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DOES MONOPOLY BROTH MAKE BAD SOUP?

DANIEL A. CRANE*

There is an oft-repeated maxim in U.S. antitrust law that a monopolist's conduct must be examined in its totality in order to determine its legality.[1] Judges admonish that plaintiffs "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."[2] As the U.S. Court of Appeals for the Seventh Circuit stated in much-quoted language, "It is the mix of various ingredients . . . in a monopoly broth that produces the unsavory flavor."[3]

In this article, I examine the use and misuse of monopoly broth theories. Reflecting a certain ambivalence on the topic, I deliberately have chosen an ambiguous title. Does monopoly broth make bad soup because a monopolist's disparate bad acts sometimes combine to threaten competition in a way that would not be apparent if one simply examined each act in isolation? Or are monopoly broth *theories* the problem?

I argue that both of these senses of my title are valid. On the one hand, in a certain class of cases—particularly those where the legality of a defendant's contracts depends on whether they foreclose a substantial share of the relevant market—it is necessary to consider the aggregate effect of defendant's conduct in order to determine legality. In those cases, determining legality on a contract-by-contract or practice-by-practice basis would systematically lead to false negatives. On the other hand, the "monopoly broth" maxim is susceptible to misuse, particularly if ap-

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* Member of the Florida and New York bars and Professor of Law, University of Michigan. Many thanks for helpful comments to Adi Ayal, who served as commentator, and the other participants at the Issues at the Forefront of Monopolization and Abuse of Dominance Conference held at the University of Haifa (May 2009).

[1] On the general question of aggregating various antitrust claims in order to establish liability, see 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 310, at 197–210 (3d ed. 2007).

[2] Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).

[3] City of Mishawaka v. Am. Elec. Power Co., 616 F.2d 976, 986 (7th Cir. 1980).

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plied to species of conduct whose legality depends on a developed conduct-specific test. In such cases, the prima facie legality of the conduct should be determined on a practice-by-practice basis. Any conduct that does not meet the relevant conduct-specific test should not be allowed to count toward liability or any other issue. In particular, plaintiffs should not be allowed to invoke "monopoly broth" rhetoric in order to defeat established legal tests applicable to different kinds of conduct.

I. WHAT'S AT STAKE: RULES AND STANDARDS

Before we come to the specific principles that do, or should, govern monopoly broth theories, we should step back and consider the issue in its broader juridical context. At its core, the question presented is whether rules or standards are more appropiate for antitrust cases in general and monopolization cases in particular. In the traditional juridical distinction, a rule is a legal norm that makes liability turn on a small number of concrete factors, whereas a standard makes liability turn on a much more open-ended set of considerations.[4] So a sixty-mile-per-hour speed limit is a rule, and a "drive reasonably given road and traffic conditions" norm is a standard. Similarly, requiring a plaintiff to prove that the defendant priced below average variable cost sounds like a rule, whereas requiring a plaintiff to prove that the defendant priced unreasonably in order to foreclose competition sounds like a standard.

Elsewhere, I have argued that rules are often more appropriate than standards in antitrust cases.[5] Particularly in the exclusionary conduct arena, open-ended standards fail to give adequate notice to business people and, therefore, prevent effective business planning. Further, in the U.S. civil litigation system, standards tend to delegate decision-making authority to lay juries (instead of judges) that are not well-equipped to deal with the complexities of monopolization litigation.[6] Rules are often more administrable than open-ended standards and less likely to chill efficiency-enhancing behavior. And rules may streamline litigation and reduce its costs.

Perhaps the greatest danger of monopoly broth theories is that they allow plaintiffs to transfer theories of exclusionary conduct from the domain of rules to the domain of standards. Under a liberal use of monopoly broth theories, plaintiffs can avoid the rules put in place to govern

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[4] *See generally* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007).

[5] *See id.* For a more pro-standard perspective, see Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207 (2008).

[6] Crane, *supra* note 4, at 76–77.

