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 RESPONDENT

Tucker K. Trautman
(Counsel of Record)
John H. Evans
Owen C. Rouse

Ireland, Stapleton, Pryor
& Pascoe, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
(303) 623-2700

Attorneys for Respondent

Of Counsel:

John H. Shenefield
Milbank, Tweed, Hadley & McCloy
Washington, D.C.

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether Petitioner can challenge for the first time on appeal the sufficiency of the evidence to create a jury issue of unlawful monopolization when Petitioner failed to present the issue, "stating the specific grounds therefor," in its motions for directed verdict before the District Court, as required by Rule 50(a), Fed. R. Civ. P.

2. Whether the evidence of Petitioner's conduct as a monopolist, including its numerous and targeted refusals to deal and other exclusionary acts, was sufficient to submit to the jury the question of whether Petitioner had unlawfully maintained or used its monopoly power in violation of §2 of the Sherman Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	12
ARGUMENT:	
I. THE ISSUE OF MONOPOLIZATION IS NOT PROPERLY BEFORE THIS COURT	14
A. Rule 50(a), Fed. R. Civ. P., Precludes Review	15
B. Ski Co. Did Not Raise This Issue At Trial	16
II. THIS CASE WAS PROPERLY SUBMITTED TO THE JURY AND THERE WAS MORE THAN SUFFICIENT EVIDENCE TO SUPPORT ITS GENERAL VERDICT THAT SKI CO.'S CONDUCT CONSTITUTED WILLFUL ACQUISITION, MAINTENANCE OR USE OF MONOPOLY POWER IN VIOLATION OF § 2 OF THE SHERMAN ACT	18
A. The Established Test For Unlawful Monopoly Protects The Process Of Competition	19
B. Ski Co. Willfully Maintained Or Used Monopoly Power	22
C. Ski Co.'s Monopoly Power Was Not Maintained Or Used As The Result Of Superior Product, Business Acumen, Or Historic Accident	26
1. Ski Co.'s Monopoly Power Was Deliberately Acquired	26
2. Ski Co.'s Monopoly Power Was Not The Result Of A Superior Product	27

TABLE OF CONTENTS—Continued

Pages

3. Ski Co.'s Conduct Was Not An Exercise Of Business Acumen But Rather A Targeted Exclusion Of Highlands 29

III. SKI CO. DISTORTS THE LAW AND THE FACTS IN ITS ATTEMPT TO PROMOTE A RADICAL RULE OF LICENSE FOR MONOPOLISTS 34

A. Ski Co. Attempts To Justify Its Conduct By Distorting The Evidence That Was Before The Jury 35

B. Ski Co.'s Formalistic Analysis Of The Essential Facilities Cases Obscures The Evidence Here Of Substantial Anticompetitive Impact 38

C. Ski Co.'s New Test Should Not Be Adopted—Properly Stated And Applied To The Facts It Does Not Change The Result Reached By The Jury Below 44

1. Ski Co. Substantially Restrained The Opportunities Of Its Competitor 46

2. Ski Co. Substantially Restrained Consumer Freedom Of Choice 46

3. Ski Co.'s Conduct Was Predatory 47

4. Ski Co.'s Conduct Was Uniquely Monopolistic 48

CONCLUSION 50

TABLE OF CASES AND AUTHORITIES

Pages

Associated Press v. United States, 326 U.S. 1 (1945) 19

Banana Distributors, Inc. v. United Fruit Co., 162 F. Supp. 32 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959) 23

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F. 2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) 31, 49

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 39

California Computer Prods. Inc. v. IBM, 613 F.2d 727 (9th Cir. 1979) 33

Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) 21

Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982) 42

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 16

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 19

Continental T.V., Inc. v. GTE/Sylvania, Inc., 433 U.S. 36 (1977) 45

Coughlin v. Capitol Cement Co., 571 F.2d 290 (5th Cir. 1978) 15

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) 19, 23, 29, 31, 42

Follette v. National Tea Co., 460 F.2d 254 (3d Cir. 1972) 15

TABLE OF CASES AND AUTHORITIES—Continued

Pages

Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) 41, 43

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) 39, 41

Johnson v. New York, New Haven & Hartford Railway Co., 344 U.S. 48 (1952) 16, 17

Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975) 15

Little v. Bankers Life & Casualty Co., 426 F.2d 509 (5th Cir. 1970) 16

Lorain Journal Co. v. United States, 342 U.S. 143 (1951) 23, 24, 41

MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983) 41

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 24, 42, 43

Palmer v. Hoffman, 318 U.S. 109 (1943) 17

Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) 43

Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc., 364 F.2d 57 (8th Cir. 1966) 16

Sabin v. Berglund, 585 F.2d 955 (10th Cir. 1978) 29

Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) 44

TABLE OF CASES AND AUTHORITIES—Continued

Pages

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 27

Telex Corp. v. IBM, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) 49

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) 29

United States v. American Tobacco Co., 221 U.S. 106 (1911) 27

United States v. Colgate & Co., 250 U.S. 300 (1919) 28

United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973) 18

United States v. Grinnell Corp., 384 U.S. 563 (1966) .... 19, passim

United States v. Terminal Railroad Assoc., 224 U.S. 383 (1912) 40, 41

United States v. Topco Associates, Inc. 405 U.S. 596 (1972) 42

United States v. United Shoe Machinery Corp. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) 20

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) 21

White Motor Co. v. United States, 372 U.S. 253 (1963) 45

STATUTES AND RULES

Pages

15 U.S.C. § 2 .... 19, passim

16 U.S.C. § 497 .... 3, 29

Rule 50(a), Fed. R. Civ. P. 15, 16, 17

Rule 50(b), Fed. R. Civ. P. 15

36 C.F.R. §§ 251.50-251.64 29

OTHER AUTHORITIES

P. Areeda and D. Turner, *Antitrust Law* (1978) 20, 31

P. Areeda, *Antitrust Analysis* (2d ed. 1974) 40

P. Areeda, *Introduction to Antitrust Economics*, 52 Antitrust L. J. 523 (1983) 47

R. Bork, *The Antitrust Paradox* (1978) 20, 28, 40, 48

E. Fox, *The Modernization of Antitrust: A New Equalibrium*, 66 Cornell L. Rev. 1140 (1981) 47

E. Mansfield, *Microeconomics* (3d ed. 1979) 28

A. D. Neale, *The Antitrust Laws of the United States* (2d ed. 1970) 43

L. Sullivan, *Handbook of the Law of Antitrust*, (1977) 40

9 Wright and Miller, *Federal Practice and Procedure* (1971) 16

Comment, *Refusals to Sell and Public Control of Competition*, 58 Yale L. J. 1121 (1949) 22, 23

STATEMENT OF THE CASE

Aspen Highlands Skiing Corporation ("Highlands")* presents its own statement of the Questions Presented because it is dissatisfied in several respects with the statement of issues presented by Petitioner Aspen Skiing Co. ("Ski Co.").

Specifically, this appeal does not involve a "court-ordered scheme of mandatory joint marketing."[1] If Petitioner is entitled to any review, the sole issue presented here is whether the evidence of Ski Co.'s conduct was sufficient to allow the jury to determine whether Ski Co. was guilty of unlawful monopolization.[2] Accordingly, Highlands is compelled to set forth the following more detailed recitation of facts to supplement the four paragraphs devoted to that task by Ski Co. in its Brief.

---

* Highlands' listing in compliance with Supreme Court Rule 28.1 was made in the Entry of Appearance for Respondent heretofore filed with the Court.

[1] Ski Co.'s frequent invocation of this phrase and much of Ski Co.'s policy argument can be understood only as an attack upon the injunctive relief entered by the trial court, which Ski Co. never specifically challenged at trial or on appeal. After the jury verdict, the Court announced that it intended to model an injunction after the lift ticket exchange system willingly used by Ski Co. in Summit County, Colorado. Tr. 2341. After hearing, the Court entered an injunction, largely in the form proposed by Ski Co., to last for three years, and retained jurisdiction for that period. J.A. 193-97. When the injunction expired after the 1983-84 ski season, and at the suggestion of trial counsel for Ski Co., a stipulation extending the injunction through this appeal was executed and became an order of the District Court. Pursuant to that stipulated order, the injunction will expire at the conclusion of the 1984-85 ski season, on April 14, 1985. Highlands will not seek an extension of the injunction. Thus, the injunction will soon be a moot issue.

[2] Thus, although they were vigorously contested at trial, the scope of the revelant market, the existence of monopoly power, antitrust injury, and damages are *not* issues here.

The Development of a Lift Ticket Exchange System in Aspen

In 1962, Highlands, Ski Co. and Buttermilk Mountain Skiing Corporation ("Buttermilk") developed an innovative lift ticket exchange system in the Aspen market. J.A. 21-22, 154. Before 1962, each skier was required to purchase a lift ticket each day at one of the individual Aspen ski areas. The new product, a six-day coupon book, provided the vacation skier more convenient access to all three areas in Aspen. J.A. 21-22. With a single purchase at the beginning of their vacation, skiers had only to exchange a coupon for a daily lift ticket at any of the three areas. J.A. 21-22.

From the beginning, the allocation of revenues on the basis of actual usage was considered by the three companies to be a fair and effective way to promote competition among the companies to attract skiers to their respective areas. J.A. 22. Each company remained free to innovate, promote and develop its own ski area. J.A. 22. Each company offered its own lift tickets and participated in the exchange system at the same time. J.A. 154; Tr. 222. The development of this new product indelibly impacted the ski industry in Aspen.

In 1945, Ski Co. had obtained a special use permit[3] in order to develop Aspen Mountain, or "Ajax," a mountain

---

[3] Entry into the ski industry in Aspen generally requires regulatory approval from the United States Forest Service. Most

(Continued on next page)

suited for expert skiers. Tr. 1466-67. In 1958, the founder of Highlands obtained a Forest Service permit and began the development of a more balanced ski area at Highlands with trails laid out by two pioneers in the ski industry. J.A. 19-20, 23. In that same year, several individuals formed Buttermilk and developed the area as a teaching mountain for beginning skiers. J.A. 139-40. After three years of operation on private land at lower elevations, Buttermilk obtained a Forest Service permit allowing it to expand to the top of the mountain. J.A. 140. By the time the lift ticket exchange system was introduced in 1962, Ski Co., Highlands and Buttermilk were each competing to attract skiers to their respective ski mountains.

To compete, Highlands pursued a course of innovation from the beginning. Highlands started the first free bus system in the Aspen area to provide a convenient way for skiers to get from the lodges to the slopes. J.A. 22-23. Highlands was the first ski company in the United

---

(Continued from previous page)

of the potential skiing terrain in Aspen is administered as national forest land which must be preserved for and made reasonably accessible to the public for its "full enjoyment." 16 U.S.C. § 497. In addition to Forest Service approval, ski area development in Aspen requires approval from Pitkin County, which has been known for its restrictive "growth management" regulation. J.A. 167; Tr. 378. These federal and local regulatory barriers to entry were characterized by Ski Co.'s president as "substantial," making it "difficult" to develop a new ski area in Pitkin County, Colorado. Tr. 378.

