Lessons From *Trinko* for a Consolidating Telecom Industry

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"He may well win the race that runs by himself."
Benjamin Franklin, Poor Richard's Almanac (1732-57).

I. INTRODUCTION

No one in the telecommunications industry has failed to hear the klaxon sounds of industry consolidation—particularly in the United States over the past few months. In November 2004 Cingular Wireless and AT&T Wireless joined in a $(US)41 billion merger approved by the Federal Communications Commission ("FCC") and Department of Justice ("DOJ"), conditioned upon divestitures and other relief.[1] In December Sprint announced its merger with Nextel, at a value of $(US)35 billion. Before that ink was dry, on February 1, 2005, SBC announced its $(US)16 billion acquisition of AT&T. Two weeks later Verizon launched a $(US)6.75 billion bid for MCI, in competition with QWest. The FCC is also currently reviewing a proposed merger of Alltel Corp. and Western Wireless Corp. When the dust settles from all these transactions, there will be five dominant players remaining in the telecommunications market in the United States. One can only wonder when the next shoe will drop, reducing that group to four, or even three.

The transactions announced to date, and the regulatory handling of them, are "likely to affect the competitive environment in the telecommunications industry for years to come." Comments by the American Antitrust Association submitted to the FCC on April 25, 2005, on *In re AT&T Corp and SBC Communications Inc*.[2] It may reasonably be expected that some of the resulting entities will dominate certain markets.[3]

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1 *United States, et al. v. Cingular Wireless, et al.* Dk. No. 1:04CV01850, slip op. (D.D.C. Nov. 3, 2004), *available at*, http://www.usdoj.gov/atr/cases/f208000/208093.htm (Final Judgment); *In re Applications of AT&T Wireless Servs. and Cingular Wireless Corp.*, WT Docket No. 04-323 (FCC Oct. 26, 2004), *available at*, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-255A1.pdf (Memorandum Opinion & Order).

2 W.C. Docket No. 05-65, *available at*, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517585545.

3 Verizon apparently won its bid for MCI on May 2nd. According to a study by Control Point Solutions cited by the Wall Street Journal, with the SBC/AT&T and Verizon/MCI mergers, "businesses will receive 87% of their

On the precipice of this historic telecom transformation came the U.S. Supreme Court's January 13, 2004 decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* ("*Trinko*").[4] That decision, and the cases spawned by it, offer important guidance on the limits of dominant firm conduct. In particular, *Trinko* and its progeny suggest a narrowed zone of antitrust risk for the newly emerging telecom behemoths in their dealings with competitors. At the same time, *Trinko* may subtly tilt the competitive assessment in favor of the pending telecom mergers.

II. TELECOM CONSOLIDATION IN THE UNITED STATES MAY WELL CREATE FIRMS THAT ARE DOMINANT IN CERTAIN MARKETS

As illustrated by the divestitures required in Cingular/AT&T Wireless, there is ample fodder for debate on whether the various pending transactions threaten to contravene Section 7 of the U.S. Clayton Act, which bars mergers that may "tend substantially to lessen competition" in some relevant antitrust market. Concerned voices have already been raised. For example, FCC Commissioners Michael Copps and Jonathan Adelstein dissented in part from the FCC's approval of the consent settlement with Cingular and AT&T, based upon their concerns about the lack of competition that might still result in certain markets.[5] More strident opposition was voiced by such as Gene Kimmelman, Senior Director for Public Policy and Advocacy at Consumer's Union:

> This merger is significant because this new Cingular Wireless behemoth is actually owned by two of the dominant local phone companies in the country. . . . It just doesn't make sense to expect the local phone company to compete against itself with its wireless product. Rather, it likely will raise prices for both local and wireless service, because it can control the market.[6]

Similarly, in a paper dated March 24, 2005, American Antitrust Institute ("AAI") Research Fellow Jonathan Rubin articulated his concerns with both the SBC/AT&T and Verizon/MCI mergers.[7] Among Dr. Rubin's worries about both of these acquisitions was "the prospect for the unlawful exclusion of rivals." More specifically, "the addition of MCI's

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services from their top two providers." *See* "Phone Consolidation May Cost Corporate Clients Clout," Wall Street Journal May 4, 2005, p. B1.

[4] 124 S. Ct. 872.

[5] WT Dk. No. 04-70 (FCC Oct 22, 2004); *see* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253545A4.pdf (Copps); http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253545A3.pdf (Copps).

[6] WT Dk. No. 04-70 (FCC May 3, 2004) (Petition to Deny), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516183071.

