St. John's Law Review

Volume 65, Summer 1991, Number 3 Article 9

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I. INTRODUCTION

The Second Circuit has played a significant role in the development of the substantive law of antitrust. To be sure, most of the important antitrust precedents have emanated from the United States Supreme Court. This is precisely what Congress intended when it enacted the Expediting Act,[1] which permitted direct appeals from district courts to the Supreme Court in government-initiated actions.[2] However, the repeal of the Expediting Act,[3] coupled with the Supreme Court's arcane case selection process and the practical limitations on the Court's ability to hear cases, has shifted much of the burden of hearing and deciding antitrust matters to the circuit courts, particularly the Second Circuit.

This Article will survey antitrust case law in the Second Circuit as it developed over the last century. It is not intended to be a case-by-case discussion of all antitrust decisions within the Second Circuit, but rather it seeks to highlight and analyze only the most important developments.

II. MONOPOLIZATION

The Second Circuit has played a prominent role in developing the law relating to monopolization. Section 2 of the Sherman Act[4] makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" trade or commerce.[5] By its terms, the Sherman Act does not prohibit the status of monopoly but rather only

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[1] Ch. 544, §§ 1, 2, 32 Stat. 823 (1903) (§ 1 repealed 1984; § 2 codified as amended at 15 U.S.C. § 29 (1988)).

[2] *Id.* § 2 (codified as amended at 15 U.S.C. § 29 (1988)).

[3] Act of Nov. 8, 1984, Pub. L. No. 98-620, § 402(11), 98 Stat. 3335, 3358.

[4] 15 U.S.C. §§ 1-7 (1988).

[5] *Id.* § 2.

the act of monopolization or attempted monopolization, and the interpretative cases have made clear that "monopoly *simpliciter*"[6] or "monopoly in the concrete"[7] is not prohibited. Herein exists the fundamental tension that lies at the heart of section 2. The courts, while repeatedly proclaiming that monopoly power is the evil at which section 2 is directed,[8] have not taken what would appear to be the next logical step of declaring monopolies unlawful per se.[9] If, indeed, monopoly power is the evil that the statute seeks to address, it arguably makes no difference how that power is acquired, whether lawfully or unlawfully. On the other hand, if competition is truly the virtue that the statute seeks to reinforce,[10] it would be inherently unfair to condemn those who have achieved monopoly power by out-competing all rivals and driving them from the field.[11] The resolution of these conflicting currents in section 2 law is very much a tale of two cases[12]—both of them from the Second Circuit—*United States v. Aluminum Company of America* ("*Alcoa*")[13] and *Berkey Photo, Inc. v. Eastman Kodak Co.*[14]

A. *Alcoa*

All modern analyses of section 2 issues begin with Judge Learned Hand's eloquent, though perhaps flawed, opinion in *Alcoa*. In that case, the government sought dissolution of Alcoa, claiming that the company had monopolized the market in virgin aluminum ingot from 1909 to 1938. The trial court held that Alcoa had not monopolized, and the case was appealed directly to the

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[6] *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) ("§ 2 does not prohibit monopoly *simpliciter*").

[7] *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911) ("omission of any direct prohibition against monopoly in the concrete").

[8] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (citing United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395 (1956)) ("commodities reasonably interchangeable make up that 'part' of trade or commerce which § 2 protects against monopoly power").

[9] *Berkey*, 603 F.2d at 273; Malina, *The Antitrust Jurisprudence of the Second Circuit*, 37 REC. B.A. CITY N.Y. 436, 464-66 (1982).

[10] *See* Blecher, *Antitrust Law: Commentary*, 46 BROOKLYN L. REV. 609, 609 (1980) (noting current "trend among federal courts . . . of interpreting antitrust laws to encourage competition").

[11] United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) [hereinafter *Alcoa*].

[12] Malina, *supra* note 9, at 465 ("[i]n a sense, then, the Section 2 jurisprudence may be denoted as a tale of two monopolists: Alcoa and Eastman Kodak").

[13] 148 F.2d 416 (2d Cir. 1945).

[14] 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

United States Supreme Court under the Expediting Act.[15] However, the Supreme Court was unable to muster a quorum, and the matter was remanded to the Second Circuit for final review.[16] The Second Circuit reversed and held that Alcoa had monopolized the virgin aluminum ingot market in violation of section 2 of the Sherman Act.[17]

Alcoa was a far cry from the monopolists previously pursued by the federal government, notably Standard Oil Company[18] and American Tobacco Company.[19] The company had achieved dominance in the virgin aluminum ingot market through lawful acquisition of patents between 1899 and 1909.[20] Unlike *Standard Oil Co. v. United States*[21] and *United States v. American Tobacco Co.*,[22] two earlier United States Supreme Court cases, there were no allegations of widespread predatory practices, nor was Alcoa a party to a series of interconnected secret agreements in restraint of trade.[23] This is not to say that the company was entirely without "skeletons in its closet." On the contrary, Alcoa was admittedly a party to a series of agreements during the period 1909-1912 designed to keep foreign aluminum out of the United States, but ceased participation in these exclusionary arrangements following the entry of a consent decree in 1912.[24] Whether Alcoa's cartel participation had any causal relationship to Alcoa's dominant position at the time of trial some twenty-eight years later is debatable but not central to the court's analysis.

Rather, the key to the court's conclusion appears to have been Alcoa's size. According to Judge Hand, the company controlled over ninety percent of the virgin aluminum market.[25] Judge Hand equated monopoly with market control, which presumably exists when a monopolist controls prices. Unquestionably, Alcoa possessed control over the price of virgin aluminum and hence was a monopolist. But was it a monopolizer?

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[15] *Alcoa*, 148 F.2d at 421.
[16] *Id.*
[17] *Id.* at 432.
[18] *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[19] *See* United States v. American Tobacco Co., 221 U.S. 106 (1911).
[20] *Alcoa*, 148 F.2d at 422-23.
[21] 221 U.S. 1 (1911).
[22] 221 U.S. 106 (1911).
[23] *Alcoa*, 148 F.2d at 422-23.
[24] *Id.*
[25] *Id.* at 423, 425.

In answering that question, Judge Hand accepted as given the proposition in *Standard Oil* that the section 2 prohibition of unilateral monopolization complements the section 1 prohibition of conspiracies.[26] Thus, in Judge Hand's view, it made no difference whether supracompetitive prices arose from unilateral activity of monopolists or the concerted activity of conspirators: "[I]t would be absurd to condemn such [price-fixing] contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies."[27]

What mattered to Judge Hand was the effect and not the cause. He bolstered this view by asserting that "Congress . . . did not condone 'good trusts' and condemn 'bad' ones; it forbad all."[28] Nevertheless, even Judge Hand was unwilling to accept blanket condemnation of an entity based on size alone because this would effectively eliminate any distinction between a monopolist and a monopolizer. Without missing a beat, Judge Hand explained:

> It does not follow because "Alcoa" had such a monopoly, that it "monopolized" the ingot market: it may not have *achieved* monopoly; monopoly may have been *thrust upon* it. . . . A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, [sic] 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.*[29]

Hence, a monopoly is thrust upon a seller and consequently lawful when (1) only one seller is economically feasible—the so-called natural monopoly; (2) there are changes in taste so that only one seller is left in business; or (3) monopoly status is achieved by superior skill, foresight, and industry. Judge Hand thus recognized

[26] *Id.* at 427-28.
[27] *Id.* at 428.
[28] *Id.* at 427.
[29] *Id.* at 429-30 (emphasis added).

the fundamental paradox of section 2: that if free and unfettered competition is a goal, society must accept the seller who has gained monopoly status by out-competing its rivals.

