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No. 84-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether under § 2 of the Sherman Act a firm with market power can be found to have a duty to cooperate with its smaller rivals in a court-ordered scheme of mandatory joint marketing?

2. Whether a firm can be found to have violated § 2 of the Sherman Act under the "essential facilities" or "bottleneck" doctrine not by denying a competitor access to an input necessary to its production process, but rather by refusing to combine with the competitor in the joint marketing of both firms' output to the public?

3. Whether a firm's refusal to participate in a joint marketing scheme demonstrates an unlawful intent to create or maintain a monopoly, in violation of § 2 of the Sherman Act?

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 738 F.2d 1509 (1984) and appears at Pet. App. 1a.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1984. Pet. App. 40a. By order of July 31, 1984, the court of appeals stayed its mandate until September 2, 1984. Pet. App. 41a. By order of August 28, 1984, that court further stayed its mandate until October 2, 1984. Pet. App. 42a. On September 28, 1984 the petitioner filed its Petition for a Writ of Certiorari. On December 3, 1984, this Court granted the petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, Title 15

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Petitioner, Aspen Skiing Co. ("Ski Co."),[1] was founded in 1946. Since the 1960's, it has operated three skiing mountains near Aspen, Colorado—Aspen Mountain (also called "Ajax"), Snowmass, and Buttermilk. Respondent, Aspen Highlands Skiing Corporation ("Highlands"), since 1958, has operated another skiing mountain nearby—Aspen Highlands. All four mountains have been operated pursuant to Forest Service permits.

Skiers generally use one mountain per day. Each firm issues single-day and multi-day lift tickets. Ski Co.'s have always been usable at any of its mountains. A joint six-day ticket, usable at both firms' mountains, was issued from 1962-63 through 1971-72 and from 1973-74 through 1977-78. J.A. 26, 153-55; Tr. 170. Its price was set by agreement of the firms, and revenues were divided on the basis of estimated usage of each firm's facilities, except that in 1977-78 fixed percentages were used. From 1973-74 through 1976-77, neither firm offered its own six-day ticket.[2]

In December, 1975 the Colorado Attorney General attacked, under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1,2 (1982), the conduct involved in setting the price of the joint ticket. (Ex. X, Tr. 229). A 1977 consent decree permitted the ticket but required each firm to set its own ticket prices unilaterally (Ex. 26; Tr. 229).

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[1] This action was brought against Aspen Skiing Corporation and two wholly-owned subsidiaries. The three defendants were subsequently reorganized into a partnership known as Aspen Skiing Company, which was substituted for its predecessors. For convenience, we treat Ski Co. as having existed at all relevant times.

[2] Each firm offered a basic ticket, its own daily ticket, in every year from 1962-63 through 1980-81 (Tr. 1508, 157, 216-17).

Ski Co. offered its own seven-day ticket in 1962-63 through 1964-65, J.A. 154, and a six-day ticket in 1965-66, 1966-67, 1969-70, 1972-73, and 1977-78 through 1980-81, J.A. 79, 154-55. In 1967-68 and 1968-69, it

Footnote continued on next page

During the following season, 1977-78, the joint ticket was continued, but for the first time since 1972-73 Ski Co. offered its own six-day ticket in competition with it. During the next three seasons, 1978-79, 1979-80, and 1980-81, Ski Co. effectively declined to participate in a joint ticket,[3] and each firm offered a competing six-day ticket package. Ski Co.'s sole reason for refusing to continue the joint ticket was that it thought it could do better on its own, and did not want to help Highlands. *See* pp. 44-45, *infra*.

In 1979 Highlands filed this action alleging violations of §§ 1 and 2 principally due to Ski Co.'s withdrawal from the joint ticket. J.A. 1. At a Ski Co. board meeting, one

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Footnote 2 continued

offered one-week tickets. J.A. 154. In addition, at various times, it offered two-day, three-day, four-day and five-day tickets. J.A. 81-83, 139, 154-55. *See generally* Ex. 47, Tr. 181 (not excluded from exhibit list p. 4).

The record covers Highlands' offerings in detail only for 1970-71 and 1972-73 forward. Highlands offered its own six-day ticket in 1978-79 through 1980-81 (Ex. 15, Tr. 180). It offered its "Adventure Pack," described in text, *infra*, in those years. *Id.* In 1972-73, when there was no joint ticket, it offered a ten-day ticket. *Id.* It offered a three-day ticket in each year from 1973-74 through 1980-81. *Id.*

Thus, the years in which no joint ticket was offered were 1972-73, 1978-79, 1979-80, and 1980-81. In 1972-73, Ski Co. offered a six-day ticket; and Highlands, a ten-day ticket. In each of the other years when no joint ticket was offered, each firm offered its own six-day ticket. Highlands did not offer a six-day ticket of its own in any year when a joint ticket was offered. Ski Co. did not offer a six-day or seven-day ticket of its own when a joint ticket was offered in 1973-74 through 1976-77. It did offer a competing six-day ticket in 1977-78, the year before it withdrew from the joint ticket arrangement.

[3] In fact, Ski Co. offered to continue the joint ticket if Highlands would accept a 12.5% share of the revenues from it. Highlands refused, and contended that Ski Co. knew its offer would be unacceptable and intended that it be rejected. We treat the verdict as sustaining Highlands' interpretation.

member of management commented in reference to the Colorado Attorney General's suit and Highlands' action: "You are damned if you do and you are damned if you don't." J.A. 55.

The case was tried to a jury in June, 1981. Highlands' principal claim was that Ski Co. had monopolized by refusing to cooperate with Highlands: by refusing to continue the joint ticket, by refusing to facilitate Highlands' substitute joint ticket scheme, and by offering its own six-day ticket in competition with the joint ticket and later with Highlands' joint ticket scheme.

The jury was instructed that it could find both a relevant product market and submarket and both a relevant geographic market and submarket. It found that the relevant product market was "[d]ownhill skiing at destination ski reorts," and that the relevant product submarket was "[d]ownhill skiing services in Aspen [sic] including multi-area, multi-day lift tickets." J.A. 186-87. It found that the relevant geographic market was "North America," and that the relevant geographic submarket was the "Aspen area." J.A. 187. It also found that Ski Co. had monopoly power during the four skiing seasons that constitute the damage period (1977-78 through 1980-81). These findings are not challenged in this Court.

Although the court of appeals refers to "the market for [multi-day, multi-mountain] tickets," Pet. App. 20a-21a, no such market was claimed at trial, and none was found by the jury.[4] Rather, as just noted, the jury found that multi-area, multi-day lift tickets were included in the submarket of downhill skiing services in Aspen.

The jury further found for Ski Co. on the § 1 claim and for Highlands on the monopolization claim. It awarded

[4] Highlands also invokes this non-existent market in its Opposition to Petition for Writ of Certiorari 17.

damages of $2.5 million, trebled to $7.5 million.[5] Attorneys' fees and interest have since been added.

The trial court entered an injunction requiring Ski Co. to cooperate with Highlands in offering a joint ticket. J.A. 192-96. The two firms must confer and agree on the ticket price. Where they have not agreed, the court has set the price, terms, and conditions of the joint ticket; and has resolved disputes about allegedly excessive competition between Ski Co.'s own tickets and the joint ticket. The trial court, recognizing the pro-competitive character of Ski Co.'s six-day ticket, allowed it to continue. J.A. 196. Although Highlands filed a cross-appeal, it did not contest the trial court's upholding of that ticket.

SUMMARY OF ARGUMENT

Preservation of the incentive to compete requires that attainment of monopoly power through competition on the merits not be penalized as soon as it is achieved. Substantial exclusionary conduct should be a required element of monopolization. Under any reasonable definition of "exclusionary conduct," Ski Co.'s refusal to engage in joint marketing with its horizontal competitor was not exclusionary. It did not restrain Highlands from bringing its services to market; it did not restrain consumers from choosing between the two firms on the merits; it was not predatory; and it did not depend for success on the exercise of monopoly power. The joint marketing arrangement demanded by Highlands would have depressed competition

[5] The jury's award included 1977-78, when there had been a joint ticket, and Ski Co. had offered its own competitive six-day ticket. On appeal, Ski Co. contended that its own ticket was not anti-competitive and that therefore the damage award could not stand. The court did not deny that Ski Co.'s own six-day ticket was lawful, but it upheld the award. Pet. App. 28a-29a n.21. The court's finding that the 1977-78 division of revenues was unfair to Highlands (Pet. App. 29a-31a) puts the court in the dubious business of evaluating the worth to the parties of consensual transactions. See pp. 26 n.28, 49-50, *infra*.

and given it a free ride. Ski Co.'s refusal to sell its lift tickets to Highlands or to accept Highlands' coupons for admission to Ski Co.'s facilities was also not exclusionary. It was merely a corrollary of Ski Co.'s decision to compete, rather than cooperate, with Highlands. Ski Co.'s offering of its own six-day ticket was not exclusionary; it did not restrain Highlands or consumers.

The essential facilities doctrine does not apply to this case. There was no leveraging of monopoly power in one market to exclude or distort competition in another. Ski Co. was not vertically integrated, and produced no goods or services needed by Highlands to produce or deliver its own services. Ski Co. had no essential facility. Highlands sought to buy from Ski Co. a service that competed with its own service. Highlands is in the same position as any firm that over many years has opportunities to take long lead-time steps to remain competitive, but fails to take them.

Neither the logic of § 2 nor any decision of this Court permits a finding of monopolization, in the absence of exclusionary conduct, on the basis merely of monopoly power plus improper intent. Moreover, there was no evidence, from conduct or from statements, that Ski Co.'s intent was anti-competitive, rather than competitive.

Ski Co.'s refusal to cooperate is lawful under the *Monsanto-Colgate* doctrine.

ARGUMENT

Introduction: The Development Of The Law Of Monopolization

One rule and two themes relevant here have persisted throughout the history of § 2. The rule is that the statute does not prohibit "mere" monopoly, or monopoly "in the concrete".[6] The first theme concerns the types of conduct

[6] Standard Oil Co. v. United States, 221 U.S. 1, 60-62 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179-83 (1911); United

Footnote continued on next page

that, in the gaining or retaining of monopoly power, constitute monopolization. The second concerns the relevance of anti-competitive intent.

