



DEPARTMENT OF JUSTICE

THE STRUGGLE FOR STANDARDS

Remarks by

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Anytime the nine ladies and gentlemen up at the Supreme Court hand down a decision in a Sherman Act § 2 matter, it is likely to be considered “hot” by this group. And at any recent gathering of antitrust lawyers, you can be sure that the standard for monopolization and the best remedies for unlawful conduct by monopolists was discussed.

It is not always easy to distinguish between anticompetitive conduct that violates Section 2 and competitive conduct that benefits consumers, but an important part of U.S. antitrust philosophy requires that we make this a distinction. As Justice Scalia said in *Trinko*, “To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”¹ If you believe that antitrust can protect competitive markets, but may not be so good at creating them, even dominant firms must be allowed to compete aggressively. We do not demand, in the words of a recent European commentator, that firms compete “like gentlemen.” Antitrust enforcement cannot be suspicious of the unilateral conduct of any firm, until there is evidence of exclusionary conduct.

Therefore, we engage in what Judge Richard Posner calls the “struggle for standards.” There is no shortage of proposed all-purpose, one-sentence, universal tests for Section 2 liability. In the Government’s amicus brief in *Trinko*, we drew on precedent to articulate the following standard: “[C]onduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.”

I think the recent *Trinko* decision has made a positive contribution to this struggle for standards, even if it does not make a comprehensive statement on monopolization law.

Trinko Background

Quickly the background. Defendant Verizon is the incumbent local exchange carrier (ILEC) in New York – inheritor of the old Bell monopoly. The Telecommunications Act of 1996 requires that ILECs like Verizon sell at wholesale unbundled parts of their local networks to competitive local exchange carriers (CLECs). The goal is to undercut the ILEC monopolies by having them share their networks with these new competitors.

The FCC had asserted that Verizon had breached its duty under the Telecom Act by inadequately providing service to the customers of its CLEC competitors, one of which is AT&T. Plaintiff Trinko, an AT&T customer, alleged that Verizon had engaged in a scheme to discourage customers from becoming or remaining customers of CLECs like AT&T, and claimed that Verizon's breach of its Telecom Act duties constituted a Section 2 violation.²

The District Court dismissed the complaint for failure to state a claim. The Second Circuit reinstated the complaint in part, holding that Trinko may have stated an antitrust claim for monopolization under Section 2 by alleging that Verizon had not fulfilled its contractual duties to AT&T, as derived from the Telecom Act.³

The Supreme Court's Decision

The basic question for the Supreme Court was whether a complaint that an incumbent had breached its Telecom Act duty to share its network with competitors stated a claim under Section 2 of the Sherman Act. The court answered this question in the negative, but in doing so it said a lot more. I'll give you the law school outline of the Court's analysis:

- The Telecom Act’s antitrust saving clause precludes the argument that it creates new antitrust duties under the Sherman Act.
- Did Verizon violate Section 2 under existing antitrust standards? The general rule is that even monopolists may refuse to deal with rivals.
- What about an exception to the general rule? *Trinko*’s allegations did not fit the exception created by *Aspen Skiing* (which the Court described as “at or near the boundary” of Section 2 liability) or otherwise satisfy the essential facilities doctrine (if valid).
- *Trinko*’s allegations did not justify creating a new exception to the general rule that firms, even monopolists, may refuse to deal with rivals, especially because the Telecom Act had created a regulatory structure that specifically addressed Verizon’s conduct.
- Holding: reversed

What, then, does *Trinko* portend about Section 2 enforcement?

Return to fundamentals

In some ways, the Court’s opinion is a return to fundamentals, to a more focused application of the antitrust laws. First, the majority indicated that exceptions to antitrust’s general rules are and should remain narrow. Specifically, Justice Scalia wrote, “We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.”⁴ This is especially so where the remedy made possible by the exception, such as imposing new obligations that require

competitors to share resources, would undercut antitrust's more general goals of promoting competition and preventing collusion,⁵ which Justice Scalia calls the "supreme evil of antitrust."⁶

Second, Justice Scalia says that broadening antitrust liability is less desirable where regulation is available and antitrust enforcement would undercut the regulatory scheme.

