

MAKING A MARKET OUT OF A MOLE HILL? GEOGRAPHIC MARKET DEFINITION IN ASPEN SKIING

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ABSTRACT

Because firm conduct in *Aspen Skiing* stands at the outer boundaries of monopolization, it has received considerable scrutiny from antitrust scholars. The critical and somewhat puzzling determination of the relevant geographic market in this case—“the Aspen area”—however has received essentially no attention. In this paper, we report the results of archival and interview research to illuminate the process by which the district court initially determined this narrow market definition and how this market determination withstood the appeals process.

JEL: K21; L41

I. INTRODUCTION

Lying “at or near the outer boundary”¹ of the Sherman Act’s Section 2 prohibitions against monopolization and attempts to monopolize, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*² has received considerable scrutiny from economists and lawyers within the antitrust community.³ In that case, Aspen Skiing Corporation (ASC), which controlled three of four mountains in the Aspen, Colorado area, engaged in business practices that were judged to be exclusionary toward a rival, Aspen Highlands, which controlled the fourth

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¹ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

² 472 U.S. 585 (1985). For a transcript of the oral argument at trial, see Transcript of Oral Argument, *Aspen Skiing Co.*, 472 U.S. 585 (No. 84-510), available at http://www.oyez.org/cases/1980-1989/1984/1984_84_510/argument [hereinafter Transcript].

³ See, e.g., Symposium, *Aspen Skiing 20 Years Later*, 73 ANTITRUST L.J. 59, 59–268 (2005).

ski mountain in the Aspen area. The vast majority of the economic and legal scrutiny focused on *Aspen* has been on the tension surrounding the question of when a firm with monopoly power has a duty to cooperate with its rivals.⁴ The Court's decision in *Aspen* provided key language that has subsequently guided tests in both economics and law regarding business practices that may be judged to be in violation of the Sherman Act's prohibitions on monopolization and attempts to monopolize.

Although ASC's business practices were the focus of the Court's attention, a critical feature of the case that has received far less academic scrutiny has been the geographic market definition adopted. In particular, the geographic market definition that was adopted at the trial (district court) level and the definition that proceeded to the Supreme Court were "downhill skiing in the Aspen area."⁵ This geographic market definition is, however, not without controversy. Indeed, although the market definition issue did not itself come before the Supreme Court, during the oral argument before the Court, Justice Powell digressed to opine that "[a]s a matter of general antitrust law, I would have thought that that's a perfectly absurd finding. . . . With all the other mountains in that area, it seems absurd to have a market that narrow."⁶

The critical nature of this definition is readily apparent: on the one hand, if Aspen Skiing competed in a relevant geographic market of "the Aspen area," then (1) it might reasonably be judged to possess monopoly power in the relevant market; and (2) its business practices might reasonably be inferred to be exclusionary, with the result of willfully maintaining or extending its monopoly position within such a narrow geographic market. Indeed, this is precisely what the Court ruled. On the other hand, if the relevant geographic market were judged to be larger, then conclusions of monopoly power fade, effectively eroding the foundation for the case.

The sensitivity of market power conclusions to the scope of the relevant market is, of course, not a new observation. Consequently, it should be no surprise to conclude, even counterfactually, that were the court to have defined the market differently in this case, it might have reached an entirely different conclusion. One need only consider the value brought by Judge Posner's critique of the process of market definition in

⁴ See, e.g., CHARLES GOETZ & FRED S. MCCHESENEY, *ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION* (3d ed., Foundation Press 2006); Abbott B. Lipsky & J. Gregory Sidak, *Essential Facilities*, 51 *STAN. L. REV.* 1185, 1187–1248 (1999); J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 *J. COMPETITION L. & ECON.* 581 (2009).

⁵ As will be described in detail in Part III *infra*, the jury returned a finding that there was both a broad geographic market consisting of North America and a relevant submarket consisting of "the Aspen area." It is this latter submarket that was the focus of ASC's business conduct that was ultimately judged to be illegal.

⁶ Transcript, *supra* note 2.

the *E. I. du Pont*⁷ case, however, to appreciate how thorough scrutiny of the development of the market definition process in landmark cases holds the promise to both reveal the nuances of that process and provide pathways for improved jurisprudence on a forward going basis.⁸

Accordingly, in this paper, we undertake a review of the market definition process in *Aspen*, with an eye toward understanding both the foundations for, and frailties of, the court's determination. The remainder of this paper proceeds as follows. Part II sets the stage with a background discussion of the downhill skiing industry. Part III reviews the trial record and appeal on the matter of the geographic market in *Aspen*. Finally, Part IV closes the paper with reflections of larger issues raised for antitrust analysis brought on by the market definition process in *Aspen*.

