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Does a Monopolist Have a Duty to Deal with Its Rivals? Some Thoughts on the Aspen Skiing Case

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DOES A MONOPOLIST HAVE A DUTY TO DEAL WITH ITS RIVALS? SOME THOUGHTS ON THE *ASPEN SKIING* CASE

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The grant of a petition for certiorari implies that at least four Justices of the Supreme Court believed that the case raised questions of general significance. Surely this was true when, on December 3, 1984, the Court granted the petition in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[1] More than a decade had passed since the Supreme Court had seriously addressed any questions arising under Section 2 of the Sherman Act.[2] The ruling definition of the offense of "monopolization" was almost twenty years old.[3] A great deal had happened during that twenty year period, but perhaps the most significant development had been the increased influence of the view that the primary if not the sole objective of the antitrust laws should be the promotion of economic efficiency.

Not only had this view gained ascendancy among academic writers; the Court's decisions, too, had evidenced an increased reliance upon economic notions, and upon the goal of promoting efficiency. Many saw a potential conflict between this trend in the Court's thinking and the apparent rule of *United States v. Aluminum Co. of America* (*Alcoa*)[4] and its progeny, which had been criticized as anticompetitive. The Department of Justice had, for the most part, gotten out of the Section 2 business, regarding the gains to be achieved far outweighed by the costs of litigating Section 2 cases. Private treble damage plaintiffs, attempting to take over for the government, had been defeated by several Court of Appeals decisions that, both in result and rationale, suggested a disenchantment with the *Alcoa* rule.[5]

Notwithstanding these developments, the jury in *Aspen Skiing*,

* I would like to thank my colleagues Homer Clark and Stephen Williams for their comments on a draft of this paper, and F. Brittin Clayton, University of Colorado Law School, Class of 1986, for valuable editorial efforts.

1. 105 S. Ct. 2847 (1985). Certiorari was granted at 105 S. Ct. 562 (1984).
2. *See* Otter Tail Power v. United States, 410 U.S. 366 (1973).
3. United States v. Grinnell Corp., 384 U.S. 563 (1966).
4. 148 F.2d 416 (2d Cir. 1945).
5. *E.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Telex Corp. v. International Business Machines Corp., 510 F.2d 894 (10th Cir. 1975).

operating under unchallenged instructions, had found that the defendant had monopolized the submarket for downhill skiing in the Aspen area. The Tenth Circuit had affirmed the district court's decision to submit the case to the jury, justifying its conclusion by arguing that the defendant's conduct had deprived the plaintiff of an "essential facility" and demonstrated an intent to "create or maintain a monopoly."[6]

The result seemed in conflict with the trend in recent court of appeals decisions. The defendant argued that its conduct could be characterized as "exclusionary" only if a firm with monopoly power had a duty to cooperate with its competitors. If this view of the decision were accurate, it could only mean that the Tenth Circuit, by the use of arresting and provocative theories, had halted the inhumation of the *Alcoa* doctrine.

When the Court granted certiorari, most observers, I believe, expected a reversal and, quite possibly, an opinion that essayed a major reworking of Section 2 doctrine. It did not quite turn out that way. All participating Justices[7] joined an opinion by Justice Stevens, probably the most sophisticated antitrust analyst on the Court, that affirmed the Tenth Circuit. Some lawyers asked whether the decision was not a "backlash" decision — one that moved counter to most of the Court's rulings. The opinion is a difficult one to interpret, but it is closer in spirit to recent antitrust jurisprudence than may appear at first. In this short paper I should like to offer some comments about the decision and speculations about what it may portend.

The Case

Aspen Skiing Company (Ski Co.) owns and operates three of the four skiing mountains (Ajax, Buttermilk, and Snowmass) in the Aspen area. Aspen Highlands Skiing Corp. (Highlands) owns and operates the remaining mountain (Aspen Highlands).[8] In 1962 the three companies then offering downhill skiing in Aspen began marketing an all-Aspen ticket that permitted the holder to ski on any of the three Aspen area mountains during the period of the ticket (usually six days). This practice continued through the opening of the fourth area at Snowmass and the consolidation of the Ajax, Buttermilk and Snowmass areas under Ski Co. Initially, this ticket came as a book of coupons, one for each day, that could be redeemed for a lift ticket at

6. Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1518-22 (10th Cir. 1984).

7. Justice White took no part in the decision of the case.

8. This statement of the facts comes from the opinions of the Tenth Circuit and the Supreme Court.

any of the mountains. This format had the disadvantage of requiring the holder to stand in a ticket line each day, but the problem was corrected by the institution of a ticket that could be hung around the neck and used at any mountain.

This ticket proved very popular with destination skiers, who typically travelled a considerable distance to Aspen, who intended to ski six days, and who valued the convenience and choice the ticket offered. The ticket induced some skiers to ski Aspen who would have chosen another locale had the ticket been unavailable. Ski Co. and Highlands divided the revenues and joint advertising expenses associated with the ticket in proportion to the skiers who skied the various areas. Over the years they used several different methods to measure where skiers having an all-Aspen ticket skied. Highlands' percentage of those skiers, and hence its share of the revenues and costs, fluctuated during the period 1973-1977, ranging from 18.5% in the 1974-75 season to 13.2% in the 1976-77 season.

Ski Co. proposed the continuation of the ticket for 1977-78, with Highlands receiving a fixed share of 13.2%. Highlands insisted upon the usage-based allocation scheme; it also argued that its 13.2% for the preceding year was atypical and not indicative of a downward trend. Eventually, they agreed to continue the all-Aspen ticket for 1977-78, with Highlands accepting a fixed share of 15%. For the first time in several years, however, Ski Co. began marketing a three mountain, six day ticket in competition with the all-Aspen ticket. The four area ticket outsold the three area ticket by two to one.

