCOA*[153] courts have continued to attach great weight to percentage share of the "market" measured at a specific point in time. In most cases, a market share in excess of 70% appears to result in a finding of monopoly power, while less than 50% market share results in a finding of no monopoly power.[154] In the 50% to 70% range, evidence beyond market share appears to be required before a finding of monopoly power will be sustained.[155]

[151] *See*, Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979).

[152] *See*, Flynn, *The Role, If Any, of Economic Analysis in Antitrust—A Reply*, 12 SW.U.L.REV. ____, ____ (1980); J. HICKS, CAUSALITY IN ECONOMICS ch. 4 (1979).

[153] 148 F.2d at 424 (2d Cir. 1945).

[154] For an empirical analysis of the cases, *see*, Stein & Brett, *Market Definitions and Market Power in Antitrust Cases—An Empirical Primer on When, Why and How*, 24 N.Y.L.S.REV. 639, 672 (1979).

[155] *Id.*

The commentators, as well as some courts, are unanimous in pointing out that market share—big or little—is a factor, but should not be the sole factor in determining whether or not monopoly power exists.[156] A firm may have a large market share yet lack the ability to fix prices or exclude competitors because entry barriers are low. Conversely, a firm with a relatively small market share may still possess the power to fix prices or exclude competitors particularly where entry barriers are high, there is excess capacity and the firm is earning excessive profits. Moreover, monopoly power may be inferred from factors not so directly dependent upon market definitions like entry barriers, excessive profits over a sustained period of time, the relative size of competitors, the actual use of economic power by predatory conduct, and a trend toward greater or lesser economic power.[157]

In *Greyhound* the court relied in part on market share to draw the inference of monopoly power, finding IBM had 64% to 82% of revenues from leasing computers and 77% to 83% of revenues from leasing by firms that also manufactured computers.[158] In addition, the court found a jury could draw the inference of monopoly power from the fractionated nature of the rest of the market—with no other firm having more than 4% of lease revenues.[159] Entry barriers were inferred from IBM's leverage over customers by virtue of having 80% of the installed base of general system equipment and the high cost to customers of changing equipment.[160] IBM's pricing policy, targeting a 30% return, and its ability to maintain market share and a high rate of return while charging a 5% to 15% higher price than competing

[156] *See,* 2 AREEDA & TURNER, *supra* note 13, at 396 (1978); SULLIVAN, *supra* note 13, at 76 (1977).

[157] *See,* SULLIVAN, *supra* note 13, at 74-89; Stein & Brett, *supra* note 154, at 671-75.

[158] 559 F.2d at 496-97.

[159] *Id.* at 497.

[160] *Id.*

leasing firms, added further evidence from which an inference of monopoly power could be drawn.[161]

Greyhound reflects a more sophisticated wave III attempt than that found in Tenth Circuit's *Telex* opinion to examine factors beyond a mechanical measurement of market share at a fixed point in time to determine whether or not monopoly power is present or was exercised. The nature of the industry, the use of leasing by a firm with a dominant share of the installed base, and the return to IBM as compared with its competitors leasing peripheral equipment were all deemed relevant.

On the conduct front, the court in *Greyhound* also differed from the *Telex* opinion on whether the conduct relied upon to prove one with monopoly power had unlawfully monopolized required proof of conduct that was "predatory" in the sense of "sinister." No requirements of the conduct being "predatory" let alone "sinister" was found necessary, rather, the court held:

> If the jury concluded IBM possessed monopoly power in the leasing of general purpose computers, IBM would be precluded from employing otherwise lawful practices that unnecessarily excluded competition from the submarket. The question is whether the jury could have found that the alleged practices were in fact adopted, and, if so, whether they had the prohibited effect.[162]

[161] *Id.*

[162] *Id.* at 498. The F.T.C. adopted the same test in E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (1980), an attempt to monopolize case. In drawing the line between procompetitive and anticompetitive conduct, the Commission saw as its task determining "whether DuPont's conduct represents legitimate competitive behavior or an unreasonable effort to propel the firm into a dominant position in the [titanium dioxide] . . . market." 3 TRADE REG.REP. at p. 21,972. In applying the test, the Commission engaged in an extended rule of reason analysis with due regard for the facts and circumstances of the industry and the particular case. Among the factors weighed, the Commission found "especially pertinent": "(1) The extent to which the conduct enhances efficiency or innovation, including profitability considera-

Several specific marketing tactics by IBM were relied upon as conduct from which a jury could conclude "unnecessarily excluded competition from the submarket." The court held a jury could find several of IBM's practices were intentionally designed to disadvantage competing leasing companies dependent on IBM for equipment by raising their costs, making more difficult the acquisition of equipment, locking in lease customers to IBM and hobbling the ability of competing lease companies to be flexible in lease terms by manipulation of maintenance rates on new equipment.[163] In categorizing these otherwise admittedly lawful tactics as not "honestly industrial" and appropriate candidates for conduct which a jury could infer caused unlawful monopolization, the court adopted as its standard Judge Wyzanski's language in *United Shoe*:

> [T]hey are not practices which can be properly described as the inevitable consequences of ability, natural forces, or law. They represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production and distribution, which a competitive society must foster. They are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market.[164]

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tions; (2) the extent to which the conduct is a reaction to competitive behavior, demand shifts, new technology or other market considerations; (3) the permanence or reversibility of the challenged actions; (4) the alternatives available to the firm; and (5) the effect of the conduct on entry barriers and rival firm behavior." *Id.* at p. 21,982, n.38. The Commission also recognized that it would be "unwise policy . . . to focus solely on the benefit side of the equation, while ignoring the adverse effects of dominant firm behavior." *Id.* at p. 21,978. Rather a balancing test is required, where standards are the beginning of the analysis and an informed judgment based on all the facts is the end of the process.

163 559 F.2d at 498-505.

164 559 F.2d at 502-03, quoting United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 344-45 (D.Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

This qualitative standard for assessing the conduct element falls short of the *Telex* standard of predatory in the sense of "sinister." It clearly is more in line with the *ALCOA* and *United Shoe* precedent from wave II and at a minimum suggests a structural approach to section 2 more narrowly circumscribing the conduct of one possessing monopoly power, regardless of how that power was acquired, than the other wave III monopolization cases.[165] It is not a standard that is capable of being used for easy

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165 Although our principal concern here is wave III monopolization litigation it is worthwhile noting that *Greyhound Computer* also involved reversal of the dismissal of a claim that IBM had attempted to monopolize by the judge who authored the *Lessig* opinion, Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), *cert. denied,* 377 U.S. 993 (1965), and launched the Ninth Circuit on its separate path for defining the attempt offense under section 2. Judge Browning rejected, as he did in *Lessig,* requirements of proving a relevant market and a dangerous probability of achieving a monopoly in the market defined in order to prove an attempt to monopolize. Rather, Judge Browning held:

"A prima facie case of attempt to monopolize is made out by evidence of a specific intent to monopolize 'any part' of commerce, plus anticompetitive conduct directed to the accomplishment of that unlawful purpose. . . .

"If proof of an economic market, technically defined, and proof of a dangerous probability of monopolization of such a market were made essential elements of an attempt to monopolize, as a practical matter the attempt offense would cease to have independent significance. A single firm that did not control something close to 50 percent of the entire market, . . . would be free to indulge in any activity however unreasonable, predatory, destructive of competition and without legitimate business justification. Any concern not dangerously close to monopoly power could deliberately destroy its competitors with impunity. These are not abstract hypotheses. A market share approaching a monopoly is not required to enable one concern seriously to impede the capacity of others to compete by use of abusive trade practices. A construction of the Sherman Act that would immunize such practices would be contrary to the purposes of the Act; it is not required by the Act's language or legislative history." 559 F.2d at 504.

In a footnote, Judge Browning went further to suggest: "Specifically there is support in the decisions and legislative history for the conclusion that Section 2 was intended to prohibit unreasonable restraints of trade that exclude competition even when they are imposed by a single line drawing, nor is it one that elevates short-term "consumer welfare" as the primary goal of antitrust policy. Rather, it is a standard recognizing broader economic, political and social goals of antitrust policy[166] and one requiring greater restraint by a firm possessing monopoly power than the "predatory" standard of *Telex* if the firm wishes to avoid antitrust liability.

Conduct evidence to prove causation in fact, that IBM's alleged violation caused the injury Greyhound claimed, was treated by the court as a jury question, separate from conduct evidence to prove the alleged violation. In finding that Greyhound introduced sufficient evidence from which a jury could "infer Greyhound had sustained damage and that IBM caused it"[167] the court relied on evidence of the alleged impact of IBM's conduct (proving a violation) on Greyhound's business and evidence showing a specific intent on IBM's part that the conduct have an adverse impact on Greyhound's business.[168] Countervailing IBM evidence discounting Greyhound's causation in fact proof was properly found to raise "conflicting inferences"[169] for

trader." *Id.* at 505, n.37. Judge Browning's approach would therefore ban unilateral predatory conduct by a firm without monopoly power under the attempt to monopolize offense, and otherwise lawful conduct by a firm with monopoly power under the monopolization offense if the conduct is "unnecessarily exclusionary." See also, E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (F.T.C. 1980).

166 "Congress' general purpose in passing the Sherman Act was to limit and restrain accumulated economic power, represented by the trusts, and to restore and preserve a system of free competitive enterprise. The Congressional debates reflect a concern not only with the consumer interest in price, quality, and quantity of goods and services, but also with society's interest in the protection of the independent businessman for reasons of social and political as well as economic power." Browning, J., dissenting in GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1019 (9th Cir. 1976), *aff'd,* 433 U.S. 36 (1977).

167 559 F.2d at 505.

168 *Id.*

169 *Id.* at 506.

resolution by the jury, rather than a failure of proof as a matter of law of the added element of cause in fact. By keeping causation for purposes of proving a violation separate from questions of causation for purposes of proving injury as the result of a violation of the law, the court avoided the *Telex* confusion of damage "causation" with illegality "causation," as well as preserved the distinction between judge and jury functions. The failure of the *Telex* court to make this distinction generated the vague standard of "sinister" conduct to prove a violation of the law.

The confusion over various levels of causation became manifest in the third computer case. In *California Computer Products, Inc. v. IBM Corp.,*[170] (*Calcomp*), on review of a directed verdict for IBM at the end of plaintiff's case, a peripheral manufacturer of disk drives and controllers complained that IBM's leasing and other marketing practices injured it in the general purpose computer systems market, the leasing market and the market for IBM-compatible peripheral equipment.

In a less than analytical and understandable finding, the court held CalComp lacked standing to sue for alleged anticompetitive effects in the general purpose computer systems market and the leasing market. The court announced a "ripple" standard for private plaintiff standing and that CalComp's claims in the general purpose computer systems and leasing markets were based on an "indirect ripple effect" of injuries in markets where CalComp did not compete with IBM as a general systems manufacturer or leasing company.[171] Of course, if CalComp's claims were based on its status as a buyer or supplier of peripheral

170 613 F.2d 727 (9th Cir. 1979).

171 *Id.* at 732. A result appropriately characterized as "terribly mechanical" and "ultimately naive" by Professor Sullivan. Remarks delivered to the Antitrust Section Meeting, Los Angeles County Bar Ass'n, by L. Sullivan, *Recent Antitrust Developments,* p.23, Los Angeles, California (October 10, 1980).

equipment in those markets and IBM's alleged conduct in the peripheral markets excluded CalComp from those markets, CalComp may well have had standing.[172] The court's cryptic treatment of the standing issues however, leaves unclear what CalComp claimed "caused" it injury and why the court concluded the injuries claimed were not "direct" or were the result of an "indirect ripple effect."

As in other recent treble damage actions,[173] the "standing" issues in *CalComp* appear not to be either clearly identified or rationally analyzed. It is unclear whether the court considered "standing" to be a question of the scope of the duty and risk imposed by the statute, an issue of who is owed the duty, an issue of causation in fact, or a problem of proof of damage. While sorting out the appropriate meaning and use of "standing" is beyond the scope of this article, suffice it to say "indirect ripple effect" is scarcely an intelligible or useful standard likely to find widespread acclaim in the litigation. Like "target area," "direct and indirect purchaser," and "bull's-eye" and "carom shot," "indirect ripple" should be consigned to Von Jehring's heaven of legal concepts[174] along with "proximate cause," "submarkets" and the like. The "standing" concept should be confined to issues concerned with insuring a case or controversy and determinations of the appropriate limits of the judicial process vis-a-vis the other branches of government.[175] It should not be used as a confusing surrogate for causation, duty or intent issues.

The confusion over causation was extended into the analysis of IBM's conduct in the remaining market where the plaintiff was found to have standing, the market for IBM-compatible peripheral equipment. Although expressing reservations, the court was willing to accept, for purposes of review, that IBM-compatible peripheral equipment was a relevant market and that IBM had monopoly power in that market.[176] On review, therefore, the principal issues were whether IBM's conduct could support an inference that one with monopoly power had monopolized and whether it could be inferred that CalComp's claimed injuries resulted from the alleged section 2 violation.

CalComp relied on three categories of conduct evidence to prove IBM unlawfully monopolized: (1) that IBM engaged in predatory pricing of its peripheral equipment; (2) that IBM made unnecessary design changes on IBM main frames to frustrate competition from plug compatible peripheral manufacturers; and (3) that IBM unlawfully raised main frame prices to offset price reductions in peripheral markets. CalComp's evidence on the IBM's pricing practices showed substantial IBM price reductions in disk drive peripherals and an IBM change in marketing peripheral products from a sale or 30-day only lease policy to a policy of giving customers the added option of a 1- or 2-year lease with significant additional discounts over the life of the lease. The

172 The Ninth Circuit has developed the "target area" test for standing in antitrust cases. "[I]n order to state a cause of action under the antitrust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of the competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden by the antitrust laws." Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-5 (9th Cir. 1952). *See also,* Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970); Karseal Corp. v. Richfield Corp., 221 F.2d 358, 361 (9th Cir. 1955); Alioto & Donnici, *Standing Requirements for Antitrust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy,* 4 U.S.F.L.Rev. 205 (1970); Tyler, *Private Antitrust Litigation: The Problem of Standing,* 49 U.Colo.L.Rev. 269 (1978); Note, *Standing to Sue in Antitrust: The Application of Data Processing to Private Treble Damage Actions,* 11 Tulsa L.J. 542 (1976).

173 *See, e.g.,* Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976); Reading Industries v. Kennecott Copper Co., 477 F.Supp. 1150 (S.D.N.Y. 1979).

174 *See* Cohen, *supra* note 69.

175 *See,* Tyler, *supra* note 172, at 272.

176 613 F.2d at 739.

court found IBM's new lease policy, while initially producing reduced revenues, was expected to produce added profits over the long run from increased market share and longer equipment life. Since IBM's pricing tactics and profit calculations were taking place in a relatively long-term leasing context, the court chose to measure the legality of the exclusionary effect of the pricing conduct on the basis of profits over the life of the lease and whether those profits fell below marginal or average variable costs.[177]

Aside from the more general and serious questions with the propriety of using marginal cost as the standard for predatory pricing to be discussed *infra,* the court relied on the theory of marginal cost pricing without regard to the implications of leasing. It is at least probable that the initial lease returns on IBM's peripheral equipment were below the cost of the installed equipment during the early life of the leases; a cost gradually recovered and exceeded over the later life of the lease. Smaller competitors without similar investment resources or access to relatively low cost financing may well have found themselves disadvantaged in the initial struggle to sign up and lock in lessors, compared to competing in a market where IBM sold or leased on a short-term basis rather than leased on a long-term basis. The use of marginal cost pricing theory in a long-term lease market does not make sense if the critical element of time in which to measure costs and return becomes significant because of other competitive factors in the industry like differentials in financing capital, use of retained earnings derived from monopoly profits elsewhere, or financing leased equipment with monopoly profits from other markets.

