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Draining the Alcoa "Wishing Well": The Section 2 Conduct Requirement after Kodak and Calcomp

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COMMENT

DRAINING THE *ALCOA* "WISHING WELL": THE SECTION 2 CONDUCT REQUIREMENT AFTER *KODAK* AND *CALCOMP*

INTRODUCTION

"Hard competition" by established monopolists has been endorsed in recent court opinions.[1] These decisions have focused renewed attention on the applicable standard of culpable conduct[2] required under section 2 of the Sherman Act[3] (the Act) to turn lawful monopoly into unlawful monopoliza-

1. *E.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713 (9th Cir. 1979); Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); Transamerica Computer Co. v. IBM Corp., No. C 73-1832 (N.D. Cal. Oct. 18, 1979); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *appeal docketed sub nom.* Memorex Corp. v. IBM Corp., Nos. 78-350, 78-3236 (9th Cir. Aug. 1, 1979). In each of these cases, the court was presented with a substantial record of the strategic development, announcement, and introduction of new products, as well as aggressive sales and marketing practices. The cases held that the individual business practices reflected the monopolist's success through superior products and business acumen, and not unlawful anticompetitive conduct. *See generally*, Millstein, *Courts Are Accepting Areeda-Turner Thesis*, Legal Times of Wash., Sept. 17, 1979, at 9, col. 1; Baker, Berkey, CalComp *Cases Support Innovation by Dominant Enterprise*, Nat'l L. J., Sept. 10, 1979, at 22, col. 1; Sims, 'Kodak' *Provides Comfort for Trust Defendants*, Legal Times of Wash., July 16, 1979, at 13, col. 1.

2. Anticompetitive business practices are commonly characterized as either "predatory" or "exclusionary." Both terms, however, have different legal and economic definitions. Predation, in economic terms, refers to anticompetitive conduct that tends to eliminate competing firms from a market, to deter new entry into the market, or to intimidate competitors from engaging in vigorous competition. Thus, pricing has been considered predatory if below cost or at a non-profit-maximizing level. *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 703-18 (1975) [hereinafter cited as *Predatory Pricing*]. *See also* Bain, *A Note on Predatory Pricing in Monopoly and Oligopoly*, 39 Am. Econ. Rev. 448 (1949). Predatory conduct is used in a broader legal sense to include business practices that unreasonably restrict the level of competition in a market by "inhibit[ing] others in ways independent of the predator's own ability to perform effectively in the market." L. Sullivan, Handbook of the Law of Antitrust § 43, at 111 (1977). Such conduct may also be described as exclusionary. Because all business decisions and policies are aimed at drawing customers away from competing firms, the concept of "exclusion" is particularly difficult to define. It commonly refers to acts which allow a firm to eliminate or injure rivals without regard to their efficiency. 3 P. Areeda & D. Turner, Antitrust Law, ¶¶ 626b-626c (1978). Professor Posner describes an exclusionary practice as "a method by which a firm . . . trades a part of its monopoly profits, at least temporarily, for a larger market share, by making it unprofitable for other sellers to compete with it." R. Posner, Antitrust Law 28 (1976); *see* Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1219 (1969). "Predatory" and "exclusionary" are conclusory terms; characterizing business practices as either does not explain why they are unlawful. The meaning of either term is generally ascertainable from the specific facts examined. Attorney General's National Committee to Study The Antitrust Laws, Report 327-28 (1955) [hereinafter cited as 1955 Report]. ("[T]he accusation of 'predatory' . . . practices often turns out on examination not to stem from the abuse of significant degrees of market power, but from the uncomfortably active pressures of competition itself.")

3. 15 U.S.C. § 2 (1976): "Every person who shall monopolize, or attempt to monopolize, or

tion. The offense of monopolization under section 2 requires more than the mere possession of monopoly power.[4] The Supreme Court most recently spoke in terms of "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."[5] Judicial efforts to make a meaningful distinction have proven extremely difficult.

Several lower courts,[6] in deciding suits by private plaintiffs, have found that many alleged exclusionary practices merely reflect a monopolist's superior

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combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." Section 4 of the Clayton Act, 15 U.S.C. § 15, creates a private right of action for treble damages in favor of "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." To be entitled to damages in a private action, plaintiff must prove 1) an antitrust violation, 2) an injury to plaintiff's "business or property" caused by the violation, and 3) a basis for a reasonable estimate of the amount of damages resulting from defendant's unlawful conduct. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). An antitrust decree or judgment in favor of the government can be used as prima facie evidence of liability against the same defendant in the private action. 15 U.S.C. § 16(a).

4. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427) ("The mere possession of monopoly power does not *ipso facto* condemn a market participant."); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,974-75 (9th Cir. 1979); Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 9, 123 (N.D. Cal. Oct. 18, 1979). Because size may be the unavoidable result of a legal monopoly or the consequence of vigorous competitive activity, size, absent unlawful conduct or an intent to monopolize, is not an antitrust offense. United States v. United States Steel Corp., 251 U.S. 417, 451 (1920); Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911) (section 2 does not in fact condemn "monopoly in the concrete"). Despite this well-settled rule of law, however, some courts still suggest that the mere existence of monopoly power offends the antitrust laws. *E.g.,* United States v. Griffith, 334 U.S. 100, 107 (1948) ("monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised"); United States v. Swift & Co., 286 U.S. 106, 116 (1932) ("Mere size . . . is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . ."); United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945) ("Congress . . . did not condone 'good trusts' and condemn 'bad' ones; it forbad all."); United States v. Aluminum Co. of America, 91 F. Supp. 333, 341 (S.D.N.Y. 1950). Monopoly power is "the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). Such power is a primary requisite to a finding of monopolization, and may be a factor in judging the reasonableness of alleged anticompetitive conduct. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d at 272 (section 2 is aimed "at a pernicious market structure"). Monopoly power remains, however, a separate element of the offense. This Comment's discussion of the culpable conduct element of unlawful monopolization assumes *arguendo* the existence of monopoly power.

5. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). This standard has been routinely cited in virtually every subsequent case involving monopolization. *See, e.g.,* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174, (U.S. Sept. 14, 1979) (No. 79-427); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,974 (9th Cir. 1979); Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 9 (N.D. Cal. Oct. 18, 1979).

6. *See* cases cited note 1 *supra.*

product, business acumen, or "skill, foresight and industry,"[7] and not willful maintenance of monopoly power. These decisions, of which *Berkey Photo, Inc. v. Eastman Kodak Co.* (*Kodak*)[8] and *California Computer Products, Inc. v. IBM Corp.* (*CalComp*),[9] are the most notable,[10] are characterized by strict objective tests to detect the existence of exclusionary conduct. Challenged business practices are tested individually in terms of rational economic behavior.[11] The conduct speaks for itself: if a given practice results from an objectively rational business decision, no inquiry need be made into the subjective intent behind the practice.[12]

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7. United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d. Cir. 1945). "Skill, foresight and industry" may generally be defined as superior competitive practices that reflect an intent to compete on the merits of price and performance. *Id.* These practices are of the type which are encouraged by the antitrust laws. *See* notes 25-32 *infra* and accompanying text; *cf.* 148 F.2d at 430 (only a "strong argument" may be made that § 2 does not condemn the result of those very competitive forces which is its primary object to foster).

8. 603 F.2d 263 (2d Cir. 1979).

9. [1979-1] Trade Cas. (CCH) ¶ 62,713 (9th Cir. 1979).

10. In Telex Corp. v. IBM Corp., 510 F.2d 894, 925 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975), the Tenth Circuit essentially took the same position as did the courts in *Kodak* and *CalComp* with respect to rigorous competition by a monopolist to protect its market power. The Tenth Circuit reversed the jury verdict in favor of Telex, however, on market definition grounds. Thus, its discussion of conduct was merely dicta and, many thought, largely overshadowed by the Ninth Circuit's decision in Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978). The 1975 *Telex* decision takes on new significance in light of the decisions in *Kodak* and *CalComp,* both of which looked to *Telex* for direction. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274-75 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,983 (9th Cir. 1979); *see* Transamerica Computer Co. v. IBM Corp., No. C 73-1832 (N.D. Cal. Oct. 18, 1979); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *appeal docketed sub nom.* Memorex Corp. v. IBM Corp., Nos. 78-350, 78-3236 (9th Cir. Aug. 1, 1979). For a discussion of the implications of *Telex,* see Note, *Innovation Competition: Beyond* Telex v. IBM, 28 Stan. L. Rev. 289 (1976) [hereinafter cited as *Innovation Competition*].

11. Alleged exclusionary practices are economically rational if they represent, for example, above cost pricing (profitability), California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713 (9th Cir. 1979); Transamerica Computer Co. v. IBM Corp., No. C 73-1832 (N.D. Cal. Oct. 18, 1979), satisfaction of consumer preferences (increased sales volume), Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274-75 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427), and profitability/cost savings of leasing and bundling policies (legitimate business justifications). Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975).

12. *See, e.g.,* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 287 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,980 (9th Cir. 1979). It is not the role of the court to second guess business or engineering decisions. 603 F.2d at 287; Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1330 (5th Cir. 1976); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 438-39 (N.D. Cal. 1978), *appeal docketed sub nom.* Memorex Corp. v. IBM Corp., Nos. 78-350, 78-3236 (9th Cir. Aug. 1, 1979); Telex Corp. v. IBM Corp., 367 F. Supp. 258, 347 (N.D. Okla. 1973), *rev'd,* 510 F.2d 894 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975).

This strong encouragement of vigor, rather than passivity, by the monopolist in developing and marketing its products is a dramatic departure from the more traditional concern for detecting an exclusionary "course of conduct."[13] Under the course of conduct analysis, economically rational business practices which individually may be lawful and "honestly industrial," are evaluated in terms of the intent with which they were adopted: whether the primary purpose is competition on the merits or the elimination of competition.[14] Purpose is inferred from evidence of other related conduct and from the subjective intent of management.[15] Thus, any number of otherwise lawful business practices may be deemed a willful maintenance of monopoly power when viewed in light of " 'all the circumstances of a case.' "[16] The whole, it appears, is greater than the sum of its parts.

Kodak and *CalComp* implicitly reject this view. In so doing, they invite comparison with the earliest section 2 cases.[17] According to the early theory,

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13. "Course of conduct" is a term which rarely appears in court opinions, and is given little emphasis when it does. It is, however, closely associated with the traditional legal rule under § 2 that any number of lawful acts in and of themselves may evidence an unlawful intent to monopolize, or an exclusionary course of conduct. United States v. Aluminum Co. of America, 148 F.2d 416, 431 (2d Cir. 1945) ("Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' "). The term played an important role in Judge Frankel's instructions to the jury on the issue of predisclosure in *Kodak:* "Standing alone, the fact that Kodak did not give advance warning of its new products to competitors would not entitle you to find that this conduct was exclusionary . . . . However, if you find that Kodak had monopoly power . . . , you may decide whether in the light of other conduct you determine to be anticompetitive, Kodak's failure to predisclose was on balance an *exclusionary course of conduct.*" Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 414 n.9 (S.D.N.Y. 1978), *rev'd in part,* 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427) (emphasis added) (transcript no. omitted).

14. *See* Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (attempt to monopolize). Intent is the element that ties together otherwise lawful acts into an exclusionary course of conduct. In his discussion of conspiracy and attempt to monopolize, Justice Holmes stated: "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body . . . . It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful." *Id.* (citation omitted); *see* United States v. IBM Corp., [1975-2] Trade Cas. (CCH) ¶ 62,495, at 67,176 (S.D.N.Y. 1975).

15. L. Sullivan, *supra* note 2, § 51, at 135-37.

16. Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 412 (S.D.N.Y. 1978), *rev'd in part,* 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427) (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)). Judge Frankel carefully instructed the jury to consider each alleged anticompetitive act in light of all the relevant evidence: the extent of market power, relative character of new product introductions, related pricing practices, and manifest intent of corporate management. "While *per se* rules *of liabililty* are useful and comfortable where they exist, the task usually is to weigh 'all of the circumstances of a case' to determine whether a company has engaged in unlawfully anticompetitive practices. The ultimate judgment . . . must commonly rest 'upon demonstrable economic effect rather than . . . upon formalistic line drawing.' " *Id.* (citations omitted). This approach was overruled by the court of appeals, which adopted a presumptive legality test for sales and marketing practices. 603 F.2d at 275-76.

17. Standard Oil Co. v. United States, 221 U.S. 1 (1911); *see* United States v. American Tobacco Co., 221 U.S. 106 (1911).

under which only unreasonable restraints of trade were condemned, a corporation could grow without limit, even within its own market, provided it did so by "normal methods."[18] The recent cases suggest in part a return to the early standard. Unlawful monopolization under *Kodak* and *CalComp* is not inferred from normal, "honestly industrial"[19] practices which have an exclusionary economic effect due solely to the rigors of competition; they are not unreasonable responses to competition. On the contrary, the monopolist is given greater freedom to fight off its competitors with the same lawful weapons with which those competitors are assaulting its dominant position.

The degree of conduct necessary to prove unlawful monopoly is uncertain. The Supreme Court has not recently addressed the issue,[20] and lower courts

18. Standard Oil Co. v. United States, 221 U.S. 1, 75 (1911); *see* United States v. United States Steel Corp., 251 U.S. 417 (1920); United States v. United Shoe Mach. Co., 247 U.S. 32 (1918); United States v. American Tobacco Co., 221 U.S. 106 (1911). While § 1 of the Act prohibits agreements, combinations and conspiracies between firms which unreasonably restrain trade, 15 U.S.C. § 1 (1976), § 2 proscribes unilateral acts by the monopolist which have the same effect. 15 U.S.C. § 2 (1976); Standard Oil v. United States, 221 U.S. at 61 ("[T]he second section seeks . . . to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section . . . . "); *see* note 3 *supra* This approach has "the least sweeping implications . . . . An enterprise has monopolized in violation of § 2 . . . [only] 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." United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Despite having the "least sweeping implications," this approach appears to be gaining credence in evaluating conduct in private treble damage actions. In *CalComp*, for example, the court stated that a monopolist's acts "are properly analyzed analogously to [agreements] under § 1 . . . : the test is whether defendant's acts . . . were *unreasonably* restrictive of competition." California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,975 (9th Cir. 1979) (emphasis in original). It is also interesting to note that the only claim against Kodak that the Second Circuit upheld was an agreement with Sylvania providing for nondisclosure of photoflash developments to rival camera manufacturers, an agreement which was found to be per se unlawful under § 1. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 304 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427).

19. The phrase "honestly industrial," like so many others in the § 2 lexicon, was coined in a very different context by Judge Hand in United States v. Aluminum Co. of America, 148 F.2d 416, 431 (2d Cir. 1945). In that case, the court stated that to limit proscribed acts under § 2 to only those not "honestly industrial" would emasculate the Act. *Accord*, United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 344 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

20. The most recent Supreme Court case addressing the conduct issue is United States v. Grinnell Corp., 384 U.S. 563 (1966). The Court appears to have become much more tolerant of arguments predicated upon the efficiency-creating nature of the defendant's conduct than it had been during the 1960's. *See* Flynn, *Antitrust Jurisprudence*, 125 U. Pa. L. Rev. 1182, 1184 (1977) ("Perhaps in response to the open-ended and uncertain evolution of antitrust policy during the era of the Warren Court, there has been a renewed effort to bring greater certainty and predictability to antitrust analysis . . . ."); Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 Mich. L. Rev. 325, 334-35 (1968). Practices under § 1, for example, once held per se unlawful, are now deemed procompetitive when examined under the rule of reason. *See, e.g.*, Broadcast Music, Inc. v. CBS, Inc., 99 S. Ct. 1551 (1979) (blanket licensing facilitates integration of sales, monitors and enforces against unauthorized copyright use, increases economic efficiency, and renders the market more competitive); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (vertical agreements between manufacturer and retailer may promote interbrand competition by allowing manufacturer to achieve efficiencies in distribution).

are inconsistent in their approach.[21] Moreover, while some cases are endorsing hard competition by dominant firms, proposed legislation[22] would replace the need for proof of conduct in government monopolization suits seeking divestiture with proof of persistent monopoly power alone.[23] The presumption underlying the proposal is that monopoly power persistently maintained is in all but the rarest cases acquired or maintained through culpable conduct.[24]

These widely divergent and conflicting approaches to culpable conduct reflect the tension inherent in the antitrust laws between the monopolist's legitimate right to compete fairly and vigorously, on the one hand, and the need to protect competition from abuse by monopolists, on the other. The paradox of section 2 enforcement, which has left neither courts nor businessmen with clear guidelines of permissible practices, should be resolved with a cogent standard of culpable conduct.

