

7-1-2009

Expanding Definition of Monopoly Leveraging

Eun K. Chang

Follow this and additional works at: <http://repository.law.miami.edu/umblr>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Eun K. Chang, *Expanding Definition of Monopoly Leveraging*, 17 U. Miami Bus. L. Rev. 325 (2009)
Available at: <http://repository.law.miami.edu/umblr/vol17/iss2/4>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Business Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

EXPANDING DEFINITION OF MONOPOLY LEVERAGING

EUN K. CHANG*

I.	ANTITRUST LAW AND MONOPOLY LEVERAGING	326
A.	<i>Unilateral Conduct Under Section 2 of Sherman Act</i>	326
B.	<i>Monopoly Leveraging as a Distinct Section 2 Offense</i>	328
1.	DEVELOPMENT OF THE MONOPOLY LEVERAGING DOCTRINE	328
2.	REJECTION OF THE MONOPOLY LEVERAGING DOCTRINE	330
II.	ECONOMIC ANALYSIS OF MONOPOLY LEVERAGING	331
A.	<i>Traditional Approach</i>	331
B.	<i>Chicago School Approach</i>	332
C.	<i>Post-Chicago Approach</i>	334
III.	APPLICATION OF THE ECONOMICS: <i>SCHOR V. ABBOTT</i> <i>LABORATORIES</i>	336
A.	<i>Factual Background & Ruling in Schor</i>	336
B.	<i>Application of Bundling in Schor: Market Entry Barrier</i> . . .	338
C.	<i>Application of Bundling in Schor: Defensive Leveraging</i> . . .	339
IV.	CONCLUSION	341

Antitrust jurisprudence evolves with both political and economic ideologies.¹ With new schools of thought and new political generations, antitrust policy has changed both in its force and complexity.² Further, the broad and vague language of the Sherman Antitrust Act (“Sherman Act”) not only permits, but encourages the development and evolution of antitrust common law.³ And courts have obliged.

This article focuses on one such case of antitrust common law development: the scope of Section 2 of the Sherman Act and the monopoly leveraging doctrine. Defined as the use of monopoly power in one market as leverage to obtain a competitive advantage in a second market,⁴ the

* Judicial Clerk, Fourth District Court of Appeal of Florida. B.S., Salem College; J.D., University of Miami School of Law. I extend special thanks to Professor Benjamin Depoorter for his insightful comments and to the University of Miami Business Law Review for their editorial assistance. All remaining errors are my own.

¹ Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 213–14 (1985).

² *Id.*

³ Daniel Castro, Case Note, *Cleveland v. Viacom, Inc.: Implications for the Dissemination of Movies in a Digitally Networked World*, 20 BERKELEY TECH. L.J. 765, 777 (2005).

⁴ See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979).

monopoly leveraging doctrine has divided courts, legal scholars, and economists. To begin with the economists, there is an evolving disagreement about whether leveraging conduct can hurt the market and under what conditions. Legal scholars have questioned whether courts are competent enough to apply the different economic theories in decision-making. And federal circuits are split on what types of conduct offend Section 2 and whether monopoly leveraging is such conduct.

Part I of this article examines the language and scope of Section 2 and the common law development of the monopoly leveraging doctrine. This section focuses on the federal circuit court decisions that have accepted monopoly leveraging as a claim under Section 2, and those that have rejected it. Part II is an overview of the economic perspectives on leveraging conduct. Various theories have been advanced by different schools of thought as to what type of behavior harms the market and its consumers. The Chicago school has been the most prominent opponent of the viability of monopoly leveraging as a Section 2 violation. Post-Chicago economists have worked to revive it. Part III takes a closer look at a recent Seventh Circuit decision that rejected the leverage doctrine. By applying the post-Chicago analysis, this section rebuts the economic theories and factual findings in that decision. Part IV concludes. An accurate understanding of leveraging behavior necessarily leads to a broader definition of that doctrine. Further, a clear guidepost is needed to ensure consistent and effective application of economics in antitrust jurisprudence. The Supreme Court's reluctance to rule on the validity of the monopoly leveraging doctrine may be attributed to the ongoing academic dispute. Nevertheless, the lack of a unified legal standard only adds to the cost of litigation and subsequently cripples robust competition. This article thus calls for the authority of the Supreme Court.

I. ANTITRUST LAW AND MONOPOLY LEVERAGING

A. *Unilateral Conduct Under Section 2 of Sherman Act*

Section 2 of the Sherman Act criminalizes “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce.”⁵ Distinguished from actual monopolization,⁶ attempted monopolization must

⁵ 15 U.S.C. § 2 (2000).

⁶ Attempted monopolization differs from actual monopolization in two important respects: (1) There must be a specific intent to achieve monopoly power in an attempted monopolization case. The general intent standard that applies in actual monopolization cases does not

be proved with: (1) a specific intent to monopolize; (2) predatory or anticompetitive conduct; and (3) a dangerous probability of success in achieving monopoly power.⁷ Further, attempted monopolization generally involves anticompetitive behavior of a single player in the market, while a conspiracy to monopolize arises out of collusive conduct.⁸

Because it is “difficult to distinguish robust competition from conduct with long-run anticompetitive effects,”⁹ the Supreme Court has ruled that “[t]he conduct of a single firm is . . . unlawful only when it threatens actual monopolization.”¹⁰ The Court reasoned that unilateral conduct is unlike collusive conduct, covered by Section 1¹¹ of the Sherman Act, and is “inherently [] fraught with anticompetitive risk.”¹² It further reasoned vigorous competition is not unreasonable if it drives out inefficient players and ultimately promotes consumer interests.¹³ In fact, most conduct that

suffice.