The *CalComp* court did not explore these ramifications of IBM's pricing conduct or permit a jury to do so, but simply relied on the long-run profitability of IBM's leasing plan, the questionable line of marginal cost as the test for predatory pricing

[177] *Id.* at 741.

conduct,[178] and the short-term goal of lowering prices to consumers without regard to long-term effects on maintaining a competitive process as the primary goal of antitrust policy[179] to conclude the pricing evidence did not prove IBM monopolized. The court also appeared to confuse conduct evidence for proof of unlawful monopolization with causation evidence for proof of damages as the result of a violation of the law. The court found IBM had a "right to reduce prices" so long as the prices were profitable in the long run because the price reductions were in response to price competition by peripheral manufacturers including the plaintiff. Reasoning that price competition and IBM's price cuts "were a part of the very competitive process the Sherman Act was designed to promote,"[180] the court held that it was impossible to find CalComp's alleged injury from IBM price cuts was the kind of injury compensable under the antitrust laws. Moreover, the court held that:

[178] For a discussion of the validity of marginal cost as the test of predatory pricing, see the text discussion of Transamerica Computer Corp. v. IBM, 481 F.Supp. 965 (N.D.Cal. 1979), text accompanying nn. 188-218, *infra.*

[179] The following statement from the court's opinion would seem to be particularly at odds with the *ALCOA* and *United Shoe* objective of controlling monopoly power in the long run: "Granted that IBM's technological innovations resulted in 'growth as a consequence of superior product,' it was entitled to maintain its consequent dominant position in the market it created through 'business acumen,' which we take to include shrewdness in profitable price competition. The Sherman Act does not draw a distinction between competition on the bases of price and of performance: the two are inseparable parts of any competitive offering. Where the opportunity exists to increase or protect market share profitably by offering equivalent or superior performance at a lower price, even a virtual monopolist may do so." 613 F.2d at 742. Shrewdness in profitable price competition by a deep pocket monopolist did not save *United Shoe* from being found to have monopolized by virtue of its leasing practices. United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 343-45 (D.Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

[180] 613 F.2d at 742.

> [t]o accept CalComp's position would be to hold that IBM could not compete if competition would result in injury to its competitors, an ill-advised reversal of the Supreme Court's pronouncement that the Sherman Act is meant to protect the competitive process, not competitors.[181]

Use of the cliche, "the Sherman Act is meant to protect competition, not competitors," overlooks the fact that we cannot have competition or a competitive process without competitors. Like the "bigness is not necessarily bad" cliche (bigness is not necessarily good either), the competitive process—not competitors cliche avoids grappling with the difficult problem of determining which competitive tactics by a firm possessing market power are legitimate in light of the goals of the law and which are not. Cliches distort analysis by implying more than they say. Evidence that a firm is receiving profits far in excess of marginal cost indicates monopoly pricing may be taking place and a cliche will not aid in sorting out when such evidence ought to lead to a conclusion that a firm has or has not monopolized.

CalComp's simplistic use of marginal cost pricing theory and the competition, not competitors cliche scarcely advances clarity in the analysis of some of the more difficult issues of section 2 litigation. One is still left without meaningful guidelines for drawing the line of legality between permissible conduct that is consistent with maintaining a regime of competition from that which is not, since injury to competitors and receipt of profits in excess of marginal cost can be benchmarks pointing in either direction.

CalComp also appears to end up with a catch-22 standard for proof of unlawful pricing in private monopolization cases. A defendant's pricing tactics injuring a plaintiff in response to the plaintiff's price cuts do not violate the law because the injury suffered by the plaintiff is a part of the "very competitive process" which the Sherman Act was designed to promote. On

[181] *Id.*

the other hand, even if a plaintiff is injured by the unlawful retaliatory pricing practices of a monopolist, the plaintiff does not have standing to sue since it is impossible to say the plaintiff's injuries "represent compensable 'injury' from acts of . . . [the defendant] unnecessarily *excluding* or *restricting* competition."[182] QED the difficult process of sorting out the standards for imposing duties upon an antitrust defendant possessing monopoly power through the process of defining standards for proof of a violation of the law should not be confused with the age old mystery of proving causation in fact for purposes of establishing a nexus between the violation and the fact of damage.[183] Cases like *CalComp* mingling one with the other, leave legal standards for assaying whether the law has been violated by a particular course of conduct in a confused state, needlessly generate awkward standing questions, confuse the lines between questions of law for the judge and those of fact for the jury,[184] and deflect analysis from the underlying policy goals of the statute and the facts of the case in favor of cliches and unanswerable and metaphysical causation questions.[185]

The *CalComp* court's reliance on pricing above short-run marginal cost as the line between lawful competition and unlawful predation by a monopolist,[186] tempered by recognition of the

[182] *Id.* (emphasis added).

[183] *See* Cohen, *Field Theory and Judicial Logic,* 59 YALE L.J. 239 (1950).

[184] For a discussion of a rational method for allocation of judge and jury functions, *see* W. Thode, *Tort Analysis: Duty Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury,* 1977 UTAH L.REV. 1.

[185] *See,* L. GREEN, THE LITIGATION PROCESS IN TORT LAW (1965); Cohen, *supra* note 183.

[186] "[P]rice reductions up to the point of marginal cost are consistent with competition on the merits, since in this case only less efficient firms will be disadvantaged, while a firm pricing below marginal cost by definition incurs losses, so that competition on the basis of efficiency in this situation is frustrated." 613 F.2d at 743.

"possibility" that price reductions to some point above short-run marginal costs plus some other conduct might be held unlawful,[187] was less than binding precedent in the fourth significant computer case: *Transamerica Computer Co. v. IBM Corp.*[188] The *Transamerica* case, decided by a Ninth Circuit district court, was tried to a jury for over 7 months upon a pretrial stipulation that if the jury was unable to reach a unanimous verdict the case would be decided by the trial judge. The jury was unable to reach a verdict, and Judge Schnacke rendered a verdict in favor of the defendant IBM, accompanied by a thoughtful, analytical, and significant opinion.

Transamerica financed the equipment leased by peripheral manufacturers competing with IBM thereby relieving those manufacturers of heavy capital investments in leased equipment and enabling them to maintain a better earnings record to support new financing. Transamerica's objectives in the financing program included the obtaining of a "window on the computer industry" and the more mundane objective of taking advantage of the investment tax credit for its corporate parent as owner of the leased peripheral equipment.[189] Transamerica claimed antitrust injury by reason of IBM's alleged exercise of monopoly power in three markets: (1) the manufacture and placement of general purpose computer systems; (2) the market for tape drives and their controllers plug-compatible with IBM CPU's; and (3) the markets for disk drives and their controllers plug-compatible with IBM CPU's.

Unlike *CalComp,* the court did not deny standing to the non-manufacturer plaintiff on a "ripple" theory, but did hold that Transamerica's market definitions were either faulty or resulted in markets where IBM could not be said to possess monopoly power.

[187] *Id.*

[188] 481 F.Supp. 965 (N.D.Cal. 1979).

[189] *Id.* at 973.

Since the significant wave III aspect of the *Transamerica* opinion concerns analysis of predatory pricing concepts as conduct proving monopolization, no extended examination of the court's market and monopoly power analysis will be undertaken here other than salient points in light of the other computer cases.

Unlike the Tenth Circuit *Telex* opinion, the court examined numerous factors including supply and demand substitutability, price and profit data, technological pace, entry barriers, the strength of the rest of the market, and industry recognition in determining relevant markets.[190] IBM's successful "supply substitutability" argument in the circuit court opinion in *Telex,* viz, that the IBM-compatible disk and tape drive markets should be defined as including potential suppliers manufacturing tapes and disk drives for other systems, was rejected in *Transamerica.* The court did so because "[i]nterface changes would cost hundreds of thousands, if not millions of dollars, and might require a year to carry out,"[191] therefore making it improper to include that potential competition in the definition of the "submarket."

In all three markets claimed to be the relevant markets by Transamerica however, the court found IBM lacked monopoly power, either because IBM's market share was below 60%, IBM's share was rapidly dropping from an earlier high market share conferred by technological innovation, or because the plaintiff's method for computing market share was faulty.[192] The court's analysis of market power was not as generous as that employed in *Greyhound* and indicated a proclivity to place primary reliance upon market share in relation to market definition. Conduct evidence, a frequent source from which to infer monopoly power in behavioral cases,[193] was not considered since conduct was

[190] *Id.* at 975-87.

[191] *Id.* at 985.

[192] *Id.* at 986.

[193] See the discussion of *Greyhound* in text accompanying notes 144-169 *supra.*

treated as an element analytically separate from the question of whether the defendant possessed monopoly power in a relevant market. Like the plaintiffs in *Telex* and *CalComp,* Transamerica found itself presenting a case based on a theory of structural monopolization while its injury was claimed to be caused by allegedly predatory behavior having the effect of fixing prices and excluding competition.

Proceeding on a structural track to prove markets and monopoly power and a behavioral track to prove conduct and causation, resulted in Transamerica winning neither. The court went further, however, in case it was reversed on the market and monopoly power issues and proceeded to analyze IBM's conduct in three areas: (1) IBM's pricing conduct; (2) its design conduct; and (3) its long-term leasing practices.

The pricing practices of a firm with market power present particularly troubling questions for the conduct element of a section 2 case, since a monopolist's prices can be both an expression of a response to a functioning competitive process which the statute seeks to foster as well as an anticompetitive weapon to fix prices or exclude competition signaling the possession or exercise of power displacing the competitive process which the statute condemns. Wave III litigation has come to see the problem presented as how to sort out the latter from the former in a practical and predictable way that can be managed in the courts, provide workable standards for those subject to the law, and achieve the goals of the Sherman Act.

It should be noted that the ambiguity about conduct left by wave II litigation might still be interpreted as embracing pricing practices not found to be "sinister" or "predatory" if one were to follow the philosophy of *ALCOA, United Shoe* and *Greyhound.* That philosophy holds that one possessing monopoly power is precluded from employing otherwise lawful practices that "unnecessarily" or avoidably exclude competition and further the dominance of a particular firm. This approach sees as the objective of section 2 the displacement of monopoly power governing a

market, not control of the abusive exercise of power, as the essence of the offense. Under this view of the purpose of the statute, for example, reductions resulting in prices above average cost might be considered proof of prescribed conduct where there is evidence like that in *Telex,* that price reductions are aimed at specific customers, have a long-term exclusionary effect, are unnecessary and are accompanied by compensating price rises in markets where the monopolist does not face competition. The facts of the particular case and a more complex understanding of the goals of antitrust policy require a more refined analysis. Such a test might sacrifice short economic efficiency as defined by some, in the name of the longer term economic, social or political goals of the Sherman Act.[194] To coin a cliche, the Sherman Act protects the competitive process not the short-run maximization of consumer welfare. The competitive process in turn is understood as embracing broader economic, political and social goals than those admitted by neoclassical price theory.

Transamerica did not wholly adopt this philosophical approach to section 2, since the court viewed lower prices in part as a reflection of increased "efficiency" and the goals of section 2 as including maximizing consumer welfare and encouraging dynamic competition by encouraging maximum "efficiency" even by those possessing monopoly power.[195] On the other hand, the *Transamerica* court recognized that a monopolist's lower prices might create entry barriers or be so low as to reflect predatory conduct as the result of the exercise of monopoly power and thereby exclude competitors not by virtue of competition but as the result of undue market power. Thus the search becomes one for a standard—a measuring stick—by which to judge when a monopolist's lower pricing tactics move from efficiency producing and praiseworthy competition into the realm of predatory and

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[194] *See* Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy,* 89 Yale L.J. 213 (1979); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis,* 87 Yale L.J. 284 (1977).

[195] 481 F.Supp. at 987-88.

exclusionary conduct which the courts ought to declare unlawful for section 2 purposes in light of the goals of the statute.[196]

A standard, one derived from the model of some schools of economic thought, for reflecting pricing, costs, and demand in a market, was advocated by Areeda and Turner in their 1975 article, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act.*[197] The Areeda-Turner position, one which has provoked rejoiners,[198] rebutters,[199] surrebutters[200] and so on,[201] suggests that pricing conduct relied upon to prove section 2 violations should be analyzed on the neoclassical theory of

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196 "The great problem in fixing a legal standard by which pricing conduct should be measured is that it is extremely difficult to distinguish between a monopolist's price reduction that is a normal, expected component of the dynamic competitive process, and the predatory, undesirable conduct just described. If the law is overzealous in guarding against predatory pricing, it may well inhibit the competitive process it seeks to promote." *Id.* at 990.

197 88 HARV.L.REV. 697.

198 Scherer, *Predatory Pricing and the Sherman Act: A Comment,* 89 HARV.L.REV. 869 (1976); Williamson, *supra* note 194.

199 Areeda & Turner, *Scherer on Predatory Pricing: A Reply,* 89 HARV.L.REV. 891 (1976); Areeda & Turner, *Williamson on Predatory Pricing,* 87 YALE L.J. 1337 (1978).

200 Greer, *A Critique of Areeda and Turner's Standard for Predatory Practices,* 24 ANTITRUST BULL. 233 (1979). Scherer, *Some Last Words on Predatory Pricing,* 89 HARV.L.REV. 901 (1976); Williamson, *A Preliminary Response,* 87 YALE L.J. 1353 (1978).

201 Areeda & Turner, *Predatory Pricing: A Rejoinder,* 88 YALE L.J. 1641 (1979); Williamson, *Williamson on Predatory Pricing II,* 88 YALE L.J. 1183 (1979). For a comprehensive review of the debate and a more refined analysis, *see* 1 NCRALP, *supra* note 11, at 149-50; SULLIVAN, *supra* note 13, at 116-125 (1977); Joskow & Klevorick, *supra* note 194. For an excellent summary of the debate *see,* E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (F.T.C. 1980). The leading articles on predatory conduct are collected and reprinted in 10 J. REPRINTS FOR ANTITRUST L. & ECON. #1 (1979).

marginal cost pricing and that pricing conduct should be conclusively presumed legal if price levels exceed either a defendant's short-run marginal cost or its accounting surrogate of average variable cost.

Transamerica claimed that IBM's pricing practices constituted predatory conduct not honestly industrial, thereby plunging the court—despite the *CalComp* precedent adopting a marginal cost test[202]—into the mysteries of predatory pricing controversy. Without fully tracing the conflicting points of the debate extensively discussed by the court in *Transamerica,* it was held that price reductions resulting in prices above average *full* cost (the average of fixed plus variable cost per unit) were to be conclusively presumed lawful and those below average *variable* costs (the average of variable cost per unit not including fixed cost per unit) unlawful.[203] On the other hand, the court rejected the Areeda-Turner suggestion that price reductions resulting in prices at or above short-run marginal costs and below average full cost should be conclusively presumed lawful.[204] The *Transamerica* court held that price reductions by a firm possessing monopoly power resulting in prices in the range below average full cost but above marginal cost or average variable costs were not to be presumed lawful conduct but pricing subject to judicial inquiry in monopolization cases as to whether there is a reasonable explanation for the firm selling at such a price.[205]

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202 The trial court distinguished *CalComp* on the grounds that the *CalComp* court limited its "pronouncements to the facts of the case before it," recognized "limit pricing" to discourage new entrants might call for holding profitable prices unlawful and "held out the possibility that other aspects of a defendant's conduct might make prices in excess of marginal cost predatory." 481 F.Supp. at 989.

203 *Id.* at 991.

204 *Id.* at 991-95.

205 The court held that "reasonable" explanations might include: "Prices below average cost would be reasonable if the monopolist was merely liquidating excess, perishable, or obsolete merchandise. Prices

The court's rationale was based on the belief that average full cost "is the point to which the normal forces of competition will tend to lower price";[206] that if a firm sells below average full cost "it is incurring a loss, equally efficient firms are incurring a loss, and more efficient firms (if their average cost is lower than the monopolist's average cost but greater than the price) will also be incurring a loss";[207] that "[o]nly firms able to withstand losses for as long as the monopolist chooses to inflict them will survive";[208] and that "[i]f a monopolist is permitted to set a price below its average cost, competition on the basis of efficiency is frustrated, and competition on the basis of wealth replaces it."[209] Moreover, the concept of marginal cost was judged a "figment of the economist's imagination"[210] and an impractical standard to administer in the context of court litigation. But even if all this were not so, the court held it would still reject the Areeda-Turner thesis:

> [I]f all the world's economists were of one voice, and like Areeda and Turner, placed their faith in the monopolist to maximize social welfare by eliminating competitors from crowded industries through temporary provision of more and lower priced goods, the Congress and the Courts have placed their faith elsewhere. The goal of welfare maximization through proper resource allocation is to be accomplished by a system of effective competition, not by reliance upon the presumed beneficence of a monopolist.
>
> . . . .
>
> Economic considerations aside, justifiable apprehension of excessive economic power concentrations underlie the law's aversion to monopolies.
>
> Areeda and Turner have made a policy judgment. The economic analysis used to justify that judgment is incomplete, and the judgment itself stands contradicted by the economic, political, and social policies of the Sherman Act.
>
> A conclusive presumption of the legality of an unprofitable low price, merely because it is above marginal cost, a cost which is all but incapable of proof, would truly be a "defendant's paradise." This Court rejects it.[211]

In other words, the court applied the old cliche of the antitrust laws protecting competition and not competitors with a new twist. The antitrust laws protect the competitive process and not a monopoly competitor engaged in unreasonable exclusionary pricing tactics or short-run maximization of consumer welfare as defined by neoclassical price theory.

