

# **Trinko: Will the Supreme Court Bring Clarity to Dealings Among Telecommunications Competitors?**

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The interplay between the antitrust laws and the Telecommunications Act (1996 Act) has become an area of increasing uncertainty to those in the telecommunications industry. The lower courts have disagreed about the antitrust significance of alleged failures to comply with the obligations imposed by the 1996 Act. District Courts have widely—though not unanimously—interpreted the Seventh Circuit’s decision in *Goldwasser v. Ameritech Corp.* to mean an antitrust claim can never be based on allegations of conduct that also happens to violate the 1996 Act. The Second, Ninth, and Eleventh Circuits have recently disagreed. The Supreme Court’s decision to grant review of the Second Circuit’s decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, Docket No. 02-682, seems to present the Court with the opportunity to resolve a number of significant issues affecting dealings between local telephony incumbents and challengers. Verizon’s petition for certiorari does not merely raise questions concerning how to interpret *Goldwasser* but also raises challenges to the Second Circuit’s treatment of essential facilities and monopoly leveraging claims without regard to the 1996 Act—challenges sufficiently broad to have significance well beyond the regulated telecommunications industry. But it is not clear that *Trinko*, a class action by indirect customers of incumbent local telephone monopolists (ILECs) is the proper vehicle by which to address many of those issues, especially as they relate to the ILECs’ direct customers, the competing local exchange carriers (CLECs).

## **Goldwasser and Its Progeny**

The Seventh Circuit was the first court of appeals to consider the interplay of the 1996 Act and the antitrust laws, in *Goldwasser*, 222 F.3d 390 (7th Cir. 2000). A putative class of end users of local telephone services sued Ameritech, claiming that it had violated a number of its duties under the 1996 Act to provide to competitive local exchange carriers reasonable, nondiscriminatory access to its network. As the Seventh Circuit put it, the *Goldwasser* plaintiffs somewhat simplistically argued that “Ameritech is a monopolist; Ameritech is engaging in conduct designed to maintain its monopoly power, through a variety of exclusionary practices; and plaintiffs as consumers are harmed,” where the only exclusionary practices alleged were violations of the 1996 Act. *Id.* at 396. The court emphatically rejected any suggestion of such a syllogism. It found the duties imposed by the 1996 Act are not “coterminous with the duty of a monopolist to refrain from exclusionary practices.” *Id.* at 399. The court went on to observe that “it would be undesirable here to assume that a violation of a 1996 Act requirement automatically counts as exclusionary behavior for purposes of Sherman Act § 2.” *Id.* at 400.

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Those points are hardly controversial; few would argue that every violation of a 1996 Act duty, no matter how minor or technical, would *automatically* suffice as sufficient exclusionary conduct to impose antitrust liability. But *Goldwasser* became controversial because, at least as interpreted by a number of lower courts, it announced a per se rule that any conduct which implicated the 1996 Act could never be the basis for antitrust liability. It disclaimed any finding of express or implied immunity, *id.* at 401, but went on to hold that “the 1996 Act imposes duties on the ILECs that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws, either; they are simply more specific and far-reaching obligations . . . .” *Id.* The Seventh Circuit concluded that

[a]t some appropriate point down the road, the FCC will undoubtedly find that local markets have also become sufficiently competitive that the transitional regulatory regime can be dismantled and the background antitrust laws can move to the fore. Our holding here is simply that this is not what Congress has mandated at this time for the ILEC duties that are the subject of the *Goldwasser* complaint.

*id.* at 401–02.

A number of ILECs responded to the Seventh Circuit’s ruling by asserting *Goldwasser* defenses to a variety of consumer and competitor antitrust claims around the country. While several courts rejected the defense,<sup>1</sup> the majority of district courts to consider the issue followed—or even expanded—*Goldwasser*.<sup>2</sup>

***Trinko, Covad, and MetroNet All Disagree with Goldwasser***

The Second, Ninth and Eleventh Circuits, the only courts of appeal to have considered the issue since *Goldwasser*, have refused to follow an interpretation of *Goldwasser* that precludes antitrust liability based on conduct violative of the 1996 Act. All three circuit courts reversed district court rulings that dismissed antitrust claims, but each arose in a distinct procedural setting.

