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Putting the "Squeeze" On Refusal to Deal Cases: Lessons from *Trinko* and *linkLine*

BY ELLEN MERIWETHER

THE U.S. SUPREME COURT HAS issued a number of significant antitrust decisions since 2004, in each case ruling in favor of the defendants, and in each case making it more difficult for plaintiffs to commence or maintain actions arising under the Sherman Act. *Trinko*[1] and *linkLine*[2] are the earliest and most recent of these decisions, respectively. In each, the Supreme Court addressed Section 2 monopolization claims in the telecommunications industry challenging alleged refusals to deal with a rival, either on any terms or on specified terms sought by the plaintiffs. In *linkLine*, the Supreme Court eliminated from antitrust purview an entire class of claims,[3] holding that conduct previously characterized as a "price squeeze" would not violate Section 2 of the Sherman Act unless a plaintiff could prove that the defendant had a "duty to deal" with the plaintiff arising under the antitrust laws, or engaged in predatory pricing under the standards established in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[4] In *Trinko*, the Court severely limited the circumstances in which a duty to deal arises under the antitrust laws such that a refusal to deal is actionable under Section 2.

The holdings in these two cases, considered together, have put the squeeze on would-be plaintiffs seeking to challenge unilateral refusals to deal with a rival. This article explores the avenues, if any, that remain for plaintiffs to assert Section 2 claims challenging such conduct.

Trinko and the Duty to Deal

In *Trinko*, the Supreme Court held that a statutorily compelled duty to deal, along with regulatory enforcement of that duty, precluded a finding that there was an antitrust duty to deal enforceable under Section 2. The dispute in *Trinko* arose out of provisions in the Telecommunications Act of 1996, passed by Congress in an effort to break up the historical statutory monopolies that regional "Baby Bell" companies held over local telephone service.[5] In order to facilitate entry by competitors into those local telephone markets, the Act required incumbent local telephone companies like the defendant Verizon to provide competitors with access to their telephone networks and individual elements of those networks on an "unbundled" basis, thus allowing the competitors to package and resell the unbundled network elements to customers in competition with the incumbent provider.[6] After certain competitors complained to state regulators and the Federal Communications Commission that Verizon was violating its duties under the Act, the regulators commenced an investigation and, upon finding a violation, entered into a consent decree with Verizon, subjecting it to new performance and reporting requirements and imposing monetary penalties.[7]

Following entry of the consent order, plaintiff *Trinko*, a customer of one of Verizon's competitors, filed a suit under Section 2, alleging that Verizon's violation of its duties under the Act was part of an anticompetitive scheme to discourage customers from remaining or becoming customers of its competitors, thus impeding or blocking market entry by those competitors. The Supreme Court held that a complaint alleging that Verizon provided insufficient or discriminatory services to rivals did not state a Section 2 monopolization claim.[8] The Court recognized that Congress imposed duties upon the defendant to deal with and provide services to its rivals, but held that the existence of this statutory duty to deal does not automatically mean that the duty "can be enforced by means of an antitrust claim."[9] In fact, the Court reached the opposite conclusion. Although a savings clause in the Act precluded the Court from ruling that the regulated entities were "shielded from antitrust liability altogether,"[10] the Court relied on the fact that the duty to deal was imposed by statute and was enforceable through the regulatory scheme, to conclude that the regulated entity had no antitrust duty to deal, enforceable by way of a claim under the Sherman Act.

The Court found that existing antitrust principles did not support the conclusion that there was an antitrust duty to deal under the circumstances alleged. In reaching this conclusion, the Court distinguished the facts at hand from those at issue in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[11] the "leading case for § 2 liability based on a refusal to deal or cooperate with a rival."[12] In *Aspen*, the plaintiff owned and operated one of four ski mountains in the Aspen ski area, and the defendant owned and operated the other three. For many years, the parties had cooperated by issuing a joint, multiple-day, all-area ski pass, which allowed skiers access to all four mountains. After demanding an ever-increasing percentage of the revenues generated by the joint ticket, the defendant cancelled its participation and refused to cooperate in any efforts by the plaintiff to recreate the arrangement, even to the

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point of refusing to sell its lift tickets to the plaintiff at retail prices.[13] The Supreme Court found a Section 2 violation arising out of the defendant's refusal to deal with the plaintiff, holding that the evidence supported a jury finding that the defendant was willing to forgo short-term profits in order to achieve, in the words of *Trinko*, a "distinctly anticompetitive" aim; that is, to reduce competition over the long run by harming its smaller competitor.[14]