The court proceeded to measure IBM's pricing conduct on a standard of whether prices were above average full cost, a calculation requiring complicated and unavoidably arbitrary accounting analysis and adjustments.[212] It is also a standard subject to the same policy conclusions the court used against adoption of the marginal cost test. Although the court's finding that IBM's pricing practices were above average full cost sought to take account of a number of variables, it unavoidably may not have taken account of several others. One factor is the dimension of the time coupled with the factor of leasing. As with *CalComp,* IBM's profits on leased equipment in *Transamerica* may not have been profitable in the time frame when it is alleged pricing

below average cost would be warranted if shrinking demand forced the monopolist to minimize its losses by selling at the best price-cost relationship available to it, or where the industry suffers from chronic excess capacity. And the same might be true of promotional pricing, meeting competitors' prices, or even occasional price wars, if carried out under appropriate circumstances. Intent evidence can prove helpful here. The monopolist's own evaluation of the situation, whether it thought it was cutting losses or cutting throats, can help to clarify the nature of the acts undertaken." *Id.* at 996.

206 *Id.* at 992.

207 *Id.*

208 *Id.*

209 *Id.*

210 481 F.Supp. at 994.

211 *Id.* at 994-995.

212 *Id.* at 996-1002.

practices were exclusionary even though the payout on the leased equipment ultimately exceeded average cost. The court measured IBM's return over the life of the lease rather than examining its return at a particular point in time vis-a-vis sunk costs in the leased equipment.[213] Although *Transamerica* provided no evidence to the contrary, it is conceivable that a deep pocket monopolist may have cheaper capital costs derived from excess monopoly revenue elsewhere to deploy in a leasing system than do small competitors. Competition in those circumstances would be based on wealth and not competitive merit, an argument the court relied upon to reject the test of pricing above marginal cost and below average cost as conclusively lawful.

A further difficulty, attributable to the belief that law ought to and can conform reality to an a priori model or theory rather than generate a theory out of the facts in light of precedent and the policy goals of the law,[214] is the evidence that many businesses do not price products in neat conformity with average cost theory, let alone marginal cost theory.[215] This, in turn, means that the burden of extrapolating data from the alleged monopolist's books with reference to all costs properly attributable to a product line and conforming the data to a model detached from reality will be both costly and controversial at every step of the litigation process. Consequently, the court's conclusive presumption that

[213] *Id.* at 1002. For a critical analysis of the court's market definition and failure to consider leasing in the context of analyzing predatory pricing theories, *see* Sullivan, *Recent Antitrust Developments*, remarks before the Antitrust Section, L.A. County Bar Ass'n. pp. 23-30 (October 10, 1980).

[214] *See* Flynn, *supra* note 152.

[215] For an analysis of the empirical data *see* Harris & Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Analysis*, 128 U.PA.L.REV. 269, 303-309 (1979). If the assumptions of the neoclassical economics do not pertain, the entire analysis is irrelevant. Those assumptions are under significant attack, particularly by the post-Keynesians at Cambridge, England. *See,* EICHNER, *supra* note 71; HOLLIS & NELL, *supra* note 71.

prices above average cost are lawful and its willingness to examine and conform complex cost accounting calculations and a reality that is otherwise to the concept of average cost will probably foreclose all but deep pocket plaintiffs in private suits, unless there is substantial and easily obtained evidence that a defendant is pricing well below average full cost or is pricing below marginal cost and the plaintiff is willing to expend the resources to prove it. Even then, a plaintiff may encounter a judge unable or unwilling to endure the travail of understanding or listening to the proof.

When these realities of meeting even an average cost standard are realized, it is doubtful that many plaintiffs will be willing to rely solely on predatory pricing conduct to prove their case unless some amelioration of the standard is adopted. For example, the burden of proving price reductions are above average cost might be placed on the defendant in cases where it is found that the defendant has monopoly power in a relevant market and its pricing tactics are specifically intended to exclude competitors or have an exclusionary effect. In some cases, even if prices produce a return above average cost, it might be wise to make the presumption of legality less than conclusive where other and suspicious conduct is present like frequent and unnecessary design changes, long-term leasing, price increases in other product lines, substantial entry barriers, excess capacity, or a specific exclusionary intent. Otherwise the practical result of adopting average cost rather than marginal cost as the line of legality of pricing practices will be as practically adverse for plaintiffs injured by pricing below that line as would be a standard drawing the line at marginal cost. In neither case will proof of a claim be certain, inexpensive, efficient, nor even appropriate.

On the other hand, too lax a standard can result in "private predatory pricing actions carry[ing] with them the seeds of protectionist abuse."[216] Sorting out procompetitive from anticompetitive conduct through the use of shorthand formulae relying upon

[216] Joskow & Klevorick, *supra* note 194, at 221.

"objective" criteria rooted in an artificial and unrealistic model of one school of economic thought is scarcely empirical or inductively based decisionmaking. About all that may be said for it, is that it gets rid of difficult cases relatively rapidly even though the process may not accurately determine whether there has been a violation of the law or not or one that ought to be compensable under the antitrust laws. Only a sophisticated and empirically based analysis of the type advocated by Joskow and Klevorick[217] would serve the goals of antitrust policy and justice to the litigants by taking account of the facts peculiar to the case before the court; *i.e.,* industry structure, the dynamics of the industry and the problem of predicting long-run consequences from short-run pricing activity. Such an analysis, however, might strain the capacity of litigants, the court and a jury to comprehend and adjudicate fairly all the facts and considerations involved.

Predatory pricing cases consequently, will probably continue to present a practical as well as a theoretical quandary to all concerned, until such time as a more expeditious way to deal with the fact and exercise of undue power in the economy is implemented.[218] By the same token, predatory pricing cases may continue to pose a threat to the vitality of the competitive process if too loose a standard is adopted for proof that pricing practices displace the process rather than signal its appropriate operation.

217 *Id.* at 213-270.

218 Avoiding unduly complex treble damage litigation is one factor behind my advocating adoption of a no-conduct monopolization standard before the National Commission for the Review of Antitrust Laws and Procedures. *See,* Flynn, *Statement,* 48 ANTITRUST L.J. 845, 849 (1979); Flynn, *No Conduct Monopolization: An Assessment for the Lawyer and Businessman,* ____ ANTITRUST L.J. ____ (1980). Adoption of the standard and a more active and expeditious enforcement program by the Antitrust Division pursuant to a "no-conduct" standard would alleviate the need for private plaintiffs seeking protection from structural monopolists by complex treble damage litigation.

The Ninth Circuit's direction on each element of an unlawful monopolization claim is difficult to predict. The basic philosophy and methodology of *Greyhound* and *CalComp* differs. *Transamerica,* with its theoretically sensible yet heavy practical burden on private plaintiffs to prove predatory pricing, makes it impossible to predict what direction the ideologically divided Ninth Circuit will go on the issues of markets, monopoly power, conduct, and predatory pricing in a monopolization case under section 2. For wave III purposes however, the computer cases demonstrate that the ambiguities of wave II remain unresolved and the difficulties of seeking to work them out in the context of private litigation are not subject to resolution by superficial or shorthand formulae deductively applied which only raise more questions than the ones they resolve—if any.

2. THE BERKEY CASE In the case of *Berkey Photo, Inc. v. Eastman Kodak Co.,*[219] the Chief Judge of the Second Circuit, Judge Kaufman, left little doubt about the direction in which he believes the Second Circuit should go on conduct issues. *Berkey* is a sprawling case which was tried to a jury over 7 months and resulted in an $87 million treble damage verdict for *Berkey.* Judge

219 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980). For an interesting analysis of the *Berkey* case from the perspective of tying arrangements, see Note, *An Economic and Legal Analysis of Physical Tie-Ins,* 89 YALE L.J. 748 (1980). The analysis here focuses on *Berkey* from the more general perspective of a monopolization case. *See also,* Comment, *supra* note 139 for an analysis of the case on the conduct element of a section 2 violation; and Comment, *Antitrust Scrutiny of Monopolists' Innovations,* 93 HARV.L.REV. 408 (1979) analyzing *Berkey* from the perspective of permitting innovation by a monopolist. A further insight, perhaps entitled to more weight than the academic speculation about *Berkey,* may be gained from the unusual step of printing the dissenting opinion of Justices Rehnquist and Powell on the denial of certiorari in the case. 444 U.S. 1093 (1980). Rehnquist and Powell, characterizing the Second Circuit opinion as "bizarre" in some respects, apparently wished to use the *Berkey* case as the occasion for cutting back even further than the Second Circuit did from the implications of wave II monopolization precedent.

Kaufman managed to reverse the trial judge, Judge Frankel, at every turn, whether the trial court found for Berkey or Kodak. The case involved numerous monopolization issues arising out of Berkey's relationship to Kodak as a competitor in the camera and photofinishing markets and as a customer of Kodak for photofinishing equipment, film, chemicals and photographic paper. Berkey claimed Kodak possessed monopoly power in the film, color print paper and camera markets in violation of section 2 and used that power to injure Berkey in the camera and photofinishing markets and to charge Berkey excessive prices for film, color print paper and photofinishing equipment. Little dispute or debate existed at the appellate level over the selection of four relevant markets[220] and Kodak's monopoly power in at least three of them:

1. Amateur conventional still camera market where Kodak, between 1954 and 1973 never had less than 61% of unit sales, 64% of the dollar volume, and, in its peak year, 90% of industry revenues;[221]
2. The film market where Kodak's annual sales since 1952 have always exceeded 82% of annual unit volume and 88% in revenues;[222] and
3. The market for specially treated paper for making color prints where Kodak's market share dropped from 94% to 67% between 1968 and 1975, while earnings from paper operations as a percentage of sales averaged a constant 60% over the period and its only domestic competitor dropped out of the market in 1977.[223]

The other markets involved in the litigation, photofinishing services and equipment, were at one time also dominated by Kodak as a result of Kodak's power in the film market. Until 1954, Kodak had tied photofinishing services to the sale of film

[220] The definition of markets was strenuously contested in the trial court. 457 F.Supp. 404 (S.D.N.Y. 1978).

[221] 603 F.2d at 269.

[222] *Id.* at 270.

[223] *Id.* at 271.

by including an advanced charge in the price of the film for photofinishing services. A government consent decree in 1954[224] enjoined the tie and Kodak's share of the photofinishing market subsequently dropped from 96% in 1954 to 17% in 1970 and 10% by 1976.[225] Over 600 competing photofinishing firms have entered the market, with Berkey one of the largest. Despite the dramatic growth of competition in the photofinishing market, Berkey claimed Kodak used its leverage in the film market to injure competition in the photofinishing market even though Kodak was not charged with monopolizing or attempting to monopolize the photofinishing market.

With little debate on appeal over markets or Kodak's power in those markets, since Kodak did not appeal the resolution of these controversial issues below, the case focused on conduct issues; namely, the legitimacy of Kodak's behavior in markets where Kodak possessed monopoly power, the impact of that behavior in related markets and the relationship of all of the above to the injuries Berkey claimed it suffered. The court introduced its analysis of specific Berkey claims, an analysis that reads in many areas like the deliberations of a jury rather than appellate review of a jury's verdict, with an overview of the evolution of monopolization standards. Recognizing precedent suggesting the gist of a violation of section 2 is the possession of monopoly power, the court nevertheless held the law requires proof of some kind of conduct element proving "willful acquisition or maintenance of . . . [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[226] Condemnation of monopoly power as the evil the act was intended to prevent, yet requiring some element of conduct in the acquisition, use or maintenance of monopoly

[224] United States v. Eastman Kodak Co., 1954 Trade Cases ¶ 67,920 (W.D.N.Y. 1954).

[225] 603 F.2d at 270-71.

[226] *Id.* at 274, quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

power before a monopolist would be held to have violated the law was viewed as the "paradox" or "conundrum"[227] of section 2. This led the court to conclude:

> The mere possession of monopoly power does not *ipso facto* condemn a market participant. But, to avoid the proscriptions of section 2 the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market. . . .
>
> . . . We tolerate the existence of monopoly power . . . only insofar as necessary to preserve competitive incentives and to be fair to the firm that has attained its position innocently. There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other. . . .
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> . . . But as we have indicated, a large firm does not violate section 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad based activity—more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.[228]

The court's opinion, quite appropriately in view of the issues presented, evidences an attempt to paint with the artistic touch of a Learned Hand in *ALCOA,* assessing the landscape of prior section 2 litigation in light of the philosophical goals of the Sherman Act and the factual controversy before the court. The attempt, however, parts company with the wave II cases restricting the voluntary actions of a monopolist and does not take full account of the structure/conduct dichotomy in the history of section 2 litigation. Consequently, the opinion creates a "paradox" where none may exist, although a "conundrum" in the sense of a difficult problem may certainly be present. Judge Hand, in the seldom noted 1916 opinion of *United States v. Corn Products Refining Co.,*[229] recognized two differing circumstances generating two different theories or tracks for proving a violation of section 2. Judge Hand suggested one test of legality was "power only and not the manner of its exercise":

> If the decisions of the Supreme Court are to be so understood, it is the mere possession of an economic power, acquired by some form of combination, and capable, by its own variation in production, of changing and controlling price, which is illegal. . . . Under such an interpretation of the act, Corn Products Refining Company is certainly a combination in restraint of trade, and its excuse is irrelevant, if it were true, that it has had a beneficent effect upon the industry. If the statute condemns an industrial integration of producing units sufficient to fix prices, so long as the total producing capacity remains unchanged, that policy must be respected and enforced, whether it is a good one or a bad.[230]

In other circumstances, Judge Hand recognized that the exercise of power, not its existence, is the crucial factor relevant to the section 2 question of whether competition has been displaced by unilateral behavior antithetical to the long-run value of maintaining a regime of competition. Judge Hand stated it this way:

> Under that theory the injuries to the public are shown by the means which the combination has employed in its efforts either to gain or to maintain its position. . . . While the statute under this theory relies upon competition as a proper stimulus to the maintenance of industrial advance and as the chief protection to the consumer, it takes a long view, not a short. It recognizes that with the customer in the end must lie the decision between producers, and that those who fail to secure the market by the quality and cost of their service must pass out of the field; but it does not identify permanent capacity with the inability to endure a transitory or local appeal to customers. Its presupposition is that there may well be competitors capable in the end of giving a service which will serve the public as well as their

227 603 F.2d at 273.

228 *Id.* at 275-276.

229 234 F. 964 (S.D.N.Y. 1916).

230 *Id.* at 1012.

neighbors, who may yet succumb to concerted competition apparently more serviceable, but only because it is temporary, and is put forward with no purpose of universal application. Possibly it would be hazardous to attempt an absolutely general statement, but it would yet be true to say that nearly all the devices condemned by the courts contain this sporadic element, either of time or place; that is to say, that they cover only a competition which was not intended to be permanent, and which the combination knew was only for the temporary purpose of extirpating a competitor who had at least some chance in the long run of establishing a service which would be as acceptable as any within the power of the combination itself.

It is on this account that the intent of the combination so often appears in the cases as the determinating factor in illegality. It is not because unfair competition is a crime, but only because a monopolistic intent is the clearest evidence that the competition attempted is shown to be temporary and local, and that there is on this account a reasonable expectation that it will be succeeded by competition which the newcomer might well be able to meet, had his development been all the while left unimpeded. If that temporary or local competition were not coupled with such an intent, if there were honest grounds for supposing that it would or could remain to the permanent advantage of the consumer, the public would have no ground to complain, so long as the organization of industry remains on a competitive basis. The intent is the touchstone, not because we are concerned with moral delinquency, but with a test of probable persistence of the combination's course of conduct.[231]

The 1916 dichotomy in monopolization cases and conceptual approach to them reognized by Judge Hand is not a 1979 "paradox." It is a recognition of the previously discussed two broad categories of circumstances where it is claimed that the competitive process has been displaced by monopoly power: (1) structural cases where the source of displacement of competition is the persistent, unexplained and overwhelming market share of the defendant as in *ALCOA* and *United Shoe;* and (2) behavioral cases where market definitions and market share are not as significant, but the conduct of a defendant with significant economic power is alleged to be the inappropriate cause of the displacement of the neutral hand of competition as in *Woods*

[231] *Id.* at 1012-13.