**Trinko.** The Second Circuit’s ruling arose in *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.* (*Trinko*), 305 F.3d 89 (2d Cir. 2002), which, like *Goldwasser*, was a class action on behalf of end-user consumers. Following the entry of a consent decree in which Verizon agreed to pay over \$10 million to the FCC and AT&T concerning access disputes, a putative class of CLEC customers sued Verizon. The end-users claimed that they received poor local service from CLECs because Verizon did not provide the CLECs access to its network equal in quality to what it provided itself. Had Verizon met its obligations, the plaintiffs theorized, those competing carriers would have been able to provide better service as a competitive alternative to Verizon. Verizon moved to dismiss, claiming (1) the end user plaintiffs lacked standing to pursue their claims and (2) no

<sup>1</sup> See, e.g., *Ohio Bell Tel. Co. v. CoreComm Newco Inc.*, 214 F. Supp. 2d 810 (N.D. Ohio 2002) (permitting § 2 claim based on 1996 Act violations); *Davis v. Pac. Bell*, 204 F. Supp. 2d 1236 (N.D. Cal. 2002) (same); *Stein v. Pac. Bell*, 173 F. Supp. 2d 975 (N.D. Cal. 2001) (same); *Sprint-Florida, Inc. v. Electronet Intermedia Consulting, Inc.*, No. 4:00-CV-176-RH (N.D. Fla. Sept. 20, 2000) (same); *MGC Communications Corp. v. Sprint Corp.*, No. CV-S-00-948-PMP (D. Nev. Dec. 12, 2000) (same); *Bell Atl. Network Servs., Inc. v. Ntegrity Telecontent Servs., Inc.*, Civ. No. 99-5366-AET (D.N.J. Oct. 31, 2000) (same).

<sup>2</sup> See, e.g., *Covad Communications Co. v. Bell Atl. Corp.*, 201 F. Supp. 2d 123 (D.D.C. 2002) (dismissing based on *Goldwasser*); *Cavalier Tel., LLC v. Verizon Va. Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002) (same); *MGC Communications, Inc. v. BellSouth Telecomms., Inc.*, 146 F. Supp. 2d 1344 (S.D. Fla. 2001) (same); *Intermedia Communications Inc. v. BellSouth Telecomms., Inc.*, No. 8:00-CIV-1410-T-24(C) (M.D. Fla. Dec. 15, 2000) (R2-7-A200) (same); *Telecomms. & Info. Sys., Inc. v. BellSouth Telecomms., Inc.*, No. 99-1706-SEITZ (S.D. Fla. June 6, 2001) (same); *Building Communications, Inc. v. Ameritech Servs., Inc.*, No. 97-CV-76336 (E.D. Mich. June 21, 2001) (same).

antitrust claim was possible in any event, under *Goldwasser*. The district court found the plaintiff had standing, but dismissed the antitrust claims, expressly following *Goldwasser*.

The Second Circuit reversed. First, the court agreed that the end-user plaintiffs had standing. Relying on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the court concluded that a “customer of a competitor can suffer a direct injury from an anticompetitive scheme aimed principally at the competitor.” 305 F.3d at 106. Next, the Second Circuit expressly disagreed with the district court’s application of *Goldwasser*. It found that “The allegations in the amended complaint describe conduct that may support an antitrust claim under a number of theories. While some of this conduct might also violate section 251, these are not merely allegations that section 251 has been violated.” *Id.* at 108. While the class plaintiffs’ allegations were somewhat conclusory, the court found the plaintiffs had properly stated Section 2 claims on both monopoly leveraging (applying the Second Circuit’s lower threshold standard as expressed in *Berkey Photo*)<sup>3</sup> and essential facilities theories, finding that many of Verizon’s arguments were simply inappropriate for resolution at the Rule 12 stage. 305 F.3d at 108.

