# ***TRINKO* AND BEYOND**

## I. Introduction

In *Verizon Communications, Inc. v. Trinko* ("*Trinko*"),[1] the Supreme Court made one of its relatively infrequent forays into the substantive law governing liability under Section 2. Although Verizon, and federal enforcers, urged the Court to use the case to announce a broadly applicable doctrine protecting the opportunities of a monopolist to compete, the Court's decision did not accept that invitation. Consequently, although *Trinko* points in a direction, it does not offer any particular analytic framework to resolve Section 2 issues.

This article evaluates first, the impact of *Trinko* in telecommunications cases as well as in cases involving other regulated industries. Next, we examine whether *Trinko* announced a new pleading standard in refusal to deal cases, which requires plaintiffs to allege that a monopolist abandoned a prior and profitable course of dealing. We then go on to explore the Court's monopoly leveraging analysis and what it portends for future Section 2 cases. Finally, the article examines Justice Stevens' concurring opinion and assesses the traction of his standing analysis in the lower courts.

## II. The *Trinko* Decision

*Trinko* arose in the backdrop of the Telecommunications Act of 1996 ("Telecommunications Act"),[2] which requires Incumbent Local Exchange Carriers ("ILECs") to share their network elements in a non-discriminatory fashion with competing local exchange carriers ("CLECs"), such as AT&T.[3] Briefly, under Sections 271(c) and (d) of the Telecommunications Act, for an ILEC – here, Verizon (formerly Bell Atlantic) – to secure authority to sell long distance telephone service, it also

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1 540 U.S. 398 (2004).

2 47 U.S.C. §§ 151 *et seq.*

3 Since the time of the events underlying *Trinko*, AT&T has merged with SBC, an ILEC.

must provide CLECs non-discriminatory access to certain local services. Consequently, CLECs were able to contract for access to Verizon's local telecommunications lines in Verizon's service area, such as New York State, where it was the ILEC.

CLECs complained to the Federal Communications Commission ("FCC") and New York State Public Service Commission ("NY PSC") about Verizon's discriminatory practices. Following investigations, the FCC and NY PSC imposed fines, remedial action and reporting requirements on Verizon.[4] Shortly thereafter, The Law Offices of Curtis V. Trinko, LLP ("Trinko"), a commercial telephone subscriber of AT&T, filed a class action lawsuit against Verizon in the Southern District of New York.[5] Trinko alleged claims under the Telecommunications Act and the Sherman Act,[6] as well as state claims for tortious interference with contract.

Trinko alleged that Verizon filled its own customers' orders before filling those of CLEC customers, and in some cases, did not fill CLEC customer orders at all. Verizon's alleged motivation for this conduct was to harm CLECs, and to induce their customers to switch to Verizon's service.[7] Trinko further alleged that by favoring its own customers and discriminating against the CLECs' customers, Verizon failed to discharge its obligations under the Telecommunications Act, thereby violating the prohibitions of Section 2 of the Sherman Act.[8]

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[4] *Trinko*, 540 U.S. at 403-04.

[5] In an unusual twist, on remand, the district court found that Trinko was not a customer of AT&T during the time in which the alleged harm occurred. *Law Offices of Curtis V. Trinko v. Verizon Comm.., Inc.*, 2006 WL 2792690, *8 (S.D.N.Y. Sept. 27, 2006).

[6] 15 U.S.C. §1, *et seq.*

[7] *Trinko,* 540 U.S. at 404-05.

[8] *Trinko* alleged that the relevant market comprised those areas where Bell Atlantic n/k/a Verizon was the ILEC, and thus possessed monopoly power.

Verizon moved to dismiss, and the district court granted the motion.[9] The Court held that Trinko could not allege any "willful acquisition or maintenance" of monopoly power based on Verizon's refusal to deal or cooperate with CLECs.

On appeal to the Court of Appeals for the Second Circuit, a unanimous panel reversed the dismissal of Trinko's Sherman Act Section 2 claim.[10] A divided panel also affirmed the dismissal of Trinko's Section 251 claim under the Telecommunications Act.[11] The Second Circuit held that Trinko's refusal to deal claims were legally sufficient under Section 2's essential facilities and monopoly leveraging doctrines, independent of the alleged Telecommunications Act violations.[12] The Supreme Court granted *certiorari*, limited to reviewing the Court of Appeals' ruling that Trinko's Section 2 claim was legally sufficient.[13]

The Supreme Court reversed, holding that Trinko failed to state a claim under Section 2 for either monopolization or attempted monopolization. Justice Scalia authored the majority opinion, which Chief Justice Rehnquist and Justices O'Connor, Kennedy, Ginsburg and Beyer joined.[14]

### A. <u>The Antitrust Savings Clause in the Telecommunications Act</u>

The Supreme Court first addressed Trinko's antitrust claims that stemmed from violations of the anti-discrimination provisions of the Telecommunications Act. For those claims, Trinko relied on the antitrust "savings clause" in the Telecommunications Act. Section 152 provides that "nothing in this Act or the amendments made by this Act . . . shall be construed to modify, impair,

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[9] *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 123 F. Supp. 2d 738 (S.D.N.Y. 2000).

[10] *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002).

[11] Judge Sack issued a separate opinion concurring with the majority's disposition of the claims alleged under Sherman Act and Section 202 of the Telecommunications Act, but dissenting as to its treatment of Section 251of the Act. *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 309 F.3d 71 (2d Cir. 2002) (Sach, J, concurring and dissenting).

[12] *Id.*

[13] Specifically, the Court granted review of the following issue: "[d]id the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims[.]" *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 538 U.S. 905 (2003).

