July 2015

Refusals To Deal By Monopolists - Recent Decisions

Thomas J. Collin

Recommended Citation
Available at: https://ideaexchange.uakron.edu/akronlawreview/vol14/iss4/1

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.
A unilateral refusal to deal is lawful under the Sherman Act unless, as the Supreme Court noted more than sixty years ago in *United States v. Colgate & Company* (*Colgate*), the firm refusing to deal has a "purpose to create or maintain a monopoly." If this purpose is absent, a firm acting on its own can refuse to deal "for any reason or for no reason at all." Not surprisingly, plaintiffs have repeatedly sought to avail themselves of this "monopoly" exception to the *Colgate* doctrine by challenging refusals to deal under section 2 of the Sherman Act, which prohibits monopolization.

Recent judicial and administrative attention to monopolists' refusals to deal has produced tests of legality inconsistent with conventional section 2 standards. Section 2 is the only provision of the Sherman Act under which single-firm conduct can be challenged. Some courts, ignoring section 2 standards, have attempted to evaluate this conduct under section 1 of the Sherman Act. Other courts have required proof of specific intent to monopolize even though proof of unlawful monopolization requires only evidence of general intent. The Federal Trade Commission has even attempted to impose liability on a monopolist in the absence of fault.

This article will review and evaluate these recent principal cases, both judicial and administrative, in which single-firm refusals to deal by monopolists have been challenged under section 2 of the Sherman Act or, by analogy, under section 5 of the Federal Trade Commission Act. It will demonstrate that there is no reason to depart from conventional monopolization analysis in deciding these cases.

### I. INTRODUCTION: THE COLGATE DOCTRINE

In *Colgate* the Supreme Court reviewed the sufficiency of an indictment

---

1 *Member Ohio Bar and Associate with Thompson, Hine & Flory—Cleveland, Ohio.*


3 250 U.S. 300 (1919).

4 *Id.* at 307.

5 *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978).

6 Section 2 of the Sherman Act provides in pertinent part as follows:

   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.


7 Section 1 of the Sherman Act provides in pertinent part as follows:

   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.

charging Colgate & Company with entering into a combination with its wholesalers and retailers to fix the resale prices of its soap and toilet products. The trial court sustained a demurrer to the indictment on the ground that it recited only a unilateral refusal on the part of Colgate to sell to customers "who would not resell at indicated prices." In affirming the lower court's action, the Supreme Court noted:

the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company.

The Court reasoned that under these circumstances no violation of the Sherman Act had been charged:

In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

This proposition continues to be honored, and the courts find no difficulty in approving unilateral refusals to deal in the absence of a purpose to create or maintain a monopoly. When, however, the firm refusing to deal possesses monopoly power, the refusal, even though unilateral and therefore not subject to challenge under section 1 of the Sherman Act, is nonetheless subject to review under section 2.

As will be seen below, the courts and the Federal Trade Commission have repeatedly failed to apply proper section 2 standards and have instead fashioned unwarranted ad hoc tests of legality when evaluating the legality of unilateral refusals to deal by firms possessing monopoly power.

II. Refusals to Deal by Single-Firm Monopolists

Single-firm refusals subject to evaluation under the monopolization branch of section 2 fall into two general categories: refusals to deal with competitors and refusals to deal with non-competitors. Decisions under these two headings are reviewed below.

A. Refusals to Deal With Competitors

Refusals by single firms to deal directly with competitors have given rise to potential section 2 liability only (1) in the case of vertically integrated monopolists and (2) when a monopolist refuses to make an essential facility or service available.

---

7 250 U.S. at 302-04.
8 253 F. 522, 527 (E.D. Va. 1918).
9 250 U.S. at 307.
10 Id.
1. Refusal to Deal by a Vertically Integrated Monopolist

A vertically integrated monopolist is a firm which has monopoly power at one level of the production or distribution of a product or service and is at the same time engaged at another level in the production or distribution of the product or service. Section 2 liability for a refusal to deal by a vertically integrated monopolist has typically been predicated upon the refusal by a firm with a lawful monopoly in one market, such as a manufacturing market, to sell to customers competing with its own distribution organization. The Supreme Court faced this situation in *Otter Tail Power Co. v. United States* (*Otter Tail*). The Court held that an electric utility violated section 2 when it used its monopoly power in the market for the transmission of electric power to foreclose potential entrants at the resale level from obtaining electric power from other sources.

The major cases in this class of refusals before and including *Otter Tail* were exhaustively reviewed in a 1974 student note, and there is no need to discuss them further here. A recent decision by the Court of Appeals for the Sixth Circuit raises serious questions about the proper section 2 analysis for this type of conduct, however, and it warrants extended consideration.

The Court of Appeals for the Sixth Circuit reviewed the duty of a monopolist to deal in *Byars v. Bluff City News Co.* (*Byars*). The plaintiff, Byars, distributed periodicals to retail outlets in certain sections of the Memphis metropolitan area. The defendant, Bluff City News Company (Bluff City), was the sole supplier of periodicals for resale in the Memphis area. It both supplied Byars and distributed periodicals to all remaining retail outlets in the Memphis area.

Bluff City had been Byars' sole source of supply for what are known

---

12 See generally 3 P. AREEDA AND D. TURNER, ANTITRUST LAW ¶¶ 723-25 (1978) [hereinafter cited as AREEDA & TURNER].
15 Id. at 377.
18 609 F.2d 843 (6th Cir. 1979).
19 Id. at 847.
20 Id. at 852.
21 Id. at 847.
as primary line periodicals, *i.e*., those periodical publications with the broad-
est popular appear,\(^{22}\) but it stopped selling them to Byars at the end of 1970.\(^{23}\) Following Bluff City’s refusal to deal, Byars brought an action under section 2. Byars urged that Bluff City, as a monopolist, had a duty to deal with him and that its refusal to deal violated section 2.\(^{24}\) The dis-

The court of appeals began its analysis of whether or not Bluff City had a duty to deal by identifying the elements of proof necessary to show unlawful monopolization:

1) 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.”\(^{26}\)

The court disagreed with the district court’s conclusion that Bluff City did not possess monopoly power in the relevant market, the market for primary line periodicals for resale,\(^{27}\) and concluded that additional fact-finding was necessary before a determination about the existence of monopoly power could be made.\(^{28}\)

The court of appeals then turned its attention to whether or not, assuming the district court on remand were to conclude that in fact Bluff City possessed monopoly power in the relevant market, Bluff City had used that power unlawfully.\(^{29}\) Byars contended that Bluff City abused its mon-
opoly power by refusing to deal with him.\(^{30}\)

Before embarking on a lengthy discussion of abuse of monopoly pow-
er, the court of appeals noted that Byars and Bluff City were not com-

\(^{22}\) *Id.* at 848-49. Although Byars was eventually able to acquire primary line periodicals from other sources, his access to these other sources was limited and, as the court noted, he had therefore “been unable to fully compete with the defendant since he cannot expand the number of stores which he services.” *Id.*

\(^{23}\) *Id.* at 848.

\(^{24}\) *Id.* at 846.

\(^{25}\) *Id.*


\(^{27}\) 609 F.2d at 852.

\(^{28}\) *Id.* at 852-53.

\(^{29}\) *Id.* at 853.

\(^{30}\) *Id.* Byars also contended that Bluff City had abused its monopoly power by engaging in certain “dirty tricks.” *Id.*

\(^{31}\) *Id.* at 853-54.
Before recommending a framework for analysis of refusals to deal by monopolists, the court analyzed existing law. It first observed, citing representative cases, that if Bluff City were found on remand not to possess monopoly power, "it could have terminated, with impunity, its relationship with Byars." The court then noted that there are two general circumstances under which a duty to deal has been imposed upon a monopolist. Citing and discussing Eastman Kodak Co. v. Southern Photo Materials Co. (Eastman Kodak), Lorain Journal Co. v. United States (Lorain Journal), Otter Tail and lower court decisions, the court pointed out that a refusal can violate section 2 if it is "done with intent to preserve a monopoly." It referred to this as the "intent" theory of liability.

The court then identified a second circumstance under which the courts have held that a monopolist's refusal to deal violates section 2. The refusal violates section 2 if it denies competitors "reasonable access" to a scarce facility. The court referred to this as the "bottleneck" theory of liability. It cited as authority for this theory United States v. Terminal Railroad Association (Terminal Railroad), Associated Press v. United States (Associated Press) and comparable lower court cases, some of them arising from concerted refusals to deal. It then observed that the Supreme Court had merged both the bottleneck and intent theories to find liability in Otter Tail.

After identification of these two general theories for imposing a duty to deal, the court listed, by reviewing applicable cases, the different factual

---


33 273 U.S. 359 (1927).

34 342 U.S. 143 (1951).


37 609 F.2d at 856.

38 Id.

39 Id.

40 Id.

41 224 U.S. 383 (1912).

42 326 U.S. 1 (1945).

43 609 F.2d at 856 n. 34. The court cited Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972); Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966); Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3d Cir. 1958); and Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952).

44 609 F.2d at 857.
It identified four separate factual contexts:

1. A refusal to deal which has as its purpose the impairment of competition in a market other than that in which the defendant has monopoly power;46
2. A refusal to deal with customers of a competitor;47
3. A refusal to deal which bars competitors access to "an indispensable facility which cannot be easily duplicated;"48
4. A refusal to deal in furtherance of vertical integration.49

The court observed that Bluff City's conduct placed it in the fourth category, and it noted that if the district court on remand were to determine that Bluff City were in fact a monopolist, then "application of Otter Tail, Kodak and Poster Exchange would seemingly result in a quick finding of liability."50

Things are not always what they seem, however, and the court declined to impose an absolute duty to deal on a monopolist "in the vertical integration context."51 Instead, it turned its attention to identification of those criteria which, in its view, should be taken into account in determining whether a refusal to deal in this setting violates section 2.

At the outset of its discussion of these criteria, the court noted that the cases addressing a monopolist's duty to deal "have effectively required a finding of specific intent to monopolize."52 Without addressing the propriety of the use of a specific intent standard,53 the court emphasized that intent was, in any event, not dispositive:

46 Id.
47 The court cited as representative cases: Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966); and Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3d Cir. 1958). Id. at 857.
48 The court cited as representative cases: Lorain Journal Co. v. United States, 342 U.S. 143 (1951); North Texas Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189 (5th Cir. 1965), cert. denied, 382 U.S. 977 (1966); and Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir), cert. denied, 354 U.S. 923 (1957). Id. at 858.
49 The court cited as representative cases: United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); and Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952). Id. at 858.
50 Id. at 859.
51 Id.
52 Id. (emphasis in original).
53 The Supreme Court expressly rejected the need to prove specific intent in a monopolization case in United States v. Griffith, 334 U.S. 100 (1948). Proof of specific, as opposed to general, intent "is necessary only where the acts fall short of the results condemned by the Act," i.e., only in an attempt case under Section 2. 334 U.S. at 105. See generally notes 179-91, infra and accompanying text.
[W]hat should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices. As preservation of competition is at the heart of the Sherman and Clayton Acts, a practice should be deemed "unfair" or "predatory" only if it is unreasonably anti-competitive. In a § 2 case, only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anti-competitive and thus unlawful.⁶⁴

After observing that the "anti-competitive impact" of the first three types of refusal listed above is "obvious,"⁵⁵ the court proceeded to explain how the impact in the case of a vertically integrating monopolist is, in contrast, anything but "obvious."⁵⁶ It then set out to detail the variables which must be weighed to determine whether a refusal to deal in this latter factual context is, in its words, "unreasonably anti-competitive" and therefore unlawful.

