NOTE

As interpreted by the US Supreme Court in the 21st century, *Aspen Skiing* articulates a narrow antitrust's duty to deal. This duty to deal is an exception to the general rule of firm independence (no-duty-to-deal rule). To establish a violation of *Aspen Skiing*'s duty to deal, a plaintiff must establish that the defendant (1) unilaterally terminated a voluntary and profitable course of dealing; (2) the only conceivable rationale of the termination is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition; and (3) the refusal to deal involves products that the defendant already sold in the existing market to other similarly situated customers.

Courts have imposed duties to deal on joint ventures that acted to exclude competition. *See*, *e.g.*, *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912). This duty to deal is not an exception to the general rule of firm independence, because it applies to concerted actions.

The narrow scope of the antitrust's duty to deal has been a source of considerable controversy. Its rationale, however, is sound. The purpose of antitrust law is to protect the freedom of trade. Therefore, antitrust's restrictions on the freedom of trade tend to conflict with the philosophy of the US antitrust laws. Additionally: (1) the enforcement of duties to deal is not practical in most circumstances because it requires persistent oversight of business interactions; and (2) hostility to legal duties to act is part of the DNA of the American jurisprudence.

There may be good reasons to create additional duties to deal. However, proposals to "restore" duties to deal that the Supreme Court allegedly abandoned are typically uninformed and impractical.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.

472 U.S. 585 (1985)

Justice STEVENS delivered the opinion of the Court.

In a private treble-damages action, the jury found that petitioner Aspen Skiing Company (Ski Co.) had monopolized the market for downhill skiing services in Aspen, Colorado. The question presented is whether that finding is erroneous as a matter of law because it rests on an assumption that a firm with monopoly power has a duty to cooperate with its smaller rivals in a marketing arrangement in order to avoid violating § 2 of the Sherman Act.

I

Aspen is a destination ski resort with a reputation for "super powder," "a wide range of runs," and an "active night life," including "some of the best restaurants in North America." Between 1945 and 1960, private investors independently developed three major facilities for downhill skiing: Aspen Mountain (Ajax), Aspen Highlands (Highlands), and Buttermilk. A fourth mountain, Snowmass, opened in 1967.

The development of any major additional facilities is hindered by practical considerations and regulatory obstacles. The identification of appropriate topographical conditions for a new site and substantial financing are both essential. . . .

Between 1958 and 1964, three independent companies operated [the three facilities that existed at the time. In 1964, Ski Co. acquired one of its competitors. With the opening of the fourth facility in 1967, Ski Co. operated three of the four facilities. Highlands operated the fourth one. The companies used an "all Aspen ticket" that allowed skiers to use all facilities. The two companies had some disagreements over the method used to split the revenues].

Highlands' share of the revenues from the ticket was 17.5% in 1973-1974, 18.5% in 1974-1975, 16.8% in 1975-1976, and 13.2% in 1976-1977. . . . Highlands . . . accepted a fixed percentage of 15% for the 1977-1978 season. No survey was made during that season of actual usage of the 4-area ticket at the two competitors' mountains.

In the 1970's the management of Ski Co. increasingly expressed their dislike for the all-Aspen ticket. They complained that [the] method of monitoring usage was administratively cumbersome. They doubted the accuracy of the survey. . . . In addition, Ski Co.'s president had expressed the view that the 4-area ticket was siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued. . . .

In March 1978, the Ski Co. management recommended to the board of directors that the 4-area ticket be discontinued for the 1978-1979 season. The board decided to offer Highlands a 4-area ticket provided that Highlands would agree to receive a 12.5% fixed percentage of the revenue-considerably below Highlands' historical average based on usage. Later in the 1978-1979 season, a member of Ski Co.'s board of directors candidly informed a Highlands official that he had advocated making Highlands "an offer that [it] could not accept."

Finding the proposal unacceptable, Highlands suggested a distribution of the revenues based on usage to be monitored by coupons, electronic counting, or random sample surveys. If Ski Co. was concerned about who was to conduct the survey, Highlands proposed to hire disinterested ticket counters at its own expense—"somebody like Price Waterhouse"—to count or survey usage of the 4-area ticket at Highlands. Ski Co. refused to consider any counterproposals, and Highlands finally rejected the offer of the fixed percentage.

As far as Ski Co. was concerned, the all-Aspen ticket was dead. In its place Ski Co. offered the 3-area, 6-day ticket featuring only its mountains. In an effort to promote this ticket, Ski Co. embarked on a national advertising campaign that strongly implied to people who were unfamiliar with Aspen that [its three facilities] were the only ski mountains in the area. . . .

Ski Co. took additional actions that made it extremely difficult for Highlands to market its own multiarea package to replace the joint offering. [The company] refused to sell Highlands any lift tickets, either at the tour operator's discount or at retail. Highlands finally developed an alternative product, the "Adventure Pack," which consisted of a 3-day pass at Highlands and three vouchers, each equal to the price of a daily lift ticket at a Ski Co. mountain. The vouchers were guaranteed by funds on deposit in an Aspen bank, and were redeemed by Aspen merchants at full value. . . . Ski Co., however, refused to accept them.