The logic of § 2—the incentive to compete that it (with the rest of the antitrust laws) seeks to promote—requires that the attainment of market power, or even monopoly, through proper means not be penalized as soon as it is achieved. *United States* v. *United States Steel Corp.*, 251 U.S. at 450-51. If it were, the law would deter firms having or even approaching substantial market power from competing, and thus would be "at war with itself." *United States* v. *American Tobacco Co.*, 221 U.S. at 180.[7]

The Senate debates on the Sherman Act reflect a clear distinction between monopoly attained by superior skill in

Footnote 6 continued

States v. Unites States Steel Corp., 251 U.S. 417, 450-51 (1920); United States v. International Harvester Co., 274, U.S. 693, 708 (1927); United States v. Aluminum Co. of America, 148 F.2d 416, 429-32 (2d Cir. 1945) ("*Alcoa*"); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740 n.14 (1984).

[7] It has been argued that mere monopoly plus long persistence and a likelihood that judicial intervention can restore competitive conditions should justify under § 2 equitable relief for the Government, but not treble damages or criminal prosecution. This approach would preserve the finding of a violation, but not the rationale, in *Alcoa*. *See, e.g.*, Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1217-25 (1969); Breyer, *The Problem of the Honest Monopolist*, 44 ABA Antitrust L.J. 194, 200 (1975); 2,3 P. Areeda & D. Turner, ANTITRUST LAW ¶¶ 311-13, 623 (1978) [hereinafter cited as "Areeda & Turner"]. *Contra*, Noble, *"No Fault" Monopolization: Requiem or Rebirth for Alcoa?* 17 N. Eng. L. Rev. 777, 799-805 (1982). The decision in this case need not affect the issues whether it is appropriate to have different standards under § 2 for Government equity suits and private treble damages actions, and, if so, under what standards the Government should be entitled to relief.

competition on the merits[8] and monopolization, involving "something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons in the same business."[9] This distinction was refined and applied in this Court's early § 2 cases.[10] There, following common law precedents, the Court also inferred improper intent from the exclusionary nature of conduct.[11] It does not appear,

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[8] This category of conduct is what Judge Learned Hand later described in *Alcoa* as "honestly industrial." 148 F.2d at 431. *See also* Turner, *The Scope of "Attempt to Monopolize,"* 30 The Record of the Ass'n of the Bar of the City of New York 487, 494 (1975).

[9] 21 Cong. Rec. 3151-52 (1890), reprinted in Trusts: Bills and Debates, S. Doc. 147, 57th Cong., 1st Sess. (1903). The explicators of § 2, Senators Edmunds and Hoar, probably drafted the legislation that became the Sherman Act. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 n.10 (1940).

[10] Standard Oil Co. v. United States, 221 U.S. at 75-76 (development of business power by usual or normal methods contrasted with methods reflecting an intent to exclude competitors); United States v. American Tobacco Co., 221 U.S. at 181 ("mere exertion of the ordinary right to contract and to trade" distinguished from "methods devised in order to monopolize the trade by driving competitors out of business"); United States v. Reading Co., 253 U.S. 26, 57 (1920) ("normal expansion to meet the demands of a business growing as a result of superior and enterprising management" distinguished from "deliberate, calculated purchase for control"); United States v. Southern Pacific Co., 259 U.S. 214, 230 (1922) ("normal and natural growth and development" distinguished from "the formation of holding companies, or stock purchases, resulting in the unified control of different roads or systems, naturally competitive"). *See also* FTC v. Curtis Publishing Co., 260 U.S. 568, 582 (1923).

[11] *E.g.*, Standard Oil Co. v. United States, 221 U.S. at 51-58, 76; United States v. American Tobacco Co., 221 U.S. at 182-83 ("wrongful purpose" "established" by six categories of conduct and circumstances). *Cf.* United States v. Patten, 226 U.S. 525, 543 (1913) (no specific intent required for violation of § 1; only relevant intent is that to engage in the conspiracy that violates the act); International Harvester Co. v. Missouri, 234 U.S. 199, 209 (1914) (combinations to defeat competition not saved by good intentions). On rare occasion, extrinsic evidence of subjective intent was cited. *E.g.*, United States v. Reading Co., 253 U.S. at 44-45.

however, that intent independent of conduct was a significant factor in any of the decisions.[12]

During the late 1940's, when America enjoyed world supremacy, the original understanding of the conduct element of monopolization was challenged in decisions addressing Government attacks on entrenched monopolies.[13] The lead was taken by Judge Learned Hand in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"). In language susceptible of varying interpretation, he suggested that a monopoly can escape condemnation under § 2 only where the firm enjoying it is "the passive beneficiary . . ., following upon an involuntary elimination of competitors by automatically operative economic forces," *id.* at 430.[14] If the conduct that brought about or maintained the monopoly tended to make it

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[12] In Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (Holmes, J.), the Court held, in the context of a charge of attempt to monopolize, that otherwise lawful acts, when bound together as part of an unlawful plan, may be unlawful. That conclusion was not specific to § 2, but followed from the principles governing the general law of attempt. The specific intent required for attempt to monopolize is not required for monopolization. United States v. Griffith, 334 U.S. 100,105 (1948).

[13] These cases are sometimes viewed as taking a "structural" (as distinguished from a "conduct") approach to § 2 issues. *E.g.* Comment, *Draining the ALCOA "Wishing Well": The Section 2 Conduct Requirement After Kodak and CalComp*, 48 Fordham L. Rev. 291 (1979).

[14] *Alcoa* is sometimes regarded as having recognized as lawful a monopoly resulting from "superior skill, foresight and industry," 148 at 430, or from conduct that is "honestly industrial," *id.* at 431. It is not clear that Judge Hand in fact recognized an exception in such terms from the prohibitions of § 2. With respect to monopolies resulting from natural circumstances, changes in demand or efficiency, or superior skill, etc., he commented (i) that "a strong argument can be made" against their condemnation, (ii) that the most extreme expression of this view was in *U.S. Steel* and *Harvester* [*supra*, n.6], and (iii) that "whatever authority [this view] does have was modified by the gloss of Cardozo, J. in *United States v. Swift & Co.*, 286 U.S. 106, [116 (1932)]."

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harder for rivals to enter or survive and was "not inevitable," it was unlawful, *id.* at 431.

Alcoa's attenuation of the conduct element (with its paradoxical ambiguities) was apparently adopted by this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946) ("*American Tobacco (II)*"), and *United States* v. *Griffith*, 334 U.S. 100 (1948). *See also United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 171-73 (1948); *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 390-91 (1956). In *American Tobacco (II)*, the Court, in *dicta*, endorsed some of the principal passages in *Alcoa*, 328 U.S. at 811, 813-14, and also quoted approvingly: ". . . trade and commerce are 'monopolized' . . . when, as a result of efforts to that end, such power is obtained that a few persons acting together can control . . . prices. . . ."[15] The critical phrase, "efforts to that end," is undefined. *American Tobacco (II)* involved a conspiracy, not unilateral conduct; and the Court noted that defendants had engaged in exclusionary conduct, which was evidence of a subjective intent to exclude. 328 U.S. at 804.

Footnote 14 continued

148 F.2d at 430. Moreover, he expressed the view that to "interpret 'exclusion' as limited to maneuvres not honestly industrial, but actuated solely by a desire to prevent competition ... would ... emasculate the Act," *id.* 148 F.2d at 431. It is not entirely clear what Judge Hand would have said about manoeuvres "honestly industrial" actuated by a desire to maintain monopoly power through vigorous competition.

[15] 328 U.S. at 811. The passage is from United States v. Patten, 187 F. 664, 672 (C.C.S.D.N.Y. 1911), *rev'd on other grounds*, 226 U.S. 525 (1913). The quotation continued: "It is not necessary that the power thus obtained should be exercised. Its existence is sufficient." 328 U.S. at 811, quoting 187 F. at 672. This point relates not to the acquisition or maintenance of monopoly power, but rather to whether, once acquired and maintained, it is exercised to raise prices or exclude competitors. Monopolization does not require actual raising of prices or exclusion of competitors. *E.g.*, United States v. Union Pacific R.R., 226 U.S. 61, 88 (1912); United States v. Reading Co., 253 U.S. at 58.

In *Griffith*, 334 U.S. at 107, the Court observed:

> [M]onopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 . . . is aimed, *inter alia*, at the acquisition or retention of effective market control. [*Alcoa*.] Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of §2, provided it is coupled with a purpose or intent to exercise that power. [*American Tobacco (III)*] . . . [T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

The first sentence says that monopoly, however acquired, *may* be condemned; by implication, not all monopolies are condemned. The Court noted that ownership of the one theatre in a one-theatre town would not be unlawful, nor would an exclusive license to exhibit a film. 334 U.S. at 106. The second sentence suggests that condemnation-or-not depends on how the monopoly was acquired or retained, *i.e.*, by what kind of conduct. The third sentence suggests, however, that the determining factor is not conduct, but the purpose or intent with which the monopoly was to be used. *But see* 334 U.S. at 105. The fourth sentence seems to define a more substantial exclusionary conduct element than that contemplated in *Alcoa*: conduct involving the abuse of monopoly power. The Court found Griffith to have engaged in such conduct by leveraging its monopoly power in closed towns to gain advantage in open towns.

What is most surprising in *Griffith* is the survival of any reference to purpose or intent. Judge Hand had "disregard[ed] any question of 'intent.'" 148 F.2d at 431. No specific intent to gain or maintain a monopoly was required; the only intent necessary was that to engage in the acts that brought about or preserved the monopoly. *Id.* at 432.

Finally, in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), the Court summed up the offense in the formula relied on by lower courts ever since:

> The offense of monopoly under § 2 . . . 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.

The formula fails to make clear whether the distinction is between two kinds of conduct or two kinds of intent. It is unclear what is added by "willful," a term often requiring a specific mental element beyond general intent. R. Perkins, CRIMINAL LAW 820-22 (1957). Presumably, any competitive strategy is willful. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1219 (1969). In light of Judge Hand's observation that "no monopolist monopolizes unconscious of what he is doing," 148 F.2d at 432, quoted in *Griffith*, 334 U.S. at 105, understanding of the second element of the *Grinnell* formula is not aided by the Court's observation that because "this monopoly power was consciously acquired," there was no need to consider the burden of proof on whether the monopoly was attained by proper means, 384 U.S. at 576 n.7. Nor is light shed by the statement that "this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose," *id.* at 571, particularly when coupled with the comment that "this monopoly was achieved in large part by unlawful and exclusionary practices." *Id.* at 576.

