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Is 'Trinko' the Last Word on a Telephone Monopolist's Duty to Deal?

Earlier this year, the U.S. Supreme Court rendered a significant decision concerning the instances in which a local telephone monopolist will face antitrust penalties for failing to deal with its rivals. That decision, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872 (2004), evidences hostility toward requiring telephone monopolists to deal with their competitors, even when they control a facility essential to competition. This hostility is antithetical to antitrust maxims, set forth in earlier Supreme Court jurisprudence, that favor such sharing when it would likely ameliorate consumer harm.

Most astounding about *Trinko*'s majority decision (written by Justice Antonin Scalia), is the Court's willingness to override congressional directives concerning the role of antitrust in spurring local telephone competition. While this makes the decision indefensible, it may not be the last word on this issue. Congress may legislatively reaffirm that telephone monopolies can face antitrust liability if they refuse to provide access to cure distorted competition.

Even if Congress fails to do this, state antitrust law may provide an avenue for such pro-consumer required dealing. Certain states have enacted anti-monopoly provisions that may cause antitrust liability to attach when telecommunications monopolists refuse to provide competitor access.

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Background

In *Trinko*, a customer of AT&T landline services, on behalf of a putative class, sued Verizon under Section 2 of the Sherman Act for failing to fairly and reasonably interconnect with AT&T's local exchange facilities. Verizon's alleged failure caused the AT&T customer to have inferior local phone service.

The difficulty that local exchange carriers (CLECs) have had with respect to interconnecting their systems to regional Bell operating company (RBOC) local exchange facilities has been reported repeatedly. RBOCs have engaged in these acts of alleged predation for one purpose: to reinforce their monopoly position in local services to the detriment of consumers. Consumers who have benefitted from vigorous competition in wireless and long distance markets (as evidenced by repeated price wars) have not received similar benefits in local wireline markets.[1]

Almost eight years after the Telecommunications Act of 1996 was passed, effective competition has not arisen in markets for local exchange services.[2] The four RBOCs — Verizon, Qwest, Bell South and SBC — continue to dominate their markets, even while Sections 251 and 252 of the act require that these entities provide CLECs with facility access on a non-discriminatory and unbundled basis.

The meek penalties offered by the Telecommunications Act to cure anti-competitive refusals to deal has not eroded RBOC domination. If such refusals were amenable to antitrust litigation, a RBOC could be liable for treble damages in instances where a plaintiff could prove that a refusal to deal led to consumer harm.

Antitrust Savings Clause

Section 601(b) of the act specifically states that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair or supersede the applicability of any of the antitrust laws."[3] Consequently, argued the plaintiff, antitrust law provided an avenue for requiring telephone monopolies to deal with their competitors under the "essential facilities" doctrine — a doctrine that has been explicitly recognized by numerous courts.[4]

Essential facilities claims are not easy. Courts will only impose a duty to deal on a monopolist in the limited instance where "duplication of [a] facility (owned by a monopolist) would be economically infeasible" and "denial of its use inflicts a severe handicap on potential [or current] market entrants."[5]

In *Trinko*, it was argued that Verizon's refusal to provide competitive access created a severe handicap for CLECs, thus harming competition by causing consumers to incur inferior local telephone service.

The Supreme Court has not explicitly recognized the essential facilities doctrine. Nevertheless, it has previously required monopolists to deal with their competitors under Sherman Act §2.[6] Consequently, the plaintiff in *Trinko* argued that prior Supreme Court precedent provided a basis for a refusal to deal cause of action.[7]

Because the act's savings clause undisputedly makes antitrust relevant to telephony markets, the Court was forced to decide whether the plaintiff had stated a cause of action under Section 2 for monopoly maintenance. It is axiomatic that using exclusionary means to maintain a monopoly as opposed to superior business acumen or skill is a violation of the antitrust laws.[8] The question in *Trinko* was whether a refusal to deal by a telephone monopolist can ever be deemed to be exclusionary conduct under Sherman Act §2.

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The Supreme Court answered that, pursuant to its *Aspen Skiing* precedent, antitrust liability for a refusal to deal with telephone competitors only applies where a telephone monopolist discontinues a voluntary course of dealing with a competitor for the purpose of destroying it. RBOC failure to open access to entrants with whom it had not previously dealt — even though such a refusal could preclude consumers from reaping the benefits of competition (e.g., lower prices, increased output or innovation) — would not rise to an antitrust violation. The Court set forth various policy rationales to support its holding, none of which hold water.

• The Court held that "enforced sharing" of a telephone monopolist's facilities "is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival or both to invest in those economically beneficial facilities." In other words, the Court argued that telephone monopolists will lose an incentive to invest in superior facilities if they are required to open their facilities when a refusal to do so would harm competition. Notably, the Court did not point to any evidence that suggests that telephone service providers would discontinue investing in production innovations in order to gain market share if such limited duties to deal were placed on them. To the contrary, elementary economic theory holds that, in a competitive environment, businesses have the incentive to invest in production innovations in order to increase profits.

