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Antitrust and Competition Law Update

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Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP:

The Supreme Court Reins in Plaintiffs' Attempts
to Use Section 2 to Force Companies to Assist Rivals

Last week, the U.S. Supreme Court issued an important opinion concerning Section 2 of the Sherman Act, which prohibits monopolization and attempted monopolization. The opinion, written by Justice Scalia, limits the circumstances under which antitrust law will compel companies to assist their rivals.

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,¹ arose in the context of the 1996 Telecommunications Act and related regulations, administrative interpretations, and agreements. These required incumbent local exchange carriers (LECs) to provide certain interconnection services and facilities to rivals at cost-based rates. In 1999, the Federal Communications Commission and the New York Public Service Commission (PSC) investigated whether Verizon, the incumbent LEC in New York City, discriminated against its rivals in fulfilling orders for certain of these required services and facilities. These investigations culminated with Verizon agreeing to a consent decree with the FCC and the New York PSC entering a series of orders concerning Verizon's obligations.

Trinko, a New York City customer of AT&T, filed a lawsuit immediately after the FCC consent

decree was entered. Trinko claimed that Verizon violated Section 2 of the Sherman Act by allegedly carrying out a scheme to discourage consumers from becoming or remaining customers of its competitors, including AT&T, "thus impeding the competit[ors'] ability to enter or compete in the market for local telephone service." The complaint identified only one action by Verizon that was part of the alleged anticompetitive scheme: the failure to properly provide interconnection services, which was the subject of the FCC consent decree and the New York PSC orders.

The Supreme Court held that Trinko had not stated a claim under Section 2.² First, the Court observed that, although the 1996 Telecommunications Act contained an antitrust "savings clause," it provided only that the Act preserved claims that satisfy established antitrust standards and thus did not alter otherwise applicable antitrust principles. Consequently, even though the 1996 Telecommunications Act required Verizon to provide interconnection services, it did not create new antitrust duties beyond those that otherwise existed.

Second, the Court explained that the antitrust laws only rarely require a company to cooperate

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with its rivals. Such a requirement could lessen incentives for investment by both the monopolist and its rivals, “facilitate the supreme evil of antitrust: collusion,” and require antitrust courts to act as central planners. The Court emphasized its previous holdings that antitrust law does not condemn the exercise of monopoly power, standing alone:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth. 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*.

Third, the Court explained that Trinko’s claims did not fall within any previously recognized exception to the general rule that the antitrust laws do not require a company to deal with its rivals. Trinko relied heavily on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). *Aspen* involved a firm that ended a profitable arrangement with a rival jointly to offer multi-mountain ski ticket packages, and refused even to sell lift tickets for its ski areas to its rival at retail prices, so that the rival could assemble ticket packages itself. In those circumstances, the Court held that a jury could hold the firm liable under Section 2 because its refusal to deal with its rival “suggested a willingness to forsake short-term profits to achieve an anticompetitive end” -- *i.e.*, the firm would recoup its lost profits by charging monopoly prices after eliminating its rival. Trinko, by contrast, failed to allege that Verizon had ceased a profitable course of dealing

with its competitors, or even that it would ever have cooperated with its competitors absent statutory compulsion.

The Court declined to add a new exception to encompass Trinko’s allegations, stating that *Aspen* “is at or near the boundary of §2 liability.” The Court emphasized that the 1996 Telecommunications Act created a regulatory scheme to deter and remedy the anticompetitive harm Trinko alleged. Thus, the residual role for antitrust enforcement to play is small compared to the costs of applying the antitrust laws, which would include the possibility of wrongfully deterring procompetitive conduct, the probability of interminable litigation, and the difficulty that a court would face in supervising the day-to-day issues inherent in compelled cooperation among rival firms.³

Trinko is a major victory for incumbent LECs, whose potential antitrust liability under Section 2 for failures to fulfill obligations under the 1996 Telecommunications Act has been greatly circumscribed. More generally, the Court’s decision signals a cautionary note to plaintiffs hoping to use the antitrust laws to force companies to help current or potential rivals to compete.

If you would like more information about the *Trinko* case or any other issue of U.S. or foreign antitrust or competition law, please contact us at: (202) 663-6000.

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¹ Wilmer Cutler & Pickering represented an *amicus curie* before the Court.

² Three Justices concurred but would reverse the judgment of the Court of Appeals solely on the ground that Trinko lacked standing to bring the claim under the antitrust laws.

³ The Court also stated that, because the 1996 Telecommunications Act, itself, gives rivals access to Verizon’s network, the case presented no opportunity to address the “essential facilities” doctrine that some lower courts have recognized.