Even during the period of *Alcoa*, *American Tobacco (II)*, and *Griffith*, Judge Hand's view of §2 was not universally accepted. *See, e.g.*, *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227-28 (1947); *United States* v. *New York Great A. & P. Tea Co.*, 175 F.2d 79, 82, 87-88 (7th Cir. 1949); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 342-43 (D.Mass. 1953), *aff'd p.c.*, 347 U.S. 521 (1954).

In recent treble damage actions dealing with aggressive competitive conduct by large firms, many courts have re-emphasized the public importance of high standards of performance and vigorous competition even by firms with dominant positions in U.S. markets.[16] This emphasis derives from the legislative origins of the Sherman Act and the cases that established its fundamental interpretation. See pp. 7-9, *supra*. It also carries out this Court's clear directive that, under this Act, competition is the *only* value to be considered, *e.g.*, in Rule-of-Reason analysis under §1. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691-92, 695 (1978); *NCAA* v. *Board of Regents*, 104 S. Ct. 2948, 2969 (1984). There is no reason why the fundamental value should be different under §2. The congressional policy of competition requires substantial exclusionary conduct as an element of monopolization, at least in private actions. Despite *Alcoa, American Tobacco (II)*, and *Griffith*, such conduct has consistently been required. *MCI Communications Corp.* v. *AT&T*, 708 F.2d at 1108 n. 35.

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[16] *See, e.g.*, MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1114 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); Transamerica Computer Co. v. IBM, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983); Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 93 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); California Computer Products, Inc. v. IBM, 613 F.2d 727, 742, 744 (9th Cir. 1979); Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1980); Telex Corp. v. IBM, 510 F.2d 894, 927 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); Travelers Ins. Co. v. Blue Cross of W. Pennsylvania, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653, 657 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); ILC Peripherals Leasing Co. v. IBM, 458 F. Supp. 423, 444 (N.D. Cal. 1978), *aff'd p.c.* sub nom. Memorex Corp. v. IBM, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705, 718-19 (D. Hawaii 1964), *aff'd p.c.*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969).

The instant case does not present the specific (and, we submit, more difficult) issues addressed in the recent dominant firm cases. Like them, however, it presents the threshold philosophical question whether a firm with large market share has a duty under §2 to cooperate with a smaller horizontal rival. If the answer here is yes even as to a joint marketing arrangement, then those cases were wrongly decided, and a new jurisprudence of mandatory horizontal cooperation will have to be developed. If the answer here is no, the issues in those cases still remain open for review by this Court.

I. EVEN A FIRM WITH MONOPOLY POWER HAS NO DUTY, UNDER PAIN OF TREBLE DAMAGE LIABILITY, TO ENGAGE IN JOINT MARKETING WITH A COMPETITOR.

"The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." *United States* v. *Citizens & Southern Nat'l Bank*, 422 U.S. 86, 116 (1975).[17] Under *any* of the views of §2 discussed *supra*, an unintegrated firm's refusal to enter with a competitor into a treaty for joint marketing should not be held to violate §2 and should not subject the firm to liability for millions of dollars of trebled damages.

[17] *See also* United States v. Topco Associates, 405 U.S. 596, 610 (1972), *quoted in* Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 n.19 (1982); Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 538 (1983) ("our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 291 ("The purpose of the Sherman Act is not to maintain friendly business relations among firms in the same industry. . . .").

A. In a Private Treble Damage Action, Substantial Exclusionary Conduct Should be Required for Monopolization.

There are great difficulties with any view of monopolization that attenuates the requirement of exclusionary conduct, and would, in effect, impose on firms with large market share a duty to eschew robust competition and so conduct their business that less efficient rivals may enter, consume productive resources, survive, and prosper.

First, to penalize conduct that is honestly industrial (albeit "not inevitable") would dull the incentive of firms with market power to go on competing and performing efficiently, and would cost consumers some of the benefits of efficiency. It would erode the competitive vigor of American firms that have large domestic market shares, but also compete (and may well not be dominant) in foreign markets.[18] A corporate culture taught not to respond energetically to competitive opportunities at home is likely over time to lose its zeal for such opportunities abroad,[19] with obvious losses for our balance of payments and our national standard of living. *See* U.S. COMPETI-

[18] Although skiing is not a major American industry, Colorado ski resorts compete in international markets. J.A. 32, 74, 163; Ex. 75, p.5, Table 1, Tr. 181 (not excluded from exhibit list, p.6). Indeed, the jury found that North America as a whole is a relevant geographic market. J.A. 186-87.

[19] It is no accident that, in most of the cases, cited in n. 16, *supra*, the defendants were technologically innovative—*e.g.*, IBM, AT&T, Kodak. Even where the aggressive conduct at issue was not, itself, technological innovation, it flowed from the same corporate culture that fostered innovation. Leading firms' effective innovations, their successful disturbances of the comfortable status quo—whether in product design, promotion, pricing or something else—are tempting targets for treble damage actions, but also a principal basis for the future competitiveness of the American economy. On the concept of "corporate culture," see T. Peters & R. Waterman, IN SEARCH OF EXCELLENCE (1982).

TIVENESS IN THE WORLD ECONOMY (B. Scott & G. Lodge eds. 1985). Limiting the conduct element to exclusionary conduct would permit market incentives to elicit vigorous competitive conduct.

Second, if honestly industrial conduct is penalized, there are no useful guidelines for distinguishing lawful from unlawful conduct. Laws that are supposed to guide conduct but fail to do so cause great harm. L. Fuller, THE MORALITY OF LAW 33-94 (1964). Clarity of standards is particularly important in the field of antitrust, where private conduct generally is planned, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 445 (1978), and often counseled, the penalties for violation are severe, and, therefore, the law's opportunity to guide conduct is large. Although an exclusionary conduct standard does not remove all uncertainty, it draws on relatively objective economic analysis to guide firms, courts, and juries.

Third, where conduct is competitive on the merits and the law is unclear, imposition of penalties is unfair. People in business know that the antitrust laws urge them to compete. If they are penalized for trying to compete or for competing too successfully or are told they also have a *duty to cooperate with rivals*, then they are victimized not merely by unclear laws, but by laws internally in conflict. *See* L. Sullivan, ANTITRUST §34 (1977); *see also* Tr. 420. An exclusionary conduct standard, properly applied, conforms with normal expectations and is not unfair.

Fourth, the gist of a private treble damage action is to redress (three times over) private injury and deter future violations. *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556, 575 (1982). Substantial antitrust injuries do not result from structure (or from structure plus intent), but only from substantial exclusionary conduct. *Cf. Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). What is to be deterred, presumably, is not lawfully acquired market power, *see* n. 6, *supra*, nor honestly industrial conduct, but exclusionary conduct, *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 472 (1982) ("forbidden practices"); *Brunswick Corp.*, v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 485.

Fifth, without a substantial conduct element, §2 becomes a weapon to *attack* competition. Here, as in *Brunswick Corp.*, 429 U.S. at 488, the damages awarded Highlands were "the profits [it] would have realized had competition been reduced."

Finally, there is no justification for shifting money (even single damages) to a private antitrust plaintiff from a defendant that has done nothing wrong. 3 Areeda & Turner ¶630c. It is Government-brought cases alone that have spawned the range of views of the conduct element of §2. Areeda and Turner comment: "We know of no case in which damages were granted without [avoidable and improper] behavior by the defendant." 2 *Id.* ¶311c, at 34.

For these reasons, substantial exclusionary conduct should be a required element of monopolization, at least in private treble damage actions.

B. Refusal to Engage in a Joint Marketing Arrangement with a Horizontal Competitor is, Under any Reasonable Definition, Not "Exclusionary".

The following definitions of "exclusionary" (including predatory) conduct,[20] are representative:

> "[E]xclusionary" behavior should be taken to mean conduct other than competition on the merits, or other

[20] The term "exclusionary" is used herein so as to leave open the possibility that one and the same practice may be non-exclusionary when carried out by a firm with little or no market power but exclusionary when carried out by a firm with monopoly power. What determines whether the practice is exclusionary is not the intent with which it is carried out but its competitive effects in the actual circumstances.

> than restraints reasonably "necessary" to competition on the merits, that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power. 3 Areeda & Turner ¶ 626c.
>
> [T]he plaintiff must show that the defendant's acts "unnecessarily excluded competition". . . . The . . . acts are properly analyzed analogously to contracts, combinations and conspiracies under §1: the test is whether the . . . acts, otherwise lawful, were *unreasonably* restrictive of competition. . . . While this "in large measure" has the effect of making acts of monopolization "merely the end products of conduct which violates § 1," "that is not always true." [*Griffith*, 334 U.S. at 106.] Section 1 is limited to concerted activity and contractual restraints, while under § 2, individual activity may also give rise to liability. *California Computer Products, Inc.* v. *IBM*, 613 F.2d at 735-36 (emphasis in original).
>
> The first factor is whether or not the acts are ordinary business practices typical of those used in a competitive market, and secondly whether the acts constitute the *use* of monopoly power. *Telex Corp.* v. *IBM*, 510 F.2d at 925-26 (emphasis in original).

The task is to distinguish conduct that §2 should foster from conduct it should condemn. Probably no verbal formula is always apt. We suggest the following test (i) fully responds to the policies of §2, (ii) adequately reflects the general concerns expressed in the definitions just quoted, and (iii) is appropriate for the specific competitive concerns in the instant case:

> whether the conduct (a) substantially restrained the opportunity of Highlands to produce its own services and offer them to consumers, to be purchased or rejected on their merits; (b) substantially restrained the opportunity of consumers to choose on the merits between the services offered by Highlands and those offered by Ski Co.; (c) depended for its long-term success on the destruction of Highlands; or (d) could be engaged in successfully only by a firm with monopoly power.