According to the Supreme Court in *Trinko*, of particular significance in the *Aspen* case was defendant's decision to cease participation in an existing cooperative venture.[15] This was not the situation in *Trinko*, where defendant dealt with its competitors only because it was compelled to do so under the existing regulatory scheme. Moreover, the regulatory scheme required Verizon to provide unbundled goods and services which were completely new, and were not otherwise available to retail customers. Based on these factors, the Court concluded that, unlike in *Aspen Skiing*, defendant's reluctance to provide the required service at the rate of compensation available under the statute, "says nothing about [defendant's] dreams of monopoly."[16]

Using the same reasoning, the Court concluded that "traditional antitrust principles [do not] justify adding the present case to the exceptions to the proposition that there is no duty to aid competitors."[17] The Court again relied on the "existence of a regulatory structure designed to deter and remedy anticompetitive harm." As the Court put it, "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."[18] Finally, application of the "essential facilities" doctrine was likewise precluded by the existence of the regulatory scheme. While declining either to recognize the doctrine or repudiate it, the Court stated that, because access to the essential facilities exists by way of the regulatory scheme, it was "unnecessary to impose a judicial doctrine of forced access."[19]

Unlike *Aspen*, which was decided on a trial record, *Trinko* arose within the context of a motion to dismiss under Rule 12(b)(6). Although the Court concluded that the facts alleged in *Trinko* did not reflect a "distinctly anticompetitive aim," the decision appears to be driven less by the factual allegations of the anticompetitive nature of the conduct, and more by the existence of the regulatory scheme itself. In short, even though the Court distinguished the facts of *Aspen*, the regulatory scheme appears to have been the trump card in the analysis.

In sum, through somewhat counterintuitive reasoning, the Court held that by creating a statutory duty to deal, Congress precluded Section 2 claims based on an antitrust duty to deal. One might suggest that whether this is the exact opposite of the result envisioned by the Telecommunications Act, which has a savings clause providing that "nothing in this act shall be construed to modify, impair or supersede the applicability of any antitrust laws."[20]

Linkline and the Duty to Deal

The *linkLine* case[21] involved the market for digital subscriber line (DSL) service, a method of connecting to the Internet over telephone lines. AT&T owned much of the infrastructure needed to provide DSL service. To spur retail competition, the FCC required AT&T to sell wholesale transmission service to DSL companies like plaintiffs, so they could provide their own retail DSL service to end users. AT&T offered its own DSL service to end users, and thus was both a wholesale supplier and retail competitor of the plaintiffs for DSL service.

The plaintiffs alleged that AT&T engaged in a price squeeze—that is, that AT&T squeezed its rivals' profit margins by setting a high wholesale price for DSL transmission service and a low retail price for DSL Internet service. The leading case on price squeezes is *United States v. Aluminum Co.* (*Alcoa*),[22] a decision by Judge Learned Hand. In *Alcoa*, the Second Circuit, sitting as a court of last resort because of the recusal of four Supreme Court Justices, held that a price squeeze violates Section 2 when (1) the firm conducting the squeeze has monopoly power at the first industry level, (2) its price at this level is "higher than a 'fair price,'" and (3) its price at the second level is so low that its competitors cannot match the price and still make a "living profit."[23] Commentators have characterized the "living profit" test of *Alcoa* as akin to a somewhat primitive version of an "equally efficient rival" test: the pricing is so low that it would exclude an equally efficient rival.[24]

The Court in *linkLine* began with the premise that its holding in *Trinko* precluded any allegation that the defendant had a duty to deal with the plaintiff arising under the antitrust laws. The Court described the issue before it as "whether a plaintiff can state a price-squeeze claim when the defendant has no obligation under the antitrust laws to deal with the plaintiff at wholesale," and answered this question in the negative. In fact, although the Court had a number of possible alternative grounds for its holding,[25] it reached out and entirely eliminated price-squeeze claims from antitrust purview. The Court held that in order to state an actionable Section 2 claim in this context, plaintiffs must allege and prove that defendants either refused to deal with plaintiffs under circumstances that created an antitrust duty to deal, or engaged in predatory pricing under the standards in *Brooke Group*. The Court reasoned that it was not able to discern any competitive harm caused by price squeezes other than the harm that would result from a duty to deal violation at the wholesale level or a predatory pricing violation at the retail level:

