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Analyzing Refusal-to-Deal Cases Under *Brooke Group's* Predatory Pricing Test: The Tenth Circuit Misses the Mark in *Christy Sports, LLC v. Deer Valley Resort Co.*

I. INTRODUCTION

In *Christy Sports, LLC v. Deer Valley Resort Co.*, the Tenth Circuit held that Deer Valley Resort Co. (“Deer Valley”) did not have a duty to deal with Christy Sports, LLC (“Christy Sports”), a snow ski rental company, and that it did not violate § 2 of the Sherman Act¹ (“§ 2”) when it began to exercise a restrictive covenant after many years of non-enforcement.² The *Christy Sports* court confronted the issue of whether Deer Valley, in light of antitrust law, could lawfully exercise its land sale agreement’s restrictive covenant.³ Ultimately, the court allowed Deer Valley to terminate its working relationship with Christy Sports even though such action would likely result in Deer Valley obtaining monopoly power in renting skis at the resort.⁴

Relying on earlier Tenth Circuit and United States Supreme Court decisions, the Tenth Circuit held that Deer Valley and Christy Sports did not enjoy a relationship sufficient to bind Deer Valley to continue dealing with Christy Sports. The decision attempted to draw the boundaries for § 2 refusal-to-deal monopolization claims⁵ based on a business relationship rule.⁶ Rather than using the hard-to-follow business relationship rule, however, the Tenth Circuit should have employed the tried and proven predatory pricing analysis as

1. 15 U.S.C. §§ 1–7 (2006); *see* *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (reasoning that the purpose of the Sherman Act is to protect the public from unfair business practices and antitrust violations).

2. *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009).

3. *Id.* at 1190.

4. *See id.*

5. Sherman Act, 15 U.S.C. § 2 (2006) (making monopolizing or attempting to monopolize illegal).

6. Recent United States Supreme Court cases have left the boundaries in this area of law less than clear. *See infra* Part III.B.

used in the United States Supreme Court case of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*⁷

II. FACTS AND PROCEDURAL HISTORY

Utah's claim to being the home of the "greatest snow on earth"⁸ is supported by the number of skiers who travel to Utah to enjoy the state's pristine, snowy mountain slopes.⁹ Deer Valley is one of three large ski resorts in the world-renowned skiing haven of Park City, Utah.¹⁰ Most of Deer Valley's patrons are destination skiers; they fly into Salt Lake City and take a shuttle to the resort where they lodge and ski down Deer Valley's slopes.¹¹

In 1990, Deer Valley sold a parcel of commercial property in its up-scale, mid-mountain village "subject to a restrictive covenant that prohibited use of the property for . . . ski rental . . . purposes without [Deer Valley's] express written consent."¹² The buyers erected a commercial building at the mid-mountain village and leased space in the building to Bulrich Corporation ("Bulrich").¹³ In accord with the restrictive covenant, Bulrich's lease agreement initially prohibited using the space for renting skis.¹⁴ One year later, Deer Valley granted Bulrich permission to rent skis in return for 15% of the revenues.¹⁵ In 1994, Bulrich merged with another company to form Christy Sports.¹⁶ Christy Sports continued to rent skis at the mid-mountain village until 2005.¹⁷ However, in 1995, for reasons unknown at the time of the case, Christy Sports discontinued paying Deer Valley 15% of the rental revenues as previously agreed upon.¹⁸

In 2005, Deer Valley opened its own ski rental facility at the mid-mountain village; Deer Valley notified Christy Sports that the

7. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–28 (1993).

8. Ski Utah Home Page, <http://www.skiutah.com> (last visited Feb. 15, 2010).

9. See *Christy Sports*, 555 F.3d at 1190.

10. *Id.*; Park City Tourism Page, <http://www.utah.com/parkcity/> (last visited Feb. 15, 2010).

11. *Christy Sports*, 555 F.3d at 1190.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1191.