The court first noted that vertical integration is normally undertaken to achieve marketing and distribution efficiencies and that "[s]ubstitution of a more efficient distributor (the monopolist) for a less-efficient one via a refusal to deal would ordinarily enhance competition in the distribution market."⁵⁷ The court acknowledged, however, that a refusal to deal in furtherance of vertical integration may, under some circumstances, prove anti-competitive,⁶⁸ but it reasoned that a refusal producing marketing efficiencies would be justifiable.⁶⁹ It directed the district court to "analyze the evidence and make a determination whether Bluff City's cut-off of Byars was justifiable on efficiency grounds."⁷⁰

The court also ruled that the district court should examine the business reasons which might have justified Bluff City's refusal to deal.⁶¹ Bluff City contended that by refusing to deal with Byars, it had put itself in a position better to control its publications distribution and better to handle returns of unsold periodicals.⁶² The court stated that if in fact this were the case, then its conduct could be justified.⁶³ Although the court did not expressly say so, the implication here is that even if the refusal produced no efficiencies but was carried out in furtherance of legitimate business

⁶⁴ 609 F.2d at 860 (footnote omitted).
⁶⁵ Id.
⁶⁶ Id. at 861-62.
⁶⁷ Id. at 861.
⁶⁸ Id. at 861-62. It would be anticompetitive, according to the court, if it facilitated price discrimination, heightened entry barriers or facilitated evasion of regulation of monopoly profits. Id. at 861.
⁶⁹ Id. at 861-62.
⁷⁰ Id. at 863 (footnote omitted).
⁷¹ Id.
⁷² Id. at 862-63.
reasons, it would have been lawful under section 2. That is to say, it would then, to use the court’s phrase, not have been “unreasonably anti-competitive.”

This detailed review of the court of appeals’ analysis of the factual and legal issues in Byars is a necessary foundation for an evaluation of the propriety of the court’s formulation of a section 2 liability test. We can now weigh the propriety of its holding that a refusal to deal by a vertically integrated monopolist must be evaluated under section 2 by reference to a standard of “unreasonable anti-competitiveness.”

A refusal to deal by a monopolist in Bluff City’s position will, of course, always have anti-competitive impact because it is injurious to the terminated customer-competitor of the vertically integrated monopolist. A court’s inquiry under the Byars formulation, therefore, must focus upon whether the impact is “unreasonable.”

Concentration on the “unreasonableness” of a refusal to deal, however, reduces the test of legality for single-firm conduct under section 2 to the rule-of-reason test applicable to Section 1 conduct. The “unreasonably anti-competitive” test adopted by the court in Byars impedes rather than aids analysis of the legality of single-firm conduct under section 2. What the Byars court effected, sub silentio, was a merger of section 1 rule-of-reason analysis and section 2 monopolization analysis to yield a separate standard for evaluating the legality of single-firm refusals by monopolists. Why any such separate standard is needed or warranted is left unanswered, of course, but the court’s unspoken and erroneous premise is that single-firm refusals by a monopolist are somehow not susceptible of, or appropriate for, analysis under conventional section 2 tests. The court may have been

64 Except for a narrow category of restraints which are presumptively, or per se, unlawful, such as price fixing, see, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), or concerted refusals to deal, see, e.g., Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), a court must determine whether joint conduct challenged under Section 1 of the Sherman Act (15 U.S.C. § 1) produces an unreasonable restraint of trade by evaluating its impact on the market. It is not enough merely to show that a restraint has occurred; it must be shown, in addition, that the restraint is unreasonable, see e.g., Standard Oil Co. v. United States, 221 U.S. 1, 61-62 (1911). Whether conduct is “unreasonable” is determined by balancing its procompetitive benefits against its anticompetitive effects:

If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the “anticompetitive evils” of the challenged practice must be carefully balanced against its “procompetitive virtues” to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the “net effect” of substantially impeding competition.


There was in Byars, however, no need for the court to resort to rule-of-reason analysis, for even under the court’s own test of reasonableness, Bluff City’s refusal would have been reasonable if undertaken to achieve marketing and distribution efficiencies or if undertaken for legitimate business reasons (“business justifications”) unrelated to efficiencies.
led to this assumption by its recognition that under certain circumstances refusals to deal by vertically integrated monopolists may create economies beneficial to competition at the consumer level, but the fact that this kind of single-firm conduct may not always damage competition does not warrant the creation of a hybrid test of legality.

While it is true that the conduct condemned by section 2 is "in large measure merely the end product . . . of conduct which violates section 1," the method of analyzing conduct under these separate provisions of the Sherman Act must take into account the crucial fact that the separate statutory provisions do indeed have application to different types of conduct. While joint conduct constituting monopolization may be reached under both section 1 and section 2, a refusal to deal by a single-firm monopolist cannot be challenged under section 1. This circumstance should alone be sufficient to suggest that conventional section 1 rule-of-reason analysis may not be applicable.

Before demonstrating that section 1 rule-of-reason analysis has no application in evaluating the legality of a unilateral refusal to deal by a monopolist, it will be helpful to review the section 2 test for unlawful monopolization.

Judge Hand suggested in United States v. Aluminum Company of America (Alcoa) that the attainment of monopoly power would be lawful only if the monopolist was "the passive beneficiary of the monopoly." Later decisions, however, have expanded the range of business conduct permissible by a monopolist or by a firm engaged in the attainment of monopoly power.

The most significant of these decisions is Berkey Photo, Inc. v. Eastman Kodak Co. (Berkey). Berkey Photo, Inc. (Berkey) and Eastman Kodak Co. (Kodak) had been competitors in the manufacture of cameras and continued to compete in the processing of color film. Kodak manufactured

65 609 F.2d at 861. See generally Areeda & Turner, supra note 12, at ¶ 725d; Note, Refusals to Deal, supra note 16, at 1726.
69 148 F.2d 416 (2d Cir. 1945).
70 429-30.
72 603 F.2d (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).
color film and paper for developing color film. Berkey used the paper for its own photo processing, and purchasers of Berkey cameras needed the film for use in those cameras. Between 1954 and 1973 Kodak’s share of the “amateur conventional still camera” market—the relevant camera market—in the United States never fell below 61 percent of the total annual unit sales for these cameras. Since 1952, Kodak’s share of the market for photographic film (comprising color print, color slide, color movie and black and white film) had never fallen below 82 percent of the market on a unit sales basis. Kodak’s share of the market for color photo finishing fell from 95 percent in 1954 to 10 percent in 1976, and its share of the color paper market fell from 94 percent in 1968 to 67 percent in 1975.

Berkey brought an action against Kodak alleging monopolization of these various markets. It attempted to demonstrate at trial that Kodak’s introduction in 1972 of its “110 system,” the “Pocket Instamatic” camera, constituted an act of monopolization of the amateur camera market because the new camera could be used only with a new type of film, Kodacolor II, which Kodak had developed specifically for the camera. Berkey urged that Kodak’s failure to provide Berkey advance information sufficient to enable it to produce and market a competitive camera simultaneously with the introduction of the 110 system constituted an act of monopolization.

The jury found, among other things, that Kodak’s refusal to predisclose its contemplated introduction of the 110 system and the new film which was needed for use with it constituted exclusionary conduct in furtherance of Kodak’s monopoly position in the camera market. Judgment was entered for Berkey; Kodak appealed.

The court of appeals reversed, holding that the trial court’s instruction which permitted the jury to make this finding was erroneous and that “as a matter of law, Kodak did not have a duty to predisclose information about the 110 system to competing camera manufacturers.” After turning aside other grounds that would have supported the jury’s damage award for Kodak’s conduct in connection with the introduction of the 110 system and Kodacolor II, the court of appeals also considered whether Kodak’s
refusal to predisclose to independent photo finishers, such as Berkey, the formulae for chemicals used in the finishing process for Kodacolor II and its refusal to predisclose the kind of equipment that would be needed to process the film constituted a violation of section 2. The court held that Kodak would not be liable for any conduct "unless it gained a competitive advantage in these markets [i.e., the markets for photo-finishing and the sale of equipment used in photo-finishing] by use of the monopoly power possessed in other segments of the industry." The court concluded that a new trial would be necessary to resolve the issue:

The instructions to the jury did not draw with sufficient sharpness the distinction between exercises of power and the natural benefits of size and integration. Nor is the record so clear that we can say with certainty on which side of this demarcation the facts fall. The parties quite naturally gave relatively little attention to this aspect of the case in light of the comparatively small sums involved. If the parties wish to pursue these claims to a final determination, therefore, a new trial will be necessary.

Other issues were raised on the appeal, but the foregoing brief review of the facts is sufficient for present purposes. In concluding as it did that Kodak was under no duty of predisclosure, either with respect to the 110 system or with respect to the photo-finishing formula and photo-finishing equipment necessary to process Kodacolor II film, the court sought to clarify the test for unlawful monopolization.

The court of appeals observed that section 2 does not prohibit monopolies, but it emphasized that the possessor of monopoly power "may not wield it to prevent or impede competition." Citing United States v. Grinnell Corp. (Grinnell), the court noted that "maintaining or extending market control by the exercise of that [monopoly] power is sufficient to complete a violation of § 2." Liability under section 2 by a firm possessing monopoly power thus turns upon whether or not the firm used that power — "the power to control prices or exclude competition" in its competitive efforts. The court explained that use of monopoly power is an action that a firm would have found substantially less effective, or even counterproductive, if it lacked market control. Thus, the classic example of such a use is a refusal to deal in goods or services needed

---

86 Id. at 290-91.
87 Id. at 291.
88 Id. at 292.
89 Id. at 294-95.
90 Id. at 274.
92 603 F.2d at 274.
by a competitor in a second market. E.g., Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 . . . (1927). But, a firm without control of the market that attempts this will simply drive the purchaser to take its patronage elsewhere.94

Stated differently, it is not a violation of section 2 for a firm possessing monopoly power to engage in competitive activity that is coincidentally damaging to its competitors. A firm's status as a possessor of monopoly power does not carry with it the obligation to refrain from competition. If it did, the "antitrust laws would thus compel the very sloth they were intended to prevent."95 The purpose of the Sherman Act, as the Berkey court of appeals noted, is not "to maintain friendly business relations among firms in the same industry nor was it designed to keep those firms happy and gleeful."96 As other courts have explained, a possessor of monopoly power is under no duty to help its competitors "survive or expand,"97 nor need it "affirmatively assist potential competitors by subsidizing their entry into the marketplace."98

Rule-of-reason analysis under section 1, in contrast, stands on different footing.98a The question in a non-per se section 1 case is not whether the defendant has by virtue of its position as a monopolist wielded economic power not available to a firm without monopoly power and which would be ineffective or counter-productive if exercised by a nonmonopolist. The question is, instead, "whether an agreement is on balance an unreasonable restraint of trade, that is, its anti-competitive effects outweigh its pro-competitive effects."99 The key inquiry under section 1 is not how monopoly power has been used but rather what has been the impact of this business conduct on the market.100

In National Society of Professional Engineers v. United States101 the Su-
The Supreme Court stressed that the reasonableness of a restraint under Section 1 must be ascertained by evaluating its effect on the market. If the "net effect" of the restraint is substantially to impede competition, then it is unreasonable under the rule of reason and unlawful under section 1. Single-firm conduct by a monopolist, however, is not necessarily susceptible to this kind of analysis. Consider, for example, the business justification defense advanced by the court of appeals in Byars. Applying an "unreasonably anti-competitive" test, the court of appeals proposed that Bluff City's refusal to deal with plaintiff would have been lawful under section 2 if done in order to enable Bluff City better to control the return of unsold periodical copies so it could obtain affidavit privileges. Analyzed under the single-firm monopolization test of Berkey, the refusal to deal would be permissible, since it would not arise from the use of monopoly power. Analyzed under the rule-of-reason, however, the competitive disadvantages of the refusal to deal would surely outweigh the competitive benefits; it would be unlawful if it were the product of joint conduct. The anti-competitive effects of the refusal to deal—total elimination of price and service competition—would be offset by no competitive benefits, since, as the court of appeals itself noted in Byars, the business justification defense would not necessarily require demonstration of customer benefits.