II. BACKGROUND

The downhill skiing industry in Colorado began in earnest in the wake of World War II. ASC was formed in 1946, when its founders introduced two lifts on Aspen Mountain. In 1958, Buttermilk opened and operated independently until 1964, when it became a wholly owned subsidiary of ASC. A third ski resort in the area, Snowmass, began downhill skiing operations in 1967 as a joint venture between ASC and an outside investor. Aspen Highlands, also located in the Aspen area, opened in the 1958–1959 ski season and remained independent of ASC until the 1990s.⁹

During this period and continuing into the 1970s, skiing became increasingly popular, with skiing participation rates growing 40 percent in both the 1973–1976 and the 1976–1979 periods.¹⁰ Congruent with the growth in the popularity of skiing, the number of ski resorts increased significantly over this period. An average of ten new ski resorts opened annually in the United States between 1968 and 1978. In Colorado, the number of resorts also grew. Vail began ski operations in 1962 and by 1966 had become the largest downhill ski resort in Colorado. The geographic distribution of the Colorado's eleven "destination" ski resorts in existence at the time of the trial is shown in Figure 1.¹¹

⁷ *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

⁸ For a complete discussion of *United States v. E. I. du Pont de Nemours & Co.*, see RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 125–29 (Univ. of Chicago Press 1976).

⁹ In 1992, Aspen Highlands' owner donated the property to Harvard University, which sold the property. It was then, in turn, sold to ASC, which ironically today operates all four Aspen mountains with a marketing logo "The Power of Four." See GOETZ & MCCHESENEY, *supra* note 4. Aspen Snowmass, <http://www.aspensnowmass.com/> (last visited Aug. 27, 2010).

¹⁰ Transcript, *supra* note 2, at 1749–50.

¹¹ The distinction of a ski resort as a "destination" during this period is triggered by the availability of nearby lodging.

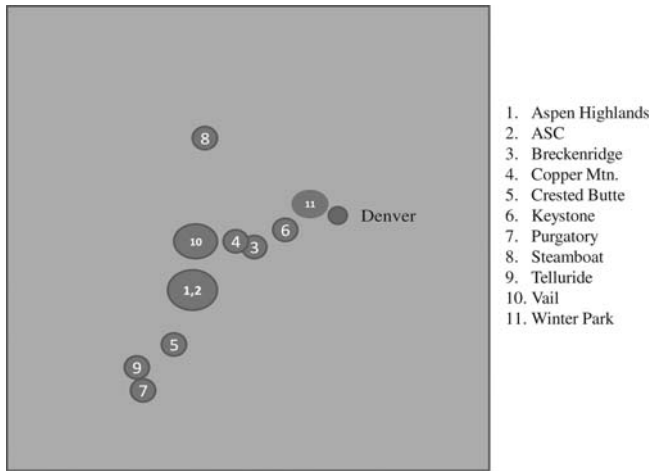


Figure 1. Destination ski resorts in Colorado.

Note: For purposes of the map, we have combined the ASC resorts.

Source: Defendants' Trial Memorandum, at 4 (May 29, 1981), *Aspen Skiing*, 472 U.S. 585.

Market structure in the provision of downhill ski services is highly sensitive to the specification of the geographic scope of the relevant market. At one extreme, if the unique characteristics of ski resorts create brand loyalty such that consumers are unwilling to switch resorts independent of price variations, then, despite the presence of geographically proximate ski resorts, each resort may face few, if any, geographic competitors. In this case, subject to the standard constraints imposed by the market demand, each resort will enjoy a unique geographic market and operate as a monopoly over its customer base. At the other extreme, if skiers see resorts as only mildly differentiated and are willing and able to geographically substitute across proximate or not-so-proximate ski resorts, then the scope of the geographic market is necessarily wider. For example, in Colorado alone, there were some 44 ski resorts in operation during the late 1970s at the time that ASC's business conduct was under scrutiny.¹²

The downhill skiing experience has been described as highly differentiated, with each geographically distinct ski resort creating a one-of-a-kind skiing experience. Indeed, each ski resort has its own, unique set of characteristics to offer, including length of vertical drop, number and types of lifts, number and types of trails, après-ski activities, and proximity to local and major airports. At the same time, the importance of these various characteristics in creating differential value for skiers is ultimately an empirical question. For instance, it cannot be known *a priori* how consumers of ski services trade off superior vertical drop against improved proximity to air transportation. Because it is not clear how consumers value these characteristics, it is

¹² Defendants' Trial Memorandum at 4, *Aspen Skiing Co.*, 472 U.S. 585.

difficult to determine the willingness and ability of consumers to switch their consumption patterns across locations due to either differences in individual resorts' characteristics or geographic variations in the price of lift tickets across resorts.

