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THE LATEST WORD FROM THE SUPREME COURT ON WHEN A FIRM MUST DEAL WITH A RIVAL: *VERIZON COMMUNICATIONS V. TRINKO*

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Courts have wrestled with the law of monopolization ever since Congress passed the Sherman Act. Although Section 2 of the Sherman Act forbids monopolization and attempts to monopolize, courts have consistently held that monopolies themselves are not unlawful and that actions leading to monopoly are not necessarily illegal.[1] Some courts and antitrust scholars have warned that overly broad application of Section 2 will deter beneficial business activity; they have wanted to ensure that the antitrust laws encouraged, but did not encumber, competition.[2] Other courts and scholars have regarded monopolies with less deference and expressed the view that monopolies are to be disfavored because they generally cause more harm than good.[3] A majority of the current Supreme Court appears to fall in the first camp, concerned that an expansive interpretation of Section 2 could be unduly regulatory and a deterrent to investment and innovation.

The philosophical divide over Section 2 has had a substantial impact on the debate over when the antitrust laws require a firm to do business with a competitor. As far back as 1919, the Supreme Court wrote in *United States v. Colgate* that, absent a purpose to create or maintain a monopoly, a firm can "exercise [its] own independent discretion as to parties" with which it will do business.[4] The courts have found, nonetheless, that a monopolist can, under some circumstances, violate Section 2 by refusing to deal with a competitor. Defining those circumstances has been the nub of the debate in a number of monopolization cases.

The Supreme Court recently revisited the issue of when a firm must do business with a competitor and came down firmly in the camp that considers such situations to be very

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1. The Supreme Court has long held that the mere possession of monopoly power is not illegal. Rather, Section 2 bars "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." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).
2. *Id.*
3. *See, e.g.*, *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945).
4. *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919).

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rare. In *Verizon Communications v. Trinko*,[5] the Court held that Verizon did not violate the antitrust laws when it failed to provide competing providers of local telephone service (known as "local exchange service") with reasonable access to Verizon's local telephone network. After concluding that the Telecommunications Act of 1996 neither replaced the Sherman Act nor created new competition rules, the Court found that Verizon's conduct did not fit within the narrow exception to the general rule of the *Colgate* case that there is no duty to aid rivals and declined to create a new exception.

Verizon is a successor to two of the regional operating companies created by the breakup of AT&T in 1982. Prior to enactment of the Telecommunications Act of 1996, Verizon's predecessors (NYNEX and Bell Atlantic) enjoyed exclusive franchises in their local service areas. The 1996 Act requires incumbent local exchange providers, such as Verizon, to provide competitors in local exchange service use of and interconnection with their local networks, and permits the incumbent providers to offer long-distance service if they satisfy a checklist of network access benchmarks. As required by the 1996 Act and additionally to gain permission to offer long distance service, Verizon agreed to provide AT&T, a budding local exchange provider, access to the Verizon local network.

Two agencies found in 1999 that Verizon failed to provide appropriate interconnection to AT&T; both the Federal Communications Commission and the New York Public Service Commission found that Verizon did not meet its obligations under the 1996 Act and assessed significant fines. Following the FCC action, Trinko, a New York City law firm and AT&T local telephone service customer, sued Verizon under Section 2 of the Sherman Act, claiming that Verizon's failure to give AT&T reasonable interconnection was an unlawful exercise of monopoly power that injured consumers of local telephone service, such as Trinko.

The trial court dismissed the complaint, but the Second Circuit reversed, reinstating the antitrust claim. The Supreme Court reversed. Justice Scalia's opinion analyzes several distinct issues. First, before they even reached the monopolization issue, the Court concluded that the 1996 Act had no effect on application of the Sherman Act either by rendering Verizon's conduct immune, or by creating new competition standards. Second, turning to the substantive antitrust issues, the Court held that Verizon's conduct did not fit within any existing exception to the rule that a company can decide with whom it will do business. Finally, the Court saw no reason to create a new exception.

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5. *Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. ______, 124 S. Ct. 872, 2004 WL 51011 (2004).

1. The Effect of the Telecommunications Act of 1996 on the Scope of the Sherman Act

The Court ruled that the 1996 Act did not repeal the antitrust laws with respect to the conduct it regulates. The Court has previously held that on occasion, when Congress sets up a regulatory scheme but does not explicitly exempt regulated conduct from the antitrust laws, the courts can nonetheless find under certain limited circumstances Congress impliedly repealed the antitrust laws.[6] The Court noted that the regulatory regime created by the 1996 Act would be "a good candidate" for implied immunity from the antitrust laws but for the fact that Congress had specifically precluded any implied immunity argument in the Act by including a provision that states "nothing in this Act or amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." *Trinko*, slip op. at 6. The Court also considered the opposite proposition – whether the 1996 Act created a new form of antitrust liability – and concluded that it did not.

2. A Firm Can Choose Its Customers

The Court found that Verizon's conduct did not constitute an unlawful refusal to deal. Interestingly, and perhaps significantly, Justice Scalia took the opportunity to review (and arguably alter) the law of monopolization. The opinion is a strong defense both of the incentives created by allowing firms to gain monopoly power and of the right of a monopolist to refuse to deal with a rival.