Exploration,[232] *Otter Tail*[233] and *Eastman Kodak Co. v. Southern Photo Materials Co.*[234] Structural and behavioral theories of illegality derived inductively from different factual circumstances do not present distinct and firm models or rules but broad, shifting and amorphous generalities of principles and methods of analysis taking their meaning and content from the facts before the court in light of the policies of the law rather than a priori models and generalities dictating what facts will be allowed relevance to the analysis and what goals of the law will prevail to the exclusion of all others.

Rather than presenting a "paradox" of conflicting rules, the evolution of divergent monopolization tests reaffirms the inductive nature of legal reasoning in a common law system and the refusal of reality to conform to preordained rules. Judicial responsibility for antitrust enforcement is premised upon the fact that reality is a chugging and churning state of affairs continually giving rise to new facts testing old values, thereby necessitating a broad and general statutory delegation of authority to the courts for the purpose of analyzing that ever-changing reality to achieve a variety of political, social and economic goals—goals occasionally in apparent conflict with one another. Rigid and fixed rules or models are a snare and a delusion in such a process. In the process of resolving disputes in a manner that will achieve the institutional goals of antitrust policy while justly resolving the dispute, facts ought to be analyzed in light of those goals and be organized by principles from previous litigation, the policies underlying the statute at stake, and new meanings for the principles of prior cases generated by the facts of the dispute before the court.

[232] Woods Exploration & Prod. Co. v. ALCOA, 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972).

[233] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

[234] 273 U.S. 359 (1927).

The converse process of following a preordained rule, selecting only those facts which the rule admits as relevant, and then analyzing the facts within the constraints of the rule is a discredited form of legal positivism producing undue inflexibility in the law, an ignoring of facts not consonant with the rule, and a frustration of goals of the law not embraced by the assumptions of the rule or ignored in the process of applying the rule. It is the process of analyzing the light of the model, rather than the dispute it is intended to illuminate.

Berkey's discovery of a section 2 "paradox" is the result of an apparent need in the mind of the court to discover a coherent and symmetrical rule to govern and dictate decision of the dispute before the court in accord with the maxims of deductive logic. The court proceeded upon a deductive rather than an inductive path, thereby failing to recognize fully the differing threads of analysis developed by Judge Hand in *Corn Products* and clearly carried forward in the six decades of section 2 litigation since that time. This is not to say that a "conundrum" is not presented by these divergent lines of authority in section 2 litigation since the theoretical distinction between structural and behavioral monopolization is relatively easy to detect and state but difficult to apply and the line between conduct which is acceptably competitive and that which is not, whichever theory is followed, is not susceptible to a rigid definition by generally stated rules. The court's analysis did not either resolve the "paradox" or the "conundrum" it discovered in section 2 litigation, but simply restated it in a way which required, in the mind of the court, an extended factual analysis of Kodak's conduct to determine whether the inference of "not honestly industrial" should be drawn or whether the conduct should be inferred as stemming from the court's newly discovered, but undefined, permissible efficiencies of size and benefits of business integration.[235]

[235] 603 F.2d at 276. No authority was cited for the propositions or for the assertions that for section 2 purposes the law tolerates "competitive rewards attributable to . . . efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market." *Id.* Neither proposition was elaborated upon, nor were terms defined. Both propositions would appear to have some grain of truth to them, while also carrying implications at odds with the *ALCOA-United Shoe* line of authority suggesting narrow constraints upon firm conduct where the firm approaches or attains monopoly power and the *Griffith-Otter Tail* line of cases limiting use of monopoly power from one market to injure competition in another. Since these propositions formed the predicate for most of the court's analysis of Kodak's conduct, they obviously deserved greater thought and elaboration. As in *Telex,* part of the explanation for the court's broad policy pronouncements backing away from previous precedent may reside in the reality that *Berkey* was a private damage action whereas most of the precedent involved government civil actions. Either the penalty of treble damages or confusing the standards for proof of antitrust damage with the issue of proving a violation of the law may explain the court's penchant for ignoring previous precedent. Neither explanation, however, justifies the court's failure to explain its rationale. There would appear to be even less justification for the expression of opinions going even further by two Justices of the Supreme Court on denial of the petition of certiorari and before any arguments on the merits of the case. Berkey Photo, Inc. v. Eastman Kodak Co., 444 U.S. 1093 (1980) (Rehnquist & Powell JJ., dissenting).

One of Berkey's central claims involved Kodak's introduction of a new and smaller camera utilizing a cartridge format for a new type and size of color film. The new film required a different photofinishing process conducted at higher temperatures. Berkey contended that the introduction of the new camera system using the new film coupled with a refusal to predisclose the system and the film and Kodak's refusal to make the film available for new formats developed by competing camera manufacturers, constituted monopolization of the camera market and an unlawful leveraging of Kodak's monopoly power in film and cameras into the photofinishing markets. The court held that it was error for the trial judge to leave the question of whether Kodak had a duty to predisclose its new 110 camera system to competing manufacturers for the jury; and, that as a matter of law, Kodak had no such duty:

> If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals

the benefits of those endeavors, this incentive would very likely be vitiated.

> Withholding from others advance knowledge of one's new products, therefore, ordinarily constitutes valid competitive conduct. Because, . . . a monopolist is permitted and indeed encouraged, by section 2 to compete aggressively on the merits, any success that it may achieve through the "process of invention and innovation" is clearly tolerated by the antitrust laws.[236]

The court held Berkey or any antitrust plaintiff "bears a heavy burden" in urging a predisclosure rule and that Berkey's attempt to carry its burden by claiming that Kodak enhanced its camera monopoly by use of its film monopoly was not satisfied. No definition of the burden nor how it could be sustained was set out by the court, nor was Berkey permitted to have a jury consider the evidence it did present pursuant to adequate instructions on the issue. Introduction of an advantageous new film format usable only in Kodak's new 110 camera system by the firm possessing monopoly power in the film market and not predisclosing the unique character of the film thereby excluding other camera manufacturers for a substantial time period from making cameras capable of accommodating the new film, was viewed by the court as "a benefit of integration and not, without more, a use of Kodak's power in the film market, to gain a competitive advantage in cameras."[237]

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236 *Id.* at 281. In E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (F.T.C. 1980), the F.T.C. appeared to ameliorate the *Berkey* opinion's inference that aggressive competition based on invention and innovation can never be a basis for finding a section 2 violation. After summarizing the *Berkey* opinion, the Commission stated the appropriate course was to weigh "the efficiencies and competitive virtues of the practices under scrutiny against their exclusionary characteristics and effects." 3 TRADE REG.REP. (CCH) at p. 21,978. The test was restated and followed later in the Commission's analysis of du Pont's conduct. *Id.* at p. 21,982. The Commission's test is the more appropriate standard, because it permits a refined analysis of the facts peculiar to the case and a more sensitive weighing of short-term versus long-term consequences of the conduct in question.

237 603 F.2d at 283.

Berkey's further attempt to justify a predisclosure rule with respect to the new film format because of past anticompetitive conduct by Kodak in refusing to make film formats to meet the needs of new camera designs of competing camera manufacturers was rejected by the court, since the cause of Berkey's claimed injuries in the case was not refusal to sell different film formats for a competitor's cameras but for refusal to predisclose the new Kodacolar film in the 110 format for Kodak's new cameras.

The significance of wave III monopolization standards being developed in private rather than public litigation is apparent in this ruling of the court, since the court was implicitly requiring that evidence relied upon to prove the conduct element must also carry the burden of proving causation in fact for a plaintiff's claimed damage. Failure on the latter count was relied upon to reject Berkey's claim that refusal to predisclose the new film format was unlawful conduct in the context of Berkey's suit for monopolizing the camera market. Whether Kodak's refusal to make film formats available for competing camera manufacturers would constitute unlawful monopolization in a private case by a competing camera manufacturer or in a government monopolization case remains unclear since the court intermingled conduct issues for proof of violation with causation issues for proof of damage.

A similar fate befell Berkey's claim that Kodak's restriction of the new film format to the new Kodak 110 system, thereby promoting the sale of one by the sale of the other, injured competing camera manfacturers. In order to prove this claim, the court required Berkey to prove that some customers who would have purchased Berkey cameras were "dissuaded from doing so" because the film was only available in the 110 format.[238] Berkey produced no evidence to show lost camera sales for this reason, thereby failing to prove both causation and injury.

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238 *Id.* at 285-88.

Whether Kodak's refusal to produce the new film in sizes usable in competing camera systems would constitute conduct sufficient to prove unlawful monopolization in a government case remains unclear. If, however, the court's initial and unsubstantiated premises—that monopolists are encouraged to "compete aggressively" and that gains which accrue to an integrated firm solely by virtue of integration, regardless of its market share in one or another market, cannot by themselves be considered uses of monopoly power—be followed in a similar government case, it would appear the *Berkey* court would conclude the conduct not sufficient to prove unlawful monopolization. The subtle and difficult question of assessing economic power, one unaccounted for by theoretical economic models but very real in most commercial relations, is excluded by this kind of analysis. The "encouragement of aggressive competition by a monopolist" premise is inconsistent with wave II precedent limiting the actions of a monopolist because of the presumed impact of a monopolist's power in the market and the idea that the statute is designed to protect, maintain and foster a regime of competition by forbidding the displacement of that process by monopoly.

The "benefits of integration" standard—one not identified as having a heritage by any citation to authority or extended explanation—was given no definition, nor is it clear what implications the court's newly discovered premise will have in pending government cases like *Exxon*[239] and *A.T.&T.*[240] Carried to its logical end, the "benefits of integration" standard would support a holding that non-predatory conduct exercising monopoly power in one market (refusal to predisclose the new film or make it for competing camera formats) having an exclusionary impact in another market (competition for camera sales) is not a violation of the law. This would amount to a significant departure from

239 Exxon Corp. [1973-76 Transfer Binder] TRADE REG.REP. (CCH) ¶ 20,388 (1973).

240 United States v. A.T.&T. [1970-79 Transfer Binder] TRADE REG.REP. (CCH) ¶ 45,074, Case 2416 (D.D.C. 1974) (Civ. No. 74-1698).

wave II cases strictly limiting the translation of market power from one market to another and limiting lawful conduct of a monopolist which is unnecessarily exclusionary, unless again it is a case of confusing causation issues for proof of damage purposes with conduct questions for proof of a violation of the law purposes in the context of a private damage action.

Two other conduct holdings in *Berkey* are of significance. Berkey claimed that Kodak's introduction of a new film format caused it injury in the photofinishing and photofinishing equipment markets, markets where Kodak did not have monopoly power. Berkey claimed that its injuries were the result of Kodak introducing a new film needing a different photofinishing process and equipment, services that only Kodak could perform for several weeks prior to others learning the process and being equipped to perform it. Berkey also claimed that Kodak charged excessive prices for the chemicals and film processing equipment when it was made available by Kodak to competitors in film processing.

In reversing verdicts for Berkey on some of these claims and ordering a new trial, the court held that gaining a "competitive advantage" in markets where Kodak did not have monopoly power by use of monopoly power possessed in other segments of the industry was actionable.[241] In applying this standard, however, the court found the lower court jury instructions "did not draw with sufficient sharpness the distinction between exercises of power and the natural benefits of size and integration."[242] Little guidance was given in how instructions should or could be drawn sharpening the "exercise of power/natural benefits" distinction, nor is it an easy line to draw once one departs from the *ALCOA*

241 603 F.2d at 291. A holding Justices Rehnquist and Powell apparently believe to be "little less than bizarre." Berkey Photo, Inc. v. Eastman Kodak Co., 444 U.S. 1093 (1980) (dissenting from denial of petition for certiorari).

242 *Id.* at 292.

and *United Shoe* implications that one possessing monopoly power is severely restricted in their conduct in the market; "natural advantages" of size and integration and legality of the conduct to the contrary notwithstanding.

Only the inevitable and unavoidable appeared permissible in *ALCOA* and *United Shoe,* while *Berkey* appears to broaden the realm of permissible conduct to include normally competitive and non-predatory conduct attributable to a realization of the undefined "natural benefits" of size and business integration. A natural advantage of size and integration of a monopolist is the ability to exclude less powerful competitors by tactics that of themselves are not predatory in the short run but are unnecessarily exclusionary in the long run. The premise contains its conclusion and forecloses a careful analysis of whether monopoly power is dictating the functioning of the market or whether competition is doing so.

Whether this too is a shift in the law necessitated by private monopolization litigation in the mind of the court to insure factual causation and antitrust damage are present, as well as a violation of the law, is impossible to assess. The source, meaning and implications of the court's concept of "efficiencies of size" and "natural benefits" of integration are opaque at best. If a similar standard is held applicable in government cases, then *Berkey* is indeed a significant departure from wave II conduct standards for proof of unlawful monopolization and will considerably narrow the implications of wave II doctrine circumscribing the use of monopoly power in one market to injure competition in another. Moreover, it is clearly an abandonment of the wave II limitation upon ordinary business conduct by a monopolist which is unreasonably or unnecessarily exclusionary.

A second holding of further significance in *Berkey* is the court's analysis with regard to claimed monopolization of film and color print paper markets by overcharging buyers of those products. The court held that a firm which gains or maintains monopoly power over the supply of a product by anticompetitive

conduct may be held liable for overcharges even where excessive prices were charged many years after the unlawful conduct conferring or maintaining the monopoly power. The court stated:

> So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide.[243]

A monopolist's purchasers suffer injury for purposes of treble damage litigation when the excessive prices monopoly power makes possible occur, not when the unlawful conduct conferring or maintaining the monopoly takes place. Thus, purchasers do not suffer injury and limitations do not run in a private case until overcharges are made; conduct which might not take place until several years after the conduct conferring or maintaining the monopoly, yet conduct which is itself an unlawful use of monopoly power.

The court's willingness to stretch out the limitations period—a holding in line with prior precedent[244]—in cases of a monopolist's overcharges to purchasers was considerably tempered, however, by its significant holding on the appropriate measure of damages in such cases. The court reversed the trial court standard that a purchaser may recover for the entire excess of the monopolist's price over that which would prevail in a competitive market in favor of a standard the court labeled "the wrongful conduct rule." The court's "wrongful conduct rule" limits the recovery to "the price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market."[245] The restatement of the rule later in the opinion indicates the court combined and confused the elements of

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[243] *Id.* at 295. Another holding Justices Rehnquist and Powell apparently believe to be bizarre. *See* note 241, *supra.*

[244] Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-40 (1971); Wheeler & Jones, *The Statute of Limitations for Antitrust Damage Actions: Four Years or Forty?* 41 U.Chi.L.Rev. 72 (1973).

[245] 603 F.2d at 297.

causation and proof of damage: "[a] purchaser may recover only for the price increment that 'flows from' the distortion of the market caused by the monopolists' anticompetitive conduct."[246] The court did so out of a concern for the pristine monopolist, free to charge whatever the market will bear, who might be held liable for treble damages if it committed any anticompetitive conduct no matter how unrelated to the damage claims before the court.[247]

The court's concern is a theoretical one which might better be solved by keeping the elements of causation and damages separate for analytical purposes, rather than confusing the two into a test that will be difficult or impossible to apply. Proving a factual linkage between an overcharge, itself unlawful conduct by a wrongdoing monopolist, and the wrongful conduct conferring or maintaining a monopoly would challenge a medieval scholastic's mastery of causation and logic demonstrating the connection. Solicitation for the pristine monopolist and fear of unwarranted treble damage suits would appear a bit overblown by the court, while the costs and complexities of proving a damage claim under the court's "wrongful conduct" rule by limiting recovery to damage traceable to anticompetitive conduct conferring monopoly power may prove overwhelming to the victim of "non-pristine" monopolists, particularly in cases where overcharges occur many years after the unlawful conduct conferring the monopoly power which makes possible a latter-day overcharge. Should one encounter a "pristine" monopolist, liability should not be imposed in the absence of proof of a violation of the law conferring the power to fix prices at a monopoly level. The less than pristine monopolist should be liable for displacing competition as the rule of trade to any person injured by reason of its non-pristine violation of the law within the limits established by standing requirements and certainty in the proof of damage.