I think these tend to keep antitrust focused. Don't expand or undercut antitrust where unwarranted.

No new standards

Trinko certainly does not announce a sweeping new Section 2 standard, much less establish any new principles for Section 2 liability, and the Court did not explicitly mention the Government's recommended standard. We at the Division are pleased, though, that the Court's Section 2 analysis focused on the same facts that suggest a violation under the "but for" standard the Government proposed in its *amicus* brief. For example, in its discussion of *Aspen Skiing*, the Court pointed to the defendant's willingness to forego short-term benefits through "[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing," and its "unwillingness to renew the ticket *even if compensated at retail price*," as facts that suggested its "distinctly anticompetitive bent."⁷ This is encouraging, and we plan to assert our proposed standard with renewed confidence as a result of the Court's decision.

One could read Justice Scalia's language, peppered as it is with colorful references to a defendant's "anticompetitive malice" and "dreams of monopoly,"⁸ as suggesting a standard for Section 2 liability that is based on the defendant's subjective motivation. Such a reading of the opinion probably is misguided. Although evidence of the defendant's intent can help the court determine the likely effect of a defendant's conduct – as the D.C. Circuit found in *Microsoft*⁹ and

the Supreme Court itself suggested in *Aspen Skiing*¹⁰ – the focus should remain on the effect of the defendant’s actions and not subjective intent.

Retrenchment?

Certainly one may argue from the opinion that the Court has indicated that antitrust liability is not boundless, if not signaled future retrenchment.

First, the Court explicitly refused to endorse or reject the essential facilities doctrine. But it took the effort to confirm what many of us always suspected: *Aspen Skiing* (in which the Court also neither endorsed nor rejected the doctrine) is “at or near the outer boundary of Section 2 liability.”¹¹ And it is the Division’s position that the *MCI v. AT&T* four-part test¹² is not sufficient for Section 2 liability.¹³

The Court also came very close to barring use of the essential facilities doctrine where the court order to share facilities would require complex judicial oversight.¹⁴ If the doctrine remains viable at all, then, it is not as wide-ranging a doctrine as some courts have suggested, and it unquestionably will not be expanded much.

Second, in case there was lingering doubt, the Court buried monopoly leveraging as a distinct offense.¹⁵ Proof of the mere “use of monopoly power” is not a substitute for exclusionary conduct,¹⁶ and the usual elements of Section 2 liability still apply: possession of monopoly power in the relevant market, and the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product (etc.).

Regulated industries

The impact of the Court’s decision will be keenly felt in Section 2 enforcement in telecom and other regulated industries.

First, the argument that violation of a regulatory statute like the Telecom Act is *ipso facto* a Section 2 violation is dead. Both statutes seek competitive markets, but the likeness ends there. The Court observed that the Telecom Act “attempts to *eliminate* the monopolies enjoyed by the inheritors of AT&T’s local franchises,” whereas the Sherman Act “seeks merely to *prevent* unlawful monopolization.” These are two quite different goals, and we agree with the Court’s conclusion that it would “be a serious mistake to conflate” them.¹⁷

Of course, *Trinko* does not eliminate Section 2 liability in regulated industries. On the contrary, a monopolist can certainly violate Section 2 even in an area in which its conduct is regulated. The question, before and after *Trinko*, is whether the conduct that violates a duty under a regulatory statute also violates Section 2 according to pre-existing antitrust standards. Proof of a violation of some other statute, by itself, will not and should not establish a violation of the Sherman Act. And neither the Telecom Act nor *Trinko* lessen the exposure of telecommunications industry participants to antitrust violation.