[14] *Trinko*, 540 U.S. at 398-416.

or supersede the applicability of any of the antitrust laws."[15] The Court disagreed with the notion that, under the savings clause, a Telecommunications Act violation necessarily gives rise to an antitrust claim. As Justice Scalia wrote, "[t]hat Congress created these duties . . . does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim."[16] According to the majority, Trinko's claim was cognizable only if it offended antitrust principles that pre-existed the Telecommunications Act.[17]

### B. Lack of "Traditional" Monopolistic Practices

Having held that a violation of the Telecommunications Act did not, in itself, sustain a Section 2 claim, the Court examined whether Verizon's conduct offended "traditional" antitrust principles. Trinko argued that Verizon's conduct was actionable under Section 2 as an unlawful refusal to deal with competitors - here, AT&T and other CLECs. The Court identified its prior decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[18] as the leading decision addressing this issue. In *Aspen Skiing*, the defendant owned three out of the four ski mountains. Defendant entered into a business relationship with plaintiff, owner of the fourth ski mountain, under which the two owners offered all-area ski passes. Defendant ultimately terminated this relationship and refused to provide plaintiff with any access to its ski mountains, even though plaintiff offered to purchase tickets at retail prices. Although *Aspen Skiing* sustained a jury verdict in favor of a Section 2 claim, the *Trinko* Court declined to apply the case.[19]

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[15] *Id.* at 399 (citing 47 U.S.C. § 152).

[16] *Id.* at 406.

[17] *Id.* The Court's subsequent statements concerning the "difficult[ies]" the federal courts would encounter marking the boundaries of new antitrust liability for violations of Section 251(c) provide additional insight to the Court's analysis. *See id.* at 414 ("Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations.").

[18] 472 U.S. 585 (1985).

[19] *Trinko*, 540 U.S. at 399.

Justice Scalia began his analysis by reiterating "[t]he high value we have placed on the right to refuse to deal with other firms,"[20] and the Court's "cautious" approach in departing from that principle.[21] The Court stressed that requiring competitors to deal would dull incentives to invest and innovate both for the monopolist and for competitors.[22] Characterizing *Aspen Skiing* as "at or near the outer boundary of § 2 liability[,]"[23] the Court assessed the sufficiency of Trinko's allegations under the "limited exception" recognized in *Aspen Skiing*. The facts in *Aspen Skiing* included: (1) a prior course of dealing between the monopolist and the competitor, (2) to which the monopolist voluntarily agreed, and (3) from which it presumably made a profit doing business.[24] Trinko did not allege similar facts with respect to Verizon and AT&T; nor did it allege that Verizon would have provided access to AT&T or other CLECs absent the Telecommunication Act's mandate to do so.[25] The majority held that the absence of these specific facts were fatal to Trinko's Section 2 claim.

The Court also stressed that the FCC's ability to withhold access to the "lucrative"[26] long distance market would protect competition. The Court further expressed concern that applying the antitrust laws in this context would overwhelm the judiciary in the minutiae of CLEC access to ILEC networks.[27] Thus, the Court suggested that regulators, rather than Article III courts, are better equipped to deal with a regulated monopolist who is alleged to have unlawfully refused to deal with a competitor. The decision concludes as follows: "The Sherman Act is indeed the Magna Carta of

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20 *Trinko,* 540 U.S. at 408-11 (internal citations omitted).

21 *Id.* at 408.

22 *Id.* at 409.

23 *Id.*

24 *Id.*

25 *Id.* at 409-10 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)).

26 *Id.* at 412.

27 *Id.* at 414.

free enterprise, . . . but it 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."[28]

### C. Essential Facilities Doctrine Not Recognized

In addition to its "refusal to deal" claim, Trinko also alleged a Section 2 violation based on the essential facilities doctrine. While acknowledging that the lower courts and some commentators have recognized the essential facilities theory of antitrust liability, the Supreme Court reiterated that it had never adopted the doctrine. Expressly declining, once again, either to adopt or reject the doctrine, the Supreme Court held that on the facts alleged, the essential facilities theory did not resuscitate Trinko's Section 2 claim.[29] Bearing in mind the extensive sharing obligations that the Telecommunications Act imposes on ILECs, the majority held that the essential facilities doctrine had little, if any, application. As Justice Scalia put it, "where access exists" – here, by statutory mandate – "the doctrine serves no purpose."[30]

### D. Monopoly Leveraging Rejected

The Court dealt tersely with the Second Circuit's holding that Trinko's complaint stated a Section 2 monopoly leveraging claim: "To the extent that the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred . . . . In any event, leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected."[31]

### E. No Bright Line Test for Monopolization

Verizon, supported by federal enforcers, sought to persuade the Court to use the case as an opportunity to announce a far-reaching, bright line rule to distinguish pro-competitive unilateral

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[28] *Id.* at 415-16.

[29] *Id.* at 410-11.

[30] *Id.* at 399.

[31] *Id.* at 415 n.4 (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993)).

refusals to deal from predatory conduct actionable under Section 2. Specifically, Verizon argued for a test that insulated from liability any refusal to deal "as long as it makes business sense apart from enabling monopoly returns."[32] The analysis is sometimes referred to as the "sacrifice test" because, as a precondition to liability, it requires proof that the monopolist sacrificed short-term profits in an effort to drive rivals out of the market. This argument produced opposing amicus briefs from a group of economists[33]- including several former chief economists for the DOJ and the originators of the sacrifice test- and from New York and a group of other states.[34] Despite the extensive briefing, the Court never mentioned the sacrifice test at all in its decision. Although the decision refers to the fact that the defendant in *Aspen Skiing* was prepared to forego short-term profits, that suggests, at most, that profit-sacrifice may be a *sufficient* condition to impose Section 2 liability. But the Court's decision does not answer whether profit-sacrifice is a *necessary* one.