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various different exclusionary practices theories simply by alleging that they are pleading a different kind of theory—one that asks for a pattern of conduct to be analyzed as a whole and not in its discrete parts. As only the most general standards are capable of ascertaining whether a pattern of conduct, taken as a whole, is exclusionary, monopoly broth theories can transform poor antitrust cases into jury trials with a wave of the hand. Only an incompetent plaintiff's lawyer cannot find another species of bad conduct to tack onto a predatory pricing case if he cannot prove pricing below cost, or to a predatory product design case if he cannot prove that the new design was inferior to the old one. Further, monopoly broth theories may be particularly persuasive to fact-finders who cannot make out the technical details of any of the discrete forms of misconduct alleged but can understand a story about the cumulative effects of the conduct on the defendant's rival.[7] If we are to have rules governing at least some classes of exclusionary conduct, then it is necessary that the plaintiff prove a violation of the relevant rules—conduct by conduct—before invoking a monopoly broth theory of liability.

On the other hand, it would be impossible to administer antitrust adjudication solely on the basis of hard-and-fast rules. The "rules versus standards" literature frequently observes that rules have a tendency to erode into standards when the relevant subject matter is complex and the terms of the rule ambiguous.[8] A good example of this is the "rule" of per se illegality for price fixing, which has been applied to conduct that literally is not price fixing and not applied to conduct that literally is price fixing.[9] Often, before applying the "rule" it is necessary to undertake an initial inquiry into the economic effects of the conduct—whether it tends to be output increasing or reducing.[10] This "characterization" step merely shifts a standard-based analysis to the front end of the liability determination. The conduct is condemned as per se illegal under a rule-based form of rhetoric, but only after a standard-based triaging analysis has determined that the conduct is "price fixing."

The upshot is that neither rules nor standards can do all of the work in antitrust law. Courts need to arrive at sensible principles that allow the application of rules when rules would tend most often to get the decision right, save litigation costs, and increase predictability—*and*

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[7] FTC Commissioner J. Thomas Rosch has argued that monopoly broth theories "have to be considered extremely valuable in trying to persuade any trier of fact—especially a lay jury—that monopolization (or an attempt to monopolize) has occurred." J. Thomas Rosch, *Evolution of Exclusive Dealing Law*, 7 SEDONA CONF. J. 51, 56 (2006).

[8] Crane, *supra* note 4, at 72–76.

[9] *Id.*

[10] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 23–24 (1979).

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when the rules could actually be applied without inevitably eroding into standards. Where these objectives cannot be satisfied, it is better not to announce rules, which simply obscure the standard-based analysis that is going on under the surface of the purported rule.

With these background observations, I propose three principles—partly descriptive and partly normative—to govern monopoly broth theories.

II. INDEPENDENTLY LAWFUL CONDUCT MAY NOT BE COMBINED WITH OTHER CONDUCT TO CREATE ILLEGALITY

Courts are fond of saying something to the following effect: "[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to *consider their overall combined effect*. . . . We are dealing with what has been called the 'synergistic effect' of the mixture of the elements."[11] However, there exists—or should exist—a class of competitive acts that are per se lawful and cannot become unlawful by combining them with other acts. Examples include above-cost price discounting, technological innovations creating product improvements, unconditional and unilateral refusals to deal with rivals, and non-predatory package pricing. Such conduct should never be allowed into a monopoly broth theory, because it is not unlawful—regardless of its effect on competitors or competition.

There is support in U.S. law, albeit with some contradiction, for the proposition that such per se legal conduct cannot be thrown into the cauldron in order to create liability. For example, the U.S. Court of Appeals for the Second Circuit has "reject[ed] the notion that if there is a fraction of validity to each of the basic claims and the sum of the fraction is one or more, the plaintiffs have proved a violation."[12] Although it is easy to get lost in this arithmetic metaphor, the basic point appears to be that if elements of a theory of liability are missing, the entire theory of liability falls out and cannot be revived by an incremental approach of mixing and matching it with other similarly deficient theories of liability.

An excellent and concrete example of this principle in application is the Second Circuit's decision in *Northeastern Telephone Co. v. AT&T*,[13] an old-fashioned decision concerning access to telecommunications infra-

[11] City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992) (emphasis added).

[12] City of Groton v. Conn. Power & Light Co., 662 F.2d 921, 928 (2d Cir. 1981).

[13] 651 F.2d 76 (2d Cir. 1981).

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structure, rendered on the cusp of the AT&T break-up and long before the days of the 1996 Telecom Act,[14] and the decisions it spawned, such as *Verizon*[15] and *linkLine*.[16] In 1968, the Federal Communications Commission ruled that the Bell telephone companies were obliged to interconnect with competitors wishing to sell telephone terminal equipment (which was used primarily by businesses).[17] AT&T's Connecticut affiliate—SNET—allegedly engaged in a variety of anticompetitive acts designed to impede Northeastern Telephone's ability to compete in the terminal equipment market.

