ASPEN SKIING CO. V. ASPEN HIGHLANDS SKIING — THE CONDUCT STANDARD UNDER SECTION 2 OF THE SHERMAN ACT

*J.A. Bouknight, Jr.**

INTRODUCTION

On June 19, 1985, the Supreme Court, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[1] ventured into the substance of Section 2 of the Sherman Act[2] for the first time since it decided the *Otter Tail*[3] case in 1973. In *Aspen:*

1. The Court, by affirming on other grounds, declined to reach questions raised by the Tenth Circuit Court of Appeals application of the "essential facilities" doctrine in circumstances where only a single product market was found.
2. The Court, in upholding a damage judgment for the plaintiff, holds that the critical factor in evaluating whether conduct by a monopolist can be justified by " 'valid business reasons' "[4] is whether the conduct was motivated by efficiency considerations. This formulation appears to lay to rest the more extreme interpretations of the *Alcoa* decision[5] — that the intent to acquire or maintain a dominant market share is unlawful. However, it leaves open the door for plaintiffs, particularly those armed with economic evidence, to reach the jury with claims that conduct by a monopolist interferes with efficient resource allocation.

The Facts of Aspen

The plaintiff, Aspen Highlands Skiing Corp., operates one of four skiing areas in Aspen, Colorado. The defendant operates the other three skiing areas in Aspen. For many years, the parties had participated in an "all-Aspen ticket" arrangement, which permitted skiers to buy from either the plaintiff or defendant a one-week ticket that could be used at any of the four skiing areas. The defendant terminated this arrangment, over the plaintiff's objections. The plaintiff then tried to devise other ways of offering a ticket that could be used at all four skiing areas, such as by purchasing tickets for the defendant's lifts at retail and including those tickets in its weekly ticket package. The defendant first refused to sell tickets at retail to the plaintiff, and then restructured its pricing to increase the discount available for a one week ticket that could be used exclusively at defendant's lifts. The new price structure prevented the plaintiff from competing. Otherwise purchase of other kinds of tickets from defendant and packaging them with plaintiffs own tickets in a one week plan would permit a customer to ski on all four mountains. The Court observed that the absence of a one week "all-Aspen ticket" caused considerable

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[1] 105 S.Ct. 2847 (1985), *aff'g* 738 F.2d 1509 (10th Cir. 1984).

[2] The statute provides, in relevant part that "[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. . . 15 U.S.C. § 1 (1982).

[3] Otter Tail Power v. United States, 410 U.S. 366 (1973).

consumer dissatisfaction and that, from a consumer's perspective, the alternative of buying tickets with a duration of less than one week from both plaintiff and defendant was not economically attractive.

The plaintiff brought suit under Section 2 of the Sherman Act, which prohibits monopolization. The offense of monopolization consists of two elements: possession of monopoly power in a relevant market, and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[6]

The jury found, in a special verdict, that the defendant possessed monopoly power in the market for downhill skiing services at Aspen. The district court then instructed the jury on the second (or conduct) element of monopolization, and included the following passsage:

> [A] firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which possesses monopoly power under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.
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> In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available — or in other ways — and instead has the effect of impairing competition.
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> To sum up, you must determine whether Aspen Skiing Corporation gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or sub-market.[7]

The jury found for the plaintiff on the conduct issue, and the district court entered judgment for the plaintiff. The Tenth Circuit affirmed, on two separate grounds. The Supreme Court affirmed the result reached by the Tenth Circuit, although solely on the basis of one of the two grounds invoked by the Tenth Circuit.

The Essential Facilities Doctrine

One of the grounds invoked by the Tenth Circuit for its affirmance of the district court's judgment was the "essential facilities" doctrine. The Tenth Circuit held that access to an all-Aspen ticket is essential to the ability of any firm to compete with Aspen Skiing Co. in the market for downhill skiing in Aspen. Finding no evidence that access could not feasibly have been granted,[8] the Tenth Circuit found liability under Section 2. The Supreme Court's opinion focuses entirely on the issue of application of the conventional conduct standard under Section 2 (see discussion below), and disposes of the "essential facilities" question with the following statement, which is contained in the final footnote to the opinion:

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[4] 105 S.Ct. at 2854 (quoting from jury instructions by the district court).

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

> Given 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. . . .[9]

Thus, the Supreme Court declined to reconcile what appears to be a conflict among the circuits over application of the "essential facilities" doctrine to single firm conduct. Perhaps a brief background discussion is in order.