**Covad.** Unlike *Trinko* and *Goldwasser*, the Eleventh Circuit was not faced with indirect claims by a class action of would-be end-user customers of local service resellers. Instead, the court in *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), faced claims brought by a facilities-based CLEC, Covad Communications Company. Covad, a provider of DSL service, needed access to BellSouth’s local telephone network in order to provide its own services. Covad claimed it was excluded from the relevant Internet access markets in which it competed with BellSouth when it was denied proper access to BellSouth’s local network. *Id.* at 1276–77. BellSouth moved to dismiss, relying heavily on *Goldwasser*. The district court, quoting liberally from *Goldwasser*, dismissed Covad’s claims.

The Eleventh Circuit reversed. First, it rejected *Goldwasser* “to the extent that it is read to say that a Sherman Act antitrust claim cannot be brought as a matter of law on the basis of an allegation of anti-competitive conduct that happens to be ‘intertwined’ with obligations established by the 1996 Act.” *Id.* at 1282. The Eleventh Circuit then went on to review Covad’s allegations on their merits, and found they sufficed to state a Section 2 claim under theories of essential facilities, refusal to deal, and price squeeze, finding each to be merely a subspecies of monopoly leveraging. *Id.* at 1284. The Eleventh Circuit subsequently denied BellSouth’s petition for rehearing en banc, with three judges dissenting.<sup>4</sup>

**MetroNet.** The Ninth Circuit also recently confronted a *Goldwasser* defense in a CLEC case, *MetroNet Services Corp. v. U.S. West Communications*, 325 F.3d 1086 (9th Cir. 2003). The plaintiff, MetroNet, buys Centrex service from Qwest in bulk at a volume discount and passes along the discount to small customers who would otherwise not qualify for it. Qwest changed its volume discount pricing rules in 1997. As the court put it “Qwest’s new pricing scheme rendered MetroNet’s customers ineligible for the volume discount,” *id.* at 1091, causing a 400 percent increase in their cost of service. *Id.* at 1093. Qwest moved for summary judgment, claiming, among other things, that the highly regulated nature of the telecommunications industry precluded any claim of market power or exclusionary conduct. The district court granted Qwest’s motion for summary judgment.

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<sup>3</sup> *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 253, 275 (2d Cir. 1979).

<sup>4</sup> The denial of the petition for rehearing, and the dissenting opinion from that denial, are reported at 314 F.3d 1282 (11th Cir. 2002).

The Ninth Circuit, finding the matter to be “a close question,” reversed. *Id.* at 1091. The court first rejected Qwest’s Goldwasser defense:

Even absent the explicit language of the savings clauses, Qwest would not be entitled to implied immunity for its imposition of per location pricing. . . . Where the conduct challenged under the antitrust laws “is the product of the regulated business” independent initiative and choice, [that conduct] is properly subject to antitrust scrutiny.

*Id.* at 1101. The Ninth Circuit went on to review MetroNet’s claims on the merits and found that triable issues existed concerning Qwest’s market power, the anticompetitive effects of its conduct, and antitrust injury. The court also expressly found a triable issue on MetroNet’s essential facilities claim. *Id.* at 1111–12.

### Certiorari in *Trinko*

Verizon petitioned for certiorari in *Trinko*,<sup>5</sup> at which point the case took some interesting turns.