Moreover, the ability and willingness of consumers to geographically switch ski resorts is, plausibly, a function of the economic and demographic composition of skiers. Typical consumers of downhill skiing services at Aspen during the 1970s were relatively wealthy, and over 70 percent skied, on average, more than 10 days per year. Although ski resorts attract both local and distant skiers, over 90 percent of Aspen skiers during this period were from outside the Colorado area.¹³

III. THE TRIAL

The case against ASC originated on August 1, 1979, when Aspen Highlands filed a civil case against ASC, which, in turn, comprised Buttermilk, Snowmass, and Aspen mountains.¹⁴ In brief, the charges filed by Aspen Highlands were that after cooperating since the 1960s in the provision of joint tickets that allowed skier access to all four of the Aspen-area mountains, ASC in 1978 refused to cooperate in the provision of the joint ticket.¹⁵ In particular, for the 1978–1979 ski season, ASC indicated to Highlands that it would no longer participate in the provision of the joint lift ticket unless Highlands agreed to a reduced share of the revenues generated by the multi-area ticket sales. Absent such an agreement, no joint multi-area ticket was offered during the 1978–1979 season. Instead, Highlands offered its own four-area, six-day ticket package, called the “Adventure Pack.” The Adventure Pack package included lift tickets for three days of skiing at Highlands and three coupons with a face value of \$15 each (the prevailing price of a single-day lift ticket at the ASC mountains). These coupons could be redeemed for cash or used for tickets at any of the ASC skiing facilities. ASC, however, refused to accept these coupons and instead required Aspen customers to first exchange them for cash at the Highlands resort and then purchase lift tickets to the ASC resorts. Noting that ASC maintained between 80 and 85 percent of the skier days in the Aspen, Colorado area, Highlands argued that the business conduct adopted by ASC surrounding

¹³ *Id.* at 7. This observation was uncontested at trial and is consistent with a subsequent survey of Aspen skiers conducted in March 1982, which found that only 4 percent of Aspen skiers were from the Rocky Mountain States. See The Denver Consulting Group, Survey of Six Day, Three Area Lift Ticket Purchasers, May 1982.

¹⁴ The original case was filed as *Aspen Highlands Skiing Corp. v. Aspen Skiing Corp., Buttermilk Mountain Skiing Corp., Snowmass Skiing Corp. and J.R.S. Invs., Inc.* in the district court of Colorado.

¹⁵ Complaint at 4, *Aspen Skiing*, 472 U.S. 585. For a detailed discussion of the exclusionary conduct elements of the case, see Symposium, *supra* note 3.

the provision of the multi-area ticket had the effect of willfully acquiring or maintaining a monopoly in the provision of downhill skiing services in “the Aspen, Colorado area.”¹⁶ ASC denied these charges on a variety of grounds, including both the general legality of a competitor to refuse to deal with rivals and the inappropriately narrow geographic market within which the complaint sought to allege monopolization.¹⁷

In pretrial arguments, both Highlands and ASC acknowledged the necessity to appropriately determine the relevant product and geographic markets. Importantly, both ski resorts also acknowledged the *ex ante* potential for the presence of product and geographic submarkets. However, although both parties pointed to the legal precedent of submarkets established in *Brown Shoe Co., Inc. v. United States*¹⁸ and *United States v. Grinnell Corp.*,¹⁹ the parties disagreed on the interpretation and application of the “practical indicia” of submarkets identified by these precedents. As the case proceeded, it would be the court’s focus on, and the jury’s finding of, a geographic submarket that would ultimately prove to be instrumental in ASC’s undoing. The trial began on June 1, 1981, and continued for thirteen days. It was tried before a six-person jury.

IV. THE PLAINTIFF’S “MARKET”

In its complaint, Aspen Highlands claimed that ASC “willfully acquired and/or maintained a monopoly in the sale of downhill skiing services in the Aspen, Colorado area.”²⁰ Although acknowledging that “Aspen Ski Corporation may have insufficient power in the broad national or global market,” Highlands sought to convince the jury that “the Aspen region is the relevant market for assessing both the impact of the challenged conduct on competition and the liability of Defendants to *this* Plaintiff.”²¹

Highland’s affirmative case for the adoption of a narrow geographic market did not rely upon an economic approach used by the antitrust authorities or that appeared in the antitrust economics literature.²² To defend its

¹⁶ Complaint, *supra* note 15, at 8.

¹⁷ Memorandum in Opposition to Plaintiff’s First Motion to Compel Discovery, *Aspen Skiing*, 472 U.S. 585.

¹⁸ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

¹⁹ *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

²⁰ Complaint, *supra* note 15, at 8 (emphasis added).

²¹ Plaintiff’s Trial Brief and Brief in Support of Requested Jury Instructions at 8, *Aspen Skiing*, 472 U.S. 585 [hereinafter Plaintiff’s Trial Brief].