The key to reconciling these crosscurrents in section 2 is found in Judge Hand's "thrust upon" language. Judge Hand's application of the "thrust upon" language demonstrates that "[a]s an operative rule of law . . . the 'thrust upon' phrase does not suffice."[30] For Judge Hand, a monopoly was "thrust upon" a seller only when it was the "passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces."[31] Applying this standard, the court condemned Alcoa. It found that Alcoa's "doubling and redoubling" its capacity to anticipate increases in demand was unlawfully exclusionary.[32] This suggests that whenever a monopolist wins additional sales of a product at the expense of a rival, it has monopolized. If the court intended this result—and it appears that it did[33]—then *Alcoa* proclaims a rule of per se illegality condemning competition by dominant firms. Thus, after *Alcoa*, the successful competitor may indeed be "turned upon" because he may not compete.[34]

The court in *Alcoa* took a theoretical approach in analyzing conduct under section 2, rejecting the intuitive, practical analysis employed by the Supreme Court in *Standard Oil*[35] and *American*

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[30] *Berkey*, 603 F.2d at 274.

[31] *Alcoa*, 148 F.2d at 430.

[32] *Id.* at 431.

[33] *See* Malina, *supra* note 9, at 472.

For Judge Hand, the only monopoly Section 2 tolerated was the "thrust-upon" variety—one in which the dominant company was the "passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces"—one which do[es] not seek, but cannot avoid, the control of a market." And applying this stringent criterion to Alcoa, it was a short step to hold that Section 2 had been violated when the monopolist "anticipate[d] increases in the demand for ingot and [was] prepared to supply them." In a sentence which, if taken seriously, announces a rule of *per se* illegality for any monopolist who continues to engage in business, Judge Hand summed up his holding this way:

> [Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.

Id. (citations omitted).

[34] Director & Levi, *Law and the Future: Trade Regulation*, 51 Nw. U.L. REV. 281, 286 (1956).

[35] *See Standard Oil*, 221 U.S. at 63-70 (enunciating "rule of reason" to determine

Tobacco.[36] The case is an example of the structural school approach to section 2. Under the structural approach, size alone may be sufficient to create section 2 liability; simply put, bigness is badness. To the structuralist, mere size creates the evils that section 2 was designed to remedy.[37] It is fair to say, however, that the structural approach is now out of the mainstream. Today the orthodox approach to section 2 analysis looks for size in combination with bad acts.[38]

Alcoa has been brutally and convincingly criticized by scholars[39] and the courts.[40] Nevertheless, if the case is viewed as a product of its time, instead of from a modern perspective, such criticism would appear to be unduly harsh, and perhaps unfair, because it overlooks Judge Hand's remarkable accomplishments in *Alcoa.*[41]

First, Judge Hand developed an analytical framework for examining section 2 issues that remains the standard today; incredibly, he did so without the benefit of prior precedent.[42] In *Standard Oil* and *American Tobacco*, the Supreme Court's conduct-oriented approach clarified its view that monopolies springing from contracts or conspiracies in restraint of trade violate section 2, but the Court made no effort to erect any jurisprudential matrix under which to analyze section 2 issues. Judge Hand, presaging later developments in *United States v. E.I. duPont de Nemours & Co.*[43] and *United States v. Grinnell Corp.*,[44] reasoned that in any mo-

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whether direct or indirect effect of contract or combination is restraint of trade).

[36] *See American Tobacco*, 221 U.S. at 175-82 (expressing and reaffirming "rule of reason").

[37] *See generally* Director & Levi, *supra* note 34, at 282-88 (discussing significance of entity's size in antitrust law).

[38] *See id.* at 289 ("new importance . . . must be attached to the concept of abuses"); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1186 (1981) ("battleground centers on characterization of behavior of a monopoly-sized firm as abusive or competitive").

[39] *See, e.g.*, R. BORK, THE ANTITRUST PARADOX 170 (1978). "The Alcoa opinion, therefore, stands revealed as a thoroughly perverse judicial tour de force, contrary to the legislative intent of the Sherman Act, the great 1911 cases that formulated the rule of reason and the entire spirit of antitrust." *Id.*

[40] *See, e.g.*, United States v. Syufy Enters., 903 F.2d 659, 668 (9th Cir. 1990) (*Alcoa* "has been questioned by just about everyone who has taken a close look at it").

[41] *See* Malina, *supra* note 9, at 469-71 (noting Judge Hand's influence on development of law of monopolization).

[42] *Id.* at 466.

[43] 351 U.S. 377 (1956).

[44] 384 U.S. 563 (1966).

nopolization case the court must determine the relevant market[45] and the alleged monopolist's power in that market. Judge Hand's opinion was less clear concerning the threshold market share that is necessary to constitute the offense of monopolization. Although Judge Hand believed that ninety percent control of a market was sufficient to constitute monopolization[46] and that thirty-three percent was insufficient,[47] he was unsure whether sixty-four percent would meet the test.[48] Unfortunately, he did not expound on the reasons for these conclusions. Nevertheless, Judge Hand's two step approach remains the standard starting point for section 2 analysis.

Second, Judge Hand's analysis was developed at a time when courts' understanding of industrial organization and related economic principles was, to say the least, unsophisticated, if not nonexistent. To criticize Judge Hand for not taking into account factors that only years later were understood to be significant seems unfair.[49]

B. Berkey

Despite its shortcomings, *Alcoa* remained largely unexamined and unchallenged until 1979, when the Second Circuit decided *Berkey*. *Berkey* presented a slightly different question from that raised in *Alcoa*, because with respect to several claims, Kodak's monopoly in a number of relevant markets was not contested.[50] The question in *Berkey* was whether a monopolist could compete on the merits with rivals or whether section 2 imposed special limitations on dominant firms that limited their ability to compete.

Berkey Photo, Inc. ("Berkey") and Eastman Kodak Co. ("Kodak") were involved in a complex business relationship. In some respects, Berkey was Kodak's rival; in other respects, it was Kodak's customer. Berkey sold cameras and offered photo processing services, and therefore competed with Kodak.[51] On the other hand, Berkey was a customer of Kodak in that it purchased film and

[45] *Alcoa*, 148 F.2d at 424.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *See* Malina, *supra* note 9, at 469 (Judge Hand cannot be faulted for not approaching case as one "schooled in . . . modern antitrust jurisprudence").
[50] *Berkey*, 603 F.2d at 269-71.
[51] *Id.*

color paper from Kodak.[52] Unlike the *Alcoa* case, there was no question that Kodak exercised a monopoly over cameras, film, and color paper.[53] The question, then, was whether Kodak, the monopolist, had monopolized. More precisely, the issue concerned whether Kodak was free to compete vigorously or whether the company owed special duties to refrain from competing with its smaller rivals because of its dominant position.

In answering that question, the Second Circuit had little post-*Alcoa* authority to draw on. To be sure, basic concepts of relevant market and monopoly power under section 2 had been fleshed out in *Grinnell*[54] and *duPont*[55]; but no court had addressed the critical question of when a monopolist becomes a monopolizer in any systematic way prior to *Berkey*. Describing the *Alcoa* opinion as a "litigant's wishing well" whose "thrust upon" language "does not suffice" as "an operative rule of law,"[56] the *Berkey* court undertook a systematic analysis of the unexplored contours of section 2; it synthesized the earlier cases and provided a comprehensive formulation of the scope of the section 2 prohibitions.[57]

The *Berkey* court adopted the rule in *duPont* that the first step in analyzing monopolization claims is to define the relevant market.[58] The court also adopted the two-part definition of monopoly under *Grinnell*: (1) the possession of monopoly power, *i.e.*, the power to control price or to exclude competition; and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[59] The court did not stop there; it further ruled that even when monopoly power is legitimately acquired, the monopolist violates section 2 if such power is wielded "to prevent or impede competition."[60] Nor may a monopolist use "its market position as a lever to create—or attempt

[52] *Id.*

[53] *Id.*

[54] *See Grinnell*, 384 U.S. at 570-72 (defining relevant market and monopoly power under section 2).

[55] *See duPont*, 351 U.S. at 391, 395, 404 (defining relevant market and monopoly power).

[56] *Berkey*, 603 F.2d at 274.

[57] *Id.* at 271-76.

[58] *Id.* at 268-71.

