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The False Duality of Efficiency and Predation in the Analysis of Monopolizing Conduct

Mark Anderson

ARTICLES

THE FALSE DUALITY OF EFFICIENCY AND PREDATION IN THE ANALYSIS OF MONOPOLIZING CONDUCT

Mark D. Anderson*

Section 2 of the Sherman Act[1] prohibits monopolization.[2] The offense of monopolization does not prohibit the mere possession of monopoly power, but requires some culpable conduct by the defendant.[3] Thus, it is this conduct requirement which distinguishes legal from illegal monopolies. The nature of the conduct requirement has troubled courts for decades.[4]

This article develops a definition of the conduct element which is based on the recognition that the power element and the conduct element operate at cross purposes. The scope of the conduct element must be determined by analyzing the purposes of that element. Part I of this article will set forth the nature of the dilemma posed by the

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* B.A. 1973, Macalester College; J.D. 1977, University of Chicago; Professor of Law, University of Idaho.

1. Section 2 of the Sherman Act (hereinafter Section 2) states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (Supp. II 1990).

2. Section 2 also prohibits attempted monopolization and conspiracies to monopolize. *Id.*

3. *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) 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.

Id.

4. *See, e.g.*, United States v. Griffith, 334 U.S. 100 (1948); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

two elements of the monopolization offense in the context of Learned Hand's seminal opinion in *United States v. Aluminum Co. of America.*[5] Part II will describe the solution to this dilemma proposed by Judge Robert Bork which divides the universe of conduct by monopolists into two hemispheres, the efficient and the predatory. Part III will analyze the position taken by the United States Supreme Court during the last decade regarding the conduct element which is based upon the dichotomy advanced by Judge Bork. Part IV will explain why the efficiency-predation dichotomy advanced by Judge Bork and adopted by the Court fails. Part V will set forth a definition of the conduct element which is based on the reasons for the existence of that element.

I. The Nature of the Problem

While much about antitrust law is subject to great debate, one agreed upon premise is that, all other things being equal, competition is preferable to monopoly. The monopolization offense of Section 2 is based upon this preference. Monopoly power allows a firm to reduce output and raise prices above the level which would prevail in a competitive market. This price increase has at least three consequences. First, it effects a wealth transfer from consumers to producers. Second, it forces consumers who are unwilling or unable to pay the higher prices to buy less attractive substitute products.[6] Third, the monopoly profits earned by the monopolist may cause other firms to expend resources to enter the market and these attempts may cause the monopolist to spend its resources trying to repel such entry.[7] The wealth transfer from consumers to the monopolist is neutral from the perspective of the net welfare of society. For every dollar a consumer loses, the monopolist gains a dollar. The latter two effects, however, are net losses to society. Welfare losses are incurred without offsetting gains.[8] Thus, even from a purely economic perspective, the preference for competition over monopoly is justified.

It is important to recognize that much of the welfare loss identified above flows merely from the exercise of monopoly power over

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

6. Throughout this article, the word "product" includes both products and services.

7. In some markets, consumers might be induced to spend resources trying to prevent any producer from exercising monopoly power. Such expenditures would increase the cost of monopoly. *See* John T. Wenders, *On Perfect Rent Dissipation*, 77 Am. Econ. Rev. 456 (1987).

8. For a general discussion of the social cost of monopoly, *see* Herbert Hovenkamp, Economics and Federal Antitrust Law § 1.3 (1985).

prices and is not dependent upon further conduct by the monopolist. The consumers who respond to the monopoly price by switching to inferior substitutes will do so regardless of other conduct by the monopolist. The same is true of potential producers who spend resources attempting to enter the monopolized market. They are attracted by the profits realized by the monopolist, not by any conduct by the monopolist. Thus, both of these costs of monopoly exist whether or not the monopolist engages in conduct deterring entry.

Because significant social costs flow from the exercise of monopoly power over prices even without further conduct by the monopolist, defining and applying the conduct element has been troublesome. The fundamental question is why harmful monopolies should be legalized merely because the monopolist has not engaged in further harmful conduct. In some settings, the conduct requirement can be attributed to the nature of the proceeding. Section 2 provides that the monopolization offense is a felony punishable by fines of $10,000,000 for corporations and $350,000 for individuals and a term of imprisonment of up to three years in prison.[9] Applying such criminal penalties without some culpable conduct by the defendant is inappropriate.[10] Similarly, a violation of Section 2 gives rise to a private cause of action for treble damages plus costs and attorneys' fees under Section 4 of the Clayton Act.[11] Since treble damages are in part punitive, they would be inappropriate in the absence of culpable conduct by the monopolist.[12]

The conduct element, however, is part of the definition of the monopolization offense. As such, it must be satisfied to establish monopoly liability in any procedural context, including a governmental action seeking only injunctive relief. If the reasons for the conduct element arose only in limited procedural contexts, it would not be an element required to establish liability for the offense, but rather would be an additional element required before relief was granted in those limited contexts. Since the conduct element must be satisfied in all procedural contexts, the explanation for its existence must not depend upon the remedy sought.[13]

Over four decades ago, Learned Hand struggled with the con-

9. 15 U.S.C. § 2 (Supp. II 1990).

10. 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 630b (1978).

11. 15 U.S.C. § 15(a) (1988).

12. *See* 3 AREEDA & TURNER, *supra* note 10, ¶ 630c.

13. Areeda and Turner concluded that the conduct element should be eliminated in governmental actions seeking equitable relief against a substantial, persistent monopoly. 3 AREEDA & TURNER, *supra* note 10, ¶ 623a.

duct element of the monopolization offense in *United States v. Aluminum Co. of America*.[14] In that case, the United States alleged that Alcoa monopolized the production of virgin aluminum ingot in violation of Section 2 and sought its dissolution.[15] Because the United States Supreme Court lacked a quorum of six justices qualified to hear the appeal, the final decision was rendered by the three senior judges of the relevant circuit, Learned Hand, Thomas W. Swan, and Augustus N. Hand.[16] After facing difficult issues regarding the impact of ingots made from scrap aluminum, imports and Alcoa's own internal use of ingots to fabricate other products, Learned Hand, writing for the court, concluded that Alcoa had monopoly power for purposes of Section 2.[17] The court then addressed the conduct element.

The portion of the opinion addressing the conduct element first sets forth a series of statements which characterize lawful conduct by a monopolist. Some of those statements are then applied to the facts of the case to reach a conclusion. Learned Hand's statements characterizing lawful conduct by a monopolist are fundamentally inconsistent. On one hand, he offers a number of characterizations of lawful conduct which require passivity on the part of a monopolist. "[Defendant] may not have achieved monopoly; monopoly may have been thrust upon it . . . . [P]ersons may unwittingly find themselves in possession of a monopoly, automatically so to say . . . they may become monopolists by force of accident."[18] On the other hand, Learned Hand offers an alternative characterization under which ordinary competitive acts would be lawful despite the fact that competitors are eliminated and monopoly power results.

> A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins.[19]

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14. United States v. Aluminum Co. of America (hereinafter Alcoa), 148 F.2d 416 (2d Cir. 1945).

15. *Id.*

16. *Id.*

17. *Id.* at 422-29.

18. *Id.* at 429-30.

19. *Id.* at 430.

Learned Hand's conflicting characterizations of lawful conduct by a monopolist reflect an underlying conflict about the role of the conduct element. A characterization requiring a monopolist to be passive virtually eliminates the conduct requirement. Such a characterization would make any monopoly illegal if the monopolist engages in any conduct which impacts an actual or potential competitor adversely. The urge to reduce the conduct element to insignificance rests on the realization that monopoly pricing imposes welfare losses on society without further conduct by the monopolist. Learned Hand's alternative characterization of lawful conduct by a monopolist would legalize many monopolies. This characterization would allow any act based on "superior skill, foresight and industry"[20] as well as any act which constitutes ordinary competition. Learned Hand recognizes that such a characterization of the conduct element "may expose the public to the evils of monopoly."[21]

Because Learned Hand was addressing a concrete factual situation, he had to choose between his conflicting characterizations of the conduct element. He chose the characterization requiring passivity.[22] During the period addressed by the record, demand for aluminum grew rapidly. Alcoa expanded production to meet anticipated increases in demand. Alcoa argued that this action constituted a competitive act based on skill, which the process of competition encouraged, and, therefore, did not satisfy the conduct element.[23] Learned Hand, however, held that Alcoa's expansion of capacity satisfied the conduct element and violated the Act. In doing so, he characterized the conduct element as creating a narrow exception to liability for "those who do not seek, but cannot avoid, control of a market."[24] Obviously, this holding adopts a definition of the conduct

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20. *Id.*

21. *Id.*

22. "It would completely misconstrue 'Alcoa's' position in 1940 to hold that it was the passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces." *Id.*

23. " 'Alcoa' avows it as evidence of the skill, energy, and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered." *Id.* at 430-31.

24. Learned Hand:

> We need charge it with no moral derelictions after 1912; we may assume that all it claims for itself is true. The only question is whether it 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 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. It insists that it never excluded competitors; but we can think of no more effective exclu-

element which will almost always be satisfied.

Learned Hand's conflicting characterizations of the conduct element reflect the dilemma which has proven so difficult to resolve in the past. If the conduct element is defined in a way that allows a monopolist to engage in competitive acts which adversely affect existing or potential competitors, society may be forced to suffer the ill effects of enduring monopoly. If the conduct element is virtually eliminated by defining it in such a way that it is always satisfied, a monopolist will be condemned for engaging in acts which the process of competition is designed to foster. Parts II and III will explore attempts by Judge Bork and the United States Supreme Court to resolve this dilemma. Both of these attempts base their definition of the conduct element upon the reasons for prohibiting monopoly rather than the reasons for legalizing some monopolies by operation of the conduct element.

II. JUDGE BORK'S EFFICIENCY-PREDATION DICHOTOMY

The recognition that a monopolist's increase in price and reduction in quantity cause harm makes it difficult to defend the existence of the conduct element when the grounds for defense are limited to maximizing the net welfare of society. The conduct element legalizes some monopolies which have increased price and reduced quantity. This difficulty caused Areeda and Turner to urge that the conduct element be eliminated in governmental actions seeking injunctive relief against a substantial, persistent monopoly.[25]

Judge Bork defines a version of the conduct element which he argues maximizes the net welfare of society in his influential book, *The Antitrust Paradox*.[26] The first hurdle which a reader faces in understanding Judge Bork's analysis is the label he applies to it: the consumer welfare model.[27] While the label implies a distinction between the interests of consumers and producers, the model values the

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> sion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the lite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

Id. at 431.

25. 3 AREEDA & TURNER, *supra* note 10, ¶ 623a.

26. ROBERT H. BORK, THE ANTITRUST PARADOX (1978).

27. *Id.* at ch. 5.

interests of both groups equally. Judge Bork's explanation of his model's treatment of the wealth transfer from consumers to producers caused by monopoly pricing makes this clear. When the price of a product is increased from the competitive level to a monopoly level some consumers either stop buying the product or buy less of it. Consumers who continue to purchase, pay more per unit than they would under competitive conditions. This increase paid on purchases made at the monopoly price causes a wealth transfer from consumers to producers. For society as a whole, the wealth transfer does not affect total welfare because it merely transfers wealth from one group in society, consumers, to another group, producers. Judge Bork's consumer welfare model values the welfare of consumers and producers in this situation equally. Judge Bork describes the wealth transfer to producers "who are also consumers."[28] In the lexicon of Judge Bork's model, both consumers and monopolists are "classes of consumers."[29] Thus, Judge Bork's consumer welfare model is a standard efficiency model measuring the net welfare of society.

Any approach to the monopolization offense of Section 2 based upon maximizing the net economic welfare of society must confront the net detrimental effects of monopoly pricing. At a minimum, these effects include the losses suffered by consumers who would purchase the monopolized product under competitive conditions but switch to substitute products when faced with a monopoly price. The welfare of these consumers is reduced without any offsetting gain to the monopolist, thus causing a net reduction in the welfare of society. Accepting any form of the conduct element legalizes at least some monopolies where these losses are possible. It was this prospect which caused Areeda and Turner to recommend abolition of the conduct element in governmental actions seeking equitable relief against a substantial, persistent monopoly.[30] This approach would make such a monopoly illegal without regard to conduct adversely affecting competitors in order to avoid the net welfare loss caused by monop-

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28. *Id.* at 110.

> Those who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, who are also consumers. This is not dead-weight loss due to restriction of output but merely a shift in income between two classes of consumers. The consumer welfare model, which views consumers as a collectivity, does not take this income effect into account. If it did, the results of trade-off calculations would be significantly altered.

Id.

