The *Grinnell* Test of Monopolization Sounds a False Alarm: *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[1] — With enactment of the Sherman Antitrust Act[2] (the Act) in 1890, Congress established a federal law of antitrust, imposing criminal and civil penalties upon businesses and individuals who engage in anticompetitive conduct. Section 1 of the Act prohibits contracts, combinations, and conspiracies in restraint of trade and functions as a broad proscription against collusive agreements among competitors which have the purpose and effect of reducing competition.[3] Section 2 condemns monopolies, attempts to monopolize, and combinations or conspiracies to monopolize any part of interstate trade or commerce, and thus reaches both concerted and unilateral conduct.[4] Yet while sections 1 and 2 of the Act catalog in broad terms the various illegal practices at which the Act's enforcement provisions are directed, the text of the Act itself provides no clear criteria or tests to define and identify the proscribed anticompetitive conduct.[5] Thus, it has largely been left to the courts to formalize the elements required to make out a prima facie case for a section 1 or section 2 Sherman Act violation.[6]

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[1] 472 U.S. 585 (1985).

[2] 15 U.S.C. §§ 1–7 (1982). For a detailed discussion and analysis of the Act, see 1–6 P. AREEDA & D. TURNER, ANTITRUST LAW (1978) [hereinafter AREEDA & TURNER]; R. BORK, THE ANTITRUST PARADOX (1978); A.D. NEALE & D.G. GOYDER, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA (1980); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1977); 1–3 VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION (1985).

[3] Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

[4] Section 2 of the Sherman Act provides:

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

15 U.S.C. § 2 (1982).

[5] In a recent section 1 case the Supreme Court noted candidly that the Sherman Act itself provides no more than broad definitions of the conduct it means to proscribe. United States v. United States Gypsum Co., 438 U.S. 422, 438–39 (1978). "The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *Id.* at 438 (footnote omitted). *See also* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955) (quoted in *United States Gypsum*, 438 U.S. at 439) ("The Sherman Act, inevitably perhaps, is couched in language broad and general . . . . Thus it may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures."). The indeterminancy of the Sherman Act's standards, however, does not preclude its enforcement on grounds that it is unconstitutionally vague. Nash v. United States, 229 U.S. 373, 376–78 (1913).

[6] Indeed, the framers of the Act recognized that the statute left to the courts the critical task of developing tests to distinguish lawful from unlawful conduct. Senator Sherman himself noted that "all that we, as lawmakers, can do is to declare general principles, and we can be assured that

It is clear from both the legislative history surrounding passage of the Sherman Act and from the judicial decisions interpreting the Act that section 2 does not prohibit monopoly *per se*.[7] The Senate debates on the Sherman Act reflect the intention of the drafters that the Act only prohibit monopolies acquired through abuse of the competitive process, not those legitimately obtained through lawful competitive conduct.[8] Unlawful monopolization, as proscribed by the Act, necessarily involves the unfair or unreasonable use of monopoly power,[9] as distinct from monopoly attained by superior skill in "competition on the merits"[10] which may appropriately be labeled honestly industrial.[11] Thus, only unfair conduct — those practices which constitute the active use of monopoly power to exclude rivals — is unlawful under the Act.[12]

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the courts will apply them so as to carry out the meaning of the law . . . ." 21 CONG. REC. 2460 (1980) (quoted in *United States Gypsum*, 438 U.S. at 438 n.14).

[7] "Mere monopoly" or "monopoly in the concrete" is not itself unlawful absent wrongful conduct or intent on the part of the monopolist in achieving the monopoly. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.14 (1984); United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); United States v. International Harvester Co., 274 U.S. 693, 708 (1927); United States v. United States Steel Corp., 251 U.S. 417, 450–51 (1920); Standard Oil Co. v. United States, 221 U.S. 1, 60–62 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179–83 (1911); United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 429–32 (2d Cir. 1945).

[8] Indeed, the sponsors of the Act explicitly intended to exempt from the Act's proscriptions one "who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well." 21 CONG. REC. 3151–52 (1890) (remarks of Senator Hoar).

[9] Unlawful monopolization, as appreciated by the drafters, involved "something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons in the same business." 21 CONG. REC. 3161–62 (1890) (remarks of Senator Hoar).

[10] As the phrase is used throughout this casenote, "competition on the merits" envisions pricing and marketing behavior which reflects the skill, foresight, industry, and/or efficiency of the competitor. The firm that excludes rivals by "building a better mousetrap" or by "building it more cheaply" is merely competing on the merits and should not be held in violation of the antitrust laws. *See* 3 AREEDA & TURNER, *supra* note 2, ¶¶ 626a–b. The firm that sells that mousetrap at prices below its costs of production or buys up all of the raw materials required to build mousetraps, however, for purposes of driving all of its competitors from the mousetrap market is said to be acting in a "predatory" manner, that is, in a manner that goes beyond competition with its rivals on the firms' respective merits. This kind of predatory behavior violates the antitrust laws. *Id.* As one commentator describes:

> Predatory business conduct can be defined as conduct which has the purpose and effect of advancing the actor's competitive position, not by improving the actor's market performance, but by threatening to injure or injuring actual or potential competitors, so as to drive or keep them out of the market, or force them to compete less effectively . . . . The predator seeks not to win the field by greater efficiency, better services, or lower prices reflective of cost savings or modest profits. The predatory firm tries to inhibit others in ways independent of the predator's own ability to perform effectively in the market . . . . The predation is likely to involve present losses to the predator, or at all events to foreclose profits which could currently be earned, detriments which are accepted by the predator as the cost of freeing itself for the future from the competition it now faces.

L. SULLIVAN, *supra* note 2, § 43.

[11] *Alcoa*, 148 F.2d at 431.

[12] *Id.* at 430. Section 2 envisions conduct beyond competition on the merits, that is, conduct that is unnecessarily "exclusionary" or "predatory" and appears to be reasonably capable of making a significant contribution to creating or maintaining monopoly power. 3 AREEDA & TURNER, *supra* note 2, ¶ 626c. It encompasses conduct that unnecessarily impairs the opportunities of rivals, *id.*

Indeed, courts and commentators have been careful to draw the line between legitimately gained monopoly and improper monopoly obtained through anticompetitive practices, so as to avoid penalizing legitimately successful industrial conduct which happens to result in monopoly power.[13] It is only "exclusionary" behavior, that which prevents actual or potential rivals from competing, or which impairs their opportunities to do so effectively that the Act prohibits.[14] To penalize legitimate competitive conduct that

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¶ 626b, and practices that "represent something more than the use of accessible resources, the process of invention and innovation, and the employ of those techniques of employment, financing, production, and distribution, which a competitive society must foster." United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 344–45 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

See United States v. Swift & Co., where the Court stated "[m]ere size is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." 286 U.S. 106, 116 (1931). *See also* 3 AREEDA & TURNER, *supra* note 2, ¶ ¶ 625b–626; L. SULLIVAN, *supra* note 2, § 43. As one commentator notes, "[c]ertainly the evils at which the Act was aimed, primarily excessive prices and excessive private power, were seen by those who sponsored the Act as stemming, not from inevitable responses to market structure, but from *wrongful conduct*." L. SULLIVAN, *supra* note 2, § 38 (emphasis added) (citing Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956); H. THORELLI, THE FEDERAL ANTITRUST POLICY, 180–85, 226–29 (1955)).

[13] *Alcoa*, 148 F.2d at 431. This distinction is also present in the standard adopted by the Supreme Court in *Grinnell*, where the Court announced that in order to find the offense of monopoly under section 2 of the Sherman Act, the antitrust plaintiff must show "the willful acquisition or maintenance of that [monopoly] power [by the monopolist] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell*, 348 U.S. at 570–71. This critical distinction dates from the earliest cases decided under the Sherman Act. *See* United States v. Southern Pacific Co., 259 U.S. 214, 230 (1922) ("normal and natural growth and development" distinguished from "the formation of holding companies, or stock purchases, resulting in the unified control of different roads or systems, naturally competitive"); United States v. Reading Co., 253 U.S. 26, 57 (1920) ("normal expansion to meet the demands of a business growing as a result of superior and enterprising management" distinguished from "deliberate, calculated purchase for control"); *Standard Oil*, 221 U.S. at 75–76 (development of business power by usual or normal methods contrasted with methods reflecting an intent to exclude competitors); *American Tobacco Co.*, 221 U.S. at 181 ("mere exertion of the ordinary right to contract and to trade" distinguished from "methods devised in order to monopolize the trade by driving competitors out of business").

[14] 3 AREEDA & TURNER, *supra* note 2, ¶ 626b. Because all competitive moves tend to exclude, it is only *unnecessarily exclusionary* conduct which the antitrust laws prohibit. *Id.* Only acts which are not "honestly industrial" (derived from superior skill, foresight, and industry), but rather impair the opportunities of rivals and corrupt competition on the merits are "unnecessarily exclusionary" and thus violative of the Sherman Act. *Id.* Thus, the firm that excludes its competitors by selling a superior product or by producing at substantially lower costs than its rivals due to successful research and development, high-quality production processes, cost reducing innovations, and the like, is merely competing successfully on the merits with its rivals. The Sherman Act welcomes such conduct, beneficial to the cause of competition, and thus it is not considered "exclusionary" for section 2 purposes, even if monopoly results. *Id.*

Indeed, the Act is not concerned with protecting competitors against competition from their more efficient rivals, but, rather, with protecting the competitive process against unreasonable restraints and abuse. *Brunswick*, 429 U.S. at 488; *Brown Shoe*, 370 U.S. at 320; Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133–34 (2d Cir. 1978), *cert. denied*, 439 U.S. 946 (1979). This principle echoes in the decisions of several of the circuits, which require proof of exclusionary conduct to support a section 2 monopolization claim, as distinct from mere aggressive competitive behavior which happens to harm a rival. See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273–75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), in which the Second Circuit

happens to result in monopoly power would deter large firms from competing vigorously on the merits with their smaller rivals and produce the paradoxical result of discouraging, rather than promoting, competition.[15] In sum, section 2 of the Sherman Act does not proscribe aggressive competitive behavior that is no more restrictive of rivals' opportunities than is reasonably necessary to effect competition on the merits, even where such behavior increases the market share of a dominant firm at the expense of its smaller competitors.[16]

Among the most common practices alleged to constitute monopolization in violation of section 2 of the Sherman Act is the monopolist's refusal to deal with a competitor.[17] The questions of when and under what circumstances a monopolist has a duty to deal are, however, among the most controverted and unsettled in the antitrust field.[18] In

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noted that "[t]he mere possession of monopoly power is not illegal. A monopolist who achieves that status because of 'a superior product, business acumen, or historic accident' cannot be faulted." Monopolies thus obtained are "tolerated but not cherished" because of "considerations of fairness and the need to preserve proper economic incentives." *Id.*; California Computer Products, Inc., v. International Business Mach. Corp. (*Calcomp*), 613 F.2d 727, 735 n.6 (9th Cir. 1979) in which the Ninth Circuit observed that "[p]ower obtained or maintained by the kind of behavior that competition is thought to foster, if not compel, [is] immune [from antitrust scrutiny] even though businesses [may be] destroyed in the process." *Id.* (quoting C. KAYSEN & D. TURNER, ANTITRUST POLICY 20 (1959). *See also* Telex Corp. v. International Business Mach. Corp., 510 F.2d 894, 925–26 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). The *Telex* court held that in determining what is unnecessarily exclusionary conduct, "[t]he first factor is whether or not the acts are ordinary business practices typical of those used in a competitive market, and secondly, whether the acts constitute the *use* of monopoly power." *Id.* (emphasis in original).

[15] As Judge Learned Hand noted in *Alcoa*:

> A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which is its prime objective to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins.

Alcoa, 148 F.2d at 430. Indeed, because the purpose of the antitrust laws is to protect the competitive process and not individual competitors, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 320 (1962), an intent to prevail in competition on the merits, even to the point of capturing all the customers of an inefficient rival, is not unlawful, even if the resulting conduct is fatal to the rival. *United States Steel*, 251 U.S. at 450. As the Court noted in *Copperweld*, "an efficient firm may capture unsatisfied customers from an inefficient rival . . . . This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Copperweld*, 467 U.S. at 767. *See also United States Steel*, 251 U.S. at 450–51; *American Tobacco Co.*, 221 U.S. at 180.

[16] 3 AREEDA & TURNER, *supra* note 2, ¶ 626b. *See* Foremost Pro Color v. Eastman Kodak Co., 703 F.2d 534, 544 (9th Cir. 1983) ("A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits . . . ."); Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 712 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978) (a monopolist is not forbidden from improving its efficiency in manufacturing or marketing, for example, even though the effect of doing so may be to improve its sales at the expense of its smaller rivals).

[17] *See generally* SULLIVAN, *supra* note 2, § 48; 10 VON KALINOWSKI, *supra* note 2, 661.01–03; Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); Fulda, *Individual Refusal to Deal: When Does Single-Firm Conduct Become Vertical Restraint?*, 30 LAW & CONTEMP. PROB. 590 (1965); Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720 (1974); Annotation, *Refusals to Deal as Violations of the Federal Antitrust Laws*, 41 A.L.R. FED. 175 (1979).

[18] Byars v. Bluff City News Co., Inc., 609 F.2d 843, 846 (6th Cir. 1979).

resolving cases of monopolists' alleged anticompetitive refusals to deal, the courts have long distinguished between concerted refusals to deal,[19] or group boycotts, and unilateral refusals to deal.[20] The former are in many cases *per se* violations of section 1 of the Sherman Act;[21] unilateral refusals to deal, on the other hand, are generally permissible under the Act.[22]

Courts and commentators generally agree that a unilateral refusal to deal constitutes illegal monopolization only where the monopolist's refusal unnecessarily excludes competitors or impairs the process of competition on the merits.[23] Thus, a unilateral refusal

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[19] A concerted refusal to deal occurs where a group of competitors unlawfully organizes to boycott a particular buyer or seller for the purpose of unreasonably restraining trade, controlling a market, or creating a monopoly. *See, e.g.*, Northwest Wholesale Stationers v. Pacific Stationers, 472 U.S. 284, 287–90 (1985); United States v. General Motors Corp., 384 U.S. 127, 129–30 (1966); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 692–96 (1962); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212–13 (1959); Fashion Originator's Guild, Inc. v. Federal Trade Comm'n, 312 U.S. 457, 461–62 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 603 (1914).

[20] A unilateral refusal to deal occurs where an individual manufacturer, distributor, or firm, acting alone and in the exercise of its own independent discretion, declines to buy from or sell to a particular business concern or individual. *See* Associated Press v. United States, 326 U.S. 1, 14–15 (1945); United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[21] *See supra* cases cited at note 20.

[22] The Supreme Court laid down the general rule in *Colgate*, holding that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Colgate*, 250 U.S. at 307. This general right of a private business concern to exercise freely its own independent discretion as to with whom it will deal is known as the *Colgate* doctrine and it remains the general rule governing unilateral refusals to deal. Annotation, 41 A.L.R. FED. at 185–86, 196. Thus, the federal courts have often stated that a unilateral refusal to deal, in and of itself, without more, does not constitute a violation of the Sherman Act. *See, e.g.*, Daily Press, Inc. v. United Press Int'l, 412 F.2d 126, 134–35 (6th Cir.), *cert. denied*, 396 U.S. 990 (1969); Standard Oil Co. v. Moore, 251 F.2d 188, 211 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958); Unibrand Tire & Product Co. v. Armstrong Rubber Co., 429 F. Supp. 470, 474 (W.D.N.Y. 1977). The Supreme Court recently reaffirmed the doctrine in Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984) (under section 1 of the Sherman Act, a "manufacturer of course generally has a right to deal, or to refuse to deal, with whomever it likes, so long as it does so independently").

The sharp contrast between the harsh treatment accorded concerted refusals to deal and the presumption of propriety given unilateral refusals reflects the basic distinction in the Sherman Act between concerted and independent action. *Copperweld*, 467 U.S. at 767; *Monsanto*, 465 U.S. at 761. While all concerted activity is judged sternly, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. *Copperweld*, 467 U.S. at 768. The *Copperweld* Court continued:

> It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the zeal of a single aggressive entrepreneur.

Id. at 767–68 (footnote omitted).

[23] In a section 2 action, "the plaintiff must show that the defendant's acts unnecessarily excluded

to deal is illegal under the Act only when it embodies or produces an unreasonable restraint of trade,[24] the purposeful elimination of competition,[25] or the creation of a monopoly through conduct not honestly industrial.[26] In determining whether a unilateral refusal to deal violates section 2, the courts have applied a two-pronged test focusing on market power and anticompetitive intent.[27]

In *United States v. Grinnell Corp.*,[28] decided in 1966, the United States Supreme Court set forth the current formulation of this two-part test to distinguish legitimate competitive practices from unreasonably exclusionary conduct violative of section 2.[29] Consequently, this is the test by which the legality of unilateral refusals to deal is measured.[30] The *Grinnell* Court stated that in order to establish a prima facie monopolization offense under section 2 of the Sherman Act, the plaintiff must show:

> 1) possession of monopoly power in the relevant market [by the putative monopolist]; and 2) the willful acquisition or maintenance of that power [by the putative monopolist], as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[31]

Thus, the test requires proof of two distinct elements: monopoly power and an intent or purpose to monopolize.[32]

The first element requires evidence that the alleged monopolist possessed the power to control prices or exclude competition in the relevant market.[33] The second element of the test requires evidence supporting an inference that anticompetitive animus motivated the monopolist's challenged conduct.[34] The Court has long held, however, that

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competition from the relevant market." *Calcomp*, 613 F.2d at 735; Greyhound Computer Corp. v. International Business Mach. Corp., 559 F.2d 488, 498 (9th Cir. 1977). *See Daily Press*, 412 F.2d at 134–35 (citing United States v. Parke, Davis & Co., 362 U.S. 29, 32 (1959); Lorain Journal v. United States, 342 U.S. 143, 154 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951); *Colgate*, 250 U.S. at 307). *See also* 3 AREEDA & TURNER, *supra* note 2, ¶ 736.