17. *Id.*

18. *Id.*

restrictive covenant would be enforced and Christy Sports would no longer be allowed to rent skis at the mid-mountain location.¹⁹ By exercising the restrictive covenant, Deer Valley positioned itself not only as the sole purveyor of ski rentals at the mid-mountain village, but at the entire resort.²⁰ By eliminating the ski rental competition from within its resort, Deer Valley left destination skiers “with few choices: they [could] carry unwieldy ski equipment onto the plane, take a shuttle into Park City and hunt for cheaper ski rentals in town, or rent from the more conveniently located [Deer Valley] location.”²¹

Christy Sports filed a complaint, arguing that Deer Valley’s exercise of the restrictive covenant was anticompetitive and would result in a monopoly for Deer Valley in which it could charge destination skiers artificially inflated prices for ski rentals.²² Christy Sports argued that consumers would not only face increased prices, but also decreased selection.²³ Christy Sports’ antitrust claims, based on § 2 of the Sherman Act,²⁴ were dismissed, however, by the district court after Deer Valley filed a 12(b)(6) motion²⁵ for “failure to state a claim upon which relief can be granted.”²⁶

III. SIGNIFICANT LEGAL BACKGROUND

The Tenth Circuit used precedent regarding two closely related antitrust concepts to set the background for their decision: restrictive covenants and refusal to deal. Restrictive covenants are artificial barriers in the free market that produce limits on competition and, at the same time, are catalysts that pave the way for market entrants which, ironically, increases competition.²⁷ Refusal-to-deal claims arise in the rare instance where a company has a legal duty to cooperate

19. *Id.*

20. *Id.* There was a trivial exception to Deer Valley’s monopoly: one lodge at the resort offered ski rentals exclusively to its own lodgers. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* Christy Sports accused Deer Valley of either monopolizing or attempting to monopolize the ski rental market at the resort or alternatively at the mid-mountain village. *Id.*

24. Section 2 prohibits monopolizing or attempting to monopolize “any part of the trade or commerce among the several States.” 15 U.S.C. § 2 (2006).

25. *Christy Sports*, 555 F.3d at 1191.

26. FED. R. CIV. P. 12(b)(6).

27. *See Christy Sports*, 555 F.3d 1188; *Drury Inn-Colo. Springs v. Olive Co.*, 878 F.2d 340 (10th Cir. 1989).

with a competitor instead of simply competing in the free market as companies usually do; breaching such a duty may violate antitrust principles and result in a refusal-to-deal claim.²⁸

A. Restrictive Covenants

In dismissing Christy Sports' claim, the district court relied principally on a single Tenth Circuit case, *Drury Inn-Colorado Springs v. Olive Co.*²⁹ In *Drury Inn*, a motel chain purchased land on which it intended to build and operate a motel.³⁰ The motel chain insisted that the seller attach a restrictive covenant to the neighboring lots, also owned by the seller, so as to prevent anyone purchasing the land from building a competing motel within close proximity to its own.³¹ The court held that the restrictive covenant did not violate the Sherman Act.³² The restrictive covenant, in all probability, induced Drury Inn to enter the market, which bolstered competition. Much like a valid covenant not to compete, the restrictive covenant in *Drury Inn* was limited in time and geographic scope.³³ The restrictive covenant provided the bargained-for inducement required by Drury Inn to purchase the land and increase competition in the motel industry.

B. Refusal to Deal

In rare situations, refusing to deal with another is a § 2 violation; such situations are exceptions to the notion that businesses are not generally obligated to assist their competition.³⁴ One such situation, discussed at length in *Christy Sports*, arose in *Aspen Skiing Co. v.*

28. See *Christy Sports*, 555 F.3d 1188; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

29. *Christy Sports*, 555 F.3d at 1195–96.

30. *Drury Inn*, 878 F.2d at 341.

