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Refusals To Deal By Single-Firm Monopolists—Should We Rob Peter To Save Paul?

Under section 2 of the Sherman Act, a single firm can freely refuse to deal with another firm without being found guilty of the offense of monopolization if that single firm does not intend to create or maintain a monopoly. Single firms which already possess monopoly power by virtue of their position as natural monopolists or through their control of "essential facilities," however, have had their freedom to refuse to deal restricted by the courts. In these cases, the courts have found that a refusal to deal constitutes exclusionary conduct in violation of section 2 of the Sherman Act.

Since courts have found some single firms in violation of section 2 of the Sherman Act because of their refusals to deal, some argue that single firms have an affirmative duty to deal with other firms to avoid section 2 liability. This note analyzes various situations in which courts have found a single firm's refusal to deal to constitute monopolization in violation of section 2. Part I of this note discusses the offense of monopolization under section 2 of the Sherman Act. Part II analyzes Aspen Skiing Co. v. Aspen Highlands Skiing Corp., the Supreme Court's most recent decision regarding conduct for a lawful monopolist. Part III discusses the antitrust consequences in the Seventh Circuit after Aspen Skiing for two firms that recently refused to deal with other firms. Part IV suggests that in

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1 15 U.S.C. § 2 (1976). Section 2 of the Sherman Act provides in relevant part: "[e]very 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 . . . ." See infra notes 8-20 and accompanying text. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), allows any person "injured in his business or property" by an antitrust violation to recover damages. Id.

Section 2 delineates three separate offenses: 1) attempt to monopolize; 2) conspiracy to monopolize; and 3) monopolization. The offense of attempt to monopolize is defined as a specific intent to monopolize and the dangerous probability of success. See Swift & Co. v. United States, 196 U.S. 375 (1905). However, when the plaintiff presents "adequate evidence of monopoly power, he can get no mileage out of charging attempted as well as completed monopolization." Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 373 (7th Cir. 1986), cert. denied, 107 S. Ct. 1574 (1987). This note will discuss cases which only involve allegations of the completed offense of monopolization.


3 A natural monopolist is a monopolist whose power is over a natural monopoly market. A natural monopoly market has room for only one firm. Omega Satellite Prod. Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982). See infra notes 23-27 and accompanying text.

4 A facility is essential if it is necessary for access to the relevant market (see infra note 14) and a competitor cannot "practically or reasonably . . . duplicate" it. MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132 (7th Cir.), cert. denied, 464 U.S. 891 (1983). For a discussion of the essential facilities doctrine, see infra notes 28-33 and accompanying text.

5 Exclusionary conduct is conduct on the part of a firm that exercises monopoly power "which is either predatory . . . or which is 'exclusionary' in purpose and effect." L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 99-100 (1977). This definition was articulated by Judge Wyzanski in United States v. United Shoe Corp., 110 F. Supp. 295 (D. Mass. 1955). Predatory conduct is conduct aimed at eliminating competition through threatening to or engaging in tortious conduct. SULLIVAN, supra at 99.

certain situations antitrust laws should not determine which prospective natural monopolist is the best from the perspective of consumers.

I. Monopolization and Refusal to Deal Under Section 2 of The Sherman Act

On its face, section 2 of the Sherman Act neither defines the offense of monopolization nor allows for the existence of "lawful" monopolies. The courts, however, have defined the elements of the offense of monopolization so as to exclude those monopolies which are inevitable or desirable and to include those which are harmful.7

A. Elements of the Offense of Monopolization

The two elements of the offense of monopolization under section 2 of the Sherman Act were articulated by the Supreme Court in United States v. Grinnell.8 In Grinnell, defendant Grinnell Corporation manufactured fire sprinkler systems while its three affiliates, controlled through stock ownership, supplied fire and burglar alarm systems to subscribers' premises. Grinnell Corporation and its affiliates acquired 87 percent of the country's insurance company-accredited central station protective service market9 by acquiring competitors,10 contracting for restrictive agreements allocating certain geographical and service markets exclusively to one of the affiliates,11 and through pricing arrangements.12

The Supreme Court held that Grinnell Corporation and its affiliates acquired their monopoly power "in large part by unlawful and exclusionary practices."13 These practices constituted monopolization in violation of section 2 of the Sherman Act. The Court used a two-prong analysis to define the offense of monopolization. The first prong is the possession of monopoly power in the relevant market,14 and the second prong is the

7 The Supreme Court in United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956) noted that Senator Hoar, co-sponsor of the section 2 legislation, realized that "a man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist . . . ." Id. at 390 n.15 quoting 21 CONG. REC. 3152 (1890).
9 Subscribers who used accredited central station services received greater reductions in insurance premiums than those who used nonaccredited services. Id. at 567. The Court found that the relevant market was that for accredited services only. Id. at 575.
10 One of Grinnell's affiliates, ADT, had purchased the stock or assets of some 27 companies which had provided fire or burglar alarm services. Id. at 567.
11 For example, ADT had the exclusive right to provide burglar alarm and nightwatch service throughout the United States. It could not, however, provide service in those areas in which it had given Holmes, another Grinnell affiliate, the exclusive right. Id. at 569.
12 The Court found that ADT had reduced its prices to meet competition, and once ADT had a monopoly in a particular city, it renewed its contracts at substantially increased rates. Id. at 570.
13 Id. at 576. The Court was referring to the acquisitions, the restrictive agreements, and the pricing policies. See supra notes 9-12 and accompanying text.
14 Monopoly power is the power to control prices or exclude competition in the relevant market. United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). Since United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), the courts have generally looked at a firm's degree of concentration of the relevant market. A natural monopolist by its very nature possesses monopoly power. See infra note 23. The relevant market is defined both geographically and by product. Grinnell, 384 U.S. at 575, 571. The relevant geographical market depends upon the commercial realities of the particular industry. The relevant market must also be economically significant. Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962). In Hecht v. Pro-Football, Inc.,
"willful acquisition or maintenance of that power" or the "conduct" prong.

It is important to note that the offense of monopolization does not require specific intent to monopolize, but rather only a finding by a court that the conduct is illegal. The courts have developed the exclusionary conduct test which determines whether a firm's conduct violates the second prong of Grinnell, thus constituting monopolization in violation of section 2. Under this test, a firm violates section 2 by obtaining or holding monopoly power through conduct which is either predatory or which is exclusionary in purpose or effect. Such illegal conduct has been termed anticompetitive by the courts.

Most often, the jury must draw the fine line between illegal anticompetitive conduct and lawful conduct with which the antitrust laws should not be concerned. Cases involving natural monopolists and firms that

570 F.2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978), the plaintiff claimed that he was unable to secure an American Football League franchise in Washington, D.C. because the defendant, owner of the National Football League Washington Redskins, refused to waive a restrictive covenant it had with RFK Stadium which prohibited a lease with any other professional football team. The court found "[g]iven the posture of the case, it seems evident that the relevant geographical market is the D.C. metropolitan area: it is here that 'the seller operates . . . .'" Id. at 989. In cases involving professional sports and franchises, the courts in defining the relevant product market look to the "area of effective meaningful competition under the circumstances of the particular case." Fishman v. Wirtz, 1981-2 Trade Cas. (CCH) 64,378 (N.D. Ill. 1981) at 74,763. In Hecht, supra note 14, a case with facts very similar to Fishman, the court found the relevant product market to be the business of professional football. Hecht, 570 F.2d at 988.

The relevant product market consists of those commodities which are reasonably interchangeable. duPont, 351 U.S. at 395 (relevant product market for producer of cellophane was the market for flexible packaging materials); Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.")

