ANTITRUST—TYING AGREEMENTS—A no transshipment policy between a sports apparel manufacturer and its retailer does not violate the Sherman Antitrust Act—*Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186 (2d Cir. 1992).

The Sherman Antitrust Act (Act)[1] has been a source of legal debate and controversy since its enactment by Congress on July 2, 1890.[2] Recently, this controversy has extended into the sports apparel market.[3] In *Trans Sport, Inc. v. Starter Sportswear, Inc.*,[4] the United States Court of Appeals for the Second Circuit confronted the issue of whether a manufacturer, who possessed an exclusive license to manufacture official sports team jackets, violated § 2 of the Act by refusing to continue business relations with a particular

1. 15 U.S.C. §§ 1-2 (1982). Section 1 of the Act provides, in pertinent part, that:

> [e]very contract, combination in the form of trust or otherwise, or conspiracy in the restraint of trade of commerce among the several states . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished.

15 U.S.C. § 1 (1982).

Section 2 of the Act provides, in pertinent part, that:

> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1982).

2. Standard Oil Co. v. Federal Trade Comm'n, 340 U.S. 231 (1951). Congress initially enacted antitrust laws to protect competition and, simultaneously, to prevent the creation of monopolies. *Id.* In 1888, the Republican party, after winning the presidency and control of both houses, called for the passage of federal antitrust legislation. JAMES MCCALL, SUM & SUBSTANCE OF ANTITRUST 11-12 (1986). In January 1889, Senator John Sherman of Ohio, a prestigious Republican, reintroduced his antitrust bill to the Senate. *Id.* In July 1890, after the Senate Judiciary Committee revised the bill, and successfully completed the legislative process . *Id.* History reveals that the courts did not vigorously enforce the Act between 1890 and 1910. *Id. Contra* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); *and* United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898) (declaring price fixing agreements void).

3. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186 (2d Cir. 1992).

4. *Id.*

retailer.[5] The subsequent decision of the United States Court of Appeals for the Second Circuit indicates the growing conflict among manufacturers and retailers in the sports apparel industry.[6] The competition for obtaining exclusive licenses in the sports apparel market has become intense and the subsequent antitrust effects have become increasingly significant.[7]

Generally, the Act makes it illegal for any person to monopolize, attempt to monopolize, or conspire to monopolize.[8] Each offense requires proof of anticompetitive conduct.[9] Specifically, the purpose

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5. *Id. See infra* note 24 and accompanying text.
6. *See infra* notes 24-53 and accompanying text.
7. Bobby Clay, *It Is the Shoes*, 23 BLACK ENTERPRISE, Mar. 1993, at 80. For example, the competitiveness of licensing in the sports apparel market is demonstrated through recent statistics regarding the 1996 Summer Olympic Games. *Id.* The Atlanta Olympic Committee, which will host the 1996 Summer Games, mailed out over two thousand product licensing applications. *Id.*
8. 15 U.S.C. § 2. Monopolization exists only if the essential element of monopoly power is present. Lamb Enters., Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir. 1972). "Monopoly power," within the confines of §§ 1-7 of the Sherman Act, is defined as the power to control prices or exclude competition. United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956). Under § 2 of the Act, "monopolize" means the acquisition of power to fix prices, limit production, or deteriorate quality. Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938). The integral components of monopolization under §§ 1-7 consist of the power to eradicate competition at will or to reasonably restrict competition and the intent to exercise that power. National Wrestling Alliance v. Myers, 325 F.2d 768 (8th Cir. 1963). Additionally, a monopoly violation assumes exclusive possession or control by an individual or conspiracy. Winn Ave. Warehouse, Inc. v. Winchester Tobacco Warehouse Co., 339 F.2d 277 (6th Cir. 1964). If an individual or conspiracy attempts to use their means and ability to gain exclusive possession or control of a market or product to the exclusion of other actual or potential competitors, then a monopoly violation occurred. *Id.* A monopoly, separate from "monopoly power," has been defined as the acquisition of something for oneself, not necessarily an entire specified commodity or the whole commerce, but at a minimum, control of at least a part sufficient to constitute withholding from the public the right to deal in the open market. Peto v. Howell, 101 F.2d 353 (7th Cir. 1938). Although the usual meaning of "monopoly" is the acquisition of something for oneself, and while the word is most appropriately used when the whole of a given trade is obtained, the terms of § 2 of the Act make it applicable to monopolization of a part of trade. United States v. Keystone Watch Case Co., 218 F. 502 (D. Pa. 1915), *cert. denied*, 257 U.S. 664 (1921).
9. *See* MCCALL, *supra* note 2, at 58-59. The offenses of monopolization and attempting to monopolize require proof of market power whereas proof of market power is absent from the offense of conspiracy to monopolize. *Id.* The elements of monopolization include proof that the defendant has acquired a monopoly and the monopoly has been acquired or maintained by conduct characterized as monopolizing. *Id.* A court determines if monopoly power exists by examining whether the alleged monopolist has the power to set the product price and sell it at that price or the power to ban competitors from the relevant market. *Id.* at 58. A monopolist is not necessarily the sole competitor in a designated market. *Id.* at 59. For purposes of § 2 of the Act, a monopolist is considered a firm that maintains the ability to set its product price over a diverse range of possible prices. *Id.* Monopoly power, as applied in § 2, is more a

of § 2 of the Act is to serve as a supplement to § 1, which denounces restraints on interstate commerce trade and promotes free trade, while simultaneously protecting the public from the negative effects of monopolies.[10] In each offense, the plaintiff has the burden of proving the elements of monopolizing, attempting to monopolize and or conspiracy to monopolize.[11]

When analyzing restraints of trade pursuant to the Act, courts utilize one of two opposing standards.[12] The first is the rule of reason standard.[13] Courts applying this standard must balance the procompetitive and anticompetitive results of certain trade restraints.[14] Courts then conduct a detailed and comprehensive inquiry into whether a particular restraint hinders or eliminates

matter of degree than a concrete concept. *Id.* In all reported cases in which courts have declared that monopoly power existed, there has been an extremely high level of market power. *Id.* The elements of an "attempt to monopolize" case include that the plaintiff prove the defendant had specific intent to obtain a monopoly and there was a serious probability that the defendant would obtain the monopoly. *Id.* at 57-58. Specific intent requires more than a mere showing of general intent. *Id.* at 83. Circumstantial evidence is typically the only proof the plaintiff can offer regarding specific intent cases. *Id.* In cases concerned with the offense of attempting to monopolize, the circumstantial evidence is customarily the defendant's anticompetitive conduct. *Id.* at 58, 83. When determining if a defendant's conduct includes specific intent, courts examine whether the activity abuses competitors and lacks any genuine business or social grounds. *Id.* at 83. The elements of conspiracy to monopolize include the plaintiff proving defendant conspired to obtain a monopoly and that the conspirators furthered the conspiracy by committing an overt act. *Id.* at 58. Although there is no proof requirement for this offense, courts have reported that most cases inevitability reveal that defendants possessed monopoly power or near monopoly power. *Id.*

10. 15 U.S.C. § 2. In an attempt to supplement § 1 of the Act, § 2 focuses not only on nationwide dilemmas concerning interstate trade, but also strives to eliminate all obstructions so that free trade can be achieved. United States v. Yellow Cab Co., 332 U.S. 218 (1947). Both § 1 and § 2 of the Act were considered in the famous case of Standard Oil v. United States, 221 U.S. 1 (1911). In *Standard Oil*, the Court declared that under § 1 analysis, a "rule of reason" test would be applied to all contracts restraining trade. *Id.* at 66. The Court stated that certain contracts would be presumed an unreasonable restraint on trade without undergoing the "rule of reason" analysis due to their character. *Id.* at 65-66. The Court held that Standard Oil Trust violated both § 1 and § 2 of the Act. *Id.* at 79-82. Soon after *Standard Oil*, the Democratic and Progressive parties promised to pursue more restrictive antitrust legislation. MCCALL, *supra* note 2, at 13. In 1914, the Democrats passed the Clayton Act, which designated certain business activities and agreements as illegal if there existed a probability that these activities would generate an anticompetitive effect. *Id.* For example, the Clayton Act prohibited price discrimination, exclusionary dealing agreements, and stock acquisition mergers if it was demonstrated that competition in a relevant market would probably be substantially diminished. *Id.*

11. 15 U.S.C. § 2.

12. LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 166 (1977).

13. *Standard Oil*, 221 U.S. at 58. In *Standard Oil*, the Court held that the Act only prohibited unreasonable restraints of trade. *Id.* at 65-66.

14. *Id.*

competition or whether it simply regulates competition.[15] The second is the per se standard.[16] Contrary to the rule of reason standard, the per se standard considers particular practices that restrain trade as illegal per se and are deemed unlawful without requiring an inquiry.[17]

Although the standard used to analyze restraints of trade may vary among courts, the application of § 2 has been consistent through the years.[18] Since its origin, the text of § 2 has consistently prohibited monopolization[19] while the United States Supreme Court has rejected restraints on trade consistently.[20] In an effort to enforce a § 2 prohibition, Congress has also incorporated strict penalties into the Act with the intent of effectuating a more effective and equitable punishment.[21]

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15. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). The Court is encouraged to consider the following factors when undergoing a rule of reason analysis: the business involved, the nature and effect of the restraint, the reason for the restraint and the purpose of the restraint. *Id.* For a more detailed analysis, see John J. Scura, Comment, *The Time Has Come: Ending the Antitrust Non-Enforcement Policy in Professional Sports*, 2 SETON HALL J. OF SPORT L. 151, 154 (1992).

16. North Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958).

17. *Id.* Some cases have demonstrated that certain practices have been deemed illegal per se. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (holding that group boycotts are per se illegal including a group boycott by businessmen to an individual merchant); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930) (holding that a per se illegal restraint on trade existed when parties made an outright refusal to deal or a refusal to deal if certain conditions were not met).

18. MCCALL, *supra* note 2, at 63-65.

19. *Id.* at 9. While § 2 has prohibited monopolization, § 1 has strictly prohibited the existence of cartels. *Id.*

20. United States v. General Motors Corp., 384 U.S. 127, 146 (1966) (holding that despite General Motors' claim that their refusal to deal was premised on the necessity to maintain their distribution system, General Motors' refusal to deal, nevertheless, was a per se illegal restraint of trade).