[24] *See, e.g., Parke, Davis*, 362 U.S. at 29; *Kiefer-Stewart*, 340 U.S. at 213.

[25] *See, e.g., Lorain Journal*, 342 U.S. at 154.

[26] *See, e.g.*, Eastman Kodak Co. v. Southern Photo Materials, Co., 273 U.S. 359, 368–69, 375 (1927).

[27] *See, e.g., Grinnell*, 384 U.S. at 570–71; *Colgate*, 250 U.S. at 307.

[28] 384 U.S. 563 (1966). In *Grinnell*, the federal government brought suit against the Grinnell Corporation and its affiliated companies, alleging that it had illegally monopolized the market for accredited central station protection services (burglar alarm, fire alarm, sprinkler supervision, and watch signal services) in violation of section 2. *Id.* at 566–67. The Court held that the offense of monopolization under section 2 of the Act required proof that the defendant possessed monopoly power in the relevant market and that it acquired or maintained that power in pursuit of a purpose to monopolize. *Id.* at 570–71. Finding that Grinnell's practices, including restrictive marketing agreements, predatory pricing arrangements, and acquisition of competitors, evidenced an illegal intent to monopolize the relevant market, the Court held that the second prong of the monopolization test was satisfied. *Id.* at 571.

[29] *Id.* at 570–71.

[30] Unilateral conduct, by its very nature, may only be challenged under § 2 of the Act. *Copperweld*, 467 U.S. at 768. *See supra* note 4 and accompanying text.

[31] *Grinnell*, 384 U.S. at 570–71.

[32] *Id.* This casenote refers to this two-pronged test alternately as the "*Grinnell* test" or the "monopoly power plus intent" test of monopolization. The elements of the test are, however, evident in much earlier cases brought under § 2 of the Act. *See, e.g., Southern Photo*, 273 U.S. at 375; *Colgate*, 250 U.S. at 307.

[33] *Id.* at 571. *See infra* notes 84–85 and accompanying text.

[34] *Id.*

the putative monopolist may rebut the elements of the *Grinnell* test by demonstrating that it does not possess monopoly power in the relevant product and geographic markets, or that legitimate business purposes, rather than an intent to monopolize, motivated its conduct.[35]

Typically, the defendant monopolist in a refusal to deal case is a vertically integrated business enterprise,[36] often in possession of materials or facilities vital to the productive processes and operations of its competitors.[37] In these cases, the courts as a rule have found section 2 violations where, in refusing to sell its smaller competitors the input factors necessary for them to furnish their services, manufacture their products, or operate their businesses, the monopolist's conduct created an inference of the monopolist's intent or purpose to monopolize by excluding its competitors.

In only one case prior to 1985 had the Court applied the *Grinnell* test to a section 2 monopolization claim where no vertical customer-seller relationship existed between the adversary parties. In that case, *Lorain Journal Co. v. United States*,[38] decided in 1951, a newspaper which was indispensable to local businesses refused to sell advertising space to customers who bought advertising on a local radio station.[39] The Court found both that the *Journal* possessed monopoly power in the relevant market and that its conduct was designed to destroy the competitor.[40] Accordingly, the Court enjoined the monopolist's conduct as an illegal attempt to monopolize, having as its purpose exclusion of the competing radio station through means beyond competition on the merits.[41] Thus, prior to 1985, the Court had applied the *Grinnell* test to unilateral refusals to deal arising only in two general factual contexts — those cases in which termination of a vertical customer-seller relationship was at issue,[42] and the situation in *Lorain Journal*, where a monopolist refused to deal with those who dealt with its competitor.[43]

In 1985, however, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[44] the Supreme Court for the first time addressed the question of whether an unintegrated[45] monopolist's

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[35] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608–10 (1985), (*Aspen*). *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 381–82 (1973); *Lorain Journal*, 342 U.S. at 155; *Southern Photo*, 273 U.S. at 375 (by implication); *Colgate*, 250 U.S. at 307; Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 718 F.2d 1509, 1519 (10th Cir. 1984), (*Aspen I*), *aff'd*, 472 U.S. 585, 611 (1985); *Byars*, 609 F.2d at 862–63 & n.53; Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc., 194 F.2d 484, 487–88 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

[36] A vertically integrated firm is one that operates at more than one level or stage in the production of the same product, such that the firm through its separate divisions and activities stands in a supplier-customer relationship to itself. *United States Steel*, 251 U.S. at 438. *See also* 3 AREEDA & TURNER, *supra* note 2, ¶ 723.

[37] These are the cases to which the so-called "essential facilities doctrine" or "bottleneck" theory is applicable. *See, e.g., Aspen I*, 738 F.2d at 1520–21; *Byars*, 609 F.2d at 856. For a detailed discussion of the doctrine and its application in refusal to deal cases, see *infra* notes 108–116 and accompanying text.

[38] 342 U.S. 143 (1951).

[39] *Id.* at 148–49.

[40] *Id.* at 152–55.

[41] *Id.* at 153–54.

[42] These cases are discussed *infra* notes 92–116 and accompanying text.

[43] *See supra* notes 38–41 and accompanying text.

[44] 472 U.S. 585 (1985).

[45] An unintegrated monopolist is a firm which operates only in the market in which it holds monopoly power, as distinguished from a vertically integrated firm, which operates at more than one level of production of a product. 3 AREEDA & TURNER, *supra* note 2, ¶ 723.

unilateral refusal to continue a cooperative marketing arrangement with a horizontal[46] competitor could constitute unlawful monopolization in violation of section 2 of the Sherman Act. A unanimous Court, applying the two-pronged *Grinnell* test, held that the defendant monopolist's refusal to cooperate with its rival in offering a joint ski lift ticket was indeed conduct prohibited by section 2 of the Sherman Act.[47]

The dispute in *Aspen* arose when Aspen Skiing Co. (Ski Co.), which owns three of the four ski mountains in the Aspen, Colorado area, discontinued its participation in an interchangeable ski lift ticket with Aspen Highlands Skiing Corp. (Highlands), owner of the fourth ski mountain at Aspen.[48] In most years from 1962 through 1978, the two competitors offered their customers a joint ticket useable on all four mountains.[49] When, contrary to Highlands' wishes, Ski Co. refused to continue the cooperative arrangement for the 1978–1979 season, Highlands' share of the market for downhill skiing at Aspen declined substantially.[50] Highlands then filed suit alleging that by refusing to offer the joint ticket, Ski Co. had monopolized the market for downhill skiing at Aspen in violation of section 2 of the Sherman Act.[51]

At trial, the jury found that Highlands proved the two elements of monopolization as required under the district court's *Grinnell* instruction and returned a verdict for damages against Ski Co.[52] The Tenth Circuit Court of Appeals affirmed, holding that the evidence was sufficient for a jury to infer that Ski Co.'s intent in refusing to market the four area ticket was to create or maintain a monopoly.[53] The Tenth Circuit also held that the ability to offer its customers access to Ski Co.'s larger facilities was essential to Highlands' ability to compete effectively.[54] Consequently, the appeals court held, Ski Co. had an affirmative duty to make its facilities available to Highlands.[55]

In response to the Tenth Circuit's judgment, Ski Co. obtained a writ of certiorari to the United States Supreme Court.[56] Writing for a unanimous Court,[57] Justice Stevens affirmed the Tenth Circuit's holding that Ski Co.'s refusal to cooperate with Highlands violated section 2 of the Sherman Act.[58]

The Court held that even though a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor, the firm may nevertheless be subject to section 2 liability where its refusal to continue a joint venture gives rise to inferences of anticompetitive intent and is unsupported by valid business justifications.[59]

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[46] The economic relationship between companies performing similar functions in the production or sale of comparable goods or services is characterized as "horizontal." *Brown Shoe*, 370 U.S. at 334. The Court distinguishes such relationships from those between firms standing in a supplier-customer relationship, which are characterized as "vertical." *Id.* at 323. Where, as in *Aspen*, 472 U.S. 585, two firms operate in the same market, that is, at the same level of production, and operate *only* at that level, the firms are "unintegrated horizontal competitors." *Brown Shoe*, 370 U.S. at 323.

[47] *Aspen*, 472 U.S. at 610–11.

[48] *Id.* at 593–95.

[49] *Id.* at 589–92.

[50] *Id.* at 594–95.

[51] *Id.* at 592–95.

[52] *Id.* at 595–97.

[53] *Id.* at 599.

[54] *Id.*

[55] *Id.*

[56] 469 U.S. 1071 (1984).

[57] Justice White took no part in the decision of this case. *Aspen*, 472 U.S. at 611.

[58] *Id.* at 610–11.

[59] *Id.* at 600–01.

The Court emphasized that a monopolist's intent, as inferred from its conduct and from the general circumstances of the case, is critical in determining whether the challenged conduct is fairly characterized as exclusionary, anticompetitive, or predatory.[60] Citing evidence of Ski Co.'s past pattern of dealing with Highlands,[61] the fifteen-year history of the cooperative venture,[62] the adverse impact of Ski Co.'s conduct on both Highlands and consumer welfare,[63] and the lack of an ordinary business purpose or efficiency justification to legitimate Ski Co.'s decision to discontinue the joint ticket,[64] the Court held that the record was sufficient for the jury to find Ski Co.'s refusal to deal with Highlands unlawfully exclusionary.[65] In determining that the evidence was sufficient to support the verdict of unlawful monopolization based on Ski Co.'s intent alone, the Court found it unnecessary to consider the possible relevance of the essential facilities doctrine.[66]

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[60] *Id.* at 602–04.

[61] As illuminative of Ski Co.'s monopolistic intent, the Court noted that in this case "the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id.* at 603.

[62] *Id.*

[63] *Id.* at 606–08. Ski Co. argued that it should not be required to demonstrate that its conduct was supported by an affirmative business justification, because its "undisputed desire to compete with Highlands rather than help it through cooperation" was alone sufficient evidence of the pro-competitive character of its conduct. Brief of Petitioner at 20. Ski Co. did, nonetheless, advance several justifications for its conduct at trial, but was unable to persuade the jury that its conduct was justified by a normal business purpose. *Aspen*, 472 U.S. at 608–10. Ski Co. proffered six justifications for terminating the joint ticket: (1) the joint ticket was the product of a voluntary, bilateral agreement which Ski Co. was perfectly justified in terminating when it perceived that the agreement was more beneficial to Highlands than to itself; (2) the joint ticket, operating as it did to increase Highlands' market share above the level it would have achieved in the absence of the cooperative venture, distorted the efficient resource allocation of the competitive free-market system; (3) the arrangement produced an "unacceptable free-rider problem," with Highlands taking advantage of Ski Co.'s national advertising campaign and siphoning off revenues that Ski Co. could recapture if the ticket was discontinued; (4) use of the jointly offered ticket could not be monitored properly; (5) the coupons (in use from 1962 to the 1971–1972 ski season) were administratively cumbersome, and the survey method of revenue allocation was inaccurate and disruptive; and (6) Ski Co. desired to disassociate itself from what it considered the inferior skiing services offered at Highlands. *Id. See also* Brief of Petitioner at 20–28.

[64] The Court emphasized the convenience and flexibility of the six-day ticket because it eliminated the need for skiers to wait in line for an individual one-day ticket each morning, expanded the variety of ski terrain skiers could access with the same ticket, and allowed purchasers to decide in their own time and for their own reasons which mountain to ski on each day. *Id.* at 608.

[65] *Aspen*, 472 U.S. at 610–11. The trial court instructed the jury that to find conduct exclusionary, it must draw a distinction "between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck on the other." *Id.* at 604. *See infra* note 179 and accompanying text. Citing 3 AREEDA & TURNER, *supra* note 2, [¶ 626b], the Court noted that "'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen*, 472 U.S. at 605 n.32.

[66] *Id.* at 611 n.44. The Tenth Circuit discussed at length the applicability of the essential facilities doctrine to this case. *See Aspen I*, 738 F.2d at 1520–21. The Supreme Court, however, agreed with Highlands that "given the evidence in the record, it is not necessary to rely on the essential facilities doctrine in order to affirm the judgment." *Aspen*, 472 U.S. at 600.

In holding an unintegrated monopolist's unilateral refusal to enter into a cooperative marketing arrangement with its horizontal competitor unlawful, the Supreme Court's decision in *Aspen* is at odds with the procompetitive purposes and goals of the Sherman Act.[67] In *Aspen*, the Court for the first time held that a monopolist's refusal to deal violated section 2 of the Sherman Act where the challenged conduct neither impeded its rival's ability to bring its services to market, distorted free choice in the marketplace, nor otherwise obstructed the process of competition on the merits. The *Grinnell* "monopoly power plus intent to monopolize" standard of liability for section 2 violations[68] in past refusal to deal cases successfully distinguished unnecessarily exclusionary conduct, which the Act intends to prohibit,[69] from legitimate conduct which represents and furthers competition on the merits. Yet the *Grinnell* standard's failure to examine directly the nature of the monopolist's challenged *conduct* led the Court in *Aspen* to condemn legitimate industrial behavior which actually furthered competition on the merits. The *Aspen* decision in effect proscribes a dominant firm from competing vigorously on the merits with its smaller competitor where the two firms have a history of cooperation. The decision, furthermore, has severe implications respecting a private firm's autonomy and its commonly presupposed right to enter into only those business agreements it deems advantageous.[70]

This casenote begins by discussing the background and development of the standard of liability for unilateral refusals to deal under section 2 of the Sherman Act. The discussion focuses on the factual situations the Court confronted in cases prior to *Aspen* and the result obtained in those cases upon applying the *Grinnell* "monopoly power plus intent" test to determine whether section 2 had been violated. Section two of the casenote presents the *Aspen* decision, describing the unanimous Court's approach and reasoning. Section three then evaluates the merit and effect of the Court's application of the *Grinnell* test to the situation in *Aspen*, emphasizing the factual dissimilarities between *Aspen* and the prior refusal to deal cases to which the Court has applied the test.

Finally, section four proposes that a *conduct-oriented* test of liability which examines the nature and competitive impact of the challenged conduct, rather than the more subjective "intent" standard of *Grinnell* would more effectively enforce the purposes and policy objectives underlying the Sherman Act in refusal to deal cases. A unilateral refusal to deal should not be held to violate section 2 of the Sherman Act absent a nexus between the antitrust defendant's monopoly power and the challenged conduct,[71] and absent conduct which deprives the rival plaintiff of materials or resources necessary for it to carry on its business or which interferes with the rival's ability to compete with the monopolist on the merits. Explicit recognition of the need to prove "nexus" and "impaired competition" would provide the courts with a more objective standard on which

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[67] *See infra* notes 285–303 and accompanying text.

[68] *Grinnell*, 384 U.S. at 570–71.

[69] *See supra* notes 7–16 and accompanying text.

[70] *See infra* notes 304–334 and accompanying text.

[71] This is the "nexus" test discussed *infra* notes 86–90 and accompanying text. While this essential link between the defendant's monopoly power and its challenged conduct was present in *Aspen*, *see infra* notes 262–67 and accompanying text, the Court did not make an express finding to that effect. This casenote proposes that proof of existence of a nexus between monopoly power and the challenged conduct should be explicitly required in section 2 cases, such that only conduct which constitutes an *actual misuse* of monopoly power is penalized. *See infra* notes 289–98 and accompanying text.

to adjudge anticompetitive conduct and enable them to better effectuate the goals and purposes which underlie the Sherman Act.

I. Background and Development of Liability for Refusal to Deal Under Section 2 of the Sherman Act

Section 2 of the Sherman Act makes it a felony to monopolize, attempt to monopolize, or conspire to monopolize "any part of the trade or commerce among the several states, or with foreign nations . . . ."[72] The Act, along with the Clayton Act[73] passed in 1914, provides criminal and civil remedies for antitrust law violations.[74] Persons who are injured in their business or property by practices violative of the antitrust laws may bring suit under the Act and recover threefold the damages they sustain.[75] The Act also provides the United States and each of the states through its Attorney General a right of action for antitrust violations.[76] While it is clear that all instances of monopoly are not illegal[77] and unilateral refusals to deal by a monopolist are generally permissible,[78] exceptions to the general rule are numerous.[79] Where a monopolist's refusal to deal with a competitor evinces a purpose to create or maintain a monopoly, such conduct may constitute unlawful monopolization or an unlawful attempt to monopolize in violation of section 2 of the Act.[80]

In applying section 2 to a monopolist's alleged refusal to deal, the courts have long employed the *Grinnell* two-pronged test to determine whether a plaintiff has made a prima facie showing of the monopolization offense.[81] Courts have read the test as requiring the antitrust plaintiff to prove that the defendant monopolist possessed mo-

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[72] 15 U.S.C. § 2 (1982). *See supra* note 4 and accompanying text.

[73] 15 U.S.C. §§ 12–27 (1982).

[74] Clayton Act section 4, 15 U.S.C. § 15 (1982), superseded Sherman Act section 7, 15 U.S.C. § 7 (1952), providing for private treble damage actions. The Clayton Act's remedial provisions, through Clayton Act section 1, incorporate the Sherman Act by reference. 15 U.S.C. § 12 (1982). Section 4 of the Clayton Act provides for private treble damage actions and criminal actions by both the federal government and the states through their Attorneys General for violations of the antitrust laws. 15 U.S.C. § 15 (1982).

[75] 15 U.S.C. § 15 (1982).

[76] *Id.*

[77] *See supra* notes 7–16 and accompanying text.

[78] *See supra* notes 19–22 and accompanying text.

[79] *See, e.g.*, cases cited *infra* at notes 91–125.