### F. Justice Stevens' Concurring Opinion

Justice Stevens authored a concurring opinion joined by Justices Souter and Thomas.[35] While not challenging the result reached by the majority, these three Justices believed Trinko's claims failed to satisfy *Associated General Contractor's* [36] antitrust standing requirements. The concurrence preferred to decide the case on this ground, without embarking on the analysis undertaken by the majority.[37]

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[32] Brief for Petitioner at 11, *Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682); *See id.* at 20-23. *See also* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, at 7 (arguing that a refusal to deal with a competitor is lawful under Section 2, except one that "would not make business or economic sense apart from its tendency to reduce or eliminate competition."), *Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682).

[33] Brief of Amici Curiae Economics Professors in Support of Respondent, *Verizon Comm., Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682).

[34] Brief of the State of New York and 14 Other States as Amicus Curiae in Support of Respondent, *Verizon Comm., Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682).

[35] *Trinko*, 540 U.S. at 416-18 (Stevens, J., concurring).

[36] *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

[37] *Trinko*, 540 U.S. at 417.

## III. *Trinko*'s Impact On Future Telecommunications Cases

Although *Trinko* limits the circumstances in which a monopolist may be sued on a refusal to deal theory, the Court's decision nevertheless does not express any particular analysis for resolving such claims. Thus, lower courts, which have long wrestled with the absence of standards under Section 2 to differentiate pro-competitive conduct from unnecessarily restrictive business practices, will continue to do so.[38] Similarly, although rejecting Trinko's essential facilities claim as inadequately pleaded, the Supreme Court's unwillingness to recognize or repudiate the doctrine leaves it to the lower courts to continue to wrestle over the doctrine's vitality and contours. However, the Court did remind that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."[39] In that vein, *Trinko* at least provides guidance to lower courts addressing antitrust claims that arise within the telecommunications industry and in regulated industries more generally.

Because the Telecommunications Act imposes extensive obligations on CLECs to deal with ILECs, there is likely to be little room for antitrust scrutiny on either a refusal to deal or essential facilities approach. The post-*Trinko* rulings in the lower courts reflect this teaching.

For instance, in *Covad Communications Co. v. Bellsouth Corp.,*[40] the Eleventh Circuit Court of Appeals read *Trinko* to effectively sound the death knell for CLEC refusal to deal cases:

> *Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under Aspen. The relationship between AT&T and Verizon was mandated by the FTCA and thus cannot be said to have initiated a "voluntary" course of dealing, profitable or otherwise. For the same reason, Verizon cannot be said to have failed to make available to AT&T

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[38] *See, e.g.,* Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 147-8 (2005) ("Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined. No generalized formulation of unilateral or multilateral exclusionary conduct enjoys anything approaching universal acceptance.").

[39] *Trinko*, 540 U.S. at 399, 411.

[40] *Covad Comm. Co. v. Bellsouth Corp.,* 374 F.3d 1044 (11th Cir. 2004).

> otherwise publicly marketed services, whether at retail or lower cost. *Trinko* emphasizes the coercive effect of the FTCA on incumbent LECs such as Verizon who-but for the FTCA-would not be required to make their network elements . . . available to third parties such as AT&T. In short, Covad's refusal-to-deal claims do not survive *Trinko* and must be dismissed. [41]

On the other hand, where the ILEC's refusal to deal is directed at a rival's customers, the courts are still feeling their way, despite *Trinko*. In *Stein v. Pacific Bell,* [42] the Ninth Circuit considered whether the lower court properly dismissed a consumer's claim that an ILEC violated the Sherman Act by denying a competitor access to its Digital Subscriber Line ("DSL"). The court affirmed the dismissal because plaintiff's claims were "foreclosed by *Trinko*."[43] The court further stated that, as in *Trinko*, the facts of the case were distinguishable from *Aspen Skiing*.[44] The court contrasted the prior voluntary business relationship in *Aspen Skiing* to the "congressionally-imposed regulatory scheme" in *Trinko* and in the case before it. Thus, the Ninth Circuit found that the case did "'not fit comfortably in the *Aspen Skiing* mold' of voluntariness."[45]

However, in *Covad Communications Co. v. Bell Atlantic Corp.*,[46] Covad alleged a refusal to deal claim based on Bell Atlantic's refusal to sell its DSL services to would-be customers who had orders pending for DSL service with Covad.[47] In a pre-*Trinko* ruling, the district court held that Bell Atlantic's conduct related to its obligations under the Telecommunications Act, and therefore, "f[e]ll squarely outside the parameters of antitrust law."[48]

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41 *Id.* at 1049.

42 No. 04-16043, 2006 WL 751812, at *1 (9th Cir. March 2, 2006).

43 *Id.*

44 *See id.*

45 *Id.* (internal citation omitted).

46 201 F. Supp. 2d 123 (D.D.C. 2002), *aff'd in part, rev'd in part*, 398 F.3d 666 (D.C. Cir. 2005).

47 *See Covad,* 398 F.3d at 675.

48 *Covad,* 201 F. Supp. 2d at 130.