15 Grinnell, 384 U.S. at 570-71.
16 United States v. Griffith, 334 U.S. 100, 105 (1948) ("It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements."). The defendant's intent, however, is "relevant to the question of whether the challenged conduct is fairly characterized as 'exclusionary' or 'anti-competitive'. . . ." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. --, 105 S. Ct 2847, 2857 (1985). See infra notes 56-72 and accompanying text.
17 Judge Wydzinski in United States v. United Shoe Corp., 110 F. Supp. 295 (D. Mass. 1953) discussed the three tests the courts have used in evaluating a firm's conduct. First, the courts applied the classic test, under which a firm whose conduct violated section 1 of the Sherman Act also violated section 2. Id. at 542. See United States v. Columbia Steel Co., 334 U.S. 495, 525 (1948).

Other courts used the prima facie approach which held that proof of the existence of monopoly power creates a presumption of illegal monopolization which can be rebutted by a firm showing "that its power is attributable solely to a cause which the law does not wish to discourage . . . ." Sullivan, supra note 5, at 104. The exclusionary conduct test is the test used by the courts today.
18 Sullivan, supra note 5, at 94.
19 Griffith, 334 U.S. at 108 ("And even if we assume that a specific intent to accomplish that result [a monopoly] is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did.").
20 See Aspen Skiing, 105 S. Ct. at 2854.
21 In Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. --, 105 S. Ct. 2847 (1985), the Supreme Court reviewed the Tenth Circuit's ruling that the evidence was sufficient to support a finding that the defendant's conduct was anticompetitive. The court noted the District Judge's instructions to the jury. After explaining the two elements of the offense of monopolization, the judge elaborated:

In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competi-
control essential facilities magnify this subtle distinction. Courts consider both a natural monopolist and the possessor of an essential facility as lawful monopolists. This means that both legally possess monopoly power in the relevant market. Since such firms possess their power legally, the second, or conduct, prong of the Grinnell test is the key prong in antitrust analysis.

B. Natural Monopolies and Firms Controlling Essential Facilities—The Courts’ Analyses

A natural monopoly market has room for only one firm. Since the successful competitor for a natural monopoly market captures the entire market, all conduct by the eventual natural monopolist is exclusionary by nature. This does not mean that competing for or acquiring a natural monopoly is illegal per se or that antitrust laws never protect competition in a natural monopoly. The courts have held that a natural monopolist only violates section 2 of the Sherman Act if the natural monopolist “acquired or maintained [its] power through the use of means which are ‘exclusionary, unfair or predatory.’ ”

22 SULLIVAN, supra note 5, at 115.

23 Judge Posner states that “[i]f the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it.” Posner, Natural Monopoly and Its Regulation, 20 STAN. L. REV. 548, 548 (1969). A natural monopolist by its very nature possesses monopoly power in the relevant market, the natural monopoly market.

24 Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506, 515 (6th Cir.), cert. denied, 409 U.S. 1001 (1972). In Lamb Enterprises, the plaintiff alleged that the defendants had conspired to exclude it from the community antenna television business in Toledo, Ohio. The court held that plaintiff and defendants were competing for a natural monopolist position, and since only one competitor could possibly survive, the defendant's success did not constitute a per se violation of the Sherman Act. Id. at 514.

25 Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960) (“a natural monopoly market does not of itself impose restrictions on one who actively, but fairly competes for it ....”). See also Lamb, 461 F.2d at 514 (“[i]f success in such a venture could become a per se violation of the antitrust laws, the ultimate effect would be to stifle, rather than to encourage, competition and formation of new business enterprises.”); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974).

26 Numerous antitrust defendants have contended that in the struggle for control of a natural monopoly market the antitrust laws should not govern the competition because the eventual winner will be a monopolist either way, and in most cases will merely be a replacement for a previous monopolist. See, e.g., Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962); City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F. Supp. 1306 (N.D. Ohio 1980). The Supreme Court in Poller, however, rejected the defendant's contention that there was no violation of the antitrust laws because the public would receive the same service. Poller, 368 U.S. at 473. See also Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975), cert. denied, 423 U.S. 1053 (1976) (an agreement between defendant and a flour mill owner not to sell the flour mill to plaintiff, which was the only means for plaintiff of entering the market, was a violation of the antitrust laws, even though one of the two bidders would be unsuccessful anyway).

27 Hecht, 570 F.2d at 990 (quoting Ovitron Corp. v. General Motors Corp., 295 F. Supp. 373, 378 (1969) (citation omitted)). See also American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963). Although intent is relevant with respect to the offense of monopolization as far as characterizing the defendant’s conduct as exclusionary, see supra note 16, the mere intent to
As with the control of a natural monopoly, the control of an essential facility is not illegal per se. The courts have developed the essential facility doctrine\(^{28}\) to determine whether the mere control of an essential facility constitutes exclusionary conduct in violation of section 2 of the Sherman Act. Courts invoke the essential facility doctrine when a firm controlling an essential facility has refused to make the facility available to others. The doctrine has been articulated as follows:

\[
\text{[I]f a group of competitors, acting in concert, operate a common facility and if due to natural advantage, custom, or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable, non-discriminatory terms.}\(^{29}\)
\]

Examples of essential facilities include the only railroad terminal system in a city,\(^{30}\) a building near a railroad terminal which houses the local wholesale produce market,\(^{31}\) electrical transmission lines,\(^{32}\) and the only stadium suitable for professional football in Washington, D.C.\(^{33}\)

C. Illegal Conduct for Natural Monopolists and Firms Controlling Essential Facilities

In cases involving natural monopolists or essential facilities, the greatest difficulty arises when courts apply the second, or conduct, prong of the Grinnell analysis to a single defendant's activities, particularly when the defendant has allegedly refused to deal with a competitor. Courts seem to apply stricter scrutiny when evaluating conduct by lawful monopolists, e.g., natural monopolists and controllers of essential facilities. In theory, however, a refusal to deal by a firm competing for or controlling a natural monopoly market and a refusal to deal by a firm which gain power in a natural monopoly market does not constitute exclusionary intent. *Union Leader*, 284 F.2d at 587.

\(^{28}\) See [*infra* note 4].

The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

*MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d at 1132-33.

\(^{29}\) *L. Sullivan, Handbook Of The Law Of Antitrust* § 48, at 131 (1977). Sullivan's definition reflects the cases of *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (see [*infra* notes 46-54 and accompanying text]); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) (see [*infra* note 45]); and *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912) (see [*infra* notes 41-45 and accompanying text]). All of the above cases involved groups of competitors who attempted through a joint venture to exclude or actually excluded other competitors from the essential facilities. See [*infra* note 132 and accompanying text].

\(^{30}\) *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). See [*infra* notes 41-45 and accompanying text].

\(^{31}\) *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952). See [*infra* note 45 and accompanying text].

\(^{32}\) *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). See [*infra* notes 46-54 and accompanying text]. Although the Supreme Court in *Otter Tail* did not label the electrical transmission lines controlled by Otter Tail as essential facilities, the Court did note that Otter Tail's potential competitors at the retail level had to have access to existing transmission lines, and "[t]he only ones available belong to Otter Tail." *Id.* at 370 (footnote omitted). Thus, *Otter Tail* reflects the fact pattern of an essential facility case, but does not explicitly name the doctrine. See [*Note, Unclogging the Bottleneck - A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441, 451 n.62 (1983)].

