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Antitrust-Related Recent Developments

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Novell appealed to the Tenth Circuit, which similarly opined that "the antitrust laws rarely impose on firms—even dominant firms—a duty to deal with their rivals." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013). The appellate court rejected Novell's assertions that Microsoft's refusal to continue its code-sharing practices established a monopolization claim. The Tenth Circuit held that in order to prevail on a refusal to deal claim, the plaintiff must demonstrate that the monopolist sacrificed a preexisting course of dealings that resulted in a short-term loss of profits for the monopolist, "showing that the monopolist's refusal to deal was part of a larger anticompetitive enterprise, such as (again) seeking to drive a rival from the market or discipline it for daring to compete on price. Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect." *Id.* at 1075. Novell was unable to demonstrate that "Microsoft took any course other than seeking to maximize the company's net profits in the short as well as long-run." *Id.* at 1077.

The Tenth Circuit's decision is consistent with the general trend rejecting efforts to require monopolists to help rival companies. A monopolization claim based on refusal to deal theory was accepted by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, where the Court held that three ski slope operators situated on the same mountain as a fourth competitor violated Section 2 of the Sherman Act by discontinuing an "all-Aspen" ski ticket and preventing the competitor from acquiring rival lift tickets to offer its own multi-mountain package. 472 U.S. 585 (1985). The decision has, however, proven to be the high water mark for refusal to deal liability, especially in light the Supreme Court's subsequent decision in *Verizon Communications Inc. v. Trinko*, 540 U.S. 398 (2004), distinguishing *Aspen Skiing*.

Since *Trinko*, district courts have been very reluctant to find companies liable under a refusal to deal theory. The Supreme Court's decision not to review Novell's case against Microsoft reinforces the view expressed by the Court in *Verizon* that the *Aspen Skiing* refusal to deal standard exists "at or near the outer boundary of § 2 liability." *Id.* at 409.

[1] Novell originally, and more logically, claimed that Microsoft monopolized the market for Windows 95 applications, but that claim was rejected on statute of limitations grounds. Novell then changed its theory to take advantage of the tolling of the statute of limitations for operating system monopolization claims by virtue of the then long-running Department of Justice case against Microsoft.

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