²² The prevailing approach toward market definition used by the Department of Justice at the time of the *Aspen* case was governed by the 1968 Merger Guidelines. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (1968), available at <http://www.usdoj.gov/atr/hmerger/11247.pdf>. Another prominent economics-based approach toward geographic market definition that emerged before the *Aspen* case was provided by Elzinga & Hogarty. See Kenneth Elzinga & T. Hogarty, *The Problem of Geographic Market Delineation in Antitrust Merger Suits*, 18 ANTITRUST BULL. 45 (1974).

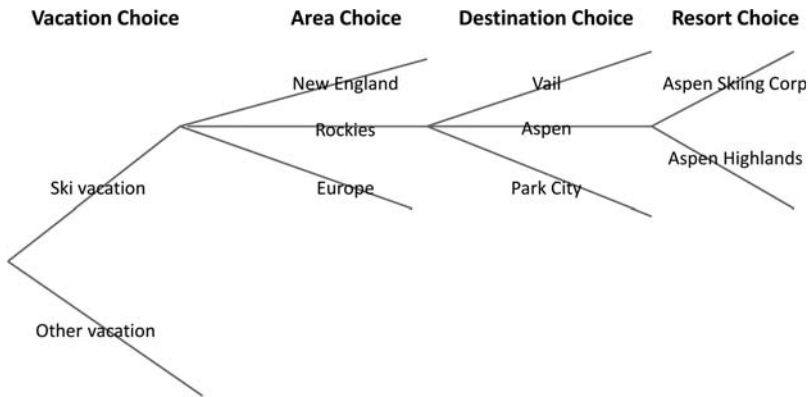


Figure 2. Conceptual model of consumer choice.

Sources: Telephone Interview with Alan Andreasen, Professor of Marketing, Georgetown University, McDonough School of Business, Washington, D.C. (June 25, 2009); authors' rendition of trial exhibit.

narrow geographic market, Aspen Highlands instead presented two arguments. First, its trial expert, a marketing professor, offered a conceptual model of consumer choice for a typical Aspen skier. His testimony suggested that consumers of skiing services in Aspen engaged in a four-level decision process. At the first level, the “vacation choice level,” consumers choose whether to ski or engage in an alternative vacation activity. Second, given the decision to ski, consumers choose the region in which they intend to ski. This “area choice” involves consumers deciding whether to ski in the Rockies, New England, or Europe. The third level of decisionmaking, the “destination choice” level, occurs when consumers who have chosen to ski in the Rockies decide whether to ski at Aspen, Vail, or some other Rocky Mountain resort. A final tier decision he argued occurs when, having arrived at Aspen, consumers choose to ski at an ASC mountain, or, alternatively, Highlands. This latter choice, he refers to as the “resort choice” level. Figure 2 provides a visual depiction of this process that was presented at trial. Highland’s expert indicated that “I think [the tiered decision analysis] is a good way to think about relevant markets and submarkets.”²³

²³ See Transcript, *supra* note 2, at 763. Although Highland’s expert offered no empirical support for this position, nested discrete choice logit model estimation has attracted considerable attention in the modern industrial organization literature. Indeed, model parameter estimates have recently been proffered as the basis upon which to render market definition assessments. See Steven Berry, James Levinsohn & Ariel Pakes, *Automobile Prices in Market Equilibrium*, 63 *ECONOMETRICA* 841 (1995); Melisande Cardona, Anton Schwarz, B. Bursin Yurtoglu & Christine Zulehner, *Demand Estimation and Market Definition for Broadband Internet Services*, 35 *J. REG. ECON.* 70 (2009); Penelope Goldberg, *Product Differentiation and Oligopoly in International Markets: The Case of the U.S. Automobile Industry*, 63 *ECONOMETRICA* 891 (1995).

He went on to indicate that, of these consumer decisions, the latter two are most important. “[M]ost of the competition we are talking about here is either to get people to come to Aspen or to get people, once they have already come to Aspen, to ski Buttermilk or to ski Snowmass or to ski Ajax Mountain or Aspen Highland.”²⁴ With respect to the destination choice, or what subsequently began to be referred to as the “destination market,” the testimony was that ASC and Aspen Highlands “don’t really compete with each other.”²⁵ Although acknowledging independent marketing efforts by both Highlands and ASC, Highland’s expert emphasized the cooperation between the competitors in their collective quest to lure skiers to Aspen: “They are cooperating together to compete against these other areas to bring people to Aspen. The competition... is at the last level.”²⁶

Having dismissed the larger “destination market” as the focus of attention, Highland’s expert testified that once skiers arrive in Aspen, they are “locked into the Aspen area” because Aspen is “geographically isolated.” Other resorts are “rinky-dink” or, in the case of Vail, two and a half to three hours away.²⁷ Given this lock-in, “The competition... that is important here is the competition at the last stage, the last level, where they fight with each other for... the decisions that are made in Aspen.”²⁸ Finally, Aspen Highland’s expert testified that, although the destination choice (Aspen versus other resorts areas) is made well in advance of the actual ski vacation, some 85 percent of skiers make the choice of which mountains, in the Aspen area, to ski after arriving in Aspen.²⁹ Based on this approach, Highlands argued that “the evidence presented in this case amply supports the conclusion that downhill skiing in the Aspen area is a distinct relevant market or at least a legally cognizable submarket.”³⁰