\(^{33}\) *Hecht*, 570 F.2d 982. See [*infra* notes 35-36 and accompanying text].
controls an essential facility are subjected to the same antitrust analysis as any other single firm's refusal to deal.\textsuperscript{34}

In \textit{Hecht v. Pro-Football, Inc.},\textsuperscript{35} the District of Columbia Circuit analyzed the legality of a firm's conduct where the firm had already acquired control of a natural monopoly market. In \textit{Hecht}, the court found that an exclusive lease between the Washington Redskins and RFK Stadium illegally restrained trade and that the Redskins' unilateral refusal to waive the exclusivity provision of the lease constituted an illegal refusal to deal in violation of section 2.\textsuperscript{36} On the other hand; the Eighth Circuit in \textit{Paschall v. Kansas City Star Co.}\textsuperscript{37} found that a newspaper holding a natural monopoly of its own wholesale newspaper market in Kansas City could refuse to deal with the independent carriers, which had previously distributed its papers to the public, without violating section 2.\textsuperscript{38} The Eighth Circuit, relying heavily on economic theory, held that the newspaper's vertical integration\textsuperscript{39} was not exclusionary conduct because it would not have unreasonable anticompetitive effects and would in fact benefit consumers.\textsuperscript{40}

Firms that control essential facilities also risk having their refusals to deal labeled as exclusionary conduct and therefore in violation of section 2 of the Sherman Act. The first essential facility case, \textit{United States v. Ter-}

\textsuperscript{34} Byars v. Bluff City News Co., 609 F.2d 843, 856 (6th Cir. 1979). The Byars court discussed the two circumstances under which courts have imposed a duty to deal upon a lawful monopolist (finding that a refusal to deal violated section 2). In the first instance, the courts look to a monopolist's, e.g., natural monopolist, intent in refusing to deal (the "intent" theory of liability). A monopolist who refuses to deal with the intent of preserving a monopoly has violated section 2. \textit{Id.} See Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); \textit{Otter Tail}, 410 U.S. 366 (1973).

The second situation involves the control of an essential facility by a firm. The Byars court called this the "bottleneck" theory of liability. \textit{Byars}, 609 F.2d at 856. A firm controlling such a facility must provide "reasonable access" to that facility. \textit{Id.} See \textit{United States v. Terminal R.R, Ass'n}, 224 U.S. 383 (1912); Associated Press v. United States, 342 U.S. 143 (1951); \textit{Otter Tail}, 410 U.S. 366 (1973).

The Byars court noted that in \textit{Otter Tail} the Supreme Court seemed to merge both of the above theories in order to find the defendant liable. \textit{Byars}, 609 F.2d at 857. Citing \textit{Byars}, the Fifth Circuit in Mid-Texas Communication Systems v. American Tel. & Tel., 615 F.2d 1372 (5th Cir.), \textit{cert. denied}, 449 U.S. 912 (1980), noted that the theoretical differences between the two approaches do not bear out in practice. \textit{Id.} at 1388 n.12. One commentator has said that the cases which invoke the essential facility doctrine are actually a subset of all natural monopoly cases and should be analyzed as such. Cirace, \textit{An Economic Analysis of Antitrust Law's Natural Monopoly Cases}, 88 W. Va. L. Rev. 677, 678 (1986).


\textsuperscript{36} Id. at 993 n.44. The \textit{Hecht} court seemed to focus on the agreement between the Redskins and the operators of RFK Stadium which the court found would violate section 1 of the Sherman Act, "provided of course, that the facility can be shared practically." \textit{Id.} at n.45. The plaintiff in \textit{Hecht} wished to use the stadium as a home for a second professional football team. Once the \textit{Hecht} court found the exclusive lease an illegal restraint of trade, it then noted that the Redskins could be found liable under section 2 for unilaterally refusing to waive the illegal provision. The \textit{Hecht} court also found that the stadium was an essential facility.

\textsuperscript{37} 727 F.2d 692 (8th Cir.) (en banc), \textit{cert. denied} 459 U.S. 872 (1984).

\textsuperscript{38} Id. at 704. The plaintiffs, 250 independent newspaper carriers, sought an injunction prohibiting the termination of their contracts with the Star.

\textsuperscript{39} When a single firm acquires control of two or more stages of the production and distribution of one end product, vertical integration is said to occur. A firm which acquires a competitor in order to create a monopoly has horizontally integrated. III P. AREEDA & D. TURNER, \textit{Antitrust Law} § 723 (1978).

\textsuperscript{40} Paschall, 727 F.2d at 703-04.
minal Railroad Association,\textsuperscript{41} was decided by the United States Supreme Court in 1912. In \textit{Terminal Railroad}, fourteen out of the twenty-four railroad companies which converged in St. Louis obtained control of all three of the previously independently controlled terminal systems in that city. These fourteen proprietary railroads agreed that non-proprietary railroads would be allowed to join the system only upon unanimous consent of all fourteen proprietary railroads.\textsuperscript{42}

Although the Court never expressly called the terminal system an essential facility, it treated it as one.\textsuperscript{43} Since not all of the companies compelled to use the system were proprietary companies,\textsuperscript{44} the Court found that the combination which controlled the terminal system constituted a combination in restraint of commerce in violation of sections 1 and 2 of the Sherman Act.\textsuperscript{45}

\textit{Otter Tail Power Company v. United States,}\textsuperscript{46} often cited as reaffirming the essential facility doctrine,\textsuperscript{47} also made no direct reference to the essential facility doctrine in its opinion. Otter Tail was a vertically integrated power company which had a natural monopoly over the wheeling of power because it owned the only transmission lines in the area, and it also produced and sold electric power in the retail market.\textsuperscript{48} When some of the municipalities which Otter Tail had served decided to establish

\textsuperscript{41} 224 U.S. 383 (1912).
\textsuperscript{42} Id. at 399. Although the government conceded that nonproprietary railroads were allowed to use the terminal facilities upon paying the same charges as the proprietary companies, no such provision was found in the agreement. Id. at 400.
\textsuperscript{43} The Court in \textit{Terminal Railroad} noted:

\begin{quote}
The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company.
\end{quote}

\textit{Id.} at 397. The court found that the nonproprietary companies were compelled to use the Terminal Railroad-controlled system, and that this compulsion was "the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated." \textit{Id.} at 398.

\textsuperscript{44} Id. at 404. The court noted that a witness for the defense, the railroad expert of the Municipal Bridge and Terminal Board, testified that if every railroad using the terminal system were a joint owner of the system it would "serve the greatest possible economy, and [would] give the most efficient service without discrimination." \textit{Id.} at 406.

\textsuperscript{45} Id. at 409. The Court decreed that the contract between the fourteen proprietary railroads be reorganized so that any other railroad be allowed to join on fair and reasonable terms, and those who elected not to join be allowed to use the terminal system on such terms that they would be on "nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." \textit{Id.} at 411.

The circuits have struggled with analyzing the conduct of a firm controlling an essential facility. In Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952), the First Circuit held that the defendant corporation, a group of produce wholesalers which controlled a building used for produce markets, violated section 2 when it refused to allow the plaintiff-wholesaler to sell his produce in the building. \textit{Id.} at 488. The court found that control of the building, which was the center of the local wholesale produce trade, placed the corporation in a monopoly position, and the "conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize." \textit{Id.} Since the Building Corporation offered no business justification for the plaintiff's exclusion, the court held that its refusal to deal violated section 2. \textit{Id.} at 489.

\textsuperscript{46} 410 U.S. 366 (1973).
\textsuperscript{47} Hecht, 570 F.2d at 992.
\textsuperscript{48} Id. at 369. Each municipality could support only one retailer of electric power, so each municipality was a natural monopoly with regards to the retail sale of electric power.
their own municipal power systems, Otter Tail refused to sell those municipal systems power which it had generated as well as power that was generated by other producers.

The Supreme Court found that Otter Tail had used the monopoly power it possessed in the market of wheeling electricity to impede competition in another market, i.e., the retail electricity market, in violation of the Sherman Act. The Court disagreed with Otter Tail's argument that compulsory wheeling could erode its integration system and impair its ability to adequately serve the public. The dissent criticized the majority's reliance on *Lorain Journal Company v. United States*, stating that *Lorain Journal* "dealt neither with a natural monopoly at retail nor with the congressionally approved system predicated on the existence of such monopolies."

II. *Aspen Skiing v. Aspen Highlands Ski Corporation*

Since the Supreme Court in *Terminal Railroad* up through *Otter Tail* had found that some refusals to deal by a controller of an essential facility or a natural monopolist constitute exclusionary conduct, it appeared that some monopolists may have an actual duty to deal with their competitors. These Supreme Court decisions also created confusion in the circuits regarding the lawful conduct for a lawful monopolist, i.e., a controller of an essential facility or a natural monopolist. *Aspen Skiing Company v. Aspen Highlands Skiing Corporation* presented these issues to the Supreme Court in 1985, but the Court failed to clear up the ambiguities.