This Comment argues that the recent use of strict economic tests in evaluating anticompetitive conduct under section 2 is a well-reasoned formulation of objective legal standards, but that it must be complemented with a limited inquiry into related conduct and intent to prevent more subtle forms of anticompetitive conduct. Part I presents the modern "structuralist" approach to section 2 enforcement and the legal tests implicit in that approach. The course of conduct standard for permissible business practices is examined and found to be at odds with the stated goals of the Sherman Act and early standards of predatory conduct. The strict objective tests of *Kodak* and *CalComp* are set forth in Part II. The tests articulated in these cases represent a repudiation of the course of conduct approach and a partial return to the earlier standard of predatory conduct. The merits and failures of the discrete conduct analysis is demonstrated by applying the test to several sales and marketing practices. Part III presents a proposed judicial approach that distinguishes between standards of culpable conduct applicable in private and government antitrust suits. In private treble-damage actions, a monopolist's conduct should be judged by strict economic tests coupled with a limited inquiry into substantial intent. Finally, this Comment urges the courts to adopt a separate no-conduct standard in government suits upon a showing of persistent monopoly power.

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21. Unlike *Kodak* and *CalComp*, many other cases are characterized by the course of conduct analysis. *E.g.*, Purex Corp. v. Procter & Gamble Co., [1979-1] Trade Cas. (CCH) ¶ 62,675 (9th Cir. 1979); Greyhound Computer Corp., Inc. v. IBM Corp., 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978), *rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); Telex Corp. v. IBM Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 432 U.S. 802 (1975); Borden, Inc., [1979] 3 Trade Reg. Rep. (CCH), ¶ 21,490 (Nov. 7, 1978) (opinion of the Comm'n).

22. *See* National Commission for the Review of Antitrust Law and Procedures, Report to the President and the Attorney General 141-74 (1979) [hereinafter cited as National Commission]; *see* Maher, *'No-Conduct Monopolization'—Proposed Legislation*, N.Y.L.J., Mar. 30, 1979, at 1, col. 1.

23. National Commission, *supra* note 22, at 152.

24. *Id.* at 155.

I. Structuralist Approach

A. *The Early Standard: Predatory Conduct*

The motives behind the Sherman Act and the perceived evils which it was intended to remedy have been debated at length.[25] In enacting the Sherman Act, Congress was undoubtedly concerned with private abuses of economic power in the marketplace and with increasing industrial concentration in the form of business trusts.[26] The Sherman Act was designed not to protect competitors against their own inefficiencies, but to protect the competitive process against unreasonable restraints.[27] Size, because it gives the monopolist the power to set prices and restrict output,[28] was suspect to the extent it conflicted with consumer welfare.[29] But the Act did not condemn monopoly *qua* monopoly, nor did it mandate atomistic industries.[30] Rather,

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25. Commentators have attempted to use the legislative history of the Sherman Act and its early judicial interpretation to support various contentions in the relentless debate over economic versus noneconomic goals of the Act. *See generally* Bork & Bowman, *The Goals of Antitrust: A Dialogue on Policy,* 65 Colum. L. Rev. 363 (1965); Dewey, *The Economic Theory of Antitrust: Science or Religion?,* 50 Va. L. Rev. 413 (1964). Extensive research has been conducted on the events leading up to the passage of the Sherman Act. *E.g.,* W. Letwin, Law and Economic Policy in America (1965); H. Thorelli, The Federal Antitrust Policy (1955). In his inquiry into the debates on the Sherman Act, Prof. Bork concludes that Congress intended the new law to promote efficiency and consumer welfare exclusively. R. Bork, The Antitrust Paradox (1978); Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J.L. & Econ. 7 (1966).

26. Senators Hoar and Edmunds thought that the proposed Act did little more than bring national authority to bear upon common law restraints of trade. 21 Cong. Rec. 3151-52 (1890). The existing common law rules of restraints of trade, however, grew out of several different traditions and were often at odds with each other. Moreover, Congress enacted the legislation in part because Congress was not certain the common law of the United States governed the subject. *Id.* at 3152; *see* Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911). It appears that what was meant by common law restraints were anticompetitive practices such as cartel agreements, monopolistic horizontal mergers, and predatory business tactics. *See* R. Bork, *supra* note 25, at 20; R. Posner, *supra* note 2, at 23. For a discussion of the English and American law on restraints of trade, see Justice White's discussion in Standard Oil Co. v. United States, 221 U.S. at 50-58.

The language of the statute was chosen in large part so that the Act's reach would be coextensive with the Supreme Court's demarcation of Congress's commerce power. R. Bork, *supra* note 25, at 20. Many early Sherman Act defendants, including Standard Oil, argued that the statute could not be constitutionally applied because it was an attempt by Congress to extend its commerce power by regulating questions of intrastate production. That argument was rejected in *Standard Oil,* 221 U.S. at 68-69, and in Northern Sec. Co. v. United States, 193 U.S. 197, 334 (1904).

27. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,980 (9th Cir. 1979); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133-34 (2d Cir. 1978), *cert. denied,* 99 S. Ct. 340 (1979).

28. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 380 (1956); R. Posner, *supra* note 2, at 23.

29. R. Bork, *supra* note 25, at 35-36. Justice White suggested three "evils" that led to the public outcry against monopolies and restraints of trade: the power of the monopolist to fix prices, to limit production, and to deteriorate the quality of products. Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911). Deterioration in quality is merely a special form of diminished quantity or restricted output.

30. *See* C. Kaysen & D. Turner, Antitrust Policy 20 (1959) ("In short . . . protection of

the sponsors intended to exempt from the Act's proscriptions one "who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well."[31] Unlawful monopolization "involved something like the *use of means* which made it impossible for other persons to engage in fair competition."[32]

Justice White's 1911 opinion in *Standard Oil Co. v. United States*[33] was the first clear articulation of standards governing section 2 monopolization.[34] The Court held that the offense of monopolization required both monopoly power

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incentives to competitive behavior would prevail over dispersion of market power."); note 25 *supra*. Populist rhetoric still persists, however, in court opinions suggesting that the goal of the Sherman Act is the protection of small competitors against rivals. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting). The populist origins of the Act were reflected by the debates: "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life." 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman). Judge Learned Hand was of the opinion that a principle purpose of the framers "was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945). *See also* Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 57 (N.D. Cal. Oct. 18, 1979).

31. 21 Cong. Rec. 3152 (1890) (remarks of Sen. Hoar). Power obtained or maintained by the kind of behavior that competition is thought to foster, if not compel, was immune from antitrust scrutiny even though rivals might have been destroyed in the process. *See, e.g.*, California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,975 n.6 (9th Cir. June 21, 1979). Vigorous competition produces winners and losers. The very essence of competition is a "striving for potentially incompatible positions" in which the success of one competitor is likely to be achieved at the expense of another. F Scherer, Industrial Market Structure and Economic Performance 9 (1970).

32. 21 Cong. Rec. 3152 (1890) (remarks of Sen. Hoar) (emphasis added).

33. Standard Oil Co. v. United States, 221 U.S. 1 (1911). The record on appeal to the Supreme Court in *Standard Oil* was precedent-setting and foreshadowed the era of complex, protracted litigation under § 2. The complaint and exhibits filed by the Government on November 15, 1906, covered 170 pages of the printed record, itself consisting of 23 volumes, aggregating some 12,000 pages. *Id.* at 30-31. The enormous volume of proof related to innumerable, complex and varied business transactions, extending over a period of nearly forty years. *See* W. Letwin, *supra* note 25, at 253 ("The groundwork of the assault had been laid by the Bureau of Corporations, which prepared a report of unparalleled detail. The case was the beginning of modern antitrust actions . . . .").

34. Justice White established the "rule of reason" analysis, 221 U.S. at 61-62, against a vigorous dissent by Justice Harlan. 221 U.S. at 82 (Harlan, J., dissenting in part and concurring in part). Condemned under the Sherman Act, according to Justice White's interpretation, were all *unreasonable* restraints of trade. *Id.* at 61. In a somewhat strained interpretation of two earlier cases, United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898), and United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), Justice White concluded that the Court had always applied an implied test of reasonableness to contracts in restraint of trade without expressly stating it. Thus, certain offenses like price-fixing were put into a per se category only after examining them in the light of reason. 221 U.S. at 64-65. Per se analysis is a subspecies of the rule of reason analysis. Thus, the so-called "rule of reason" was developed in fact, if not in name, in these earlier cases. R. Bork, *supra* note 25, at 34. *See generally* United States v. American Tobacco Co., 221 U.S. 106 (1911), which was decided two weeks after *Standard Oil*.

and conduct resulting in an unreasonable restraint of trade. The latter is analyzed in the same manner as agreements under section 1.[35]

The Court enumerated two factors bearing on the "reasonableness" of a monopolist's acts: 1) whether the acts were "normal methods of industrial development;"[36] and 2) whether the acts were unduly coercive.[37] By opening an inquiry into the reasonableness of monopoly, *Standard Oil* implies that many uses of monopoly power are reasonable and, indeed, beneficial.[38] Inherent in Justice White's analysis is the belief that the successful competitor is entitled to his just rewards and should not be penalized for having fairly acquired a monopoly.[39] Moreover, his analysis is based on the assumption that competition works; market forces were expected to prevent or erode

35. 221 U.S. at 59-62. Section 2 was intended to supplement § 1 and to ensure that the policy embodied therein was not frustrated or evaded. *See* note 18 *supra*.

36. *Id.* at 75.

37. *Id.* Unusual methods and coercive acts were considered "solely as an aid for discovering intent and purpose." *Id.* at 76. The intent "to exclude others . . . [is] frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view." *Id.* Justice White inferred wrongful intent from wrongful conduct. The result would have been identical and the analysis clearer had he ignored intent and spoken of conduct alone. P. Areeda & D. Turner, *supra* note 2, ¶ 626, at 76; R. Bork, *supra* note 25, at 37-39.

38. The rule of reason analysis entertains business justifications and defenses of superior skill. In what Justice White characterized as a "powerful analysis of the facts", he noted Standard Oil's argument that its power was "the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed." 221 U.S. at 48. Standard Oil also argued that alleged acts of wrongdoing were either the result of "too great individual zeal in the keen rivalries of business or of the methods and habits of dealing which, even if wrong, were commonly practiced at the time." *Id.*

The record on actual predatory conduct in *Standard Oil* has been extensively debated since Prof. John McGee's study, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & Econ. 137 (1958). McGee reviewed the entire record of the Standard Oil litigation and reported that there were no clear episodes of the successful use of predatory pricing or other predatory practices. *But see* F. Scherer, *supra* note 31, at 275 (arguing that McGee would have found predatory price cutting by Standard Oil had he searched the Rockefeller papers). It is interesting in this context to note the language of the Tenth Circuit in Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), exonerating the conduct of the defendants despite a substantial record of anticompetitive intent: "The record demonstrates that these acts of IBM are again part of the competitive scene in this volatile business inhabited by aggressive, skillful businessmen . . . . It is IBM's participation in this marketing that the trial court termed 'predatory,' but the record shows this was no more than engaging in the type of competition prevalent throughout the industry." *Id.* at 928.

39. Justice White suggested that a benefit of adopting a rule of reason analysis instead of condemning *all* contracts in restraint of trade, as Justice Harlan had advocated, 221 U.S. at 82 (Harlan, J., dissenting in part and concurring in part), was that it would protect defendants against an unreasonable restriction on the right to contract or right to acquire or hold property. *Id.* at 69.

monopoly power if economic freedom were not unreasonably restrained by acts of the monopolist.[40]

B. *The Traditional Standard: Course of Conduct*

The great merger movement that produced the classic trusts ended in about 1905, and by 1911 most of the antitrust cases challenging these mergers had been decided.[41] By 1945, however, it was no longer assumed that self-policing market forces would inevitably prevent monopolies if the government restrained anticompetitive acts.[42] Perhaps as a consequence of this understanding, courts increasingly directed antitrust analysis toward market concentration. Beginning with Judge Hand's decision in *United States v. Aluminum Co. of America* (*Alcoa*)[43] and continuing until the present, the emphasis has been on monopoly power.[44]

Alcoa and its progeny have been considered to set forth a "structural" test of monopoly.[45] The structural approach is posited on the belief that effective

40. 221 U.S. at 62. "[T]he omission of any direct prohibition against monopoly in the concrete . . . indicates a consciousness that the freedom of the individual right to contract . . . was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if . . . no right to make unlawful contracts having a monopolistic tendency were permitted." *Id.*

41. R. Posner, *supra* note 2, at 27; *see* Shepard, *The Economics: A Pep Talk,* 41 A.B.A. Antitrust L.J. 595, 598 (1972) ("Section 2 was tried on most of the top 10 [industrial firms as of 1911]. U.S. Steel, Standard Oil, American Tobacco, International Harvester, American Sugar, Corn Products, American Can, duPont are among those at the very top of the business ladder [which were sued for monopolization]".).

42. In 1940, there was a sharp and permanent increase in the volume of antitrust cases brought by the Justice Department under antitrust chief Thurman Arnold. At the same time, the Supreme Court became noticeably more friendly to antitrust enforcement. R. Posner, *supra* note 2, at 84 n.7.

43. 148 F.2d 416 (2d Cir. 1945). The Government's complaint was filed in April, 1937; trial began in June, 1938, and proceeded until August, 1940. More than 40,000 pages of testimony were taken. After delivering an oral opinion, findings of fact and conclusions of law, the trial court entered final judgment dismissing the government's complaint in July, 1942. On appeal, the Second Circuit acted as the court of last resort because the Supreme Court could not muster a quorum of six qualified justices to hear the case. Therefore, the matter was referred for decision under special statute to the court of appeals in the circuit from which it came. *Id.* at 421 (citing 15 U.S.C. § 29 (1940) (current version at 28 U.S.C. § 2109 (1976)). The *Alcoa* case is an example of the type of protracted litigation that largely makes the relief stage ineffective if not irrelevant. Although the case was brought in 1937, it was not decided until after World War II. The enormous increase in the demand for aluminum during the war resulted in the creation and rapid expansion of competing aluminum producers, so that by 1950 Alcoa no longer had a monopoly market share and substantial divestiture was rightly judged unnecessary and inappropriate. *Id.* at 432. *See generally* O'Connor, *The Divestiture Remedy in Sherman Act § 2 Cases,* 13 Harv. J. Legis. 687 (1976).

44. *E.g.,* American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *aff'd in part,* 384 U.S. 563 (1966); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954). *See also* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427).

45. *See* National Commission, *supra* note 22, at 156; *id.* at 346 (separate statement by Comm.

antitrust policy cannot be built entirely on rules of law prohibiting "unfair" business conduct, and that rules aimed at preventing "unfair" industry structure must be fashioned.[46] Big is inherently bad.[47] These cases have placed severe limitations on a monopolist's ability to compete by condemning "honestly industrial" acts, not predatory or coercive under earlier standards, that, when viewed as a course of conduct, are in economic effect exclusionary.[48]

The *Alcoa* court recognized that the mere existence of monopoly power is not sufficient to constitute the offense of monopolization under section 2, and that "something else" is required.[49] The standard, established in *Alcoa* and further refined and applied in *United States v. United Shoe Machinery Corp.*,[50]

Eleanor Fox); 1955 Report, *supra* note 2, at 55 n.207; Northwestern Univ., Conference on the Antitrust Laws and the Attorney General's Committee Report 38 (1955); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 Ill. L. Rev. 745, 762 (1949); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. Chi. L.R. 567, 577-80 (1947); Turner, *supra* note 2, at 1219; *Antitrust Symposium: Section 2 of the Sherman Act*, 10 Sw. U. L. Rev. 35, 129 (1978) (closing remarks of District Court Judge Wyzanski).

46. Mueller, *The New Antitrust: A 'Structural' Approach*, 1 Antitrust L. & Econ. Rev. 87, 108 (Winter 1967).

47. Natural monopolists, those whose monopoly power has been "thrust upon" them, are not condemned for that fact alone. United States v. Aluminum Co. of America, 148 F.2d 416, 429-30 (2d Cir. 1945). Under the maximum reading of the structural cases, unlawful monopolization is established by monopoly power alone unless the defendant can show that it has been the "passive beneficiary" of monopoly power. *See* notes 72-79 *infra* and accompanying text. Such a view is tantamount to saying that the mere status of monopoly offends § 2. Under a less radical reading of the structural cases, monopolization is shown by proof of monopoly power alone unless defendant shows that its monopoly resulted solely from superior skill, foresight and industry. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 344 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *see* United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *aff'd in part*, 384 U.S. 563 (1966). Such an approach would appear to give the putative monopolist very limited freedom to engage in a volitional act which maintained its market position.