[7] *See* "The Competitive Threat of the Telecommunications Mergers," available at www.antitrustinstitute.org.

substantial market share to Verizon's already dominant position in its valuable local service area threatens a duopoly of vertically integrated firms with a stronghold on the business market."[8] Further: "Through blocked or costly network access or technical incompatibilities, a vertically integrated firm has the power to exclude its rivals."[9]

Joined in the fray are a number of competitive local exchange carriers ("CLECs"), who announced in March 2005 that they have allied to mount a coordinated opposition to one or more of the telecom megamergers.[10] These smaller independent telecoms intend to argue that innovation will suffer because "they will be swamped by the larger companies unless the government puts curbs in place . . . ."[11]

CLECs and others have since filed comments with the FCC, opposing SBC's acquisition of AT&T. Joined in opposition with the Alliance for Competition in Telecommunications, the National Association of Utility Advocates and others, they argue that wireless, satellite, cable, and internet telephony will not offer sufficient competition to protect consumers, and that the merger "will put too much of the nation's Internet backbone in the hands of Bell companies."[12] SBC/AT&T respond that in a world of converging markets and technologies a company with global reach will benefit consumers, who will enjoy "increased innovation, competition and investment."[13]

As recently as April 19th, members of a U.S. Senate subcommittee conducting hearings on the telecom mergers took note of various competitor concerns. These included: (1) product bundling—such as DSL with local telephone service; and (2) impeding or denying network access to competitors—such as by offering discriminatory levels of service or, more flagrantly, by "trying to impede, sabotage, block or slow down a competitor's traffic moving over the network."[14]

The FCC and the DOJ share concurrent antitrust jurisdiction to review mergers between common carriers. The FCC's mandate is to ensure that the merger "serves the public interest,

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[8] *Id*.

[9] *Id*.

[10] *See* Jeffrey H. Bimbaum and Mike Musgrove, "Small Telecom Firms Fight Mergers," *Washington Post*, p. E01 (March 16, 2005), *available at* http://www.washingtonpost.com/wp-dyn/articles/A38353-2005Mar15.html.

[11] *Id*.

[12] Dow Jones Newswire, "Telecom Merger Opponents Ask FCC to Block SBC-AT&T Deal," (Apr. 25, 2005), *available at* http://news.morningstar.com/news/DJ/M04/D25/200504251537DOWJONESDJONLINE000511.html.

[13] *Id*.

[14] BNA Antitrust & Trade Reg. Rpt., Vol. 88, No. 2201, p. 425 (April 22, 2005).

convenience and necessity."[15] The DOJ's task is to ensure that there is no substantial lessening of competition in relevant markets under Section 7 of the Clayton Act.[16] Generally, both agencies assess a merger's competitive effects, and look to traditional antitrust principles, including the DOJ/FTC Horizontal Merger Guidelines.[17]

Department of Justice and FCC review of recent telecom consolidation in the United States is in early stages, with decisions not likely before the fall of 2005 or later. Indeed, in a filing with the FCC on April 25, 2005, the AAI urged the agency to stay its consideration of the SBC/AT&T application pending resolution of the MCI contest between QWest and Verizon; to then consolidate and consider both mergers, and their impact on competition, together; and to require, before ruling on the application, far more detail from the merging parties on likely competitive effects in the many markets they serve, as well as on claimed efficiencies.[18] Meanwhile the Justice Department is presumably forging ahead with its own antitrust investigation, the details of which will remain nonpublic until formal decisions—and a possible Consent Decree—are reached.

The pending telecom mergers present an extraordinarily complex stew of horizontal and vertical antitrust issues in dozens of product markets and likely hundreds of geographies. It is beyond the scope (and capability) of this paper to assess the likelihood of challenge and the types of remedies that will be required for successful conclusion of these transactions. Whatever the immediate outcomes, it seems unlikely that telecom consolidation has run its course. Will the next merger involve Bell South and QWest? Verizon and SBC? Carriers and satellite or cable companies, or digital content providers? With even the announced transactions, it may reasonably be said that the resulting entities are likely to be enjoy dominant positions—*i.e.*, have a degree of market power—in at least some markets, whether defined by geography or by product (wireless service, enterprise telephony, local or long distance telephone service, etc.)[19]

As the U.S. agencies labor to predict—and react to—the likely competitive effects of these telecom mergers, they will properly consider the extent to which any of the companies

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[15] 47 U.S.C. 3310(d).

[16] 15 U.S.C. 18.

[17] U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) (with Apr. 8, 1997 revisions to Section 4 on efficiencies), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, *available at* http://www.usdoj.gov/atr/public/guidelines/ hmg.htm.

[18] *See In re AT&T Corp and SBC Communications Inc*. (W.C. Docket No. 05-65), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517585545.