(2) An attempt to monopolize implies that monopoly has not yet been attained. Consequently, the possession of monopoly power is not an essential element of an attempt to monopolize; rather, there need only be a dangerous probability that the attempt will succeed.

2 JULIAN O. VON KALINOWSKI ET AL., *ANTITRUST LAWS AND TRADE REGULATION* § 26.01[1] (2d ed. 2008).

⁷ See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* § 8.02 (2003); see also *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (“The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in ‘unfair’ or ‘predatory’ tactics. Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously, but demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant’s economic power in that market.”); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (“If a firm has been ‘attempting to exclude rivals on some basis other than efficiency,’ it is fair to characterize its behavior as predatory.”).

⁸ See KALINOWSKI ET AL., *supra* note 6, § 26.01[1].

⁹ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767–68 (1984).

¹⁰ *Id.* at 767; see also *Spectrum Sports*, 506 U.S. at 459.

¹¹ Section 1 of the Sherman Act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.

15 U.S.C. § 1 (2000).

¹² *Spectrum Sports*, 506 U.S. at 459 (citing *Copperweld*, 467 U.S. at 767–69); see also 2 EARL W. KINTNER, *FEDERAL ANTITRUST LAW, PRACTICES PROHIBITED BY THE SHERMAN ACT* § 9.2 (1980) (“While the Section 1 proscription against contracts, combinations and conspiracies in restraint of trade requires concerted action by two or more persons, the Section 2 prohibitions against monopolization and attempts to monopolize can be violated by a single actor.”).

¹³ See *Spectrum Sports*, 506 U.S. at 458–59; *Copperweld*, 467 U.S. at 767.

injures rivals is not anticompetitive.¹⁴ The Court thus cautioned against “constructions of § 2 which might chill competition, rather than foster it.”¹⁵

Phillip Areeda and Herbert Hovenkamp, accordingly, define unlawful exclusionary conduct, under Section 2, as acts:

- (1) that are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and
- (2) that either do not benefit consumers at all, or are unnecessary for the particular consumer benefits that the acts produce, or produce harms disproportionate to the resulting benefits.¹⁶

Under this analysis, the dispositive inquiry is whether the conduct causes or threatens lower market output, higher prices, or reduced innovation so as to diminish competition and harm consumers.¹⁷ Accordingly, certain types of unilateral conduct have often formed the basis of a Section 2 claim: “tie-in sales (or another form of bundling), group boycotts, exclusive dealing and selective refusal to deal, [and] predatory pricing.”¹⁸

B. Monopoly Leveraging as a Distinct Section 2 Offense

1. DEVELOPMENT OF THE MONOPOLY LEVERAGING DOCTRINE

Monopoly leveraging is defined as the use of monopoly power in one market as leverage to obtain a competitive advantage in a second market.¹⁹ The Supreme Court first suggested the viability of a monopoly leveraging claim in *United States v. Griffith*: “[T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.”²⁰ The Court seemed to find

¹⁴ See PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 6.04d (3d ed. 2007).

¹⁵ *Spectrum Sports*, 506 U.S. at 458; see also *Copperweld*, 467 U.S. at 768.

¹⁶ AREEDA & HOVENKAMP, *supra* note 14, § 6.04a; see also RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 28 (1976) (Exclusionary practice is “a method by which a firm . . . trades a part of its monopoly profits, at least temporarily, for a larger market share, by making it unprofitable for other sellers to compete with it.”).

¹⁷ AREEDA & HOVENKAMP, *supra* note 14, § 6.04d.

¹⁸ *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006).

¹⁹ See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979).

²⁰ 334 U.S. 100, 107 (1948).

offensive the mere status of a monopoly, absent conduct utilizing that monopoly power.²¹

Relying on that decision, the Second Circuit instituted monopoly leveraging as an independent claim under Section 2.²² The Second Circuit announced, “[A] firm violates § 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.”²³ The *Berkey Photo* court determined that an antitrust threat is inherent in monopoly power. It was presumed that a profit-maximizing monopolist would exploit its power to maintain prices high and output low²⁴ and to impede competition.²⁵ The court’s ruling thus reflected a rather cynical approach toward monopoly power:

We tolerate the existence of monopoly power . . . only insofar as necessary to preserve competitive incentives and to be fair to the firm that has attained its position innocently. There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other. That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable. Social and economic effects of an extension of monopoly power militate against such conduct.²⁶

Nine years later, the Sixth Circuit followed the lead of the Second Circuit. In *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*,²⁷ the court rejected the district court’s finding that a monopolist in one market does not injure competition in a second market, if it does not possess a dominant position in the second market.²⁸ Rather, the court stated, “[I]t cannot be doubted that Kerasotes’ alleged conduct [of monopoly leveraging], if proven, had a negative impact on competition.”²⁹ According to the court, when a monopolist “extend[s] [its] dominance from one

²¹ *Id.* (“[M]onopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised Hence the existence of power ‘to exclude competition when it is desired to do so’ is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power.”).