48. 148 F.2d at 431. *Alcoa*, however, has been regarded as "something of an intellectual sport —the high watermark of overly zealous Section 2 enforcement—important to classroom and academic analysis, but . . . less important to the real world." Baker, *FTC's Use of Alcoa, DuPont Cases Puts More Businesses in Jeopardy*, Nat'l L.J., April 23, 1979, at 23, col. 2. Nevertheless, *Alcoa* does have a significant influence on the "real world." The *Alcoa* doctrine is still cited by counsel and court in private as well as government suits, even though its specific holding is not controlling on what are invariably distinguishable fact patterns. Moreover, the decision has been resorted to of late, purposely or unwittingly, as a weapon to curb efficiency in the name of "competitive equality." *See, e.g.* E.I. DuPont de Nemours & Co., [1979] 3 Trade Reg. Rep. (CCH) ¶ 21,613 (Sept. 4, 1979); Borden, Inc., [1979] 3 Trade Reg. Rep. (CCH) ¶ 21,490 (Nov. 7, 1978). Finally, the decision in *Alcoa* lends direct support to advocates of legislative proposals eliminating the conduct element from government suits for unlawful monopolization. *See* notes 238-254 *infra* and accompanying text.

49. 148 F.2d at 429. "This notion has usually been expressed by saying . . . that there must be some 'exclusion' of competitors; that the growth must be something else than 'natural' or 'normal'; that there must be a 'wrongful intent,' or some other specific intent; or that some 'unduly' coercive means must be used." *Id.*

50. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

is one of deliberateness.[51] Despite this attempt to define a standard, however, the requisite "something else" remains vague.

1. Deliberateness

Deliberateness is variously stated in terms of conduct or intent. The opinion in *Alcoa* has been broadly interpreted[52] to mean that a firm with substantial market power is subject to more stringent rules of fair competition than those promulgated under section 1. The plaintiff is no longer required, as he had been under *Standard Oil,* to prove an unreasonable restraint of trade such as would violate section 1.[53] Under both *Alcoa* and *United Shoe,* culpable conduct may be any voluntary or other than "inevitable" market practices which, when considered as a course of conduct, have the primary effect of preserving existing monopoly power.[54] In terms of intent, the alleged monopolist need not have a specific intent to monopolize. All that is required is a general intent to do the acts which led to the establishment or perpetuation of monopoly power.[55] Even a generalized purpose to attain a monopoly or eliminate competitors is not essential.[56]

51. *See* 1955 Report, *supra* note 2, at 43; Blecher & Woodhead, *Bigness and Badness: A Review of the Requirement of "Deliberateness" in Monopolization,* 10 Sw. U. L. Rev. 117 (1978).

52. The most literal reading of *Alcoa* indicates that a lawfully acquired monopoly may enjoy its status free of antitrust scrutiny only so long as it keeps its prices high, at an entry inducing level, and limits its capacity. Alcoa was found liable for monopolizing the virgin aluminum ingot market because it had aggressively promoted the use of aluminum, a relatively new metal in which it had early patents. 148 F.2d at 430-31. A general intent to monopolize was inferred from the voluntary decision to maintain low profit margins and continuously expand output in anticipation of greater demand. *Id.* Judge Hand may well have rested his judgment on facts outside the trial court record. Some of the more convincing evidence during the trial dealt with Alcoa's systematic purchase of bauxite deposits in the United States and the Caribbean for the alleged purpose of pre-empting access by potential competitors. *Id.* at 422. The intent with which these and other such purchases were made—whether they were needed for an adequate future supply or merely to ensure an absolute barrier to entrants—was a major issue in the case. *Id.* at 432-33. After hearing several witnesses on behalf of Alcoa, the trial judge ruled in Alcoa's favor. The court of appeals was bound by the district court's findings of fact because Judge Hand did not rule as a matter of law that they were clearly erroneous under Fed. R. Civ. P. 52(a). In United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass 1953), *aff'd per curiam,* 347 U.S. 521 (1954), Judge Wyzanski, reviewing the *Alcoa* decision, speculated that Judge Hand did not rest his judgment on Alcoa's coercive practices "perhaps because he was cabined by the findings of the District Court." *Id.* at 341. *See also* Turner, *supra* note 2, at 1219.

53. In *Alcoa,* Judge Hand upheld the trial court's finding of no unlawful practices by Alcoa. 148 F.2d at 432-39. He concluded, however, that Alcoa meant "to 'monopolize' the market, however innocently it otherwise proceeded." *Id.* at 432. In *United Shoe,* 110 F. Supp. at 330, 344, Judge Wyzanski went out of his way to commend the defendant for its lack of any taint or wrongdoing for over forty years.

54. United States v. Aluminum Co. of America, 148 F.2d at 429-32; United States v. United Shoe Mach. Corp., 110 F. Supp. at 343-44.

55. 148 F.2d at 431-32. The element of general intent differs from the more demanding concept of "specific intent," which refers to the conscious purpose of the monopolist to exclude competitors. 1955 Report, *supra* note 2, at 55. The general intent standard has been criticized as "based upon the 'structure' test of monopoly to which intent is irrelevant . . . . Perhaps it would be better so to state than to leave the provision in terms of an intent which in itself can scarcely be meaningful." *Id.* at 56 n.211.

56. 1955 Report, *supra* note 2, at 55-56 & n.211.

The course of conduct approach obliterates the once clear line between conscious exclusion by predation and the inevitable exclusion by efficiencies.[57] Alcoa had argued that its performance was evidence of the skill, energy and initiative with which it had always conducted its business.[58] Indeed, the court acknowledged that Alcoa had stimulated demand and use for aluminum.[59] Moreover, there was impressive evidence that Alcoa's prices were fairly competitive as a result of the close substitutability of other metals and the threat of potential entry by foreign producers.[60] Nevertheless, the court pointed out that as a matter of law the reasonableness of Alcoa's prices and profits was irrelevant to the charge of monopolization.[61] Judge Hand prefaced his discussion of the law with a statement reflecting his belief in the political tradition of antitrust, namely, a dislike of concentrations of private power despite their economic advantages.[62] According to the decision, the purpose of the Act is to "preserve, for its own sake and in spite of possible cost," an industrial structure of small competing units.[63] The court ironically seemed to agree, however, that it would be unfair to punish a firm for sheer industrial success.[64]

Although Alcoa seemed to be doing the things expected and encouraged in a competitive market—keeping prices and profits down, stimulating demand, and being prepared to meet that demand on reasonable terms—the history of Alcoa and the structure of the aluminum industry had a major influence on the result in the case. The court was apparently convinced that Alcoa's monopoly position rested on more than technical and business skill. During the same twenty-five year period in which Alcoa's output increased 800%, no other company had succeeded in breaking into this basic manufacturing industry, despite the industry's widely known technology.[65] Culpable conduct or intent was therefore inferred from the fact that Alcoa had maintained complete dominance over the market for so long.[66] The court concluded that Alcoa "meant to keep, and did keep, [market control]" and intended to " 'monopolize' that market," even though it had engaged in a course of conduct consisting of admittedly "honestly industrial" business policies.[67]

57. R. Posner, *supra* note 2, at 215-16.

58. 148 F.2d at 429-31.

59. *Id.* at 430.

60. *Id.* at 425-26.

61. *Id.* at 427.

62. *Id.* "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.*

63. *Id.* at 429. *But see* notes 27-32 *supra* and accompanying text (Sherman Act intended to protect competition, not competitors).

64. 148 F.2d at 430.

65. *Id.* at 430-31; *see* 1955 Report, *supra* note 2, at 60.

66. 148 F.2d at 430-31; *see* Turner, *supra* note 2, at 1219. Similarly, the net effect of the leasing policies found unlawful in *United Shoe* was the exclusion of all but one significant competitor from the shoe machinery market during United's 50-year history, 110 F. Supp. at 323-25.

67. 148 F.2d at 432.

The *Alcoa* court failed to distinguish natural barriers to entry, those which the monopolist itself had to overcome, from unnatural barriers, those erected by acts designed not to increase efficiencies, but to exclude competitors.[68] Because the course of conduct condemned in *Alcoa* included business practices designed to overcome natural barriers, as well as those aimed at creating artificial ones, the case does not indicate which business practices would not be considered deliberate. The court in *United States v. United Shoe Machinery Corp.* attempted to resolve the ambiguity by defining deliberateness as the achievement or retention of monopoly power by business methods which are more restrictive than necessary.[69]

This "least restrictive alternative" analysis, however, does not adequately define specific standards to guide businessmen and courts; virtually any business practice, no matter how benign, might be found, with benefit of hindsight, to have a less restrictive alternative.[70] Furthermore, the least

68. *See* R. Posner, *supra* note 2, at 92-93. In both *Alcoa* and *United Shoe*, the erection of barriers to entry itself was characterized as exclusionary conduct. Barriers to entry are most commonly relevant to the issue of market power: the greater the barriers, the greater the power of a monopolist to fix prices or exclude competition. *See* Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 12 (N.D. Cal. Oct. 18, 1979). *See generally* L. Sullivan, *supra* note 2, § 23. Some barriers to entry, of course, may result from predatory conduct, such as when one manufacturer preempts the supply and control of an essential input into the manufacturing process. Such barriers are clearly "unnatural." Others, however, such as economies of scale, cost of capital, or advertising, are generally relevant only to a firm's relative power to control prices and restrict output. R. Posner, *supra* note 2, at 92. Some recent cases have attacked as exclusionary conduct just such natural barriers. *See, e.g.*, E.I. Du Pont de Nemours & Co., [1979] 3 Trade Reg. Rep. (CCH) ¶ 21,613 (Sept. 4, 1979) (FTC ruling dismissing complaint charging attempt to monopolization by expanding plant capacity and maintaining low price margins); Borden, Inc., [1979] 3 Trade Reg. Rep. (CCH) ¶ 21,490 (Nov. 7, 1978) (willful maintenance of monopoly power through "unreasonably" low prices, product differentiation, extensive advertising, and successful trade name).

69. 110 F. Supp. at 344-45; *see* C. Kaysen, United States v. United Shoe Machinery Corp. 304 (1956). United Shoe's policy of bundling free repair services to the lease of machines was challenged as unnecessarily restrictive, because it foreclosed competition in the service industry and made it more difficult for smaller machine manufacturers to effectively compete with United. 110 F. Supp. at 340. Nevertheless, bundling of repairs with machines serves several legitimate business purposes. First and foremost, customers prefer it. Furthermore, the practice protects the manufacturer's interest in quality control of its machines and safeguards its legitimate interest in their ownership.

The court pointed, however, to United's varied line of machines, its competitive advantage in size, resources, patents, facilities, and knowledge, its marked capacity to attract inventions, inventors and shoe machinery businesses, and its long-term leases, as additional barriers to entry. *Id.* at 343-44. Many of these barriers were concededly created as a result of United's superior skill and products. *Id.* at 297. Some, however, could have been replaced with less restrictive practices. The exclusionary leasing policy, for example, consisted of United's refusal to sell its equipment and its insistence that users take the equipment on 10-year lease terms. The leases obligated the lessee to use United equipment to its full capacity before using competitors' equipment, or to pay a rental based on full capacity use. United imposed return charges payable if the lessee did not hold the machines for their full 10-year term; in practice, the charges were collected only when the user substituted a competitor's machine for a United machine. *Id.* at 319-22. Because United could have sold its equipment or given shorter leases, the court found an exclusionary course of conduct. *See id.* at 323-24.

70. Counsel for United Shoe artfully pointed out these problems on the unsuccessful appeal to

restrictive alternative analysis fails because it emphasizes competitors, rather than competition. Any inquiry into less restrictive alternatives in the interest of protecting actual and potential competitors must balance that concern against the cost to consumers and efficiency in general. The latter should be considered the overriding concern of the antitrust laws; consumers, arguably, should not be required to pay higher prices to subsidize less efficient rivals in a market.[71]

2. The Thrust-Upon Defense

The deliberateness standard is further obfuscated by the "thrust-upon" defense created in *Alcoa.*[72] In theory, at least, a company which has obtained monopoly power as the inevitable result of market forces and has done nothing more to maintain it is not in violation of section 2. Alcoa, however, was not "the passive beneficiary of a monopoly;" it therefore did not fall "within the exception established in favor of those who do not seek, but cannot avoid, the control of a market."[73]

Monopoly power might be innocently acquired when demand only supports a single large plant, when a change in cost or public taste has driven out all but one supplier, or when one company out of several has survived by virtue of superior skill, foresight and industry.[74] The thrust-upon defense fails,

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the Supreme Court. *See* Brief for Appellant at 57-59, United Shoe Mach. Corp. v. United States, 347 U.S. 521 (1954), *reprinted in* C. Kaysen, *supra* note 69, at 305-06: "It is one thing to limit by law the individual's freedom of choice in the interest of others. It is quite another thing to leave the individual ostensibly free to choose among several courses, none of which is proscribed by the positive or even the moral law, and then to make a case against him because his actual choice is deemed by a court not to be 'economically inevitable.' . . . [Section 2's] prohibition against 'monopolizing' must not be perverted into a positive requirement of conducting business in a fashion which creates a maximum of opportunities for competitors to take it away. This would be contrary to all known laws of economics and to fundamental principles of competition." (footnote omitted).

71. This policy consideration predominates in predatory pricing cases under § 2. *See, e.g.*, Hanson v. Shell Oil Co., 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) ("The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business. The Sherman Act is not a subsidy for inefficiency."); International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714, 725 n.31 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *see* pt. II (B)(1) *infra*.

72. 148 F.2d at 429-30; *accord*, American Tobacco Co. v. United States, 328 U.S. 781 (1946).

73. 148 F.2d at 430-31.

74. *Id.* at 430. In American Tobacco Co. v. United States, 328 U.S. 781, 786 (1946), the Supreme Court suggested the additional case of a company which has made a new discovery or is the original entrant into a new field, and thus is unavoidably possessed of monopoly power. This situation is analogous to the innovator's temporary monopoly over its own innovations and the peripheral products and services associated with them. Such short-lived monopolies, like those existing by reason of patent protection, are the lawful rewards for competitive innovation. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 291 n.49 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); Telex Corp. v. IBM Corp., 510 F.2d 894, 931 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 46 (N.D. Cal. Oct. 18, 1979); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 436-37 (N.D. Cal. 1978), *appeal docketed sub nom.*

however, if the company acquired or retained monopoly power in part by business actions having an exclusionary effect. Thus, a defendant monopoly may escape statutory liability only if it bears the burden of proving that it owes its monopoly position *solely* to inevitable market forces.[75] This burden is virtually impossible to bear, because ostensibly "honestly industrial" acts, which would be used to establish the principal defense, are themselves relied upon to find an illegal course of conduct that maintains monopoly power.[76]

The *Alcoa* court appeared to link what has recently been referred to as "persistent monopoly power"[77] with a general intent to maintain it unlawfully, despite the lack of an independent showing of unlawful conduct.[78] The most striking and important interpretation derived from the *Alcoa* structural test of monopoly is that both conduct and performance become irrelevant to the prima facie case of monopolization, and are relegated to rebutting presumptions resulting from proof of monopoly power.[79] In *United States v. Grinnell Corp.*,[80] the Supreme Court noted, but refused to decide the merits of,[81] the express statement of this rule as set forth in the district court opinion:

> [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 . . . defendant's predatory tactics . . . .[82]

While the Supreme Court went on to distinguish "the willful acquisition or maintenance of [monopoly] power" from "superior product, business acumen,

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Memorex Corp. v. IBM Corp., Nos. 78-350, 78-3236 (9th Cir. Aug. 1, 1979); *see Innovation Competition*, *supra* note 10, at 304-14.

75. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *accord*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 425-26 (1956) (Warren, C.J., dissenting); *see* 3 P. Areeda & D. Turner, *supra* note 2, ¶ 624c.