> Plaintiffs' price squeeze claim . . . is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price both of these services in a manner that preserves its rivals' profit margins.[26]

The Court's reasoning arguably ignores a critical marketplace reality—that suppliers rarely attempt to monopolize markets through predatory pricing because such conduct is costly in the short run and difficult to sustain in the long run. A supplier that controls the cost of a key input of a rival can accomplish the anticompetitive result that *Brooke Group* seeks to avoid without predatory pricing, by raising the rival's input cost rather than cutting its own retail prices. In other words, a supplier with power over wholesale prices can engage in predatory conduct using above-cost prices, and need not engage in unprofitable and risky retail predatory pricing to eliminate a retail competitor.[27]

A better rationale for the ruling in *linkLine* may be found on the other side of the equation, with respect to the defendant's duty to deal. The Supreme Court alluded to the problem in stating that, "if AT&T can bankrupt the plaintiffs by refusing to deal all together, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market."[28] In short, although the Supreme Court left open the possibility that a price-squeeze claim can be recast as a predatory pricing claim, as a practical matter such claims must be grounded on an unlawful refusal to deal.

Duty to Deal After *Trinko* and *linkLine*

The *linkLine* decision effectively shut the door on any Section 2 violation labeled as a price squeeze,[29] and although the Court remanded for the district court to consider whether the plaintiffs could state a predatory pricing claim, as noted above, the Court was less than welcoming of this approach. Thus, plaintiffs who seek to assert Section 2 claims challenging pricing disparities at the wholesale and retail level must establish a duty to deal and an unlawful refusal to deal under the general pleading and proof standards applicable to such claims.

Both *Trinko* and *linkLine* recognize the continuing viability of antitrust duty to deal as a concept. As the Supreme Court stated in *Trinko*, quoting *Aspen*: "[T]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified . . . . Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." And although *Trinko* characterized *Aspen Skiing* as "at or near the outer boundary of § 2 liability," the Supreme Court did not foreclose the possibility that liability for a refusal to deal might extend beyond the situation described in *Aspen*.[30]

Refusal to Deal Would Create, Entrench, or Strengthen a Monopoly

Whether analyzed as part of the duty to deal question itself or in connection with anticompetitive effects, a refusal to deal will not be actionable unless the conduct is likely to create a new monopoly or entrench or strengthen an existing one. This fact was certainly present in *Aspen*, where the trial evidence was sufficient to show that the defendant used a refusal to deal as a ploy to weaken and eventually knock its smaller rival out of business, thus allowing the defendant to strengthen its monopoly position. On the other hand, this factor was absent in *linkLine*, where the Supreme Court observed that, even if *Trinko* had not foreclosed the question, a duty to deal could not be found because a competitive retail market had already arisen for high-speed Internet service beyond DSL.[31]

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Courts have sometimes analyzed the use of market power in one market to strengthen or achieve a monopoly in a second market as monopoly leveraging.[32] The Supreme Court decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*,[33] illustrates how Section 2 may apply where the defendant allegedly refuses to deal with rivals in order to leverage a monopoly from one market into a different market. Kodak sold parts to independent service organizations (ISOs), which needed those parts to service Kodak equipment. Kodak ceased making such sales, allegedly in an effort to take over the market for service of Kodak equipment. The Supreme Court upheld the claim because plaintiffs presented evidence that Kodak used its monopoly power over parts for Kodak equipment to strengthen or leverage its monopoly into the Kodak service market.

Other courts have upheld similar claims.[34] While *Kodak* involved *horizontal* monopoly leveraging, i.e., leveraging a monopoly from one retail market to another, a price squeeze is a form of *vertical* monopoly leveraging, where a monopolist at the wholesale level leverages that power to achieve or strengthen a monopoly at the retail level. Economists argue that vertical leveraging through a price squeeze does not cause any greater consumer harm because there is only one set of monopoly profits that can be achieved through the distribution chain, and thus a monopolist at the wholesale level does not gain any greater profits from leveraging its monopoly to the retail level.[35] This economic view of the competitive effects of a price squeeze may help explain the Supreme Court's decision in *linkLine*. In any event, one article argues that a price squeeze can cause consumer harm and should be condemned when the wholesale monopolist is squeezing its retail rival in order to prevent encroachment by that rival at the wholesale level.[36] When this occurs, a monopolist arguably is using its power to entrench or strengthen its existing monopoly in the upstream market, potentially causing consumer harm.