[80] *See, e.g.*, *Lorain Journal*, 342 U.S. at 155 (The Sherman Act prohibits a monopolist's exercise of the "right" to accept advertisements from whomever it pleases, as a purposeful means of monopolizing interstate commerce); *Southern Photo*, 273 U.S. at 375 (monopolist's refusal to deal illegal where motivated by policy "in pursuance of a purpose to monopolize"); *Colgate*, 250 U.S. at 307 ("[I]n the absence of any purpose to create or maintain a monopoly, the Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal."). *See also Otter Tail*, 410 U.S. at 377; United States v. Terminal R. Ass'n, 224 U.S. 383, 401 (1912); MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1106–08 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); Mid-Texas Communication Systems v. Am. Tel. & Tel. Co., 615 F.2d 1372, 1387 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980); Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979); Six Twenty-Nine Productions, Inc. v. Rollings Telecasting, Inc., 365 F.2d 478, 482 (5th Cir. 1966); Package Programs, Inc. v. Westinghouse Broadcasting Sys., 255 F.2d 708, 710 (3d Cir. 1958).

[81] The Court first formulated the test in its present form in *Grinnell*, 384 U.S. at 570–71. The *Grinnell* test is quoted *supra* note 31 and accompanying text.

nopoly power in the relevant market and intended by its conduct to monopolize or exclude competition in that market.[82] The first element of the test requires that the plaintiff establish the relevant geographic and product markets in which the defendant is alleged to wield monopoly power.[83] The plaintiff also must establish that the defendant indeed possessed the power to control prices or exclude competition in the relevant market.[84] Such power ordinarily may be inferred from the defendant's possession of a predominant share of the market.[85]

The second element of the test, whether the challenged conduct represents the willful acquisition or maintenance of monopoly power, necessitates an inquiry into the nature of the monopolist's conduct.[86] Under *Grinnell*, the determinative question under this element is whether the challenged conduct and the surrounding circumstances are sufficient to raise an inference of monopolistic intent or purpose on the part of the monopolist.[87]

The Supreme Court, however, adheres to the monopoly power plus intent standard it announced in *Grinnell* and thus shuns direct examination of conduct in its section 2 analysis.[88] Many courts have, however, in effect read the *Grinnell* test as requiring proof of a third element in order to make out a case for illegal monopolization. These courts have implicitly required a plaintiff to show that the defendant has unlawfully *used* its monopoly power.[89] This reading of *Grinnell* requires that an antitrust plaintiff prove not

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[82] *See Byars*, 609 F.2d at 853. *See also supra* notes 7–15 and accompanying text.

[83] *Grinnell*, 384 U.S. at 571. For detailed discussion of this requirement and the problems of market definition, see *id.* at 571–76; *Byars*, 609 F.2d at 849–53; *Alcoa*, 148 F.2d at 424–28. This first element required under *Grinnell* to establish a section 2 violation was not at issue in *Aspen* either on appeal in the Tenth Circuit or before the Supreme Court. *See Aspen*, 472 U.S. at 596; *Aspen I*, 738 F.2d at 1509 n.12.

[84] *Grinnell*, 384 U.S. at 571; United States v. DuPont & Co., 351 U.S. 377, 391 (1956); *American Tobacco*, 147 F.2d at 112, *aff'd*, 328 U.S. 781 (1946).

[85] *Grinnell*, 384 U.S. at 571; *Byars*, 609 F.2d at 850–51 and examples cited at *id.* n.18. Determination of the relevant market is a question of fact. *Aspen I*, 738 F.2d at 1514 n.4.

[86] *Grinnell*, 384 U.S. at 576. The necessary inquiry under the second prong of the *Grinnell* test is whether the challenged acts unnecessarily exclude competition. *Calcomp*, 613 F.2d at 735. The *Calcomp* court interpreted the second prong of the *Grinnell* test as requiring proof of "predatory or anticompetitive conduct," rather than simply a showing of monopolistic intent. *Id.* at 737. *See also Berkey Photo*, 603 F.2d at 276; *Greyhound Computer*, 559 F.2d at 498.

[87] *See, e.g., Aspen*, 472 U.S. at 605–11; *Otter Tail*, 410 U.S. at 377; *Mid-Texas Communications*, 615 F.2d at 1387–89; *Byars*, 609 F.2d at 853; *Berkey Photo*, 603 F.2d at 274–76. *See also* United States v. Griffith, 334 U.S. 100, 107–08 (1948); Smith-Kline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1065 (3d Cir.) (A monopolist may not arbitrarily or invidiously *use* its monopoly power in one market, even if lawfully obtained, to harm competition in another market) (emphasis added), *cert. denied*, 439 U.S. 838 (1978).

Courts frequently have noted the importance of considering the challenged conduct in the context of the monopolist's other actions to determine whether there in fact existed an "intent to monopolize" on the part of the monopolist. *See, e.g., Lorain Journal*, 342 U.S. at 152 ("The surrounding circumstances [of the conduct of the monopolist] are important."); *Mid-Texas Communications*, 615 F.2d at 1389 ("as a general principle, section 2 prohibits only those refusals to deal which under the particular circumstances of a case are unreasonably anticompetitive."); *Byars*, 609 F.2d at 860, 863 ("In a § 2 case, only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anticompetitive and thus unlawful . . . . Each case must necessarily turn on its own facts."). *See also Calcomp*, 613 F.2d at 735–38; *Berkey Photo*, 603 F.2d at 276–78; *Greyhound Computer*, 559 F.2d at 498–503.

[88] *See, e.g., Aspen*, 472 U.S. at 602–05.

[89] Several of the circuit courts of appeals have recently signalled their adherence to this ap-

only the defendant's possession and intent to misuse monopoly power, but also that the defendant's conduct constituted an *actual misuse* of monopoly power to effectuate its allegedly anticompetitive purposes.[90] Thus, these courts have implicitly imposed upon antitrust plaintiffs the additional requirement of proving a "nexus" between the defendant's monopoly power and its allegedly illegal conduct motivated by an intent to monopolize.

A. *The Factual Parameters of Prior Refusal to Deal Cases*

Prior to *Aspen*, all unilateral refusals to deal that gave rise to the inference of anticompetitive intent required under section 2 fell into four categories, based upon the nature of the conduct involved and the factual contexts in which the respective refusals to deal took place.[91] The first generally recognized refusal to deal situation is where a monopolist uses its monopoly power in one market to distort competition in another market by refusing to deal.[92] Such violations typically involve the refusal of a firm wielding monopoly power in one market to sell to[93] or to buy from[94] a firm against which the monopolist competes in another market. On several occasions courts have held such practices illegal as exclusionary conduct undertaken in pursuance of a purpose to monopolize.[95] Thus, in *Poster Exchange, Inc. v. Nat'l Screen Service Corp.*,[96] the Fifth Circuit

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proach. *See, e.g.*, *Byars*, 609 F.2d at 860 ("[w]hat should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices. As preservation of competition is at the heart of the Sherman and Clayton Acts, a practice should be deemed 'unfair' or 'predatory' only if it is unreasonably anticompetitive.") (citation omitted); *Berkey Photo*, 603 F.2d at 276 ("It is the use of economic power that creates the liability."). *See also MCI*, 708 F.2d at 1108 n.35; *Telex*, 510 F.2d at 926–28.

[90] *See, e.g.*, *Byars*, 609 F.2d at 853 (finding that a violation of section 2 by refusal to deal requires proof of "*abuse* of monopoly power") (emphasis in original).

[91] *Byars*, 609 F.2d at 857–58.

[92] *See, e.g.*, Home Placement Serv. v. Providence Journal Co., 682 F.2d 274, 281 (1982) (monopolist newspaper publisher's use of its dominance in the newspaper advertising market to foreclose competition in the housing vacancy market by refusing to purchase from the plaintiff prospective advertiser listings of housing rental information); Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478, 483 (5th Cir. 1966) (issue existed as to whether refusal of a local television station to pay the normal commission for material prepared by the plaintiff advertising agency violated section 2 where the defendant television station operated an advertising agency which competed with the plaintiff); *Packaged Programs*, 255 F.2d 708, 710 (3d Cir. 1958) (cause of action existed under section 2 where a television station refused to deal with a producer of filmed programs where the television station also competed in the separate market of filming television shows). *Cf.* United States v. Griffith, 334 U.S. 100, 107–09 (1948) (film monopolist illegally attempted to use its monopoly power in one geographic market to obtain monopoly in another geographic market by negotiating agreements with film distributors to obtain exclusive privileges to new releases).

[93] *See Providence Journal Co.*, 682 F.2d at 281 (refusal to sell advertising space).

[94] *See Six Twenty-Nine Productions*, 365 F.2d at 486 (refusal to buy packaged advertisements); *Packaged Programs*, 255 F.2d at 710 (refusal to buy television programming).

[95] *Providence Journal Co.*, 682 F.2d at 281; *Six Twenty-Nine Productions*, 365 F.2d at 485–86; *Packaged Programs*, 255 F.2d at 710 (question existed as to "monopolistic designs" of the defendant). *Cf. Berkey Photo*, 603 F.2d at 291 (A Sherman Act defendant "is not liable under § 2 for the actions described [introduction of new camera design simultaneous with introduction of new film format] unless it gained a competitive advantage in these markets by use of the monopoly power it possessed in other segments of the industry.").

[96] 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

held that National Screen, a monopolist in the manufacture and wholesale supply of promotional movie posters, violated section 2 by refusing to sell wholesale stock to Poster Exchange, a distributor of the posters.[97] The court held that because National Screen intentionally used its monopoly power at the manufacturing level to eliminate Poster Exchange as a competitor at the distributor-jobber level, its refusal to deal was illegal monopolization in violation of section 2.[98] Thus, section 2 prohibits a monopolist's predatory leveraging of its monopoly power in one market to gain power in another geographic market or product market, absent a valid business justification for the refusal to deal.[99] When, however, a monopolist's refusal to deal results in discontinuation or curtailment of competition in another market where the monopolist *does not compete*, such conduct does not violate the antitrust laws.[100]

The second situation in which courts have found that refusals to deal violate section 2 of the Sherman Act is when a monopolist seeking to vertically integrate refuses to deal in order to effect the integration.[101] A monopolist's refusal to sell materials or products over which it exercises monopoly control to a firm in a vertically adjacent market[102] in which the monopolist also competes or desires to compete may be sufficient, considered in the context of the other evidence, to give rise to an inference of unlawful intent to monopolize.[103] Thus, in *Eastman Kodak Co. v. Southern Photo Materials Co.*,[104] the Supreme Court held unlawful Kodak's refusal to deal with Southern Photo, one of its retail distributors, because Kodak refused to deal in order to vertically integrate into the retail distribution of photography supplies.[105] The cases which fit this factual construct all involve attempts by monopolists in one market to distort competition in another market or to establish a monopoly for themselves in that second market.[106] Such practices clearly

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[97] *Id.* at 338–40.

[98] *Id.* at 339–40.

[99] The "valid business justification" defense to an alleged illegal refusal to deal is discussed *infra*, notes 126–36, and accompanying text.

[100] Official Airline Guides, Inc. v. Federal Trade Comm'n, 630 F.2d 920, 925–26 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

[101] *See, e.g., Otter Tail*, 410 U.S. at 377 (power company unlawfully used its monopoly power in the wholesale power generation market to prevent the displacement of its monopoly power in the local retail power market by refusing to sell wholesale power to municipalities who proposed to start their own retail power systems); *Southern Photo*, 273 U.S. at 369 (monopolist in wholesale photography supplies cut off one of its retail distributors as part of its efforts to vertically integrate into the retail distribution of photography supplies); *Byars*, 609 F.2d at 848–50 (regional wholesaler of newspapers and magazines illegally used monopoly power to cut off small local distributor of periodicals where wholesaler also competed in local distribution market); *Poster Exchange*, 431 F.2d at 338–40 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) (monopolist in the wholesale supply of promotional movie posters violated section 2 where it refused to deal with retail distributor of posters against whom the monopolist also competed in the retail distribution market); United States v. Kleerflax Linen Looms, Inc., 63 F. Supp. 32, 40–42 (D. Minn. 1945) (sole manufacturer of linen rug material illegally used monopoly power in refusing to sell material to a distributor to prevent distributor from bidding on government contracts on which the monopolist also bid).

[102] Thus, in these cases, the firms alleging injury occupy the positions of both competitor and customer vis-a-vis the monopolist. *See, e.g., Byars*, 609 F.2d at 848.

[103] *See Otter Tail*, 410 U.S. at 377–78; *Southern Photo*, 273 U.S. at 375; *Byars*, 609 F.2d at 855–61; *Poster Exchange*, 431 F.2d at 339–40; *Kleerflax*, 63 F. Supp. at 41.

[104] 273 U.S. 359.

[105] *Id.* at 375.

[106] This "intermarket leveraging" was also present in *Lorain Journal*, where the monopolist newspaper publisher attempted to use its monopoly in the local newspaper market to exclude

represent something more than competition on the merits, and thus fulfill the "willful acquisition or maintenance of monopoly power" requirement of section 2's prohibitions.

The third class of conduct generally found to constitute an illegal refusal to deal is where a business or a group of competitors[107] controls a facility or resource that is essential to competitive viability in the marketplace and that business or group refuses to sell the resource or grant access to the facility to competitors.[108] In these cases, the vertically integrated monopolist refuses to deal an essential, non-replicable supply factor, necessary to a competitor's production processes, to that competitor on non-discriminatory terms.[109] The so-called "essential facilities" analysis is exemplified by the Supreme Court's 1912 decision in *United States v. Terminal Railroad Assoc.*[110] In *Terminal Railroad,* the Court held that the refusal of a group of railway companies to allow competing railroad operators access to the terminal facilities at St. Louis, Missouri, constituted an illegal refusal to deal in violation of section 2 of the Sherman Act.[111] The Court stressed the essential and unique nature of the terminal facilities, the defendants' exclusive control of the facilities, the virtual impossibility of competitors' duplicating the facilities, and the indispensability of the facilities to railway line operators.[112]

Because liability in these cases is founded upon the monopolist's denial of use of an essential facility to a *competitor*, the test requires both that the monopolist be a competitor

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competition in the local radio market. *Lorain Journal,* 342 U.S. 143. *See infra* notes 117–21 and accompanying text. While *Lorain Journal* involves the use of monopoly power to affect competition in a horizontal market, rather than in a vertical market where the monopolist and the injured rival stand in a supplier-customer relationship in addition to their status as competitors, the nature of the conduct is the same. In both the *Lorain Journal* and *Southern Photo* situations, the monopolist used its monopoly power in one market to distort competition in another market.

[107] Indeed, most of the cases involving the essential facilities doctrine have concerned concerted, as opposed to unilateral, action. *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 3–5 (1945) (members of coopérative news gathering agency whose services were vital to the success of a newspaper refused to furnish news to non-members and imposed large financial burdens on a member's competitor seeking membership); *Terminal Railroad,* 224 U.S. at 410–11 (combination of railroad companies which exercised exclusive ownership and control over all of the railway terminal facilities at St. Louis, Missouri, effectively controlling the only reasonable means of access to that city, illegally denied competitors use or access to those facilities); *Gamco,* 194 F.2d at 486 (fruit wholesalers who jointly own a warehouse may not exclude competing wholesaler, absent some justification). Concerted action of this type, of course, is also subject to attack under section 1 of the Act.

[108] *Byars,* 609 F.2d at 856 & n.34 ("Under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it."). *See also Aspen I,* 738 F.2d at 1520–21 (Ski Co.'s refusal to market a multi-day, multi-mountain ticket with Highlands constituted the denial of an essential facility to a competitor by a monopolist); *MCI,* 708 F.2d at 1133 (where competing defendant communications system controlled access to the communications facility essential to operation of its competitor, essential facilities doctrine applicable). *Cf. Lorain Journal,* 342 U.S. at 153 (fact that the *Journal* was an "*indispensable* medium of advertising for many Lorain concerns" weighed heavily in Court's decision).

[109] *See Aspen I,* 738 F.2d at 1519; *Byars,* 609 F.2d at 858. The courts have identified four elements which are necessary to establish a monopolist's liability for a unilateral refusal to deal under the essential facilities approach: (1) control of the essential facility by the monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facilities. *Aspen I,* 738 F.2d at 1520; *MCI,* 708 F.2d at 1132–33.

[110] 224 U.S. 383 (1912).

[111] *Id.* at 394–406, 411.

[112] *Id.* at 397–400.

of the putative buyer *and* that the monopolist control an essential supply or facility necessary for the buyer to carry on its business.[113] Such a situation, therefore, most often arises where a vertically integrated monopolist is involved.[114] The rationale for holding illegal a monopolist's refusal to allow its competitors reasonable access to essential facilities it controls, on non-discriminatory terms,[115] is clear; by withholding the facility, the monopolist intentionally interferes with the ability of its competitor to continue its business and bring its product to market, thereby severely crippling the rival's opportunity to compete on the merits.[116]

Finally, courts have held refusals to deal violative of section 2 where a monopolist refuses to deal with those who deal with its competitors.[117] In *Lorain Journal*, for example, the *Journal* was a daily newspaper that reached an estimated 99% of Lorain, Ohio families in the late 1940's and early 1950's.[118] As such, businesses in the Lorain area considered the *Journal* an indispensable means of advertising.[119] The Court found the *Journal's* refusal to sell advertising space to merchants who also purchased advertising time from a competing radio station an attempt to monopolize in violation of section 2.[120] The Court held that the *Journal's* conduct clearly evinced a purpose to destroy the radio station, and enjoined the conduct as an illegal attempt to monopolize interstate commerce under section 2.[121] Refusal to deal with those who deal with competitors is inherently anticompetitive because it requires a monopolist to turn away business and incur either

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[113] *Aspen I*, 738 F.2d at 1520; *MCI*, 708 F.2d at 1132–33.

[114] This is both the logical and empirical result. *See Otter Tail*, 410 U.S. at 77–79; *Southern Photo*, 273 U.S. at 368; *Terminal Railroad*, 224 U.S. at 391–94; *MCI*, 708 F.2d at 1132–33.

[115] *Terminal Railroad*, 224 U.S. at 410–11; *MCI*, 708 F.2d at 1132; *Byars*, 609 F.2d at 856.