76. Professor Gelhorn asks: "Is it not *skill* to have 'the advantage of experience,' trade connections and 'the elite of personnel'? What is *foresight* if it does not include 'anticipat[ing] increases in the demand for ingot and be[ing] prepared to supply them' or 'embrac[ing] each new opportunity as it opened'? And what does *industry* mean, if it does not cover Alcoa's investments 'doubling and redoubling its capacity'? Each of these factors was relied upon to find that Alcoa deliberately maintained its monopoly power, yet each comes close to establishing the primary defense also recognized in *Alcoa*." E. Gelhorn, Antitrust Law and Economics 150-51 (1976) (alterations in original); 3 P. Areeda & D. Turner, *supra* note 2, ¶ 626(a); Turner, *supra* note 2, at 1218.

77. *See* National Commission, *supra* note 22, at 141.

78. *See* Turner, *supra* note 2, at 1219. According to Prof. Turner, the result in *Alcoa* can be justified, even assuming the absence of exclusionary conduct, by distinguishing between the acquisition of monopoly power and the persistent retention of monopoly over a substantial period of time. *Id.*

79. *See* 148 F.2d at 427. "Having proved that 'Alcoa' had a monopoly of the domestic ingot market, the plaintiff had gone far enough; if it was an excuse, that 'Alcoa' had not abused its power, it lay upon 'Alcoa' to prove that it had not." *Id.*

80. 384 U.S. 563 (1966).

81. *Id.* at 576 n.7.

82. 236 F. Supp. 244, 248 (D.R.I. 1964), *aff'd in part*, 384 U.S. 563 (1966).

or historic accident,"[83] the Court did not have to consider these defenses due to the presence in *Grinnell* of egregiously anticompetitive conduct of the type which would violate section 1.[84]

Although the Court might have been requiring some tangible culpable conduct to prove unlawful monopolization, the outcome under the *Grinnell* test in any given case will be greatly influenced by which half of the test is emphasized: "willful acquisition or maintenance" or "superior product, business acumen, or historic accident." If too much emphasis is placed on intent and purpose independent of unlawful acts, the standard would bear a striking resemblance to the course of conduct approach.[85] As such, it leaves unresolved many of the questions raised by *Alcoa*. Must a firm with monopoly power forgo heavy investment in research and development or refrain from expanding to meet new needs? Is a monopolist required to disclose trade secrets or prohibited from using restrictive covenants? What constitutes an unreasonable price reduction for a monopolist? *Kodak* and *CalComp* have provided answers to many of these questions by setting up strict objective tests of antitrust behavior.

II. ECONOMIC EVIDENCE OF EXCLUSIONARY INTENT.

Kodak and *CalComp* suggest strict economic tests to identify the existence of exclusionary conduct. They reject the "passive beneficiary" language in *Alcoa* by noting that the contention that any act taken by a monopolist satisfies the literal "monopolizes" language of the statute is an overly broad one,[86] and that acts unreasonably restrictive of competition must be proved.[87]

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83. 384 U.S. at 570-71.

84. *Id.* at 571. The conduct involved in *Grinnell* included pricing below cost, dismantling competing firms, agreements among competitors to divide markets and fix prices and a dominance based upon a "steady stream of acquisitions of competitive enterprises." 236 F. Supp. at 258. Thus, the district court concluded by condemning defendants conduct as *per se* violations: "[T]he companies he controlled had in the most flagrant way violated the clearest aspects, the so-called *per se* rules, of the Sherman Act and were continuing to follow patterns conceived in crime." *Id.* at 259.

85. *See, e.g.,* Telex Corp. v. IBM Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd in part,* 510 F.2d 894 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975). The distinction, in the extreme, between an intent to gain customers by superior competitive strategies and an intent to injure competitors is spurious; it "is about as useful as defining normal sexual conduct as that engaged in to express love and abnormal sexual conduct as that engaged in for personal gratification." R. Bork, *supra* note 25, at 38-39. A successful competitor intends the consequences of his success, *i.e.* the concomitant "injury" to its rivals; such an intent cannot be unlawful by itself. Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125, 144 (D. Mass.), *modified on other grounds,* 284 F.2d 582 (1st Cir. 1960), *cert. denied,* 365 U.S. 833 (1961); *see* 3 P. Areeda & D. Turner, *supra* note 2, ¶ 626a, at 76, ¶ 822a, at 314; Turner, *supra* note 2, at 1219. *Compare* Borden, Inc., [1979] 3 Trade Reg. Rep. (CCH) 21,490 at 21,503-525 (Nov. 7, 1978) (opinion of Comm'r) *with* E.I. du Pont de Nemours & Co., [1979] 3 Trade Reg. Rep. (CCH) 21,613 at 21,749 (Sept. 4, 1979) (Business awareness of the nature and probable results of otherwise lawful conduct does not supply an illegal intent to monopolize).

86. 603 F.2d 263, 274 (2d Cir. 1979); [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,975 n.7 (9th Cir. 1979).

87. [1979-1] Trade Cas. ¶ 62,713, at 77,975.

The significance of the new tests is highlighted by the fact that the courts formulated them to evaluate the conduct of two highly-developed and well-established monopolies. A brief outline of both cases is necessary to a complete understanding of the objective tests for predatory conduct.

A. CalComp *and* Kodak

1. *CalComp*[88]

IBM is one of the largest industrial corporations in the world,[89] having achieved leadership in the computer industry in the mid-1950's and thereafter pioneering the development of many electronic data processing products. IBM manufactures entire computer systems, including central processing units (CPUs) and various peripheral devices.[90] Like other manufacturers, IBM both leases and sells its computers.

CalComp manufactured various peripheral devices, primarily disk drives, plug compatible with only IBM computers.[91] CalComp's business strategy, like that of other plug compatible manufacturers (PCMs) was straightforward: copy and, where possible, improve upon an IBM design. By using reverse engineering techniques, CalComp was able to avoid the expenditures for research and development incurred by IBM, and pass on the savings through lower prices.[92]

CalComp brought suit against IBM, alleging that IBM had adopted policies amounting to predatory price cuts in peripherals. This allegation was rejected because CalComp failed to adduce evidence of below cost pricing.[93] CalComp further argued that IBM's price increase on CPUs shortly after its price cuts in peripherals was an unlawful use of IBM's power in the systems market to

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88. The facts and legal theories involved in *CalComp* are substantially the same as those in several private treble damage actions brought by plug compatible manufacturers (PCMs) against IBM. Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); Transamerica Computer Co. v. IBM Corp., No. C 73-1832 (N.D. Cal. Oct. 18, 1979); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *appeal docketed sub nom.* Memorex Corp. v. IBM Corp., Nos. 78-350, 78-3236 (9th Cir. Aug. 1, 1979); *see In re* IBM Peripheral EDP Devices Antitrust Litigation, 375 F. Supp. 1376 (J.P.M.L. 1974).

89. In 1978, IBM had a net income of $3.1 billion on a gross revenue of $21 billion. *See* Wall St. J., Nov. 13, 1979, at 48, col. 1.

90. The CPU, or computer "mainframe," includes the essential computing hardware and operating software, and communicates information to peripheral devices for printing, display, storage, or other functions. Peripheral equipment, such as disks, tapes, printers, and terminals, is connected to the CPU to enable the data processing system to perform particular functions. Despite the rapid growth of PCM and small business computer manufacturers, IBM still dominates the computer systems market. *See 'King Computer' Still Clobbers the Opposition*, Industry Week, June 11, 1979, at 132.

91. The peripheral products involved here were disk drives, which are devices using magnetic disks similar to phonographic records to store information, and controllers, which are used for communication between the disk drives and the CPU. Generally, such devices exist as external components that may be "plugged into" IBM CPUs. [1979-1] Trade Cas. ¶ 62,713, at 77,971.

92. *Id.*

93. *Id.* at 77,979-80. IBM's price cuts were encouraged so long as its prices remained equal to or above marginal cost. *Id.* at 77,981-82. "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." *Id.* at 77,981.

gain a competitive advantage. This claim also failed, however, because evidence showed that the CPU increase was not expected by IBM to be a complete "wash" with lost revenue resulting from peripheral price reductions.[94] Furthermore, there were compelling independent business justifications for the price increase, including increased manufacturing costs and inflation.[95]

IBM had also coupled its price reductions with new design changes in its disk drive system. The changes required new CPU/peripherals interfaces which differed significantly from previous configurations. No interface information was predisclosed to the PCM companies, thereby inhibiting them from competing for peripherals business until they successfully copied the new devices and interfaces. CalComp claimed that the design changes were not technologically justified, that the new products were inferior, and that the changes were incorporated to frustrate PCM competition. The court, however, found a lawful attempt by IBM to compete on the basis of a "superior product."[96] The court noted, that while there was some evidence supporting CalComp's claim of product inferiority, the new devices were not without advantages over the old and offered similar performance at a lower price.[97]

The court acknowledged that a monopolist is held to a higher standard of conduct than less powerful companies and may be liable for otherwise lawful acts that unnecessarily exclude competition from the relevant market.[98] The court further stated, however, that defendant's acts should be analyzed analogously to those of multiple parties under section 1 of the Sherman Act. In an analysis reminiscent to that of *Standard Oil,* CalComp's allegations were rejected because IBM's acts were not "*unreasonably* restrictive of competition."[99] The outcome would not have been different had the alleged anticompetitive acts, as plaintiff insisted, been considered collectively. In an interesting postscript to its decision, the court noted that it was required, due

94. The court found insufficient evidence to support CalComp's "subsidization" claim and further noted that such subsidization was unnecessary since the disk products were sold at a profit. *Id.* at 77,983.

95. *Id.*

96. In 1970, when IBM introduced its very popular System 370 Model 145, it announced the 2319A as the standard disk drive for use with the 145. The control function for the new IBM disk drive was partially integrated into the CPU, whereas earlier disk products themselves housed the control function. IBM's new communication controllers for the System 370 Models 158 and 168 also integrated the disk control function within the CPU. *Id.* at 77,982. CalComp characterized these design changes as " 'technological manipulation' which did not improve performance." *Id.* Regardless of whether it improved performance, the Model 145/2319A was found to be a lower cost alternative and hence a superior product from the buyer's point of view. *Id.*

97. The court rejected CalComp's claim of nonfunctional design changes by finding some evidence of competitive purpose: "IBM . . . had the right to redesign its products to make them more attractive to buyers—whether by reason of lower manufacturing cost and price or improved performance. It was under no duty to help CalComp or other peripheral equipment manufacturers survive or expand. IBM need not have provided its rivals with disk products to examine and copy, nor have constricted its product development so as to facilitate sales of rival products." *Id.* at 77,983 (citation omitted); *see* 3 P. Areeda & D. Turner, *supra* note 2, ¶ 738, at 286.

98. [1979-1] Trade Cas. ¶ 62,713, at 77,975 (citing Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978)).

99. *Id.*

to the number of issues presented, to consider each instance of anticompetitive "conduct separately for purposes of analytical clarity."[100] The court recognized, however, that " 'plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.' "[101] The court's language must be read, in light of the preceding analysis, not as an endorsement of a general course of conduct approach, but as an acknowledgment of the presumptions in favor of the nonmoving party in considering a motion for a directed verdict.[102]

2. *Kodak*

Kodak is the giant of the photography industry,[103] dominating the manufacture of still cameras,[104] film,[105] and paper used to print color pictures.[106] It also has a ten percent market share in photofinishing services.[107] The firm has rivals at each stage of the photography process, but in many of them it remains largely unchallenged.

Berkey is primarily a photofinisher, but between 1966 and 1978 it also sold still cameras.[108] In 1973, Berkey came out with its own 110 camera to compete with the 110 Kodak model. Berkey made approximately eight

100. *Id.* at 77,984.

101. *Id.* (quoting Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962)).

102. *Id.* at 77,972-74; *see* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 278-79 (2d Cir. 1979) *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427).

103. 603 F.2d 263, 267 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427). In 1977 Kodak had sales of nearly $6 billion and pre-tax profits in excess of $1.2 billion. *Id.*

104. The "amateur conventional still camera" market consists almost entirely of the 110 and 126 instant-loading cameras. Between 1954 and 1973 Kodak never enjoyed less than 64% of the dollar volume; in the peak year of 1964, Kodak cameras accounted for 90% of market revenues. The court pointed out that this success was "no doubt due to the firm's history of innovation." *Id.* at 269.

105. Kodak's position in the film market is even stronger than its hold on cameras. Since 1952, its annual sales in film have never been lower than 82% of the nationwide volume on a unit basis, and 88% in revenues. Kodak's trial counsel told the jury in his summation that " 'the film market . . . has been a market where there has not been price competition and where Kodak has been able to price its products pretty much without regard to the products of competitors.' " *Id.* at 270.

106. While Kodak's market power in the color paper market fell from 94% in 1968 to 67% in 1975, its earnings relative to sales remained virtually constant, averaging 60% for the period. *Id.* at 271.

107. Before 1954, Kodak had a nearly absolute monopoly over the color photofinishing market. With over 95% of color film sales, Kodak sold every roll with an advance charge for processing included. The film/processing "tie-in" resulted in a consent decree in 1954; the Justice Department required Kodak to make its processing technology and materials available to rivals at reasonable rates. Thus, Kodak's share of the processing market plummeted from 96% in 1954, to 17% in 1970, and reached a low of 10% by 1976. *Id.* at 270-71.

108. Berkey's entry into the still camera market dates to its 1966 acquisition of Keystone Camera Company. Berkey accounted for 8.2% of the sales in the camera market during the period of 1970-1977, with a peak of 10.2% in 1976. In 1978, Berkey abandoned this market when it sold its camera division. *Id.* at 269-70.

percent of such camera sales during the complaint period, and sued Kodak for monopolizing the camera and film markets by acts that cost Berkey greater sales in the market. The Second Circuit reversed the jury verdict in Berkey's favor.[109]

The focal point of Berkey's claim was Kodak's introduction in 1972 of the 110 camera system.[110] The 110 was a smaller version of the earlier Instamatics, capable of producing photographs as clear and as large as larger cameras. At the time the development program was initiated in the early 1960's, Kodak personnel considered existing film "quite adequate" for use with the proposed 110 camera. In 1967, however, Kodak decided to develop a new film and photofinishing process, despite concern that these new products might adversely affect competing photofinishers who had no access to the new process.[111] Two years later, it was decided that the introduction of the new film and finishing process should coincide with the introduction in 1972 of the 110 camera in order to increase the marketability of the entire system.

The Second Circuit did not question the district court's finding of monopoly power in the camera and film markets. Berkey challenged the introduction of the Kodak 110 camera system as an illegal attempt to leverage Kodak's

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109. 457 F. Supp. 404 (S.D.N.Y. 1978), *rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427).

110. With respect to Berkey's claims concerning Kodak's introduction of the 110 photographic system, the court noted that the "factors present here are representative of the case as a whole." 603 F.2d at 276. Berkey also claimed to have been injured as a result of lost photofinishing profits, of overcharges paid for Kodak photofinishing equipment, *id.* at 290-92, and of overcharges paid for Kodak film and color print paper. *Id.* at 293-98. The court reversed and remanded for retrial on the photofinishing claims, suggesting that Kodak's refusal to supply its competitors with photofinishing supplies in bulk might have been an unlawful refusal to deal. The court noted, however, that "the purpose of the Sherman Act . . . is not to maintain friendly business relations among firms in the same industry nor was it designed to keep these firms happy and gleeful." *Id.* at 291 (citations omitted). The court also reversed the film and color print paper damage awards, ruling that Judge Frankel's jury instructions on damages were in error. The jury had been instructed that Kodak, if found to have monopolized the markets in question, was fully liable for the entire excess of the monopoly price over the competitive price. The Second Circuit, rejecting this "competitive price" rule, held that a monopolist is liable only for the price increment that is reasonably attributable to its wrongful conduct. *Id.* at 296-98. Proof of causation between a price overcharge and defendant's actionable behavior is extremely difficult to establish, and plaintiff should perhaps be given the benefit of the doubt on close questions. 3 P. Areeda & D. Turner, *supra* note 2, ¶ 630, at 98. The requisite causation will generally be inferred from proof of *some* injury flowing from unlawful acts. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 143-44 (1968) (White, J., concurring); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 702 (1962). Plaintiff need only show that the unlawful conduct was a "material cause" of plaintiff's injury, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. at 123-24, not that it was the only or most substantial cause. Weimer Co. v. Kroehler Mfg. Co., 428 F.2d 726, 729 (7th Cir. 1970); Haverhill Gazette Co. v. Union Leader Corp., 33 F.2d 795, 806 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964).