Justice Scalia began by noting that possession of monopoly power itself is not unlawful. Indeed, according to the Court, monopoly power "is an important element of the free market system" – the ability of a monopolist to charge monopoly prices spurs innovation and economic growth as firms strive to gain monopoly power. *Id.* at 7. A firm violates the antitrust laws only when monopoly power "is accompanied by an element of anticompetitive *conduct*." *Id.* (emphasis is original). Accordingly, the Court emphasized that the manner in which a defendant obtained and exercised monopoly power is crucial to determining whether it has abused that power.

The incentive to gain monopoly power can impel a firm to build an infrastructure "uniquely suited to serve" its customers. *Id.* at 8. Requiring a firm to share the benefits of that investment with rivals would, the Court wrote, be undesirable in several respects.

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6. *See, e.g.*, *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975) (antitrust exemption should be implied when there is a possibility of conflict between the antitrust laws and the regulatory scheme).

First, it could chill innovation and beneficial economic investment. *Id.* Second, it would cast judges as central planners – roles for which they are ill-suited. *Id.* Finally, forcing rivals to share network facilities could facilitate collusion among rivals – a far greater evil, according to the Court, than monopolization. *Id.* Accordingly, absent intent to create or maintain a monopoly, the general rule under the Sherman Act is that a trader is free to rely on its own independent business judgment in selecting those with whom it will deal or not deal. *Id.* Without proof of anticompetitive conduct, a defendant cannot be found liable. The issue posed by *Trinko,* therefore, was whether the facts fit into an exception to the rule that a firm can decide with whom it will do business.

3. *Aspen Skiing*

The Court recognized that the right to refuse to deal is not completely unqualified. For example, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985), the Court was willing to find a refusal to cooperate with rivals to be actionable under Section 2. The Trinko Court concluded, however, that the Aspen Skiing exception to the *Colgate* doctrine does not apply because it is very narrow. In *Aspen Skiing*, an operator of a ski slope in Aspen, Colorado, sued the area's dominant operator of ski slopes when the larger firm ended an agreement to sell a single lift ticket that granted access to all the slopes in the area. As Justice Scalia noted in *Trinko*, *Aspen Skiing* involved an ongoing and presumably profitable venture that was unilaterally terminated by the defendant. The Court stated that the defendant's conduct there "suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko slip op.* at 9. It was especially significant to the Court that the defendant refused to renew the venture, even if the plaintiff were to purchase its tickets at retail prices. That, said the Court, "revealed a distinctly anticompetitive bent." *Id.*

Justice Scalia wrote that the *Aspen Skiing* exception has been applied cautiously "because of the uncertain virtue of forced sharing and difficulty of identifying and remedying anticompetitive conduct of a single firm." *Id.* at 8. Indeed, he said, *Aspen Skiing* is "at or near the outer boundary of § 2 liability." *Id.* at 9.

The Court found that the facts in *Trinko* are distinguishable from those in *Aspen Skiing*. First, Verizon did not provide AT&T access to its network prior to passage of the 1996 Act. Indeed, Verizon would not have dealt with AT&T but for the statutory compulsion. Accordingly, Verizon's prior conduct sheds no light on the company's motivation not to deal and creates no inference of anticompetitive malice. *Id.* More importantly, the defendants' pricing strategies were different in the two cases: in *Aspen Skiing*, the defendant declined compensation at retail levels, an action from which one could infer monopolistic intent; Verizon's compensation, on the other hand, was cost-based, which tells us nothing of Verizon's motivations. *Id.* at 9-10. The Court further distinguished *Aspen Skiing* by pointing out that the single lift ticket had previously been available to the

public, whereas in *Trinko*, access to the Verizon local telephone network had never been available. Rather, the services only became available to rivals when Congress passed the 1996 Act. *Id*. In fact, the Court noted, investment is needed simply to make access to the Verizon network possible for outsiders – hardly, the Court thought, a situation in which failure to do so should be unlawful. *Id*. at 10.

The Court also found *Trinko*'s reliance on *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), and on *Associated Press v. United States*, 326 U.S. 1 (1945), to be ill-founded because those cases involved concerted action, not unilateral action. *Trinko* slip op. at 10. Concerted action, said Justice Scalia, raises greater competitive concerns than unilateral action, and is more amenable to judicially enforceable remedies than are alleged refusals to deal.

