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DUTY TO COOPERATE UNDER SECTION 2 OF THE SHERMAN ACT: *ASPEN SKIING'S* SLIPPERY SLOPE

A monopolist is under no general duty to help its rivals survive in the market.¹ In 1985, however, the Supreme Court ruled in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*² that a monopolist's refusal to do business with a competitor sometimes may constitute monopolization in violation of section 2 of the Sherman Act.³ *Aspen Skiing*, the Court's first elaborate discussion of monopolization in nearly two decades,⁴ is significant for two reasons. First, the opinion reestablishes a jury's competence to infer anticompetitive intent in monopolization cases. Second, the opinion expressly recognizes the importance of efficiency concerns in section 2 analysis.

This Note begins by discussing the self-correcting monopoly phenomenon and exclusionary practices. This Note then discusses evolving standards in the conduct element of monopolization. After considering the *Aspen Skiing* conduct test, this Note questions whether the circumstances relied upon by the Court can contribute to meaningful differentiations between aggressive competition and illegal exclusion. Finally, this Note argues that the Court disregarded the inherent difficulties in requiring cooperation among competitors and failed to articulate clearly the evidentiary requirements for a section 2 violation when a monopolist refuses to cooperate. This Note concludes that courts should construe *Aspen Skiing's* holding narrowly: a monopolist's decision to extricate itself from a profitable joint venture can give rise to section 2 liability when the joint venture is demonstrably more efficient than its break-up, the monopolist lacks any legitimate business justification for its conduct, and barriers preclude entry into the relevant market.

¹ 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 738m (1978).

² 472 U.S. 585 (1985).

³ 15 U.S.C. § 2 (1982). Section 2 of the Sherman Act provides in relevant part: "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony. . . ." Section 6 of the Clayton Antitrust Act provides private parties the right to seek injunctive relief for antitrust violations. 15 U.S.C. § 26 (1982).

For discussions of legislative history and the evolving judicial interpretation of section 2, see W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965); H. THORELL, THE FEDERAL ANTITRUST POLICY: ORIGIN OF AN AMERICAN TRADITION (1955). Compare R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 15-89 (1978).

⁴ The last significant discussion appeared in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

I

THE ECONOMICS OF MONOPOLY AND EXCLUSIONARY PRACTICES

Section 2 of the Sherman Act seeks to redress undesirable economic and political consequences flowing from market dominance. In seeking to enforce section 2, however, the following dilemma has plagued courts: How should antitrust law respond to a business that legitimately prevails in a competitive struggle and achieves a dominant market position? The answer lies in identifying those features and consequences of market dominance that should be corrected or avoided. To do that, one first must understand the economic forces underlying the monopoly problem.⁵

A. The Self-Correcting Monopoly Problem

In general, higher prices exist in monopolistic markets than in perfectly competitive markets. Monopolies also tend to lower output, stifle innovation, and transfer wealth from consumers to producers.⁶ In theory, these undesirable consequences are self-correcting.⁷ High profits or profitable new opportunities encourage entry into the monopolist's market or induce existing competitors to increase output. Consequently, the monopolist lacks incentive to raise prices by lowering output.⁸ The market will not self-correct, however, in two instances, yielding persistent single firm dominance. In the first instance, the dominant firm's greater efficiency and innovation permits it to drive out all its rivals.⁹ Here, the market needs no correcting. In the second instance, barriers to entry,¹⁰ such as legal licenses or controls over essential resources, prevent entry into the market. The market needs correcting, yet it cannot self-correct; the law should thus provide a remedy.

B. Exclusionary Practices

The market's self-correcting nature is anathema to a monopolist hoping to preserve its market position, thereby reaping its attendant rewards. A monopolist may respond strategically to the

⁵ For a discussion of the costs of monopoly, see, e.g., F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 9-44 (2d ed. 1980).

⁶ R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 9.3, at 254-59, § 7.1, at 201-05 (3d ed. 1986).

⁷ 3 P. AREEDA & D. TURNER, *supra* note 1, ¶ 618, at 41-42.

⁸ *Id.* 618, at 41.

⁹ *Id.* 618, at 41.

¹⁰ A barrier to entry is some factor in the market that makes operation more expensive for new entrants than it is for existing firms. See Demsetz, *Barriers to Entry*, 72 *AM. ECON. REV.* 47 (1982). Thus, to the extent entry barriers exist, a monopolist may succeed in charging monopoly prices without incurring new entry.

threat of increased competition by implementing price or output schemes designed to deter entry or eliminate smaller existing rivals.¹¹

Section 2 proscribes strategic maneuvers that interfere with the normal competitive process and artificially deter entry or prevent existing rivals from increasing their output. Judges and scholars use the term "exclusionary" as a shorthand for such conduct.¹² But, as reflected in judicial opinions, not all practices that exclude competitors are "exclusionary." For this reason, one must distinguish conduct that increases the firm's market share because of efficiencies or the rigors of competition from improper conduct that deters entry or eliminates smaller rivals. Efficient conduct may benefit consumers by improving the product or lowering the product's price.¹³ Improper exclusionary practices, on the other hand, stifle effective competition and reduce consumer welfare.¹⁴ Section 2 functions best when courts clearly distinguish between exclusionary practices that actually promote efficiency and those practices deserving condemnation. Far from condemnation, these former practices should be tolerated, if not encouraged—even if they harm competitors.

C. Refusals-to-Deal

A refusal-to-deal is a strategic business practice that firms sometimes use to exclude existing or potential competitors. A competitive market firm's refusal-to-deal has little market effect, but a monopolist's refusal-to-deal may create an undesirable restraint on competition.¹⁵ In competitive markets, no firm is large enough to control output or price and therefore each firm lacks the incentive to refuse to deal in the hope of restricting output and raising prices. Moreover, the competitive market penalizes arbitrary refusals-to-deal because the rejected party can deal with a multitude of other firms. Thus, a refusal-to-deal is less likely to occur in competitive markets. A rational firm will decide not to deal only for sound business reasons.¹⁶ For example, a rational manufacturer in a competitive market would refuse to deal with a distributor only if dealing

11 H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 1.2, at 18 (1985).

12 See P. AREEDA & D. TURNER, *supra* note 1, ¶ 626b.

13 H. HOVENKAMP, *supra* note 11, at 138.

14 *Id.*

15 See *Banana Distribs., Inc. v. United Fruit Co.*, 162 F. Supp. 32, 37 (S.D.N.Y. 1958), *rev'd*, 269 F.2d 790 (2d Cir. 1959) (contrasting refusal-to-deal in competitive market, which is self-correcting, and anticompetitive refusal-to-deal by a monopolist, which is not, therefore requiring remedy by antitrust law); see also Note, *The Monopolist's Refusal to Deal: An Argument for a Rule of Reason*, 59 TEX. L. REV. 1107, 1112-13 (1981).

16 See, e.g., *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 670 (9th Cir. 1980) (although defendants' conduct far from congenial, mere intention to exclude competition insufficient to establish violation of Sherman Act.).

with alternative distributors would result in lower costs or a better product or service. In those situations, the refusal-to-deal actually contributes to market efficiency by increasing output or demand.¹⁷

A monopolist's refusal-to-deal, however, may result in serious anticompetitive effects. The presence of one dominant firm able to lower output and raise price characterizes a monopolistic market.¹⁸ A monopolist can lower output and cause a price increase by refusing to deal with a firm or group of firms. In a monopolistic market, refusals-to-deal harm firms because of the absence of parties with whom to deal. Firms must then seek their next best alternative.¹⁹ Interference with the victim's freedom of choice prevents the efficient operation of a competitive market, which operates on the principle that people are best off when they voluntarily exchange goods and services.²⁰ Because the monopolistic market lacks a built-in mechanism to prevent interference with freedom of choice and to protect victims of refusals-to-deal, the law provides a remedy.²¹

When analyzing a lawful monopolist's refusal-to-deal, courts should clearly distinguish refusals-to-deal that promote efficiency from refusals-to-deal that impede competition and lack business justifications. The effect on output or demand should provide the basis for differentiation. If a refusal-to-deal causes an increase in output, the conduct generally should not be condemned. The competitive process as a whole, not merely harm to competitors, should serve as the focus of this inquiry. In this proposed test, intent should play a small role. Courts should require proof of intent only in cases

¹⁷ See H. HOVENKAMP, *supra* note 11, § 10.4.

¹⁸ *Id.* § 1.2, at 14-17.

¹⁹ *Id.* at 38.

²⁰ See E. MANSFIELD, *MONOPOLY POWER AND ECONOMIC PERFORMANCE* vii (3d ed. 1974).