[246] *Id.*

[247] *Id.*

Berkey's recognition of a broader range of competitive tactics considered honestly industrial for monopolists is in line with the ideology of the wave III cases of *Telex, Transamerica,* and *CalComp* but parts company from the *ALCOA, United Shoe,* and *Greyhound Computer* standard of limiting a monopolist to conduct which is inevitable, unavoidable or untainted by an unnecessary exclusionary effect.[248] Whether one approves of this philosophical drift of the law in this series of cases of not—specific criticism of doctrinal development and analytical methodology to one side—depends on at least three factors: First, one's view of private enforcement accompanied by treble damages and whether standards different from public enforcement ought to apply in private cases for proof of violation; second, what policies or goals one believes ought to be served by enforcement of section 2 of the Sherman Act—displacement of monopoly power over a significant segment of the economy in order to insure competition serves as the long-run rule of trade or, that the purpose of section 2 is only to curb the abuse of monopoly power in the belief that

[248] *See,* Comment, *supra* note 139, where the endorsement of hard competition by the *Kodak* and *CalComp* courts is appropriately described as "a dramatic departure from the more traditional concern for detecting an exclusionary 'course of conduct.' " To those schooled in the "niceties of antitrust litigation" this is not a startling conclusion. those not so schooled and unwilling to attach any significance to Kodak's status as a monopolist, the conclusion may be startling. See the dissenting opinions on denial of certiorari by Justices Rehnquist and Powell, *supra* note 235, for two who were apparently "startled."

The F.T.C. opinion in E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (1980), an "attempt to monopolize" case drawing heavily from monopolization precedent, grapples with many similar difficult conduct issues. The *du Pont* opinion is more consistent with the wave II cases by recognizing that the analysis must go beyond determining whether the conduct is "competitive" and take account of the fact that the conduct is engaged in by a firm with market power and that procompetitive effects must be weighed against anticompetitive effects. The final decision on legality or illegality of conduct in difficult cases like *Berkey* and *du Pont* is one of judgment based on all the facts and circumstances, rather than an objective conclusion produced by the deductive logic of applying fixed assumptions to fixed facts.

market forces will more efficiently and effectively deal with the power itself over time than will intervention by public and private court actions directed at monopoly power; and, third, whether one agrees with the premises of *CalComp* and *Berkey* that aggressive competition by a monopolist should be presumed lawful and that objective rules can determine when aggressive conduct becomes unlawful predatory conduct in light of the goals of section 2 and the methodology of a common law legal process. On all three factors, *Berkey* departs from wave II monopolization standards and assumptions and is, for these reasons, a significant though not persuasive wave III decision.

3. THE BORDEN CASE The leading wave III public enforcement case to date, *Borden, Inc.,*[249] involved an F.T.C. challenge to Borden's domination of the processed lemon juice market with its "ReaLemon" brand of the product. The Commission held market tests developed under section 2 of the Sherman Act and section 7 of the Clayton Act were applicable in monopolization cases brought pursuant to section 5 of the F.T.C. Act. The Commission evaluated numerous factors in reaching its conclusion that processed lemon juice was an appropriate market in which to measure market power, invoking cross-elasticity tests to define the broad outer boundaries of the market and the *Brown Shoe* concept of "submarkets" as a necessary further refinement to determine whether Borden had monopolized "any part" of commerce.[250] The Commission majority then proceeded to examine a number of factors including unique characteristics of the product, industry and public recognition of the product as a separate product, the degree of price difference and price sensitivity in relation to similar products and such additional factors as use of distinct manufacturing and marketing facilities to infer processed lemon juice is a distinct market for section 2 purposes.[251]

Professor Schmalensee in a thoughtful and significant article on the *ReaLemon* case criticizes the opinion's methodology in analyzing the market, as a matter of economic theory, while agreeing with the Commission's finding of monopoly power.[252] The Schmalensee criticism stems from the Commission's apparent use of inherently coherent economic models premised on assumptions about reality that do not comport with the relevant facts of the dispute before the agency or court.[253] Schmalensee suggests—a suggestion at odds with my experience and much that is passed off as the use of economic analysis in law—that students of economics are taught to engage in "creative theoretical analysis" by examining the host of theoretical and internally coherent models available in light of and consistent with the "principal facts at hand"[254] if they wish to arrive at defensible predictions about the consequences of change or explanations of observed behavior. This methodology of economic analysis is analogous to Kuhn's model of paradigm construction or the creative process by which a new hypothesis explaining observed reality is created in science as opposed to normal science or research aimed at filling out a known and accepted paradigm or hypothesis by repeatedly testing and applying it to reality.[255]

Economic theorizing is seldom presented to courts or agencies in this way, nor is it understood by many proponents of economic theorizing that courts are always confronted with questions of

249 [1976-79 Transfer Binder] TRADE REG.REP. (CCH) ¶ 21,490 (1978). *See also,* The Reuben H. Donnelley Corp., 3 TRADE REG.REP. (CCH) ¶ 21,650 (F.T.C. 1979) discussed *infra* part III; E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (F.T.C. 1980) (an attempt to monopolize decision by the F.T.C.).

250 [1976-79 Transfer Binder] 3 TRADE REG.REP. (CCH) at pp. 21,497-498.

251 *Id.*

252 Schmalensee, *supra* note 67.

253 *Id.* at 995-96.

254 *Id.* at 996.

255 *See,* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1966).

"ought" which can only be determined by a process of analysis which is primarily inductive and creative, and not the wooden and deductive process of applying a theoretical model to that reality which fits the model. Determining whether a particular activity *ought* to be found a "market" for section 2 purposes cannot be dictated by a model or by a pat formula. Proceeding upon such a path is dangerous since recalcitrant facts not accounted for by the model are usually ignored, or not even observed, and goals of the law not compatible with the artificial assumptions and methodological restrictions of the model are ignored.

It is in this sense that the Commission's methodology in analyzing the market in *ReaLemon* may be criticized. In Schmalensee's view, the Commission bent the model to fit the facts[256] which is at least less objectionable than bending the facts to fit the model. It indicates the Commission was proceeding upon an inductive path in its investigation of whether an inference of monopoly power ought to be drawn. The Commission inferred monopoly power, in part, from the "ReaLemon" brand's share of the market defined: 75% to 88% of the gallonage sold and 77% to 88.9% of the dollar sales and over 75% of sales in most of the local markets examined.[257] Monopoly power was also inferred from Borden's ability to command a price premium even though the product was found indistinguishable from competing brands; by virtue of its "almost generic" tradename providing substantial product differentiation and preferred shelf space; high entry barriers to existing and new competitors; and, a profit rate, excluding goodwill, of from 16.9% to 35.2% compared to a 5.0% to 6.97% rate of return for all manufacturing concerns and 5.5% to 6.4% for the "food and kindred products industries."[258] The persistence of excessive profits, coupled with relationships in the market from which entry barriers may be inferred are indicative

256 127 U.Pa.L.Rev. at 1044.

257 [1976-79 Transfer Binder] 3 Trade Reg.Rep. (CCH) at p. 21,501.

258 *Id.* at pp. 21,501-503.

of short-run monopoly power in a relevant market.[259] This kind of profit picture coupled with successful exclusionary conduct may also be an indication of long-run monopoly power or the power to prevent erosion of profits by new entry or by control of existing competitors.[260]

The Commission held that it was not sufficient to show Borden had monopoly power in a relevant market but that "it must also be shown that that power was willfully acquired or maintained."[261] In other words, some conduct in obtaining, maintaining or using monopoly power must be identified and it must be concluded that the conduct identified is "not honestly industrial"—to borrow a phrase—behavior, but is the product of the defendant's monopoly power rather than a permitted competitive response.

The Commission entered the black hole of conduct issues by observing that the conduct relied upon "need not . . . be independently unlawful or predatory to constitute acts and practices of monopolization."[262] The majority fastened on Borden's use of geographic price discrimination in marketing ReaLemon, keeping prices high in most markets while lowering list prices, increasing promotional allowances, and expanding advertising where it faced competition. These practices were done in the context of a trademark differentiated, but physically fungible, product able to command a substantial premium price by virtue of a strong trademark and preferred shelf space. Price cuts and promotional allowances to retailers were aimed at markets where "ReaLemon" faced competition; evidence the majority appeared to rely upon to conclude that the price cuts and allowances were used with the specific intent of excluding competitors or that Borden's main-

259 Schmalensee, *supra* note 67, at 1016.

260 *Id.* at 1044.

261 [1976-79 Transfer Binder] 3 Trade Reg.Rep. (CCH) at p. 21,503.

262 *Id.*

tenance of monopoly power over the market defined was not economically inevitable in the tradition of the *ALCOA* test for conduct.[263]

It is unclear whether the majority believed that this evidence, standing alone, would have been sufficient to support a finding of unlawful monopolization. The complaint, however, went further by charging Borden with selling ReaLemon "below cost or at unreasonably low prices with the effect of injuring, suppressing or destroying competition."[264] The majority found that Borden sold ReaLemon in at least two local markets where it faced strong competition below average total cost but above average variable cost. The majority found sales below average total cost to be predatory pricing, adopting the Posner argument[265] that the predatory pricing line be drawn at average total cost since a monopolist's pricing below that level could drive out an equally or more efficient competitor. The reason this is so, at least in theory, is because short-run marginal costs may not include a variety of past and current expenses which have become fixed costs for existing firms but are yet to be incurred by the new entrant seeking to gain part of the market. A deep pocket monopolist could therefore price below an equally or more efficient new competitor with impunity if the predatory line be drawn at average variable costs driving the latter from the market. Thus the majority relied in part on Borden's pricing below average total cost, with no contrary evidence of increased efficiency or innovation justifying lower prices, to conclude that Borden unlawfully monopolized by predatory pricing.

It is difficult to assay whether any one factor of Borden's conduct analyzed by the majority—product differentiation and

[263] *Id.* 21,503-506.

[264] *Id.* at 21,506.

[265] R. Posner, Antitrust Law: An Economic Perspective, 188-92 (1976).

premium pricing coupled with geographic price discrimination, sales below average total cost, or specific intent to exclude competitors, or a combination of all three not being economically inevitable—convinced the majority to draw the inference of unlawful monopolization. Commissioner Pitofsky concurred because of this, stating that intent was too "ambiguous an indicator" for the conduct element and geographic price discrimination too blunt a test for conduct which might sacrifice worthwhile and justified competitive responses by a monopolist.[266]

Instead, Commissioner Pitofsky relied on a narrower test to the effect that pricing below average total cost in a market with high entry barriers is presumptively unlawful predatory pricing. Commissioner Pitofsky pointed to Borden's ability to command a premium price by virtue of a "pronounced consumer preference" due to Borden's strong brand recognition.[267] That recognition was due to image not product superiority and placed on competitors high entry costs, costs not traceable to efficiency or innovation but to past and current expenditures by the monopolist for advertising, sales promotions and distribution expenses building cordial relations with retailers. An equally efficient producer of equivalent processed lemon juice could be driven to the wall by a deep pocket monopolist able to command a preferential price in these circumstances if the monopolist were free to price at average variable cost without taking into account past advertising, promotional and distributional expenses which contributed to monopoly power in the first place. A new and equally, or even more, efficient entrant required to charge a price below the premium realized by the monopolist pricing at average variable cost could never make the necessary investment in fixed costs or a profit sufficient to remain in business and would therefore be driven from the market by means not honestly industrial.

[266] 3 Trade Reg.Rep. (CCH) [1976-79 Transfer Binder] at 21,517-518.

[267] *Id.* at 21,521.

Thus Commissioner Pitofsky's standard would normally draw the line of predatory pricing at average variable costs except where there are substantial entry barriers traceable to fixed costs. In those cases the standard would apparently presume predation where prices are below average total or full costs and there is no justification or excuse offered on a sort of rule of reason basis taking account of the fact that the pricing is being done by a monopolist. Since this was the case in *Borden,* and Borden offered no justification or excuse for its pricing practices, Commissioner Pitofsky concluded that Borden's pricing conduct was "unreasonably exclusionary" conduct justifying a finding of unlawful monoplization.[268]

Borden, Inc. is an important third wave monopolization opinion, one where pricing conduct and the ongoing debate over short-run marginal cost, long-run marginal cost and the ambiguities of each are explored. The Areeda-Turner test of marginal costs or average variable costs was rejected in favor of average total cost as the test for predation, but it is difficult to ascertain whether this will be so in all cases or only in those cases involving a plus factor like artificial and high entry barriers or a specific intent to exclude a competitor. Nor is it clear whether a less efficient monopolist pricing above its average total costs and

[268] *Id.* at 21,522. The Commission's analysis of predatory pricing in E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (1980) appears to come down to the same test of "unreasonably exclusionary." In *du Pont,* the pricing tactics did not entail an analysis of "predatory pricing" in the sense of pricing below marginal or average cost. The claimed "predation" was one of strategic pricing coupled with an expansion of capacity, causing an alleged increase of entry barriers for titanium dioxide producers using a less efficient manufacturing process. In finding du Pont's conduct not predatory, the Commission held the increased difficulty of competitors to expand in the future as a result of du Pont's conduct "is not the product of artificially induced conduct that is unrelated to market conditions, cost differences, or scale economies." The Commission concluded, therefore, that du Pont's pricing behavior was not "unreasonable" conduct from which it could be inferred that du Pont had unlawfully attempted to monopolize. 3 TRADE REG.REP. (CCH) at p. 21,982.

supporting that price with higher prices in other markets would escape section 2 liability. Although such a practice may shelter more efficient competitors by a price umbrella it would also misallocate resources by allowing a monopolist to remain in a market where it should no longer be predominant. Unlike the *Transamerica* court, neither the majority nor the concurring opinions in *Borden, Inc.,* suggested that prices above average full cost are conclusively presumed lawful, although Commissioner Pitofsky appeared to go a long way down that road.

For wave III monopolization litigation, it would also appear that neither *Transamerican* nor *Borden, Inc.,* have conclusively settled the predatory pricing issue, much less the extended, and at times esoteric, academic debate on the question. Neither opinion forecloses the broader and deeper jurisprudential debate concerning the goals of section 2 of the Sherman Act, *i.e.,* whether the statute ought to be interpreted only to achieve economic efficiency goals in the sense of maximizing short-run consumer welfare by curbing anticompetitive exercises of economic power or whether section 2's purpose ought to be interpreted in a broader sense. Namely, as mandating a regime of competition and prohibiting displacement of that regime by monopoly no matter how monopoly power is acquired, maintained or exercised because of long-run economic, political and social goals, as well as short-run economic concerns with unchecked economic power in society.

III. Beyond wave III

Several tentative conclusions and suggestions for improving future litigation may be offered about wave III monopolization litigation subject to the following caveats: First, most of the law is being made in the context of private litigation where the added elements of standing, causation and proof of the fact and amount of antitrust damage become intertwined and, on occasion, confused with the substantive elements for proof of violation. Confusion of standards for violation with those of causation and majority may have a penchant for conservative neoclassical analysis emphasizing narrow efficiency goals as the sole purpose of the Sherman Act, it is well to remember the present Court has been activist in other areas of antitrust.[270] Generous precedent is available permitting the Court to justify legalistically a decision imposing strict proof of markets, monopoly power, and predatory exclusionary conduct; or, one adopting a "no conduct" standard of unlawful monopolization in structural cases of persistent monopoly power in a significant industry. Predicting where the Court would go in monopolization litigation like *Berkey* or the computer cases is hazardous at best, since the precedent would tend to support anything the Court wishes to decide if it chooses to ignore the behavioral-structural dichotomy, the facts unique to each past decision and the multiplicity of economic, political, and social goals past cases have attributed to section 2.

A third and more subtle caveat concerns the ideological struggle over the goals of antitrust policy, one which has been going on since wave I and which still persists in the litigation as well as the academy. The ideological debate in the opinions seldom surfaces above mechanistic tests for markets, monopoly power, and conduct. Buried deep beneath the manipulation of the legal concepts in *Berkey, Telex,* and *Transamerica* on the one hand and *Borden* and *Greyhound* on the other, are different understandings of the goals of antitrust policy in general and section 2 in particular. The clearest clash is between the view that the antitrust laws should be limited to curbing behavior inconsistent with maximizing short-run consumer welfare as defined by neoclassical price theory versus the structuralist view and those who define the goals of antitrust policy in broad economic, social, and political terms. *Telex, CalComp* and *Berkey* represent the former

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[270] In particular, the narrowing of the *Parker v. Brown* state action doctrine. *See generally,* 1 AREEDA & TURNER, *supra* note 13, at 57-118; Flynn, *Trends in Federal Antitrust Doctrine Suggesting Future Directions for State Antitrust Enforcement,* 4 J.CORP.L. 479 (1979); Rogers, *The State Action Antitrust Immunity* 49 COLO.L.REV. 147 (1978).

view, while *ALCOA*, *United Shoe* and *Greyhound* represent the latter.