29. *Id.*

30. *See supra* text accompanying note 25.

oly. Judge Bork uses the same goal of maximizing the net welfare of society to reach virtually the opposite conclusion. He asserts that single firm monopoly power should almost always be lawful.[31]

Understanding Judge Bork's approach to the conduct element requires an understanding of his definition of predatory conduct. In his view an act is predatory if it causes the monopolist to forego profits in the present in order to increase or maintain its monopoly power and earn monopoly profits in the future.

> Predation may be defined, provisionally, as a firm's deliberate aggression against one or more rivals through the employment of business practices that would not be considered profit maximizing except for the expectation either that (1) rivals will be driven from the market, leaving the predator with a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds inconvenient or threatening.[32]

Under this definition, predatory conduct is a present expenditure which is profit maximizing because it affects the actors' monopoly power, thereby yielding increased monopoly profits in the future. Judge Bork uses this definition of predation in contrast with efficient conduct, to create an efficiency-predation dichotomy. His approach to the conduct element is based upon this dichotomy.

Judge Bork believes that self-adjusting mechanisms at work in the marketplace cause the resulting monopolies to be better for the net welfare of society than the alternative of dissolving the monopolist into competing firms.[33] Judge Bork's argument has four components. First, if a monopolist is restricting output, raising prices, and making higher than competitive profits, potential entrants will discover this fact and attempt entry. Second, a potential entrant may be excluded only by the superior efficiency of the monopolist or by acts which are "predatory."[34] Third, predatory acts are very rare.[35]

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31. BORK, *supra* note 26, at 160.

32. BORK, *supra* note 26, at 144. For an argument that a firm may gain monopoly power without foregoing present profits by purchasing exclusionary rights from input suppliers, *see* Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986); *see also* Douglas F. Greer, *"Understanding 'Raising Rivals' Costs'": Comment*, 34 ANTITRUST BULL. 895 (1989).

33. BORK, *supra* note 26, at ch. 8.

34. As stated earlier, Judge Bork uses the word predatory to mean acts which are profit maximizing only because they enhance the monopololist's power over price in the future. BORK, *supra* note 26, at 144.

35. BORK, *supra* note 26, at 144-60.

Fourth, from the perspective of the net welfare of society, a monopolist which has survived by being more efficient than potential entrants, is preferable to competing firms resulting from the dissolution of the monopoly because those competing firms would be no more efficient than the potential entrants. The combination of these four components leads to the conclusion that, in the absence of rare predation, a monopolist will either have its dominant position eroded by entry, or will survive by providing society with products more cheaply than the firms resulting from a judicially ordered dissolution.

The analysis set forth in this article rejects Judge Bork's contention that the universe of conduct by monopolists can be divided into two sets, the efficient and the predatory, defining predation as conduct which is profit maximizing only because of an impact on future monopoly power.[36] Rejecting this contention requires rejecting the premise that the conduct element can be defined based upon an efficiency-predation dichotomy.[37] The other components of Judge Bork's argument, however, are also subject to question. It may not be universally true that potential entrants will always be able to discern when a firm with a high market share is making profits above the competitive level. This is particularly the case for a monopolist making numerous products, or where the monopolist's costs are not easy to discover. Further, the issue of whether predation is common or rare and the development of legal tests to detect it have been topics of great scholarly and judicial debate.[38] Finally, in some markets, firms resulting from a dissolution might be more efficient than new entrants. This is particularly the case where the monopolist has valuable information which would be shared with some or all of the firms resulting from a dissolution but is not available to new entrants.

In summary, Judge Bork and Areeda and Turner adopt approaches to the conduct element of the monopolization offense based on an efficiency rationale. Areeda and Turner conclude that a monopoly could be illegal without culpable conduct by the monopolist.

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36. *See infra* Part IV.

37. *See infra* text accompanying notes 121-25.

38. *See, e.g.*, Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1985); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983); Thomas J. Campbell, *Predation and Competition in Antitrust: The Case of Nonfungible Goods*, 87 COLUM. L. REV. 1625 (1987) (reviewing predation literature); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); Lawrence A. Sullivan, *Monopolization: Corporate Strategy, the IBM Cases, and the Transformation of the Law*, 60 TEX. L. REV. 587 (1982).

Judge Bork, on the other hand, concludes that the conduct element should be defined based upon an efficiency-predation dichotomy in such a way that few monopolies would be illegal. The analysis set forth in this article concludes that the conduct element is not based upon an efficiency-predation dichotomy. Part III of this article will analyze the Supreme Court's application of the conduct element in cases which reach startling results because the Court adopts Judge Bork's efficiency-predation dichotomy as the basis for the conduct element.

III. The Supreme Court Adopts the Efficiency-Predation Dichotomy as the Basis for the Conduct Element

The Supreme Court's contemporary position regarding the conduct element of the monopolization offense is set forth in two cases discussed in this section.[39] In these cases plaintiffs claimed that defendants were monopolists and had engaged in conduct tending to exclude the plaintiffs from the market. In each case the Court focused on the possibility that the alleged monopolist refused to deal or cooperate with the plaintiff. Because of this focus, the Court needed to address the conduct element in the context of refusals by monopolists to cooperate with rivals. The Court concluded that the conduct element was controlled by the efficiency-predation dichotomy and developed a qualified duty requiring monopolists sometimes to cooperate with rivals.

In both of these cases, the Supreme Court failed to perceive that the alleged monopolists engaged in conduct other than refusing to cooperate with rivals and that the other conduct might give rise to liability under the monopolization offense.

A. *A Monopolist Ski Resort's Refusal to Cooperate with a Rival Is Deemed Predatory Because It Was Not Efficient*

1. *The Supreme Court Condemns a Monopolist for Refusing to Continue a Joint Marketing Arrangement With a Competitor*

The Supreme Court addressed the conduct element of the monopolization offense in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[40] In that case the defendant, Ski Co., owned three of four ski-

39. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1984); Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072 (1992).

40. *Aspen Skiing Co.*, 472 U.S. 585 (1984).

ing facilities in Aspen, Colorado. The plaintiff, Highlands, owned the fourth.[41] In addition to offering skiing at each of their respective facilities, the plaintiff and defendant had for a number of years cooperated to offer a joint four-mountain ticket. This ticket was good for six consecutive days of skiing at any of the four mountains in Aspen.[42] The revenues from the joint four-mountain ticket were divided between plaintiff and the defendant based upon the proportion of skiing done by joint ticket holders at each mountain.[43] In the late 1970's, discord developed between the plaintiff and the defendant over the four-mountain ticket. This discord culminated in 1978 when Ski Co. offered to continue the four-mountain ticket only if Highlands would agree to accept a fixed share of the revenue which was significantly below its historical average.[44] Ski Co. purported to find the distribution of revenues based on surveys of use unacceptable because it doubted the accuracy of the surveys and was troubled by the methods employed by the survey takers.[45] Therefore, Highlands offered to pay for surveys by a nationally recognized accounting firm. When Ski Co. refused to consider this proposal and stuck to its fixed proportion offer, Highlands declined.[46]

The termination of the joint four-mountain ticket put Highlands in a difficult marketing position. In place of the joint four-mountain ticket, Ski Co. continued to offer a six-day ticket to its three mountains. Highlands tried to create a convenient package which would allow a skier to ski Highlands for several days and Ski Co. for the remainder of the week. These efforts were thwarted by Ski Co., which refused to sell daily lift tickets to Highlands at the tour operator's discount or at retail.[47] When Highlands marketed an "Adventure Pack" consisting of a three-day Highlands pass and

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41. *Id.* at 590.

42. *Id.*

43. The use of each mountain by joint ticket holders was monitored in three ways. Initially the joint ticket took the form of a booklet of six coupons, each of which could be exchanged at the ski lift for a day ticket. Under this system the portion of use by joint ticket holders was monitored by counting the coupons collected at each mountain. *Id.* at 589. Later the four-mountain ticket took the form of a pass worn around the neck. This allowed the holder to avoid standing in the ticket line each morning. However, monitoring use of each mountain by holders of the joint ticket became more difficult. During the first season in which the around-the-neck pass was sold, usage was monitored by lift operators. *Id.* at 590. Thereafter random surveys were used to monitor use. *Id.*

44. Ski Co. offered Highlands 12.5% of the revenue from the joint ticket. *Id.* at 592. "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 1976-77." *Id.* at 590 (footnote omitted).

45. *Id.* at 592.

46. *Id.* at 593.

47. *Id.*

three vouchers equal to the daily lift ticket price at Ski Co. and guaranteed by funds on deposit at an Aspen bank, Ski Co. refused to accept the vouchers.[48] After Highlands replaced the vouchers with American Express Traveler's checks, Ski Co. established a price relationship between its daily tickets and its six-day tickets, which made the Adventure Pack an unprofitable package in Highlands' view.[49] Highlands' share of skiing in Aspen declined significantly after the abolition of the joint four-mountain ticket.[50]

Highlands eventually filed suit alleging that Ski Co. had violated Section 2 of the Sherman Act by monopolizing the downhill skiing market at Aspen. The trial court entered judgment on the jury's verdict in favor of Highlands.[51] Ski Co. did not challenge in the Supreme Court the jury's special verdict finding that it possessed monopoly power in the relevant market.[52] Thus, the Court was faced with the issue of whether Ski Co.'s actions satisfied the conduct element of Section 2. The Court concluded in an eight to zero decision[53] that while "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor,"[54] Ski Co.'s refusal to continue the joint four-mountain ticket satisfied the conduct element of the monopolization offense.[55]

2. *The Supreme Court Fails to Perceive That Ski Co.'s Conduct Was Analogous to a Tying Arrangement*

The Court's sense that there was something unsavory about Ski Co.'s conduct led it to condemnation of the demise of the four-mountain ticket. The Court could have condemned Ski Co.'s conduct, however, without focusing on the termination of the four-mountain ticket or imposing a duty on monopolists to aid their competitors. The Court failed to realize that Ski Co. engaged in conduct other

48. *Id.* at 593-94.
49. *Id.* at 594 n.15.
50. *Id.* at 594-95.
51. *Id.* at 595.
52. *Id.* at 596. The jury identified the relevant product market as downhill skiing at destination ski resorts and relevant geographic submarket as Aspen. *Id.* at n.20. Treating Aspen as a relevant submarket seems implausible on its face. Since most skiers travel long distances to get to Aspen, the geographic market would seem considerably larger than Aspen. By altering their travel arrangements slightly, skiers would end up at any of a large number of resorts. Thus, even a firm with 100% of the skiing facilities at Aspen would have to compete with many other resorts.
53. Justice White took no part in the decision. *Id.* at 585.
54. *Id.* at 600.
55. *Id.* at 610-11.

than the termination of the four-mountain ticket which could be analyzed under the conduct element.

When Ski Co. terminated the four-mountain ticket, it continued to offer a six-day ticket to its three mountains.[56] This ticket was offered at a substantial discount off the daily ticket price.[57] The Court observed that this price disparity created a strong incentive to buy the six-day ticket.[58] The Court did not recognize, however, that the pressure placed on skiers to buy the six-day ticket by Ski Co.'s pricing policy could be analyzed separately from the termination of the four-mountain ticket. The pricing structure adopted by Ski Co. gave skiers staying a week three choices: They could ski for six days at Ski Co. at a cheap rate; or, they could ski for six days at Highlands; lastly they could ski at Highlands for several days and pay Ski Co.'s expensive daily rate for the rest of their visit. For skiers affected by the discount, the choice was skiing six days at Ski Co. or six days at Highlands. The discount coerced skiers into a choice between purchasing solely from Ski Co. or solely from Highlands. The Court did not recognize that the adoption of this pricing structure was an act, separate from the termination of the joint four-mountain ticket arrangement, which might satisfy the conduct element.

The coercive effect of Ski Co.'s pricing structure could be analogized to a "tying" arrangement. Because Ski Co. was giving skiers a substantial incentive to buy the six-day ticket instead of purchasing individual tickets on a daily basis, it was in effect tying all six days of skiing together.[59] Ski Co.'s de facto tie of six days of skiing causes two anticompetitive consequences. First, barriers to entry are significantly raised and, second, Ski Co.'s power over price is enhanced.

Entry barriers are raised because entry will be required on a much larger and more difficult scale. By tying six days of skiing together, Ski Co. altered the unit of production in the market. Before the tie, the unit of production was one day of skiing. A producer in the market had to offer a day of skiing of a competitive quality.[60] After the tie, the unit of production for skiers who were spending a week in Aspen was a six-day block of skiing. Once Ski Co. tied its

56. *Id.* at 593.

57. For example, during the 1981-82 season the six-day three-mountain ticket cost $114, while six daily tickets cost $132. *Id.* at 594 n.15.

58. *Id.* at 610 n.42.

59. Professors Areeda and Hovenkamp recognize the coercive effect of Ski Co.'s pricing practices and characterize the effect as "quasi-exclusive dealing." PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.1f (Supp. 1990).