²¹ In view of the inefficiencies associated with a monopolist's refusal-to-deal, some commentators have suggested that antitrust law should impose on monopolies a duty to deal with all comers on a nondiscriminatory basis. This duty would resemble that already imposed on public utilities. See, e.g., Jones, *Antitrust and Specific Economic Regulation: An Introduction to Comparative Analysis*, 19 A.B.A. ANTITRUST SECTION 261, 267-68 (1961) (restrictions applicable to regulated monopolists should be, and have been, imposed upon unregulated natural monopolies; these restrictions include forbidding monopolies from arbitrarily refusing to deal, from discriminating unduly, or from engaging in unreasonable practices).

Two broad and related theoretical foundations, however, militate against imposing upon monopolists a general "duty to deal." The first is efficiency. The Supreme Court has acknowledged that efficient competition demands that a business entity exercise freedom of choice over its distribution patterns. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54-55 (1977). A firm needs freedom to increase its efficiency by substituting what it believes are more productive methods of supply and distribution. The second theoretical foundation derives from "free market" ideology. See R. BORK, *supra* note 3, at 344. "Free market" implies freedom of choice over one's distribution patterns and protection of that freedom absent anticompetitive intent.

where competitive impact is uncertain.²²

II JUDICIAL TREATMENT OF EXCLUSIONARY PRACTICES UNDER SECTION 2

Nearly a century after enactment, section 2 of the Sherman Act remains among the most perplexing of the antitrust laws. To violate section 2, an entity must, at a minimum, possess monopoly power. Courts have defined monopoly power as the power to control prices or exclude competitors from the relevant market.²³ In addition, monopolization includes a conduct component (arguably embracing an element of intent).

A. Development of the Conduct Element of Monopolization

Confusion surrounds judicial attempts to enumerate those business practices that violate section 2. Three historical approaches, exhibiting varying degrees of hostility toward monopolists, have emerged as formulations of the conduct element of monopolization.²⁴ Under the first and narrowest approach,²⁵ monopolization entails the acquisition or maintenance of a power to exclude others as a result of using any unreasonable restraint of trade that would violate section 1 of the Sherman Act.²⁶ In *United States v. American Tobacco Co.*, Chief Justice White suggested that conduct that would violate section 1 if engaged in by two parties would also violate section 2 if unilaterally performed by a firm possessing monopoly power.²⁷

Justice Douglas developed a second, "more inclusive approach" in *United States v. Griffith*.²⁸ Under the *Griffith* rule, a firm violates section 2 when it (a) has the power to exclude competition, and (b) has exercised, or has the purpose to exercise, it.²⁹ In *United States v. United Shoe Machinery Corp.*, Judge Wyzanski interpreted the

²² See *infra* text accompanying notes 119-20.

²³ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition."); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986) (monopoly power is power to raise prices without losing so much business that price increase is unprofitable).

²⁴ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953) (Wyzanski, J.), *aff'd*, 347 U.S. 521 (1954).

²⁵ This approach was seen as the rule before *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); see *infra* notes 31-33 and accompanying text.

²⁶ 15 U.S.C. § 1 (1982) (providing in relevant part that every contract, combination or conspiracy in restraint of trade is illegal).

²⁷ 221 U.S. 106, 180-81 (1911).

²⁸ 334 U.S. 100 (1948).

²⁹ *Id.* at 107.

Griffith rule to mean, at a minimum, that "it is a violation of Section 2 for one having effective control of the market to use, or plan to use, any *exclusionary* practice, even though it is not a technical restraint of trade."³⁰

The third and broadest approach was set forth by Judge Learned Hand in *United States v. Aluminum Co. of America*.³¹ The *Alcoa* rule condemns "one who has acquired an overwhelming share of the market . . . whenever he does business . . . apparently even if there is no showing that his business involves any exclusionary practice."³² Under the *Alcoa* rule a defendant could escape liability only by proving that its dominant position was due solely to:

superior skill, superior products, natural advantages, (including accessibility to raw materials or markets), economic or technological efficiency, (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law, (including patents on one's own inventions, or franchises granted directly to the enterprise by a public authority).³³

In 1966 the Supreme Court in *United States v. Grinnell Corp.*³⁴ articulated a rule closely resembling the second approach. Under *Grinnell*, monopolization entails (1) monopoly power 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."³⁵ *Grinnell* thus draws a distinction between "willful acquisition or maintenance" and dominance achieved through superior skill. Today, the *Grinnell* rule predominates.

Recent appellate court decisions endorsing vigorous competition by monopolists³⁶ ignore intent, however, signaling a partial

³⁰ 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (emphasis added). Under this approach, courts could deem conduct exclusionary even if the conduct would not violate section 1 if performed by two or more parties, e.g., price fixing or tie-ins.

³¹ 148 F.2d 416 (2d Cir. 1945). The unique procedural posture of this case lent itself to unusual precedential value. The Second Circuit decided this case under 15 U.S.C. § 29 (amended 1944) (current version at 28 U.S.C. § 2109 (1976)), which provided that in antitrust cases brought by the Department of Justice, when a quorum of six Supreme Court Justices could not be obtained because of disqualification, the case was to be certified to the circuit court in the district in which the case was brought and heard by the three senior judges, whose decision would be final and not be reviewable by appeal, certiorari or otherwise. The Supreme Court endorsed the *Alcoa* decision the following year in *American Tobacco Co. v. United States*, 328 U.S. 781, 811-14 (1946).

³² *United Shoe*, 110 F. Supp. at 342 (citing *Alcoa*).

³³ *Id.*

³⁴ 384 U.S. 563 (1966).

³⁵ *Id.* at 570-71.

³⁶ E.g., *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727 (9th Cir.

erosion of *Grinnell's* willful conduct standard.³⁷ These decisions employ strict objective tests of challenged business practices to detect unlawful conduct. Under this trend, practices reflecting rational business decisions, such as pricing above costs or introducing a product or service improvement, will not constitute illegal conduct under section 2. If a given practice reflects rational business conduct, a court will not inquire into the monopolist's intent.

For example, the Tenth Circuit in *Telex Corp. v. IBM Corp.*³⁸ reversed a monopolization judgment against IBM, concluding that the district court's approach, closely following that in *Grinnell*, was erroneous. The Tenth Circuit stated that the district court had failed to consider whether IBM's acts were ordinary practices available to all in the market and whether IBM's conduct amounted to an improper "use" of its monopoly power.³⁹

Similarly, in *California Computer Products, Inc. v. IBM Corp. (Calcomp)*⁴⁰ the Ninth Circuit held that IBM's price reduction and design changes did not violate section 2. The Ninth Circuit decided that a monopolist may rightfully respond to its rivals' lower prices with reduced, but still above cost, prices of its own.⁴¹ Further, the court ruled that monopolists may redesign their products to increase performance or decrease cost. The court noted that because a monopolist has no duty to help its competitors survive or expand, IBM need not disclose information on its new products prior to their introduction.⁴² The Ninth Circuit ultimately held that IBM escaped liability because its practices did not unnecessarily exclude or restrict competition.

Finally, in *Berkey Photo, Inc. v. Eastman Kodak Co.*⁴³ plaintiff Berkey Photo claimed that Kodak's introduction of a 110 camera system, a new pocket camera and complementary film and photofinishing process, violated section 2 of the Sherman Act. The Second Circuit ruled that introduction of a new camera with improved film was a "superior product"⁴⁴ that could not be consid-

1979); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). See also Comment, *Draining the Alcoa "Wishing Well": The Section 2 Conduct Requirement after Kodak and Calcomp*, 48 *FORDHAM L. REV.* 291 (1979).

³⁷ See Note, *The Conduct Standard for Legally Acquired Monopolies Under Section 2 of the Sherman Act*, 49 *U. CIN. L. REV.* 206, 222 (1980).

³⁸ 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

³⁹ *Id.* at 925-26. For more elaborate discussions of *Telex*, see Note, *Innovation Competition: Beyond Telex v. IBM*, 28 *STAN. L. REV.* 285 (1976); Note, *Telex v. IBM: Monopoly Pricing Under Section 2 of the Sherman Act*, 84 *YALE L.J.* 558 (1975).

⁴⁰ 613 F.2d 727 (9th Cir. 1979).

⁴¹ *Id.* at 741-42.

⁴² *Id.* at 744.