21. 15 U.S.C. § 2. Throughout the years, Congress has increased the monetary penalties for violations of the Act. SENATE COMM. ON THE JUDICIARY, SHERMAN ANTITRUST ACT-INCREASING CRIMINAL PENALTIES, S. REP. NO. 618, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2322. On July 7, 1955, for example, Congress passed an amendment to § 2 of the Act substituting "$50,000" for "$5000." *Id.* Today, the Act provides for a penalty not to exceed $50,000 and or one year in prison for any violations. *Id.*Although the Act provides for punishment by imprisonment, it is rarely invoked because many of the violations are committed by corporations rather than individuals. *Id.* Corporations cannot go to jail and courts have been leery to sentence an individual businessperson to prison for Act violations. *Id.* The courts have also been reluctant to impose prison sentences on individuals who violate the Act. *Id.* As a result of both the inability and reluctance of the courts to impose the punishment of imprisonment, the committee believed that the remaining penalty, a fine of $5000, was completely inadequate. *Id.* The increased fine of $50,000 serves as a more effective punishment for violators of the Act. *Id.* A civil injunction is also available as a remedy and can

Because the Act is the primary antitrust statute, it encompasses an extraordinary amount of subject matter.[22] More specifically, the courts are encountering an increasing number of antitrust issues in the sports merchandising market.[23] In a addition, § 2 has found its way into the realm of sports apparel.[24] For example, in *Trans Sport*, the United States Court of Appeals for the Second Circuit confronted the issue of whether a manufacturer, maintaining an exclusive license to manufacture official sports team jackets, violated § 2 of the Act by refusing to deal with a particular retailer.[25] The United States Court of Appeals for the Second Circuit explained the business justifications for a refusal to deal and why such acts did not necessarily constitute monopoly violations.[26] Although just one of many issues encompassing antitrust, its significance is its contribution to the ongoing application and interpretation of the Act while begging the eternal question of "what is a monopoly?"[27]

An alleged monopolist's refusal to deal has been an issue plaguing the courts.[28] In *Trans Sport, Inc. v. Starter Sportswear, Inc.*,[29]

prohibit continuance of illegal acts, divestiture, or dissolution, but neither civil nor criminal proceedings can secure restitution. *Id.* at 2322.

22. 15 U.S.C. § 2.

23. Trans Sport, Inc. v. Starter Sportswear Inc., 964 F.2d 186 (2d Cir. 1992). With the increase in sports merchandising and the expansion of product availability, retail sales in the market have skyrocketed, thereby opening the door for unfair trade practices to develop. *See* Clay, *supra* note 7, at 80 (stating that licensing for sports apparel has become an extremely competitive market). Retail sales, for example, of licensed merchandise in Major League Baseball Properties, Inc., have increased from approximately $200 million in 1985 to $1.1 billion in 1989. GREGORY J. BATTERSBY & CHARLES W. GRIMES, THE LAW OF MERCHANDISE AND CHARACTER LICENSING, MERCHANDISING LAW AND PRACTICE 4 (1989). Retail sales in 1989 for other leagues included $250 million for the National Hockey League (NHL), $525 million for the National Basketball Association (NBA), and $750 million for the National Football League (NFL). *Id.* at 5. Because the sports merchandising market continues to grow, so does the competition to gain power over certain markets. *See* Clay, *supra* note 7, at 80.

24. *Trans Sport*, 964 F.2d at 186. Additionally, courts have examined antitrust as it effects professional sports' business practices. *See* Scura, *supra* note 15, at 151.

25. *Trans Sport*, 964 F.2d at 187.

26. *Id.* at 189-91.

27. *See* United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956) (defining monopoly power as the power to control prices and exclude competition and the existence of such power ordinarily may be inferred from the predominant share of the market); Peto v. Howell, 101 F.2d 353 (7th Cir. 1938) (stating that a monopoly has been defined as the acquisition of something for oneself, not necessarily an entire specified commodity).

28. David M. Rievma, Note, *The* Grinnell *Test of Monopolization Sounds a False Alarm:* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 28 B.C. L. REV. 415, 418-19 (1987). A monopolist's refusal to deal with a competitor is a common allegation as violative of § 2 of the Act. *Id.* (citing LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 48 (1977)).

retailer Trans Sport brought an antitrust claim against Starter Sportswear, a manufacturer, alleging that Starter violated § 2 of the Act by refusing to do business with Trans Sport unless they agreed to terminate transshipping to other retailers with whom Starter refused to conduct business.[30] The United States Court of Appeals for the Second Circuit affirmed the lower court's grant of summary judgment for Starter because Starter, who had an exclusive license[31] for official sports team jackets,[32] had valid business reasons for its no-transshipment policy.[33]

In *Trans Sport*, Trans Sport and Stickley Corporation, its predecessor-in-interest, were retailers who purchased authentic team jackets from Starter and subsequently sold them on the market.[34] After several months of business with Starter, Stickley began reselling the jackets it purchased from Starter to other retailers.[35] It became extremely lucrative for Stickley to purchase large quantities

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Courts have distinguished between a concerted refusal to deal and unilateral refusals to deal. Associated Press v. United States, 326 U.S. 1, 14-15 (1945); United States v. Colgate & Co., 250 U.S. 300, 307 (1919)). While concerted refusals to deal are typically per se violations of § 1 of the Act, unilateral refusals to deal are typically lawful. *Id.* A unilateral refusal to deal generally arises when an individual distributor, firm or manufacturer, acting alone and with independent discretion, refuses to buy from or sell to a certain business or individual. *Id.*

29. 964 F.2d 186 (2d Cir. 1992).

30. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 187 (2d Cir. 1992).

31. Clay, *supra* note 7, at 80. The business of licensing is complex and many who want a license do not necessarily obtain one. *Id.* For example, NFL Properties, the licensing arm of the NFL, earned two billion dollars in 1991. *Id.* NFL Properties processes over 600 applications per year and rejects the majority of them. *Id.*

32. *Trans Sport*, 964 F.2d at 187. Since 1976, Starter Sportswear, Inc. has had a license to manufacture and sell original satin team jackets bearing the trademark of the four major professional sports leagues: Major League Baseball (MLB), the NFL, the NHL and the NBA. *Id.* The jackets are "original" in the sense that they are the same style jacket worn by the professional players, coaches, referees, and other sport personnel. *Id.* These authentic jackets have been trademarked by the respective leagues: MLB has its "Diamond Club;" the NFL has its "Pro Line;" the NHL has its "Center Ice;" and the NBA has its "NBA Authentic." *Id.* Although there are many manufacturers licensed to produce a myriad of league merchandise, including team jackets bearing the official trademarks, only Starter and a few other companies are licensed to manufacture and sell nationwide authentic, or "original," team jackets. *Id.*

33. *Id.* at 189-90.

34. *Id.* at 187.

35. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186 (2d Cir. 1992). Stickley's decision to resell the jackets to other retailers was based upon a perceived business opportunity. *Id.* Because one of Starter's policies required that its retailers place a minimum order, Stickley believed that by negating the minimum order requirement for its customers, it would be able to supply a special order or out-of-season product to them. *Id.* This service would impose a seven dollar per jacket mark-up. *Id.*

of Starter jackets and then resell them to other retailers.[36] In March 1987, Starter informed Stickley that it would terminate all business relations if they did not restrict the resale of Starter's authentic team jackets to other retailers.[37] After Stickley refused to agree not to resell Starter's jackets to other retailers, Starter stopped delivery on Stickley's remaining orders for jackets.[38] Starter subsequently amended its order forms to prohibit resale of its products without prior approval.[39]

As a result of Starter's refusal to honor outstanding orders from Stickley after February 16, 1987, Trans Sport commenced legal action against Starter demanding treble damages and injunctive relief.[40] In Trans Sport's complaint, Stickley first alleged that Starter was attempting to make it noncompetitive as a distributor and wholesaler by intentionally using the monopoly power it possessed as a manufacturer.[41] Secondly, they alleged that Starter was able to maintain artificially excessive prices by intentionally regulating the market.[42] Finally, Trans Sport alleged that Starter restricted them from supplying the retail market with licensed team jackets.[43]

Starter moved to dismiss the complaint for failure to properly set forth the allegations.[44] In March 1989, the United States Dis-

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36. *Id.*

37. *Id.* Starter demanded that Stickley limit its resale of the authentic jackets to sales through a consumer catalog, sales from Stickley's retail store, and premiums on company-run stores. *Id.*

38. *Id.* at 187.

39. *Id.* Specifically, Starter inserted the following conditions in its new order forms:

> No Transshipment: Starter has a policy of selling only directly to selected retail outlets for resale by them at specified locations. Proposed sale at any new retail outlet requires advance written approval from Starter's Home Office. Resale or transshipment of our merchandise to an unauthorized location or to another business contravenes that policy and the items and conditions of sale and may result in no-shipment or termination of the retailer's business relationship with Starter.

Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 187 (2d Cir. 1992).

40. Trans Sport, Inc. v. Starter Sportswear, Inc., 775 F. Supp. 536, 538 (N.D.N.Y. 1991).

41. *Id.* Starter's anticompetitive conduct was allegedly directed at plaintiff by intentional use of monopoly power. *Id.* Such an intentional use of monopoly power is a violation of § 2 the Act. *Id.*

42. *Id.* Trans Sport alleged that Starter maintained the artificially high prices by restricting supply at the consumer level, requiring retailers to place minimum orders and reorders and to carry Starter's products which were not readily marketable. *Id.*

43. *Id.* The retail market referred to includes the retail market for licensed team jackets in the NHL, NFL, NHL and NBA. *Id.*

44. *Trans Sport*, 775 F. Supp. at 536. Starter moved to dismiss the complaint in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure for four reasons: first,

trict Court for the Northern District of New York denied Starter's motion to dismiss, noting that the allegations did set forth a pursuable claim under the Act.[45] Approximately two years later, Starter moved for summary judgment to dismiss the case, and Starter argued that it did not have monopoly power in the relevant market.[46] Although Trans Sport defined the market as official team jackets of the National Football League (NFL), National Hockey League (NHL), National Basketball Association (NBA) and Major League Baseball (MLB), Starter perceived the market much broader.[47] Moreover, Starter contends that although it possessed an exclusive marketing arrangement, it did not create unreasonable, anticompetitive effects.[48]

Judge McAvoy, writing the opinion for the United States District Court for the Northern District of New York, granted Starter's motion for summary judgment.[49] On May 20, 1992, Justice Marshall, sitting by designation for the United States Court of Appeals for the Second Circuit, affirmed the district court's holding for three reasons.[50] First, Justice Marshall concluded that pursuant to the

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the complaint failed to specify and explain the relevant product and geographic market; second, the complaint lacked an allegation of anticompetitive conduct; third, plaintiff lacked standing to claim damages or injunctive relief and fourth, plaintiff failed to allege an injury arising out of antitrust. *Id.*

45. Trans Sport, Inc. v. Starter Sportswear, Inc., F. Supp. 536 (N.D.N.Y. 1991). After careful evaluation of all relevant caselaw, pertinent memorandum and oral argument, the court denied the motion to dismiss the complaint. *Id.* The court remarked that the plaintiff Trans Sport had sufficiently set forth its allegations. *Id.* The allegations regarding Starter's status as a monopolist seeking to eliminate Trans Sport as a competitor were adequately pleaded for a claim under § 2 of the Act. *Id.*

46. *Id.* at 539.