60. A smaller unit of production is possible if producers sold tickets for portions of a day and skiers wanted part-day tickets.

skiing into a six-day package, such skiers could either ski six days at Ski Co. or six days at Highlands.[61] Under this arrangement, a producer must offer not merely one day of skiing of competitive quality but six.

Offering six days of quality skiing is substantially more difficult than offering one. Many Aspen visitors want the variety in their skiing experience that comes from skiing different types of terrain.[62] As a result, it takes a much larger facility to provide six days of interesting skiing than one. Thus, if the unit of production is changed from one day of skiing to six, a much larger scale of operation is required.

If an increase in scale merely required an increase in capital, entry barriers might not be significantly affected. In the Aspen skiing market, however, an increase in scale would be very difficult. To begin, a world-class downhill skiing facility requires obvious topographical conditions. Most of the suitable terrain near Aspen is controlled by the United States Forest Service, an agency heavily concerned about the environmental impact of any new skiing facility.[63] Further, approval of the county government would be required and it had adopted a policy limiting growth.[64] Because of these geographic and regulatory hurdles, it would be difficult for Highlands to expand its existing facility significantly. Although it can offer one day of interesting skiing, it cannot offer six. Therefore, when Ski Co.'s tie increased its unit of production from one day to six days for visitors staying a week, it effectively took Highlands out of that portion of the market.

In addition to raising entry barriers, Ski Co.'s tie of six days of skiing enhanced its power to control price. Most arrangements involving tying and tied products that are used in fixed proportions do not increase the seller's power to extract monopoly profits.[65] If the seller has monopoly power in the tying product, it will often be able

61. The discussion in the text assumes that, because of the discount for the six-day ticket, splitting the week between Ski Co. and Highlands and paying the higher daily rate was unattractive at least for a significant number of skiers.

62. The utility of any one mountain declines over the time which a particular skier uses it. During six days of skiing any mountain is of high quality only for several days. *Aspen Skiing Co.*, 472 U.S. at 606 n.34.

63. *Id.* at 588.

64. *Id.* at 588-89.

65. If the tying and tied products are not used in fixed proportions, the seller may be able to increase its profits by using sales of the tied product as a metering device to price discriminate between high-volume and low-volume users. *See* HOVENKAMP, *supra* note 8, at 229-30.

to extract the total monopoly profits available by charging the monopoly price for that product.[66] In the Aspen skiing context, however, this typical analysis does not apply. This is because Ski Co. is unable to determine which skiers are purchasing the product over which Ski Co. has monopoly power.

In order to understand why this is so, it is necessary to recall that because of skiers' demand for variety, the quality of skiing at any one mountain declines after several days.[67] Thus, during a particular skier's six-day stay in Aspen, Highlands can compete for several of the days, but Ski Co. has the only available facilities for the remainder. Because skiers do not ski the facilities in Aspen in any particular order, absent the tie, Ski Co. will not be able to determine when it is competing with Highlands and when it is not. Were it able to do so, Ski Co. could extract the full monopoly profits by increasing its price when it was not competing with Highlands. Since it is not able to do this, the only way to capture these profits is to tie the six days of skiing together and price them as a package. Thus, tying the six days of skiing into a package allows Ski Co. to extract monopoly profits not otherwise available by avoiding the impossible task of determining when it is facing Highlands' competition and when it is not.[68]

In summary, the Court recognized that Ski Co.'s pricing pattern created a strong incentive for week-long visitors to Aspen to buy a six-day Ski Co. ticket.[69] The Court failed, however, to realize that the adoption of this pricing pattern was an act separate from the termination of the joint four-mountain ticket. Failure to recognize this distinction prevented the Court from analyzing whether adopting this pricing pattern would have satisfied the conduct element of the monopolization offense.

3. *The Supreme Court Explains Its Condemnation of the Demise of the Joint Marketing Arrangement by Adopting the Efficiency-Predation Dichotomy*

Because the Supreme Court did not recognize Ski Co.'s pricing pattern as separate conduct, it focused on the termination of the joint four-mountain ticket and condemned this termination as violating

66. HOVENKAMP, *supra* note 8, at 223-24.

67. *See supra* text accompanying note 62.

68. For a similar analysis in the context of the block booking of movies, see PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS-PROBLEMS, TEXT, CASES 726 n.34 (4th ed. 1988) and GEORGE STIGLER, THE ORGANIZATION OF INDUSTRY 165-66 (1968).

69. *Aspen Skiing Co.*, 472 U.S. at 593-95.

the conduct element. In reaching this conclusion, the Court quoted Judge Bork and adopted the efficiency-predation dichotomy. "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[70] The Court applied this standard by examining (1) the impact of Ski Co.'s conduct on Highlands' ability to compete,[71] (2) the effect of that conduct on consumer welfare,[72] and (3) Ski Co.'s justification for its conduct.[73]

The Court determined that termination of the joint four-mountain ticket had a sufficiently adverse impact on Highlands' ability to compete that it could properly be characterized as exclusionary.[74] Mere exclusion of a rival, however, is insufficient to satisfy the conduct element of the monopolization offense. Under the standard adopted by the Court, this exclusion must be predatory rather than efficient.[75] The Court found that consumer welfare declined when the four-mountain ticket was abolished. It based this conclusion on consumer surveys, anecdotal evidence, and the consumer preference for the four-mountain ticket over a three-mountain Ski Co. ticket when both were offered. The Court then considered Ski Co.'s justification for its conduct. The Court assumed that the jury found that Ski Co. had no valid business purpose for terminating the four-mountain ticket[76] and determined that this finding was supported by the evidence.[77] The Court concluded that the jury could have found that no efficiency justification existed, and that Ski Co. sought financial gain, not by efficiency, but by excluding Highlands.[78]

In the absence of an efficiency justification, the Court offered a predatory explanation of Ski Co.'s conduct. It believed that Ski Co. was foregoing profits by refusing to sell daily lift tickets to Highlands for resale and by refusing to accept the vouchers contained in

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70. *Id.* at 605 (footnote omitted)(quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)).

71. *Id.* at 607.

72. *Id.* at 605.

73. *Id.* at 608.

74. *Id.* at 607-08.

75. *Id.* at 605.

76. *Id.* at 604-05.

77. *Id.* at 608-11. In rejecting Ski Co.'s efficiency justification the Court cited Judge Bork's application of the efficiency-predation dichotomy to changes in distribution patterns. *Id.* at 608-09 n. 39. *See* BORK, *supra* note 26, at 156-59.

78. *Aspen Skiing Co.*, 472 U.S. at 608-10. In determining that Ski Co. offered no efficiency justification for its conduct, the Court rejected Ski Co.'s purported concerns about the skier surveys to monitor use and being associated with Highlands' alleged inferior skiing.

Highlands' Adventure Pack.[79] The Court concluded that Ski Co. may have been willing to forego these short-term profits in order to gain long-term benefits by reducing Highlands' ability to compete in the future.[80] Such a predatory strategy would satisfy the standard adopted by the Court. The Court's inference, however, is hardly compelled by the evidence. The Court assumed that when Ski Co. refused to cooperate with Highlands' Adventure Pack program, either by selling Ski Co. daily lift tickets in bulk to Highlands or by accepting Adventure Pack vouchers, it was merely giving up ticket sales. However, it seems much more likely that in trying to make the Adventure Pack an inconvenient package for skiers to use, Ski Co. was attempting to sell those skiers six days of skiing at Ski Co. facilities. In essence, Ski Co. was telling skiers that it was more convenient to ski at Ski Co.'s three mountains for six days than to ski part of the week at Highlands and part of the week at Ski Co. Under this view of the facts, Ski Co. was trying to sell more skiing up front. It was not foregoing sales now in order to gain sales later after its competitor was injured.[81] Thus, the Court's predatory explanation is inappropriate.

In summary, the Court in *Aspen Skiing* seems to be saying that a monopolist violates Section 2 when it refuses to aid a competitor by cooperating in a joint marketing effort, where the monopolist has previously cooperated and cannot persuade a jury that its present refusal is justified by an efficiency calculus.[82] Such a conclusion would, of course, have dramatic consequences in the on-going debate about the parameters of the conduct element of the monopolization offense.[83]

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79. "Ski Co. was apparently willing to forego daily ticket sales both to skiers who sought to exchange the coupons contained in Highlands' Adventure Pack, and to those who would have purchased Ski Co. daily lift tickets from Highlands if Highlands had been permitted to purchase them in bulk." *Id.* at 608.

80. "The jury may well have concluded that Ski Co. elected to forego these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Id.* at 608.

81. *See* AREEDA & HOVENKAMP, *supra* note 59, at 753 n.36.

82. In reaching this conclusion the Court disclaimed reliance upon the essential facilities doctrine. *Aspen Skiing Co.*, 472 U.S. at 611 n.44.

83. *Aspen Skiing* provoked considerable commentary. *See, e.g.*, Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986); Arthur H. 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 (1986); Daniel W. Ladd, III, Note, *The Efficiency Defense: Section Two Limits On Monopolist Conduct After* Aspen, 86 COLUM. L. REV. 1712 (1986); David M. Rievman, Note, *The* Grinnell *Test of Monopolization Sounds A False Alarm:* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 28 B.C. L. REV. 415 (1987); Mary E. Schill, Note, *Refusals To Deal By Single-Firm Monopolists—Should We*

The Court concludes that Ski Co.'s termination of the joint four-mountain ticket was predatory because it was not efficient. This analysis is based upon the efficiency-predation dichotomy, i.e., the premise that profit maximizing conduct by a monopolist is either efficient or predatory.[84] The Supreme Court has recently relied on *Aspen Skiing* to impose a duty on an alleged monopolist to sell to its rivals.[85]

B. *The Supreme Court Holds That a Machine Manufacturer Must Sometimes Sell Parts to its Rivals in the Service Market*

In *Eastman Kodak Co. v. Image Technical Services, Inc.*[86] the Supreme Court faced claims under both Section 1 and Section 2 of the Sherman Act. Section 1 prohibits agreements between two or more parties which unreasonably restrain trade,[87] while unilateral conduct by a monopolist can violate Section 2. The defendant, Kodak, engaged in three lines of business. It manufactured photocopying and micrographic equipment. It sold parts for the equipment it manufactured. Finally, for a fee it serviced the equipment.[88] The plaintiffs were independent service organizations (hereinafter ISOs) which competed with Kodak in providing service for equipment sold by Kodak.[89] Kodak manufactured some of the parts needed for servicing the equipment. Other parts were manufactured by third parties called original-equipment manufacturers (hereinafter OEMs).[90] ISOs purchased parts either directly from Kodak and OEMs or indirectly through intermediaries.[91]

The plaintiffs alleged that in the mid-1980's Kodak took steps

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Rob Peter To Save Paul?, 63 NOTRE DAME L. REV. 214 (1988); David M. Tyler, Jr., Note, *The Monopolist's Duty To Cooperate In Joint Marketing Ventures With Competitors: The Quandary of* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 32 WAYNE L. REV. 1243 (1986); *The Supreme Court-Leading Cases*, 99 HARV. L. REV. 120, 275-283 (1985).

84. Part IV will demonstrate that this premise is false. The efficiency-predation dichotomy fails because a monopolist may sometimes maximize its profits by conduct which is neither efficient nor predatory.

85. Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072 (1992).

86. *Id.*

87. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988). The literal words of Section 1 appear to prohibit all agreements restraining trade. For most of a century, however, courts have recognized that reasonable restraints of trade are lawful. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

88. *Eastman Kodak*, 112 S. Ct. at 2076.

89. *Id.*

90. *Id.* at 2077.

91. *Id.*

to limit the availability of parts to ISOs to impede ISOs competing in the service business.[92] First, Kodak would not sell parts to ISOs. Second, Kodak would sell parts to owners of Kodak equipment only if they also purchased service from Kodak or did their own service. Kodak would not sell parts to equipment owners who bought service from ISOs. Third, Kodak agreed with OEMs that the OEMs would sell parts which fit Kodak equipment only to Kodak.[93] These steps had the predictable adverse impact on the ISOs.