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

⁴⁴ 603 F.2d at 285-86.

ered exclusionary. The court agreed with Berkey Photo that Kodak's introduction of the 110 system sought to combine its power in the camera and film markets to bolster stagnating camera sales. The court held, however, that Kodak was not liable because none of its acts unreasonably restricted competition; they merely reflected "the process of invention and innovation."⁴⁵ Significantly, the Second Circuit expressly rejected its earlier *Alcoa* approach.⁴⁶

B. Refusal-to-Deal as an Exclusionary Practice⁴⁷

Generally firms in competitive and monopolistic markets freely choose with whom they will deal. Nonetheless, courts have imposed a duty to deal upon monopolists in two lines of cases. First, firms may not refuse to deal where they seek to create or maintain a monopoly.⁴⁸ Second, a business or group of businesses controlling an "essential facility" has a duty to provide reasonable access to competitors.⁴⁹

The first line of cases, designated as the "intent" theory of liability, derives from the free-trader principle articulated in *United States v. Colgate & Co.*⁵⁰ In *Colgate* the Supreme Court declared in

⁴⁵ *Id.* at 281.

⁴⁶ *Id.* at 273-74.

⁴⁷ For extensive treatments of refusals-to-deal by monopolists, see Adams, *Antitrust Constraints on Single-Firm Refusals to Deal by Monopolists in the European Economic Community and the United States*, 20 TEX. INT'L L.J. 1 (1985); Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1721 (1974); Note, *Vertical Refusals to Deal Under the Sherman Act: Products Liability and Malley Duff Divide the Circuits*, 69 MINN. L. REV. 1355 (1985).

⁴⁸ See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (private utility company with monopoly power in wholesale power market illegally "sought to substitute for competition anticompetitive uses of its dominant economic power"); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (monopoly newspaper's refusal to sell advertising to customers who bought advertising from local radio station was designed to destroy competitor and therefore enjoined as illegal attempt to monopolize); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (Kodak's refusal to sell supplies to distributor after acquiring control of competing distributor, and after unsuccessfully attempting to purchase plaintiff's business, supported inference of monopolistic intent which was basis of jury finding of illegal monopolization).

⁴⁹ See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945) (bylaws allowing existing members to restrict membership of competitors struck down as unreasonable restraint of competition); *Woods Exploration & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1303-09 (5th Cir. 1971) (defendants hindered plaintiff from extracting natural gas from field by refusing access to transport facilities, pooling arrangements, or right-of-way), *cert. denied*, 404 U.S. 1047 (1972); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.) (local produce wholesalers who jointly owned building with unique access to rail facilities may not refuse access to out-of-state distributor if valid business reason such as lack of space or financial unsoundness is absent), *cert. denied*, 344 U.S. 817 (1952).

⁵⁰ 250 U.S. 300 (1919) (holding lawful defendant's refusal to continue selling to dealers who did not abide by seller's suggested retail prices).

dictum that has since become axiomatic:⁵¹

*In the absence of any purpose to create or maintain a monopoly, the [Sherman A]ct does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.*⁵²

The *Colgate* free-trader rule implies an important exception to the presumption of free trade. A business cannot refuse to deal with whomever it pleases when a "purpose to create or maintain a monopoly" motivates that refusal.⁵³

In *Lorain Journal Co. v. United States*⁵⁴ the Supreme Court applied the exception to the *Colgate* free-trader rule. The newspaper contended that *Colgate's* free-trader principle sanctioned its refusal to deal with advertisers who also purchased advertising from a local radio station. The Supreme Court disagreed, however, holding that the *Journal's* refusal to deal fell squarely within *Colgate's* "purpose to create or maintain a monopoly" exception because the refusal sought to eliminate a local radio station as a competitor in the advertising market.⁵⁵

The second line of cases imposing a duty to deal upon monopolists sets forth the "essential facilities" or "bottleneck" theory of monopolization.⁵⁶ A duty to deal under the "essential facilities" theory applies where a business or group of businesses controls a unique facility, access to which is necessary for rivals to compete. In the seminal "essential facilities" case, *United States v. Terminal Railroad Association*,⁵⁷ the Supreme Court held that a group of railroad companies that owned the only terminal in St. Louis capable of accommodating traffic from the West had to provide access to all competing railroads on reasonable terms.⁵⁸ The Court reasoned that

⁵¹ Courts still faithfully adhere to the *Colgate* free-trader principle. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (citing *Colgate* and reaffirming its holding); *Reeves, Inc. v. Stake*, 447 U.S. 429, 438-39 (1980); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927-28 (2d Cir. 1980), cert. denied, 450 U.S. 917 (1981).

⁵² 250 U.S. at 307 (emphasis added).

⁵³ The scope of the "purpose to create or maintain a monopoly" exception is unresolved. A strict reading of the *Colgate* rule indicates that refusals to deal are unlawful only when used to create or maintain a monopoly, not if used to exploit a monopoly position. See Adams, *supra* note 47, at 7-8. Professors Areeda and Turner argue for an even more restrictive construction. See 3 P. AREEDA & D. TURNER, *supra* note 1, ¶ 729b & n.4, at 235. A monopolist, of course, may only refuse to deal if he acts unilaterally. *Colgate*, 250 U.S. at 307.

⁵⁴ 342 U.S. 143 (1951).

⁵⁵ *Id.* at 155.

⁵⁶ For a comprehensive discussion of the "essential facilities" doctrine, see Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441 (1983).

⁵⁷ 224 U.S. 383 (1912).

⁵⁸ *Id.* at 411-12.

compelling the owners to provide services to all railroads on equal terms prevented exclusive ownership of vital facilities from impeding commerce.⁵⁹

One distinction between the "intent" theory and the "essential facilities" theory is that the former focuses on the monopolist's motivations behind a refusal-to-deal and the latter primarily scrutinizes the refusal's effect on victimized rivals.⁶⁰ In practice, both theories often appear in a court's analysis in a single case, as demonstrated by the Supreme Court's opinion in *Otter Tail Power Co. v. United States*.⁶¹ In *Otter Tail* the government brought a civil antitrust action against Otter Tail Power Company, an electric utility, for attempting to monopolize the retail distribution of electric power in its service area. The Court held that Otter Tail used its monopoly position as the exclusive regional supplier of wholesale power to "foreclose competition or gain a competitive advantage, or to destroy a competitor"⁶² in the retail power market, all in violation of section 2. Otter Tail's conduct was blatantly exclusionary: it refused to deal with proposed municipal power systems needing access to backup wholesale electricity only Otter Tail could supply; it denied proposed power companies access to its power lines, rendering them unable to obtain power from other suppliers; it invoked restrictive contract clauses for the same purpose; and it engaged in a pattern of harassing litigation against the potential entrants designed to "delay and prevent" the establishment of municipal electrical systems.⁶³ In noting that monopolist motives and a desire to withhold essential facilities underlay Otter Tail's conduct, the Supreme Court incorporated both theories into its brief analysis.⁶⁴

Relying on *Otter Tail*, the Sixth Circuit in *Byars v. Bluff City News Co.*⁶⁵ abandoned the traditional approach of separately treating intent and essential facilities. Instead, the Sixth Circuit focused on the overall impact of the monopolist's practices. In *Byars* a periodicals supplier terminated his relationship with his lone distributor,⁶⁶ ex-

⁵⁹ *Id.*

⁶⁰ See *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979).

⁶¹ 410 U.S. 366 (1973).

⁶² *Id.* at 377.

⁶³ *Id.* at 368.

⁶⁴ The Court rejected Otter Tail's only proffered business justification—self-preservation—because the "'promotion of self-interest alone does not . . . immunize otherwise illegal conduct.'" *Id.* at 380 (quoting *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967)). The Court did not declare that self-preservation was an invalid justification. Rather, the Court merely accepted the lower court's conclusion that Otter Tail's fears were greatly exaggerated. See *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 64 (D. Minn. 1971), *aff'd in part, rev'd in part*, 417 U.S. 901 (1974).

⁶⁵ 609 F.2d 843 (6th Cir. 1979).

⁶⁶ The distributor serviced small retail outlets that the supplier had directly ser-

tending the supplier's monopoly in the supply market to the local market for periodicals distribution. In remanding the case for further findings, the Sixth Circuit proposed a framework for analyzing a lawful monopolist's refusal-to-deal. The Sixth Circuit instructed the district court to focus on the overall impact of the monopolist's practices, requiring a thorough analysis of each fact situation.⁶⁷ Under this test a court must balance the damage to competition against the monopolist's business and efficiency justifications and deem a practice exclusionary only if it is "unreasonably anticompetitive."⁶⁸

The *Byars* court justified its consideration of a monopolist's business justification by reasoning that because the law tolerates the existence of some monopolists, courts must give monopolists some leeway in making business decisions.⁶⁹ Moreover, the technical justification for such a defense is that a valid business purpose can offset a finding of monopolistic intent.⁷⁰

III

ASPEN SKIING CO. V. ASPEN HIGHLANDS SKIING CORP.