In *Trinko*, the Supreme Court ruled that the facts alleged there could not support a claim for monopoly leveraging, based primarily on the plaintiff's failure to allege a "dangerous probability of success" in monopolizing a second market. The rulings in *Trinko* and *linkLine*, however, do not foreclose monopoly leveraging claims that are grounded in a refusal to deal, as in *Kodak*, at least where horizontal leveraging is alleged or demonstrated. The plaintiff would need to establish an antitrust duty to deal and a "dangerous probability of success" in monopolizing a second market.[37] Even a price-squeeze claim may have continuing viability if it is characterized as "monopoly leveraging" and if the plaintiff demonstrates that the defendant's conduct has or likely would entrench the upstream monopolist's position.[38]

In short, whether characterized as monopolization or monopoly leveraging, a successful Section 2 refusal to deal claim would likely require that the plaintiff allege and prove that the defendants' conduct either has or is likely to create a monopoly in a second market, or entrench or strengthen an existing monopoly.

No Duty to Deal Where Regulatory Oversight Is Active and Effective

What *Trinko* makes abundantly clear is that where there is an active and established regulatory structure in place, one designed to "deter and remedy anticompetitive harm," there is no duty to deal enforceable by means of a Section 2 claim. As the Supreme Court put it in *Trinko*, "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."[39] But *Trinko* also suggests that the opposite is true as well: "Where, by contrast, '[t]here is nothing built into the regulatory scheme which performs the antitrust function,' the benefits of antitrust are worth its sometimes considerable disadvantages."[40] Therefore, if a plaintiff can demonstrate that the refusal to deal, or some aspect of it, cannot be remedied under the regulatory scheme, rivals or customers may be able to assert viable Section 2 claims.

Support for such claims rests not only in the *Trinko* decision itself, but also in *Town of Concord v. Boston Edison Co.*,[41] on which *Trinko* partially relies. *Concord* was a price-squeeze case decided by Justice Breyer when he sat on the First Circuit. The plaintiffs were two towns that operated municipal electrical distribution systems, purchased electricity at wholesale from defendant Boston Edison, and competed with Edison at the retail level in providing electrical service to customers. The plaintiffs alleged that Edison increased its wholesale rates to plaintiffs while keeping its retail rates low, putting a squeeze on their electricity distribution business. Edison's wholesale and retail rates were completely regulated by the Federal Energy Regulatory Commission. The First Circuit held that the likely effects of a price squeeze in a fully regulated industry are not normally exclusionary, and for that reason the squeeze did not violate the Sherman Act.[42]

Thus, *Town of Concord*, *Trinko*, and *linkLine* all have something in common. In each case, regulatory oversight was active, not merely theoretical. In *Town of Concord*, for example, the plaintiffs had challenged the defendants' rate setting on numerous occasions, both before the FERC and on administrative appeal to the federal courts. Similarly, in *linkLine*, the Court noted that "[r]espondents could have gone to the regulators and asked for petitioner's wholesale prices to be lowered in light of the alleged price squeeze." Finally, in *Trinko*, the Court noted that the regulatory scheme worked: "Verizon has been fined and subject to expensive burdens for its failure to comply with regulatory requirements by the FCC." In short, in each case, the Court found it significant that there was some remedy for, or at least a structure for consideration of, the alleged anticompetitive harm.

The results in these cases can be contrasted with the result in *Otter Tail Power Co. v. United States*.[43] There, the Supreme Court sustained a refusal to deal claim occurring in a regulated industry where the authority of the regulator to remedy the anticompetitive conduct was not clearly granted by the statute at issue, the Federal Power Act.

Defendant Otter Tail was an electric utility company which generated electrical power, transmitted or "wheeled" the power over transmission lines that it owned and operated, and also distributed it to consumers under municipally-granted franchises. The claims in *Otter Tail* were brought by municipal entities, which sought to establish municipal-based retail distribution of electrical power. Otter Tail refused to transmit or "wheel" power from other suppliers to these municipalities over its transmission lines. The Federal Power Commission, which had regulatory oversight over some aspects of these arrangements, lacked the power to order Otter Tail to wheel power from another supplier to a municipal entity.