A difference in methodology is also apparent with courts in the *Telex* and *Berkey* line of cases proceeding upon the legal positivist path while opinions like *Borden* and *Greyhound* follow the legal realist tradition. An awareness of these underlying and contending ideological and methodological differences is essential if one is to understand subtle shifts in doctrine, differences in analytical methodology, and the receptivity of particular courts or agencies to one kind of evidence but not another and ongoing tendencies to favor one side as opposed to another. A court's underlying ideology serves as the bridge by which one type of evidence, for example a particular economic theory or social and political concerns with size, is imported into, and given weight in, the process of deciding. Ideology also serves as the connecting tissue between the analytical elements of decisionmaking or as the agent dictating the balance between the various elements considered relevant to a decision. So long as law remains a human institution dependent upon inductive and deductive thinking processes and the value system of the decisionmaker, ideology will play a predominant and inescapable role in shaping the direction and evolution of doctrine.

In the pursuit of an understanding of where the courts are going in wave III monopolization litigation, one ignores shifts in ideology at his or her peril. Pretenses that the law can function with the mechanical efficiency of a computer or a "gumball dispenser" oblivious of the underlying ethical and metaphysical choices of the decisionmaker or the models relied upon is a form of long-discredited legal positivism. To the extent that much wave III monopolization litigation exhibits these surface tendencies, it represents a pernicious tendency in the law obscuring the underlying reasons for decision and a guarantee of further litigation or legislation seeking to conform law to evolving reality and perceptions of reality.

With these caveats in mind several general conclusions may be derived from wave III monopolization litigation and suggestions for improvement may be made. The struggle to pin down the policy goals of section 2, identified in wave I long ago, continues. One view of section 2 sees as its purpose the dissipation of monopoly power for economic, political and social reasons. It is a part of the populist traditions of antitrust law which seeks to use the law to dismantle monopoly power and control the unilateral abuse of power unfairly injuring competition and competitors. In this tradition, threats to the fundamental goal of protecting and maintaining a competitive process are seen as twofold: the persistent maintenance of presence of monopoly power in a significant part of the economy and conduct unreasonably fixing prices or excluding competitors in a way inconsistent with the competitive process. Both threats are seen as requiring legal condemnation in order to avoid the long- and short-run economic, political and social evils of monopoly power or its exercise in the economy. Legal intervention is seen as necessary, because the market is unable to correct itself within a reasonable time and because the policy of the law is one of guaranteeing to competitors and consumers that a competitive process shall govern trade free of the distortion or displacement of that process by the exercise or possession of monopoly power.

A second view holds the sole or primary purpose of section 2 is to promote economic "efficiency" in the narrow sense of maximizing short-run consumer welfare in accord with the models of neoclassical economic theorizing. This tradition uses economic theorizing according to the narrow limits of neoclassical models as the primary or sole means for defining the law's constraints. In some of its manifestations, for example, the writings of Professor Bork,[271] this tradition carries heavy overtures of libertarian political philosophy and views legal intervention in the affairs of economic man counterproductive in all but the most extreme

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[271] R. Bork, The Antitrust Paradox: A Policy at War With Itself (1977).

cases of predation. Others assume a more schizophrenic posture—for example Areeda and Turner—decrying the populist tradition on the one hand, yet tempering their devotion to the market as maximizer of consumer wants without government intervention on the other hand by supporting no conduct monopoly proposals.[272]

The "economic efficiency" view emphasizes a narrow definition of "efficiency"; one that finds its meaning in artificial economic models predicting consequences that the model and its assumptions call "efficient." The assumptions of the models, metaphysical ones seldom explicitly examined or at work in an area of the economy afflicted with monopoly power or its exercise, provide an analytical straitjacket dictating what facts are relevant, limiting what values and insights from other disciplines are admissible, ignoring the implications of time and power in the analysis, and—where applied rigorously—denying the use of legal intervention in any case where the invisible hand has any theoretical potential to operate. In its most extreme form, "empirical" justification of the models is a case of analyzing the models in light of a rigorous preselection of the facts according to a strict deductive methodology in the belief that law is a science, not an art, of projecting consequence from quantified and quantifiable facts in accord with the dictates of the model. Unfortunately, the human and institutional quality of the facts and evolving human behavior refuse to be put down or confined to artifically deduced formulae which avoid exploration or the reasons for failure of the model and economic disequilibrium infecting economic activity. While economic models may shed some light and be a useful beginning point for analysis, it advances knowledge little to examine repeatedly the light and not what it is intended to illuminate.

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272 *Compare* AREEDA & TURNER, *supra* note 13, at 8-31 *with* 3 AREEDA & TURNER, *supra* note 13, at 35-71 (1978). *See also,* Fox, *Book Review: A Clarion Universe of Microeconomic Policy,* 54 N.Y.U. L.REV. 446 (1979); Schwartz, *Book Review, On the Uses of Economics: A Survey of the Antitrust Treatises,* 128 U.PA.L.REV. 244 (1979).

The courts in wave III reflect these ambivalences of the academy over the policy goals of section 2; with noticeable ascendancy of neoclassical economic theorizing and trust in the ability of its models to predict consequences in their decisionmaking over that which prevailed in wave II. This is a significant and unwise development in monopolization litigation with a clear potential for substantially narrowing the scope of section 2 as a constraint upon large firm behavior from that which prevailed at the end of wave II. Affirmative proof of not honestly industrial exclusionary behavior is now clearly required to prove a violation, at least in treble damage actions, by courts like the *Berkey* court, and the definition of what is honestly industrial has become more generous if not better defined. Hard competition by a monopolist is tolerated rather than only the economically inevitable. The probable consequence will be some short-run promotion of consumer benefit at the expense of competiton and the consumer in the long run, particularly if the *Telex, Berkey* and *CalComp* philosophy is followed in government cases attacking structural monopolization. The artificially predicted short-run consequences of specific conduct by a monopolist will be the primary focus of the litigation, rather than the broader concern with protecting the competitive process, for a variety of social, political, and economic reasons, from displacement by the persistent possession of monopoly power or the unreasonable exercise of power to fix prices or exclude competitors.

While a blind adherence to a policy of atomizing economic institutions to equate more nearly with a society of yeoman farmers expanding to fill an untamed and isolated continent is unrealistic and inconsistent with modern reality; so also is the blind adherence to frozen models rooted in 17th-century assumptions about human nature and motivation in a society increasingly dominated by large institutions, economic interdependence, new modes of communication, shrinking opportunities for independence, evolving perceptions of what is valued and what is valuable, and the capacity to destroy itself without a moment's notice. If antitrust policy is to remain relevant and a fundamental predicate for organizing economic affairs in the face of evolving reality, it cannot afford to become locked into any single ideology of what reality is or ought to be.

A more tolerant view is required, recognizing the complexity of reality and its evolution; one rooted in that reality rather than the frozen assumptions of an era no longer relevant or a reality that cannot be. "Efficiency," however defined, is entitled to its due where it can reasonably be identified in fact; but so, also are the other goals we seek to achieve by the establishment and maintenance of a competitive process as the rule of trade. It is the art of the legal process which finds a sensible balance of these competing and sometimes apparently conflicting goals in light of the facts and circumstances of particular cases.

Wave III market tests, with the exception of cases like *Telex*, continue to evolve on a more complex analytical basis than that followed in wave II. There appears to be a willingness to fragment markets further in the analytical process of identifying the presence or absence of monopoly power with primary reliance placed on market tests evolved in merger cases. Yet the opinions tend to use market tests as devices producing a concrete conclusion describing a physically identifiable and frozen thing in a tangible area of space. The function of defining relevant markets in monopolization litigation should be understood and used in a more subtle way. Market definitions are only the beginning of an analytical process leading to a judgment on the intangible question of whether it is appropriate to determine that a defendant's structure and/or behavior have displaced the competitive process in the context of the facts and circumstances peculiar to the case and in a way inconsistent with the goals of antitrust policy.

The overall goal of the Sherman Act is to insure that competition to the greatest extent practicable under all the circumstances serves as the mechanism for determining price, entry and exit, resource allocation, innovation, entrepreneurial success and failure, and individual economic decisionmaking. Section 1 of the Sherman Act prohibits joint action unreasonably interfering with or unduly hampering these objectives, while section 2 extends the

constraints of the law to unilateral conduct or industry structure displacing the competitive process in a significant area of economic activity. The language of the statute does not command anyone to compete, nor does it reward the winner of the race. The statute requires a qualitative judgment, not a quantitative one, by prohibiting agreements not to compete and behavior or structure unreasonably displacing competition as the rule of trade.

In determining whether industry structure or unilateral behavior displaces competition, market definitions may be helpful in organizing the analysis so that it is practical, significant, economically sensible, and manageable in the context of the judicial process. But market analysis is subservient to the broader qualitative question of whether the policy of the law has been violated, and on occasion market analysis should be dispensed with where the level of predatory behavior is obviously destructive of a competitive process. The persistence of dominance in a significant area of economic activity may also warrant a common sense conclusion that power is present in a form inconsistent with the competitive ideal and the public interest requires it be constrained or eliminated where the persistence of dominance is likely and its erosion by the market is unlikely, even though some theoretical arguments about the metaphysical concept of markets may be advanced to escape liability.

Elsewhere market definitions should be understood in a way that is analogous to the function of rule of reason analysis in section 1 cases. Where it is not readily apparent that industry structure or behavior is consistent or inconsistent with the competitive ideal, market analysis serves as a mechanism for determining whether it is fair, just, practical, and economically sensible to isolate or fragment an area of economic activity as an area where the goals of antitrust policy can work and to make judgments about whether they are at work in light of all the facts and circumstances of the industry. A too casual attitude about the function of market concepts in the analysis can be equally misleading and result in finding a violation where there is none, an *antitrust* violation where the violation is of some other law or policy, or the imposition of the wrong remedy for structure or behavior inconsistent with the competitive ideal. Market analysis can serve to avoid these hazards if its function is more carefully understood.

As in section 1 rule of reason cases, the function of market analysis in section 2 cases aids in drawing the line of illegality. The methodology requires a balancing of all the facts and circumstances, judgments of policy, and a well developed use of common sense. Economic models, understood as working hypotheses and a place to begin analysis, can be of aid in the process but cannot be a substitute for the judgment of a trained judge alert to the policy goals of the law, the practical limitations of the judicial process, the realities of the industry involved, the need for predictability in the law, the short- and long-run implications of the facts and the propriety of visiting sanctions upon the defendant involved or extending or denying the protection of the law to the plaintiff involved.

Aside from Judge Browning's opinion in *Greyhound* and the F.T.C. opinion in *Borden*, the leading wave III opinions exhibited few of these qualities in market analysis, but continued the tendency of wave II opinions to treat market definition questions mechanically and as conclusions to the analysis rather than the beginning of it. A reliance upon mechanical tests to define markets is understandable in light of the complexity of the issues presented and the facts involved. But that reliance becomes excessive when the function of market analysis as subservient to the ends of the analysis is lost sight of by decisions like *Telex* and *CalComp*.

Tests for monopoly power have evolved little over wave II precedent with primary emphasis still placed on market share. Evidence of excessive profits and actual use of power to fix prices or exclude competitors is highly relevant, while an absence of high profits or non-use of market power still does not serve to disprove monopoly power. In close cases where market share is below 70% and above 50%, profit and conduct evidence can make the

difference between a finding of monopoly power and the absence of it. Inferring monopoly power from a persistent and unexplained market share, particularly where accompanied by factors like high profit rates and excess capacity, is appropriate where the possession of power is persistent and significant. Indeed, it has been argued that such a showing should suffice in a government proceeding were a standard of "no conduct" monopoly developed and applied in light of the presumed adverse effects of persistent monopoly power and with consideration of efficiency defenses in the remedy phase of the case.[273]

On the other hand, excessive reliance upon market share, big or small, can be misleading. It is a case of piling an inference upon an inference in the belief that one can tangibly discover the answer to the intangible question of whether the competitive process has been displaced by structure or behavior to the point where legal intervention is wise, just, and appropriate under the antitrust laws. Care in the selection of cases is essential if a no-conduct standard is to be followed or argued for in the interests of efficiently administering the law and dissipating without penalty, the adverse consequences of persistent monopoly power. In such circumstances, greater sensitivity to proof of monopoly power will be required than the present tendency to rely upon mechanical measurements of market share to answer the intangible question of whether monopoly power is present or not.

Behavioral cases and private damage actions alleging structural or behavioral monopolization, on the other hand, require some showing of a use of monopoly power. The possession of

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[273] *See* 3 AREEDA & TURNER, *supra* note 13, at 63-64; Dougherty, *Elimination of the Conduct Requirement in Government Monopolization Cases,* 48 ANTITRUST L.J. 869 (1979); Dougherty, Kirkwood & Hurwitz, *Elimination of the Conduct Requirement in Government Monopolization Cases,* 37 WASH. & LEE L.REV. 83 (1980); Flynn, 1979, *supra* note 218; Fox, *Monopoly and Competition: Tilting the Law Towards a More Competitive Economy,* 37 WASH. & LEE L.REV. 49 (1980).

monopoly power by the defendant does not suffice for the private plaintiff in damage cases, since it must be shown that the antitrust violation alleged is also the violation that "causes" the injury to the plaintiff. Proving that permissible competitive conduct of one possessing monopoly power caused injury to the plaintiff is not legally sufficient to sustain a damage claim since there must be a nexus or factual connection between what it is that violates the law and the injury claimed before it is appropriate to award damages. Wave III cases, particularly *Berkey*, have tended to become lost in the labyrinth of distinguishing between evidence of monopoly power, proof of conduct that will suffice to show an exercise of monopoly power vis-a-vis the plaintiff seeking damages, and the function of conduct as an added element of the offense and its role in private damage litigation for linking a violation to an injury which ought to be compensable under the antitrust law.

Considerable progress may be made and confusion avoided in defining the conduct element in private damage litigation if a methodology of thinking about the issues were followed which kept analysis of questions of conduct for proof of violation distinct from those of "causation" for proof of damage. The problem is not a new one; it has plagued the field of torts for centuries and has generated such nonsensical concepts as "proximate," "supervening" and "remote" cause to mystify courts, juries, clients and lawyers since Henry VIII. Dean Leon Green's system of duty-risk analysis in tort litigation,[274] where followed, has significantly cleared the tort arena of metaphysical notions of causation, maintained an appropriate division of judge and jury functions rather than confuse the one with the other, clarified analysis of the policy reasons for extending the law or refusing to do so, and has generally avoided the misuse of concepts like standing in tort litigation as a surrogate for straightforward policy

[274] Dean Green's major writings on the topic are collected and reprinted in GREEN, *supra* note 185. A succinct summary by one of Dean Green's prominent students and followers may be found in Thode, *supra* note 184.

analysis of the law involved—a problem which has come to plague antitrust analysis.

Briefly stated, the methodology of duty-risk analysis as outlined by Dean Green and applied to antitrust treble damage litigation would organize the analysis into four distinct questions: 1. Is there a factual connection between plaintiff's injury and the defendant? 2. Does the legal system's protection extend to the interest that plaintiff seeks to vindicate; and if some protection is afforded, what standard of care does the legal system impose on the defendant? 3. Was the standard of care breached by the defendant? 4. What are the damages?

1. Is there a factual connection between plaintiff's injury and the defendant? Under this heading, questions of morality, fault, liability, "target area" direct-indirect, motive and so on are irrelevant.[275] Standing tests, like *CalComp's* "indirect ripple effect" or "direct causal injury" test[276] do not present questions of a factual connection between the defendant's conduct and the plaintiff's injury. Nor does the establishment of a factual connection establish liability since three additional elements of the claim (discussed *infra*) must be established before liability may be imposed.

While the factual connection issue is not usually disputable if the plaintiff has carefully thought through the complaint, there are occasions where a factual connection between the conduct claimed unlawful and the injury suffered is clearly nonexistent or presents a disputed question of fact for the jury. In *Berkey*, for example, the plaintiff's reliance on Kodak's potentially unlawful refusal to sell film in the past injuring competing camera manufacturers as a basis for claiming damages for refusing to predis-

[275] *See* Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); Thode, *supra* note 184, at 23-4.