The ISOs sued alleging that the steps taken by Kodak violated Section 1 and Section 2 of the Sherman Act. The plaintiffs alleged that Kodak engaged in an unlawful tying arrangement tying the purchase of parts to the purchase of service from Kodak. This arrangement allegedly constituted an unreasonable agreement in restraint of trade which violated Section 1.[94]

Agreements which restrain trade are judged under two alternative standards. The standard applied to most agreements is the Rule of Reason under which the procompetitive and anticompetitive aspects of the agreement are analyzed.[95] Some agreements, however, are so likely to have anticompetitive consequences that they are deemed illegal per se.[96] Tying arrangements are per se illegal if four elements are present.[97] First, two separate products must exist. The desired product is referred to as the tying product and the undesired product is referred to as the tied product. Second, the sale of the tying product must be conditioned on the sale of the tied product. Third, the seller must have sufficient market power in the market for the tying product to force the purchase of the tied product. Finally, a not insubstantial volume of commerce in the tied product must be affected.[98] The principal element of the claim under Section 1 which was in dispute before the Supreme Court was whether Kodak had sufficient market power in parts to force the purchase of service.[99]

Kodak contended that it could not have market power over parts since it did not have market power in the equipment market. The district court had granted Kodak's motion for summary judgment. Therefore, the issue before the Supreme Court was whether

92. *Id.* at 2077-78.
93. *Id.* at 2078.
94. *Id.* at 2074.
95. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-92 (1977).
96. Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958).
97. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1983).
98. *Id.* at 12-18, 20-22.
99. *Eastman Kodak*, 112 S. Ct. at 2074.

Kodak's contention was correct as a matter of law. If a reasonable trier of fact could find that Kodak had market power in parts even though it lacked power in equipment, then summary judgment was not appropriate on this issue. The Supreme Court held that summary judgment was inappropriate.[100] It ruled that the ISOs had presented sufficient evidence of power over parts and imperfect connections between the parts and equipment markets to withstand a motion for summary judgment.[101]

The ISOs also alleged that Kodak had violated Section 2 of the Sherman Act by monopolizing or attempting to monopolize the parts market and the service market.[102] The Supreme Court held that the ISOs had presented sufficient evidence of monopoly power to survive a motion for summary judgment on the power element of the monopolization offense.[103] The Court went on to consider the evidence that the conduct element of the monopolization offense was satisfied.

The Court's discussion of the conduct element begins with four somewhat opaque sentences. First, the Court quotes *United States v. Griffith*.[104] "The second element of a [section] 2 claim is the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.' "[105] This sentence seems to stress the distinction between acts which are uses of monopoly power and acts which do not depend on monopoly power.[106] The Court's second sentence, however, does not address this distinction. "If Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated [section] 2."[107] This sentence stresses the willfulness of the defendant's conduct. As has been frequently noted, however, willfulness is not a helpful concept for separating lawful from unlawful

100. *Id.* at 2089.

101. *Id.* at 2089-90.

102. *Id.* at 2089.

103. The ISOs had presented evidence that Kodak controlled almost 100% of the parts market and over 80% of the market for service of Kodak equipment. 112 S. Ct. at 2089. The monopoly power element of the monopolization offense of Section 2 requires more power than the market power element of the per se tying offense under Section 1. *Id.*

104. United States v. Griffith, 334 U.S. 100, 107 (1948).

105. *Eastman Kodak*, 112 S. Ct. at 2090.

106. See also Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 283 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), in which the court distinguished conduct requiring monopoly power from conduct which does not.

107. *Eastman Kodak*, 112 S. Ct. at 2090 (citing United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966), United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945), and Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600-05 (1984)).

conduct by an alleged aggressor under the antitrust laws.[108] The paradigm of lawful conduct under the monopolization offense, the non-predatory invention of a better or cheaper product, is a willful act designed to make sales and gain market share. Thus, willfulness does not separate lawful from unlawful conduct under Section 2.

The Court's third and fourth sentences addressing the conduct element introduce the concept which the Court finds dispositive. "It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal."[109] The Court cites *Aspen Skiing*[110] for this proposition.[111] The Court then goes on to require business justifications for exclusionary acts in addition to refusals to deal.[112] It is the presence or absence of "legitimate competitive reasons" or "valid business reasons" which controls whether a monopolist's exclusionary conduct is lawful. Since the case arrived at the Court on an appeal from the grant of the defendant's motion for summary judgment the issue was whether the plaintiffs presented sufficient evidence contesting the defendant's offered business or competitive reasons to create a contested issue of fact.[113]

The Court concluded that summary judgment was improper since contested issues of fact existed regarding the justifications which Kodak offered for its conduct.[114] Kodak first asserted that preventing equipment owners from using ISOs was justified because it would maintain high standards for service. This would assist Kodak in the equipment market by preventing customers from blaming Kodak equipment for defects caused by poor service. The Court, however, found that there was a contested issue of fact regarding whether preventing equipment owners from using the ISOs they preferred was necessary to ensure quality service and to ensure that customers correctly assigned blame for defects. The ISOs had submitted evidence that they provided quality service. Furthermore, if ISOs provided low quality service, the customers could reach that

108. *See, e.g.*, A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400-02 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990).

109. *Eastman Kodak*, 112 S. Ct. at 2091.

110. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1984).

111. *Eastman Kodak*, 112 S. Ct. at 2091.

112. "As recounted at length above, respondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market. Liability turns, then, on whether 'valid business reasons' can explain Kodak's actions." *Id.*

113. *Id.*

114. *Id.*

conclusion. The claim that customers were too unsophisticated to make that determination was undermined by Kodak's willingness to sell parts to customers who provided their own service and by Kodak's claim in its market definition argument that customers were extremely sophisticated at acquiring information.[115]

The Court also concluded that a factual issue existed regarding the second justification offered by Kodak. Kodak claimed that preventing customers from using ISOs was necessary to allow it to control inventory costs. The Court concluded that inventory costs depended on breakdown rates of Kodak equipment, not on who did the service. Further, a concern with inventory costs would not explain why Kodak prevented OEMs and others from selling parts to ISOs.[116]

Finally, Kodak claimed that preventing customers from using ISOs was justified in order to prevent free-riding on its efforts producing the equipment.

> Kodak claims that its policies prevent ISOs from 'exploit[ing] the investment Kodak has made in product development, manufacturing and equipment sales in order to take away Kodak's service revenues.' Brief for Petitioner 7-8. Kodak does not dispute that respondents invest substantially in the service market, with training of repair workers and investment in parts inventory. Instead, according to Kodak, the ISOs are free-riding because they have failed to enter the equipment and parts markets.[117]

The Court rejected this assertion as a matter of law. "This understanding of free-riding has no support in our caselaw."[118] The Court stated that conduct by a monopolist which requires a competitor to enter two markets and thus increases entry barriers is unlawful.[119] Thus in the Court's view, Kodak's conduct, designed to force ISOs to enter the parts market if they wanted to compete in the service market, was not justifiable.

The Court's approach to the conduct element of the monopolization offense has two important features. First, the Court does not set forth a definition of unlawful conduct. It refers to the concepts of use of monopoly power and willfulness but does not apply those con-

115. *Id.*

116. *Id.* at 2091-92.

117. *Id.* at 2092.

118. *Id.*

119. "[O]ne of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously." *Id.*

cepts. Second, the Court relies heavily on *Aspen Skiing* in requiring that a monopolist's conduct be justified by valid business or competitive justifications. These justifications then separate lawful from unlawful conduct. Third, while the Court relied heavily on *Aspen Skiing*, it does not overtly apply the concepts of predation and efficiency which expressly underlie the test set forth in that case. Since the Court offers no other conceptual basis for the conduct element and relies on *Aspen Skiing*, it apparently continues to adhere to the conceptual basis set forth there. Finally, the Court lumps all of the defendant's conduct into one category. Kodak engaged in three different types of conduct.[120] It refused to sell parts to ISOs. It sold parts to equipment owners only if they did not use ISOs. It agreed with OEMs that they would not sell parts to ISOs. Each of these categories of conduct may be separately analyzed and subjected to the test of lawful conduct under the monopolization offense of Section 2.

IV. THE FAILURE OF THE EFFICIENCY-PREDATION DICHOTOMY

Both Judge Bork and the Supreme Court accept the efficiency-predation dichotomy as the basis for the conduct element of the monopolization offense. Under this view a monopolist acts in a predatory manner when it engages in conduct which injures a rival and is profit maximizing only because it will increase the firm's monopoly profits in the future after the injured rival exits the market or limits its competitive activities.[121] Thus, a predator foregoes profits in the present in order to gain increased monopoly power, and profits, in the future.[122] The efficiency-predation dichotomy consists of two steps. The first is the truism that a profit maximizing monopolist is either attempting to gain profits in the present or in the future.[123]

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120. *See supra* text accompanying notes 92-93.

121. BORK, *supra* note 26, at 144. For criticism of Bork's view from the perspective of "raising rivals' costs" see Greer, *supra* note 32.

122. Some non-predatory conduct also requires foregoing profits in the present in order to gain greater profits in the future. The construction of a new factory which will produce goods at lower cost is an example. Constructing the factory costs money in the present. The output of the factory will yield profits in the future. Building the factory would not be predatory, however, if the future profits did not depend on any increase or stabilization of the firm's monopoly power, i.e., the power over price. Building a new, lower cost factory could be profit maximizing for a small firm in a competitive market with no monopoly power. Such an act would not be predatory. A monopolist may build a similar factory for similar reasons and such conduct would not be predatory. Predatory conduct requires an effect on monopoly power. Non-predatory conduct is profit maximizing without an effect on monopoly power, i.e., the power over price.

123. In *Aspen Skiing* the Court asked whether the defendant's conduct yielded increased revenue in the present or would increase profits only in the future. *Aspen Skiing Co.,* 472 U.S.

The second step is the assertion that a monopolist may gain profits in the present without any increase in its monopoly power only by being more efficient than its rivals.[124] If this second step were true then the universe of profit maximizing conduct by a monopolist could be divided into hemispheres of the efficient and the predatory.[125] The assertion that a monopolist may gain profits in the present only by being more efficient than its rivals is, however, false. A monopolist may engage in conduct which is presently profit maximizing without any effect on the actor's monopoly power but which reduces the net welfare of society. Such conduct is neither predatory nor efficient. It is not predatory because it presently maximizes profits without any effect on monopoly power. It is not efficient because it reduces the net welfare of society. Thus, the efficiency-predation dichotomy fails and cannot be used as the basis for the conduct element of the monopolization offense. This Part IV will examine two scenarios where profit maximizing conduct by a monopolist is neither predatory nor efficient and will explain why *Aspen Skiing* and *Eastman Kodak* are examples of both such scenarios.

A. *Forcing Customers into an All or Nothing Choice*

The efficiency-predation dichotomy assumes that a monopolist maximizes profits either by foregoing revenue now in order to gain more monopoly profits later, i.e. predation, or by gaining revenue now by advancing efficiency. The dichotomy breaks down if a monopolist can gain monopoly profits now without advancing efficiency. Such conduct would be neither predatory nor efficient. This is so when third parties such as customers or suppliers would prefer to deal both with a firm possessing monopoly power and with a competitor, but the monopolist engages in conduct designed to force customers or suppliers into dealing only with it. In such a situation the monopolist may presently gain revenues without advancing efficiency.

An example of confusion over the existence of this possibility is *Lorain Journal Co. v. United States*.[126] In that case the defendant newspaper served ninety-nine percent of the families in Lorain,

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at 608-11.

124. If the monopolist's conduct is presently profit-maximizing without an impact on monopoly power, that conduct is by definition not predatory. BORK, *supra* note 26, at 144. The efficiency-predation insists that if conduct is not predatory, it is efficient. *Id.* at 138-39.

125. *Id.* at 138-39.

126. Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

Ohio, a city of 52,000.[127] When a radio station commenced operations eight miles away in Elyria, the defendant newspaper refused to accept any advertising from businesses which also advertised on the new radio station. The United States filed a civil action alleging that the defendant newspaper violated Section 2 of the Sherman Act by engaging in an attempt to monopolize.[128] The Supreme Court agreed with the government and upheld the district court's judgment in its favor.[129]

The newspaper's conduct obviously caused advertisers to make a difficult choice. Many businesses wanted to advertise both in the newspaper and on the new radio station, but if forced to choose between using only the newspaper or only the radio, would choose the newspaper.[130] When the defendant newspaper forced the advertisers into making this choice it did not advance efficiency. Instead, it reduced the net welfare of society. The advertisers were worse off. By their own calculus, the advertisers maximized their welfare with a mix of newspaper and radio advertising. The defendant's conduct, which denied advertisers this choice, reduced their welfare. The newspaper, of course, gained by this strategy. It gained either by selling more advertising now or by forcing the radio station from the market and selling more advertising and/or charging higher rates later.[131] If it sought to gain by selling more advertising now, the newspaper's welfare gains would be directly offset by welfare losses to the radio station. These losses, combined with losses to advertisers, would yield a net loss to society. If the newspaper sought to gain by driving the radio station from the market and thereafter selling more and/or higher priced advertising later, the newspaper's welfare gains would be more than offset by current and future welfare losses to the radio station and advertisers. Thus, the newspaper's conduct forcing advertisers into an unpleasant choice does not advance efficiency.