States (and the only area in Aspen) to use the Graduated Length Method ("GLM") in its ski school, which by starting with short skis allowed novices to be skiing the entire mountain by the end of the week. J.A. 26; Tr. 307-08, 484-85. As a result, Highlands' ski school became the most popular in Aspen. J.A. 172-73. Highlands pioneered a children's ski program, which taught children as young as three years old to ski within three days. Tr. 567-68. It was so successful that many Ski Co. managers sent their own children to Highlands to learn to ski. J.A. 75-76, 79; Tr. 571. In addition, Highlands initiated NASTAR racing in Aspen, which allowed destination skiers an opportunity to race against the clock with their friends and family. J.A. 26; Tr. 687-88. Highlands was the first area in Aspen to provide free picnics for groups and to entertain its guests with acrobatic skiing and jumping exhibitions. J.A. 23, 25-26.

Ski Area Acquisitions by Ski Co.

In 1963, Ski Co. acquired Buttermilk as a wholly owned subsidiary. J.A. 113-14, 140; Tr. 1472. At about the same time, Ski Co. made an offer to acquire Highlands because Ski Co. wanted to "control" skiing in Aspen. J.A. 23-24. The offer was rejected and Highlands continued under independent ownership. Tr. 160-61.

Also, during the early 1960's, Janss Development Company ("Janss") purchased land in the Snowmass area with a view toward developing the base area and the skiing terrain. J.A. 137; Tr. 1475-76. Janss obtained a temporary Forest Service permit and began to offer ski tours to the public in the area. J.A. 137-38; Ex. 36A, Tr. 182; Tr. 1476. Janss obtained a full permit in 1965; two years later, when the first lifts opened, Janss assigned all of its permit rights to the Snowmass Skiing Corporation, another wholly owned subsidiary of Ski Co. J.A. 138; Ex. 36D and 36E, Tr. 182; Tr. 368, 1475-76.

Thus, by 1967, Ski Co. had acquired control of three of the four ski areas in the Aspen market. Only Highlands remained independent to compete with Ski Co. During this entire period of acquisitions by Ski Co., the lift ticket exchange system continued and became far more popular with skiers than Ski Co.'s counterpart three-area, six-day ticket. J.A. 162.

Creation of Aspen Reservations, Inc.

In 1973, the marketing director of Highlands developed the idea of Aspen Reservations, Inc. ("ARI"), which became a joint venture between the ski companies combining a central reservation service with the marketing of a convenient around-the-neck, four-area ticket.[4] J.A. 24-25; Ex. 2, Tr. 162. Beginning in the 1973-74 ski season, the two ski companies, through ARI, marketed the Aspen resort, offered the four-area ticket, and divided the revenues based on an independent survey of patronage.[5] J.A. 24-25.

---

[4] This format was far more convenient to the skier than the coupon book since there was no need to stand in a ticket line to exchange coupons each day.

[5] The marketing through ARI included films, ski shows, and even a sign at Denver's Stapleton Airport, all designed to attract skiers to come to the Aspen community, and, once there, to purchase the convenient four-area ticket. J.A. 38-40, 104-05;

(Continued on next page)

This enterprise was a clear success. Apart from one poor snow season, the Aspen market enjoyed a steady growth in destination skier visits. Ex. 97, J.A. 183. Customer convenience and choice were enhanced because, with a single purchase at the beginning of their stay, vacationers could ski any combination of the four areas in Aspen. J.A. 24-25. The four-area ticket increased in popularity. J.A. 31. During this period of vigorous competition between the companies, each sought to increase its usage, and thus revenues from the four-area ticket sales, through innovation and improvements to its own skiing facilities.[6] Highlands' share of destination skier visits grew steadily. Ex. 97, J.A. 183.

Ski Co.'s Exclusionary Activities

In 1977, Ski Co. offered to continue participation with Highlands in the sale of four-area tickets only on the condition that Highlands accept a fixed percentage of the revenues rather than a share based upon actual usage. Tr. 270-71. Highlands instead sought to maintain the division of revenues on the basis of actual usage so that each company would keep the incentive to compete

---

(Continued from previous page)

Ex. 60, Tr. 182. Like the revenues, these marketing expenses were apportioned upon the basis of usage of the four-area ticket. Tr. 823-24. Thus, the thrust of this arrangement was precisely to avoid the "free rider" problem theorized by Ski Co. Pet. Br. 25-27.

6 For example, Highlands added a new lift in 1975, and thereafter pursued a plan for major expansion, which was substantially delayed awaiting Forest Service and county approvals. J.A. 59; Tr. 279, 285-86. Trails were significantly expanded. Tr. 202. Innovations by Highlands during this period included free picnics, acrobatic skiing, ski patrol jumps, NASTAR, and the children's ski program. J.A. 25-26, 36; Tr. 567-68.

for its revenue share. Ski Co. refused. J.A. 28, 30; Tr. 270-73. Highlands also sought to purchase Ski Co. tickets in bulk so that Highlands could itself package and market a four-mountain ticket.[7] J.A. 32-33. Ski Co. again flatly refused, despite the fact that it continued to sell its tickets to tour operators and travel agents for packaging and resale.[8] J.A. 33-34; Ex. 45C, Tr. 182; Tr. 828.

Finally, when there was no other way to continue a four-area package, Highlands accepted a fixed 15% of the revenues. J.A. 30. Ski Co. then agreed to continue the four-area ticket for that year. Tr. 273. Also in 1977-78, Ski Co., for the first time since the 1972-73 ski season, marketed and sold its own three-area, six-day ticket, which was valid only at Ski Co. mountains. Tr. 583-84. That year, the four-area ticket outsold the Ski Co. ticket by almost two-to-one. J.A. 83, 94.

Again in 1978, Ski Co. proposed to continue the four-area ticket only on the condition that Highlands accept a fixed 12½% share of revenues, an even lower percentage

---

[7] Both ski companies sold their individual lift and four-area tickets at two distribution levels, wholesale and retail. At wholesale, multi-day tickets were sold to tour operators and travel agents who would package them with other products, such as lodging, ground transportation and other skiing services, to be resold to consumers. J.A. 117-18. The wholesale discount took the form of a commission, usually 10-15%. J.A. 38; Tr. 322-23, 828, 831. These wholesale sales represented about 15-20% of the revenues of the ski companies. J.A. 163. In addition, both ski companies sold these tickets directly to skiers at retail after they had arrived in Aspen, accounting for approximately 80-85% of the ski companies' revenues. J.A. 92, 163; Tr. 623.

[8] Travel agents and tour operators compete with their suppliers, the ski companies, since they both market packages to the skiing public at retail. J.A. 118. It is customary for these competitors to package tickets of more than one ski area in a destination resort. Tr. 1034-36.

than offered the year before. Highlands rejected this offer because it was unjustified by actual usage and removed all incentive to compete. J.A. 29-30. Highlands suggested other means to allow continuation of a four-area ticket, including a return to the coupon book concept. J.A. 29. Ski Co. refused these suggestions, even though it participated in similar lift ticket exchange systems in every other market in which it operated ski areas.[9] J.A. 29-30. Consequently, for the 1978-79 ski season, the previously available four-area ticket was eliminated.

In order to compete for the business of multi-area skiers, Highlands attempted to develop its own four-area package. J.A. 40-41. Highlands again offered to buy Ski Co. tickets in bulk. J.A. 42-43. Again, Ski Co. refused to sell. J.A. 43-44, 46-47. At that point, Highlands, determined to keep a convenient four-area option available for skiers, created the "Adventure Pack," which combined a Highlands' three-day ticket and three coupons, each equal to the price of a daily lift ticket at Ski Co. mountains. J.A. 43. The coupons were fully guaranteed by funds in an Aspen bank and were intended to allow skiers to exchange them for lift tickets at Ski Co. mountains or redeem them for cash at any local merchant

---

[9] Ski Co. was already participating in a ticket exchange system in Summit County, Colorado. There, Ski Co. operated one ski mountain and two independent competitors operated three other mountains. Tr. 1071, 1082, 1097. In the 1970's the companies implemented a four-area ticket exchange system, similar to that begun in Aspen in the 1960's, using coupon books and dividing revenues on the basis of usage. Tr. 1071-72, 1102. Ski Co. continued its participation there through the time of trial. Tr. 1071. Beginning in the 1980-81 ski season, Ski Co. opened its Blackcomb Mountain ski area in Canada next door to an established competitor, Whistler Mountain, and immediately entered into an interchangeable ticket arrangement. J.A. 111-12.

if they wanted a day of rest from skiing. J.A. 44-46. Yet, when skiers presented these coupons to Ski Co. for exchange, they were refused, even though the coupons were as secure as any other exchange media customarily accepted by Ski Co., and were freely redeemed by other businesses in town. J.A. 44-46; Tr. 623-24, 1687-88.

Ski Co.'s chief financial officer admitted that its refusals to accept the Adventure Pack coupons made Highlands' package less attractive, J.A. 85, and were directed at Highlands because it was "our competition." J.A. 46. During this exact time, Ski Co. continued to accept virtually identical coupons from its competitors and customers in Summit County, Colorado. Tr. 1688. In 1979, after Highlands replaced the rejected coupons with more costly traveler's checks and money orders, J.A. 62, 67, and after the filing of this lawsuit, Ski Co. accepted the medium of exchange. Tr. 628.

Ski Co.'s campaign to become the only supplier of multi-mountain lift packages in Aspen extended to other unseemly activities. In 1978, Ski Co. unilaterally appropriated the sign at Stapleton Airport in Denver (erected previously with funds supplied in part by Highlands), eliminated its reference to Aspen's four mountains and substituted its own three-area "Aspen" promotion. J.A. 105-06; Ex. 60, 62, Tr. 182. In addition, Ski Co.'s own advertising distorted information available to consumers by deceptively equating the word "Aspen" with Ski Co. to convince consumers that the Aspen resort complex was comprised of three mountains and that Ski Co.'s three-area ticket provided full access to all of Aspen's skiing terrain. J.A. 100-01, 107-09; Ex. 66, 67, Tr. 182. Ski Co. even produced a nationally distributed advertisement that depicted an aerial photograph of the mountains of Aspen, brazenly mislabeling Highlands as "Buttermilk." J.A. 109-10; Ex. 103, J.A. 184. As a result of these activities, newcomers to Aspen were misled; return visitors, confused.[10]

The Effect on the Competitive Process

Thus, by the time this case was brought to trial, Ski Co. had successfully eliminated the four-area package as a consumer alternative in the marketplace.[11] J.A. 132. With its efforts to market a four-area package continually frustrated, Highlands could not compete effectively. J.A. 100.