A second, complementary argument to the consumer choice model offered by Highlands was that typical Aspen skiers, who were well educated, relatively affluent, from outside Colorado and had skied a number of times in the past,³¹ were seeking a one-of-a-kind resort provided by Aspen. Highland’s expert testified that Aspen had “a number of things that seem to make it pretty unique.”³² These unique characteristics included “super snow,” “four-mountain capability,” “a wide range of runs,” “some of the best restaurants in North America,” “Victorian charm,” “an active night

²⁴ Transcript, *supra* note 2, at 763.

²⁵ *Id.* at 768.

²⁶ *See id.*

²⁷ *Id.* at 772.

²⁸ *Id.* at 791–92.

²⁹ *Id.* at 769.

³⁰ Plaintiff’s Trial Brief, *supra* note 21, at 13.

³¹ Transcript, *supra* note 2, at 764.

³² *Id.* at 766.

life,” and “an international prestige.”³³ These characteristics led to repeat business in Aspen. Supporting this argument fully, 80 percent of the Aspen skiers in a survey had been to Aspen before and 40 percent had been to Aspen at least five times before.³⁴ Given these differentiating characteristics of the Aspen area, Highland’s expert testified that the competition between ASC and Highlands was at the resort-choice level.

V. THE DEFENDANT’S “MARKET”

Well before the case came to trial, the defendant began its objections to the “very narrow geographical area” alleged by the plaintiff.³⁵ Observing the Supreme Court’s earlier declaration that the geographic market area is “the market area in which the seller operates and to which the purchaser can practically turn for supplies,”³⁶ ASC argued that the vast majority of Aspen skiers reside outside Colorado, use airlines to get to Colorado, and that the practical necessity of air transportation “makes available a host of alternative ski areas on an equally accessible basis.”³⁷ It also pointed out that its advertising and promotional budget, amounting to several hundred thousand dollars per year, was spent on national and international trade journals, ski magazines, and newspaper outlets throughout the country and internationally. It additionally noted that it annually sent representatives to trade shows throughout the United States seeking the patronage of skiers. With all this in mind, ASC argued that the relevant geographic market is the “national and international arena in which the defendants operate and compete for the distribution of their services.”³⁸

At trial, ASC offered a professor of marketing, Charles Goeldner, to testify. After providing an overview discussion of the growth of the downhill skiing industry, Dr. Goeldner turned to a presentation of the market share of lift tickets sold by ASC in Colorado during the decade leading up to the trial. Because of entry, ASC’s share of sales in Colorado had fallen to 15 percent. The testimony then turned to thirteen “vacation area” resorts in Colorado that, beyond ski facilities, also had nearby lodging.

In contrast to the plaintiff’s ground-up development of a geographic market based upon a model of consumer choice, Dr. Goeldner only spoke cursorily to the issue of the relevant geographic market and then only in the context of the plaintiff’s consumer choice model.³⁹ Instead, he testified in a conclusory fashion that, in light of the fact that Aspen skiers hail from the

³³ *Id.* at 766–67.

³⁴ *Id.* at 768.

³⁵ Memorandum in Opposition to Plaintiff’s First Motion to Compel Discovery, *supra* note 17.

³⁶ *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

³⁷ Defendants’ Trial Memorandum, *supra* note 12, at 26.

³⁸ *Id.* at 25.

³⁹ Transcript, *supra* note 2, at 1771.

entire country and may choose among a variety of resorts, all of the vacation area resorts in Colorado competed in a “national market,” and “there is no question but what a number of our Colorado ski areas compete in the international market.”⁴⁰

VI. ANALYSIS: THE RELEVANT MARKET AS A MATTER OF FACT OR A MATTER OF LAW

Not surprisingly, the trial revealed divergent strategies regarding market definition. Although the litigants clearly differed on what they saw as the relevant geographic market, a more subtle, but arguably critical second strategic difference emerged in the course of the litigation. On the one hand, Aspen Highlands proffered an expert at trial who emphasized both the potential for a small geographic submarket and a model of consumer choice that portrayed the ultimate consumer market as the Aspen area, notwithstanding the fact that the overwhelming proportion of skiers arrive in Aspen from outside of Colorado. This approach was designed to convince the *jury* that, *as a matter of fact*, the relevant geographic market at issue was the Aspen area. As Aspen Highland’s expert recalls, “My testimony was pretty simple. I argued that from Highland’s perspective the people they were competing for were not from Zurich or Telluride, but those folks that had just gotten off the plane in Aspen. My job was to get the jury to identify with a skier that had just gotten off the plane in Aspen.”⁴¹ On the other hand, ASC’s expert at trial did not offer testimony before that jury regarding the geographic scope of the market. Rather, ASC’s principal argument for a larger geographic market was made in court pleadings before the judge. Thus, ASC’s strategic approach was to convince the *judge* that, *as a matter of antitrust law*, the relevant geographic market was the “national and international arena in which the defendants operate and compete for the distribution of their services.”⁴²