The Supreme Court rejected Otter Tail's argument that "by reason of the Federal Power Act, it is not subject to antitrust regulation with respect to its refusal to deal."[44] After citing certain provisions of the legislative history, including the deletion of language that would have empowered the FPC to order wheeling, the Court held that there was no basis for concluding that the "limited authority of the FPC was intended to immunize Otter Tail from antitrust regulation for refusing to deal . . . ."[45]

The decision by the District of Columbia Circuit in *Covad Communications Co. v. Bell Atlantic Corp.*[46] also supports the view that conduct that is beyond the reach of regulatory enforcement may be remediable under Section 2. There, in a case following closely on the heels of *Trinko*, the court dismissed most of the plaintiff's claims arising from defendant AT&T's alleged breach of certain duties imposed under the Telecommunications Act, but did not dismiss claims related to its failure to sell DSL service to would-be customers who had service orders pending with rival Covad. Because the conduct was "unrelated to the duties" imposed by the Telecommunications Act (and presumably not remediable by the

statute), the court allowed the claim to proceed. The permitted claim there, however, was not a claim arising from a refusal to deal *with a rival*, but instead involved a refusal to deal *with the customers of a rival*.

Following *Trinko*, no court has permitted a unilateral refusal to deal claim to proceed within the context of a regulated industry.[47]

In short, where regulatory oversight is active and effective, a duty to deal enforceable by way of a Section 2 claim is not likely to be found. No case subsequent to *Trinko* has held such a claim viable in a regulated industry. Given *Trinko*'s heavy reliance on the existence of the regulatory structure designed to "deter and remedy anticompetitive harm," however, refusal to deal claims may remain viable where regulatory oversight is insufficiently active, broad, and specific to foreclose antitrust scrutiny.

Duty to Deal May Require Proof of Cessation of Voluntary Dealings

Both within and outside the regulatory context, *Aspen* sets the parameters for finding an antitrust duty to deal. There, the Supreme Court ruled that an antitrust duty to deal may arise where the defendant has elected to forgo short-term profits "because it was more interested in reducing competition . . . over the long run by harming its smaller competitor."[48] Of great significance in that case was the fact that the defendant had ceased or withdrawn from a business arrangement that had "originated in a competitive market and had persisted for several years."[49] In addition, the defendant refused to make available to the plaintiff, even at retail prices, a product that it sold to the consuming public. The key, however, was that there was persuasive evidence of anticompetitive intent. The defendant eliminated a product that consumers wanted, i.e., an all-mountain multi-day ski pass, without any plausible business justification. This conduct made sense only if viewed as having the objective to drive a rival out of business.[50]

The Supreme Court in *Aspen* did not mandate proof that the defendant ceased prior voluntary business dealings with the plaintiff. Following *Trinko*, however, some circuit courts have imposed this requirement for a Section 2 claim based on a refusal to deal.[51] In *Kodak*, where the refusal to deal claim was sustained, the plaintiffs had alleged that the defendant ceased a voluntary course of dealing with the plaintiff ISOs.[52] The same was true in *Creative Copier Services*,[53] a post-*Trinko* case.

The ultimate issue in *Aspen* and these other cases however, was not whether the defendant ceased prior voluntary dealings with the plaintiffs, but rather whether the totality of facts and circumstances show that the defendant's conduct was exclusionary or predatory. As the Tenth Circuit put it in *Christy Sports LLC v. Deer Valley Resort Co.*, "The critical fact in *Aspen Skiing* was that there was no valid business justification for the refusal."[54] Thus, other facts and circumstances may be sufficient to show an antitrust duty to deal even where the defendant does not cease prior voluntary dealings with the plaintiff or other rivals. For example, as in *Aspen*, a refusal to make a product or service available to a rival, where the product or service is available to the public at large, could also be viewed as evidence of predatory conduct. Ultimately, the issue is and must be whether the conduct lacks a business justification, demonstrating instead "a willingness to sacrifice short-term benefits in order to obtain high profits in the long run from the exclusion of competition."[55]

In *Helicopter Transport Services, Inc. v. Erickson Air-Crane, Inc.*,[56] the court denied summary judgment on a refusal to deal claim even though the plaintiff had not shown a cessation of voluntary dealing. There, the plaintiff operated a helicopter transport business using surplus military helicopters that had been manufactured by defendant Erickson. The plaintiff's evidence showed that the defendant refused to sell replacement parts for these helicopters, or even to sell parts manufacturing data that it had no use for, allegedly in an attempt to coerce owners of these aircraft, like the plaintiff, to purchase or invest in more costly helicopters manufactured by the defendant.