This test is very demanding. Conduct that imposes a restraint may sometimes be justified by specific redeeming competitive benefits. Here, in view of the verdict, the only redemption we claim flows from the general competitive benefit of Ski Co.'s undisputed desire to compete with Highlands rather than help it through cooperation. The test does not require that conduct be supported by an affirmative business justification (other than a desire to compete). If conduct does not impose the kinds of substantial harmful restraints that raise antitrust concerns, is not predatory, and is not dependent on monopoly power, then it needs no justification beyond a desire to compete rather than cooperate. The philosophy of antitrust law and Anglo-American law generally is to permit (and not require justification for) conduct unless it is harmful in ways the law seeks to prevent.

1. Ski Co.'s Refusal to Continue the Joint Ticket Was Not Exclusionary.

The refusal to continue the joint ticket did not restrain Highlands' opportunity to offer its own skiing services to the market. Highlands remained totally free and fully able to offer its services, and it did so.

The refusal did not restrain consumers' freedom to choose between Highlands and Ski Co. or secure to Ski Co. the patronage of any skier who did not prefer its facilities to Highlands'. Ski Co. had to earn patronage through the means customary in the industry (principally quality and promotion). Each firm offered single-day tickets, so skiers could buy exactly as many days at each firm's facilities as they chose. Had there been substantial effective demand for a six-day ticket for skiing at both firms' facilities, it presumably would have been provided. For example, a substantial tour packager could have demanded a two-day ticket for Highlands and a four-day ticket for Ski Co., or any other such combination. *Cf.* Tr. 885,892-93.[21] The cost of the tickets would have been higher than that of a discounted single-firm six-day ticket, but the increase would have been insignificant.[22] Ski Co. also had a liberal refund policy, J.A. 155-61, so even purchasers of Ski Co. tickets were free to ski at Highlands without significant loss.

From the perspective of consumers, the joint ticket presents a risk of collusion on prices generally and other matters. Although that risk does not warrant *per se* condemnation, imposition of a mandatory joint ticket on the supposed authority of §2 stands the law on its head.

The refusal to continue the joint ticket was not predatory because the success of Ski Co.'s policy did not depend on the destruction of Highlands. The refusal merely cleared the way for Ski Co. to compete energetically for skier patronage, in the hope of earning additional patronage.

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[21] There was evidence that Ski Co. refused to sell single-day lift tickets in bulk to Highlands, J.A. 42-43, but no evidence that it refused to sell any tickets to any tour packager, group, or individual skier. There was evidence that Ski Co. was responsive to demand from skiers. In 1978-79 Ski Co. initially eliminated its three-day ticket, but restored it in response to strong consumer demand. J.A. 602. Similar demand for any other kind of ticket, including a joint ticket, would presumably elicit a similar response because the skiers who fly to Aspen can fly elsewhere in North America. That is how a healthy market works.

[22] Customers of Highlands and Ski Co. are mobile, well-educated, and affluent. J.A. 32, 74, 89-90. Even excluding transportation to and from Aspen, skiers staying in Aspen pay per day (for lodging, meals, entertainment, etc.) eight to nine times the cost of a lift ticket. Tr. 773-74. Ski Co.'s discount on its three-area, six-day ticket was $2/day from the daily price of $15 in 1978-79 and $16 in 1979-80; in 1980-81, the discount was $1/day from the daily price of $18. Ex. 47, Tr. 181 (not excluded from exhibit list, p. 4). The discount was, thus, immaterial. Tr. 872. Highlands' expert opined that, for skiers in Aspen, lift ticket prices within the range relevant here are not important. J.A. 93.

The refusal did not require the exercise of monopoly power. No market power is needed to conduct business without a joint-marketing arrangement. Here, Ski Co.'s strategy depended not on market power, but only on its having facilities it believed would attract skiers in the absence of cooperation.

Even under the most attenuated view of the conduct element—*Alcoa*'s "not inevitable" standard—a refusal to cooperate is not monopolizing conduct. Even *Alcoa* requires some affirmative conduct that creates a barrier to rivals' entry or survival. Ski Co.'s conduct did not create any barrier. It removed the umbrella that had partially sheltered Highlands from the demands of the market.

Where a joint marketing arrangement is voluntary, each party presumably finds it to be in its interest, and consistent with its receiving the full benefits of its own productive (including promotional) expenditures: *i.e.*, the terms of the arrangement do not create an unacceptable free-rider problem. Because each firm is presumably the best judge of how to employ its economic resources,[23] its voluntary decision to join or not join the arrangement presumably reflects the use of its resources that is in fact most advantageous to it. If the arrangement is lawful,[24] these

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[23] 1 A. Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (1776) (R. Campbell, A. Skinner & W. Todd eds. 1981).

[24] Any such arrangement is, of course, subject to scrutiny under § 1. The focus of such scrutiny would be whether any benefits to the competitive process arising from the arrangement outweigh any restraints on competition created by it, and whether the benefits could be achieved by means less restrictive of competition. The benefits, in the case of a ski area, might include enhanced competition with other ski areas. *See generally, e.g.*, NCAA v. Board of Regents, 104 S. Ct. 2948, 2961-62, 2967 (1984); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 18-23 (1979); Continental T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36, 51-57 (1977).

voluntary decisions of individual firms will tend to produce the result economically most desirable for society.

Where as here, however, a court holds that a horizontal joint marketing arrangement may be imposed on an unwilling party, no inference of economic desirability arises. Because analyzing the effects of an arrangement is often difficult, *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343 (1982), the court may have failed to perceive free-rider problems or other harms to fullbodied competition. Indeed, the opposite inference can be drawn. The unwilling firm will not receive the full benefit of its productive expenditures, and will shift its strategies and behavior in ways it considers (and that presumably are) sub-optimal for itself, unduly beneficial to its rivals, and a less efficient use of its resources. This last point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979); *NCAA* v. *Board of Regents*, 104 S. Ct. at 2964. In the instant case, the court below failed to recognize economically significant harms to competition and free rider problems.

First, the joint ticket had the effect of depressing competition in national and North American advertising.[25] Highlands and Ski Co. had opportunities to compete at two geographic levels—a national or North American level, and a local, Aspen level. J.A. 75, 186-87; Tr. 2218. Each could try to sell its tickets to consumers (i) while they were planning their trips in their home communities, and (ii) to the extent that failed, after they arrived in Aspen.[26]

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[25] The informational value of commercial advertising has led this Court to give it some First Amendment protection. *See, e.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[26] Well over 90% of Aspen skiers came from outside Colorado, Ex. 75, p.5, Table 1, Tr. 181 (not excluded from exhibit list, p.6), and 70-80%

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Ticket sales at the North American or "in advance" level were made to individual skiers or to tour packagers. The standard stay in Aspen was one week, for six days of skiing. J.A. 102-03; *see also* Tr. 245-46. Skiers who booked package tours gained the convenience of obtaining all their tickets in advance. Tr. 949. There was also a small, but insignificant (*see* n.22, *supra*), discount for purchasing a six-day ticket from one firm. The packagers preferred to sell six tickets to gain increased commissions. J.A. 68-69. Thus, that segment of the market demanded six-day tickets, J.A. 68-69, 119, 129, and made them a standard item in ski tour packages, J.A. 104, 163-64, Tr. 814, 1772-73. Both Highlands and Ski Co. offered six-day tickets in response to strong market demand, arising from circumstances beyond their control. J.A. 41, 68-69, 119. Neither firm was attempting to force a six-day ticket on an unwilling market.

Highlands and Ski Co. had an opportunity to compete for inclusion of their respective tickets in ski tour packages. When no joint ticket was offered, each firm, responding to irresistible incentives, offered its own six-day (or longer) ticket. *See* n.2, *supra*. When, however, a joint ticket was offered during 1973-74 through 1976-77, neither firm offered its own six-day ticket, *id.*, presumably because to

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Footnote 26 continued

had skied there before, Tr. 768, 1768. Ski Co. sold 80-85% of its lift tickets over its counters in the Aspen area, Tr. 633, and the remainder in advance as part of ski tour packages, J.A. 84-85. These figures are typical of Aspen generally, Ex. 75, p. 31, Table 33, Tr. 181 (not excluded from exhibit list, p. 6). Highlands' position at trial was that, during the years when a joint ticket was offered, Highlands and Ski Co., at the North American or national level, did not compete with each other but cooperated in promoting Aspen skiing as a whole. *See, e.g.*, J.A. 31-32, 34-36, 91. Highlands viewed its potential customers as aware of Aspen in general, but not of the specific mountains there, J.A. 41-42; and its preferred business strategy was to leave them in that relative ignorance until they arrived in Aspen, J.A. 35-36. Highlands did not contend that there was no possibility for competition between the firms at the North American level.

compete against a joint ticket would have been to compete against its rival and itself combined. Thus, the actual effect of the joint ticket was to destroy competition between the two firms' own six-day tickets. The firms continued to compete, in Aspen, for the patronage of skiers who purchased the joint ticket, but they essentially abandoned competition at the North American level, until Ski Co. in 1977-78 offered its own six-day ticket, in a transition to the elimination of the joint ticket.

Ski Co.'s refusal to continue the joint ticket re-opened the North American competition for the patronage of those 15-20% of skiers who book package tours, as well as those who ultimately buy six-day tickets in Aspen. Highlands' response was to offer, for the first time, its own six-day tickets. N.2, *supra*; J.A. 40-42. Thus, the joint ticket suppressed, and Ski Co.'s action stimulated, new competition.

Second, the joint ticket created a free rider problem. Highlands' marketing was based on the premise that it was not in Highlands' interest to pay for unilateral advertising outside of Aspen because skiers attracted by such advertising would spend a substantial part of their time at Ski Co. facilities. *See* J.A. 99. Highlands emphasized local advertising and did only occasional and limited national or North American advertising; it left that burden principally to Ski Co. *See* J.A. 31-32, 34-35, 64, 176-77; *see also* Tr. 1302.[27] Thus, Highlands gained a free ride on national advertising. J.A. 164-65. Highlands' owner, when asked why Highlands did not belong to the National Ski Areas Association, replied: "Because Aspen Skiing Corporation belongs, and I don't need to. They take care of the big things, and I take care of my operation." J.A. 177.[28]

[27] Highlands' national advertising became more substantial in 1977-78, J.A. 38-39, when Ski Co. began to offer its own six-day ticket in competition with the joint ticket.

