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Aggressive, competitive conduct by a monopolist is highly beneficial to consumers. Courts should prize and encourage it under the antitrust laws. Aggressive, exclusionary conduct by a monopolist is deleterious to consumers. Courts should condemn it under the antitrust laws. There is only one problem. Competitive and exclusionary conduct look alike. The dominant firm is an aggressor and expands its market share at the expense of its smaller rival. The rival yelps and sues.

I

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.[1] offers an illustration. For many years Aspen Skiing Co. (Skiing), which operated the slopes of three mountains near Aspen, and Aspen Highlands (Highlands), which operated the slopes of one mountain, had sold a ticket allowing skiers to ski any mountain's slopes for six days. About a third of all skiing was paid for through one of these multi-mountain, six-day tickets. Skiing and Highlands split the revenues according to the popularity of the slopes. In the early 1970s, Highlands took in between 13% and 18% of the total from these joint tickets. In 1978 Skiing ended the cooperation by demanding that Highlands accept only 12.5% of the take, a deal Highlands would not accept. When Highlands tried to revive a multi-mountain ticket by buying Skiing's tickets and packaging them with its own, Skiing refused to sell; when Highlands gave its patrons scrip that they could tender to Skiing for lift tickets, and that Skiing could redeem at face value, Skiing refused to accept the scrip. Skiing also changed its price structure, charging $22 for a daily ticket to one of its three mountains but only $114 ($19 per day) for a six-day ticket, making it more expensive for skiers to switch between Highlands' trails and Skiing's by the day. Highlands' share of revenues from the four mountains fell to 11% by 1981. It sued; the jury found that Skiing had violated section 2 of the Sherman Act; the Supreme Court agreed.

The Court treated Skiing as a monopolist, though one must wonder of what. Most good skiing slopes are not in Aspen, and

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1 105 S. Ct. 2847 (1985).

monopolistic prices in Aspen would simply induce skiiers to go to Vail or St. Moritz. But the parties did not labor the point, and neither will I.[2] The Court thought that three things condemned Skiing's non-cooperation as exclusionary conduct: the four-mountain ticket was beneficial to skiiers, the exclusion of Highlands injured it, and there was no business justification for the change of policy.[3] Any change that injured Skiing's rival had to be justified, and this was not.

The opinion creates a trap. If two firms start cooperating, the larger cannot back out without a good business purpose. But if the cooperation continues, that, too, must be justified by a good business purpose.[4] If the business purpose is hard to define, then the firm is damned if it keeps cooperating and damned if it stops. Why is this? Because juries have good records in finding business purposes and separating economic efficiency from exclusionary conduct? Hardly. The reason, as the Court sees things, must be that continued cooperation could be monopolistic and desisting from cooperation could be exclusionary; either could be injurious to consumers. Yet the decision implicit in *Aspen* to assign the burden of justification to the defendant—whether the defendant is seeking to explain the cooperation or the lack of cooperation—poses big risks. If the true economic effects of a business practice are hard to know, let alone to prove in court, then putting the burden on the defendant is bound to create systematic error.

II

Vigorous competition "excludes" rivals. The more successful a firm is at reducing the cost of its product or making that product more attractive to consumers, the more it sells. In the end a very successful firm will wind up with the whole market. The objective is to find ways to separate this from the kind of exclusion that injures consumers. The Court put the difference this way: "[I]t is relevant to consider [the conduct's] impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm

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2 Indeed, Skiing kicked away its strongest points one after another. It did not challenge the definition of the market as the four mountains near Aspen. 105 S. Ct. at 2854 n.20. It did not argue that the initial cooperation between Highlands and Skiing raised questions under § 1 of the Sherman Act, questions that would have compelled a dissolution. *Id.* at 2855 n.22. It did not challenge the instructions to the jury. It did not argue that its posture toward Highlands had any legitimate business justification. *Id.* at 2860. So the case may be a sport, governing only masochistic litigants. I put all of this to one side in order to see whether the decision has anything constructive to say about how to distinguish exclusionary conduct from aggressive competition.

3 105 S. Ct. at 2859-62.

4 *See* National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 104 S. Ct. 2948 (1984).

has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[5] Good enough in principle, but this poses a new question. How can we tell when conduct excludes rivals "on some basis other than efficiency?"

Exclusion "on some basis other than efficiency" might take two forms. The first is predatory behavior, perhaps the charging of low prices, that makes it unprofitable for the rival to compete. If a dominant firm can both drive its rival out of the market and erect barriers to the entry of new rivals, it may raise its prices in the future.[6] The second is raising rivals' costs. If a firm can present its rivals with costs it does not face, the rivals must raise their price. The dominant firm can do likewise and make a profit.[7] The two strategies imply different consequences. During an episode of predatory conduct the price must fall and output rise; later, during the recoupment period, the price must rise substantially. If a firm raises its rival's costs, the price in the market will rise at once and total output will fall, but the predator's share of the output will rise. It may be possible to look for these signs, but the search will be hard.