Skiers came to Aspen in large part because of the variety of skiing available. J.A. 90-91. Destination skiers who intended to ski a full six days during their stay demanded convenient access to this variety. J.A. 94-95, 120; Tr. 981-84, 1029-30. By 1977, their purchases of multi-mountain, six-day tickets accounted for 35-40% of the lift revenues of both companies. J.A. 84; Tr. 1367. The extent of the access provided by these tickets also influ-

---

10 First-time visitors to Aspen, who comprise 20% to 25% of skiers annually and are crucial to continued growth in consumer patronage, could easily purchase Ski Co.'s three-area, six-day ticket in the mistaken belief that they were thereby securing access to all of the skiing in Aspen. J.A. 100-01, 104-10. Return visitors to Aspen frequently bought Ski Co.'s three-area, six-day ticket, assuming that it was the four-area ticket with which they were previously familiar, only to be sorely disappointed when they discovered that the ticket could not be used at Highlands. J.A. 50-51, 77-78, 86-87, 115-16.

11 Shortly before trial, Ski Co. raised its individual daily lift ticket prices over 22% from the previous year, J.A. 71-72, 132; Tr. 390-92, but, by contrast, only raised the retail price of its six-day ticket by 12%. J.A. 72; Tr. 391-92. Highlands could not merely pass on the daily lift ticket cost increase to the consumer, given Ski Co.'s deeply discounted alternative. J.A. 132. Highlands' chief financial officer testified that these pricing actions by Ski Co. made Highlands' continuation of the Adventure Pack impossible. J.A. 132.

enced the daily lift ticket purchases of less vigorous skiers who came to Aspen accompanying purchasers of six-day tickets. Tr. 1209. On the days these daily lift ticket purchasers skied, they generally skied with family or group members who had purchased six-day tickets. J.A. 95-96, 130. Thus, foreclosure from offering a four-mountain ticket impacted both Highlands' multi-day and daily lift ticket sales. J.A. 130.

As another result of such foreclosure, participation in the Highlands' ski school also declined, although this product was still perceived by skiers and Ski Co. management as superior to others in Aspen. J.A. 76-77, 120-23, 172-73; Tr. 488-89, 1391-92, 1394-95. By the time of trial, Highlands had fallen well below its economic break-even point and its destination skier visits continued on a downward trend.[12] Ex. 97, J.A. 183; Tr. 1363-64.

The decline in Highlands' ability to compete also constrained consumer choice. From 1977 on, skiers who had purchased Ski Co. tickets repeatedly came to ski at Highlands, mistakenly assuming that their tickets gave them access. J.A. 50-51, 77-78, 86-87, 115-16. As a practical matter, at that point, in order to ski at Highlands, skiers had to sacrifice one day of skiing they had already bought from Ski Co. and purchase an additional day from Highlands, or seek a refund from Ski Co., which most skiers did not know was available.[13] Those skiers who stumbled

---

[12] Accordingly, Highlands was forced to tighten its budget. J.A. 130-31; Tr. 1399-1403. Costly national advertising of the Adventure Pack was cut back. J.A. 131.

[13] Ski Co. would explain its refund policy only if asked by the skier. J.A. 161. Two long-time and sophisticated buyers of skiing in Aspen, a tour operator and ski club leader, were surprised to learn that the policy even existed. J.A. 114-15, 121-22.

upon Ski Co.'s refund policy found that to use it they had to give up the six-day discount and lose a half day of skiing in the process.[14] J.A. 51-52, 86-87; Tr. 1670. Faced with those options, most skiers, by now frustrated and angry, left Highlands and used Ski Co. mountains exclusively.[15] J.A. 51-52, 86-88. They were not happy about it. In a consumer survey performed by Ski Co.'s marketing expert in the 1979-80 ski season, over 50% of responses by those surveyed indicated that because their tickets were not valid for Highlands, they would not ski there during their Aspen stay, even though they wanted to. J.A. 95.

SUMMARY OF ARGUMENT

Petitioner argues that some new rule or *per se* test should be invoked to, in effect, take this case from the jury and give Ski Co. a directed verdict in the United States Supreme Court on one question—whether there was sufficient evidence to create a jury issue on unlawful monopolization. This contention is untenable. Ski Co. never challenged the sufficiency of this evidence at trial and never asked for a directed verdict on monopolization. Thus, this Court can and should summarily affirm on this basis alone.

---

14 Ski Co. often sent skiers across town to the tour operator who sold them the ticket to secure a proper refund. J.A. 123-24.

15 Although often well-to-do, Aspen skiers were cost-conscious and thus did not spend additional money on daily lift tickets at Highlands, having already purchased the Ski Co. six-day ticket. J.A. 75, 88, 95-96, 119; Tr. 713-15.

If the Court reaches the issue of unlawful monopolization, Ski Co.'s substantial amount of exclusionary conduct, including targeted refusals to deal, clearly raised a proper jury issue under traditional § 2 jurisprudence. Taken as a whole, Ski Co.'s conduct went well beyond acceptable methods of competition and instead destroyed the competitive process in Aspen.

When Highlands devised a better way to market skiing services in Aspen, Buttermilk, Snowmass and Ski Co. eagerly joined the effort. The innovation was a great success. Skiers came to Aspen in increasing numbers. More and more of them demanded the mnlti-area tickets. While all of Aspen's ski areas benefited, each area nevertheless continued to compete to attract skiers to its mountain after they had arrived in Aspen.

Ski Co. then arrogated to itself the exclusive enjoyment of the fruits of this effort. First, it embarked upon an announced scheme to control skiing in Aspen. It attempted to acquire all the ski areas, and succeeded in getting three out of four. Then, using the threat of destroying the four-area ticket, it extorted more than the usage-based share of the revennes it would have received based solely on its competitive merit.

In order to destroy its remaining rival in Aspen, Ski Co. abandoned the competition it had previously pursued in Aspen, and continued to pursue in another multi-mountain market. Instead it deprived consumers of the product they wanted most—a four-area ticket—and targeted Highlands with a series of refusals to deal and a panoply of other exclusionary tactics. It refused to sell tickets to Highlands. It refused to deal with skiers who had purchased Highlands' four-mountain package. It tore down advertising Highlands had financed. It advertised a market from which Highlands' identity had been erased. It used the by-now-familiar format for its reinstated three-area ticket and led skiers into believing they had purchased a four-area ticket. It ignored reports that a substantial portion of the skiers in its captive market were not satisfied with the substituted product. It fostered a widespread misconception that skiers were locked into the three-area ticket once they had purchased it. It manipulated its prices in a way precisely suited to doom the Adventure Pack.

Ski Co.'s conduct produced the intended effect: excluded from a huge segment of the market that it had helped create, Highlands' ability to compete effectively was severely damaged. The jury correctly concluded that Ski Co. had monopolized the market.

Petitioner attempts to justify its conduct here by the liberal use of distortions of the evideuce and hypothetical facts that are not before this Court in this case. To measure its conduct, Petitioner urges new unduly restrictive tests, which are unnecessary and rely upon formalistic categorizations supported neither by precedent nor logic. In a final effort to salvage its position, Ski Co. asks this Court to turn away from its fact-sensitive conduct evaluation in § 2 cases and instead establish a new rule of *per se* legality, immunizing Ski Co.'s unambiguously exclusionary conduct. All of these attempts should be rejected and the result below, affirmed.

ARGUMENT

I. The Issue Of Monopolization Is Not Properly Before This Court.

The monopolization issue in this case was tried and presented to the jury as a traditional exclusionary conduct case. Highlands proposed to show that Ski Co.'s conduct was unreasonably exclusionary, and thus an abuse of monopoly power. Pet. App. 13a. Ski Co.'s trial strategy was to show that its conduct was reasonable and justified by valid business reasons. The District Court adopted the monopolization instructions proposed by Ski Co., and instructed the jury that a monopolist had no "duty to cooperate with its business rivals," and may "refuse to deal with a competitor . . . if valid business reasons exist for that refusal." Compare J.A. 181-82 with 185-86. Significantly, at no point during the trial did Ski Co. even suggest that, as a matter of law, the question of abuse of monopoly power should be taken from the jury for lack of sufficient evidence. It willingly submitted that issue to the jury and lost. Ski Co. should not be able to retry that issue here on its newly proposed theories.

A. Rule 50(a), Fed. R. Civ. P., Precludes Review.

Having declined to challenge the sufficiency of the evidence in its motions for directed verdict at trial, Ski Co. cannot, as a matter of both sound procedure and good conscience, be allowed to raise the issue for the first time on appeal.[16] To preserve an issue for appeal, a motion for directed verdict must comply with Rule 50(a), Fed. R.Civ.P., which requires that the motion "shall state the specific grounds therefor." As this Court has ruled with regard to the parallel provisions of Rule 50(b), specificity and strict compliance with the requirements of the rule

---

[16] *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978); *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155, 157 (8th Cir. 1975); *Follette v. National Tea Co.*, 460 F.2d 254 (3d Cir. 1972).

are necessary so that a party will not "have [its] opportunity to remedy any shortcomings in [its] case jeopardized by a failure to fathom the unspoken hopes of [opposing] counsel." *Johnson v. New York, New Haven & Hartford Railway Co.*, 344 U.S. 48, 51 (1952); *cf. Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947). The same specificity is necessary under Rule 50(a) to advise the trial court and the opposing party adequately of the legal theories upon which a party is relying and to preclude a party from gambling upon a verdict.[17] Ski Co. provided no such illumination to the court or to Highlands. Rather, apparently satisfied with the instructions it had proposed on monopolization and confident about the strength of its business justification defense, it gambled upon a favorable verdict at trial. It should not be allowed a second roll of the dice on appeal.

B. Ski Co. Did Not Raise This Issue At Trial.

To reach the issue of whether there was sufficient evidence of unlawful monopolization, the Court of Appeals erroneously concluded that two cryptic statements by trial counsel in Ski Co.'s motions for directed verdict had properly raised a monopolization issue. Pet. App. 14a. However, the Court of Appeals overlooked both the context of these statements, which was completely unrelated to the issue,[18] and the fact that the statements make no mention of the sufficiency of the evidence to

---

[17] *Ralston Purina* Co. v. *Parsons Feed & Farm Supply, Inc.*, 364 F.2d 57, 59-60 (8th Cir. 1966); *Little* v. *Bankers Life & Casualty* Co., 426 F.2d 509 (5th Cir. 1970); 9 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 2533 at 579 (1971).