At trial, Northeastern Telephone tried to prove six different species of monopolistic misconduct: It alleged that SNET engaged in predatory pricing, filed anticompetitive tariff applications, instituted an exclusionary "two-tier payment plan," employed anticompetitive marketing and advertising methods, leveraged its monopoly power in the telephone business to obtain power in the terminal market, and introduced a defective coupler device (to be used for interconnection from SNET's phone line to Northeastern's terminal equipment) that limited Northeastern's access to the market.[18] A jury returned a verdict for Northeastern, finding that each of the six challenged actions was anticompetitive.[19]

On appeal, the Second Circuit found that five of the six challenged activities were not anticompetitive. For example, on the predatory pricing claim, the court adopted the Areeda-Turner average variable cost test[20] and found that SNET had not priced below cost.[21] It similarly found that none of the other theories—apart from the allegedly predatory introduction of the coupler—met the relevant legal test for that particular species of conduct.[22] The court found, however, that there was sufficient evidence of predatory product design as to the coupler and remanded for a new trial on that issue only.[23]

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[14] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[15] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[16] Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109 (2009).

[17] *Northeastern Telephone*, 651 F.2d at 79–80.

[18] *Id.* at 80–81.

[19] *Id.* at 82.

[20] *Id.* at 86, 88 (citing Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975)).

[21] *Northeastern Telephone*, 651 F.2d at 87–91.

[22] *Id.* at 96.

[23] *Id.* at 95–96.

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Northeastern strenuously argued that its monopolization claim should not be segmented into discrete pieces—that it "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."[24] The Second Circuit rejected this argument, finding that "treating Northeastern's claims collectively [could not] have any synergistic effect."[25] Northeastern could press forward with its predatory product design claim, but without resort to evidence of the lawful conduct.[26]

Northeastern Telephone establishes an important principle. Where there are developed tests for a particular species of competitive conduct such as predatory pricing, a plaintiff must first satisfy the test as to each species of allegedly anticompetitive conduct before measuring the cumulative or "synergistic" effect of the conduct. Shortcuts that skip the elements of different theories of exclusionary behavior and go straight to a "cumulative effects" bottom line are prohibited. Further, preliminary success on one legal theory—the predatory product design in *Northeastern Telephone*—does not allow the plaintiff to continue to invoke other lawful conduct in order to create liability.

Notwithstanding *Northeastern Telephone* and some similar decisions, courts continue to fumble over monopoly broth theories. Consider, for example, the following statement from a recent district court decision (citing an earlier Ninth Circuit decision):

> Recognizing the danger of falsely condemning innovation and competition, it should be "much more difficult to find overall wrongdoing" when considering only "a number of perfectly legal acts." Even "a finding of some slight wrongdoing in certain areas need not by itself add up to a violation" of section 2. What matters is whether the "synergistic effect" of the alleged conduct is to harm competition, and thus perpetuate a monopoly.[27]

Much more difficult? Why should a "perfectly legal act" combined with another "perfectly legal act" ever add up to illegality? Is it possible that SNET's above-cost pricing could suddenly become suspect when combined with its aggressive but otherwise permissible advertising? Can two rights make a wrong?

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[24] *Id.* at 95 n.28 (citing Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962)).

[25] *Id.*

[26] *Id.* at 96.

[27] Tele Atlas N.V. v. NAVTEQ Corp., 2008 WL 4911230, at *2 (N.D. Cal. Nov. 13, 2008) (quoting City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992)) (internal citations omitted).

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Even the Areeda-Hovenkamp treatise suffers from some imprecision on this point. It states:

> In a monopolization case conduct must always be analyzed "as a whole." A monopolist bent on preserving its dominant position is likely to engage in repeated and varied exclusionary practices. Each one viewed in isolation might be viewed as de minimis or an error in judgment, but the pattern gives increasing plausibility to the claim.[28]

The assertion that the monopolist's conduct must "*always*" be viewed as a whole is problematic. If the conduct viewed individually is lawful, it is hard to see what can be added by viewing it as a whole.[29] Hence, there will be many occasions in which the monopolist's conduct analyzed in isolation will not yield illegality, and there is no occasion for viewing the conduct as a whole.