The Supreme Court did not look for these signs in *Aspen*. Instead it paid substantial attention to things that do not differentiate competition and exclusion. It inquired whether ending the four-mountain ticket harmed Highlands. Of course it did—both competition and exclusion harm rivals. We learn nothing from this. It inquired whether Skiing had changed a longstanding practice. Of course it had—both an outbreak of competition after a period of cartelization and exclusionary conduct entail change. Change is ambiguous. It inquired whether buyers preferred the four-mountain ticket to other methods of selling lift tickets. Of course some buyers did—before 1978 about one-third of buyers had bought these tickets. But then two-thirds had bought tickets in other ways, and any change of business practices and products will disappoint the people who used the old ones. Competition is no different from exclusion in this respect; there must be many who wish that Ford still made the Edsel, and at the right price the Lockheed L-1011 would have been a great success.[8]

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5 105 S. Ct. at 2859 (footnotes omitted) (quoting from R. BORK, THE ANTITRUST PARADOX 138 (1978)).

6 *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

7 G. STIGLER, THE ORGANIZATION OF INDUSTRY 67-70 (1968); Salop & Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983).

8 On the effects of changing one's products, see, e.g., MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Telex

So the Court's position resolves to a conclusion that a dominant firm that imposes large costs on its rival must have a good business justification (one "consistent with efficiency") and be able to persuade the jury of it. No intermediate questions, no indicators, no steps on the way to decision. Just ask the ultimate question. Was it efficient or was it not? Whichever way the jury decides, goes.

The Court is not alone in thinking that the defendant should be asked to justify its conduct and pay the penalty if it fails.[9] But why? This means that the plaintiff wins whenever the defendant does not know or cannot explain the true function of its conduct. In business the only thought may be to make as much money as possible, and entrepreneurs often flounder from one practice to another trying to find one that works. When they do, they may not know why it works, whether because of efficiency or exclusion. They know only *that* it works. If they know why it works, they may be unable to articulate the reason to their lawyers—because they are not skilled in the legal and economic jargon in which such "business justifications" must be presented in court, or perhaps because their lawyers cannot understand (or translate for a jury) what they have been told.

If the entrepreneurs were economists, they would not be any more articulate. It takes economists years, sometimes decades, to understand why certain business practices work, to determine whether they work because of increased efficiency or exclusion. To award victory to the plaintiff because the defendant has failed to justify the conduct properly is to turn ignorance, of which we have regrettably much, into prohibition. That is a hard transmutation to justify.[10]

Such explanations as there are tend to be vague, hard to verify, even damning. Consider an explanation Skiing might have offered for cutting Highlands out of the multi-mountain ticket. It might have said that Highlands was an inefficient "fringe" firm taking a free ride on the fact that Skiing had developed the resort's principal

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Corp. v. IBM Corp., 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); Easterbrook, *supra* note 6, at 304-12.

9 *See, e.g.*, VII P. AREEDA, ANTITRUST LAW ¶ 1506 (1986); R. BORK, *supra* note 5, at 157; General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984) (Posner, J.).

10 *See* Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 4-9 (1984); Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 707-10 (1982). Ronald Coase wrote about the wisest thing that has been said on this subject: "If an economist [or a judge!] finds something . . . that he does not understand, he looks for a monopoly explanation. And as in this field we are rather ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on monopoly explanations frequent." R. COASE, *Industrial Organization: A Proposal for Research*, in 3 POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59, 67 (V. Fuchs ed. 1972).

mountains and attracted tourists, which Highlands diverted once they were in Aspen. Highlands' mountain was below average in attractiveness; why else did it get only 13% to 18% of the business from the four-mountain ticket? The four-mountain ticket gave Highlands an opportunity to divert skiiers at no marginal cost to the skiiers. Skiing might believe that it was entitled to compensation for providing Highlands with a pool of ready customers and facilitating their migration to Highlands' mountain. The demand that Highlands accept 12.5% of the proceeds, even if in an average year skiiers spent 16% of their time on Highlands' slopes, could have been a way to compensate Skiing for producing the customers. Similar arguments about "property rights in customers" have been made by respected economists.[11] Moreover, Skiing might have argued that economies of scale called for the use of only three rather than four mountains. Assembling skiiers in larger numbers (per mountain) would make use of the lifts more efficient, allow the ski patrol to handle more skiiers per patrolman, and so on. The multi-mountain ticket might have diverted skiiers to Highlands, preventing the realization of these efficiencies.