[18] In both motions, Petitioner's trial counsel raised only two issues dealing with the § 2 claim—the scope of the relevant market and the non-existence of monopoly power as a matter of law. The statements adverted to by the Court of Appeals were made in conjunction with Petitioner's relevant

(Continued on next page)

prove monopolization. The Court of Appeals' cursory treatment of these significant lacunae completely subverts the "specificity" requirement of Rule 50(a).

The adequacy of Ski Co.'s "motions cannot be measured by its unexpressed intention or wants."[19] To do so deprives the trial court of its proper function to review these factual issues in the first instance. Clearly, the trial judge never understood Ski Co.'s trial counsel to be urging the court to take the monopolization issue from the jury: her ruling on Ski Co.'s motion for directed verdict makes no reference whatsoever to the issue. Tr. 1461-62. Ski Co.'s trial counsel sought no clarification at the conclusion of the ruling. Tr. 1462.

Again, when Ski Co. renewed its motion in shorthand at the close of all the evidence, the trial judge did not address the issue in her ruling on the motion.[20] As

---

(Continued from previous page)

market and monopoly power arguments. The first was a statement that "there clearly cannot be a requirement of cooperation between competitiors" made in the context of counsel's argument on the relevant market issue. Tr. 1452. The second was a statement that "a company like Aspen Skiing Corporation is required to compete." J.A. 133-34. Ski Co.'s counsel was arguing that there was no evidence Ski Co. possessed monopoly power and that its duty to compete essentially prevented it from attaining such power. Tr. 1453-54. He was not arguing that the evidence of Ski Co.'s conduct was insufficient to establish unlawful monopolization.

[19] *Johnson v. New York, New Haven & Hartford Railway Co.*, 344 U.S. at 51. *Cf. Palmer v. Hoffman*, 318 U.S. 109, 119-20 (1943) (specificity required in objecting to jury instruction).

[20] Ski Co.'s trial counsel merely incorporated "the arguments made at the close of Plaintiff's case" and stated that:

> In all of the issues, including both the Section 2 and the Section 1 issues that Plaintiff has proved our case under the decisions cited in our trial brief.

J.A. 180. Ski Co.'s counsel then briefly restated his relevant market and monopoly power argument but made no mention of any issue concerning unlawful monopolization. J.A. 180; Tr. 2192.

before, Ski Co.'s trial counsel sat by quietly at the conclusion of her ruling. Tr. 2212. It is inconceivable that, if Ski Co. intended to argue at trial, as it so vigorously contends here, its conduct was lawful as a matter of law, it would not even request a specific ruling on that point from the trial judge.

The failure to raise this issue in the trial court was not mere oversight. Instead it was part of Ski Co.'s trial strategy. Both in its trial brief and the instructions it proposed on the issue of monopolization, Ski Co. acknowledged that resolution of the issue would depend upon an evaluation of the reasonableness of the conduct that Highlands challenged. Petitioner allowed the issue to be presented to the jury without objection as to sufficiency, and thus cannot now, by means of a post-trial "theory transplant," seek appellate reversal of the judgment for reasons not asserted below.[21]

II. This Case Was Properly Submitted To The Jury And There Was More Than Sufficient Evidence To Support Its General Verdict That Ski Co.'s Conduct Constituted Willful Acquisition, Maintenance Or Use Of Monopoly Power In Violation Of § 2 Of The Sherman Act.

Even if Ski Co. is entitled to a review of the sufficiency of the evidence, the judgment was amply supported and must be affirmed. A successful antitrust plaintiff defending a jury verdict on appeal "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wip-

---

21 *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 575 (1973) (Rehnquist, J., dissenting).

ing the slate clean after scrutiny of each."[22] Moreover, all of the evidence and inferences must be viewed in the light most favorable to Highlands.[23] Unless it can be determined as a matter of law from the evidence that a defendant could not be guilty of monopolization, the jury's decision on this question of fact is conclusive.[24]

A. The Established Test For Unlawful Monopoly Protects The Process Of Competition.

After 75 years of Supreme Court jurisprudence under §2 of the Sherman Act, 15 U.S.C. §2, this Court's description of unlawful monopolization was succinctly stated in *United States v. Grinnell Corp.*:

> [t]he offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintaintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

384 U.S. 563, 570-71 (1966).

A monopolist whose power is sustained or enhanced by practices that go beyond competition has monopolized in violation of §2.[25] By deliberately seeking to maintain

---

[22] *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). *See also Associated Press v. United States*, 326 U.S. 1, 14 (1945).

[23] *Continental Ore Co.*, 370 U.S. at 696.

[24] *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927).

[25] "In sum, 'exclusionary' behavior should be taken to mean conduct other than competition on the merits, or other than restraints reasonably 'necessary' to competition on the merits, that reasonably appear capable of making a significant con-

(Continued on next page)

or enhance market power "through means that would not be employed in the normal course of competition,"[26] the unlawful monopolist goes beyond competition on the merits, and thereby unnecessarily impairs the opportunities of rivals.[27]

Whether conduct is competition on the merits or exclusionary will frequently not be evident without an exploration of the market context. It is not sufficient in this case, therefore, to attempt to evaluate Petitioner's conduct simply by the process of formalistic categorization suggested by Ski Co. Rather, the refusals to deal and other conduct found by the jury at trial to have violated § 2 are exclusionary if, as in this case,[28] the exercise of monopoly power has the effect in the short run of disadvantaging competitive firms, perhaps even driving them out of the market, in an effort to gain larger profits in the long run.

(Continued from previous page)

tribution to creating or maintaining monopoly power." III P. Areeda and D. Turner, ANTITRUST LAW ¶ 626c at 79 (1978); and see *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 344-45 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), in which the court similarly condemned practices that " . . . represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production and distribution which a competitive society must foster."

26 R. Bork, THE ANTITRUST PARADOX, 144 (1978).

27 *See* III P. Areeda and D. Turner, *supra* note 25, ¶ 626b at 78 (1978).

28 Ski Co. grudgingly acknowledges the need for a close look at the market. Conduct may be exclusionary for a monopolist that would not be exclusionary for ordinary competitors. The determining factor is "its competitive effects in the actual circumstances." Pet. Br. 18, n. 20.

The *Grinnell* definition of unlawful monopolization has served to guide lower courts and juries for almost twenty years,[29] and it was the basis of the jury instructions in this case. It properly legitimizes a monopolist's competition on the merits while it condemns the exercise of monopoly power that goes beyond, and thereby unreasonably damages, competition.

Ski Co. has presented no cogent rationale for departing from this standard, which it espoused at trial, other than the fact that, if the traditional standard applies, submission of the case to the jury was clearly proper and the judgment must be affirmed.

---

[29] To the extent that lower courts and commentators have expressed dissatisfaction with the *Grinnell* formulation, their complaint has generally focused upon the extent to which "intent" is relevant in determining whether there has been an abuse of monopoly power. Obviously, the injury element of a private action is present only because of conduct, not just intent. Nevertheless, as Ski Co. acknowledges, Pet. Br. 41, evidence of intent is relevant in gauging the nature of ambiguous conduct. *See, e.g., Chicago Bd. of Trade v. United States,* 246 U.S. 231, 238 (1918); *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 696 n. 12 (1967). While the conduct at issue here was unambiguously anticompetitive, it is certainly illuminating to evaluate that conduct in light of Ski Co.'s announced intent, at the time it sought to acquire Highland's: "well, what we want to control is skiing in Aspen." J.A. 23-24. Ski Co. did not seek to exclude such intent evidence at trial, nor did it seek an instruction regarding its lack of relevance.

Ski Co.'s attack, Pet. Br. 40-44, upon the Court of Appeals for relying upon a theory of anticompetitive intent as one basis for affirming the judgment is misplaced. A reading of the court's opinion makes it clear that it, like so many other courts addressing the issue, was speaking in terms of intent but was actually analyzing conduct and the impact of that conduct upon consumers and upon the competitive process.

B. Ski Co. Willfully Maintained Or Used Monopoly Power.

Ski Co. repeatedly refused to sell tickets to Highlands or to deal with its customers.[30] Only Highlands was the target of such refusals, while Ski Co. willingly dealt with every other comparable competitor. It reinforced special treatment of Highlands with extortionate demands and distorted advertising. The impact of this conduct was aggravated by—indeed, it depended upon—Ski Co.'s monopoly power, which it used to prevent Highlands from being able to compete for a major portion of the market. Under the objective standard set forth in *Grinnell*—honest competition or exclusionary conduct—the jury properly found the refusals unlawful.

"A producer in a purely competitive market will ordinarily sell to all comers. He will refuse only if his entire output is already spoken for, or if the sale would be unprofitable, or if the would-be buyer is a poor credit risk."[31] Under conditions of effective competition, a ra-

---

30 Ski Co. attempts to explain away this admittedly "unusual conduct" by an argument that, ignoring the record, paints a picture of minimal effect and advances several business justifications for what it characterizes as mere "refusals to engage in cooperative marketing." Pet. Br. 28-30. This argument ignores all the evidence of the context in which the refusals took place, ignores Ski Co.'s announced motives, and ignores the obvious impact of the refusals upon Highlands and upon consumers. To accept it would be tantamount to concluding, as Ski Co. later expressly requests, that a monopolist's refusal to deal with a competitor is *per se* lawful. Ski Co.'s only support for this position is a recitation of hypotheticals, Pet. Br. 30-32, not before the Court in this case. Presumably if such cases ever arose with real facts, the monopolist involved would have valid business reasons to justify its refusals under existing law.

31 Comment, *Refusals to Sell and Public Control of Competition,* 58 Yale L.J. 1121 (1949).

tional firm knows that customers with whom it arbitrarily refuses to deal can simply trade with another firm.

Not so in the case of a firm with monopoly power. The competitive consequences of a monopolist's refusal to deal cannot be remedied through marketplace discipline.[32] Rejected customers cannot simply turn to another source of supply. Thus, a seller such as Ski Co. can utilize a refusal to deal as a device to restrict output or to discipline customers and competitors. "Moreover, he has a weapon with which to extend his power over the market."[33]

There is nothing novel about the result in this case. This Court early recognized that a refusal to sell by a firm possessing monopoly power must be scrutinized like any use of market power.[34] A monopolist's right to refuse to deal is not absolute.[35] Where a monopolist has arbitrarily refused to sell to a former customer who desired to compete at the retail level, *Eastman Kodak Co.*, 273 U.S. 359, where a monopolist has refused to sell to cus-

---

[32] See *Banana Distributors, Inc. v. United Fruit Co.*, 162 F. Supp. 32, 37 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959) (distinguishing between an individual trader's prerogative to refuse to deal, which can be remedied through the marketplace, and an anticompetitive refusal to deal by a monopolist, which cannot be remedied through marketplace discipline).