111. 603 F.2d at 277. One Kodak scientist saw "no need" for a new film, believing that it " 'would raise hell in the photofinishing business, would do little to decrease the cost of the operation, 'and that the ultimate customer would not benefit.' " *Id.* at 277 n.16. The same scientist feared an " 'unethical' attempt to create a 'deliberate . . . incompatibility with systems other than Kodacolor.' " *Id.* at 277 (footnote omitted).

monopoly power in film into the camera, photofinishing services, and equipment markets.[112] Essentially, Berkey advanced three arguments with respect to the 110 system introduction: first, that because Kodak set *de facto* standards for the photography industry, it had a special duty to refrain from surprise innovations, and was required to make adequate predisclosure to enable rivals to stay competitive with it;[113] second, that the introduction of Kodacolor II as part of the 110 system was not technically necessary for the new camera[114] and was instead a use of Kodak's monopoly power in film to gain a competitive advantage in cameras; and finally, that limiting Kodacolor

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112. *Id.* at 282. In United States v. Griffith, 334 U.S. 100 (1948), the Supreme Court held that a firm with lawful monopolies of motion-picture exhibition in towns too small to support more than one movie theater violated § 2 when it used the leverage conferred by the monopolies to obtain advantageous terms from motion picture distributors in larger towns in which it faced competition. *Id.* at 107-09. *Griffith* has been read to the effect that it may also be an "abuse" of monopoly power and a violation of § 2 to use that power to tamper in markets related horizontally or vertically to the market monopolized. *See* 3 P. Areeda & D. Turner, *supra* note 2, ¶ 626f, at 82-83. Presumably, then, under the *Griffith* doctrine, lawful monopolies may be held liable under § 2 for using the leverage conferred by a legal monopoly, e.g., patent protection, to gain a competitive advantage in another product or geographic market.

Unlawful leveraging may be found where a practice is accompanied by coercive use of monopoly power. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275-76 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427). This latter rule strongly links two-market conduct under § 2 to tying arrangements under § 1. *Id.* at 275-76. Firms with substantial power over one product are prohibited from tying the sale to that of another product. Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); Times-Picayne Publishing Co. v. United States, 345 U.S. 594 (1953); International Salt Co. v. United States, 332 U.S. 392 (1947); Smithkline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir.), *cert. denied,* 439 U.S. 838 (1978) (defendant misused monopoly power when it linked the purchase of competitive drugs to drugs over which it had a valid monopoly); *see* Bowman, *Tying Arrangements and the Leveraging Problem,* 67 Yale L.J. 19 (1957). Coercion is most often found when a monopolist refuses to deal with firms which need the monopolist's products to effectively compete. *See, e.g.,* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927). For a thorough review of the law on refusals to deal by a monopolist, see Andrew Byars v. Bluff City News Co., No. 17-1227, slip op. at 19-35 (6th Cir. Oct. 16, 1979). *See also* 3 P. Areeda & D. Turner, *supra* note 2, ¶¶ 725-726; Note, *Refusals to Deal by Vertically Integrated Monopolists,* 87 Harv. L. Rev. 1720 (1974).

113. Kodak, with a monopoly in both film and cameras, "was in a position to set industry standards. Rivals could not compete effectively without offering products similar to Kodak's." 603 F.2d at 279. Throughout the 1960's, Kodak had selectively disclosed as "a matter of judgment" innovations to competitors to ensure that the industry could meet the demand for complementary goods and services required by new Kodak products. Although it initially intended not to distribute plans of the 110 system, Kodak agreed to limited disclosure for a fee under pressure of threatened litigation. Berkey paid $60,000 for less than two months advance knowledge of the 110 plans; this notice was far from adequate to permit Berkey to have its own products ready when the 110 was introduced. *Id.* at 279-81.

114. *Id.* at 279. To meet the introduction deadline, several problems with the new film, Kodacolor II, remained unresolved. The new film was grainier than had been anticipated, although it was still considered superior in that respect to Kodacolor X. *Id.* at 278 n.17. Moreover, it had a shorter shelf life than its developers expected, and was deceptively advertised as having a shelflife more than twice as long as it actually had. *Id.* at 288 n.41.

II to the 110 format unlawfully foreclosed competition by other manufacturers in existing formats.[115]

In rejecting Berkey's claims, the Second Circuit endorsed the view that a monopolist is "encouraged, by § 2 to compete aggressively on the merits."[116] The court agreed that introduction of the Kodacolor II/110 camera system was part of a plan by which Kodak sought to use its combined film and camera capabilities to bolster faltering camera sales. None of Kodak's acts, however, were unreasonably restrictive of competition; they merely represented "superior products" and the "process of invention and innovation."[117] Most significant is the fact that the *Kodak* court expressly rejected the broad reading of *Alcoa.*[118]

B. *Application of Objective Tests to Particular Business Practices.*

Kodak and *CalComp* have extended the once extraordinary defense in favor of skill, foresight and industry to ordinary business practices by creating a presumption that such practices are procompetitive. Plaintiffs bear a substantial burden of proving willful maintenance of monopoly power through anticompetitive acts which do not have legitimate business justifications. Under this approach, examination of a monopolist's conduct generally ends in its favor, without inquiry into intent, if a given price reduction results in a profit,[119] if a product innovation incorporates a price or performance improvement,[120] if a marketing practice reduces costs and prices,[121] or if sales and marketing practices in general are common to the industry.[122]

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115. For 18 months after the 110 system was introduced, Kodacolor II was produced only in the 110 format. Because no other firm as yet had a 110 on the market, thereby compelling consumers who wished to use the "remarkable new film" to buy a Kodak camera, Berkey claimed it lost camera sales. The court conceded that the restriction of the new film to the 110 format without legitimate justification might be an unlawful use of monopoly power in one market to foreclose competitors in another. The court held, however, that Berkey failed to establish more than *de minimus* injury. *Id.* at 288-89; *see* notes 174-204 *infra* and accompanying text.

116. 603 F.2d at 281.

117. *Id.* at 281, 286-87.

118. *Id.* at 273-74.

119. California Computer Prods. Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,981-82 (9th Cir. 1979); Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 50 (N.D. Cal. Oct. 18, 1979); *see* pt. II (B)(1) *infra.*

120. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263,286-87 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 439 (N.D. Cal. 1978), *appeal docketed sub nom.* Memorex Corp. v. IBM Corp., Nos. 78-350, 78-3236 (9th Cir. Aug. 1, 1979); *see* pt. II (B)(2) *infra.*

121. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,981 (9th Cir. 1979). Some practices merely reflect efficiencies in production, marketing, and distribution, which are encouraged rather than condemned by the antitrust laws. Hence, a large firm does not violate § 2 by merely enjoying the competitive advantages afforded by integrated corporate structure—"more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth." 603 F.2d at 276.

122. Telex Corp. v. IBM Corp., 510 F.2d 894, 925 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975). A monopolist is permitted to meet competitive threats with any ordinary marketing

1. Pricing Behavior

One of the persistent problems in the area of single market monopolization is the extent to which a monopolist may reduce prices in response to competitive challenges to its dominant market share.[123] When a dominant firm charges higher than competitive prices it creates a "price umbrella" under which competitors prosper, thereby inducing new entry into the market.[124] At some point, the dominant firm will be compelled to lower its prices to recapture lost sales revenue. By consciously planning to recapture eroding market power, the monopolist, under the *Alcoa* standard, is deliberately maintaining monopoly power in violation of section 2.[125]

Proof of below cost, or "predatory," pricing under the *Alcoa* view is not necessary. To condemn price reductions as such, however, would be a disincentive for monopolists to engage in vigorous price competition. Hence, the circuit court in *CalComp* agreed that IBM had a right, as has any company, "to respond to the lower prices of its competitors with reduced, but still substantially profitable, prices on its own products."[126] The court held that below cost pricing is *per se* unlawful, and that above cost pricing is protected by a presumption of legality.[127] Such an objective test is required so as not to discourage or punish aggressive price competition, thereby avoiding an "ill-advised reversal of the Supreme Court's pronouncement that the Sherman Act is meant to protect the competitive process, not competitors."[128] In effect, the exception created by *Grinnell* in favor of "business acumen" has been expanded to include "shrewdness in profitable price competition."[129]

CalComp adopted the Areeda and Turner approach to predatory pricing.[130]

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methods common to the industry, so long as the success of its practice or policy does not depend on monopoly power for its success. *Id.* at 927.

123. *See generally* 3 P. Areeda & D. Turner, *supra* note 2, ¶¶ 710-722; *Predatory Pricing*, *supra* note 2.

124. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 n.12 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,978-79 (9th Cir. 1979); Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 46-47 (N.D. Cal. Oct. 18, 1979).

125. *E.g.*, Telex Corp. v. IBM Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd* 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); Borden, Inc., [1979] 3 Trade Reg. Rep. (CCH) ¶ 21,490, at 21,502, 21,506-510 (opinion of Comm'n), 21,517-524 (concurring opinion of Comm'r Pitofsky), (Nov. 7, 1979); *see* note 85 *supra*.

126. [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,980 (9th Cir. 1979).

127. *Id.* at 77,980-82.

128. *Id.* at 77,980.

129. *Id.* at 77,981.

130. 3 P. Areeda & D. Turner, *supra* note 2, ¶¶ 711-15; *Predatory Pricing*, *supra* note 2. Pricing below short-run marginal costs or average variable costs of production are conclusively presumed unlawful under the Areeda and Turner view. 3 P. Areeda & D. Turner, *supra* note 2 ¶ 711(d), at 153-54; *Predatory Pricing*, *supra* note 2, at 712. Areeda and Turner's cost-based standard for defining illegal predatory practices has been criticized. R. Posner, *supra* note 2, at 184-96; Greer, *A Critique of Areeda and Turner's Standard for Predatory Practices*, 24 Antitrust Bull. 233 (1979); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977). The Areeda and Turner standard was considered and rejected by the National Commis-

A price is considered predatory if it is below short-run marginal costs,[131] or as surrogate, average variable costs, of production.[132] Firms, monopolists included, are encouraged to engage in aggressive price competition, reducing prices to the point of marginal costs.[133] This price level is the "competitive and socially optimal result,"[134] and will ordinarily cause only the elimination of less efficient competitors.[135]

It is not clear to what extent, if any, prices above marginal costs may be deemed, in light of other circumstances, exclusionary.[136] Some courts have held that a prima facie case for section 2 cannot be established without proof of below cost pricing.[137] *CalComp* may not go that far. The court, following

sion to Review Antitrust Laws and Procedures. National Commission, *supra* note 2, at 149-51, 165-66; *see* Fox, *In Defense of the Natl. Comm.'s Attempt-to-Monopolize Amendment*, Nat'l L.J., May 14, 1979, at 24, col. 1.

131. "Marginal cost" is defined as the cost to produce one more unit of output. *See* Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 857 n.8 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); 3 P. Areeda & D. Turner, *supra* note 2, ¶ 712, at 155. The "short run" is defined as "the period in which the firm cannot replace or increase plant equipment." *Id.* ¶ 712, at 155-56.

132. "Average variable cost" is defined as "the sum of all variable costs divided by output." 3 P. Areeda & D. Turner, *supra* note 2, ¶ 712, at 155; *see* Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 858 n.11 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). One notable difference between the 1975 and 1978 versions, both discussed *supra* note 2, of the predatory pricing standards espoused by Areeda and Turner, is that under their latter version average variable cost can substitute for short-run marginal cost only when accounting records do not permit determination of marginal cost. 3 P. Areeda & D. Turner, *supra* note 2, ¶¶ 715c-715d. The court in *Janich Bros.* held that "[a]verage variable cost is likely to approximate marginal cost." 570 F.2d at 858 (citations omitted) (footnote omitted). Similarly, Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977), determined that "because marginal cost is often impossible to ascertain" average variable cost was a sufficient judicial substitute.

133. [1979-1] Trade Cas. ¶ 62,713, at 77,981; *see* 3 P. Areeda & D. Turner, *supra* note 2, ¶¶ 711-722; *Predatory Pricing*, *supra* note 2, at 709-16.

134. *Predatory Pricing*, *supra* note 2, at 711.

135. [1979-1] Trade Cas. ¶ 62,713, at 77,981 (citing Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 857 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978), and Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977)).

136. While pricing below average variable or short-run marginal costs is clearly *per se* unlawful, the legal consequences of pricing above that level are still unclear. In their 1975 article, Professors Areeda and Turner suggested that pricing conduct should be conclusively presumed legal if price levels exceeded either defendant's average variable cost or defendant's short-run marginal cost. *Predatory Pricing*, *supra* note 2, at 733. In their 1978 treatise, Areeda & Turner concluded that such pricing should only be presumed legal. P. Areeda & D. Turner, *supra* note 2, ¶ 711(d), at 154. Following Areeda & Turner's 1978 approach, the courts in *CalComp* and ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *appeal docketed sub nom.* Memorex Corp. v. IBM Corp., Nos. 78-350, 78-3236 (9th Cir. Aug. 1, 1979), protected above marginal cost pricing with a presumption of legality. Neither court, however, adequately defined the type of evidence which would rebut such a presumption.

137. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Hanson v. Shell Oil Co., 541 F.2d 1352, 1358-59 & n.6 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). The charge in both cases was an attempt to monopolize based solely on predatory pricing claims. The standard may be less severe in actual monopolization cases where there is some evidence of other associated anticompetitive conduct. Trans-

Areeda and Turner, suggests that predation may be found where the monopolist sets his prices below his short-run profit-maximizing rate, although they remain above marginal cost.[138] In a market with high barriers, the monopolist might be required to keep his prices high enough to induce entry.[139] Nevertheless, the circuit courts in *CalComp* and *Telex Corp. v. IBM Corp.*,[140] a case with a similar fact pattern, appear to insulate above cost pricing from further scrutiny. Although both courts only created a presumption that pricing above marginal costs is lawful,[141] neither court suggested the type of evidence, if any, required to rebut the presumption. The court in *Telex* expressly refused to look beyond the acts involved to the substantial

america Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 44-45 (N.D. Cal. Oct. 18, 1979).

138. [1979-1] Trade Cas. ¶ 62,713, at 77,981. The court recognized "that refinement of the marginal or average variable cost test will be necessary as future cases arise. For instance, limit pricing by a monopolist might, on a record which presented the issue, be held an impermissible predatory practice." *Id.* The court goes on, however, to enumerate two instances in which pricing should not be given to a jury for consideration: 1) "substantial proof that [the] price cuts were highly profitable" and 2) evidence that the "reductions were a response to lower-priced competition." *Id.* at 77,982.

139. P. Areeda & D. Turner, *supra* note 2, ¶ 711-722; *see Predatory Pricing, supra* note 2, at 733. Limit pricing, that is, pricing below the monopolist's short-run profit maximizing price, has yet to be successfully attacked as predatory. This may reflect a reluctance by courts to condemn monopolists for not keeping its prices *high* enough, or it may merely reflect the administrative difficulties of policing such price behavior. *See* 3 P. Areeda & D. Turner, *supra* note 2, ¶ 714b, at 160-61. In International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir. 1975), the Fifth Circuit recognized the possibility of predation where a monopolist charges a price below its short-run profit-maximizing price. This standard, which might find predation when the monopolist's price is above its average costs, should be applied "only when the barriers to entry are extremely high." *Id.* at 724-25 n.31. The Ninth Circuit acknowledged the possibility of unlawful limit pricing in Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 n.5 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977), but noted with reservation that "[t]here is some question whether [limit pricing] should be considered predatory: it only discourages inefficient new entrants who must have higher prices to survive." *Id.* In California Computer Prods. Corp. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,981 (9th Cir. 1979), the Ninth Circuit again acknowledged that the marginal cost standard requires further "refinement," and that limit pricing might on other facts be held unlawful. The latest refinement of the marginal cost standard adopts an average total cost standard for predatory pricing and appears to reject any possibility of unlawful limit pricing above the point of total costs. Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 50 (N.D. Cal. Oct. 18, 1979). All pricing above that level is protected by a conclusive presumption of legality despite the existence of significant entry barriers. *Id.* Memorex bases a large part of its appeal to the Ninth Circuit on their limit pricing claims; a clearer statement of the status of limit pricing awaits the Ninth Circuit's decision. Brief for Appellant, ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *appeal docketed sub nom.* Memorex Corp. v. IBM Corp., Nos. 78-3050, 78-3236 (9th Cir. Aug. 1, 1979).

140. 510 F.2d 894 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975).