31. *Id.*

32. *Id.*

33. *Id.* at 341–42. The restrictive covenant was limited to two and a half years and the neighboring thirteen acres. *Id.* at 342; see 6 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 13:4 (Richard A. Lord, 4th ed. 1995). Restrictive covenants, like covenants not to compete, are valid when their limiting effect is “no broader than is necessary for the protection of the buyer.” *Id.*

34. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (illustrating that when such situations arise, they violate section 2 of the Sherman Act). The fact that *Aspen* and the subject of this Note both involve winter sports is happenstance.

Aspen Highlands Skiing Corp.,³⁵ a case heard by the United States Supreme Court. Of the four major down-hill skiing facilities in Aspen, Colorado, three were owned by a single company (“the larger owner”).³⁶ For many years, skiing patrons visiting Aspen had the option of purchasing an All-Aspen ski pass, a cooperative effort by the owners of the facilities allowing skiers the flexibility to ski at any of the Aspen resorts over a limited period of time.³⁷ The facility owners received revenues based on the number of All-Aspen ski tickets redeemed by their respective facility.³⁸ When the single-facility owner (“the smaller owner”) refused to accept a predetermined percentage of the revenues from the All-Aspen ski pass, which would have been much less than the single facility’s average revenue from the pass, the larger owner discontinued issuing or accepting the All-Aspen ski pass and began a program that only included the larger owner’s facilities.³⁹ Because consumers valued the option of choosing among the four facilities, the smaller owner sold vouchers to the larger owner’s facilities which were redeemable for their regular retail price.⁴⁰ The larger owner refused to accept the vouchers.⁴¹ Refusing the vouchers was detrimental to the smaller owner’s viability because skiers placed such a high value on the flexibility to choose among the Aspen facilities.

The Supreme Court held that the larger owner was monopolizing the Aspen down-hill skiing market.⁴² The Court held that two owners had engaged in a business relationship that required further dealing, and one party could not choose to discontinue their dealing with the other. The Court was especially concerned that the larger owner refused to accept the vouchers that were redeemable for retail price of admittance to the larger owner’s facilities.⁴³ Refusing the vouchers indicated that the larger owner was willing to forego profits in the short-term to eliminate the smaller owner from the market in hopes to enjoy monopoly pricing in the future.⁴⁴

35. *Id.*

36. *Id.* at 589–90.

37. *Id.* at 590.

38. *Id.*

39. *Id.* at 592–93.

40. *Id.* at 593–94.

41. *Id.* at 594.

42. *Id.* at 608–11.

43. *Id.* at 603–05.

44. *Id.* at 608–11.

The Supreme Court limited the duty to deal holding in *Aspen Skiing* by its decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.⁴⁵ *Trinko* strengthened the nearly universally-assumed proposition that companies do not generally have an obligation to assist their competitors and limited the *Aspen* exception to its facts.⁴⁶

In *Trinko*, a telecommunications company, Verizon, was the only company with the needed infrastructure to provide certain telecommunication services to the state of New York.⁴⁷ To encourage increased competition in the telecommunication industry, Congress passed the Telecommunications Act.⁴⁸ The Telecommunications Act required Verizon to allow other companies access to its infrastructure so as to provide consumers with options from which to choose their telecommunications service provider.⁴⁹ The Act included a savings clause, which stated that aside from what the Act enumerated, all antitrust issues should be considered in regular antitrust form, without regard to the Telecommunications Act.⁵⁰

Verizon was accused of failing to allow its competitors access to its infrastructure, as required under the Telecommunications Act, and consequently, preventing its competitors from providing customers with uninterrupted telephone service.⁵¹ In addition to claims of violating the Telecommunications Act, Verizon's competitors brought a monopolization claim under § 2, alleging that Verizon was discouraging customers from using its competitor's service in an attempt to maintain a monopoly.⁵² The Court analyzed

45. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

46. *Id.* at 408–10.

