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Monopoly Leveraging in Verizon Communications v. Law Offices of Curtis v. Trinko, LLP: Why the United States Supreme Court Should Draw a Clear Line for Anticompetitive Behavior Violative of the Sherman Act

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MONOPOLY LEVERAGING IN VERIZON COMMUNICATIONS V. LAW OFFICES OF CURTIS V. TRINKO, LLP: WHY THE UNITED STATES SUPREME COURT SHOULD DRAW A CLEAR LINE FOR ANTICOMPETITIVE BEHAVIOR VIOLATIVE OF THE SHERMAN ACT

I. INTRODUCTION

On November 1, 2002, Verizon Communications Inc. ("Verizon")[1] petitioned for writ of certiorari in the United States Supreme Court, asking in part that the Court decide whether a cause of action exists for monopoly leveraging.[2] On March 10, 2003, the United States Supreme Court granted Verizon's petition.[3] Courts have confronted monopoly leveraging many times throughout the course of the doctrine's

[1] Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89 (2d Cir. 2002), *petition for cert. filed sub nom.* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 71 U.S.L.W. 3576 (2002). Verizon assumed this lawsuit after Bell Atlantic merged with GTE Corporation to form Verizon Communications.

[2] The United States Supreme Court has yet to address the issue of whether a cause of action for monopoly leveraging exists.

[3] *Verizon Communications*, 123 S.Ct. at 1480. The petition was limited to the following question: Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims? *Id.*

history.[4] In doing so, courts have either embraced the theory or flat-out rejected it. Even in the courts that have embraced the doctrine, however, only a few plaintiffs have succeeded on the merits.[5]

Monopoly leveraging is the use of monopoly power in one market as leverage to obtain a competitive advantage in another market.[6] The doctrine was created based upon courts' interpretation of Section 2 of the Sherman Act, which deals with a single firm's anticompetitive manipulation of a market.[7] Courts have provided various approaches in defining what constitutes a cause of action for monopoly leveraging.[8] Monopoly leveraging, however, cannot be established in any way without a firm having some pre-existing monopoly power in one market.[9] The pre-existing monopoly power must then be used in some way by the firm to exact an anticompetitive outcome in a second market.[10] Finally, the outcome in the second market must result in a competitive advantage for the firm.[11]

The type of outcome in the second market is where much of the disagreement lies.[12] Circuits that have rejected the doctrine have generally done so because they believe that a mere competitive advantage falls short of the anticompetitive behavior the Sherman Act is designed to prohibit.[13] As a result of the discrepancy concerning what kind of anticompetitive behavior the Sherman Act is designed to prohibit, the Supreme Court needs to set the bar once and for all, so the lower federal courts know whether the monopoly leveraging doctrine makes the cut.

There are three purposes to this article. One purpose is to demonstrate the circuit split on the issue of whether a cause of action for monopoly leveraging exists, and the need for the Supreme Court to decide the issue. To demonstrate the split, this article will begin with an overview of the Sherman Act. This article will then discuss the seminal cases. It will, first, discuss the cases in various circuits that have embraced the doctrine and elaborated on it. Second, this article will analyze the cases in circuits that rejected the doctrine and focus on their reasons for rejecting the

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[4]Federal Circuit and District Court of Appeals have encountered the monopoly leveraging doctrine 122 times.

[5]Excluding federal district courts, plaintiff has succeeded in bringing the doctrine in the federal court of appeals cases of Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), Kerasotes Mich. Theatres, Inc. v. Nat'l Amusements, Inc., 854 F.2d 135 (6th Cir. 1988), and Key Enters. of Del., Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990), *vacated by*, 979 F.2d 806 (11th Cir. 1992), *dismissed as moot*, 9 F.3d 893 (11th Cir. 1993).

[6]*Berkey*, 603 F.2d at 275.

[7]Anthony E. DiResta, "*Monopoly Leveraging": A New Section 2 Challenge for Integrated Firms*, C847 A.L.I-A.B.A. 393, 395 (1993).

[8]*Id.*

[9]*Id*.

[10]*Id*.

[11]*Id*.

[12]Gen. Cigar Holdings, Inc. v. Altadis, S.A., 205 F. Supp. 2d 1335, 1352-53 (S.D. Fla. 2002).

[13]*Id*. at 1353.

doctrine. It will also discuss the doctrine in light of two recent cases: *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*,[14] which has embraced the monopoly leveraging doctrine, and *General Cigar Holdings, Inc. v. Altadis, S.A.*, which has rejected the monopoly leveraging doctrine.[15] To demonstrate the need for the Supreme Court to decide the issue, this article will discuss several Supreme Court cases that have not only indirectly affected the doctrine, but have also sent mixed messages concerning its viability.[16]

The second purpose of this article is to determine the state of the doctrine prior to the Supreme Court ruling in the *Verizon* case, and what is required to successfully bring the cause of action today in the circuits that embrace the doctrine. The final purpose is to determine how the Supreme Court should rule on the issue of whether a cause of action exists for monopoly leveraging.

II. The Monopoly Leveraging Circuit Split

A. Overview of the Sherman Act

The monopoly leveraging doctrine is based upon Section 2 of the Sherman Act.[17] There are two general aims of the Sherman Act.[18] The first aim is generally to prohibit anticompetitive conduct.[19] The second aim is to prohibit market conditions that are anticompetitive.[20]

Section 1 of the Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[21] Because Section 1 focuses on specific conduct of firms and is expressly limited to conduct that involves at least two firms,[22] its conditions are not implicated in the monopoly leveraging doctrine as the doctrine deals with conduct of individual firms.[23] This article will show how courts have used Section 1, however, to fight against the validity of the monopoly leveraging doctrine.[24]

[14]305 F.3d 89 (2d Cir. 2002), *petition for cert. filed sub nom.* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 71 U.S.L.W. 3352 (2002).

[15]*Gen. Cigar Holdings*, 205 F. Supp. 2d at 1352.

[16]Though the Supreme Court has not decided whether the monopoly leveraging doctrine is a viable cause of action under section 2 of the Sherman Act, other Supreme Court cases have indirectly affected the doctrine and pose great significance in determining its survival. *See* discussion *infra* Part III.

[17]DiResta, *supra* note 7, at 397.

[18]*Id.* at 395.

[19]*Id.*

[20]*Id.*

[21]15 U.S.C. § 1 (1994).

[22]DiResta, supra note 7, at 395-96.

[23]*Id.*

[24]*See* Fineman v. Armstrong World Indust., Inc., 980 F.2d 171 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993).

Section 2 focuses on a firm's manipulation of a market[25] by making it unlawful to "monopolize, or attempt to monopolize, or 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."[26] Each of the activities proscribed in Section 2 has its own elements.[27] There are two elements to unlawful monopolization.[28] They are: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[29] There are three elements of attempted monopolization.[30] They are: "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[31]

Congress realized when passing the Sherman Act that it could not possibly conceive of every type of activity that could effectively constitute monopolization; and therefore, left Section 2 broad enough to allow it to act as the vehicle for federal courts to use when adopting common law that targets activity that leads to monopolization.[32] Senator John Sherman of Ohio, who was the chief proponent of the Sherman Act in the late 19th century, explained, "it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case."[33] As a result, there is an expansive common law dealing with activity that leads to monopolization.[34] Three universally-accepted violations, actual monopolization, attempted monopolization, and conspiracy to monopolize, are stated expressly in Section 2.[35] They have, however, been expanded by the courts with regard to their elemental applications.[36] Monopoly leveraging, on the other hand, is not expressly identified as violative of Section 2.[37] Nevertheless, the courts have found that monopoly leveraging is, under certain circumstances, a violation thereof.[38]

[25]DiResta, *supra* note 7, at 396.