²² *See Berkey Photo Inc.*, 603 F.2d at 265.

²³ *Id.* at 275.

²⁴ *See id.* at 272 (citing Frederic M. Scherer, *Industrial Market Structure and Economic Performance* 13-19 (1970); LAWRENCE A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 25-26 (1977); AREEDA & HOVENKAMP, *supra* note 7, § 6.05c).

²⁵ *See Berkey Photo Inc.*, 603 F.2d at 274.

²⁶ *Id.* at 275.

²⁷ 854 F.2d 135 (6th Cir. 1988).

²⁸ *Id.* at 136.

²⁹ *Id.* at 138.

market into a second market, without . . . developing a superior product or other legitimate competitive advantages," it injures competition and produces no economic gains.³⁰

2. REJECTION OF THE MONOPOLY LEVERAGING DOCTRINE

More recent circuit court decisions have diminished the validity of the monopoly leveraging doctrine.³¹ And notwithstanding *Berkey Photo* and *Kerasotes*, the Ninth and Third Circuits have explicitly rejected monopoly leveraging as an independent claim under Section 2. In *Alaska Airlines, Inc. v. United Airlines, Inc.*,³² the Ninth Circuit criticized *Berkey Photo* for going beyond "the Sherman Act's focus on the problem of the *creation, or attempted creation, of a monopoly*."³³ Because not all monopolies are proscribed by the Sherman Act,³⁴ the court found the Section 2 distinction between monopolization and attempted monopolization necessary to differentiate between lawful and unlawful monopolies.³⁵ The monopoly leveraging doctrine was problematic because it obliterated such a distinction.³⁶

This court also presented a much less skeptical view of monopoly power: "Every act exploiting monopoly power to the disadvantage of the monopoly's customers hastens the monopoly's end by making the potential competition more attractive."³⁷ Thus, leveraging conduct would violate Section 2 only upon the showing of a dangerous probability that a monopoly will be created.³⁸ This rule necessarily discounts monopoly leveraging as a distinct Section 2 offense.³⁹

³⁰ *Id.* at 137.

³¹ See, e.g., *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517 (4th Cir. 2003); *Aquatherm Indus., Inc. v. Fla. Power & Light Co.*, 145 F.3d 1258, 1262 (11th Cir. 1998) (refusing to apply monopoly leveraging offense to reach conduct in market in which defendant did not compete); *M & M Med. Supplies & Serv. v. Pleasant Valley Hosp.*, 981 F.2d 160 (4th Cir. 1992) (stating the validity of the monopoly leveraging claim was unsettled and that the issue should not be resolved on summary judgment); *Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (reserving judgment on validity of leveraging theory).

³² 948 F.2d 536 (9th Cir. 1991).

³³ *Id.* at 549.

³⁴ *Id.* at 548 (citing 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 47–48 (1978) ("There is also at least one other type of lawful monopoly—the natural monopoly. Such a monopoly occurs when: 'There may not be room enough in the market for more than one firm In that case, demand is 'too thin' to support two surviving firms. Monopoly is inevitable.'")).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 549 (citing AREEDA & TURNER, *supra* note 34, at 41–42).

³⁸ *Id.*

³⁹ HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 318 (2d ed. 1999) ("[S]everal decisions accept only a narrow version of the leverage theory

The Third Circuit's decision in *Fineman v. Armstrong World Industries, Inc.*,⁴⁰ mirrored that of *Alaska Airlines*. The court in *Fineman* emphasized the distinctions between Sections 1 and 2 of the Sherman Act: "Section 1 prohibits 'restraints of trade' accomplished by means of concerted action; [Section] 2 prohibits more severe monopoly and attempted monopoly resulting from unilateral conduct."⁴¹ Short of threatened monopolization, unilateral conduct, including monopoly leveraging, could not be found violative of § 2.⁴² Notwithstanding such a circuit split, the Supreme Court has declined to rule explicitly on the issue of monopoly leveraging.⁴³ And with respect to the most recent Seventh Circuit decision rejecting the monopoly leveraging doctrine, the Supreme Court denied certiorari.⁴⁴

II. ECONOMIC ANALYSIS OF MONOPOLY LEVERAGING

The Supreme Court's reluctance to rule on a monopoly leveraging dispute may be attributed to the ongoing academic disagreement about the doctrine. Since its inception, the leverage doctrine has continued to receive scholarly support as well as criticism. This section provides an overview of the development in monopoly leveraging scholarship.

A. Traditional Approach

Traditionally, monopoly leveraging was considered to be an antitrust threat under the assumption that a monopolist could reap additional profits by leveraging its power in a second market.⁴⁵ Two monopolies could create more profits for the monopolist than one could.⁴⁶ Two monopolies could

that involves using monopoly power in one market to create a second monopoly in a related market. In the process, however, they generally hold that all the elements of an attempt to monopolize offense must be met for the second market. This effectively robs the leverage theory of its distinctiveness.") (footnote omitted).

⁴⁰ 980 F.2d 171 (3d Cir. 1992).

⁴¹ *Id.* at 205 (relying on *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)).