The recent decision by the Court of Appeals for the Ninth Circuit in California Computer Products, Inc. v. International Business Machines Corp. offers a further example of the inapplicability of the section 1 rule-of-reason analysis to single-firm conduct by a monopolist challenged under section 2. The plaintiff, California Computer Products, Inc. (CalComp), manufactured certain disc products, part of a larger category of "peripheral equipment," for use with central data processing units manufactured by the

---

101 Id. at 691-92.
103 Citing Byars, 609 F.2d 843, 860 (6th Cir. 1979), the Fifth Circuit volunteered in Mid-Texas Communications Systems, Inc. v. American Telephone and Telegraph Co., 615 F.2d 1372, 1389 n. 13 (1980), cert. denied, 101 Sup. Ct. 286, (1980) that "[i]t is clear ... that the analysis under section 2 is similar to that under section 1 regardless whether the rule of reason label is applied per se." The Ninth Circuit remarked in California Computer Prods., Inc. v. International Business Machines Corp., 613 F.2d 727 (1979), that a defendant's acts are properly analyzed for legality under section 2.

104 Analogously to contracts, combinations and conspiracies under § 1 of the Sherman Act: the test is whether the defendant's acts, otherwise lawful, were unreasonably restrictive of competition.

105 Id. at 735-36 (emphasis in original; footnote omitted). As will be shown below at notes 105-16 and accompanying text, these kinds of dicta overlook crucial differences separating section 2 analysis of single-firm conduct from analysis of joint conduct under section 1.

106 See id. In any event, evidence of business justification is irrelevant under rule-of-reason analysis except insofar as it establishes procompetitive benefits produced by the restraint under review. See note 167 infra and accompanying text.

107 609 F.2d at 862-63.

108 See id. In any event, evidence of business justification is irrelevant under rule-of-reason analysis except insofar as it establishes procompetitive benefits produced by the restraint under review. See note 167 infra and accompanying text.

109 613 F.2d 727 (9th Cir. 1979).
defendant, International Business Machines Corp. (IBM) and others.  

CalComp alleged that IBM had violated section 2 by cutting prices on disc products. The record showed that IBM had repeatedly cut prices on the products in response to price cuts by competitors, including CalComp, to the point that it was no longer profitable for CalComp to compete. 

Even though IBM had reduced its prices, the evidence showed that it still continued to sell the disc products at a profit. 

In evaluating the legality of IBM's price cuts, the court of appeals framed the issue before it as follows:

The test of the reasonableness of the foregoing pricing actions, and the principal question facing us in this case is whether IBM . . . had the right to respond to the lower prices of its competitors with reduced, but still substantially profitable, prices on its own products.

The court held that the price cuts did not violate section 2:

Rather, IBM's price cuts were a part of the very competitive process the Sherman Act was designed to promote. To accept CalComp's position would be to hold that IBM could not compete if competition would result in injury to its competitors, an ill-advised reversal of the Supreme Court's pronouncement that the Sherman Act is meant to protect the competitive process, not competitors.

Rule-of-reason analysis simply would not fit these facts. If rule-of-reason analysis were applied, IBM would have been found liable, because the harm to competition from IBM's price-cutting could not possibly be offset by any countervailing benefits to competition. Although purchasers of disc products benefited from IBM's conduct by being able to purchase the products at a reduced price, IBM's aggressive response to price-cutting by its competitors caused CalComp loss of revenue, and, presumably, loss of market share. It enhanced IBM's dominance in the market while impairing CalComp's and other manufacturers' ability to compete.

The recognition by the court of appeals in Byars, that a refusal to deal by a single-firm vertically integrating monopolist may under certain circumstances produce efficiencies beneficial to competition does not justify the creation of a separate, hybrid standard for evaluation of the legality of that conduct under section 2. Without considering how sections 1 and 2 should be harmonized generally, it is sufficient to note simply that single-

108 Id. at 731.
109 Id.
110 Id. at 739-41.
111 Id. at 741.
112 Id. at 741-42.
113 Id. at 742.
114 Id.
115 See generally AREEDA & TURNER, supra note 12, at § 715a.
firm conduct by a monopolist can best be evaluated under the Berkey test, if only because the factual predicate for meaningful rule-of-reason evaluation—measurement of competitive benefits against competitive disadvantages—may in many cases be missing when single-firm conduct by a possessor of monopoly power is reviewed. The Byars opinion is devoid of any meaningful section 2 analysis, and the Sixth Circuit's postulation of an "unreasonably anti-competitive" test to evaluate conduct properly tested under the monopolization test of Berkey and similar cases can lead only to further confusion about the legality of refusals to deal by single-firm monopolists.

Not all refusals by a vertically integrated monopolist adversely affecting its competitors have been held potentially violative of section 2. The Court of Appeals for the Ninth Circuit recently ruled in Cowley v. Braden Industries, Inc.,117 that a distributor termination by a firm possessing 70 percent of the national windmill market did not violate section 2 even though the firm, Aeromotor, was itself engaged, through its branches, in direct competition with the terminated distributor.118

While noting that Aeromotor possessed monopoly power in the relevant market, whether the market was viewed nationally or by focusing on Colorado and Arizona where plaintiffs, a distributor and a retailer of Aeromotor products, had been engaged in business,119 the court held that the plaintiffs had failed to satisfy the second prong of the Grinnell test: they had failed to show that the monopoly power of defendant had been willfully acquired or maintained.120 The court noted, without analysis, that plaintiff had introduced "no evidence that Aeromotor [had] acquired or maintained its market position through the use of predatory conduct."121 It further noted that plaintiff had "failed to prove its allegation that Aeromotor used its dominant position in the windmill market (in which it had monopoly power) to improve its pump sales by tying pump sales to windmill sales."122 Finally, the court noted that certain territorial limitations imposed on distributors by Aeromotor, which the court had earlier in the opinion held not to violate section 1 of the Sherman Act under either the rule of reason or the per se test,123 were not used by Aeromotor in the windmill market "with predatory intent."124

The presence or absence of "predatory intent" is, of course, not the

---

116 See note 71 supra for articles reviewing similar cases.
117 613 F.2d 751 (9th Cir.), cert. denied, 48 U.S.L.W. 3767 (1980).
118 Id. at 753, 755.
119 Id. at 756.
120 Id.
121 Id.
122 Id.
123 Id. at 754-55.
124 Id. at 756.
measure of unlawful monopolization. While proof of such an intent may be necessary to establish attempted monopolization, where “a specific intent to destroy competition or build monopoly” is an element of proof,\textsuperscript{125} characterization of motive as “predatory” adds nothing to monopolization analysis.\textsuperscript{126} Rather, as discussed above,\textsuperscript{127} whether conduct by a firm possessing monopoly power constitutes unlawful monopolization turns instead upon whether or not that conduct arises from the exercise of the monopoly power and could not otherwise be effectuated. Under this test, the court of appeals’ disposition of plaintiff’s monopolization count in Cowley was proper even if its reasoning was not.\textsuperscript{128} The conclusion was proper because Aeromotor, in terminating plaintiff Cowley as its Arizona distributor, was engaging in conduct consistent with rational business behavior by a non-monopolist, and the exercise of that conduct in no way depended upon the possession and exercise of monopoly power by Aeromotor. A brief review of the facts giving rise to the litigation confirms this analysis.

In appointing a distributor, Aeromotor agreed that its branches would not compete with the distributor in the distributor’s territory.\textsuperscript{129} Additionally, Aeromotor’s policy discouraged distributors from selling within the territory of another distributor.\textsuperscript{130} A distributor could sell outside its territory only if the goods were first sent to the selling distributor’s territory and were placed in the stock of the selling distributor.\textsuperscript{131} When plaintiff Cowley, the Aeromotor distributor for Arizona, began selling windmills to purchasers in Colorado, including Carder (a retailer who joined Cowley as plaintiff) without first shipping the windmills through Arizona, Aeromotor’s Colorado distributor complained to Aeromotor.\textsuperscript{132} Aeromotor in return warned Cowley against this practice and subsequently terminated Cowley when it ignored Aeromotor’s requests to stop selling to Carder.\textsuperscript{133} Thus, Aeromotor’s termination of Cowley was fully consistent with Aeromotor’s previously announced distribution policies, and it in no way depended upon the possession of monopoly power for its justification or execution.

\textsuperscript{125} Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953).
\textsuperscript{126} See generally Areeda & Turner, supra note 12, at ¶ 626a.
\textsuperscript{127} See notes 89-98 supra and accompanying text.
\textsuperscript{128} For a recent decision in which a district court found, on a motion for preliminary injunction, a probable violation of section 2 when a manufacturer of heavy equipment terminated the sale of replacement parts to a firm engaged in servicing the equipment, see Kresl Power Equipment, Inc. v. Acco Inds., Inc., 1980-2 Trade Cas. ¶ 63,554 (N.D. Ill. 1980). As did the court of appeals in Byars (see notes 61-63 supra and accompanying text), the district court erroneously evaluated the legality of the refusal by reference to defendant’s motives and held that “defendant had the burden to show a reasonable business justification for its action.” Id. at 76,956.
\textsuperscript{129} 613 F.2d at 753.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 753-54.
\textsuperscript{133} Id. at 754.
A comparable result was reached by the Court of Appeals for the First Circuit in *Homefinders of America, Inc. v. Providence Journal Co. (Homefinders)*.\(^{134}\) Although the defendant was not vertically integrated, the case is nonetheless closely analogous to vertical integration cases because the defendant was a supplier of plaintiff in one market and a competitor of plaintiff in an adjacent market. Plaintiff in *Homefinders* was a franchisor of businesses engaged in the sale of lists of apartment properties. Walker, plaintiff's former Rhode Island franchisee, brought an action, in which his franchisor was later joined, against the publisher of the Providence *Journal*, a newspaper of general circulation in Providence, Rhode Island, alleging that its refusal to accept classified advertising from Walker eventually forced him out of business and caused the franchisor, Homefinders, antitrust injury.\(^{135}\)

Walker's sole activity as a franchisee was the sale and maintenance of lists of rental properties.\(^{136}\) He advertised for the sale of a list by placing in the classified section of the *Journal* advertisements which appeared to be for individual rental properties. The advertising was in fact, however, simply bait, and a reader calling about a particular property would be advised that if he or she wanted complete information about the property it would be necessary to purchase the appropriate list from Walker.\(^{137}\) The *Journal* received frequent complaints about Walker's ads (including some from the Better Business Bureau) and it eventually determined not to run them.\(^{138}\)

Homefinders lost in the trial court and made no effort on appeal to dispute the fact that the ads were misleading. Plaintiff did contend, however, that the refusal by the *Journal* to run the classified advertising constituted an act of unlawful monopolization. Reviewing the case after the district court had tried it on the merits and dismissed the complaint, the court of appeals affirmed the dismissal, holding that the *Journal*'s conduct did not constitute unlawful monopolization.