[59] *Id.* at 274 (quoting *Grinnell*, 384 U.S. at 570-71).

[60] *Id.*

to create—a monopoly in another market."[61] The court summed up its holding as follows:

> In sum, although the principles announced by the § 2 cases often appear to conflict, this much is clear. The mere possession of monopoly power does not *ipso facto* condemn a market participant. But, to avoid the proscriptions of § 2, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market.[62]

Having established this framework, the court sought to apply it to the facts. Berkey's claims against Kodak, in substance, were: (1) that Kodak's violations of section 2 in the film, color print paper, and camera markets caused Berkey to lose camera and photofinishing sales and to pay higher prices for color print paper and photofinishing equipment than it would have paid but for the violation;[63] (2) that Kodak exploited its market power over film to obstruct rivals in camera sales, specifically by refusing to supply film usable in cameras designed by competitors;[64] (3) that Kodak engaged in illegal leveraging by projecting its power over film to the photofinishing market;[65] and (4) that Kodak exacted monopolistic overcharges on its sales of film and color paper.[66]

1. Predisclosure

Perhaps the most significant issue related to Berkey's claims for lost camera sales, for which the trial court sustained a verdict of $15.3 million prior to trebling.[67] Berkey claimed that Kodak had monopolized the camera market by introducing a new camera format ("the 110") and a new film, Kodacolor II. Unquestionably, Kodak was a monopolist in the relevant camera market.[68] Berkey claimed that because of its position as an industry trend-setter,

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[61] *Id.* at 275.
[62] *Id.*
[63] *Id.* at 267-68.
[64] *Id.* at 269.
[65] *Id.* at 270.
[66] *Id.* at 271.
[67] *Id.* at 296; Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 410 (S.D.N.Y. 1978), *aff'd in part, rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).
[68] *Berkey*, 603 F.2d at 279.

Kodak had an obligation to predisclose its new product developments to rivals.[69] Kodak had followed a policy of not making film available in formats other than those for which Kodak made cameras; this effectively prevented other manufacturers from introducing cameras in new formats. Because of Kodak's dominant position in cameras and film, and the alleged use of its film monopoly to distort camera sales, Berkey argued that Kodak had forfeited any rights to profits made from innovations for which it did not provide advance notice.[70] Berkey also urged that simultaneous introduction of the 110 camera and new Kodacolor II film enabled Kodak to sell more cameras than it would have sold had the cameras been introduced alone.[71] Finally, Berkey claimed that it was injured because for eighteen months following the introduction of the new film, that film was available only in a 110 format, thus enabling Kodak to gain enormous lead time.[72]

The Second Circuit flatly rejected Berkey's predisclosure argument. The court noted that the rule of predisclosure adopted by the trial court was uncertain and hence unfair to Kodak because it would require the company to have been omniscient: Kodak would have to have known when it was required to predisclose and when it was not.[73] The court noted that there were no workable guidelines to identify at what point and to what extent disclosures would have to be made.[74]

The Second Circuit further noted that withholding competitive information from rivals is generally considered fair conduct.[75] Indeed, such conduct is the very essence of innovative and successful competition. Mandated predisclosure would have a chilling effect on innovation by denying the innovator the lead time from its new product.[76] This requirement would thus encourage sluggishness,[77] or worse, perhaps, collusion.

Most importantly, the court held that a monopolist should be encouraged to compete aggressively on the merits.[78] The monopo-

[69] *Id.* at 282.
[70] *Id.* at 279.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 282.
[74] *Id.*
[75] *Id.* at 281.
[76] *Id.* at 283.
[77] *Id.* at 281-82.
[78] *Id.* at 281.

list has no special duty to its smaller rivals by reason of its size alone, and is thus entitled to benefit from innovation, new product developments, and lead time.

Similarly, the Second Circuit rejected the argument that by introducing the new format Kodak unlawfully enhanced its position in camera sales.[79] The court unequivocally ruled that Kodak's introduction of a new format did not constitute an act of monopolization merely because Kodak manufactured a film to fit its camera.[80] Kodak's ability to pioneer film formats did not turn on its possession of monopoly power in film; rather, it was solely the benefit of integration.[81] While the court also concluded that Kodak's refusal to sell new film in bulk may well have constituted an act of monopolization, it noted that Berkey did not sue on that basis.[82] Berkey contended that Kodak's *past* practices gave rise to a *present* duty to predisclose, but this position was summarily rejected by the Second Circuit.[83]

Secondly, the Second Circuit held that Kodak's simultaneous introduction of a new camera and a new compatible film did not constitute a violation of section 2.[84] The court ruled that even a monopolist is permitted to advertise its products in the most favorable light:

> A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier. And in its advertising, a producer is ordinarily permitted, much like an advocate at law, to bathe his cause in the best light possible. Advertising that emphasizes a product's strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of § 2.[85]

Thirdly, the Second Circuit found that even if Kodak had violated the antitrust laws by confining its new film to the 110 format, Berkey could not recover because it failed to prove that buyers were dissuaded from purchasing cameras for this reason.[86] Nor did

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[79] *Id.* at 282.
[80] *Id.* at 283.
[81] *Id.*
[82] *Id.* at 284.
[83] *Id.* at 284-85.
[84] *Id.* at 285.
[85] *Id.* at 287-88 (citations and footnotes omitted).
[86] *Id.* at 288-89.

Berkey establish that Kodak or its dealers sought to persuade consumers to buy the 110 camera because it was the only camera that could use Kodak's new film.[87]

2. Photofinishing and Photofinishing Equipment

Berkey contended that Kodak used its monopoly power over film to gain a competitive advantage in photofinishing and photofinishing equipment.[88] The court found that although this conduct, if proven, would constitute impermissible leveraging, a showing that Kodak was merely enjoying advantages inuring to its photofinishing and equipment arms by virtue of its membership in an integrated firm would not be illegal.[89] Thus, for example, a dominant firm's refusal to supply a rival with goods or services needed to compete in a separate market would be unlawful.[90] At the same time, a firm without market power that attempted such conduct would not violate section 2 because its customers could simply go elsewhere for the needed supplies. The Second Circuit concluded that Kodak's conduct was not unlawful because it acted no differently than a smaller firm with integrated capabilities, but without market power, would have acted.[91] Kodak's ability to gain a competitive advantage with its new 110 system may have been attributable to the innovation of a novel system of photography, not to monopoly power.[92]

Berkey thus makes clear that even a lawfully acquired monopoly position becomes unlawful when wielded to gain a competitive advantage in another market.[93] Although the court provided an illustration of illegal leveraging, it offered little to distinguish between lawful and unlawful practices by dominant firms. Nor has it done so since *Berkey.*

Several important general principles regarding the law of monopolization emerge from *Berkey.* First, a monopolist is free to compete vigorously on the merits with its smaller rivals and to capitalize on its technological superiority.[94] Second, a monopolist may

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[87] *Id.* at 289.
[88] *Id.* at 290-91.
[89] *Id.* at 291.
[90] *Id.* at 284.
[91] *Id.* at 291.
[92] *Id.* at 292.
[93] *Id.* at 276.
[94] *Id.*

take advantage of economies of scale that flow from size. Thus, efficiencies generated by membership in an integrated firm may be exploited. On the other hand, a monopolist may not lawfully use its monopoly power in one market to gain an advantage in another.

Third, a lawful monopolist may, and typically will, charge a supracompetitive price for its product.[95] Contrary to the holding in *Alcoa*, the mere charging of a supracompetitive price does not constitute an act of monopolization. High prices themselves do not impair competition because they tend to invite new entry. Fourth, as a corollary to the foregoing principle, when a monopolist has violated section 2, the "but for" price from which damages are measured is the price that would have prevailed but for the defendant's wrongful conduct, *not* the price that would have prevailed had the market been competitive.[96]

While the core holding of *Berkey* on monopolization issues is clear, the opinion is fuzzy at the edges. The court, for example, does not adequately distinguish between illegal leveraging and legal utilization of scale economies that exist as a consequence of integration. The court's lack of precision in discussing the leveraging concept has led to substantial scholarly criticism and has left unclear whether leveraging is an independent offense under section 2 or merely an act in furtherance of monopolization.[97] Nor is it clear from the opinion at which point advertising by a monopolist becomes a barrier to entry. Nonetheless, these deficiencies pale in comparison with the considerable virtues of *Berkey*, which have made it *the* leading authority on section 2 issues.