[33] *Refusals to Sell and Public Control of Competition*, *supra* note 31, at 1121.

[34] *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

[35] *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951).

tomers who deal with a competitor, *Lorain Journal Co.*, 342 U.S. 143,[36] or where a monopolist has refused to sell to potential competitors, *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973), this Court has consistently upheld the factfinder's scrutiny of the conduct and found the refusals unlawful.[37] Implicit in each result is the recognition that the adverse competitive consequences of the refusals were beyond market discipline, resulting in actual damage to the competitive process.[38] In each instance, the monopolist failed to demonstrate any business justification or redeeming competitive benefit to legitimize its otherwise exclusionary behavior.

This application of the *Grinnell* formulation in the refusal-to-deal context provides an economically rational, objective and workable framework for judging the competitive impact of a monopolist's conduct. It also pro-

---

[36] Like the purchasers of advertising in Lorain, Ohio, skiers in Aspen wanted to buy services from more than one supplier. The suppliers offered interchangeable products that consumers wanted in full variety. In each case, the stronger seller used its power to deny consumer wants. In each case, the impact on competition was the same—the refusals "amounted to an effective prohibition of the use of" the smaller competitor's products. *Id.* at 153.

[37] The issue in each of these cases was not the existence of some abstract "duty to cooperate" but whether a specific refusal was unlawful in the factual context in which it arose. The same is true here. Ski Co.'s contention that an affirmance of the verdict below creates a "duty to cooperate" completely ignores both this critical distinction and that the jury was told no such duty existed.

[38] Here, Ski Co. stood to gain a complete elimination of competition in Aspen through its refusal to deal.

vides businesses with a reliable guide to behavior. If their conduct goes beyond normal means of competition or efficient behavior and is not justified by any competitive benefits, it is unlawful.

That Ski Co.'s conduct was fundamentally different from that of a firm in a competitive market need not be merely theorized—it is proven by Ski Co.'s own conduct in other markets in which it does not possess monopoly power. In Summit County, Colorado, Ski Co.'s subsidiary operates only one of four areas. Its Blackcomb Mountain operation in Canada was in a region containing two independent ski areas. In Aspen before 1967, Ski Co. had not solidified its control of the market. In each of those three situations, Ski Co.'s behavior reflected the presence of effective competition. It actively encouraged skiers to purchase convenient, full-variety, multi-area tickets. To have done otherwise would have been self-defeating: skiers could simply shun an area that denied them the variety they wanted. It divided revenues from the multi-area ticket on the basis of usage. Any other system would simply not have been tolerated. J.A. 126-27. Indeed, a refusal to deal by Ski Co. in any other market would not have been protected by its monopoly power nor could it have been used to achieve or maintain such power. Thus, there was powerful evidence from Ski Co.'s own behavior that a rational competitor, interested in competition on the merits rather than exclusion, would not have acted as Ski Co. did in Aspen. This evidence was more than adequate to support the jury's conclusion that Ski Co. had monopolized in violation of § 2.

C. Ski Co.'s Monopoly Power Was Not Maintained Or Used As The Result Of Superior Product, Business Acumen, Or Historic Accident.

As *Grinnell* requires, the jury was instructed to consider whether the monopoly power of Ski Co. was maintained or used as the result of "superior product, business acumen, or historic accident." There was ample evidence for the jury to conclude that none of these conditions was present, and that Ski Co.'s conduct represented solely the unjustified exercise of monopoly power to prevent competition.

1. Ski Co.'s Monopoly Power Was Deliberately Acquired.

Despite Petitioner's repeated assertions to the contrary, the evidence showed that Ski Co.'s monopoly power in Aspen resulted not from the growth of a company with an innovative product, but rather from a systematic pattern of acquisition,[39] leading it to become the largest skiing company in North America. Tr. 370. As its president admitted, Ski Co. has "intentionally sought out other ski areas to acquire." Tr. 375. Indeed, as a part of its plan to control skiing in Aspen, Ski Co. made an earlier un-

---

39 American Airlines, Inc., in its Brief Amicus Curiae, shares the confusion—Ski Co. is mistaken for a firm which has obtained a market advantage "as a result of its own lawful innovation and initiative." Amicus Brief at 2. From this, Amicus concludes that the "developer-owner of an innovation" has a right to drive a hard bargain for the use of that innovation. *Id.* Like Petitioner, Amicus advances a theory that ignores an ugly fact—Highlands had an equally strong claim to the title of developer, owner and innovator. Ski Co. tried to usurp the title by merger and exclusion.

successful attempt to acquire Highlands. J.A. 23-24; Tr. 159-61.[40]

Thus, Ski Co. has eliminated its competitors by acquiring them. The acquisition of competitors to create a monopoly has itself been a violation of § 2 from the earliest days of Sherman Act enforcement. *See, e.g., Standard Oil Co. v. United States,* 221 U.S. 1 (1911); *United States v. American Tobacco Co.,* 221 U.S. 106 (1911). Here, however, the significance of Ski Co.'s acquisitions is that it thereby acquired the leverage, and indeed the appetite, to prevent Highlands from offering a competitively superior four-area ticket, thus denying consumers access to the product they wanted most. Accordingly, Ski Co.'s acquisition history, including its announced purpose, sheds light on the exclusionary nature of Ski Co.'s subsequent conduct directed at its remaining competitor in Aspen.

2. Ski Co.'s Monopoly Power Was Not The Result Of A Superior Product.

The evidence at trial clearly showed that Ski Co.'s increasing market share and market power were not the result of a superior product.[41] So long as a form of four-area lift ticket exchange system was available, Highlands' market share steadily grew. Later, after Ski Co. had solidified its control over destination skiers in Aspen, Highlands' market share dropped, not *because* of product

---

40 In 1976, another suitor of Highlands, Twentieth Century Fox ("Fox"), explored the possibility of such control. Tr. 206, 2074. In that period, Fox evaluated acquisition of all four areas in Aspen, including Highlands, but gained control only of Ski Co.'s mountains. Tr. 370, 2083.

41 Any argument that the Ski Co. three-area ticket is the superior product is demonstrably wrong. Indeed, for most of the recent period in which a four-area ticket was available, Ski Co. chose not to offer a three-area ticket at all. And when Ski Co. reinstated the three-area ticket in 1977, the four-area ticket outsold it by a ratio of two-to-one.

quality considerations, but *in spite* of them. Over 50% of the responses from Ski Co. skiers in one survey disclosed that they wanted to ski at Highlands but could not because the Ski Co. ticket precluded them from doing so.[42] Thus, Ski Co.'s course of conduct was designed not to emphasize the relative merits of its own skiing product, but rather, to prevent consumers from exercising their freedom of choice based on their own assessment of those relative merits.[43]

Ski Co. suggests that this Court should defer to Ski Co.'s prerogative to choose its customers because it "engaged in an entirely private business." Pet. Br. 34, n. 35, *citing United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Yet, even *Colgate* recognized that the exercise of monopoly power requires a different analysis. *Id.* This is especially true where the dominant firm's product is derived in part from its status as a permittee on public lands, with the obligation to provide access to the public

---

[42] The rational consumer will try to maximize utility. In the context of consumer choice, maximum utility is determined by satisfaction with the product. E. Mansfield, MICROECONOMICS 50-51 (3d ed. 1979). Rational consumers in Aspen testified that they were deprived of the choice to buy a superior product (a four-area ticket) and as a result, access to an equally attractive product (a day at Highlands) became more expensive and inconvenient. J.A. 95-96, 120-21; Tr. 1029-30.

[43] Ski Co.'s contempt for skier frustration, Pet. Br. 45-46, reflects a monopolist's arrogant indifference to consumer preference. Fortunately, however, one important function of the antitrust laws is to "preserve, improve, and reinforce the powerful economic mechanisms that compel businesses to respond to consumers." R. Bork, *supra* note 26, at 91.

for its "full enjoyment."[44] Thus, Ski Co.'s exclusionary conduct not only impairs competition on the merits, it also directly infringes upon public rights to use public resources.

3. Ski Co.'s Conduct Was Not An Exercise Of Business Acumen But Rather A Targeted Exclusion Of Highlands.

At trial, Ski Co.'s primary strategy was to convince the jury that its conduct reflected only legitimate management decisions. Because there was substantial evidence to support the jury's inference that Ski Co.'s conduct served only its pursuit of monopoly power, those arguments should be given short shrift here.[45]

The jury could properly have concluded that Ski Co.'s conduct on the whole was not "honestly industrial."[46] Specifically, it was proper for the jury to infer that it was no reflection of a "desire to compete" when, for two seasons running, Ski Co.'s toll for allowing a four-area

---

[44] The ski areas in Aspen are located primarily on public lands and the privilege of using those lands is granted by Forest Service special use permits. *See* 36 C.F.R. §§ 251.50-251.64. These permits grant an exclusive right to operate ski facilities in portions of the national forest. Such a permit is therefore "tantamount to a certificate of public convenience and necessity." *Sabin* v. *Berglund*, 585 F.2d 955, 959 (10th Cir. 1978). Moreover, the only reason the skiing public would pay for such transportation services is to enjoy the recreational use of the public lands—a use to which the public is entitled in any case. *See* 16 U.S.C. § 497 (special use permits must not be granted so as to "preclude the general public from full enjoyment of the natural, scenic, recreational and other aspects of the natural forests").

[45] *Eastman Kodak Co.*, 273 U.S. at 375.

[46] *See United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431 (2d Cir. 1945).

ticket was a share of the proceeds unrelated to the merits of its own products. J.A. 28-30; Tr. 270-73. The jury properly could find that it was no hallmark of superior management for Ski Co. to refuse to deal with Highlands in any form of lift ticket exchange system, while other of its subsidiaries freely participated with independent entities in virtually identical arrangements, in markets where Ski Co. did not possess monopoly power. J.A. 29-30, 111-12.[47]

It was proper for the jury to infer that it was no exercise of business acumen when Ski Co. refused to sell lift tickets to Highlands on any basis, while Ski Co. willingly made sales at wholesale prices to tour operators and travel agents. J.A. 85; Tr. 828, 831-32. Despite the fact that such entities were Ski Co.'s competitors at the retail level,[48] J.A. 118, it did not target them with the

---

[47] In an apparent effort to taint such lift-ticket exchange systems, Ski Co. also mentions a lawsuit filed by the Colorado Attorney General resulting in the 1977 Consent Decree. Pet. Br. 3. The only relevance of that lawsuit here is that the Decree by its terms allowed the four-area ticket to continue. Ex. 26, Tr. 182. The fear of such actions by the Attorney General was urged upon the jury as a business justification for dropping out of the four-area ticket. J.A. 55. Yet, Ski Co.'s continued willingness to participate in a similar lift ticket exchange system in another part of Colorado, or even in Aspen on its "fixed" terms, made clear to the jury that Ski Co. was not chastened by this "threat." Finally, such a hypothetical threat could provide no justification for its refusals to sell tickets to Highlands or accept coupons from its customers.