⁴² *Id.*

⁴³ In a footnote in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, however, the Court stated, "To the extent the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred." 540 U.S. 398, 415 n.4 (2004). This is not a rejection of the leverage doctrine because monopoly leveraging is defined as "using [one's] monopoly power in one market to gain a competitive advantage in another, *albeit without an attempt to monopolize the second market.*" *Berkey Photo, Inc.*, 603 F.2d at 275 (emphasis added).

⁴⁴ *Schor v. Abbott Labs.*, 549 U.S. 1205 (2007).

⁴⁵ Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2080 (1999).

⁴⁶ *Id.*

cause more economic harm and deadweight loss than one could.⁴⁷ “If one monopoly is bad, surely two monopolies are worse.”⁴⁸ Some argued that even absent a traditional Section 2 violation, a dominant competitor could generate a substantial loss in social welfare.⁴⁹ By exploiting its advantages in one market, the dominant competitor could reduce output and increase price in a second market without actual or threatened monopoly.⁵⁰

This theory was often illustrated in the context of tying arrangements. A monopolist that sells one monopolized product and a second, complementary product, could condition the sale of its monopolized product on the buyer’s promise to purchase the complementary product.⁵¹ Such an arrangement would have two anticompetitive effects. It would turn “one monopoly into two, [giving the monopolist] supracompetitive profits in two markets instead of one.”⁵² It could also drive out competition from the complementary market.⁵³ Thus, traditional theorists conceived that the motive and rationale behind tying arrangements was the leverage and extension of monopoly power.⁵⁴

B. *Chicago School Approach*

The most prominent critics of the traditional monopoly leveraging theory have been the Chicago school economists.⁵⁵ Aaron Director and

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Jennifer M. Clarke-Smith, *The Development of the Monopolistic Leveraging Theory and Its Appropriate Role in Antitrust Law*, 52 CATH. U. L. REV. 179, 197 (2002).

⁵⁰ *Id.*

⁵¹ J. Neil Lombardo, *Resuscitating Monopoly Leveraging: Strategic Business Behavior and Its Implications for the Proper Treatment of Unilateral Anticompetitive Conduct Under Federal Antitrust Laws*, 41 ST. LOUIS U. L.J. 387, 417 (1996).

⁵² *Id.* at 417-18; see also Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 929 (1979) (“The leverage theory held that if a seller had a monopoly of one product, he could and would monopolize its indispensable complements as well, so as to get additional monopoly profits.”).

⁵³ Lombardo, *supra* note 51, at 417.

⁵⁴ Posner, *supra* note 52, at 929.

⁵⁵ *Id.* at 925. Judge Robert H. Bork lays out the canons of the Chicago school antitrust jurisprudence:

The primary characteristics of the Chicago School of antitrust are two. The first is the insistence that the exclusive goal of antitrust adjudication, the sole consideration the judge must bear in mind, is the maximization of consumer welfare. The judge must not weigh against consumer welfare any other goal, such as the supposed social benefits of preserving small businesses against superior efficiency. Second, the Chicagoans applied economic analysis more rigorously than was common at the time to test the propositions of the law and to understand the impact of business behavior on consumer welfare.

ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* xi (Simon & Schuster

Edward Levi first introduced what became known as the “fixed sum” argument,⁵⁶ forming the foundation of Chicago school antitrust analysis.⁵⁷ The fixed sum argument is that “a firm with market power may be able to gain its profit all from its own market, all from another, or from any combination thereof, but the total amount of restriction that the monopolist will be able to profitably impose is fixed.”⁵⁸ Regardless of its reach, a monopolist cannot increase the total amount of monopoly profit.⁵⁹

Applying this theory to, among other things, tying arrangements, the Chicago school emphasized that tie-in sales involve complementary products, and that “by definition of complementary, an attempt to increase the price of one would reduce the demand for the other.”⁶⁰ In other words, by increasing prices in a secondary market, a monopolist would lose profits in its primary market.⁶¹ Thus, even a monopolist that successfully extends its dominance into other markets through leverage, cannot reap additional monopoly profit.⁶²

Another illustration of the fixed sum theory is the Chicago school’s view of predatory pricing. Traditionally, it was conceived that a dominant firm could gain long-term profits by selling at an artificially low price, driving out competition, and eventually recouping its short-term losses with an artificially high monopoly price.⁶³ The Chicago economists countered that argument: when the newly established monopolist raises its price, it also raises incentives for others to enter the market and bid down the price to the competitive level.⁶⁴ Accordingly, monopolies tend to be self-correcting.⁶⁵ And because of “the uncertainty of the potential benefits and the certainty of the costs of the practice,” predatory pricing cannot be a sensible strategy.⁶⁶

1993) (1978).

⁵⁶ Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 290 (1956), reprinted in 17 MISS. C. L. REV. 7, 14–15 (1996).

⁵⁷ Posner, *supra* note 52, at 925 (“The basic features of the Chicago school of antitrust analysis are attributable to the work of Aaron Director in the 1950s. Director formulated the key ideas of the school, which were then elaborated on by students and colleagues such as Bowman, Bork, McGee, and Telser.”).

⁵⁸ Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 517–18 (1985).

⁵⁹ Feldman, *supra* note 45, at 2080.

⁶⁰ Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 932 (2001); see also, e.g., Feldman, *supra* note 45, at 2084–85; Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 VAND. L. REV. 213, 229 n.56 (1983); BORK, *supra* note 55, at 373.