141. California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,982 ("[W]e do not foreclose the possibility that a monopolist who reduces prices to some point above marginal or average variable costs might still be held to have engaged in a predatory act because of *other aspects of its conduct.*" (emphasis added)); *accord,* Telex Corp. v. IBM Corp., 510 F.2d at 926.

evidence of specific intent to destroy rivals.[142] Both courts refused to infer a general intent to monopolize from allegations of an unlawful course of conduct.[143]

The objective standard of predatory pricing proposed by Areeda and Turner, and embraced enthusiastically by several courts, is incomplete.[144] The Areeda and Turner analysis only accounts for the short-run[145] and fails to consider the strategy behind pricing decisions.[146] There are strong implications of unreasonable conduct restricting competition, "[i]f a monopolist, in response to actual or threatened entry into a previously controlled market," reduces its price below its total costs but above short-run marginal costs.[147] In *Telex,* for example, there was evidence that IBM timed its otherwise lawful

142. 510 F.2d at 926-28. The district court found numerous business justifications for IBM's price cuts and leasing policy that, although "convincing under different circumstances, [are] overpowered by IBM's monopoly position . . . and the rather clear indication that [IBM's] action was directed not at competition in an appropriate competitive sense but at competitors and their viability as such." 367 F. Supp. 258, 299 (N.D. Okla. 1973), *rev'd,* 510 F.2d 894 (10th Cir. 1975), *cert. dismissed,* 423 U.S. 802 (1975).

143. The court of appeals in *Telex* acknowledged the substantial evidence that IBM planned its response to make it more difficult for Telex to refinance its leasing operations, but gave it little weight. 510 F.2d at 928; *see* note 38 *supra.* The court held that IBM's response was reasonable since its prices were still profitable and represented ordinary marketing methods available to others in the market. 510 F.2d at 928. Similarly, the court in *CalComp,* while conceding the possibility that profitable pricing might still be predatory because of other aspects of IBM's conduct, did not find predatory practices on the basis of evidence of design changes or offsetting price increases for CPUs. [1979-1] Trade Cas. ¶ 62,713, at 77,983.

144. *See* note 130 *supra.*

145. The more relevant inquiry is into a firm's long-run marginal costs, since a "predator operates strategically in the long run." Greer, *supra* note 130, at 243. Because reliable estimates of long-run marginal costs are almost always unavailable, average total costs may serve as a "reasonable but admittedly imperfect surrogate." *Id.* at 244-45; *see* Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 41-43 (N.D. Cal. Oct. 18, 1979) (adoption of a total average cost test for predatory pricing).

146. *See* Transamerica Computer Co. v. IBM Corp., No. C 73,1832, slip op. at 53-55 (N.D. Cal. Oct. 18, 1979); Greer, *supra* note 130, at 240-41; Scherer, *supra* note 130, at 883-90; Williamson, *supra* note 130, at 291. The distinction between the long-run purpose and effect of competitive behavior as opposed to its short-run effect, was recognized early by Judge Hand in United States v. Corn Prods. Ref. Co., 234 F. 964 (S.D.N.Y. 1916), *appeal dismissed,* 249 U.S. 621 (1919): "While the [Sherman Act] . . . 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 neighbors, who may yet succumb to concerted competition apparently more serviceable, but only because it is temporary . . . . [N]early 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." *Id.* at 1012-13.

147. Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 43 (N.D. Cal. Oct. 18, 1979).

price reductions on peripheral equipment to reduce its competitors' revenues when the competitors were most vulnerable.[148] Such evidence would appear to be relevant to the purpose for which IBM adopted its price reductions: to compete on the merits for increased sales or to harm the financial stability and therefore the viability of specific competitors. Protecting the pricing behavior with a conclusive presumption of legality allows established monopolists the freedom to eliminate equally or more efficient rivals from the market even if the monopolist's purpose is exclusionary.[149]

The theory that pricing at or above marginal cost will only eliminate less efficient firms is not in all cases true.[150] The marginal cost theory does not account for different "structures of cost."[151] Consider a small firm which has recently entered a market, induced by the high price umbrella of the dominant firm. A small firm may have substantially lower fixed costs than the larger established firm, but may also have significantly higher variable costs of production.[152] Thus, although total costs for the smaller firm might be the same or even less than those of the dominant firm, it still can be priced out of the market by prices set at or above the dominant firm's average variable cost.

148. IBM's competitive response to PCM competition was initiated after IBM management had made several detailed studies of the peripherals market, of how its own market share could be increased, and of the competitive vulnerability of its rivals. 510 F.2d 894, 921. In 1970, an IBM task force was established which studied in detail the products, financial condition, management, and general viability of its competitors in the market. The task force concluded that Telex was in a vulnerable financial position, that its cash flow was inadequate to refinance its own lease base, and that IBM could exploit that vulnerability by sharp price cuts and increased leasing of its own equipment. 367 F. Supp. 258, 294-95 (N.D. Okla. 1973), *rev'd*, 510 F.2d 894 (10th Cir. 1975). The district court also found that IBM reduced its price on memory products and increased prices on CPUs "with the primary purpose of creating barriers to entry for potential plug compatible memory competitors." *Id.* at 304.

149. The court of appeals in *Telex* reversed the district court's decision, holding that because IBM's price reductions were not below cost, it could not be liable for violating § 2 even if its purpose was to destroy Telex. The court rejected the trial court's inference of monopolistic intent from the conclusions of the IBM task forces and the subjective intent of management. 510 F.2d at 928; *see* note 148 *supra*. The court expanded the "thrust upon" defense to include any voluntary, as well as involuntary, act by a monopolist to preserve or expand its monopoly power, so long as the act is an "ordinary business practice" which does not depend upon the existence of monopoly power for its success. 510 F.2d at 925-26.

150. Courts adopting the Areeda and Turner standard have not always acknowledged its potential anticompetitive effect. *See* California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,981 (9th Cir. 1979) ("[O]nly less efficient firms will be disadvantaged" by a marginal cost standard); Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) (only the less efficient are threatened by a marginal cost rule); International Air Indus. Inc. v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (equally efficient firms may be driven out of business by marginal cost pricing); Weber v. Wynne, 431 F. Supp. 1048, 1060 n.16 (D.N.J. 1977) (equally efficient firms may be threatened by marginal cost pricing, but more efficient rivals are safe).

151. Scherer, *supra* note 31, at 5.

152. *Id.* at 70. The author would like to express his appreciation to Barbara Epstein, an economist with Horace J. De Podwin Associates, New York, for her insights into the implications of differing "cost structures" on a predatory pricing standard based on average variable costs. *See* B. Epstein, *Politics of Trade in Power Plant* 110-11 (1971).

As an illustration, the court in *Transamerica Computer Co. v. IBM Corp.*[153] found that IBM's marginal costs were as little as fifty percent of its average costs.[154] The court pointed out that, as a result, IBM had the ability to destroy rivals who were twice as efficient in terms of average costs simply because IBM "had a bigger bankroll."[155] Under these circumstances, "[e]fficiency is no longer the sole determinant of survival;" once price falls below the monopolist's total cost, a rival firm's staying power in terms of cash reserves becomes paramount.[156] A better test, then, is one based on total, or "full cost."[157] Because pricing below that level but above short-run marginal is excusable under certain circumstances,[158] evidence of such pricing behavior should be coupled with a limited inquiry into its intent or purpose.[159]

Monopolists condemned under the marginal cost test are almost certainly genuine predators, and therefore monopolistic intent need not be examined.[160] But the test is too lenient: while it avoids "branding sheep as wolves," it is subject to "mistaking wolves for sheep."[161] Insulating all pricing above marginal cost from antitrust scrutiny would be a "defendant's paradise."[162] The test tends to see innocence where guilt may be present; and more importantly, it involves a general rejection of evidence that is relevant if not indispensable to an accurate determination of predatory conduct, that is, evidence of predatory intent.

Hence, where the alleged conduct is ambiguous, it is essential to consider the effect and purpose of the pricing behavior.[163] Intent has always played a

153. No. C 73-1832 (N.D. Cal. Oct. 18, 1979).

154. *Id.*, slip op. at 51.

155. *Id.* Areeda & Turner, in discussing their cost-based standard of predation, acknowledge the possibility that an equally efficient rival may be eliminated from a market or prevented from entering it if a monopolist is permitted to price at his marginal costs. *Predatory Pricing*, *supra* note 2, at 710. They consider this result, though "not a happy one," justified because of the heavy administrative burden entailed in policing temporary price cuts without unduly hindering valid price competition. 3 P. Areeda & D. Turner, *supra* note 2, ¶ 714c, at 161. They do not, however, acknowledge the possibility that a more efficient firm could be destroyed.

156. No. C 73-1832, slip op. at 50.

157. "Total cost" is the sum of fixed and total variable costs. Total cost divided by output is average cost, or "full cost." 3 P. Areeda & D. Turner, *supra* note 2, ¶ 712, at 155.

158. Prices below total cost might be reasonable, for example, if the monopolist was merely liquidating its excess or obsolete merchandise. Williamson, *supra* note 130, at 317-18. Less than full cost pricing might be justified if reduced demand forced the monopolist to minimize losses by selling at the best price the market offered. R. Posner, *supra* note 2, at 193.

159. Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 59 (N.D. Cal. Oct. 18, 1979). Contemporaneous evidence of intent in these circumstances may be appropriate to help characterize the nature of the acts taken: "whether [the monopolist] thought it was cutting losses or cutting throats." *Id.* at 60.

160. *See* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

161. Greer, *supra* note 130, at 239; *see* National Commission, *supra* note 22, at 149-50. (Recommendation of a more flexible analytical approach "especially as it applies to conduct by a firm with a dominant market position"). *Id.* at 149.

162. Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 57 (N.D. Cal. Oct. 18, 1979) (citing Williamson, *supra* note 130, at 305).

163. United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 288 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); *see* note 14 *supra*.

central role under section 2;[164] it can be shown by a wide variety of economic and noneconomic evidence. To avoid condemning legitimate and desired price reductions, however, the requisite showing must be "substantial."[165] It can be inferred, for example, by evidence that the conduct was coercive or unusual,[166] or by evidence that the monopolist increased prices immediately after regaining its dominant position.[167]

2. Design Changes

A dominant firm which produces a product in its monopoly market, as well as complementary accessories which must be compatible with the main product, exercises a great deal of control over the complementary markets.[168] IBM, for example, developed its products on a system basis, and selected design alternatives which would enhance the commercial attractiveness of other IBM products.[169] Kodak conceded that it marketed Kodacolor II simultaneously with the new 110 Instamatic in part to help bolster faltering camera sales and increase the marketability of the entire system.[170] In finding in favor of the multiproduct monopolist, *Kodak* and *CalComp* rely in part on the Supreme Court's holding in *United States v. Griffith*:[171] a firm has unlawfully monopolized if it uses its monopoly power in one market to foreclose competition, gain a competitive advantage or destroy a competitor in different markets.[172] Conduct, therefore, violates section 2 when monopoly power is a necessary condition for its use.[173]

Kodak and *CalComp* hold that a competitor cannot complain of product

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164. *See* Standard Oil Co. v. United States, 221 U.S. 1, 75 (1911); *see* note 37 *supra*.

165. *See* Greer, *supra* note 130, at 245.

166. Courts have only recently delineated objective standards of predatory pricing; earlier courts had generally settled upon proof of intent plus pricing below average total cost. *See, e.g.*, American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Corn Prods. Ref. Co., 234 F. 964, 1013-15 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919); *cf.* Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 43 (N.D. Cal. Oct. 18, 1979) (strong implications that prices below average total cost are unreasonable).

167. *See* Greer, *supra* note 130, at 247-50. Other indicia of intent suggested by Greer include, *inter alia*, "long-term business plans of injurious price-cutting activity . . . . [p]enetrating studies of the victims' financial weaknesses and staying power under adverse price circumstances . . . . [*i*]*nitiating* price cuts below average total cost and holding to those below cost prices for a considerable time span." *Id.* at 248 (footnote omitted).

168. Such power by itself is not condemned, because it merely reflects competitive advantages afforded by a vertically-integrated corporate structure. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); *see* Bork, *Vertical Integration and the Sherman Act*, 22 U. Chi. L. Rev. 157 (1954).

169. California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,982-83 (9th Cir. 1979).

170. 603 F.2d at 285.

171. 334 U.S. 100 (1948).

172. *Id.* at 107.

173. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); Telex Corp. v. IBM Corp., 510 F.2d 894, 926-27 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 9 (N.D. Cal. Oct. 18, 1979); *see* note 112 *supra*.

introduction or change *simpliciter.*[174] Rather than being exclusionary, the ability to innovate and develop superior products is regarded as a natural result of integration,[175] and an essential element of lawful competition.[176] Nevertheless, new product introductions are not ipso facto immune from antitrust scrutiny, but a finding that a monopolist is unreasonably tying the sale of one product to another is not made unless substantial coercion over consumers is present.[177] Doubts about the technical deficiencies of the innovation does not by itself evidence an intent to monopolize, nor does it provide the element of coercion.[178] Rather, the test of the reasonableness of a product introduction is its success in the marketplace.[179]

In *CalComp,* for example, the court refused to question business or engineering decisions as long as the product in question had enjoyed some success in the market and at least some consumers believed the new or redesigned products offered some price or performance improvement.[180] The court concluded that IBM's new disk drive system, which was less expensive than the old, satisfied a legitimate consumer preference in terms of price and performance. These two criteria were not considered separately, because the court found that an equivalent product at a lower price represents to customers a "superior product."[181] Hence, the design changes introduced by IBM were regarded as a genuine technological innovation, rather than an attempt at impairing or destroying competition in the plug-compatible market.

In *Kodak,* Berkey demonstrated that the Kodacolor II film was not necessary to bring the new 110 camera to market. Moreover, there was evidence that the new film was in some ways inferior to the old.[182] Both facts, it was argued, tended to show that the film was introduced with the 110

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174. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d at 286. The court stated that "it is not the product introduction itself, but some *associated conduct,* that supplies the violation." *Id.* at 286 n.30 (emphasis added). The court appears to require some actionable conduct associated with the product introduction, for example, an unlawful tie-in or refusal to deal.

175. *Id.* at 276, 283.

176. *Id.* at 286.

177. *Id.* at 286 n.30, 287. When, however, consumers have a viable alternative in other products, the question whether a product is "superior" can only be inferred from the reaction of the market. *Id.* Success in the marketplace is a reliable barometer of "superior products" only so long as the monopolist does not exercise coercion over customers. *Id.* at 287.

178. *Id.* at 286-87. The technological desirability of a product change—its relative quality—is relevant to the question of monopolistic intent only when an inference of coercion exists. *Id.* at 287 n.39; *see* Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1330 (5th Cir. 1976).

179. 603 F.2d at 287.

180. [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,982-83 (9th Cir. 1979).

181. *Id.* at 77,982. It would appear that a monopolist could redesign its products with the purpose of excluding competition by merely offering an equivalent function at a lower price. Even where there is a dispute over the quality of the design change, some courts have suggested that no inquiry into intent should be made and the design change should be presumed legal. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d at 287; ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 439 (N.D. Cal. 1978), *appeal docketed sub nom.* Memorex Corp. v. IBM Corp., Nos. 78-350, 78-3236 (9th Cir. Aug. 1, 1979).

182. *See* notes 114, 177-78 *supra* and accompanying text.

camera solely to tie the sales of cameras to Kodak's powerful position in the film market. Furthermore, Berkey alleged that a monopolist has a duty to give its competitors in the complementary market advance knowledge of design changes in primary products, so that the competitors can be "at the starting line" when the new product is introduced.[183]

The district court's treatment of these claims was a clear application of the course of conduct approach.[184] The court reluctantly allowed the "possibly difficult, but seemingly appropriate" question of the relative character of the new product to go to the jury.[185] The jury was cautioned that it did not sit to second-guess business judgments as such, and that the quality of Kodacolor II was not a concern "for its own sake."[186] The quality, however, was considered to "cast light on whether the securing of monopoly power in the camera market was a natural and innocent business development or the kind of willful acquisition condemned by *Grinnell*."[187] Similarly, under the district court analysis, failure by a monopolist to predisclose in light of some unspecified associated conduct may be an exclusionary course of conduct[188] despite the fact that nondisclosure is a reasonable method of competition.[189] Apparently, the associated conduct may be some unrelated anticompetitive acts or intent, or merely the cumulative effect of all of plaintiff's evidence.[190] Although it is not clear what other conduct the jury considered in finding the unlawful course of conduct,[191] Berkey had argued that Kodak forfeited its right to innovate without predisclosure by previously refusing to supply its camera competitors with the film formats on economical terms.[192] Thus, the

183. 603 F.2d at 285.