The defendant, Aspen Skiing Company (Ski Co.), owned and operated three of the four ski mountains in the Aspen area. The plaintiff, Aspen Highlands Skiing Corporation (Highlands), owned the fourth

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49 Otter Tail had previously served those municipalities through franchises. When the franchises expired, the citizens in the towns voted to establish municipal systems. *Id.* at 370-71.

50 *Id.* at 371.

51 *Id.* at 377. The Court relied on the District Court's finding that Otter Tail refused to wheel solely to enhance its position as a monopolist. *Id.* at 378.

52 *Id.* at 381.

53 342 U.S. 143 (1951). *See infra* note 54. In *Lorain Journal*, a single newspaper was a natural monopolist in the daily newspaper market in Lorain, Ohio. The newspaper disseminated news and advertising to 99% of the families in Lorain. The newspaper was the only means of advertising for Lorain businesses until a radio station was established in nearby Elyria. The newspaper then refused to accept advertising from businesses who advertised on the radio station. *Id.* at 149.

The Supreme Court found that the newspaper had violated Section 2 of the Sherman Act by using its monopoly to destroy threatened competition. *Id.* at 155. By virtually closing off the radio station to advertisers, the newspaper had used its monopoly power in the newspaper market to foreclose competition in the market for advertising.

54 410 U.S. at 388 (Stewart, J., concurring in part and dissenting in part). Justice Stewart noted that the residents of the municipalities would be faced with a monopolist no matter what the result of the competition between Otter Tail and the municipal systems, because the retail market was a natural monopoly. In *Lorain Journal*, on the other hand, the monopolist, a newspaper, impeded competition in the communications business, a market which was not a natural monopoly. *Id.* at 388-89.


56 Travers, Jr., *Does A Monopolist Have A Duty To Deal With Its Rivals? Some Thoughts on the Aspen Skiing Case*, 57 U. COLO. L. REV. 727 at 728 (1986). Travers notes that many commentators had seen *Aspen Skiing* as an opportunity for the Court to clear up the confusion in the circuits by narrowing the definition of exclusionary conduct and therefore limiting the offense of monopolization. *Id.* at 737.
mountain. From 1962-1978, the two companies jointly offered an all-Aspen ticket that allowed skiers to use any of the four mountains\textsuperscript{57} regardless of the company from which the ticket was purchased.\textsuperscript{58} In 1978, Ski Co. decided to discontinue the all-Aspen ticket, and Highlands’ market share in the downhill skiing market declined from 20.5 percent in 1976-1977 to 11 percent in 1980-1981.\textsuperscript{59} Without the all-Aspen ticket, Highlands became a day ski area.\textsuperscript{60} Highlands filed suit, alleging that Ski Co. had violated section 2 of the Sherman Act by its refusal to continue in the joint marketing arrangement.

The District Court judge instructed the jury that a firm which possesses monopoly power has no duty to cooperate with its rivals.\textsuperscript{61} The jury was also instructed that a firm’s refusal to deal with a competitor does not violate section 2 of the Sherman Act so long as “valid business reasons exist for that refusal.”\textsuperscript{62} Conduct for which there was no valid business reason, according to the judge’s instructions, was exclusionary conduct, i.e., “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.”\textsuperscript{63} The jury, by specific interrogatory, found that Ski Co. had not met the conduct prong of \textit{Grinnell} and thus had violated section 2 of the Sherman Act.\textsuperscript{64}

The Tenth Circuit affirmed the lower court’s decision on two grounds.\textsuperscript{65} First, the Tenth Circuit held that the all-Aspen ticket was an “essential facility” which Ski Co. had a duty to market jointly with Highlands.\textsuperscript{66} Second, the court found that Ski Co.’s refusal to deal, along with its other conduct, demonstrated an intent to create or maintain a monopoly.\textsuperscript{67}

The Supreme Court affirmed the Tenth Circuit’s decision, relying solely on the second part of the decision, despite Ski Co.’s contention that the decision against it was based on the erroneous proposition that a

\textsuperscript{57} 105 S. Ct. at 2850. The all-Aspen ticket, which actually began as a coupon booklet, consisted of a tag which the skier wore around the neck. The ticket could be used for six days and those with the tag did not need to visit the ticket window every morning before skiing. \textit{Id.} at 2851.

\textsuperscript{58} Revenues from the all-Aspen ticket sales were divided according to the usage of each of the four mountains. Random surveys were taken to determine how many skiers used each mountain. \textit{Id.} at 2851. For example, during the 1974-75 ski season, Highlands received 18.5\% of the revenues from the ticket, while in 1976-77, it received 13.2\%. \textit{Id.} Prior to the 1977-78 season, however, Ski Co. offered Highlands a flat 13.2\% of the revenues. Highlands wanted the distribution to be based on actual usage, but eventually settled for a fixed 15\% rate. \textit{Id.} at 2852.

\textsuperscript{59} \textit{Id.} at 2853. Highlands did attempt to put together its own all-Aspen ticket by purchasing Ski Co. tickets at the tour operator’s discount and at retail. Ski Co. refused to sell any lift tickets to Highlands. \textit{Id.} Ski Co. also refused to accept vouchers from Highlands’ customers equal to the price of a lift ticket at Ski Co.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.} at 2854.

\textsuperscript{62} \textit{Id.} at 2854, quoting District Court jury instructions.

\textsuperscript{63} \textit{Id.} at 2854, quoting District Court jury instructions. The jury had found that Ski Co. possessed monopoly power in the relevant market, “the downhill skiing at destination resorts market” in the Aspen area. \textit{Id.} at 2854 n.20, quoting \textit{Aspen Skiing}, 738 F.2d at 1513.

\textsuperscript{64} \textit{Id.} at 2855. \textit{See supra} notes 13-14 and accompanying text.

\textsuperscript{65} 738 F.2d 1509 (10th Cir. 1984).

\textsuperscript{66} \textit{Id.} at 1520-21. The court relied on \textit{Terminal Railroad}; \textit{see supra} notes 41-45 and accompanying text.

\textsuperscript{67} \textit{Id.} at 1522. The Tenth Circuit held that Ski Co. had shown no valid business reason for refusing to accept Highland’s vouchers.
monopolist has a duty to cooperate with its rivals. The Supreme Court, in rejecting this contention, noted that the jury was clearly instructed that the law imposed no such duty.68

Although the law imposes no duty to cooperate, the Court noted that the "absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances."69 Since the jury concluded that Ski Co.'s conduct was exclusionary, the Court examined the record to determine whether the record supported that conclusion.

In evaluating Ski Co.'s conduct, the Court noted that it was not only necessary to look at its impact on Highlands but also the effect on consumers and on the Ski Co.70 The Court found that the jury's conclusion was "strongly supported by Ski Co.'s failure to offer any efficiency justification whatever for its pattern of conduct."71 Therefore, the injury to consumers and to Highlands was not justified, and Ski Co.'s conduct was termed exclusionary conduct.72

III. Refusals to Deal by Lawful Monopolists Since Aspen Skiing

The Seventh Circuit, in two recent cases since Aspen Skiing, had the opportunity to evaluate the antitrust implications of refusals to deal by two lawful monopolists. In Olympia Equipment Leasing Company v. Western Union Telegraph Company,73 the defendant was a natural monopolist which