⁶¹ Feldman, *supra* note 45, at 2080.

⁶² *Id.*

⁶³ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 317 (7th ed. 2007).

⁶⁴ Posner, *supra* note 52, at 927.

⁶⁵ Hovenkamp, *supra* note 1, at 227.

⁶⁶ William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury*,

The Chicago school thus concluded that the leveraging behavior of a monopolist was intended to produce and did produce procompetitive or neutral effects on the market.⁶⁷

C. Post-Chicago Approach

The simplicity and universality of the Chicago school antitrust analysis soon became the reason for its widespread acceptance as well as the subject of intense disapproval.⁶⁸ First, post-Chicago economists questioned the utility of the overly simplified economic model in antitrust jurisprudence.⁶⁹ While, in theory, it may be asserted that the proper goal of antitrust policy should be to maximize net efficiency in the market,⁷⁰ the “most efficient” solution may not be practicable within the economic or political construct.⁷¹ Also, post-Chicago economists argued, policy considerations should reach beyond the single dimension of maximizing market efficiency.⁷²

Further, in examining the effects of certain behaviors on price or output, the Chicago school approach assumes away external factors that may affect the market being examined.⁷³ This yields an incomplete analysis of strategic behavior that aims beyond profit maximization.⁷⁴ For instance, exclusionary strategies may be implemented to protect or extend market share and entry barriers.⁷⁵ This is strategic behavior, “designed to decrease the attractiveness of offer against which a monopolist must compete.”⁷⁶ “A firm acts strategically when it takes into account its rivals’ reaction before acting.”⁷⁷ This means a firm is not always driven solely by the desire to maximize its profits.

and *Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1235 (1989).

⁶⁷ Feldman, *supra* note 45, at 2080; *see also, e.g.*, Page, *supra* note 66, at 1234 (“[A] price-cutting campaign is often not a reasonable means of increasing monopoly power . . . it is more likely a form of aggressive competition.”); BORK, *supra* note 55, at 376 (“Tying arrangements . . . have among their explanations: (1) evasion of price regulation, (2) price discrimination, (3) nondiscriminatory measurement of use, (4) economies of scale, and (5) technological interdependence or the ‘protection of good will.’”).

⁶⁸ Lombardo, *supra* note 51, at 412.

⁶⁹ Hovenkamp, *supra* note 1, at 234.

⁷⁰ *Id.* at 228.

⁷¹ *Id.* at 234.

⁷² *Id.*

⁷³ *Id.* at 256.

⁷⁴ *Id.*

⁷⁵ JANUSZ A. ORDOVER & GARTH SALONER, PREDATION, MONOPOLIZATION, AND ANTITRUST, 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 538, 538 (R. Schmalensee & R. D. Willig eds., 1989); *see also, e.g.*, Feldman, *supra* note 45, at 2079.

⁷⁶ Paul G. Scott, *Bundled Discounts: Procompetitive Efficiency Enhancing Behaviour or Strategic Monopolisation?*, 10 N.Z. BUS. L. Q. 336, 337 (2004).

⁷⁷ *Id.*

Post-Chicago economists recognize the possibility that firms with dominant market power are committed to maximizing total output, increasing sales, or accelerating growth rates rather than simply focusing on profits.⁷⁸ Such a firm would be more likely—than Chicago school proponents predicted—to invest in predatory pricing, tying arrangements or other exclusionary activities.⁷⁹ Hence, accounting for a firm's willingness to deviate from profit maximization, the Chicago school's argument that leveraging schemes are irrational or impossible loses force.⁸⁰ Using a market-specific approach, post-Chicago scholars have demonstrated numerous ways in which exclusionary or leveraging behavior can produce anticompetitive effects.⁸¹

⁷⁸ Lombardo, *supra* note 51, at 424–25.

⁷⁹ *Id.* at 425. Even Judge Richard A. Posner, a prominent Chicago school economist, has conceded the effectiveness of predatory pricing as a form of exclusionary practice:

Assume that it is lawful to buy a rival. It does not follow that a firm will never resort to predatory pricing. After all, it wants to minimize the price at which it buys its rivals, and that price will be lower if it can convince them of its willingness to drive them out of business unless they sell out on its terms. One way to convince them of this is to engage in predatory pricing from time to time.

Posner, *supra* note 52, at 939.

⁸⁰ Lombardo, *supra* note 51, at 425.

⁸¹ See, e.g., Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 270–71 (2001) (“For example, when the proportions of inputs can be varied, vertical integration can be socially harmful. When information is not evenly balanced, anticompetitive strategic behavior is possible. In the presence of specialized assets and economies of scale strategic pricing, even at prices significantly above cost, can be anticompetitive. Network externalities in some markets, such as for computer operating systems or telephone or other networks, can give dominant firms decisive advantages that enable them to defeat even superior technologies. Mergers in product-differentiated markets pose unique threats to competition that are not captured by the traditional collusion model.”); Michael S. Jacobs, *The New Sophistication in Antitrust*, 79 MINN. L. REV. 1, 37–38 (1994) (“Some have suggested that firms in competitive markets can attain monopoly power by foreclosing rivals from lower cost inputs; this practice raises rivals’ costs and forces them either to quit the market or to increase prices to levels at which the strategic firms can earn supra-competitive profits. Others have proposed that predatory pricing, which some judges and academicians consider implausible, can succeed in certain markets if the predator implements the proper strategy. Still others have hypothesized that strategic behavior can take the form of advertising, investment, product selection, or other activities that raise the cost of doing business or deter entry.”).