The court of appeals, in an opinion written by Judge Aldrich, summarily disposed of plaintiff's monopolization contention. Without discussing the principles of *Grinnell* or related cases, the court began by simply observing that even if the *Journal* did have monopoly power and even if the plaintiffs were a competitor of the *Journal* (in the classified advertising market), these circumstances would not require the *Journal* "to immolate itself" by accepting fraudulent advertising.\(^{139}\) The court went on to note

\(^{134}\) 621 F.2d 441 (1st Cir. 1980).
\(^{135}\) Id.
\(^{136}\) Id.
\(^{137}\) Id. at 442.
\(^{138}\) Id.
\(^{139}\) Id. at 443.
that the Sherman Act "is not aimed at reasonable conduct, and it is not unreasonable for a newspaper to refuse misleading advertising that offends its readers and could turn them away from its classified columns altogether." Citing Byars, Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., and America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., the court observed that the defendant was free to refuse to deal with a party who so lowered the standards of its advertising. The court concluded this part of its discussion by noting that the plaintiff "fails to distinguish between legally attempting to maintain a monopoly position and protecting one's assets."

The Doric simplicity of the Homefinders opinion should not obscure the fact that the court's disposition of the section 2 claim is unassailable. Plaintiff's wrongful conduct, damaging not only to the Journal but to the public at large, was the only reason for the refusal to deal. Although the refusal had anticompetitive consequences because plaintiff and defendant were both competitors in the market for the advertising of apartments, those consequences were an incidental effect of reasonable steps that defendant took to protect its goodwill and business position. The refusal to deal falls far short of the kind of exercise of monopoly power identified in Berkey as necessary to establish a violation of section 2. Although the court of appeals was content simply to note that the Sherman Act "is not aimed at reasonable conduct," its holding in light of the facts of the case is entirely consistent with proper standards for evaluating monopolization. Its reliance on Byars does not alter this fact.

2. Refusal by a Monopolist to Grant Access to an Essential Facility

Single-firm refusals to deal can also occur when the holder of monopoly power has control over a facility, service or product, access to which is essential to the business success of a competitor of the monopolist. Joint conduct barring access to such facility, service or product has repeatedly been challenged under section 1 of the Sherman Act. The same joint

---

140 Id.
143 621 F.2d at 443.
144 Id., citing Otter Tail, 410 U.S. at 380-82; Byars, 609 F.2d at 863 and n. 55; and International Railways v. United Brands Co., 532 F.2d 231, 239-40 (2d Cir. 1976), cert. denied, 429 U.S. 835 (1976).
145 621 F.2d at 443.
conduct has also been challenged under section 2.\textsuperscript{147}

One of the few cases, if not the only case, challenging single-firm control by a non-integrated monopolist\textsuperscript{148} over an essential service or facility is Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co. (Mid-Texas Communications).\textsuperscript{149} It was there alleged by a telephone company, Woodlands Telecommunications Corporation (WTC), in competition with Southwestern Bell Telephone Company (Bell) that Bell had violated the monopolization proscription of section 2 by refusing to permit WTC to interconnect with existing Bell telephone lines so WTC could offer long-distance service.\textsuperscript{150}

WTC was a joint venture, to which plaintiff, Mid-Texas Communications Systems, Inc., was a party, formed for the purpose of providing telephone service in the Woodlands, a new residential development outside of Houston, Texas.\textsuperscript{151} If WTC was to provide adequate telephone service, it needed to interconnect with Bell’s existing interstate network so its customers would have long distance service. It was also necessary to secure the Bell system’s cooperation to obtain NNX codes, the three-digit prefix for all phone numbers.\textsuperscript{152}

When WTC requested NNX codes and interconnection with its proposed new telephone system, Bell refused to cooperate. Bell planned to serve the area itself, and it reasoned that the establishment of a new independent telephone company was contrary to the public interest and would constitute a wasteful duplication of facilities.\textsuperscript{153} Following a trial, the jury returned a verdict, which, after trebling by the court, was approximately $55 million.\textsuperscript{154} The court of appeals reversed and remanded for a new trial.

Only one of the issues on appeal need concern us here: WTC’s claim that Bell’s refusal to deal with it in the long-distance market constituted a willful misuse of monopoly power in violation of section 2.\textsuperscript{155} After noting that the district court had erroneously instructed the jury on the effect regu-

\textsuperscript{147}See, e.g., Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972); Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 1979-1 Trade Cas. ¶ 62,527 at 77,041-42 (N.D. Cal. 1979).

\textsuperscript{148}The legality under section 2 of denial of access to an essential service or facility by a vertically integrated monopolist was addressed in Otter Tail Power Co. v. United States, 410 U.S. 366, 377-78 (1973), and Town of Massena v. Niagara Mohawk Power Corp., 1980-2 Trade Cas. ¶ 63,526 at 76,812-13 (N.D.N.Y. 1980).

\textsuperscript{149}615 F.2d 1372 (5th Cir.), cert. denied, 101 S. Ct. 286 (1980).

\textsuperscript{150}Id. at 1376-77.

\textsuperscript{151}Id. at 1376.

\textsuperscript{152}Id.

\textsuperscript{153}Id.

\textsuperscript{154}Id. at 1375-76.

\textsuperscript{155}Id. at 1383.
lation of Bell by governmental agencies would have on whether or not Bell possessed monopoly power, the court of appeals turned to consider whether, even assuming Bell were shown to possess monopoly power, its refusal to interconnect constituted a violation of section 2.

The court began by noting that even if Bell were shown to possess monopoly power, "liability under Sherman Act Section 2 exists only if the jury finds that Bell abused its monopoly power by acting 'in an unreasonably exclusionary manner' relative to its competitors." The court then held, citing Byars again, that, "as a general principle, section 2 prohibits only those refusals to deal which under the particular circumstances of a case are unreasonably anticompetitive." Bell argued that whether the refusal to interconnect was reasonable required consideration of the impact of government regulation on Bell's actions. Bell urged that the jury should have been instructed that it could take into consideration Bell's contention that its primary justification for refusing interconnection was its belief that interconnection was contrary to the public interest as defined in section 201(a) of the Communications Act of 1934 because it would result in duplication of facilities in The Woodlands area. The court of appeals reduced the matter to this proposition:

Bell's position is that the refusal was not arbitrary or motivated by anticompetitive intent, but instead was proper because Bell believed that WTC's request was contrary to the public interest. If Bell was correct in its assessment, and if its purpose in refusing interconnection was to vindicate the public interest, then the refusal, despite its obvious anticompetitive effect, would have been proper and entitled to protection from antitrust scrutiny.

The court then held that the jury should have been instructed that it could consider the reasonableness of Bell's conduct by taking into account the "relevant regulatory framework."

Following the lead of the Byars court, the Fifth Circuit ignored conventional section 2 principles and relied upon a hybrid standard for the evaluation of a unilateral refusal to deal by a firm possessing monopoly power: whether the refusal is "unreasonably anticompetitive." It did so by remarking that "[i]t is clear . . . that the analysis under section 2 is similar

156 Id. at 1387.
157 Id. citing Byars v. Bluff City News Co., 609 F.2d 843, 853 (6th Cir. 1979).
158 Id. at 1389.
159 Id.
161 615 F.2d at 1389.
162 Id. at 1390 (emphasis added; footnote omitted).
163 Id.
to that under section 1 regardless whether the rule of reason label is applied per se.\textsuperscript{164} The only authority cited for this glib pronouncement is, not surprisingly, the Byars case. As has already been shown above, however, the importation of section 1 rule-of-reason standards into a section 2 single-firm monopolization case compounds rather than eases analytical difficulties.

In any event, the simple fact of the matter is that the court of appeals in Mid-Texas Communications did not engage in rule-of-reason analysis. It did not weigh the anticompetitive effects of Bell's refusal to interconnect against the competitive benefits of the refusal. Indeed, it acknowledged, in the passage quoted above,\textsuperscript{165} that the refusal would have been lawful "despite its obvious anticompetitive effect" if Bell's purpose was the prevention of competition, \textit{i.e.}, the avoidance of duplication of facilities. The refusal would be lawful if Bell had an adequate "justification," such as a belief that Congress has already made the determination that duplication of telephone facilities is contrary to the public interest, competitive consequences to the contrary notwithstanding.\textsuperscript{166} Under rule-of-reason analysis, evidence of justification other than the promotion of competition is not even relevant.\textsuperscript{167}

The court's instincts were correct, however, even if its language was not. Under the section 2 test refined by the court of appeals in Berkey, Bell's conduct would not have been a use of monopoly power. Bell's refusal was a rational response to WTC's potential competition, would have made sound business and economic sense, and could have been effected even if Bell had not possessed monopoly power. The court of appeals' misplaced reliance on Byars does not alter these facts.

B. \textit{Refusals to Deal with Noncompetitors}

The legality of a unilateral refusal to deal by a firm possessing monopoly power has also been addressed in connection with refusals to deal with certain categories of noncompetitors. The courts and the Federal Trade Commission have found violations of section 2 by single firms in three separate settings:

1. Refusal to deal with a customer of a competitor;\textsuperscript{168}

2. Refusal to deal with a distributor; and

\begin{itemize}
\item \textsuperscript{164} \textit{Id.} at 1389 n. 13.
\item \textsuperscript{165} See note 162 \textit{supra} and accompanying text.
\item \textsuperscript{166} 615 F.2d at 1389.
\end{itemize}
3. Refusal to deal with a customer where the firm possessing monopoly power controls an essential facility.