[48] Remarkably, Ski Co. admits in its brief that it was and is willing to let tour operators and travel agents package its tickets with those of Highlands to make a four-area package. Pet. Br. 20-21, n. 21. Highlands is the only actual or potential retail competitor "forbidden" to create such a package. Ski Co.'s entire argument about what products "would have been provided" in response to "substantial effective demand" is astonishing. The evidence established that there was just such a demand for a multi-day, four-area ticket. J.A. 90-91, 94-96, 120; Tr. 982-83. Highlands sought to respond to that demand and was rebuffed and restrained by Ski Co. in all its attempts.

kind of discriminatory and exclusionary practices it leveled against Highlands. The jury's conclusion that such a refusal was anticompetitive, not the demonstration of business skill, was hardly unwarranted, nor does it reflect a novel view of antitrust law. *See Eastman Kodak Co.*, 273 U.S. 359.

The jury had good reason to conclude that Ski Co.'s mislabeling of Highlands as one of its own mountains in aerial photographs published nationwide and its willingness to deface Highlands' advertising materials were something more than shrewd competition on the merits. This campaign of misinformation adds further support to the jury verdict of unlawful monopolization.[49] By this dishonestly contrived barrier to attracting first-time skiers and a significant number of return visitors, Highlands was put at a great competitive disadvantage, J.A. 101-102, with a significant impact on competition.[50]

It also was proper for the jury to conclude that it was not competition on the merits for Ski Co. to refuse to honor Highlands Adventure Pack coupons, especially since the coupons were no more difficult to negotiate than the checks or credit cards that Ski Co. regularly accepted for lift tickets. J.A. 44-46, 100.

Moreover, there was no disadvantage to Ski Co. in accepting the coupons. The evidence showed that the Ad-

---

[49] "A monopolist's misrepresentations encouraging the purchase of his product can fit our general test for an exclusionary practice when the impact on rivals is significant; deception of buyers can impede the opportunities of rivals. Even apart from its impact on rivals, deception is undesirable because it can injure buyers and offend public morality." III P. Areeda & D. Turner, *supra* note 25, ¶ 738a at 278 (1978).

[50] *Cf. Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 288, n. 41 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

venture Pack coupons provided Ski Co. the full undiscounted rate for each day of skiing at any of its three areas. J.A. 43-44, 46-47. Only after the filing of this action did Ski Co. choose to honor the traveler's checks and money orders that Highlands substituted for the rejected coupons—a fact that further reinforced the jury inference that Ski Co. unreasonably impeded competition.[51]

Ski Co.'s new claim that its conduct was legitimized *solely* by its "desire to compete," Pet. Br. 20, would be valid only if the willingness to sacrifice volume and profits in order to eliminate its remaining competitor is held, as a matter of law, to merely reflect such a benign motivation. The jury had evidence of a more sinister desire. No true competitor would have deliberately sacrificed the potential for increasing its own output that a four-area ticket represented. The Highlands' product would have attracted new skiers by its greater variety, and

---

[51] Ski Co. argues that it should not have to sell tickets to Highlands for inclusion in the Adventure Pack because by purchasing an Adventure Pack skiers would do at least half of their skiing at Highlands. Pet. Br. 30-31. However, such a situation would not entail any threat to a firm competing vigorously on the merits. There was no evidence that Highlands was, or could be, less responsive to market demand than independent tour operators. *Cf.* Pet. Br. 31, n. 33. If Ski Co.'s product were truly superior, market forces would doom the Adventure Pack. Its elimination would not have to be accomplished through a refusal to deal.

Moreover, if Ski Co. sold its tickets to Highlands at wholesale, as it did to tour operators and travel agents, it might have been economically feasible for Highlands to design its four-mountain package with greater flexibility. For example, as Ski Co. suggests, Pet. Br. 31, n. 33, packages could have been developed with two days, or even one day, at Highlands and the balance at Ski Co. mountains. Ski Co.'s complete refusal to pre-sell any tickets to Highlands on any basis forced Highlands to design the Adventure Pack with three days at Highlands to make it even marginally profitable.

would certainly have done more to assure that skiers frustrated with the three-area ticket would return to Aspen another year.[52] All of those skiers, in addition to the skiers satisfied with the three-area ticket, would have skied at Ski Co.'s mountains. A firm interested in competition, rather than exclusion, would have seized such an opportunity to compete and exercise real business acumen.

The jury properly could have found that it was more than shrewd price competition when Ski Co. manipulated its price structure in order to impede Highlands' competition. Ski Co. raised the daily ticket price substantially and at the same time deepened the discount on its three-area, six-day ticket. This use of monopoly power[53] was hardly the result of natural market forces[54]—it was twice the average rate of increase announced by Ski Co. during the previous eight years[55] and was not justified by the rate of inflation. Tr. 2140. Instead, the evidence showed that Ski Co.'s managers were aware of the characteristics of the Adventure Pack, Tr. 392-93, 623, and that the change in price effectively eliminated its profitability and continued existence. J.A. 132-33.

---

[52] Ski Co. relied on its market power and exclusion instead. From 1977, when its exclusionary conduct began, Ski Co.'s total skier visits and market share steadily grew, even though the total number of skiers coming to Aspen leveled off from the previous growth period, presumably because of overall consumer dissatisfaction. Ex. 97, J.A. 183.

[53] Monopoly power is, of course, "the power to control prices." *United States v. Grinnell Corp.*, 284 U.S. 563, 571 (1966).

[54] *Cf. California Computer Prods. Inc. v. IBM*, 613 F.2d 727, 739-42 (9th Cir. 1979).

[55] *See* Ex. 42, Tr. 182.

In sum, the jury had ample grounds for concluding that Ski Co. maintained or used its monopoly power through conduct that exceeded ordinary competition, and thereby unnecessarily excluded Highlands, constrained consumer choice and destroyed the competitive process in Aspen. As Ski Co. apparently concedes by arguing for new standards, under any reasonable application of this Court's traditional monopolization standards, the evidence was clearly sufficient.

III. Ski Co. Distorts The Law And The Facts In Its Attempt To Promote A Radical Rule Of License For Monopolists.

In its efforts to obtain a reversal, Ski Co. ignores the *Grinnell* standard, buries the essential facilities doctrine in a coffin of formalistic analysis, and argues that this Court must define some new standard of substantial exclusionary conduct. It then proposes a rule that at least in part goes far beyond what would be required under existing law. Even worse, it then applies that rule through conclusions and hypotheticals rather than facts found in the record. The result of this high handed treatment of the law and the facts is the creation of a barely disguised rule of *per se* lawfulness for a monopolist's conduct, essentially the same as the rule expressly advocated at the end of Ski Co.'s argument. Pet. Br. 48-50. When Ski Co.'s statements of the law are rectified to conform with existing law and applied to the facts in this case, the necessary result is affirmance. Only if the Court accepts Ski Co.'s self-serving characterizations of its conduct and its radical new *per se* approach, in either its covert or its overt exposition, can the verdict be reversed. Such a result would virtually eliminate the role of fact-sensitive analysis in future § 2 cases.

A. Ski Co. Attempts To Justify Its Conduct By Distorting The Evidence That Was Before The Jury.

To support its call for a depature from traditional monopolization standards, Ski Co. advances several "policy" arguments purportedly showing that those standards produced a wrong result here. For example, Ski Co. argues that the four-area ticket had a depressing effect on competition at the national level and created a "free rider" problem. Pet. Br. 23-27. The evidence for these arguments has been selectively pruned from the record and severely disfigured by Ski Co.

First, Ski Co. incorrectly asserts that, when a four-area ticket was offered, neither firm offered its own six-day ticket. Pet. Br. 24-25. The record is to the contrary.[56]

Next, Ski Co. fabricates support for its "free rider" arguments. Pet. Br. 25-27. In essence, Ski Co. maintains that, during the era of the four-area ticket, Highlands relied unfairly on the national advertising efforts of Ski Co. To support this argument, Ski Co. grossly mischarac-

---

[56] Through the 1971-72 ski season, Ski Co. offered its own six- or seven-day packages in competition with the four-area ticket. J.A. 154. By the same token, in the 1960's and early 1970's, Highlands offered a "wide variety of multi-day tickets of its own." Tr. 222. By the late 1960's, skiers expressed their strong preference for the four-area package, rather than a three-area package. J.A. 162. Thus, Ski Co.'s eventual decision not to offer its own three-area, six-day ticket was a normal response to demonstrated consumer preference and not a manifestation of diminished competition.

terizes the evidence by completely ignoring Highlands' promotional contributions through ARI.[57]

The so-called "limited" national advertising undertaken by Highlands of which Ski Co. is so critical was all in addition to Highlands' contribution to advertising through ARI. Ski Co.'s other criticism is that Highlands failed to continue its increased national advertising after elimination of the four-area ticket. This charge fails to acknowledge that the advertising cutback was part of the severe budget constraint Highlands was forced to undertake in response to the impact of Ski Co.'s exclusionary conduct on its revennes. J.A. 130-31.

The remainder of Ski Co.'s "free rider" argument is a theory never exposed to the facts. Highlands did

---

[57] Ski Co. seeks to prove its point by selectively setting forth the advertising and promotion line from Schedule E of Highlands' financial statements. Ex. S, Tr. 1292; Pet. Br. 25-26, n. 28. However, Ski Co. ignores Highlands' share of the marketing and administrative expenses of ARI which appear on those same schedules. By definition, because the division of marketing expenses was usage-based, the alleged "free rider" argument is devoid of theoritical validity. Factually, when the arithmetic correction is actually made, Ski Co.'s free rider argument completely evaporates:

	Highlands' Advertising & Promotion	Highlands' Share of ARI Marketing and Administrative Expense	Highlands' Total	
1972-73	$136,624	$ 33,240	$169,864	
1973-74 (ARI begun)	69,168	102,474	171,542)	
1974-75	80,638	173,626	254,264)	4-area
1975-76	100,769	194,954	295,723)	ticket
1976-77 (low-snow)	86,017	89,764	175,781)	offered
1977-78 (ARI sold)	125,847	—	125,847)	
1978-79	139,844	—	139,844	

not sit by "complacently" in the face of changing market conditions, Pet. Br. 39, but instead made extensive investments in its facilities, keeping pace with similar improvements by Ski Co.[58]

Ski Co. also contends that Highlands sought to continue free riding with the Adventure Pack. Pet. Br. 27. The basis for this contention is Ski Co.'s assertion that Highlands was appropriating Ski Co. good will by including skiing at Ski Co. mountains in the Adventure Pack and was doing so "only because Ski Co. provided and was known to provide, outstanding skiing." *Id.* Ski Co. offers no evidentiary support for this bold assertion. The evidence makes clear that the Adventure Pack included a mechanism for skiing at Ski Co. mountains in response to consumer demand for variety, J.A. 90-91, 97, 120; Tr. 982-83, 1029-30, not because of quality differences among individual mountains. J.A. 121. Ski Co.'s continning efforts to justify its refusals to deal on the basis of Highlands' alleged inferior quality must be rejected by this Court, as they were by the jury, which had ample evidence to conclude that all the Aspen areas were of comparable quality.[59] More importantly, Highlands, and not

---

58 After the initial construction of three lifts in 1958, lifts were replaced or added in 1959, 1961, 1963, 1964, 1965, 1966, 1969, 1970 and 1975, for a total of twelve lifts by the time of trial. Tr. 429-34. In addition to these improvements, Highlands added "significantly" to its trail capacity in recent years, Tr. 202, including a major new trail, some 4,500 feet long, constructed in 1980, Tr. 449, which brought Highlands over 425 acres of skiing terrain. Tr. 281. From the 1973-74 ski season through the 1980-81 ski season (excluding the abnormal 1976-77 "low-snow" year), Highlands' capacity share of the Aspen market remained approximately the same. Ex. 97, J.A. 183.