On appeal, Bell Atlantic argued that Covad had to show that Bell Atlantic suffered "short-term economic loss."[49] Bell Atlantic further maintained that Covad could not satisfy this requirement because it would not have been profitable for Bell Atlantic to sell its DSL service to a customer who would ultimately switch DSL service once Covad came to the market.[50] The Court of Appeals for the District of Columbia reversed the district court's dismissal in part. While holding to the view that, to plead a claim, Covad had to prove the refusal to deal caused Bell Atlantic to sacrifice short-term profits,[51] the court further held that Bell Atlantic's proposed economic justification for its refusal presented a question of fact, and thus, was unsuitable to resolve on a motion to dismiss.[52] Dismissal was inappropriate because it was "possible Bell Atlantic's refusal to deal reflected its willingness to sacrifice immediate profits from the sale of its DSL service in the hope of driving Covad out of the market and recovering monopoly profits in the long run."[53]

Interestingly, the D.C. Circuit did not mention *Aspen Skiing* in its analysis. Nor did it focus on a prior voluntary relationship between the parties. Instead, the court relied on *United States v. Colgate & Co.*,[54]the seminal Supreme Court refusal to deal case. Specifically, the D.C. Circuit cited *Colgate* for the proposition that a dominant firm may only refuse to deal with a rival when the refusal is not intended "to create or maintain a monopoly."[55] In *Trinko*, the Court quoted *Colgate* to highlight a firm's affirmative right to refuse to deal,[56] but it omitted the qualification that the refusal not be "intended" to "create or maintain a monopoly."

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49 *Covad,* 398 F.3d at 675.

50 *See id.* at 675.

51 *See id.*

52 *See id.* at 676.

53 *Id.*

54 250 U.S. 300 (1919).

55 *Id.* at 307.

56 *Trinko*, 540 U.S. at 408.

Since *Trinko*, courts have uniformly rejected essential facilities claims in the context of the telecommunications industry.[57] These decisions consistently hold that a facility is "available" so long as access is compelled by regulation.[58]

## IV. Expansion Of *Trinko* Beyond Telecomm Into Other Regulated Industries

*Trinko* arose from the telecommunications industry. Thus, the Court took the opportunity to advise that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."[59] As the Court further explained, "[o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm."[60] "Where such a structure exists, 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."[61] More generally, however, the Court suggested a highly deferential view favoring regulation, noting that when "[t]here is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust immunity are worth its sometimes considerable disadvantages."[62]

At least since *Silver v. New York Stock Exchange*[63] was decided in 1963, courts have asked this same basic question in applying the doctrine of implied immunity.[64] This doctrine was not available

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[57] *See MetroNet Servs. Corp v. Quest Corp.*, 383 F.3d, 1124, 1128-30 (9th Cir. 2004) (relying on *Trinko* to reject claim); *Covad*, 374 F.3d at 1050 (same); *see also* Neil R. Stoll & Shepard Goldfein, *Is §2 of the Sherman Act on Hold?*, N.Y.L.J. 3 n.1, Feb. 17, 2004 ("[*Trinko*] call[s] into question the parameters, if not the existence, of the essential facilities doctrine"); James Keyte, *The Ripple Effects of Trinko: How It Is Affecting Section 2 Analysis*, 20 FALL ANTITRUST 44 n.1 (ABA Section of Antitrust, Fall 2005) ("*Trinko* . . . has clearly signaled that the demise of the essential facilities doctrine . . . may be on the horizon.").

[58] *See id.*

[59] *Trinko*, 540 U.S. at 411.

[60] *Id.* at 412.

[61] *Id.*

[62] *Id.* (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 358 (1963)).

[63] 373 U.S. 341.

[64] *Id.* at 358.

to the *Trinko* Court because of the savings clause in the Telecommunications Act.[65] Nonetheless, the Court cited implied immunity cases in asserting that the regulatory scheme "may also be a consideration in deciding whether to recognize an expansion of the contours of § 2."[66] The Court was unwilling to expand Section 2 by "adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors," and it discussed the FCC's regulatory scheme in that context.[67]

Antitrust defendants have sought to apply the *Trinko* Court's discussion to other regulated industries, arguing that the antitrust laws should not interfere with regulatory authority and expertise. These subsequent attempts to apply *Trinko* to other regulated industries have not been limited to refusal to deal and essential facility claims. And, even though implied immunity was unavailable in *Trinko*, parties have used the case to buttress implied immunity arguments. Following the *Trinko* Court's discussion, lower courts have assessed the regulatory scheme at issue to determine whether it "performs the antitrust function."[68]

In both *New York Mercantile Exchange, Inc. v. Intercontinental Exchange Inc.,*[69] ("*NYMEX*"), and *Stand Energy Corp. v. Columbia Gas Transmission Corp,*[70] participants in regulated industries invoked *Trinko* to argue that the antitrust laws did not impose a duty to aid competitors. This approach succeeded in *NYMEX*, where the court dismissed the defendant's essential facility and refusal to deal counterclaims.[71] The alleged essential facility was NYMEX's settlement prices, the access to

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[65] *Trinko*, 540 U.S. at 406.

[66] *Id.* at 412 (citing *Silver*, 373 U.S. at 358); *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 730-35 (1975)).

[67] *Trinko*, 540 U.S. at 411-12.

[68] *Id.* at 412.

[69] 323 F. Supp. 2d 559 (S.D.N.Y. 2004).

[70] 373 F. Supp. 2d 631 (S.D.W. Va. 2005).

[71] *NYMEX*, 323 F. Supp. 2d at 559; *see also The American Channel, LLC v. Time Warner Cable, Inc.*, 2007 WL 142173, at **9-10 (D. Minn. Jan. 17, 2007) (granting motion to dismiss plaintiff's monopolization claim because the defendant's activity was regulated by the FCC).

which the CFTC regulated comprehensively.[72] Like the FCC's authority in *Trinko*, the CFTC's power to compel access made it "unnecessary to impose a judicial doctrine of forced access."[73] Moreover, the Commodity Exchange Act requires the CFTC to "take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving" its objectives.[74] Accordingly, the court concluded that "the CFTC is in a better position than a general antitrust court to determine the scope and terms of any forced sharing of settlement prices among the exchanges that it regulates, and then to oversee and enforce any such sharing of settlement prices."[75]

