# *Editor's note*

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## I. INTRODUCTION

The articles in this special issue on the Supreme Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[1] provide thoughtful contributions to the continuing debate over the significance of the Court's most recent pronouncement on monopolization law under section 2 of the Sherman Act. One reason—perhaps the *main* reason—for the competing and seemingly irreconcilable interpretations of the *Trinko* decision reflected in the articles that follow is the unusual volume of dicta in Justice Scalia's opinion.

Black's Law Dictionary defines "dicta" as opinions of a Justice "that do not embody the resolution or determination of the specific case before the Court." They are "[e]xpressions in [the Court's] opinion which go beyond the facts before [the Court] and therefore are individual views of [the] author of [the] opinion and not binding in subsequent cases as legal precedent."[2] The debate, then, boils down to differing views on how much of the language in the *Trinko* opinion

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1 540 U.S. 398 (2004).

2 BLACK'S LAW DICTIONARY at 454 (6th ed., 1990).

really is dicta, and how much of it was essential for the resolution of the case and is therefore binding as legal precedent.

## II. THE CONTOURS OF THE DEBATE

In Trinko: *Going All the Way*, for example, George Hay sees somewhat less dicta and somewhat more substance in his evaluation of the potential impact of the decision on a monopolist's duty to deal or otherwise cooperate with a competitor. He suggests that the opinion has planted the seed for a complete overhaul of section 2 jurisprudence in this area and argues that the logical conclusion of the *Trinko* decision is likely to be either the elimination of compulsory dealing under section 2 altogether or its limitation to a "tiny pocket of exceptional circumstances."

To support his thesis, Professor Hay argues first that, under *Trinko*, liability for refusing to deal seems to require something more than a violation of the qualification imposed on a monopolist's unfettered freedom to deal under the rule established in *Colgate* (a qualification that was omitted—without an ellipsis—from Justice Scalia's rendition of the *Colgate* rule[3]). *Trinko* suggests that a monopolist who refuses to deal, even for the purpose and with the effect of creating or maintaining its monopoly, must also satisfy some "recognized" exception to its *Colgate* freedom to deal. The case thus speaks in terms of exceptions in an already narrow set of circumstances under which a monopolist may face liability for such conduct.

Hay's second line of argument relies on the distinction drawn in the *Trinko* opinion between the discontinuance of a preexisting course of dealing (as in the *Aspen Skiing* case) and the refusal to commence dealing in products that had never before been offered (or would have not been offered but for a statute compelling them to be offered, as in *Trinko*). The distinction implies a safe harbor for vertically integrated firms that refuse to sell products as long as they have never before been marketed at arm's length. Applying such a rule to vertically integrated monopolists but not to unintegrated monopolists,

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[3] *Trinko*, 540 U.S. at 408 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

however, awkwardly skews business incentives, making it likely that the Court will eventually settle on an even more general rule that abolishes refusal to deal doctrine altogether.

Finally, after a process that considers and rejects various remedial approaches to compelling access or dealing, Hay argues that very little scope remains for intervention that involves court-administered price setting, particularly in the context of a traditionally regulated industry.

The article makes a compelling case for a further narrowing or even the elimination of any section 2 obligation of a monopolist to deal with its rivals.

Phil Weiser, in *The Relationship of Antitrust and Regulation in a Deregulatory Era*, argues that the Supreme Court in *Verizon v. Trinko* has set forth a new stance toward antitrust oversight of regulated industries. Although the particulars of that stance remain open for debate and are likely to generate considerable disagreement, an ambitious reading of *Trinko* suggests that courts should avoid evaluating antitrust claims where a regulatory agency is empowered to oversee the conduct at issue. However, Weiser calls for a less ambitious application of *Trinko*'s rule of antitrust restraint. In particular, antitrust courts should make discretionary judgments about whether the effectiveness of regulation in a given set of circumstances renders antitrust oversight unnecessary. By so doing, antitrust courts would defer to regulatory agencies only where those agencies are reasonably capable of managing the competition policy matter at issue. If antitrust courts opt for a broader rule of restraint, such a stance would only fuel an unfortunate trend of devaluing the role of antitrust oversight and overly valuing the capabilities of alternative institutional actors. Rather than adopt that stance, Weiser argues, antitrust courts should formulate legal doctrines and procedural practices to evaluate claims that might otherwise be dismissed under *Trinko*. As courts, legislatures, and regulators increasingly confront the problem of striking an appropriate balance between administrative oversight and antitrust intervention, Weiser's article raises important issues and sounds an appropriate caution.

