Twenty-Five Years of Access Denials

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IN 1986, AS ANTITRUST MAGAZINE was being launched, the key precedent governing a monopolist's denial to rivals of access to its facilities was *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[1] decided just one year earlier by a unanimous Supreme Court. Yet in 2004, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*,[2] a 6–3 majority described *Aspen* as "at or near the outer boundary of § 2 liability,"[3] and not even the three in the minority offered a word in *Aspen*'s favor.[4] *Trinko* was reaffirmed (some would say expanded) five years later in *Pacific Bell Telephone Co. v. linkLine Communications*.[5] So, at the beginning of ANTITRUST's history, *Aspen* was bedrock law. Today, two and a half decades later, it is evidently an outlier.

In this article, we describe what happened—how a 9–0 precedent became an unwelcome relic—and offer some suggestions for a path going forward. In doing so, we explain why the distinction commonly offered, that the conduct at issue in *Aspen* involved a break from a prior course of dealing while *Trinko* did not, is a distinction that is not only inconsistent with other Supreme Court precedent, but that provides a wholly inadequate basis for sound antitrust policy.

Historical Context

Aspen was not written on a clean slate. It followed some sixty years of Supreme Court precedent in refusal to deal cases, precedent that (like *Aspen*) almost invariably supported the side of intervention.

Following the dictum in *Colgate*[6] in 1919 that the Sherman Act "does not restrict the long recognized right of trader or manufacturer . . . freely to exercise his own independent discretion as to the parties with whom he will deal" in "*the absence of any purpose to create or maintain a monopoly*,"[7] the Supreme Court decided its first denial of access case in 1927 in *Eastman Kodak Co. v. Southern Photo Materials Co.*[8] The case involved allegations that Kodak refused to sell photographic supplies to Southern Photo at wholesale prices in order to capture for itself a greater share of the retail photo supply market in Atlanta. The jury found that Kodak did so with a "purpose" to monopolize, and the Supreme Court upheld the judgment with little discussion.[9]

The next major denial of access case was *Otter Tail*[10] in 1973, decided by a 4–3 vote. Otter Tail was an electric power company serving most of the Dakotas and Minnesota. In the years preceding the antitrust case, several towns voted to provide their own power at retail, displacing Otter Tail. (The service was inevitably provided by a single firm, but there was competition, through the voting process, for the municipal contracts.) Towns electing to provide their own retail service depended on Otter Tail either to "wheel" (or carry) power generated by another power company over its lines into the towns or to sell them power at wholesale rates. Otter Tail did wholesale and wheel power in other areas, but refused to do so for the towns that voted it out. Relying on *Southern Photo* and other precedents focusing on a "purpose" to monopolize, the Supreme Court affirmed the judgment for the government.[11]

Aspen came twelve years later. A jury had found that defendant Ski Co. had violated Section 2 by: (1) terminating its existing agreement with plaintiff Highlands to offer jointly a four-mountain pass for skiing at Highlands' one mountain and Ski Co.'s three; (2) refusing to sell tickets to its mountains to Highlands at full retail price; and (3) refusing to honor cash-like vouchers from Highlands' customers. The Supreme Court upheld the judgment. The Court recognized that there is no general duty to cooperate with rivals—something of a contrast with *Southern Photo*—but concluded that the conduct was unlawful as "a decision by a monopolist to make an important change in the character of the market"[12] that was not supported by any legitimate efficiency justification.[13] The Court concluded that Ski Co. "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[14] The decision reflected greater economic sophistication than its predecessors, focusing on the diminution in consumer choice and the lack of business justification. It remained insensitive, however, to the dangers of requiring forced access for rivals.