[116] While the essential facilities decisions appear to focus on the detrimental effect of the challenged conduct on competitors, rather than on the monopolist's state of mind as in the other refusal to deal contexts, it is clear that these cases must also satisfy the second element of the *Grinnell* test. Generally, however, the overall conduct of a monopolist in refusing to make an essential facility available to a competitor provides plain evidence that it was seeking to destroy the rival. In refusing to deal an essential facility to a competitor, a monopolist by definition turns away business, and thus current revenues, presumably in exchange for the benefits of long run monopoly. *Otter Tail*, 410 U.S. at 377; *Byars*, 609 F.2d at 856–57. In direct contrast, the monopolist's conduct in *Aspen* did not require that it turn away eager customers as in the true essential facilities cases. In refusing to continue the joint ticket arrangement with Highlands, Ski Co. did not forego current revenues by turning away sales. Rather, by discontinuing the all-Aspen ticket Ski Co. hoped to increase current sales by winning customers from its rival, Highlands. *See* Brief of Petitioner at 29. *See also supra* note 8a and accompanying text. On the so-called "overlap" between the essential facilities doctrine and the "intent theory," see *Byars*, 609 F.2d at 856–57.

[117] *See, e.g.*, *Lorain Journal*, 342 U.S. at 154 (monopolist newspaper's refusal to sell advertising space to merchants who also purchased advertising time from a competing radio station violated section 2); Kansas City Star Co. v. United States, 240 F.2d 643, 661 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957) (media company which owned only television station, a radio station, and a major daily morning and evening newspaper in Kansas City market violated section 2 where it used its monopoly power to increase its newspaper advertising by refusing to sell to advertisers who did not agree to advertise in the company's two newspapers). *Kansas City Star* might also be classified in category one, *supra* notes 92–100 and accompanying text. There, the media monopolist used its monopoly power in one market (television) to distort competition in another market (newspapers) by refusing to deal with potential television advertisers who would not also purchase advertisements in the monopolist's newspapers. *See Kansas City Star*, 240 F.2d at 648–49.

[118] *Lorain Journal*, 324 U.S. at 146.

[119] *Id.* at 152.

[120] *Id.* at 154–55.

[121] *Id.*

short-run losses or reductions in profits.[122] Further, such conduct can only rationally be designed to destroy competition, through use of means beyond competition on the merits.[123] Where a monopolist refuses to deal with those who deal with its competitors, its conduct makes a mockery of competition on the merits. Conduct of this type constitutes the monopolist's direct use of its economic might to coerce customers' choice. Thus, it destroys potential customers' ability to choose freely among all the sellers in a market based solely on their respective merits. Such conduct certainly supports an inference that it was motivated by an intent to destroy competition.[124] This type of conduct, therefore, constitutes illegal monopolization in violation of section 2 of the Sherman Act.[125]

B. *Defenses to Monopolists' Alleged Refusals to Deal*

In any of the four typical refusal to deal situations, a monopolist may rebut evidence of monopolistic intent by evidence that the monopolist's challenged acts were not exclusionary or driven by anticompetitive motives, but instead were legitimately justifiable business practices, undertaken in the ordinary course of business in a competitive environment.[126] Further, a monopolist may defend the existence of its monopoly power on the basis that it was acquired through conduct which was honestly industrial, such as manufacture of a superior product, superior marketing techniques, or greater responsiveness to consumer demand.[127] Finally, a monopolist may defend its acquisition or possession of monopoly power on the grounds that its power is protected by grace of governmental regulatory authority. Congress and the courts have recognized that in some instances monopoly power may actually serve the public interest in economic efficiency, rather than cause it harm.[128] Government regulation of utility companies[129]

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[122] *See* L. SULLIVAN, *supra* note 2, § 43. *See also supra* note 8.

[123] *See Lorain Journal*, 342 U.S. at 154–55; *Kansas City Star*, 240 F.2d at 658.

[124] *See Lorain Journal*, 342 U.S. at 154–55; *Kansas City Star*, 240 F.2d at 658.

[125] *See Kansas City Star*, 240 F.2d at 662 (defendant's manipulation of its advertising policies to destroy competitors in the dissemination of news was ample evidence of its attempt to monopolize the dissemination of news in the Kansas City area).

[126] *See, e.g., Mid-Texas Communications*, 615 F.2d at 1388 ("a monopolist is not liable simply by refusing to deal, but may in appropriate situations present valid justifications for its actions"); *Gamco*, 194 F.2d at 487–88 (denial of access to commercial building would have been justified in certain situations). *See also MCI*, 708 F.2d at 1133; *Greyhound Computer*, 515 F.2d at 502–05; *Poster Exchange*, 431 F.2d at 339; *Six Twenty-Nine Productions*, 365 F.2d at 483; *Kansas City Star*, 240 F.2d at 657–60.

[127] This is the "thrust upon" defense, whereby a monopolist innocently acquires its monopoly status merely by operation of its legitimate competitive techniques and virtues. This is the case, for example, where a firm gains monopoly power by producing a higher quality product than its competitors or producing it at a lower cost than its competitors. *See, e.g.*, United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956); *Byars*, 609 F.2d at 853; *Berkey Photo*, 603 F.2d at 273–74; *Gamco*, 194 F.2d at 487–88; *Alcoa*, 148 F.2d at 429–30.

[128] *See MCI*, 708 F.2d at 1137 ("Ordinarily antitrust liability should not be imposed when a firm acts in compliance with its regulatory obligations"). *See also* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 627 (1975); Silver v. New York Stock Exchange, 373 U.S. 341, 360–61 (1963); *Mid-Texas*, 615 F.2d at 1385; Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 ANTITRUST BULL. 559 (1977).

[129] *See MCI*, 708 F.2d at 1137; *cf. Otter Tail*, 410 U.S. at 373–74; 1 AREEDA & TURNER, *supra* note 2, ¶ 223d.

and grants of patents[130] exemplify government sanctioned monopolies tolerated in the interests of economic efficiency and the protection of economic incentives to innovate. Ultimately, the courts must weigh evidence that conduct is legitimately competitive against evidence that anticompetitive animus or an intent to exclude competition motivated the monopolist's conduct.[131]

Whether a monopolist has presented evidence sufficient to show that its actions were not motivated by an intent to monopolize but by valid business reasons is a question for the trier of fact.[132] Thus, in 1983, in *Becker v. Egypt News Co.*,[133] the Eighth Circuit held that where the distributor of a horse racing publication suspended its dealings with a retail concessionaire of the publication and the distributor provided evidence of the retailer's poor past sales performance, the refusal to deal was a valid exercise of the monopolist's business judgment and thus not unlawful under section 2 of the Sherman Act.[134] Similarly, in *Auburn News Co. v. Providence Journal Co.*,[135] the First Circuit in 1981 found the defendant newspaper publisher's decision to become the exclusive distributor of its own papers valid justification for its refusal to deal with the plaintiff distributor. Thus, the publisher's conduct did not give rise to liability under the antitrust laws.[136]

In sum, under the test announced in *Grinnell*, in deciding the liability of a defendant for refusal to deal under section 2 of the Sherman Act, courts are only to consider questions of whether the defendant possessed monopoly power in the relevant market and whether its conduct evidenced a purpose to create or maintain a monopoly. Against the plaintiff's proof of these elements, the defendant is entitled to offer evidence tending to disprove that it possesses monopoly power and evidence that the challenged conduct was motivated by proper competitive purposes. *Grinnell* does not require direct inquiry into the competitive nature and effect of the challenged conduct, nor does it explicitly require a plaintiff to prove that the defendant's conduct was unreasonably exclusionary.

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[130] In Kewanee Oil Co. v. Bicron Corp., the Court emphasized the public policy interests which justify the award of monopoly rights through patents:

> The stated objective of the Constitution in granting the power to Congress to legislate in the area of intellectual property is to "promote the Progress of Science and the useful Arts." [U.S. CONST. art. 1, § 8, cl. 8.] The patent laws promote this progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous cost in terms of time, research, and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens.

416 U.S. 470, 480 (1974).

[131] *See, e.g.*, *Aspen*, 472 U.S. at 608–11; *MCI*, 708 F.2d at 1137; *Byars*, 609 F.2d at 862–63.

[132] *See Aspen*, 472 U.S. at 608–10. *See also* Becker v. Egypt News Co., Inc., 713 F.2d 363, 368 (8th Cir. 1983) (distributor of horse racing publication acted in exercise of legitimate business judgment and thus did not violate section 2 where it provided evidence that its suspension of dealings with a retail concessionaire of the publication was in response to the retailer's poor past sales performance); Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 278 (1st Cir. 1981) (court held defendant newspaper publisher's decision to become the exclusive distributor of its own papers valid justification for its refusal to deal with plaintiff distributor), *cert. denied*, 445 U.S. 921 (1982).

[133] 713 F.2d 363 (8th Cir. 1983).

[134] *Id.* at 367–68.

[135] 659 F.2d 273 (1st Cir. 1981).

[136] *Id.* at 278.

Despite its focus on monopolistic intent,[137] the *Grinnell* standard does seek to distinguish unreasonably exclusionary conduct from legitimately competitive conduct which also has the effect of excluding competition.[138] This intent-oriented test, however, is incapable in cases like *Aspen* of making this critical distinction and thus of carrying out the purposes of the Sherman Act.[139] Before *Aspen*, the Supreme Court had applied the *Grinnell* standard only to distinguish unnecessarily exclusionary conduct from legitimate conduct grounded in competition on the merits in the four general refusal to deal factual contexts.[140] In *Aspen*, however, the Court was presented the novel issue of whether the unilateral refusal of an unintegrated monopolist to participate in a cooperative marketing arrangement with a horizontal competitor could constitute an abuse of monopoly power cognizable under section 2 of the Act.

II. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.

Since the late 1960's, Aspen Skiing Co. has operated three skiing mountains[141] near Aspen, Colorado — Aspen Mountain,[142] Buttermilk,[143] and Snowmass.[144] Since 1958, Aspen Highlands Skiing Corporation ("Highlands"), has operated another skiing mountain nearby — Aspen Highlands.[145]

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[137] By requiring only proof of monopoly power and the willful acquisition or maintenance of that power "as distinguished from growth as a result of [honestly competitive practices]," the Court focuses on evidence of improper intent or purpose on the part of a monopolist in order to determine whether the monopolist's conduct is predatory or honestly industrial for section 2 purposes. *Grinnell*, 384 U.S. at 570–71. *See also Aspen*, 472 U.S. at 600–11.

[138] The Supreme Court has accepted this as the principal goal of the Act since the first cases decided under section 2, *see supra* note 13 and accompanying text.

[139] The Court's use of an intent-oriented test to distinguish legitimate competitive conduct from illegal exclusionary conduct is critically flawed. The intent of *all* competitive behavior is to exclude competition, in so far as a firm's attempt to win customers from its rivals constitutes "exclusion" of those rivals. *See* 3 Areeda & Turner, *supra* note 2, ¶ 626b. *See also supra* note 14 and accompanying text. Thus, any test purporting to define exclusionary behavior as that which evidences an "intent to exclude" competition is ineffective. It is not *intent* to exclude competition that the Act makes illegal — if this were indeed the case then all competitive conduct would be illegal — but rather *conduct* based on monopoly power which impairs a rival's ability to compete that the Act condemns. The second prong of the *Grinnell* test, therefore, because it focuses only on monopolistic intent, fails to honor the stated purposes of the Sherman Act. *See supra* notes 7–15 and accompanying text.

[140] *See supra* notes 91–125 and accompanying text.

[141] Buttermilk Skiing Corporation and Snowmass Skiing Corporation are wholly owned subsidiaries of Aspen Skiing Co. Brief of Petitioner at 3, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[142] Ski Co. developed Aspen Mountain in 1946. The runs are steep and primarily designed for expert or advanced intermediate skiers. The base area of Aspen Mountain is within the village of Aspen. *Aspen*, 472 U.S. at 587 n.2.

[143] Development of the Buttermilk Ski area began as an independent project in 1958. Freidl Pfeiffer, the director of the ski school for Ski Co., and Arthur Pfister planned and developed Buttermilk primarily for beginner and intermediate skiers, although the area has since developed more advanced runs. The base area of Buttermilk is approximately two and one quarter miles from the village of Aspen. In 1964, Ski Co. purchased Buttermilk. *Id.* at 588 & n.4.

[144] Snowmass opened in 1967 and was developed and always operated by Ski Co. Snowmass is eight miles from the village of Aspen and presents skiers with a well-balanced mixture of beginner, intermediate and advanced runs. *Id.* at 588 n.5.

[145] Whipple V.N. Jones developed Highlands independently of Ski Co. in 1957. Jones laid out

Between 1958 and 1964, three independent companies operated Aspen Mountain, Highlands, and Buttermilk, and each offered its own day or half-day tickets for use of its mountain.[146] In 1962, however, the three competitors also introduced an interchangeable ticket.[147] This six-day, "all-Aspen" ticket, consisted of a booklet containing six coupons, each redeemable for a daily lift ticket at Aspen Mountain, Highlands, or Buttermilk during a seven-day period.[148] In 1971, the areas replaced the all-Aspen coupon booklets in favor of an "around the neck" all-Aspen ticket.[149]
This refinement in the interchangeable ticket was essentially the same product as its predecessor but eliminated the daily inconvenience of coupon redemption. With the refined format, skiers simply presented their tickets to a lift attendant each morning as they prepared to board the first lift.[150] In most seasons after it acquired Buttermilk in 1964, Ski Co. also offered two and three area tickets featuring its mountains only, in competition with the all-Aspen ticket.[151]

Under the system instituted in 1971–1972, Highlands and Ski Co. allocated revenues from the sale of all-Aspen tickets on the basis of skier usage, as determined by random-sample surveys of skiers who purchased four-area tickets.[152] By 1977, multi-area tickets, including those offered by Ski Co. for its mountains alone, accounted for nearly 35% of the total market.[153] Highlands' share of the revenues from the all-Aspen ticket was 17.5% in 1973–1974, 18.5% in 1974–1975, 16.8% in 1975–1976, and 13.2% in 1976–1977.[154]

For the 1977–1978 season, Ski Co. offered to continue the all-Aspen ticket only if Highlands would accept a 13.2% fixed share of the tickets' revenues.[155] Although 13.2% had been Highlands' share of the ticket revenues in 1976–1977, Highlands believed that its poor performance in that year was an aberration due to unfavorable weather.[156] Although it would have preferred to continue to divide revenues on the basis of actual usage, Highlands eventually accepted a fixed percentage of 15% of all-Aspen ticket revenues in the 1977–1978 season.[157]

During the 1970's, the management of Ski Co. increasingly expressed its dislike for the all-Aspen ticket.[158] Ski Co. management complained that a coupon method of monitoring usage was administratively cumbersome.[159] It doubted the accuracy of the survey method of allocating revenues and complained about the appearance, deportment, and

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a fairly balanced set of ski runs: 25% beginner, 50% intermediate, 25% advanced. The base area of Highlands is one and one half miles from the village of Aspen. *Id.* at 588 n.3.

Any further development upon most of the suitable skiing terrain in the vicinity of Aspen requires United States Forest Service approval. Any new downhill skiing project also requires approval of the county government. *Id.* at 588–89.

[146] *Id.* at 589.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 590.

[150] *Id.*

[151] *Id.* at 589.

[152] *Id.* at 590.

[153] *Id.* at 591.

[154] *Id.* at 590.

[155] *Id.* at 591.

[156] *Id.*

[157] *Id.* at 592.

[158] *Id.*

[159] *Id.*

attitude of the individuals employed to conduct the surveys.[160] Ski Co. also believed that the four-area ticket was siphoning off revenues that it could recapture if the ticket was discontinued.[161]

In March, 1978, Ski Co. management recommended to its Board of Directors that the four-area ticket be discontinued for the 1978–1979 season.[162] As a result of this recommendation, Ski Co. offered Highlands a four-area ticket provided Highlands would agree to receive an historically low 12.5% fixed percentage of the revenue.[163] Highlands found this proposal unacceptable and, unable to persuade Ski Co. to accept any of its counter-proposals,[164] rejected the offer of the fixed percentage.[165] The areas offered no all-Aspen ticket for the 1978–1979 season.[166]

Ski Co. took additional steps to break its marketing ties with Highlands. Following the 1978–1979 season, Ski Co. embarked on a national advertising campaign to promote its three mountains.[167] These advertisements often depicted Highlands' mountain but did not refer to the ski area by name.[168] Ski Co. also refused to sell to Highlands lift tickets in bulk for resale by Highlands as a package with Highlands' own tickets.[169] When Highlands instituted an alternative product, the "Adventure Pack," which consisted of a three-day pass at Highlands and three vouchers, redeemable with Aspen merchants and each equal to the value of a daily lift ticket on a Ski Co. mountain, Ski Co. refused to accept them as payment for Ski Co. tickets.[170] Later, Highlands redesigned the Adventure Pack to contain travellers checks or money orders instead of vouchers.[171] Ski Co. eventually accepted these negotiable instruments in exchange for daily lift tickets.[172] After the four-area ticket based on usage was abolished in 1977, Highlands' share of the market for downhill skiing services in Aspen declined steadily.[173] From 20.5% of the Aspen market in 1976–1977, Highlands' share fell to 15.7% in 1977–1978, 13.1% in 1978–1979, 12.5% in 1979–1980, and 11% in 1980–1981.[174]

In 1979, Highlands filed a complaint against Ski Co. in the United States District Court for the District of Colorado.[175] Highlands' complaint alleged that by refusing to

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[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] Highlands continued to insist on a distribution of ticket revenues based on usage and suggested that coupons, electronic counting, or random sample surveys could monitor actual usage. Highlands also offered to hire disinterested professional ticket counters to survey usage of the four-area ticket at Highlands. *Id.*

[165] *Id.* at 593.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* at 594.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 594–95.