47. *Id.* Starter contended that Trans Sport made false allegations regarding the unavailability of comparable alternate products. *Id.* Starter remarked that the relevant product market includes a multitude of products, not solely professional satin team jackets. *Id.*

48. *Id.* Starter's natural monopoly consisted of the power to control the distribution of the jackets it manufactured while also choosing its particular retailers. *Id.* By choosing its retailers, Starter maintained control over the marketing of its products, but this did not result in unreasonable anticompetitive effects. *Id.*

49. *Id.* at 536-37.

50. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188 (2d Cir. 1992). The United States Court of Appeals for the Second Circuit reviewed the district court's decision of summary judgment *de novo*. *Id.* at 188 (citing Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 152 (1991)). The court remarked that they must view the evidence in the light most favorable to the non-moving party. *Id.* After examining the evidence in this case, the United States Court of Appeals for the Second Circuit, agreeing with the District Court for the Northern District of New York, concluded that there were no genuine issues of material fact to base for a claim under § 2 of the Act. *Id.*

Act, Trans Sport failed to prove that Starter willfully acquired or maintained the power to monopolize, thereby generating exclusionary or anticompetitive market effects.[51] Secondly, the court remarked that Starter had legitimate business reasons for refusing to supply Trans Sport with its products.[52] Finally, the court reiterated that Trans Sport did not prove that Starter engaged in illegal tying by establishing a no-transshipment policy.[53]

While § 1 and § 2 of the Act broadly set forth the illegal practices regarding monopolization, the text of the Act neither provides clear criteria nor tests to identify anticompetitive conduct and monopolization.[54] It has been left greatly to the courts to set forth the necessary elements for a prima facie case of monopoly violations.[55] In formulating a working definition of monopolization, courts have distinguished between undesirable versus inevitable monopolies.[56] Courts have generally concluded that a unilateral refusal to deal constitutes illegal monopolization only if the monopolist's refusal to deal unnecessarily excludes competitors or hinders competition.[57]

51. *Id.* at 192.

52. *Id.* at 189-91. Assuming the absence of intent to create or maintain a monopoly, the Act does not deny a manufacturer its right to conduct a private business at its discretion and to choose the parties with whom it will deal. *Id.* at 189. The United States Court of Appeals for the Second Circuit determined that Starter had valid business reasons for their decision not to conduct business with Trans Sport. *Id.* at 189-91. Those reasons included Starter's desire to combat counterfeiting by selecting only those retailers who would uphold the image that Starter, as a manufacturer, chose to project. *Id.* Starter was concerned with promoting the high quality and uniqueness of its products. *Id.*

53. *Id.* at 192. A tying arrangement has been defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Id.* (quoting Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 684-85 (2d Cir. 1982)). Illegal tying is a per se violation of the Sherman Act. *Id.*

54. Rievma, *supra* note 28, at 415. The United States Supreme Court, in United States v. United States Gypsum Co., 438 U.S. 422, 438-39 (1978), remarked that the Sherman Act provides no more than broad definitions of the conduct it means to proscribe. *Id.* The Court stated that "[t]he Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *Id.*

55. Rievma, *supra* note 28, at 415. The framers of the Act recognized that the statute leaves to the courts the task of developing tests to identify conduct whether conduct is lawful or unlawful. *Id.*

56. Mary Ellen Schill, Note, *Refusals to Deal by Single-Firm Monopolists-Should We Rob Peter to Save Paul*, 63 NOTRE DAME L. REV. 214, 215 (1988). Legislative intent indicates that some monopolies could be considered legitimate while others could be considered harmful, hence it was important to make that distinction. *Id.* Some of this legislative intent of § 2 of the Act was reflected in a statement made by Senator Hoar, a co-sponsor of § 2, who remarked, "a man who merely by superior skill and intelligence ... got the whole business because nobody could do it as well as he could was not a monopolist.... *Id.* (citing E.I. Du-Pont de Nemours & Co., 351 U.S. 377, 390 n.15 (1956)).

57. Rievma, *supra* note 28, at 419 (citing Greyhound Computer Corp. v. International

The landmark case on monopolization allegations resulting from a refusal to deal is *United States v. Grinnell, Corp.*[58] In *Grinnell*, the United States Supreme Court set forth the current two prong test for distinguishing legitimate competitive practices from unreasonably exclusionary conduct violative of § 2 of the Act.[59] Under this new test, the Court looked to two specific elements: possession of monopoly power in the relevant market,[60] and willful ac-

Bus. Mach. Corp., 559 F.2d 488, 498 (9th Cir. 1977)). *See* United States v. Park, Davis & Co., 362 U.S. 29, 32 (1959) (stating that a unilateral refusal to deal is illegal under the Act when there is an unreasonable restraint on trade); Lorain Journal v. United States, 342 U.S. 143, 154 (1951) (holding that a unilateral refusal to deal is illegal under the Act when there is a purposeful elimination of competition).

58. 384 U.S. 563 (1966).

59. United States v. Grinnell, Corp., 384 U.S. 563, 570-71 (1966). Three approaches have emerged over the years as formulations of the conduct element of monopolization. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954). The first approach defines monopolization as including the acquisition or maintenance of a power to exclude others as a result of using any unreasonable restraint of trade that would violate § 1 of the Act. 15 U.S.C. § 1. The second approach, set forth in United States v. Griffith, 334 U.S. 100 (1948), stated that § 2 of the Act is violated when a firm has the power to exclude competition and has exercised or has the purpose to exercise it. *Id.* at 107. *See United Shoe Mach. Corp.*, 110 F. Supp. at 342 (noting that it is a violation of § 2 when a person, having effective control of the market, uses or plans to use, any exclusionary practice, even though it is not a technical restraint of trade). Lastly, the third, and broadest approach, condemned anyone who had acquired an overwhelming share of the market, even if there was no showing of exclusionary practices. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (*Alcoa*). In *Alcoa*, the United States Court of Appeals for the Second Circuit held that a defendant, who acquired a dominant share of the market, was liable unless the defendant proved that her dominant position was due solely to:

> superior skill, superior products, natural advantages, (including accessibility to raw materials or markets), economic or technological efficiency, (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law, (including patents on one's own inventions, or franchises granted directly to the enterprise by a public authority).

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

60. *Grinnell*, 384 U.S. at 571. The first prong of the *Grinnell* test requires evidence that the alleged monopolist possessed the power to eliminate competition or control prices in the relevant market. *Id.* Monopoly power, in this sense, has been defined as the power to control prices or exclude competition in the relevant market. United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 391 (1956). To determine monopoly power, courts have generally examined a firm's degree of concentration of the relevant market. *See, e.g.*, *Alcoa*, 148 F.2d at 416. The relevant market has been defined both geographically and specifically by product. *Grinnell*, 384 U.S. at 571, 575. A natural monopolist, for example, by its very nature, possesses monopoly power in the relevant market, the natural monopoly market. Richard A. Posner, *Natural Monopoly and Its Regulation*, 20 STAN. L. REV. 548 (1969). Judge Posner remarked that "[i]f the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it." *Id.*

quisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product.[61] This test is used to determine the legality of unilateral refusals to deal by focusing on market power and anticompetitive intent.[62]

In *Grinnell*, the federal government brought a civil suit against Grinnell and its affiliated firms[63] asserting violations of both § 1 and § 2 of the Act.[64] Specifically, the federal government alleged that Grinnell Corp. and its affiliates had illegally monopolized the accredited central station protection services[65] by capturing a majority percentage of the United States market through discriminatory practices.[66]

61. *Grinnell*, 384 U.S. at 570. The second prong requires evidence supporting an inference that anticompetitive motives surrounded the monopolist's conduct. *Id.* at 571. *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19 (1985) (stating that the second element of the Act required "willful acquisition or maintenance of power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"); Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 73 (2d Cir. 1988) (remarking that proof of the first element of attempted monopolization or exclusionary conduct may be used to infer specific intent to monopolize which is the second element of the test); Trans Sport, Inc. v. Starter Sportswear, Inc., 775 F. Supp. 536, 540 (N.D.N.Y. 1991) (stating that to prevail under a common § 2 claim under the Act, plaintiff must prove the second element of the test, that defendant "has acquired or maintained that power willfully rather than through growth or development as a consequence of, for example, business acumen"). *See also* Alon Y. Kapen, *Duty to Cooperate Under Section 2 of the Sherman Act: Aspen Skiing's Slippery Slope*, CORNELL L. REV. 1047, 1052 (1987) (discussing that the Act requires "willful acquisition or maintenance of power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.")

62. *Grinnell*, 384 U.S. at 570-71.

63. *Id.* Grinnell Corp., a manufacturer of plumbing equipment and fire sprinkler units, had affiliates who were integral to their business structure because they supplied subscribers with burglary and fire protection services. *Id.* Grinnell's affiliates included the American District Telegraph Co. (ADT), which provides both burglary and fire protection services, Holmes Electric Protective Co. (Holmes), which provides burglary services and Automatic Fire Alarm Co. of Delaware (AFA), which provides only fire protection services. *Id.* Each affiliate provided a central service station, and, in the event of an emergency, each affiliate would receive an electric signal from any premise installed with one of Grinnell's hazard-detecting-devices. *Id.*

64. United States v. Grinnell Corp., 384 U.S. 563, 566 (1966).

65. *Id.* at 566-67. The central station protective services included burglar alarms, fire alarms, sprinkler supervision and watch signal services. *Id.* An accredited central service station is one which must satisfy certain requirements set forth by insurance agencies. *Id.* at 575. Insurers usually require a station to qualify as an accredited station as a condition to writing insurance. *Id.* An accredited station is superior to a non-accredited station in the opinion of underwriters. *Id.* Some of the requirements include that the station be located in an approved building equipped with an emergency lighting system and two alternate central power sources. *Id.* Additionally, there must be a direct line to the fire headquarters, and if possible a direct line to a police station. *Id.*

66. *Id.* at 567, 576. Grinnell and the affiliates had managed to capture an 87% share of

Justice Douglas, writing for the majority, concluded that monopoly power could be inferred from the overwhelming market share possessed by both Grinnell and its affiliates.[67] In making this determination, the Court first noted the consistency with established case law.[68] Next, the Court used the two part test to determine that a monopoly offense had been committed.[69] Specifically, the Court declared that the first element of the two part test was satisfied because the central service station, although consisting of a combination of various services, served as a single relevant market.[70] The second element of the test was also satisfied in that Grinnell and its affiliates had knowingly maintained monopoly power through exclusionary practices.[71]

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the protective service market in the United States. *Id.* Specifically, Grinnell owned 76% of ADT stock, 89% of AFA stock and 100% of Holmes stock. *Id.* at 566. Some of the discriminatory practices the federal government alleged that Grinnell used in acquiring this dominant share included exclusionary behavior through restrictive agreements that freed the affiliates from competition, pricing practices that suppressed competitors and Grinnell Corp.'s overwhelming percentage of ownership in the three affiliates. *Id.* at 576.