The decision in *Trinko* marked a dramatic change in approach. The plaintiffs' complaint alleged that Verizon, as a local telephone carrier, had discriminated against rivals that sought to compete in local markets by delaying or impeding their connections to Verizon's lines. The Court upheld the district court's dismissal of the complaint for failure to state a claim, concluding that Verizon's insufficient assistance of its

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rivals was not a viable theory of exclusionary conduct under Section 2.[15] The Court's opinion was notable in several respects:

- In contrast to prior decisions' hostility to the possession of monopoly power, the Court said that the "mere possession of monopoly power . . . is not only not unlawful; it is an important element of the free-market system."[16]
- It revived *Colgate*'s statement of the "long recognized" right to refuse to deal, while *omitting* the qualifier of an "absence of any purpose to create or maintain monopoly."[17]
- It emphasized that the right to refuse to deal was important for at least three reasons: (1) that forced sharing undermines the incentive to invest in markets characterized by scale economies; (2) that forced sharing can interfere with market forces by "requir[ing] antitrust courts to act as central planners," identifying the terms a forced sharing would require[18]; and (3) that "compelling negotiation between competitors may facilitate . . . collusion."[19]

Given the result, the Court naturally also had to overrule or distinguish *Aspen*. It chose to distinguish the case, first, by saying that *Aspen* would not be expanded (because it is "at or near the outer boundary of § 2 liability"); second, by noting that "the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent"[20]; and, third, by pointing to "[t]he unilateral termination [by Ski Co.] of a voluntary (*and thus presumably profitable*) course of dealing . . . ."[21] This latter point, combined with the emphasis on the same point in *Kodak* in 1992, has led to quite a bit of mischief, as discussed below.[22]

Trinko was reaffirmed (and arguably extended) in 2009 in the *linkLine* decision, where the Court largely rejected "price squeeze" liability under Section 2.[23] Relying heavily on *Trinko*, the Court there reaffirmed the rights of parties to refuse to deal, saying further that the "instances in which a dominant firm may incur antitrust liability for purely unilateral conduct" are "rare."[24] The Court noted the importance of "safe harbors" so that firms can make informed business decisions without the risk of antitrust exposure, and explained that, after *Trinko*, "a defendant with no antitrust duty to deal with its rivals has no duty to deal under the terms and conditions preferred by those rivals."[25]

"Vertical" versus "Horizontal" Refusals to Deal

"Vertical" refusals, which involve the terms of dealing with the rivals' customers and suppliers, have a different history and involve considerations different from those governing denials of access to rivals, sometimes called "horizontal" refusals to deal.[26]

The classic "vertical" case is *Lorain Journal Co. v. United States*.[27] There, the only daily newspaper in Lorain, Ohio, refused to allow ads to be placed by advertisers who also patronized the Journal's only rivals, local radio stations. The Court had little difficulty in concluding that "forcing advertisers to boycott a competing radio station violated § 2."[28]

Later cases have similarly found exclusive dealing and similar arrangements to raise issues under Section 2. In the *Microsoft* case,[29] the defendant's requirements that computer makers, software vendors, and Internet service providers carry only Internet Explorer (to the exclusion of Netscape) were found unlawful.[30] And in *Dentsply*,[31] the court of appeals found a violation where the defendant would supply replacement teeth only to those dealers who carried its products exclusively.[32]

Cases involving these types of "vertical" arrangements are far less controversial than horizontal denial of access cases like *Aspen* and *Trinko*. Vertical refusals to deal and exclusive arrangements by dominant firms are treated without much controversy in a manner analogous to the treatment of exclusive dealing, tying, bundling, or loyalty discounts under Section 1.[33] These arrangements may raise the cost of rivals in a manner allowing the defendant to increase the market price, in which case they may be condemned; or they may be supported by significant efficiencies and upheld—except in the extraordinary case where the plaintiff can show that the harm materially outweighs the benefits.[34]

Denials of access differ from these "vertical" arrangements for reasons similar to those used by the Supreme Court to distinguish *Trinko* from *Aspen*.[35] First, these conditional refusals to deal typically involve no risk of horizontal collusion. The defendant is negotiating with (or dictating to) the rival's customers or suppliers. In that context, there generally is no communication with the rival at all. Second, remedies are available that do not require the court to act as a central planner setting price or other terms of sale. Specifically, the arrangements in issue can simply be enjoined. In price bundling and loyalty discount cases, the court will need to analyze the defendant's pricing structures, but the remedy can still be a simple injunction without any requirement of dictating contract terms in advance. Third, and most importantly, vertical arrangements involve no claim that the defendant should share its own property with rivals. The concern voiced correctly by the *Trinko* court about trampling on the incentives of a firm to invest permeates every case involving a "horizontal" denial of access. A vertical refusal to deal, in contrast, involves conditions imposed on customers or suppliers. There is little risk that an asset the defendant has taken the time and money to develop will be wrenched away with a requirement to share it with the very rivals against which the firm is striving to compete.