184. 457 F. Supp. 404, 437 (S.D.N.Y. 1978), *rev'd in part*, 603 F.2d 263 (2d Cir. 1979). The district court acknowledged that its instructions to the jury reflected "a direct application of the principles of *Alcoa* and *United Shoe*." *Id.*

185. *Id.* at 416.

186. *Id.* at 416 n.12.

187. *Id.* at 416.

188. 603 F.2d at 281 (citing the district court's instruction to the jury); *see* note 16 *supra*.

189. 603 F.2d at 281.

190. One commentator has characterized judicial approaches to the specific intent required in attempt cases as falling into one of three categories: 1) the legitimate purpose approach, 2) the unfairness approach, and 3) the gestalt approach. Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121, 1137 (1973). Under the "gestalt approach," practices from which intent is to be inferred are admitted into evidence and submitted to the jury with broad instructions defining unlawful intent as an intent to acquire monopoly power or to destroy a competitor. *Id.* at 1146. The jury may infer unlawful intent "from all the practices viewed as a whole, without any discussion or examination of each individual practice or activity." *Id.* at 1147. The gestalt approach presents no less a problem in cases of actual monopolization, where courts instruct juries to consider the evidence in light of concepts like "honestly industrial," "exclusionary," and "anticompetitive." *See* Malina, *Recent Developments in Monopolization Litigation*, 47 A.B.A. Antitrust L.J. 1135 (1979).

191. The court of appeals stated that "the better practice [in such a complex jury case] would have been to require special verdicts or the submission of interrogatories . . . pursuant to Fed. R. Civ. P. 49." 603 F.2d at 279. Review of the case was made difficult by the court's lack of knowledge of the precise jury findings on several specific issues. The court did not express its view on whether such actions may be too complex to be tried to a jury. *Id.* at 279 n.20.

192. 603 F.2d at 284-85.

jury might have inferred the duty to disclose from Kodak's alleged past refusal to deal with competitors in the camera market.[193]

The Court of Appeals rejected the course of conduct approach and concluded that inquiry into the merits of the product in question is generally useless.[194] The court further held that withholding from others advance knowledge of one's new product is presumed lawful, rebutted only by convincing evidence that predisclosure is the only remedy for some present and related anticompetitive conduct.[195] The imposition of these objective standards was necessary to prevent the "sluggishness the Sherman Act was designed to prevent;"[196] any success achieved through the process of invention and innovation should clearly be encouraged.[197] The ability to introduce new products without predisclosure is "a benefit of integration and not, without more, a use of [the monopolist's] power in the [main] market to gain a competitive advantage in [the complementary one]."[198] The "lead time" advantage over competitors is an acceptable incentive for the monopolist.[199]

Moreover, failure to use objective standards to govern product innovation results in great uncertainty. The court reasoned that it is difficult to conceive of conditions under which a business, making research and development decisions, would possess the "omniscience" to anticipate all instances in which a jury might retrospectively conclude that predisclosure was warranted. The court found it equally difficult to discern workable guidelines to aid the firm's decision.[200] Similarly, the "necessity" of Kodacolor II to the 110 camera was a "slippery concept," as was the question of product quality.[201] The only question that could be answered, the court said, was whether there was sufficient demand for the product, as there was in the instant case, to make it worthwhile.[202]

Nevertheless, it is not enough to allow a monopolist to bring new products

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193. *Id.*

194. *Id.* at 286. The court stated that, under *Griffith*, the mere existence of monopoly power "whether lawfully or unlawfully acquired" is itself violative of § 2, "provid[ing] it is coupled with the *purpose or intent* to exercise [it]." *Id.* at 274 (citing United States v. Griffith, 334 U.S. 100, 107 (1948)) (emphasis added). The court, however, inferred unlawful intent only from evidence of palpably anticompetitive conduct, and considered evidence of subjective intent relevant only to divine the nature and effect of ambiguous conduct. *Id.* at 288 (citing United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978); Sargent-Welch Scientific Co., 567 F.2d 701, 712 (7th Cir.), *cert. denied,* 439 U.S. 822 (1978)).

195. *Id.* at 282, 285. "Hence the function of the court includes 'undoing' what the monopoly achieved by its illegal acts." *Id.* at 285 (citing United States v. Paramount Pictures, Inc., 334 U.S. 131, 171 (1948)). Accordingly, a rival camera maker, harmed by Kodak's refusal to deal with it, might be remedied by being permitted "to share from the start in the business created by its own changes in format." 603 F.2d at 285.

196. *Id.* at 282.

197. *Id.* at 281 (citing United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 344 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954)).

198. 603 F.2d at 283.

199. *Id.* at 281, 283; *see* note 74 *supra.*

200. *Id.* at 282. Enforced predisclosure is totally uncertain in its application and "explain[s] why no court has ever imposed the duty Berkey seeks to create here." *Id.*

201. *Id.* at 286.

202. *Id.* at 287.

to market whenever and wherever it chooses, without a limited inquiry into the purpose and effect of the design change to ensure that it does not represent the use of monopoly power in one market to foreclose competition in another. Although the objective test of success in the marketplace is to be commended for eliminating the battle between the experts and for providing an incentive to innovate, success in the market may reflect no more than the consumer's familiarity with the monopolist's products or lack of viable choice. Kodak might have coercively used its film monopoly, for example, had it not offered various other film formats which customers could use with other manufacturers' cameras.[203] In addition, a redesigned product at a lower price while deemed a superior product under an objective test, might in fact represent the financial ability of a monopolist with sufficient power over one product to incorporate any number of nonfunctional design changes, with no purpose other than to eliminate rivals in the related product market.[204]

III. ALTERNATIVE SOLUTIONS

There are at least two options available to resolve the uncertainty surrounding section 2: require palpably anticompetitive conduct under an objective economic test, or require no conduct at all and base liability on proof of monopoly power persistently maintained. The solution lies in both; each in its own way injects greater certainty into the "unclear and somewhat confused legal standards"[205] underlying section 2 enforcement. Because each approach is supported by precedent,[206] the critical issue is not whether one is "right" and the other "wrong"; rather, the issue is under what circumstances each is appropriate.

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203. The court suggested that the requisite degree of coercion might be proved by evidence that the decision to restrict Kodacolor II to the 110 format for 18 months after the 110 system introduction, was not justified by the nature of the film, but was motivated by a specific intent to impede competition in the camera market. 603 F.2d at 287 n.39.

204. *See id.* at 283. The Second Circuit noted the absence in *Kodak* of "the possibility lurking in *Memorex* that [the monopolist], by creating technological incompatibilities, was tying peripherals sales to its [primary product]." *Id.* Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 79 (N.D. Cal. Oct. 18, 1979), interprets *CalComp* as providing for a more flexible analytical approach which permits the factfinder to consider the "effects" of a design change on competitors and on consumers, the degree to which it was the product of "desirable technological creativity," and the monopolist's intent, "since a contemporaneous evaluation by the actor should be helpful . . . in determining the effects of a technological change." *Id.*

205. National Commission, *supra* note 22, at 143-44 (uncertainty requires no-conduct approach); *see* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427) (uncertainty requires objective approach).

206. *Compare* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427) *and* California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713 (9th Cir. 1979) *with* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) *and* United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *aff'd* 384 U.S. 563 (1966) *and* United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

A. *The Private Action and the Public Interest*

The interests of the private plaintiff and that of the public are not necessarily the same.[207] The private antitrust plaintiff, by definition the less successful rival in a market, wishes to restrain competition by the dominant firm in order to obtain a greater share of the coveted market.[208] The resulting treble-damage action may or may not serve the public interest in promoting competition, depending of course on whether the conduct sought to be restrained is in fact anticompetitive or merely a legitimate competitive practice.

The arguments in favor of objective economic tests for permissible business practices reflect an understanding that the private litigant has a limited interest in promoting vigorous competition. The absence of objective standards may result in treble-damage awards that subsidize less efficient firms[209] and in restraints on honestly industrial practices that have a chilling effect on competition.[210] Furthermore, without objective tests, courts and businessmen operate under precedents which are inadequate guides for predictable decision-making.[211]

Moreover, the policy underlying the private cause of action supports the recent trend toward objective standards. Private litigants are enlisted in the antitrust enforcement effort to help prevent anticompetitive practices which escape detection by public agencies.[212] In theory at least, the threat of liability

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207. "[N]o principle of justice or social ordering would warrant extracting a penalty from an innocent defendant, who committed no act identifiable as reprehensible, in order to confer a bounty upon a private citizen . . . . There is, after all, a difference between the government plaintiff and the 'private attorney general.' The government agency is much more likely than private parties to exercise the kind of restraint which the public interest requires . . . ." 2 P. Areeda & D. Turner, *supra* note 2, ¶ 311, at 35.

208. *See* Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 125 (N.D. Cal. Oct. 18, 1979).

209. *See* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (treble damages claim bearing no relationship to competitive, or "antitrust," injury); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713, at 77,980 (9th Cir. 1979); Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied* 429 U.S. 1074 (1977) ("The Sherman Act is not a subsidy for inefficiency."); Telex Corp. v. IBM Corp., 510 F.2d 894, 927 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975).

210. Berkey Photo, Inc. v. IBM Corp., 603 F.2d 263, 273 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 125 (N.D. Cal. Oct. 18, 1979); 3 P. Areeda & D. Turner, *supra* note 2, ¶ 614, at 35-36.

211. Berkey Photo, Inc. v. IBM Corp., 603 F.2d 263, 282 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); 3 P. Areeda & D. Turner, *supra* note 2, ¶ 626c; *see* Baker, *Section 2 Enforcement—The View From the Trench,* 41 A.B.A. Antitrust L. J. 613 (1972) ("Law in general, and antitrust law in particular, tends to be most effective where it can focus on particular conduct and its effects—for then individual cases can produce useful rules giving general guidance.").

212. The treble-damage provision, 15 U.S.C. § 15 (1976), was designed to enlist private parties "as allies of the Government in enforcing the antitrust laws," 51 Cong. Rec. 16319 (1914) (remarks of Rep. Floyd), and to give the injured party "ample damages for the wrong suffered." *Id.* at 9073 (remarks of Rep. Webb).

for punitive damages[213] restrains monopoly firms from engaging in anticompetitive conduct that injures rivals, thereby injuring the public through decreased competition. When there are no objective standards, the treble-damage action becomes an unpredictable, anticompetitive weapon in the hands of a less successful competitor.

Unreasonable conduct should be the focus of the private cause of action. The rule of reason analysis established in *Standard Oil,* and the vagueness of the Sherman Act itself, were intended to allow then unknown practices to be incorporated within the Act's prohibition should future courts find them to be unreasonable restraints of trade. The *Standard Oil* Court did not suggest that the conduct requirement could be met by less than "unreasonable" restraints of trade,[214] but only that courts were free to decide what practices were unreasonably restrictive of competition. Considerations of fairness in meting out reward and punishment and the need to preserve proper economic incentives militate against the adoption of a general course of conduct approach in private actions. No one, including the sponsors of the Sherman Act[215] and the courts subsequently interpreting it,[216] is entirely comfortable with the notion that a firm can be civilly liable for success alone.[217] To condemn ultimate success would not only be a disincentive to vigorous competition, but would also deprive a firm of a major reason to exert its best efforts once it has achieved dominance.

Moreover, businessmen must have notice of what is violative of the law;[218] when the proscribed conduct is left undefined, the law neither restrains

213. "[T]reble damages are indisputably punishment." 2 P. Areeda & D. Turner, *supra* note 2, ¶ 311, at 34. *Contra,* Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 440 (S.D.N.Y. 1978), *rev'd in part,* 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427) ("trebling of damages is compensatory in the special sense that it tends to ensure, albeit in a rough fashion, that wrongs do not go unredressed because of the inherent difficulty or impossibility of proving all items of damages").

214. *See* Transamerica Computer Co. v. IBM Corp., No. C 73-1832, slip op. at 125 (N.D. Cal. Oct. 18, 1979). "It is the choice of an unreasonable alternative, not the failure to choose the least restrictive alternative, that leads to liability." *Id.*

215. *See* notes 25-40 *supra* and accompanying text.

216. *See* notes 123-204 *supra* and accompanying text.

217. "[A] strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat.* The successful competitor, having been urged to compete, must not be turned upon when he wins." United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

218. In a post-trial motion to the district court, Kodak attacked § 2 as unconstitutionally void for vagueness. Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 436 (S.D.N.Y. 1978) *rev'd in part,* 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427). "[D]efendant says that it 'does not here challenge the application of the antitrust laws in cases like *Alcoa* or *United Shoe,* nor . . . contend that the results reached there were necessarily unconstitutional.' Those were decisions by judges, defendant argues, and involved merely equitable relief, not huge damage claims. It is one thing the argument runs, to have *judges* manipulate concepts like 'honestly industrial,' 'exclusionary,' and 'anticompetitive,' for purposes of decreeing future changes in the lives of large corporations. It is something quite different to unleash a *jury* under such concepts to consider large money claims 'that *retrospectively* punish conduct newly found to violate the law.' " *Id.* at 436-37 (emphasis in original) (citations omitted).

economically undesirable results nor encourages legitimate competitive behavior. The deliberateness test, based strictly on general intent inferred from a course of conduct, does not serve that goal,[219] nor does a test based strictly on specific intent evidenced by contemporaneous documents.[220] As the district court in *Transamerica Computer Corp. v. IBM Corp.*[221] recently observed:

> The punitive impact of the antitrust laws must not be permitted to compel high prices. Unless some objective, understandable standard is established for the guidance of businessmen, they must either forego competitive price decreases or risk punitive damages that might turn on some careless word once spoken in a board room.[222]

In exorcising the demon "intent," however, the objective tests imposed in some recent cases are clearly too lenient; certain acts may be predatory despite their failure to meet an objective economic test.[223] While strict objective tests of predatory conduct serve as needed guidelines for businessmen and courts, the judiciary should not be constrained from inquiring into intent, evidence of which is perhaps indispensable in determining the reasonableness of alleged anticompetitive conduct.[224]

B. *The Government Action and the Public Interest*

In enacting the Sherman Act, Congress made it unlawful for a single firm to monopolize; it gave the government broad power to seek, and the courts the power to order, an equitable decree for divestiture in the public interest.[225] Equitable relief in a government section 2 case is a remedy, not a penalty.[226] As such, it is used to restore competitive conditions to an industry in the *future,* and to ensure that market structures will not retard healthy competitive processes.[227] Hence, its principal concern should not be the adjudication of past conduct;[228] even in the absence of deliberate impairment of competition, "an industry which does not have a competitive structure will not have competitive behavior."[229]

If there are markets in which the self-policing functions of private compet-

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219. *See* notes 51-85 *supra* and accompanying text.

220. *See* note 85 *supra* and accompanying text.

221. No. C 73-1832 (N.D. Cal. Oct. 18, 1979).

222. *Id.*, slip op. at 48; *see* Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 Mich. L. Rev. 373, 396 n.77 (courts should consider cautiously "the excited prose often adopted by middle management").

223. *See* notes 144-67, 202-04 *supra* and accompanying text.

224. *Id.*

225. The Sherman Act § 4 vests the district courts "with jurisdiction to prevent and restrain violations of [this act]; and it shall be the duty of . . . [the government] to institute proceedings in equity to prevent and restrain such violation . . . and praying that such violations shall be enjoined or otherwise prohibited." 15 U.S.C. § 4 (1976).

226. United States v. National Lead Co., 332 U.S. 319, 338 (1947); United States v. Aluminum Co. of America, 148 F.2d 416, 446 (2d Cir. 1945); *see* 3 P. Areeda & D. Turner, *supra* note 2, ¶ 620, at 46.

227. United States v. Aluminum Co. of America, 91 F. Supp. 333, 346-47 (S.D.N.Y. 1950); *see* 2 P. Areeda & D. Turner, *supra* note 2, ¶¶ 311c, 312.