[26]15 U.S.C. § 2 (1994).

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

[28]*Id.*

[29]*Id.*

[30]Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[31]*Id.*

[32]DiResta, *supra* note 7 at 397.

[33]James P. Puhala, III, *Antitrust Law—Berkey Photo and Alaska Airlines: Different Approaches to Monopoly Leveraging Claims*, 16 W. NEW ENG. L. REV. 111 (1994) (quoting Seantor Sherman).

[34]*Id.*

[35]DiResta, *supra* note 7, at 397.

[36]*Id.*

[37]*Id.*

[38]*Id.*

B. The Conception of the Monopoly Leveraging Doctrine

The concept of using lawfully-gained monopoly power in one market as a lever to obtain a competitive advantage in another market was alluded to by the United States Supreme Court over fifty years ago.[39] Despite its tenuous beginnings, however, it later emerged into a full-fledged legal doctrine.

The Supreme Court case that suggested the monopoly leveraging doctrine was *United States v. Griffith*.[40] Here, the Court was faced with movie exhibitors who originally had theaters in approximately thirty-seven towns; forty-nine percent of which were competitive with other theaters in their respective towns and fifty-one percent of which were noncompetitive.[41] In the towns that were noncompetitive, the movie exhibitors operated lawfully-gained monopolies under the scope of the Sherman Act.[42] Five years later, however, the same movie exhibitors had theaters in approximately eighty-five towns; thirty-eight percent of which were competitive and sixty-two percent of which were noncompetitive.[43] The strategy of the movie exhibitors was to use their already-achieved monopoly power to bargain for exclusive movie distribution rights in towns in which they sought to establish themselves.[44] As a consequence, the exhibitors were able to dramatically increase the number of markets in which they enjoyed monopoly power.[45] The Court held that their use of monopoly power "to beget monopoly"[46] was illegal.[47] In addition to finding that this activity violated Section 2 of the Sherman Antitrust Act, the Court stated in *dictum* that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."[48] It additionally proclaimed that "monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under [Section] 2 [of the Sherman Act]."[49] From these broad statements, the theory of monopoly leveraging was born.[50]

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[39]*See* United States v. Griffith, 334 U.S. 100 (1948), *overruled by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

[40]*Id.*

[41]*Id.* at 102-03.

[42]*Id.*

[43]*Id.*

[44]*Griffith*, 334 U.S. at 102.

[45]*Id.* at 103.

[46]*Id.* at 108.

[47]*Id.*

[48]*Id.* at 107.

[49]*Griffith*, 334 U.S. at 107.

[50]*Gen. Cigar Holdings*, 205 F. Supp. 2d at 1352. Though not yet an expressly recognized legal doctrine, monopoly leveraging at this early stage in the game meant there must be some pre-existing monopoly power. Pre-existing monopoly power must be used in some way to disrupt competition and gain a competitive advantage, and notably, intent is not required.

Before it became an expressly-recognized legal doctrine, monopoly leveraging was mentioned in the broad context afforded by *Griffith* and in relation to other antitrust theories.[51] In *Sargent-Welch Scientific Co. v. Ventron Corp.*,[52] for example, the Seventh Circuit discussed the doctrine in the realm of a tying arrangement under which a manufacturer who enjoyed a monopoly selling electromagnetic microbalances terminated a dealership when the buyer refused to also purchase the manufacturer's millibalances.[53] The Seventh Circuit noted that "[t]he possessor of [a] lawfully acquired monopoly power may not use that power as leverage to deprive competitors of access to customers, to force customers to maintain resale prices or in any other coercive manner,"[54] despite the fact that the manufacturer had not established a monopoly in the second millibalances market.[55] The manufacturer additionally did not have a reasonable possibility of achieving a monopoly in the second market.[56] Nonetheless, the leveraging of monopoly power through a tying arrangement, when used to gain a competitive advantage in the second market, constituted unlawful activity under the Sherman Act.[57]

The monopoly leveraging doctrine was expressly recognized in the Second Circuit case of *Berkey Photo, Inc. v. Eastman Kodak Co*.[58] The markets involved in this case were cameras, film, photofinishing equipment and services, and color paper on which to develop the film.[59] Kodak was a competitor in all of these markets, but it had monopoly power in the camera and film markets, controlling sixty percent and over eighty percent, respectively.[60] Berkey competed with Kodak in several markets including those of photofinishing equipment and services, and the sale of cameras.[61] At the same time, Berkey was a distributor of Kodak products.[62] It purchased Kodak film in addition to other Kodak supplies for the purpose of reselling them to its own customers.[63] In the course of their business relationship, however, Kodak developed a new and better type of color film, and, rather than introduce it in an existing format, decided to introduce it in a new 110mm format.[64] Kodak then developed a

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[51]*See* Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701 (7th Cir. 1977).

[52]*Id.*

[53]*Id.* at 704.

[54]*Id.* at 712.

[55]*Id.*

[56]*Sargent-Welch Scientific*, 567 F.2d at 706.

[57]*Id.* at 712.

[58]603 F.2d 263 (2d Cir. 1979).

[59]*Id.* at 269.

[60]*Id.* at 269-70.

[61]*Id.*

[62]*Id.*

[63]*Berkey*, 603 F.2d at 269-70.

[64]*Id.*

110 Pocket Instamatic camera with which to use the new color film.[65] Because the 110mm film would only operate in the Pocket Instamatic camera, Kodak enjoyed a monopoly in the new film market until competitors, such as Berkey, could develop their own 110mm camera.[66] In addition to other allegations such as tying, Berkey alleged that Kodak's monopoly in the 110mm film market gave it an unfair advantage in the photofinishing equipment and services markets.[67] The court noted that Kodak did not come close to gaining control of the markets and did not attempt to monopolize them.[68]

After examining previous decisions such as *Griffith*, which had not expressly recognized the doctrine, the Second Circuit affirmatively held for the first time that "a firm violates section 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market."[69] It further stated that "the competition in the leveraged market may not be destroyed but merely distorted."[70] The court, however, did not hold that any competitive advantage would satisfy the doctrine.[71] Rather, it provided an example of behavior that would not satisfy the doctrine.[72] "[A] large firm does not violate section 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market."[73] The court effectively made an exclusion for large firms with efficient operations. "[C]omplementary products, reduced transaction costs, and so forth . . . are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power."[74] In providing this exclusion, it made the task of determining what kinds of monopoly power are prohibited difficult because that which constitutes the large firm with efficient operations is largely vague.[75]

Certainly the doctrine made headway as an expressly-recognized legal doctrine after *Berkey Photo*, but because of the newly-created difficulty in determining what kinds of monopoly power are prohibited under the efficient operations exception, the doctrine remained in a state of confusion.[76]

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[65] *Id.*

[66] *Id.* at 268.

[67] *Id.* at 267-68.

[68] *Berkey*, 603 F.2d at 275.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Berkey*, 603 F.2d at 276.

[74] *Id.*

[75] Puhala, *supra* note 33, at 123.