[19] 'Dominant firm' under Article 82, has, of course, special meaning and consequence for a company's obligations to its competitors, consumers and suppliers. While market power is not alone determinative of 'dominant firm' under Article 82, it nevertheless "may be sufficient to impute dominance." F. Fine, "Abuse of Dominant Position: Some Reflections on Legal Theory and Practice," The Antitrust Counselor, pp. 7-8 (Apr. 15, 2005).

have already found it possible and useful unilaterally to exercise their power in an exclusionary fashion. Implicit in that review is of course a standard for determining what conduct is anticompetitive under the Sherman Act. For their part, the merging firms and their competitors are also surely looking not just to the regulatory merger statutes, but also to the state of substantive monopolization law, in determining their respective risks, rights and obligations when consolidation comes to rest.

The remainder of this paper will therefore turn to the U.S. Supreme Court's 2004 decision in *Trinko*, and the cases spawned by it, for guidance on the limits of dominant firm conduct—particularly the apparently narrowed zone of antitrust risk for newly consolidated telecoms in their dealings with competitors.

III. IMPLICATIONS OF *VERIZON COMMUNICATIONS V. TRINKO* FOR DOMINANT TELECOM FIRMS AND THEIR COMPETITORS.

A. Overview

Any discussion of recent U.S. antitrust developments must start with the Supreme Court's 2004 *Trinko* decision. In an opinion written by conservative jurist Antonin Scalia, with three concurring opinions but no dissent, the ruling further narrowed the circumstances in which a monopolist is obliged to deal with its competitors. *Trinko* also all but dammed two other streams of monopolization law running through the rulings of some U.S. lower courts: the "essential facilities" doctrine and monopoly leveraging.[20]

Liability for refusals to deal under Section 2 of the Sherman Act has been a long contested battleground in the United States. As Antitrust Division chief Hewitt Pate observed in his dismayed reaction to the European Commission's March 2004 *Microsoft* decision, "unilateral competitive conduct [is] the most ambiguous and controversial area of antitrust enforcement."[21] This topic continues, after *Trinko*, to represent a clear divergence between U.S. and European competition jurisprudence.

Trinko warrants particular note by telecom companies. With neither subtlety nor shyness, the opinion pronounces the Supreme Court's strong reluctance to trust judicial intervention, via antitrust law, to interdict unilateral conduct in complex and changing markets—all the more so where existing statutory or regulatory regimes enjoy hegemony.

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[20] There was no dissent to Justice Scalia's decision in *Trinko*, although Justice Stephens, Souter and Thomas concurred with the judgment on the grounds that the complaint should have been dismissed for plaintiffs' lack of standing, without reaching the merit of the antitrust allegations. *Trinko*, 124 S. Ct. at 884-85.

[21] DEPARTMENT OF JUSTICE PRESS RELEASE (Mar. 24, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/202976.htm.

B. The *Trinko* Decision

Mr. Trinko's law firm filed a class action on behalf of the New York City customers of AT&T, a new local service entrant competing with Verizon. The suit was filed one day after Verizon entered into a consent decree with the FCC, based upon its failures to comply with the 1996 Telecommunications Act.[22] The 1996 Act sought to encourage competition among local phone carriers by requiring incumbent local exchange carriers ("ILECs") such as Verizon to share their facilities with competitors. Trinko contended that Verizon impeded competitors' access to the system, thereby harming the class of consumers he represented. Trinko's complaint was dismissed by the district court for failure to state a claim—*i.e.*, before the discovery or consideration of any evidence. The U.S. Second Circuit Court of Appeals reinstated the case, ruling that plaintiffs had properly alleged cognizable Section 2 claims under the essential facilities doctrine and monopoly leveraging.

The first issue faced by the *Trinko* court revolved around the interplay of traditional antitrust principles with the 1996 Telecommunications Act. The 1996 Act carried with it an intricate structure for regulatory monitoring and enforcement of its provisions, intended to facilitate market entry by ILEC competitors. Because the 1996 Act expressly mandated that nothing in it was intended to "modify, impair, or supersede the applicability of the antitrust laws," the Court had no choice but to reject an argument that the Act implied immunity from normal antitrust scrutiny. At the same time, Justice Scalia emphasized that the Act also created no new claims or antitrust standards.[23] The Court then dealt squarely with the obligations of Verizon to deal with its competitors; the essential facilities doctrine; and whether "monopoly leveraging" stands as an independent basis of antitrust liability under Section 2.

1. **<u>Refusals to deal as exclusionary conduct</u>**

The Supreme Court in *Trinko* took the opportunity to issue a ringing endorsement of the "Colgate doctrine," first articulated in 1919: Absent a purpose to create or maintain a monopoly, a firm can exercise its own independent discretion as to the parties with which it will do business. There is no general obligation for any company to deal with a competitor.[24] While acknowledging that the right to refuse to deal is not unqualified, the Court emphasized that "[w]e have been very cautious in recognizing exceptions."[25]

Plaintiff relied heavily on the Supreme Court's 1985 decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*.[26]—perhaps the leading case imposing Section 2 liability for

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[22] *Trinko*, 124 S. Ct. at 877.