C. *Predatory Pricing*

Drawing on the theoretical work of Areeda and Turner, the Second Circuit has adopted cost-based, bright line rules on predatory pricing.[98] In the leading case of *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*,[99] the court noted that "in the general case at least, the relationship between a firm's prices and its . . . costs provides the best single determinant of

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[95] *Id.* at 274-75 n.12.

[96] *Id.* at 297-98.

[97] Malina, *supra* note 9, at 477.

[98] *See* Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 86-93 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

[99] 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

predatory pricing."[100] The court ruled that "prices below reasonably anticipated marginal cost will be presumed predatory, while prices above reasonably anticipated marginal cost will be presumed non-predatory."[101] In addition, recognizing that marginal cost is difficult to quantify, the court held that average variable cost can serve as a surrogate for marginal cost.[102] After specific consideration, the court rejected other measures of cost as benchmarks of predation, including average total cost and fully distributed costs.[103]

In addition, the Second Circuit, embracing the new "economic learning," expressed skepticism about the wisdom and pervasiveness of predatory pricing:

> Predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote. Whether this risk is worth running depends in part of [sic] the prevalence of truly predatory conduct. There is considerable evidence, derived from historical sources and from economic teaching, that predation is rare. Indeed, nowhere in the recent outpouring of literature on the subject do commentators suggest that such pricing is either common or likely to increase. This does not mean, of course, that this behavior should no longer be deemed anticompetitive. But the rarity of the phenomenon informs our decision as to the appropriate legal definition.[104]

Nevertheless, allegations by plaintiffs of predatory conduct persist, and the Second Circuit is likely to be among the leaders in formulating the law in this complex area.

D. Refusals to Deal

Under *United States v. Colgate & Co.*,[105] a trader, *absent a purpose to create or maintain a monopoly*, is free to deal or not to deal with whomever it chooses. Still, the question of the point at which a monopolist who has refused to deal violates the antitrust

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[100] *Id.* at 88.
[101] *Id.* (footnote omitted).
[102] *Id.*
[103] *Id.* at 88-90.
[104] *Id.* at 88 (citations omitted).
[105] 250 U.S. 300 (1919).

laws remains largely unsettled.[106] The Second Circuit shed some light on this issue in *Official Airlines Guide, Inc. v. FTC*,[107] concluding that the monopolist does not have an unqualified obligation to deal with all potential customers.[108] The defendant in this case published the only available compilation of airline flight schedules. It declined to publish schedules of connecting flights of noncertified commuter airlines, a policy that the Federal Trade Commission ("FTC") contended put such airlines at an unfair competitive disadvantage.[109] Reversing the FTC finding of unfair trade practice, the Second Circuit held that a monopolistic refusal to deal is unlawful only when the monopolist is seeking to enhance its own competitive position. The court concluded that "even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively," may lawfully refuse to deal.[110] In *Official Airlines Guide*, coercive action was clearly not present because the defendant was not a rival and could gain no competitive advantage by a refusal to deal.

Moreover, in *International Railways of Central America v. United Brands Co.*,[111] the Second Circuit rejected the claim that the defendant, the sole exporter of bananas from Guatemala, must continue its unprofitable operation because shutting down might mean a loss for the plaintiff, a railroad.[112] Thus, a monopolist is not required to deal at a loss, even if this refusal causes financial detriment to others.

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[106] *See, e.g.*, Aspen Skiing Co. v. Aspen Highland Skiing Corp., 472 U.S. 585, 605-11 (1985) (concluding that evidence in record supported jury's verdict that ski company had valid reasons for refusing to deal with competitor); Lorain Journal Co. v. United States, 342 U.S. 143, 152-55 (1951) (emphasizing that refusal to deal is "qualified" right); *see generally* Consolidated Gas Co. v. City Gas Co., 912 F.2d 1262, 1283-1312 (11th Cir. 1990) (Tjoflat, C.J., dissenting) (categorizing refusal-to-deal cases under section 2), *vacated*, 111 S. Ct. 1300 (1991); Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CALIF. L. REV. 959, 963-65 (1987) (criticizing Supreme Court's "vague and general" instructions that leave policy decisions to jury in refusal-to-deal cases); Note, *Duty to Cooperate Under Section 2 of the Sherman Act:* Aspen Skiing's *Slippery Slope*, 72 CORNELL L. REV. 1047 *passim* (1987) (discussing uncertainty created by Supreme Court in refusal-to-deal cases).

[107] 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

[108] *Id.* at 927-28.

[109] *Id.* at 924.

[110] *Id.* at 927-28.

[111] 532 F.2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

[112] *Id.* at 239-40.

III. Standing

Section 4 of the Clayton Act[113] authorizes an action for damages by any person "injured in his business or property by reason of anything forbidden in the antitrust laws."[114] The lower courts, under the rubric of "standing," have narrowed the statute's apparently unlimited reach to preclude actions by plaintiffs too remote from the wrongdoing[115] or whose injuries are indirect.[116] In other words, the standing doctrine seeks to limit antitrust suits to those who are in the best position to prosecute the claim and bars those claims arising from a ripple effect. Thus, when a corporation is the victim of an antitrust violation, its suppliers,[117] stockholders,[118] and creditors[119] have typically been denied recovery. Similarly, franchisors and licensors may not sue to recover for harm inflicted upon their franchisees[120] or licensees.[121] Nor may the employee of a company victimized by antitrust violations sue when the alleged injury of the employee derives from the injury suffered by the company.[122]

The circuit courts have developed a variety of tests for stand-

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[113] 15 U.S.C. § 15 (1988).

[114] *Id.*

[115] *See, e.g.*, Calderone Enters. v. United Artists Theatre Cir., Inc., 454 F.2d 1292, 1295 (2d Cir. 1971) (to have standing person must be within target area of alleged antitrust conspiracy), *cert. denied*, 406 U.S. 930 (1972).

[116] *See, e.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (antitrust damages "cannot be extended to . . . indirect or remote parties such as supplier"); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) ("plaintiff did not receive any direct injury").

[117] *See, e.g.*, Associated Radio Serv. Co. v. Page Airways, 624 F.2d 1342, 1362 (5th Cir. 1980) (denying recovery to supplier), *cert. denied*, 450 U.S. 1030 (1981); *Volasco Prods.*, 308 F.2d at 395 (same).

[118] *See, e.g.*, Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290, 294 (6th Cir. 1983) (denying recovery to stockholders); Stein v. United Artists Corp., 691 F.2d 885, 894-98 (9th Cir. 1982) (same); *see also* Data Digests, Inc. v. Standard & Poor's Corp., 43 F.R.D. 386, 388 (S.D.N.Y. 1967) ("it is by no means clear that [employees] are barred").

[119] *See, e.g.*, *Associated Radio*, 624 F.2d at 1362 (denying recovery to creditor); Reaemco, Inc. v. Allegheny Airlines, 496 F. Supp. 546, 553 (S.D.N.Y. 1980) (same).

[120] *See, e.g.*, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 188-89 (2d Cir. 1970) (franchisor), *cert. denied*, 401 U.S. 923 (1971); International Tel. & Tel. Corp. v. American Tel. & Tel. Co., 481 F. Supp. 399, 403 (S.D.N.Y. 1979) (same).

[121] SCM Corp. v. Radio Corp. of Am., 407 F.2d 166, 170 (2d Cir.) (licensee), *cert. denied*, 395 U.S. 943 (1969); *International Tel. & Tel. Corp.*, 481 F. Supp. at 403 (same).