67. *Id.* at 578. The Court stated that ADT created significant barriers to competition because they required subscribers to sign five-year contracts and they retained the titles to the protective services equipment of the subscribers. *Id.* More specifically, the Court noted that Grinnell's restrictive marketing agreements and acquisition of competitors was evidence of an illegal intent to monopolize. *Id.* at 570-71.

68. *Id. See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962) (stating that pursuant to the Clayton Act, the relevant market must be economically significant and, more specifically, the relevant geographic market depends upon the commercial realities of the particular industry); United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 391 (1956) (defining monopoly power as the power to control prices or exclude competition and the existence of such power ordinarily may be inferred from the predominant share of the market); American Tobacco Co., v. United States, 328 U.S. 781, 797 (1946) (concluding that over two-thirds of the entire domestic field of cigarettes constituted a substantial monopoly); United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945) (holding that courts should look at the firm's degree of concentration of the relevant market and that in the case at bar, 90% of the market constituted monopoly power).

69. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 578 (1966). The Court noted that plaintiff commits a monopoly offense pursuant to the Act when the plaintiff possesses monopoly power in the relevant market and willfully acquires or maintains that power. *Id.*

70. *Id.* at 571-72. The Court ruled that although the station services consisted of various types such as burglar alarm and fire alarm services, the central station had one ultimate purpose which was to protect property through its operation. *Id.*

71. *Id.* at 571. The United States Supreme Court referred to the pricing policies, acquisitions and restrictive agreements when it concluded that Grinnell and its affiliates acquired monopoly power through exclusionary practices. *Id.* at 567, 569-70. For example, although ADT, one of Grinnell's affiliates, had the exclusive right to provide burglar alarm systems and nightwatch service throughout the United States, ADT was not permitted to provide the services in the designated area in which it had given Holmes, another Grinnell affiliate, the exclusive right. *Id.* at 569. Additionally, to meet competition, ADT reduced its prices and, once they secured a monopoly in the particular geographic area, it renewed its contracts at

Grinnell, the landmark case on monopolization, not only set forth the two prong test for distinguishing between legitimate competitive practices and monopoly violations, but it established guidelines for the courts to use when evaluating antitrust.[72] Since the Act provided no clear guidance as to what constituted anticompetitive conduct, *Grinnell* clarified the elements necessary to establish Act violations.[73] Lastly, the *Grinnell* test is used to determine the legality of unilateral refusals to deal.[74]

Following *Grinnell*, many lower courts tried to erode the two part test for determining monopolistic conduct.[75] In these cases, courts have determined the unlawful conduct of business practices by using strict objective tests.[76] If the business practice is based upon rational business choices, such as pricing above the cost or presenting an improved product or service, courts have not considered the practice to be violative of § 2 of the Act.[77] Similarly, courts do not examine monopolistic intent if the conduct of the business is rational.[78] In *Telex Corp. v. IBM, Corp.*,[79] for example, the United States Court of Appeals for the Tenth Circuit eroded the Grinnell test when it reversed a judgment against IBM, stating that the district court's approach, which mirrored *Grinnell*, was erroneous.[80] The court concluded that the lower court neither examined whether IBM's actions were common practices available to everyone in the market nor whether IBM's conduct was improper use of monopoly power.[81]

Additionally, over the years antitrust claims have expanded

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higher rates. *Id.* at 570.

72. *Id.* For a detailed discussion on the present state of these guidelines, *see supra* notes 58-71 and accompanying text.

73. Rievma, *supra* note 28, at 415.

74. *Id.*

75. Kapen, *supra* note 61, at 1052-54. *See, e.g.*, California Computer Prods., Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979) (holding that a monopolist may reduce prices and redesign products without excluding or restricting competition); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (stating that the introduction of a new camera with improved film could not be considered exclusionary); Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802 (1975) (concluding that the district court's approach, which closely followed *Grinnell*, was erroneous).

76. Kapen, *supra* note 61, at 1052-53.

77. *Id.*

78. *Id.* at 1053.

79. 510 F.2d 894 (10th Cir. 1975).

80. Telex Corp. v. IBM, Corp., 510 F.2d 894 (10th Cir. 1975).

81. *Id.*

beyond the general marketing scenario presented in *Grinnell*, and have extended to sporting goods dealers and manufacturers.[82] In *Sports Center, Inc. v. Riddell, Inc.*, for example, a sporting goods dealer filed a complaint against a sports equipment manufacturer alleging that the manufacturer conspired to destroy the dealer's business in violation of the Act.[83]

In *Sports Center*, Sports Center, a dealer, and Riddell, a manufacturer, were bound by a bootlegging policy.[84] After discovering that Sports Center violated this bootlegging policy by selling to an unauthorized dealer, Riddell then terminated the contract with the dealer.[85] After losing the contract with Riddell, Sports Center filed suit against Riddell alleging antitrust violations, including conspiracy to force plaintiff from the market.[86]

Regarding the issue of conspiracy to remove Sports Center from the market, the United States Court of Appeals for the Fifth Circuit ruled that Riddell was not in violation of the Act.[87] The court reasoned that Riddell mandated a reasonable bootlegging policy and that this policy was not akin to conspiracy.[88] Instead, Judge Politz concluded that, coupled with its legal right to discontinue a contractual relationship with a retailer, Riddell had legitimate business

82. Sports Ctr., Inc. v. Riddell, Inc., 673 F.2d 786 (5th Cir. 1982). In *Sports Ctr.* the court held that sports equipment manufacturer did not violate the Act by executing a policy of limiting distribution of its products to authorized dealers and terminating distribution to dealers which failed to adhere to policy. *Id. See Trans Sport*, 964 F.2d at 189-92 (holding that Trans Sport did not violate the Act by refusing to deal with retailer who would not conform to Trans Sport's marketing policies).

83. *Sports Ctr.*, 673 F.2d at 786. The Sports Center, located in Natchez, Mississippi, is a retail outlet of all types of sporting goods. *Id.* at 788. Riddell, based in Chicago, is a sports equipment manufacturer which produces football shoes, helmets and other accessories. *Id.* at 787-88.

84. *Id.* at 788. This policy discourages dealers from selling to anyone besides the ultimate consumer. *Id.* The one exception to this policy is that dealers may transfer goods to other authorized dealers. *Id.* Riddell instituted the "bootlegging" policy as an effort to counteract products liability exposure and to maintain competitiveness. *Id.* For example, dealers of Riddell equipment were responsible for servicing the equipment before and after the sale thereby decreasing exposure to products liability suits. *Id.* Riddell believed that by protecting its dealers, it could require more of them in the service field. *Id.*

85. *Id.* at 788-89. Specifically, Riddell discovered that Sports Center had sold football shoes to a department store that was not an authorized Riddell dealer. *Id.* The department store, in turn, sold the shoes to East Mississippi Junior College. *Id.* This was in violation of Riddell's bootlegging policy. *Id.*

86. *Id.* at 789 (citing United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)).

87. Sports Ctr. Inc., v. Riddell Inc., 673 F.2d 786, 791 (5th Cir. 1982).

88. *Id.* (citing Parsons v. Ford Motor Co., 669 F.2d 308, 313 (5th Cir. 1982)).

reasons for restricting its product distribution to specified dealers.[89]

Although the United States Court of Appeals for the Fifth Circuit examined antitrust and the sports equipment industry in *Sports Center*, the United States Supreme Court did not extensively revisit monopolization until 1985.[90] In 1985, the United States Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[91] surveyed the Act and analyzed its relation to the sports market.[92]

Aspen Skiing added a new dimension to antitrust analysis by examining the sports service market.[93] *Aspen Skiing*, specifically, reconfirmed a jury's ability to infer anticompetitive intent while acknowledging that efficiency is necessary in § 2 Act analysis.[94]

Between the years of 1945 and 1960, investors developed three major downhill skiing facilities in Aspen.[95] The three mountains were operated by three independent companies, including Aspen Ski Co. (Ski Co.) and Aspen Highlands Skiing Corp. (Highlands).[96] The companies offered full-day and half-day tickets for use at their respective facilities, and after several years, the companies intro-

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89. *Id.* at 786, 791 (citing Burdett Sound Inc. v. Altec Corp., 515 F.2d 1245 (5th Cir. 1975)). Those business reasons included the desire to maintain competitiveness within the market and the desire to decrease product liability dilemmas. *Id.* at 791. Some manufacturers prefer to market their products through retailers instead of dealing directly with the consumer. *Id.* at 791; Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795 (1962). As a result of such an arrangement, manufacturers frequently place restrictions on the sale of their goods. *Id.* Restrictions may include designated geographic locations for sale, post-sale obligations and requirements of sale. *Sports Ctr.*, 673 F.2d at 791. These restrictions are called vertical restrictions because the mandate frequently emanates from the top level or manufacturer. *Id.* Vertical restrictions have been categorized as permissible and sometimes desirable if they are not unreasonable. *Id.* The United States Supreme Court has remarked that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Id.* (quoting Continental T.V., Inc., v. GTE Sylvania, Inc., 433 U.S. 36, 54 (1977)).

90. Kapen, *supra* note 61, at 1047. The last significant discussion appeared in United States v. Grinnell Corp. 384 U.S. 563 (1966). *Id.* at n.4.

91. 472 U.S. 585 (1985).

92. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

93. *Id.*

94. Kapen, *supra* note 61, at 1045. The article provides a detailed analysis of *Aspen Skiing* and the inference of a monopolist's anticompetitive intent pertaining to antitrust violations. *Id.*

95. *Aspen Skiing*, 472 U.S. at 587. The three downhill skiing facilities were Aspen Mountain (Ajax), Aspen Highlands (Highlands), and Buttermilk. *Id.* at 587-88. By 1967, a fourth mountain opened called Snowmass. *Id.* at 588.