59 For example, the Forest Service snow ranger who inspected the four areas in Aspen weekly found the quality of Highlands' skiing experience among the "finest" in the country and comparable to Ski Co.'s. J.A. 60.

Ski Co., was the innovator bringing to Aspen the first free bus system, the only GLM ski school, the best children's ski instruction, the first NASTAR racing, and the only acrobatic skiing exhibitions. Such attractions contributed substantially to Aspen's overall popularity among destination skiers. J.A. 123, 172-73, 179-80.

B. Ski Co.'s Formalistic Analysis Of The Essential Facilities Cases Obscures The Evidence Here Of Substantial Anticompetitive Impact.

The present case was not tried under any "essential facilities" jury instruction; rather, the verdict is grounded solidly in the principles of *Grinnell*. However, because the Court of Appeals used an approach that analogized to the doctrine in affirming the judgment, Ski Co., drawing largely on hypothetical facts, attempts to turn the doctrine into a rigid and formalistic method of analysis and to persuade the Court that it does not apply here.

This Court has never announced a separate doctrine for antitrust cases under the name "essential facilities" or "bottleneck." Rather, each of the cases so labeled by commentators has rested upon its own particular facts and the application of traditional antitrust principles. However, as Ski Co. acknowledges, Pet. Br. 33, the doctrine had its origin in situations where some horizontal competitors had, through development of a new facility, come to control a service or delivery mechanism used by the competitors in that market. There is a direct analogy here.

The four-area ticket developed by the competitors in Aspen became the preferred choice of consumers for access to the variety of skiing experience available there.

It facilitated competition between the companies.[60] The evidence showed not only that a large number of skiers opted to purchase this "product," which gave the most variety, but also that many single-day skiers followed them. When Ski Co. refused to continue with the product the parties had together developed, used its monopoly power to provide a similar, though less complete product, and denied Highlands the ability to market a reasonable substitute by its refusals to deal and other exclusionary conduct, it precluded Highlands from reaching those consumers.[61] The damage inflicted on Highlands' ability to compete was severe.[62]

---

[60] The four-area ticket had none of the undesirable characteristics of a cartel: it did not restrict output; it created a new product; overall utilization of skiing increased; consumers received a discount; and the competitiors continued to market their own products. Because the parties obtained revenues and incurred promotional expenses from the arrangement on the basis of skier usage, the companies retained strong incentives to compete to attract skier visits and putative free rider problems were thereby eliminated. In analyzing an analogous arrangement in *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19-21 (1979), this Court correctly concluded that such an access mechanism was in reality a new product, comprising something more than its constituent elements, and that the arrangement was in fact procompetitive.

[61] Ski Co. argues that skiers still could ski Highlands because of the continued availability of daily lift tickets. Pet. Br. 20-21, 45-46. However, the evidence contrasts sharply with this hypothetical opportunity. Skiers demanded convenient access to a variety of mountains. Once the popularity of multi-area tickets was established, the daily life ticket had become an inferior distribution system, used mainly by less vigorous skiers tagging along after multi-area ticket holders.

[62] A facility is "essential" if denial of its use "inflicts a severe handicap" on competitors. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956

(Continued on next page)

Commentators have often recognized the potential for abuse in forcing a competitor out of an important distribution pattern.[63] As they foresee, Ski Co., with its market control, could bear the short run cost of limiting its own output that resulted from precluding the development of a full-variety exchange system. Highlands, on the other hand, loses such a war of attrition. The monopolist, by the use of its power alone, thus completely shuts down the competitive process, in spite of the fact that Highlands — an original participant, joint creator, and financing risk-taker in the ticket exchange system — had the strongest possible claim to a right of continued access to the market it helped create.[64]

The courts have also repeatedly confirmed that unreasonable exclusion from an important market access

---

(Continued from previous page)

(1978). Under Ski Co.'s self-serving definition of essentiality, had one of the railroads in *United States v. Terminal Railroad Assoc.*, 224 U.S. 383 (1912), later been excluded from the group and sued, it would have lost because the lack of access to the defendant's terminal did not "prevent" it from operating on its own tracks, or building its own terminal facilities.

63 *E.g.*, R. Bork, THE ANTITRUST PARADOX 158-59 (1978) (discussing predatory opportunity for majority of members of board of trade to force out or chasten more efficient rivals); and see P. Areeda, ANTITRUST ANALYSIS ¶¶ 383 and 385 (2d ed. 1974). The four-area ticket or exchange system is a "distribution pattern" because it permits the individual areas to sell to the substantial number of skiers who only buy multi-area tickets.

64 *See* L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST ¶ 48 at 132 (1977). Professor Sullivan finds sound support in this Court's decisions for the rule that a monopolist may not deny competitors reasonable and non-discriminatory access to an important distribution pattern.

mechanism can be an unlawful use of monopoly power.[65] Ski Co.'s narrow focus on formal market and business structures only obscures the important point: there is more than one way to use market power to deny access. No case has ever held that there was a doctrine applicable only to "unilateral vertical inter-market leveraging." Pet. Br. 35. In fact, the cases do not generally rely upon any finding of separate markets.[66] Thus, in *Terminal Railroad*, there was no formal finding of a "market" for railroad services and of a separate "market" for terminal, bridge and tunnel facilities. Nor in *Gamco* was there one "market" for produce wholesaling and a separate "market" for selling space. Rather, the "familiar evil," as articulated in *Lorain Journal*, was the use of market power to solidify a monopoly over "the mass dissemination of *all* news and advertising."[67]

Moreover, the essential facilities approach does apply in situations, as here, involving one product at different levels of a distributional system, without there being a

---

[65] See *e.g. MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d at 992; *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, 194 F.2d 484, 487 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

[66] Ski Co. argues that the essential facilities doctrine cannot apply here because the jury did not find a separate "market" for multi-day, multi-mountain lift tickets. Pet. Br. 5, 39. Besides being legally unsupportable, this ignores the obvious. Because the case was submitted to the jury under the *Grinnell* standard proposed by Ski Co., the jury was not asked to identify such a market separately. It did find, however, that such a product was a discrete element within the relevant submarket. J.A. 188. Moreover, the evidence of separate demand for such a product was overwhelming.

[67] *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951) (emphasis added).

formal definition of markets. For example *Otter Tail*, where, as Ski Co. acknowledges, Pet. Br. 34-35, n. 36, no markets were clearly defined, involved a refusal to sell electrical power at wholesale to a retail competitor. Nor have the "essential facilities" cases all been confined, as Petitioner argues, to "*producer*" goods to be incorporated into some end product, as opposed to a *consumer* good or service that the plaintiff wanted to re-sell to the public. Pet. Br. 36. Indeed in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), which Ski Co. identifies as an essential facilities case, Pet. Br. 43, the plaintiff wanted to purchase defendant's goods at wholesale and resell them to the public at retail in competition with the defendant.[68] In short, the so-called essential facilities cases, far from supporting Petitioner's revisionist antitrust jurisprudence, actually confirm the result below.

Given Ski Co.'s refusal to sell its tickets to Highlands, at wholesale or retail, Highlands could offer an effective substitute ticket only by developing another ski mountain in Aspen.[69] The actual record evidence of huge

---

[68] The identical situation is presented here. Highlands wanted to purchase Ski Co. life tickets at wholesale and resell them to consumers in a retail package. Ski Co.'s facile conclusion that "it had no actual or potential vertical relationship to Highlands," Pet. Br. 37, patently conflicts with the evidence. More importantly, this type of beguiling mischaracterization demonstrates the dangers of abandoning fact-sensitive inquiry and instead making labels outcome-determinative. Whether particular conduct has horizontal or vertical components and consequences is often not readily discernible, and the label may vary depending on the viewer's perspective. *Cf. United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982).

[69] Ski Co.'s indifference to the evidence presented at trial concerning essentiality, Pet. Br. 38-39, is startling given the

(Continued on next page)

capital costs, tough regulation of entry by the Forest Service and local government, and limited lodging development in Aspen amply showed that such development was not practicable.[70]

Realistically viewed, the essential facilities cases simply teach that a monopolist may not arbitrarily refuse to compete. Because a monopolist has no absolute right to preserve the condition of ineffective competition, it may not arbitrarily deny access to a mechanism without which competition would be futile. Of course, neither the doctrine in the abstract, nor its application here, stands for the existence of an absolute "duty to cooperate." If, as required by *Grinnell,* Ski Co. had shown a plausible business justification for the exclusion of Highlands, such as inability to serve its own customers adequately, its conduct would have been defensible.[71] This it failed to do.

(Continued from previous page)

posture in which this appeal arises. For example, Ski Co. asks this Court to take judicial notice of the existence of single-mountain destination ski resorts (not all of which, incidentally, are single-mountain), Pet. Br. 38, while ignoring the evidence of what actually transpires in comparable multi-mountain resorts where Ski Co. also competes. Ski Co. claims that "[l]ike Ski Co., Highlands had the opportunity to develop multi-mountain capacity," Pet. Br. 39, while ignoring the obvious fact that Ski Co. did not "develop" several mountains, but rather *acquired* them—*i.e.* Ski Co. "integrated backward," *cf.* Pet. Br. 33, to gain control over multi-mountain capacity.

70 *Cf. Poster Exchange, Inc. v. National Screen Service Corp.,* 431 F.2d 334, 339 (5th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971). *See* A. D. Neale, THE ANTITRUST LAWS OF THE UNITED STATES 67 (2d ed. 1970).