III. APPLICATION OF THE ECONOMICS: *SCHOR V. ABBOTT LABORATORIES*⁸²

A. *Factual Background & Ruling in Schor*

The most recent monopoly leveraging case came before a Chicago school economist and jurist, Frank H. Easterbrook. The dispute involved two prescription drugs manufactured by Abbott Laboratories designed to fight the acquired immune deficiency syndrome ("AIDS").⁸³ Ritonavir, known by its trade name NORVIR, is a protease inhibitor, which slows the progress of AIDS.⁸⁴ This drug, however, is more effective as a booster for other protease inhibitors than as a stand-alone.⁸⁵ Thus, Abbott also offers KALETRA, a combination of NORVIR and another protease inhibitor, lopinavir.⁸⁶ Abbott holds patents on both NORVIR and KALETRA.⁸⁷

The complaint, raised in a class action by a consumer of protease inhibitors, alleged that Abbott charges too much for NORVIR alone and too little for the NORVIR component of KALETRA.⁸⁸ A consumer wishing to purchase NORVIR and combine it with a protease inhibitor produced by one of Abbott's competitors would end up paying a higher price for that combination than for the ready-made cocktail that Abbott offers: KALETRA.⁸⁹ It was contended that this price disparity was Abbott's attempt to drive out its rivals and monopolize the market for protease inhibitors, in violation of Section 2 of the Sherman Act.⁹⁰ The complaint alleged that Abbott committed monopoly leveraging.⁹¹

Chief Judge Easterbrook, writing for the Seventh Circuit, determined

⁸² 457 F.3d 608 (7th Cir. 2006).

⁸³ *Schor*, 457 F.3d at 609.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 610.

⁸⁷ *Id.* at 609–10.

⁸⁸ *Id.* at 610.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* ("Schor calls the strategy 'monopoly leveraging': Abbott is trying to use its patent to obtain a monopoly of all protease inhibitors by inducing HIV patients to buy Kaletra, which will lead other vendors to drop out of the market. Once rivals' products have been vanquished, Abbott will be able to jack up the price of Kaletra as well as Norvir.").

⁹² *Id.*

then rejected monopoly leveraging as a “naked” claim⁹³ or a “free-standing theory” under Section 2.⁹⁴ This decision was founded firmly upon the Chicago school’s fixed sum argument. The chief judge ruled that monopoly leveraging is not an antitrust violation because “the practice cannot increase a monopolist’s profits”: “[A monopolist] can collect a monopoly profit from ritonavir and allow a competitive market to continue in other products. Or, by reducing the price of ritonavir, it can induce customers to buy more from it. But it can’t do both.”⁹⁵ As to any objections against tying arrangements, the chief judge concluded that an attempt to raise the price of both the monopolized and the complementary products and thereby augment overall profits would be self-detering.⁹⁶ The motive behind Abbott’s profit-maximizing behavior, as put forth in *Schor*, was to promote competition in the complementary market and thus lower the price of complements.⁹⁷ “The less the complements cost, the more the monopolist can charge for its own product.”⁹⁸ And under the assumption that “[l]ower prices almost always benefit consumers,”⁹⁹ the effect of Abbott’s pricing scheme would indeed be procompetitive rather than anticompetitive.¹⁰⁰

Schor is unique in its use of economics compared to other federal circuit decisions, such as *Alaska Airlines* and *Fineman*, which rejected a monopoly leveraging claim. While the Ninth and Third Circuits focused on the language and function of the Sherman Act, the Seventh Circuit in *Schor* derived its ruling from economic theories, mostly of the Chicago school. And as a result, *Schor* is subject to the criticisms of the post-Chicago philosophy. Although Chief Judge Easterbrook placed little merit on the assertion that Abbott’s leveraging behavior could produce anticompetitive effects, scholars have advanced findings to the contrary. And it is not only conceivable but likely that the strategy used by Abbott will produce an anti-competitive outcome by creating a low-cost entry barrier to the protease inhibitor market and insulating Abbott’s market dominance beyond the terms of its patents.

⁹³ *Id.* at 613.

⁹⁴ *Id.* at 611.

⁹⁵ *Id.* at 611–12.

⁹⁶ *Id.* at 612 (citing PHILIP AREEDA & HERBERT HOVENKAMP, 9 ANTITRUST LAW ¶¶ 1706a, 1706b (2d ed. 2000)).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 613.

¹⁰⁰ *Id.* at 612–13.

B. *Application of Bundling in Schor: Market Entry Barrier*

Abbott's strategy of selling the two drugs together can be described more accurately as bundling rather than tying. Bundling is distinguished from tying in that consumers are not forced to buy the bundled products together, as they also have the option of buying the products separately.¹⁰¹ Consumers, on the other hand, have an incentive to purchase the products together because discounts are offered on bundles.¹⁰² Bundling also provides benefits to the producer.¹⁰³ And while this mutually beneficial practice can increase market efficiencies,¹⁰⁴ it can also serve as "a way to leverage monopoly."¹⁰⁵ By deterring market entry of new firms and mitigating natural erosion of monopoly, bundling strategies, such as that employed in *Schor*, can hinder competition and raise monopoly profits.