96. *Id.* at 589.

duced an interchangeable ski ticket, the "all-Aspen ticket."[97] This ticket provided skiers with flexibility to ski at any of three mountains.[98]

Prior to the 1977-78 ski season, Ski Co. had acquired two of the original three mountains and additionally opened a fourth mountain, resulting in ownership of three mountains.[99] Ski Co. then decided to offer an exclusive multiarea pass for only its three mountains.[100] Although Ski Co. agreed to continue to sell the all-Aspen ticket, Ski Co. set a condition that Highlands must accept a fixed percentage of the "All-Aspen" ticket profits.[101] When Highlands refused to accept the fixed percentage, which was lower than the percentage originally agreed upon, Ski Co. refused to sell the "all-Aspen ticket."[102] In addition, Ski Co. began a misleading national advertising campaign that made it extremely burdensome for Highlands to market a multiarea ticket pass of its own.[103]

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97. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). Friedl Pfeiffer, a developer of Buttermilk mountain, introduced the concept of an interchangeable ticket called the all-Aspen ticket. *Id.* at 589 n.7. Pfeiffer explained to his competitors that a similar interchangeable ticket was used at a St. Anton mountain which had three different lift companies and suggested it could be done in Aspen as well since the circumstances were similar. *Id.*

98. *Id.* at 589. In its initial format, the all-Aspen ticket was actually a booklet of six coupons which could be exchanged for a daily ski pass at Ajax, Highlands, or Buttermilk. *Id.* Skiers would exchange a coupon from the all-Aspen ticket booklet for a ski pass at the mountain of their choice. *Id.* The companies' revenues corresponded to the amount of coupons redeemed at each individual mountain. *Id.* Although the booklet price had a tendency to be less costly than purchasing six individual ski lift tickets, certain restrictions were imposed, such as use of the tickets within a limited time period. *Id.*

99. *Id.* at 588-590.

100. *Id.* Petitioner, Ski Co., was the owner of three facilities when it made the offer of a multiarea ticket. *Id.* The multiarea ticket was a six-day pass covering only its own facilities. *Id.* at 587. Highlands was the owner of one of the four major mountain facilities at Aspen. *Id.*

101. *Id.* at 585. Throughout the years, profits from sales of the all-Aspen ticket were distributed in accordance with random sample surveys that ascertained the total number of skiers using each mountain. *Id.*

102. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 592-93 (1985). Highlands had traditionally received revenues based upon usage of its mountain. *Id.* at 592. The Ski Co. management offered Highlands a fixed percentage of 12.5% of the revenue, which was notably below its average revenue. *Id.*

103. *Id.* at 593. Ski Co. promoted its multiarea ski ticket by engaging in a national advertising campaign. *Id.* The campaign was deceiving in that Ski Co. implied that its mountains were the only skiing facilities in the Aspen area. *Id.* Additionally, Ski Co. underwent such endeavors like changing a sign in an airport in Denver from referring to the "Four Big Mountains" to referring to only three mountains yet retained the old picture of the four mountains on the new sign. *Id.* Ski Co. also refused to sell any ski tickets to Highlands. *Id.* Finally, when Highlands created its own ski ticket package, which included a three day lift ticket at Highlands and three vouchers each equivalent to the cost of one lift pass at any Ski Co.

Justice Stevens, writing for the majority, stressed that Ski Co.'s conduct was exclusionary and that it effected a relevant market, thereby violating the Act.[104] The Court recognized that although companies have the right to decline to enter into business relationships with fellow competitors, the right is not unqualified and the possibility of liability still exists.[105] Justice Stevens remarked that a monopolist's refusal to participate in joint marketing could reflect monopolistic intent, and this intent is relevant to determine if conduct is exclusionary.[106] The Court concluded that Ski Co. did not merely reject an offer to conduct business with a competitor, but instead engaged in exclusionary conduct by attempting to monopolize through alterations in the established business of ticket distribution in Aspen.[107]

Aspen Skiing reaffirmed the *Grinnell* willful maintenance standard for the conduct element of monopolization.[108] Aspen Skiing stressed the significance of evaluating the business justifications provided by a monopolist and the effects on both competitors and

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mountain, Ski Co. refused to accept the vouchers. *Id.* at 593-94.

104. *Id.* at 586.

105. *Id.* at 601. Pursuant to § 1 of the Act, a business "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." United States v. Colgate & Co., 250 U.S. 300, 307 (1919). In *Aspen*, Justice Stevens emphasized that this free-trader right is limited to cases "in the absence of any purpose to create or maintain a monopoly." *Aspen Skiing Co.*, 472 U.S. at 602. In Lorain Journal Co. v. United States, 342 U.S. 143 (1951), the Court declared that the right to refuse to conduct business relations with competitors was not unqualified. *Id.* The *Lorain Journal*, a local newspaper in Ohio, was the only business distributing news to a small Ohio town. *Id.* Eventually, a radio station organized in an adjacent community, thus providing an additional news source for the town. *Id.* In an attempt to destroy its competitor and reestablish its monopoly, the *Loraine Journal* banned the sale of advertising to anyone who patronized the radio station. *Id.* The Court ruled that the Loraine Journal had violated § 2 of the Act by attempting to monopolize. *Id.* The Court established that a firm possessing monopoly power does not have a duty to undertake joint business ventures with competitors, but the choice not to engage in a joint business venture may still result in liability. *Id.*

106. *Id.* at 602.

107. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 603-04 (1985). The Court had three reasons for determining that Ski Co. acted in an exclusionary manner. *Id.* at 605-11. First, the evidence revealed that the "all-Aspen ticket" was in great demand among skiers and that its elimination had a negative effect upon consumers. *Id.* at 605-07. Secondly, Ski Co.'s actions had an adverse impact on Highlands ability to compete which was demonstrated by Highlands' financial losses, inability to protect itself from the terminated business agreement, and a decline in its share of the relevant market after Ski Co. canceled the ticket. *Id.* at 607-08. Lastly, Ski Co. failed to provide any legitimate business justifications for its conduct regarding the joint ticket. *Id.* at 608-10. Ski Co. was merely attempting to reduce competition and gain monopoly power in a relevant market. *Id.* at 608-11.

108. *Id.* at 595-97.

consumers, thus clarifying the *Grinnell* test.[109] Through its analysis, *Aspen Skiing* bolstered *Grinnell* and resisted a trend among lower courts to weaken the willful maintenance standard of *Grinnell*.[110] Taken together, these two cases now form the present state of antitrust analysis for monopolistic conduct.[111]

Since *Aspen Skiing*, the United States Court of Appeals for the Second Circuit has assumed the leadership role in antitrust cases and has sought to define monopolistic conduct in many situations, including the practices of sports markets.[112] Specifically, two cases, *USFL v. NFL*[113] and *Volvo North America Corp. v. Men's International Professional Tennis Council*,[114] have redefined the antitrust analysis in a sports-related context.[115]

In *USFL v. NFL*,[116] the United States Court of Appeals for the Second Circuit examined antitrust from the perspective of alleged monopolies among professional sports leagues.[117] This case is important to antitrust analysis because it demonstrated that businesses such as the NFL are not required to surrender all favorable markets simply to permit the latecomer to compete more productively.[118]

In *USFL*, the court confronted allegations that the NFL had violated § 1 and § 2 of the Act.[119] Among other allegations,[120] the

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109. Kapen, *supra* note 61, at 1062-63.

110. *Id.* For a discussion on lower court resistance to *Grinnell*, *see* notes 75-81.

111. *Aspen Skiing*, 472 U.S. 585; United States v. Grinnell Corp., 384 U.S. 563 (1966). For a more complete discussion on the present state of antitrust analysis, *see supra* notes 58-74 and accompanying text.

112. Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55 (2d Cir. 1988); USFL v. NFL, 842 F.2d 1335 (2d Cir. 1988).

113. 842 F.2d 1335 (2d Cir. 1988).

114. 857 F.2d 55 (2d Cir. 1988).

115. *Volvo*, 857 F.2d at 55; *USFL*, 842 F.2d at 1335.

116. *Id.*

117. *Id.*

118. WALTER T. CHAMPION, JR., SPORTS LAW 65 (1993). Champion stated that "[a] natural monopoly does not violate antitrust laws unless the natural monopoly was misused to gain a competitive advantage." *Id.* The NFL had obtained markets that the latecomer, the United States Football League (USFL), wished to possess. *Id.* This does not mean that the NFL is responsible for surrendering its already obtained markets. *Id. See* Trans Sport Inc. v. Starter Sportswear, Inc. 964 F.2d 186, 188-89 (2d Cir. 1992) (discussing that although Trans Sport possessed an exclusive marketing arrangement by maintaining the power to control and distribute official sports team jackets, it did not create unreasonable anticompetitive effects).

119. *USFL*, 842 F.2d at 1341. The USFL filed suit against the NFL, the NFL commissioner, and 27 of the NFL club members seeking both injunctive relief and $1.701 billion in damages. *Id.* at 1340-41.

120. *Id.* at 1341. The USFL alleged that the NFL violated § 1 and § 2 of the Act as well

United States Football League (USFL) alleged that the NFL had monopolized the television market for professional football in the United States.[121] Specifically, the USFL believed that the NFL had willfully attempted to exclude them from the television market by contracting with the three major television networks.[122]

The United States Court of Appeals for the Second Circuit determined that the NFL's television network contracts were not in violation of the Act; moreover, the NFL did not create an anticompetitive barrier to the USFL's success.[123] Judge Winter

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as the federal common law. *Id.*

121. *Id.* at 1341. The USFL, consisting of 12 teams, began its first season in March 1983. *Id.* at 1340. Although they had instituted an initial strategy to become competitive with the NFL, including obtaining television contracts with the American Broadcasting Company (ABC) and the Entertainment and Sports Programming Network (ESPN), the USFL was unsuccessful and lost approximately $200 million after three football seasons. *Id.* at 1340, 1342. Additional strategic goals to make the USFL more competitive with the NFL included an overall theme of patience and publicity geared toward increasing public awareness of the USFL, a schedule of spring play in order to increase the number of fans while gaining league recognition, and an effort to minimize costs through team salary guidelines. *Id.* at 1342. At trial, the United States District Court of the Southern District of New York found that the NFL had willfully acquired monopoly power of professional football in the United States, hence injuring the USFL. *Id.* at 1340-41. The jury awarded the USFL only $1.00 in damages, an insufficient amount to help rebuild the financially troubled league. *Id.* at 1341. Although the jury based its finding of illegal monopolization upon evidence such as the NFL's attempt to co-opt USFL owners, NFL roster increases, and NFL conduct directed at USFL franchises, the court concluded that these activities were insufficient to support a large damages verdict. *Id.*

122. USFL v. NFL, 842 F.2d 1335, 1340 (2d Cir. 1988). The NFL, having been established for over 70 years and having developed into a popular source of entertainment, had acquired a large quantity of rights fees from the major television networks. *Id.* Between 1982 and 1986, the NFL, consisting of its 28 teams, had acquired a shared total of $2.1 billion in rights fees from the three major television networks. *Id.* This was partly dependent upon the fact that the NFL had a tremendous television viewer audience. *Id.* at 1342. The USFL alleged that the NFL prevented them from obtaining a major television network contract, which was a necessary element to the USFL's as well as any league's success. *Id.*