[122] Solinger v. A&M Records, Inc., 586 F.2d 1304, 1311 (9th Cir. 1978) (employee), *cert. denied*, 441 U.S. 908 (1979); Pitchford v. PEPI, Inc., 531 F.2d 92, 97 (3d Cir.) (same), *cert. denied*, 426 U.S. 935 (1976).

ing, including (1) the direct injury test,[123] (2) the target area test,[124] (3) the zone of interest test,[125] and (4) the factual matrix approach.[126] Under the earliest approach, the direct injury test developed by the Third Circuit, only one directly injured by the alleged antitrust violations can proceed; indirect, consequential, and remote damages are insufficient to confer standing.[127] The target area approach, on the other hand, requires the court to examine the nature of the violation, the area of the economy adversely affected by the alleged wrongdoing and the plaintiff's relationship to that "targeted" area.[128] Only those plaintiffs who are within the area of the economy endangered by the breakdown of competitive conditions caused by the defendant's alleged misconduct and who are "aimed at" by the defendant have standing to sue.[129] However, one does not have to be at the bull's eye to be within the target area.[130] At the same time, if the injury suffered was not central, but merely incidental, to the defendant's unlawful objectives, the plaintiff is not within the target area.[131] The target area approach has been perhaps the most widely used test for standing.

A third approach, similar to the target area test, is the "zone of interest" test adopted by the Sixth Circuit.[132] Under this test, the plaintiff must show that its injury is within the zone of interest protected by the statute in question.[133] Finally, the Third Circuit, rejecting the direct injury that it initially championed, has adopted a factual matrix test which determines standing on a case-by-case

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[123] *See, e.g.*, Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) (direct injury test).

[124] *See, e.g.*, Calderone Enters. v. United Artists Theatre Cir., Inc., 454 F.2d 1292, 1295 (2d Cir. 1971) (target area test), *cert. denied*, 406 U.S. 930 (1972).

[125] *See, e.g.*, Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151-52 (6th Cir. 1975) (zone of interest test).

[126] *See, e.g.*, Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 506-08 (3d Cir. 1976) (factual matrix approach).

[127] *Loeb*, 183 F. at 709.

[128] *See Calderone*, 454 F.2d at 1295; Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).

[129] Calderone Enters. v. United Artist Theatre Cir., Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *Karseal*, 221 F.2d at 362, 365.

[130] Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347, 1361 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977) ("[o]ne need not be sitting on the bull's-eye in order to be within the target of an antitrust conspiracy").

[131] Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

[132] *See* Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151-52 (6th Cir. 1975).

[133] *Id.*

basis.[134] The factors considered under this test include: (1) the plaintiff's relationship to the alleged violator; (2) the directness of the injury; and (3) the plaintiff's position in the area of the economy threatened by the alleged anticompetitive acts.[135]

Prior to the Supreme Court decisions in *Blue Shield of Virginia v. McCready*[136] and *Associated General Contractors v. California State Council of Carpenters*,[137] the Second Circuit was squarely in the target area camp, following the lead of the Ninth Circuit.[138] That is not to say that the target area test has been uniformly applied by those circuits purporting to embrace it. For example, the Ninth Circuit has ruled that a plaintiff meets the target area test if his injury could have been reasonably foreseen.[139] The Second Circuit, on the other hand, has held that foreseeability is not the standard under the target area test.[140] Nor have the results in applying the target area test been uniform. The Ninth Circuit has held that a licensor claiming lost royalties for illegal block booking or blanket licensing by its licensee meets the test for standing.[141] At the same time, the Second and Seventh Circuits have denied standing on similar facts under the target area criteria.[142]

The landscape of the standing doctrine has been drastically altered and, unfortunately, muddled by the *McCready* and *Associated General Contractors* cases. Part of the confusion lies in the fact that these two decisions, rendered a year apart, point in different directions. *McCready* emphasizes Congress's broad remedial purpose in enacting section 4 of the Clayton Act, while *Associated General Contractors* emphasizes its limitations. In *McCready*, the Court ruled that the plaintiff, a psychotherapy patient who had

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[134] *See* Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 506-08 (3d Cir. 1976).

[135] *Id.* at 508.

[136] 457 U.S. 465 (1982).

[137] 459 U.S. 519 (1983).

[138] *See* Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).

[139] *See, e.g.*, Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967).

[140] *See* Calderone Enters. v. United States Theatre Cir., Inc., 454 F.2d 1292, 1297 n.2 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *But see* Schwimmer v. Sony Corp., 637 F.2d 41, 47-48 (2d Cir. 1980) (suggesting foreseeability is relevant factor).

[141] *See* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

[142] *See* Repp v. F.E.L. Publications, Ltd., 688 F.2d 441, 444-47 (7th Cir. 1982); Fields Prods., Inc. v. United Artists Corp., 318 F. Supp. 87, 88 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

been denied insurance reimbursement because she had been treated by a psychologist rather than a psychiatrist, had standing to pursue a claim alleging conspiracy between insurance companies and psychiatrists to exclude psychologists from psychotherapy by denying their patients reimbursement for treatment comparable to that provided by psychiatrists.[143]

Acknowledging the various standing tests developed at the circuit court level, the *McCready* Court nevertheless declined to embrace or disclaim any of these standards.[144] The Court also specifically declined "to engraft artificial limitations on the § 4 remedy."[145] Instead it analogized the standing issue to the "elusive" concept of proximate cause and articulated a two-step analysis requiring courts to look:

> (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.[146]

The Court analyzed the first requirement in terms of foreseeability:

> The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely " 'the type of loss that the claimed violations . . . would be likely to cause.' "[147]

Using target area language, the Court found that McCready, as a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, "was within that area of the economy . . . endangered by [that] breakdown of competitive conditions resulting from Blue Shield's selective refusal to reimburse."[148]

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[143] Blue Shield v. McCready, 457 U.S. 465, 480-81 (1982); *see also* Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 293-97 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (emphasizing Congress's broad remedial purpose in enacting section 4).

[144] *McCready*, 457 U.S. at 476 n.12, 478 n.14.

[145] *Id.* at 472.

[146] *Id.* at 478.

[147] *Id.* at 479 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969))).

[148] *Id.* at 480-81 (quoting *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129

Secondly, the Court concluded that the alleged injury was the type for which Congress intended to provide a remedy under the antitrust laws.[149] Noting that McCready had suffered damages in the form of lost insurance benefits, which she had to make up out of her own pocket, the Court declined to limit recovery to psychologists, the intended target of the alleged conspiracy.[150] The Court held that McCready's injury was "inextricably intertwined with the injury the conspirators sought to inflict on the psychologists and psychotherapy market."[151] Hence, McCready's injury flowed "'from that which makes defendants' acts unlawful'" and was therefore the type of injury that Congress intended the antitrust laws to redress.[152]

The two-step McCready analysis perhaps raises more questions than it answers. Particularly puzzling was the Court's express refusal to embrace or disavow the various approaches to standing that had percolated up through the circuits. The picture was further confused by the Court's apparent acceptance of target area language. Consequently, it is not surprising that the High Court revisited the antitrust standing question one year later in *Associated General Contractors.*

In that case, two unions sued a multiemployer association of construction contractors and its members, alleging that the defendants had coerced members of the association and others to hire nonunion help in order to injure construction unions and contractors employing union labor.[153] The Court distinguished *McCready* by pointing out that unlike the plaintiff in that case, who was a consumer of services in the market affected by the antitrust violation, the unions in *Associated General Contractors* were neither consumers nor rivals of the wrongdoers.[154] Although the Court did not overrule its holding in *McCready*, it did take a much more restrictive approach in ruling that the plaintiffs in *Associated General Contractors* lacked standing. To support its holding, the Court emphasized four factors:[155] (1) that the injuries to the unions were only an indirect result of the effect of the violation on coerced

(9th Cir.), *cert. denied*, 414 U.S. 1045 (1973)).

[149] *Id.* at 484.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Associated Gen. Contractors*, 459 U.S. at 521.

[154] *Id.* at 538-39.