First, the Solicitor General filed an amicus brief on behalf of the DOJ Antitrust Division and the FTC, supporting review by the Supreme Court.<sup>6</sup> The government’s position appears to have migrated substantially from the views espoused in 2001 when the government first addressed *Goldwasser* in an amicus brief filed in the Eleventh Circuit on behalf of the plaintiff in *Intermedia Communications Inc. v. BellSouth Telecommunications, Inc.*<sup>7</sup> In *Intermedia*, the government had argued that while “*Intermedia*’s lengthy complaint could have been clearer with respect to its antitrust claims,” its allegations of exclusionary conduct grounded in the 1996 Act included “all of the factual allegations required to state a claim under Section 2.” *Intermedia* Amicus Brief at 24. But in *Trinko*, the government (the FTC being notably absent) argued that, while the plaintiff may have alleged necessary elements, such as exclusionary conduct, its allegations were “inherently implausible when measured against the regulatory scheme the complaint itself mentions.” *Trinko* Amicus Brief at 14. The government also criticized the Second Circuit’s application of the lower threshold *Berkey Photo* monopoly-leveraging standard and asked the Supreme Court to clarify that monopoly leveraging is only actionable when it results in a monopoly, or a dangerous probability of achieving one, in the downstream market. *Id.* at 16. As to both monopoly leveraging and essential facilities, the government argued that it is an antitrust plaintiff’s burden, in establishing exclusionary conduct, to prove the defendant acted in an economically irrational manner, but rather for the effect of excluding competition: “essential facilities claims must at a minimum include some showing of ‘exclusionary’ or ‘predatory’ conduct, *i.e.*, that the refusal to share the facility would not make economic sense unless it tended to reduce or eliminate competition.” *Id.* at 13. The government noted that, while the *Trinko* plaintiffs had pleaded that Verizon’s conduct lacked any legitimate business justification, its allegation should be disregarded—even at the Rule 12 stage—as “inherently implausible.” *Id.* at 14.

The Supreme Court obviously wrestled with whether and how to deal with Verizon’s petition. The Court put the matter on its conference schedule four times before finally granting review. And when it did take the case, the Court declined to review either of the issues raised by Verizon (which

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<sup>5</sup> Petition for a Writ of Certiorari, No. 02-682 (*Trinko* Pet.).

<sup>6</sup> Brief for the United States and the Federal Trade Commission as Amici Curiae, S. Ct. No. 02-682 (filed Dec. 2002) (*Trinko* Amicus Brief).

<sup>7</sup> Brief for the United States and Federal Communications Commission as Amici Curiae in Support of Appellants, 11th Cir., No. 01-10224-JJ (filed Mar. 28, 2001) (*Intermedia* Amicus Brief).

focused on consumer standing and the interplay of the 1996 and Sherman Acts), or the alternative question proposed by the government (which focused on the standards for assessing exclusionary conduct). Instead, it stated that review was “limited” to the question “[d]id the Court of Appeals err in reversing the District Court’s dismissal of respondent’s antitrust claims?”<sup>8</sup> Thus, the Court’s intended scope is unclear. Ultimately, *Trinko* could range from a narrowly focused examination of antitrust claims in the shadow of the 1996 Act, to a broad review of antitrust standing and/or parties’ burdens in showing exclusionary conduct under Section 2.

### The Potential For Dramatic Changes

The telecommunications industry has been slow to achieve the goal of increased competition in all markets, which Congress mandated when it passed the landmark Telecommunications Act of 1996.<sup>9</sup> A number of CLECs have alleged that ILECs, such as Verizon and BellSouth, have manipulated the regulatory and competitive landscapes in order to protect their long-sanctioned, rate-payer-funded monopolies over local telephone service. ILECs responding to those antitrust cases have relied on *Goldwasser* to assert that the 1996 Act absolutely precluded any claim that they had violated the antitrust laws in their interactions with competitors. The district courts were split in their treatment of that defense, though a majority followed *Goldwasser* and dismissed competitor’s claims.<sup>10</sup>

The Second Circuit’s decision in *Trinko* addresses such allegations of ILEC abuse, albeit in the context of the end-user customers of those companies that compete with Verizon by reselling its local service offerings. The Supreme Court found those issues to be serious enough to merit its review. CLECs have also alleged (including in *Covad*) that the ILECs have simultaneously been engaged in conduct that has more far-reaching, and ultimately more seriously anticompetitive effects, than merely retaining their historic, local telephone monopolies. The CLECs allege that the ILECs have extended their traditional local service monopolies so as to dominate new, innovative markets, markets that depend on access to the local telephone network in order to provide competing services in downstream markets. That type of monopoly extension behavior is not squarely presented in *Trinko* (though it is the very core of *Covad*’s claims against BellSouth, as recently analyzed and approved by the Eleventh Circuit), so it is unclear whether the Supreme Court can or should properly reach those issues based on the *Trinko* complaint.