123. *Id.* The USFL contended that the NFL maintained a monopoly both in the professional football market and in the market of network broadcasting of professional football. *Id.* For instance, the USFL alleged that the NFL accomplished its monopoly power by signing multiyear contracts with the major television networks, by convincing the networks to refrain from broadcasting USFL games and by prohibiting competitive bidding for television rights to regular and post season games. *Id.* More specifically evidence revealed that the USFL's lack of success was caused by its inability to adhere to its initial strategy set forth for establishing a successful professional football league. *Id.* The USFL had initially sought to build its reputation and stability through spring playing seasons, through containing costs and through a publicity campaign. *Id.* These efforts were abandoned when the costs were not contained, but instead continually rose. *Id.* Team salary guidelines were eliminated. *Id.* Team owners grew impatient with the original plan of patiently building up fan support and recognition. *Id.* Instead, the idea of spring play was discarded and the USFL announced its deci-

concluded that the networks, for reasons of their own, chose not to contract with the USFL.[124] It was not, as the USFL alleged, the NFL's intentional monopolization and conspiracy that caused the league's downfall.[125] The court specifically noted that much of the evidence revealed that the USFL had self-destructed.[126] The court reasoned that an industry, such as the NFL, is not in violation of the Act solely because it deters competitors from attaining instantaneous parity.[127]

Judge Winter additionally ruled that the NFL did not violate the Sports Broadcasting Act of 1961 by forming contractual relationships with three networks.[128] Although the NFL had maintained contractual relationships with three major networks, the

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sion to enter play in the fall season of 1985 with the hope of securing immediate equality with the NFL. *Id.*

124. *Id.* at 1342.

125. *Id.*

126. *Id.* Current support for *USFL* can be found in the recent events which have transpired with CBS. Rudy Martzke, *CBS to "Downsize" After Losing NFL*, USA TODAY, Dec. 21, 1993, at C1; *USFL*, 842 F.2d at 1335. After losing the rights to broadcast the National Football Conference games of the NFL, CBS is currently seeking new sources of programming such as golf or soccer. *Id.* Accordingly, if the USFL existed today and needed a television contract, CBS would likely give the USFL consideration. *Id.* While CBS might be more willing to consider the USFL today, they are equally capable of denying a broadcasting contract to the USFL as they were back in 1988. *Id.*

127. USFL v. NFL, 842 F.2d 1335, 1342 (2d Cir. 1988). The court noted that this was especially the case with professional football because in 1966 Congress approved the merger of the two then existing leagues into the league which now exists. *Id.*

128. *Id.* at 1353. The Sports Broadcasting Act states that:

> The antitrust laws . . . shall not apply to all joint agreements by or among persons engaging in or conducting the organized professional team sport of football, . . . by which any league of clubs participating in professional football . . . contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the game of football.

15 U.S.C. § 1291 (1982).

This statutory language does not limit a football league, specifically the NFL, to only forming a contract with one television network. *USFL*, 842 F.2d at 1354. *See* United States v. James, 478 U.S. 597 (1986) (outlining immunity from the Sports Broadcasting Act in sweeping terms). In its argument, the USFL relied upon the House Report, which accompanied the Sports Broadcasting Act and stated that "the committee does not intend that an exemption from the antitrust laws should be made available to a league or its members where the intent or effect of a joint agreement is to exclude a competing league or its members from the sale of any of their television rights." H.R. REP. NO. 1178, 87th Cong., 1st Sess. 4 (1961). The United States Court of Appeals for the Second Circuit believed that the USFL exaggerated the significance of the House Report. *USFL*, 842 F.2d at 1354. The USFL should have accepted the report as it was literally stated, meaning that a competing league has the right to make a claim of monopolization and restraint of trade against a league engaging in multiple pooled-rights agreements. *Id.* In *USFL*, the USFL made such claims, but they were rejected by the jury. *Id.*

court concluded that the NFL neither unreasonably restrained trade nor possessed the power to prevent a competing league from securing similar network contracts.[129] Finally, the court declared that the USFL failed to prove an intent and an effect necessary for a claim of illegal monopolization.[130]

Similar to *USFL*, the United States Court of Appeals for the Second Circuit in *Volvo North America Corp. v. Men's International Professional Tennis Council*,[131] confronted allegations of monopolization in the sports market.[132] While *USFL* examined monopolization of the television market for sporting events, *Volvo* examined monopolization of tennis events in particular.[133] Referring once again to *Aspen* and *Grinnell*, the United States Court of Appeals for the Second Circuit reiterated the two elements necessary for a claim of monopolization and how they apply in a sports market context.[134] Specifically, Volvo alleged that Men's International

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129. *USFL*, 842 F.2d at 1356. The court based its conclusions on several factors. *Id.* First, the court noted and the USFL conceded that the "dilution effect" did not exist after the NFL television contracts had expired. *Id.* In effect, whatever exclusionary impact existed, it only existed for the time period of the NFL's contracts. *Id.* After these contracts expire, any league is able to compete, based on the quality of its sport, for a network contract. *Id.* The jury determined that the length of the NFL's contracts were not unreasonable. *Id.* Second, the three networks were impacted differently in that ABC, for example, was mainly contracted for a single game on a weekday evening, while the other networks were contracted for Sunday afternoon play. *Id.* As a result, the exclusionary theory set forth by the USFL did not have the same result for each network. *Id.* Lastly, the conduct displayed by the networks and the NFL revealed no sense of exclusionary behavior. *Id.* at 1357.

130. *Id.* at 1358. Upon the USFL's allegation that the NFL had violated § 2 of the Act, the district court charged that "[a] company may not be found to have wilfully acquired or maintained monopoly power if it has acquired that power solely through the exercise of superior foresight and skill or because of natural advantages . . . , or because of economic or technological efficiency . . . or by laws passed by Congress." *Id.* With no evidence to counteract the district court's charges, the USFL was not able to prevail on a claim under § 2 of the Act. *Id.* The NFL had not wilfully acquired or maintained monopoly power. *Id.*

131. 857 F.2d 55 (2d Cir. 1988). *Volvo* emanates from a dismissal of its claims by the United States District Court for the Southern District of New York "for failure to state a claim upon which relief can be granted." Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55 (2d Cir. 1988) (quoting Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 678 F. Supp. 1035 (S.D.N.Y. 1987), *appeal dismissed in part*, 839 F.2d 69 (2d Cir. 1988)).

132. *Id.*

133. *Id.*; USFL v. NFL, 842 F.2d 1335 (2d Cir. 1988).

134. *Volvo*, 857 F.2d at 55 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19 (1985)). The two necessary elements for a claim of monopolization include: "possession of monopoly power in the relevant market and the willful acquisition or maintenance of monopoly power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.*

Professional Tennis Council (MIPTC) violated § 1 and § 2 of the Act by conspiring to monopolize trade in the men's professional tennis market.[135]

Men's professional tennis is currently grouped into two categories of sanctioned events, thereby creating a great deal of competition to obtain professional players to participate in respective events.[136] Volvo first became involved with professional tennis by sponsoring tournaments, and eventually became the sponsor of the MIPTC sanctioned Grand Prix series of tournaments.[137] After five years of sponsoring the Grand Prix, however, MIPTC awarded the sponsorship to Nabisco Brands, Inc., instead of Volvo.[138] In return for Volvo's assignment of its contractual rights of play[139] and television broadcasting privileges to Nabisco, MIPTC agreed to approve a sanctioned event for Volvo.[140] Despite this arrangement, Volvo filed a complaint against MIPTC alleging restraint of trade and conspiracy to monopolize the men's professional tennis market.[141]

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135. *Id.* at 57. According to Volvo, the men's professional tennis market included production of the tennis events, tennis playing services for the players and the rights to telecast the events. *Id.* The market of men's professional tennis is complex and has multiple players. *Id.* at 58. The players include the owner who actually "owns" the event, pays compensation to players, pays the event's expenses and receives revenues. *Id.* Additionally, there are often third parties who advertise and manage the actual event. *Id.* Lastly, there are sponsors who buy the rights to have there name associated with the event. *Id.* In *Volvo*, "Volvo is an owner, producer and sponsor of certain men's professional tennis events," while MIPTC is only an owner and producer. *Id.*

136. Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 60 (2d Cir. 1988). The first category of men's professional tennis includes events sanctioned by either the MIPTC or the International Tennis Federation (ITF) and consists of such events as Wimbledon and the United States Open. *Id.* The other category of events include non MIPTC or ITF sanctioned tournaments called "Special Events." *Id.*

137. *Id.* at 59. In 1973, Volvo sponsored its first tournament in New Hampshire called the Volvo International Tennis Tournament. *Id.* After sponsoring other tournaments in the 1970s, Volvo agreed to sponsor the entire Grand Prix tournament series from 1980 through 1982 with the option of sponsoring the series in 1983 and 1984. *Id.*

138. *Id.* Volvo offered to continue sponsoring the Grand Prix beyond 1984, but MIPTC awarded the sponsorship to Nabisco, thereby deteriorating current relations between the MIPTC and Volvo. *Id.*

139. *Id.* at 59-60. Volvo had already contracted for the use of Madison Square Garden for the 1985 Masters Tournament, the final tournament of the Grand Prix series, prior to knowing MIPTC had awarded sponsorship to Nabisco. *Id.* Additionally, Volvo had also contracted with the National Broadcasting Company (NBC) granting them television rights to the tournament. *Id.* at 60. Since Volvo had no use for the contracts because it was no longer sponsoring the series, Volvo agreed to assign its rights to Nabisco in exchange for the right to sponsor a MIPTC sanctioned event. *Id.*

140. *Id.*

141. Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 60 (2d

In *Volvo*, the United States Court of Appeals for the Second Circuit reversed the United States District Court for the Southern District of New York, remarking that Volvo's complaint properly alleged that MIPTC engaged in monopolization and conspiracy to monopolize.[142] Additionally, the court stated that Volvo adequately alleged claims of price fixing, market division, and hindrance of business relations.[143] In conclusion, the court remanded for further proceedings.[144]

As *Grinnell* and *Aspen Skiing* set forth, a monopoly violation pursuant to § 2 of the Act must satisfy two elements: the possession of monopoly power in a relevant market and the willful acquisition or maintenance of that power.[145] Recognizing the significance and complexity of antitrust issues, the court in *Trans Sport* carefully applied this test.[146] The court was able to examine various aspects of the expanding legal debate and relationship between sports marketing and monopolies.[147]

Justice Marshall, sitting by designation on the United States Court of Appeals for the Second Circuit, utilized the test in *Grinnell* and *Aspen* to determine if Starter, as a manufacturer of sportswear,

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Cir. 1988). The complaint submitted by Volvo consisted of three main allegations. *Id.* at 60-61. First, Volvo contends that MIPTC restricted its ability as "owners and producers of sanctioned events" because it denied them the opportunity to produce the tennis events as Volvo desired. *Id.* For instance, Volvo was not permitted to determine site locations for tournaments, players' compensation or schedules of the events. *Id.* Second, Volvo submits that MIPTC restricted their ability to compete fairly in the market for tennis events. *Id.* MIPTC reached an agreement with the World Championship Tennis, Inc. (WCT), a rival organization which sponsored men's tennis tournaments, in which WCT agreed not to promote any Special Event that would negatively affect a MIPTC event. *Id.* Lastly, Volvo alleges that MIPTC limited the amount of non-sanctioned tournaments that a player is able to compete in by mandating that all players who participate in the Grand Slam tournament sign Commitment Agreements. *Id.* at 61. These agreements contain restrictive provisions such as preventing players from participating in non-sanctioned events for approximately 21 weeks out of the year and forcing a player to agree not to take part in any Special Event if it occurs the same week as a Grand Slam event. *Id.* Volvo believes that the allegations it set forth collectively and individually restrain trade and conspire to monopolize in violation of the Act. *Id.*

142. *Id.* at 76.

