

Correct Answers to Large Questions about *Verizon v. Trinko*

Robert A. Skitol

Perhaps the title of this article is a bit presumptuous, but I do presume to have irrefutable answers to questions that are now keeping the antitrust world awake at night about the true meaning of the Supreme Court's January 2004 opinion in *Verizon v. Trinko*.¹ These answers became all the more urgent to share in the wake of Assistant Attorney General Hewitt Pate's March 2004 declaration that "unilateral competitive conduct [is] the most ambiguous and controversial area of antitrust enforcement."² Mr. Pate thereby echoed Einer Elhauge's recent (pre-*Trinko*) charge that "for decades monopolization doctrine has been governed by standards that are not just vague but vacuous."³ Did *Trinko* help? Not too much according to Eleanor Fox, who has called the decision "a child in a china shop of Section 2."⁴ So let's assess the damage it brought, pick up the pieces, and move on.

The Decision in a Nutshell

Trinko was a consumer class action on behalf of New York City customers of AT&T in its capacity as a new-entrant local phone service provider competing with Verizon, the incumbent monopoly local service provider. The thrust of the complaint was that Verizon refused to provide AT&T with access to its systems and support operations in a reasonable manner, thereby impairing AT&T's ability to provide competitive service. Plaintiffs alleged that this refusal violated Verizon's obligations under the Telecommunications Act of 1996, and thereby also amounted to anticompetitive and exclusionary conduct cognizable under Section 2 of the Sherman Act.

The district court granted Verizon's Rule 12(b) motion to dismiss, relying on the authority of *Goldwasser v. Ameritech*,⁵ in which the Seventh Circuit held that similar allegations against another monopoly service provider failed to state a Section 2 claim. The Second Circuit reversed, and reinstated the antitrust claim, suggesting the allegations could establish Section 2 liability under either the essential facilities doctrine or the monopoly leveraging doctrine. The Supreme Court reversed the Second Circuit, thereby bringing the case to an end.

Justice Scalia's opinion on behalf of six members of the Court began by explaining that the Telecom Act neither foreclosed nor created new antitrust liabilities in light of the Act's savings

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¹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872 (2004), *rev'g* 305 F.3d 89 (2d Cir. 2002).

² U.S. Dep't of Justice, Antitrust Div., Press Release, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on The EC's Decision in its Microsoft Investigation (Mar. 24, 2004), http://www.usdoj.gov/atr/public/press_releases/2004/202976.htm.

³ Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255 (2003).

⁴ Eleanor Fox, *The Trouble with Trinko 4* (Paper Prepared for ABA Section of Antitrust Law Spring Meeting Apr. 1, 2004).

⁵ 222 F.3d 390 (7th Cir. 2000).

clause to the effect that nothing therein “shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”⁶

The Court then turned to the question whether Verizon’s alleged refusal to deal with its rival on reasonable terms “violates preexisting antitrust standards.”⁷ The starting point in the analysis of that issue was a sweeping restatement of the *Colgate* holding that the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal.”⁸ The Court acknowledged that this right is not unqualified, but emphasized that “[w]e have been very cautious in recognizing” exceptions.⁹ *Aspen Skiing*¹⁰ was discussed at length as an exception involving termination of a voluntary and “presumably profitable” course of dealing, a case the Court called “at or near the outer boundary of Section 2 liability.”¹¹ In contrast, Verizon never voluntarily assisted its rivals and would not have done so absent the compulsion of the Telecom Act. The dispositive difference was that Aspen’s conduct “suggested a willingness to forsake short-term profits to achieve an anticompetitive end”; no such factor was present in the Verizon situation.¹²

On that ground, the Court then held that “Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim . . .”¹³ And this conclusion, the Court continued, “would be unchanged even if we considered to be established law the ‘essential facilities’ doctrine crafted by some lower courts . . .”¹⁴ The “indispensable requirement” under that doctrine is unavailability of access to an essential facility, an element missing in this case in light of the Telecom Act’s imposition of access obligations.¹⁵

The Court went on to explain why it did not believe traditional antitrust principles justified “adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.”¹⁶ The Court emphasized the presence of an extensive “regulatory structure designed to deter and remedy anticompetitive harm,” leading to a judgment that the “slight benefits” of antitrust intervention are outweighed by the costs and risks of any court’s attempted enforcement of “detailed sharing obligations.”¹⁷ In a footnote at that point, the Court then disposed of the Second Circuit’s suggestion that plaintiffs could rely on a monopoly leveraging theory: “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” (citing *Spectrum Sports*).¹⁸

⁶ 47 U.S.C. § 152.