• The Court held that enforced sharing is bad because it requires courts to "act as central planners, identifying price, quantity and other terms of dealing." But what are the other options? To permit private monopolies to act as central planners and thus dictate price, quality or output? Surely, this would lead to consumer harm — the very harm that antitrust law is designed to prevent. And, if Congress was so concerned about judges playing this "central planning" role, why did they expressly permit plaintiffs to sue RBOCs under Sherman Act §2 for impermissible monopoly maintenance? And why have courts often presided over consent decrees in order to ensure that an adjudged monopolist will behave properly?[9]

• The Court held that the costs of enforced sharing of telephone monopolist facilities outweigh its [benefits. These costs, according] to the Court, are "false positives," i.e., the finding of exclusionary behavior when none was intended. The Court indicated that a risk of false positives in antitrust enforcement was high because it is often difficult to determine whether conduct was exclusionary or legitimate. While this may be so, isn't it the case that finding liability in numerous other legal contexts (e.g., certain patent infringement cases) is difficult? Moreover, there are more than "slight benefits" to applying antitrust law to refusals to deal by telecom players. The treble damages penalties afforded by the antitrust laws would, for example, act as a much more effective deterrent for anti-consumer refusals to deal than the remedies set forth in the Telecommunications Act.[10]

State Antitrust Law

Even before the Sherman Act was enacted in 1890, at least 26 states had adopted antitrust laws, some of which were anti-monopoly laws.[11] Most courts have interpreted state antitrust law as closely following federal law. There has, however, been times of conflict.[12] State courts may hold that this is one of those times.[13]

Generally, when a court holds that certain conduct is immune from antitrust attack because of a federal regulatory scheme, it holds that such a regulatory scheme preempts state antitrust law as well.[14] But the Telecommunications Act, has a clause that states, "[t]his Act and the amendments made by this Act shall not be construed to modify . . . state or local law unless expressly so provided." Accordingly, there is no implied preemption of state antitrust law under the act. To the extent state law deviates from *Trinko*, an antitrust cause of action for RBOC failure to interconnect with CLECs could possibly be stated.

If other modes of communication — namely, wireless telephony or Voice-Over-The- Internet Protocal — begin to constrain the price of RBOC local service or otherwise cause RBOCs to improve their service, *Trinko* will become moot. In that event, RBOC alleged control of local exchange facilities would no longer lead to consumer detriments.

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1. In 1974, AT&T, then a monopolist in long distance service, was sued by MCI and the Department of Justice for impeding long distance telephone competitors from entering the market. These lawsuits resulted in a Modified Final Judgment (MFJ) in 1982, which explicitly permitted MCI and Sprint to interconnect. Prices fell dramatically in long distance service as a [result of the MFJ's interconnection require-]

[...] Attorney General of the Department of Justice, Antitrust Division, before the National Press Club (Feb. 28, 1995).

2. The Telecommunications Act promised to bring the benefits of vigorous competition to local telephone markets. Its preamble states that its purpose is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

3. Revealing his discontent for the savings clause, Justice Scalia writes in particularly gratuitous language that "[i]n some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity to avoid the real possibility of a judgment conflicting with the agency's regulatory scheme." Of course, it matters not whether Justice Scalia believes that the act's enforcement scheme could or should have been granted implied immunity. Congress explicitly refused to provide antitrust immunity to RBOCs in the act.

4. See *MCI Communications Corp. v. American Telephone and Telegraph Company*, 708 F.2d 1081 (7th Cir. 1983) (monopolist long distance telephone provider has duty to interconnect with competitor).

5. *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990).

6. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) (monopolist ski resort required to provide lift services for competitor); *Otter Tail Power v. United States*, 410 U.S. 366 (1973) (power generation company has duty to deal with actual and potential municipal power systems).

7. In *Trinko*, the Court attempts to distinguish *Otter Tail* on the ground that *Otter Tail* dealt with sales to a consumer, not a competitor. But this is not the case. The defendant in *Otter Tail* was a vertically integrated power supplier that owned generation facilities and a transmission grid. The plaintiffs were actual and potential competitors of the defendants in the power supply market. The defendant refused to permit plaintiffs access to its transmission grid in order to monopolize the power supply market. As a result, the *Otter Tail* Court required that the defendant deal with the plaintiffs because "[t]he record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws."

8. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

9. See *United States v. Microsoft*, 231 F.Supp.2d 144 (D.D.C. 2002); *State of New York by Abrams v. Prime Star Partners*, 1993 WL 720677 (S.D.N.Y., Sept. 14, 1993) (final judgment requiring vertically integrated partners of satellite joint venture to provide programming to satellite competitors).

10. See e.g., Joel I. Klein, The Race for Local Competition: A Long Distance Run, Not a Sprint at 6-7 (Nov. 5, 1997) ("As for 'sticks,' there are real questions at this point; the Act itself call for no real penalties for non compliance.")

11. ABA Section of Antitrust Law, Antitrust Law Developments (Debra J. Pearlstein et al. eds., 5th ed. 2002).

12. Several states have refused to follow the Supreme Court's *Illinois Brick* decision, which precluded indirect purchasers of product from recovering treble damages for anticompetitive overcharges.

13. The *Trinko* Court failed to recognize the essential facilities doctrine. Several state courts, however, have recognized this doctrine. See e.g., *Weinberg v. Chicago Blackhawk Hockey Team*, 653 N.E.2d 1322, 210 Ill.Dec. 860 (App. Ct. 1995) (cause of action for essential facility survives motion to dismiss); *Natural Design, Inc. v. Rouse Co.*, 485 A.2d 663, 669, 302 Md. 47, 60, (1975) (recognizing existence of essential facilities doctrine).

14. See e.g., *In re Initial Public Offering Antitrust Litigation*, 287 F.Supp.2d 497 (S.D.N.Y. 2003) (court held that because there is implied immu-[nity under federal securities laws, there must]