In the article by antitrust and regulatory practitioners Bob Jablon, Mark Hegedus, and Sean Flynn entitled *Dispelling Myths: A Real World Perspective on* Trinko, the authors argue that the *Trinko* decision is based on two faulty assumptions about today's regulated industries. The first is that competitive response in these industries can be relied upon to defeat the exercise of incumbent monopoly power; that is, that all markets are contestable. The second is that administrative agencies are equipped to substitute for antitrust courts in the enforcement of competition law, particularly in regulated infrastructure industries where market forces are increasingly relied upon to determine prices. Jablon, Hegedus, and Flynn argue persuasively that the *Trinko* decision relied upon both "myths," and they set out to dispel them, a task at which they largely succeed.

Using the electricity industry as their template, the authors argue that today's regulated industries are not characterized by ease of new entry and exit, conditions on which the contestable markets theory depends. Further, vertically integrated electric utilities that own both generation and bottleneck transmission facilities can limit or eliminate competitive responses in the market, so they can minimize the threat of new competition. By implicitly adopting a contestable markets framework, the *Trinko* Court takes a benign view of monopoly power and would apparently apply this "monopoly is good" view to markets in which the easy entry/exit assumption of the contestable markets theory is not fulfilled. Given the inapplicability of the theory to infrastructure industries, among others, the authors argue that *Trinko* should not be deemed to announce a rule of general applicability.

The second myth is that administrative agencies have the enforcement tools and adjudicatory independence needed to replace antitrust courts in deterring and remedying anticompetitive conduct. The authors demonstrate the fallacy of this myth. They note first that vesting exclusive antitrust enforcement in administrative agencies is contrary to law, because courts do not have the discretion to refrain from enforcing the antitrust laws, and Congress has not exempted regulated industries from antitrust statutes. Furthermore, agencies lack certain important remedies available to antitrust courts, limiting the deterrence effect of administrative enforcement. The authors also argue that the institutional structure of most administrative agencies inhibits

them from effectively pursuing procompetitive initiatives or from providing remedies compelled by antitrust norms that may be unpopular with politically connected companies. Finally, the authors show how administrative procedures in recent years have moved away from a more judicial model and its due process safeguards and more toward informal mechanisms that increase opportunities for industry influence, ex parte communications, and unsworn testimony, rendering agencies inappropriate for antitrust law enforcement.

The article builds a convincing case for viewing court and agency responsibility for competition policy as complementary and maintaining the current system of dual authority, notwithstanding the outcome in *Trinko*.

In his article, Trinko *v. Baxter: The Demise of U.S. v. AT&T*, Tim Brennan argues that by relying on regulation to justify limiting the scope of antitrust enforcement, *Verizon v. Trinko* contradicts both the outcome in *United States v. AT&T* twenty years ago and the theory on which that case rested. The fundamental facts—discrimination against unaffiliated competitors in access to regulated monopoly network services—were the same in both cases. However, the *AT&T* decision was consistent with the view that regulation created anticompetitive vertical incentives that would not be present in an unregulated market, while in *Trinko* the Court took the view that the regulation mitigated a problem that would be of greater concern in unregulated markets. Professor Brennan argues that this flaw in the *Trinko* Court's reasoning is compounded by the reliance on an economically erroneous monopolization doctrine that seems to immunize refusals to deal where no profits were sacrificed or where the dealing was not voluntary. This reversal of the role of regulation in monopolization cases implies that had *Trinko* been the law in 1980 the antitrust cases against *AT&T* would have failed and the firm would have remained a monopolist in both the local and long distance markets. Brennan suggests that the fallout from *Trinko* may go beyond the telecommunications sector to other partially regulated industries and perhaps even to the use of economics in antitrust jurisprudence.