[175] *Id.* at 595. The first suit regarding the four-area ticket was actually brought in December, 1975, by the Colorado Attorney General. The Attorney General filed a complaint against Ski Co. and Highlands attacking, under sections 1 and 2 of the Sherman Act, the conduct involved in marketing the joint ticket. The complaint alleged that the negotiations over the four-area ticket provided Ski Co. and Highlands with a forum for price-fixing in violation of section 1 and that the

cooperate with Highlands — specifically by refusing to continue the joint ticket, by refusing to facilitate Highlands' substitute joint ticket scheme, and by offering its own six-day ticket in competition with the joint ticket — Ski Co. had monopolized the market for downhill skiing services at Aspen in violation of section 2 of the Sherman Act.[176] The complaint prayed for treble damages.[177]

The case was tried to a jury in the district court in June, 1981.[178] In her instructions to the jury, the judge explained that the offense of monopolization under section 2 of the Sherman Act has two elements: the defendant's possession of monopoly power in a relevant market and its willful acquisition, maintenance, or use of that power by anti-competitive or exclusionary means or for anticompetitive or exclusionary purposes.[179]

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two firms had attempted to monopolize the market for downhill skiing services in Aspen in violation of section 2. In 1977, the case was settled by a consent decree that permitted the parties to continue to offer the joint ticket provided that they set their own ticket prices unilaterally before negotiating its terms. *Id.* at 591 n.9. When, in 1979, Highlands commenced the instant suit against Ski Co., alleging Ski Co.'s withdrawal from the joint ticket violated sections 1 and 2 of the Sherman Act, a member of Ski Co.'s management commented, in reference to the Colorado Attorney General's suit and Highlands' action: "You are damned if you do and you are damned if you don't." Brief of Petitioner at 5.

[176] 472 U.S. at 595. In addition to the allegations of monopolization, Highlands claimed Ski Co. violated section 2 of the Sherman Act by "attempt[ing] to monopolize the market for downhill skiing services and multi-area lift tickets in the Aspen, Colorado area" and "combining and/or conspiring to monopolize" [with Buttermilk Mountain Skiing Corp., Snowmass Skiing Corp, and other unknown persons] the sale of multi-area lift tickets in the Aspen, Colorado area. Amended Complaint at 8–9, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). Additionally, Highlands alleged Ski Co. violated section 1 of the Sherman Act by entering into "contracts, combinations, or conspiracies with each other and with unknown persons resulting in restraints of trade." Amended Complaint at 10. After the close of evidence at trial, the district court granted Ski Co.'s motion for a directed verdict with respect to all of Highlands' claims except those of unlawful monopolization and conspiracy to restrain trade between Ski Co. and non-parties.

[177] 472 U.S. at 595.

[178] Brief of Petitioner at 5.

[179] 472 U.S. at 595–96. The instructions elaborated:

> In considering whether the means or purposes were anticompetitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. The line between the legitimately gained monopoly, its proper use and maintenance, and improper conduct has been described in various ways. It has been said that obtaining or maintaining monopoly power cannot represent monopolization if the power was gained and maintained by conduct that was honestly industrial. Or it is said that monopoly power which is thrust upon a firm due to its superior business ability and efficiency does not constitute monopolization.
>
> For example, a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which possesses monopoly power under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate section 2 if valid business reasons exist for that refusal.
>
> In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or

After finding both elements of the offense as defined in the court's intructions,[180] the jury rendered a special verdict finding Ski Co. guilty of the section 2 violations and calculated Highlands' actual damages at $2.5 million.[181] The district court thereupon trebled the verdict and entered judgment of $7.5 million plus attorneys' fees and costs for the plaintiff.[182] The court also issued an injunction requiring the defendant to participate with the plaintiff in offering a joint four-area, six-day lift ticket for a period not exceeding three years.[183] Ski Co. appealed the district court's judgment to the United States Court of Appeals for the Tenth Circuit.[184]

On appeal, Ski Co. argued that the evidence presented at trial was insufficient to present a jury issue of monopolization. Ski Co. urged that the district court should have ruled, as a matter of law, that the challenged conduct was pro-competitive, nonexclusionary behavior in which a monopolist could lawfully engage.[185] The Tenth Circuit affirmed the district court, however, advancing two reasons for rejecting Ski Co.'s appeal.[186] First, the court held that the multi-day, multi-area ticket could be characterized as an "essential facility" that Ski Co. had a duty to market jointly with Highlands.[187] Second, the court held that there was sufficient evidence to support a finding that Ski Co.'s intent in refusing to market the four-area ticket was to create or maintain a monopoly.[188] In affirming the district court, the Tenth Circuit observed that in "refusing to cooperate" with Highlands, Ski Co. "became the only business in Aspen that could offer a multi-day, multi-mountain skiing experience."[189] The court noted also that the

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> handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available — or in other ways — and instead has the effect of impairing competition.
>
> To sum up, you must determine whether Aspen Skiing Corporation gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or sub-market.

Id. at 596–97.

[180] The jury, by special verdict, found that Ski Co. possessed monopoly power in the relevant product market in satisfaction of part one of the court's instructions. *See supra* note 179. The jury identified "downhill ski resorts" as the relevant product market and the "Aspen area" as the relevant geographic submarket. In finding the second element of the section 2 offense satisfied, the jury answered the following specific interrogatory in the affirmative:

> Willful Acquisition, Maintenance or Use of Monopoly Power: Do you find by a preponderance of the evidence that the defendants willfully acquired, maintained or used monopoly power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident?

Aspen, 472 U.S. at 597–98 n.21.

[181] *Id.* at 595. While it found for Highlands on the section 2 monopolization claim, the jury found for Ski Co. on the section 1 conspiracy claim. *Aspen I*, 738 F.2d at 1513.

[182] *Aspen*, 472 U.S. at 598.

[183] *Id.* at 598 n.23. The district court denied post-trial motions by Ski Co. for judgment notwithstanding the verdict, a new trial, and remittur. *Id.* at 598.

[184] *Id.* at 599.

[185] *Aspen I*, 738 F.2d at 1516–17 (quoting Brief of Appellant at 40).

[186] *Id.* at 1527–28.

[187] *Id.* at 1520–21.

[188] *Id.* at 1522.

[189] *Id.* at 1521.

refusal to offer a four-area ticket resulted in consumer frustration over its unavailability.[190] Finally, the court held that no valid business reason was apparent for Ski Co.'s refusal to accept the vouchers in Highlands' Adventure Pack.[191] The record taken as a whole, the court concluded, was sufficient for the jury to find Ski Co. guilty of the section 2 violation.[192]

In the Supreme Court, Ski Co. did not dispute the jury's special verdict finding that Ski Co. possessed monopoly power in the identified relevant market.[193] The thrust of Ski Co.'s argument, rather, attacked the lower courts' analyses of its conduct under the second or "intent" prong of the *Grinnell* test.[194] Ski Co. first contended that even a firm with monopoly power has no duty to engage in joint marketing with a competitor.[195] Ski Co. further contended that a plaintiff cannot establish a section 2 violation without evidence of substantial exclusionary conduct, and that none of its activities could be characterized as exclusionary.[196] Ski Co. also argued that the Tenth Circuit incorrectly relied on the essential facilities doctrine and that mere anticompetitive intent does not transform nonexclusionary conduct into monopolization.[197] Highlands, on the other hand, contended that the evidence in the record was sufficient to establish a section 2 violation and that the Court need not rely on the essential facilities doctrine to affirm the judgment.[198]

In its unanimous decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Supreme Court affirmed the Tenth Circuit's ruling that Ski Co. violated section 2 of the Sherman Act.[199] The Court found that the monopolist's refusal to engage in joint marketing with Highlands, taken together with the record as a whole, supported an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival.[200] Because the trial resolved against Ski Co. the issue of whether Ski Co. possessed monopoly power and Ski Co. did not challenge this finding in its appeal to the Supreme Court,[201] the Court's opinion focused only on

[190] *Id.*

[191] *Id.*

[192] *Id.* at 1521–22. *See also Aspen*, 472 U.S. at 610.

[193] *Aspen*, 472 U.S. at 596.

[194] *Id.* at 600.

[195] *Id.*

[196] *Id.* In support of its argument that its refusal to engage in joint marketing with its horizontal competitor was not exclusionary, Ski Co. argued that its conduct (1) did not restrain Highlands from bringing its services to market, (2) did not restrain customers from choosing between the two firms on the merits, (3) was not "predatory," and (4) did not depend for its success on the exercise of monopoly power. Ski Co. argued strenuously that its conduct merely reflected its decision to compete rather than cooperate with Highlands and that neither its refusal to engage in joint marketing with Highlands nor its refusal to sell lift tickets to Highlands or to accept Highlands' Adventure Pack coupons were in any way exclusionary in the sense that they restrained Highlands or customers. Brief of Petitioner at 6–7.

[197] *Aspen*, 472 U.S. at 600.

[198] *Id.*

[199] *Aspen*, 472 U.S. at 610–11.

[200] *Id.* at 610.

[201] The jury found by special verdict that the relevant product market was "downhill skiing at destination ski resorts," that the "Aspen area" was a relevant geographic submarket, and that during the years 1977–1981, Ski Co. possessed monopoly power. While Ski Co. disputed this element at

whether there was sufficient evidence presented to show that the second element of the section 2 offense was satisfied.[202] The Court held that the evidence supported an inference that Ski Co.'s refusal to deal with Highlands was not motivated by efficiency concerns, but rather, by a purpose to harm its smaller rival.[203] Thus, applying *Grinnell*, the Court concluded that evidence was sufficient to find that Ski Co. both possessed and misused monopoly power and therefore violated section 2 of the Sherman Act in refusing to deal with Highlands.[204]

The Court began its opinion by reaffirming the long-standing doctrine that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor.[205] The Court held, however, that the judgment in this case rested on no such proposition of law.[206] While the Court acknowledged that there is indeed no general duty to transact business with a competitor and that the right of independent businesses to select their customers and associates is of high value,[207] the Court stated that the general right to refuse to deal with other firms is not unqualified.[208] Further-

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trial and in the court of appeals, the jury's special verdict finding that Ski Co. possessed monopoly power was not an issue before the Supreme Court. *Id.* at 596 & n.20.

The jury's determination that the "Aspen area" was the relevant geographic market in this case, however, is at the least curious. At trial, Ski Co. contested vigorously the instructions given the jury on the issue of relevant market. *Aspen I*, 738 F.2d at 1513–16. The Tenth Circuit disposed of Ski Co.'s objections to market definition on procedural grounds, ruling only that the instructions on the relevant market and the resultant verdict did not constitute plain error. *Id.* at 1516.

It appears incongruous, however, that the relevant product market was "downhill skiing at destination ski resorts," yet the other major destination ski resorts of the American and Canadian Rocky Mountains and, indeed, Europe were not included in the geographic market. This is particularly so when considered in light of the fact, presented at trial, that over 90 percent of Aspen skiers come from outside Colorado. Brief of Petitioner at 23–24 n.26. It stands to reason that well-educated, affluent, mobile, and experienced skiers, *See Aspen*, 472 U.S. at 585, who travel substantial distances to reach their skiing destinations, consider the other resorts of the Rocky Mountains and Alps in addition to Aspen in deciding where to spend their ski vacations. It appears that the jury, in deciding that the relevant geographic submarket was Aspen, based its determination on the fact that Ski Co.'s conduct was designed to win customers from Highlands once the customers were already in Aspen. Nevertheless, it appears from the facts that both Ski Co. and Highlands compete in national and perhaps international markets. Consequently, even if Ski Co. were to monopolize the market for "downhill skiing services at Aspen" the harm done to consumer welfare would be minimal.

[202] *See id.* at 600–11.

[203] *Id.* at 610.

[204] *Id.*

[205] *Id.* at 600. *See Colgate*, 250 U.S. at 307. The *Colgate* doctrine is discussed *supra* note 22 and accompanying text.

[206] *Aspen*, 472 U.S. at 600. Indeed, the Court pointed out, the trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals. *Id. See supra* note 179.

[207] *Id.* at 601 & n.27 (citing *Monsanto*, 465 U.S. at 761, and *Colgate*, 250 U.S. at 307, for the proposition that a business "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently").

[208] *Aspen*, 472 U.S. at 601. The Court extensively cited and quoted *Lorain Journal*, 342 U.S. at 155, for the proposition that the right of a single firm to refuse to deal is a qualified one. *See Aspen*, 472 U.S. at 601–03. The *Aspen* Court noted that where a private business exercises its general right to choose persons with whom it deals as a "purposeful means of monopolizing interstate commerce," the firm's conduct falls under the proscriptions of the Sherman Act. *Id.* at 602 (quoting *Lorain Journal*, 342 U.S. at 155).

more, the Court noted, refusal to deal may be significant as evidence of a predominant firm's monopolistic intent.[209] In a monopolization case, the Court elaborated, evidence of intent is relevant to the question of whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive" and thus whether the conduct violates section 2 of the Sherman Act.[210]

The Court then turned to an examination of the record to determine Ski Co.'s purposes in rejecting the joint ticket. The Court began by noting that the qualification on the right of a monopolist to deal with whom it pleases is not so narrow that it encompasses no more than the circumstances of *Lorain Journal*.[211] Conduct less brazen than the *Journal*'s conduct, the Court declared, may also support an inference of anticompetitive intent.[212] The Court then cited evidence that Ski Co., an admitted monopolist, did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor, but rather "elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several [15] years."[213] The Court also noted that interchangeable tickets are used in other multi-mountain areas which apparently are competitive, and that "it seems appropriate to infer that such tickets satisfy consumer demand in freely competitive markets."[214] The Court concluded that the issue of Ski Co.'s alleged anticompetitive intent presented a valid question for the jury.[215] The Court further held that viewing the record in the light most favorable to respondent Highlands and giving it the benefit of all inferences which the evidence fairly supported, the jury's verdict on the issue of Ski Co.'s monopolistic intent in refusing to deal was proper.[216]

The Court devoted the remainder of its opinion to a discussion of whether the record supported the jury's conclusion that Ski Co.'s conduct constituted unlawful monopolization and unreasonably and unjustifiably excluded competition. In analyzing whether Ski Co.'s conduct may properly be categorized as exclusionary, the Court considered its effect on Highlands and its impact on consumers.[217] The Court also considered whether the conduct impaired competition in an unreasonably restrictive way. The Court first discussed the effect of the challenged conduct on consumers.[218] From a review of expert testimony heard at trial, the Court found that the all-Aspen ticket was a "superior product" to the separate Ski Co. and Highlands tickets.[219] The Court noted that the six-day ticket afforded skiers the opportunity to purchase their tickets at once for the whole period of their stay in Aspen, thus eliminating the need to stand in line to purchase a ticket each day.[220] Additionally, the Court found, the four-area ticket provided skiers greater convenience and flexibility and expanded the variety and number of runs available to them during the week's vacation.[221] Furthermore, the Court pointed out, the

[209] *Aspen*, 472 U.S. at 601.
[210] *Id.* at 602.
[211] *Id.* at 603. For a discussion of *Lorain Journal*, see *supra* notes 117–25.
[212] *Aspen*, 472 U.S. at 603.
[213] *Id.*
[214] *Id.* & n.30.
[215] *Id.* at 604.
[216] *Id.* at 604–05, 610.
[217] *Id.* at 605.
[218] *Id.*
[219] *Id.* at 605–06.
[220] *Id.* at 606.
[221] *Id.*

ticket was particularly attractive for skiers with family members or companions of differing abilities. The same six-day all-Aspen ticket offered a beginning skier the ability to upgrade to more difficult areas through the week and allowed advanced skiers to ski some days with less advanced friends, while skiing more challenging mountains on other days.[222]

While the Court conceded that Ski Co.'s three-area, six-day ticket possessed some of these attributes, it held that the evidence supported a conclusion that the elimination of the four-area ticket adversely affected consumers.[223] Citing comparative sales figures between the three-area Ski Co. ticket and the all-Aspen ticket in the years after 1967, the Court concluded that skiers demonstrably preferred four mountains to three.[224] Further, the Court relied on a consumer survey undertaken in the 1979–1980 season which indicated that 53.7% of those surveyed wanted to ski Highlands but would not, presumably because it was not accessible on a Ski Co. three-area multi-day ticket.[225] Additionally, the Court found that there was evidence that skiers experienced frustration at not being able to ski Highlands on the three-area Ski Co. pass.[226]

The Court next dealt summarily with the adverse impact of Ski Co.'s pattern of conduct on Highlands.[227] The Court first found that expert testimony adequately described the extent of Highlands' pecuniary injury.[228] The Court also found, given Highlands' attempts to buy Ski Co. tickets in bulk and its efforts to market the Adventure Pack, that Highlands had tried to protect itself from losing its share of the all-Aspen ticket patrons.[229] Nonetheless, the Court found, as a result of Ski Co.'s conduct, Highlands' share of the relevant market declined steadily after the four-area ticket was terminated.[230]

Finally, the Court considered Ski Co.'s apparent failure to persuade the jury that a normal business purpose justified its conduct. The Court held that the jury could properly have concluded from the evidence presented at trial that Ski Co.'s purpose in refusing to deal with Highlands was to reduce competition in the Aspen market in the long run by harming its smaller competitor.[231] Highlands rebutted at trial all of Ski Co.'s proferred justifications for its decision to terminate the jointly offered ticket — that use of the ticket could not be properly monitored, that the tickets were administratively cumbersome, and that Ski Co. desired to disassociate itself from what it considered the inferior skiing services offered at Highlands.[232] Thus, the Court concluded, in light of Ski Co.'s "failure to offer any efficiency justification whatever for its pattern of conduct," the jury could have found that Ski Co.'s intent in refusing to deal with Highlands was

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[222] *Id.* at 606 n.34.

[223] *Id.* at 606.

[224] *Id.* The Court cited evidence that after 1967 the all-Aspen coupon booklet began to outsell Ski Co.'s ticket featuring only its mountains. *Id.* at 589–90.

[225] *Id.* at 606.