Ski Co. decided to discontinue the all-Aspen ticket for 1978-79. It went through the motions of offering Highlands a four area arrangement but insisted that Highlands accept a fixed share so low that Highlands refused the offer. Ski Co. continued to market its three area ticket. Highlands attempted to market a multi-area package of its own but was repeatedly thwarted by Ski Co.'s countermoves. Ski Co. discontinued its three day, three area pass (which Highlands could combine with a three day pass of its own to produce a six day package), and it refused to sell its single day lift tickets to Highlands either at a tour operator's discount or at retail. When Highlands developed an "Adventure Pack," which combined a three day pass at Highlands with coupons redeemable for lift tickets at Ski Co.'s mountains, Ski Co. refused to accept the coupons, although they presented no credit risk and were identical to coupons that Ski Co. accepted at its ski areas outside of Aspen.

Highlands, reduced to a day ski area and with a shrinking share of the market, sued Ski Co. The district court instructed the jury on the offense of monopolization, using the *United States v. Grinnell* formula:

> The offense of monopoly under Section 2 of the Sherman Act has two elements: (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.[9]

The district court also told the jury that a monopolist has no general duty to deal with, or aid, its competitors.

Ski Co. did not object to these instructions, but argued that the case should not be submitted to the jury at all because, as a matter of law, it had done nothing that would satisfy the conduct element of the *Grinnell* test: it had merely refused to cooperate with its competitor and, as the district court had implied, even a monopolist has no duty to engage in a joint marketing arrangement with its competitors. Having lost at trial and in the Tenth Circuit, Ski Co. pressed these arguments upon the Supreme Court

The Background

Three notions have dominated judicial discussion of the offenses listed in Section 2 of the Sherman Act: power, conduct, and intent. Ski Co.'s power was not an issue before the Supreme Court, but it has long been settled antitrust doctrine that something in addition to monopoly power must be shown to establish a violation of Section 2. Early monopolization cases[10] rejected the notion that Section 2 prohibits "monopoly in the concrete,"[11] that is, that the section was addressed entirely to a market structure. In those cases, the Court was not much concerned with the issue of the defendant's power; the analysis centered upon the defendant's conduct. The conduct condemned seemed reprehensible or, at least, unnatural.[12] Where a firm had gained or maintained its power by the use of such conduct, the firm had monopolized.

The revolution in Section 2 jurisprudence that began with Judge

9. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). The trial court's paraphrase is, in turn, paraphrased by the Supreme Court at 105 S. Ct. 2847, 2854.

10. Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911). *Cf.* United States v. United States Steel Corp., 251 U.S. 417 (1920).

11. The phrase is Chief Justice White's in *Standard Oil*, 221 U.S. at 62.

12. The Standard Oil and American Tobacco companies were both products of the consolidation of a large number of previously independent firms. Both of Chief Justice White's opinions regarded this form of growth as unnatural or artificial. Presumably if the firms had evolved entirely by internal growth it would have been seen as a more natural process, although not necessarily a legal one.

Hand's opinion in *Alcoa* did not purport to repudiate the notion that a firm did not violate Section 2 merely because it possessed an unwholesome amount of market power. The various locutions that one finds in the post-*Alcoa*, pre-*Grinnell* decisions all seem to require power plus conduct, although a close parsing of the opinions will reveal different implications about what must be shown.[13] In essense, *Alcoa* and its successors developed a more sophisticated analysis of the concept of power, and expanded the definition of "exclusionary conduct." The idea that the Sherman Act compels the courts to distinguish between good and bad monopolies on the basis of conduct or intent was a constant.

There were persuasive reasons for not defining the offense of "monopolization" entirely in structural terms. The use of the word "monopolize" in Section 2 suggests a process or course of conduct rather than a market structure.[14] More fundamentally, a firm may find itself with monopoly power as a result of circumstances beyond its control. If the market can only support one efficient firm, condemnation of that firm may penalize the very efficiencies that we rely on the competitive process to produce. The conduct element may serve to distinguish those monopolies that result from superior efficiency from those that do not. It seems agreed, for example, that the charging of a monopoly price should not satisfy the conduct element. Such conduct, though avoidable, is what we would expect from any monopolist, however the monopoly came to be. It is not the sort of conduct that satisfactorily distinguishes one monopoly from another.[15]

Even if efficiency does not require a single firm, the defendant may have achieved its power by vigorous competition or in other ways that do not merit condemnation. Section 2 defines a crime, after all, and treble-damage awards are, to an extent, punitive.[16] Such penalties ought not be imposed unless the defendant's avoidable conduct merits them.

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13. The leading opinions are American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Griffith, 334 U.S. 100 (1948); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

14. As Areeda and Turner point out, the language merely implies that some sort of active participation by the monopolist is necessary; it does not by itself require any particular type of conduct. III P. AREEDA & D. TURNER, ANTITRUST LAW 38 (1978).

15. *See, e.g.*, H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 137-38 (1985).

16. Some commentators argue that the treble-damage provisions are deterrent rather than penal. The underlying notion is that only a portion of the actual offenses will be detected and subjected to sanctions. If a firm about to engage in conduct that violates the antitrust laws could anticipate that the likelihood of its being held liable was one in three, it might well proceed if the expected damage award were not to be trebled. Trebling, however, might prevent the act. *But see* R. POSNER, ANTITRUST LAW 226-27 (1976), arguing that treble damages are largely unnecessary.