[23] *Id.* at 878.

[24] *See United States v. Colgate*, 250 U.S. 300, 307 (1919).

[25] *Trinko*, 124 S. Ct. at 879.

[26] 472 U.S. 585.

refusing to deal with a competitor. That case involved the defendant's refusal to continue an earlier agreement to sell a single lift ticket granting access to all ski slopes in the area. Beyond that, defendant even refused to sell tickets at the retail prices to plaintiff, which owned the single ski mountain in the area that was excluded from the joint ticket. The *Trinko* court rejected the application of *Aspen Skiing,* characterizing it as "at or near the outer boundary of Section 2 liability."[27]

The *Aspen Skiing* exception to the *Colgate* doctrine should be applied cautiously, wrote Justice Scalia, "because of the uncertain virtue of forced sharing and difficulty of identifying and remedying anticompetitive conduct of a single firm."[28] The Court took pains to celebrate the merits of monopoly power. Not only is the possession of monopoly power alone not unlawful, in fact its achievement "is an important element of the free market system." The ability of a monopolist to charge monopoly rents, urged the Court, spurs innovation and economic growth as firms strive to gain monopoly power.[29] Requiring a firm that has lawfully acquired monopoly power to share the benefits could chill innovation, lessen beneficial economic investment, and cast judges as "central planners"—a role for which they are ill-suited.[30]

Reading *Aspen Skiing* narrowly, the *Trinko* Court found dispositive distinctions: First, *Aspen Skiing* involved the termination of a prior course of dealing, which had been voluntarily established and was "presumably profitable."[31] By contrast, Verizon had never voluntarily assisted its rivals and would not have done so at all but for the dictates of the 1996 Act. No inference of anticompetitive intent was therefore raised by the obstacles Verizon created for its competitors.

Second, the defendant in *Aspen Skiing* had refused to sell its lift tickets to its competitor even at its own retail price, thereby suggesting a "calculation that its future monopoly retail price would be higher."[32] The *Aspen Skiing* defendant's conduct "suggested a willingness to forsake short-term profits to achieve an anticompetitive end,"[33] and "revealed a distinctly anticompetitive bent."[34] In Trinko, however, anticompetitive intent could not be inferred from Verizon's willingness to sacrifice cost-based compensation for sharing its network, which was

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[27] *Trinko*, 124 S. Ct. at 880.

[28] *Id*. at 879.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 880.

[32] *Id*. at 874.

[33] *Id*. at 880.

[34] *Id*.

quite distinct from the retail price-based compensation lost in the short-term to the *Aspen Skiing* defendant.[35]

Interestingly, Justice Scalia ignored both the Supreme Court's own 1992 ruling,[36] and the 9th Circuit's 1997 decision in *Image Technical Services, Inc. v. Eastman Kodak Co*.,[37] which affirmed Section 2 liability for Kodak's refusal to continue selling independent service organizations the replacement parts needed to service Kodak copiers. That 1997 decision was possible only after the Supreme Court ruled that plaintiffs had stated a claim under Section 2 strong enough to withstand summary judgment—a decision in which Justice Scalia angrily dissented.[38]

Kodak, like *Aspen Skiing* but unlike *Trinko*, involved termination of a voluntary prior course of dealing. *Kodak* also hinged on defendant's "pretextual" explanation for its refusal to license certain IP, which served to rebut the presumption of legality in such refusals.[39] The *Trinko* court had therefore at least two bases for distinguishing *Kodak*—a much more recent decision than *Aspen Skiing*—had it chosen even to acknowledge the decision. One commentator has suggested that the Court in *Trinko* implicitly reversed the burden of proof applied in *Kodak*; it may now be necessary for a Section 2 plaintiff to plead and establish anticompetitive intent in a Section 2 refusal to deal case.[40] Another doubts that, after *Trinko*, "the Ninth Circuit's opinion in the *Kodak* case, or at least a substantial portion of it, is good law."[41]

Trinko suggests a "new rule" under Section 2 for refusals to deal: Liability attaches only if defendant's anticompetitive *animus* is shown by a willingness to sacrifice short-term profits for longer-term monopolistic gains. Exclusionary conduct cases in the United States, of course, involve a wide range of predatory non-price conduct beyond refusals to deal. A simple profit sacrifice test is arguably both under-inclusive and over-inclusive as a general standard of Section 2 liability.[42] The Department of Justice itself urges a broader, "no economic sense" test

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35 *Id*. at 880.