The court found the lack of prior dealing immaterial under the circumstances. It stated:

> The Supreme Court has never held that termination of a preexisting course of dealing is a necessary element of an antitrust claim. It was merely one of several facts in *Aspen Skiing* that supported a finding that the refusal to deal was intended to exclude competition rather than to advance a legitimate business interest.[57]

Because a factual dispute existed over whether Erickson had any business justification for its refusal to deal, and because a jury could conclude that "the refusal to deal was intended to exclude competition rather than to advance a legitimate business interest," the court allowed the claim to proceed.[58]

Just as the cessation of prior business dealings should not be required to establish a refusal to deal claim, neither will it be sufficient. The key is whether the business relationship was terminated without economic justification.[59] *Four Corners Nephrology Associates v. Mercy Medical Center of Durango*[60] illustrates this point. There, defendant Mercy Hospital had provided the plaintiff, Dr. Bevan, with access to the hospital's inpatient kidney dialysis and other inpatient nephrology services. After unsuccessfully attempting to hire Dr. Bevan to be part of the hospital staff, Mercy hired another physician and invested considerable sums in his practice to ensure its success. Following this investment, the hospital withdrew privileges from plaintiff Bevan.

Even though the hospital withdrew from a prior business arrangement with Bevan, the evidence suggested that it did so with economic justification, i.e., to protect its investment in its own practice. Unlike *Aspen*, in terminating the relationship the hospital sought to maximize its short-term profits not to forsake them to achieve an anticompetitive aim.[61]

Other courts have reached similar conclusions.[62] These decisions illustrate that a plaintiff may have better prospects for sustaining a Section 2 refusal to deal claim if the defen-

dant has ceased a voluntary course of dealing with the plaintiff, but evidence of such conduct should not (strictly speaking) be necessary or sufficient to support such a claim. As *Aspen* teaches, ultimately the issue is whether there is a valid business justification for the refusal to deal or whether the facts demonstrate a willingness to forgo short-term profits in favor of reducing competition over the long run by harming a rival.

Conclusion

Trinko and *linkLine* have "squeezed" much of the remaining vitality out of Section 2 claims challenging unilateral refusals to deal, but some life remains in these cases. In regulated industries, where rival service providers have asserted these claims with the greatest frequency, the ruling in *Trinko* leaves little room for plaintiffs to assert viable refusal to deal claims, except where the regulatory scheme is not adequate to detect and remedy anticompetitive harm arising from such conduct.

Outside the regulatory context, plaintiffs must establish that the defendant has an antitrust duty to deal to sustain a Section 2 refusal to deal claim. Plaintiffs stand a greater chance of success if the defendant discontinued a voluntary course of dealing with the plaintiff, but this is only one way to show that the defendant's conduct made no sense unless viewed as having the aim of driving the plaintiff out of business under *Aspen*.

In either context, the plaintiff must show that the defendant's conduct has or is likely to entrench or strengthen an existing monopoly, or create a new monopoly. Even price-squeeze claims remain viable after *Trinko* and *linkLine* if the plaintiff alleges and proves these elements of an antitrust duty to deal, and an anticompetitive effect aimed at protecting or entrenching the upstream monopoly position. ■

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[1] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004).

[2] Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109 (2009).

[3] A price squeeze is a form of exclusionary conduct whereby a monopolist operating on both the wholesale and retail levels of production squeezes the profit margins of its single stage retail rivals by denying them access to an essential input at a price necessary to make a reasonable profit. *See* Town of Concord v. Boston Edison Co., 915 F.2d 17, 18 (1st Cir. 1990) (Breyer, J.).

[4] 509 U.S. 209, 222–24 (1993).

[5] 540 U.S. at 401–02.

[6] *Id.* at 402–03.

[7] *Id.* at 403.

[8] *Id.* at 411.

[9] *Id.* at 405.

[10] *Id.* at 406. Section 601(b)(1) of the Telecommunications Act provides that nothing in the Act "shall modify, impair, or supersede the applicability" of the antitrust laws. *See* 47 U.S.C. § 152.

[11] 472 U.S. 585 (1985).

[12] *Trinko*, 540 U.S. at 408–10.

[13] *Aspen*, 472 U.S. at 593–94.

[14] *Trinko*, 540 U.S. at 409; *Aspen*, 472 U.S. at 610–11.

[15] *Trinko*, 540 U.S. at 409.

[16] *Id.*

[17] *Id.* at 411.

[18] *Id.*

[19] *Id.*

[20] *See supra* note 10.

[21] Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109 (2009).