As to the refusal to deal claim, the *NYMEX* court distinguished the facts of the case from both *Aspen Skiing* and *Otter Tail*. *Aspen Skiing* did not apply because NYMEX had a legitimate business justification for its refusal to deal with the competitor-plaintiff, and because there was no prior cooperation between the parties that would raise an inference of abandonment of a prior course of profitable dealings.[76] *Otter Tail* did not apply because, in that case, the regulatory agency, the Federal Power Commission lacked the authority to remedy the monopolist's exclusionary conduct.[77] In contrast, the CFTC "ha[d] the power to compel disclosure of the settlement prices and to regulate the scope and terms of such disclosure."[78]

Antitrust defendants had less success applying *Trinko* in *Stand Energy Corp. v. Columbia Gas Transmission Corp.*[79] Plaintiffs were shippers, wholesalers, and marketers of natural gas who alleged that pipeline owners gave preferential treatment to particular gas shippers. Plaintiffs asserted breach

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72 *NYMEX*, 323 F. Supp. 2d at 570.

73 *Id.* at 568.

74 *Id.* at 569 (quoting Commodity Exchange Act, 7 U.S.C. § 19(b)).

75 *Id.* at 570.

76 *See id.* at 571 (citing *Trinko*, 124 S. Ct. at 880).

77 *Id.* at 572.

78 *Id.*

79 373 F. Supp. 2d 631.

of contract and violation of state antitrust laws, which included refusal to deal claims.[80] Defendants relied on *Trinko* in moving to dismiss the refusal to deal claims.[81] They argued that plaintiffs had pleaded violations of only Federal Energy Regulatory Commission (FERC) regulations, not antitrust violations.[82] Denying the motion to dismiss, the Court stated:

> The [*Trinko*] Court explained at some length the regulatory framework imposed by the FCC to provide competition access in that setting, in [a] new wholesale market created by the regulatory scheme pursuant to an act "more ambitious than the antitrust laws . . . 'to eliminate the monopolies'" . . . . Though FERC regulates the rates for transporting and selling natural gas in interstate commerce, Defendants have not demonstrated that this case involves the same level of regulatory overlay and unique market found in *Trinko*.[83]

The court assessed whether FERC's regulatory scheme performed the antitrust function and analogized the case to *Otter Tail*.[84] Like the Federal Power Commission's regulatory scheme in *Otter Tail*, and unlike that of the FCC in *Trinko*, FERC's regulatory scheme did not incorporate antitrust authority.[85] Although FERC issued an order requiring the defendants to disgorge profits and refund certain fees, FERC's order did not "purport[] to address any anticompetitive results" of defendants' conduct.[86]

Litigants have also successfully expanded *Trinko* to accomplish an implied immunity from antitrust review. In *Last Atlantis Capital LLC v. Chicago Board. Options Exchange, Inc.*, the Northern District of Illinois cited *Trinko* in ruling that the SEC's consistent and pervasive regulation of

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[80] *Id.*

[81] *Id.* at 634, 641.

[82] *Id.* at 641-42.

[83] *Id.* at 641 (quoting *Trinko*, 540 U.S. at 415) (internal citations omitted).

[84] *Stand Energy Corp.*, 373 F. Supp. 2d at 641 (discussing *Otter Tail*, 410 U.S. 366 (1973)).

[85] *See id.*

[86] *Id*; *see also In re Remeron Direct Purchaser Antitrust Litig.*, 335 F. Supp. 2d 522 (D.N.J. 2004) (rejecting defendants' argument that the Hatch-Waxman Act and Food and Drug Administration (FDA) regulations supersede the antitrust laws).

options trading warranted implied repeal of the antitrust laws.[87] "Applying federal antitrust law in this area," the court reasoned, "creates the very real possibility of subjecting the defendants to conflicting standards of conduct."[88] Furthermore, "'the antitrust laws conflict with an overall regulatory scheme that empowers [the SEC] to allow conduct that the antitrust laws would prohibit.'"[89]

Whether *Trinko* will have a significant role immunizing activity subject to non-telecomm regulation is an open question, however, in view of the Supreme Court's recent decision in *Billing v. Credit Suisse First Boston*.[90] There, individuals who purchased stock in various initial public offerings alleged that certain offering practices manipulated the market, and subjected the defendant-underwriters to antitrust liability, as well as to liability under the securities law. The Court of Appeals for the Second Circuit held that there was no implied antitrust immunity based on pervasive SEC regulation.[91] The Supreme Court reversed, however, and in so doing articulated four-factors that may form the touchstone analysis to resolve future implied immunity issues: "(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct" and (4) a determination that conflict affected practices that "lie squarely within an area of financial market activity that the securities law seeks to regulate." [92] Inasmuch as *Billing* directly addresses the matter of implied immunity from antitrust review, whereas

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87 No. 04C397, 2005 WL 3763262, at **2-3 (N.D. Ill. Mar. 30, 2005).

88 *Id.* at *3.

89 *Id.* (quoting *In re: Stock Exch. Options Trading Antitrust Litig.* 317 F.3d 134, 149 (2d Cir. 2003)).

90 127 S. Ct. 2383 (2007).

91 426 F.3d 130 (2d Cir. 2005).

92 127 S. Ct. at 2392.

*Trinko* does not, going forward it is difficult to predict whether *Trinko* will play a role in developing this area of the law, or whether it will, instead, disappear into the shadows of *Billing*.

## V. Pleading a Refusal to Deal Claim after *Trinko* – Is Abandonment of a Prior and Profitable Course of Dealing Required?