Given those divergent legal strategies, a critical turning point in the case centered on the ability of ASC to (1) persuade the judge to accept that, as a matter of law, the relevant geographic market was significantly larger than the Aspen area, or to (2) formulate the jury instructions in such a way that the jury would be likely to reach the same conclusion. As it turned out, neither approach proved successful for ASC.

ASC’s first efforts to effectuate its strategy emerged through a motion for a directed verdict at the conclusion of the presentation of the plaintiff’s case. Specifically, it argued that, because Aspen drew its skiers from a wide

⁴⁰ *Id.* at 1762.

⁴¹ Telephone interview with Alan Andreasen, Professor of Marketing, Georgetown University, McDonough School of Business, Washington, D.C. (June 25, 2009).

⁴² Defendants’ Trial Memorandum, *supra* note 12, at 25.

geographic area, the court could conclude that the relevant geographic market is larger than that proffered by Aspen Highlands. It was at this point that the first inklings appeared that the court had found some sympathy with Highland's consumer choice model. Specifically, Judge Weinshienk opined that multiple witnesses had indicated that "[t]here is not competition between the two corporations in bringing people to Aspen."⁴³ ASC pressed its case, stating that the case law did not support the use of the customer choice model presented by Aspens Highlands, and that the cooperative nature of advertising to lure skiers to the Aspen area was irrelevant to the issue of geographic market definition.

Aspen Highlands countered that ASC's argument had ignored the concept of a relevant submarket and that, contrary to ASC's representations, "all of [the] indicia of a relevant sub-market are present."⁴⁴ In addition, Aspen Highlands pointed to the case law in which a relevant market was determined by "where the really last relevant purchasing decision is made."⁴⁵

In dismissing the ASC's motion of a directed verdict, Judge Weinshienk ruled that "there is a strong indication that the geographical market definition that we are concerned about here when we are talking about competition is the Aspen market."⁴⁶ She went on to indicate that "I have no question that both of these ski areas or ski corporations compete in the national or international market, but not with each other. They compete to get people to come to Aspen . . . It is only after someone decided to come to Aspen or is in Aspen that competition really takes place."⁴⁷

Having failed in its efforts to persuade the judge that as a matter of law the geographic market was wider than the Aspen area, the next battle arose over the instructions that would be offered to the jury. Both parties submitted proposed jury instructions to the court and each offered reply comments on the other's proposed instructions. In its proposed jury instructions, the plaintiff continued to press its case for a factual determination of the relevant geographic market, arguing: "Congress prescribed a pragmatic, factual approach to the definition of the relevant market, and not a formal or legalistic one."⁴⁸ Additionally, Aspen Highlands proffered specific instructions for the jury to consider the possibility that the Aspen

⁴³ Transcript, *supra* note 2, at 1450.

⁴⁴ *Id.* at 1456.

⁴⁵ *Id.* at 1457 (citing *Columbia Metal Culvert Co., Inc. v. Kaiser Indus. Corp.*, 526 F.2d 724 (3d Cir. 1975)).

⁴⁶ Transcript, *supra* note 2, at 1461.

⁴⁷ *Id.* at 1461–62.

⁴⁸ Plaintiff's Tendered Jury Instructions, Jury Instruction No. 24 at 26, *Aspen Skiing*, 472 U.S. 585 [hereinafter Plaintiff's Tendered Jury Instructions]; see also *id.*, proposed Jury Instruction No. 25 (stating, "Your approach should be a practical one and not 'a formal legalistic one'").

area may constitute a relevant submarket capable of being monopolized. Finally, Aspen Highland's proposed instructions indicated that the jury's consideration of consumers' geographic substitutes should include the perspective of the buyer "at the time he is making his purchase decision." In contrast, ASC continued to offer a simpler, legalistic approach with two short generic instructions regarding geographic market definition, no mention of submarkets, and citations to six previous cases.⁴⁹

In its reply brief, ASC argued that Highland's desire to have the jury focus on consumers at the moment that they choose a resort from which to purchase a lift ticket was prejudicial and inconsistent with prior law. Its reply brief, however, takes no exception to Aspen Highland's language regarding either the factual, pragmatic nature of the geographic market determination process or the potential for the jury to identify a relevant geographic submarket. Instead, ASC chose to formally enter its objection prior to the reading of the jury instructions by the court. Pressing its consistent theme, ASC argued that "the geographic market should be decided as a matter of law and should not be submitted to the jury."⁵⁰

At this point any doubt regarding the court's opinion evaporated when Judge Weinshienk stated that

If the Court were to rule as a matter of law on the relevant market, it would rule that the relevant market was Aspen and that the relevant product market was downhill skiing services. . . . I think it is a factual issue for the jury. . . . My not ruling as a matter of law is actually better for the defendants.⁵¹

Not surprisingly, the subsequent jury instructions on the geographic market closely followed those proposed by the plaintiff.