68 Aspen Skiing, 105 S. Ct. at 2857. See supra note 62 and accompanying text.
69 Id. at 2856. The Court cited Lorain Journal v. United States, 342 U.S. 143 (1951) as holding that the right to refuse to deal is not unqualified. Although Lorain Journal concerned a claim of attempted monopolization, see supra note 53, the Court noted that intent is relevant to both the offense of attempted monopolization and monopolization. "In the latter case [monopolization] evidence of intent is merely relevant to the question of whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive" - to use the words in the trial court's instructions - or "predatory," to use a word that scholars seem to favor." Id. at 2857. Specific intent is not an element of the offense of monopolization. See supra note 16 and accompanying text.
70 Id. at 2859, citing III P. Areeda and D. Turner, Antitrust Law 78 (1978). Citing Judge Bork, the Court said that "if a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." Id. (quoting R. Bork, The Antitrust Paradox 138 (1978)). The Court found that consumers preferred the all-Aspen ticket, and that most were dissatisfied with its unavailability after Ski Co. discontinued the arrangement. Aspen Skiing, 105 S. Ct. at 2859. As to the effect upon Highlands, the court noted the decline in market share since the discontinuation of the all-Aspen ticket (see supra note 58 and accompanying text) and the pecuniary injury to Highlands as established by expert testimony. Id. at 2860. The jury awarded Highlands $2.5 million in damages, trebled to $7.5 million.
71 Id. at 2860 (footnote omitted). Ski Co. had contended that it had withdrawn from the all-Aspen ticket marketing arrangement because of the difficulty in monitoring the usage of each of the four mountains and because it felt the skiing services offered by Highlands were inferior. Id. at 2861. The Supreme Court found, however, that the evidence showed Ski Co. used the same method of monitoring usage on its own three mountains, and that the consumers should be the arbitors of the quality of Highlands' facilities. Id.
72 Id. at 2862. As to the Tenth Circuit's finding of liability based on the essential facility doctrine, the Court in its final footnote stated: "[g]iven our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the "essential facilities" doctrine ...." Id. at 2862 n.44.
obtained its monopoly power as a result of historical evolution,\textsuperscript{74} while in \textit{Fishman v. Wirtz}\textsuperscript{75} the defendant's monopoly power flowed from its control of an essential facility. In \textit{Olympia}, the Seventh Circuit discussed \textit{Aspen Skiing} extensively in distinguishing it from \textit{Olympia} and found that the defendant had no duty to deal.\textsuperscript{76} In \textit{Fishman}, the Seventh Circuit referred to \textit{Aspen Skiing} only once and placed a duty to deal upon the defendant.\textsuperscript{77}

A. Olympia

Western Union, before the 1970's, provided telex services\textsuperscript{78} to its subscribers by charging a "bundled" price, which included both the telex service and the terminal which was required to transmit and receive messages. Like AT&T in the telephone terminal equipment market, Western Union was subsequently ordered to open the telex terminal market to competition.\textsuperscript{79}

In 1973, Western Union notified its subscribers that they could lease their telex terminals from any vendor and still receive telex service from Western Union. In addition, Western Union had its salespeople give new subscribers a list of vendors which leased telex terminals.\textsuperscript{80} One such vendor was Olympia, which was formed in 1975 to take advantage of the newly opened market for telex terminals.\textsuperscript{81} Olympia flourished until Western Union decided that it was liquidating its own stock of terminals too slowly. Western Union, therefore, encouraged its salespeople to push its own terminals and to stop showing the vendor list to new subscribers.\textsuperscript{82} Olympia's leases of terminals fell to zero, and Olympia went out of business in 1976.\textsuperscript{83}

Olympia alleged that Western Union's decision not to show the vendor list to new subscribers constituted monopolization in violation of section 2 of the Sherman Act.\textsuperscript{84} The Seventh Circuit, noting the change

\textsuperscript{74} Western Union's development of "Telex" evolved from its historical position as a provider of telegraph service. \textit{Id.} at 372.
\textsuperscript{75} 807 F.2d 520 (7th Cir. 1986).
\textsuperscript{76} \textit{Olympia}, 797 F.2d at 377-79. See infra notes 85-88 and accompanying text.
\textsuperscript{77} \textit{Fishman}, 807 F.2d at 536. The Seventh Circuit in \textit{Fishman} noted that although the Supreme Court in \textit{Aspen Skiing} had considered the impact of Ski Co.'s conduct on consumers when labelling it as exclusionary, the Court did not place the burden on the plaintiff to demonstrate an injury to consumers in order to show an antitrust violation. See infra notes 101-105 and accompanying text.
\textsuperscript{78} Telex is a service by which messages are transmitted over communications lines from one subscriber's terminal to another. \textit{Olympia}, 797 F.2d at 372.
\textsuperscript{79} \textit{Id.} See \textit{Use of the Carterfone Device for Message Toll Telephone Service}, 13 F.C.C.2d 420 (1968); Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984).
\textsuperscript{80} Western Union held a seminar for prospective vendors, encouraging them to enter the market.
\textsuperscript{81} \textit{Olympia}, 797 F.2d at 372. Olympia in fact had no salespeople to sell its terminals, but rather relied solely on referrals from Western Union's salespeople. During one period in 1975, Olympia sold 20% of all the telex terminals installed. \textit{Id.} at 373.
\textsuperscript{82} \textit{Id.} at 373.
\textsuperscript{83} Sales and leases by other vendors also fell, but those which had their own sales forces from the start were able to stay in business. \textit{Id.}.
\textsuperscript{84} Olympia conceded that Western Union did not originally have a duty to assist terminal vendors by providing the vendor list to subscribers, but contended that once it had undertaken to do so, it could not stop without a valid business reason. \textit{Id.} at 375, 378.
in opinion about monopolists, found that a lawful monopolist has “no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches.” The court noted that the Aspen Skiing opinion was narrowly written and imposed only a duty to deal in limited situations. The court distinguished Aspen Skiing, finding that Western Union’s conduct did not prevent Olympia from competing. The Court concluded by stating that so long as a monopolist’s methods are not calculated to make consumers worse off in the long run, a monopolist can refuse to deal with a competitor, even if the result is fatal to the competitor.

B. Fishman v. Wirtz

In Fishman v. Wirtz, the plaintiffs, Marvin Fishman and Illinois Basketball, Inc. ("IBI"), brought suit against Chicago Professional Sports Corporation ("CPSC") and Chicago Stadium Corporation, alleging that CPSC had acquired the Chicago Bulls Professional Basketball team through CPSC’s refusal to lease Chicago Stadium to IBI, and that such refusal violated sections 1 and 2 of the Sherman Act.

85 The court stated that in the era of United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945), a lawful monopolist was expected to exercise special restraint, even to the point of keeping its prices high, in order to encourage new competitors. Now, according to the Seventh Circuit,

[As] the emphasis of antitrust policy shifted from the protection of competition as process of rivalry to the protection of competition as a means of promoting economic efficiency . . . it became recognized that the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors. Olympia, 797 F.2d at 375 (citations omitted).

86 797 F.2d at 375.

87 Id. at 379. "If it stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." Id.

88 Id. at 377.

89 Id. at 379.

Most businessmen don’t like their competitors, or for that matter competition. They want as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run. Consumers would be worse off if a firm with monopoly power . . . having extended it [assistance] voluntarily [had] a duty to continue it indefinitely.

Id.