[28] The joint ticket depressed Highlands' overall promotional efforts. Highlands' financial statements (Ex. S, Tr. 1292) show that, immedi-

Footnote continued on next page

When Ski Co. withdrew from the joint ticket, it began to promote not only Aspen in general but also itself. J.A. 107-10, 167-68.[29] At the time of trial, Ski Co.'s marketing expenses were quite large—$1.3 million budgeted for 1981-82, Tr. 874.[30] Similarly, in the first year without a joint ticket, Highlands increased its North American advertising by promoting its own Adventure Pack, though, in subsequent years, in the face of relative lack of success, it did not maintain that advertising. Ex. 93; J.A. 30-31, 63-64.

Footnote 28 continued

ately before and after the joint ticket was offered, total expenditures for advertising and promotion were higher than they were when the ticket was offered. The figures for advertising and promotion (from Schedule E of each set of statements) were:

1972-73	$136,624	(no joint ticket)
1973-74	69,168	
1974-75	80,638	
1975-76	100,769	
1976-77	86,017	
1977-78	125,847	(Ski. Co. six-day ticket offered)
1978-79	139,844	(no joint ticket)

Division of revenues from the joint ticket on the basis of estimates of usage, the method used in the years prior to 1977-78, J.A. 24-25, Tr. 185, would not necessarily have removed the free rider problem, even as to skiers who used the joint ticket. In 1977-78, the last year of the joint ticket, a one-day lift ticket for Highlands cost $12, a one-day lift ticket for Ski Co., $13; and the six-day joint ticket, $77 ($12.83 per day). Ex. 15, Tr. 180; Ex. 47, Tr. 181 (not excluded from exhibit list p. 4); Tr. 1367. Consequently, for a day of skiing at Highlands a skier using the joint ticket paid $.83 more than Highlands' own daily price. A division of revenues on the basis of usage would have rewarded Highlands with $.83 per skier visit above what it was otherwise charging—due solely to Highlands' association with Ski Co. in the joint ticket. It is not surprising that Ski Co. was unwilling to agree to a division of revenues on the basis of usage in 1977-78.

[29] Some joint efforts to promote Aspen continued. J.A. 47.

[30] The latest figure for Highlands' advertising and promotion expense, for 1979-80, is $83,950. Ex. S, schedule E, Tr. 1292.

Third, after Ski Co. withdrew from the joint ticket, Highlands continued to seek a free ride. Highlands was perfectly capable of fashioning a six-day skiing package to meet the demand of the ski tour segment of the market, and it did so. Its own six-day ticket competed head-to-head with Ski Co.'s. Although Highlands had 12 different lifts, J.A. 56, and claimed that its mountain was as good and as varied as Ski Co.'s three mountains together, J.A. 19-20, 60-61, 127, 129, it did not rely on tickets for its mountain alone. *See* n.2, *supra.*

Highlands also created its "Adventure Pack," consisting of three tickets for Highlands and three coupons (later traveler's checks and then money orders) for use at Ski Co.'s facilities or elsewhere. J.A. 61-62, 70, 72-73. Highlands promoted the Adventure Packs extensively, J.A. 47-49; Ex. 20, Tr. 180; Ex. 23A-N, Tr. 180. About 50% of them were sold to tour operators, J.A. 133, some of whom began to offer skiers a choice of lift tickets, J.A. 103.

The key to the Adventure Pack was its inclusion of skiing at Ski Co.'s facilities. Highlands was determined to associate itself with Ski Co., whether Ski Co. was willing or not. J.A. 40-42. The 1980-81 high season Adventure Pack, for \$96, gave skiers three one-day tickets for Highlands and three \$18 money orders, each good for a day at a Ski Co. mountain or for spending elsewhere. J.A. 67-68, 97-98. Thus, skiers were paying \$96, but getting back \$54 in a cash equivalent. Why didn't Highlands simply sell the three days at its mountain for \$42 or add three more days of skiing at its own facilities? The answer is two-fold. First, as already shown, the ski tour segment of the market demanded a six-day not a three-day package. Second, the opportunity for three days of skiing at Ski Co. facilities made the package more attractive to skiers than would another three days at Highlands. J.A. 40, 97. That was so only because Ski Co. provided, and was known to provide, outstanding skiing. *Cf.* J.A. 127, 129. Highlands sought to appropriate some of the benefit of Ski Co.'s investment in the quality of its facilities,[31] its promotion of those facilities, and its good will, J.A. 164-65, earned by satisfying consumers over many years.

When Highlands asked why Ski Co. would not maintain the joint ticket, Ski Co. responded: "Well, we will not support our competition." J.A. 46. Highlands' representative testified, "That response . . . shocked me. . . ." *Id.* Judge Hand was concerned that a firm with monopoly power might opt for the easy life of half-hearted performance. 148 F.2d at 427. The seductions of the easy life appeal as well to small firms sheltered from vigorous competition by cooperative arrangements with larger firms. The end of the easy life comes as a shock.

2. Ski Co.'s Refusal to Sell Lift Tickets to Highlands and its Refusal to Accept Highlands' Adventure Pack Coupons Were Not Exclusionary.

Ski Co. refused to sell its single-day lift tickets to Highlands for the latter to include in the 1978-79 Adventure Pack. J.A. 42-43. Highlands thereupon included coupons for use at Ski Co.'s mountains, but Ski Co. refused to honor them. J.A. 43-44; Tr. 1659.[32] These refusals were not exclusionary.

Like the refusal to continue the joint ticket, the refusals to sell lift tickets to Highlands and to honor Highlands'

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[31] Ski Co.'s improvements in its skiing facilities and releated operations were extensive. *See, e.g.*, J.A. 34-37, 140-41, 144, 148-51. By contrast, the owner of Highlands could not recall when Highlands had last added a lift. Tr. 202. Another witness thought one had been added in 1975 or 1976. Tr. 302.

[32] In 1979-80 Highlands substituted traveler's checks for coupons in the Adventure Pack, and in 1980-81 it used money orders. Ski Co. accepted both the traveler's checks and the money orders. Tr. 548-49, 628.

coupons were merely refusals to engage in cooperative marketing with a competitor seeking to sell more of its own tickets than it could on its own. None of these refusals restrained Highlands' opportunity independently to offer its own services, or the opportunity of consumers to choose freely between the firms on the merits. Each firm offered a variety of tickets, enabling any skier to spend as many days with each as he or she wanted.

These refusals were not predatory. Ski Co. rejected coupons issued by Highlands because it sought to sell to actual or potential coupon-holders its own tickets, in a manner not giving Highlands a free ride. Ski Co.'s success did not depend on the destruction of Highlands, but on the attractiveness of Ski Co.'s own services. Ski Co.'s strategy was to extricate itself completely from joint marketing with Highlands, and compete successfully against Highlands on the merits. Ski Co.'s conduct, unlike any predatory conduct, was capable of sustaining itself without change or subsidy indefinitely.

Ski Co.'s refusal to sell tickets to Highlands or to honor its coupons, like the refusal to continue the joint ticket, did not depend on market power. *Any* firm that has a product it believes will be independently attractive to consumers can successfully refuse to cooperate with a competitor.

These refusals are also readily distinguishable from the conduct condemned in *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). There, a firm with a monopoly in the local newspaper market refused to sell advertising space to firms that also purchased advertising time from the local radio station. The case involved inter-market leveraging because the Journal was seeking to use its monopoly power in the newspaper market to distort competition in the radio market, which it had unsuccessfully sought to enter. The case also involved a demand for exclusive patronage (analogous to an exclusive dealership), where, because the customers were end-users rather than middlemen, there were no even arguable distributional efficiencies to justify the severe restraint on the free choice of purchasers of advertising. That fact pattern does not fit the instant case. Here, there was no leveraging between different product markets, nor any demand for exclusive patronage. Ski Co. was perfectly happy to deal with skiers who also patronized Highlands. J.A. 82, 112-13, 157, 159. Ski Co.'s conduct did not restrict consumer choices, as the Journal's did. Ski Co. did not refuse to sell to any consumer, but only to a horizontal competitor.

Ski Co.'s refusal to sell lift tickets to Highlands and to honor Highlands' coupons may appear to be unusual conduct. But it was a response to conduct more unusual—Highlands' attempt to include Ski Co. involuntarily in a joint marketing arrangement. It is not normal business behavior for a firm to seek to coerce its horizontal competitor into a joint marketing arrangement by purchasing and reselling the competitor's products with its own. It is not normal for one firm to issue coupons for admission to another firm's facilities. Resistance to such coercive schemes should require no justification (beyond a desire to compete independently on the merits) where, as here, the resistance is not shown to be exclusionary.

Creation of a duty to sell products to a competitor or to accept coupons for one's own products issued by a competitor would lead to undesirable results, as this case illustrates.

First, any firm subject to such a duty would be vulnerable to coerced inclusion in unfair schemes. The Adventure Pack allocated a minimum of three days of patronage to Highlands and a maximum of three to Ski Co. J.A. 30. Since Ski Co. had more than three times the capacity of Highlands, Tr. 624, the structure of the ticket was unfair to Ski Co. Highlands' payment of Ski Co.'s daily lift ticket price and the sales commission did not compensate Ski Co. for the loss of the opportunity to compete for the three days of patronage Highlands allocated to itself. The ticket was structured not with concern for fairness to Ski Co. or skiers, but only to protect Highlands' profits. J.A. 41. Some skiers may be indifferent to whether they spend an extra day or two at Highlands or Ski Co. There is no reason why Highlands should be able to exploit such indifference by designing a ticket package unfairly advantageous to it and coercing Ski Co.'s participation. In the long run, the Adventure Pack would have to face the test of the market, but Highlands persisted with the scheme even in the face of general consumer rejection, perhaps because it could be sold to first-time visitors. Highlands would not under any circumstances of market demand reduce the number of days allocated to it because to do so would be unprofitable. J.A. 41.[33] Thus, Ski Co. would for some time be locked into a financially disadvantageous arrangement in which it had to compete against itself.

Second, Ski Co.'s lift tickets are fungible and have a publicly-announced price. In some industries, products or services are not fungible, and prices are subject to individual negotiation. If a firm making such a product has a duty to sell it to a competitor, then competitors must negotiate about price, and presumably costs and other factors that enter into price. Such negotiations could well serve as a cover for collusion.