Finally, the Court explicitly decided not to consider the "essential facilities" doctrine, which it described as "crafted by some lower courts," because the *sine qua non* of the essential facilities doctrine is that a plaintiff be denied access. *Id.* at 11. In the 1996 Act, however, Congress mandated that Verizon provide rivals with access to its network, making it "unnecessary to impose the judicial doctrine of forced access." *Id.*[7]

4. No New Exception to the *Colgate* Doctrine

The Court decided that the *Trinko* facts demonstrate no need for a new exception to the rule that a monopolist has no duty to aid rivals. The Court wrote that the regulatory scheme already contained provisions designed to promote competition and that the extensive regulatory network in place in the telecommunications field diminishes the need for antitrust liability. *Id.* at 12-14. The Court's concern about the dangers of excessive application of Section 2 is evident in its statement that any marginal benefit derived from antitrust liability in this case would likely be outweighed by the cost of enforcement. In particular, the Court fretted about the difficulty of evaluating Section 2 claims in light of the myriad means of exclusion. The Court also feared that the cost of error if the antitrust laws were mistakenly applied would be substantial, concluding that the "cost of false positives counsels against an undue expansion of § 2 liability." *Id*. at 14. The Court opined that the interconnection requirements imposed by the 1996 Act are challenging and that the threat of "interminable litigation" could be a potent, but anti-competitive, weapon. *Id*. at 15. Finally, the Court found that for antitrust courts to police

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7. The Court also rejected consideration of a monopoly leveraging theory on the grounds that "leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected." *Id*. at 16. In any event, the dicta cast doubt on the Court's regard for that theory.

conduct under the 1996 Act would create intolerable administrative burdens and transform antitrust courts into regulatory agencies, particularly in light of the regulatory responsibility already residing with the FCC and state agencies. While the Sherman Act is the "Magna Carta of free enterprise," wrote the Court, the Act "does not give judges carte blanche to insist that a monopolist alter its way of doing business wherever some other approach might yield greater competition." *Id.* at 16.

5. The Concurrence

Three Justices, Stevens, Souter and Thomas, although concurring in the result, would have declined to rule on the merits of the monopolization claim and would have dismissed for lack of standing because plaintiff's injuries were derivative of those suffered by AT&T. They would have preferred that the Court not decide the broader monopolization issues.

6. *Trinko* and the Future of Monopolization Law

The *Trinko* decision is likely to have a significant impact on monopolization cases for years to come. First, the holding itself may substantially raise the bar for Section 2 plaintiffs. Second, the dicta indicate that the current Court has general reservations about Section 2 and is not likely to be a friendly forum for Section 2 plaintiffs.

The Court's opinion, emphasizing the monopolist's freedom to choose its customers and hence to exclude others from the field, including rivals, clarifies some previously murky areas of monopolization law. Prior to *Trinko*, a monopolist who refused to deal with rivals faced the risk of a Section 2 suit against the backdrop of conflicting and, at times, confusing case law. *Trinko* sweeps all of that away with its stress on a monopolist's right to exploit its economic advantage, even to the extent of excluding rivals, and places the onus squarely on the plaintiff to prove that the monopolist's conduct is *anticompetitive.* In the future it may no longer be enough simply to show that a defendant's conduct limited entry; a plaintiff will also need to prove that the overall effect of that exclusion is to reduce competition, thereby harming consumers.

Trinko could encourage monopolists to exploit their monopoly power more aggressively. The Court apparently wants to encourage monopolists to do so, out of the belief that such a permissive attitude will produce economic benefit by creating an incentive to invest, innovate and take risks.

Trinko also gives us a sense of the Court's view of the judiciary's ability to analyze refusals to deal and to administer relief. The Court apparently believes that judges are generally ill-suited to determining whether relief is appropriate and to supervising and administering forced sharing agreements among rivals when it is. The Court's deference to the economic benefits of monopoly combined with its skepticism of the judiciary's

ability to distinguish beneficial from harmful monopoly impels it to instruct that absent proof of anticompetitive conduct, lower courts should give monopolists the benefit of the doubt and not speculate as to how a dominant firm may have conducted its affairs differently.

The Court does recognize that the right to refuse to deal is not unqualified. *Aspen Skiing* remains good, but limited, law. Until now, *Aspen Skiing* has been a potent weapon in the antitrust plaintiff's arsenal and a hurdle to defendants' motions for summary judgment. It may no longer be so, but rather could be a precedent of very little, if any, utility to plaintiffs, limited to its peculiar facts. In short, the qualifications to the general rule that a firm can decide with whom it will trade are likely to be few and the courts will likely be "cautious" in recognizing any exceptions. What exceptions, other than *Aspen Skiing*, now exist is completely unclear.

The Court's failure to endorse the essential facilities doctrine is also significant. The Court makes clear that if the essential facilities doctrine remains viable at all, it does not apply in those cases where access to the purported essential facility is mandated by law.

Apart from the case's specific holding, dominant firms can take comfort from the opinion's tone. Adopting a decidedly Chicago School posture, the Court cautions against judicial intervention to force a monopolist to alter its business practices, stressing (1) the complexity of monopolization cases generally; (2) the potentially high cost of error in wrongly condemning lawful conduct as violative of Section 2; and (3) the high costs of judicial administration and day-to-day supervision of communications companies. The Court eschews antitrust as an all-purpose remedy to enhance competition, concluding that, while Section 2 prohibits monopolization, a lawful monopolist cannot be forced to alter its practices whenever a court believes that an alternative course of conduct would enhance competition.

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