Second, the Court arguably signaled more ready acceptance of implied immunity for regulated conduct, at least when the regulators have some responsibility for competitive concerns. In *Trinko* that argument was precluded because the Telecom Act includes an antitrust-specific saving clause, something that the Antitrust Division strongly and frequently supports as a component of federal regulatory legislation. However, it is difficult to read the tea leaves here, because the Court’s dicta was not explicit, and it did not undercut its earlier instructions that antitrust repeals implied by a regulatory statute are strongly disfavored and should be found only when the regulatory scheme otherwise just wouldn’t work.

The Court's discussion really goes to whether the bases for Section 2 liability should be expanded in areas where a regulator has been specifically assigned the task of deterring and remedying anticompetitive harm. Justice Scalia asserts that if there is an elaborate regulatory scheme in place designed to foster competition, it may be less appropriate to create a new exception to general antitrust rules to make it possible to reach the same conduct, especially if application of the antitrust laws would interfere with the regulatory scheme.¹⁸

It is important to remember that the *Trinko* case arose in the context of a very highly regulated scheme, and that the violations alleged were direct violations of those regulations. So the Court was faced with a regulatory body enforcing regulatory duties in the context of competition-based regulation. It is unclear how applicable this decision would be in less pervasively regulated areas, although I am sure that we will see the issue developed in arguments by parties before the agencies and the courts before too long.

False Positives

Finally, it is worth noting the Court's deference to the unilateral business decisions of monopolists, especially regarding what, to whom, and at what price to sell. We at the Division welcomed the Court's attention to another of Judge Posner's antitrust struggles, the "struggle for administrability," and the Court's stated desire to balance what can sometimes be "the slight benefits of antitrust intervention" with "a realistic assessment of [the] costs" of such intervention.¹⁹

Extending its traditional concerns about the effects of "[m]istaken inferences" beyond the predatory pricing context of *Matsushita* and *Brooke Group*, the *Trinko* Court warned of the "false condemnations" that can result from such inferences, which can "chill the very conduct the antitrust laws are designed to protect."²⁰ Such "false positives," the Court suggested, "counsel[] against an

undue expansion of Section 2 liability,” especially in an area that – like the above-cost pricing schemes of *Brooke Group* – are “beyond the practical ability of a judicial tribunal to control.”²¹

Simply put, courts and antitrust agencies are fallible, and using the antitrust laws as a kind of super-regulation to force a monopolist in a regulated industry to share its resources with competitors “requires antitrust courts to act as central planners . . . a role for which they are ill-suited.”²²

Thank you.

Endnotes:

1. *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP*, __ U.S. __, 124 S.Ct. 872, 879 (2004).
2. *Id.* at 875-77.
3. *Id.* at 877.
4. *Id.* at 879.
5. *See, e.g., id.* at 879 (“We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.”).
6. *Id.*
7. *Id.* at 880 (emphasis in original).
8. *Id.*
9. *United States v. Microsoft*, 253 F.3d 24, 59 (D.C. Cir. 2001)
10. “[E]vidence of intent is . . . relevant to the question of whether the challenged conduct is fairly characterized as ‘exclusionary’ or ‘anticompetitive’ . . . or ‘predatory.’” *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).
11. *Trinko*, 124 S. Ct. At 879.
12. (1) Control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).
13. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, Brief for the United States and the Federal Trade Comm’n as *Amici Curiae* Supporting Petitioner, 21-22 (available at <http://www.usdoj.gov/atr/cases/f201000/201048.pdf>).
14. *See Trinko*, 124 S.Ct. at 883 (“An antitrust court is unlikely to be an effective day-to-day enforcer of . . . detailed sharing obligations.”).
15. *See Trinko*, 124 S.Ct. at 883 n.4 (“The Court of Appeals also thought that respondent’s complaint might state a claim under a ‘monopoly leveraging’ theory We disagree. To the extent the Court of Appeals dispensed with a requirement that there be a ‘dangerous probability of success’ in monopolizing a second market, it erred.”) (internal citations omitted).

16. *See id.* (“[L]everaging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.”).

17. *Id.* at 883.

18. *Id.* at 881-82

19. *Id.* at 882.

20. *Id.*

21. *Id.* at 882-83.

22. *Id.* at 879.