Finally, to the extent that a court can identify avoidable conduct that contributed to the acquisition or retention of monopoly power, an injunction directed to that conduct should be adequate. If the offense were to be defined entirely in terms of market structure, it would seem that only a remedy reorganizing the industry would suffice. But structural relief is expensive and difficult to fashion (if it can be fashioned at all), and it would raise the social costs of an erroneous judgment against a defendant, denying consumers, at least for a while,[17] efficiences resulting from the monopoly.

The trick, therefore, has been to identify the sorts of exclusionary conduct that a firm with monopoly power must avoid, and the cases, beginning with *Alcoa*, have not always handled this task satisfactorily. In *Alcoa*, Judge Hand's opinion was unclear about the status of a firm that achieved or maintained a monopoly by engaging in vigorous but non-predatory competition. Such a firm could hardly be styled a "passive beneficiary" of monopoly, or be said to have had "monopoly thrust upon it," but at the same time it could be described as having shown "superior skill, foresight, and industry."[18]

Moreover, Judge Hand stressed the exclusionary nature of Alcoa's record of anticipating increases in the demand for aluminum and enlarging its capacity to enable it to service this demand as it arose. Although in theory a firm may design its plant so as to exclude potential competitors, it is in practice difficult to discern when a firm's investment in capacity differs from the level to be expected from a profit-seeking firm unconcerned with forestalling entry.[19] In *Alcoa*, Judge Hand did not attempt to show that Alcoa's investment in capacity was excessive. For all that appears, Alcoa merely wished to avoid temporary shortages as demand for aluminum increased. To avoid "exclusionary conduct," Alcoa might have had to encourage new entry by charging high prices, creating shortages, and then remaining passive if entry occurred. In other words, Alcoa would be encouraged by law to behave more like the classic monopolist than it had chosen to do. It was by no means obvious that this would encourage entry and, in the meantime, consumers would be denied many of the benefits that Alcoa had elected to provide. This aspect of *Alcoa* may be partially ex-

17. If monopoly is really inevitable, market forces will simply override any judicial action, unless the courts engage in a process of ongoing supervision of the market. This would, of course, mean that the courts persistently interfered with developments that would make the market more efficient.

18. These phrases appear in Judge Hand's *Alcoa* opinion. 148 F.2d at 429-30.

19. For the theoretical argument, *see* Spence, *Entry, Investment and Oligopolistic Pricing*, 8 BELL J. ECON. 534 (1977); Spence, *Investment Strategy and Growth in a New Market*, 10 BELL J. ECON. 1 (1979). For a discussion of the problems of putting theory into practice, *see* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 289-97 (1981).

plained by the fact that Judge Hand did not see efficiency as the primary goal of the antitrust laws, but this merely states the question: To the extent that efficiency does become the primary goal of antitrust, are not the courts compelled to re-examine what the earlier cases have defined as exclusionary conduct?

Another instance of troublesome identification of exclusionary conduct is the Supreme Court's decision in *United States v. Griffith*.[20] There the defendant owned movie theatres in a number of towns, some of which were "closed" in the sense that the defendant's theatre was the only one in town. Other towns were "open" because the defendant faced competition from rival movie houses. The defendant was held to have violated Section 2 because it negotiated with movie distributors on a system-wide basis, thus linking its closed to its open towns. Presumably, the defendant's monopolies in the closed towns were "natural" and hence legal. Nevertheless, the Supreme Court saw the defendant's bargaining as a way of leveraging the power of the monopolies in the closed towns to enable the defendant to drive out its competitors in the open towns. Since distributors had no choice but to use the defendant if they wished to exhibit movies in the closed towns, they would be compelled to select the defendant as their exhibitor in the open towns as well.

Assuming the Court was right in its apprehensions,[21] the question remains: What was to be done about it? The Court could, of course, order the defendant to bargain separately for its closed and for its open towns. This would leave the defendant with monopoly power in the closed towns, and the defendant could use that power to bargain down the price that it had to pay the distributors for the films it exhibited in the closed towns. It could then use the money that it saved to outbid its rivals in the open towns. How could this be prevented? Ordering the defendant not to use its monopoly power to get a lower price for the closed towns would be tantamount to ordering a monopolist not to

20. 334 U.S. 100 (1948).

21. Many commentators have argued that this leverage theory suffers from serious theoretical defects. Where the markets are related, there may be no advantage to the monopolist in gaining a second monopoly. If, for example, in a tying arrangement the tied product and the tying product are used in fixed proportions by the purchaser, the monopolist can gain the maximum profit from its monopoly of the tying product. Even if the monopolist could gain by obtaining a second monopoly, it may not be as easy to obtain as the theory often suggests. In *Griffith*, for instance, the distributors of films benefitted from competition in the open towns. They therefore would not look with equanimity upon the defendant obtaining monopolies there. Hence, the distributors could be expected to bargain with the defendant in attempts to extract price concessions from him that might compensate them for future losses, if and when the defendant achieved additional local monopolies. Whether the anticipated gains from achieving monopolies in the now open towns would counterbalance these concessions cannot be determined in the abstract. The point, however, is that even in a case like *Griffith* the monopolist may not wish to engage in "leveraging."

charge the monopoly price. A court could hardly order the defendant not to outbid its rivals in the open towns without stifling competition. Could a court allow the defendant to outbid its rivals so long as the bidding was not financed by profits from the closed towns? This would seem to involve the courts in the task of supervising how a monopolist spent its money, and courts appear ill-equipped to undertake this type of supervision.