But at least some parties are seeking to turn *Trinko* into much more than a battle over the interplay of the Sherman Act and the 1996 Act. *Trinko* potentially presents a number of issues of interest well beyond the telecommunications industry.

**Predatory Conduct.** If the Supreme Court reviews *Trinko* in the manner suggested by the government, it could have significant effects on Section 2 claims in general, not just in the regulated telecommunications context. The government’s amicus brief could be read as an attempt to use *Trinko* as a vehicle to reformulate the Section 2 pleading rules as they relate to “exclusionary” or “predatory” conduct.

The government argues that, in order to plead any type of Section 2 claim, a plaintiff must make an affirmative showing that the defendant’s conduct is without any legitimate business justifica-

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<sup>8</sup> Order Granting Petition For Writ of Certiorari, *Verizon Communications v. Law Offices of Curtis V. Trinko*, 123 S. Ct. 1480 (2003) (No. 02-682).

<sup>9</sup> 47 U.S.C. §§ 151 *et seq.*

<sup>10</sup> *See supra* notes 1 & 2.

tion—in the government’s words, that the conduct makes no economic sense but for the purpose to exclude competition. *Trinko* Amicus Brief at 11. Specifically, the government criticizes the *Trinko* complaint for failing to allege that Verizon’s conduct “involves a sacrifice of profits or business advantage and makes economic sense only because it softens or injures competition.” *Id.* Indeed, at least in the context of *Trinko*’s claims, the government asserts that it is appropriate on a Rule 12 motion to weigh the credibility of such allegations, even if the plaintiff makes them. *Id.* at 13–14 (criticizing plaintiffs’ allegations of lack of business justification as “inherently implausible”). The government’s position, read most broadly, would appear to be (1) a significant shift in the traditional allocation of Section 2 burdens of pleading and proof and (2) wherever those burdens fall, a significant narrowing of what has traditionally been viewed as exclusionary conduct.

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It is well-settled that a monopolist does not enjoy an unfettered right to refuse to deal, even with competitors. That right “exists only if there are legitimate competitive reasons for the refusal.”<sup>11</sup> As a number of circuits have recently reaffirmed, including most recently the Third Circuit in *LePage’s*, the defendant bears the burden of showing such reasons motivated its conduct.<sup>12</sup> The government’s position on exclusionary conduct in *Trinko* could be interpreted to shift that burden to the plaintiff, to prove as part of its affirmative case that the defendant’s challenged conduct makes no business sense except for its adverse effects on competition. It is unclear what justifies this shift.

Regardless of who ultimately bears the burden of proof on the issue, the government’s position could also be stretched to assert a relatively narrow view of the type of conduct that would fail to meet the “legitimate justification” standard. Any efforts to turn the government’s position into an absolute would appear to be unsound, as well as a significant shift in position by the government, even within the telecommunications industry. The government considered similar issues in the *Intermedia* case in the Eleventh Circuit in 2001, and opined that allegations of “failure to provide reasonable interconnection” by BellSouth against a CLEC sufficiently “allege[d] exclusionary conduct by a firm with monopoly power that lacks business justification and that harms competition.”<sup>13</sup> It is true that in *Trinko* the government argued that exclusionary conduct “normally involves the sacrifice of short-term profits or goodwill in order to maintain or obtain long-term monopoly power.” *Trinko* Amicus Brief at 10. But “normally” is an important modifier of that sentence. While conduct that directly sacrifices short-term profits in order to harm competition is certainly an instance in which conduct has been found exclusionary, it is by no means the only such instance. For example, price squeezes have commonly been found unlawful without any requirement that the monopolist engage in predatory pricing at either end of the squeeze.<sup>14</sup> And more generally, a narrow reading of the government’s position on exclusionary conduct would seem to do away with recognized theories of anticompetitive conduct, such as raising rivals’ costs, which need not

<sup>11</sup> *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602–05 (1985)); *accord* *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (refusals to deal acceptable only “[i]n the absence of any purpose to create or maintain a monopoly”).