A. The Facts

Aspen, Colorado is a destination ski resort⁷¹ boasting superior ski facilities and first-rate entertainment. Prior to 1964 three independent companies, including Aspen Skiing Co. (Ski Co.) and Aspen Highlands Skiing Corp. (Highlands), operated three major

viced, but then had abandoned because their volume was insufficient to justify the servicing costs. *Id.* at 846.

⁶⁷ *Id.* at 860.

⁶⁸ *Id.* If the subcontractor could establish anticompetitive injury resulting from the distributor's acts, the distributor could still escape condemnation by presenting business reasons justifying its conduct. *Id.* at 862-63.

⁶⁹ *Id.* at 862 (citing *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 711-13 (7th Cir. 1977) (lawfulness of monopolist's termination of relationship with dealer depends upon monopolist's purpose), *cert. denied*, 439 U.S. 822 (1979); *International Rys. of Cent. Am. v. United Brands Co.*, 532 F.2d 231, 239-40 (2d Cir.) (defendant's refusal to deal was proper because it "had no reasonable business alternative but to abandon an unprofitable and uncomfortable operation"), *cert. denied*, 429 U.S. 835 (1976)).

⁷⁰ *Id.* at 862 & n.53 (citing *Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 486 (5th Cir. 1966)); *see also Eastman Kodak Co. v. Southern Photo Materials Co.*, 295 F. 98 (5th Cir. 1923), *aff'd*, 273 U.S. 359 (1927). *See generally Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

⁷¹ Destination resorts differ from day resorts in that vacationers visit the former expecting to spend at least several days at the resort, and the latter caters to patrons who normally drive in, use the facilities, and leave the same day. Destination resorts feature, in addition to skiing slopes, lodges, restaurants, and entertainment. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605-06 n.34 (1985).

ski facilities in the Aspen area.⁷² Each operator offered its lift tickets for daily use at its own facility and an interchangeable six-day, all-Aspen ticket.⁷³ Ski Co., which acquired its second of the three original facilities in 1964 and opened a fourth in 1967, also offered a weekly, multi-area ticket covering only its facilities.⁷⁴ Practical considerations and regulatory obstacles make the development of any more major ski facilities in Aspen infeasible.⁷⁵

Ski Co. terminated the joint ticket in 1978 after Highlands rejected Ski Co.'s demand that Highlands accept a fixed share of revenues⁷⁶ far below Highlands's historical average, which was based on actual usage.⁷⁷ Ski Co. continued to offer a six-day pass good only for its three facilities. Ski Co. promoted its six-day package with a national advertising campaign that strongly suggested that it offered the only ski facilities in Aspen.⁷⁸

As an alternative to Ski Co.'s three-area ticket, Highlands sought to offer its own multi-area package by combining Highlands's lift tickets with those it hoped to purchase directly from Ski Co. Ski Co., however, refused to sell any tickets to Highlands, either at the tour operator's discount or at retail.⁷⁹ When High-

⁷² *Id.* at 587.

⁷³ *Id.* The Colorado Attorney General had challenged the legality of the all-Aspen ticket in 1975 when he filed a complaint against the participating parties charging that the joint marketing arrangement violated sections 1 and 2 of the Sherman Act. The Attorney General alleged that the negotiations over the four-area ticket provided the parties with a forum for price fixing in violation of section 1 and that the joint ticket was a mechanism by which they attempted to monopolize the market for downhill skiing services in Aspen in violation of section 2. In 1977, the case was settled in a consent decree permitting the parties to continue offering the joint ticket provided that they set their own prices unilaterally before negotiating its terms. *Id.* at 591 n.9.

⁷⁴ *Id.*

⁷⁵ *Id.* at 588.

⁷⁶ During the lifetime of the all-Aspen ticket, the issuers experimented with various methods of distributing revenues. Initially the joint package consisted of booklets containing six coupons, each redeemable for a daily lift ticket at any of the three original mountains. Revenues from the sale of the coupon books were distributed in accordance with the number of coupons collected at each mountain. *Id.* at 589. When an "around the neck" ticket replaced the coupon book, lift operators at Highlands monitored its usage. Officials from Ski Co. and Highlands periodically met to review the figures recorded at Highlands, and to distribute revenues based on that count. *Id.* at 590. Later, random sample surveys were implemented when the parties expressed concern that a more scientific method of monitoring was necessary. The parties allocated revenues based on these surveys. *Id.* at 590-91.

⁷⁷ Highlands had controlled as much as 20.5% of the Aspen downhill skiing market. Yet, Ski Co. insisted that Highlands accept a 13.2% fixed share of the ticket revenues for the 1977-78 season. Highlands acceded to Ski Co.'s demand, but only because it feared the elimination of the joint ticket, and because it hoped to persuade Ski Co. to return to the division of revenues based on usage. This was not to be. The following season, Ski Co. demanded that Highlands accept a 12.4% fixed share. Highlands rejected this demand. *Id.* at 592.

⁷⁸ *Id.* at 593.

⁷⁹ *Id.*

lands developed its "Adventure Pack," consisting of a three-day pass at Highlands and three vouchers—each equal to the price of a daily lift ticket at a Ski Co. mountain⁸⁰—Ski Co. refused to accept the vouchers.⁸¹ In a final bid to salvage a multi-area ticket, Highlands replaced the coupons with travelers checks. But Ski Co. thwarted this attempt by raising its prices for a single-day lift ticket, making Highlands's package prohibitively expensive.⁸²

B. The Lower Courts Find a Duty to Cooperate

Highlands filed a complaint against Ski Co. claiming that Ski Co. had monopolized the market for downhill skiing services in Aspen in violation of section 2.⁸³ Following *United States v. Grinnell Corp.*,⁸⁴ the district court judge instructed the jury that the offense entailed "(1) possession of monopoly power in the relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes."⁸⁵ The jury determined that the relevant product market was "downhill skiing at destination ski resorts," that the relevant geographic submarket was the "Aspen area," and that Ski Co. possessed monopoly power, defined as the power to set prices in, or to exclude competitors from, the relevant market.⁸⁶

The jury instruction on the conduct element of monopolization—willful acquisition or maintenance of monopoly power—stressed the importance of the monopolist's motive. The trial judge instructed the jury that mere possession of monopoly power does not give rise to a duty to cooperate with business rivals, and that possession of monopoly power coupled with a refusal to enter into a joint marketing arrangement with a competitor does not compel a finding of monopolization "if *valid business reasons* exist for that refusal."⁸⁷ The jury found both elements of monopolization as de-

⁸⁰ The vouchers were backed up by funds deposited in a local bank, and redeemable at full value by Aspen merchants. *Id.* at 594.

⁸¹ *Id.* Ski Co. justified its position of not even selling tickets at retail to Highlands by stating, "[W]e will not support our competition." *Id.* at 594 n.14.

⁸² *Id.* at 594 n.15. Ski Co. also discounted the price of its three-area, six-day ticket. *Id.*

⁸³ *Id.* at 595. Highlands filed its complaint in the United States District Court for the District of Colorado.

⁸⁴ 384 U.S. 563 (1966); see *supra* notes 34-35 and accompanying text.

⁸⁵ 472 U.S. at 595-96.

⁸⁶ *Id.* at 596 n.20.

⁸⁷ *Id.* (emphasis added). The judge elaborated:

In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. . . .

. . . [Y]ou must determine whether [Ski Co.] gained, maintained, or

fined in these instructions and the district court entered a judgment awarding Highlands treble damages of \$7,500,000.⁸⁸

The Tenth Circuit affirmed.⁸⁹ The court relied on both the "intent" theory and the "essential facilities" theory in rejecting Ski Co.'s argument that "there was insufficient evidence to present a jury issue of monopolization because, as a matter of law, the conduct was pro-competitive."⁹⁰ First, the court determined that a jury could have characterized the all-Aspen ticket as an essential facility that Ski Co. had a duty to market jointly with Highlands.⁹¹ Second, the court found that there was sufficient evidence to support the jury's finding that Ski Co., in terminating the all-Aspen ticket, "together with its other conduct," intended to create or maintain a monopoly.⁹²

C. The Supreme Court Qualifies the Duty

Before the Supreme Court, Ski Co. did not challenge the district court judge's instructions to the jury. Rather, Ski Co. claimed that the jury's finding of willful maintenance was erroneous as a matter of law because it rested on an assumption that a firm with monopoly power has a duty under section 2 of the Sherman Act to cooperate with its smaller rival.⁹³ Justice Stevens, writing for a unanimous eight-justice Court,⁹⁴ rejected this contention.⁹⁵ Indeed, the trial judge had unambiguously instructed the jury that even a firm possessing monopoly power has no duty to cooperate with its competitors.⁹⁶ Justice Stevens noted that the absence of an unqualified duty to cooperate is "merely the counterpart of the independent businessman's cherished right" to select business associates.⁹⁷ Citing *United States v. Colgate & Co.*,⁹⁸ Justice Stevens

used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or sub-market.