[76] *Id.*

C. Progression of the Monopoly Leveraging Doctrine

Courts in several circuits accepted the doctrine despite the state in which *Berkey Photo* left it. Courts even elaborated upon the principles set forth in *Berkey Photo* in order to clear up some of the confusion. The Sixth Circuit adopted the principles set forth in *Berkey Photo* and *Griffith* in *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc*.[77] The facts are similar to *Griffith*. National Amusements alleged that Kerasotes used its monopoly power as a movie exhibitor outside the region of Flint, Michigan, as leverage to obtain exclusive exhibition rights of first run films inside the region of Flint.[78] Though National Amusement's claim was dismissed in the district court pursuant to a motion to dismiss for failure to state a claim under Fed. R. Civ. P. § 12(b)(6), the circuit court stated that National Amusement's leveraging claim was a viable antitrust cause of action sufficient to defeat such a motion.[79]

> A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors.[80]

The court thereby reinforced the idea that monopoly leveraging is the use of monopoly power as a lever to gain a competitive advantage in another competitive market, while confirming that it is not necessary to possess monopoly power or a dominate market position in the second market.[81] It additionally tried to clarify the *Kodak* exception by stating that monopoly leveraging occurs when a firm attempts "to extend a business dominance from one market into a second market, without having to achieve that dominance in the second market by developing a superior product or as the result of other legitimate competitive advantages."[82]

The monopoly leveraging doctrine was reaffirmed by the Second Circuit in *Grandlight & Supply Co. v. Honeywell, Inc*.[83] Grandlight alleged that defendant, Micro Switch, had used its market power in its basic, core-line products to gain a

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[77]854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom*. G.K.C. Mich. Theatres, Inc. v. Nat'l Amusements, Inc. 490 U.S. 1087 (1989).

[78]*Id*. at 136.

[79]*Id*. at 136. ("We believe National has adequately alleged a viable antitrust cause of action sufficient at least to defeat a Rule 12(b)(6) dismissal. Kerasotes' alleged behavior, using its dominant market position in non-Flint areas to obtain first run films in Flint, which they would not have been able to obtain in a competitive process, does indeed constitute 'leveraging,' which is forbidden by the antitrust laws"). *Id.*

[80]*Id*. at 137.

[81]*Id*. ("We expressly reject the district court's reasoning that leverage or the abuse of monopoly power is not actionable when the offender has not yet acquired a dominant position in the affected market"). *Id.*

[82]*Id.*

[83]771 F.2d 672, 681 (2d Cir. 1985).

competitive advantage in its ventured line.[84] The court, in reaffirming that a cause of action for monopoly leveraging exists, broke down the claim of monopoly leveraging into three factors.[85] First, there must be some form of monopoly power in one existing market.[86] Second, as seen in *Berkey*, there must be use of monopoly power in one market to foreclose competition, gain a competitive advantage, or destroy a competitor.[87] Third, there must be an injury caused by the conduct.[88] Applying these elements, the court affirmed the district court's finding that the plaintiff did not meet its burden of establishing that the defendant used its monopoly power to gain a competitive advantage.[89]

The Eleventh Circuit recognized a claim for monopoly leveraging in *Key Enterprises of Delaware, Inc. v. Venice Hospital*.[90] The facts of the case surrounded the rental and sale of durable medical equipment in Venice, Florida.[91] Venice Hospital enjoyed a monopoly in acute care as it had eighty percent of the patient hospital admissions in Venice, and few Venice area residents would go to neighboring hospitals outside of Venice.[92] A supplier of durable medical equipment brought a cause of action against the hospital when the hospital implemented a joint venture with a private corporation, that was also a supplier of durable medical equipment.[93] The joint venture excluded the plaintiff supplier and other competing vendors from selling their durable medical products to the hospital's patients.[94]

The jury concluded, and the circuit court agreed, that Venice Hospital had intentions of abusing the monopoly power it enjoyed in the acute care market to exclude competitors from the durable medical equipment market in Venice, Florida.[95] When finding in the affirmative for the monopoly leveraging claim, the court looked to three factors.[96] One, Venice Hospital had a pre-existing monopoly power in the acute care market.[97] Two, the hospital "willfully used that power to foreclose competition, gain a competitive advantage or destroy a competitor in a

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Grandlight*, 771 F.2d at 681.

[89] *Id.*

[90] 919 F.2d 1550 (11th Cir. 1990), *vacated* 979 F.2d 806 (11th Cir. 1992), *dismissed as moot* 9 F.3d 893 (11th Cir. 1993).

[91] *Id.* at 1552.

[92] *Id.* at 1553.

[93] *Id.* at 1553-54.

[94] *Id.* at 1553-54.

[95] *Venice Hosp.*, 919 F.2d at 1567.

[96] *Id.*

[97] *Id.*

different market."[98] Three, as a result of the hospital's actions the plaintiff supplier of durable medical equipment was injured in that it was excluded from access to customers.[99]

The court focused heavily on the intent requirement, more so than previous cases that adopted the monopoly leveraging doctrine, and noted that "[t]he key to distinguishing unlawful monopoly leveraging from lawful competitive advantage available as a result of integration is intent."[100] It went so far as to provide two ways in which the plaintiff could properly prove the element of intent.[101] The first was through a showing that the hospital had a conscious objective to leverage its monopoly power in the acute care market to obtain an unlawful advantage or to injure other suppliers in the durable medical equipment market.[102] This approach, commonly used to prove intent for other causes of action such as fraud, requires a high degree of proof as it is difficult to discern one's conscious objective. The court, however, provided an alternative approach which required a lesser degree of proof.[103] It stated that intent can be established simply by showing that "the unlawful competitive advantage or injury to competitors in the durable medical equipment market was the necessary and direct consequence of defendant Venice Hospital's conduct or business arrangements."[104] This approach seems to allow for the fulfillment of the intent requirement by substituting a showing of a causal connection between the unlawful leveraging and the plaintiff's injury.[105]

In addition to providing a framework for establishing the intent requirement in a monopoly leveraging analysis, the court reinforced the long-recognized notion that a firm that enjoys a lawful monopoly is permitted to receive the natural benefits to which it is entitled.[106] The court, however, may have done so at the expense of the doctrine. After mentioning that a firm may receive those natural benefits, it stated, "[h]owever, when a party with monopoly power abuses its monopoly power in one market as a means of gaining an unlawful competitive advantage in and monopolizing another market, we have no hesitation to conclude that the Sherman Act prohibits such conduct."[107] That statement may have constituted a blow to the doctrine if the court really meant the four words "and monopolizing another market."[108]

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[98] *Id.*

[99] *Id.*

[100] *Venice Hosp.*, 919 F.2d at 1567-68.

[101] *Id.* at 1567.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Venice Hosp.*, 919 F.2d at 1567.

[106] *Id.*

[107] *Id.* at 1568.

[108] *Id.*

The core idea behind monopoly leveraging is that the firm does not have to monopolize the second market to offend Section 2 of the Sherman Act. If monopolization in the second market is required, the leveraging doctrine is narrowed to the point of being toothless. This is because monopolization in the second market would require the high degree of anticompetitive behavior that is actionable under the offense of monopolization. At that level of anticompetitive behavior, the monopoly leveraging doctrine is not necessary. It would only serve the purpose of more clearly defining how the firm achieved its monopoly in the second market.

In the Ninth Circuit, the court suggested its concurrence with the doctrine.[109] In *M.A.P. Oil Co. v. Texaco Inc.*,[110] the plaintiff brought an action under Section 2, asserting that Texaco had monopoly power in the sale of gasoline and used that power to gain a competitive advantage in a distribution services market.[111] Although the plaintiff's action failed, because it could not establish that a distribution services market actually existed,[112] the court nevertheless mentioned, when discussing causes of action under Section 2 of the Sherman Act, that one exists when "a firm... use[s] its monopoly power in one market to gain an unwarranted competitive advantage in another."[113] The court at least recognized the monopoly leveraging doctrine.