Third, would a duty to sell to a competitor apply only to a firm with monopoly power, or to any firm? If the former, then smaller firms would, by force of law, be able to offer joint products but larger firms would not. If the market paid a premium for the joint product, it would be captured by the smaller firms. That would be an unfair and an incentive- and efficiency-eroding disadvantage to impose

[33] In this respect, Highlands differs from an independent tour packager, who presumably is neutral as between the skiing firms. The independent packager is likely to he more responsive to market demand than Highlands and would, as appropriate, reduce Highlands' number of days to two, one or zero.

on a firm that, although enjoying monopoly power, had done nothing wrong. If all firms have a duty to sell to competitors, then a large firm could make demands on a small firm; and the courts would have to work out, case by case, what limitations, if any, to impose on the duty, so as to protect small firms. If the small firm's duty to sell to the large arises only if it invokes the large firm's duty to sell to it, then competition would take on features of a game: business strategies would address not only how to make and sell the largest quantity of the best product at the lowest cost, but also when and how to take advantage of a rival's products by asserting a right to purchase and resell them, subject to the rival's reciprocal right.

Fourth, a firm armed with an enforceable right to buy and re-sell the products of a horizontal rival might use that right, advertently or inadvertently, to injure the rival's good will. Such injury might result from, *e.g.*, inadequate point-of-sale explanation to purchasers, warranties, service, or refund policies. This concern might be partially removed by recognition of a defense of legitimate business justification (beyond desire to compete). Then, however, the risk of failure to persuade the jury would rest with the firm that internalized the guiding principle of the Sherman Act and simply wanted to compete on the merits. That healthy desire should not be so burdened. Those defeated by a larger firm competing vigorously on the merits may well elicit sympathy from juries, who may not accept that protection of inefficient firms ultimately harms consumers.

3. Ski Co.'s Offering of its Own Six-Day Ticket Was Not Exclusionary.

Neither of the courts below found Ski Co's six-day ticket unlawful. It was a response to market demand, *see* p. 24, *supra*. It did not restrain Highlands' ability to offer its own tickets to skiers. Because Ski Co. offered one-day tickets (and also, for most of the time, three-day tickets), its six-day ticket was not a tying arrangement and did not restrain the freedom of skiers to choose between Highlands and Ski Co. It was not predatory, and its success did not depend on monopoly power. It was not exclusionary.

* * *

Therefore, Ski Co.'s conduct was not exclusionary and does not support a verdict of monopolization.

II. THE ESSENTIAL FACILITIES DOCTRINE DOES NOT APPLY TO THIS CASE

The origins of the doctrine lie in *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912), and *Gamco, Inc.* v. *Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).[34] Each case involved a combination of horizontal competitors violating §1. In each, the combination had integrated backward to gain control over a service used by its members in the market in which they competed with each other. The service controlled was a *producer*, not a *consumer*, service: it would be used or transformed by each firm in carrying on its own competitive business in the downstream market. The service was essential for participation in that market.

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[34] *See also* Montague & Co. v. Lowry, 193 U.S. 38 (1904); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 47-49 (1912). Associated Press v. United States, 326 U.S. 1 (1945), is sometimes considered an essential facilities case, but really is not. The Court treated the case as involving a concerted horizontal refusal to deal, and decided it on that basis. *See, e.g.*, 326 U.S. at 4, 9 n.4, 12, 15, 18-19. It did not cite *Terminal Railroad*. The decree did not require the AP to admit non-member newspapers (the appropriate remedy in a true essential facilities situation), but rather required it merely to avoid discrimination against competitors of existing members when considering applications for membership. *Id. See also* n.39, *infra*.

The first subsequent case to present a unilateral denial of access to an essential facility was *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). *See also Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927). There, as in *Terminal Railroad* and *Gamco*, the defendant was vertically integrated, the integration gave it control of a producer good or service (bulk electric power), and that good or service was essential to participate in the downstream market (retail sales of power). There was no §1 combination, but the defendant was a regulated utility. The fact of regulation warranted an inference that, at the wholesale level, Otter Tail enjoyed a natural monopoly, and that consequently for all or most of its potential wholesale customers (municipal utilities selling at retail) bulk power truly was unobtainable elsewhere. Although Otter Tail was not regulated in all facets of its business, to the extent it was regulated as a public utility it was outside the framework of free market competition, and therefore a more suitable object than an unregulated firm for imposition of an affirmative duty to deal.[35] The already applicable regulatory process provided a convenient non-judicial mechanism for implementing a duty to deal, or at least a model a court could follow. *See* 410 U.S. at 375. This Court did not invoke the essential facilities doctrine, but, viewing the case as one of inter-market leveraging, cited *Griffith*. 410 U.S. at 377.[36]

[35] Thus, in United States v. Colgate & Co., 250 U.S. 300, 307 (1919), the Court's formulation of the right of a trader to choose the parties it will deal with limited that right to one "engaged in an entirely private business," *i.e.*, a firm other than a public utility, common carrier, inn or similar business. The "*Colgate* doctrine" is discussed at pp. 42, 48-50, *infra*.

[36] Otter Tail had two kinds of monopoly: one in the wholesale transmission market for its service area, and the other in individual towns in which it sold at retail. It is not clear whether the Court, in its analysis of leveraging, relied on a theory of horizontal leveraging based

Footnote continued on next page

Since *Otter Tail*, the doctrine has been considered in numerous lower court decisions,[37] and its elements are relatively clear:

First, it is directed at a familiar evil: the use of monopoly power in one market to exclude or distort competition in another (here, vertically adjacent) market.[38] *Cf., e.g., Griffith, supra; Lorain Journal, supra*; unlawful tying arrangements, *e.g., Jefferson County Hospital District* v. *Hyde*, 104 S. Ct. 1551 (1984). It does not matter how the monopoly was obtained, or whether the monopolist is regulated. The doctrine prohibits unilateral vertical inter-market leveraging even by a lawful monopolist.

Second, the doctrine has been applied where the defendant competed in one market and (through growth, acquisition or contract) controlled a vertically adjacent market that provided an input for the downstream market. Thus, for example, in *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), the defendant was an actual, and the plaintiff a potential, competitor in the market for professional football exhibitions; but also, the defendant, through contract, had gained control over the relevant geographic market's only suitable stadium, an essential input.

Footnote 36 continued

on the power in individual towns (as was the case in *Griffith*), or on a theory of vertical leveraging based on monopoly power at the wholesale level (on analogy to *Terminal Railroad* and *Gamco*). Only a theory of vertical leveraging would seem to fit the facts.

[37] Many of the cases are reviewed in Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 Colum. L. Rev. 441 (1983); Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv. L. Rev. 1720 (1974).

[38] *See, e.g.*, MCI Communications Corp. v. AT&T, 708 F.2d at 1132; Mid-Texas Communications Systems Inc. v. AT&T, 615 F.2d 1372, 1387 (5th Cir. 1980); Dart Drug Corp. v. Corning Glass Works, 480 F. Supp. 1091, 1097-98 n.9 (D. Md. 1979).

Third, in every case applying the doctrine, the plaintiff wanted to purchase from the integrated defendant an input (producer or wholesale good or service) with which the plaintiff's own product did not complete. None involved a *consumer* good or service that the plaintiff's product competed with and that the plaintiff wanted to buy at retail and re-sell to the public.

Fourth, the facility in question must be truly essential, in that, as a practical matter, it is necessary for entry into or survival in a market, and no substitute is available or can be created. "[A] facility is not essential merely because it is better than, or preferable to, another." *Fishman* v. *Wirtz*, 1981-82 Trade Cas. (CCH) ¶ 64,378 at 74,771 (N.D. Ill. 1981). It is not enough that a facility is "more economical" or "more beneficial." *Florida Cities* v. *Florida Power & Light Co.*, 525 F. Supp. 1000, 1007 (S.D. Fla. 1981).

The distinction between merely "advantageous" and truly "essential" is nicely illustrated in *MCI Communications Corp.* v. *AT&T*, n.16, *supra*. MCI, which was in the long distance telephone service business, demanded access to (i) AT&T's local telephone service, and (ii) AT&T's long distance network, which was much larger than MCI's. The court held that AT&T had a duty to provide the local service because it was "essential" for MCI to offer its long distance service, 708 F.2d at 1132-33. Although access to AT&T's national long distance network would have been of great benefit to MCI, the court held that AT&T had no duty to provide it because in that market MCI and AT&T were competitors and AT&T's network had not been shown to be "essential". 708 F.2d at 1148. *Accord, American Football League* v. *National Football League*, 323 F.2d 124, 131 (4th Cir. 1963).

This requirement of essentiality is particularly important where the facility in question is controlled by a single firm rather than a combination. A combination may create an unreasonable restraint of trade through control of a facility that is not essential.[39] The plaintiff's remedy in such a case need not be an order for access, but merely an injunction requiring the defendants to act independently, or prohibiting discrimination by the combination against non-members. Where a single defendant is involved, however, such remedies are unlikely to be useful, and the only remedy may be an affirmative duty to deal.

Imposition of a duty to deal with a competitor is a drastic departure from established antitrust principles, which generally recognize the freedom of firms to decide with whom they will deal, *see* pp. 48-50, *infra*, and which are suspicious of, and certainly do not encourage, dealings between horizontal competitors. Where a firm is not assured through regulation of a prescribed rate of return, imposition of such a duty would erode incentives to take risks, make investments, and compete vigorously. *Cf. MCI* v. *AT&T*, 708 F.2d at 1148-49; *Florida Cities* v. *Florida Power & Light Co.*, 525 F. Supp. at 1007. A duty to deal should not be imposed except where the facilities involved are truly essential, and the duty is necessary to prevent vertical leveraging.

The instant case does not satisfy *any* of the criteria for application of the essential facilities doctrine. First, there was no leveraging of monopoly power in one market to exclude or distort competition in another. Second, Ski Co. was not vertically integrated; it had no actual or potential vertical relationship to Highlands; it produced no goods or services needed by Highlands to offer its own services to the market. Third, Highlands did not seek to buy from Ski Co. any *producer* or wholesale service or good for use in the production or delivery of its own services, and what it sought from Ski Co. was a service (or ticket) with which its

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[39] In *Associated Press v. United States*, n.34, *supra*, the holding did not depend on any finding that the AP news service was essential. For a *combination* to restrain trade unlawfully, it is enough that it discriminatorily withhold a competitive advantage. 326 U.S. at 17.

own service (or ticket) competed. Highlands sought to buy its horizontal competitor's *consumer* service, which it wanted to re-sell to the public in a manner that would induce tag-along purchases of its own skiing services.