Plaintiff's proposed instruction: "[A]lthough the geographic market in some instances may be national or international, under other circumstances it may be as small as a single metropolitan area."⁵²

Judge's actual instruction: "[A]lthough the geographic market in some instances may be national or international, under other circumstances it may be as small as a single town or resort area."⁵³

Plaintiff's proposed instruction: "[I]f you adopt the view . . . that the relevant market is destination ski resorts in North America, you must still determine whether the sale of downhill skiing services . . . in the Aspen region is a relevant submarket within the larger relevant market."⁵⁴

⁴⁹ Defendants' Proposed Jury Instructions, Nos. 15 & 16 at 89–90, *Aspen Skiing*, 472 U.S. 585.

⁵⁰ Transcript, *supra* note 2, at 2290.

⁵¹ *Id.* at 2292.

⁵² Plaintiff's Tendered Jury Instructions, Jury Instruction No. 24, *supra* note 48, at 26.

⁵³ Transcript, *supra* note 2, at 2307.

⁵⁴ Plaintiff's Tendered Jury Instructions, Jury Instruction No. 25, *supra* note 48, at 27.

Judge's actual instruction: "[I]f you decide that the relevant product market is downhill skiing at destination resorts, you must still determine whether downhill skiing services in Aspen . . . is a relevant submarket within the larger market."⁵⁵

ASC had effectively lost its bid to tailor the jury instructions of the market definition issue. Upon deliberation, the jury returned a finding that the relevant product market was "downhill skiing at destination resorts" and a relevant product submarket finding of "[d]ownhill skiing services in Aspen including multi-area, multi-day lift tickets."⁵⁶ The jury then turned to the geographic dimension of the market. Here, the jury found that the relevant geographic market was "North America," but that the "Aspen area" constituted a relevant geographic submarket.⁵⁷ With these markets in hand, the question posed to the jury regarding monopoly power centered on whether ASC had "the power to control prices in the relevant market or sub-market or to exclude competition from the relevant market or sub-market."⁵⁸ Given the identification of the narrower submarket, the jury found that ASC did, indeed, possess monopoly power. Together with a finding that ASC's actions constituted the willful acquisition and maintenance of that power, ASC was convicted of monopolization.⁵⁹

ASC did not readily accept the jury's finding that there was, in this case, a geographic submarket of "the Aspen area." Rather, ASC made three arguments: (1) as a matter of law, the relevant market was North America;⁶⁰ (2) it was improper for the jury to consider the presence of submarkets "as an issue separate and distinct from the issue of the relevant geographic market;"⁶¹ and (3) there was insufficient evidence presented at the trial to support the jury's finding of a geographic submarket of Aspen. Judge Weinshienk dismissed all three arguments, leaving no option but appeal for ASC.

On appeal, ASC argued that the district court had erred in its jury instructions regarding the relevant market—in particular, in the instruction that permitted the jury to identify both a relevant market and a relevant submarket. The substantive issues regarding the relevant geographic market were, however, not addressed by the appeals court. Rather, the court found that for the appeal on the relevant market to prevail, one of two things must have happened at the original trial: (1) the defendant must have made its

⁵⁵ Transcript, *supra* note 2, at 2307.

⁵⁶ *Id.* at 2337.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *Id.* at 2338.

⁶⁰ Memorandum in Support of Defendants' Motion for Judgment Notwithstanding the Verdict, *Aspen Skiing*, 472 U.S. 5855.

⁶¹ *Id.* at 5.

position (in this case, regarding the improper instruction regarding submarkets) “abundantly clear to the trial court;”⁶² or (2) the jury instruction constituted “plain error” and therefore created a miscarriage of justice.⁶³ The Tenth Circuit Court of Appeals, however, pointed out that the Rules of Civil Procedure require that “[n]o party may assign as error the giving or failure to give an instruction unless he objects thereto *before the jury retires to consider its verdict*, stating distinctly the matter to which he objects and the grounds of his objection.”⁶⁴ Because ASC’s objections to the jury instructions had focused exclusively on its claim that the court should, as a matter of law, determine the relevant market and not on the jury instructions pertaining to the potential for submarkets, the Court found no basis to sustain ASC’s appeal. The legal debate over the relevant geographic market was over; the defendant proceeded with its appeal to the Supreme Court only on the grounds that, quite apart from the court’s determination of the relevant market, its conduct in that market was legal.