36 504 U.S. 451 (1992).

37 125 F. 3d 1195.

38 504 U.S. at 486.

39 125 F.3d at 1219-20.

40 *See* Robert A. Skitol, "Correct Answers to Large Questions about *Verizon v. Trinko*," THE ANTITRUST SOURCE, pp. 4-5 (May 2004).

41 Remarks by Herb Hovenkamp, panelist in ABA Teleseminar "Hitting the Section 2 'Refresh' Button for in-House Counsel Following *Trinko*," published in THE ANTITRUST SOURCE, p. 6 (July 2004).

42 *See*, *e.g*., Skitol, THE ANTITRUST SOURCE, pp. 3-4, c*iting* Einer Elhauge, "Defining Better Monopolization Standards," 56 Stan. L. Rev. 253 (2003).

for unilateral refusals to deal: "Conduct is 'exclusionary' or 'predatory' in antitrust jurisprudence if the conduct would not make economic sense for the defendant but for its elimination or softening of competition."[43]

2. <u>The Essential Facilities doctrine on life support.</u>

The *Trinko* decision was, if possible, even more hostile to the essential facilities doctrine than to the role of courts in judging unilateral conduct in regulated industries. As articulated by lower courts in the U.S. over many years, a refusal to deal may violate Section 2 when four elements are present: 1) the dominant firm controls an essential facility or research which serves its market; 2) competitors cannot practically duplicate that essential facility; 3) the competitor is denied use of or access to the facility; and 4) it is feasible for the dominant company to provide its competitors access to that facility.[44]

The plaintiff in *Trinko* argued that in failing to provide network access to its competitors on a non-discriminatory and reasonable basis, Verizon discouraged customers from doing business with competitive ILECs like AT&T. Plaintiff claimed that conduct amounted to an act of monopolization under the essential facilities doctrine, which required Verizon to share its facilities. Justice Scalia took little time in disposing of that theory. Because the 1996 Telecommunications Act mandated sharing of the facility, and because a federal agency had the power to compel sharing and regulate its scope, the third prong of the traditional test—denial of use—was not satisfied.[45] In effect, the Court told plaintiff: "*Pursue your regulatory remedies; whether or not sufficient, they almost always trump resort to the courts under the antitrust statutes. The agency has the primary expertise, process and responsibility for such claims. If it fails you, or errs, keep trying.*"

Trinko leaves serious doubt about the vitality of the essential facilities doctrine. Although the Court noted that "we find no need either to recognize or repudiate" the doctrine,[46] Justice Scalia characterized it with apparent disdain as "crafted by some lower courts."[47] The fact is that denial of essential facility as exclusionary conduct under Section 2 has never been explicitly adopted by the Supreme Court, despite opportunities to do so in *Aspen Skiing* and other cases. Even the 9th Circuit's *Kodak* decision, favoring plaintiff, declined to apply the essential facilities doctrine.[48]

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[43] *See* Brief for the United States and the Federal Trade Comm'n Supporting Petitioner (May 2003), *available at* http://www.ftc.gov/os/2003/05/trinkof.pdf.

[44] *See, e.g., MCI v. AT&T*, 708 F.2d 1081, 1132-1133 (7th Cir. 1983).

[45] *See Trinko*, 124 S. Ct. at 881.

[46] *Id*.

[47] *Id*. at 880.

[48] *See Kodak*, 125 F.3d at 1209.

3. Monopoly Leveraging.

There has long been a split in the circuit courts in the United States on the question of whether illegal monopolization under Section 2 can be made out under the "monopoly leveraging" theory. In *Berkey Photo, Inc. v. Eastman Kodak Co.*,[49] for example, the appellate court ruled that a firm could violate Section 2 "by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market." [50] Other circuits have flatly disagreed, insisting on all the elements of proof for either actual or attempted monopolization in each market.[51]

In footnote 4, the *Trinko* court ended this split of authority with decisiveness: "To the extent the [2nd Circuit] Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred."[52]

4. Trinko's lessons for regulated industries

Trinko's narrowed view of exclusionary conduct has special relevance for regulated industries like telecom. "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation."[53]

The Court made much of the regulatory scheme and remedies available to plaintiff in *Trinko*, decrying the intolerable administrative burdens for courts attempting to police conduct under the 1996 Act. Moreover, where a regulatory scheme is in place that addresses anticompetitive harms, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[54] Notwithstanding the 1996 Act's denial of antitrust immunity, which the *Trinko* court acknowledged, the decision evinced strong reluctance to enter where regulators dwell. "Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs."[55]

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[49] 603 F. 2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

[50] *Id*. at 275.