Is There a Prior Course of Dealing Requirement?

It is useful to ask why there was such a marked change in the Supreme Court's approach from *Aspen* to *Trinko*. There was of course a significant change in the Court's membership. But that was by no means the whole explanation. Over the course of time, *Aspen* had been subjected to a wide array of academic criticism. The critics focused on the potential adverse effects on investment incentives that can arise from a broad construction of a duty to deal.[36] *Aspen* had no clear limiting principle; it was cited often in support of broad constructions of Section 2 liability,[37] and this breadth in turn energized the decision's academic critics.[38] It was no surprise, then, that when the Supreme Court next confronted a denial of access claim, the Court took a fresh look at the issues and undertook to limit *Aspen*'s reach.

Many have read *Trinko* as limiting *Aspen* and *Kodak* (1992), not through its focus on investment incentive effects, but by construing it as imposing a prior course of dealing requirement; that is, that a denial of access should generally be deemed lawful absent termination of a profitable prior course of dealing.[39] This construction was the square holding of the Second Circuit in the *Elevator* case,[40] the Eleventh Circuit in its *Covad* decision,[41] and the strong implication of the D.C. Circuit in its *Covad* variant,[42] as well as the holding of a number of other decisions.[43] Even Areeda and Hovenkamp appear to endorse the proposition, although with some qualification.[44] None of these authorities suggests that a prior course of dealing is a sufficient condition for illegality, but, by using prior course of dealing as a screen, they have implied that the termination of a prior course of dealing is sufficiently suspect that it warrants further discovery (and possibly trial).[45]

Not all authorities, however, agree. For example, in *Christy Sports, LLC v. Deer Valley Resort Co.*,[46] a company that rented skis and equipment at the Deer Valley resort sued the resort owner for monopolization. The allegation was that Deer Valley had allowed the plaintiff to operate its rental business in competition against Deer Valley for some years but then terminated that authority in order to capture all the equipment rental business for itself. The district court dismissed the case and the court of appeals affirmed. The *Christy* court pointed out that both sides agreed that "antitrust law permits a resort operator to organize its business . . . either . . . by providing ancillary services itself or by allowing third parties to provide the service on a competitive basis."[47] Given that point, the court did not "see why an initial decision to adopt one business model would lock the resort into that approach and preclude adoption of the other at a later time."[48] The court distinguished *Aspen* as a case where the refusal to deal involved a profit sacrifice supported by "no valid business reasons for the refusal."[49]

The logic underlying the *Christy Sports* opinion was articulated earlier in an important post-*Aspen*, pre-*Trinko* decision by Judge Richard Posner. In *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*,[50] Western Union had permitted independent vendors to sell telex terminals in competition against it, and had structured the commission schedules of its sales force in a way that encouraged them to push sales from independent vendors, such as Olympia. Subsequently, however, Western Union concluded that it wanted to liquidate its own inventory of telex machines, and so it changed the commission schedules to encourage the sale of Western Union's terminals instead. Because Olympia had relied only on Western Union's sales force and had no salesmen of its own, the change in policy thus drove it out of business. It sued and obtained a jury verdict for significant damages. The Seventh Circuit reversed.