[226] *Id.* at 607. This evidence was proffered through the testimony of ski-tour promoters, ski club officials, and Highlands officials. *Id.*

[227] *Id.* at 607–08. Ski Co. did not dispute the adverse impact of its conduct on Highlands.

[228] *Id.* at 607.

[229] *Id.* at 607–08. On the basis of expert testimony, the jury found Highlands was injured in the amount of $2.5 million. *Id.* at 595.

[230] *Id.* at 608. *See supra* note 174 and accompanying text.

[231] *Id.* at 608.

[232] *Id.* at 608–10.

predatory and designed to maintain or enhance its monopoly in the market for ski services at Aspen, Colorado.[233]

In summary, the Court concluded that while Ski Co.'s pattern of conduct may not have been as "bold, relentless and predatory" as the publisher's actions in *Lorain Journal*, the record comfortably supported an inference that Ski Co. made a deliberate effort to discourage its customers from doing business with its smaller rival.[234] The Court found that a desire to injure Highlands motivated Ski Co.'s refusals to market a joint ticket and accept the Adventure Pack coupons in exchange for daily tickets.[235] Thus, the Court affirmed the Tenth Circuit's decision, finding it unnecessary to consider the possible relevance of the essential facilities doctrine given its conclusion that the evidence amply supported the verdict under the trial court's instructions.[236]

III. THE *ASPEN* DECISION: BREAKING THE UNWRITTEN RULES OF SECTION 2 MONOPOLIZATION INQUIRIES

The Court's application of the two-pronged *Grinnell* test in *Aspen* to hold unlawful an unintegrated monopolist's unilateral refusal to continue a cooperative marketing arrangement with its horizontal competitor is at odds with the purposes and goals of the Sherman Act. In *Aspen*, the Court for the first time held that a monopolist violated section 2 of the Sherman Act where its challenged conduct neither impeded the monopolist's rivals' ability to bring their services to market nor otherwise obstructed competition between the firms on the firms' respective merits by distorting choice in the consumer marketplace. In all of the cases decided prior to *Aspen* in which courts held refusals to deal violated section 2, the monopolist's illegal conduct involved more than the mere monopoly power plus intent to monopolize required under *Grinnell*. In each of the prior cases, the monopolist's conduct interfered with competition on the merits or with its rival's ability to bring its product to market.[237] Moreover, the monopolist's success depended on the existence of its monopoly power.[238] While the *Grinnell* test does not expressly require that the plaintiff prove a nexus between the challenged conduct and the defendant's monopoly power or show that the challenged conduct impaired competition on the merits, some courts have implicitly recognized the "nexus" and "impaired competition" elements of a monopolization action under section 2.[239] Additionally, commentators have urged adoption of "nexus" and "impaired competition" as requisite elements of a prima facie section 2 claim to better effectuate the purposes and goals of the Act.[240] Thus, the requirements of a nexus between the monopolist's conduct and its monopoly power and of conduct which impedes competition on the merits are in effect the unwritten elements of a monopolization claim.

The Court's failure to expressly recognize and apply these unwritten elements in *Aspen* led the Court to an unwarranted result. While Ski Co.'s conduct in refusing to

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[233] *Id.* at 608–11.

[234] *Id.* at 610 (quoting *Lorain Journal*, 342 U.S. at 149 (quoting *Lorain Journal Co. v. United States*, 92 F. Supp. 794, 796 (N.D. Ohio 1950))).

[235] *Aspen*, 472 U.S. at 610–11.

[236] *Id.* at 611 & n.44.

[237] *See infra* notes 246–84 and accompanying text.

[238] *See infra* notes 246–84 and accompanying text.

[239] *See supra* note 89 and accompanying text.

[240] *See supra* notes 8, 12 and accompanying text.

deal with Highlands was dependent for its successful exercise on its possession of monopoly power, neither the nature nor the effect of Ski Co.'s conduct in *Aspen* was exclusionary. Despite its satisfaction of the two-pronged *Grinnell* test and the proposed nexus requirement, then, the Court should not have held Ski Co.'s conduct violative of section 2.[241] Ski Co.'s conduct neither impeded Highlands from offering and providing its services to the market, nor prevented customers from making a fair choice between Ski Co. and Highlands solely on the basis of the firms' respective facilities. In order to preserve the intent and effectuate the purposes of the Sherman Act, therefore, the Court should revise the *Grinnell* test to require a nexus between the challenged conduct and monopoly power, and to explicitly define illegal behavior as that which impairs the competitive process. Only through such redefinition can the courts surehandedly promote acts legitimately based on fair competition on the merits and penalize exclusionary conduct unreasonably restrictive of competition.

This section begins with an analysis of the refusal to deal decisions prior to *Aspen*, emphasizing that liability only attached in those cases where both the nexus and impaired competition elements were present in addition to the monopoly power and intent to monopolize required under *Grinnell*. The section next compares the test of section 2 liability under *Grinnell* to the purposes and goals underlying the Sherman Act and concludes that the courts should expressly recognize these unwritten elements of a section 2 violation in order to better effectuate the purposes of the Act. Section IV of this casenote then analyzes the potential deleterious impact of the *Aspen* decision on incentives of both dominant firms and their rivals to innovate and increase efficiency,[242] future decisions to enter into productive cooperative arrangements,[243] and future actions for refusal to deal.[244] The section then argues that the *Grinnell* intent-oriented standard is ill-suited for application to cases factually similar to *Aspen*, because the test may in such situations penalize a monopolist's honestly industrial conduct — a result at odds with the undisputed intents and purposes of the Act.[245] Finally, the casenote concludes that explicit adoption of the proposed "nexus" and "impaired competition" requirements, elements which several courts have implicitly recognized, would substantially reduce the potential for such undesirable results in future section 2 cases.

A. *The Elements Required to Establish Illegal Conduct in Past Refusal to Deal Cases*

The factual situation presented to the Court in *Aspen* differed fundamentally from the contexts of the Court's prior refusal to deal decisions. *Aspen* does not involve a vertically integrated monopolist's refusal to *sell* any necessary product to its small competitor,[246] but rather, the monopolist's refusal to continue to engage in a cooperative marketing scheme with its smaller competitor. Further, the case does not involve any "essential facility" over which a monopolist is alleged to exercise control,[247] nor does it

[241] *See infra* notes 246–303 and accompanying text.

[242] *See infra* notes 309–17 and accompanying text.

[243] *See infra* notes 324–27 and accompanying text.

[244] *See infra* notes 318–23 and accompanying text.

[245] *See infra* notes 328–34 and accompanying text.

[246] *See, e.g., Otter Tail*, 410 U.S. at 377; *Southern Photo*, 273 U.S. at 359; *Byars*, 609 F.2d at 848–50; *Poster Exchange*, 431 F.2d at 338–40; *Kleerflax*, 63 F. Supp. at 40–42. *See also supra* note 116 and accompanying text.

[247] *See, e.g., Associated Press*, 326 U.S. at 3–5; *Terminal Railroad*, 224 U.S. at 397–400; *Gamco*, 194 F.2d at 486.

turn on practices which inhibit free choice in the marketplace or distort competition between rivals on their respective merits.[248] In essence, the case concerns the refusal of a monopolist present in only one market[249] and operating at only one level of production[250] to assist its smaller competitor in its marketing efforts by allowing the small firm to offer as part of its own package of services access to the dominant firm's facilities as well. Based on a determination that the two firms offered the joint ski-lift ticket in the past[251] and that the dominant firm could produce no valid business reasons for termination of the long-standing arrangement,[252] the Court held that the record presented sufficient evidence of Ski Co.'s anticompetitive purpose in terminating the ticket to satisfy the "willful acquisition or maintenance of [monopoly] power" element of the *Grinnell* standard.[253]

Yet in each of the past cases in which the Court used the *Grinnell* standard to find a monopolist in violation of section 2 for refusing to deal, more than monopoly power and intent to monopolize were present. First, in each of these cases there was a nexus between the firm's monopoly power and its anticompetitive conduct, in addition to the two required *Grinnell* elements. The monopolists' conduct in these cases was only successful in harming competitors because of and through the use of monopoly power.[254] Thus, the monopolists' conduct in the essential facilities,[255] vertical integration,[256] and intermarket leveraging[257] contexts was only successful in impairing their rivals' ability to bring their products to market because the rivals could not obtain the necessary resources refused them by the monopolists from some other source.[258] It is elementary in these cases that if the defendants did not wield monopoly power, their attempts to monopolize by refusing to deal with their competitors would have failed, because the rival firms easily could have obtained the necessary products or facilities from another supplier.

Similarly, a monopolist's refusal to deal with those who deal with its competitors[259] requires monopoly power in order to be successful. If, for example, a newspaper pub-

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[248] *See, e.g.*, *Lorain Journal*, 342 U.S. at 154–55; *Kansas City Star*, 240 F.2d at 661.

[249] Ski Co. was determined to exert monopoly power in the "Aspen area" submarket of the market for downhill skiing services at destination ski resorts. *Aspen*, 472 U.S. at 596 n.20.

[250] The only level or stage of production at which Ski Co. operates is the retail furnishing of downhill skiing facilities to the public. Ski Co. is thus an unintegrated firm, and Highlands, which produces in the same capacity, is Ski Co.'s horizontal competitor. *See supra* notes 45–46 and accompanying text.

[251] *Aspen*, 472 U.S. at 603.

[252] *Id.* at 608–11.

[253] *Id.* at 610–11. The Court thus upheld the district court's order that the joint ticket be reinstated and that the dominant firm compensate its smaller rival for damages caused by the ticket's two year absence. *Id.* at 611.

[254] *See, e.g.*, *Otter Tail*, 410 U.S. at 377; *Lorain Journal*, 342 U.S. at 154–55; *Southern Photo*, 273 U.S. at 369; *Terminal Railroad*, 224 U.S. at 397–400.

[255] This is the third "category" or "type" of refusal to deal, discussed *supra* notes 107–16 and accompanying text.

[256] This is the second type of refusal to deal, discussed *supra* notes 101–06 and accompanying text.

[257] This is the first type of refusal to deal, discussed *supra* notes 92–100 and accompanying text.

[258] *See, e.g.*, *Otter Tail*, 410 U.S. at 377 (monopolist only source of wholesale electrical power in geographic region); *Southern Photo*, 273 U.S. at 369 (monopolist predominant manufacturer of photographic materials and supplies); *Terminal Railroad*, 224 U.S. at 397–400 (monopolists controlled only feasible railroad facilities at St. Louis).

[259] This is the fourth recognized category of refusal to deal, discussed *supra* notes 117–25 and accompanying text.

lisher engages in this type of conduct to secure the exclusive patronage of its advertisers,[260] it could only succeed in its attempt if it were a monopolist. If five other newspapers competed with the one that refused to deal, the publisher's refusal to deal would not compel advertisers to submit to the publisher's conditions and they would thus take their advertising budgets elsewhere. Only if and because the publisher has monopoly power and is therefore "indispensable" to advertisers will its attempt to secure the exclusive patronage of advertisers successfully exclude competitors.[261]

Similarly, in *Aspen*, the Court held that the record was sufficient for the jury to infer that monopolistic purposes, not valid business considerations, motivated Ski Co.'s refusal to deal with Highlands.[262] Implicit in the Court's finding was that Ski Co.'s refusal to deal was not conduct reflecting a superior product, a well-run business, or luck, but rather, conduct constituting a conscious effort by the monopolist to use its monopoly power to win customers from its smaller rival.[263] Thus, implicit in the Court's holding in *Aspen* is a finding that a nexus existed between Ski Co.'s monopoly power and its challenged conduct.[264] Absent monopoly power, the Court indicated, Ski Co. would not have refused to continue marketing the joint all-Aspen lift ticket with Highlands.[265] While explicit recognition of the need to show a nexus between monopoly power and

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[260] This was the situation in *Lorain Journal*, 342 U.S. 143. The defendant Journal Publishing Co. refused to deal with advertisers who also dealt with the *Journal*'s rival, a start-up radio station. *Id.* at 148. Because the *Journal* reached 99% of all Lorain families, it clearly possessed monopoly power in that local market. *Id.* at 149–50. Furthermore, absent its monopoly power, the *Journal*'s conduct would have had no effect on either the advertisers the *Journal* sought to influence or the competing radio station it attempted to exclude. Advertisers would still have had a meaningful choice to advertise on the radio station and in the other available print media.

[261] *Id.* at 152.

[262] *Aspen*, 472 U.S. at 608–11.

[263] *See id.* at 605–11.

[264] *Id.* at 607–08. In its brief to the Supreme Court, Ski Co. argued vigorously that its conduct did not require a connection with monopoly power for its successful exercise and thus did not violate section 2. Brief of Petitioner at 28–29. Ski Co. argued that its refusals to market a joint ticket with Highlands, to accept Highlands' coupons, and to sell tickets in bulk to Highlands did not depend on monopoly power. *Id.* Any firm, Ski Co. contended, that has a product it believes will be independently attractive to customers can successfully refuse to cooperate with a competitor. *Id.* Because Ski Co.'s refusals merely produced a situation in which Ski Co. and its rival were left to market their respective products independently of each other, the defendant maintained, the conduct did not require monopoly power. Indeed, Ski Co. asserted, Highlands itself could have taken these actions and succeeded, as Ski Co. did, in breaking marketing ties with its competitor. *Id.* at 29–31. Similarly, Ski Co. argued, were there 100 ski areas in the Aspen market, Ski Co. could have just as easily severed marketing ties with its 99 competitors. Ski Co. argued that its refusal to cooperate, then, did not in any way require monopoly power for its successful execution. *Id.*

[265] In this respect, Ski Co.'s conduct is analogous to that of the defendant publisher in *Lorain Journal*, 342 U.S. 143. *See supra* notes 259–61 and accompanying text. If the *Journal* lacked monopoly power, its policy of refusing to sell advertising to potential customers who purchased advertising from the rival radio station would be doomed to failure. This is because conduct of this nature necessarily depends on monopoly power for its successful exercise. The conduct in *Aspen* similarly required monopoly power for its successful exercise, given the jury's verdict that Ski Co.'s conduct was not based on the superiority of its services, facilities, or techniques of management, but rather, on an intent to monopolize. While it is true, as Ski Co. urged, that Highlands *could* as easily and successfully have announced to Ski Co. that it was breaking marketing ties between the two firms in order to pursue independent marketing policies as the reverse, Highlands *would* not have done so, because the only reason a firm *would* engage in such a practice, the Court implied, would be to use monopoly power to exclude smaller competitors. *See Aspen*, 472 U.S. at 608–11.

conduct would not have changed the result in *Aspen*, its adoption would certainly provide the courts with a clearer and more objective test to determine satisfaction of the section 2 monopolization offense and ensure application of the antitrust laws consistent with their purposes.[266]

The Court should thus recognize explicitly what it has heretofore applied implicitly. The Court should directly examine the relationship between the challenged act and monopoly power, rather than follow its less certain and more circuitous current approach of examining the monopolist's purposes in engaging in conduct and then determining whether the conduct in fact constituted the exercise of monopoly power. Rather than ask whether the challenged conduct evinces a purpose to use monopoly power to determine whether the monopolist has violated section 2, it is far more relevant to ask whether the conduct *in fact constitutes the use* of monopoly power. It is the actual *misuse* of monopoly power, not mere monopolistic purposes or intent, which the Sherman Act prohibits.[267] An objective inquiry into the nature of the challenged conduct, further, is more certain to distinguish legitimate conduct from conduct reflecting misuse of monopoly power than is an inquiry into subjective inferences of intent based upon the monopolist's actions.

Second, in each of the refusal to deal cases prior to *Aspen*, the monopolist's conduct either prevented a rival from bringing its product to market or otherwise inhibited competition on the merits by distorting consumers' freedom of choice in the marketplace. Thus, in each of the first three refusal to deal categories — monopolists' refusals to sell to effect vertical integration, monopolists' refusals to sell to distort competition in other markets, and monopolists' refusals to sell or provide access to an essential facility[268] — monopolists denied essential supplies to their rivals or terminated vertical supplier-customer relationships vital to the rivals' ability to produce their products.[269] These refusals to deal, then, clearly impaired and in some cases destroyed the ability and opportunity of rivals to compete effectively in their market against the monopolist.

Refusals to deal in category four,[270] typified by the situation in *Lorain Journal*,[271] similarly distort the process of competition on the merits. By refusing to deal with those who deal with its competitors,[272] or by refusing to sell a product over which it exercises

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[266] *See infra* notes 290–98.

[267] *See, e.g., Berkey*, 603 F.2d at 276 ("It is the *use* of economic power that creates the liability."); *Alcoa*, 148 F.2d at 430 (essential inquiry is whether monopolist "utilized" its size for "abuse").

[268] *See supra* notes 91–136 and accompanying text.

[269] *See, e.g., Otter Tail*, 410 U.S. at 377 (refusal to sell wholesale power or allow power lines to be used for transmission to prevent municipalities from selling power on the retail level); *Associated Press*, 326 U.S. at 3–5 (refusal to sell news gathering services); *Southern Photo*, 273 U.S. at 369 (refusal to sell wholesale photography supplies to retail distributor); *Terminal Railroad*, 224 U.S. at 397–400 (refusal to allow access to railroad terminal facilities); *Home Placement*, 682 F.2d at 281 (refusal to sell advertising space to real estate publisher attempting to list housing rental information); *Byars*, 609 F.2d 848–50 (refusal to wholesale periodicals to local distributor); *Poster Exchange*, 431 F.2d at 338–40 (refusal to wholesale promotional movie posters to retail distributors); *Six Twenty-Nine Productions*, 365 F.2d at 486 (refusal to buy advertisements from advertising agency); *Packaged Programs*, 255 F.2d at 710 (refusal to buy filmed programs from producer); *Gamco*, 194 F.2d at 486 (refusal to rent space in produce market building in which retail buyers congregate and which is accessible to shipping facilities); *Kleerflax*, 63 F. Supp. at 40–42 (refusal to wholesale raw linen material to rug manufacturer and distributor).