Id. at 597 (quoting trial judge's instruction) (emphasis added).

⁸⁸ *Id.* at 598. The District Court also entered an injunction ordering the parties to market jointly a six-day, multifacility coupon booklet "substantially identical to" the booklet offered by Ski Co. at another of its ski resorts in Colorado. *Id.* at 598 n.23.

⁸⁹ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

⁹⁰ *Id.* at 1516-17 (quoting Brief of Defendant-Appellant, Cross-Apellee, at 40, *id.* (Nos. 82-1407, 82-1424)).

⁹¹ *Id.* at 1521.

⁹² *Id.* at 1521-22.

⁹³ Brief of Petitioner at 15, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (No. 84-510).

⁹⁴ Justice White did not participate in the decision. 472 U.S. at 611.

⁹⁵ *Id.* at 600.

⁹⁶ 738 F.2d at 1522 n.16.

⁹⁷ 472 U.S. at 601; see *supra* notes 50-55 and accompanying text.

emphasized that this free-trader right is limited to cases “*in the absence of any purpose to create or maintain a monopoly.*”⁹⁹ In other words, under the *Colgate* rule a firm may not refuse to cooperate when the refusal is primarily aimed at monopolization. A monopolist’s refusal to participate in joint marketing could reflect such a monopolistic intent in certain circumstances, Justice Stevens stated, and evidence of intent is thus relevant to whether challenged conduct is “fairly characterized as exclusionary.”¹⁰⁰

After endorsing the trial court’s instructions, Justice Stevens reasoned that the jury (assuming that it followed those instructions) must have distinguished “between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other.”¹⁰¹ A valid business justification would have placed Ski Co. in the “superior product” or “well-run business” category. For the Court, then, the issue was whether the record supported the jury’s conclusion that no valid business justifications existed for Ski Co.’s refusal to cooperate.¹⁰²

In addressing this question, Justice Stevens considered not only Ski Co.’s proffered justifications, but also the effect of Ski Co.’s conduct on consumers and on Highlands to determine whether Ski Co. was “attempting to exclude [Highlands] on some basis other than efficiency.”¹⁰³ Justice Stevens noted that three circumstances supported the jury’s conclusion that Ski Co. willfully maintained its monopoly power. First, because the evidence established the superior quality of the all-Aspen ticket, Ski Co.’s termination of that ticket adversely affected consumers.¹⁰⁴ Second, Ski Co.’s practices had an adverse impact on Highlands’s opportunity to compete, as evidenced by the extent of Highlands’s pecuniary injury, its fruitless attempts to protect itself from the cancelled arrangement, and the steady decline of its share of the relevant market after Ski Co. terminated the ticket.¹⁰⁵ Finally, and perhaps most significantly, Ski Co. failed to present any legitimate business or efficiency justification for its conduct concerning the joint ticket.¹⁰⁶

Justice Stevens noted in conclusion that although Ski Co.’s pattern of conduct may not have been as “bold, relentless, and preda-

⁹⁸ 250 U.S. 300 (1919).

⁹⁹ 472 U.S. at 602 (emphasis in original).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 604.

¹⁰² *Id.* at 605.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 605-07; see *infra* notes 124-32 and accompanying text.

¹⁰⁵ 472 U.S. at 607-08; see *infra* notes 133-45 and accompanying text.

¹⁰⁶ 472 U.S. at 608-10; see *infra* notes 147-54 and accompanying text.

tory” as the newspaper’s practices in *Lorain Journal*, the record supported an inference that Ski Co. had intended to discourage skiers from patronizing Highlands:¹⁰⁷ “Ski Co. was not motivated by efficiency concerns and was willing to sacrifice short run benefits and consumer good will in exchange for a perceived long run impact on [Highlands].”¹⁰⁸ Finally, because the evidence adequately supported the jury finding of willful maintenance under the trial court’s instructions, Justice Stevens found it unnecessary to address the possible relevance of the “essential facilities” doctrine.¹⁰⁹

IV ANALYSIS

The Tenth Circuit in *Aspen Skiing* noted that “‘the instances in which a monopolist has a duty to cooperate or deal is one of the most ‘unsettled and vexatious’ issues in antitrust law.’”¹¹⁰ *Aspen Skiing* thus presented the Supreme Court with an opportunity to resolve a serious dilemma faced by monopolists: whether to cooperate with competitors and risk a collusion suit under section 1 or refuse to cooperate and hazard a monopolization suit under section 2. The Supreme Court failed, however, to resolve adequately this dilemma. The Court’s reliance on factors which do not meaningfully differentiate between exclusion and competition and its failure to state clearly the circumstances under which a refusal to cooperate constitutes monopolization creates uncertainty and may distort incentives to engage in efficient business activity.

Aspen Skiing reaffirms the *Grinnell* willful maintenance standard¹¹¹ of inferring anticompetitive intent from proof of adverse effects on competitors and consumers. The monopolist can negate this inference only by establishing a valid business justification for its conduct. The Court noted that three circumstances supported the inference that Ski Co. was unlawfully attempting to exclude Highlands on some basis other than efficiency. After examining these circumstances, however, it is difficult to determine precisely how the Court distinguished between exclusionary conduct and aggressive competition. Moreover, requiring cooperation among competitors is especially problematic for two reasons. First, a judi-

¹⁰⁷ 472 U.S. at 610. Ski Co. had contended in its brief that its conduct was clearly different from that of the monopolist in *Lorain Journal* because Ski Co. was perfectly willing to sell ski lift tickets to skiers who also patronized Highlands’s facility. Brief of Petitioner, *supra* note 93, at 29-30.

¹⁰⁸ 472 U.S. at 611.

¹⁰⁹ *Id.* at 611 n.44.

¹¹⁰ 738 F.2d at 1519 (quoting *Byars v. Bluff City News Co.*, 609 F.2d 843, 846 (6th Cir. 1980)).

¹¹¹ See *supra* note 35 and accompanying text.

cially imposed arrangement demands judicial supervision, a task for which courts are unsuited. Second, imposing terms is far more difficult in a horizontal context (competitors) than in a vertical context (e.g., producer-distributor). Unlike the vertical context, where a court could merely require a producer to deal with all distributors on equal terms, no benchmark exists upon which to rely in fixing terms among competitors. The *Aspen Skiing* Court apparently overlooked these difficulties.

Dominant firms need to know the precise point at which their aggressive competition becomes exclusionary conduct and therefore illegal.¹¹² Unfortunately, *Aspen Skiing* sends out an uncertain signal. To mitigate this uncertainty, courts should limit *Aspen Skiing* to its narrow holding that a monopolist's decision to extricate itself from a successful joint venture can give rise to section 2 liability when the joint product or service is demonstrably more efficient than its alternative, the monopolist lacks any legitimate business justification for its conduct, and barriers seriously hinder entry into the relevant market.

A. The *Aspen Skiing* Test for Exclusionary Conduct

1. The Court Reaffirms Grinnell's Willful Maintenance Standard

In sustaining the trial judge's instructions to the jury on monopolization, the Supreme Court in *Aspen Skiing* reaffirmed the *Grinnell* willful maintenance standard for the conduct element of monopolization. The Court's analysis of challenged conduct by a lawful monopolist (evaluating the effect on consumers and on competitors and the monopolist's business justifications) refines the *Grinnell* rule. In so doing, *Aspen Skiing* resists a recent trend in the lower courts whose benign attitude toward monopolists signaled a partial erosion of *Grinnell*.¹¹³ Indeed, *Aspen Skiing* gave teeth to *Grinnell*'s willful maintenance standard.

Citing *Grinnell*, the district court judge had defined the conduct element of monopolization as "the willful acquisition, maintenance or use of [monopoly] power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes."¹¹⁴ The judge instructed the jury that, in considering whether Ski Co.'s means or purposes were anticompetitive or exclusionary, it should distinguish between practices that tended to restrict competition and those that reflected only a superior product, a well run business or luck. As such, a lawful monopolist's refusal to deal or cooperate

¹¹² See *supra* notes 11-14 and accompanying text.

¹¹³ See *supra* notes 36-46 and accompanying text.

¹¹⁴ 472 U.S. at 595-96.

with a competitor is not willful maintenance if valid business reasons exist for that refusal.