The court determined that Western Union had no antitrust obligation to encourage its salesmen to push rival products in the first place; but it then had to confront the change-in-policy argument based on *Aspen*. Judge Posner wrote:

> If a monopolist does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does he incur antitrust liability? We think not. Conceivably he may be liable in tort or contract law, under theories of equitable or promissory estoppel or implied contract (of which more shortly) . . . . But the controlling consideration in an antitrust case is antitrust policy rather than common law analogies. Since Western Union had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation. Then no firm would dare to attempt a graceful exit from a market in which it was a major seller. We can imagine, though with difficulty, an argument that a monopolist might decide to entice new firms into its market only to destroy them and so deter other firms from trying to enter. But no such diabolical scheme is ascribed to Western Union, which undoubtedly was sincere in inviting new vendors into the market and in wanting to leave the market as soon as it [could].[51]

As did the *Christy* court several years later, Judge Posner distinguished *Aspen* as a case where the refusal to deal was supported by no business justification.[52]

Given the logic of Judge Posner's reasoning, a fair question to ask is how we got to where we are today—with so many reading *Trinko* as making a prior course of dealing such an important consideration in denial of access cases. Do *Aspen* and *Kodak*, after *Trinko*, compel a conclusion that it is the appropriate screen for assessing liability?

There is no doubt that a profitable prior course of dealing was important in both cases. Without Ski Co.'s prior cooperation in permitting Highlands to offer an all-mountain ticket, there might have been no case. No court would have required Ski Co. to offer such a ticket had it not previously done so. But what led to liability in *Aspen* was not the termination of Ski Co.'s cooperation in marketing the all-mountain pass—it was its refusal to allow Highlands to purchase Ski Co. tickets at full retail value or to accept Highlands' vouchers redeemable for cash. These tactics were profitable only because of their negative impact on the competitiveness of Ski Co.'s rival. It was not that the change in strategy was exclusionary; it was that the change was implemented in an exclusionary manner.

In *Kodak*, the change in policy was important for a different reason. Because Kodak had previously supplied parts to independent copier service firms, customers purchasing (or entering into long-term leases for) Kodak copiers understood that lower-cost independent service would be available, and this served as an inducement to purchase (or lease) Kodak copiers in the first instance. The initial policy thus induced

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customers to lock themselves into a long-term commitment (through sunk purchase costs or lease commitments), allowing Kodak to charge supracompetitive prices by changing its policy later on. As Judge Easterbrook subsequently explained, "That change had the potential to raise the total cost of copier-plus-service above the competitive level—and . . . above the price that Kodak could have charged had it followed a closed-service model from the outset."[53] It was not the fact that Kodak changed policy that was exclusionary; it was, again, the means of implementation—here, the conduct in inducing and exploiting customer lock-in through the refusal to deal with service rivals. And, again, at least for purposes of evaluating Kodak's summary judgment motion, there were issues of fact as to the existence of any efficiency rationale for denying service rivals parts after the policy change. The change in policy made economic sense only because the exclusion of service rivals post lock-in allowed Kodak to raise prices over competitive levels.[54]

Fairly read, then, neither *Aspen* nor *Kodak* compels a prior course of dealing screen. And, importantly, *Otter Tail*—a decision that the Supreme Court has never questioned and often cites—is inconsistent with any such rule. None of the activity in *Otter Tail* involved a prior course of dealing. The defendant sold power at wholesale and wheeled power over its lines to retail power providers with which it did not compete; its refusals were confined to those with which it competed for long-term service agreements.[55] As in the later cases, its denials of access were based only on whether the request came from a rival and were profitable only because of the negative effects on the competitors.

What's Next?

If a prior course of dealing requirement is not *compelled* by Supreme Court precedent, would such a rule nonetheless be the best screen under sound antitrust policy? We think not.

A requirement that a plaintiff cannot state a claim based on a monopolist's refusal to deal without establishing that the refusal altered a prior course of dealing would not be without some virtue. It would, in particular, preclude litigation over whether a firm has an obligation to deal with a potential rival with which it has never done business before, a circumstance that only rarely can give rise to competitive concern. But that would be the rule's principal benefit, and it would immunize actions, such as those taken in *Otter Tail*, in which the refusal to deal excludes rivals and extends monopoly power without any procompetitive benefits whatsoever.

Possibly even more important, any rule suggesting that there is something intrinsically suspect about terminating a prior course of dealing would be squarely at odds with *Trinko*'s first principle, regarding incentives to invest. Think about it: much of our entire law of contracts is built around the recognition that contracts that once were profitable may cease to be so, and that it is welfare-maximizing to permit firms to end such contracts.