Four years later, another circuit court in *Grason Electric Co. v. Sacramento Municipal Utility Dist.*[114] found this language to be a definitive acceptance of the doctrine when it stated "[t]he *Berkey Photo* opinion, by virtue of its adopting in *Mapp* [sic], seems to have settled the question in this circuit of whether a 'pure' monopoly leveraging theory exists."[115]

The monopoly leveraging doctrine seemingly reached a level of legitimacy as a result of the cases that nurtured the doctrine. Missing, however, were any persuasive reasons from the courts for finding a competitive advantage violative of the Sherman Act. This left the doors wide open for courts to attack the validity of the doctrine.

D. Rejection of the Monopoly Leveraging Doctrine

Indeed, courts began to attack the validity of the doctrine. The same year that the *Grason Electric Co.* decision suggested that the monopoly leveraging doctrine had been adopted in the Ninth Circuit, the Ninth Circuit began to disavow the doctrine and what it had said in *M.A.P. Oil*.[116] In *Catlin v. Washington Energy Co.*,[117] Washington Energy had a lawful monopoly in natural gas distribution, and the plaintiffs alleged that it used that monopoly power as a leverage to gain advantages

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[109]Puhala, *supra* note 33, at 128. The Ninth Circuit soon after changed its mind and is now the Circuit to most heavily refute the monopoly leveraging doctrine.

[110]691 F.2d 1303 (9th Cir. 1982).

[111]*Id*. at 1305.

[112]*Id*. at 1306.

[113]*Id*. at 1305-06.

[114]571 F. Supp. 1504, 1516 (E.D. Cal. 1983).

[115]*Id*. at 1516.

[116]791 F.2d 1343, 1346 (9th Cir. 1986).

[117]*Id.*

in a vent damper market by printing advertisements for its vent dampers on billing envelops that were sent to its gas customers.[118] When confronted with the plaintiff's argument that the Ninth Circuit adopted the monopoly leveraging theory in *M.A.P. Oil*, the court explained that because it did not elaborate on or apply the theory in *M.A.P. Oil* and only held that the plaintiffs failed to establish the existence of a second market, it had not formally adopted the doctrine.[119] The court then reinforced its position by citing two cases in which it had held that more than a mere competitive advantage in the second market is required for a Section 2 violation.[120] In one case it held that a requirement of any Section 2 cause of action is that in the second market there be "some associated conduct which constitutes an *anticompetitive* abuse or leverage of monopoly power... rather than aggressive competition on the merits."[121] In another case the court held that "[a] firm may not use its market position as a lever *to create a monopoly* in another market."[122] The court additionally questioned whether *Berkey Photo* intended to create a theory that prohibited the use of a lawful monopoly to gain any kind of competitive advantage in a second market, without an attempt to monopolize the second market.[123] Although the court did not expressly reject the doctrine at this point, it essentially declined to decide whether that doctrine indeed did constitute a separate offense under Section 2.[124]

Five years after *Catlin*, the Ninth Circuit used that decision to expressly and decisively reject the monopoly leveraging doctrine in *Alaska Airlines, Inc. v. United Airlines, Inc.*[125] The case involved American Airlines' government-approved attempt to create a computer reservation service with other airlines.[126] The plan to create the service did not succeed, and ultimately, United Airlines and American Airlines created their own services.[127] Other smaller airlines would use these services, and they did so by paying a per booking rate.[128] Because United Airlines and American Airlines had the two dominating computer reservation services, they effectively enjoyed a monopoly power in this market.[129] In their complaint, the smaller airlines alleged that the larger airlines, in controlling the computer reservation service market, engaged in display biasing; advertising their own flights in more desirable

[118] *Id.* at 1345.

[119] *Id.* at 1346.

[120] *Id.*

[121] *Catlin*, 791 F.2d at 1346 (citing Foremost Pro Color, Inc. v. Eastman Kodak Co*.,* 703 F.2d 534 (9th Cir. 1983)).

[122] *Id.* (citing Betaseed, Inc. v. U and I, Inc., 681 F.2d 1203, 1231 n.42 (9th Cir. 1982)).

[123] 791 F.2d at 1346.

[124] *Id.*

[125] Alaska Airlines, Inc. v. United Airlines, Inc , 948 F.2d 536 (9th Cir. 1991).

[126] *Id.* at 538.

[127] *Id.*

[128] *Id.*

[129] *Id.*

locations than those of the smaller airlines.[130] Therefore, the smaller airlines charged the larger airlines with monopoly leveraging by using their monopoly power in the computer reservation services market to gain a competitive advantage in the air transportation market.[131]

The court rejected the monopoly leveraging doctrine as established in *Berkey* and stated that "a plaintiff cannot establish a violation of Section 2 without proving that the defendant used its monopoly power in one market to obtain, or attempt to attain, a monopoly in the downstream, or leveraged, market."[132] Therefore, the court concluded that *Berkey's* holding that anticompetitive behavior arises from obtaining a competitive advantage was incorrect.[133] After stating that *Berkey* was incorrect, it stated in a footnote that *Griffith* was not applicable either because it dealt with anticompetitive behavior violative of Section 1, concerted actions.[134] Additionally, in the same footnote, it rejected *Kerasotes* for the same reason it rejected *Berkey*.[135]

The court stated two reasons for rejecting the monopoly leveraging doctrine.[136] First, it took a literal approach in interpreting the Sherman Act, not recognizing a cause of action for behavior that falls short of monopolization or attempted monopolization.[137] The court explained that the traditional interpretation of the Sherman Act was to punish "any individual or entity that uses 'predatory' means to attain a monopoly, or to perpetuate a monopoly after the competitive superiority that originally gave rise to the monopoly has faded."[138] In other words, the court believed that anticompetitive behavior, chargeable under the Sherman Act, did not arise when a monopolist uses a lawful monopoly in one market only to achieve a competitive advantage in a second market.[139] The court's view of the Sherman Act was that anticompetitive behavior only arises when a firm monopolizes and, at the very least, when a firm engages in an attempt to monopolize.[140]

Second, the court maintained that monopoly leveraging did not make a distinction between lawful and unlawful monopolies, as do causes of action such as monopolization and attempted monopolization.[141] The court explained that the Sherman Act only makes unlawful predatory monopolies, not monopolies such as efficient and natural monopolies.[142] Therefore, the court's argument relied on the

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[130]Puhala, *supra* note 33, at 133.

[131]*Alaska Airlines*, 948 F.2d at 549.

[132]*Id*. at 547.

[133]*Id*.

[134]*Id*. at 547 n.16.

[135]*Id*.

[136]*Alaska Airlines*, 948 F.2d at 547.

[137]*Id*.

[138]*Id*.

[139]*Id.* at 548.

[140]*Id*.

[141]*Alaska Airlines*, 948 F.2d at 549.

[142]*Id*. at 547.

assumption that monopoly leveraging leads to lawful competition. Indeed, it pointed out that "monopoly leveraging is just one of a number of ways that a monopolist can permissibly benefit from its position."[143] The court even compared monopoly leveraging to the monopolistic behavior of setting high prices in the market in which the monopolist holds the monopoly.[144] The court said that both monopoly leveraging and setting high prices "represent the cost that we incur when we permit efficient and natural monopolies."[145] Additionally, the court explained that "[t]he danger that a lawful monopoly will either create a new monopoly or unduly perpetuate itself is no more evident when a lawful monopoly is leveraged than when a lawful monopolist reaps its monopoly profit solely from price increases in the monopoly market."[146]

The monopoly leveraging doctrine then suffered a small setback in the Second Circuit, ten years after it had been born in *Berkey Photo*.[147] In *Twin Laboratories, Inc. v. Weider Health & Fitness*,[148] the court was faced with two companies that competed in two markets.[149] The first was the market for bodybuilding magazines, and the second was for the production of nutritional supplements for bodybuilders.[150] Twinlab published Muscular Development, which had a relatively small circulation compared to the magazines that Weider published, Muscle & Fitness and Flex,[151] which were two leading magazines in the market.[152] In the nutritional supplement market, Twinlab had five to twelve percent of the market share and Weider had ten to twenty-five percent of the market share.[153] As Weider's magazines were leading magazines in the market, Twinlab used them as its primary vehicles for advertisement for several years.[154] That ended when Weider refused to deal with Twinlab and no longer accepted Twinlab's advertisements.[155] As a result, Twinlab asserted several claims against Weider including a claim for monopoly leveraging.[156] The primary claim was a denial of essential facilities; however, within that claim, Twinlab alleged that Weider used its monopoly power in the magazine market to

[143] *Id.* at 548.