71 See Jury Instructions, J.A. 180-81; *Otter Tail Power Co. v. United States,* 410 U.S. at 378; *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.,* 194 F.2d at 488. Ski Co.'s assertion that it need not demonstrate any justification or competitive benefit betrays its thinly veiled argument for a rule of *per se*

(Continued on next page)

For this and other reasons, Ski Co.'s assertion that a requirement of reasonable access under these circumstances would be a "drastic departure" from antitrust principles, Pet. Br. 37, is unwarranted. As Ski Co. concedes, Highlands proved there was no business justification for Ski Co.'s refusal to deal, Pet. Br. 20, so Ski Co. can point to no demonstrable, as opposed to hypothetical, harm from such a requirement. More fundamentally, any complaint Ski Co. might have about such a requirement is pertinent only to the form of equitable relief, which is not at issue here. It has no bearing on whether the refusal was lawful or unlawful.

Finally, Ski Co.'s panegyric to "vision, planning, a willingness to take risks," Pet. Br. 39-40, cannot obscure the facts presented to the jury: Highlands had the vision to bring many new skier services to Aspen; Highlands did the planning that resulted in the four-area ticket; Highlands took the risk of investing in ARI and its advertising. However, the risk anticipated by Highlands was that consumer acceptance might not reward the effort. The risk that materialized was quite different—Ski Co. laid exclusive claim to that consumer acceptance and diverted the rewards to itself alone. No antitrust rule heretofore announced by this Court would protect the license of a monopolist to the extent Petitioner now requests.

C. Ski Co.'s New Test Should Not Be Adopted —Properly Stated And Applied To The Facts It Does Not Change The Result Reached By The Jury Below.

Ski Co. promotes a rule that would require a showing of "substantial exclusionary conduct" to prove unlawful

---

(Continued from previous page)
lawfulness for all horizontal refusals to deal. Under an appropriate rule of reason analysis, anticompetitive effects are unlawful if not counterbalanced by procompetitive benefits. *E.g.*, *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978).

monopolization.[72] Pet. Br. 18. To meet this requirement a plaintiff would have to prove that a defendant's conduct met one of four "tests." The new rule is proposed despite the fact that the *Grinnell* standard—whether a defendant is protecting his market position by competition on the merits or by unnecessarily exclusionary conduct—will identify exactly the same culpable conduct and anticompetitive impact as the proffered four-part test.[73] When these tests are actually applied to the evidence, the exclusionary nature of Ski Co.'s conduct is obvious.

---

[72] Ski Co. nowhere explains the origin in existing law of the "substantiality" component of this test. If, by proposing a requirement of showing a "substantial restraint," Ski Co. intends to add some new element to traditional standards for gauging whether a particular type of conduct is unlawful, its attempt must be rejected. It invites a reviewing court to second-guess every jury verdict in a monopolization case and, without having heard all the evidence directly, to decide instead, from its own subjective analysis, whether a restraint is or is not "substantial." If, however, Ski Co. is suggesting that the amount of offensive conduct must be substantial or significant, the jury was explicitly instructed to that effect. Tr. 2314.

[73] Ski Co. also expressly proposes a *per se* rule of lawfulness for its unreasonably exclusionary conduct. Its rationale for such an abrupt and unprecedented departure from fact-sensitive antitrust analysis is a tautological ode to trader sovereignty and the spectre of "judicial supervision of dealings." Pet. Br. 48-50. However, *per se* rules are appropriate only when the Court is convinced from experience with a market situation that it knows "enough of the economic and business stuff out of which these arrangements emerge to be certain." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Presumably, a *per se* rule of legality would be "appropriate" only with respect to conduct that is "manifestly" procompetitive. *Cf. Continental T.V., Inc. v. GTE/Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). It would be impossible to reach such a conclusion about Ski Co.'s conduct here without totally ignoring the record.

1. Ski Co. Substantially Restrained The Opportunities Of Its Competitor.

A monopolist goes beyond acceptable conduct when it preserves its market position by preventing another business from competing with it on the merits. It thereby excludes competition and short-circuits the competitive process. Thus, a monopolist is held to have engaged in unlawful conduct when it pursues a course of action which prevents another business from competing *regardless* of its relative efficiency, the attraction of its products, or the skill of its management—precisely the kind of behavior addressed in and condemned by *Grinnell*. Because of its monopoly power, the monopolist's refusal to deal excludes competitors from the process of competition.

Affirmance under Ski Co.'s test requires only that there be evidence from which the jury could find that Ski Co. imosed any substantial amount of restraint, unrelated to competition on the merits, on Highlands' ability to compete. The preceding review of the impact of Ski Co.'s preclusion of Highlands' competition for a significant number of destination skiers leaves no doubt that there was more than enough evidence.[74]

2. Ski Co. Substantially Restrained Consumer Freedom Of Choice.

Ski Co. did not simply offer what it hoped was a superior product—it removed from the market, and precluded Highlands from selling, a product skiers had demonstrated they wanted. Ski Co. in fact acknowledges that consumers were frustrated. Pet. Br. 45-46. Where a monopolist frustrates consumer choice, *Grinnell* requires

---

[74] *See* pp. 10-11, 29-33, *supra*.

that there be an acceptable explanation for its conduct.[75] If such an explanation is not forthcoming, then a jury can fairly find that the monopolist has unreasonably interfered with the attainment of an essential goal of the competitive process—consumer freedom of choice.[76] Thus, *Grinnell* also encompasses the second Ski Co. test.

Again, under that second test, the question is whether there was evidence from which the jnry could find that Ski Co. imposed any substantial amount of restraint on consumer freedom of choice. Evidence of the fustrated skiers practically locked into Ski Co.'s three-area ticket, unable to get or conveniently use the preferred four-area ticket, and misled by deceptive advertising provided the answer to this question.[77] Even under the second Ski Co. test, it has unlawfully monopolized.

3. Ski Co.'s Conduct Was Predatory.

Ski Co.'s third test is a severely limiting definition of predatory conduct. In contrast, a formulation more faithful to this Court's decisions defines predatory conduct as "a firm's deliberate aggression against one or more rivals through the employment of business practices that would not be considered profit-maximizing except for the expectation either that (1) rivals will be driven from the market . . . or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator

---

[75] "Consumer interests require, particularly, that acts of dominant and leading firms in concentrated markets be scrutinized and possibly restrained." E. Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 Cornell L. Rev. 1140, 1168 n. 109 (1981) (citations omitted).

[76] *See* P. Areeda, *Introduction to Antitrust Economics,* 52 Antitrust L.J. 523, 534 (1983), in which the author identifies as one of the goals of the antitrust laws the preservation of "multiple choices for producers and consumers free of the arbitrary dictates of monopolies."

[77] See pp. 11-12, 28-33, *supra*.

finds inconvenient or threatening."[78] The definition need not, as Ski Co. suggests, Pet. Br. 19, depend on absolute destruction. The *Grinnell* rule readily covers such conduct, which is not only exclusionary but deliberately so.

In the record below, one need not look far for evidence of such predatory conduct. For example, in 1977 Ski Co. conditioned Highlands' continued participation in the ticket exchange system on its acceptance of an arbitrarily low percentage of revenues unrelated to the competitive merits of the products. Ski Co. did not invoke the spirit of Adam Smith, Pet. Br. 22, or the ethos of corporate culture, Pet. Br. 16, to justify this proposal. Instead, it acted on its naked power to limit Highlands' revenues without regard to the relative efficiency or competitive attractiveness of either firm. Its position was a simple ultimatnm: If you capitulate to our demands, we will not pursue our effort to drive you out of the market for destination skiers. In that first year of its exclusionary campaign, when Highlands yielded, Ski Co. dropped its threat to eliminate the four-area ticket exchange system. Its style was predatory from the beginning.[79]

4. Ski Co.'s Conduct Was Uniquely Monopolistic.

By definition, actions advantageous uniquely to a monopolist must be something other than "ordinary business practices typical of those used in a competitive

[78] R. Bork, *supra* note 26, at 144.

[79] *See* R. Bork, *supra* note 26, at 157: "Proof of specific intent to engage in predation may be in the form of statements made by the officers or agents of the company, evidence that the conduct was used threateningly and did not continue when a rival capitulated, or evidence that the conduct was not related to any apparent efficiency."

market."[80] Market actions that are uniquely monopolistic are those that a firm without market control would find substantially less effective or even counterproductive.[81] Nor are they examples of superior product or business acumen.

Such conduct confirms by its very existence that competition is ineffective. Application of the *Grinnell* rule prevents this abuse of monopoly power and protects the process of competition. Thus, "the *Grinnell* rule recognizes that maintaining or extending market control by the exercise of that power is sufficient to complete a violation of § 2."[82]

Again, the record below amply reveals uniquely monopolistic behavior. Ski Co. could successfully refuse to allow any form of four-area ticket in Aspen only because consumers did not have the option of switching to any other supplier to get the product they desired. No producer without market power, such as the ski areas in Summit County, would have set out to destroy this means of access to a substantial segment of the market. Ski Co. could successfully refuse to honor Adventure Pack coupons or refuse to sell its own tickets to Highlands at their full retail price only because it could sacrifice the short-run profit on the sale to the expectation of ultimately freeing itself from all competition. Ski Co., unlike a competitive firm, derived a demonstrable benefit from this limitation on consumer choice: by its own survey, a substantial portion of destination skiers spent at least one day on Ski Co.'s mountains which they would have preferred

---

80 *Telex Corp. v. IBM*, 510 F.2d 894, 925-26 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

81 *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 291.

82 *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 274.

to spend at Highlands. Thus, Ski Co.'s profits and relative utilization were increased in spite of the consumer's preference for an alternative mountain. As is predictable where competition is foreclosed by a monopolist, the consumer is the true loser.

CONCLUSION

Petitioner may not challenge the sufficiency of the evidence on monopolization, because it did not raise the issue below. Even if this Court reaches Ski Co.'s arguments, ample evidence thoroughly supports the general jury verdict. This case presents no basis for discarding the existing law of monopolization and adopting radical theory. Overbearing and unnecessarily exclusionary conduct by an admitted monopolist was properly condemned under conventional § 2 standards after full trial to a jury. This Court can readily conclude that the jury rightfully found that Ski Co. had succeeded in insulating itself from competition by conduct that went beyond the lawful boundaries of vigorous competition on the merits.

For the foregoing reasons, the jury verdict should be left undisturbed and the judgment below, affirmed.

Respectfully submitted,
TUCKER K. TRAUTMAN
(Counsel of Record)
JOHN H. EVANS
OWEN C. ROUSE
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
(303) 623-2700
Attorneys for Respondent

Of Counsel:
JOHN H. SHENEFIELD
MILBANK, TWEED, HADLEY & McCLOY
Washington, D.C.