The confusion appears to arise from the supposition that a group of otherwise legal acts could become illegal based on their cumulative effect on a competitor. In this way of thinking, the individual acts are "perfectly legal" only because they are not capable of harming competition, whereas the sum of the acts might harm competition. But rules, such as those protecting above-cost price cutting, product-design changes resulting in product improvement, above-cost bundled discounts after discount reallocation, and refusals to deal with rivals, are not premised on the view that these acts are incapable of harming competition. Above-cost price cuts, building better mousetraps, bundled discounting by diversified firms, and refusals to aid new entrants can indeed harm competition. But those acts are immunized from liability for a variety of reasons including a fear of false positives, the need to give adequate notice to business people for planning and fairness purpose, the administrative difficulty of policing certain kinds of competitive conduct, ideological commitment to a light regulatory hand in policing competitive behavior, and the view that any short-term harm to competition will be more than offset by the long-term efficiency and productive gains that result from allowing free play (within the boundaries of the rule) on matters, such as innovation, marketing, and pricing. To reduce all monopolization law to a case-by-case inquiry on whether the sum of the defendant's conduct harms competition is to miss a much more complex set of policy and juridical inputs into monopolization law and to create excessive uncertainty in adjudication.

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[28] AREEDA & HOVENKAMP, *supra* note 1, ¶ 310c7, at 208.

[29] Elsewhere the Areeda-Hovenkamp treatise appears to acknowledge as much, stating that aggregation should not be permitted when "plaintiff fails to prove an element essential to every claim." *Id.* ¶ 310c2, at 202.

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To be sure, there is a stage of analysis in every monopolization case in which the effects of the defendant's conduct—individually or in total—on competition must be addressed. In all attempt cases, liability can only attach if the defendant's conduct creates a dangerous probability of monopolization. In a predatory pricing case, the below-cost price is not unlawful unless it creates monopoly power by excluding rivals. But these kinds of effects inquiries only arise once the conduct has been shown to be prima facie unlawful. We do not come to the dangerous probability inquiry unless the conduct is exclusionary or to the exclusion step in predation cases unless the price is below cost.

III. CONDUCT WHOSE LEGALITY DEPENDS ON ITS CUMULATIVE FORECLOSURE EFFECT MAY BE ASSESSED "SYNERGISTICALLY"

I have just argued that monopoly broth theories should not be employed as to kinds of conduct governed by rule-like tests that prohibit liability unless the defendant has crossed some concrete hurdle—such as below-cost pricing in a predatory pricing case. In other cases, however, aggregating a monopolist's disparate acts in order to determine liability makes perfect sense. This approach may be particularly appropriate when the legality of the defendant's conduct turns on whether it forecloses a significant share of the relevant market—an issue that is the key determinant in exclusive dealing cases[30] and plays a role in other kinds of cases as well, such as tying and bundled discounting cases. In such cases, it is necessary to look at the total effect of the defendant's "foreclosing" contracts in order to determine whether the market as a whole is substantially foreclosed.

A case that sensibly establishes this proposition is the Supreme Court's *Continental Ore* decision—which includes the "full benefit of their proof without tightly compartmentalizating"[31] language that has given rise to some mischief when applied in other contexts. In that case, defendants allegedly foreclosed plaintiff's access to the vanadium ore market through a series of exclusive dealing arrangements.[32] Acting on its own or through its subsidiaries or affiliates, Union Carbide allegedly acquired control of various mines (and then denied plaintiff access), entered into an exclusive purchasing agent relationship with the Canadian government, threatened other firms that were considering doing business with the plaintiff, and interfered with a joint venture agree-

[30] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).
[31] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).
[32] *Id.* at 691–95.

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ment between the plaintiff and another company.[33] The net effect of this conduct was that the plaintiff was stymied at every turn.