What is the effect of a rule that says that monopolists are an exception to the general rule that parties are free to terminate a course of dealing, and once they start a joint venture or contractual relationship, they risk being stuck with it forever? It is, of course, just what Judge Posner pointed out—that any such rule will necessarily deter firms ex ante from entering into efficient arrangements. Such a regime would be "perverse" because, under it, "no firm would dare to attempt a graceful exit from a market in which it was a major seller."[56] It is no answer to say, "Well, at least it's a clear rule." It is also a clear rule to say that "it is presumptively unlawful for monopolists to terminate contracts entered into on Thursdays." That is a really clear rule too, but totally nonsensical.

Nor is it an answer to say that the effect on incentives will impact only monopolists and may have a long-run effect of offsetting that negative through the promotion of more competitive markets.[57] No economic analysis and no legal authority in the past several decades supports the argument that we should not encourage firms with significant market power to invest and innovate, nor that the risks of chilling such investments should not be taken into account when setting antitrust policy. As *Trinko* makes clear, preservation of the incentives to innovate, even by firms with substantial market power, is important. "The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[58]

In addition, as a practical matter, monopoly power is a lot easier to allege in a complaint than to find in the real world. Did Deer Valley really have monopoly power in the market for renting ski equipment? Risk-averse firms will often be shy about entering into arrangements that cannot be terminated later on when clever attorneys can cobble together narrow enough markets to suggest that the firm might have some market power. The adverse effect on incentives of the prospect of litigation and treble damages will extend well beyond true monopolists to firms fearing gerrymandered markets or who, if successful, might be alleged to have monopoly power later on.

The real-world impact of a rule based on "prior course of dealing" is considerable. With the ease by which allegations of market dominance can be advanced, and the risk of liability from terminating a prior business arrangement, firms have avoided initiating new business relationships that would have been beneficial for both the firm and the prospective partner for fear that the firm will never be able to extricate itself if circumstances change or things do not otherwise go as planned. That, at least, is our own counseling experience—and a circumstance we have encountered with disturbing frequency. The consequence is that some valuable and efficient arrangements are not being pursued as a result of this interpretation of *Trinko*.

Where are we left if there is no screen based on a prior course of dealing? Surely *Colgate*'s "purpose to monopolize" rubric would not be an answer even if *Trinko* had not abandoned it. Similarly, the various types of balancing tests, often appropriate in other Section 2 contexts, are less useful here in light of both the need for some level of business certainty and the deference due a firm's right to deal, or refuse to deal, with rivals in connection with its own competitive assets.[59]

One workable answer, consistent with Supreme Court precedent, is the "no economic sense" or "profit sacrifice" test.[60] Although we have questioned application of that text in other contexts,[61] when considering activities on which antitrust policy places a particularly high value—such as price cutting or, here, the "long recognized right of [a] trader . . . freely to exercise his own independent discretion as to parties with whom he will deal"[62]—the test works well.[63] It limits liability for refusing access to those rare instances in which there is no basis at all for the access denial other than the marginalization of rivals, precluding claims just based on arguments that there would be "more" competition if access were provided.

The no economic sense test is also consistent with *Otter Tail*, *Aspen*, *Kodak*, and *Trinko*. In *Otter Tail*, the refusal to sell to rivals at the same price as the defendant was selling to everyone else was a distinction based solely on the character of the customer and was profitable only because of the negative effects on the customer-rivals. In *Aspen*, the refusal to accept Highlands' tickets at par or its cash-like vouchers was equally based solely on the character of the payer and otherwise made no sense. Similarly, in *Kodak*, the refusal to sell parts to service rivals was a choice that sacrificed profits on parts sales in order to capitalize on diminished competition in the service market. *Trinko* involved no such facts, and that allowed the defendant to prevail. Instead, as the Court explained, "Verizon's reluctance to interconnect at the cost-based rate of compensation available under [the Telecommunications Act] tells us nothing about dreams of monopoly" because, in a competitive market, Verizon would have interconnected, if at all, only at prices above cost.[64] No economic sense, then, was an important or controlling basis for illegality in *Otter Tail*, *Aspen*, and *Kodak*; and a decision that would make economic sense in a competitive market excused the denial of access in *Trinko*.