[155] *Id.* at 539-44.

contractors; (2) that the direct victims of coercion—construction firms and union members—could sue, and therefore the existence of such a class of plaintiffs whose self-interest would normally motivate them to vindicate their rights under the antitrust laws diminished any justification for allowing the more remote union to sue; (3) that the union's claims were highly speculative; and (4) that allowing the unions to pursue these claims could lead to duplicative recoveries or to complex apportionment problems, contrary to the policy expressed in *Illinois Brick Co. v. Illinois*.[156]

As in *McCready*, the Court acknowledged the various standing formulae developed at the circuit court level and again declined to endorse any.[157] It went further, however, casting doubt on the legitimacy of any of these standards by stating that "these labels may lead to contradictory and inconsistent results."[158] The Court then set forth its own list of factors relevant to the issue of standing: (1) the causal nexus between the violation and the harm to the plaintiff; (2) the nature of the plaintiff's injury and whether it is the type of injury that the antitrust laws were intended to vindicate; (3) the directness or indirectness of plaintiff's injury; (4) the existence of an identifiable class of persons whose self interest would normally motivate them to vindicate the public interest in enforcement of the statute and whether plaintiff is within that class; (5) the speculative nature of the injury; and (6) the likelihood of duplicative recovery or complex apportionment of damages.[159]

The Court, without explicitly so stating, appears to have developed its own criteria for antitrust standing. The lower courts are divided as to whether the *Associated General Contractors* factors constitute a test that supersedes the standing tests developed at the circuit court level. The Second Circuit in *Crimpers Promotions Inc. v. Home Box Office, Inc.*[160] has taken the position that the fact-bound tests in *McCready* and *Associated General Contractors* now comprise the governing standard on standing issues, and further that the leading target area cases, such as *Billy Baxter, Inc. v. Coca Cola Co.*[161] and *Calderone Enterprises v. United Artists*

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[156] 431 U.S. 720 (1977).
[157] *Associated Gen. Contractors*, 459 U.S. at 536 n.33.
[158] *Id.*
[159] *Id.* at 542, 545.
[160] 724 F.2d 290 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).
[161] 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

Theatre Circuit, Inc.[162] are to be limited to their own facts.[163]

In *Crimpers*, a company organized to produce, manage and operate a cable television trade show to facilitate contacts between producers of cable television programming and local television cable stations brought an antitrust action alleging that the two dominant purchasers and assemblers of cable television shows, HBO and Showtime, conspired to cause a boycott of the trade show by threatening to stop purchasing programming from any independent producers in attendance.[164] Crimpers neither produced nor purchased cable television shows itself. Therefore, Crimpers was not a competitor or customer of the defendant, but rather a customer of a competitor, which is normally denied standing.[165] The Second Circuit, nevertheless, found that Crimpers was a competitor "in the sense that its trade show would have served to facilitate the direct dealing between producers and television stations which defendants sought to prevent."[166]

Applying the two-pronged *McCready* test, the *Crimpers* court found that the plaintiff had adequately alleged a causal nexus between the violation and the harm suffered, and further that the plaintiff's injury was of the type that Congress intended to remedy, since "Crimpers' injury was inextricably intertwined with the injury the defendants sought to inflict on producers and television stations in the cable television programming market."[167] In the Second Circuit's view, the Supreme Court's subsequent decision in *Associated General Contractors* had not so altered the *McCready* holding to warrant a different result in *Crimpers*, and, in fact, it strengthened the plaintiff's case.[168] The court viewed *Associated General Contractors* as a "paradigm of standing":

> In sum, despite the able presentation by defendants' counsel, we are unconvinced that the victim of a successful boycott designed to support a broad policy of market limitation lacks standing under § 4 simply because the boycottee was not a buyer or a seller but was endeavoring to provide a method whereby buyers and sellers could deal effectively with each other without pay-

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[162] 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).
[163] *Crimpers*, 724 F.2d at 293.
[164] *Id.* at 291.
[165] *Id.* at 294.
[166] *Id.* at 294-95, 296 n.6.
[167] *Id.* at 294-95.
[168] *Id.* at 293. The district court decision in *Crimpers* predated the Supreme Court holding in *Associated General Contractors. Id.* at 292-93.

> ing tribute to the defendants. The contrary view would run counter not only to the two most recent decisions of the Supreme Court but to elementary common sense. Indeed, if we should free ourselves from the miasma of adjectives that has accumulated around the words of § 4, this case would seem to be a paradigm of standing.[169]

The Second Circuit's expansive approach toward antitrust standing is further exemplified by its decisions in the merger area. In *R.C. Bigelow, Inc. v. Unilever N.V.*,[170] Bigelow sought to enjoin a merger of rival herbal tea sellers, Celestial Seasonings, Inc. and Thomas J. Lipton, Inc., on the grounds that the merged company would control eighty-four percent of the herbal market and that therefore the effect of the merger would be to substantially lessen competition, or to tend to create a monopoly.[171] Reversing the district court, the Second Circuit ruled that Bigelow, as a competitor of the merging parties, had standing to challenge the merger.[172] Citing *United States v. Philadelphia National Bank*,[173] the court concluded that a post-acquisition market share of eighty-four percent constitutes an " 'undue percentage share of the relevant market' " and " 'is so *inherently* likely to lessen competition substantially that it *must* be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.' "[174] Nor did the court find relevant the fact that the plaintiff was a rival of the merging parties.

> The fact that a competitor of parties to a proposed merger is seeking to remedy the alleged anticompetitive conduct does not significantly alter the analysis. Although we must be wary of competitors attempting to obtain antitrust standing based upon prospective loss or damage due to competition for increased market share, we have little doubt that antitrust injury to a competitor can be found when the market share of the merging firms threatens to be decisive. Consequently, not only is the post-acquisition market share of 84% in this case *prima facie* evidence of monopoly power as the district court found, it also raises a presumption of illegality and of antitrust injury to competitors of the alleged

[169] *Id.* at 297.
[170] 867 F.2d 102 (2d Cir.), *cert. denied*, 110 S. Ct. 64 (1989).
[171] *Id.* at 104.
[172] *Id.* at 107-11.
[173] 374 U.S. 321 (1963).
[174] *R.C. Bigelow*, 867 F.2d at 108 (quoting *Philadelphia Nat'l Bank*, 374 U.S. at 363) (emphasis in original).

monopolist who are damaged by the "'type of loss that the claimed violations . . . would be likely to cause.'"[175]

Nevertheless, the court has denied standing in cases in which the plaintiff failed to show a causal nexus between the harm and the alleged antitrust violation,[176] in which the plaintiff was not prepared to enter the relevant market at the time of the alleged violation,[177] and in which the plaintiff whose low bid won the contract suffered decreased profits as a result of defendants' price fixing.[178]

The district courts in the Second Circuit have tended to follow the circuit's liberal interpretation of the Supreme Court's antitrust standing doctrine. For example, in *Donahue v. Pendleton Wollen Mills, Inc.*,[179] Judge Ward held that a sales representative who alleged that he was terminated by his employer for failure to adhere to the employer's resale price maintenance program had standing to proceed under section 4 of the Clayton Act because his employer used him as "the very means of enforcing the alleged scheme to restrain competition."[180]

In *Westchester Radiological Associates, P.C. v. Empire Blue Cross & Blue Shield, Inc.*,[181] the court held that radiologists had standing to challenge a Blue Cross reimbursement policy that required hospital reimbursement of radiologists in a set amount, rather than allowing radiologists to bill their patients directly. Despite the fact that they were not consumers or competitors in the relevant market, the radiologists' injury was deemed "inextricably intertwined" to the defendant's anticompetitive behavior, which was specifically directed at the radiologists.[182]

IV. ANTITRUST INJURY

Closely related to, but analytically distinct from, the doctrine

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[175] *Id.* (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969))) (citations omitted).

[176] Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 41 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

[177] Indium Corp. of Am. v. Semi-Alloys, Inc., 781 F.2d 879, 882 (2d Cir. 1985), *cert. denied*, 479 U.S. 820 (1986).