A question which has caused more confusion is whether the newspaper's conduct was predatory in the sense which Judge Bork and the Supreme Court use the term. The newspaper's conduct would be predatory in that sense if it were profit maximizing only because it caused the radio station to exit the market or otherwise

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127. *Id.* at 146.

128. *Id.* at 145.

129. *Id.* at 144.

130. "Numerous Lorain advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use the radio." *Id.* at 153.

131. *See infra* text accompanying notes 132-33.

refrain from competitive behavior and thereafter allowed the newspaper to charge increased monopoly profits sufficient to recoup present costs of the challenged conduct.[132] This is predation in the sense of giving up profits now in order to gain monopoly profits later. The problem with reaching such a conclusion here is that it is far from clear that the newspaper's conduct caused it to forego present profits. Assuming that the Court was correct in its conclusion that newspaper advertising was essential to a large number of advertisers, the defendant newspaper would probably *gain* rather than lose present profits by forcing these advertisers to choose between advertising only on the radio or only in the newspaper. The newspaper's strategy might cause it to lose some present revenue because some advertisers might choose advertising only on the radio as opposed to only in the newspaper. Further advertisers who choose to advertise only in the newspaper might be willing to pay less per unit of advertising compared to what they would be willing to pay without the restriction limiting their advertising to the newspaper.[133] However, the newspaper's strategy would cause it to gain present revenue because it would sell more units of advertising. Given the Court's assumption that newspaper advertising was essential for many advertisers, presumably the vast majority of advertisers would choose advertising only in the newspaper over advertising only on the radio. These advertisers would have preferred to reach consumers in part by newspaper and in part by radio. Because the defendant newspaper has denied them this option these advertisers are forced to use the newspaper for all of their advertising messages. While the radio was the preferred route for some of these advertisements, when that route is closed, presumably they will turn to the newspaper as the only available medium for at least some of the advertising dollars for which the radio station would have been used.

In any particular case a factual question arises whether a defendant presently gains profits by forcing its customers to choose between buying all or none of their requirements from it. In at least some cases, however, the defendant will gain profits from increased unit sales. In such cases the increased profits result from increased unit sales, not an increase in monopoly power, i.e. the power over price. It seems likely that the defendant newspaper's strategy in *Lorain Journal* is such a case. The existence of such cases demonstrates the flawed nature of the efficiency-predation dichotomy. In

132. *See supra* text accompanying note 31.

133. This is suggested by AREEDA & KAPLOW, *supra* note 68, ¶ 357.

such a case the defendant's behavior is neither predatory nor efficient. It is not predatory because the defendant's conduct is presently profit maximizing due to increased unit sales without requiring that the victim exit the market and leave the defendant with the ability to raise the unit price to monopoly levels. The defendant's conduct is not efficient because it reduces the net welfare of society. The monopolist is better off but both the rival and the customers are worse off. Thus, the existence of this scenario demonstrates the failure of the efficiency-predation dichotomy.

B. *Refusing to Share Access to Resources*

The preceding section examined the possibility that a monopolist could harm a competitor by forcing third parties who preferred to deal with the monopolist and with rivals into an all or nothing choice. In some cases such conduct by a monopolist would be neither predatory nor efficient. A monopolist may also harm rivals, while being neither predatory nor efficient, by refusing to share access to certain resources. The existence of such conduct further demonstrates the failure of the efficiency-predation dichotomy advocated by Judge Bork and adopted by the Supreme Court.

Some resources can be created more cheaply by one firm than by two.[134] A monopolist with access to such a resource who denies access to a competitor may be acting in a manner which is neither predatory nor efficient. If the denial maximizes present profits by increasing sales of the monopolist's end product it is not predatory. Conduct is predatory if it foregoes present profits and is profit maximizing only because it will drive the competitor from the market, or otherwise chasten competitive behavior, leaving the monopolist with increased monopoly power and the opportunity to recoup foregone profits in the future.[135] A refusal to share access to a resource which can be produced most cheaply by one firm may not be efficient. The refusal may reduce the net welfare of society by causing the competitor to recreate the resource or to use some inferior substitute. Such a denial of access by a monopolist would be neither predatory nor efficient.

An example of this possibility is contained in *International*

134. The statement in the text is sometimes used as a definition of a "natural monopoly." *See* John Cirace, *An Economic Analysis of Antitrust Law's Natural Monopoly Cases*, 88 W. VA. L. REV. 677, 687 (1986) (examining natural monopoly cases from an efficiency perspective).

135. *See supra* text accompanying note 32.

Boxing Club, Inc. v. United States.[136] In that case defendants were charged with violating Sections 1 and 2 of the Sherman Act by monopolizing and conspiring to restrain and monopolize the promotion of championship boxing matches.[137] As part of their boxing empire, the defendants controlled, by ownership interests, both the Chicago Stadium and Madison Square Garden in New York City.[138] The Supreme Court upheld far-reaching injunctive relief against the defendants which included a provision mandating access by competitors to the Chicago Stadium and Madison Square Garden. The decree required defendants to lease these facilities on reasonable terms to competitors promoting championship bouts.[139] If the parties could not agree on terms, the court would set them.

A major stadium or arena is a resource which can be created more cheaply by one firm so long as the capacity of the facility has not been exhausted. In denying access to competitors, the defendants had not necessarily been acting in a predatory fashion. The denial may have been presently profit maximizing by making the defendant's bouts more attractive than those of competitors. This increase in the value of the defendant's product may have offset any foregone leasing revenue. The denial would have been predatory only if it caused a present reduction in revenue to be offset by a future increase in monopoly power and profits. The defendant's denial of access to competitors was presumably not efficient. A resource went unused when its capacity had not been reached. Competitors were forced to switch to some inferior substitute. Thus, the defendant's conduct may have been neither predatory nor efficient.

Another example of a refusal by a monopolist to share access to a resource with a rival which is neither predatory nor efficient is contained in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*[140] In that case the court, in an opinion by Judge Posner, reversed a judgment that the defendant had engaged in illegal monopolization because the court concluded that the conduct element of the monopolization offense had not been satisfied.[141] For many years Western Union required subscribers to its telex service to lease

136. International Boxing Club of New York, Inc. v. United States, 358 U.S. 242 (1958).

137. *Id.* at 244.

138. *Id.* at 248.

139. *Id.* at 261.

140. Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

141. *Id.* at 376.

the terminal necessary to use the service from Western Union. Western Union purchased these terminals from the Teletype Corporation. In the early 1970's Western Union unbundled this package and allowed customers to obtain the terminal from other suppliers.[142] Further, it attempted to sell the terminals then leased to the lessees.[143] The plaintiff, Olympia, was formed to lease telex terminals, which it too purchased from the Teletype Corporation, to telex subscribers.[144]

When Western Union unbundled the telex transmission service and terminal, it overtly encouraged third parties, like Olympia, to enter the terminal market. As part of this encouragement, it "told prospective vendors of such equipment that it would put them on a list which its salesmen would give new subscribers to telex service who were seeking terminals."[145] Olympia had no sales force of its own when it entered the terminal leasing business and relied solely on referrals obtained by its presence on the list distributed by Western Union sales personnel. Olympia was quite successful in this effort, installing twenty percent (20%) of all telex terminals installed for a time. When Western Union discovered that it was not selling its existing inventory of telex terminals quickly enough, it ceased distributing the referral list of terminal vendors to customers. This predictably had a devastating impact on Olympia, causing it to cease operations.[146]

Olympia sued Western Union alleging that Western Union had violated the monopolization offense of Section 2 of the Sherman Act. The jury agreed with Olympia and the trial court entered a judgment for $36 million. Judge Posner's opinion sustained the trial court's conclusion that Western Union had monopoly power in telex transmission service. Judge Posner also agreed that a monopolist such as Western Union, whose prices are regulated in the monopolized market, may violate Section 2 by impairing competition in a related market. Judge Posner, however, did not agree that Western Union had inappropriately restrained competition in the terminal market by ceasing to deliver its referral list of terminal suppliers to customers. He rejected Olympia's arguments that *Aspen Skiing* required Western Union to continue this assistance to Olympia and other vendors.[147]

142. *Id.* at 372.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 373.
147. *Id.* at 379.

When Western Union ceased the distribution of its referral list of terminal vendors, it was engaging in conduct which was neither predatory nor efficient. This conduct was not predatory because it was intended to presently maximize profits by increasing sales. The profit maximizing nature of this conduct was not dependent upon causing rivals to exit the market leaving Western Union with the power to recoup profits later. Indeed in the long run Western Union was getting out of the terminal leasing business. Western Union's conduct was not predatory. It was designed to make more money now by increasing unit sales, not by increasing monopoly power.

Western Union's decision to cease delivering the referral list of terminal vendors also was not efficient. Western Union decided not to share its sales force with Olympia and other terminal vendors. This decision was rational and profit maximizing from Western Union's perspective. This decision, however, caused the total cost of distributing telex terminals to increase. Now firms such as Olympia would have to hire their own sales force to survive.[148] Since Olympia and Western Union were both offering terminals manufactured by Teletype Corporation there were not complex differences in available equipment to explain. The referral list was a very efficient means of telling customers of the existence of other vendors of the same product. While it was understandable that Western Union was not interested in financing this efficient means by sharing access to its sales force, the termination of the referral list, although not predatory, was not efficient. Thus, although Judge Posner's conclusion about the legality of Western Union's conduct may be correct, it cannot be explained on the basis of the efficiency-predation dichotomy advocated by Judge Bork and adopted by the Supreme Court. The existence of situations in which a monopolist's denial of access to a resource is neither predatory nor efficient demonstrates the failure of the efficiency-predation dichotomy.

C. *Aspen Skiing as an Example of Both Forcing Customers into an Inefficient All or Nothing Choice and Refusing to Efficiently Share Access to Resources*

In *Aspen Skiing* the Court failed to realize that the defendant was engaged in two different acts, both of which could be neither predatory nor efficient. Ski Co. adopted prices for its daily tickets and six-day tickets for its three mountains which created a powerful

148. *Id.*

incentive to purchase the six-day ticket.[149] Ski Co. also refused to continue the joint four-mountain ticket with Highlands.[150] While the Court recognized the coercive effects of Ski Co.'s pricing structure, it did not realize that adopting that structure was an act separate from terminating the joint four-mountain ticket with Highlands. This failure caused the Court to focus on the termination of the joint four-mountain ticket to which it then applied the efficiency-predation dichotomy. The Court's conclusion that the termination of the joint four-mountain ticket was predatory[151] is tainted by its failure to realize that conduct may be neither predatory nor efficient. In fact, it is extremely likely that both the adoption of a coercive price structure and the termination of the joint four-mountain ticket were neither predatory nor efficient.

When Ski Co. adopted a price structure that significantly discounted its six-day three-mountain ticket from the price of six daily tickets it created a powerful incentive to buy the six-day ticket. This coercive pricing policy is an example of conduct which forces consumers who would like to purchase some of their requirements from the monopolist and some from a rival into an all or nothing choice.[152] Some skiers who would have preferred to ski several days at Highlands and several days on Ski Co.'s mountains will be coerced by Ski Co.'s price structure into foregoing skiing at Highlands. While there is no reason to believe that this conduct is predatory, there is also no reason to believe that it is efficient.

In adopting this pricing structure, Ski Co. was probably trying to maximize profits now by selling more skiing. Like the advertisers in *Lorain Journal*,[153] if skiers were given a choice between buying all or nothing from the monopolist, more would choose all than nothing. Here Ski Co. offered skiers a somewhat more subtle choice to the same effect. Ski Co.'s pricing structure forced skiers into choosing between buying all of their skiing at Ski Co. for a cheap rate or some from Ski Co. at an expensive rate and some from Highlands. The result of this strategy was that Ski Co. sold more skiing.[154] If Ski Co. was attempting to maximize profits now by selling more skiing, then its strategy was not predatory since it did not de-

149. *See supra* text accompanying notes 56-58.

150. *See supra* text accompanying notes 44-46.

151. *See supra* text accompanying notes 80-82.

152. *See supra* Part IV.A.

153. Lorain Journal Co. v. United States, 342 U.S. 143 (1951). For a discussion of the *Lorain Journal* circumstances, see *supra* text accompanying notes 126-33.

154. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 594-95 (1984).

pend on an increase in Ski Co.'s power over price. The profit maximizing nature of the strategy in such a situation would not depend on forcing Highlands from the market to enhance Ski Co.'s monopoly power and thereafter recoup foregone profits.

While Ski Co.'s pricing structure may not have been predatory, neither was it efficient. As in *Lorain Journal*, the mere fact that the monopolist maximizes its current profits by forcing customers into an unpleasant choice does not measure the impact of the strategy on society as a whole. This is the ultimate fallacy of the efficiency-predation dichotomy. Any business gained by Ski Co. was lost to Highlands, creating a wash. Any money saved by skiers in the form of a discounted six day ticket was lost to Ski Co., creating another wash. The welfare effect of the discounted six-day ticket is that skiers who would have preferred the variety of skiing several days at Highlands and several days at Ski Co. end up foregoing the variety of four mountains. This caused a net reduction in the welfare of society. Thus while Ski Co.'s pricing strategy may not have been predatory because it resulted in Ski Co. selling more skiing, it was not efficient.