Extension of monopoly power does not harm consumers unless the monopolist can exploit that power to restrict output and raise prices.¹⁰⁶ And a monopolist cannot exploit its market share and dominance unless it can hinder competition in the market.¹⁰⁷ Thus, creating entry barriers to the

¹⁰¹ John Thorne, *Discounted Bundling by Dominant Firms*, 13 GEO. MASON L. REV. 339, 339 (2005) ("Bundled discounts are distinguished from tying arrangements because, unlike a tie, consumers are not forced to purchase one product as a prerequisite to being allowed to purchase another product.").

¹⁰² Scott, *supra* note 76, at 339 ("[A] bundled discount occurs when a firm offers consumers a discount if they purchase a bundle of goods or services. A firm offers the bundle at a lower price than the sum of the components when individually priced. It is cheaper for consumers to purchase the goods or services as a bundle than it is to purchase them separately."); *see, e.g.*, Thorne, *supra* note 101, at 341 ("The universe of bundled discounts includes such simple fare as 'value meals' at fast-food restaurants, season ticket offerings of sports teams, and furniture sold both in suites and by individual item. . . . It includes products so commonly offered as a package that the bundling aspect is almost taken for granted—mutual fund shares, round-trip airplane tickets, telephone service allowing calls to all U.S. locations, and multi-channel cable TV service.").

¹⁰³ *See, e.g.*, Scott, *supra* note 76, at 340 ("[Bundled discounts] can enhance efficiency by enabling a firm to sell more of its product. This may enable a firm to take advantage of scale economies and thus reduce production and inventory costs. Similarly economies of scope and multi-product production can cause firms to reduce their operating and advertising costs. Such economies might allow a firm to sell goods or services at a lower price than it could on a single product or service basis. In some circumstances the bundled discount may allow a firm to provide consumers with a product or service that might not otherwise be available.").

¹⁰⁴ *See id.*

¹⁰⁵ *See generally* Barry Nalebuff, *Bundling as a Way to Leverage Monopoly* (Yale Sch. of Mgmt., Working Paper No. 36, 2004).

¹⁰⁶ *See, e.g.*, Keith Wollenberg, *An Economic Analysis of Tie-In Sales: Re-Examining the Leverage Theory*, 39 STAN. L. REV. 737, 744 (1987) ("If extension of monopoly means a larger market share and the ability to exploit that market share by restricting output and charging higher prices, extension of monopoly harms consumers.").

¹⁰⁷ *See, e.g.*, Lombardo, *supra* note 51, at 420 ("[W]hile the 'fixed sum' argument correctly states that the monopolist will not be able to obtain a supracompetitive level of profits in the [tied] market, he

may, nonetheless, foreclose competition in that market.”).

¹⁰⁸ See, e.g., *Wallersteig v. American Airlines*, 774 F.2d 1031, 1034 (9th Cir. 1985) (“[A dominant firm’s] ability to exploit [its dominant] position depends, among other things, on entry conditions in the other market.”).

¹⁰⁹ Barry Nalebuff, *Bundling* (Yale Int’l Ctr. for Fin., Working Paper No. 99-14, 1999).

¹¹⁰ *Id.* at 1.

¹¹¹ *Id.*

¹¹² Yongming Tse & Chun Pong Fong, *Defining TTT*, *Tf. Tc. T. Td, B, .T. Tc T. . . . Tm TTT Tf. Tc. . . . Tm Semje GTTT Tf. Tc. T Td Nalebuff* *u hNavang oBicB i le*

entrants.¹¹⁷ When a new firm enters a monopolized market, however, its probability of success is affected by factors such as cost of entry, customer loyalty, network effects, and legal barriers.¹¹⁸ One way to avoid such hurdles is to “splinter” the market, to target a smaller geographic section, to offer a generic or lower-version of the product, and to meet more limited market needs.¹¹⁹ Tactical bundling by the monopolist can compromise the effectiveness of such insurgent efforts.

In *Schor*, the court dismissed the monopoly leveraging argument partly based on the fact that Abbott holds a patent on KALETRA: NORVIR plus one other protease inhibitor manufactured by Abbott.¹²⁰ The patent granted Abbott the right to exclude others in the “combination treatment” market until the expiration of the patent.¹²¹ What the court hastily disregarded, however, was the effect of Abbott’s bundling and pricing tactics on the market *after* the expiration of the two patents.

Abbott’s competitors, who already manufacture their own protease inhibitors, are well-positioned to undermine Abbott’s monopolized market in NORVIR once the patent expires.¹²² With little investment of time and money, those competitors will be able to develop and market generic versions of NORVIR. Subsequently, Abbott has a high incentive to extend its monopoly power beyond the term of the patent.¹²³ This interest is further heightened by the fact that the marginal cost of producing one additional unit of NORVIR is insignificant compared to the total cost, which includes the cost of research and development.¹²⁴ Put another way,

¹¹⁷ *Id.* at 2088.

¹¹⁸ *Id.* at 2088–90.