[178] Triple M. Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 247 (2d Cir. 1985).

[179] 633 F. Supp. 1423 (S.D.N.Y. 1986).

[180] *Id.* at 1436.

[181] 659 F. Supp. 132 (S.D.N.Y. 1987), *aff'd*, 884 F.2d 707 (2d Cir. 1988), *cert. denied*, 110 S. Ct. 1169 (1990).

[182] *Id.* at 137.

of standing is the doctrine of antitrust injury. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[183] the Supreme Court held that to recover, an antitrust plaintiff must prove more than injury causally linked to an illegal presence in the marketplace. Rather, the plaintiff must prove *antitrust* injury, which is defined as

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."[184]

Brunswick itself involved a merger, but the concept of antitrust injury has been broadly applied to all types of antitrust violations.[185]

Unfortunately, the courts have been less than precise in distinguishing antitrust injury from standing, and frequently use the terms interchangeably. Both concepts do share a common ingredient: " 'confin[ing] recovery to those who have been injured by restraint on competitive forces in the economy.' "[186] The Second Circuit has tried to harmonize these concepts by adopting the view that under *McCready* and *Associated General Contractors*, antitrust injury is an element of standing.[187] Thus, even after negotiating the antitrust injury hurdle, a plaintiff still must meet the additional criteria set forth by the Supreme Court to establish standing. Put another way, antitrust injury is a necessary but not a sufficient condition to prosecute an antitrust suit.

A. *Parties "Injured"*

As in the case of standing, the Second Circuit has adopted a rather expansive view of antitrust injury. Specifically rejecting contrary holdings from other circuits, the court has held that the target of a consolidated hostile takeover may suffer antitrust injury

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183 429 U.S. 477 (1977).

184 *Id.* at 489 (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)).

185 *See, e.g.*, Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 (6th Cir.) (claim under § 1 of Sherman Act), *cert. denied*, 454 U.S. 893 (1981); Malcolm v. Marathon Oil Co., 642 F.2d 845, 856 (5th Cir.) (predatory pricing), *cert. denied*, 454 U.S. 1125 (1981).

186 Triple M Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 247 (2d Cir. 1985) (quoting GAF Corp. v. Circle Floor Co., 463 F.2d 752, 758 (2d Cir. 1972)).

187 *See id.*

and therefore may challenge such a takeover on antitrust grounds.[188] Similarly, the Second Circuit has maintained that an alleged cartel participant may suffer antitrust injury by reason of the cartel's illegal restraints, specifically rejecting arguments that a particular cartel participant inevitably benefits from cartel activities.[189]

Yet, the Second Circuit has also noted that the "antitrust laws were never intended to provide a balm for the hardships occasioned by vigorous competition."[190] In *Triple M Roofing Corp. v. Tremco, Inc.*,[191] the court held that a roofing contractor that was the successful bidder on a roofing project had not suffered antitrust injury from an alleged conspiracy between the project owner and the manufacturer of roof coating.[192] The plaintiff contended that the alleged conspiracy inflated the price of roof coating and that it was therefore injured because its low bid on the roofing project was predicated on the fallacious assumption that the roof coating had been priced competitively.[193] Had the plaintiff known that the price of suppliers had been rigged, its bid would have been higher.[194] The plaintiff contended that damages should be measured by the difference between the actual bid and the bid that would have been submitted had it known of the price fixing.[195] Terming this claim "bizarre," the court ruled that the "proscription against price-fixing was not intended to forestall injury of the type Triple M alleged."[196] The lower courts have not hesitated to dismiss questionable claims on antitrust injury grounds.[197]

B. *Indirect Purchaser Claims*

Even prior to the Supreme Court's decision in *Illinois Brick*, which held that only those who purchase directly from price fixers,

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[188] Consolidated Gold Fields PLC v. Minorca, S.A., 871 F.2d 252, 259 (2d Cir. 1989).

[189] Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 69 (2d Cir. 1988).

[190] *Triple M Roofing*, 753 F.2d at 243.

[191] 753 F.2d 242 (2d Cir. 1985).

[192] *Id.* at 247.

[193] *Id.*

[194] *See id.*

[195] *Id.* at 245.

[196] *Id.* at 247.

[197] *See, e.g.*, Remington Prods., Inc. v. North Am. Philips, Corp., 763 F. Supp. 683, 688 (D. Conn. 1991) (dismissing claims for lack of antitrust injury); Retail Serv. Assocs. v. Conagra Pet Prods. Co., 759 F. Supp. 976, 979-81 (D. Conn. 1991) (same); Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 837 (S.D.N.Y. 1988) (same).

and not others in the chain of distribution, are "injured" within the meaning of section 4 of the Clayton Act,[198] the Second Circuit was hostile to damage claims by indirect purchasers. Indirect purchasers were found to have been too remote to prosecute private claims.[199] However, the Second Circuit has not had the opportunity to reexamine the indirect purchaser question in the wake of the Supreme Court's *California v. Arc America Corp.*[200] decision upholding indirect purchaser actions under state law. Thus, whether the Second Circuit would permit indirect purchaser suits under New York's Donnelly Act remains an open question.

V. Horizontal Restraints

The courts within the Second Circuit have consistently condemned as per se unlawful, agreements among competitors affecting price.[201] At the same time, these courts have eschewed formalistic analysis based on labelling, and have evidenced a willingness to analyze the substance of a transaction before deciding whether to condemn it summarily merely because literal price-fixing arguably is involved.[202] The courts of the Second Circuit have taken their cues from the Supreme Court's 1979 decision in *Broadcast Music, Inc. v. Columbia Broadcast System* ("*BMI*"),[203] a case that arose in the Southern District of New York and adopted the view that "easy labels do not always supply ready answers."[204] Unquestionably, *BMI* has profoundly impacted the analysis of alleged price restraints in violation of section 1 of the Sherman Act.

In *BMI*, the plaintiff, Columbia Broadcasting System ("CBS"), challenged the royalty practices of the defendants, Broadcast Music, Inc. ("BMI") and American Society of Composers, Authors and Publishers ("ASCAP"), two clearing houses for

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[198] *Illinois Brick*, 431 U.S. at 729.

[199] *See, e.g.*, FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1028 (2d Cir. 1976) (denying recovery to indirect purchaser of auto parts), *cert. denied*, 429 U.S. 1097 (1977).

[200] 490 U.S. 93 (1989).

[201] *See, e.g.*, Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 71 (2d Cir. 1988) (quoting Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 8 (1979)) (normally, "agreements among competitors to fix prices on their individual goods or services are among those concerted activities" that are considered *per se* illegal).

[202] *See id.* at 71-72 (instructing district court on remand to consider substance of tennis association's practices).

[203] 441 U.S. 1 (1979).

[204] *Id.* at 8.

music copyright owners and users.[205] For a specified royalty, the defendant licensors issued blanket licenses that allowed the licensee access to their entire libraries for a specified period of time.[206] Thus, CBS was not free to license individual works through BMI or ASCAP, but could, if it wished, negotiate directly with copyright holders because BMI and ASCAP were nonexclusive licensors. CBS contended that this conduct constituted price fixing and was per se unlawful.[207]

The district court, after an eight-week trial limited to liability issues, dismissed the complaint, rejecting the claim that the blanket license was price fixing and a per se violation of section 1 of the Sherman Act. The court further held that the blanket license was not an unreasonable restraint of trade because CBS was free to negotiate with individual copyright holders.[208] The Second Circuit reversed, concluding that the blanket licensing arrangement constituted unlawful price fixing, a per se violation of the Sherman Act.[209]

Acknowledging the utility of the per se rule, the Supreme Court nevertheless declined to apply it to the facts of *BMI*.[210] The Court criticized the Second Circuit for its literal approach to price fixing, and held that before a practice can be fitted into a per se pigeonhole, it must be found to be "plainly anticompetitive."[211] The Court also noted that the particular restraints, involving the interface of antitrust and copyright laws, were sui generis, and therefore must be carefully scrutinized.[212]