As a predicate to maintaining a refusal to deal claim, the *Trinko* Court's majority placed substantial emphasis on the fact that the monopolist in *Aspen Skiing* refused to deal with a competitor with whom it had previously and voluntarily engaged in a profitable course of dealing.[93]

Since *Trinko,* a number of courts have required rigid pleading of the *Aspen Skiing* "exception," holding that a Section 2 refusal to deal claim must allege the abandonment of a profitable, prior course of dealing with a competitor.[94] Thus, the *NYMEX* court explained that the plaintiff's "§ 2 claims of a refusal to deal do not fit the rubric of claims recognized by the Supreme Court in *Aspen Skiing*"[95]:

> There is no history of cooperation between ICE [the plaintiff] and NYMEX in sharing the use of NYMEX's settlement prices. Therefore, NYMEX's "prior conduct sheds no light upon the motivation of its refusal to deal." *Id.* [quoting *Trinko*]. There is no indication that NYMEX is flouting consumer demand and foregoing short-term profits by refusing to cooperate with ICE. And unlike the defendant in *Aspen Skiing*, NYMEX has proffered a legitimate business justification for its refusal to deal with ICE. (Tr. 21-23.) NYMEX has a legitimate business interest in preventing its competitor, ICE, from free-riding on NYMEX's settlement prices. NYMEX's settlement prices have value because they are viewed as proxies for market prices, and NYMEX has a legitimate interest in preventing rivals from free-riding on this reputation.[96]

The Fifth Circuit reached a similar conclusion as to the necessary pleading requirements:

> Although ASAP claims that CenturyTel "voluntarily" rated calls to their numbers as local from October 2001 through March 2002, the

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[93] *Trinko*, 540 U.S. at 408.

[94] *See NYMEX*, 323 F. Supp. 2d 559.

[95] *Id.* at 571.

[96] *See id.*; *accord Horrell v. SBC Comm., Inc.*, No. 5:05CV88, 2006 U.S. Dist. LEXIS 15659, at *37-38 (E.D. Tex. Feb. 16, 2006).

> complaint does not allege that CenturyTel understood where ASAP's switch was located at that time. So there is no indication that the prior arrangement was agreed to, and therefore presumably profitable, in the manner of the ski ticket arrangement in *Aspen Skiing*. And there is otherwise nothing that would suggest that CenturyTel is giving up short-term profits in hopes of running ASAP out of business. CenturyTel gets more short-term profit, not less, by charging the calls to ASAP's numbers as toll calls. Even if no one calls ASAP anymore when the calls are rated as toll, CenturyTel is not giving up profits as compared to rating calls to ASAP as local, because CenturyTel's customers pay a flat fee for local service. ASAP's allegations do not fit into the *Aspen Skiing* exception for refusal-to-deal claims, and therefore do not state a cognizable antitrust claim. The antitrust claims were therefore properly dismissed.[97]

However, it may be sufficient to allege a prior course of dealing between the alleged monopolist and any competitor, not limited to the plaintiff. On that score, a Texas District Court held:

> It is of vital importance to this Court's analysis that the text on those two pages [of the *Trinko* decision] do not support Defendant's contention that a cessation of voluntary business activity must have been with a § 2 plaintiff in order to satisfy the standard of *Aspen Skiing*….The bottom line is that the Supreme Court's repeated use of the generic terms "rival" in both the singular and the plural [negates] Defendant's contention that only termination of a cooperative venture with a § 2 plaintiff, rather than other market participants, suffices.[98]

Still, other courts assert that *Trinko* did not change the pleading standard for refusal to deal claims at all.[99] But whether or not required, prudence suggests including such allegations in support

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[97] *ASAP Paging Inc. v. CenturyTel of San Marcos Inc.*, 2005 WL 1491285, *4 (5th Cir. June 24, 2005); *Accord MetroNet Servs. Corp.* , 383 F.3d at 1134 ; *Levine v. Bellsouth Corp.,* 302 F. Supp. 2d, 1358, 1372 (S.D. Fla. 2004).

[98] *Z-TEL Comm., Inc. v. SBC Comm., Inc.*, 331 F. Supp. 2d 513, 539 (E.D. Tex, 2004).

[99] *See Creative Copier Servs. v. Xerox Corp.*, 344 F. Supp. 2d 858, 866 (D. Conn. 2004) ("nowhere in *Trinko* did the Court indicate that a complaint should be dismissed if it fails to recite the magic words 'no short-term profit.' Accordingly, though *Trinko* did highlight that anticompetitive 'refusal to deal' is the exception, and not the rule, I do not think *Trinko* heightened the pleading standard in section 2 cases.").

of a refusal to deal claim whenever there is a good faith basis to do so.[100] This is particularly so in light of the Supreme Court's recent decision in *Bell Atl. Corp. v. Twombly*,[101] In *Twombly*, the Court held that, to plead a Sherman Act § 1 "conspiracy," the plaintiff must allege facts that "plausibly" suggest joint activity. Fact allegations that are merely consistent with a conspiracy are not enough.[102] Although *Twombly* arose under Section 1, it is fairly predictable that defense attorneys will assert that the decision's announced "plausibility" standard governs Section 2 cases as well.[103]

## VI. ***Trinko's*** **Impact on Monopoly Leveraging Claims**

After a number of years of uncertainty and a split in the Courts of Appeals, the decision in *Trinko* seems to have crystallized the Supreme Court's Section 2 jurisprudence on monopoly leveraging. Before *Trinko*, a monopoly leveraging action could be brought in some Circuits under Section 2 against a single independent actor that lacked market power in the second or "target" market. In other words, there could be a Section 2 monopoly leveraging violation even though the defendant did not monopolize, or come dangerously close to monopolizing, the target market.[104]

The *Trinko* decision dealt with this issue in a single footnote. The Court held that monopolization or the dangerous probability of monopolization of the second market is an essential

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[100] *See Nobody in Particular Presents, Inc. v. Clear Channel Comm., Inc.*, 311 F. Supp. 2d 1048, 1113-1114 (D. Colo. 2004) (motion to dismiss denied where the plaintiff, "NIPP alleges that Clear Channel provided advertising and concert promotional support in the past because concert promotions benefit the radio station as well as the promoter. Furthermore, NIPP claims that Clear Channel now refuses this support and sacrifices short-term gains in hopes of destroying other promoters and reaping long-term monopolistic profits. Clearly, the conduct alleged in this case bears striking resemblance to the refusal to deal in Aspen Skiing, conduct that the Supreme Court states is proscribed by the Sherman Act."); *A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 250 (S.D.N.Y. 2004).