Rivals' demands for access to a firm's facilities or assets invariably pose a threat to the incentive to invest. A rule of law that condemns refusals to provide that access only where the refusal's profitability depends entirely on weakening competition is a rule that runs the least risk of reducing investment incentives while maintaining society's critical interest in preserving consumer welfare through competition.

1 472 U.S. 585 (1985).

2 540 U.S. 398 (2004).

3 *Id.* at 409.

4 *Id.* at 416–18 (Stevens, J., concurring in the judgment).

5 555 U.S. 438 (2009).

6 United States v. Colgate & Co., 250 U.S. 300 (1919).

7 *Id.* at 307 (emphasis added).

8 273 U.S. 359 (1927).

9 *Id.* at 375.

10 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

11 *Id.* at 377–79.

12 472 U.S. at 604.

13 *Id.* at 608.

14 *Id.* at 610–11. *Aspen* was reaffirmed a few years later in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). The Court there reversed summary judgment for Kodak based on a change in policy—a decision no longer to supply replacement parts to independent copier service firms—that was alleged to allow Kodak to extend its power in the copier market downstream to the market for servicing copiers.

15 540 U.S. at 407–11.

16 *Id.* at 407.

17 *Compare id.* at 408, *with Colgate*, 250 U.S. at 307.

18 *Trinko*, 540 U.S. at 407–08.

19 *Id.*

20 *Id.* at 409.

21 *Id.*

22 A number of cases, led by *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), have considered denials of access in the context of the so-called essential facilities doctrine. Under that doctrine, a monopolist controlling an "essential" facility (at one level of competition) generally may not deny rivals at another level access to the facility except on reasonable terms. The doctrine has been the underpinning of a number of decisions dating back (in the unilateral context) to *Gamco v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952). *See* Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977); *cf.* United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) (condemning a *concerted* denial of access by horizontal competitors). The doctrine has been criticized widely. *E.g.*, 3B Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶¶ 771–774 (3d ed. 2008). *Aspen* declined to address the argument. *Trinko* noted the criticism of the doctrine, and pointed out that "[w]e have never recognized such a doctrine"; but the Court found "no need either to recognize it or to repudiate it here." 540 U.S. at 410–11. It is difficult to imagine a fact pattern in which a denial of access lawful under the principles articulated in the *Trinko* opinion would be found unlawful under the essential facilities doctrine, and so that doctrine will not be addressed further here.

23 555 U.S. at 452.

24 *Id.* at 448.

25 *Id.* at 453, 457.

26 *See generally* Kenneth Glazer, Written Testimony Before the Antitrust Modernization Commission 2–6 (2005), *available at* govinfo.library.unt.edu/amc/commission_hearings/pdf/Glazer.pdf; *see also* ABA Section of Antitrust Law, Antitrust Law Developments 246–48 & 260–70 (7th ed. 2012) [hereinafter Antitrust Law Developments] (treating the two categories separately).

[27] 342 U.S. 143 (1951).

[28] *Id.* at 152. No efficiency justification was proposed by the defendant. For approving commentary, see Robert Bork, The Antitrust Paradox 344–45 (1978).

[29] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).

[30] *Id.* at 70–73.

[31] United States v. Dentsply Int'l, 399 F.3d 181 (3d Cir. 2005).

[32] *Id.* at 185–91.

[33] *See* Jonathan Jacobson & Scott Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 Antitrust L.J. 779 (2006).

[34] *E.g.*, *id.* at 799–801.

[35] *See supra* text accompanying note 22.

[36] The attack was led by Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 Antitrust L.J. 659 (2001); *see also* Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and* Microsoft, 8 Geo. Mason L. Rev. 1, 27 (1999); Herbert Hovenkamp, *The Monopolization Offense*, 61 Ohio St. L.J. 1035, 1044–45 (2000); Michael Jacobs, *Introduction: Hail or Farewell? The* Aspen *Case 20 Years Later*, 73 Antitrust L.J. 59, 68 (2005); James B. Speta, *Antitrust and Local Competition Under the Telecommunications Act*, 71 Antitrust L.J. 99, 135 (2003).