The Supreme Court sustained the district court judge's instructions as consistent with *Grinnell* and then evaluated Ski Co.'s conduct under the *Grinnell* standard. The Court suggested a three-prong test to determine whether a lawful monopolist intentionally maintained its power through exclusionary means or with exclusionary purposes:¹¹⁵ first, whether the monopolist's conduct adversely affected consumers; second, whether the monopolist's conduct hampered rivals' ability to compete; and third, whether the monopolist's conduct is justified by valid business considerations.

2. *The Court's Reliance on Intent Creates an Uncertain Standard*

Aspen Skiing's three-prong test for exclusionary conduct reestablishes intent as a relevant section 2 inquiry in analyzing challenged monopolist conduct. A finding of adverse impact on consumers and on rivals' ability to compete gives rise to a rebuttable presumption of section 2 illegality. To rebut this presumption, the defendant monopolist must establish that a legitimate business purpose justified its conduct; thus, proof of a valid business purpose negates the inference of monopolistic intent.¹¹⁶

The reliance on intent under the *Aspen Skiing* test for illegal exclusionary conduct creates undesirable uncertainty for lawful monopolists. In defining improper conduct, courts should concentrate on conduct rather than motive, isolating those characteristics of conduct that antitrust law seeks to prohibit.¹¹⁷ Although *Aspen Skiing* does mention conduct, the discussion largely focuses on conduct that gives rise to inferences of intent. In short, *Aspen Skiing* conclusively infers wrongful motive from wrongful conduct. The result would have been the same, the analysis more clear, and the signal to dominant firms more intelligible had the Court spoken exclusively of conduct. Discussion of intent is mostly diversionary or redundant. All competitively aggressive firms "intend" to withstand competition from rivals. The monopolist who introduces a superior

¹¹⁵ The Court endorsed the definition of exclusionary conduct as articulated by Professors Areeda and Turner. Under this formulation, exclusionary conduct means, at most, behavior that (1) tends to impair the opportunities of rivals, and (2) either does not further competition or does so in an unnecessarily restrictive way. See 3 P. AREEDA & D. TURNER, *supra* note 1, ¶ 626b, at 77-78.

¹¹⁶ The test suggested in *Aspen Skiing* is similar to the test applied by several lower courts in refusal-to-deal cases under section 2. This test was first articulated in *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979). In *Byars*, the Sixth Circuit proposed a two-part test to evaluate refusals-to-deal: first, whether the refusal is on balance procompetitive or anticompetitive; second, whether the refusal is justified by normal business reasons. *Id.* at 860-62; see *supra* notes 65-68 and accompanying text.

¹¹⁷ See *supra* notes 6-14 and accompanying text.

product or service “intends” either to create new demand or to woo customers away from his rival. Declaring this beneficial conduct illegal under the heading of willful maintenance would in effect abolish the conduct requirement and make mere monopoly power per se illegal. Aside from perhaps the Second Circuit in *Alcoa*, no court has “intended” to reach this result.¹¹⁸ Intent does not provide a meaningful basis to distinguish between lawful and unlawful monopolist conduct.

The question of intent can be relevant, however, in cases where a monopolist's acts have an uncertain competitive effect. In such a case, a limited inquiry into intent can channel judicial discretion.¹¹⁹ As Justice Brandeis aptly stated, “[T]he purpose or end sought to be attained [is a] relevant [fact] because knowledge of intent may help the court to interpret facts and to predict consequences.”¹²⁰

B. The Court Failed to Articulate a Clear Standard

The Supreme Court in *Aspen Skiing* noted that three important circumstances supported the jury verdict. The Court did not, however, indicate the minimum evidentiary requirements necessary for a finding of a section 2 violation in future refusal-to-cooperate cases. It did not draw a bright line between aggressive competition and exclusion. The resulting uncertainty will exacerbate the monopolist's dilemma over how far it may go in competing with potential and existing rivals.

The Court characterized Ski Co.'s decision to terminate the joint marketing arrangement as a “decision by a monopolist to make an important change in the character of the market.”¹²¹ Ski Co. had contended that neither the decision nor its implementation could fairly be described as exclusionary.¹²² Although the Court agreed that such a decision is not necessarily exclusionary,¹²³ it noted that three circumstances could support the jury's verdict: (1) the superior quality of the all-Aspen ticket; (2) the adverse impact on Highlands's ability to compete; and (3) the absence of a legitimate business justification. Upon examination of each circumstance, however, it is difficult to determine precisely where the Court has drawn the line between condemnable exclusionary conduct and beneficial competition.

¹¹⁸ See 3 P. AREEDA & D. TURNER, *supra* note 1, ¶ 626b, at 77-78.

¹¹⁹ See *supra* note 22 and accompanying text.

¹²⁰ *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (analyzing regulation competitors adopted to govern their trading behavior).

¹²¹ 472 U.S. at 604.

¹²² *Id.* at 604.

¹²³ 472 U.S. at 604.

1. *Adverse Effect on Consumers*

The Court stated that the adverse impact on skiers resulting from the termination of the all-Aspen ticket supported the jury's verdict. Yet, a consumer impact standard for detecting exclusionary conduct depends upon gauging benefits and detriments to consumers, an inherently difficult task.

Aspen Skiing was an easy case. The six-day, all-Aspen ticket was a voluntarily established pattern of marketing downhill skiing services. The joint ticket, with revenues allocated according to actual usage, first developed when three companies operated three different ski mountains in the Aspen area. The multi-area ticket continued in use when Ski Co. opened up a fourth mountain. Moreover, the record disclosed that other competitive multimountain ski resorts offered skiers multiday interchangeable tickets, including some in which Ski Co. participated.¹²⁴ Because the four-mountain, all-Aspen ticket arose in a competitive milieu, it was presumptively more efficient than any of the posttermination arrangements.¹²⁵ The joint ticket provided the skier convenience and flexibility by allowing him to purchase a multiday ticket in advance while reserving the opportunity to ski any of the Aspen mountains on any particular day. Although Ski Co.'s three-area ticket featured some of the same attributes,¹²⁶ the evidence supported an inference that skiers were "frustrated" over the unavailability of the four-area ticket.¹²⁷

Consumer frustration, however, inaccurately indicates exclusionary conduct. Under *Aspen Skiing*'s peculiar facts, the monopolist's conduct unambiguously promoted consumer dissatisfaction. Future cases, however, likely will not be as straightforward. For example, firms occasionally "frustrate" consumers by discontinuing some product or service, hoping to earn larger profits in other ways. A television network may cancel a program in the hopes that its replacement will attract a larger audience, thus "frustrating" those viewers who preferred the old program.

The Court believed that adverse effect on skiers supported an inference of predation because Ski Co. was apparently willing to sacrifice consumer goodwill in exchange for a perceived long-run im-

¹²⁴ Ski Co. participated in interchangeable ticket systems in at least two other ski resorts. *Id.* at 603 n.30.

¹²⁵ The Court stated that because the all-Aspen ticket "originated in a competitive market and had persisted for several years" and because "interchangeable tickets are used in other multimountain areas which apparently are competitive, it seems appropriate to infer that such tickets satisfy consumer demand in free competitive markets." *Id.* at 603 (footnote omitted); see R. BORK, *supra* note 3, at 156 (predation may be inferred from disruption of existing distribution patterns).

¹²⁶ 472 U.S. at 606.

¹²⁷ *Id.* at 606-07 & 607 n.36.

pact on Highlands.¹²⁸ A predatory strategy, however, seeks to draw consumers away from a competitor in the short run through lower price or through product enhancement.¹²⁹ No predatory strategy succeeds by frustrating consumers.

Some courts have employed a "beneficial impact on consumers" standard. Under this standard if a monopolist's new service or product increases quality or lowers price, the introduction of the new service or product is presumptively procompetitive. For example, the Second Circuit in *Berkey Photo* deemed Kodak's design changes presumptively procompetitive because they gained "acceptance in the market."¹³⁰ The court reasoned that, absent coercion, a monopolist's innovation succeeded in the marketplace because the innovation had incorporated performance improvements and thus should not be condemned. The flaw with this reasoning is that acceptance in the market may merely reflect the absence of viable choice available to the consumer or an overwhelming familiarity with the monopolist's product or service.¹³¹ Where the effects of challenged conduct on consumers are uncertain, or cannot be attributed conclusively to either exclusion or efficiency, courts should conduct a limited inquiry into the monopolist's intent.¹³²

2. *Adverse Impact on Rivals's Ability to Compete*

The Court also ruled that adverse impact on Highlands's ability to compete supported the jury finding of exclusionary conduct. In assessing the impact on Highlands the Court considered the extent of Highlands's pecuniary injury,¹³³ its futile attempts to provide an alternative to the joint ticket,¹³⁴ and the steady decline in its market share after Ski Co. cancelled the arrangement.¹³⁵ Ski Co.'s refusal to cooperate prevented Highlands from offering its customers a multi-area ski experience and had a direct, ruinous effect on Highlands's ability to compete. Once again, future cases may not be as straightforward. Because all competing firms aim to succeed, and success usually comes at the expense of rivals, adverse impact on

¹²⁸ *Id.* at 610-11.