[276] California Computer Prod., Inc. v. IBM Corp., 613 F.2d 727, 732 (9th Cir. 1979).

close the new 110 film format, without more evidence of factual nexus, lacked the requisite factual connection between the conduct claimed unlawful and the claimed injury to establish the first step of imposing liability on Kodak in the camera sales phase of the case.[277] On the other hand, in *Greyhound,* sufficient evidence of factual connection between some of IBM's marketing practices (eliminating the technological discount, increasing the ratio of IBM's purchase price to its lease price and "unbundling") and injury to Greyhound, justified sending the issue of factual connection to the jury.[278] More often than not, however, factual connection is not a controversial issue and should not consume court time if the plaintiff's attorney has carefully thought through the claim and the nexus between what is claimed to be unlawful and the source of the injury claimed by the plaintiff.

2. Do the policies of the antitrust laws extend to the interest that plaintiff seeks to vindicate, and if some protection is afforded what standard does the legal system impose on the defendant?[279] This heading presents two questions of law for the court: (1) to determine whether the risk or injury to which the plaintiff has been subjected is within the scope of the duties imposed on the defendant by the antitrust laws and the risks plaintiffs are protected from; and (2) what standard of proof of a breach of the duty by the defendant must a plaintiff establish to impose liability?

In both public and private antitrust litigation the questions of the duty imposed by the particular statute involved and the definition of the standard for proof of its breach are frequently the heart of the case. In the remainder, the central issue is usually

[277] 603 F.2d at 285.

[278] Greyhound Computer Corp., Inc. v. IBM Corp., 559 F.2d 488, 498-502 (9th Cir. 1977).

[279] *See,* Green, *The Duty Problem in Negligence Cases* (pts. 1 & 2), 28 Colum.L.Rev. 1014 (1928), 29 Colum.L.Rev. 255 (1929); Green, *supra* note 93; Thode, *supra* note 184, at 26-30.

an issue falling within the third step of the inquiry; the factual issue for the jury of whether the defendant has in fact breached the duty. Several sources of confusion can arise at this point in the analysis because the same statutory formula for illegality has been made the basis for public and private remedies ranging across the spectrum from criminal penalties, to civil damages to equitable relief. Additional complexity is generated because of difficulties in distinguishing conduct which is procompetitive from that which is not, since both "injure" competitors and the underlying industry structure or other circumstances may significantly alter the legal characterization of the selfsame conduct from case to case as conduct which is in keeping with a regime of competition to a labeling of it as conduct antithetical to a regime of competition.

Confusion generated by the differences in remedy stemming from the same statutory formula of illegality can be minimized by increasing the standard of proof to show a breach of the duty—but not the definition of the duty which a defendant must comply with to avoid liability. For example, a court may require proof of a purpose as well as an effect to fix prices where criminal remedies are sought for conduct claimed to be price fixing; while in a civil or equitable proceeding the standard may only require a jury to find a purpose *or* effect of fixing prices.[280] In each case, the duty is one of not combining or conspiring to fix prices; proof of a breach of the duty may be of a higher standard where the sanction imposed is of greater consequence.

In the case of criminal sanctions, liability is imposed to punish antisocial behavior and deter others from doing the same, and proof of some level of intent to violate the law is required before criminal sanctions are employed. Damage actions seek to make plaintiffs "injured in their business or property by reason of a violation of the antitrust laws"[281] whole as well as deter violations

[280] *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978); Garvey, *supra* note 115.

[281] Clayton Act, § 4, 15 U.S.C. § 15.

of the law by trebling the damages found. The effect of injury may be sufficient to impose liability without proof of an intent to do so, once breach of the duty is shown since the statute expressly so provides. Injunctive relief, on the other hand, seeks to restore a regime of competition where it has been displaced by private agreement or the possession or exercise of monopoly power, as well as to prevent and restrain threats to competition. Since no penalty is imposed, proof of either purpose or effect to violate the law is all that is required. These differing objectives of relief justify different definitions in the level of proof necessary to show a breach of the duties imposed by the antitrust laws before a particular remedy is imposed; distinctions which may only now be evolving in recent antitrust litigation.

Confusion generated because conduct in one case constitutes a violation of the law and in another does not, may also be attributable to the difference in relief sought causing a difference in the level of the *standard of proof* required to show a violation related to the particular plaintiff bringing the suit—rather than a difference in what it is that is illegal. Proof that the injury to the competitive process is also the source of the injury to the plaintiff and that the injury is one which the antitrust laws protect against are required before damages may be awarded. In the antitrust context, particularly structural monopolization cases, this subtle issue demands that greater attention be paid to the context and environment in which the alleged violation occurs in view of the difficulty in attributing the injury claimed to the presence of an unlawful monopolist.

Some additional conduct of the defendant must be shown to prove both monopolization and the factual connection to the injury claimed by the plaintiff. The fact that the conduct is otherwise lawful when done in a competitive context should not be the end of the inquiry. As Judge Browning observed in *Greyhound,* a firm possessing monopoly power is "precluded from employing otherwise lawful practices that unnecessarily exclude . . . competition. . . ."[282]

[282] 559 F.2d at 498.

The fact that the conduct in question is engaged in by a monopolist is a fact of significance which should not be dismissed by vague generalities about the efficiencies of size, the benefits of integration, or the degree to which the conduct is predatory or "sinister." When a court does so, perhaps because of doubts about the fact and amount of damage in private cases like *Berkey,* the definition of the duty imposed by the law becomes vague and confused and the court can trespass on factual issues within the province of the jury. The *Berkey* opinion departs from wave II monopolization standards by sanctioning exclusionary but avoidable conduct by a monopolist, thereby confusing the substantive standard for defining a monopolist's duties under the antitrust laws. Avoiding the imposition of treble damages in close cases of causation or in circumstances of conduct that is ambiguous vis-a-vis a competitor need not require confusing or changing the definition of the duties consistently defined as ones imposed by the law.

Under the duty-risk framework of analysis, the level of proof to show a breach of the duties imposed by the law or the factual connection between injury and the breach may be increased in light of the punitive nature of the remedies sought. In this way consistency may be maintained in the definition and understanding of the duties imposed by section 2 of the Sherman Act without impairing the need for flexibility to adjust the standard of proof required to show a violation of the law in light of the remedies sought. To the extent *Berkey* holds otherwise, it should not be considered persuasive precedent in subsequent litigation seeking consistency with wave II standards. Rather, it is a case where the court should have imposed a high standard for proof of a breach of the duty, rather than minimize the duty imposed, in order to minimize the risk of the jury basing liability on permissibly competitive conduct by a monopolist or finding liability where there was no factual connection between the violation and the injury claimed.

The underlying issue is the definition and scope of the duty imposed by the antitrust laws upon firms operating in a free market economy where the antitrust laws are designed to guarantee the maintenance of a regime of competition. Antitrust cases seldom conceptualize the analysis in this manner but treat the law as an identifiable series of lines beyond which one must not go on pain of the remedies imposed by the law. The meaning of the lines, however, shifts and changes depending upon the characteristics of the industry, the power of the firms involved, the quality of the conduct in view of the competitive ideal and the context in which it occurs, the nature and characteristics of the specific firms involved, and all the facts and circumstances of the case.

The fundamental duty imposed by the law is that the competitive process govern trade and business behavior. Joint or unilateral conduct displacing that process is potentially an antitrust violation. The scope of the duty and who may complain about its breach and what remedies may be available all entail legal questions to be decided by the court. The analysis unavoidably requires policy judgments concerning the legislative purposes of the antitrust laws, precedent, practical administration of the law, justice as between the parties, and other considerations arising out of the facts and circumstances of the case.

The Sherman Act should be explicitly viewed as guaranteeing a corresponding right of competitors to compete under the aegis of a free market; a regime where opportunity and individual initiative may operate free of unreasonable distortions created by monopoly power dictating, rigging, or unreasonably tampering with the forces of the market in either the short run or the long run.[283] The antitrust laws should be viewed in the treble damage

[283] "The right to trade is one of the 'natural' rights of men in that it has developed over the centuries as a means of livelihood and the acquisition of wealth. It is a group right in that it can be exercised only if there are other persons with whom to trade. The interests of the trader are thus largely relational, and much law has been developed to protect his trade relations as well as to protect those with whom he trades." Green, *Protection of Trade Relations Under Tort Law,* 47 VA.L.REV.

context as protecting the competitor from these risks and as imposing a corresponding duty upon those possessing monopoly power to avoid behavior imposing those risks upon competitors by actions displacing competition as the rule of trade. A corresponding duty of the monopolist to avoid unnecessarily exclusionary behavior in line with wave II precedent should be recognized, rather than a presumption in favor of hard competition by the monopolist like that indulged in by *Telex, Berkey* and *CalComp.* The latter approach emphasizes short-run consumer benefits and ignores the long-run consequences of aggressive conduct by a firm possessing monopoly power. A more balanced approach is needed, otherwise we will not have the benefits of competition, since there will be no competitors to insure the benefits in the long run.

Defining the duty and whether it includes the particular risk imposed on the plaintiff (the scope of the duty) ultimately rests upon the broad policies which underlie the antitrust laws in particular and all law in general.[284] One part of this analysis may include the question of standing in the narrow sense of whether problems of proof or remedies are beyond the capacity of the judicial process to adjudicate. The majority of "standing" questions invoking meaningless concepts like "ripple effect," "direct or indirect," "target area," and so on, however, are not standing issues in the technical sense of case or controversy or the limits of the judicial process but involve the question of the scope of the duty imposed by the antitrust laws. The resolution of the duty question is a policy one for the court to be resolved by recourse to the factors enumerated above rather than by reference to meaningless concepts which confuse, rather than clarify, by claiming to

559, 560 (1961). The *Berkey* opinion analyzed Kodak's actions in terms of what duties Kodak owed to a competitive market. It did so on the premise: "[T]o avoid the proscriptions of § 2, the . . . [monopolist] must refrain at all times from conduct directed at smothering competition." 603 F.2d at 275.

[284] *See* Green, *supra* note 93, at 45.

deny a factual connection between the conduct of the defendant and injury to the plaintiff.

There is a significant line of monopolization cases where this form of duty analysis and even the imposition of affirmative duties upon a monopolist have been implicitly recognized.[285] The *Greyhound* opinion implicitly followed the duty-risk line of analysis, as does *Berkey* and *Transamerica*. In all three cases, the courts grappled with the issues of pricing, marketing and innovation tactics by firms possessing monopoly power from the view that such firms at least have a duty not to "smother" or suppress competition or "unnecessarily" exclude competitors by their conduct. Where the cases differ, is in their sense of the scope of that duty and whether the facts would support a judge or jury conclusion that the firm's conduct "unnecessarily"[286] excluded or "smothered" competition.

285 *See* cases cited *supra* note 127 and the discussion therein.

286 "[U]nnecessarily excluded competition" is the standard adopted by Judge Browning in *Greyhound,* 559 F.2d at 498. This standard would appear to be more in line with wave II precedent like *ALCOA* and *United Shoe,* narrowly limiting the conduct of a monopolist, than is the *Berkey* standard of "conduct directed at smothering a competitor." 603 F.2d at 275. The "unnecessarily" standard also suggests a rule of reason analysis in section 2 cases similar to that which has evolved in section 1 cases on difficult issues like product innovation, pricing practices and so on. A further implication of the standard is the employment of the "least restrictive alternative" principle in the analysis. *See,* Struve, *The Least-Restrictive Alternative Principle and Economic Due Process,* 80 HARV. L.REV. 1463 (1967). Viewed from this perspective, many of the issues in *Berkey* surrounding Kodak's introduction of a new film format without predisclosure should have been viewed as presenting jury questions in accord with appropriate instructions. The circuit opinion in *Berkey* however, took most of these issues from the jury by endorsing a narrower duty of care by a monopolist to competition or, conversely, by endorsing hard competition by a monopolist so long as it was not "predatory." It is at this juncture that *Berkey* can most clearly be said to depart from the standards of wave II. In E.I. du Pont de Nemours & Co., 3 TRADE REG.REP. (CCH) ¶ 21,770 (F.T.C. 1980), the Commission adopted Judge Browning's standard to assess conduct in an attempt to monopolize case. The Commission's analysis, resulting in a finding of no violation of the law, is more in line with wave II standards than is the *Berkey* case. See discussion, *supra* note 248.

Telex and *Berkey* tend to confuse definition of the duty with standards for proof of its breach and whether the facts support a finding of a breach. Confusing definition of the duty with standards for proof of its breach engenders unnecessary ambiguity in the law; while confusing definition of the duty and the standards for proof of its breach with the question of whether the facts support of finding of a breach, constitutes an invasion of jury functions by judges or an invasion of trial court functions by appellate courts. When the process of decisionmaking becomes confused in these ways, it is difficult to determine how a decision squares with precedent; what are questions of fact and those of law; which side has the burden of proving what at trial; what is the burden of proof for purposes of motions, trial and jury instructions; and, what is the scope of review upon appeal.

All these characteristics are apparent in many of the wave III monopolization decisions, with considerable ambiguity over what duty does section 2 impose upon a defendant and what risks are plaintiffs protected from by section 2. *Telex* and *Berkey* are most pronounced in their confusion of trial and appellate functions. The *Berkey* opinion is particularly insensitive to the jury function; the court's opinion reading like the deliberations of the jury rather than the review of a jury's findings.

The difficult line between questions of law and those of fact becomes even more obscure when appellate courts go to such lengths to reverse trial courts. The definition of the duty, the evidence necessary to prove a breach and the standard of proof required to show a violation of the law ultimately become ad hoc factual judgments by appellate judges, rather than questions the litigants and a trial judge can determine by legal analysis of prior cases for submission to the fact finder. At a minimum however, the wave III cases appear to recognize a negative duty imposed on a monopolist to avoid the use of its power to displace competition in its own market and in other markets where the monopolist competes, in line with the wave II cases, even though the scope of the duty is considerably lessened by the confusion in analysis in *Telex, Berkey* and *CalComp.*

The law should go further and also recognize affirmative duties of a monopolist owed to the regime of competition mandated by the Sherman Act in markets adversely effected by a monopolist. The recognition and imposition of affirmative duties on a monopolist were made explicit in F.T.C. Commissioner Pitofsky's opinion in *The Reuben H. Donnelley Corp.* case;[287] a case subsequently reversed by the Second Circuit.[288] In *Donnelley,* the refusal of the sole publisher of the collected airline schedules to integrate the schedules of certificated, intrastate, and commuter airlines was found to be an act of unlawful monopolization. The Commission found that Donnelley's publication was the "Bible" of all airline schedules and fares in North America; that the publication was a distinct market for airlines, travel agents and others to obtain flight information and book flights; that Donnelley had a monopoly of the market by virtue of being the sole publisher of all the airline schedules in one place; that refusal to integrate flight information of certificated, intrastate and commuter airlines injured competition between them since those using the publication encountered certificated carrier listings before those of intrastate or commuter lines and thereby tended to book flights with certificated carriers;[289] and, that Donnelley's refusal to integrate flight schedules was unjustified and not excused by the defenses offered.[290]

At this juncture of the opinion, Commissioner Pitofsky noted that the case was a unique one since it did not present the traditional circumstance where it is claimed that the acts of the monopolist allegedly maintained or enhanced its own monopoly power in the market.[291] Rather, Donnelley's refusal to integrate the schedules was of no observable benefit to Donnelley but was viewed as conduct injuring intrastate and commuter airlines by placing them at a competitive disadvantage vis-a-vis certificated carriers with users of Donnelley's publication. Because of this posture of the case, the Commission framed the issue as follows:

> [W]hether Donnelley as a monopolist, had some duty under the FTC Act not to discriminate unjustifiably between the competing class of carriers so as to place one class at a significant competitive disadvantage. Stated another way, we must determine whether, as a matter of law, the owner of a "scarce resource" . . . must exploit that resource in a manner which creates no unjustified or invidious distinctions among competitors seeking access to the scarce resource. If it is determined that Donnelley did have such a legal duty, then we must

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287 3 TRADE REG. REP. (CCH) ¶ 21,650 (F.T.C. 1979). A series of cases in the context of refusals to deal by a monopolist have been read as coming "perilously close to establishing an absolute duty to deal" since they permitted a finding of unlawful monopolization in the context of an unjustified or unexplained refusal to deal. Byars v. Bluff City News Co., Inc., 609 F.2d 843, 855 (6th Cir. 1979). The court cited and discussed Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Lorain Journal v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Poster Exchange, Inc. v. National Screen Serv. Corp., 431 F.2d 334 (5th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971); United States v. Klearflax Linen Looms, 63 F.Supp. 32 (D. Minn. 1945). The court also discussed a series of cases where the defendant monopolist's control of a scarce resource justified a finding that the defendant had an "obligation to give competitors reasonable access to it." 609 F.2d at 856. The court cited United States v. Otter Tail Power Co., *supra;* Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) and several lower court cases. Each of these cases, it is submitted, was carving out circumstances in which affirmative duties ought to be imposed on the monopolist in order to comply with the more basic duty imposed by the Sherman Act of maintaining a regime of competition.