Maybe these are real efficiencies, maybe they are fairy tales. It would be very hard to devise tests within the two or three years allowed by the process of litigation. (Even antitrust cases do not last forever.) Suppose the lawyers could find economists who would test these propositions and present the tests to the jury. What would happen? Explanations of this sort sound like justifications of monopoly, not demonstrations of how the exclusion of Highlands from the multi-mountain ticket was "competitive." Counsel for Highlands would say that Skiing may not extol the virtues of a reduction in competition. This would be a bad argument. Highlands would be focusing attention on the process of daily rivalry as "competition," while Skiing's hypothetical explanation demonstrates efficiencies, viewed *ex ante*. But the processes of litigation—especially litigation conducted to lay deciders who may know nothing of the industry and see the inside of a courtroom but once—favor arguments based on fair *ex post* divisions of gains.[12] It is very hard to justify any unusual business conduct even to a panel of economists. The economists, quite properly, want more data and more time. The process of litigation, in which a plaintiff suffering real injury confronts a defendant offering abstruse explanations, does not hold out much promise for finding economic truth. To require the defendant to show that its conduct is efficient is to

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11 *See* Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 Nw. U.L. Rev. 736 (1984); Marvel, *Exclusive Dealing*, 25 J. L. & Econ. 1 (1982).

12 *See* Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 5-7, 10-12 (1984).

hand victory to the plaintiff in a large number of cases no matter whether the defendant's conduct helped or harmed consumers.

III

Aspen is in many ways an advance in the application of economic analysis to antitrust law. It focuses attention on price and output. It calls for resolution of the question whether the business conduct is efficient. The Court scorned the use of "intent," pointing out that intent is useful only to the extent it helps a court decide whether the conduct is efficient or exclusionary.[13] Objective indicators, not intent, are what matter. These are conclusions for which many have lobbied in their scholarly writing, and the lobbying has paid off. The Court cited Robert Bork's work from beginning to end.

Yet two very important economic lessons are unlearned. Without these the rest are useless or worse. The first is that the legal system must minimize the *sum* of error and process costs. A rule that tilts things in plaintiffs' favor (by demanding explanations from defendants) ensures that much desirable conduct will be condemned. Some will be doomed in litigation, some will be abandoned as firms try to avoid the risk of wrongful condemnation. There is no sense in *Aspen* that false positives are harmful or common, yet they are. Just the previous term, the Court saw both the harms of false positives and the difficulty of separating competition from exclusion.[14] More recently the Court examined the logic of the economic arguments implicit in an antitrust claim and, finding the logic faulty, rejected the claim.[15] One wonders what changed in *Aspen*. False positives are at least as harmful as false negatives. I have argued elsewhere that false positives are much more harmful than false negatives.[16] Market processes undercut monopolies wrongfully permitted, but no similar processes undercut judicial decisions that wrongly condemn efficient conduct. Judges hearing antitrust cases have a lousy record in separating economic wisdom from fallacy; this is the central point of Judge Bork's book, cited so often in *Aspen*. We should not expect judges to improve their record by very much; the rules must accommodate the judges' limits, rather than the other way around. In other fields, the inability of judges to decide what is efficient business conduct and what is not

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13 105 S. Ct. at 2857. *See also* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.); Ball Memorial Hosp. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338-39 (7th Cir. 1986).

14 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-69, 771, 775-77 (1984).

15 Matsushita Elec. Indus. v. Zenith Radio Corp., 106 S. Ct. 1348, 1357-62 (1986).

16 Easterbrook, *The Limits of Antitrust*, *supra* note 10, at 15-17.

is a foundation for powerful rules compelling judges to keep their hands off—in corporate law this is known as the business judgment doctrine. Why should antitrust law demand of judges and juries answers that other branches of the law know courts cannot supply?

The second lesson is that it is pointless to ask the ultimate question—"is it efficient?"—without offering some criteria. Throwing this marshmallow at a jury is not going to get the results we seek. A fog-bound instruction of the sort given in *Aspen* ensures that confusion and random results will emerge, ensures, in other words, more false positives and false negatives than under the old regime.

Courts must change the way they think about antitrust. Now that efficiency is the standard by which business practices are to be gauged, courts must approach the task of finding efficiency in the same way a social scientist would. The court must formulate a hypothesis and test that hypothesis against the facts. The court should accept only the hypotheses that tally with observation. Forming and testing hypotheses is not the ordinary work of lawyers and judges, but it has become essential.