Decisions such as these raised the question whether the mere possession of monopoly power constituted a violation of Section 2, despite the judicial pronouncements and the arguments against such a rule. If the conduct element can be found in behavior that appears competitive or in behavior that seems implicit in the market structure, like monopoly pricing, then power alone makes out the offense. Once the defendant acquires monopoly power it can avoid condemnation, if at all, only by being inefficient.

Of particular interest here were cases holding or suggesting that the conduct element of Section 2 might be satisfied by a monopolist's refusal to deal. *United States v. Colgate & Co.*,[22] that venerable decision establishing the right of a firm to choose with whom it will deal, said the right existed "in the absence of any purpose to create or maintain a monopoly." In *Lorain Journal Co. v. United States*[23] the sole newspaper in Lorain, Ohio, refused to accept advertising from anyone who also advertised on the radio station in neighboring Elyria, and the Supreme Court held that Section 2 had been violated.[24] In *Otter Tail Power Co. v. United States*[25] the Court condemned as a violation of Section 2 the refusal of a power company that had a monopoly of transmission lines either to supply power it generated, or to "wheel" power generated by others to municipally-owned retail systems.

As the district court in *Aspen Skiing* instructed the jury, this miscellany of holdings still did not amount to a general duty of a monopolist to deal with all comers. The courts had rejected the notion that the Sherman Act transformed monopolies into public utilities and courts into regulatory agencies. But just as plainly did they establish that a monopolist's right to choose its customers was subject to limits that did not similarly circumscribe a non-monopolist. The problem

22. 250 U.S. 300 (1919).

23. 342 U.S. 143 (1951).

24. Technically, the charge in *Lorain Journal* was that the defendant *attempted* to monopolize, but nothing should turn on this distinction. The defendant would not have been able to put any pressure on the advertisers had it not possessed monopoly power. In any case, if the defendant's behavior satisfies the conduct element of "attempt to monopolize" (where there need be less power), it should also suffice for "monopolization."

25. 410 U.S. 366 (1973).

was to define those limits in a way that neither required inefficient behavior by the monopolist nor imposed upon the courts the task of overseeing the monopolist's deals and negotiations. If a monopolist sets a single price to all buyers, and offers no discounts, it will thereby "refuse to deal" at any lower price, or with those who will not meet the price asked. Even if the price set is a monopoly price, this sort of "refusal" cannot be the basis of an antitrust violation. Moreover, even a monopolist must have some latitude to decline dealings that it expects to be unprofitable. The lone bank in a small town cannot be under a duty to extend credit to a notorious deadbeat.

On the other hand, the refusal to deal in *Lorain Journal* seems unjustified. A decree ordering the defendant not to discriminate might readily be drafted, and the Court might well have been disinclined to overrule that case. If *Aspen Skiing* required the Court to do no more than reaffirm *Lorain Journal,* the Court would need to give some thought to how this "duty to deal" could be defined to prevent its becoming "general."

Perhaps the third notion, "intent," might serve to distinguish permissible from forbidden refusals to deal. Preliminarily, one must differentiate specific intent, which has traditionally been an element of an attempt to monopolize, from general intent, which is all Judge Hand required to establish a monopolization claim.[26] The latter is nothing more than the intent to do the acts that constitute the conduct element of the monopolization offense. Plainly, where the intent that must be shown is general intent, this element tends to disappear, but the same is often true in practice where specific intent must be shown in theory. If a monopolist's lawyer is on his toes, there will be no embarassing documents proclaiming the firm's intent to destroy its competition. Specific intent must be inferred from conduct. Proof of exclusionary conduct, then, is the basis of a finding of either kind of intent. Moreover, to the extent that the same behavior supports an inference of "specific" as well as "general" intent, any distinction between these tends to evaporate in practice.

Even if rummaging through the monopolist's files unearthed damaging documents, what would that prove? Suppose the firm's board formally resolved to make a product so superior to any competi-

26. In Swift & Co. v. United States, 196 U.S. 375, 396 (1905), Justice Holmes found that an attempt to monopolize was like other criminal attempts, requiring both a specific intent and a dangerous probability of success. Conceivably, a distinction between general and specific intent might be made in terms of the kinds of acts that the defendant intended to do, but if so, presumably fewer acts would be consistent with a "specific intent to monopolize" than would be consistent with the sort of general intent that Judge Hand was talking about. Pursuit of this idea is not one of my objectives in this paper.

tive product that the firm would corner the market. Surely, no court should condemn on such a basis. When we speak of specific intent to monopolize, we mean the specific intent to control the market by employing tactics that are improper. Hence, the analysis of intent always comes back to conduct and to the need to define what sorts of acts are forbidden to a monopolist. If the act in question is a refusal to deal, under what circumstances will such a refusal amount to exclusionary conduct?

Prior to *Aspen Skiing* the whole notion of predatory or exclusionary conduct had been subjected to thorough academic examination.[27] Most of the writing focused on predatory pricing and the problem of devising tests that could distinguish predatory pricing from vigorous price competition.[28] Although no consensus emerged about the test to be employed, there was considerable agreement about other points. Most commentators agreed that real world incidents in which predatory conduct was employed to monopolize were rare. Since there is a social cost when vigorous competition is condemned as predatory, the commentators, for the most part, opted for a narrow definition of predatory conduct. To the extent that this might allow actual predation to escape, there is a cost to this option as well, but since most believed actual predation to be rare, the cost seemed tolerable.[29] One commentator, Professor (now Judge) Easterbrook, went so far as to conclude that we would be better off without such a doctrine: the costs of an erroneous judgment that conduct was predatory plus the costs of identifying such conduct outweighed the costs of sporadic, successful predation.[30] But a rule of "per se legality" for all exclusionary conduct would require a major rethinking of Section 2. If we were to jettison the idea of exclusionary conduct, would monopolization become a structural offense? Or would Section 2 simply cease to be effective?