¹²⁹ See H. HOVENKAMP, *supra* note 11, at §§ 6.8-.11; Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268-69 (1981).

¹³⁰ "If a monopolist's products gain acceptance in the market, therefore, it is of no importance that a judge or jury may later regard them as inferior, so long as that success was not based on any form of coercion." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1983).

¹³¹ Comment, *supra* note 36, at 324.

¹³² See *supra* notes 119-20 and accompanying text.

¹³³ The jury calculated Highlands's actual damages at \$2.5 million. 472 U.S. at 595.

¹³⁴ *Id.* at 593-94; see *supra* notes 79-82 and accompanying text.

¹³⁵ 472 U.S. at 595.

rivals, standing alone, does not differentiate between aggressive competition and exclusion.

The termination of an established marketing pattern, here the all-Aspen ticket, may be used strategically to gain a competitive advantage. The all-Aspen ticket originated in a competitive market, was voluntarily adopted by the operators of the three original ski facilities in Aspen, and continued in operation for sixteen years. Under Professor (now Judge) Bork's view, disturbing optimal patterns of distribution¹³⁶ can constitute exclusion, or more specifically, predation.¹³⁷ Bork opines, however, that this tactic would be counterproductive when the "predator" will incur substantial added costs.¹³⁸

The Court stated that Ski Co.'s termination of the joint ticket was "predatory."¹³⁹ Predation, however, involves the practice of accepting short-term losses in order to reap future monopoly profits.¹⁴⁰ Because Ski Co. had not suffered any short-term losses following its termination of the joint ticket, its conduct was not technically predatory. Rather, Ski Co.'s pattern of conduct was more likely a subtle form of exclusion recently described as "raising rivals' costs." Although Ski Co.'s refusal to cooperate with Highlands was "costly" to Ski Co., it was even more costly to Highlands. Because Ski Co. could continue to offer its skiers a multislope experience through its three-mountain package while Highlands could not, the all-Aspen ticket was more valuable to Highlands than it was to Ski Co. The immediate result of the termination of the joint ticket was that Ski Co.'s relative market share grew, while that of Highlands declined.¹⁴¹

For a monopolist, raising rivals' costs has significant advantages over predation as a means of exclusion.¹⁴² This strategy, however,

¹³⁶ Bork theorizes that, in every market, certain marketing patterns develop over time. According to Bork, these established market patterns, which he calls "optimal patterns," are presumably more efficient than those marketing patterns that do not develop. R. BORK, *supra* note 3, at 156.

¹³⁷ *Id.* By disturbing "optimal patterns" of marketing, a monopolist may impose costs on its rival. If these imposed costs are significant the monopolist may employ the disturbance as a means of predation. Predation, although frequently used synonymously with exclusion, technically means sacrificing losses today in return for a perceived increase in future profits. See, e.g., F. SCHERER, *supra* note 5, at 273-78. Bork avoids the conclusion that disturbance of established patterns should be per se illegal for two reasons. First, the "predator" will incur added costs as well, limiting the situations where it can use this tactic as a predatory tool. Second, Bork opines that such conduct will potentially create efficiencies. R. BORK, *supra* note 3, at 156.

¹³⁸ R. BORK, *supra* note 3, at 156.

¹³⁹ 472 U.S. at 605-09.

¹⁴⁰ See F. SCHERER, *supra* note 5, at 273-78.

¹⁴¹ 472 U.S. at 595.

¹⁴² First, whereas predation is successful only if the rival exits the market, raising a

may inevitably cause higher market prices, higher market share for the monopolist, more profits for the monopolist relative to his rivals, and most important, lower output. An inquiry into the impact on rivals' ability to compete, then, should consider whether a monopolist aims to raise his rivals' costs. If the strategy results in higher prices or reduced output, courts should condemn it.

Adverse impact on competitors does not provide a meaningful basis for distinguishing between competition and exclusion. The objective of antitrust law is to protect the process of competition on the merits, not to preserve the financial viability of all competitors.¹⁴³ Moreover, focusing on adverse impact on rivals obscures the important distinction between practices that seek to exclude competitors and those that reduce a rival's market share because of the monopolist's superior product or business acumen.¹⁴⁴ All competitive firms intend to prevail over their existing or potential rivals; and all successful competitive maneuvers tend to exclude.¹⁴⁵ An inquiry into effect on competitors as *Aspen Skiing* seems to require should not divert attention from the ultimate question: whether the alleged exclusionary practice increases or decreases output.

3. Business Justification

In concluding its analysis of Ski Co.'s challenged conduct the Supreme Court stated that the absence of a legitimate business or efficiency justification was perhaps the most "significant" factor supporting the jury finding of exclusionary conduct.¹⁴⁶ The Court reasoned that a normal business or efficiency reason could offset an inference of monopolistic intent.¹⁴⁷ The problem lies in determining what is a normal or legitimate business purpose.

The Court stated that the evidence did not support Ski Co.'s two proffered business justifications: Ski Co.'s inability to monitor

rival's costs is effective even if the smaller rival does not exit the market because competing against a high-cost firm is preferable to competing against a low-cost firm. Second, the predator must sacrifice short-run profits in exchange for speculative and indeterminate long-run profits, but a cost-raiser may enjoy higher profits even in the short run. A firm whose costs have risen either reduces output or raises prices, permitting the dominant firm to raise its prices or increase its relevant market share. Third, although successful predation requires that the predator have a "deep pocket" or easy access to financing, raising rivals' costs may be relatively inexpensive for the firm engaging in this strategy. See Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); Salop & Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983).

¹⁴³ 3 P. AREEDA & D. TURNER, *supra* note 1, ¶ 626b, at 77-78.

¹⁴⁴ See *supra* notes 12-14 and accompanying text.

¹⁴⁵ 3 P. AREEDA & D. TURNER, *supra* note 1, ¶ 626b, at 77-78.

¹⁴⁶ 472 U.S. at 608-10.

¹⁴⁷ *Id.* at 610 ("Thus the [absence of a normal business justification] supports an inference that Ski Co. was not motivated by efficiency concerns . . .").

usage accurately and its desire to disassociate itself from the allegedly "inferior skiing services at Highlands."¹⁴⁸ Thus, the Court determined that the jury could find that Ski Co.'s conduct lacked a legitimate business or efficiency justification.

Attracting the customers of a competitor, however, is a normal business purpose. The Court apparently ignored the need to allow monopolists some discretion in making business decisions.¹⁴⁹ Ski Co. terminated the joint marketing arrangement, a profitable business venture, because it thought that it could increase revenues by attracting those skiers whose dollars would otherwise go to Highlands under the joint ticket.¹⁵⁰

Aspen Skiing arguably stands for the inflexible proposition that a lawful monopolist's termination of any profitable business venture with a smaller rival gives rise to antitrust liability. Moreover, as the Ninth Circuit recently held, *Aspen Skiing's* reasoning would even sanction a desire to increase short-term profits as a normal business justification.¹⁵¹ The *Aspen Skiing* Court believed, however, that Ski Co. aimed to economically injure Highlands more than pursue efficiencies, in part because Ski Co. would have reaped increased ticket revenues had it cooperated with Highlands after Ski Co. terminated the joint ticket.¹⁵²

The presence or absence of a legitimate business justification is perhaps the most reliable factor in the Court's section 2 inquiry. A legitimate business justification can offset an inference of anticompetitive intent¹⁵³ resulting from evidence of an adverse impact on rivals or consumers. More important, allowing a monopolist to avoid section 2 liability by presenting a normal business justification is consistent with the most important antitrust goal:¹⁵⁴ promoting vigorous competition. Courts should not deny firms whose market

¹⁴⁸ *Id.* at 608-09.

¹⁴⁹ *Cf.* *Byars v. Bluff City News Co.*, 609 F.2d 843, 862 (6th Cir. 1979) (citing *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 711-13 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1979); *International Rys. of Cent. Am. v. United Brands Co.*, 532 F.2d 231, 239-40 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976)).

¹⁵⁰ 472 U.S. at 592.

¹⁵¹ *See* *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir. 1985) (desire to make more money is proper motive consistent with *Aspen Skiing*), *cert. denied*, 106 S. Ct. 1471 (1986).

¹⁵² 472 U.S. at 610.

¹⁵³ *See supra* note 147 and accompanying text.