The *BMI* Court found that the restraints were neither plainly anticompetitive nor without "redeeming virtue."[213] The restraint existed only because of copyright law, and the marketing arrangement was reasonably necessary to effect rights protected by that law.[214] Hence, there was no anticompetitive purpose in the use of blanket licenses. Rather, the restraints were ancillary to the legitimate objectives of monitoring and enforcing rights under the copy-

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[205] *Id.* at 5.
[206] *Id.*
[207] *Id.* at 6.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 8.
[211] *Id.* at 9.
[212] *Id.* at 10.
[213] *Id.* at 9.
[214] *Id.* at 18-19.

right laws. The blanket licensing system was developed out of the exigencies of the marketplace, including the user's need for quick access to copyrighted works, the owner's need for a reliable method of collection, and the shared need for a low-cost means of transacting business.[215] Thus, blanket licensing provided an efficient, low-cost mechanism for bringing together providers and users, and, in fact, it was the vehicle preferred by most licensees.[216]

Moreover, the Court found that there was little likelihood that the blanket license could be used to foster an anticompetitive scheme because BMI and ASCAP were subject to consent decrees monitored by the Department of Justice.[217] Among other things, the consent decrees provided that BMI and ASCAP must share the right to license with the copyright holder. Finally, the Court took the unusual step of stating that if a royalty rate could not be agreed upon, the district court could intervene to establish a reasonable license fee.[218]

Whether *BMI* stands as an exception to the general rule of per se prohibition against horizontal price fixing, or is simply a sui generis case that does not fit into any previously defined pigeonhole, is a matter that could be debàted endlessly and, in the end, pointlessly. The key teachings of *BMI* are: (1) the per se label is reserved only for those activities that are plainly anticompetitive; (2) courts must avoid the tyranny of labels and analyze the true nature and effects of competitive restrictions; and (3) the fact that competitors are parties to a common course of action does not automatically create antitrust liability.

In the sequel to *BMI*, an action by local affiliates against BMI and ASCAP raising essentially the same issues, the Second Circuit applied the Supreme Court's analysis lock, stock, and barrel. Reversing the district court, the Second Circuit ruled that blanket licensing to affiliate stations did not constitute an unreasonable restraint of trade.[219] Most recently, in *Volvo North America Corp. v. Men's International Professional Tennis Council*,[220] the Second Circuit urged caution in applying the per se analysis to alleged re-

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[215] *Id.* at 20.
[216] *Id.* at 20-21.
[217] *Id.* at 11.
[218] *Id.* at 11-12.
[219] Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 933 (2d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).
[220] 857 F.2d 55 (2d Cir. 1988).

straints involving horizontal price fixing and horizontal division of markets in the production of men's professional tennis events, the tennis playing services of men's professional tennis players, and the rights to broadcast men's professional tennis events.[221] Without characterizing the alleged misconduct, the court directed that "on remand, the district court should carefully consider whatever arguments appellees may offer in support of their practices relating to player compensation before deciding whether the *per se* rule or the Rule of Reason should apply."[222]

The *Volvo* court urged similar caution in evaluating the alleged concerted refusals to deal.[223] Indeed, the lower courts have demonstrated a reluctance summarily to condemn alleged group boycotts as per se unlawful, and have heeded the admonition of the Supreme Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*[224] In *Northwest Wholesale*, the Court held that a plaintiff alleging a group boycott "must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects," and that the "mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive."[225] For example, the district court in *Apex Oil Co. v. DiMauro*[226] stated:

> However, what behavior constitutes a horizontal group boycott deserving of *per se* condemnation under the Sherman Act has been the source of considerable confusion in recent years. The Supreme Court has warned that courts should not adjudicate allegations of boycotts under section one of the Sherman Act "by forcing the [defendant's] policy into the 'boycott' pigeonhole," particularly where doing so would "extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact . . . is not immediately obvious." In this context, the Fifth Circuit has noted that "in the course of deciding whether a business practice challenged under Section 1 fits within the 'boycott pigeonhole,' many courts find themselves in a detailed inquiry into the economic effects of the practice—precisely the sort of 'rule of reason' analysis the *per se* approach is sup-

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[221] *Id.* at 71-72.
[222] *Id.* at 72.
[223] *Id.* at 73.
[224] 472 U.S. 284 (1985).
[225] *Id.* at 298.
[226] 713 F. Supp. 587 (S.D.N.Y. 1989).

> posed to eliminate for 'obviously' anticompetitive reasons." Indeed, the Supreme Court has recently held that in alleged cases "there is a presumption in favor of a rule-of-reason standard."[227]

Thus, in boycott cases especially, the courts in the Second Circuit are moving away from per se analysis.

At the same time, the Second Circuit has resisted expanding the reach of the per se rule. In *FTC v. Ethyl Corp.*,[228] the FTC challenged a series of alleged anticompetitive practices affecting price under section 5 of the Federal Trade Commission Act ("FTC Act"), which the FTC conceded were not the result of any agreement, express or implied. Rather, they arose in an oligopolistic market characterized by high concentration, small likelihood of new entrants because of a sharply declining market, inelastic demand, and homogeneity of product.[229] The FTC alleged that the noncollusive acts of defendants in that market facilitated the maintenance of uniform price levels and the reduction or elimination of price competition in the lead antiknock gasoline additives market.[230] Put another way, the unilateral activities of one defendant constituted price signalling to other defendants and thereby perpetuated a supracompetitive price structure.

Finding the FTC's theory vague and uncertain, the Second Circuit rejected price signalling as a basis of liability under the FTC Act.[231] The court observed that the FTC's position could be read to condemn any price increase by any seller in an oligopolistic market.[232] The court also found that to establish an unfair trade practice absent tacit agreement, the FTC must allege, at a minimum, some indicia of oppressiveness, such as the seller's anticompetitive purpose or intent or absence of an independent business reason for its conduct.[233]

On the other hand, the Second Circuit has not gone as far as other courts in eroding traditional section 1 prohibitions against horizontal restraints.[234] Taking a Chicago School approach, those

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[227] *Id.* at 598 (citations omitted).
[228] 729 F.2d 128 (2d Cir. 1984).
[229] *Id.* at 132.
[230] *Id.* at 133.
[231] *Id.* at 137.
[232] *Id.* at 138-39.
[233] *Id.* at 139-40.
[234] *See, e.g.*, Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478-81 (9th Cir. 1986) (hybrid horizontal/vertical relationship due to dual distributorships warranted analysis under rule of reason approach), *modified*, 810 F.2d 1517 (9th Cir. 1987).

courts have evidenced a willingness to uphold horizontal restraints, once summarily condemned as per se unlawful, by analogizing them to joint ventures or, at least when market power is not shown, to ancillary restraints.[235]

VI. Conclusion

The Second Circuit has been at the forefront in shaping antitrust doctrine and will continue to exercise a leadership role in the future. Less clear is the significance of antitrust in the overall mix of cases that come before the court. Given the downturn in antitrust activity at the federal level that began a decade ago, the Second Circuit has had fewer opportunities to confront antitrust issues. Whether this trend will continue remains to be seen. However, those who have declared that the antitrust laws have outlived their usefulness would be premature in proclaiming their demise.

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[235] *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 223-30 (D.C. Cir. 1986) (horizontal restraints were ancillary and clearly incapable of suppressing market competition), *cert, denied*, 479 U.S. 1033 (1987); National Bancard Corp. v. Visa U.S.A., Inc., 779 F.2d 592, 601-02 (11th Cir.) (complex market relationship suggestive of joint venture not subject to per se scrutiny because of its necessity to functioning of system), *cert. denied*, 479 U.S. 923 (1986); Polk Bros. v. Forest City Enters., 776 F.2d 185, 190 (7th Cir. 1985) (because ancillary restraint made cooperation and increased production possible, rule of reason applies); Vogel v. American Soc'y of Appraisers, 744 F.2d 598, 602-03 (7th Cir. 1984) (lack of market power makes horizontal restraints not subject to per se classification).