The *Aspen Skiing* case put before the Court basic questions about the role of the concept of "exclusionary conduct" in an efficiency-oriented antitrust law. Since the case itself involved a refusal to deal, an observor asked to predict the outcome of the case might have an-

27. The stimulus for the most recent outpouring was Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). A good bibliography is in Easterbrook, *supra* note 19, at 263 n.1. Many of these articles are reproduced in 10 J. REPRINTS FOR ANTITRUST L. & ECON. 1-413 (1980).

28. See, however, the catalog of non-pricing exclusionary conduct in H. HOVENKAMP, *supra* note 16, at 146-58.

29. Predatory techniques other than predatory pricing, to the extent that they can be defined, might not merit such lenient treatment. *Cf.* Salop & Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983).

30. Easterbrook, *supra* note 19, at 318-33.

swered that she expected a sharper definition of the circumstances in which a monopolist's refusal to deal would be impermissible, a narrower definition of "exclusionary conduct," and ultimately a more limited offense of monopolization.

What Did the Supreme Court Do?

Because the Court's unanimous affirmance is so different from those expectations, one may be tempted to give the case a narrow interpretation. It could be argued that the Court did no more than decide an issue of fact: Ski Co. behaved badly. It may be argued further that any propositions of law implicit in this decision can be found in the *Lorain Journal* case. Consider the following propositions, all of which might be thought to have been established by *Lorain Journal* (and the other precedents).

1. There is a class of conduct in which a firm with monopoly power may not engage. This conduct we call "exclusionary." A monopolist engaging in such conduct violates Section 2 of the Sherman Act.

2. A monopolist's refusal to deal may, under certain circumstances, be deemed exclusionary conduct. If the effect of the monopolist's refusal is the exclusion or disadvantage of a competitor (or potential competitor), the monopolist must offer a justification for the refusal.

3. The obligation to justify its refusal does not amount to any general duty on the part of a monopolist to deal with its competitors (or any one else), but it does expose the monopolist to the risk that its justification will be considered unsatisfactory. *Ex ante* the monopolist must weigh the cost of dealing against the expected cost of not dealing.[31]

The specific issue in *Aspen Skiing* was whether a reasonable jury might have determined that Ski Co.'s conduct was exclusionary. This was translated into the question: Could a reasonable jury have regarded Ski Co.'s proffered justifications inadequate? The lion's share of Justice Stevens' opinion is given over, not to a discussion of legal doctrine, but to an analysis of the evidence relating to those justifications. All eight participating Justices agreed that a reasonable jury might have disbelieved Ski Co.'s ostensible fears about the techniques used to monitor usage and its other justifications. Hence it is arguable

31. To the extent that the monopolist's behavior might be affected by the anticipation of such costs, one might see a "duty" of a general sort. To be sure, the cost is less than would be expected if the refusal to deal were automatically subjected to antitrust penalties. But to the extent the probability that the monopolist's justification will be rejected approaches one, these two costs converge.

that the Court affirmed the decision below on an *ad hoc* basis and deferred the task of revising Section 2 doctrine to another day. Under this view, the Court failed to address the issues that seemed important to those voting for certiorari.

But this interpretation glosses over some real difficulties. Ski Co. argued that the case should not have been submitted to the jury at all. It asked the Court to adopt a general rule that a monopolist need never have direct dealings with its competitors. *Lorain Journal*, after all, did not present the situation of a monopolist refusing to deal with its competitor, and the preceding analysis smooths over this distinction without assessing its merits. Ski Co. offered the Court one way of defining the circumstances in which a monopolist's refusal to deal might be deemed exclusionary, and the Court rejected it.

Both the refusal and the Court's justification for it deserve comment. The Tenth Circuit had upheld the verdict by invoking both the "essential facilities" doctrine[32] and the language of *Colgate*,[33] quoted above, about a "purpose to create or maintain a monopoly." The Tenth Circuit appeared to invoke these notions as rules, to be applied more or less easily to the facts before it. Although it rejected Ski Co.'s exculpatory rule, it countered with rules of its own.

But neither satisfactorily resolved the *Aspen Skiing* case. As noted earlier, "intent" adds nothing to conduct. Ski Co. plainly intended to engage in the conduct to which Highlands objected; the issue was whether Ski Co. might freely engage in such conduct. There is, however, no analysis of the effect of that conduct in the Tenth Circuit's opinion. As far as the "essential facilities" doctrine is concerned, even the use of the word "doctrine" is a bit grandiose. A handful of cases have found that the exclusion of a firm from a joint venture controlled by the firm's competitors can be a violation of the Sherman Act,[34] but the exact scope of these precedents is far from clear. Apparently, the joint venture must supply an essential input that is not readily available elsewhere. Those precedents cannot be applied to a single-firm monopolist's refusal to deal without a searching analysis.[35] For one thing, a monopolist is always, in some sense, the sole source of whatever it supplies. If, in a given case, that product could be classified as "essential," the monopolist might be under a

32. 738 F.2d at 1520-21.

33. *Id.* at 1521-22. It probably goes without saying that the language was dictum in *Colgate*. *See* 250 U.S. at 307.

34. United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1945).

35. *See* P. AREEDA & D. TURNER, *supra* note 14, at 272-76, concluding that a single-firm monopolist's refusal to deal should not be proscribed by Section 2.

general duty to deal. Moreover, it is often more difficult for a court to fashion relief in the single firm case than it is in the joint venture situation.[36] These factors do not necessarily render the essential facilities doctrine useless to a court confronted with a refusal to deal by a single firm monopolist; they do argue for a more careful analysis than the Tenth Circuit offered.