Like Ski Co.'s pricing strategy, the termination of the four-mountain ticket was neither predatory nor efficient. The termination of the joint four-mountain ticket should be analyzed as an act separate from the discounted nature of Ski Co.'s three-mountain ticket. Ski Co. might have terminated the joint four-mountain ticket but offered an undiscounted three-mountain ticket. Such conduct would constitute a refusal to share resources which is neither predatory nor efficient.

Visitors to Aspen desire variety in their skiing.[155] Ski Co. had acquired three mountains which offered skiers substantial variety. Ski Co. previously shared access to these three mountains with Highlands by offering the joint four-mountain ticket. Ski Co.'s decision to terminate the four-mountain ticket was a decision to refuse to continue to share access to its resources. Analyzed separately from its subsequent pricing strategy, this refusal to share access to its three mountains was neither predatory nor efficient.

There is no reason to believe that Ski Co. was engaged in a predatory strategy in terminating the four-mountain ticket. This termination, like its subsequent pricing strategy,[156] was probably designed to sell more skiing now rather than to forego profits now in the hope of recouping more monopoly profits later. Even without

155. *Id.* at 606 n.34.

156. *See supra* text accompanying note 154.

discounting its six-day three-mountain ticket, Ski Co. may have sold more skiing by terminating the joint four-mountain ticket. When skiers could purchase the joint four-mountain ticket, Ski Co. obtained no advantage from the fact that three mountains were owned by a single firm. A skier holding a joint four-mountain ticket could freely move from one mountain to another. Each mountain stood alone in offering quality skiing. The desired variety flowed from the joint offering of mountains owned by different firms, not from a single firm owning more than one mountain. When the joint four-mountain ticket was terminated, Ski Co. was able to capture some value from its ownership of three mountains.

Ski Co. offered a six-day ticket to its three mountains. If that six-day ticket was not discounted off the price of six daily tickets, skiers could still ski Ski Co. and Highlands by purchasing daily lift tickets at each resort. However, even an undiscounted six-day ticket offered the convenience of purchasing only a single ticket. Thus, Ski Co. could offer convenience and variety to skiers purchasing its six-day ticket. Ski Co.'s termination of the joint ticket with Highlands would be predatory only if Ski Co. immediately made *less* money because of the termination. It seems much more likely that Ski Co. would sell more skiing rather than less because after the termination only Ski Co. offered the convenience of purchasing a single ticket during a six-day visit and the variety of skiing three mountains. In such a situation Ski Co.'s increased profits would result from increased unit sales rather than increased power over price.

Although Ski Co.'s termination of the six-day four-mountain ticket was probably not predatory, it also was not efficient.[157] The Court correctly concluded that the welfare of skiers declined after the termination of the joint four-mountain ticket.[158] Before the termination skiers could conveniently ski four mountains. After the termination skiers had convenient access to only three mountains.[159] Since any business gained by Ski. Co. was lost to Highlands, the reduction in the welfare of skiers caused a net reduction in the welfare of society. Thus, the termination of the four-mountain ticket constituted a refusal to share access to resources which was neither predatory nor

157. *See also* Cirace, *supra* note 134, at 720-28, in which the author analyzes the efficiency aspect of Ski Co.'s conduct as a balance of the efficiency enhancing effect of shared access and the potential detriments of joint price setting.

158. *Aspen Skiing Co.*, 472 U.S. at 605-07. *See also* Lawrence A. Sullivan, *Section 2 of the Sherman Act and Vertical Strategies*, 21 Sw. U. L. Rev. 1227, 1239 n.67 (1992).

159. Ski Co.'s pricing strategy enhanced the reduction in consumers' welfare. *See supra* text accompanying notes 154-55.

efficient.

In summary, *Aspen Skiing* presents examples of both conduct which forces consumers into an inefficient choice and a refusal to efficiently share access to resources. Both of these acts may be neither predatory nor efficient. Acts are neither predatory nor efficient if they presently maximize the profits of a monopolist by increasing its sales rather than by increasing its power but cause the net welfare of society to decrease. The fact that conduct is neither predatory nor efficient destroys the efficiency-predation dichotomy advocated by Judge Bork and adopted by the Supreme Court as a test for determining the legality of conduct by a monopolist.

D. *Eastman Kodak as an Example of Both Forcing Customers and Suppliers into an Inefficient All or Nothing Choice and Refusing to Efficiently Share Access to Resources*

In *Eastman Kodak*[160] the Supreme Court lumped all of Kodak's conduct into one category for purposes of the conduct element of Section 2. Kodak, however, engaged in three different categories of conduct, each of which might be subject to different treatment under the monopolization offense.[161] First, Kodak refused to sell parts to ISOs. Second, Kodak agreed with other manufacturers of parts for Kodak equipment (OEMs) that they would not sell parts to ISOs. Finally, Kodak refused to sell parts to equipment owners who bought repair service from ISOs. The efficiency-predation dichotomy assumes that each of these acts must be either efficient or predatory. The third possibility, however, is that these acts were neither.

Kodak's refusal to sell parts to ISOs could be efficient, predatory or neither. This refusal to deal would be efficient if it enhanced the net welfare of society. The typical decision by a seller to sell to the highest bidder results in an efficient refusal to sell to bidders offering less. Such a decision transfers the good to the person who values it most highly, i.e. the person willing to pay the most.[162] Given a choice between transferring the good to someone who values it more and someone who values it less, the efficient choice is to transfer it to the person who values it more and refuse to sell to the person who values it less. There is, however, no indication that ISOs valued the parts less than the customers to which Kodak was willing

160. Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072 (1992).

161. *See supra* text accompanying notes 92-93.

162. The statement in the text is, of course, subject to the usual assumption that the marginal value of money is equal.

to sell, i.e. equipment owners who also bought service from Kodak or who performed their own service. The fact that Kodak was willing to sell parts to equipment owners performing self service demonstrates that Kodak valued the price more than the part[163] and that the equipment owners valued the part more than the price. The transfer increased the net welfare of society since the welfare of both Kodak and the equipment owner increased.[164] The ISOs were willing to pay Kodak the same prices for parts that were paid by the self servicing equipment owners, a price which, other things being equal, Kodak valued more than the parts. Yet Kodak was unwilling to sell parts to ISOs. If the transfer of parts to self servicing equipment owners was efficient, then a transfer of the same parts at the same prices to ISOs would be similarly efficient. Kodak refused to engage in this efficient transfer for some reason which maximized its profits. The remaining question is whether that profit maximizing reason was predatory or not.

Kodak's refusal to sell parts to ISOs would be predatory if it maximized Kodak's profits only by increasing Kodak's monopoly profits in the future. An act is predatory if it presently costs money but will yield profits in the future after the actor's monopoly power is increased. Such an increase in monopoly power could result from competitors being forced from the market or scared into ceasing competitive behavior.[165] Predatory conduct is a present investment of money hoping for a future return once monopoly power has increased or been made more secure. Kodak's refusal to sell parts to ISOs would be predatory if it presently cost Kodak money but would increase Kodak's monopoly profits in the future. The refusal does cause Kodak to lose the revenue from the sale of parts and does injure the ISOs. Indeed, it caused some ISOs to leave the market and resulted in increased service business for Kodak. This, however, does not demonstrate that the refusal to sell parts was predatory. The refusal might have been presently profit maximizing without regard to any increase in Kodak's monopoly power.

The refusal to sell parts to ISOs resulted in increased service sales by Kodak. Its parts sales remained the same[166] and its service

163. It is theoretically possible that Kodak valued the part more than the price but was willing to sell parts to self servicing customers in order to sell equipment in the first place.

164. Otherwise one or both of the parties would have refused to engage in the transaction.

165. *See supra* text accompanying note 32.

166. The statement in the text assumes that breakdown rates for Kodak equipment remained constant and that no new parts suppliers entered the market. In such a case, the parts

sales increased. If service was a profitable business, Kodak's profits increased in the present because of its refusal to sell parts to ISOs. The refusal to sell parts to ISOs, therefore, did not cause Kodak to forego profit in the present. It is also important to note that this increase in profits did not require any increase in Kodak's monopoly power or any decrease in the competitive strength of the ISOs. The increase in Kodak's profits resulted from the increase in unit sales of service. It did not depend on Kodak increasing its monopoly power, i.e. its ability to raise price above cost. The refusal to sell parts to ISOs would have been profit maximizing if it increased combined profits from parts and service sales even if Kodak's monopoly power remained the same.[167] The fact that Kodak's monopoly power may have increased does not demonstrate that its conduct was predatory. If the conduct would have maximized profits even if monopoly power remained constant, then the conduct was not predatory. Conduct is predatory only if its profit maximizing nature is dependent on the conduct's effect on monopoly power.

In summary, Kodak's refusal to sell parts to ISOs may have been neither predatory nor efficient. It was not predatory if its profit maximizing nature was not dependant on its impact on Kodak's monopoly power. It was not efficient if it reduced the net welfare of society. In such a case the refusal would constitute another example of an inefficient but non-predatory refusal to share access to a resource, i.e. the parts, which can be most cheaply produced by a single firm.[168] The parts which Kodak produced could be manufactured by the ISOs only at greater cost than Kodak could produce and sell them.[169] Thus, although the refusal to sell parts to ISOs was presently profit maximizing for Kodak, it was not efficient.

The second category of conduct which Kodak undertook involved other manufacturers of parts for Kodak equipment (OEMs). Kodak and the OEMs agreed that the OEMs would not sell parts which fit Kodak equipment to ISOs. Like Kodak's own refusal to sell parts to ISOs, this agreement between Kodak and the OEMs could be neither efficient nor predatory.[170] Kodak was obviously try-

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which Kodak did not sell to ISOs it did sell to equipment owners who either used Kodak service or did self service.

167. Monopoly power could remain constant even though market share was somewhat increased.

168. *See supra* part IV.B.

169. If the ISOs could have produced the parts as cheaply as Kodak, they would have done so when Kodak refused to sell rather than suffer the losses they did.

170. In addition to liability under Section 2, 15 U.S.C. § 2 (Supp.II 1990), the agreement between Kodak and the OEMs must be scrutinized under Section 1 of the Sherman Act.

ing to maximize its welfare by preventing the OEMs from selling to the ISOs. The first question was whether this strategy was predatory or not. The strategy would be predatory if it reduced Kodak's profits in the present but would increase its monopoly profits in the future sufficiently to recoup the presently foregone profits. The strategy would not be predatory if it was presently profit maximizing without regard to any impact on Kodak's monopoly power. As with Kodak's own refusal to sell parts to the ISOs, it seems likely that Kodak's agreement with the OEMs would be profit maximizing without regard to any increase in its monopoly power. Kodak was trying to sell more service to equipment owners. By making it more difficult for ISOs to obtain parts Kodak's service business would increase. Further, it would also sell more parts.[171] Thus, the agreement eliminating parts sales to ISOs by OEMs would increase Kodak's parts and service profits in the present without regard to any impact on its monopoly power, i.e. the power to increase price above cost. The increase in Kodak's welfare would result from increased unit sales of service and parts. It would not depend on increasing Kodak's power over price. In such a case, the agreement would not be predatory.

The remaining question is whether the agreement was efficient. The agreement would be efficient only if it increased the net welfare of society. Before Kodak came to the OEMs with the proposed agreement, the OEMs had three choices. They could sell solely to Kodak, sell solely to others, or sell both to Kodak and others. The OEMs chose to sell both to Kodak and others. The OEMs chose this alternative since, of the three choices, it maximized their welfare. Kodak then reduced the choices available to the OEMs from three to two. The OEMs lost the welfare maximizing choice of selling both to Kodak and others. The OEMs could now sell solely to Kodak or solely to others. Given this limited choice, the OEMs chose to sell solely to Kodak. While this was the welfare maximizing choice of the two remaining, it was not as beneficial to the OEMs as the alter-

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Id. § 1. That section prohibits unreasonable contracts and combinations in restraint of trade. *Id.* § 1. Although Kodak's own refusal to sell parts to ISOs was a unilateral act and therefore not subject to Section 1, the agreement between Kodak and the OEMs was concerted behavior subject to assessment under Section 1.