<sup>12</sup> *LePage’s, Inc. v. 3M*, 324 F.3d 141, 164 (3d Cir. 2003); *accord* *Nat’l Communications Ass’n Inc. v. AT&T Corp.*, 238 F.3d 124, 131 (2d Cir. 2001); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir.) (*en banc*), *cert. denied*, 534 U.S. 952 (2001).

<sup>13</sup> Brief for the United States and Federal Communications Commission as Amici Curiae in Support of Appellants, *Intermedia Communications, Inc. v. BellSouth Telecomms., Inc.*, No. 01-10224-JJ (filed Mar. 28, 2001) at 25–26.

<sup>14</sup> *See, e.g., City of Batavia v. FERC*, 672 F.2d 64, 90 (D.C. Cir. 1982); *Ray v. Indiana & Mich. Elec. Co.*, 606 F. Supp. 757, 776 (N.D. Ind. 1984), *aff’d*, 758 F.2d 1148 (7th Cir. 1985).

involve predation in the sense of forgone short-term profits.<sup>15</sup> Courts have held that allegations of raising rivals' cost "qualify as anticompetitive conduct" unless there is a "legitimate business justification for it."<sup>16</sup>

**Essential Facilities.** Verizon devotes much of its petition for certiorari to an open attack on the essential facilities doctrine. It cites a number of academic criticisms of the doctrine, points out that the Supreme Court has never expressly endorsed the theory (despite its roots in the Supreme Court's decision in *United States v. Terminal Railroad Ass'n*),<sup>17</sup> and urges the Supreme Court to reject the doctrine outright. *Trinko* Pet. at 15–17. But as a fallback, Verizon also argues for significant limitation on the doctrine: it asserts that the doctrine should only be applicable to concerted, not unilateral conduct, *id.* at 16 n.10, and should only be applied in the context of absolute denials of access—not constructive denials based on unreasonable terms and conditions of access. *Id.* at 13–14.

Adoption of either of these fallback suggestions would effect a significant change in essential facilities jurisprudence. A number of circuit court decisions have found viable essential facilities claims despite the lack of an outright denial of access,<sup>18</sup> and that would appear to be the logical result. Otherwise, a monopolist with control over an essential bottleneck could simply throttle competition by "permitting" access, but only on terms that would not allow any real competition. That would seem at odds with the purpose of having the essential facilities doctrine in the first place. Similarly, every circuit court has recognized the viability of the doctrine, all recognizing the same four essential elements (none of which includes concerted action), and most have done so in the context of Section 2, not Section 1.<sup>19</sup> Verizon has not stated any logical reason why an essential facilities claim should depend on concerted action.

**Monopoly Leveraging.** Verizon and the government have also asked the Supreme Court to review the Second Circuit's monopoly leveraging analysis. Both attack the Second Circuit's reduced, *Berkey Photo* threshold: the Second Circuit monopoly leveraging test requires only a showing that a monopolist has attempted to utilize its monopoly power in one market to gain a "competitive advantage" in another. *Trinko*, 305 F.3d at 108. Verizon and the government assert that, to the extent leveraging is recognized as an offense at all, it requires a showing that the monopolist used its monopoly power in one market to obtain or maintain a monopoly in another market (or, for an attempt claim, that there is a dangerous probability that it will do so). *Trinko* Pet. at 21–22; *Trinko* Amicus Brief at 16. While the "competitive advantage" language originated with

<sup>15</sup> See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 235–62 (1986); see also Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 318–23 (2001) (discussing economic logic behind raising rivals' cost theory).

<sup>16</sup> See, e.g., *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995).  
<sup>17</sup> 224 U.S. 383 (1912).

<sup>18</sup> See *Covad*, 299 F.3d at 1286–87 (citing cases from other circuits holding that "Section 2 prohibits denial of access to essential facilities on reasonable terms").