In a petition for rehearing en banc, Olympia charged that the Seventh Circuit panel had "avoided and counter-attacked" the Supreme Court’s decision in Aspen Skiing, rather than following it. Olympia, 797 F.2d 370 (7th Cir.), reh’g denied per curiam, 802 F.2d 217 (7th Cir. 1986). In denying the petition for rehearing, the Seventh Circuit noted that its panel had "devoted extended consideration" to the Aspen Skiing case. Olympia, 802 F.2d at 215. For the Seventh Circuit’s discussion of Aspen Skiing, see Olympia, 797 F.2d at 377-79. The Seventh Circuit in its denial of rehearing noted four important differences between Aspen Skiing and Olympia. One of these was the fact that in the Aspen Skiing case the defendant refused to deal, despite the cost of customer good will, in order to gain a competitive advantage. In the Olympia case, however, there was no “evidence that consumers noticed or cared about the withdrawal of the vendor list . . . .” Olympia, 802 F.2d at 216.
When Chicago Basketball, former owner of the Bulls, decided to sell the team, both IBI and CPSC attempted to negotiate a deal.\(^9\) IBI reached an agreement conditioned upon approval of the transfer by the National Basketball Association ("NBA").\(^9\) The NBA refused to approve IBI's purchase of the Bulls unless IBI secured a lease of Chicago Stadium, controlled by some members of CPSC.\(^9\) CPSC refused to lease the Stadium to IBI,\(^9\) and the Bulls were subsequently sold to CPSC.\(^9\)

Fishman and IBI filed suit in federal court alleging that the Wirtzes and the Chicago Stadium Corporation had violated section 2 of the Sherman Act by refusing to deal with IBI concerning a lease for Chicago Stadium, "thereby precluding plaintiffs from entering the market for the

\(^{90}\) In 1971 plaintiff Fishman formed his first investment group to purchase the Bulls which included defendants Albert Adelman, Lester Crown, Philip Klutznick and James Cook. Fishman, 807 F.2d at 525. This group reached an agreement in principle for $2.3 million with Chicago Basketball in January of 1972. Fishman's group offered to lease Chicago Stadium from defendant Arthur Wirtz, who along with his son controlled the Stadium, at a rate lower than Chicago Basketball was currently paying. The Bulls had been playing at the Stadium under a series of one-year leases. The Chicago Stadium Corporation refused the offer, and the group's subsequent lower offer to Chicago Basketball was refused. Id. at 526.

\(^{91}\) Id. at 526. Before Chicago Basketball accepted IBI's offer, defendant Adelman contacted Chicago Basketball president Rich and reminded Rich that IBI had no place for the Bulls to play and also had not yet gotten NBA approval. Rich told Adelman that, although he did not see how any offer by CPSC would get preference over IBI's offer, CPSC could submit a signed contract which would incorporate all terms required by Chicago Basketball.

\(^{92}\) Fishman, 807 F.2d at 527. Those who withheld approval mentioned two reasons. First, IBI had not yet secured a lease on a stadium, namely Chicago Stadium. Second, the NBA Governors were well aware that CPSC wanted to purchase the Bulls. Id. Some of the CPSC shareholders had sent telegrams to the Board of Governors prior to the execution of the IBI-Chicago Basketball contract, notifying the Board that CPSC had made a larger offer to Chicago Basketball, and that CPSC had reached an agreement with Chicago Stadium Corporation for a ten-year lease of Chicago Stadium. Id.

\(^{93}\) Id. at 528. Defendant Wirtz met with Chicago Basketball president Rich and told him that the Chicago Stadium Corporation would not discuss a lease with IBI because IBI did not own the Bulls. Wirtz told Rich that he would consider executing a ten-year lease with Chicago Basketball, which Chicago Basketball could assign to IBI only if it guaranteed the assignee's performance, including rent payments, for the entire term. Wirtz also asked Rich either to sell the Bulls to CPSC or to let the NBA Board of Governors choose between the two groups. Rich told Wirtz to put his ten-year lease proposal in writing, and although Wirtz agreed, he never did so. Id. at 527. Rich told Wirtz that Chicago Basketball would not accept a lease which was not freely assignable and which Chicago Basketball would have to guarantee. He also said that since Chicago Basketball had already executed a contract with IBI, it would not consider selling the Bulls to CPSC. Id.

Wirtz required the guarantee because he was concerned about IBI's financial responsibility. Id. However, the District Court found that Wirtz never asked Fishman about the group's financial responsibility. "Moreover, the rent for Chicago Stadium was often taken 'off the top' of the office receipts and, accordingly, the 'guarantee' concept appears to have been unrelated to any business need of the Chicago Stadium." Fishman, 1981-2 Trade Cas. (CCH) 64,378 (N.D. Ill. 1981) at 74,751.

\(^{94}\) IBI terminated its contract with Chicago Basketball because of its failure to obtain NBA approval. Chicago Basketball then renewed negotiations with CPSC, and, after the execution of a contract, the NBA approved the transfer. Id. at 529.
presentation of live basketball in Chicago.”95 The District Court held in favor of the plaintiffs on all of the allegations.96

The Seventh Circuit affirmed the District Court’s ruling that the Wirtzes and the Chicago Stadium Corporation had violated section 2 by refusing to lease Chicago Stadium to IBI, and that CPSC, CPSC members, the Chicago Stadium Corporation, and the Wirtzes had conspired to withhold the lease in violation of sections 1 and 2.97 The court agreed that the relevant market was the presentation of live professional basketball in Chicago,98 and that such a market was a natural monopoly market.99 Despite the defendants’ argument that the antitrust laws should not govern competition for a natural monopoly market,100 the court held that in Otter Tail the Supreme Court established that competition for a natural monopoly market was protected.101

The defendants then countered that even if some natural monopoly cases fell within the scope of the Sherman Act, the Fishman case should not because the plaintiff had failed to show how consumers were injured by the defendants’ conduct.102 The Seventh Circuit responded that although “enhancement of consumer welfare is an important policy—probably the paramount policy—informing the antitrust laws,”103 it had found no cases which placed the burden on the plaintiff to demonstrate injury to consumers when the alleged conduct was not aimed at the consumer level.104 The court distinguished its own decision in Brunswick

95 Id. at 530. Plaintiffs also alleged that CPSC and its members conspired with the Chicago Stadium Corporation and the Wirtzes to withhold a lease of Chicago Stadium from IBI, in violation of section 1 of the Sherman Act, and also constituting an attempt to monopolize, monopolization, and a conspiracy to monopolize in violation of section 2. Id. Fishman and the IBI also claimed that CPSC and its defendant-members and the Chicago Stadium Corporation and the Wirtzes had conspired with the NBA and certain NBA members, to preclude IBI from purchasing the Bulls by staging a group boycott in violation of sections 1 and 2. Id. The Seventh Circuit Court of Appeals reversed the District Court’s ruling in favor of the plaintiffs on this charge, finding that “[s]ince only one competitor could win NBA approval, it was not in itself anticompetitive for CPSC to suggest to the NBA that it should be the lucky one.” Id. at 544.
96 Fishman, 1981-2 Trade Cas. (CCH) 64,378 (N.D. Ill. 1981) at 74,789-90.
97 Fishman, 807 F.2d at 525.
98 Id.
99 Id. at 532. The district court found that “[t]he Chicago metropolitan area, like virtually all of the cities in which the NBA has franchises, cannot as a practical matter support two professional basketball franchises.” Fishman, 1981-2 Trade Cas. (CCH) 64,378 (N.D. Ill. 1981) at 74,757.
100 Fishman, 807 F.2d at 532. See supra note 25. The defendants argued that substitution of one competitor for another in the competition for a natural monopoly market does not injure competition and therefore does not violate the antitrust laws. The defendants relied on Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488 (1977) (“the antitrust laws . . . were enacted ‘for the protection of competition, not competitors.’”) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). The Seventh Circuit noted that Bowl-O-Mat set a requirement that plaintiffs allege an “antitrust injury” which was “akin to a standing requirement.” Since competition for a natural monopoly market is protected by the antitrust laws, any conduct which impaired competition caused antitrust injury, for which the Sherman Act provided a remedy. Fishman, 807 F.2d at 532-33.
101 Id. at 533. See supra notes 46-54 and accompanying text.
102 Id. at 535.
104 Fishman, 807 F.2d at 536. The court did note, however, that the Supreme Court in Aspen Skiing, (see supra notes 59-72 and accompanying text) had stated that the effect on consumers is significant in labeling conduct exclusionary. Id. According to the court in Fishman, a rule which would make the effect on ultimate consumers the key factor in analyzing conduct by monopolists would be “capricious, as well as unjust.” Id. at 537.
Corporation v. Riegel Textile Corporation, finding that in Riegel the competitive process was not affected by the defendant's conduct because the plaintiff and defendant were not in competition.