171. Kodak's own refusal to sell parts to ISOs would leave its parts sales constant since the equipment owners would need the same number of Kodak-made parts. The only question is whether Kodak would sell the part directly to the equipment owner or indirectly through the ISOs. *See supra* note 166. The agreement with the OEMs, however, would increase Kodak's parts sales since it would now be reselling parts to equipment owners which it purchased from OEMs. If this resale of parts was a profitable business, Kodak's parts profits would increase.

native they previously selected, i.e. selling both to Kodak and to others. Thus, the welfare of the OEMs declined.[172]

The ISOs were also worse off after the OEMs were coerced into refusing to sell parts to them. Prior to this refusal the ISOs could provide service without also manufacturing parts. After this refusal the ISOs had to manufacture parts, induce new OEMs to enter the market or exit the service business. The refusal of the OEMs to sell parts to the ISOs thus reduced the welfare of both the OEMs and the ISOs.

The agreement between Kodak and the OEMs would be inefficient unless the diminished welfare of both the ISOs and the OEMs was offset by welfare gains for Kodak.[173] Kodak gained by coercing OEMs into refusing to sell parts to ISOs. There is no reason, however, to believe that Kodak's welfare gains were sufficient to offset the welfare losses of the other parties. In making its decision to force the OEMs into choosing between selling solely to it or solely to others, Kodak was not assessing the impact on the net welfare of society. Instead, Kodak was assessing only the impact on its own profits. Kodak's welfare went up since it was now selling more parts and service.[174] This welfare gain for Kodak was offset by welfare losses to the ISOs who lost these very same sales of parts and service. The welfare loss for the OEMs was not offset by welfare gains for any one.[175] Further, since the welfare gains for Kodak depended on impeding sales of service by ISOs to equipment owners, the welfare loss by equipment owners is also important. This welfare loss was not offset by any welfare gain.[176] Therefore, the agreement preventing sales of parts by OEMs to ISOs would not be efficient if it reduced the net welfare of society. In such a case the agreement would

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172. The senario set forth in the text assumes that the decision of the OEMs was the result of the exercise of power by Kodak over the OEMs. It is also possible that Kodak lacked power over the OEMs and obtained the exclusive agreement merely by paying the OEMs for it. In such a case, the agreement would not reduce the welfare of the OEMs and may be efficient.

173. The other parties to the parts and service relationships are the customers. The customers welfare was reduced since they were prevented from purchasing service from the ISOs who they preferred. *See supra* text accompanying note 115.

174. *See supra* text accompanying note 171.

175. The OEMs may have been able to extract a higher price or other concessions from Kodak in exchange for the agreement to sell exclusively to it. There is no assurance, however, that the OEMs would be able to extract concessions equal to their entire welfare loss. This would depend both on the relationship between the OEMs' costs and prices and on the relative power of Kodak and the OEMs. The scenario set forth in the text assumes that Kodak's conduct was the result of its power.

176. The welfare gain to Kodak was already accounted for by the offsetting welfare loss to the ISOs.

be neither predatory nor efficient. It would be an example of conduct which forces a third party into an inefficient, non-predatory choice of dealing either solely with a monopolist or solely with others. It is an inefficient choice since it reduces the net welfare of society and it is not predatory since it maximizes the welfare of the monopolist in the present without requiring any impact on monopoly power.

The third category of conduct which Kodak undertook restricted the equipment owners. Kodak refused to sell parts to equipment owners who purchased service from ISOs. Like Kodak's refusal to sell parts to ISOs and its agreement with OEMs restricting sales of parts to ISOs, this category of conduct could be neither efficient nor predatory. Like Kodak's other conduct, its refusal to sell parts to equipment owners who bought service from ISOs was probably not predatory. This refusal would be predatory if its profit maximizing nature depended on an impact on Kodak's monopoly power. It seems much more likely that the profit maximizing nature of the refusal depended only on an increase in Kodak's service business. Some equipment owners who could not do their own service bought service previously from ISOs. These owners would now buy their service from Kodak. Kodak's service business would increase. Thus, the profit maximizing nature of refusing to sell parts to equipment owners who bought service from ISOs did not depend on increasing Kodak's power over price. Therefore, the refusal was not predatory.[177]

Kodak's refusal to sell parts to equipment owners who bought service from ISOs may also not have been efficient. The refusal increased Kodak's welfare by increasing its service business. This increase in Kodak's welfare, however, was offset by a corresponding decrease in the welfare of ISOs which lost all of the business which Kodak gained. This offset creates a wash. The welfare of the equipment owners, however, also decreased. When the equipment owners had the choice of buying both parts and service from Kodak or buying parts from Kodak and service from ISOs, they chose the latter. Kodak's new policy deprived the equipment owners of their preferred alternative and forced them to purchase both parts and service from Kodak. This reduced the welfare of the equipment owners. Since no welfare gain offset this welfare loss, the net welfare of society declined. Kodak's conduct was therefore not efficient.

Kodak's refusal to sell parts to equipment owners who pur-

177. The fact that Kodak's monopoly power may have increased does not change the conclusion stated in the text. An act which increases monopoly power is not predatory if it would have been a profit maximizing act without such increase in power. *See supra* text accompanying note 167.

chased service from ISOs was neither predatory nor efficient. It was a decision by a monopolist to force its customers into dealing solely with it or solely with others. While this strategy was not predatory because it was profit maximizing in the present without regard to an effect on Kodak's monopoly power, it was not efficient because it caused the net welfare of society to decline.

In summary, Kodak engaged in three different categories of conduct and each of these categories may be neither predatory nor efficient. The existence of conduct which is neither predatory nor efficient destroys the efficiency-predation dichotomy. The efficiency-predation dichotomy formed the basis of the Supreme Court's approach to the conduct element of the monopolization offense of Section 2. Without this dichotomy another approach to the conduct element must be developed.

V. A Standard of Illegal Monopolizing Conduct Which Does Not Depend Upon the Efficiency-Predation Dichotomy

In light of the failure of the efficiency-predation dichotomy, an alternative standard of illegal monopolizing conduct must be found. Perhaps predation and efficiency are not two mutually inconsistent halves of a dichotomy which defines the universe of conduct by a monopolist, but rather one or the other defines a standard of illegality. Two possible standards would flow from this premise. First, predation might be adopted as a standard of illegality. Under this standard only predatory conduct would be illegal and all other conduct, whether efficient or not, would be lawful. The second possible standard would judge all conduct by monopolists on the basis of efficiency. Under this standard all efficient conduct would be lawful, while all other conduct, whether predatory or not, would be unlawful.

If either of these two standards were adopted, the types of conduct discussed in the preceding Part IV would as a group all be either legal or illegal. This is because all such conduct was neither predatory nor efficient. Thus, if only predatory conduct were illegal, the conduct discussed in Part IV would be lawful since none of it was predatory. A newspaper monopolist facing a new radio station would be able to force advertisers into choosing between advertising solely on the radio or solely in the newspaper, so long as the result of that forced choice presently maximized the monopolist's profits.[178] A skiing monopolist would be able to force skiers into a similar choice under similar conditions.[179] A monopolist of parts and service would be able to coerce equipment owners into dealing only with it.[180] The conduct of neither the newspaper, the skiing company, nor the parts and service monopolist would be predatory if it presently maximized profits. Alternatively, if only efficient conduct by a monopolist was lawful, the conduct discussed in Part IV would all be illegal since none of it was efficient. If a monopolist boxing promoter owned the best arena, a refusal to share access to the arena with other boxing promoters would be illegal.[181] If one supplier of telex machines possessing a related monopoly already had a sales force calling on potential customers, a refusal to share access to that sales force with a rival would be illegal.[182] If a skiing monopolist refused to share access to its facilities with a rival by including the rival in a multi-day ticket, that refusal would be illegal.[183] If a parts and service monopolist refused to sell parts to its rivals in the service business, that refusal would be unlawful.[184] Each of these refusals is inefficient and would, therefore, be illegal. Choosing between standards based solely on predation or solely on efficiency is not necessary, however.

A preferable standard of conduct for monopolists would condemn all predatory conduct, allow all efficient conduct and determine the legality of conduct which is neither predatory nor efficient on some other basis. The roots of such a standard are found in Learned Hand's opinion in *United States v. Aluminum Co. of America*.[185] There Judge Hand was torn between two standards. The first would condemn virtually all monopolists by requiring passivity.[186] The second would allow a monopolist to engage in ordinary competitive acts

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178. *See* discussion of Lorain Journal Co. v. United States, 342 U.S. 143 (1951), *supra* text accompanying notes 126-33.

179. *See* discussion of Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1984), *supra* text accompanying notes 152-54.

180. *See* discussion of Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072 (1992), *supra* text accompanying notes 170-77.

181. *See* discussion of International Boxing Club, Inc. v. United States; 358 U.S. 242 (1959), *supra* text accompanying notes 136-39.

182. *See* discussion of Olympia Equipment Leasing Co. vs. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), *supra* text accompanying notes 140-48.

183. *See* discussion of Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1984), *supra* text accompanying notes 155-59.

184. *See* discussion of *Eastman Kodak, supra* text accompanying notes 162-69.

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

186. *See supra* text accompanying note 18.

despite the adverse impact on rivals.[187] Realizing that the second of these two approaches "may expose the public to the evils of monopoly,"[188] Judge Hand chose the standard requiring passivity.[189] Having concluded that the conduct element legalizes monopolies which cause the net welfare of society to be reduced, Judge Hand chose a standard which virtually eliminates the element.

Judge Bork and the Supreme Court seek to avoid the unpleasant choice between a standard which condemns almost all monopolies and a standard which allows harmful monopolies to persist. Their attempt to avoid this choice is based upon the efficiency-predation dichotomy. If the universe of conduct by monopolists could be divided into hemispheres consisting of the efficient and the predatory, the conduct element could allow efficient conduct while condemning predatory conduct. As Part IV demonstrates, the efficiency-predation dichotomy fails and, thus, cannot serve as the basis for the conduct element. This failure returns the analysis to the choice facing Judge Hand in *Alcoa*.[190]

Judge Hand could not bring himself to apply the conduct element in any substantive form because of his realization that harmful monopolies would result. Judge Hand failed to realize that he had fallen into the trap which has ensnared courts and commentators for decades. This trap is the assumption that both elements of the monopolization offense serve the same purpose, i.e. efficiency. If efficiency was the only purpose to be served, the conduct element, which legalizes some monopolies, would not exist. The power element, defining harmful monopolies, would be sufficient. Monopolies are condemned to advance efficiency. The conduct element legalizes some monopolies for some other purpose.

Judge Hand stated this purpose when he set forth the alternative standard which he ultimately rejected.

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

187. *See supra* text accompanying note 19.
188. *Aluminum Co. of America*, 148 F.2d at 430.
189. *See supra* notes 22, 24 and accompanying text.
190. *Aluminum Co. of America*, 148 F.2d 416.

pete, must not be turned upon when he wins.[191]

It is the purpose of the conduct element to legalize monopolies which engage only in ordinary competitive acts. The statute was designed to foster ordinary competitive acts and must not condemn a firm which engages only in such acts, even if the firm has obtained and retained monopoly power by means of such acts.

An interpretation of the conduct element which allowed ordinary competitive acts would treat as lawful any act by a monopolist in which a firm in a competitive market would engage.[192] Such a standard would condemn predatory behavior, allow efficient behavior and distinguish among acts which were neither predatory nor efficient. An ordinary competitive act is not predatory. Since firms in competitive markets do not obtain monopoly power, no rational firm intentionally foregoes profits now in order to extract monopoly profits later. Such profits are not available in a competitive market. Thus, a standard of illegal monopolizing conduct which allowed ordinary competitive acts would condemn predatory behavior. A standard of illegal monopolizing conduct which allowed ordinary competitive acts would allow efficient acts. Firms in a competitive market compete by improved efficiency. Such firms gain by offering an improved combination of price and quality while operating within their costs.[193] Thus, such conduct would be lawful under a standard allowing ordinary competitive acts by a monopolist.[194]

A standard which allowed a monopolist to engage in ordinary competitive acts would allow a monopolist to refuse to share access to its resources so long as the refusal was not predatory. This is true even if such a refusal would be inefficient. A firm in a competitive market does not ordinarily share with rivals access to resources it has acquired. Such a firm usually maximizes profits by using its resources to compete with its rivals and would lose profits by sharing access. As discussed in Part IV, a refusal by a monopolist to share access to resources may be inefficient.[195] A standard allowing ordinary competitive acts would allow such an inefficient refusal to share

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191. *Id.* at 430.

192. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 279-85 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (holding that a monopolist may refrain from notifying competitors of impending product developments).

193. Costs include a return on invested capital.

194. It is, of course, possible that an improved combination of price and quality might be predatory if it causes a monopolist to forego revenues now in the hopes of gaining monopoly profits later. Such predatory conduct would be illegal under a standard allowing only ordinary competitive acts.