Justice Stevens' approach is quite different from this rule-oriented method, and it seems quite consistent with at least the first of two major trends of the Court's recent antitrust jurisprudence. First, the Court has moved away from rules that determine the legality or illegality of a challenged practice by locating the defendant or the practice within a larger class of actors or practices. Instead, the Court has favored a particularized evaluation of each practice under a general standard.[37] A noteworthy example of this was *Continental T. V., Inc. v. GTE Sylvania Inc.*,[38] in which the Court rejected the notion that a manufacturer's territorial confinement of its dealers could be condemned as *per se* illegal.[39] Convinced that a particular restriction might be either pro- or anti-competitive, the Court opted for a case by case analysis under the Rule of Reason.

This approach has also been evident in cases narrowing or repudiating certain antitrust immunities. In *National Society of Professional Engineers v. United States*[40] the Court rejected the hardy myth that "professions" are exempt from the antitrust laws. In *Community Communications Co., Inc. v. City of Boulder*[41] the Court held that the immunity from antitrust liability enjoyed by the states does not extend to municipalities. Decisions like these have effectively subjected a whole new set of activities to scrutiny under the Rule of Reason. Thus, in some instances the Court has placed at risk defendants who had thought themselves immune, while in others it has provided greater freedom for firms to engage in practices previously thought illegal. This aspect of the Court's jurisprudence has by no means been uniformly pro-business. The constant has been the movement from

36. *Id. See also* R. POSNER, *supra* note 15, at 211.

37. A classic exposition of the distinction is in H. HART & A. SACKS, THE LEGAL PROCESS 155-58 (tent ed. 1958).

38. 433 U.S. 36 (1977).

39. In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the Court had held that such territorial confinement, with respect to goods that the dealers had purchased, was illegal *per se*. The case was consistent with the earlier decision in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), holding resale price maintenance illegal *per se*. In an interesting recent case the Court declined the invitation to adopt a rule of *per se legality* for vertical restraints. Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464 (1984).

40. 435 U.S. 679 (1978).

41. 455 U.S. 40 (1982).

the use of rules toward the use of standards. The opinion in *Aspen Skiing* is entirely consistent with this evaluation. It rejects the rule-like justification offered by Ski Co., as well as the rule-like analysis of the Tenth Circuit. A monopolist's refusal to deal and its proferred justification are now to be judged under a general standard.

But squaring the decision with the second trend — the explicit use of the notion of economic efficiency to define these standards — is a more difficult task. The trend itself has been less clear than the first. In *Professional Engineers*, for example, the Court rejected the idea that an anticompetitive restriction could be justified by showing that it served some social goal other than efficiency.[42] Some other decisions might be thought contrary to this trend.[43] But if the decisions are not completely harmonious, the Court has been striving to purge its analysis of factors other than economic efficiency. Indeed, the shift from rules to standards is related to this. It is difficult to articulate rules that do not either condemn efficient behavior or allow inefficient behavior. At the same time, the comparative vagueness of the general standard can create uncertainty about the legal status of certain practices and, perhaps, deter desirable conduct. It thus becomes even more important that the Court apply the standards accurately and clearly. For example, in *Aspen Skiing* the Court's task was to apply its general standard to a monopolist's refusal to deal in such a way as to guide and direct future behavior. The Court's handling of this task was not all that might be desired.

The Court first assessed the effects of the refusals to deal on Highlands, on consumers, and on Ski Co. itself. It found that Ski Co. had effectively denied consumers a product that actual buying patterns had shown to be preferred over the three area, six day pass that Ski Co. offered as an alternative. By preventing Highlands from developing any sort of multi-area ticket, it had seriously impaired Highlands' ability to compete for destination skiers. Finally, by forgoing profitable transactions, Ski Co. was imposing costs upon itself, presumably because these costs would be more than recouped when Ski Co. succeeded in gaining control of the Aspen submarket.

Thus far, the Court had done little to define the monopolist's

42. The defendants had claimed that competitive bidding by engineers would lead to deceptively low bids. To put the best interpretation on this argument, they were contending that the purchasers' lack of information about engineering services would induce them to accept bids so low that quality would be below minimum standards. The Supreme Court felt that purchasers could be depended upon to inform themselves adequately.

43. Some commentators believe the decision in Arizona v. Maricopa Cy. Medical Soc'y, 457 U.S. 332 (1982), to be anti-competitive. In that case the Court condemned as illegal *per se* a horizontal agreement fixing *maximum* prices for medical services.

"duty" to deal. A monopolist refusing to deal always imposes costs upon itself (in the form of profits forgone), and it always denies customers something they would like. If the effect is also to disadvantage competitors, the conduct may be labelled exclusionary. This was already implicit in *Lorain Journal.* Moreover, this analysis does not distinguish between Ski Co.'s refusal to market the all-Aspen ticket and its refusals to sell day tickets to Highlands and to accept Highlands' coupons. In effect the Court's analysis imposes at least a duty to explain a refusal, even if the spurned party is a competitor, and it makes no attempt to limit this duty to explain to a defined subset of refusals. If the opinion fails to impose a general duty to deal, it is because the Court leaves open the possibility that a monopolist's proffered justification for a refusal will be found satisfactory. To the extent that a monopolist can anticipate that its justification is certain to be accepted, the situation is much the same as it would be if there were no duty to explain at all (ignoring the costs of explaining). Since the Court rejected Ski Co.'s justification, the case does not establish any justifications as "safe." Nevertheless, the Court might have explained its rejection in terms that could guide future defendants. A clear statement of the deficiencies of Ski Co.'s position might have helped future defendants supply what was missing in *Aspen Skiing.*