[144] *Id.*

[145] *Id.* at 548-49.

[146] *Alaska Airlines*, 948 F.2d at 549.

[147] Joseph Kattan, *The Decline of the Monopoly Leveraging Doctrine*, 9-FALL ANTITRUST 41, 42 (1994).

[148] 900 F.2d 566 (2d Cir. 1990).

[149] *Id.* at 567.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Twin Labs.*, 900 F.2d at 567.

[154] *Id.*

[155] *Id.*

[156] *Id.*

attempt to monopolize the supplement market.[157] In refusing to apply the theory it had established ten years earlier, the court stated that its creation of the monopoly leveraging theory was done in dictum, as the plaintiff in the earlier case did not raise the claim.[158] Second, the court noted that in *Berkey Photo* the primary claim was tying and in *Twin Laboratories, Inc*. it was a denial of essential facilities.[159] Finally, the court agreed that it alternatively established the doctrine in *Berkey Photo*, but noted that the doctrine, as it was established, required "tangible harm to competition."[160] Since the court found Twinlab to have remained in competition with Weider, it did not believe that the tangible harm element was established.[161]

The monopoly leveraging theory took another upset[162] in the Third Circuit case of *Fineman v. Armstrong World Industries, Inc.*[163] Armstrong World Industries was a leading manufacturer of floor covering products.[164] Distributors of Armstrong's floor covering products depended on Armstrong for ninety-five percent of their business.[165] Fineman's company, The Industry Network System, Inc. (TINS), developed a monthly videotape magazine designed for retailers of floor covering products.[166] Fineman alleged that Armstrong, when about to launch its own videotape magazine, used its leverage in the floor covering market to coerce its distributors to refuse to deal with TINS, thereby eliminating TINS in the videotape market and achieving its own competitive advantage in that second market.[167] The court, however, found that a finding of a competitive advantage was not enough to warrant action under the Sherman Act.[168] Rather, the court held that a plaintiff must show "threatened or actual monopoly in the leveraged market."[169]

The court based its holding on several reasons. First, it took a highly analytical approach in applying the literal framework of the Sherman Act by focusing on the differences between Section 1 and Section 2 of the Act.[170] To support its approach, it cited the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*,[171] which did not address the monopoly leveraging doctrine, but held that a

[157]*Id*. at 570.

[158]*Twin Labs.*, 900 F.2d 570.

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

[160]*Id*. at 571.

[161]*Id*.

[162]Kattan, *supra* note 147, at 42.

[163]980 F.2d 171 (3d Cir. 1992).

[164]*Id*. at 178.

[165]*Id*. at 178-79.

[166]*Id*. at 176.

[167]*Id*.

[168]*Fineman*, 980 F.2d at 203.

[169]*Id.* at 206.

[170]*Id*. at 205.

[171]467 U.S. 752 (1984).

company that is wholly owned by another company cannot engage in concerted action under Section 1.[172] A single firm cannot engage in a Section 1 violation because two firms are required for an unreasonable restraint of trade such as a concerted action.[173] Additionally, a wholly owned company cannot engage in concerted action with its parent company as it is essentially one firm.[174] As a result, the *Copperweld* Court stated that Section 1 "leaves a 'gap' in the Act's prescription against unreasonable restraints of trade,"[175] because Section 1 only targets multiple firms engaging in unreasonable restraints of trade when a single firm, e.g., one that engages in monopoly leveraging, can equally engage in such behavior if "it alone possesses the combined market power of those same two firms."[176]

Using the "gap" theory, the *Copperweld* Court stated that as a result of the fact that the Sherman Act does not "prohibit unreasonable restraints of trade as such--but only restraints affected by a contract, combination, or conspiracy--it leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to Section 1 liability."[177] In other words, the *Copperweld* Court reasoned that anti-competitive conduct such as monopoly leveraging really fits under Section 1, but because it was intentionally left out of Section 1, and because Section 2 expressly prohibits only monopolization and attempted monopolization, there is no place for a monopoly leveraging violation in the Sherman Act.[178] *Fineman*, based upon *Copperweld*, concluded that because of the distinction between Section 1 and Section 2, the Sherman Act "does not make unlawful the entire universe of anti-competitive conduct"[179] and "[i]t does not proscribe anti-competitive unilateral conduct that falls shy of threatened monopolization."[180]

The second reason, upon which the *Fineman* court based its decision, dealt with the conception of the doctrine, and specifically with the procedural posture in *Griffith*.[181] In *Griffith*, the district court did not believe that there was a demonstration of a conspiracy to restrain trade.[182] The Supreme Court, however, reversed the district court and remanded on the issue of "whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act."[183] As a result, *Griffith* neither decided

[172] *Id.* at 776.

[173] DiResta, *supra* note 7, at 396.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Copperweld*, 467 U.S. at 775.

[179] *Fineman*, 980 F.2d at 205.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 206.

[183] *Griffith*, 334 U.S. at 106.

whether the movie theater leveraged its power in one market to gain a competitive advantage in another market, nor did it determine whether that behavior would be unlawful.[184] Therefore, the court in *Fineman* stated that the broad statement made in *Griffith* should not be controlling.[185]

Also stressing the invalidly of the monopoly leveraging doctrine was the court in the recent case of *General Cigar Holdings*.[186] General Cigar was a cigar manufacturer based in the United States who brought several antitrust allegations, including one of monopoly leveraging, against Altadis, S.A., the world's largest cigar manufacturer.[187] Altadis had a monopoly in the cigar market outside of the United States, controlling seventy-eight percent of the market.[188] In the United States, Altadis controlled thirty-nine percent of the market.[189] In September 2000, however, Atladis acquired fifty percent of Corporacion Habanos, which had a monopoly in the Cuban cigar market.[190] General Cigar alleged that Atladis used its newly found monopoly power in the Cuban cigar market to gain a competitive advantage in the United States markets.[191]

Responding to the plaintiff's monopoly leveraging claim, the court first noted the circuit split and then rejected the doctrine along with the Third and Ninth Circuits.[192] In an extensive analysis, it rejected the doctrine for several reasons. It first embraced the Supreme Court's decision in *Copperweld*, stating that Section 2 liability requires a threat of monopoly, rather than a competitive advantage.[193] "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur."[194] The court also embraced *Fineman* stating that monopoly leveraging allows for a violation of Section 2 for "merely 'unfair' but non-monopolistic unilateral activity."[195] It additionally cited Professors Philip E. Areeda and Herbert Hovenkamp for the proposition that "enlargement of the defendant's market share at the plaintiff's expense or even at the destruction of plaintiffs by unfair means" does not constitute anticompetitive behavior under Section 2 and rather "monopoly performance measured by reduced output or higher prices in the

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[184] *Fineman*, 980 F.2d at 205.

[185] *Id.*

[186] Gen. Cigar Holdings, Inc. v. Altadis, S.A., 205 F. Supp. 2d 1335 (S.D. Fla. 2002).

[187] *Id.* at 1338.

[188] *Id.* at 1339.