[51] *See, e.g., Alaska Airlines v. United Airlines*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992).

[52] *Trinko*, 125 S. Ct. at 883 n.4 (*citing Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993)).

[53] *Id.* at 881.

[54] *Id*. at 878, 881.

[55] *Id*. at 883.

This is not to say that *Trinko* should be read as limited to refusals to deal in the context of regulatory regimes. To the contrary: The tone and tint of the opinion suggests general hostility to the concept that courts should second-guess the reasons for unilateral refusals to deal—even by a monopolist—for fear of deterring innovation, investment and the urge to succeed. As stated by Justice Scalia, the Sherman Act "does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[56] These potentially broader implications of *Trinko*, the stridency of its articulation and the Court's reliance, in its "narrative," on facts found only in Verizon's appellate brief, have found vigorous critics in the year since.[57]

IV. U.S. CASES SINCE *TRINKO* INVOLVING REFUSALS TO DEAL.

A. Circuit Court Cases

Shortly after its decision in *Trinko*, the Supreme Court vacated several lower court decisions that had allowed Section 2 claims by competitors in similar circumstances. Appellate courts in the Ninth and Eleventh Circuits have since acted on remanded cases, with plaintiff in one retaining a viable antitrust claim.

(1) In *Metronet Services Corp. v. Qwest Corp.*,[58] the court reconsidered its earlier ruling that the plaintiff had stated a claim for denial of access to an essential facility and for unlawful refusal to deal in violation of Section 2. On remand following *Trinko*, the 9th Circuit held that plaintiff reseller of telecommunications services had failed to establish an essential facilities claim because a governmental authority had the power to compel access to defendant Qwest's facility.

Furthermore, Qwest was not liable for refusal to deal because it had not terminated a voluntary course of dealing with the plaintiff, and had been willing to sell at its retail price—which, unfortunately for it, plaintiff found unprofitable.[59] Following the reasoning in *Trinko*, the court determined that the state regulatory authority had been attentive to the plaintiff's difficulties, that the cost of antitrust intervention by the courts might be significant, and therefore that the lower district court ruling granting summary judgment to defendant Qwest should be affirmed.[60]

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[56] *Id.* at 883.

[57] *See, e.g.*, Andrew I. Gavil, "Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance," 72 ANTITRUST L.J. 3, 44-51 (2004).

[58] 383 F. 3d 1124 (9th Cir. 2004).

[59] *See id*. at 1133.

[60] *Id*.

(2) The 11th Circuit had a slightly different focus, and kept alive one of plaintiff's antitrust claims. In *Covad Communications v. Bell South Corp*.,[61] the court held on remand that the plaintiff could not state a cognizable claim for refusal to deal under Section 2 because "*Trinko* now effectively makes unilateral termination of a voluntary course of dealing a requirement" for such a claim.[62] *Trinko* also precluded an essential facilities claim, in light of the availability of a government agency with authority to compel network access. The court ruled that plaintiff did, however, adequately state a price squeezing claim "based on traditional antitrust doctrine" and "not specifically barred by *Trinko*".[63] The surviving claim was that Bell South was engaged in below-cost pricing to internet service providers and consumers, while charging higher prices intended to harm competitor Covad. The case has been remanded to the district court for further proceedings.

(3) *American Central Eastern Texas Gas Company v. Union Pacific Resources Group, Inc*. is an appellate case falling outside the telecommunications arena, where the 5th Circuit distinguished *Trinko* in confirming an arbitration award in favor of a natural gas company asserting monopolization claims against its processor.[64] The key distinctions for the *American Central* court were that here the defendant had a prior course of dealing with plaintiff, and there was no regulatory regime available to remedy plaintiff's anticompetitive actions. In *American Central*, unlike *Trinko*, the court was ruling based upon a full evidentiary record; it took note of the arbitrator's findings that defendant was a monopoly, had acted in bad faith, and had "no valid business justification for refusing to deal" with plaintiff.[65]

B. District Court Decisions.

(1) A mere two weeks after *Trinko*, (but before the appellate court reconsidered its ruling in *Covad)*, a district court within the 11th Circuit rejected all of plaintiff's antitrust claims in *Levine v. Bell South Corporation*.[66] Here BellSouth, the incumbent LEC, required purchasers of DSL service to also purchase local telephone service from the ILEC. Plaintiff asserted that this was both an illegal tie under Section 1 of the Sherman Act, and also

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[61] 374 F.3d 1044 (11th Cir. 2004).

[62] *Id*. at 1049. This seems to overstate the ruling. First, *Trinko* was merely distinguishing *Aspen Skiing* on this point. There the termination of a "presumably profitable" course of dealing was evidentiary of anticompetitive intent. Second, termination of a prior course of dealing was compelling in the Ninth Circuit's 1997 *Kodak* ruling in large part based on the 'installed base lock-in' problem faced by customers, who had made their decision to purchase Kodak's copiers in reliance upon the availability of competitive pricing later for service and parts. *See Kodak*, 125 F.3d at 1212.