195. *See supra* text accompanying notes 134-35.

access so long as the refusal was not predatory. Thus, under this standard a monopolist boxing promoter who owned the best arena could lawfully refuse to share access to the arena with other promoters.[196] Similarly, a supplier of telex machines possessing a related monopoly could refuse to share access to its sales force with a rival supplier.[197] Such refusals to share access to resources, if not predatory, would constitute ordinary competitive acts even though they may not be efficient.[198] A standard which allowed a monopolist to engage in ordinary competitive acts would condemn a monopolist which forced a third party into an inefficient choice of dealing solely with it or solely with a rival. A firm in a competitive market could not force a third party into such an inefficient choice. Competitors sometimes enter into requirements or output contracts under which customers buy solely from one source or sellers sell solely to one buyer. Such contracts, however, differ from inefficient all or nothing choices compelled by monopolists. Requirements and output contracts entered into in a competitive market are not inefficient. In a competitive market the third party would have no incentive to accept the terms of a requirements or output contract unless it gained an advantage. If the contract offered no advantage to the third party it would turn to another firm which did not impose the requirements or output condition. Only a monopolist could force a third party into an inefficient all or nothing choice.[199] A standard of conduct allowing ordinary competitive acts would condemn a monopolist for forcing a third party into an inefficient choice of dealing solely with the monopolist or solely with a rival. Thus, such a standard would condemn a newspaper monopolist facing a new radio station if the newspaper forced advertisers into choosing between advertising solely on the radio or solely in the newspaper when a mix of media was more efficient.[200]

Applying a standard allowing monopolists to engage in ordinary

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196. *See* discussion of International Boxing Club, Inc. v. United States, 358 U.S. 242 (1959), *supra* text accompanying notes 136-39.

197. *See* discussion of Olympia Equipment Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), *supra* text accompanying notes 140-48.

198. In the context of Section 2 of the Sherman Act, the standard set forth in the text would limit the essential facilities doctrine to cases involving predatory refusals to deal. The essential facilities doctrine as a theory separate from generally applicable theories of monopolizing conduct has proven difficult to justify. *See* AREEDA & HOVENKAMP, *supra* note 59, ¶¶ 736.1 to -.2.

199. *See* Rievman, *supra* note 83, at 444-45.

200. *See* discussion of Lorain Journal Co. v. United States, 342 U.S. 143 (1951), *supra* text accompanying notes 126-33.

competitive acts to the facts of *Aspen Skiing* requires recognizing that the defendant engaged in two separate acts. Ski Co. terminated the joint four-mountain ticket which it previously marketed with the plaintiff Highlands.[201] Ski Co. also adopted a pricing structure between its own three-mountain six-day ticket and its daily ticket which created a powerful incentive to buy a six-day ticket.[202] The Court focused on the termination of the joint four-mountain ticket and attempted to apply the efficiency-predation dichotomy.[203]

A standard allowing ordinary competitive acts would allow the termination of the joint four-mountain ticket. The four-mountain ticket was a means by which Ski Co. had shared access to its three mountains with Highlands. When Ski Co. terminated the joint ticket it was refusing to continue to share access to its resources. Such a refusal, if not predatory, is an ordinary competitive act. In a competitive market firms do not share their resources with rivals. Thus, the termination of the joint four-mountain ticket would be upheld as an ordinary competitive act.

Ski Co.'s pricing structure would be condemned by a standard allowing ordinary competitive acts. Ski. Co. heavily discounted its six-day three-mountain ticket off the price of six daily tickets.[204] This discount created a powerful incentive to purchase the six-day ticket. This incentive caused some skiers who would have preferred to purchase some of their skiing from Ski Co. and some from Highlands to purchase all of their skiing from Ski Co. This coerced, all or nothing choice reduced the welfare of skiers. This reduction in the welfare of skiers was not offset by other welfare gains and resulted in a net reduction in the welfare of society.[205] This inefficient coerced choice would be condemned by a standard allowing ordinary competitive acts since a firm in a competitive market would lack the power to coerce such a choice.

Applying a standard allowing a monopolist to engage in ordinary competitive acts to the facts assumed by the Court in *Eastman Kodak*[206] requires recognizing that Kodak engaged in three different categories of conduct. Kodak refused to sell parts to ISOs. Kodak refused to sell parts to equipment owners who bought service from ISOs. Finally, Kodak agreed with other manufacturers of parts

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201. *See supra* text accompanying notes 42-46.
202. *See supra* text accompanying notes 56-58.
203. *See supra* text accompanying notes 70-84.
204. *See supra* text accompanying note 57.
205. *See supra* text accompanying notes 154-55.
206. Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072 (1992).

(OEMs) that they would sell parts which fit Kodak equipment only to Kodak.

A standard of conduct which allowed ordinary competitive acts would allow Kodak to refuse to sell parts to ISOs.[207] Kodak had previously shared access to its parts manufacturing capacity with ISOs by selling parts to them. Its refusal to continue selling parts to ISOs constituted a refusal to continue to share this access to its manufacturing capacity. Such a refusal, if not predatory, is an ordinary competitive act. Firms in a competitive market do not ordinarily share access to their resources with rivals. Instead, they use those resources to compete. Thus, the refusal to sell parts to ISOs is an ordinary competitive act and should be lawful even if inefficient.

A standard of conduct which allowed ordinary competitive acts would condemn Kodak's conduct coercing equipment owners into not buying service from ISOs. Kodak refused to sell parts to equipment owners if they bought service from ISOs. This refusal forced equipment owners into choosing to deal solely with Kodak or solely with ISOs. Since Kodak could supply both parts and service and ISOs could supply only service, equipment owners chose to deal solely with Kodak. This coerced choice reduced the welfare of the equipment owners without any offsetting increase in welfare and was thus inefficient.[208] A standard allowing ordinary competitive acts would condemn such an inefficient coerced choice because a firm in a competitive market would not have the power to coerce such an inefficient choice.

A standard of conduct which allowed ordinary competitive acts would condemn Kodak's agreement with OEMs denying parts to ISOs if that agreement was the result of market power over the OEMs[209] or if it was a profit maximizing strategy only because of Kodak's monopoly power in the parts or service markets. The agreement between Kodak and the OEMs may have been the result of market power which Kodak had over the OEMs as a large buyer. The use of such monopsonistic power would be condemned by a standard which allowed only ordinary competitive acts. Ordinary competitors do not have monopsonistic power.

It is possible, however, that Kodak had no monopsonistic power over the OEMs. If the OEMs could easily manufacture other prod-

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207. The statement in the text assumes that the refusal was not predatory. A firm in a competitive market has no incentive to engage in predatory behavior.

208. *See supra* text following note 177.

209. The power of a buyer over a seller is referred to as monopsonistic power or monopsony. BLACK'S LAW DICTIONARY 1107 (6th ed. 1990).

ucts, the market in which they operated would include many customers other than Kodak and Kodak would then not have monopsonistic power. If Kodak lacked monopsonistic power over the OEMs some other reason must explain the OEMs acquiescence in the agreement. The agreement caused the OEMs to give up their previous relationship with the ISOs and if it was not the result of monopsonistic power they must have received something in return. The simplest explanation is that Kodak paid the OEMs for the exclusive dealing condition. Even a buyer without monopsonistic power can pay a supplier for an exclusive dealing contract. The remaining question is how purchasing this exclusive dealing condition would benefit Kodak. There are three posibilities.

Purchasing the exclusive dealing condition from the OEMs may have been a predatory act. It may have been designed as a present expenditure to gain future monopoly profits. In such a case, the exclusive dealing condition would have been profit maximizing only because the ISOs would exit the service market leaving Kodak with increased monopoly power and profits. A predatory act would, of course, be condemned by a standard allowing only ordinary competitive acts. Ordinary competitors have no incentive to engage in predatory acts.

Purchasing the exclusive dealing condition from OEMs may have been an efficient act. Exclusive dealing sometimes increases efficiency, for example, by facilitating the exchange of trade secret information.[210] Efficient exclusive dealing agreements are especially likely if the parties are small parts of their respective markets. A standard which allowed only ordinary competitive acts would allow an efficient exclusive dealing contract. Ordinary competitors advance their interests by engaging in efficient acts.

The exclusive dealing agreement between Kodak and the OEMs may have been neither predatory nor efficient. The agreement may not have been predatory if it was presently profit maximizing without an impact on Kodak's monopoly power and may not have been efficient if it reduced the net welfare of society.[211] In such a case, Kodak entered into the agreement for a non-predatory profit maximizing reason, i.e. to increase unit sales of parts and service. Under a standard allowing only ordinary competitive acts, the remaining question is whether this would be a profit maximizing strat-

210. A firm possessing trade secret information may be more willing to share it with a parts supplier if the firm knows that the parts supplier is contractually bound not only to keep the information secret but also from even dealing with competitors.

211. *See supra* text accompanying notes 170-76.

egy for a firm in a competitive market. A non-predatory, inefficient, exclusive dealing agreement would make it more difficult for the ISOs to sell service. This in turn would increase Kodak's profits by increasing unit sales of parts and/or service. Kodak would be confident that the equipment owners formerly serviced by the ISOs would turn to it for service since no other service provider could survive.[212] This is obviously a strategy which would not work for a firm in a competitive market. In a competitive market an exclusive dealing agreement between a single buyer and a single seller would not deprive other buyers of a source of supply. Furthermore, if a single buyer were put out of business by an exclusive dealing contract between another buyer and one or more sellers, the customers formerly served by that buyer would not necessarily turn to the beneficiary of the exclusive dealing condition. Thus, in a competitive market, a firm would engage in an exclusive dealing contract only for advanced efficiency. Therefore, a standard of conduct which allowed a monopolist to engage solely in ordinary competitive acts would allow a monopolist to engage in efficient exclusive dealing contracts and condemn all others whether predatory or not.

A standard of monopolizing conduct which allowed ordinary competitive acts would legalize efficient acts, condemn predatory acts, and legalize inefficient behavior which a firm in a competitive market would find possible and profit maximizing. The statute was designed to encourage ordinary competitive acts and should allow such acts even if they are inefficient in a particular circumstance.[213]

VI. Conclusion

The source of much of the conceptual confusion about the conduct element of the monopolization offense is the assumption that both elements of the offense rest on the same basis, i.e. avoiding the social cost of monopoly. This assumption is erroneous. The power element of the monopolization offense is designed to identify firms

212. In order to survive, a service provider would need to obtain the parts previously produced by Kodak and the OEMs.

213. It would be possible to assert an efficiency basis for allowing inefficient ordinary competitive acts such as refusing to share access to resources. Such an assertion would be based upon the fear that condemning such inefficient acts would deter efficient behavior, such as creating resources in the first place. However, in reaching their conclusion that substantial, persistent monopoly should be subject to governmental injunctive relief without proof of culpable conduct, Areeda and Turner concluded that the benefits of ending such monopolies outweighed possible negative effects on incentives to produce. 3 Areeda & Turner, *supra* note 10, ¶ 622. The position taken in the text does not depend upon the calculus of determining whether the inefficient acts allowed are offset by the efficient acts encouraged.

with the capacity to impose social costs by reducing output and raising prices. The conduct element, however, exists to legalize some of these monopolies despite the social costs which they impose.

The efficiency-predation dichotomy advocated by Judge Bork and adopted by the Supreme Court is an attempt to avoid this conclusion. This attempt fails. The efficiency-predation dichotomy asserts that all conduct by a monopolist is either predatory or efficient. If this were true, the conduct element could condemn monopolies which engage in predatory conduct, while legalizing monopolies which survive only by being more efficient than rivals. Such an approach would avoid the conclusion that the conduct element legalizes some monopolies which impose social cost by concluding that any monopoly not engaged in predation is more efficient than its rivals and thus does not impose social costs.

Part IV of this article demonstrates the failure of the efficiency-predation dichotomy. The efficiency-predation dichotomy is based on the fallacy that any act which presently maximizes the profit of the monopolist without an impact on monopoly power, and therefore is not predatory under Judge Bork's definition, is efficient. Some acts by monopolists, however, are presently profit maximizing without impacting monopoly power while reducing the net welfare of society. Such conduct is neither predatory nor efficient. Thus, the efficiency-predation dichotomy fails and cannot be used as a basis for a conduct element which would discrimate between socially costly and socially beneficial monopolies.

Accepting the conclusion that the conduct element legalizes some monopolies which impose social costs allows examination of the basis for this element. The conduct element legalizes monopolies which engage in ordinary competitive acts because the Act was designed to encourage such acts. As Learned Hand stated, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[214] Ordinary competitive acts are usually, but not always, efficient. Such acts are never predatory.

In summary, the conduct element of the monopolization offense cannot be based on the failed efficiency-predation dichotomy. Rather, the conduct element is based on a policy of encouraging ordinary competitive acts.

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214. United States v. Aluminum Co. of America, 148 F.2d 416, 430 (1945).