[270] *See, e.g., Lorain Journal*, 342 U.S. at 154; *Kansas City Star*, 240 F.2d at 661. *See also supra* note 117.

[271] *Lorain Journal*, 342 U.S. at 154. *See also supra* note 117.

[272] *Lorain Journal*, 342 U.S. at 154–55. In *Lorain Journal*, the Court found that the monopolist's

monopoly power to those who do not also purchase from the monopolist in product markets in which the monopolist has competition,[273] a monopolist clearly goes beyond competition on the merits which it is the purpose of the Sherman Act to foster.[274] Indeed, such conduct constitutes the direct exercise of monopoly power to capture customers from competitors not on the basis of the monopolist's superior product, services, or price but, rather, by threats and coercion.

Ski Co.'s conduct, in contrast, in no way impaired Highlands' ability to bring its product to market; nor did it in any way inhibit competition on the merits between the two firms. Ski Co.'s refusal to continue the joint ticket did not restrain Highlands' opportunity to offer its own skiing services to the market.[275] Highlands remained free and fully able to offer its services, and it did so.[276] In addition, while the termination of the all-Aspen ticket perhaps made patrons less likely to ski at Highlands[277] than if the companies offered the all-Aspen ticket, the refusal to continue the joint ticket did not restrain consumers' freedom to choose between Highlands and Ski Co. or secure to Ski Co. the patronage of any skier who did not prefer its facility to Highlands.[278] Any advantage Ski Co. secured in being able to offer a six-day ticket valid on three mountains derived from its ownership of three mountains, and not from any predatory or exclusionary practices.[279]

Indeed, the termination of the joint ticket actually brought the two firms closer to the ideal of competition on the merits than they had been during the life of the ticket.[280] While the all-Aspen ticket was in effect, Ski Co. and Highlands were not merely competitors, but also joint venturers. The two firms collaborated to set the prices and terms of the ticket on an annual basis, in effect colluding to fix the price for ski services in the

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refusal to sell advertising to those who purchased advertising from its competitor clearly distorted the decision of where to advertise. The Court noted that this scheme forced the prospective advertiser to choose between one medium or the other; it could not elect to use both, even if it concluded that both the radio station and the newspaper were, on their own respective merits, worthwhile places to advertise. *Id.*

[273] *Kansas City Star*, 240 F.2d at 661 (where monopolist in television market refused to sell television commercials to any person who did not also agree to advertise in the monopolist's newspapers, the monopolist unfairly interfered with consumer choice and competition on the merits in newspaper advertising, a competitive market).

[274] *See supra* notes 8–16 and accompanying text.

[275] *See* Brief of Petitioner at 20.

[276] *Id.*

[277] This might be true if, for example, a skier preferred the convenience and flexibility of a six-day, three-mountain ticket to purchasing a new daily ticket each day. *Aspen*, 472 U.S. at 605–06. This added convenience and flexibility that Ski Co. could offer its patrons, however, was not unfair or unreasonably exclusionary. It was merely an attribute of Ski Co.'s ownership of three mountains, one of the "merits" Ski Co. could offer a consumer, and one which it had every right to market for sale. *See* Brief for Petitioner at 20–21.

[278] After the demise of the all-Aspen ticket, both firms continued to offer single-day tickets which enabled skiers to buy exactly as many days at each firm's facilities as they chose. Brief of Petitioner at 20.

[279] Ski Co. in no way interfered with Highlands' ability to sell lift tickets on its mountain or with an individual patron's ability to ski at both Highlands and Ski Co. mountains. *Id.* This case would be analogous to *Lorain Journal*, *see supra* note 117, if Ski Co. had refused to sell lift tickets to those customers who patronized Highlands. No such predatory conduct above and beyond competition on the merits, however, was present in this case.

[280] *See supra* note 8 and accompanying text.

Aspen market.[281] This behavior itself raised antitrust concerns and resulted in the Colorado Attorney General's filing a section 1 suit against Ski Co. and Highlands seeking remedy of this conspiracy in restraint of trade.[282]

In addition to the section 1 implications of the joint ticket, the ticket's existence distorted competition on the merits between the two firms because it allowed the two independent producers to tie their services to their competitor's. Through the device of the all-Aspen ticket, as part of its package of services Highlands could offer skiers access to Ski Co.'s mountains, and Ski Co. similarly was able to offer access to Highlands' mountain. Rather than independent competition between the firms on their merits, during the tenure of the all-Aspen ticket both Ski Co. and Highlands offered access to facilities that they did not own or maintain.[283] Without the ticket, Highlands could no longer tie its facilities to those of Ski Co. and was left to sell its services to the public independently.[284] Thus, during the ticket's absence, Ski Co. and Highlands each was left to sell to the public precisely those facilities it operated, and the consuming public was left free to evaluate the two competitors on the basis of their respective merits and faults in deciding whose ticket to purchase.

In all of the cases prior to *Aspen* in which courts found that refusals to deal violated section 2, more than monopoly power and abuse of monopoly power as required under the *Grinnell* test were present. These prior cases all censured conduct which was only possible due to the presence and exercise of monopoly power and which impeded the injured firm from bringing its product to market or impaired competition on the merits. While Ski Co.'s conduct apparently did depend for its success upon the exercise of monopoly power, Ski Co. did not interfere with Highlands' ability to market its product or impair consumers' free choice in the marketplace. Ski Co. merely refused to combine with its smaller horizontal competitor in the joint marketing of both firms' output to the public. This conduct was not predatory in that it did not unreasonably exclude Highlands or distort competition between the firms on their respective merits. Indeed, Ski Co.'s refusal brought the two firms closer to the competitive ideal. Therefore, Ski Co.'s practices were not of the type that section 2 of the Sherman Act intended to or indeed should penalize.

B. *The* Grinnell *Standard, the Role of Exclusionary Conduct, and the Purposes of the Act*

In order to effectuate the purposes of the Sherman Act, the Court should refine the *Grinnell* test of monopolization to explicitly require that a plaintiff show a nexus

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[281] *See* Brief of Petitioner at 3–5; *Aspen*, 472 U.S. at 591 n.9.

[282] *Aspen*, 472 U.S. at 591 n.9. *See supra* note 175 and accompanying text.

[283] Logically, since "skiers demonstrably preferred" access to four mountains on a single lift-ticket to only three, *Aspen*, 472 U.S. at 606, the cooperation of Ski Co. and Highlands in issuing the all-Aspen ticket made Aspen a more attractive resort to potential visitors than it otherwise would have been. It is likely, therefore, that the all-Aspen ticket bolstered the competitive standing of the Aspen areas relative to other destination ski resorts. It is probable, then, that competing destination ski resorts in the western United States suffered competitive injury as a result of this cooperative scheme between Highlands and Ski Co. Thus, although not at issue in the *Aspen* case, it is quite conceivable that the all-Aspen ticket constituted a conspiracy to restrain trade in violation of section 1 of the Sherman Act.

[284] As Ski Co. adeptly noted in its brief, by terminating the joint ticket, Ski Co. "removed the umbrella that had partially sheltered Highlands from the demands of the market." Brief of Petitioner at 22.

between the challenged conduct and monopoly power and demonstrate that the monopolist's conduct impairs the competitive process. Because it is the purpose of the Sherman Act to prohibit only abuses of monopoly power, and not monopoly obtained through honestly competitive conduct,[285] a test which requires these two additional elements to prove a claim of unlawful monopolization would improve the current two-pronged standard of *Grinnell*. Explicit adoption of the "nexus" and "impaired competition" requirements as elements of the offense of monopolization would better enable the courts to distinguish prohibited exclusionary or predatory conduct from behavior consistent with competitive ideals.[286] Express recognition of the implicit standard of liability in past refusal to deal decisions would provide courts and juries with a more useful and accurate definition of anticompetitive conduct.[287] As the *Aspen* decision makes clear, a monopolist's possession of monopoly power and intent to use that power to harm a competitor are not enough in some situations to identify the type of conduct the Act intended to prohibit.[288]

In broad terms, in enacting the antitrust laws, "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent."[289] Monopoly power is not, however, *per se* unlawful.[290] The courts have consistently held that monopoly resting on economies of scale or obtained by skill, foresight, and industry does not violate the antitrust laws.[291] The Act unequivocally lays down a policy of competition[292] and

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[285] *See supra* notes 7–15 and accompanying text.

[286] *See supra* notes 15–17 and accompanying text. As noted in *MCI*, "[c]ourts have consistently found monopolization where predatory or exclusionary conduct was proven." *MCI*, 708 F.2d at 1108 n.35. *See* Hanover Shoe Mach. Corp. v. United States, 392 U.S. 481, 485–86 (1968); United States v. U.S. Shoe Mach. Corp., 110 F. Supp. 295, 343–44 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954); Watson & Bruner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 ANTITRUST BULLETIN 559, 590 n.83 (1977). *See also Berkey Photo*, 603 F.2d at 273–76 (integrated monopolist's failure to predisclose innovations, and its ability to sell monopolized and competitive products as a system are not unlawful uses of monopoly power but rather, legitimate advantages of size and integration); *Telex*, 510 F.2d at 927–28 (reversing finding of section 2 liability in the absence of predatory conduct).

[287] *See supra* notes 254–67 and accompanying text.

[288] *See supra* notes 275–84 and accompanying text.

[289] Standard Oil Co. v. Federal Trade Comm'n, 340 U.S. 231, 249 (1951); 1 AREEDA & TURNER, *supra* note 2, ¶ 103.

[290] *See supra* note 7 and accompanying text.

[291] *Grinnell*, 384 U.S. at 570–71; *Alcoa*, 148 F.2d at 430; *United Shoe Mach.*, 110 F. Supp. at 342. *See also Berkey Photo*, 603 F.2d at 274 ("considerations of fairness and the need to preserve proper economic incentives prevent the condemnation of § 2 from extending . . . to one who has gained his power by purely competitive means.")

[292] Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 4–5 (1957). *See also* United States v. Topco Assoc., where the Court stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

405 U.S. 596, 610 (1972). This "freedom to compete" is also guaranteed a monopolist. *Berkey Photo*, 603 F.2d at 281 ("[A] monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits [and therefore] any success that it may achieve through 'the process of invention and innovation' is clearly tolerated by the antitrust laws.").

entrusts the courts to apply the Act to punish those business practices which suppress competition, restrain trade, or curb competition on the merits.[293] Conduct which does not involve the willful use of monopoly power to injure a competitor's ability to compete or curb competition on the merits, then, does not constitute an abuse of monopoly power and does not run afoul of the intents and purposes of the Act.[294]

Only where a monopolist *uses* monopoly power to obtain an advantage over its competitors, that is, where a nexus exists between the monopoly power and the monopolist's capture of customers from its rival, does the monopolist's conduct become unreasonably exclusionary and unlawful under section 2.[295] If a firm could have carried out the challenged conduct successfully without monopoly power, the conduct by definition does not require monopoly power for its exercise. Such conduct, lacking the essential connection to monopoly power, does not exclude competition on the unfair basis of monopoly power but rather, on the legitimately competitive basis of superior operations or facilities.[296] Thus, because all unreasonably exclusionary acts are predicated on monopoly power[297] and it is only exclusionary conduct at which the Sherman Act's prohibitions are aimed,[298] liability should not attach under section 2 absent proof of a nexus between a defendant's monopoly power and its challenged conduct.

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[293] *See, e.g., Northern Pac.*, 356 U.S. at 6 (holding that tying arrangements — agreements by which a party agrees to sell one product but only on the condition that the buyer also purchases a different (or tied) product — "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ."). *See also Kansas City Star*, 240 F.2d at 658–59.

[294] Indeed, at its very heart, the Sherman Act seeks to encourage conduct promotive of competition. As the Court in *Northern Pac.* noted,

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Northern Pac. R.R. Co., 356 U.S. at 4.

[295] Because all competitive moves tend to exclude, that is, to win over customers from rival firms, it is only that conduct *which employs the use* of monopoly power to win customers from rivals that is "unfair" or unreasonably exclusionary. *See* 3 AREEDA & TURNER, *supra* note 2, ¶¶ 603b, 626. A monopolist who drives out or excludes rivals by selling a superior product or producing at substantially lower costs does not make unfair use of its monopoly power. The monopolist has merely excluded its rivals by virtue of its skills as a producer. Such conduct, whether engaged in by a monopolist or by anyone else, embodies the "essence of vigorous competition" which it is the policy of the Sherman Act to promote, not inhibit. *Id.* ¶ 603b. *See also Copperweld*, 467 U.S. at 767 ("[A]n efficient firm may capture unsatisfied customers from an inefficient rival . . . . This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster."); *U.S. Steel Corp.*, 251 U.S. at 451 ("the law does not make mere size an offence or the existence of unexerted power an offence"); *Calcomp*, 613 F.2d at 735 n.6 ("[P]ower obtained by the kind of behavior that competition is thought to foster, if not compel, [is] immune [from antitrust scrutiny] even though businesses and business opportunities [may be] destroyed in the process."); *Telex*, 510 F.2d at 925–26 (question of whether there has been a section 2 violation necessitates inquiry as to whether the challenged acts "constitute the *use* of monopoly power" (emphasis in original)).

[296] *See supra* note 15 and accompanying text.

[297] *See supra* note 12 and accompanying text.

[298] *See supra* notes 8–9, 13–15 and accompanying text.

Furthermore, a court should not hold that a monopolist's conduct which does not interfere with its competitor's ability to bring its product to market[299] or otherwise impair competition on the merits between the two firms[300] violates the antitrust laws. Unless the monopolist has engaged in acts which restrict the ability or opportunities of a rival to compete, or which distort free choice in the marketplace, its acts are neither predatory nor unreasonably exclusionary.[301] Where, in the wake of the monopolist's conduct, the rival firm remains fully able to bring its product to market and consumers remain unfettered in choosing between the firms' offerings, the monopolist has not interfered with the process of competition on the merits.[302] The Sherman Act, then, which Congress designed only to penalize conduct which hinders or encumbers the competitive process,[303] should not be triggered in such cases.

IV. THE IMPACT OF *ASPEN SKIING CO. V. ASPEN HIGHLANDS SKIING CORP.*

The Court's decision in *Aspen* reveals the inadequacy of *Grinnell*'s two-element test of monopolization. Application of the *Grinnell* standard in *Aspen* produced the undesirable result of penalizing an unintegrated monopolist's refusal to continue to engage in a joint marketing venture with its horizontal competitor, conduct which is not at odds with, but is indeed consistent with, the competitive values which underlie the Sherman Act. Furthermore, the decision is likely to hinder the incentives of both Ski Co. and Highlands to improve the quality of their operations in the future and to undertake the risks of expansion. Additionally, by creating uncertainty as to the freedom of a monopolist to terminate a joint venture with its horizontal competitor, the *Aspen* decision may forestall the formation of productive cooperative ventures in the future. Finally, the *Aspen* decision has portentous implications for future suits in which a party is alleged to have monopolized unlawfully by refusing to deal.

A. *The* Aspen *Decision is Contrary to the Sherman Act's Goal of Promoting Competition*

The undisputed goal of the Sherman Act is to preserve freely competitive markets.[304] Toward that end, the Act penalizes conduct which harms the competitive process by inhibiting competition between rivals on their respective merits.[305] In general, however, the Act imposes no duty upon a monopolist to cooperate with its rivals.[306] Indeed, such cooperation between rivals is often anathema to the purposes of the antitrust laws.[307] In

[299] *See supra* note 269 and accompanying text.

[300] *See supra* notes 270–73 and accompanying text.

[301] *See supra* notes 8–12 and accompanying text.

[302] *See supra* notes 7–12 and accompanying text.

[303] *See supra* notes 291–95 and accompanying text.

[304] *See supra* notes 294–95.

[305] *See supra* notes 8–15. *Cf. supra* note 286.

[306] As commentators have noted, "[i]n general, the monopolist has no duty to help his rivals enter, survive, or expand .... He need not provide the rival with a machine or component for purposes of examination or copying. Nor is he obliged to provide a sample of his product or otherwise facilitate the comparative testing of his product against that of a rival." 3 AREEDA & TURNER, *supra* note 2, ¶ 738m (footnotes omitted).

[307] Cooperation between rivals is apt to create opportunities for contracts, combinations, or conspiracies in restraint of trade, which violate section 1 of the Act. *See supra* note 3. Such unlawful practices might take the form of agreements between competitors to limit production, fix prices, or boycott a particular buyer or customer. *See supra* notes 19, 23–24 and accompanying text.

a recent section 1 decision, the Court reaffirmed that "[t]he central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion — that is, by competing successfully rather than by arranging treaties with its competitors."[308]

The guiding principles behind the Act, then, mandate a result directly opposite that reached in *Aspen*. Prior to the 1978–1979 season, there existed between Ski Co. and Highlands just such a "treaty between competitors" that the Act proscribes.[309] Indeed, the all-Aspen ticket and the process of negotiation and cooperation that attended it drew fire from the government in the form of an action under section 1 of the Sherman Act.[310] Upon termination of the firms' cooperative marketing venture, Highlands and Ski Co. were left to compete independently with each other for skiers' patronage, based on each skier's perception of the two firms' relative merits. One of the benefits Ski Co. could offer to prospective customers by virtue of its ownership of three mountains was a lift ticket interchangeable among three mountains. The ability to offer a multi-mountain ski package was simply a product of Ski Co.'s skill, foresight, and industry in purchasing and developing the three areas. In the wake of the all-Aspen ticket's demise, Highlands, similarly, was unimpaired in its ability to market to the skiing public the facilities it owned and the services it could provide. Competition between the two firms on their respective merits, the central objective of the Sherman Act, continued unabated. Indeed, the demise of the all-Aspen ticket produced a situation more closely approximating the ideal of competition on the merits than did the situation which existed during the life of the ticket.[311] While the ticket existed, Highlands was able to sell its services in conjunction with those of Ski Co., in effect marketing the two firms' outputs jointly.