Ski Co. attempted to show that there were costs attached to dealing with Highlands, but it failed to convince the jury or, apparently, the Court. Although it professed reservations about the method that had been used to monitor usage in connection with the four area ticket, Ski Co. was willing to employ such methods at other ski locales where it had joined with its rivals in offering multi-area tickets. Of course, those were locales in which Ski Co. was not the dominant firm. Moreover, Ski Co. offered no explanation of its refusal to accept the Adventure Pack coupons or of its refusal to sell its day tickets to Highlands at retail (beyond the argument, previously discussed, that no refusal to deal with a competitor could be objectionable). In effect, the Court was presented with a refusal to deal by a monopolist, the effect of which was to disadvantage a competitor, for which no explanation was offered. Ski Co. seems to have gambled everything on the notion that a refusal to deal with a competitor need not be explained. Once that idea was rejected, there was little upon which to fall back. The Court had no occasion to analyze the deficiencies in a particularized justification, since none was before it. But the effect is that the opinion provides few clues about how the defendant in a future case might justify its refusal.

There is no suggestion in the Court's opinion, for example, that the monopolist will ever be spared the duty to explain his refusal. And there is an aspect of the Court's analysis that suggests that any refusal can be risky. As noted, the opinion tends to lump together all of Ski Co.'s conduct. This may be understandable given the way the case was presented to the Court (as a course of conduct tending to exclude Highlands, for which no real justification was offered), but the failure to distinguish between Ski Co.'s refusal to market the all-Aspen ticket and its refusal to provide Highlands with day tickets at its established price is troublesome.

The latter seems like the refusal in *Lorain Journal*: a refusal by a seller to sell a standardized commodity to some buyers at the price at which it was willing to sell the commodity to all others. In contrast, the refusal to market the all-Aspen ticket is a refusal to enter an ongoing relationship. It seems closer to the refusal of the defendant in *Otter Tail* to provide electricity to the municipal utilities. But that case was peculiar in the sense that the relationship, once established, could be monitored by an administrative agency instead of a court.[44]

Ski Co. alluded repeatedly to what it called a "free rider problem" in its relationship with Highlands.[45] The Court seemed unpersuaded that this could exist if an accurate, usage-based scheme of allocating the costs and revenues were employed, but this is not certain. Suppose Ski Co. and Highlands were dividing the costs and revenues pro rata and it was determined that 17% of the skiers used Highlands. Ski Co. gets 83% of the profit. Of course, with respect to its three area, six day ticket, it gets 100% of the profit. The issue from Ski Co.'s point of view is whether 83% of the all-Aspen ticket profit is more or less than 100% of the profit from its own three area ticket.

The Court noted that the all-Aspen ticket outsold the three area ticket by two to one when they were offered as alternatives, but this means little without knowledge of the relative prices of the two tickets.

44. In Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), the Court was able to lateral the ball to the Federal Power Commission, through which the limited duty to deal could be administered. This fact alone suffices to limit that case. *See* P. AREEDA & D. TURNER, *supra* note 14, at 239-41.

45. A free rider is a person who benefits from a good without paying for those benefits. In Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), the Court was persuaded that territorial restrictions might be imposed by a manufacturer who wished to prevent dealers from taking a free ride on point-of-sale services provided by another dealer. For example, a dealer in complicated audio equipment might provide instruction to potential customers only to have the now-educated customer purchase the equipment at a discount house down the street that provided no such services. Point-of-sale services increased consumer welfare, but the dealer who was being undercut could not continue to offer them. Since the Court believed that territorial restrictions imposed to correct a free rider problem were efficient, it believed that such restrictions could not be condemned on their face. *See generally* Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977).

Unless the all-Aspen ticket can be sold at a sufficiently high premium (or lure a sufficient number of additional skiers), Ski Co. might do better with its own ticket. To put the point slightly differently, the fact that 17% of those holding an all-Aspen ticket chose to ski Highlands does not necessarily indicate that the ticket would bring in enough additional profit to compensate Ski Co. for its payment of Highlands' share. Nor does Ski Co.'s willingness to engage in a joint arrangement elsewhere necessarily indicate anything about Aspen. Skiers plainly like the variety of a multi-area ticket, but it may not be in the interest of a firm that can offer a three area ticket to join with another firm merely to add a fourth area.

Any collaboration among firms in marketing a product that cannot be produced by any single firm presents this problem of dividing the profits attributable to the joint product — of saying just how much each firm contributed.[46] If the parties agree to a scheme for dividing these profits, then we may presume each believes it is better off with the joint arrangement than without it. There is no such presumption, however, when a court must coerce one of the parties into entering the arrangement. The court must then take upon itself the task of allocating the profits. To the degree that the method chosen is inaccurate, the firm coerced into the arrangement may be deprived of profits that rightfully belong to it.

When a judicially imposed duty to deal involves a court in what Judge Posner describes as "the detailed and continuous supervision of an ongoing commercial relationship,"[47] the court is taking on a task that can be onerous enough without the court also having to decide on the value of each firm's marginal contribution to the joint product. But the Supreme Court appears to say in *Aspen Skiing* that it will take on such a task, if the monopolist does not convince the Court that a rival is attempting to gain a free ride on the monopolist's contribution. The mere fact that a joint arrangement *might* produce this result is not enough to deter the Court.