[63] *Covad*, 374 F.3d at 1050.

[64] 93 Fed. Appx. 1 (5th Cir. 2004).

[65] *Id*. at 8.

[66] 302 F. Supp. 2d. 1358 (S.D. Fla. 2004).

that BellSouth's refusal to offer "naked" DSL service to consumers who used its competitor's local phone service was an act of monopolization in violation of Section 2.

Levine, taking an expansive view of *Trinko*, relied upon the concurring decision by Justice Stephens in ruling that a local telephone customer had no standing under the Clayton Act to assert these antitrust claims.[67] The court also gave great weight to *Trinko's* regulatory deference: Because the FCC had already considered and rejected the claimed competitive benefits of requiring telecoms to offer "naked" DSL service, no further antitrust scrutiny was warranted. The "regulatory structure was an effective steward of the antitrust function."[68]

The *Levine* court also dismissed (with prejudice) the class action claims of Section 2 monopolization based upon refusal to deal. There was neither the termination of a "voluntary (and thus presumably profitable) course of dealing," nor a refusal to provide the competitor its product for the retail price. Absent "prior conduct that sheds light upon Defendant's motivation in not providing DSL service over CLEC-leased lines," the refusal "does not fit within the limited exception recognized in *Aspen Skiing* as narrowly construed in *Trinko*."[69]

(2) The most recent *Trinko* offshoot in telecom[70] may also be the most expansive in granting ILECs 'quasi-immunity' from antitrust claims. *Greco v. Verizon Communications, Inc*.[71] also involved competitor Section 1 and Section 2 claims arising from Verizon's "bundling" of its broadband DSL internet service with its local telephone service, and refusal to provide DSL service on competitors' lines. Granting defendant's motion to dismiss all antitrust claims, Judge Wood focused almost entirely on the inability of courts, relative to the

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[67] *Id*. at 1366.

[68] *Id*. at 1371 (*citing Trinko*). The broad issue of telecom product bundling has become a topic of controversy and no little discussion. *See generally* Mark Del Bianco, "Antitrust Issues Raised by Product Bundling in Communications Markets," THE ANTITRUST SOURCE 1 (July 2004); and "Product Bundling in Communications Markets," ABA Antitrust Law Section Brown Bag Program, published in THE ANTITRUST SOURCE 1 (November 2004).

[69] 302 F. Supp. 2d. at 1371-72.

[70] A claim arising outside telecom fell to the *Trinko* sword in *New York Mercantile Exchange Inc. v. Intercontinental Exchange Inc*., 323 F. Supp. 2d 559 (S.D.N.Y. 2004). Plaintiff was a commodity futures exchange that faced antitrust counterclaims by its internet-based competitor, which had asserted monopoly maintenance and monopoly leveraging. Plaintiff's motion to dismiss these counterclaims was granted, based upon *Trinko*, because there was a federal agency with the effective power both to compel the sharing of the mercantile exchange's settlement pricing and to regulate the scope and terms of that sharing. *Id*. at 568. Similarly, *Trinko* left no room for a Section 2 claim within the "limited exception" of *Aspen Skiing*. Because there was no history of cooperation here, there was no inference of an anticompetitive purpose in refusing to deal. Further, there was "no indication" that defendant was "flouting consumer demand and foregoing short term profits by refusing to cooperate" with plaintiff. Instead, defendant had proffered a "legitimate business justification" for its refusal to deal: preventing its competitor from free riding on its settlement prices. *Id*. at 571.

[71] 2005 WL 659200 (S.D.N.Y. April 4, 2005).

FCC, to assess bundled service offerings or to fashion relief—seemingly regardless of whether plaintiffs' antitrust claims have merit.

Characterizing *Trinko* and the case at bar as illustrations of when a court should "expand the narrow category of cases that require a monopolist to sell to competitors,"[72] Judge Wood held that plaintiff both lacked standing and had failed to state a claim. Keys to the ruling: (a) skewed investment incentives by judicial intervention might outweigh the antitrust benefit; (b) the imprudence of forcing courts to act a "central planners" in identifying and remedying the alleged wrongs; and (c) the difficulty for court engaging in "continuing supervision of a highly detailed decree."[73] Referring to "pervasive FCC oversight" in this industry,[74] the court also took note that the FCC and state public utility commissions had "devoted enormous resources and countless hours" to assessing bundling and network access issues.[75]

These factors (more than any rigorous antitrust analysis) led the *Greco* court to conclude that *Trinko* should be applied not just to refusals to deal with competitors, but also to ties or refusals to deal with customers of a competitor. Neither customers nor competitors have standing; neither can state a cognizable claim.[76]

(3) Most courts that have been unwilling to read or apply *Trinko* expansively have ruled in contexts outside the telecommunications industry—indeed, in markets not characterized by regulation of any sort. An example is *Nobody in Particular Presents, Inc. v. Clear Channel Communications*, Inc.[77] Denying defendants' summary judgment motion, the court upheld plaintiff's Section 2 claim, as well as its reliance on the essential facilities doctrine.