With regard to the Wirtzes' and CPSC's refusal to deal with IBI concerning a lease of Chicago Stadium, the Seventh Circuit affirmed the district court's finding that the Stadium was an essential facility and that the refusal to lease it to IBI without a legitimate business reason was a violation of section 2.

IV. A New Emphasis for Antitrust Law in Some Natural Monopoly and Essential Facility Cases

A. The "Chicago School" Commentators' and Aspen Skiing's Apparent Efficiency Justification Requirement

As the Seventh Circuit noted in Olympia, many courts have focused on efficiency concerns rather than strictly upon the effect of the conduct on the plaintiff in evaluating allegedly anticompetitive conduct by lawful monopolists. This shift in emphasis reflects the views of the "Chicago School" commentators, notably Judge Richard Posner, author of the Olympia opinion; Judge Frank Easterbrook, the dissenter in Fishman, 807 F.2d at 538 (quoting Riegel, 752 F.2d at 267 (emphasis added)). The Fishman court noted that there would have never been any competition between Riegel and Brunswick, and therefore no competitive process to protect, while in the Fishman case there would have been competition had the Chicago Stadium Corporation leased the Stadium to IBI. Fishman, 807 F.2d at 538. The court also affirmed the district court ruling that the Chicago Stadium Corporation and its members had agreed with CPSC and the individual defendants not to lease the Stadium to IBI, and to only lease it to CPSC, in violation of sections 1 & 2. Id.

105 752 F.2d 261 (7th Cir. 1984), cert. denied, 472 U.S. 1018 (1985). In Riegel, the plaintiff disclosed a manufacturing process for antistatic yarn to the defendant, which then applied for a patent in its own name, although it had promised to keep the process a secret. The Fishman court, in referring to Riegel, stated:

We ruled that no antitrust cause of action had been stated because only a competitor had been injured and "[f]rom the standpoint of antitrust law, concerned as it is with consumer welfare, it is a matter of indifference whether Riegel or Brunswick exploits a monopoly of antistatic yarn." Fishman, 807 F.2d at 538, (quoting Riegel, 752 F.2d at 267 (emphasis added)). The Fishman court noted that there would have never been any competition between Riegel and Brunswick, and therefore no competitive process to protect, while in the Fishman case there would have been competition had the Chicago Stadium Corporation leased the Stadium to IBI. Fishman, 807 F.2d at 538.

106 Id. at 538.

107 Id. at 539-40.

108 Id. at 541. The court found that Arthur Wirtz's offer to lease the Stadium to Chicago Basketball rather than IBI was unreasonable, and "agreeing to deal on unreasonable terms is merely a type of refusal to deal." Id. Looking at the record, the court found sufficient evidence to support a finding that the Wirtzes and the Chicago Stadium Corporation had no valid business reason to refuse to deal. Id. The court also affirmed the district court ruling that the Chicago Stadium Corporation and its members had agreed with CPSC and the individual defendants not to lease the Stadium to IBI, and to only lease it to CPSC, in violation of sections 1 & 2. Id.


110 Eleanor Fox finds one dominant thread in the Chicago School of Economics. In Consumer Beware Chicago, 84 Mich. L. Rev. 1714 (1986), Fox notes that:

The thread must be seen against a background conception of law in general, and of antitrust law in particular: The function of most law is to promote efficiency. To do so, the law should reprehend only that which is inefficient. In commercial enterprise, an act is inefficient only if it lessens 'economic welfare,' which is the sum of producers' and consumers' welfare.

Id. at 1714-15.


man; and Judge Robert Bork, whose work was cited by the Supreme Court throughout *Aspen Skiing*.113

*Aspen Skiing*,114 the most recent Supreme Court opinion regarding lawful conduct for a lawful monopolist, reflects this recent change in emphasis. According to the Court in *Aspen Skiing*, a valid business reason which would have justified Ski Co.'s conduct was any reason which was motivated by efficiency concerns.115 By repeatedly referring to testimony regarding consumer dissatisfaction, the Court found that Ski Co. apparently was willing to sacrifice the happiness of its customers in order to achieve a "perceived long-run impact on its smaller rival."116

One commentator has noted that *Aspen Skiing* "directly links the standard to be applied to each individual fact situation with the ultimate objectives of the antitrust laws."117 Should the effect on consumers be the "linchpin"118 in section 2 antitrust cases involving a single firm's refusal to deal?119 Or should it be that "[a] healthy and unimpaired competitive process is presumed to be in the consumer interest,"120 even in the competition for a natural monopoly market?

**B. The Effect On Consumers Of A Monopolist's Refusal To Deal**

If the sole purpose of section 2 is to prevent all conduct which has the effect of foreclosing competition, then "[e]very agreement concerning trade, every regulation of trade, restrains [competition]. To bind, to restrain, is of their very essence."121 It is obvious that section 2 does not prohibit every agreement or course of conduct concerning trade. The *Colgate* doctrine122 is evidence of this. What differentiates a nonmonopolist that refuses to deal with a competitor from a monopolist that refuses to deal is the effect that the monopolist's refusal may have on consumers.

114 See supra notes 56-72 and accompanying text.
115 Aspen Skiing, 105 S. Ct. at 2862.
116 Id.
117 Bouknight, Aspen Skiing Co. v. Aspen Highlands Skiing - The Conduct Standard Under Section 2 of the Sherman Act, 6 Energy L. J. 275, 279 (1985). Both Bouknight in the above title and Travers in Does a Monopolist Have A Duty To Deal With Its Rivals? Some Thoughts On The Aspen Skiing Case, 57 U. Colo. L. Rev. 727 (1986) agree that the standard will be difficult for the courts to apply in practice. Bouknight, supra, at 279; Travers, supra, at 740. ("It is difficult to articulate rules that do not either condemn efficient behavior or allow inefficient behavior. At the same time, the comparative vagueness of the general standard can create uncertainty about the legal status of certain practices and, perhaps, deter desirable conduct.").
118 Fishman, 807 F.2d at 564 (Easterbrook, J., dissenting).
119 If the courts do require that ultimate consumers must be shown to have been injured in order for a refusal to deal to constitute a violation of section 2, who should bear the burden of proof? The Court in *Aspen Skiing* found that the defendant has the burden of justifying its conduct by showing that it had valid business reasons, i.e., an efficiency justification. The *Fishman* court refused to place the burden on the plaintiff to show harm to consumers. *Fishman* reflects the traditional view preferring unimpaired competition, while *Aspen Skiing* seems to allow some interference with competition, so long as it is justified by efficiency concerns.
120 Fishman, 807 F.2d at 536.
121 Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
122 See supra note 2 and accompanying text.
Upon the nonmonopolist firm’s refusal to deal, the party seeking goods or services can still find another firm to supply its input and can therefore continue to compete in the market for its output. More firms providing a particular product for consumers means lower prices. Therefore, the refusal to deal in this instance would not injure consumers because the supplier firm can simply be replaced by another.

Once a firm is turned down by a monopolist, however, its chances of securing the input it needs are limited. If it cannot find a source for the goods or services it needs, the relevant market loses a competitor that it otherwise could have supported, a competitor that would supply desired output. Fewer competitors means higher prices for consumers. Hence, the foreclosure of competition would have an adverse effect on consumers.

If, however, the monopolist refuses to deal with a firm that is in competition for a natural monopoly market, or in competition for an essential facility, that refusal to deal would not result in the elimination of a competitor which the market could otherwise support. Only one firm sur-

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123 Since the nonmonopolist which refuses to deal does not have monopoly power in the relevant market, there must exist other firms which supply the necessary input, and perhaps even a lawful monopolist.

124 Eleanor Fox notes that:

[t]endencies toward optimal output in a market will, however, improve the position of consumers as buyers of the targeted product, because more units of that product will be available. In addition, the greater output will have a distributive effect, because all units generally will be available at a lower price.