The second and third categories of single-firm conduct adversely affecting noncompetitors are discussed below. The first category need not be reviewed, since the courts have ventured no specialized tests of section 2 legality for cases falling within it.168

1. Refusal to Deal With a Distributor

The Court of Appeals for the Third Circuit had occasion to evaluate the legality under section 2 of a refusal to deal with a customer in Sargent-Welch Scientific Company v. Ventron Corporation (Sargent-Welch).170 The defendant, through its Cahn division, manufactured and sold electromagnetic microbalances.171 It marketed the microbalances through dealers, one of which was plaintiff, Sargent-Welch.172

Cahn terminated Sargent-Welch in 1971 on the grounds that (1) its purchases from Cahn had been decreasing each year since 1968, (2) it had refused to market Cahn’s new line of millibalances and (3) it had been promoting the Cahn microbalances inadequately in advertising and at trade shows.173

Sargent-Welch sued Ventron Corporation, alleging that the termination was in furtherance of price-fixing, tying and monopolization. Only the monopolization claim need be addressed here. The district court defined the relevant market in such a way as to include all precision balances, thereby giving Cahn only 8 percent of the market.174 The court of appeals reversed this definition of relevant market and held, instead, that the district court should have evaluated Cahn’s market power by reference to a separate submarket for microbalances.175 It held that Cahn had a monopoly in the electromagnetic microbalance submarket.176

The court of appeals then considered whether Cahn’s termination of Sargent-Welch may have been motivated by Sargent-Welch’s refusal to handle its millibalances. The court reasoned that if termination was a use of monopoly power in the microbalances submarket to further sales of millibalances by remaining dealers it would have been a misuse of monopoly power in violation of section 2.177 The court concluded, however, that it was not

168 See cases cited at note 168 supra.
171 Id. at 704-05.
172 Id. at 705.
173 Id.
174 Id. at 706.
175 Id. at 711.
176 Id.
177 Id. at 713.
in a position to determine from the record as it presently stood whether in fact Cahn's dealer reduction program and its termination of Sargent-Welch had this as their purpose. It remanded the section 2 claim for further findings.\textsuperscript{178}

The court's conclusion that Cahn's purpose in undertaking the actions complained of was dispositive of their legality is puzzling, to say the least. The court began its analysis of this branch of the case by noting that a specific intent to monopolize need not be shown to prove monopolization.\textsuperscript{179} It then recited the conventional wisdom that conduct which would be lawful if undertaken by a firm without monopoly power may be unlawful under section 2 if done by a monopolist.\textsuperscript{180} Then, citing \textit{Eastman Kodak v. Southern Photo Materials Co. (Eastman Kodak)},\textsuperscript{181} the court observed that the "anti-competitive quality of an act may depend, however, upon the purpose with which it was done."\textsuperscript{182} From this, the court reasoned that the lawfulness of Cahn's termination of Sargent-Welch "depends upon Cahn's purpose. . . ."\textsuperscript{183}

While noting that the termination of Sargent-Welch would not be unlawful if undertaken for the purpose of enhancing the efficiency of Cahn's marketing efforts, the court nonetheless believed that the same conduct, producing the same effect, would be converted into a violation of section 2 if undertaken with a purpose to force dealers to handle millibalances or to punish Sargent-Welch for its refusal to handle millibalances.\textsuperscript{184}

The court of appeals correctly read the \textit{Eastman Kodak} case as support for this kind of analysis. The Supreme Court there held that the district court properly submitted for the jury's determination the question whether Kodak's refusal to sell its photographic supplies to a competitor in Atlanta at dealers' discounts was "in pursuance of a purpose to monopolize."\textsuperscript{185} The unmistakable implication of the ruling in \textit{Eastman Kodak} is that proof of monopolization requires more than simply proof that the defendant intended to take the actions which caused the effect the plaintiff complains of. The plaintiff must demonstrate that the action complained of was "in pursuance of a purpose to monopolize."

To the extent \textit{Eastman Kodak} can be read to hold that proof of monopolization requires more than simply demonstrating that the defendant took the actions constituting the alleged monopolization knowing that

\textsuperscript{178} Id.
\textsuperscript{179} 567 F.2d at 711, \textit{citing} United States v. Griffith, 334 U.S. 100, 105 (1948).
\textsuperscript{180} 567 F.2d at 711-12.
\textsuperscript{181} 273 U.S. 359, 375 (1927).
\textsuperscript{182} 567 F.2d at 712.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 712-13.
\textsuperscript{185} 273 U.S. at 375.
he was taking the actions, it directly conflicts with *United States v. Griffith*, also cited by the court of appeals in *Sargent-Welch*. The government charged in *Griffith* that the members of a film exhibitor circuit operating movie theatres in Oklahoma, Texas and New Mexico had combined and conspired to negotiate agreements with film distributors which had, among other things, the effect of monopolizing the exhibition of films in many communities. The district court found no liability under section 2 because it reasoned that the defendants had not engaged in the conduct complained of for the "avowed purpose of eliminating competition and of acquiring a monopoly of theatres in the several towns." 

The Supreme Court ruled that it was an error for the district court to require such proof of purpose:

It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as a consequence of a defendant's conduct or business arrangements. . . . To require a greater showing would cripple the Act. . . . And so, even if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act.

. . . When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did.

The purpose test relied upon by the court in *Sargent-Welch* thus has no place in the evaluation of legality of conduct under the monopolization branch of section 2. Proof of anticompetitive purpose or specific intent to accomplish an unlawful result is, as the Supreme Court noted in *Griffith*, "necessary only where the acts fall short of the results condemned by the

---

186 334 U.S. 100 (1948).
187 Id. at 101-03.
188 Id. at 105.
189 Id. at 105-06, 108.
190 See AREEDA & TURNER, supra note 12, ¶ 626a at 76-77. But see City of Mishawaka v. American Electric Power Co., 616 F.2d 976, 985 (7th Cir. 1980), cert. denied, 49 U.S.L.W. 3494 (1981) (specific intent must be shown where a defendant is regulated utility). For a recent decision in which a court mistakenly believed intent to be dispositive, see Local 1330 v. United States Steel Corp., 1980-2 Trade Cas. ¶ 63,486 at 76,568-69 (6th Cir. 1980), in which the Sixth Circuit reversed the lower court's dismissal of a complaint alleging the exercise of monopoly power "for the purpose of preventing a potential competitor from entering the steel market." Id. at 76,568. The complaint alleges a section 2 violation in the refusal by a steel manufacturer to sell its plant to the plaintiff union.
Act."\textsuperscript{191} Under section 2, evidence of specific intent is relevant only to a claim of attempted monopolization or conspiracy to monopolize.

Ignoring the court of appeals' holding with respect to intent, the court's analysis in Sargent-Welch nonetheless reflects an awareness, not shared by the Byars or Mid-Texas Communications courts, that the evaluation of a single-firm refusal to sell under the monopolization provision of section 2 neither requires nor warrants attention to any different standards than those applicable to the evaluation of single-firm conduct generally. A recent decision by the Federal Trade Commission under section 5 of the Federal Trade Commission Act\textsuperscript{192} reflects, in contrast, no such awareness and constitutes a radical departure from established analysis of the legality of refusals to deal.

2. Refusal to Deal by a Monopolist Causing Competitive Injury in Another Market

The Federal Trade Commission recently had occasion to consider the duty of a monopolist to deal with noncompetitors in need of a service or product offered by the monopolist. The Commission concluded in Reuben H. Donnelley Corporation\textsuperscript{193} that the respondent, The Reuben H. Donnelley Corporation (Donnelley), engaged in an unfair trade practice under section 5(a) of the FTC Act\textsuperscript{194} when it listed in the Official Airline Guide (OAG), which it alone published, the flights offered by commuter airlines and intrastate airlines differently from the major airlines certificated by the Civil Aeronautics Board. Although the Commission exercised its authority under section 5 of the FTC Act, its analysis rested on section 2 of the Sherman Act and could arguably be invoked under section 2 by a private litigant or by the Antitrust Division of the Department of Justice. It therefore warrants close attention here.

The facts can be simply stated. The Commission found that the OAG is the only complete listing of scheduled flights in North America, and it is the "main source of flight schedule information for the flying public and a

\textsuperscript{191} 334 U.S. at 105.
\textsuperscript{194} Section 5(a) of 15 U.S.C. § 45(a) (1976) provides in pertinent part as follows:
(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 U.S.C. 1301 et. seq.], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et. seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(a)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.
primary marketing tool for air carriers." The OAG is recognized in the industry as "unique and indispensable." The Commission therefore concluded that the guide constituted a separate product market.

After noting that certificated and non-certificated carriers compete for many of the same passengers, the Commission turned to consider whether Donnelley engaged in an unfair method of competition when, acting unilaterally, it failed to publish in the OAG connecting flight information for commuter carriers and to combine in it the flight schedule listings of all three classes of carriers. Commissioner Pitofsky, writing for the Commission, stated the issue for determination this way:

[T]he second ground [on which the administrative law judge found a violation of Section 5 of the FTC Act] raises a policy issue which has perplexed antitrust cognoscenti for decades — whether antitrust liability may attach to practices of a monopolist which are not related to achieving or maintaining its monopoly power, but which are arbitrary and result in competitive injury to customers, suppliers, or others vulnerable to its monopoly power.

The Commission embarked on its legal analysis by pointing out how:

this case differs from ordinary monopolization cases where challenged acts or practices were engaged in to benefit the monopolist competitively, either in the market in which the monopoly power existed or in some adjacent market into which the monopolist had extended its operations.

It observed that this case was not, for example, like United States v. United Shoe Machinery Corp., in which United Shoe Machinery Corporation had engaged in practices damaging to its actual and potential competitors in the market in which it possessed monopoly power, the production of shoe machinery. The Commission noted that "[h]ere, by contrast, none of Donnelley's challenged acts is alleged to have maintained or enhanced its monopoly power in the market the OAG dominates."

The Commission also noted, by way of example, that this is not a case like Otter Tail, in which the Supreme Court found a violation of section 2 because, among other reasons, "Otter Tail had used its monopoly

\[105\] 21,650 at 21,801 and 21,809.
\[106\] Id. at 21,809.
\[107\] Id.
\[108\] Id. at 21,809-10.
\[109\] Id. at 21,815.
\[110\] Id. at 21,801.
\[111\] Id. at 21,815.
\[203\] 21,650 at 21,815-16.
\[204\] Id. at 21,816.
power in one market (transmission lines) to enhance monopoly in another market (retail distribution)."\textsuperscript{208} The Commission explained that "Donnelley's policies, which have affected competition in the air transportation market, were not intended to benefit Donnelley in that market," because Donnelley was not engaged in business in the market.\textsuperscript{207}

The Commission then noted candidly that the "question we are presented with is outside the mainstream of law concerning monopolies and monopolization."\textsuperscript{208} Undaunted by the uncharted waters, it concluded nonetheless that a monopolist has an obligation "not to injure customers."\textsuperscript{209} It found support for this conclusion in an earlier Commission decision, \textit{Grand Caillou Packing Co. (LaPeyre)}.\textsuperscript{210}

The issue before the Commission in \textit{LaPeyre} was whether the only manufacturer of machinery used for peeling shrimp, LaPeyre, engaged in an unfair method of competition when it leased the machinery to canners located in the Northwest at twice the rate it leased the machinery to those located on the Gulf Coast. The same family who owned the machinery manufacturing company also owned Grand Caillou, a shrimp canning business on the Gulf Coast.\textsuperscript{211} The Commission relied upon this dual ownership to conclude that the discriminatory pricing policy for the equipment leases was an unfair method of competition because it was intended to protect Grand Caillou from the competition of the Northwest canners.\textsuperscript{212} Citing \textit{Associated Press}, \textit{and Terminal Railroad},\textsuperscript{214} Commissioner Elman noted in a concurring opinion in \textit{LaPeyre} that firms possessing monopoly power are subject, "under the antitrust laws, to some of the obligations of fair and equal treatment borne by publicly regulated utilities."\textsuperscript{215} Commissioner Elman then made the following observation about the duty to deal:

The short of it is that respondents' insistence on charging a monopoly price may well result in the destruction of a substantial segment of the shrimp canning industry. This result, which is not dictated by efficiency—for, to repeat, the cost of processing shrimp by machine is the same regardless of the size of the shrimp—but by monopoly power, is clearly opposed to the objectives of antitrust policy. The right of a monopolist to exploit his monopoly (whether such monopoly is conferred

\begin{thebibliography}{99}
\item[208] \textsuperscript{208} \textsuperscript{208} at 21,650 at 21,816 (footnote omitted).
\item[207] \textsuperscript{207} Id.
\item[208] Id.
\item[209] Id. at 21,817.
\item[210] 65 FTC 799 (1964), aff'd sub. nom., LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966).
\item[211] 65 FTC at 800.
\item[212] Id. at 848.
\item[213] 326 U.S. 1 (1945).
\item[214] 224 U.S. 383 (1912).
\item[215] 65 FTC at 868.
\end{thebibliography}
by patents or otherwise) by charging a monopolist's discriminatory price does not, in my opinion, include the right to destroy or cripple a major segment of an industry, but must yield in such a case to the policy of competition embodied in the antitrust laws . . . . In the circumstances, respondents' refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms is an abuse of monopoly power.\textsuperscript{216}

The Commission placed great reliance in \textit{Donnelley} upon Commissioner Elman's concurring \textit{LaPeyre} opinion,\textsuperscript{217} and it drew additional support for its conclusion that a monopolist has a duty not to injure customers from the Fifth Circuit's opinion which affirmed the Commission's disposition of \textit{LaPeyre}. The court of appeals there made the following pertinent observation:

[T]he problem of this case is . . . the duty of a lawful monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers . . . . Both the majority and Commissioner Elman found that the central characteristic [of respondents' conduct] was the same—the utilization of monopoly power in one market resulting in discrimination and the curtailment of competition in another . . . . [T]here is abundant evidence in the record in support of the Commission's conclusion that Peelers leasing procedure is innately discriminatory and anti-competitive in its effect and that in circumstances of the instant case, the refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5.\textsuperscript{218}

The Commission drew further support from a dictum in a recent Fifth Circuit case, \textit{Fulton v. Hecht}.\textsuperscript{219} There, plaintiff, who raised racing greyhounds, alleged that the defendant, the operator of dog racing tracks in south Florida, violated section 2 of the Sherman Act when it refused to renew plaintiff's racing contract.\textsuperscript{220} Plaintiff claimed, among other things, that under section 2 a monopolist has a duty to deal fairly with anyone who seeks to compete in an adjacent market.\textsuperscript{221} The court of appeals, citing \textit{LaPeyre}, acknowledged that this might be true under section 5 of the FTC Act but reasoned that "[s]uch a duty is no help to the instant plaintiff because his action is based on § 2 of the Sherman Act, and there is no private cause of action for violation of the FTC Act."\textsuperscript{222}

\textsuperscript{216} Id. at 868-69.
\textsuperscript{217} \textsection{} 21,650 at 21,816-17.
\textsuperscript{218} 366 F.2d at 120-21.
\textsuperscript{219} 580 F.2d 1243 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979). See notes 287-99 infra and accompanying text for a discussion of this case.
\textsuperscript{220} Id. at 1245-46.
\textsuperscript{221} Id. at 1247.
\textsuperscript{222} Id. n. 2, at 1249.
After citing *Fulton v. Hecht*, the Commission then turned its attention to what it characterized as “collateral lines of authority which support imposition of some duty on a monopolist not to discriminate in dealing with persons who compete with one another in an adjacent market.” It noted that imposing on a monopolist a duty “not to be unreasonable or not to be arbitrary” would be consistent with Supreme Court holdings in “important joint venture cases” such as *Terminal Railroad* and *Associated Press*.

Finally, the Commission identified “policy reasons” for imposing such a duty on a monopolist:

Policy reasons for imposing a duty not to be arbitrary are compelling. Since we are dealing with a monopolist, the victimized customer or supplier cannot turn to an alternative source. Thus, a refusal by the monopolist to deal, or deal otherwise than on discriminatory terms, essentially means the disfavored person suffers a competitive disadvantage which cannot be avoided. Such a result should not come about from an arbitrary decision by the monopolist. Moreover, arbitrary decisions may affect resource allocation in the adjacent market—that is, favor one competitor over another for reasons entirely divorced from considerations of efficiency or willingness of the disfavored seller to compete effectively. . . . It is inconsistent with the fundamental goals of antitrust to permit such results if they can be avoided at acceptable cost.

The Commission turned aside what it characterized as “formidable policy reasons” which had been advanced in opposition to the existence of a duty not to be arbitrary. In the course of doing so, it acknowledged, with remarkable understatement, that the result it had arrived at “may be inconsistent to some extent with the theory of the *Colgate* doctrine.” The Commission had this to say about *Colgate*:

In *Colgate* the court recognized the right of a trader “freely to exercise his own independent discretion as to parties with whom he will deal,” at least in the absence of any purpose to create or maintain a monopoly. Here, there is no such purpose, but we believe the philosophy of *Colgate* must give way to a limited extent where the business judgment is exercised by a monopolist in an arbitrary way.

Before endeavoring to apply this newly-created duty to the facts before it, the Commission undertook to define what it meant by the term

---

223 § 21,650 at 21,817.
224 *Id.*
225 *Id.* at 21,818.
226 *Id.*
227 *Id.* n. 37.
228 *Id.*
"arbitrary." It disclaimed any intention to impose a duty on a monopolist to deal fairly and equally in every case:

Rather, we should limit ourselves to a concern with conduct which results in a substantial injury to competition and lacks substantial business justification. In examining the question of business justifications, the economic self interest of the monopolist would be the major but not the exclusive consideration. Where there is little justification for a business policy, the antitrust laws can require that the monopolist take into account the effect on competition of its actions in the line of commerce made up of its customers, suppliers or others wishing to deal with it.229

Application of the duty not to be arbitrary to the facts before it detained the Commission only briefly. It ruled that Donnelley’s failure to list connecting flight information for commuter carriers was arbitrary and, therefore, a violation of section 5.230 It was “arbitrary” because, according to internal company documents, it could have been carried out at a cost of only $6,000 in 1972, and it was in fact carried out in December 1976, without any adverse consequences for Donnelley.231 The Commission therefore concluded that “Donnelley’s failure to list commuter connecting flights was arbitrary, caused commuter air carriers significant competitive injury, and constituted a violation of § 5.”232

The Commission also decided, however, that Donnelley’s failure to merge the listings of noncertificated carriers with those of certificated carriers was not arbitrary.233 It reasoned that Donnelley had “a substantial business justification for its separate listing policy.”234 The policy was based on “Donnelley’s belief that certificated carriers provide more reliable flight information for listing in the OAG and are generally faster, safer, and more comfortable than commuter carriers.”235 Comparable justifications existed for listing the intrastate carriers in a separate category.236

The Commission’s holding in Donnelley constitutes a sharp break with section 2 precedents, and the authorities relied upon by the Commission to impose on a monopolist a duty not to be arbitrary in fact offer no support for the holding.

First, the Commission’s reliance upon LaPeyre as principal authority for the proposition that a monopolist has an obligation not to injure cus-

229 Id. at 21,819.
230 Id. at 21,820.
231 Id.
232 Id. (footnote omitted).
233 Id.
234 Id.
235 Id.
236 Id.
tomers is misplaced. Despite Commissioner Elman's reference in his con-
curring opinion to public utility principles, the facts of LaPeyre place it
squarely within the reasoning of the Supreme Court's ruling in Otter Tail.
Both the Commission's opinion and Commissioner Elman's concurring
opinion turn on the central fact that LePeyre was using its monopoly
power in the market for the manufacture of shrimp peeling equipment to
gain a competitive advantage in another market in which it was indirectly
engaged, through Grand Caillou: the shrimp canning business.

Commissioner Elman concurred in LaPeyre to emphasize that the
case was not properly subject to analysis under Robinson-Patman price
discrimination principles, principles upon which he believed the majority
had implicitly relied. The majority characterized the violation of section
5 as follows:

The gravamen of the offense so found is the fixing and charging of
higher discriminatory peeling machinery rental rates to producers of
canned shrimp located in the Northwestern United States with the
result and effect of injuring and destroying competition between said
Northwest canners and canners located in the Gulf and South Atlantic
areas of the United States. 237

Commissioner Elman emphasized that the discriminatory rental rate
was not simply the result of unfair price discrimination by Peelers but was
rather the result of the exercise of monopoly power by Peelers in the equip-
ment market to achieve benefits which could not otherwise be secured
in an adjacent market, the market for canning shrimp. 238

This cross-market exercise of monopoly power is indistinguishable
from the conduct reviewed by the Supreme Court in Otter Tail and by the
Second Circuit Court of Appeals in Berkey. 239 If the Commission in Don-
nelley had not chosen to wrench Commissioner Elman's observations from
their particular factual context, LaPeyre would have been unavailable as
authority.

The "joint venture" authorities relied upon by the Commission are
inapposite, since they address joint conduct by competitors to bar access
by other competitors to a vital facility or resource. While the Commission
acknowledged that this feature made the two cases relied upon, Terminal
Railroad and Associated Press, "different from the case at hand," 240 it be-
lieved that the decisions nonetheless evidence "the Court's . . . concern
that 'scarce resources' be made available, on a non-discriminatory basis." 241

237 65 FTC at 848.
238 See text accompanying note 216 supra.
239 See notes 86-88 supra and accompanying text.
240 21,650 at 21,818.
241 Id.
The Commission reasoned that it is only a "small step" from this "concern" to the holding in the Donnelley case, imposing "a duty not to be arbitrary on a monopolist who controls a scarce resource which cannot be duplicated by the joint efforts of companies seeking to use it."\footnote{Id.}

By taking the "small step" it did, the Commission converted permissible conduct into illegal conduct. The Commission should have paid more attention to the text of section 5 under which it was proceeding. Section 5(a) prohibits "unfair \textit{methods of competition}."\footnote{Emphasis added. See note 194 \textit{supra} for the text of section 5(a).} Donnelley's conduct was, simply stated, not a "method of competition." There was no finding by the Commission that Donnelley had acquired a monopoly of the relevant market by unfair means or that it had maintained that monopoly by the proper use of monopoly power. Similarly, there was no finding that Donnelley's refusal to list commuter connecting flights or its refusal to merge the listing of all three classes of carriers were acts of competition. Rather, they were acts by a lawful monopolist, who had no competition, undertaken pursuant to judgments made by the monopolist about how to go about its business. While it is true those judgments had an adverse competitive impact on certain classes of "customers" of the monopolist, they were not made in furtherance of any "method of competition." Donnelley was not engaged in competition.