143. *Id.*

144. *Id.*

145. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). In *Grinnell*, the Court distinguished the second element of the test by recognizing that a willful acquisition or maintenance of monopoly power should be distinguished from growth or development which is a result of a superior product, business acumen, or historic accident. *Id.* *See* notes 58-74 for discussion of the *Grinnell* decision.

146. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186 (2d Cir. 1992).

147. *Id.*

violated the Act by refusing to sell products to retailer Trans Sport.[148] Although Starter possessed an exclusive contract to sell authentic professional sport team jackets, the court reasoned that the contract alone did not constitute monopoly power in the sports apparel market.[149] The court chose not to apply the first element of the test[150] but concluded that, assuming Starter possessed monopoly power in the relevant market and satisfied the first prong of the test, a violation of § 2 of the Act could still not be established.[151]

The court made a special effort to evaluate Starter's behavior to determine if it caused Trans Sport to experience either exclusionary or anticompetitive effects.[152] The court held that Trans Sport's contention that Starter's no-transshipment policy was a monopolistic plan to eliminate competition and create anticompetitive effects was without merit.[153] The court summed that Starter maintained the right, as a private business, to exercise its discretion in deciding

148. *Id.*

149. *Id.* at 187, 189. Starter possessed a license to manufacturer professional sport team jackets. *Id.* Starter was permitted to sell these jackets with the official trademarks of the NFL, MLB, NHL, and NBA. *Id.* at 187. Starter's license was extremely valuable because the license permitted them to market "authentic" jackets which were the same type of jackets worn by the professional sports players and associated staff. *Id.* Although many manufacturers produce professional sports apparel, including jackets, only Starter and a few other manufacturers were licensed to sell the "authentic" sports jackets. *Id.* If any of the leagues became dissatisfied with Starter's production or performance, they reserved the right to terminate business relations. *Id.* at 189. Although Starter's license to produce the jackets has been in existence since 1976, the existence of the license for such a period of time does not automatically result in a violation of antitrust law. *Id.*

150. *Id.* at 188. Justice Marshall did not pursue the first prong of the test, the relevant market determination, because the court affirmed the district court's decision that Trans Sport could not succeed on an allegation of a violation of § 2 of the Act. *Id.*

151. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188 (2d Cir. 1992).

152. *Id.* at 188. Exclusionary and or anticompetitive effects, which result from a demonstration of monopoly power, are distinctly different from business operations which gain a competitive edge due to efficiency, high quality products and hence public satisfaction. *Id.* at 189. A jury must determine whether anticompetitive or exclusionary effects result from efficient business or from a willful intent to monopolize in order to properly determine if the Act has been violated. *Id.* at 188-89. A determination to this extent is greatly fact sensitive. *Id.*

153. *Id.* at 189. The United States Court of Appeals for the Second Circuit concluded that Trans Sport did not allege any facts which would provide a trier of a fact with the opportunity to conclude that Starter's decision, to not permit Trans Sport to sell its jackets to other retailers, was purposefully done to eliminate competition and control prices. *Id.* (referring to International Railways of Cent. Am. v. United Brands Co., 532 F.2d 231, 239 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976)). Although Starter's no-transshipment policy may have deterred certain retailers from competing in the market of selling Starter's authentic jackets thereby reducing competition, such a possibility alone does not create genuine issues of fact. *Trans Sport*, 964 F.2d at 189.

with whom it will conduct business.[154] Trans Sport violated company policy by refusing to agree not to sell Starter's jackets to other retailers with whom Starter had decided not to conduct business.[155] Trans Sport's refusal not to transship Starter's jackets lawfully resulted in Starter's decision to terminate business relations with Trans Sport.[156] The determination was neither unlawful nor was it a monopolistic attempt to exclude Trans Sport from the retail market.[157]

Justice Marshall described Starter's justifications for its no-transshipment policy and its decision to terminate business relations with Trans Sport as valid business reasons indicative of lawful conduct.[158] Starter justified its policies by explaining that because its reputation was extremely important, it sought business relations with retailers, who like themselves, demonstrated similar high quality business standards and procedures.[159] Starter chose to sell its jackets only to those retailers who displayed the product quality and image it desired to project to the community.[160] The court also stressed that Starter was justified in choosing to sell to only those retailers who were capable and willing to invest in Starter's products.[161] The court emphasized that businesses, such as

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154. *Id.* The United States Supreme Court has precisely remarked that "in the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." United States v. Colgate & Co., 250 U.S. 300, 307 (1919). In *Trans Sport*, Starter stated that it chose not to sell its authentic jackets to Trans Sport because Trans Sport refused to adhere to company policy set forth by Starter. *Trans Sport*, 964 F.2d at 190. Starter referred to its company policy as the no-transshipment policy. *Id.* After manufacturing the jackets, Starter would sell them to chosen retailers, who were advised of the no transshipment policy, which set forth that they were not permitted to resell the jackets to other retailers. *Id.*

155. *Trans Sport, Inc.*, 964 F.2d at 189-90.

156. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 189-90 (2d Cir. 1992).

157. *Id.* at 189-91.

158. *Id.* at 190. The court noted that Starter established legitimate reasonable business justifications necessary to create a lawful prima facie case. *Id.*

159. *Id.*

160. *Id.* Starter's intrabrand restrictions served as a message to the buying public. *Id.* The restrictions had the effect of conveying to the public a message that Starter produces quality products. *Id.* A consumer often deems it valuable to know the reputation of manufacturers and retailers, as well as what brands they sell. *Id.*

161. Trans Sport, Inc. v. Starter Sportswear Inc., 964 F.2d 186, 190 (2d Cir. 1992). Starter believed that it should exclude those dealers who did not wish to make an economic investment in Starter's products because their unwillingness to invest was demonstrative of a lack of commitment to the future growth and reputation of Starter's products. *Id.* Accordingly, Starter chose its business associates based upon whether the associate was willing to

Starter, had the right to regulate where their products were sold and to whom they were sold in order to oversee its products' image.[162]

Justice Marshall concluded that Starter's attempt to combat counterfeiting was an additional justification for its behavior.[163] Starter attempted to eliminate counterfeit goods sold at unauthorized locations by limiting the number of retailers permitted to sell Starter products.[164] The court reasoned that this strategy enabled Starter to better detect the origin of counterfeit goods and thus enable Starter to more successfully combat the counterfeiting dilemma.[165] Perhaps of greater importance was the fact that this policy permitted Starter to satisfy its agreement with the professional sports leagues to monitor and safeguard the authentic products displaying their trademarks.[166]

Finally, the court determined that Starter had a legitimate need to have a direct business relationship with its retailers.[167] Corre-

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invest in the long term life of Starter products, including investments in advertising, marketing plans to increase sales and productivity and promotional strategies. *Id.*

162. *Id.* The United States Supreme Court has noted that restrictions on intrabrand competition exist, and they, in effect,:

> [I]nduce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products .... The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called 'free-rider' effect, these services might not be provided by retailers in a purely competitive situation ....

Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977).

Purchasers of sports jackets are less likely to be concerned with safety guarantees regarding the products they have purchased than are purchasers of automobiles or appliances. *Trans Sport*, 964 F.2d at 190. This lower level of concern regarding the safety of sports apparel products does not negate the effect of intraband restrictions, such as those initiated by Starter. *Id.* The restrictions enforced by Starter had the effect of encouraging promotional efforts that provided the public with information regarding product quality, price and availability. *Id.*

163. *Trans Sport, Inc.*, 964 F.2d at 190. Starter had invested greater than $200,000 to combat the unauthorized sale of counterfeit products. *Id.* Starter hoped that by limiting its number of retailers it would be better able to control the counterfeiting without incurring such phenomenal costs. *Id.*

164. *Id.* By limiting the retailers permitted to sell Starter products, Starter would be able to have greater control and supervision over its products therefore making it easier to detect counterfeiting. *Id.*

165. *Id.*

166. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 191 (2d Cir. 1992) (citing Church of Scientology Int'l v. Elmira Mission of the Church of Scientology, 794 F.2d 38, 43 (2d Cir. 1986)).

167. *Id.* Starter wanted to deal directly with its retailers instead of having its retailers,

spondingly, for business purposes, it was important for Starter to determine, prior to the athletic season, which teams would be the most popular sports teams.[168] If Starter maintained a direct dealing relationship with its retailers, it would be better able to facilitate the process of predicting the most popular sports teams and Starter therefore could determine which team's sports jackets would generate the greatest demand.[169] By forecasting the popularity of the sports teams through a direct relationship with its retailers, Starter was making efficient and effective use of its limited manufacturing resources.[170] The court reasoned that a company is permitted to take reasonable measures to safeguard its legitimate business interests.[171] Without more, an accuser has not raised a genuine issue of material fact pursuant to § 2 of the Act.[172]

As an attempt to discredit Starter's interest in deterring discount dealers from benefitting from the goodwill and outstanding business reputation of authorized dealers, Trans Sport alleged that the authorized dealers provided only minimal service and customer appreciation.[173] Trans Sport relied on the fact that authorized retailers did not provide protections such as warranties and repairs.[174] Starter conceded this fact, yet reminded Trans Sport that authorized retailers make significant contributions in the overall

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such as Trans Sport, selling Starter's products to additional retailers and creating an indirect relationship between Starter and the additional retailers. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 191 (2d Cir. 1992) (citing International Rys. of Cent. Am. v. United Brands Co., 532 F.2d 231, 239-40 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976)).