[22] 148 F.2d 416 (2d Cir. 1945) (*Alcoa*).

[23] *Town of Concord*, 915 U.S. at 18 (quoting *Alcoa*).

[24] *See* Erik Hovenkamp & Herbert Hovenkamp, *The Viability of Antitrust Price Squeeze Claims*, 51 ARIZ. L. REV. 273, 275–76 (2009).

[25] Arguably the Supreme Court should have dismissed the appeal as moot. While certiorari was granted on the question of whether price-squeeze claims remain viable "notwithstanding either the Telecommunications Act or *Trinko*," plaintiffs abandoned their stand-alone price-squeeze claim in the Supreme Court, and instead requested remand to the district court to pursue the case under a predatory pricing theory. Thus, the petitioner and the respondent were aligned on the same side of the question presented, and the independent viability of the price-squeeze claim was argued in the Supreme Court only by *amici*. *See linkLine*, 129 S. Ct. at 1117. Second, instead of eliminating all price-squeeze claims, the Court could have decided the case on a more limited basis holding that the claim was precluded where prices are dictated or correctible within a regulatory structure. This is the basis on which Justice Breyer would have resolved the case, relying on his own decision in *Town of Concord*, 915 F.2d at 18 ("[W]e conclude therefore that price regulation will in most cases prevent a price-squeeze 'from constituting an exclusionary practice' of the sort that the Sherman Act § 2 forbids."). Third, arguably the *sine qua non* of any price-squeeze claim, in fact any Section 2 claim, was no longer present; the conduct did not have the likely effect of creating or entrenching a monopoly. The Supreme Court itself recognized that, in the market for retail Internet services, "DSL now faces robust competition from cable companies and wireless satellite services." *linkLine*, 129 S. Ct. at 1115. Thus, even if AT&T had succeeded in squeezing its rivals entirely out of the DSL retail market, there was little likelihood of competitive harm.

[26] *linkLine*, 129 S. Ct. at 1120.

[27] *See* Hovenkamp & Hovenkamp, *supra* note 24, at 287.

[28] *linkLine*, 129 S. Ct. at 1123.

[29] Yet the Court did not explicitly overrule *Alcoa*. "Given developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us." *linkLine*, 129 S. Ct. at 1120 n.3.

[30] For example, the Court stated: "The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one." *Trinko*, 540 U.S. at 408.

[31] *linkLine*, 129 S. Ct. at 1119 n.2.

[32] *See, e.g.*, 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 652(a) (3d ed. 2006) ("[I]n common parlance, the monopolist might 'misuse' or 'abuse' its monopoly power by 'leveraging' it so as to give the monopolist an unfair competitive advantage in the secondary market . . . .").

[33] 504 U.S. 451, 483 (1992).

[34] *See* Creative Copier Servs. v. Xerox Corp., 344 F. Supp. 2d 858, 866 (D. Conn. 2004) (sustaining a refusal to deal case following *Trinko* in a factual situation similar to that presented in *Kodak*); Helicopter Transport Servs., Inc. v. Ericson Air-Crane Inc., 2008 WL 151833, at *5 (D. Or. Jan. 14, 2008) (court denied summary judgment in a post-*Trinko* refusal to deal case, holding that a "jury could find that [defendant] has sought to leverage its control of the parts market to thwart competition in the heavy helicopter services market, and for other improper purposes").

[35] *See* AREEDA & HOVENKAMP, *supra* note 32, § 787(b) ("[T]he monopolist at one market level cannot ordinarily make greater monopoly profits simply by acquiring or controlling a second level monopoly."); *see also Town of Concord*, 915 F.2d at 23 (discussing widely accepted economic argument that there

is but one monopoly profit to be gained from the sale of an end product).

[36] Hovenkamp & Hovenkamp, *supra* note 24, at 287–88.

[37] *Trinko*, 540 U.S. at 415 n.4.

[38] *See* Hovenkamp & Hovenkamp, *supra* note 24.

[39] *Trinko*, 540 U.S. at 412.

[40] *Id.*

[41] 915 F.2d 17 (1st Cir. 1990).

[42] This rationale differs from that in *Trinko*, though with the same result. Unlike in *Trinko*, the existence of a regulatory structure did not preclude a finding of a "duty to deal." Rather regulatory oversight was viewed as sufficient to ameliorate the exclusionary effects of the anticompetitive conduct. *Town of Concord*, 915 F.2d at 22.