[101] No. 05-1126, 2007 WL 1461066 (U.S. May 21, 2007).

[102] *Id.*

[103] *Cf. Goldstein v. Pataki*, 2007 WL 1654009, at *36 (E.D.N.Y. June 6, 2007) (noting, in public use case, that "the plausibility standard announced in *Twombly* was intended to apply beyond antitrust conspiracy cases").

[104] *See, e.g., AD/SAT Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999) (monopoly leveraging requires "monopoly power in one market, the use of [that] power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another distinct market, and injury caused by the challenged conduct.")

element of monopoly leveraging.[105] Thus, if a defendant possesses the requisite market power in the second market to have a "dangerous probability of success," the plaintiff, in almost all cases, should be able to plead attempted monopolization of the second market so long as the requisite specific intent could be alleged.

Since *Trinko*, courts have dismissed several cases because plaintiffs failed to allege or demonstrate that the defendant possessed market power, or a dangerous probability of acquiring market power, in the leveraged market.[106] At the same time, courts have upheld leveraging claims when the plaintiff alleges a dangerous probability of success in monopolizing the leveraged market - a recognized attempted monopolization claim.[107]

In *Service Employees International Union Health & Welfare Fund v. Abbott Laboratories,* [108] plaintiff challenged Abbott's use of its patent on Norvir® ("Norvir"), which is a protease inhibitor ("PI"), or anti-retroviral drug, that inhibits the AIDS virus from replicating itself into new cells. Norvir is prescribed because, "along with other PIs, it both 'boosts' the antiviral effect of those PIs and reduces their harmful side effects."[109] No other drug boosts PIs as does Norvir.[110] In fact, all of the PIs currently on the market are boosted by Norvir.[111]

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[105] *Trinko*, 540 U.S. 398, 415 n.4.

[106] *See In re Educ. Testing Serv. Praxis Principles of Learning and Teaching: Grades 7-12 Litig.,* 429, F. Supp. 2d 752, 758-59 (E.D. La. 2005) (dangerous probability of monopolization necessary to state claim for leveraging); *NYMEX.*, 323 F. Supp. 2d at 572 (failure to plead "dangerous likelihood of success" fatal to leveraging claim). Other leveraging claims have been dismissed where the courts reasoned that *Trinko* narrows the range of actionable anti-competitive conduct. *See Morris Comm. Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004); *Stein*, 2006 WL 751812. *See generally Trinko*, 540 U.S. at 412-13.

[107] *See Covad*, 374 F.3d at 1047, 1051 (monopoly leveraging claim tied to allegations of anti-competitive price squeeze); *AIB Express, Inc.*, 358 F. Supp. 2d 239, 251 (upholding monopoly leveraging claim based on a finding that plaintiff adequately alleged a dangerous probability that FedEx would monopolize the second market, as well as based on a finding that FedEx had a duty to deal with plaintiff ); *Z-Tel Comm., Inc.* 331 F. Supp. 2d 513, 543 (upholding monopoly leveraging claim where plaintiff pled cognizable anti-competitive conduct and that defendant had sufficient power in the second market).

[108] No. C04-4203 CW, 2005 WL 528323 (N.D. Cal. Mar. 2, 2005).

[109] *Id.* at *1.

[110] *Id.*

[111] *Id.*

Plaintiffs alleged that in 2003, Abbott's own boosted PI, Kaletra® began losing market share, as a result of which Abbott adopted a 400% price increase for Norvir to all manufacturers of PIs.[112] The price of Abbott's own boosted PI, Kaletra, remained largely unchanged. Plaintiff further alleged that Abbott attempted to leverage its monopoly over Norvir, secured by a patent, into a monopoly in the market for boosted PIs, where Kaletra competes.[113]

The court denied Abbott's motion to dismiss and upheld plaintiffs' leveraging claim. Plaintiffs alleged that Abbott had engaged in anti-competitive behavior by leveraging its patent. The district court held that misuse of intellectual property could give rise to Sherman Act liability.[114]

Other courts, however, have disagreed with this approach. In *Schor v. Abbott Laboratories,*[115] a case involving identical facts, the court ruled that legal use of patent rights cannot give rise to antitrust liability. The Illinois court expressly criticized the Ninth Circuit's *Kodak* decision, and instead relied on *In re Independent Service Organizations Antitrust Litigation*,[116] where the Federal Circuit held that the legal use of a patent could not give rise to antitrust liability. *Service Employees*, however, relies not only on different circuit law, but also on a factual distinction: there, plaintiffs challenge the validity of Abbott's Norvir patent. The patent challenge prevented Abbott from effectively arguing, at the pleading stage, that exercise of rights under a valid patent precludes application of the Sherman Act.

## VII. Standing and Stevens' Concurring Opinion

Since *Trinko* was decided over three years ago, Justice Stevens' concurring opinion has gained little traction in the courts and among antitrust scholars. In fact, Justice Stevens' analysis has

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[112] *Id.*

[113] *Id.*

[114] *Id.* at * 3.

[115] 378 F. Supp. 2d 850 (N.D. Ill. 2005), *aff'd*, 457 F.3d 608 (7th Cir. 2006).