172. *Id.* at 191. The burden of proof shifted to Trans Sport because Starter's business justifications were determined valid. *Id.* For a trial to be granted, Trans Sport must establish a genuine issue of material fact by alleging facts supportive of the premise that Starter's proffered business justifications were pretextual. *Id.* Trans Sport did not meet the burden of proof. *Id.* Specifically, the district court found Trans Sport:

> admits that [Starter] preferred to deal with the 'Macy's of the licensed apparel industry, not the K-Marts of the world,' . . . as if this course of conduct were somehow wrongful, and has recognized that 'the place where the jackets are sold was of apparent importance to Starter,' (emphasis supplied), as if a manufacturer, and particularly a manufacturer who has secured an exclusive right to manufacture goods under certain terms and conditions, should not be concerned with such matters.

Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 191 (2d Cir. 1992).

173. *Id.*

174. *Id.*

sales growth of the products through investments in marketing and advertising promotions.[175] Trans Sport's primary assertion, that Starter attempted to exclude discount dealers by permitting authorized dealers to engage in direct mail sales via catalogs containing Starter products, was unmerited.[176] The court concluded that a trier of fact could not reasonably infer that Starter allowed retailers to use mail catalogs as a means of excluding discount dealers from the market.[177]

The United States Court of Appeals for the Second Circuit ruled that Trans Sport's last allegation of illegal tying[178] lacked evidence to support the claim.[179] Specifically, Trans Sport believed that Starter engaged in illegal tying through its policy of selling only to retailers who purchased a "representative" amount of Starter's products and whose business operations were compatible with those of Starter.[180] Trans Sport insisted that the policy forced retailers to purchase other product lines that were not authentic

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175. *Id.*

176. *Id.* Trans Sport noted that they themselves had been authorized by Starter to sell Starter jackets via direct mail. *Id.* The court concluded that this alone did not establish a genuine issue of material fact warranting a trial. *Id.*

177. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 191 (2d Cir. 1992). The court inferred that Starter was neither attempting to eliminate competitors on some premise other than efficiency nor were they attempting to fix prices. *Id.* (citing International Rys. of Cent. Am. v. United Brands Co., 532 F.2d 231, 239 (2d Cir.), *cert. denied*, 429 U.S. 835 (-1976)); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).

178. *Id.* at 191-92. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (finding that illegal tying consists of a party agreeing to sell one product to the buyer on the condition that buyer also agrees to buy a tied or different product). To establish illegal tying, the party alleging the tying must prove that the seller forced or coerced the buyer to buy the tied merchandise. *Trans Sport*, 964 F.2d at 192 (citing Unijax, Inc. v Champion Int'l, Inc., 683 F.2d 678, 685 (2d Cir. 1982)). A manufacturer is permitted to use "strong persuasion, encouragement or cajolery to the point of obnoxiousness to induce [its] retailer to buy its full line of products," and still not be considered as participating in illegal tying. *Id.* (quoting Unijax, Inc. v Champion Int'l, Inc., 683 F.2d 678, 685 (2d Cir. 1982)). A jury must find that "the manufacturer goes beyond persuasion and conditions its retailer's purchase of one product on the purchase of another" in order to conclude actual coercion existed. *Id.*

179. *Trans Sport,'Inc.*, 964 F.2d at 192. For Trans Sport to prevail over Starter's summary judgment motion, Trans Sport must allege facts adequate to sustain an inference that Starter maintained "appreciable economic power" with reference to the tied product and that this power affected a considerable portion of commerce. *Id.* (citing Fortner Enters, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969)).

180. *Trans Sport*, 964 F.2d at 192. Starter distributed a policy to its retailers stating that Starter: "has a policy of selling only to retail outlets which carry a representative amount of the line as deemed appropriate by Starter in light of the type of retail outlet, the status of Starter's line or lines of merchandise and marketing conditions. *Id.* Trans Sport relied on this exact policy statement when alleging that Starter engaged in illegal tying. *Id.*

Starter products or else lose the privilege of selling the authentic Starter jackets.[181]

The United States Court of Appeals for the Second Circuit found that Starter's policy statement was vague and did not constitute illegal tying.[182] Starter did not specify the amount of different products it required retailers to purchase, but instead stated it required a representative amount.[183] Starter's requirement that its retailers carry a representative amount of their products did not automatically constitute coercion and illegal tying.[184]

The court implied that Starter's policy could be interpreted several ways, including that Starter desired business relationships with only those retailers willing to reasonably invest in its authentic jacket line.[185] Trans Sport did not present any evidence to support coercion on behalf of Starter.[186] Trans Sport never alleged that Starter terminated their business relationship because Trans Sport would not purchase non-authentic products as a precondition for being permitted to purchase authentic products.[187] Trans Sport was not only unable to provide the necessary evidence to establish a tying claim, but it was also unable to establish that Starter acted with the intent to exclude or caused unreasonable anticompetitive

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181. *Id.* Trans Sport asserted that retailers were forced to purchase non-authentic sports apparel such as baseball hats and T-shirts as a necessary condition to preserving the right to market Starter's authentic jackets. *Id.*

182. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 192 (2d Cir. 1992). The ambiguity regarding the phrase "representative amount" is not sufficient to establish a material fact warranting a trial. *Id.*

183. *Id.*

184. *Id. See* International Rys. of Cent. Am. v. United Brands Co., 532 F.2d 231, 239-40 (2d Cir.), *cert. denied,* 429 U.S. 835 (1976) (rejecting a claim under § 2 of the Act where company's refusal to deal was supported by reasonable business justification).

185. *Id.* The possible interpretation that Starter wanted to limit its business to those retailers willing to invest substantially in its jacket line is a legitimate business justification for limiting business to those particular dealers. *Id.* The court noted that "a company is permitted to protect its business interests by establishing reasonable standards which must be satisfied in order to have a business relationship with that company." *Id.* at 191.

186. *Id.* For the court to find that a tying agreement existed, Trans Sport, as the buyer, must reveal evidence of actual coercion through proof that it unwillingly purchased the alleged tied product. *Id. See* Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 686 (2d Cir. 1982) (holding that unless a buyer proves that it unwillingly purchased an alleged tied product, actual coercion has not been established and a tying agreement cannot be found to exist). After two years of discovery, Trans Sport failed to produce evidence that it or any other Starter dealer were victims of illegal tying by Starter. *Trans Sport,* 964 F.2d at 192. Trans Sport failed to provide evidence that Starter forced dealers to buy non-authentic products as a precondition to receiving authentic Starter products. *Id.*

187. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 192 (2d Cir. 1992).

effects in the market.[188] In affirming the District Court's award of summary judgment to Starter, Justice Marshall held that Trans Sport presented no genuine issues of material fact supporting its § 2 claim under the Act.[189]

Since 1890, the purpose of the Act has been to prohibit unreasonable restraints on competition. Only in a freely competitive market will the consumer have the ability to purchase the highest quality goods at the most affordable prices. To determine what constitutes an unreasonable restraint of trade, the United States Supreme Court has established two standards. First, unreasonable restraints of trade that are without question anticompetitive are deemed per se violations. The second standard, rule of reason, mandates that certain situations be examined in light of the surrounding circumstances. The issue that arises is whether a situation qualifies as per se, rule of reason or alternatively, as in *Trans Sport*, an aggressive marketing strategy.

The business of marketing is extremely demanding. On the one hand, customers demand the best products at the lowest prices feasible. On the other hand, the manufacturers and retailers are continually attempting to maximize their profits. Aggressive strategies are vitally important because, if the courts properly enforce antitrust laws, a competitive market will force prices to stay low. As a result, businesses must increase their revenues to generate enough of a profit to stay in business while maintaining their competitiveness. Alternatively, they may choose a smaller market share but increase their profit margins on each item sold. Such a marketing decision will polarize the quality of goods, as the higher priced item with a smaller market share will be perceived or may actually have a much higher quality than the lower priced item with a larger market share.

These two conflicting areas of industry have an inherent power struggle within the law. The Sherman Act seeks to prevent monopolies, but, at times, it also may have a tendency to overreach into what is a procompetitive marketing strategy. This is the dissention that has recently encroached upon the sports apparel market. In *Trans Sport*, the United States Court of Appeals for the Second Circuit considered whether a marketing policy created an unreasonable restraint on competition or whether it was simply an

188. *Id.* at 192.
189. *Id.*

aggressive marketing strategy. Trans Sport engaged in a marketing plan that demonstrates the tendency towards more exclusive dealings with retailers in the sports marketing industry. It chose to limit the availability of its products and increase its quality of goods.

The primary controversy was the issue of whether Starter, under exclusive license to manufacture professional sports apparel, had committed antitrust violations by refusing to supply a retailer who did not comport with Starter's business policies. Subjectively, the court was responsible for evaluating Starter's behavior in relation to antitrust law. The United States Court of Appeals for the Second Circuit concluded that Starter did not violate § 2 of the Act by refusing to supply retailer Trans Sport with its products. The court rationalized that Starter provided valid business justifications for refusing to conduct business with Trans Sport. The court concluded that a manufacturer has a valid business interest in selecting only those retailers that conform to the image and quality the manufacturer desires to project. Additionally, the court stated that Starter did not establish a no transshipment policy in order to engage in illegal tying.

As in *Trans Sport*, a manufacturer should be given the opportunity to reject business dealings with a retailer if the retailer ignores the reasonably justifiable demands of the manufacturer.[190] A monopoly does not exist simply because a manufacturer possesses an exclusive licensing agreement or effectuates a no transshipment policy. Although public policy should mandate against monopolies, public policy should not seek to exclude legitimate sports apparel industries from entering the market and striving to increase the quality and superiority of their products. By allowing manufacturers to dictate the quality of their apparel, consumers will be exposed to a greater variety of quality authentic merchandise.

As a result of *Trans Sport*, the sports apparel market will have more freedom to produce high quality authentic goods. The market originally included all levels of quality. In its evolution, the market has splintered. While splinters of the market will cover the less expensive products of lesser quality, the four major sports leagues, the MLB, NFL, NBA, and NHL, will be able to produce their

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190. *Id.* at 189-91.

authentic product lines and compete at the highest splinter of the market. Exclusive agreements are not necessarily anticompetitive, and, in many instances, such agreements will better define the market by creating future growth and a competitive environment. While Starter could charge more in the market for high level goods, the competition in the high quality market among the four major sports leagues would drive prices down. *Trans Sport* demonstrates the equilibrium that must be met to allow markets to develop and mature, while safeguarding against potential monopolies. Hopefully, future antitrust cases will follow the lead of the United States Court of Appeals for the Second Circuit and allow the markets to flourish.

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