⁷ *Trinko*, 124 S. Ct. at 878.

⁸ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

⁹ *Trinko*, 124 S. Ct. at 879.

¹⁰ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

¹¹ *Trinko*, 124 S. Ct. at 879.

¹² *Id.* at 880.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 881.

¹⁶ *Id.*

¹⁷ *Id.* at 882–83.

¹⁸ *Id.* at 883 n.4 (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993)).

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There was no dissent. Justice Stevens, joined by Justices Souter and Thomas, wrote separately to concur in the judgment on the ground that the complaint should have been dismissed for plaintiffs' lack of standing, without reaching the merits of the allegations.¹⁹ In their view, plaintiffs' alleged injury was "purely derivative" of the alleged injury to AT&T, precluding standing under *Associated General Contractors*.²⁰

Burning Questions

1. Is short-term profit sacrifice now the definitive test for when a refusal to deal—and other kinds of unilateral conduct—can be the basis for a Section 2 claim? Answer: Yes and No.

On the one hand, Justice Scalia did sharply distinguish between *Aspen Ski* liability and *Verizon* non-liability on the ground that profit sacrifice was present in the former but not in the latter situation. And he provided several reasons why, absent that factor, it would be a bad idea to make a monopolist's refusal to share or cooperate with rivals an antitrust offense: lessening of investment incentives, requiring courts "to act as central planners," facilitating collusion.²¹ If one now interprets the opinion as effectively limiting any departures from the right to refuse to deal with rivals to profit sacrifice scenarios, the result will be a felicitous convergence between the definition of exclusionary or predatory pricing conduct and the definition of exclusionary or predatory nonprice conduct.²² One might then easily apply the same idea to cases involving conduct that combines both price and nonprice elements, such as the bundled rebates and discounts to induce exclusivity at issue in *LePage's v. 3M*.²³ absent a showing of profit sacrifice, there are good reasons to allow the conduct and so there should be no liability. *Trinko* might thus mean more generally that a monopolist's showing that its conduct maximized short-term profits is a per se valid business justification and will thus always be a dispositive defense to any Section 2 claim.

On the other hand, as Professor Elhauge argues, profit sacrifice is both underinclusive and overinclusive as a standard of general applicability.²⁴ There are practices like U.S. Tobacco's "dirty tricks" to remove competitors' products from store shelves²⁵ and Microsoft's "deception" of Java application developers²⁶ that entail no apparent profit sacrifice but can bring about exclusionary effects without any redeeming justification and without any downside to judicial intervention. Conversely, there are practices, such as high-cost and high-risk innovation initiatives, that may well necessitate profit sacrifice over a significant period and that may well have adverse effects on all rivals but that the law should not condemn or chill. Surely, even Justice Scalia would reject any notion that "one size fits all" for antitrust treatment of unilateral conduct generally.

The long-running search for "unifying principles" will continue but remain as elusive as ever. Thus, competing or at least complementary tests will continue to appeal to the courts and enforcement agencies alike: DOJ/FTC's focus on whether the conduct would not make business

¹⁹ *Id.* at 884–85.

²⁰ *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529–35 (1983).

²¹ *Trinko*, 124 S. Ct. at 879.

²² *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

²³ *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (petition for cert. pending).

²⁴ Elhauge, *supra* note 3, at 268–94.

²⁵ *See Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

²⁶ *See United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001).

sense but for its exclusionary effect;²⁷ Judge Posner's focus on whether the conduct excludes an equally efficient rival;²⁸ the Krattenmaker-Salop concept of "raising rivals' costs";²⁹ Professor Elhauge's standard of conduct that impairs a rival's efficiency without contributing to the monopolist's efficiency;³⁰ the D.C. Circuit's rule of reason balancing approach;³¹ other tests destined to be either new wine in old bottles or old wine in new bottles.

2. Has the Court now newly elevated motive or intent as a central element in Section 2 law in contrast to lower courts' recent preference for a focus on effects in Section 2 cases? Answer: Yes and No.