[189] *Id.*

[190] *Id.*

[191] *Gen. Cigar Holdings*, 205 F. Supp. 2d at 1351.

[192] *Id.* at 1353.

[193] *Id.*

[194] *Id.* (citing Copperweld Corp. v. Independence Tube Corp, 467 U.S. 752, 768 (1984)).

[195] *Id.*

secondary market" is required.[196] Though Professors Areeda and Hovenkamp embrace the doctrine and the court in *General Cigar Holdings* does not, the court nevertheless cited the Professors' standard because, again, it raises the bar for anticompetitive monopoly leveraging conduct as this standard essentially requires monopolistic effects in the secondary market, not only a competitive advantage.[197] Finally, the court embraced the *Alaska Airlines* argument that the monopoly leveraging is invalid because it does not make a distinction between lawful and unlawful monopolies.[198]

With no persuasive reason why it should exist, the monopoly leveraging doctrine stood defenseless against the mentioned theories for its rejection. Combining the theories, taking a literal approach in interpreting the Sherman Act (not recognizing a cause of action for behavior that falls short of monopolization or attempt to monopolize), the fact that the monopoly leveraging doctrine does not make a distinction between lawful and unlawful monopolies, and the Section 1 "gap" theory established by the Supreme Court in *Copperweld*, the doctrine was severely weakened.

III. SUPREME COURT TREMORS

The Supreme Court has yet to directly decide the issue of whether monopoly leveraging constitutes a valid cause of action under Section 2 of the Sherman Act.[199] The Court, however, has made several conflicting statements that indirectly affect the doctrine.[200] The first is that of the Section 1 "gap" theory of *Copperweld*, which was used in *Fineman* as a reason for rejecting the doctrine. The second is found in *Eastman Kodak Co. v. Image Technical Services, Inc.*,[201] decided a year before *Fineman*. The Court stated that it "has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'"[202] This language is nearly identical to that of the monopoly leveraging doctrine. To invoke the monopoly leveraging doctrine, a firm must use its dominant position in one market to expand itself in the second market.

The statement made in *Eastman Kodak*, unlike the Section 1 "gap" theory, may have provided the monopoly leveraging doctrine with support to stand on. A close examination of the facts of *Eastman Kodak*, however, shows that the Court's statement does not entirely support the theory, at least where the theory only

[196] *Gen. Cigar Holdings*, 205 F. Supp. 2d at 1353.

[197] *Id.*

[198] *Id.*

[199] Puhala, *supra* note 33, at 125.

[200] *Id.* at 125-26.

[201] 504 U.S. 451 (1992).

[202] *Id.* at 479 (quoting Times-Picayune Publ'g Co. V. United States, 345 U.S. 594, 611 (1953)). The Court also cites the following cases in support of its statement that may be an endorsement of the monopoly leveraging doctrine: N. Pac. R. Co. v. United States, 356 U.S. 1 (1958); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938). *Id.*

demands a competitive advantage in the second market.[203] In *Eastman Kodak*, Kodak controlled "nearly 100% of the parts market and 80% to 95% of the service market."[204] Therefore, Kodak willfully used its monopoly power in the parts market to increase its *monopoly* share in the service market.[205] Monopoly leveraging traditionally had not been used in the context of a firm already possessing a monopoly in the second market; if an increase in monopoly share in the second market indeed constitutes a competitive advantage, however, then the Supreme Court's statement is in line with the monopoly leveraging theory.

The monopoly leveraging doctrine had support for one year until the Supreme Court released its opinion in *Spectrum Sports, Inc. v. McQuillan*.[206] In *Spectrum Sports*, the Court held that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[207] The monopoly leveraging doctrine suffered greatly under this holding, again, where the theory only demands a competitive advantage in the second market.[208] Requiring a showing for monopolization or a dangerous attempt to monopolize goes well beyond the inherent framework of the theory, and only allows for a violation under Section 2 for two causes of action, those of monopolization and attempted monopolization.[209] The Court stated that "[t]he purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[210]

With the Court's statement, the issue then becomes what conduct unfairly tends to destroy competition itself. Given the holding of the case, the Court believed that the only violations of Section 2 that destroy competition are monopolization and attempted monopolization. The Supreme Court, however, does not stand alone, as the court in *Davis v. Southern Bell Telephone & Telegraph Co.*[211] agreed with the Court's reasoning in *Spectrum Sports*. In *Davis*, the court rejected the plaintiff's leveraging theory and stated "[t]he Supreme Court has recently explained that, where a single firm is involved, monopoly leveraging does not constitute a claim distinct from monopolization or attempted monopolization."[212]

As evidenced by the preceding discussion of *Eastman Kodak* and *Spectrum Sports*, even after the Supreme Court's review of the doctrine, it is still unclear whether a cause of action for monopoly leveraging exists. The Supreme Court has offered conflicting statements on the cause of action, and no clear guidance on the

[203] *Id.* at 481.

[204] *Id.*

[205] *Id.*

[206] 506 U.S. 447 (1993)

[207] *Id.* at 459.

[208] Kattan, *supra* note 147.

[209] *Id.*

[210] *Spectrum Sports*, 506 U.S. at 458.

[211] No. 89-2839-CIV-NESBITT, 1994 WL 912242, (S.D. Fla. Feb. 1, 1994).

[212] *Id.* at *50.

issue, leaving plaintiffs to wonder whether or not to plead monopoly leveraging at all. The Court, however, has the opportunity to eliminate the uncertainty by granting Verizon's petition for writ of certiorari. The Court must accept this case in order to delineate the bounds of actionable anticompetitive behavior violative of the Sherman Act.

IV. State of the Monopoly Leveraging Doctrine When Verizon Petitioned for Writ of Certiorari

Because there is a circuit split on the issue of whether a cause of action for monopoly leveraging exists and in what form, whether the firm's conduct is actionable largely depends upon the circuit in which the firm is charged with leveraging its monopoly power. An examination of the totality of the circuits and their various approaches to the doctrine reveals that three types of monopoly leveraging exist today.[213] A further examination will show how to succeed on the traditional monopoly leveraging theory.

A. Three Types of Monopoly Leveraging

The first type of monopoly leveraging is when a monopolist uses its monopoly power in one market to monopolize another market.[214] This type is universally accepted by all circuits, including those that reject the traditional theory.[215] The reason this type is universally accepted is because the theory combines the leveraging principle with the well established cause of action for unlawful monopolization, found in the text of Section 2 itself.[216]

The second type of monopoly leveraging that exists today is when a monopolist uses its monopoly power in one market to attempt to monopolize another market.[217] Similar to the first type of monopoly leveraging, this theory rests on the well-established cause of action for attempted monopolization, also found in the text of Section 2.[218] This type is also universally accepted in the courts.[219]

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[213] Maxwell M. Blecher, *An Analysis of Current Trends in Monopolization, Predatory Pricing, Standing Requirements, and Distribution Issues – A Plaintiff's Perspective*, C407 A.L.I.-A.B.A. 175, 178-79 (1989).

[214] *Id.* at 178.

[215] *See* Cost Mgmt. Serv., Inc. v. WA Natural Gas Co., 99 F.3d 937, 951 (3rd Cir. 1996). The court stated, "[i]t is clear from our analysis, however, that to the extent that 'monopoly leveraging' is defined as an attempt to use monopoly power in one market to monopolize another market, this theory remains a viable theory under Section 2." *Id.* Additionally, the court stated "[e]ven in the two-market situation, a plaintiff cannot establish a violation of Section 2 *without* proving that the defendant used its monopoly power in one market to obtain, or attempt to attain, a monopoly in the downstream, or leveraged, market." *Id.* (quoting *Alaska Airlines*, 948 F.2d at 546).