47. *Id.* at 402. Because of the significant costs associated with establishing the telecommunication infrastructure, incumbent local exchange carriers enjoyed a monopoly in their respective service areas prior to the passage of the Telecommunications Act of 1996. *Id.*

48. The Act provided that incumbent local exchange carriers (LEC's) had to allow any communication carrier access to their network which would allow competitors the ability to provide telecommunication services and compete with the incumbent carrier. Telecommunications Act of 1996, Pub. L. No. 104–104, § 251, 110 Stat. 56, 61–63 (1996) (codified in scattered sections of 47 U.S.C.).

49. *Trinko*, 540 U.S. at 401. The Telecommunication Act of 1996 places a duty on telephone companies requiring them to facilitate market entrants. *Id.*

50. *Id.* at 406–07.

51. *Id.* at 404–05.

52. *Id.* at 406–09.

the antitrust claims without regard to the Telecommunications Act, as required by the saving clause, and ruled that Verizon was free to refuse to deal with their competitors.⁵³ *Trinko* strengthened the assumption that market participants are not expected to help their competitors increase market share at their own expense.

IV. THE COURT'S DECISION IN *CHRISTY SPORTS, LLC V. DEER VALLEY RESORT CO.*

The Tenth Circuit reasoned that Deer Valley was within its rights to include the restrictive covenant on the sale of the land at the mid-mountain village.⁵⁴ Resort owners are free to choose which ancillary services to provide their customers and which services to allow third parties to provide.⁵⁵ Further, the court ruled that even after fifteen years of not exercising the covenant, Deer Valley was free to exercise the covenant even if it resulted in reduced competition on the resort.⁵⁶ Companies operate under a premise that they may refuse to deal with others; exceptions to the rule are few, narrow, and not present in this case.⁵⁷

A. Restrictive Covenants

Seemingly as a preliminary matter, the court analyzed the restrictive covenant under § 2. The court did not find a problem with the resort restricting its competitors from providing ancillary services on its property.⁵⁸ Private entities such as theme parks, hospitals, universities, and movie theaters can choose to allow third parties to provide ancillary services at competitive prices or to be the sole provider of such services and enjoy monopoly pricing.⁵⁹ Ski resorts share the same luxury: “[A]llowing resorts to decide for

53. *Id.* at 410 (“We conclude that Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents.”).

54. *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1193 (10th Cir. 2009).

55. *Id.*

56. *Id.* at 1196.

57. *Id.* at 1194.

58. *Id.* at 1193.

59. *Id.* One trip to the theater’s concession area and monopoly pricing is easily understood. The author recently paid nearly \$3.00 for a Baby Ruth at one such theater. The same Baby Ruth was on sale, 3/\$1.00, at the local grocer.

themselves what blend of vertical integration and third party competition will produce the highest return may well increase competition in the ski resort business as a whole, and thus benefit consumers.”⁶⁰ Antitrust law is not concerned with the pricing of ancillary services within a resort, but the pricing of a resort’s complete package as it competes in a market with other resorts.⁶¹

As in *Drury Inn*, the restrictive covenant played a significant role in inducing Deer Valley to allow its competitors to provide ancillary services at the resort. Restrictive covenants may appear to stifle competition on the surface, but a more in-depth study reveals that they are often an important factor in attracting market entrants, thus strengthening competition.⁶²

B. Revocation of Consent and Refusal to Deal

Christy Sports’ allegations against Deer Valley hinged on the argument that the business relationship they shared with Deer Valley fit into the duty to deal exception.⁶³ Christy Sports argued that their nearly fifteen-year relationship with Deer Valley was on par with the business relationship that bound the parties in *Aspen*.⁶⁴

The court analyzed Christy Sports’ refusal-to-deal claim and the *Aspen* decision on a stage set by *Trinko*: “[T]he Sherman 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.’”⁶⁵ In *Trinko*, the Supreme Court stated that “‘*Aspen Skiing* is at or near the outer boundary of § 2 liability.”⁶⁶

The *Christy Sports* court distinguished *Aspen* on the grounds that *Aspen* dealt with the termination of a profitable business relationship without justification and that *Christy Sports* did not.⁶⁷ The larger owner in *Aspen* declined to accept retail price from the continued cooperative efforts of his competitor, presumably in an effort to force

60. *Id.* at 1195.