On the one hand, the Court did emphasize motive/intent differences between *Aspen Ski* and the Verizon facts: *Aspen Ski's* termination of a voluntary and "presumably profitable" course of dealing "suggested a willingness to forsake short-term profits to achieve an anticompetitive end" and "a distinctly anticompetitive bent";³² Verizon had never voluntarily engaged in any such course of dealing so its prior conduct "sheds no light upon the motivation of its refusal to deal."³³ One Fifth Circuit panel has already applied *Trinko* in this light, holding its key lesson to be that "courts must be careful in determining that a business's refusal to deal is based on anticompetitive motives versus a valid business strategy."³⁴ A related message would seem to be that discontinuance of an existing relationship is now considerably more vulnerable to a Section 2 claim than is a refusal to initiate a relationship of any kind: an inference of anticompetitive intent will or may often be at least plausible in the former but not in the latter situation. Indeed, plaintiffs in discontinuance situations should now be able comfortably to survive Rule 12(b) motions and move into serious discovery (unlike the plaintiffs in the *Trinko* case itself) as long as they can adequately allege something in the nature of a deliberate profit sacrifice and a motive to recoup through later elimination of competition. Indeed, even in cases that involve longtime refusals, rather than discontinuance or changed policies, the opinion can be read as requiring some inquiry into intent, as exemplified by the DOJ's use of it in its recent brief on appeal from dismissal of its Section 2 case against Dentsply International.³⁵

On the other hand, it is inconceivable that Justice Scalia and his colleagues meant to diminish in any manner the fundamental place of effects evidence in Section 2 cases. As the D.C. Circuit has said, the overall focus is on "the effect of [the challenged] conduct, not upon the intent behind it"; the monopolist's intent "is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct."³⁶ One clue to what *Trinko* may have done to that idea is its surely deliberate omission of any discussion of or even citation to the Court's *Kodak* decision,³⁷

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²⁷ See Brief for the United States and the Federal Trade Comm'n as Amici Curiae Supporting Petitioner in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, S. Ct. Docket 02-682 (May 30, 2003).

²⁸ See RICHARD POSNER, ANTITRUST LAW 193-256 (2d ed. 2001).

²⁹ See Thomas Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

³⁰ See Elhauge, *supra* note 3.

³¹ See *Microsoft Corp.*, 253 F.3d at 58-59.

³² *Trinko*, 124 S. Ct. at 880.

³³ *Id.*

³⁴ Am. Cent. E. Texas Gas Co. v. Union Pac. Resources Group Inc., 2004-1 Trade Cas. (CCH) ¶ 74,271, at 98, 227 (5th Cir. 2004).

³⁵ Brief for the United States in United States v. Dentsply Int'l, Inc., 3d Cir. Docket 03-4097, at 38-39 (Jan. 16, 2004), available at <http://www.usdoj.gov/atr/cases/f202100/202141.htm>.

³⁶ *Microsoft Corp.*, 253 F.3d at 59.

³⁷ *Eastman Kodak Co. v. Image Technical Servs., Inc.* 504 U.S. 451 (1992).

a refusal-to-deal precedent much more recent than *Aspen Ski* and one in which Scalia sharply dissented. *Kodak* suggests that a refusal to deal with exclusionary effect is unlawful unless defendant then proves “valid business reasons” that were bona fide rather than “pretextual” explanations for the actions at issue.³⁸ *Trinko* can be read as reversing that burden: plaintiffs do not allege or establish a Section 2 claim unless they show anticompetitive intent and thereby also affirmatively eliminate the possibility of a meaningful efficiency or other valid alternative explanation. And the Court suggests that this will be virtually impossible in refusal-to-initiate situations. As declared at the end of the Court’s opinion, 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.”³⁹ The more general bottom line may be that the Court has now made proof of bad intent an additional significant burden on plaintiffs rather than one diminishing the longstanding significant burden of providing anticompetitive effect.

3. Are the essential facilities and monopoly leveraging doctrines still viable grounds for Section 2 claims? Answer: No and Yes.

On the one hand, the Court was not subtle about its disdain for both doctrines. While expressly declining either to recognize or to repudiate the essential facilities doctrine, the Court cited approvingly to Professor Areeda’s frontal attack on it⁴⁰ and offered three general policy reasons why monopolists in control of “infrastructure” assets should not be required to share them with rivals: any such requirement (1) “may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities,” (2) would require courts to regulate prices and other access terms, and (3) “may facilitate the supreme evil of antitrust,” namely collusion.⁴¹ The monopoly leveraging doctrine was given short shrift: to the extent the lower court relied on it but “dispensed with a requirement that there be a ‘dangerous probability of success’ in monopolizing a second market, it erred”; and, “[i]n any event, leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.”⁴² Certainly, therefore, common invocations of these doctrines over the past two decades are no longer sufficient to state a Section 2 claim: mere denial of access to an essential facility, even if access is feasible and rivals have no alternative way to compete, is not enough; mere leveraging of monopoly power in one market to gain competitive advantage in another market is not enough.