What has come to be known as the "essential facilities" doctrine was first applied in instances where joint venturers excluded competitors from access to joint venture facilities that were essential to effective competition in some market.[10] Of course, joint ventures involve contracts or combinations, which are reached under Section 1 of the Sherman Act,[11] a provision which prohibits any unreasonable restraint of trade. An appellate court first suggested that the "essential facilities" doctrine could be applied, under Section 2, to single firm conduct in *Hecht v. Pro Football Inc.*[12] The *Hecht* case involved a lease between the District of Columbia Armory Board, which controlled Robert F. Kennedy Stadium, and the Washington Redskins. The lease prohibited use of the stadium by any other football team, a provision the court could have easily invalidated as a contract in restraint of trade in violation of Section 1.

However, in the 1980s, several clear instances of application of the "essential facilities" doctrine to single firm conduct appear in the appellate cases.[13] The principal conceptual difficulty that arises in applying the "essential facilities" logic to single firm conduct is that the dividing line between exclusionary conduct and legitimately competitive conduct is difficult to discern.[14] The most thoughtful consideration of these problems is probably to be found in Judge Cudahy's opinion in the *MCI* case. He explains that a refusal to grant access to an essential facility "may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market to another."[15]

The Tenth Circuit, however, applies the "essential facilities" doctrine in circumstances quite different from those involved in *MCI*. In *Aspen*, only one relevant market was identified — a market for downhill skiing services in Aspen. Thus, the Tenth Circuit did not find the kind of leveraging of power from one market to another that was emphasized in *MCI*. It appears, by its application of the "essential facilites" doctrine, to have imposed an obligation to cooperate with a horizontal competitor, if such cooperation is necessary to the competitor's ability to compete effectively. The principal thrust of the petitioner's attack on the Tenth Circuit's decision, in its briefs to the Supreme Court, was directed at this apparent finding of a duty of cooperation.

In contrast, the plaintiff-respondent exhibited little confidence in the survivability of the Tenth Circuit's "essential facilities" conclusion, and urged the

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[6] 105 S.Ct. at 2854 n.19 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)).

[7] Aspen Skiing Co., *supra* note 1, at 2854-55.

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

[9] 105 S.Ct. at 2862 n.44.

[10] *E.g.*, United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1945).

[11] 15 U.S.C. § 1 (1982).

[12] 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1983).

Supreme Court to affirm on other grounds. The Court did so, and, accordingly, never addressed the "essential facilities" point. While this clearly cannot be read as an endorsement of the Tenth Circuit's approach, neither does it provide definitive guidance to the lower courts.

The Conduct Standard – Valid Business Reasons

The Supreme Court's affirmance is based on application of the general conduct standard under Section 2. The Court approves of the district court's charge that "a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal."[16] The case then turns upon the distinction between conduct motivated by valid business reasons and that "which unnecessarily excludes or handicaps competitors."[17] Once again, a bit of background may prove useful.

Judge Hand's decision in the *Alcoa* case, rendered in 1945[18] — the first major exposition of the Section 2 conduct standard — contains passages that border on equating bigness with badness. *Alcoa* suggests that conduct by a monopolist that results in the acquisition or maintenance of monopoly power violates Section 2 in all cases except where the monopoly has been "thrust upon" the firm. Perhaps the most extreme statement of this view in the following passage from *Alcoa:*

> The only question is whether [Alcoa] falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field.[19]

The case law under Section 2 in recent years reflects a steady movement away from the "bigness equals badness" presumption of *Alcoa,* to the view that a monopolist should be encouraged to expand its output and compete for every sale, even if its already high market share increases further, so long as the means used reflect competition on the merits, as contrasted with unnecessary interference with efforts by others to compete on the merits.[20]

The district court's jury instructions, which the Supreme Court explicitly approved, seemed very much in tune with this recent (*Berkey*) line of authority. Moreover, the result in the *Aspen* case is in no way extraordinary, given the Court's summary of the evidentiary record. Not only did the defendant, for no apparent

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[13]See e.g., MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1978), *cert. denied,* 104 S.Ct. 234 (1983); Southern Pacific Communications Co. v. AT&T Co., 740 F.2d 980 (D.C. Cir. 1984), *cert. denied,* 105 S.Ct. 1359 (1985); Byars v. Bluff City News Co. Inc., 609 F.2d 843 (6th Cir. 1979).