61. *Id.*

62. *Id.*

63. *Id.* at 1196.

64. *Id.*

65. *Id.* at 1194 (quoting *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)).

66. *Id.* at 1197 (quoting *Trinko*, 540 U.S. at 409).

67. *Id.*

his competition to exit the market and then enjoy monopoly power.⁶⁸ Deer Valley, in contrast, did not enjoy a profitable relationship with Christy Sports; since 1995, Christy Sports had not imparted any portion of its ski rental revenues to Deer Valley.⁶⁹ Their relationship did not rise to the level of the business relationship in *Aspen*, and Deer Valley was not liable for creating or attempting to create a monopoly by refusing to deal with Christy Sports.⁷⁰

V. THE TENTH CIRCUIT SHOULD HAVE APPLIED A PREDATORY PRICING ANALYSIS RATHER THAN THE BUSINESS RELATIONSHIP RULES

Although the Tenth Circuit reached the correct decision in *Christy Sports*, its analysis fails to explicitly discuss predatory practices and does not provide a clear framework for lower courts to follow. Rather than perpetuating the business relationship reasoning found in *Aspen*, which is vague and offers little guidance to lower courts, the Tenth Circuit's decision would have delivered a more useful standard if it had introduced a predatory behavior analysis. As a well-established framework, predatory analysis would have resulted in a clearer decision in *Christy Sports* and a more established and concrete standard for lower courts to use in deciding future refusal-to-deal cases.

The *Trinko* Court sent a loud, clear signal that predatory analysis is appropriate in refusal-to-deal cases. *Trinko* offered indirect predatory analysis in its discussion of *Aspen* when the Court claimed that the larger owner's "course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end."⁷¹ *Trinko* did not, however, explicitly invite other courts to analyze refusal-to-deal cases under a predatory behavior framework. On the shoulders of *Trinko*, the Tenth Circuit should have taken the next step to apply direct predatory analysis to the refusal-to-deal issues in *Christy Sports*.

A company engages in predatory behavior when it foregoes profits in the short-term by placing artificial barriers in the marketplace in hopes that competitors will not be able to keep

68. See discussion *supra* Part III.B.

69. *Supra* note 15 and accompanying text.

70. *Id.* at 1197.

71. *Trinko*, 540 U.S. at 409.

pace.⁷² When competitors are forced to exit the market, the predator is able to exercise monopoly power by charging artificially high prices, supracompetitive prices, to recoup the losses it incurred while pricing predatorily and then enjoy increased profits in a market without competition.⁷³

A. In Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., the United States Supreme Court Formalized a Two-Pronged Test for Analyzing Liability in Predatory Pricing Cases

Brooke Group, a cigarette manufacturer, accused a competitor, Brown & Williamson, of engaging in predatory pricing in the market for generic cigarettes in violation of § 2.⁷⁴ Brooke Group claimed that Brown & Williamson was selling generic cigarettes at a loss by setting its retail price below the cost of producing them.⁷⁵ According to Brooke Group, Brown & Williamson intentionally employed predatory pricing to pressure Brooke Group to raise its prices to compensate for lower sales volume as consumers flocked to the lower priced option, ultimately forcing Brooke Group to exit the market.⁷⁶

The Court established a two-pronged test for recovering under a predatory pricing claim: First, the rival's prices must be "below an appropriate measure of [the] rival's costs,"⁷⁷ and second, the rival must have a "dangerous probability[] of recouping its investment in below-cost pric[ing]."⁷⁸

Brooke Group satisfied the first prong by proving Brown & Williamson priced its generic cigarettes below the cost of producing them but ultimately failed to recover because it was not able to

72. *Id.* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608, 610–11 (1985)). Forsaking short-term profits to manipulate the price of goods in a way that forces competitors to exit the market in order to later reap supracompetitive profits is the epitome of predatory behavior. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 318 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993); WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK* § 3:14 *Predatory Pricing; Bundled Discounts* (2008); Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975).