[116] 203 F.3d 1322 (Fed. Cir. 2000).

only been applied in two reported decisions, *Levine v. BellSouth Corp.,*[117] and *Knowles v. Visa U.S.A., Inc.*[118] Scholars have largely overlooked Stevens' opinion, except for the few that have briefly noted their disagreement with its reasoning.[119]

Although Justice Stevens' concurrence emphasized the need to avoid duplicative recovery, denying consumer standing risks under-recovery instead. As Professor Andrew I. Gavil has explained, consumers and competitors seek to recover distinct damages.[120] A competitor can recover for lost profits on sales diverted by the defendant's exclusionary conduct. But it cannot recover for higher prices resulting from that conduct. Only a consumer can recover damages caused by the defendant's control over prices and the increase in rivals' prices. If consumers are denied standing in exclusionary conduct cases, these damages go unrecovered.

Such damages went uncompensated in *Levine v. BellSouth Corp.*, where the Southern District of Florida denied standing to customers seeking damages for increased prices resulting from BellSouth's alleged tying of local telephone service to DSL service.[121] Plaintiffs were a class of customers who were required to purchase BellSouth's local phone service in order to purchase its DSL service, in areas where BellSouth was the ILEC.[122] Plaintiffs alleged BellSouth's tying of local phone service to DSL service prevented customers from obtaining lower-priced local phone service from competitors and gave BellSouth a monopoly on local phone service in the affected areas.[123]

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[117] *Levine v. Bellsouth Corp.*, 302 F. Supp. 2d 1358 (SD. Fla. 2004).

[118] No. CV-03-707, 2004 WL 2475284 (Super. Ct. Me. Oct. 20, 2004).

[119] For example, in an ABA telephonic seminar on *Trinko*, Herbert Hovenkamp summarily critiqued Stevens' opinion, stating, "this was a consumer case. It was a case, which, if the facts were true, would have alleged higher prices, or reduced product quality in the market, and that would be a traditional case for standing." "*When You Don't Know What to Do, Walk Fast and Look Worried*" (Dilbert 2003), *available at* http://www.abanet.org/antitrust/at-source/04/07/July04-Teleconf7=23.pdf.

[120] Andrew I. Gavil, *Symposium: Integrating New Economic Learning with Antitrust Doctrine: Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 3 n.151 (2004).

[121] 302 F. Supp. 2d 1358.

[122] *Id.* at 1361.

[123] *Id.*

Plaintiffs sought damages for the difference in price between BellSouth's phone service and competitors' phone service or the phone service price that would have prevailed in a competitive market.[124]

Applying Justice Stevens' reasoning, the court determined that plaintiffs did not have standing as "persons" under Section 4 of the Clayton Act because "there is only an indirect relationship between the Defendant's alleged misconduct and the Plaintiff's asserted injury."[125] Because plaintiffs allege they are unable to receive DSL service from BellSouth over a loop that has been leased to a CLEC, "[t]he missing CLECs, as the more direct victim of BellSouth's alleged misconduct, would be in a far better position than Plaintiff[s], as a local telephone service customer[s], to vindicate the public interest in the enforcement of the antitrust laws."[126] The court did not address the CLEC's inability to recover the price-related damages sought by the plaintiffs.

In a case with arguably a higher risk of duplicative recovery, *Knowles v. Visa U.S.A.*, the Maine Superior Court cited Stevens' opinion to note that the test for antitrust standing set forth in *Associated General Contractors*[127] still holds.[128] That test asks, among other things, whether there exists a more immediate class of potential plaintiffs motivated to enforce the antitrust laws, whether the damages or injuries claimed are speculative, whether there is a danger of duplicative recoveries, and whether there is a need for complex apportionment.[129]

*Knowles* followed a nation-wide class action brought by merchants alleging illegal tying of Visa and MasterCard debit cards to Visa and MasterCard credit cards.[130] The *Knowles* class consisted

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[124] *Id.*

[125] *Id.* at 1368.

[126] *Id.* at 1368-69 (citing *Trinko*, 540 U.S. at 417).

[127] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519.

[128] *Knowles,* 2004 WL 2475284, at**4-5.

[129] *Associated Gen. Contractors*, 459 U.S. at 541-44.

[130] *Knowles,* 2004 WL 2475281, at *1.

of consumers who alleged that these merchants' increased costs were passed on to them.[131] Noting that the Maine legislature had enacted a law repealing *Illinois Brick*, the court nonetheless relied on *Associated General Contractors* to deny standing to the plaintiffs.[132]

In *Knowles*, however, there was a lower risk of under-recovery than in *Trinko* because the "consumers" in the debit card services market – the merchants – had already recovered for their damages. The merchants' damages, like the damages allegedly suffered by the plaintiffs in *Trinko*, were separate and distinct from the damages suffered by competitors in the restrained market. Application of Stevens' rationale in *Trinko* and in *Levine*, in contrast, denies any end-user consumer recovery and leaves the fundamental antitrust injury of higher prices uncompensated.

## VIII. Conclusion

As the ensuing case law demonstrates, *Trinko* leaves almost as many issues unresolved as it resolves. For instance, while the Court's decision does provide clear guidance for future telecommunications cases, its impact on other regulated industries is less certain. The Supreme Court's subsequent *Billing* decision may, however, pick up where *Trinko* leaves off. Similarly, with regard to the Court's refusal to deal analysis, various lower courts have interpreted the decision: (1) to require a plaintiff to demonstrate a prior and profitable course of dealing with *the plaintiff*; (2) to require a prior and profitable course of dealing with *any competitor*; or (3) not to impose a particular or heightened pleading standard at all.

Thus, *Trinko* is more of a land-mine for antitrust practitioners seeking guidance regarding Section 2 liability than it is a landmark ruling on the law of monopolization.

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[131] *Id.* at *2.

[132] *Id.* at **3-9.