[14]Both the Second Circuit and the Federal Trade Commission have concluded that a monopolist is entitled to withhold from its competitors access to a technology that is essential to effective competitive challenge to the monopolist, provided that the monopolist's advantage was fairly acquired (e.g., as a result of luck, integration, economies of scale, or business acumen. See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980); In re Dupont de Nemours & Co., 96 FTC 653 (1980).

[15]MCI, 708 F.2d at 1132.

[16]105 S.Ct. at 2854.

[17]*Id.* at 2854-55.

business reason, withdraw from the all Aspen ticket arrangement that had produced profits for it in the past; it also obstructed the plaintiff's efforts to buy, at retail price, tickets for the defendant's ski lifts. In essence, according to the Supreme Court's summary of the evidence, the jury could have found a course of conduct that reduced the defendant's profitability for no purpose other than to eliminate competition from the market. Under any credible view of Section 2, such conduct would be sufficient to establish a violation.

The *Aspen* case is significant because the Court went to some length in explaining the conduct standard under Section 2. The Court appears to endorse the view, expressed by a number of "Chicago School" commentators, that the underlying objective of the antitrust law is to promote economic efficiency with the result of maximizing consumer satisfaction. It particularly refers to the writings of former Professor, now D.C. Circuit Judge, Robert H. Bork. The Court equates "valid business reasons" with being motivated by efficiency concerns."[21] In concluding that the defendant was not so motivated, the Court finds that Aspen Ski Co. "was willing to sacrifice short-run benefits and consumer good will in exchange for a perceived long-run impact on its smaller rival." In assessing the consumer good will question, the Court relies on direct evidence of consumer unhappiness.[22]

In theory, the opinion is beyond reproach.[23] It directly links the standard to be applied to each individual fact situation with the ultimate objectives of the antitrust laws. In practice, difficult issues remain for the lower courts in their case-by-case application of the broad principles set forth in *Aspen.*

One difficulty is that of balancing short-run versus long-run efficiency. For example, in *Berkey,* Kodak developed and immediately introduced a new photographic format consisting of a small instamatic camera and a corresponding film sized uniquely to fit the new camera. Berkey Photo Co. argued that Kodak was under a duty to disclose its new photographic format so that Berkey could design and simultaneously introduced a competing camera that would be compatible with Kodak's new film. In the short run, it is likely that prices would be lower, and consumers more satisfied, by having a choice between two cameras compatible with Kodak's new film. In the long run, a disclosure requirement would reduce incentives for innovation by firms like Kodak.

Perhaps a broader concern for Section 2 defendants is the potentially critical role of the jury in applying the enficiency concept and weighing evidence on consumer reaction in any particular case. A substantial possibility exists that disputes between economic experts concerning those subjects will be resolved by juries.

Conclusion

The first four and one half years of the Reagan administration have seen substantial movement in the direction of linking antitrust enforcement with

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

[19]*Id.* 148 F.2d at 431.

[20]Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980); California Computer Products, Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); In re Dupont de Nemours & Co., 96 FTC 653 (1980).

economic theory. The views of commentators such as Judge Bork have had substantial impact on both federal enforcement agencies and the courts. *Aspen,* in this author's view, represents an effort by the Court to apply hard-headed economic analysis to conduct under Section 2 of the Sherman Act, and yet to apply it so as to maintain the vitality of Section 2 as an effective weapon against monopolistic practices. The Court strongly rejects the *Alcoa* view that monopoly is to be tolerated only where it is thrust upon a passive firm. It also rejects, with equal emphasis, the extreme "Efficiency Theory" view that non-collusive conduct really doesn't matter, because, in the absence of collusion or vertical leverage, markets are self-correcting over time.[24]

The result could well be an increase in activity under Section 2, with a greater focus on the effect of conduct on economic efficiency, as contrasted with subjective evidence of intent to acquire or maintain monopoly power. The "efficiency" standard is not likely to prove simple in application. The creative juices of litigants will be stimulated. And, expert economic testimony may assume even greater importance in Section 2 litigation.

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[21] 105 S.Ct. at 2862.

[22] *Id.* at 2859-60.

[23] That is, unless one wishes to argue that the antitrust laws are intended to attack concentrations of power for other than economic reasons. For backgrounds, see C. Kaysen and D.F. Turner, *Antitrust Policy* 17-22 (1959); P. Areeda and D.F. Turner, I *Antitrust Law* ¶¶ 109-13 (1978).

[24] For a critical discussion of the Efficiency Model, see Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pack of Law and Economics,* 72 Geo.L.J. 1511 (1984).