73. *Brooke Group*, 509 U.S. at 225; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588–89 (1986).

74. 509 U.S. at 222–28.

75. *Id.* at 216.

76. *Id.* at 217.

77. *Id.* at 222.

78. *Id.* at 224.

establish that Brown & Williamson was capable of “recouping its investment in below-cost pric[ing].”⁷⁹

The *Brooke Group* Court advised that findings of liability should be rare and that “the costs of an erroneous finding of liability are high” because

[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because “cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”⁸⁰

B. Applying the Brooke Group Test to Other Types of Predatory Behavior

While *Brooke Group*’s two-pronged test is a staple in predatory pricing cases,⁸¹ its influence has also been felt in other types of predatory cases. In *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, a § 2 predatory buying case, the United States Supreme Court explicitly applied the *Brooke Group* test.⁸² Ross-Simmons accused Weyerhaeuser of bidding up the price of alder sawlogs, Ross-Simmons’s main production input.⁸³ Ross-Simmons claimed Weyerhaeuser attempted to drive it out of the finished lumber market by artificially increasing its production costs in hopes to then exert monopsony buying power in the sawlog market.⁸⁴ The Court held that *Brooke Group*’s predatory pricing test applied to predatory buying cases.⁸⁵

79. *Id.* at 222–26.

80. *Id.* at 226 (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 n.17 (1986)).

81. *See, e.g.*, *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005); *Star Fuel Mats, LLC v. Sam’s East, Inc.*, 362 F.3d 639 (10th Cir. 2004); *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003); *Bathke v. Casey’s Gen. Stores, Inc.*, 64 F.3d 340 (8th Cir. 1995).

82. 549 U.S. 312 (2007).

83. *Id.*

84. *Id.* at 316. Exerting monopoly power on the buy-side in a market, as was the claim in *Weyerhaeuser*, creates a monopsony, rather than a monopoly. *Id.* at 320 (citing Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991)).

85. *Id.* at 318.

The United States Supreme Court also applied the *Brooke Group* test in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, a § 2 price-squeeze case.⁸⁶ In a price-squeeze situation, a predator attempts to monopolize a market by squeezing its competitor's profit margins through predatory, unilateral conduct as both wholesaler and retailer.⁸⁷ Predators in this position can apply upward pressure on their rivals' retail prices by increasing the price of inputs as the wholesaler; the predator simultaneously applies downward pressure by decreasing its own prices as a retailer in the same market, effectively squeezing the profit margins of its retail competitors who must lower their prices to compete.⁸⁸ The Court held that price-squeeze claims are valid, but that to prevail with a price-squeeze allegation, a predator must have priced its retail goods at a short-term loss and have a "dangerous probability" of recouping the losses incurred.⁸⁹

In a third type of § 2 predatory behavior, predatory bundling, the Ninth Circuit applied the *Brooke Group* test in *Cascade Health Solutions v. Peacehealth*.⁹⁰ Peacehealth provided three major types of hospital services while Cascade offered only two.⁹¹ Cascade accused Peacehealth of attempting to create a monopoly by offering its exclusive hospital care at deep discounts to insurance companies who also agreed to use Peacehealth as their sole preferred provider of the other two (competitive) types of hospital care.⁹² Accordingly, profit-maximizing insurance companies were likely to accept such offers, excluding Cascade from the hospital care market and allowing Peacehealth to enjoy monopoly power.

While bundling often benefits consumers, it can be disadvantageous when bundling excludes efficient competitors who produce a subset of the goods offered by the predator, bundler.⁹³ The court held that "bundled discounts may not be considered exclusionary conduct within the meaning of § 2 . . . unless the

86. 129 S. Ct. 1109 (2009).

87. *Id.* at 1118.

88. *Id.*

89. *Id.* at 1120 (applying the *Brooke Group* test).