[216] 15 U.S. C. § 2 (1994).

[217] Blecher, *supra* note 213, at 179.

[218] 15 U.S. C. § 2.

[219] *See Cost Mgmt. Serv.*, 99 F.3d at 952. ("If there is a dangerous probability that a monopoly will be created by leveraging conduct, *then the conduct will be reached under the doctrine of attempted monopoly*").

The third type of monopoly leveraging that exists today is the traditional one established in *Berkey Photo*, where a monopolist leverages its monopoly power in one market to gain a competitive advantage in another market.[220] Again, this is where the circuit split lies. When a firm engages in monopoly leveraging gaining only a competitive advantage in the secondary market, and a plaintiff brings a cause of action in the Ninth and Third Circuits, its conduct will not be actionable under Section 2 of the Sherman Act as these Circuits have rejected the idea of an anticompetitive-competitive advantage.[221] Conversely, when a plaintiff brings a cause of action for monopoly leveraging in the Second, Sixth, and Seventh Circuits, its conduct will be actionable under Section 2.[222] A major caveat, however, is that in the entire history of the monopoly leveraging doctrine, plaintiffs have successfully brought the cause of action only a few times.[223] It is paradoxical that courts have rejected the doctrine because it sets too low a bar for anticompetitive behavior, when plaintiffs have succeeded in meeting its anticompetitive bar in only a few cases throughout the course of its history.

B. How to Succeed on the Traditional Monopoly Leveraging Theory

Succeeding in a cause of action in monopoly leveraging is more difficult than courts in the Ninth and Third Circuits describe because of the many conditions that must be met to establish the doctrine. Courts in the Second, Sixth, and Seventh Circuits first require proof of the three basic factors succinctly stated in *Grand Light & Supply Co. v. Honeywell, Inc*.[224] One, there must be monopoly power in one market.[225] Two, the use of that power, however lawfully acquired, must foreclose competition, give the firm a competitive advantage, or destroy a competitor in a secondary market.[226] Three, there must be injury caused by the conduct.[227] Not only must competitors be injured, but competition itself must be injured by the conduct.[228] The plaintiff must demonstrate that the conduct "threatens the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share."[229] In addition to the elements the plaintiff must put forth, there are substantial exceptions looming over the successful claim of monopoly leveraging. As stated in *Berkey Photo*,

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[220]Blecher, *supra* note 213, at 179.

[221]Gen. Cigar Holdings, Inc. v. Altadis, S.A., 205 F. Supp. 2d 1335 (S.D. Fla. 2002).

[222]*Id.*

[223]*See* Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979); Kerasotes Mich. Theatres, Inc. v. Nat. Amusements, Inc., 854 F.2d 135 (6th Cir. 1988).

[224]Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 681 (2nd Cir. 1985).

[225]*Id.*

[226]*Id.*

[227]*Id.*

[228]AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 230 (2d Cir. 1999).

[229]Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law ¶ 652c, at 90 (Rev. Ed. 1996).

> a large firm does not violate Section 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity—more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.[230]

Courts have additionally stated, "it is not unlawful for an existing firm, entering a new product market, to promote its product by touting the benefits afforded by that product's association with the firm. Nor it is unlawful for employees of one division of a firm to promote products produced by another division."[231] These exceptions demonstrate that courts view anticompetitive conduct with caution. Courts are reluctant to find anticompetitive violations when evidence suggests that firms are reaping benefits from efficient business practices.

Finally, a successful application of the doctrine may further be limited to cases in which the plaintiff can also successfully bring a tying action.[232] Though not expressly stated, tying may have been a requirement for successfully bringing a cause of action in monopoly leveraging since *Berkey Photo. Berkey Photo* involved a tying action and it was the first and one of the few instances where a plaintiff succeeded in bringing a cause of action for monopoly leveraging.[233] Tying occurs when a firm only sells product one, the "tying product," if the consumer purchases product two, the "tied product."[234] Therefore, a firm engages in both tying and monopoly leveraging when, as in *Berkey Photo*, it uses its monopoly power in the product 1 market to gain an advantage in the product 2 market by only selling product 2 if the consumer also purchases product 1.[235] When a plaintiff can successfully bring an action for tying, it greatly strengthens its monopoly leveraging claim because all of the requirements for monopoly leveraging fall in place, assuming plaintiff indeed had monopoly power in market 1.[236]

V. VERIZON COMMUNICATIONS INC. v. LAW OFFICES OF CURTIS V. TRINKO, LLP

The Supreme Court has the opportunity to draw a clear line for anticompetitive behavior violative of the Sherman Act through its ruling in *Verizon*. Because a

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[230] Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979).

[231] *AD/SAT*, 181 F.3d at 231.

[232] *Id.*

[233] *Id.*

[234] Samual R. Miller and Raquel L. Wilkening, *Antitrust Claims Against Microsoft and Intel*, 566 PLI/Pat 383, 394 (1999).

[235] *Id.*

[236] *AD/SAT*, 181 F.3d at 231.

circuit split exists, and the Court has offered conflicting statements on the cause of action, it must ameliorate the confusion.

In *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*,[237] the plaintiff class member, who was a local phone service customer of AT&T, appealed the dismissal of its class action.[238] AT&T provided the local phone service to the plaintiff by purchasing access to the local telephone network from Bell Atlantic, now known as Verizon Communications, Inc.[239] The case involved the Telecommunications Act of 1996, which required Bell Atlantic, having a lawful monopoly in the local phone service market, to give AT&T and its other competitors equal access to its local network, for purposes of allowing them to compete.[240] The plaintiff brought an action against Bell Atlantic alleging that it was damaged when Bell Atlantic refused to give AT&T equal access to its local network.[241] The plaintiff alleged that Bell Atlantic refused to give AT&T equal access because AT&T received sub-par local phone service from Bell South.[242] Bell South filled its own customers' orders before the customers of AT&T, did not fill AT&T's customers' orders timely enough, sometimes failed to fill them at all, and additionally failed to provide AT&T with information regarding the status of its customers orders.[243] The plaintiffs alleged that "Bell Atlantic's conduct had no valid business reason and was intended to exclude competition from the market 'by making it difficult for its competitors to provide service in the Local Phone Service market on the level that Bell Atlantic is able to provide to its customers in that market.'"[244] For its monopoly leveraging claim, the plaintiff alleged that Bell South used its monopoly power in the wholesale market, where it sold access to its local telephone network to AT&T, to gain a competitive advantage in the retail market, where it sells its own local telephone service to its customers.[245]

Although the district court granted the defendant's motion to dismiss without considering the plaintiff's monopoly leveraging claim, the Third Circuit Court of Appeals vacated the judgment and remanded for further proceedings.[246] The Court of Appeals stated, "the plaintiff may have a monopoly leveraging claim" and further explained that the plaintiff successfully alleged the three elements of the claim;[247]

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[237]Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89 (2d Cir. 2002), *petition for cert. filed sub nom*. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 71 U.S.L.W. 3352 (2002).

[238]*Bell Atlantic*, 305 F.3d at 92.

[239]*Id*.

[240]*Id*. at 93.

[241]*Id*. at 93.

[242]*Id*. at 95.

[243]*Bell Atlantic*, 305 F.3d at 95.

[244]*Id*.

[245]*Id*. at 108.

[246]*Id*. at 113.