[37] *E.g.*, Delaware & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 178–79 (2d Cir. 1990).

[38] *E.g.*, 3B Areeda & Hovenkamp, *supra* note 22, ¶ 772c2.

[39] *See, e.g.*, Ellen Meriwether, *Putting the "Squeeze" on Refusal to Deal Cases: Lessons from* Trinko *and* linkLine, Antitrust, Spring 2010, at 65, 69 & n.51.

[40] *In re* Elevator Antitrust Litig., 502 F.3d 47, 54 (2d Cir. 2007).

[41] Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1049 (11th Cir. 2004).

[42] Covad Commc'ns Co. v. Bell Atl. Corp., 398 F.3d 666, 673 (D.C. Cir. 2005); *accord* LiveUniverse, Inc. v. MySpace, Inc., 304 Fed. App'x 554 (9th Cir. 2008).

[43] *See generally* Antitrust Law Developments, *supra* note 26, at 263.

[44] 3B Areeda & Hovenkamp, *supra* note 22, ¶ 772e.

[45] *See, e.g.*, *Covad*, 398 F.2d at 673; Am. Cent. E. Tex. Gas Co. v. Union Pac. Res. Grp., 93 Fed. App'x 1, 8 (5th Cir. 2004); Tucker v. Apple Computer, Inc., 493 F. Supp. 2d 1090, 1099–01 (N.D. Cal. 2006); A.I.B. Express, Inc. v. FEDEX Corp., 358 F. Supp. 2d 239 (S.D.N.Y. 2004); Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc., 331 F. Supp. 2d 513 (E.D. Tex. 2004). For a useful discussion, see Robert Skitol, *Three Years After* Verizon v. Trinko*: Broad Dissatisfaction with the Whole Thrust of Refusal to Deal Law*, Antitrust Source, Apr. 2007, at 9–10, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr07_Skitol4_27f.authcheckdam.pdf.

[46] 555 F.3d 1188 (10th Cir. 2009).

[47] *Id.* at 1196.

[48] *Id.*

[49] *Id.* at 1197.

[50] 797 F.2d 370 (7th Cir. 1986).

[51] *Id.* at 376.

[52] *Id.* at 378.

[53] Schor v. Abbott Labs., 457 F.3d 608, 614 (7th Cir. 2006); *see* 3B Areeda & Hovenkamp, *supra* note 22, ¶ 772.

[54] *Kodak*, 504 U.S. at 483–85.

[55] 410 U.S. at 377–79.

[56] *Olympia*, 797 F.2d at 376.

[57] *Cf.* LePage's, Inc. v. 3M, 324 F.3d 141, 151–52 (3d Cir. 2003) (en banc) ("[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior.").

[58] 540 U.S. at 407.

[59] *See supra* text accompanying notes 15–25.

[60] See A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 Antitrust L.J. 375, 389–90 (2006); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413 (2006); *see also* Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L.J. 975, 977 (2005) (noting distinction between practices such as predatory pricing and exclusive dealing); Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L.J. 435 (2006) (rejecting any unitary test for all single-firm conduct). Many view the no-economic-sense and profit-sacrifice tests as the same. Gregory Werden's article points out some distinctions. Werden, *supra*, at 422–25. Those distinctions are not material here.

[61] *E.g.*, Jacobson & Sher, *supra* note 33.

[62] *Colgate*, 250 U.S. at 307.

[63] Jacobson & Sher, *supra* note 33, at 783 n.21 ("[S]imilar to pricing, courts should be reluctant to interfere with a party's decision not to share with rivals assets that it has developed or lawfully acquired. In this context, the no economic sense test works well to determine whether consumers will be harmed—protecting the defendant's incentives to compete and innovate, while condemning refusals to deal where the defendant objectively sacrifices profit in the short term and, in the long term, can recoup that loss after its rivals are marginalized.").

[64] *Trinko*, 540 U.S. at 409.