[43] 410 U.S. 366 (1973).

[44] *Id.* at 372.

[45] *Id.* at 374–75.

[46] 398 F.3d 666 (D.C. Cir. 2005).

[47] *See, e.g.*, Stein v. Pac. Bell, 172 Fed. App'x 192, 194 (9th Cir. 2006) (the course of dealing between Pac Bell and its competitors arises within a congressionally imposed regulatory scheme, and therefore does not fit within *Aspen*); Metronet Servs. Corp. v. Quest Corp., 383 F.3d 1124, 1134 (9th Cir. 2004) (claim does not fall within *Aspen* exception to general rule of no duty to deal, because challenged conduct does not entail a sacrifice of short-term profits for long-term gain from the exclusion of competition); Covad Commc'ns Co. v. Bell South Corp., 374 F.3d 1044, 1049 (11th Cir. 2004) (refusal to deal allegations did not fall within limited exceptions outlined by *Aspen*); ASAP Paging, Inc. v. Century Co. of San Marcos, Inc., 137 Fed. App'x 694, 699 (5th Cir. 2005) (ASAP's allegations do not fit into *Aspen* exception for refusal to deal claims).

[48] *Aspen*, 472 U.S. at 608.

[49] *Id.* at 603.

[50] *See* Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 378 (7th Cir. 1986) (describing *Aspen* as a case where defendants discontinued a service its customers wanted, thus forgoing normal competitive benefits in the hope of reaping long-term anticompetitive aims).

[51] *See* Covad Commc'ns Co. v. Bell Atl., 398 F.3d 666, 673 (D.C. Cir. 2005) (antitrust claim based on defendant's refusal to cooperate with competitor can withstand motion to dismiss only when it is alleged either that defendant had previously "engaged in a course of dealing with its rivals, or [that it] would ever have done so absent statutory compulsion") (citing *Trinko*); *Elevator Antitrust Litig.*, 502 F.3d 47, 53 (2d. Cir. 2007) (complaint dismissed because plaintiffs did not allege that defendants terminated any prior course of dealing—the "sole exception" to the broad right of a firm to refuse to deal with its rivals); LiveUniverse Inc. v. MySpace, 2008 WL 5341843 at *2 (9th Cir. Dec. 22, 2008) (refusal to deal claim requires plaintiff to plead the "unilateral termination of a prior and profitable course of dealing").

[52] Eastman Kodak Co. v. Image Technical Serv. Inc., 504 U.S. 451, 458 (1992).

[53] Creative Copier Servs. v. Xerox Corp., 344 F. Supp. 2d 858, 866 (D. Conn. 2004).

[54] 555 F.3d 1188, 1197 (10th Cir. 2009).

[55] *Christy Sports*, 555 F.3d at 1197. *See also* ASAP Paging Inc. v. CenturyTel of San Marcos Inc., 137 Fed. App'x 694 (5th Cir. June 24, 2004) (rationale underlying *Aspen* was that facts showed a willingness to give up short-term profits for anticompetitive purposes).

[56] 2008 WL 151833 (D. Or. Jan. 14, 2008).

[57] *Id.* at *9.

[58] *Id.* The court there explicitly declined to follow the Eleventh Circuit's holding in *Covad*, 374 F.3d at 1049, which held such allegations mandatory. *See id.* at n.10.

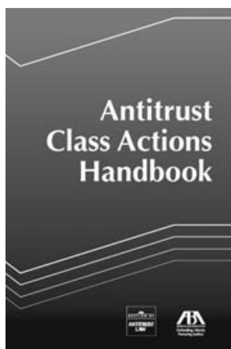
[59] *Christy Sports*, 555 F.3d at 1197.

[60] 582 F.3d 1216 (10th Cir. 2009).

[61] *Id.* at 1224–25.

[62] *See Christy Sports*, 555 F.3d at 1197 (defendant terminated the business relationship to make more money for itself); IBM v. Platform Solutions, Inc., 2009 WL 2127744 (S.D.N.Y. Sept. 30, 2009) (summary judgment granted because plaintiff failed to demonstrate that defendant had forgone short-term profits by discontinuing its prior conduct in licensing patents and supporting the technology); *see also* Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986) (Posner, J.) (the fact that defendant provided voluntary assistance to rivals in order to liquidate its inventory of used telex equipment did not obligate it to continue this conduct, or make its cessation of such conduct actionable under Section 2).

Antitrust Class Actions Handbook



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