¹⁵⁴ The basic debate concerning the underlying policies of antitrust law is between those who believe that allocative efficiency should be the exclusive goal and those who urge that antitrust policy should consider certain competing values, including maximization of consumer wealth, protection of small businesses, concern over concentrations of economic wealth, and encouragement of morality in business practices. *See* H. HOVENKAMP, *supra* note 11, § 2.1, at 41-42. For the best statement of the efficiency view, see Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). For a

success places them in dominant positions the right to compete through increased efficiency or superior products.

C. Lower Courts Should Narrowly Construe *Aspen Skiing*

Read broadly *Aspen Skiing* might suggest that a qualified duty exists on all monopolists to cooperate with their smaller rivals. The factual posture of *Aspen Skiing*, however, militates against such a broad application of the decision. First, the defendant in *Aspen Skiing* did not simply terminate the joint ski lift ticket; Ski Co. engaged in a wide range of exclusionary practices¹⁵⁵ in its attempt to disassociate itself from the all-Aspen venture. These exclusionary practices gave rise to a strong inference of anticompetitive intent and effect.¹⁵⁶ Second, the all-Aspen ticket was an efficient marketing tool; its termination and substitution with unilaterally offered services was inefficient.¹⁵⁷

Ski Co.'s exclusionary conduct went far beyond a refusal to engage in joint marketing. The Court emphasized at the outset that Ski Co. had not merely rejected a novel offer to participate in a cooperative venture; rather, it had unilaterally terminated a financially successful venture that had persisted for several years.¹⁵⁸ Ski Co. had even refused to deal with Highlands on a seller-buyer basis,¹⁵⁹ thereby excluding Highlands from the multimountain ski services market. Ski Co. also conducted an advertising campaign that conveyed the impression that Ski Co.'s three mountains were the only ski facilities in Aspen. The Court concluded that the totality of Ski Co.'s conduct supported an inference that Ski Co. was motivated, not by efficiency or business concerns, but by a willingness to sacri-

statement supporting the view that antitrust policy should concern itself with competing values, see Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

Some view *Aspen Skiing* as setting forth a compromise between those Supreme Court Justices who supported the "efficiency" theory and those Justices who advocate inclusion of "competing values." Malina, *Supreme Court Update—1985*, 54 ANTITRUST L.J. 289, 295 (1985). Under this theory, the business justification could be seen as the price of accepting intent analysis and the creation of a qualified duty to cooperate.

¹⁵⁵ Ski Co.'s refusal to sell tickets in bulk to Highlands was a refusal-to-deal. Ski Co.'s price reduction of its three-area tickets resembled predatory pricing, at least in a nontechnical sense. Ski Co.'s price increase on its single-day tickets arguably was "raising rival's costs." Finally, the deceptive advertising campaign was what antitrust litigants would call a "dirty trick."

¹⁵⁶ 472 U.S. at 610.

¹⁵⁷ See *supra* notes 124-32 and accompanying text.

¹⁵⁸ 472 U.S. at 603.

¹⁵⁹ See *supra* notes 78-82 and accompanying text. Two of Ski Co.'s proffered business justifications, that it could not properly monitor usage and that the surveys were disruptive, even if believed, would not have explained its refusal to grant access. Ski Co.'s reason for refusing to accept the vouchers—administrative inconvenience—was quickly dismissed by the Court, as it appeared to have been a self-serving *ex post facto* excuse. 472 U.S. at 609-10.

fice short-term benefits and consumer goodwill in anticipation of a long-term impact on Highlands.¹⁶⁰ *Aspen Skiing* imposed antitrust liability upon a monopolist whose numerous injurious acts all lacked legitimate business justifications. Thus, courts should limit *Aspen Skiing* and impose antitrust liability only when a monopolist goes far beyond a mere refusal to engage in joint marketing.

Courts should further limit any duty to cooperate to cases, such as *Aspen Skiing*, where the cooperative venture is demonstrably efficient, relative to its substitute. Specifically, a joint venture is more efficient than its substitute when market demand or output under the joint venture is greater than under its substitute. The opinion states that most skiers in Aspen preferred a four-mountain pass over a three-mountain pass. Thus, market demand was greater under the all-Aspen arrangement than when each firm sold its ski passes separately.¹⁶¹ In addition to its efficiency enhancing features, the joint ticket did not produce the anticompetitive effects sometimes associated with a cooperative venture,¹⁶² such as price fixing or competition reduction.¹⁶³

Finally, and perhaps most important, courts should further limit the duty to cooperate as articulated in *Aspen Skiing* to instances where barriers prohibit potential competitors from entering the market or prevent existing rivals from increasing their output.¹⁶⁴ Because of practical considerations and regulatory obstacles, no new major ski facilities could be developed in Aspen. Thus, the threat of new competition could not thwart any attempt by Ski Co. to charge monopoly prices.¹⁶⁵ In Aspen, the market could not self-correct.

¹⁶⁰ 472 U.S. at 610-11.

¹⁶¹ *Id.* at 605-07.

¹⁶² As a consequence of a prior consent decree, Ski Co. and Highlands had been forbidden from fixing prices. Further, whereas joint ventures typically threaten to reduce the level of competition between the participating parties, mere joint marketing like the all-Aspen ticket allows the parties to continue competing both in price and related services. See Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1531 (1982).

¹⁶³ One commentator opines that the all-Aspen ticket provided a forum for horizontal price fixing and that *Aspen Skiing* carves out an exception to the rule that horizontal price fixing is illegal per se. Cirace, *An Economic Analysis of Antitrust Law's Natural Monopoly Cases*, 88 W. VA. L. REV. 677 (1986). Cirace states that integration of pricing was necessary for the natural monopoly (multimountain capacity) to be realized. This efficiency aspect of "horizontal price fixing . . . outweighed its anticompetitive impact." *Id.* at 726.

¹⁶⁴ See *supra* note 10 and accompanying text.

¹⁶⁵ Arguably, the lower court may have mistakenly defined the relevant market too narrowly. An alternative definition of the relevant geographic market would include other destination ski resorts, in which case competition from these resorts would deter Ski Co. from attempting to reap monopoly profits. See *supra* note 8 and accompanying text.

Aspen Skiing is an important, but limited, precedent. *Aspen Skiing* does not stand for the proposition that once a monopolist extends a helping hand to a competitor, withdrawing that assistance must give rise to antitrust liability.¹⁶⁶ Nor does the case suggest that a monopolist's refusal to enter into a new joint venture with a competitor where none existed before could never constitute monopolization. Courts should therefore construe *Aspen Skiing* as setting forth a qualified duty to cooperate with smaller rivals, limited to situations where the defendant has engaged in exclusionary practices in addition to the refusal-to-cooperate, the joint product or service is more efficient (results in higher output or demand) than its alternative, and where barriers severely hinder entry into the relevant market.

CONCLUSION

The Supreme Court in *Aspen Skiing* ensured that the underlying verdict in this case was not misinterpreted as creating a general duty on monopolists to help their rivals survive in the market. In upholding the jury verdict of monopolization, however, the Court relied upon factors—harm to competitors, “superiority” of the joint product, and lack of a legitimate business purpose—that do not provide a meaningful basis for distinguishing between aggressive competition and exclusion.

The resulting uncertainty is exacerbated by the increased weight the Court assigned to the jury's ability to infer anticompetitive intent from conduct that could be explained either as aggressive competition or exclusion. *Aspen Skiing* was an easy case; the defendant had gone far beyond a mere refusal to cooperate. Its conduct covered a wide range of exclusionary practices. Future cases will not be so easy. Because all businesses seek to increase their market share at the expense of their rivals, intent analysis is diversionary. The possibility of understandable and workable differentiations between practices designed solely to exclude competition, and those practices that, although they might harm competitors, actually promote efficiency and should be tolerated, is further discouraged under an intent standard.

To avoid *Aspen Skiing's* slippery slope, courts should limit the duty to cooperate to instances where cooperation already exists,

¹⁶⁶ Presumably, a monopolist that extricates itself from a joint venture could incur liability under contract theories of equitable or promissory estoppel or implied contract. The same conduct could also give rise to tort liability by analogy to the common law tort principle that although no affirmative duty exists to help a bystander in distress, once offered it may not be withdrawn, at least where withdrawing diminishes the chance of rescue by another bystander. *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986), cert. denied, 107 S. Ct. 1574 (1987) (citing *Jackson v. City of Joliet*, 715 F.2d 1200, 1202 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984)).

where the joint product or service is demonstrably more efficient than its alternative, and where barriers severely hinder entry into the market. Without this limitation, the issue of when a monopolist must cooperate with its smaller rival will remain "unsettled and vexatious."

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