[247]*Id*. at 108.

namely, that Bell South possessed a monopoly power in the wholesale market, that Bell South used that power to gain a competitive advantage in the retail market, and that the plaintiff suffered an injury due to Bell South's conduct.[248]

The Court of Appeals made its decision not only by following precedent on the monopoly leveraging doctrine in the Third Circuit, but also after plaintiffs set forth arguments in its motion for reconsideration[249] based upon a treatise written by Professors Phillip E. Areeda and Herbert Hovenkamp regarding monopoly leveraging.[250] Professors Areeda and Herbert recognize the cause of action for monopoly leveraging; however, they would limit its application to conduct that "threatens the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share."[251] Although this helps the plaintiffs in Bell South, as they alleged what Professors Areeda and Herbert require, it raises the bar for anticompetitive monopoly leveraging conduct. This standard requires monopolistic effects in the secondary market, not just a competitive advantage.[252]

On November 1, 2002, Verizon Communications Inc., formally known as Bell South, petitioned for a writ of certiorari in the Supreme Court.[253] Since Verizon's filing of the petition, the United States Department of Justice and the Federal Trade Commission have expressed their opinions on the monopoly leveraging doctrine. The DOJ and FTC argue against the validity of the monopoly leveraging doctrine and in favor of Verizon.[254] The DOJ and FTC state that monopoly leveraging theory "countenances an antitrust violation unsupported by the Sherman Act's text and fundamental antitrust principles."[255] As argued in *Alaska Airlines*, the DOJ and FTC argue for a literal interpretation of the Sherman Act, which allows only for causes of action in monopolization and attempted monopolization, and not one for gaining a competitive advantage with monopoly power. The DOJ and FTC note the Court's decision in *Spectrum Sports,*[256] which held that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[257] Furthermore, the DOJ and FTC state that monopoly leveraging "does not

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[248]*Bell Atlantic*, 305 F.3d at 108.

[249]Plaintiff's Motion for Reconsideration at 8, Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89 (2nd Cir. 2002), *petition for cert. filed sub nom*. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 71 U.S.L.W. 3352 (2002).

[250]Areeda & Hovenkamp, *supra* note 229, at 90.

[251]*Id.*

[252]*Id.*

[253]Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89 (2d Cir. 2002), *petition for cert. filed sub nom*. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 71 U.S.L.W. 3352 (2002).

[254]Brief of Amici Curiae United States Department of Justice, et. al at 26, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 71 U.S.L.W. 3352 (2002) (No. 02-682).

[255]*Id.*

[256]*Id.*

[257]Spectrum Sports, Inc. v. McQuillan*,* 506 U.S. 447, 458 (1993).

require the monopolist's conduct to be 'exclusionary' or 'predatory' within the meaning of Section 2 jurisprudence."[258]

VI. How The Supreme Court Should Rule

The Supreme Court should raise the bar for actionable monopoly leveraging conduct violative of the Sherman Act. The Court should only recognize conduct that either leads to a monopoly, attempted monopoly or monopolistic effects in a second market, and *eliminate* as actionable, behavior that leads to competitive advantage in the second market. To do this, the Court should recognize that there are three types of monopoly leveraging as previously discussed in this article.[259] Because the concept of leveraging can result based on three types of conduct, recognizing them would make it useful for characterizing the precise behavior exhibited by a firm as either violative of the Sherman Act, or not.

If a firm uses its monopoly power in one market to acquire a monopoly in the second market, it has engaged in the highest degree of monopoly leveraging: unlawful monopolization through monopoly leveraging.[260] Moving down the spectrum of anticompetitive behavior, if a firm uses its monopoly power in one market to attempt to gain a monopoly in the second market, it has engaged in unlawful attempted monopolization through monopoly leveraging.[261] If a firm uses its monopoly power in one market to gain a competitive advantage in the second market, however, the firm has engaged in *lawful* competitive behavior through monopoly leveraging.

The Court must draw the line for anticompetitive behavior violative of the Sherman Act above the third type of conduct, where the firm merely gains a competitive advantage in the second market. The line, however, should not be as high as the Ninth and Third Circuit courts would proclaim. In other words, it should not fall immediately below the second type of conduct: attempted monopolization through monopoly leveraging. The line should be high enough to make lawful the gain of a competitive advantage in the second market, but low enough to allow for one exception. Namely, conduct that "threatens the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share" would be conduct that qualifies as monopoly leveraging.[262] Professors Areeda and Herbert recognize the excepted monopoly leveraging cause of action with this type of outcome in the second market because this standard requires monopolistic effects in the secondary market, not just a competitive advantage.[263] It makes sense to allow this exception because it would limit those who could allege the cause of action to firms impacted by unlawful

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[258] Brief of Amici Curiae United States Department of Justice, et al. at 26, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 71 U.S.L.W. 3352 (2002) (No. 02-682).

[259] *See* Blecher, *supra* note 213, at 178-79.

[260] *Id.*

[261] *Id.*

[262] Areeda & Hovenkamp, *supra* note 229, at 90.

[263] *Id.*

monopolistic effects in the second market, thereby barring those firms who simply felt affects of competition to have a cause of action.[264]

The arguments against the unlawfulness of a mere gain of a competitive advantage in a second market through monopoly leveraging persuasively warrant this outcome. Most persuasive is the Supreme Court's decision in *Spectrum Sports*, where the Court took a literal approach in interpreting the Sherman Act by holding that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[265]

Unfortunately for the doctrine, there is no persuasive reason why it should exist. The best argument was given in *Eastman Kodak*, where the Court stated that it "has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'"[266] The Court, however, would likely discredit this argument for two reasons. First, Kodak willfully used its monopoly power in the parts market to increase its *monopoly* share in the service market.[267] Therefore, Kodak did more than merely gain a competitive advantage in the second market.[268] Second, any confusion created by *Eastman Kodak* was resolved the following year in *Spectrum Sports*.

There are two final reasons for finding that the mere gain of a competitive advantage in the second market is not a violation of the Sherman Act. First, even in the courts that have accepted the doctrine, few plaintiffs have succeeded on the merits.[269] Second, history has already relegated the monopoly leveraging doctrine to the status of a throw-in cause of action: it does not cost the plaintiff an additional fee to add it to the complaint. However, once it is there, it imposes costs on the parties and the court in responding to it and dealing with the confusion it entails.

VII. CONCLUSION

The Court should draw the line for anticompetitive behavior violative of the Sherman Act above the mere gain of a competitive advantage in the second market. If the Supreme Court were to draw the line at this level, the circuit split and the resulting confusion would be ameliorated. By recognizing the three types of conduct that characterize monopoly leveraging, with the exception to the third type of conduct, the Supreme Court would provide much needed guidance for the lower federal courts in determining whether a firm's behavior in a given case rises to the level of the monopoly leveraging. The lower federal courts would have to examine three situations when presented with a monopoly leveraging cause of action: (1) whether monopolization occurred in the second market through leveraging, (2) whether attempted monopolization in the second market occurred through

[264] *Id.*

[265] 506 U.S. at 459.

[266] 504 U.S. at 479.

[267] *Id.*

[268] *Id.*

[269] *See* Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979); Kerasotes Mich. Theatres, Inc. v. Nat'l Amusements, Inc., 854 F.2d 135 (6th Cir. 1988).

leveraging, or (3) whether the leveraging produced "higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share"[270] in the second market. A clear pronouncement from the Supreme Court would not only help federal judges, but potential plaintiffs as well, leading ultimately to judicial economy. Those contemplating bringing a cause of action for monopoly leveraging would have guideposts by which to measure the facts of their case against to determine whether the conduct at issue is within the spectrum of actionable conduct. The waters that surround monopoly leveraging have been murky ever since the inception of the doctrine in 1948 in *Eastman Kodak*.[271] Through *Verizon*, the Supreme Court has the opportunity to clear the waters once and for all.

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[270] Areeda & Hovenkamp, *supra* note 229.

[271] *Eastman Kodak*, 603 F.2d 263.