¹¹⁹ *Id.* at 2090–92 (“Splintering [] threatens the monopolist’s long-term prospects. Once a new entrant has established a foothold in one corner of the market, the entrant is in a better position to challenge the monopolist in the full range of the monopoly market. For example, the new entrant can establish a reputation in the limited market that carries over for entry into the broader market. . . . In addition, reputation value can help the entrant obtain financing for a foray into the broader market. . . . Experience in a related market also helps the new entrant move into the broader market. . . . In short, splintering poses a significant threat to the long-term viability of a monopoly.”).

¹²⁰ *Schor v. Abbott Labs.*, 457 F.3d 608, 614 (7th Cir. 2006).

¹²¹ *Id.*

¹²² See, e.g., Courtney E. Curtis, *Under the Section 2 Microscope: Do Pfizer’s Bundled Rebates and Exclusive Dealing Contracts Violate the Sherman Antitrust Act?*, 35 SW. U. L. REV. 207, 209 (2006) (“Pfizer is facing the loss of patent protection on at least four of its best-selling drugs. Typically, when a drug manufacturer loses such protection, ‘cheaper generics rush in’ to compete with the monopolist’s drugs, and the monopolist can no longer hide behind its intellectual property.”).

¹²³ See Posner, *supra* note 60, at 935.

¹²⁴ *Id.*; see also Abraham N. Saiger, *In Search of a Government That Will Govern: Senate Bill 812 and “Reimporting” Prescription Medication from Canada*, 12 ELDER L.J. 177, 188 (2004) (“Studies suggest that in the early 1990s less than one in ten approved pharmaceutical compounds proved profitable for drug

once Abbott endures the high upfront cost of developing, patenting, and marketing the drug, its interest is in sustaining the monopoly for as long as possible because the cost of producing the drug is very low in comparison. It would thus be a lucrative venture for Abbott to incur a loss associated with bundle discounts and extend monopoly profits beyond the patent term.¹²⁵

Bundling, while prevalent and often lawful, can be a method of mitigating the impact of competition when employed by a monopolist.¹²⁶ And even though the monopolist may not be able to increase its profits, as advanced by the Chicago school's fixed sum theory, the practice can serve as a low-cost scheme¹²⁷ to increase market share, raise entry barriers, and extend an existing monopoly. The Supreme Court, in *Griffith*, found this the very type of behavior that Section 2 was designed to punish: "[T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."¹²⁸

IV. CONCLUSION

Since the Second Circuit's decision in *Berkey Photo*,¹²⁹ economists have come up with various ways in which monopoly power in one market can be leveraged to do *more than* obtain a competitive advantage in a second market. When adopted by a monopolist, leveraging behavior, such as bundling, can foreclose competition in both the primary and the secondary markets by raising entry barriers and preventing the natural erosion of the monopoly. Thus, an accurate examination of leveraging conduct requires scrutiny of its effects on the secondary as well as the primary, monopolized market. The definition of monopoly leveraging, in this sense, becomes broader. It is the use of monopoly power in one market as leverage to obtain a competitive advantage in a second market *or to perpetuate the monopoly in the primary market*.

Still, accounting for the likelihood that leveraging conduct affects the market positively or, at most, neutrally, *Schor* suggested finding such conduct presumptively legal: "[J]ust as rules of *per se* illegality condemn practices that almost always injure consumers, so antitrust law applies rules of *per se*

manufacturers. . . . [and] that the industry spends over \$800 million in discovery and development of each medication that successfully goes to market.").

¹²⁵ Posner, *supra* note 60, at 935.

¹²⁶ See Nalebuff, *supra* note 109, at 5; see also Curtis, *supra* note 122, at 226 ("While bundled rebates may be a common business practice, rebate structures that allow a monopolist to maintain its monopoly position to the detriment of consumers must not be overlooked.").

¹²⁷ Nalebuff, *supra* note 109, at 10.

¹²⁸ United States v. Griffith, 334 U.S. 100, 107 (1948).

¹²⁹ *Berkey Photo Inc., v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979).

legality to practices that almost never injure consumers.”¹³⁰ This approach, however, stunts the development of antitrust common law vis-à-vis the continuing proliferation of the scholarship of economics. It discounts a large portion of economic thought in the name of administrative convenience.

The real cost of disagreement among the judiciary, however, is the lack of clear directives for businesses. And that cost is ultimately paid by the consumers. Firms operating under the risk that different judges and juries may reach different decisions regarding the legality of their conduct would refrain from competing aggressively.¹³¹ The prospect of antitrust liability would keep firms from risky investments and innovation that are often driven by the prospect of supracompetitive returns.¹³² Consumers thus pay the price of diminished competition, delayed innovation, and, overall, a less efficient market.

The Supreme Court’s reluctance to rule on the validity of the monopoly leveraging doctrine may reasonably be attributed to the ongoing academic dispute. Nonetheless, the lack of a unified legal standard only adds to the cost of litigation and subsequently cripples robust competition. Such social cost cannot be resolved by the mere functioning of a free market. It has to be addressed with a progressive approach of incorporating the wisdoms of different schools of economics. It has to be addressed by the authority of the Supreme Court.

¹³⁰ Schor v. Abbott Labs., 457 F.3d 608, 613 (7th Cir. 2006).

¹³¹ See, e.g., Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 266–67 (2003).

¹³² See, e.g., *id.* at 274–75.