Roger D. Blair and Christine A. Piette, in *The Interface of Antitrust and Regulation:* Trinko, examine the economic genesis of the Telecommunications Act of 1996 and the origins of *Trinko* dispute. They note

that by denying incumbents recovery of their average unit costs, the TELRIC pricing regime adopted by the Federal Communications Commission under the authority of the Act induced noncompliance with the interconnection obligations that were at the heart of the *Trinko* dispute.

Analyzing the requirements for effective economic sanctions to induce compliance with an incumbent's obligations, Blair and Piette take issue with the *Trinko* Court's implicit conclusion that the remedies available to state and federal administrative agencies are sufficient in the absence of the threat of antitrust intervention to insure the degree of compliance required by the Act. In particular, they note that without adequate information about the additional profit gained as a result of an incumbent's delay from noncompliance, it is impossible to judge whether the level of fines available to regulators is sufficient to deter noncooperation.

Finally, Blair and Piette analyze the implications of *Trinko* for substantive antitrust policy in the regulated context. They present an important and persuasive contribution to the view that antitrust remedies would be an effective means of ensuring compliance with the purposes and obligations of the procompetitive provisions of the Telecommunications Act.

The analysis of the *Trinko* case is doubly expanded in Paul Jones's piece, in which he speculates on the implications of the decision for intellectual property in an international context. Jones reviews competition law as it relates to intellectual property in three jurisdictions, the European Union, Canada, and the U.S. as it may evolve post-*Trinko*. Taking his cue from several pronouncements made by the Department of Justice in the wake of the decision, the author concludes that *Trinko* signals an increased deference to intellectual property on the part of both United States antitrust agencies and the courts. Unfortunately, Jones warns, applying Justice Scalia's perspective is unlikely to contribute to a rational underlying economic basis for intellectual property rights, leading instead to judicial resolutions of conflicts over those rights that are untethered to any analysis of their competitive or anticompetitive effects. This contrasts with the Canadian approach, where the author perceives a trend toward a fuller analysis of the competitive effects of the enforcement of intellec-

tual property rights, and the European Union, where an increasing divergence of opinion between the European Court of Justice and the Supreme Court raises the specter of forum shopping and jurisdictional conflicts over trade and the regulation of global commerce.

In a further counter to some of the more sweeping interpretations of the case, I argue, in *The Truth about* Trinko, that there is restraint evident in the opinion that goes largely unnoticed. The Court introduced no substantive changes in section 2 doctrine. The *Trinko* Court overruled no refusal to deal case and even reiterated that under certain circumstances section 2 imposes a duty to deal with rivals.[4] The *Trinko* Court also left intact the essential facilities doctrine as it existed pre-*Trinko*, refrained from adopting any behavioral or legal test for anticompetitive conduct, and seemed to employ a case by case approach to disputes at the interface of antitrust and regulation. The true impact of the *Trinko* decision may be far less than is often predicted, and certainly does not represent any kind of watershed judicial rollback of section 2 monopolization law. I believe that the *Trinko* opinion was largely a restatement of the *status quo ante* of section 2 jurisprudence, and that eventually it will prove to be limited in scope to the experimental, procompetitive Telecommunications Act of 1996 and slight in substantive legal effect.

## III. CONCLUSION

The foregoing summary, of course, does not do justice to the subtlety and depth of thought evident in the contributions to this volume. But it does serve to illuminate the many weighty issues about which the *Trinko* decision inspires debate. There can be little doubt, however, that further guidance from the Supreme Court on the scope of section 2 as it applies to unilateral conduct, particularly in what traditionally have been regulated industries, will be welcome indeed.

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[4] *Trinko*, 540 U.S. at 408 ("Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2.").