The court of appeals excused away each of these separate acts, finding that none of the acts individually foreclosed the plaintiff from the vanadium market.[34] True enough, but the various contracts and arrangements in combination resulted in a substantially foreclosed market. To give an extreme example, suppose that the market consisted of 100 customers and that a monopolist entered into an exclusive dealing contract with each one. The sum of the foreclosure would be 100 percent of the market, even though the effect of each individual contract was de minimis. Clearly, an exclusive dealing analysis would need to consider the effect of the monopolist's contracts as a whole in order to determine legality. The Supreme Court was therefore justified in finding that Continental Ore

> should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . "(T)he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."[35]

It is easy to apply the aggregation principle in exclusive dealing cases because, there, foreclosure is the entire story. But there are other categories of cases where foreclosure is only a part of the story—usually, the part that comes after other elements have been established. For example, in tying cases foreclosure may matter, but only after various other elements—such as the presence of two separate products, market power in the tying market, and the presence of "forcing"[36]—have been established. Loyalty discounts may function to induce exclusive dealing and hence require a foreclosure analysis, but typically only after a showing that they would force a rival to price below cost.[37]

In mixed cases involving exclusive dealing and other forms of conduct that *may* have foreclosing effects, the aggregation should occur only after each form of conduct has been adjudged prima facie exclusionary. For example, suppose that a defendant entered into exclusive dealing contracts involving 15 percent of the relevant market, offered loyalty discounts on another 15 percent of the market, and entered into tying con-

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[33] *Id.* at 694–95.

[34] *Id.* at 698.

[35] *Id.* at 699 (citation omitted).

[36] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16–17 (1984).

[37] *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1060–63 (8th Cir. 2000).

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tracts that covered 30 percent of the market. The proper analysis would begin with an inquiry into whether the loyalty discounts were predatory and whether the alleged tying contracts met the elements of an unlawful tie-in (putting aside, for a moment, the foreclosure question). Suppose that the loyalty discounts were shown not to be predatory but that the tying contracts met the legal test for tying. Then, the 15 percent of the market covered by the exclusive dealing contract and the 30 percent covered by the tying contracts should be aggregated (assuming that they did not overlap) and an analysis performed on whether foreclosure of 45 percent of this particular market is substantial.[38]

A related point: An analysis of aggregate foreclosure should only occur within a properly defined relevant market. If the defendant has exclusive dealing contracts that cover 20 percent of one market, tying arrangements that cover 20 percent of another, and loyalty rebates that cover 20 percent of a third market, no aggregation should be allowed. There simply is not an antitrust case in those circumstances, as none of the markets is substantially foreclosed.

IV. INDEPENDENTLY UNLAWFUL CONDUCT MAY ONLY BE ASSESSED "SYNERGISTICALLY" IF THE PLAINTIFF ADVANCES A COHERENT THEORY AS TO HOW THE DISPARATE ACTS COMBINED TO INJURE COMPETITION

The previous two sections have focused on conduct that is potentially unlawful because of antitrust law. But sometimes monopolization cases involve conduct that is separately unlawful, usually because of tort law or a statutory or regulatory scheme. Although the U.S. Supreme Court has repeatedly cautioned that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws[,]"[39] in many monopolization cases plaintiffs attempt to make use of a smorgasbord of tortious bad acts or statutory violations by the defendant to create antitrust liability. Examples of the kind of offense monopolists may commit to further their monopoly power include defamation, trade libel, tortious inference with contract or prospective business relationship, trespass to chattels (think of the

[38] That question should ordinarily turn on whether the foreclosure denies rivals the opportunity to reach minimum viable scale. *See* Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 636 (1999) ("In the simplest analysis of exclusives as customer foreclosure, the monopolist might sign a sufficient number of customers to low-priced, long-term exclusive contracts so that the rival is driven below minimum viable scale.").

[39] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993).

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old saw about blowing up the competitor's factory), fraudulent inducement to contract, misrepresentation, Lanham Act (trademark) violations, patent or copyright infringement, and commercial bribery. Sometimes these are combined with more conventional antitrust theories in order to brew up some monopoly broth. The question then is how independently unlawful acts may be combined to create monopolization liability.

Here, the basic rule should be that the plaintiff may only combine disparate, independently unlawful acts into a monopoly broth if the plaintiff advances a coherent theory about how the disparate acts combined to injure competition. The plaintiff should not be allowed simply to allege a laundry list of bad acts by the defendant and get to a jury by claiming that all of the bad acts chipped away at the rival's viability in the market. The plaintiff should be required to show how the alleged bad acts worked in concert to reduce the rival's market position.