Fourth, Ski Co. had no essential facility. Highlands certainly was able to offer its own skiing services to the market in any unilateral form it chose. If Ski Co. had suddenly vanished, Highlands would not have been undone by lack of an essential facility, but would have enjoyed a monopoly in the Aspen market. Ski Co. may have had better facilities (a claim Highlands denies), but "better" is not "essential". The record contains convincing and undisputed evidence of non-essentiality.[40] It is a public fact, moreover, that a number of successful destination skiing areas have only one skiing mountain—*e.g.*, Sun Valley, Steamboat, and Crested Butte. Plainly, multi-mountain capacity is not *essential* to success.

The court below supported its application of the essential facilities doctrine on two grounds. First, "[i]f [Ski Co.]

[40] Ski Co.'s Snowmass attracts 95% destination skiers, and of the skiers who use Snowmass 83% ski nowhere else. J.A. 152. Since destination skiers are the ones who ski for a week at a time, J.A. 90, 129, it follows that the vast majority of those who ski at Snowmass spend all six days of their trip there.

When, after ten years, the joint ticket was eliminated for the 1972-73 season, Highlands did not claim it was being denied an essential facility, and it did not sue. J.A. 155. Nor does the record suggest that Highlands attracted fewer skiers that season than it did when the joint ticket was offered.

At the time of trial, another firm, independent of both Highlands and Ski Co., was preparing to open a one-mountain skiing operation in the Aspen area ("Little Annie") to compete without a joint ticket against both firms. J.A. 145-47, 174-76. After trial the Little Annie project failed, for reasons not shown by the record. It is clear, however, that the perception of the market was that multi-mountain capacity is not essential for success.

refuses to market a multi-day multi-mountain ticket with [Highlands], [Highlands] cannot compete in the market for such tickets." Pet. App. 20a-21a. There is no evidence of, Highlands did not propose, and the jury did not find, any such market. See p. 5, *supra*. Highlands was able to offer its services in each market the jury did find.

Second, the court noted the "difficulty" of developing another skiing mountain in the Aspen area due to regulatory restrictions, delays, and the expense and time needed for development. Pet. App. 21a. But there was, and could be, no finding that multi-mountain capacity is needed for success. See p. 38, *supra*. Even if multi-mountain capacity were needed, the court did not, and could not, find that it was impractical to develop another mountain nearby. It did not find that there were no other mountains suitable for development, or that upon a showing of need the Forest Service would not approve further development. It also did not consider that, when trial started, Highlands had been in business for approximately 23 years, more than enough time to develop additional mountains, if they were really essential. Like Ski Co., Highlands had the opportunity to develop multi-mountain capacity; unlike Ski Co., it sat by complacently. The situation of Highlands is the same as that of any firm that over many years has failed to take the long-lead-time steps needed to remain competitive in a changing market and then finds itself unable in the short term to attract as much patronage as a rival. This type of situation exists wherever one firm has gained an advantage over its rivals by investing in a more efficient factory, or in research and development, or a large network of local branches. It is the situation presented by IBM's development of its 370 generation of computers, by Home Box Office's pioneering use of a communications satellite for delivering movies to homes, and by General Motors' new Saturn project to revolutionize domestic manufacture of motor vehicles. Such undertakings require vision, planning, a willingness to take risks, and long lead-times. Under the Sherman Act, a faltering firm should have no right to tap into the superior current resources of its horizontal rival in order to protect itself from mistaken past inactivity.

III. THE DECISION BELOW CANNOT BE UPHELD ON THE THEORY THAT SKI CO.'S CONDUCT MANIFESTED AN ANTI-COMPETITIVE INTENT

A. "Anti-Competitive Intent" Does Not Transform Independent Non-Exclusionary Conduct Into Monopolization

The confusion created by prior definitions of "monopolization" is reflected in the decision below. In a civil case the only intent relevant to monopolization is the general intent to commit the acts that (together with monopoly power) constitute the offense. *United States* v. *Griffith*, 334 U.S. at 105; *Alcoa*, 148 F.2d at 432. Such intent may be inferred from the acts themselves. Beyond that, intent is irrelevant.[41]

[41] "To compete is to strive for something which another is actively seeking and wishes to gain." United States v. Union Pacific R.R., 226 U.S. 61, 87 (1912). "[A]n efficient firm may capture unsatisfied customers from an inefficient rival. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. at 2740. Because the purpose of the antitrust laws is to protect the competitive process and not individual competitors, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488, an intent to prevail in competition on the merits, even to the point of capturing all the customers of an inefficient rival is not unlawful, even if the resulting conduct is fatal to the rival. United States v. United States Steel Corp. 251 U.S. at 450; R. Bork, THE ANTITRUST PARADOX 118-19 (1978). An intent to prevail through non-exclusionary conduct is the motive force for productive efficiency and the creation of wealth for consumers. An intent to prevail through exclusionary conduct is irrelevant unless exclusionary conduct is engaged in; and, in that case, illegality should be based on the conduct, not the intent.

In a treble damage action, if a defendant with monopoly power engaged in substantial exclusionary conduct that caused injury to the plaintiff's business or property, the defendant is liable. It is no defense that its "intentions" were benevolent. If the defendant's conduct was not exclusionary, it *cannot* give rise to an inference of improper intent, and extrinsic evidence of such intent should not create liability.[42] Where there is ambiguity or doubt whether the conduct was exclusionary, extrinsic evidence of intent may shed light on its probable effects. *E.g., Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238 (1918). In sum, anti-competitive intent has no role in monopolization, except as an aid in the analysis of conduct and its effects.

Where specific intent or another mental element is required under §2 (in attempt, *see* n. 12, *supra*, and in criminal cases, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 (1978)), it is not a substitute for exclusionary conduct, but is required *in addition to* such conduct. The court below erred in holding, in effect, that otherwise lawful competitive conduct becomes monopolization if carried out with an anti-competitive intent.

The court cited five cases as supporting its reliance on intent: *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919); *Eastman Kodak Co.* v. *Southern Photo Materials Co., supra; Lorain Journal, supra; Byars* v. *Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979); and *MCI, supra*. None is on point. The rule of law for which each stands can be stated without reference to intent.

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[42] Of course, an otherwise lawful practice may become unlawful if it is part of a contract, combination, or conspiracy in restraint of trade, Associated Press v. United States, 326 U.S. at 14, and extrinsic evidence of subjective intent may be relevant to show whether a contract, combination, or conspiracy existed.

In *Colgate*, a criminal § 1 case, the Court stated:

> In the absence of any purpose to create or maintain a monopoly, the act 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 the parties with whom he will deal.

250 U.S. at 307. This reference to improper "purpose" is not self-explanatory. In the period when *Colgate* was decided (and subsequently), this Court and others did not seek or commonly rely on extrinsic evidence of subjective purpose (or intent or motive). They inferred purpose from conduct and economic circumstances. *See* n. 11, *supra*. A reference to improper purpose is, thus, a shorthand reference to improper conduct, from which an inference of improper purpose would arise. *Colgate*'s reference to "the absence of any purpose to create or maintain a monopoly" should be understood as a reference to the absence not of a particular state of mind, but of additional conduct or circumstances that make the refusal to deal exclusionary.

This interpretation is fortified by the subsequent history of the "*Colgate* doctrine". It addresses a manufacturer's interactions with distributors or retailers. Its subsequent refinements relate to the scope of permissible manufacturer *conduct* to achieve compliance with its wishes, particularly as to resale prices.[43] The cases treat the *Colgate* doctrine as focusing on conduct, not intent.

Kodak referred to anti-competitive intent, 273 U.S. at 359, but the Court merely inferred it from conduct and

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[43] *See, e.g.*, FTC v. Beech-Nut Packing Co., 257 U.S. 441, 451-55 (1922); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721-23 (1944); United States v. Parke, Davis & Co., 362 U.S. 29, 38-47 (1960); Simpson v. Union Oil Co., 377 U.S. 13 (1964); Albrecht v. Herald Co., 390 U.S. 145 (1968). *See also* Associated Press v. United States, 326 U.S. 1, 14-15 (1945).

circumstances, *id.* at 375. We would analyze the facts today under the essential facilities doctrine,[44] and would base liability on exclusionary conduct without regard to intent. Intent had no independent role in the case.

Lorain Journal was a case of attempt, not monopolization. and, therefore, specific intent was required. As usual, it was not established by extrinsic evidence, but was inferred from clearly exclusionary conduct and circumstances. *See* pp. 29-30, *supra.*

Byars concluded: "However one characterizes the approaches used, we think it clear that what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices," 609 F.2d at 860. *See also Home Placement Service* v. *Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982).

Finally, *MCI* squarely rejected a test based on intent. 708 F.2d at 1113, quoted at Pet. 20. *See also* 708 F.2d at 1148-49 (focus on intent *and competitive effect*).

There are good reasons for not enlarging the area where specific anti-competitive intent is relevant. It is extremely difficult, often impossible, to distinguish between a strong desire to prevail in competition on the merits and an intent to prevail by excluding competition. An expressed desire to drive opponents out of business may reflect merely an intent to compete effectively on the merits.[45] Anti-competitive expressions by some members of a collegial body may

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[44] Kodak was a vertically integrated manufacturer-stock house, with which Southern competed in the stock house market in the South. 273 U.S. at 368. Kodak had a monopoly at the manufacturing level, 273 U.S. at 369. Its refusal to sell photographic materials to Southern at the wholesale price was, therefore, a denial of an essential facility.

[45] *See, e.g.*, Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971); American Football League v. National Football League, 323 F.2d 124, 134 (4th Cir. 1963); Scott Publishing Co. v. Columbia Basin Publishers, Inc., 293 F.2d 15, 21-22 (9th Cir.), *cert. denied*, 368 U.S. 940 (1961).

not fairly reflect the body's collective intent. *E.g.*, *American Football League* v. *National Football League*, 323 F.2d at 132. By distracting lower courts and juries from a clear focus on the competitive effects of conduct (which often are difficult to analyze), the search for intent may lead, as here, to erroneous results.