Plaintiffs were rock concert promoters who sued the owner of radio stations and a concert promoter because the owner conditioned the radio stations' grant of air time and free promotional assistance to those artists who had selected the radio station's owner-promoter when giving live performances in the area. The court distinguished *Trinko*, noting that the defendants had provided advertising and concert promotional support in the past.[78] Moreover, the evidence

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[72] *Id*. at *3.

[73] *Id.*

[74] *Id*. at *5.

[75] *Id*. at *2.

[76] Perhaps bowing to consumer pressure, Verizon announced two weeks after *Greco* that some of its customers in the Northeastern United States could drop Verizon's local telephone service and still keep the DSL service, and that the program would eventually be rolled out to all customers. *See* "Verizon Offering 'Naked DSL' in Northeast," ASSOCIATED PRESS (Apr. 18, 2005).

[77] 311 F. Supp. 2d 1048 (D. Colo. 2004).

[78] *Id*. at 1113.

suggested that defendant was now sacrificing short-term gains by refusing this support, in hopes of reaping long-term monopolistic profits. "Clearly, the conduct alleged in this case bears striking resemblance to the refusal to deal in *Aspen Skiing*, . . ."[79] By contrast to *Trinko*, an essential facilities claim was adequately stated here because there was no government agency compelling the defendant to allow access to its airwaves. Consequently, the defendant's behavior did "fall into the limited category of cases where refusal to deal implicates the Sherman Act."[80]

(4) Another district court distinguished *Trinko* in *A.I.B. Express, Inc. v. Fedex Corp., et al.*[81] There, facing a motion to dismiss, the court ruled that plaintiff had pled all the elements of a cognizable attempted monopoly claim where there was an ongoing course of dealing that was highly profitable to defendant at the time it terminated the relationship. Consequently, the plaintiff's allegations "fall within the boundary set by *Aspen Skiing* for Section 2 liability. . . ."[82]

(5) One telecom case that does buck the *Trinko* trend is *Z-Tel Communications, Inc. v. SBC Communications, Inc*.[83] There the district court declined to follow its brother district court in *Levine*, rejecting application of *Trinko* to bar tying claims brought under Section 1 of the Sherman Act.

Z-Tel, like *Levine*, involved a CLEC suit against the ILEC for the manner in which it provided access to facilities as mandated by the 1996 Telecommunications Act. Plaintiff's monopolization claim based on the essential facilities doctrine was dismissed pursuant to *Trinko*,[84] but other antitrust claims survived. In particular, plaintiff successfully stated a Section 1 tying claim based upon the ILEC's refusal to provide DSL service to plaintiff's customers. Because *Trinko* was a Section 2 case with no mention of or applicability to Section 1 tying claims, the court "declines to read *Trinko* so as to lessen antitrust liability in contexts other than those addressed in that opinion."[85]

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79 *Id*.

80 *Id*. at 1114.

81 358 F. Supp. 2d 239 (S.D.N.Y. 2004).

82 *Id*. at 251.

83 331 F. Supp. 2d 513 (E.D. Tex 2004).

84 *Id.* at 531.

85 *Id*. at 547.

V. CONCLUSION

There can be little quibble with the proposition that, after *Trinko*, even dominant companies—and in particular those in regulated markets such as telecommunications—have a stronger hand in deciding when and how to deal with or assist their competitors. While certainly subject to the strictures and remedies of their regulatory environment, the telecoms' antitrust exposure under the Sherman Act has clearly been reduced by the *Trinko* decision and cases since.

Faced with denial of access or even deliberately degraded access, competitors may be restricted to their regulatory remedies at the FCC. At a minimum, competitors' antitrust claims must show anticompetitive intent evidenced by either or both (1) a voluntary prior course of dealing and (2) profit sacrifice, or other conduct making no economic sense beyond harm to competition. Even then some courts, shivering in the shadow of *Trinko's* cautions, may decline to entertain Sherman Act claims that the FCC is better suited by time and temperament to handle. Finally, neither the essential facilities doctrine nor monopoly leveraging will short-cut plaintiffs' need to plead and establish each element of monopolization under Section 2.