90. 502 F.3d 895 (9th Cir. 2007).

91. *Id.* at 902.

92. *Id.*

93. See RICHARD A. POSNER, ANTITRUST LAW 236 (2d ed. 2001); Barry Nalebuff, *Exclusionary Bundling*, 20 ANTITRUST BULL. 321, 321 (2005).

discounts resemble the behavior that the Supreme Court in *Brooke Group* identified as predatory.”⁹⁴

C. Refusal to Deal and Christy Sports Analyzed Under the Brooke Group Test

With slight modifications, the *Brooke Group* test can be the standard for predatory, refusal-to-deal cases such as *Christy Sports*. The first prong of the *Brooke Group* test requires a showing that the rival has forfeited short-term profits by instituting below-cost pricing. In the refusal-to-deal context, the first prong would require a showing that a party has forfeited short-term profits by refusing to deal with another market participant. The second prong would be virtually unchanged: the complaining party needs to establish that the firm who refuses to deal has a “dangerous probability[] of recouping its investment in”⁹⁵ refusing to deal.

The standard in refusal-to-deal cases, just as with other predatory cases, should be high because refusing to deal with competitors, as with decreasing prices, is one way firms increase competition in the marketplace—often benefiting consumers. Erroneously finding liability under antitrust laws for refusing to deal could have the effect of “chill[ing] the very conduct the antitrust laws are designed to protect.”⁹⁶

Introducing the *Brooke Group* test into the refusal-to-deal arena gives courts a definitive framework under which to decide cases and provides firms with a more predictable framework under which to make business decisions. The *Brooke Group* test is a more concrete standard than the business relationship rule relied on in *Christy Sports*.

Had the Tenth Circuit substituted a *Brooke Group* analysis in the place of its business-relationship analysis, it would have affirmed the district court after considering that, under the first prong, Deer Valley had not forfeited short-term profits by refusing to deal with Christy Sports (it had been ten years since Deer Valley had received

94. *Cascade Health Solutions*, 502 F.3d at 913.

95. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

96. *Id.* at 226 (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 n.17 (1986) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986))).

15% of the ski rental revenue).⁹⁷ Instead, however, by applying a business-relationship analysis, the Tenth Circuit had to carefully straddle the decisions in *Aspen* and *Trinko*.⁹⁸ Of greatest benefit, using the *Brooke Group* test would have avoided the confusion related to both the outer boundary of § 2 liability⁹⁹ and the hard-to-define business relationship of competing market participants.¹⁰⁰

If Christy Sports had continued paying Deer Valley a portion of its ski rental revenue, it would have likely satisfied the first prong of the test because Deer Valley would have forfeited short-term profits in refusing to deal. Then, of course, Christy Sports' success would depend on whether it could establish that Deer Valley had a dangerous probability of recouping its investment in refusing to deal.

VI. CONCLUSION

The Tenth Circuit should have analyzed *Christy Sports* under the *Brooke Group* framework to provide lower courts with something akin to a freshly-groomed ski path to follow through the thicket of antitrust jurisprudence. Indeed, the Tenth Circuit missed the opportunity to set a clear standard for refusal-to-deal cases and analyzed *Christy Sports* under the business-relationship framework—leaving lower courts to find their way through the confusing intersection of the *Aspen* and *Trinko* decisions. Under *Aspen*, the courts and market participants are left with little guidance in determining whether parties have engaged in a business relationship such that they fit the narrow exception and are required to deal with other firms. By adopting the *Brooke Group* test, the Tenth Circuit would have afforded courts and market participants a clear predatory standard under which to analyze a refusal to deal.

*Paul Jones**

97. The reason for the discontinuance of payments (15% of the ski rental revenues) from Christy Sports to Deer Valley was not revealed in the case. See *supra* note 15.

98. See *supra* notes 69–74 and accompanying text.

99. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) (“*Aspen Skiing* is at or near the outer boundary of § 2 liability.”).

100. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

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