228. National Commission, *supra* note 22, at 158.

229. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 426 (1956) (Warren, C.J., dissenting).

itors do not preserve a competitive market, a government action for divestiture based on a less severe standard of proof could provide the remedy. Instructive in this regard is Professor Williamson's work on market failure considerations.[230] Williamson posits largely hypothetical "market failures," wherein a dominant firm, in an industry that has reached maturity, is relatively immune from competitive inroads by actual and potential market participants. Williamson contends that a firm's dominance may result from the relative ineptness of extant and potential rivals, or from mere luck.[231] Because such market failures might exist despite the free play of the marketplace, Williamson concludes that use of the conduct approach is dubious.[232] Instead, he believes that section 2 "should be interpreted . . . to require a finding that persistent dominance is presumptively unlawful, provided only that the industry [has] reached an advanced stage of development."[233]

According to Williamson, those who endorse an objective conduct approach assume that, except for monopolies resulting from lawful patents or economies of scale, persistent dominance of an industry by a single firm will not occur.[234] The corollary is that the competitive force of the marketplace will dissipate dominant market power absent unreasonable restraints of trade.[235] Williamson acknowledges that competitive forces generally will dissipate concentrated industry structures, but that "aberrations can and will appear."[236] The issue becomes whether the antitrust laws should be addressed to

230. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations,* 85 Harv. L. Rev. 1512 (1972).

231. *Id.* at 1516-22. "To paraphrase [Williamson's] figure of speech: that the tortoise beat out the hare does not mean that he had the speed of a gazelle." 3 P. Areeda & D. Turner, *supra* note 2, ¶ 624b n.4. This aspect of Williamson's analysis has been criticized as "focusing on the relative *inefficiency* of competitors, instead of the relative *efficiency* of the target company. But the leader is still the best, even if only the best of a poor lot (determined, of course, with perfect academic hindsight)." National Commission, *supra* note 22, at 361 n.7 (separate statement of Comm'r Hatch) (emphasis in original). This deficiency in Williamson's "market failure" analysis can be remedied under a persistent monopoly standard by requiring an inquiry into the efficiency of firms that have failed to make inroads into the monopolized market. Such a failure, despite high efficiencies, should be convincing evidence of persistency.

232. Williamson, *supra* note 230, at 1513-14. The conduct approach makes antitrust enforcement a "charade." Substantial enforcement resources are expended identifying dominant firm industries. Once such industries are identified, however, the main effort shifts to scrutinizing the behavior of dominant firms in order to dredge up some evidence of offensive conduct. "That objectively the conduct in question could not reasonably lead to the dominance result is simply disregarded." *Id.* at 1515.

233. *Id.* at 1524-25. This presumption requires the somewhat impractical determination that an industry has reached its "mature" stage of development. Williamson suggests that "[e]xpert opinion together with statistical tests, for example, fitting the industry's development history to a logistic curve," would suffice. *Id.* at 1525 n.44. That such tests have a place in econometric models hardly recommends their use by courts. For a more comprehensible standard, see note 254 *infra.*

234. Williamson, *supra* note 230, at 1513-14.

235. *Id.*

236. *Id.* at 1514. New entry into a mature industry may be all but impossible as a result of significant structural barriers to entry. Such barriers may be a function merely of the stage of development of an industry. *Id.* at 1520; *see* F. Scherer, *supra* note 31, at 74; Kaysen & Turner,

average tendencies as opposed to concededly rare "aberrations."[237] It is contended that the private treble-damage action should address the former, on the assumption that competition works. Should a market failure be found to exist in a particular industry, the solution lies in a government suit for divestiture under a more liberal no-conduct standard.

The proposed no-conduct standard in government cases is not without precedent. The decision in *Alcoa,* itself, left little or nothing of substance to the conduct requirement: any act by a monopolist is unlawful monopolization.[238] Judge Hand[239] acknowledged that the role of conduct was de minimis, stating that the distinction between mere possession of monopoly power—"monopoly in the concrete"[240]—and unlawful monopolization is a purely formal one, valid only so long as the monopolist remains "wholly inert."[241] The distinction disappears as soon as a monopolist begins to operate; "the [monopoly] power and its exercise must . . . coalesce."[242] Hence, although *Alcoa* obscured the issue by creating the fiction of course of conduct, the result can be justified by distinguishing the acquisition of monopoly power from its persistent retention over a substantial period of time.[243]

The proper concern of the government cause of action is substantial market power, that is, the effective power to fix prices and exclude competitors. When substantial and persistent control of a market exists, courts should not require government lawyers to expend limited enforcement resources on proving anticompetitive acts, an inquiry which is largely unrelated to the perceived defects of a market. The concern in the private arena that the elimination of conduct proof would be unfair and a disincentive to valid competition is mitigated by at least three factors peculiar to the government action. First, the monopolist is rewarded for its success by being permitted to reap monopoly profits until such time as its monopoly power is deemed "persistent."[244] Second, if divestiture were ordered, the monopolist would not

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supra note 30, 73-75. There may, however, be offsetting cost advantages to coming into an industry at a late stage. "For example, successes can be imitated and failures avoided; late entrants may enjoy a free ride on the market development efforts of their predecessors." Williamson, *supra* note 230, at 1520 n.33; *see, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427); California Computer Prods., Inc. v. IBM Corp., [1979-1] Trade Cas. (CCH) ¶ 62,713 (9th Cir. 1979).

237. Williamson, *supra* note 230, at 1514; *see* 3 P. Areeda & D. Turner, *supra* note 2, ¶ 618b, at 42. "The self-correcting tendency is, after all, a tendency and not an absolute assurance." *Id.*

238. At least one commentary has claimed that, "[i]n theory at least, this is hardly a requirement at all; it is more a necessary concomitant of monopoly power." Blecher & Woodhead, *supra* note 51, at 119.

239. United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945).

240. Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911). While noting the absence in § 2 of any prohibition of "monopoly in the concrete," Justice White also said that § 2 reaches "every act bringing about the prohibited results." *Id.* at 61.

241. 148 F.2d at 428.

242. *Id.* As soon as the monopolist begins to operate, that is, as soon as it begins to sell at all, "it must sell at some price, and the only price at which it could sell is a price which it itself fixed." *Id.*

243. *See* Turner, *supra* note 2, at 1219.

244. One reason the no-conduct standard would not be unfair if applied to an "innocent"

be punitively liable for treble damages.[245] Finally, although private antitrust suits are numerous, government no-conduct actions can be expected to be rare.[246]

Recognizing these factors, the National Commission for the Review of Antitrust Laws and Procedures (the Commission) recommends the elimination of the conduct element from section 2 government cases.[247] Under the majority Commission proposal, the government could obtain structural relief in section 2 cases without proof of culpable conduct.[248] Upon a showing of

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monopolist is that the monopolist would be able to earn monopoly profits for several years as a reward for its superior performance. To this extent, dissolving persistent monopoly power is "no more unfair than limiting a patent monopoly to 17 years." National Commission, *supra* note 22, at 173-74 n.58; *see* Turner, *supra* note 2, at 1220.

245. National Commission, *supra* note 22, at 173-74 n.58. Dissolution does not expropriate the monopolist's assets. When the defendant is compelled to sell some portion of its business, it or its shareholders receive the proceeds of the sale or stock ownership in the newly created firms. 3 P. Areeda & D. Turner, *supra* note 2, ¶ 620, at 46.

246. 2 P. Areeda & D. Turner, *supra* note 2, ¶ 313, at 44. The Antitrust Division currently can only handle about three major section 2 cases at a time without detracting from its other essential enforcement activities. Shepard, *supra* note 41, at 599. It is unlikely that a firm without monopoly power would curtail its competitive efforts because of the remote possibility that it might win a monopoly and retain it long enough to provoke a suit for equitable relief. Moreover, once having obtained monopoly power, inevitable delays in attacking and remedying persistent monopoly would guarantee the actor considerable gain from its power. 3 P. Areeda & D. Turner, *supra* note 2, ¶ 622e, at 62. Given the government's limited enforcement resources, it would be unrealistic for the government to attempt to restructure more than a few markets; a rational use of enforcement resources would suggest avoiding intervention in "close" cases. *Id.* ¶ 620a, at 44; *see* Turner, *supra* note 2, at 1214-15.

247. National Commission, *supra* note 22, at 142. There have been similar legislative attempts in the past, both introduced by the late Sen. Philip A. Hart. Monopolization Reform Act, S. 3429, 94th Cong., 2d Sess. (1976), *reprinted in* Maher, *supra* note 22, at 4, col. 6; Industrial Reorganization Act, S. 1167, 92d Cong., 2d Sess., *reprinted in* 118 Cong. Rec. 11494 (1972). The Industrial Reorganization Act would have amended the Sherman Act to make the mere possession of monopoly power unlawful. The bill provided for a rebuttable presumption of monopoly power when either 1) a firm has maintained a rate of profit in excess of 15% for five consecutive years; 2) there has been no substantial price competition among two or more firms in an industry for three years; or 3) four or fewer firms account for 50% or more of sales in a market in any year. The Monopolization Reform Act of 1976 would have amended the Sherman Act to eliminate the "skill, foresight and industry" defense to a § 2 case brought by the government. A defendant could avoid divestiture only upon a showing that such a remedy would result in the loss of substantial economies of scale. *See* Note, *The Industrial Reorganization Act: An Antitrust Proposal To Restructure The American Economy,* 73 Colum. L. R. 633 (1973). Representative William S. Cohen correctly predicted that these legislative initiatives challenge the "conventional wisdom in Congress and . . . will prove to be academically interesting, I think, but politically futile." Cohen, *Perspectives from the Congress; The Legislative Realities of Strengthening Section 2,* 10 Sw. U. L. Rev. 53, 59 (1978).

248. National Commission, *supra* note 22, at 157-59. Another position taken urges the courts to adopt the test set forth in the district court opinion in *Grinnell,* 236 F. Supp. 244 (D.R.I. 1964), *aff'd in part,* 384 U.S. 563 (1966), that persistent monopoly power shall be presumed to have been caused by culpable conduct. Culpable conduct need not be shown as a part of the government's prima facie case, but its inference may be rebutted by the defendant. National Commission, *supra* note 22, at 157, 160-61. Finally, some members of the Commission have insisted that the

persistent monopoly power, a court would be required to order a plan for divestiture unless the defendant were able to demonstrate that such relief would destroy substantial efficiencies of scale.[249]

According to the Commission report, "even if the government is not required to offer affirmative proof of conduct, it is highly unlikely that the adoption of a no-conduct standard would impose liability on an 'innocent' monopolist."[250] Underlying the proposal is the critical concept of "persistent monopoly power,"[251] an idea that has been criticized as inadequately defined by the Commission.[252] The Commission suggested, however, an express presumption that persistent monopoly power is maintained through deliberate conduct that would violate traditional section 2 standards.[253] That presumption, in turn, reflects two related beliefs: that merely restraining unlawful acts will not prevent industrial concentration nor insure a competitive market; and that persistently maintained monopoly power without competitive inroads indicates a market failure even absent deliberate conduct.

"Persistent maintainance,"[254] however, like the concept of monopoly power, should be defined by the courts, and not by statute. In government suits, the courts, relying upon *Alcoa,*[255] *United Shoe,*[256] and the district court opinion in *Grinnell,*[257] should rule that monopoly power persistently maintained is unlawful regardless of whether it was acquired or maintained by

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traditional conduct requirement be preserved as part of the plaintiff's case-in-chief. *Id.* at 157, 161-62.

249. *Id.* at 158-59. The efficiencies defense would be permitted only at the relief stage of the case; eliminating the "skill, foresight and industry" defense from the trial on liability would thereby "concentrate the efforts of both government and defense counsel on the issue of whether relief would harm consumer welfare by destroying efficiencies." *Id.* at 158.

250. *Id.* at 156-57.

251. *Id.* at 152. Persistent monopoly proposals differed in their details: one would allow only engineering/plant economies of scale as a defense to dissolution at the remedy phase; another differed mainly in allowing any scale efficiency, including management efficiencies, to be a defense to liability itself; a final proposal would attack only those firms with annual sales of over $500 million which have possessed monopoly power for at least five years. *Id.* at 171-72 n.35.

252. The Commission's recommendation has been faulted for reliance on what one could "generously call a thin record." National Commission, *supra* note 22, at 392-93 (separate statement of Comm'r Javits); *accord, id.* at 357 (separate statement of Comm'r Hatch) (recommendation "based on concepts which are nowhere defined"). The example of "persistent monopoly power" suggested informally was "a monopoly of 5 years duration (a monopoly defined as 65 percent of the market) and annual sales of over $500 million." *Id.* at 392. Another Commissioner concluded that "it is not clear . . . that we as yet have the knowledge to enable us to identify [persistent monopoly power] with the precision necessary for a law of the sort proposed here." *Id.* at 410 (separate statement of Comm'r Dixon); *see* note 254 *infra.*

253. National Commission, supra note 22, at 141.

254. 3 P. Areeda & D. Turner, *supra* note 2, ¶ 623d, at 66. Areeda & Turner reject Williamson's "mature industry" analysis of market persistency, and suggest a standard which would 1) preclude intervention until a firm has held monopoly power for at least five years; 2) "permit intervention between five and 10 years only on a convincing showing of likely persistency;" and 3) certainly intervene against substantial market power that has persisted 10 years or more. *Id.* at 67.

255. 148 F.2d 416 (2d Cir. 1945).

256. 110 F. Supp. 295 (D. Mass, 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

257. 236 F. Supp. 244 (D.R.I. 1964), *aff'd in part,* 384 U.S. 563 (1966).

deliberately exclusionary conduct.[258] The fatal weakness of the proposed no-conduct legislation is that, by embodying the idea in statute, it takes away judicial flexibility. Any such standards must be determined by the courts; only they are capable of balancing competing interests on the facts of any adjudicated case. A judicial solution to the paradox of section 2 may be more administratively burdensome than a legislative fiat that all firms with a specified market share will be conclusively presumed to have violated section 2. Nevertheless, the Sherman Act was intended, in the words of Chief Justice Hughes, to be "a charter of freedom [with a] generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape."[259] As such, "the Sherman Act [represents] a broad set of principles that are to be interpreted by the judiciary in light of evolving economic and social conditions."[260]

CONCLUSION

"[T]he fundamental tension—one might almost say the paradox—that is near the heart of § 2"[261] can not be resolved without expressly differentiating between private treble-damage actions and government suits for divestiture. A strong argument can be made that distinct caselaw and burdens of proof for private suits and government suits have always existed.[262] This understanding, however, must be explicit. Without such an expression, courts and

258. National Commission, *supra* note 22, at 160; 3 P. Areeda & D. Turner, *supra* note 2, ¶ 622f.

259. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

260. National Commission, *supra* note 22, at 143; *see* 1 P. Areeda & D. Turner, *supra* note 2, ¶ 106, at 15-16; 2 P. Areeda & D. Turner, *supra* note 2, ¶ 313c.

261. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427). The court further stated: "Thus, while proclaiming vigorously that monopoly power is the evil at which § 2 is aimed, courts have declined to take what would have appeared to be the next logical step—declaring monopolies unlawful *per se* unless specifically authorized by law. . . . This tension [inherent in § 2] creates much of the confusion surrounding § 2. It makes the cryptic *Alcoa* opinion a litigant's wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes." *Id.*

262. *See* note 206. *Contra,* Berkey Photo, Inc. v, Eastman Kodak Co., 457 F. Supp. 404, 438-39 (S.D.N.Y. 1978), *rev'd in part,* 603 F.2d 263 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427). In that case, the court held that treble damages based squarely upon "the principles of *Alcoa* and *United Shoe*" are not unconstitutional for failing to give fair notice of proscribed conduct. *Id.* at 437-39; *see* note 218 *supra.* "[Defendant's argument] is actually premised upon an inaccurate supposition that there is a sharp dichotomy between [government] suits in equity and [private] damage claims." *Id.* at 438. *But see* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 298 n.57 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427) In that case the court found it "interesting to note" that Areeda and Turner would permit the break-up of a persistent monopoly even in the absence of exclusionary conduct. *See* 3 P. Areeda & D. Turner, *supra* note 2, ¶ 614, at 36 ("the major [government] precedents are in part consistent with, and in any event best rationalized by," a no-conduct approach).

private litigants may become hopelessly lost in the midst of confused standards and conflicting precedents. Moreover, the resulting confusion and need to articulate objective standards of conduct may emasculate the government suit for divestiture under section 2.

It is unquestionable that there are serious problems with adopting such a "double standard" for monopolization. Conflicting policy considerations have been inherent in the Sherman Act since its inception. That fact alone must not bar courts from developing workable standards for proof of monopolization. To this end, courts must insist that private plaintiffs base their antitrust claims on injury resulting from identifiable anticompetitive conduct. In adjudicating private suits, courts should reject arguments drawn from the *Alcoa* "wishing well."[263] The structural cases, however, remain convincing precedent for a no-conduct standard in government cases based on a finding of persistent monopoly power. It is time the courts expressly state what for so long has only been implied.

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263. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3174 (U.S. Sept. 14, 1979) (No. 79-427).