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[308] United States v. Citizens & Southern National Bank, 422 U.S. 86, 116 (1975). *See Topco*, 405 U.S. at 610–11 in which the Court condemned, as a per se violation of section 1, territorial restrictions imposed by a supermarket cooperative association (Topco) upon its member supermarkets which limited the freedom of its individual members to compete with each other. The Court noted that "the Sherman Act gives to each Topco member . . . the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in Topco-brand products. Without territorial restrictions, Topco members may indeed '[cut] each other's throats,'" but, the Court indicated, this is precisely the competitive behavior the Sherman Act seeks to encourage. *Id. See also* Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 538 (1983) ("our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market"); Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 n.19 (1982) (the antitrust laws embody "the longstanding Congressional commitment to the policy of free markets and open competition"); *Berkey Photo*, 603 F.2d at 291 ("The purpose of the Sherman Act . . . is not to maintain friendly business relations among firms in the same industry, nor was it designed to keep these firms happy and gleeful.").

[309] The Court also found that treaties between competitors violated the Sherman Act in *Grinnell*, 384 U.S. at 576. In *Grinnell*, the Court held unlawful restrictive agreements that pre-empted for each company a segment of the market where it was free of competition from the others. *Id.*

[310] The suit brought by the Attorney General of Colorado in December of 1975 against Ski Co. and Highlands emphasizes the anticompetitive nature and potential of the all-Aspen ticket. The complaint alleged, in part, that the negotiations over the four-area ticket had provided the defendants Ski Co. and Highlands with a forum for price-fixing in violation of section 1 of the Sherman Act and that they had attempted to monopolize the market for downhill skiing services in Aspen in violation of section 2. *Aspen*, 472 U.S. at 591 n.9. While the case was settled by a consent decree that allowed the parties to continue to offer the four-area ticket provided that they set their own ticket prices unilaterally before negotiating its terms, *id.*, the challenge to the ticket makes clear the potential for anticompetitive conduct that the joint ticket created.

[311] *See supra* note 10 and accompanying text.

The Court's decision in *Aspen* also impairs the competitive process by dulling incentives to compete. The joint ticket effectively operated to shield Highlands from the competitive rigors of the market by allowing it to tie itself to Ski Co.'s facilities. In penalizing Ski Co. for its withdrawal from the cooperative venture and in ordering the joint ticket reinstated, the Court has injured the competitive process in two ways. First, by penalizing conduct not shown to be unreasonably exclusionary, the Court has dulled the incentive of firms with market power to innovate and to compete and perform efficiently.[312] If Ski Co. is not allowed to appropriate exclusively the benefits of its legitimately acquired economies of scale, but rather, must share some of its advantage with its competitor, Ski Co. may be unwilling to take such risks in expanding in the future.[313] The resulting decline in innovation and economic efficiency caused by stagnation of the dominant firm in the market will adversely affect consumers.[314] Second, the Court's ruling, in protecting Highlands from competing head-on with Ski Co., reduces Highlands' incentive to improve its own facilities and services or to make itself more attractive to consumers in other ways. Thus, Highlands is less likely to expand its

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[312] The courts have long been aware of the harmful disincentive effects produced by an inappropriate application of the antitrust laws. As Judge Hand cautioned in *Alcoa*, "the successful competitor, having been urged to compete, must not be turned upon when he wins." *Alcoa*, 148 F.2d at 130. More recently, the Second Circuit warned that a "wooden" application of the antitrust laws to condemn a monopolist that achieves success in competition on the merits might "deprive the leading firm in an industry of the incentive to exert its best efforts." *Berkey Photo*, 603 F.2d at 273. "The antitrust laws", the court continued, "would thus compel the very sloth [i.e. complacent behavior by monopolists] they were intended to prevent." *Id.*

[313] *See*, for example, *Berkey Photo*, in which Kodak, an undisputed giant in the photographic equipment and supplies markets, was alleged to have used its monopoly power in the film market to monopolize and attempt to monopolize the still camera market. *Berkey Photo*, 603 F.2d at 267–68. The district court held that Kodak had a duty to give prior disclosure of its plans to introduce a new camera line to its competitors, in order for them to have an opportunity to develop a similar competitive product. *Id.* at 268. The Second Circuit reversed, holding that "[I]f a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated." *Id.* at 281.

[314] Indeed, as the Second Circuit noted in *Berkey Photo*, "[i]t is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive society rests." *Berkey Photo*, 603 F.2d at 281. As many economic and legal commentators have pointed out, monopolists are often important sources of innovation. *See generally* J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82 (1939) (In the search for the source of the most conspicuous innovations of the modern age, "the trail leads not to the doors of those firms that work under conditions of comparatively free competition but precisely to the doors of the large concerns . . . and a shocking suspicion dawns upon us that big business may have had more to do with creating that [high] standard of life than keeping it down."); J. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT 131–32 (1934) (large and powerful firms are the engine of innovation, and innovation is the long-run basis for expanding output and lowering prices . . . . Temporary monopoly profits, which result from innovation, are not only acceptable, but indeed are necessary to stimulate innovation.); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925–33 (there is no reason for a monopolist to be less innovative than a normal competitor); Comment, *Antitrust Scrutiny of Monopolists' Innovations*, 93 HARV. L. REV. 408, 418 ("If consumers are to reap the fullest possible benefits from technological change, not only must innovations be marketed in a manner that allows consumers to choose freely between new products and those already on the market, but normal incentives to innovate must be preserved, even for monopolists.").

But see Alcoa, 148 F.2d at 427 ("[i]mmunity from competition is a narcotic, and rivalry a stimulant, to industrial progress . . . the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone").

facilities, lower its lift ticket prices, improve its ski school, or add new services than it would be if the competitive process functioned unimpeded.[315]

The Court's ruling in *Aspen*, then, cuts against the fundamental policy of promoting competition which underlies the Sherman Act. As Senator Hoar remarked in the legislative debates, Congress did not intend section 2 of the Sherman Act to apply to one "who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well."[316] In holding Ski Co. liable for the section 2 violation, however, the Court in effect ruled that Ski Co. may not alone enjoy the fruits of its superior skill and intelligence in developing its facilities and bringing millions of skiers per year[317] to the Aspen market, but must share these benefits with its rival. In so ruling, the Court ordered Ski Co. to acquiesce in a venture that diverts revenue from itself to Highlands. The Court has implicitly disapproved of robust competition on the merits between the firms, cooled the dominant firm's incentive to expand, and lessened the incentives of the smaller firm to carve for itself a niche in the market through introduction of new services or improvements; to operate profitably without ties to Ski Co.

B. Aspen's *Impact on Future Dealings Between Competitors and on Future Antitrust Litigation*

Courts may extend the *Aspen* decision, applying the *Grinnell* test to find a monopolist's refusal to cooperate with its rival in a joint marketing arrangement a violation of section 2, to situations where two rival competitors do not have a past history of dealing, but where the smaller rival has unsuccessfully sought such an arrangement.[318] Subject only to a requirement that the antitrust plaintiff show that the defendant possesses monopoly power and that by refusing to deal with the smaller competitor the dominant firm is willfully maintaining that power, the small firm presumably can get to the jury on its section 2 claim.[319] Unless the monopolist can show legitimate business reasons for its refusal to deal, then, the smaller rival can force the monopolist to cooperate.[320] Thus, the *Aspen* decision creates the very real possibility of a small competitor using the Act as a sword against a larger rival in order to affiliate itself with the rival's superior product or services and avoid the competitive rigors of the marketplace.[321] As in *Aspen*, the

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[315] As long as Highlands is guaranteed a steady flow of customers to the Aspen market and is able to secure patronage on Ski Co.'s coattails through the joint ticket arrangement, Highlands is less likely to expand or improve its facilities or lower the price of its services than if fully free competition on the merits prevailed.

[316] 21 CONG. REC. 3151–52 (1890).

[317] The Aspen area routinely attracts over one million skier visits per year. *Aspen*, 472 U.S. at 591 n.11.

[318] Survey, *Supreme Court Leading Cases*, 99 HARV. L. REV. 120, 279 n.39 (1985) [hereinafter *Leading Cases*].

[319] 384 U.S. at 570–71. Under the standard announced in *Grinnell* and applied in *Aspen*, 472 U.S. at 600–11, this is all that is required to produce a prima facie showing of a section 2 monopolization violation.

[320] *See supra* notes 126–36 and accompanying text.

[321] *See Leading Cases*, *supra* note 318, at 279 n.39. One of the great questions raised by the Court's decision in *Aspen* is to what extent monopolists now have an affirmative duty to deal. Prior to *Aspen*, it was relatively certain that a single firm acting independently could choose to deal or not to deal with whomever it desired. *Colgate*, 250 U.S. at 307. It was also well established that the antitrust laws imposed upon a single firm no duty to help or assist its competitors in the absence of an additional relationship between the parties (*e.g.*, supplier-purchaser). *See supra* notes 92–116

smaller competitor gets a free ride; despite its ownership of a small business with limited facilities and resources purchased for a small investment, it can provide its customers access to the same facilities that the larger firm, through greater investment and possibly superior resourcefulness and foresight, is able to offer its customers. Thus, the smaller competitor shares with the monopolist the advantages of scale, although the smaller firm bore far less risk and exercised no superior skill or foresight.[322] This is an unsatisfactory result for an economic system based on rewarding performance, efficiency, and successful risk-taking.[323]

Additionally, *Aspen* introduces uncertainty into the realm of business dealings between competitors which is likely to produce undesirable results. First, knowing that it will be unable to terminate a joint venture with its smaller competitor at will absent its ability to show in court that legitimate business reasons motivated the termination, a market-dominant firm will hesitate to enter into such an agreement, despite its current attractiveness to both parties. Thus, firms will not undertake economically productive ventures and activities; ultimately, such a result will harm individual businesses and the national economy.[324] Second, because the second prong of the *Grinnell* standard is based purely on subjective inferences of the intent of a monopolist in refusing to deal,[325] rather than more objective factors such as the existence of a nexus between the conduct and monopoly power[326] and whether a plaintiff rival has been impaired in its ability to produce or sell its product,[327] a market-dominant firm's task in planning its competitive strategy is difficult.

Expansion of the *Grinnell* standard to include these two conduct-oriented elements[328] would serve three worthy goals. First, it would better enable courts and juries to distin-

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and accompanying text. *See also* 3 AREEDA & TURNER, *supra* note 2, at ¶ 738m ("[i]n general, the monopolist is under no duty to help his rivals enter, survive, or expand.").

The Sherman Act does, however, prohibit (impose negative duties upon) certain unilateral conduct by monopolists. *See, e.g.*, *Lorain Journal*, 342 U.S. at 154; *Kansas City Star*, 240 F.2d at 661. Thus, a recent Seventh Circuit opinion stated that "[t]here is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter." USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 513 (7th Cir. 1982). *See also MCI*, where the court noted that "[g]ranting MCI multipoint interconnections would have enabled MCI to compete with AT & T for long distance traffic into areas where MCI may have made no significant capital investment." *MCI*, 708 F.2d at 1149. In holding the evidence insufficient to permit a finding that AT & T's conduct was primarily motivated by an illegal attempt to monopolize, the court balked at using the antitrust laws to "impose upon AT & T the extraordinary obligation to fill in the gaps in its competitor's network." *Id.*

In the wake of *Aspen*, however, the right of a firm to refuse a competitor's offer of a joint venture or to withdraw from a cooperative relationship with a rival is very much in doubt.

[322] *See Alcoa*, 148 F.2d at 430.

[323] Indeed, as the Second Circuit pointed out in *Berkey Photo*, "[I]t is the possibility of success in the marketplace attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests." *Berkey Photo*, 603 F.2d at 281.

[324] Certainly the threat of not being able to terminate a joint venture at will in the future and the aura of uncertainty now attending such proposed ventures will give negotiating parties hesitation before consummating a deal. Where great uncertainties are present, such as those created by the *Aspen* decision, joint venturers will engage only in those dealings they estimate will be sufficiently profitable to compensate for the heightened degree of risk. *See* P. SAMUELSON, ECONOMICS 622–23 (12th ed. 1985).

[325] *See supra* notes 86–88 and accompanying text.

[326] *See supra* notes 254–67 and accompanying text.

[327] *See supra* notes 268–84 and accompanying text.

[328] *See supra* notes 254–84 and accompanying text. This is the approach section III of this casenote suggests.

guish conduct which interferes with competition on the merits — which the Act intends to condemn — from those practices which are not the product of monopoly power and do not alter the competitive balance between rivals on some basis other than superior skill, efficiency, or resourcefulness.[329] Second, the proposed standard would reduce the possibility of penalizing conduct which does not impinge upon competition on the merits and thus avoid the concomitant chilling effects on incentives to compete.[330] Third, addition of the nexus and impaired competition elements to the test of a section 2 monopolization offense would provide a more objective test of liability on which businesses can more reliably chart their future competitive strategies.[331]

By ordering Ski Co. to combine with Highlands in offering a four-area ski ticket to the public, the Court has in effect turned the policies underlying the Sherman Act on their head. The Court's decision forces Ski Co. to share with Highlands the fruits of its larger and more varied ski facilities, developed by Ski Co. at great risk and expense, simply because the two firms had agreed to collaborate in the past and a jury could infer that an intent to drive Highlands from the market motivated Ski Co.'s conduct.[332] The Court's decision actually forbids competition between the two firms on their independent merits and forces the dominant firm, against its wishes, business judgment, and best interests, to market its end product jointly with its horizontal competitor, a course of dealing it believes inures to the benefit of the competitor at its own expense and detriment.

Finally, the Court's decision in *Aspen* has portentous implications for future suits under section 2 of the Sherman Act and for future business arrangements between competitors.[333] Under the *Grinnell* test as applied in the *Aspen* decision, presumably any dominant firm engaged in a joint venture with a smaller competitor is not at liberty to terminate the venture should the smaller firm insist on its continuance, unless the monopolist can convince a jury of its legitimate intentions in refusing to go along with the cooperative arrangement. Further, to the extent that the Court's holding is not limited to the fact that Ski Co. and Highlands had a past history of dealing,[334] there is

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[329] *See supra* notes 285–303 and accompanying text.

[330] *See supra* notes 304–11 and accompanying text.

[331] *See supra* notes 324–27 and accompanying text.

[332] Winning customers from competitors is, of course, the essence of competition and the impetus of all competitive acts. 3 AREEDA & TURNER, *supra* note 2, ¶ 626. Mere "intent to exclude" a competitor, then, is not necessarily unlawful because all competition tends to exclude. *Id.* It is only those practices which aim to exclude through the use of monopoly power that are unfairly or unreasonably exclusionary and are thus the targets of the Act's prohibitions. *Id. See also supra* notes 8, 12, 14 and accompanying text.

[333] *See supra* notes 318–23 and accompanying text.

[334] *See Aspen*, 472 U.S. at 603. While the Court considered the history of the cooperative venture as a factor in determining Ski Co.'s intent in refusing to deal with Highlands, nowhere in its opinion does the Court state that the history of the cooperative marketing scheme in *Aspen* was an express basis of the decision. Nor does the Court limit its decision to situations where pre-existing relationships are terminated. It appears that a past history of dealing is merely a factor to be considered by the finder of fact in determining a monopolist's intent in refusing to deal. *Id.* at 603–05. Similarly, the Court does not hold that Highlands had any legitimate expectancy or reliance interest in the continuation of the joint ticket, and indeed, no such conclusion appears warranted. The all-Aspen ticket was renewed annually by mutual consent of the parties, and the parties never entered into long-term agreements or commitments with regard to the ticket. *See Aspen I*, 738 F.2d at 1512. Clearly, Highlands was free to negotiate a long-term agreement with respect to the ticket, but either neglected to do so or believed such an agreement would not be in its best interest. Regardless, in

a danger that small firms competing in other markets can now use the *Aspen* holding to force dominant firms operating in those markets to deal with them at their behest. The threats posed to free enterprise by these implications are great. The Court's ruling in *Aspen* effectively confiscates from a dominant firm the right to enjoy exclusively the benefits and profits of its large-scale operations, superior services, or innovative production processes, and forces it to share some of these benefits with its less well-situated competitors. The decision also inhibits business dealings by casting over them a blanket of uncertainty. In light of *Aspen*, a market-dominant firm may well hesitate to enter into a cooperative venture with a competitor advantageous to both parties — as the Ski Co.-Highlands venture was in its early years — for fear of being unable to terminate the venture, should it later become apparent that the arrangement is no longer in its best interest.

V. Conclusion

In *Aspen*, the Court for the first time held that an unintegrated monopolist's unilateral refusal to deal with its horizontal competitor violated the monopolization offense of section 2 of the Sherman Act. The Court held that the *Grinnell* test was the appropriate standard to apply in this case and that the plaintiff had presented sufficient evidence at trial on both the monopoly power and the "willful acquisition" or "intent" elements of the test to uphold the jury's finding that Ski Co. monopolized illegally in violation of section 2. In holding that the *Grinnell* standard was the proper test of monopolization in *Aspen*, the Court condemned conduct which neither impeded the monopolist's rival's ability to compete nor obstructed the process of competition on the merits. In so doing, the Court obscured the central purposes of the Sherman Act, to punish the abuse of monopoly power and to protect and promote honest competition between firms on their respective skills and efficiencies, merits, and faults. A test which expressly requires proof of two additional elements — a nexus between the defendant's monopoly power and the challenged conduct and a showing of impaired competition or a rival's impaired ability to compete — would better enable the courts to distinguish unreasonably exclusionary conduct, which the Act intends to condemn, from legitimately competitive practices, which the Act seeks to foster. Finally, the injuries to business incentives, freedom to contract, and robust competition on the merits which *Aspen* inflicts undermine some of the fundamental tenets and mechanisms of the free enterprise system, the very tenets and processes it is the stated purpose of the Sherman Act to protect.

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the absence of any such arrangement or contract, Highlands could not reasonably have relied upon the ticket's perpetual renewal.