Later, Highlands redesigned the Adventure Pack to contain American Express Traveler's Checks or money orders instead of vouchers. Ski Co. eventually accepted these negotiable instruments in exchange for daily lift tickets. Despite some strengths of the product, the Adventure Pack met considerable resistance from tour operators and consumers who had grown accustomed to the convenience and flexibility provided by the all-Aspen ticket.

Without a convenient all-Aspen ticket, Highlands basically "becomes a day ski area in a destination resort." Highlands' share of the market for downhill skiing services in Aspen declined steadily . . . from 20.5% in 1976-1977 . . . to 11% in 1980-1981. Highlands' revenues from associated skiing services like the ski school, ski rentals, amateur racing events, and restaurant facilities declined sharply as well.

II

In 1979, Highlands filed a complaint in the United States District Court for the District of Colorado naming Ski Co. as a defendant. Among various claims, the complaint alleged that Ski Co. had monopolized the market for downhill skiing services at Aspen in violation of § 2 of the Sherman Act, and prayed for treble damages. The case was tried to a jury which rendered a verdict finding Ski Co. guilty of the § 2 violation and calculating Highlands' actual damages at $2.5 million.

In her instructions to the jury, the District Judge explained that the offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes. Although the first element was vigorously disputed at the trial and in the Court of Appeals, in this Court Ski Co. does not challenge the jury's special verdict finding that it possessed monopoly power. Nor does Ski Co. criticize the trial court's instructions to the jury concerning the second element of the § 2 offense. . . .

Ski Co. filed a motion for judgment notwithstanding the verdict, contending that the evidence was insufficient to support a § 2 violation as a matter of law. . . . The District Court denied Ski Co.'s motion and entered a judgment awarding Highlands treble damages of $7,500,000, costs and attorney's fees. The Court of Appeals affirmed in all respects. . . .

III

In this Court, Ski Co. contends that even a firm with monopoly power has no duty to engage in joint marketing with a competitor, that a violation of § 2 cannot be established without evidence of substantial exclusionary conduct, and that none of its activities can be characterized as exclusionary. . . .

"The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975). Ski Co., therefore, is surely correct in submitting that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor. Ski Co. is quite wrong, however, in suggesting that the judgment in this case rests on any such proposition of law. For the trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals.

The absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. . . . The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

In Lorain Journal Co. v. United States, 342 U.S. 143 (1951), we squarely held that this right was not unqualified. Between 1933 and 1948 the publisher of the Lorain Journal, a newspaper, was the only local business disseminating news and advertising in that Ohio town. In 1948, a small radio station was established in a nearby community. In an effort to destroy its small competitor, and thereby regain its "pre-1948 substantial monopoly over the mass dissemination of all news and advertising," the Journal refused to sell advertising to persons that patronized the radio station. In holding that this conduct violated § 2 of the Sherman Act, the Court dispatched the same argument raised by the monopolist here:

> "The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. We do not dispute that general right. 'But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. The right claimed by the publisher is neither absolute nor exempt from regulation.
>
> In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

The Court approved the entry of an injunction ordering the Journal to print the advertisements of the customers of its small competitor.

In *Lorain Journal*, the violation of § 2 was an "attempt to monopolize," rather than monopolization, but the question of intent is relevant to both offenses. In the former case it is necessary to prove a "specific intent" to accomplish the forbidden objective, as Judge Hand explained, "an intent which goes beyond the mere intent to do the act." *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945). In the latter case evidence of intent is merely relevant to the question 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. Whichever label is used, there is agreement on the proposition that "no monopolist monopolizes unconscious of what he is doing." As Judge Bork stated more recently: "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended." R. BORK, THE ANTITRUST PARADOX 160 (1978).

[Here], the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years. . . .

Ski Co.'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market. Such a decision is not necessarily anticompetitive. . . . [The relevant question is whether the jury's conclusion finds support in the record].

IV

The question whether Ski Co.'s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself.

Superior Quality of the All-Aspen Ticket

. . . Over 80% of the skiers visiting [Aspen] each year have been there before—40% of these repeat visitors have skied Aspen at least five times. Over the years, they developed a strong demand for the 6-day, all-Aspen ticket in its various refinements. Most experienced skiers quite logically prefer to purchase their tickets at once for the whole period that they will spend at the resort; they can then spend more time on the slopes and enjoying après-ski amenities and less time standing in ticket lines. . . . [The all-Aspen ticket] provided convenience and flexibility, and expanded the vistas and the number of challenging runs available to him during the week's vacation. . . . Expert testimony and anecdotal evidence supported these statistical measures of consumer preference.

Highlands' Ability to Compete

The adverse impact of Ski Co.'s pattern of conduct on Highlands is not disputed in this Court. [The company] tried to protect itself from the loss of its share of the patrons of the all-Aspen ticket. . . . Highlands' share of the relevant market steadily declined after the [all-Aspen] ticket was terminated. The size of the damages award also confirms the substantial character of the effect of Ski Co.'s conduct upon Highlands.

Ski Co.'s Business Justification

Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose. . . . The jury may well have concluded that Ski Co. elected to forgo . . . short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor. That conclusion is strongly supported by Ski Co.'s failure to offer any efficiency justification whatever for its pattern of conduct. . . .

Although Ski Co.'s pattern of conduct may not have been as "bold, relentless, and predatory" as the publisher's actions in *Lorain Journal*, the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival. . . . Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.

. . . [T]he judgment of the Court of Appeals is *Affirmed*.