The Court would have been better advised to limit its condemnation of Ski Co.'s behavior to Ski Co.'s refusals to deal with Highlands on the same basis that it was willing to deal with others. The Court

46. *Cf.* the discussion of divided interests in land in R. POSNER, ECONOMIC ANALYSIS OF LAW 63-66 (3d ed. 1986). Any ongoing arrangement, if not well designed, can pose a problem of one party free-riding upon the contribution of the other. This is true even if the arrangement is entered voluntarily. If it is entered voluntarily, then presumably each firm (or party) receives initially at least what it would have received if it had deployed its contribution in its next best use, but each party may not always be able to reap the full benefit of contributions that it makes later. Presumably the freedom to disentangle oneself from an arrangement that has become onerous is the best protection against being exploited.

47. R. POSNER, *supra* note 15, at 211.

might have declined to treat Ski Co.'s refusal to market the all-Aspen ticket as not requiring any justification, not because such refusals are always pro-competitive, but because the Court is not well-equipped to police such ongoing arrangements or to be certain that it is not imposing or inducing inefficient behavior on or by the firms involved.[48]

The refusals of Ski Co. to sell day tickets or accept Highlands' Adventure Pack coupons do not appear to present this problem. As in *Lorain Journal*, the defendant established its price and was willing to accept all comers at that price until the refusals in question. In neither case could the defendant offer a plausible reason for the refusal. In both, a court order commanding the defendant to deal at its established price would be easy to draft and might not involve any ongoing supervision.

This is not to say that there are no problems with imposing even so limited a duty to deal. For example, Highlands evidently attempted to secure day tickets from Ski Co. at the tour operator's discount. Ski Co.'s refusal was of little significance because it had also refused to sell tickets to Highlands at the retail price. Had it been willing to sell to Highlands at retail but not at a discount, however, the Court would have had to evaluate Ski Co.'s reasons for that refusal. This could involve the Court in the same kind of difficulties that existed under the Robinson-Patman Act when a defendant offered a cost justification for discriminatory pricing.[49]

The Court should also be cautious about taking on the job of reviewing pricing decisions or price structures. For example, Highlands complained when Ski Co. increased its standard price for a single day ticket, making it unprofitable for Highlands to include them in its multi-area package. It may have been the case, however, that Ski Co. increased the price of its day ticket because it was profitable for it to do so, wholly apart from any impact that it might have had on Highlands. As noted earlier, monopoly pricing simpliciter cannot be deemed "exclusionary" conduct without eliminating the conduct element from the monopolization offense. But courts are ill-equipped to determine if a price increase, such as Ski Co.'s, represents anything more than a response to changed conditions that have raised the profit-maximizing price, or if the increase was greater than profit-seeking considerations would indicate. The problem is analogous to the problem of determining if a price decrease is predatory, but without the assistance afforded by the monopolist's cost information.

48. To the extent that Highlands gets a share of any increased profits resulting from improvements in Ski Co.'s areas, Ski Co. has a reduced incentive to improve them. This is merely one example.

49. A good introduction to cost justification is L. SULLIVAN, ANTITRUST 700-01 (1977).

The implication of this analysis is that the Court should find a refusal to deal by a monopolist to be exclusionary only under narrowly defined circumstances. The refusal to enter some sort of joint venture should not entail the risk of a finding of monopolization. Likewise the monopolist should have considerable latitude in setting its prices. Only a refusal to sell a standardized commodity at its established price should trigger a duty to explain on the part of the monopolist.

The Court could move to this position without being seriously embarassed by *Aspen Skiing*. The Court has left open the possibility that some future defendant may be able to succeed in convincing the Court that the plaintiff does seek to gain a free ride on the monopolist's contribution or that the risk of such a free ride is high. In this case Highlands introduced a great deal of evidence that showed that its area was of the same high quality as those of Ski Co. — that it did not need to piggy-back on anyone's reputation. The Court found Ski Co.'s arguments to the contrary unpersuasive. The record in future cases may well look very different. The critical question in future cases will be what sort of evidence the Court will accept as adequate to justify a monopolist's refusal to enter a joint venture. Under *Aspen Skiing*, the mere assertion that a "free rider" problem exists is not enough, but a persuasive blend of theoretical and empirical arguments might well carry the day in future litigation. To the extent that the Court is willing to accept some justifications routinely, it may move toward dispensing with the duty to explain in most cases.

This raises a final question: If the Court is to define an exclusionary refusal to deal so narrowly, would it not be better for the Court to go all the way and adopt at least part of Judge Easterbrook's advice? Would it not be better to hold that no refusals to deal can satisfy the conduct requirement of *Grinnell*? I think not. Real predation may indeed be rare, but that is no reason to tolerate it when it can be readily identified and proscribed. The Court has imposed the burden on a monopolist of justifying a refusal to deal, but it is free to accept plausible justifications when they are presented. If a monopolist can offer no such justification, there is no reason to exonerate it. Until Congress repeals or amends Section 2 of the Sherman Act, courts are not free to read the offense of monopolization out of the law.

Conclusion

The Court in *Aspen Skiing* moved cautiously. It did not eviscerate Section 2. It did not throw out the notion of exclusionary behavior. It did not expand the freedom of a monopolist to refuse to deal, but it did continue to move away from rules and toward the use of standards in evaluating business behavior under the antitrust laws. It appears to have continued the approach of *Alcoa* and its progeny of condemning as exclusionary conduct that may well have been competitive, but this may be an illusion, resulting from the way in which the case was presented and perceived. The Justices were simply unwilling to accept as a justification for a refusal to deal the argument that dealing would have benefitted the monopolist's rival. But the way is open in the future for the Justices to accept more firmly grounded justifications for refusals to deal. The way is still open as well for a re-examination of the theory of monopolization. The Court moved cautiously, but it did move. And it did not change direction.