VII. CONCLUSION

The *Aspen* case ranks among the most visible antitrust cases in modern times. Although it was not a prominent feature of the case as it went to the Supreme Court, the lower court’s determination that the relevant geographic market in the case was “the Aspen area” most certainly shaped the outcome. At a minimum, the court’s determination of this narrow market definition has struck many as quizzical. To be sure, one Supreme Court justice found the lower court’s market definition to be “perfectly absurd.”⁶⁵ Accordingly, the goal of this article is to provide additional insight through a detailed analysis of the manner in which the court came to its geographic market definition in this case.

Our reverse engineering of the manner by which the geographic market definition was determined in *Aspen* reveals a number of insights. Prominent among these, a detailed review of the trial court transcript, pleadings, and related documents reveals the expected divergence between the litigants not only on the proposed market definition, but also on the significantly different legal strategies for establishing that geographic market definition. The combination of Aspen Highland’s consumer choice model, its focus on market definition as a factual (rather than legal) determination, and its ability to advance to the jury the potential for a finding of a relevant

⁶² *Rogers v. N. Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978).

⁶³ *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *rev’d* 472 U.S. 5855.

⁶⁴ *Id.* at 1514 (quoting FED. R. CIV. P. 51 (emphasis added)).

⁶⁵ The Oyez Project, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, at 25:15–26:00, http://oyez.org/cases/1980-1989/1984/1984_84_510.

geographic submarket was instrumental in the ultimate determination of the geographic market definition.

At the same time, however, several questions are either left unanswered or raised by our retrospection. For example, our review finds that both the jury and trial judge accepted the plaintiff's description of a tiered model of consumer choice in the downhill skiing industry. The result was, effectively, to foreclose a broader market definition. What is left unanswered is the issue of when, more generally, such a tiered model of consumer choice may be apt for the determination of geographic (or for that matter, product) market definition.⁶⁶ In *Aspen*, the tiered model of consumer choice was not directly challenged either theoretically or empirically. Instead, the defendant relied upon the accepted fact that most consumers of the service in question came from outside the proposed geographic market and had, *ex ante*, ample geographic alternatives. In this sense, it remains unclear whether, in other consumer markets, a tiered model may be apt for determining the geographic boundaries of the market. Moreover, the appropriate theoretical models and empirical evidence that may most appropriately be brought to bear in such cases remain unresolved.

Finally, traditional economic analysis of the geographic market often centers on the extent to which consumers residing near (far away from) the point of sale are willing and able to switch away from (into) the region of the firm providing the product. Both Elzinga and Hogarty (1974) and the market definition procedures outlined by the Department of Justice and the Federal Trade Commission⁶⁷ emphasize this geographic substitution. In the case at hand, however, although the defendant was quick to point out the mobility of skiers across geographically distinct resorts, the plaintiff did not contest this mobility. Indeed, in its original complaint, the plaintiff argued that "a substantial number of the tourists purchasing such downhill skiing services travel from outside of the State of Colorado"⁶⁸ and that "[a] substantial portion of those tourists travel on commercial buslines, airlines or other means of interstate transportation."⁶⁹ Thus, the plaintiff readily conceded the standard economic point of mobility, yet was, through the introduction of a tiered model of consumer decision-making, able to successfully project a smaller geographic market than what would seem to be

⁶⁶ As described by Verboven "the nested logit incorporates the possibility of local competition; variants belonging to the same nest may be closer substitutes than variants belong [sic] to other nests." A relevant question then is when, and under what circumstances, such a multistage model of consumer choice is congruent with modern antitrust market definition methods. See Frank Verboven, *The Nested Logit Model and Representative Consumer Theory*, 5 ECON. LETTERS 57 (1996).

⁶⁷ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (revised Apr. 8, 1997), available at <http://www.justice.gov/atr/public/guidelines/hmg.htm>.

⁶⁸ Complaint, *supra* note 15, at 3.

⁶⁹ *Id.*

indicated by the acknowledged geographic mobility of the consumers of downhill skiing. It is unclear how, if at all, the tiered model of consumer choice accepted in *Aspen* can be reconciled with the prevailing methods for geographic market determination employed by the Department of Justice Antitrust Division and the Federal Trade Commission.⁷⁰ Finally, given the essentially anecdotal nature of the empirical evidence presented at trial, a deeper understanding of the true nature of spatial competition in the ski industry awaits further research.

⁷⁰ A first step toward bridging this gap may be in the observation that the model of consumer choice presented in *Aspen* was of a *representative* consumer with the consequent implied homogeneity of all consumers. The market definition process adopted by the antitrust authorities, however, does not require a single representation of consumers. Rather, consumers with different underlying patterns of consumer choice and different abilities and propensities to geographically substitute are aggregated to permit the analyst to address the disciplinary effect of such substitution in total rather than at the representative consumer level.