Rather, what the Commission did, without acknowledging it, was to convert Donnelley into a public utility and impose liability regardless of fault. Without warrant in the text of section 5 or from any other source of antitrust doctrine, the Commission created a standard of absolute liability for any possessor of monopoly power whose conduct, unrelated to the exercise of that power, has an adverse impact on firms outside the market occupied by the monopolist. This is diametrically opposed both to \textit{Colgate} and to the test of liability so carefully delineated by the Second Circuit in \textit{Berkey}.

The Second Circuit recognized as much when it reversed the Commission's ruling. The court methodically rejected each link in the Commission's chain of reasoning. First, it explained that \textit{Lorain Journal}\footnote{342 U.S. 143 (1951).} and \textit{Otter Tail} did not support the imposition of a duty to deal, because the conduct there under review was efforts by monopolists to preserve or extend their monopoly.\footnote{1980-2 Trad. Cas. 1 63,544 at 76,918 (2d Cir. 1980).}

Next, the court found inapposite the "joint conduct" cases relied upon by the Commission—\textit{Associated Press} and \textit{Terminal Railroad}. It pointed
out that there the illegality of defendant's conduct inhered in efforts to
block competitors' access to essential facilities or services.\textsuperscript{246}

The court then distinguished \textit{LaPeyre} by observing that "the utilization
of monopoly power in one market in \textit{LaPeyre} resulted in discrimination
and the curtailment of competition in another market in which the monopo-
list himself was also engaged . . . ."\textsuperscript{247} Donnelley's conduct, in contrast,
secured it no competitive advantages or benefits in any market.

After observing that recognition of a duty to deal "would give the
FTC too much power to substitute its own business judgment for that of
the monopolist in any decision that arguably affects competition in an-
other industry,"\textsuperscript{248} the court of appeals suggested that the \textit{Colgate} doctrine
is not "as dead as the Commission would have it."\textsuperscript{249} The right to select
one's customers remains a central principle of antitrust law:

We think that even a monopolist, as long as he has no purpose to
restrain competition or to enhance or expand his monopoly, and does
not act coercively retains this right.\textsuperscript{250}

A review of recent decisions finding no illegality in refusals to deal
with noncompetitors underscores the error of the Commission's ruling in
\textit{Donnelley}. It was alleged in \textit{Almeda Mall, Inc. v. Houston Lighting &
Power Co. (Almeda Mall)},\textsuperscript{251} that the electric utility serving the Houston
area, Houston Lighting & Power Company (Houston Lighting), violated
section 2 when it refused to sell electricity to any of three regional shopping
malls, Almeda Mall, Northwest Mall and Westwood Mall, through a single
meter at each mall. Each mall proposed to buy the electricity it needed
for the entire mall through a single meter and thereby gain the advantage
of the cheapest rate charged by Houston Lighting, the LGS rate.\textsuperscript{252} The malls
then proposed to resell the electricity to the individual retail tenants at a
higher rate, the MGS rate, which Houston Lighting would charge the ten-
ants if it were dealing directly with them.\textsuperscript{253} The mall owners would thereby
realize a profit on the resale of electricity.

Houston Lighting refused to sell electricity at the LGS rate to the
malls through a single meter, and the malls thereupon brought separate
actions against it alleging violations of sections 1 and 2 of the Sherman
Act. The actions were consolidated for trial.\textsuperscript{254} The malls alleged that this

\begin{thebibliography}{9}
\bibitem{246} Id.
\bibitem{247} Id. at 76,919.
\bibitem{248} Id.
\bibitem{249} Id. at 76,920.
\bibitem{250} Id.
\bibitem{251} 615 F.2d 343 (5th Cir. 1980), \textit{cert. denied}, 101 S. Ct. 208 (1980).
\bibitem{252} Id. at 348.
\bibitem{253} Id.
\bibitem{254} Id. at 349.
\end{thebibliography}
refusal "denied them the right to compete with [Houston Lighting] in the retail sale of electricity to their tenants" and that the refusal "[had] injured competition between them and other regional shopping centers in the Houston area." The trial court directed a verdict in favor of defendant, and the court of appeals affirmed.

After reciting the two elements of proof of unlawful monopolization established by the Supreme Court in *Grinnell*, the court distinguished *Otter Tail*, the malls' principal authority. The court noted that the municipal power systems to whom Otter Tail Power had refused to sell electricity for resale were "independent distribution systems capable of competing with the Otter Tail utility." The court noted:

[Competition clearly existed for the total retail market of entire municipalities, which could opt for service from Otter Tail or from the municipal system. The refusal by Otter Tail to sell electric power at wholesale or to transfer power, therefore, removed the option of choosing the desired power system.]

The court explained, however, that there was no such option in the Houston electric power market, "because HL&P [Houston Lighting] is the only electric utility supplying power to the Houston area." The court explained, further, that Houston Lighting, unlike Otter Tail Power, had not refused to sell power at wholesale to a competing distribution system and had not refused to transfer or supply power to a competing distribution system requesting it. The court observed:

[a] refusal to sell power at wholesale so as to prevent another system from selling at a different, competitive retail rate is one thing; selling power at retail and refusing to allow the purchaser to resell at the same retail price is a different matter. *In the latter situation there is no competition.*

The court reasoned that under these circumstances the malls did not seek actually to compete with Houston Lighting but rather sought to step into Houston Lighting's electricity distribution system and, by buying electricity cheap and reselling it at the same retail rate that Houston would resell it to mall tenants, take profit to which Houston Lighting would otherwise be entitled. Further, whether the electricity came directly to the retail tenants from Houston Lighting or from the mall owners, the price to

255 *Id.*
256 *Id.* at 345.
257 *Id.* at 351.
258 *Id.* at 352.
259 *Id.*
260 *Id.*
261 *Id.* at 353.
262 *Id.* (emphasis in original).
the retail tenants would be the same. The court reasoned that these facts established no antitrust violation. The mall owners were not true competitors of the utility. They were not competing with the utility for customers by offering the customers reduced rates or any other benefits.

The court also noted that the mall owners had failed to establish antitrust injury. Citing Brunswick Corp. v. Pueblo Bowl-O-Mat, the court made the following observation:

A showing of lost profits to the appellants is insufficient by itself to establish a compensable injury under the antitrust laws since there is no parallel injury to competition. The antitrust laws were not intended to prevent the type of activity undertaken by HL&P in the present case concerning resale of electric power. The antitrust laws were designed to protect competition and not necessarily competitors.

The court of appeals found it unnecessary to determine whether or not the utility's conduct would violate the monopolization provision of section 2. It was dispositive that the utility was not refusing to sell electricity at wholesale to actual or potential competitors. Instead, it was engaged in a refusal to deal which had no impact on competition in the resale of electricity.

Although the facts in Almeda Mall are distinguishable from those in Donnelley, because the refusal to deal in Almeda Mall caused the plaintiffs no significant competitive injury, the Fifth Circuit nonetheless resisted the temptation, to which the Commission succumbed, to imply a remedy under the antitrust laws simply because market conduct by a monopolist caused loss of profits or other economic injury in an adjacent market.

The Second Circuit addressed a single-firm refusal to deal with a supplier, rather than a customer, in International Railways of Central America v. United Brands Co. It was there alleged by the only railroad of any significance in Guatemala, International Railways of Central America (IRCA), that the sale by United Fruit Company, the predecessor in interest of the plaintiff, of its banana-producing plantations in western Guatemala (in the Tiquisate area) in such a way as to preclude use of the plantations by other banana producers was an act of unlawful monopolization by United Fruit, causing IRCA a loss of profits incident to termination of banana shipments from that area.
In the 1950's and early in the 1960's, United Fruit and Standard Fruit were the only two significant producers of bananas in Guatemala. All of United Fruit's banana-producing land was in the Tiquisate territory in western Guatemala. IRCA, as the only major railroad in Guatemala, transported all banana production from Tisquisate to Port Barrios, where the fruit was prepared for export.

In 1961, United Fruit began a company-wide program to sell or otherwise dispose of many of its unproductive land holdings, including the Tiquisate properties. Although the plaintiff disputed defendant's contention that it disposed of the Tiquisate properties in good faith, the district court found that the properties had indeed been sold for legitimate business reasons, and this finding was not disturbed on appeal. IRCA attempted to demonstrate, among other things, that in disposing of Tiquisate, United Fruit "did so in such a way as to forestall its competition from moving in." By the time the properties were closed down and sold in August 1964, however, Standard Fruit, the only other significant banana producer in Guatemala, had already closed its Guatemalan operations. Indeed, Standard Fruit's decision to cease Guatemalan operations was made even before United Fruit decided in September 1962 to phase out the Tiquisate properties.

Relying upon Lorain Journal, Eastman Kodak and Alcoa, IRCA contended that even if United Fruit had legitimate business reasons to abandon the Tiquisate properties, the closing nonetheless violated section 2:

The violation of Section 2 is premised on the theory that UF [United Fruit] abused its monopoly power by refusing to deal with IRCA. The court of appeals disagreed with this theory of liability. It observed that it is not the law that "any act of the alleged monopolist irrespective of intent constitutes a Section 2 violation." The court went on:

The action alleged to offend Section 2 must be one which is monopolistic. The Supreme Court has clearly indicated that in order to establish such a section 2 violation, the plaintiff must establish that the defendant had deliberate or willful purpose to exercise monopoly power [citing Grinnell and American Tobacco] . . . . Monopoly power is well understood as the 'power to control prices or exclude competition.'
The court reasoned that the closing of the Tiquisate properties was not an exercise of monopoly power:

UF in fact had no reasonable business alternative but to abandon an unprofitable and uncomfortable operation. This cannot possibly be characterized as an act of monopolization, which is the exercise of a power to fix prices or to exclude competition. Appellant's proposition boils down to the argument that a defendant which has a monopolistic position can never abandon an unprofitable operation but must continue to lose money because shutting down might involve a loss of profit for the supplier of a service. No authority for this position has been advanced or discovered.270

The court, which had assumed for purposes of argument that United Fruit in fact possessed monopoly power in the relevant market, the importation of bananas into the United States from Guatemala,280 properly concluded that United Fruit's conduct did not violate section 2. The action taken by United Fruit was not made possible by its possession of monopoly power, the predicate for proof of unlawful monopolization. Rather, the action was conduct which United Fruit, with or without monopoly power, would have been forced to undertake for perfectly sound business reasons. The fact that IRCA suffered a loss of profits or was otherwise damaged as a result did not convert the conduct into a violation of section 2. United Fruit's conduct was not in furtherance of maintenance of a monopoly and produced no injurious effects on its competitors,281 and even though IRCA sustained injury as a result of the conduct, the injury was not antitrust injury—injury flowing from actions unlawful under the antitrust laws.282

It is well established that a firm may not exercise monopoly power in one market to create or attempt to create a monopoly in another market.283 Similarly, a single firm violates section 2 by using monopoly power in one market to gain a competitive advantage in another, even if the effort falls short of attempted monopolization.284 As the Second Circuit noted in reversing Donnelley, it does no necessarily follow, however, that a refusal by a monopolist to deal with a firm in an adjacent market violates section 2. The Court of Appeals for the Fifth Circuit reached the same conclusion in Fulton v. Hecht,285 already discussed briefly above.286