Fox, The Modernization of Antitrust: A New Equilibrium, 66 CORNELL L. REV. 1140, 1160 (1981). Efficiency is not solely concerned with lower prices to consumers, but rather an efficiency loss is “the loss associated with substituting an alternative good for the monopolized good.” Id. at 1161, quoting Schwartz, An Overview of the Economics of Antitrust Enforcement, 68 GEO. L.J. 1075 at 1084 (1980). Therefore, the resulting higher monopoly prices to consumers force them to look to other substitute goods that cost society more resources to make. Fox, supra, at 1161.

The lower price to consumers only results, of course, if the relevant market is not a natural monopoly market, i.e., if it can support more than one firm. If the relevant market is a natural monopoly market, only one firm can ultimately exist in the market, and foreclosure of competition will not affect consumers because a monopoly will result either way. In fact, “[i]f such a market [natural monopoly] contains more than one firm . . . production will continue to consume more resources than necessary.” Posner, supra note 23, at 548.

125 This is assuming that the relevant market is not a natural monopoly, i.e., it can support more than one firm.

126 Posner in the Olympia opinion noted that “[t]he main economic objection to a monopoly is that the monopolist restricts output compared to what it would be under competition.” Olympia, 797 F.2d at 378.

127 See supra note 124.

128 Judge Easterbrook in his Fishman dissent distinguished five essential facility cases from Fishman, finding that none of the five involved a natural monopoly at each level, as Fishman did:

These cases, like the other essential facility of “bottleneck boycott” cases, share the feature that the bottleneck was used to suppress horizontal competition that might be of benefit to consumers—competition that could survive if all firms had access to the essential facility.

... In our case, however, neither the stadium business nor the pro basketball business in Chicago would be competitive but for the denial of access to the stadium.

Fishman, 807 F.2d at 571 (Easterbrook, J., dissenting). Cases discussed by Judge Easterbrook included Otter Tail (see supra notes 46-54 and accompanying text) (“Otter Tail used its bottleneck to prevent Elbow Lake from receiving the benefit of ongoing competition at the generating level.” Fishman, 807 F.2d at 571 (Easterbrook, J., dissenting)); City of Mishawaka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981) (“[T]he stratagem was designed to deprive the consumers of Mishawaka of the benefit of competition in a market (generation) that was not monopolized. . . .” Fishman, 807 F.2d at 472 (Easterbrook, J., dissenting)); and Hecht (see supra note 36 and accompanying text) (“[A] city that had an opportunity to have two teams ended up
vives the competition for a natural monopoly market, and either way the winner will be a monopolist. In such a case, the consumers are not prevented from receiving the benefits of competition, i.e., lower prices at any level of the market. If antitrust law requires the monopolist in this case to give a valid business reason based on efficiency concerns, and there is no detrimental effect on consumers whether the monopolist deals or not, then plaintiffs should not be able to succeed on a section 2 allegation of monopolization.

The presumption in section 2 antitrust law is that monopolies can often result in higher prices for consumers and an inefficient allocation of resources. It is for that very reason that even lawful monopolies are suspect. Monopoly power which was once the result of superior skill or luck may become the result of predatory, anticompetitive conduct that is harmful to consumers. In a competition for a natural monopoly market, however, the consumer will face the "evil" monopolist regardless of the outcome. The antitrust laws, therefore, should be concerned with preventing the formation and continuation of illegal monopolies which will injure consumers but should not be concerned with determining which prospective natural monopolist would be the best from the consumers' perspective. Tort law should govern "anticompetitive" conduct in such a situation.

The majority in Fishman recognized that the essential facility cases cited by Judge Easterbrook differed from the Fishman case in "some economic respects." However, the majority stated that the dissent was "engaging in post hoc analysis. There is nothing in any of these opinions to suggest that the essential facility doctrine was important considerations to the courts which found antitrust violations in these cases." Fishman, 807 F.2d at 555. Judge Easterbrook responded that the "holdings of decisions are more important than their language," and that the majority in Otter Tail did not even reveal their reason for holding as they did. Id. at 573-74. Since "[o]pinion about the offense of monopolization has undergone an evolution," it is reasonable to impute a rationale to the Otter Tail majority which would reflect such an evolution. Id. at 574, quoting Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d at 375. See supra notes 78-89 and accompanying text.

Judge Easterbrook in his Fishman dissent noted that unlike the Hecht case (see supra note 36 and accompanying text), the plaintiffs in Fishman did not want to break up a monopoly, rather "they wanted to be a monopoly." Fishman, 807 F.2d at 572 (Easterbrook, J., dissenting) (emphasis in original).

See supra note 124. See the discussion of natural monopolies, supra notes 23-27 and accompanying text, and the essential facility doctrine, supra notes 28-33 and accompanying text.

The Fishman court rejected this very contention. In Fishman, the defendants argued that only conduct which ultimately injures consumers is violative of the antitrust laws. The Seventh Circuit responded that:

[a] rule that made the legality of arguably predatory conduct at the level of entry into the consumer market depend on whether post hoc analysis could clearly identify adverse impacts on ultimate consumers would be capricious, as well as unjust. Following this approach would mean that if two teams were presumed to survive, see Hecht, 570 F.2d 982, the Sherman Act had been violated. But if only one could be practically supported, very similar business conduct would be unexceptionable. Here, there seems to be no way of telling whether IBI or CPSC would be a "better" owner from the perspective of basketball fans. Fishman, 807 F.2d at 557.

The Fishman court apparently was not willing to recognize the evolution of the law of monopoly, especially the law involving legal conduct for lawful monopolists (see supra note 85) of which the Olympia court was so willing to take note. Olympia, 797 F.2d at 375. The Olympia court cited Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 19-29 (1979); Reiter v. Sonotone
Of course, there have been and will be cases involving competition for a natural monopoly market in which efficiency concerns will require that the competition be protected by the antitrust laws. *Otter Tail* and *Terminal Railroad* are two examples. In both cases, the natural monopoly market was related to a market at another level which was not a natural monopoly market and could therefore support more than one firm. By allowing the controller of an essential facility or any other monopolist to refuse to deal in this situation would in fact foreclose competition and would deprive the consumers of the benefits of competition at the non-natural monopoly market level.

V. Conclusion

A single-firm lawful monopolist controlling an essential facility or a natural monopoly market which refuses to deal with a firm in competition for a natural monopoly or an essential facility brings into play the tension in antitrust law between the *Colgate* doctrine, which allows single firms to refuse to deal, and a basic tenet of antitrust law which condemns the withholding of facilities or goods essential to market access from competitors. A lawful monopolist’s refusal to deal with a firm that is competing for a natural monopoly market or an essential facility does not have the same effect as a lawful monopolist’s refusal to deal with a competitor for a non-natural monopoly market. The former’s refusal does not eliminate a competitor which the market could otherwise support, while the latter’s refusal does.

Leaving aside the proposition that efficiency is or should be the goal of all laws, or even the “linchpin” of antitrust law, it seems that in certain limited situations the effect which a firm’s refusal to deal has on consumers should be an important consideration. Protecting and encouraging competition is fine, but assessing treble damages against a defendant who chooses to deal with one firm over another when only one of the firms would have successfully entered the market anyway may be carrying the protection of competition too far to the point of protecting individual competitors. The protection of individual competitors should be the goal of tort law, not antitrust law.

Mary Ellen Schill

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133 See supra notes 46-54 and accompanying text (*Otter Tail*); see also supra notes 41-45 and accompanying text (*Terminal Railroad*).

134 Competition is valued for many reasons, only one of which is that it yields a competitive price and the related resource allocation. Encouraging competition at one vertical level even though another is monopolized yields all of the benefits of competition which are not associated with resource allocation and may eventually even yield some or all of those. Additional firms at the non-monopoly level means not only price competition at that level but also competition in innovation. It also increases the number of firms involved and interested in the technology and may provide a base for entry at the blockaded level as firms at the competitive level grow weary of paying monopoly prices and decide to integrate back to the monopoly level.