On the other hand, more robust versions of both doctrines survive and can be grounds for future Section 2 cases consistent with the thrust of Justice Scalia’s opinion. His specific reason for rejecting the essential facilities argument on the *Trinko* facts was that a necessary element—unavailability of access to essential facilities—was not met since the applicable telecom regulatory regime ensured that access.⁴³ In markets without that regulatory protection, a monopolist’s discontinuance of rivals’ access to facilities required for their viability in circumstances supporting an inference of anticompetitive intent for the discontinuance should still be a sound basis for Section 2 liability. Similarly, nothing in the above-quoted monopoly leveraging footnote precludes

³⁸ *Id.* at 483–86.

³⁹ *Trinko*, 124 S. Ct. at 883.

⁴⁰ *Id.* at 880–81 (citing Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989)).

⁴¹ *Trinko*, 124 S. Ct. at 879.

⁴² *Id.* at 883 n.4.

⁴³ *Id.* at 881.

a claim based on various “exclusionary” uses of monopoly power in one market to undercut competitors in another market if it threatens actual monopolization over that other market.

More fundamentally, and as recent months have dramatically shown, neither the U.S. Supreme Court nor the U.S. antitrust authorities speak for the whole of antitrust law with regard to these doctrines in today’s global economy. The European Commission’s March 2004 decision in its *Microsoft* proceeding appears to rest in large part upon variations of both the essential facilities and monopoly leveraging concepts as developed under Article 82 with its focus on “abuse of a dominant position.”⁴⁴ Relatedly, at the risk of igniting a new federalism war within the United States, I would suggest that neither state courts nor state attorneys general interpreting and applying state law counterparts to Section 2 are foreclosed from continued use and development of these doctrines in one form or another in future state antitrust litigation—even in ways that may not be entirely consistent with the fate of these concepts in the hand of courts and enforcers more clearly bound by the Supreme Court’s Sherman Act decisions.⁴⁵

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There are other questions that *Trinko* raises and that also warrant “Yes and No” or “No and Yes” answers. I conclude for now with this list for other practitioners to address over the months ahead:

- Does *Trinko* have a bearing on the conflict between the Federal and Ninth Circuits on standards applicable to the refusal to share—or refusal to continue sharing—intellectual property with other aftermarket or other complementary market rivals?⁴⁶ Does the Court’s focus on investment incentives support the Federal Circuit approach while the focus on intent or motive supports the Ninth Circuit approach?
- Does *Trinko* demand fresh consideration of the rationality of any per se rule for tying conduct? Is there a remaining principled basis for different outcomes regarding (1) a unilateral refusal to sell product A separately from product B (even when there is a “leveraging” aspect to it) as tested under Section 2 and (2) “conditioning” the sale of one on purchase of another when artificially deemed to entail “concerted” action subject to Section 1?⁴⁷
- Do Justice Scalia’s extensive remarks about regulatory agencies efficiently serving the antitrust function and about costs versus benefits of antitrust law’s applicability to markets subject to such regulation invite lower courts generally to find firms in these kinds of markets no longer subject to large parts of Section 2 law?
- Will Justice Stevens’ concurring opinion on the *Trinko* plaintiffs’ lack of standing become a newly accepted general basis for dismissing Section 2 claims by customers of mistreated rivals (as exemplified already by one post-*Trinko* district court)?⁴⁸
- Would Senator Sherman and a majority of his colleagues in 1890 have approved of the whole thrust of Justice Scalia’s opinion as consistent with their “original intent”? Would the Standard Oil Trust still be with us to this day if *Trinko* had been the law of the land in 1911?

⁴⁴ Case COMP/C-3/37.792 Microsoft, <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf>.

⁴⁵ See generally ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 803–34 (5th ed. 2002).

⁴⁶ *In Re Indep. Serv. Org. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000); *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997).

⁴⁷ See Denise Diaz & Robert Skitol, *Vertical Law Reform: Fertile Ground for a New Antitrust Modernization Commission*, ANTITRUST, Fall 2003, at 61–63.

⁴⁸ *Levine v. Bellsouth Corp.*, 302 F. Supp. 2d 1358 (S.D. Fla. 2004).

Any stab at answering the questions within that last bullet must take account of Justice Scalia's clear celebration of the monopolist's right to monopoly rents: charging monopoly prices "is an important element of the free-market system" and 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."⁴⁹ While that statement reflects the conventional wisdom of our day, it is far cry from the first three decades of the Sherman Act's history when monopolists were called Robber Barons and what to do about them was a loud issue in a half dozen presidential elections.⁵⁰ ●

⁴⁹ *Trinko*, 124 S. Ct. at 879.

⁵⁰ See Robert Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239, 240–42 (1999).