It was alleged in Fulton v. Hecht that a refusal to deal by a dog-racing
track operator with a trainer who had previously run his dogs at the track did not violate section 2 even though it had an anticompetitive impact on the market in which the trainer was engaged, dog-racing. The plaintiff, Fulton, raised and raced greyhounds. 287 He had for some 15 years raced his dogs at four tracks in south Florida. 288 One of the owners of one of the tracks, Hecht, refused after the 1972 summer season to renew Fulton's contract to race at the West Flagler Kennel Club, the track operated by Hecht. 289 Because at any given time only two of the four tracks would be in operation, and only one of those two would be in Dade County (where three of the four tracks were located), Fulton argued that Hecht possessed monopoly power in the relevant market, the south Florida greyhound racing market. 290

Without deciding whether or not Hecht, as operator of the Flagler track, had monopoly power, the court noted that plaintiff had failed to present any evidence that Hecht used his power to enhance or maintain his position. 291 Citing Colgate, the court noted that there was no evidence that Hecht's refusal to deal was in furtherance of monopolization. 292

The court then addressed Fulton's alternative argument, "that a monopolist has a duty to deal fairly with anyone who seeks to compete in an adjacent market." 293 Fulton apparently reasoned that even if the refusal to deal by Hecht was permissible under Colgate, it was nonetheless violative of section 2 because it had an anticompetitive impact on the market in which Fulton was engaged, the racing of greyhounds. (The market in which defendant Hecht was engaged was apparently the operation of tracks at which greyhounds raced). The court of appeals turned aside this argument by noting that all of the authorities relied upon by Fulton rested upon refusals to deal in which the plaintiff had been victimized by his direct competitors. 294 The court distinguished Deesen v. Professional Golfer Association, 295 one of Fulton's principal authorities:

[W]e think that the court's holding and the fact that it considered the reasonableness of the regulations under the section 2 monopoly claim must be limited to the circumstances of that case. The key element, we think, is that the PGA was an association made up of professional

287 580 F.2d at 1245.
288 Id.
289 Id. at 1246.
290 Id.
291 Id. at 1247.
292 Id.
293 Id. (footnote omitted).
294 Id. at 1247-48.
295 358 F.2d 165 (9th Cir. 1966), cert. denied, 385 U.S. 846 (1966).
golfers, i.e., direct competitors in the market of participating as golfers in professional golf tournaments.\textsuperscript{296}

While acknowledging that a monopolist's refusal to deal might have "anticompetitive or other undesirable economic effects" in an adjacent market, the court declined to extend section 2 as far as plaintiff requested. It reasoned as follows:

While it appears that a monopolist could have an anticompetitive purpose only with respect to its competitors or potential competitors, the anticompetitive effects of a monopolist's behavior might occur only in an adjacent market. If such effects, standing by themselves were sufficient to constitute a violation of § 2, the right of a single firm to refuse to deal with another, recognized in \textit{Colgate, supra}, would be significantly reduced. Not only would a firm's unilateral refusal to deal violate § 2 if it was done to enhance or maintain the monopoly, such a refusal would also violate § 2 if it had an inevitable anticompetitive effect in an adjacent market. This limitation on the \textit{Colgate} doctrine is justifiable if the monopoly is really just an association of competitors in the market where the anticompetitive effects are felt. \textit{See United States v. Terminal Railroad Ass'n}, 224 U.S. 383 . . . (1912). However, we think any broader reading of § 2, with the accompanying private cause of action under § 4 of the Clayton Act, 15 U.S.C. § 15, would be unwise.\textsuperscript{207}

The court's position is, of course, exactly the opposite of that taken by the Federal Trade Commission in \textit{Donnelley}. In order to fashion its new test for permissible single-firm behavior in \textit{Donnelley}, the Commission necessarily had to ignore the court's reasoning in \textit{Fulton}. As already noted, however, it took solace in the court of appeals' recognition, in dictum, that "under § 5 of the FTC Act, a monopolist may be required to use uniform and reasonable criteria when dealing with those who compete in an adjacent market,"\textsuperscript{298} citing \textit{LaPeyre v. FTC}.\textsuperscript{299} Of course, this speculation about the reach of the FTC Act has since been put to rest by the Court of Appeals for the Second Circuit in its reversal of the Commission's ruling in \textit{Donnelley}.\textsuperscript{300}

There is pending before the Federal Trade Commission another proceeding raising questions about the legality of a refusal to deal by a single-firm monopolist with potential customers. The Commission has charged General Motors Corporation (GM)\textsuperscript{301} with violating section 5 of the FTC

\textsuperscript{296} 580 F.2d at 1248 (footnote omitted).
\textsuperscript{297} \textit{Id.} at 1249 n. 2.
\textsuperscript{298} \textit{Id.} But see 2 \textit{AREEDA & TURNER, supra} note 12, §§ 307a-307f (analysis and results should be the same in an equitable proceeding under either section 5 of FTC Act or sections 1 or 2 of Sherman Act).
\textsuperscript{299} 366 F.2d 117 (5th Cir. 1966).
\textsuperscript{300} \textit{See} notes 244-250 \textit{supra} and accompanying text.
\textsuperscript{301} In re General Motors Corp. No. 9077 (Sept. 24, 1979).
Act by, among other things, refusing to sell crash parts to any persons other than franchised dealers.\textsuperscript{302} In an opinion filed September 24, 1979, an administrative law judge (ALJ) ruled that GM's refusal to deal did not violate the antitrust laws.

Complaint counsel defined crash parts as fenders, grills, bumpers and all other replacement parts for the bodies of GM-manufactured cars and trucks.\textsuperscript{303} Crash parts are distributed by GM exclusively to its dealers, who either wholesale, otherwise resell or install the parts.\textsuperscript{304} GM is the only source for the parts, which are manufactured either by GM itself or by independent manufacturers on tooling owned by GM.\textsuperscript{305}

The ALJ first addressed complaint counsel's contention that \textit{United States v. Arnold, Schwinn & Co.}\textsuperscript{306} requires a manufacturer to deal with everyone when there are no competitive alternatives to the manufacturer's products. Complaint counsel relied upon the following language in \textit{Schwinn}:

\begin{quote}
... [A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom alone, he will sell his goods .... If the restraint stops at that point— if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone would not violate the Sherman Act.\textsuperscript{307}
\end{quote}

The ALJ declined to rely upon this dictum in \textit{Schwinn}\textsuperscript{308} and instead noted that analysis of the legality of GM's refusal to deal with anyone except its franchised dealers "starts from the premise that, absent a purpose to monopolize or an effect producing an unreasonable restraint on trade, GM may choose its system of distribution."\textsuperscript{309} Quoting from \textit{Schwing Motor Co. v. Hudson Sales Corp.}\textsuperscript{310} and citing \textit{Colgate}, the ALJ acknowledged that a manufacturer has a natural monopoly over its own products but that it can refuse to deal for reasons sufficient to itself.\textsuperscript{311} The ALJ then employed a two-step analysis of the legality of GM's conduct. First, it noted that GM's reasons for dealing only with its franchised dealers were justifiable. It found no "predatory motives" on the part of GM and found

\textsuperscript{302} \textit{In re General Motors Corp.}, No. 9077, slip op. at 2 (Sept. 24, 1979).
\textsuperscript{303} Id. at 18.
\textsuperscript{304} Id.
\textsuperscript{305} Id. at 18-19.
\textsuperscript{306} 388 U.S. 365 (1967).
\textsuperscript{307} Id. at 376.
\textsuperscript{308} No. 9077, slip op. at 71.
\textsuperscript{309} Id.
\textsuperscript{311} No. 9077, slip op. at 72.
that the distribution arrangement served "legitimate business purposes (such as a better way to distribute new GM crash parts in order to promote the sale of new cars, or to stabilize dealer outlets or to augment profits . . .). . . ." 312 He then inquired whether the effect of the refusal to deal is "substantially adverse to competition." 313

The ALJ reasoned that because GM was not in competition with the dealers to whom it refused to sell crash parts, there could be no adverse effect on competition within the contemplation of the antitrust laws. 314 He summarized his conclusion as follows:

Insofar as the system GM uses for distributing crash parts is concerned, no persuasive evidence has been introduced of either a predatory intent or substantially adverse effect on competition attributable to the refusal to sell new GM crash parts to anyone other than GM dealers. The evidence does indicate that GM uses its system to sell crash parts exclusively through its dealers because of their mutual interest in crash parts being readily available . . . and that GM does not set or monitor prices at which crash parts are sold . . . . 315

The AJC then distinguished LaPeyre 316 on the ground that there was present in the shrimp peeling equipment manufacturer's discriminatory pricing a predatory motive not present on the part of GM. 317

The ALJ's decision is now pending before the full Commission, which directed the parties on February 6, 1980, to file supplemental briefs in light of its decision in Donnelley.

III. Conclusion

The legality of a unilateral refusal to deal by a monopolist is governed by section 2 of the Sherman Act and the standards for evaluating unlawful monopolization in Berkey and related single-firm monopolization decisions. If a refusal to deal does not constitute an act of monopolization under these standards, the Colgate doctrine requires the conclusion that the action is lawful, even though it may cause competitive or other injury to either the firm's competitors or members of another market.

The Sixth Circuit in Byars and the Fifth Circuit in Mid-Texas Communications erred in evaluating the legality of refusals to deal by reference to the test of "reasonableness" applicable to evaluation of restraints of trade under section 1 of the Sherman Act. This test has no application to

312 Id. at 73. As detailed in notes 170-91 supra and accompanying text, the legality of a refusal to deal by a monopolist does not turn upon motive or intent.
313 Id.
314 Id. at 74.
315 Id. at 75 (emphasis in original).
316 65 FTC 794, aff'd in part sub. nom., LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966).
317 No. 9077, slip op. at 75-76.
unilateral conduct by a monopolist, which is properly evaluated under monopolization standards alone — was the monopolist’s conduct an exertion of monopoly power rather than conduct which a nonmonopolist would have found feasible and appropriate?

The Third Circuit erred in *Sargent-Welch* when it held that the legality of a unilateral refusal to deal by a monopolist depends upon the purpose behind the refusal. As *Griffith* teaches, proof of purpose or specific intent has no place in a monopolization action.

The Federal Trade Commission erred in *Donnelley* when it ruled that a monopolist has a duty to deal fairly with customers. In reversing the Commission’s holding, Second Circuit properly noted the legality of a unilateral refusal to deal by a monopolist is governed by the *Colgate* doctrine where the refusal secures no competitive advantages for the monopolist. The Fifth Circuit recognized in *Almeda Mall* and *Fulton v. Hecht* that a refusal to deal producing competitive injury in a market outside that in which the monopolist is engaged does not *ipso facto* constitute a violation of section 2. The Second Circuit recognized the same principle in *International Railways*, and an administrative law judge of the Federal Trade Commission has done the same in *General Motors Corporation*. While policy reasons may support the Commission’s holding in *Donnelley*, that holding squarely conflicts with *Colgate* and cannot stand unless the Supreme Court is prepared to modify or overrule *Colgate*. 