What are the hypotheses in *Aspen*? One is that the change is efficient (or neutral). If the change is efficient, the output of skiing services in the market should rise. Add together the output (number of skiier-days) of the two firms. Is it up? The Court does not say. The raw data may not be enough. Perhaps skiing in Aspen is up less (more) than skiing in other resorts. There are statistical techniques to strip away other variables.[17] Another hypothesis is that Skiing was engaged in predation. This implies that prices for Aspen's four mountains fell as Skiing tried to take business away from Highlands. Then, the hypothesis would continue, Highlands eventually would withdraw from the market so that Skiing would raise its price.

The hypothesis of predation is inconsistent with the Court's assumption that Skiing raised its prices. It is also pretty implausible no matter what the price data show. Predatory conduct works only if the predator can force the competing assets from the market. Otherwise these assets stand by as a source of competition, preventing the predator from raising prices to recoup. No matter how Skiing tried, it was unlikely to force Highlands Mountain out of the Aspen "market." Where would the mountain go? Exit barriers defeat predatory strategies. True, Highlands might close up shop for a year or two, but it could reopen the slopes whenever Skiing tried to take advantage of its position. This hypothesis therefore cannot explain the events we observed.

17 *See* Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048 (1985).

Still a third hypothesis is that Skiing was trying to raise its rival's costs by cutting off an efficient marketing strategy (the multi-mountain ticket) that was more valuable to Highlands than it was to Skiing. Skiing had three mountains even after bouncing Highlands from the package. If Skiing could raise Highland's marginal costs, it could raise its own prices. The implications of this hypothesis are: higher prices for all skiing in Aspen, higher market share for Skiing, a lower number of skiers at Skiing, a lower number of skiers for Aspen as a whole, and a differential change in profits (Skiing's up, Highlands' down). The first two implications (higher prices and higher market share for Skiing) were confirmed, according to the Court. The last three were not tested. We do not know whether Aspen lost ground to other resorts, whether Skiing got more customers or fewer, or how Skiing's profits changed in comparison to Highlands. (We know that Highlands' dropped, but if times were bad all over, Skiing's profits would have dropped too.) The hypothesis remains to be proved.

Notice that the "efficiency" hypothesis shares some of the predictions of the "raising rivals' costs" hypothesis. If Highlands was stealing customers Skiing had attracted to Aspen, that would depress prices for all four mountains and raise Highlands' profits. A correction of Highlands' free riding would reduce Highlands' sales, profits, and market share, and raise average prices. But it also would allow Skiing profitably to attract more tourists to Aspen and take better care of them, so that the number of skiers at Skiing's three mountains, and the total business of the resort, would rise. Only the direction of this change in output distinguishes the hypotheses. Yet the parties never determined what happened to output in Aspen.

Until the Court sends judges and juries off to test hypotheses and answer questions such as these, it cannot bring rationality to antitrust litigation. Jurors have no interior compasses that help them determine which business practices are efficient. Neither do judges, lawyers, economists, or business executives. To set the jury adrift on uncharted seas—and then to defer to whatever it does—is to introduce considerable risk into all business decisions. And for no good purpose.

Elaborate econometric measures of output may help answer the essential questions, but often they are indeterminate. In a case such as *Aspen*, a quick and dirty answer would have prevented the need for complex inquiry. Aspen is not a market, so who cares what Skiing did? It could not monopolize peripatetic skiers with the world only a jet ride away. It is just as well to avoid econometric answers when we can. They are expensive as well as potentially indeterminate. Often the only way to tell what is efficient is to look at what survives in competition. Then we invent hypotheses to explain the survival.[18] A survivorship test works far too slowly to be useful in antitrust litigation, yet anything else is neither easy nor accurate. To assign burdens in a world with costly information—that is, in our world—is to conclude the inquiry in too many cases.

So the sin of *Aspen* is putting on defendants a burden they often cannot carry. In other parts of the law, the Court requires the defendant to produce an explanation and then requires the plaintiff to show the explanation wrong.[19] Why should things be otherwise in antitrust? Too many practices are too mysterious for too long. Even if 99% of businesses can explain what they do (and convince jurors of the explanation), there is a selection bias. Plaintiffs will sue the other 1%. The result will be riddled with error. What we need is a set of intelligent presumptions, not a stab at the ultimate question of efficiency. But I have made that argument before.[20]

18 G. STIGLER, *supra* note 7, at 72-80; Williamson, *Assessing Contract*, 1 J. L. ECON. & ORG. 177 (1985).

19 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (Title VII of the Civil Rights Act of 1964).

20 Easterbrook, *The Limits of Antitrust*, *supra* note 10.