These difficulties are tolerable in attempt cases, where, because monopolization has not been achieved, reference to specific intent is necessary to define uncompleted conduct; and in criminal cases, for the reasons stated in *Gypsum*. But no such necessity obtains in a civil monopolization case. There, the heart of the matter is effect on the process of competition, *i.e.*, whether the conduct at issue is exclusionary. The term "intent," as actually used in such cases, really does not refer to a state of "mind" of the corporate defendant; it does refer to the economic nature and effects of its conduct in the circumstances. *See* 3 Areeda & Turner ¶ 626a at 77.

Therefore, there is no theory of monopolization through unlawful intent, under which Ski Co.'s conduct can be condemned.

B. There Is No Substantial Evidence That Ski Co. Had An Anti-Competitive Intent

Even if anti-competitive intent is an independent element of monopolization, there was still no jury issue because there was no substantial evidence of anti-competitive intent. The principal extrinsic evidence of Ski Co.'s subjective intent was statements by members of its management. Highlands' marketing director testified that he was told by Ski Co.'s finance director, Peter Sullivan: "[W]e will not support our competition." J.A. 146. Called as a witness by Highlands, Mr. Sullivan testified that Ski Co. thought it could do better without a joint ticket, J.A. 78-79. Also, Director Art Pfister testified: "I have never really been in favor of the four-area ticket. I am a businessman, and I have never understood why a businessman should help his competitor. I don't want to kill him, but I don't want to help him." J.A. 141; *see also* Tr. 925, 927, 929. These statements evidence an intent that is competitive, not anti-competitive.

The court below, however, did not consider this evidence. Nor did it draw an inference of anti-competitive intent from the fact that Ski Co. refused to participate in the joint ticket. It apparently recognized that no such inference can be drawn from the mere fact that a firm pursues a strategy of competition rather than horizontal cooperation. Instead, the court inferred anti-competitive intent from three other aspects of Ski Co.'s conduct and the attendant circumstances. No such inference, however, can properly be drawn.

First, the court relied on "evidence that [Ski Co.] refused to offer a four mountain ticket, despite skiers' frustration over its unavailability." Pet. App. 22a-23a. Evidence of some consumers' subjective "frustration" is irrelevant. It does not indicate predation: a predatory strategy is to make consumers happy in the short run (through prices below cost) so as to draw them away from a competitor. No predatory strategy succeeds by "frustrating" consumers. Nor does "frustration" indicate that conduct is exclusionary. Firms commonly "frustrate" some consumers by terminating some product in the hope of satisfying a larger demand and earning larger revenues in other ways (*e.g.*, cancellation of television program, re-location of sports franchise). Nor does "frustration" indicate coercion. Skiers simply were not coerced. *See* pp. 20-21, *supra*.[46]

[46] The evidence of "frustration" cited by the court, Tr. 1808-16, was the answer to two questions propounded in a 1979-80 survey of skier attitudes. There was no evidence that any skier patronized a Ski Co. mountain when he or she would have preferred to patronize Highlands. Skiers were free to ski where they wanted as much as they wanted. *See* pp. 20-21, *supra*. It is fair to conclude that those who chose to patronize Ski Co. but wistfully thought about Highlands were not so seriously "frustrated" as to do something about it.

More generally, short-run consumer "frustration" has no relevance to any antitrust issue. The benefits of competition are not always obvious to consumers in the short run, and what they tell pollsters is not a reliable guide to long-term competitive effects or to sound antitrust policy. Therefore, the "frustration" of some consumers does not support an inference of anti-competitive intent.

Second, the court relied on the fact that Ski Co. refused to accept Highlands' bank-guaranteed Adventure Pack coupons. Pet. App. 23a. This conduct was merely part of Ski Co.'s policy of not cooperating with Highlands, and was not exclusionary. See pp. 28-32, *supra*. Therefore, no inference of anti-competitive intent arises.

Third, the court relied on the fact that, for the 1981-82 season (*after* the damage period), Ski Co. "raised the price of its single-day ticket to $22.00, thereby making it unprofitable for [Highlands] to market its Adventure Pack." Pet. App. 23a. The usual complaint of a competitor about a monopolist's prices is that they are too low, not that they are too high. *See, e.g., Northeastern Telephone Co.* v. *AT&T*, 651 F.2d at 86. If firms are competing, one firm's high prices tend to drive customers *away from* it and *toward* its rivals. High prices also tend to attract new entrants. Thus, in many circumstances as prices rise the competitive system, if allowed to work, tends to erode monopoly profits and power. *Standard Oil Co.* v. *United States*, 221 U.S. at 62. If Ski Co.'s price is artificially held down to protect Highlands' Adventure Pack, it will be more difficult for any new entrant to succeed. This anti-competitive effect, not noticed by the court, indicates the dangers of judicial tampering with the free market.[47]

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[47] Similarly, if a new entrant, too, decides that it prefers cooperation to competition and demands that Ski Co. enter into a joint ticket with it, under the decision below Ski Co. would have a duty to comply. If the

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Moreover, the implication of the court's analysis is that Ski Co. had a duty to keep its prices low so that Highlands' chosen marketing scheme, the Adventure Pack, would succeed. Ski Co. apparently would have to consult Highlands about Highlands' economic needs in order to know how high it could price its own tickets under the antitrust laws. The implied restraint on Ski Co.'s freedom to price *its own tickets* is contrary to the rationale for holding price-fixing unlawful—public benefit from freedom of individual economic units to set prices independently. *E.g., Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 346. It is also contrary to the spirit, and probably the letter, of the 1977 consent decree, which requires each firm to set its own ticket prices without communication with the other (Ex. 26, Tr. 180; Tr. 405).

Anti-competitive intent may be inferred from the price increase only if the latter was exclusionary. Because it was not, the inference does not arise.

For these reasons, no inference of anti-competitive intent can be drawn from any of the aspects of Ski Co.'s conduct or the surrounding circumstances.

Footnote 47 continued

joint ticket with the new entrant were priced lower than the joint ticket with Highlands and drew patronage away from Highlands, would Highlands have another treble damage claim, on the theory that Ski Co.'s cooperation was illusory or discriminatory? Would the new entrant also have a right to demand inclusion in the Ski Co.-Highlands joint ticket, or only inclusion in a joint ticket with Ski Co.? If Ski Co. were to enter into cooperative arrangements with both firms in order to comply with §2, would it have to consider the economic needs of *both* when setting *its own* prices? Would failure to do so evidence anti-competitive intent? How much of its capacity would Ski Co. have to dedicate to such involuntary cooperative arrangements? If the new entrant adheres to a go-it-alone philosophy, could it challenge the Ski Co.-Highlands joint ticket as exclusionary toward it? These represent some of the practical questions that the decision below may well lead to, if not reversed.

IV. AN INDEPENDENT REFUSAL BY AN UNINTEGRATED FIRM TO PARTICIPATE IN A COOPERATIVE MARKETING ARRANGEMENT WITH A HORIZONTAL COMPETITOR SHOULD BE PER SE LAWFUL

> [T]here is [a] basic distinction between concerted and independent action . . . Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919); *cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

Monsanto Co. v. *Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1469 (1984).[48] This principle of freedom in choosing those with whom one deals has deep roots in our political and social traditions. It also has powerful economic underpinnings. "Effective competition requires that traders have large freedom of action when conducting their own affairs." *FTC* v. *Curtis Publishing Co.*, 260 U.S. 568, 582 (1923); *see also FTC* v. *Sinclair Mfg. Co.*, 261 U.S. 463, 476 (1923); cases cited in n.17, *supra*. The decisive advantage of a competitive system over any managed economy is the freedom and powerful incentive it gives to every economic unit to use all its resources to identify and exploit opportunities to provide the largest and best output of goods and services at the lowest cost. Maintenance of that system of freedom and incentives is the function of antitrust laws. The Sherman Act's commitment to the advancement of consumer welfare through decision-making by individual economic units in competition with one another precludes imposition, on the supposed authority of the Act, of a duty of horizontal joint marketing.

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[48] *See also* Reeves, Inc. v. Stake, 447 U.S. 429, 438-39 (1980); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d at 286 ("any firm, even a monopolist, may generally bring its products to market whenever and however it chooses").

There are, of course, certain well-recognized limitations to the general principle that a firm is free to decide with whom it will deal or not deal. A *concerted* refusal to deal is generally unlawful *per se*. *E.g.*, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Outside the context of exclusive dealerships, which may be justified by efficiencies, *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), a firm with monopoly power may not sell only to customers who do not patronize its competitors, *Lorain Journal*, *supra*. A firm may not combine a refusal to deal with other efforts affirmatively to enforce resale prices, cases cited in n.43, *supra*. The essential facilities doctrine is a fourth limitation.

None of these limitations addresses a unilateral horizontal refusal to cooperate. The first three impose no duty to deal, but merely prohibit certain kinds of conduct. Only the essential facilities doctrine imposes an affirmative duty, and it does so only in a limited area. An unintegrated monopolist's independent refusal to enter into a cooperative marketing arrangement with a horizontal competitor is squarely within the *Monsanto-Colgate* principle.

Highlands' demand for a joint marketing arrangement is analogous to the restriction on the televising of college football games in *NCAA* v. *Board of Regents*, *supra*. There, as here, the party seeking to impose the arrangement feared that in a free competitive environment it (actually, its members) would not sell as many tickets. This Court upheld the interest in competition, 104 S. Ct. at 2969.

The alternative to the *Monsanto-Colgate* principle is judicial supervision of dealings. The courts have always been extremely reluctant to "set sail on [that] sea of doubt." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (Taft, J., referring to judicial supervision of cartels). *See also United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331-32 (1897). An affirmance in this case would launch the federal courts on that sea with no sextant other than, perhaps, something like "fair competition," a term without definite meaning or standards, *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

CONCLUSION

For the foregoing reasons, this Court should hold that Ski Co.'s refusal to participate in the joint ticket and the attendant conduct and circumstances did not present a jury issue of exclusionary conduct or, therefore, of monopolization; and that, consequently, a directed verdict on that issue should have been entered for Ski Co. Accordingly, the Court should reverse the judgment below.

Respectfully submitted,
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Dated: January 24, 1985