288 Official Airline Guides, Inc. v. F.T.C., 1980-2 Trade Cases ¶ 63,544 (2d Cir.).

289 3 TRADE REG. REP. (CCH) at 21,804-805.

290 *Id.* at 21,805-809.

291 *Id.* at 21,815-816.

consider whether Donnelley breached this duty and thereby violated the FTC Act. . . .[292]

The Commission's analysis found a duty on the part of the monopolist not to be "arbitrary" in the sense of engaging in conduct which "results in a substantial injury to competition and lacks substantial business justifications";[293] and further that Donnelley breached the duty not to be "arbitrary" in violation of the F.T.C. Act. The opinion clearly follows a duty-risk form of analysis. Although the case is factually unique and an interpretation of section 5 of the F.T.C. Act, it is a methodology and substantive conclusion which should be followed in all antitrust cases.[294]

The Second Circuit, however, refused to allow the imposition of a duty not to be "arbitrary" under section 5 of the F.T.C. Act on the appeal of the *Donnelley* case. The court did so on the premise that such a result "would give the F.T.C. too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[295] The court reasoned that "[s]uch a decision would permit the F.T.C. to delve into . . . 'social, political, or personal reasons' for a monopolist's refusal to deal."[296]

However, the Commission's judgment was not based upon a showing that *Donnelley's* practice had an "arguable" effect upon competition among certificated and commuter airlines; the effect of the practice was shown to create a real and significant competitive disadvantage to the commuter airlines. Nor was the Commission's decision one which delved into, nor which would necessarily permit a delving into, the social, political or personal reasons for a unilateral refusal to deal. By portraying the Commission's opinion as an open-ended grasp of power to supervise all business judgments by a monopolist, the court was relying upon the reliable old stand-by of a "floodgates" argument—a venerable but generally discredited device to avoid a deeper and more complex analysis in defining the duties imposed by the antitrust laws in the factual context of the case for decision.[297] The fact that *all* refusals to deal ought not be remedied by antitrust policy, does not mean that some should not.

Areeda and Turner advance additional, but obliquely stated, reasons for their opposition to using section 2 against arbitrary refusals to deal by a monopolist, despite what they call "a superficial appeal and a certain logic to support it."[298] They imply that courts are ill-equipped or "ill-suited" to establish tests of legality by a common law process in this area; that regulating individual refusals to deal under section 2 will necessarily draw on public utility notions of fair dealing rather than central antitrust concerns; that developing standards for sensibly drawing lines between the "arbitrary" and the permissible will be difficult; that an effective policy must also direct itself to discriminatory terms of dealing as well as absolute refusals to do so; that the danger of abuse of a monopolist arbitrarily refusing to deal are minimal since even a monopolist will usually act rationally to maximize profit; and that any abuse which does occur may better be

292 *Id.* at 21,815.

293 *Id.* at 21,819.

294 It is the implicit analysis followed in a long line of monopolization cases. *See* cases cited *supra* notes 127 and 287.

295 1980-2 Trade Cases ¶ 63,544 at p. 76,919. There was little deference given to the expertise of the administrative agency or the standard of review of F.T.C. determinations of "fairness" set out by FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

296 1980-2 Trade Cases ¶ 63,544 at p. 76,919.

297 This is not, of course, to say that the court was not confronted with a difficult and complex issue of sorting out the boundaries of antitrust policy from other fields of law which may or may not impose duties on monopolists or firms in a competitive business to deal with men with long hair or require monopoly newspapers to publish advertising from cigarette manufacturers. *See* 3 Areeda & Turner, *supra* note 13, at 270-271.

298 *Id.* at 273.

remedied by state and federal legislative action directed to situations deemed significant.[299]

There is considerable force in some of these arguments for concluding that *all* "arbitrary" refusals to deal by a monopolist ought not to be actionable under section 2 of the Sherman Act.[300] Indeed, the analysis parallels some of the factors Dean Green

[299] *Id.* at 274-76.

[300] The objection that courts are "ill-suited" or "ill-equipped" to fashion standards in this area is not elaborated upon. Courts appear to have little difficulty in fashioning sensible, predictable, and limited standards in the analogous field of torts under similar circumstances. The objection that courts will draw upon public utility notions of fair dealing is also not elaborated upon. It may have merit where an effective remedy would require day-by-day supervision of business judgments. The objection would not appear to have merit however, where an effective judicial remedy could be implemented. Drawing upon public utility notions to determine the legality of the conduct would seem appropriate in many circumstances where the vice of the conduct is an unfair wielding of monopoly power damaging the competitive process. The argument that legislative action is preferable to court action may have force in some general circumstances but not in others where the facts present a unique circumstance not easily remedied by the generality of legislation or the politics of the legislative or administrative process. *See,* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979); Associated Press v. United States, 326 U.S. 1 (1945); City of Mishawaka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980). Posing the analysis as an all or none choice, ignores the unwillingness of reality to conform to predetermined criteria and the flexibility of the legal process to adjust to the facts of the dispute. As Dean Green has said: "A process which assumes the very ends it is employed to discover will in the end betray its futility. . . . In the administration of law, both the judge who surrenders this power [of thought] to phrases as well as the judge who spends his time attempting to pattern phrases to control succeeding judges in the cases to come, can only do his science ill. His function primarily is to pass an acceptable judgment in the case before him. When the next case arises a different judgment may be desirable." Green, *supra* note 279, at 1016, 1018-19. The court in *Donnelley* appeared intent on controlling cases to come while not satisfactorily arriving at an acceptable judgment in the case before it.

claimed as the "most significant [factors] in influencing the determination of duties and through them the limits of the protection afforded by law."[301] Yet one may still conclude that *some* arbitrary refusals to deal by a monopolist ought to be actionable under section 2 and sensible standards can be carved out to define the duty, avoid a regulatory remedy and foster the goals of antitrust policy.

If one begins with the premise that the function of the antitrust laws is to maintain and promote a regime of competition as a matter of fundamental public policy and that the antitrust laws impose a duty on any person engaging in trade to refrain from conduct unreasonably displacing competition as the rule of trade, and in some limited cases of monopolization, affirmative duties to protect competition,[302] the analysis of difficult conduct issues like those presented by wave III monopolization cases would be considerably clarified. Resort to the fundamental policies of the law, rather than cliches and models detached from the facts, would be required, as well as a careful evaluation of all the facts and circumstances in which the case arose.[303]

[301] Green, *supra* note 279, at 1034. Dean Green categorized the factors as follows: "1. The administrative factor, 2. the ethical or moral factor, 3. the economic factor, 4. the prophylactic factor, 5. the justice factor." *Id.* Dean Green analyzed these factors extensively in the above cited article and a second part to the article appearing in 29 COLUM.L.REV. 255 (1929). Two other articles are also relevant: Green, *Foreseeability in Negligence Law,* 61 COLUM.L.REV. 1401 (1961) (stressing the environmental context and factual context in which the issue arises); Green, *Protection of Trade Relations Under Tort Law,* 47 VA.L.REV. 559 (1961) (reviewing the common law evolution of duties imposed in competitive and commercial business activity).

[302] See cases discussed *supra* note 287; SULLIVAN, *supra* note 13, at § 48, pp. 125-132.

[303] Commissioner Pitofsky discussed one fear with recognizing affirmative duties on the part of a monopolist in *Donnelley.* That is the fear that the antitrust laws would be converted into a policy to right all wrongs attributable to a monopolist. 3 TRADE REG.REP. (CCH) at 21,818-819. As Commissioner Pitofsky indicated, the duty imposed

In cases like *Donnelley,* a common law process may be the only way to remedy a displacement or unnecessary distortion of the competitive process in the relevant market. The unique status of the *Official Airline Guide,* the absence of a justification or excuse for the refusal to integrate commuter schedules, the impact of the action upon competition between certificated and commuter airlines, and the availability of a workable remedy justified the imposition of a limited section 5 duty on the publishers of the *Guide.* Fears of a floodgate of litigation, the imposition of public utility duties by court decree, and a standard banning all refusals to deal by outlawing some are unfounded in such circumstances.

The duty-risk methodology forces a grappling with the facts peculiar to the dispute, rather than facts not before the court. Difficult questions will not be automatically solved by the duty-risk methodology, but at least a grappling with the fundamental reasons for the decision in the context of the dispute before the court and not hypothetical cases generated by the imagination of the litigators will be fostered and a greater sensitivity to the facts in dispute will be encouraged.

The analysis of these issues by wave III litigation has not been generally illuminating, although the *Berkey, Borden, Greyhound* and *Transamerica* opinions may be read as proceeding upon a duty-risk path of analysis. *Berkey's* platform for analysis of a monopolist's duty, however, is constructed from unexamined assumptions of not turning on the successful competitor who does what section 1 "tells him to do" although section 1 carries no specific affirmative instructions; the benefits of "efficient" size

must be understood in terms of the purpose of the antitrust laws—"to protect a *competitive* process by outlawing arbitrary monopoly behavior that inflicts a competitive injury." *Id.* at 21,818. Conduct not injuring the competitive process may violate some other law, community morals or even business ethics but would not be converted into an antitrust violation absent an injury to the competitive process. To borrow and magnify a much abused cliche: The antitrust laws are intended to protect the competitive process, and not just competitors, short-run consumer welfare or whatever else might aggrieve the unhappy citizen.

without determining whether Kodak's size was "efficient"; and, the benefits of "integration," without examining whether there were any benefits of integration beyond Kodak's decision to do so. There is a similarity to wave I standards, particularly the *United States Steel* analysis, in the court's assumptions and methodology for resolving the *Berkey* case. Not surprisingly, like the *United States Steel* case of 1920, *Berkey's* assumptions led to a narrowing of the duties of a possessor of monopoly power owed to the maintenance of a competitive market and to competitors in that market as a matter of law.

The court need not have gone that far from wave II precedents and the long range goals of antitrust policy if it was concerned with imposing damages for chameleon-like conduct where a jury would have difficulty in sorting the anticompetitive from the procompetitive. Varying the level of the standard of proof of a breach of the duty required in such circumstances, by requiring a showing that the conduct was "unreasonably" exclusionary, that it is "arbitrary" and unjustified or that it was specifically intended to be unnecessarily exclusionary, would narrow jury discretion on such difficult issues as innovation, tying film formats to cameras, and predisclosure of new photofinishing requirements without distorting definition of the duty imposed by the law. The issues of defining the duty and the level of proof required to prove a breach are separate questions and they are questions of law for the court. Whether there has been a breach of the defined standard where there is sufficient contested evidence is one of fact for the jury and not for an appellate court taking over the function of the jury.

Definition of the standard required to prove a breach was also a crucial issue in the computer cases and in *Borden.* Few would argue with the proposition that a monopolist has a duty to refrain from anticompetitive or exclusionary pricing practices. Defining what is an anticompetitive or exclusionary pricing practice is part of the process of defining both the scope of the duty and the standard by which a breach of the duty is proven. The *Greyhound, Transamerica,* and *Borden* analyses grappled best with these issues, while *CalComp* and *Telex* appeared to adopt a rigid and inflexible rule without much regard for the factual setting of the case, the long-run policies of the Sherman Act, or the appropriate division between questions of fact and those of law.

3. The third major element of duty-risk analysis, one not extensively analyzed here, is whether the standard of care has been breached by the defendant. This is a question of fact for the jury, when reasonable minds could differ. Along with factual connection issues, any defenses raising factual issues and factually based damage issues, these questions are within the province of the jury or the trial judge where there is no jury, to be decided according to appropriate instructions defining the duties imposed by the law and the standards for proof of its breach.[304]

A major advantage of the duty-risk method of analysis is that it more clearly separates the judge and jury functions and the distinction between questions of fact and those of law for appellate review purposes. Once the court has defined the duty, its scope, and the standard of proof necessary to sustain a finding that the duty has been breached, the determination of whether the evidence is sufficient to show a violation is a question of fact for the jury unless reasonable minds could not differ over the analysis of the evidence presented.

Wave III litigation generally fails to pay much attention or respect to the fact-law dichotomy, save the *Greyhound* opinion, where the court consistently measured each issue in terms of the jury function.[305] There, questions of causation in fact were kept distinct from questions of the duty imposed by the law and the standard of proof necessary to show a breach of the duty. The failure of the other wave III cases to pay much attention to the

[304] *See* Thode, *supra* note 184, at 30.

[305] *See also,* Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980); International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir. 1980).

fact-law distinction, particularly *Telex* and *Berkey,* is a subtle but pronounced feature of wave III litigation resulting in an inappropriate expansion of the scope of appellate review and growing ambiguity over what kind, and how much evidence is required to go to a jury in a private section 2 case.

Following a duty-risk method of analysis will more clearly define the line between questions of fact and those of law for the purposes of defining the jury function and the scope of appellate review. More predictable and understandable standards should result; standards preserving the constitutional right to jury trial and ones aiding those seeking to comply with the law and the trial and review of those cases that are brought.

4. The fourth, and final, issue to be overcome before a plaintiff may succeed in treble damage litigation is proof of the fact and amount of damage. As in the case of determining whether there has been a breach of the duty, these too are jury questions to be decided by appropriate and workable standards defined by the court in its jury instructions. Here too, the court function of defining the standards for proof of damage may be varied according to the facts and circumstances of the case. Remote, consequential and indirect damages may be found to be beyond the duties imposed by the antitrust laws—not because of some rubric like "target area"—but because an analysis of the policies of the antitrust laws and the statutory language of section 4 of the Clayton Act limit the scope of the duties imposed by the law.[306] In such circumstances and in cases like *Illinois Brick Co. v. Illinois*[307] where the courts (rightly or wrongly) find policy reasons beyond the antitrust laws for limiting the scope of the duties owed others or where the injuries claimed are not an *antitrust* injury as in the *Brunswick* case, no damage issue would be submitted to the jury since the analysis of the duty issue would preclude recovery. Otherwise, however, unless there is a clear

[306] 15 U.S.C. § 4. *See* Tyler, *supra* note 172.

[307] 431 U.S. 720 (1977).

failure of proof, determination of the fact and amount of damage is within the province of the jury subject to instructions by the court defining the requisite standard of proof and method for proof of antitrust damage.

IV. Conclusion

Adoption of a duty-risk methodology for analyzing damage litigation in general and section 2 monopolization damage litigation in particular, will not resolve all the subtle and difficult issues presented by modern antitrust litigation. Many of the cases are structural cases which could and should be resolved by government proceedings, preferably proceedings on a no-conduct monopolization basis where the monopoly power appears to be persistent and substantial. Dissolution of monopoly power by such proceedings should be more expeditious and more consistent with the long-range goals of the Sherman Act than government suits where conduct becomes the principal issue or private damage actions where conduct issues become the unavoidable issue. Moreover, successful elimination of persistent monopoly power will alleviate pressure to bring complex private cases like those that have predominated wave III to date. Proof of a displacement of competition and injury to the plaintiff only further complicate the complex by confusing definitions of the duties imposed by the law, the standard of proof of its breach, and the function of judge and jury and trial and appellate courts.

The duty-risk framework of analysis in private cases, however, whether the case is a structural one or a behavioral one, will serve to clarify the premises of analysis, avoid confusion of issues, relieve pressure to distort standards for proof of a violation to avoid questionable awards of massive damages or punish reprehensible behavior, and serve to define rationally the line between judge and jury functions. More attention will also be paid to the facts giving rise to the controversy and courts may thus avoid the tendency toward deciding cases by fixed rules based on unrealistic

models of what reality is rather than the realities of the controversy before the court in light of the goals of the law.

Inflexible rules which fail to account for the reality of the circumstances of the case, the policies of the law, changing business practices and justice between the parties mask the only certain conclusion nine decades of section 2 litigation can justify: no matter how much the facts and judges change, the fundamental issues of section 2 litigation remain the same.