Suppose, for example, that the defendant-monopolist does three allegedly anticompetitive things: (1) it disseminates a false rumor about an anticipated earnings shortfall by a publicly traded rival, which in turn causes a collapse in the rival's stock price and, hence, causes a venture capitalist to back out of a large equity infusion into the rival; (2) it brings a new product to market in infringement of the rival's patents at a crucial moment, which slows the rival's product in achieving market acceptance; and (3) it interferes with a line of credit the rival sought at a lending institution by bribing a bank executive to deny the loan. Assume that the plaintiff has sufficient evidence to survive summary judgment as to the independent illegality of each of these three acts. How should the judge consider the "synergistic" effect of these three bad acts?

The answer depends largely on whether the plaintiff is able to tell a record-supported story about how the disparate bad acts combined to drive it out of the market. The first and third stories both involve the rival's access to capital and, hence, seem to go hand-in-hand. If the defendant simultaneously blocks the rival's access to the debt and equity markets, the effect may be to starve the rival of resources needed to compete. On the other hand, there is no obvious link between the first and third bad acts and the second. In order to claim a "synergistic effect" from all three bad acts, the plaintiff would need to explain how the deprivation of capital combined with the patent infringement to drive the rival from the market. Was there something about the loss of capital that made the infringement worse than a run-of-the-mill patent infringement case? Was the slowness in the market acceptance of the rival's product because of the patent infringement a contributing factor in the

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venture capitalist's decision to pull out? Simply declaring that the acts amounted to "death by a thousand cuts" should not suffice.

Sometimes, the alleged misconduct involves a combination of torts and conduct that is only unlawful because of antitrust law. For example, in *Conwood v. United States Tobacco Co.*,[40] the defendant allegedly employed a combination of torts (such as trade libel and destroying plaintiff's store racks) and exclusive dealing-type arrangements.[41] In such cases, it may well be that both the tortious acts and the exclusive dealing contracts had a foreclosing effect. For instance, if the exclusive dealing contracts covered 30 percent of the market and the defendant's tortious acts deprived Conwood of the opportunity to be in stores amounting to an additional 20 percent of the market, then it may be sensible to say that the alleged acts cumulatively foreclosed 50 percent of the market—which will often be sufficient to state a monopolization claim.

On the other hand, independently unlawful acts should not be allowed to create antitrust liability out of acts that are otherwise per se lawful. For example, if the defendant blew up one of its competitors' factories and also priced slightly above marginal cost, only the blowing up of the factory should count toward liability. One might consider an exception if the plaintiff were able to tell a convincing story about how the destruction of one of its factories caused it to lose efficiencies in other factories, such that it was unable to match defendant's aggressive (but above marginal cost) price cuts. But then the lynchpin of liability would not be above-cost pricing, but rather a plainly illegal act that raised a rival's costs with strongly anticompetitive effects.[42] If the plaintiff were unable to prove that the defendant blew up the factory, the pricing behavior would have to be adjudicated per se lawful. This example is not really about changing the rules for a predatory pricing case because of a monopoly broth theory, but about allowing the plaintiff to prove an anticompetitive chain of events precipitated by an undoubtedly tortious and criminal act.

V. CONCLUSION

There is a place for monopoly broth theories in the world of antitrust adjudication. It is impossible to govern all monopolization cases under hard-and-fast rules, and there are undoubtedly some cases in which legality should turn on an analysis of the effects of the conduct, taken as a

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[40] 290 F.3d 768 (6th Cir. 2002).

[41] *Id.* at 775–78.

[42] *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

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whole. But such theories should not be permitted to destroy the domain of monopolization rules—particularly rules that immunize certain species of aggressive but generally beneficial competitive behavior. Courts should take care to ensure that the "synergistic effect" of the alleged pattern of conduct does not allow the whole to become greater than the sum of the parts.

The monopoly broth theory raises a broader issue—whether rules or standards are superior in antitrust adjudication. Of course, it would be wrong to suppose that either rules or standards are optimal all of the time. As Judge Richard Posner has noted in another context, "[n]o sensible person supposes that rules are always superior to standards, or vice versa."[43] Courts and litigants must carefully consider the comparative advantages and disadavantages of antitrust rules or standards in various contexts. Monopoly broth theories thus will continue to raise a broad and interesting set of questions as antitrust law continues its inevitable search for the optimal level of liability determinant specification.

[43] MindGames, Inc. v. W. Pub. Co., 218 F.3d 652, 657 (7th Cir. 2000).

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