<sup>19</sup> See, e.g., *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977); *Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987); *Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Advanced Health-Care Servs. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Communications Sys., Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1366–67 (9th Cir. 1992); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285–88 (11th Cir. 2002); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356–57 (Fed. Cir. 1999).

[T]hat standing

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the Supreme Court's decision in *United States v. Griffith*,<sup>20</sup> the circuits have split on whether that is a correct interpretation, and even the Second Circuit has, in the past,<sup>21</sup> questioned whether the *Berkey Photo* approach is still valid in light of the Supreme Court's ruling in *Spectrum Sports*, which establishes that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."<sup>22</sup> While the complaint in *Trinko* is far from clear, the Second Circuit certainly interpreted it as asserting a monopoly leveraging claim, and the Supreme Court may do likewise. Assuming the Court reaches the monopoly leveraging issue, it could still determine that the *Trinko* allegations, as pleaded, state a monopoly leveraging claim under the monopoly-to-monopoly standard and, thus, might choose not to reach the *Berkey Photo* issue.

### Or an Isolated Case?

But there are also procedural aspects of *Trinko* that may prevent the Supreme Court from providing the clear guidance the telecommunications industry needs concerning ILECs' antitrust rights and duties, much less the sweeping changes the government seeks.

**Standing Issues.** The status of the plaintiffs is a key issue that may limit the scope of the Supreme Court's ruling in *Trinko*. The putative class in *Trinko* consists entirely of indirect customers of the incumbent monopolist, Verizon—that is, customers who succeeded in obtaining local telephone service from one of Verizon's competitors.<sup>23</sup> The plaintiffs' claimed injury is that because Verizon did not "provide equal access" to its local telephony reseller competitors, the plaintiffs "received poor local phone service." *Id.* at 95. As a result, Verizon has argued and continues to argue before that the plaintiff class members have suffered at most "indirect" harm and so lack standing to pursue antitrust claims against Verizon. *Trinko* Pet. at 24.<sup>24</sup>

The existence of that standing challenge creates a substantial risk that the Supreme Court could resolve *Trinko* without resolving the antitrust merits. If the Court determined the *Trinko* class plaintiffs lacked standing, it would have no reason to proceed further and reach the important issues framed by both Verizon and BellSouth in their respective petitions.<sup>25</sup> The indirect nature of the *Trinko* plaintiffs' claims may be compounded by the fact that the agreement between Verizon and the directly injured party, AT&T, contained a mandatory dispute resolution procedure that did not allow for a suit of the type *Trinko* brought. 305 F.3d at 94.

**Facilities-Based vs. Reseller Claims.** Even if the plaintiff in *Trinko* were AT&T, the competitive local carrier which dealt directly with Verizon, rather than a group of AT&T's customers, it is not clear that *Trinko* would squarely frame the issues Verizon and the United States seek to have the Supreme Court address. AT&T is essentially a local service reseller, using access to Verizon's local telephone network to provide the same service as Verizon. It is unclear whether that market

<sup>20</sup> 334 U.S. 100, 107 (1948).

<sup>21</sup> See *Virgin Atl. Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001).

<sup>22</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

<sup>23</sup> The court described the class as "consisting of customers who received local phone service in the region served by Bell Atlantic from company other than Bell Atlantic," 305 F.3d at 92.

<sup>24</sup> "[T]he alleged injury here should have been barred as indirect, deriving from harm to the direct customer." *Trinko* Pet. at 24.

<sup>25</sup> See, e.g., *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 110 (1998) (declining to review merits having found no standing: "However desirable prompt resolution of the merits EPCRA question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers").

position truly presents Section 2 monopoly leveraging or essential facilities issues. The district court concluded in *Covad* that claims by local telephone resellers' customers do not involve "a secondary market" so as to implicate leveraging theory at all.<sup>26</sup> The government took a similar position concerning the essential facilities doctrine in *Trinko*. The United States described the principle behind "the leading case," the Seventh Circuit's decision in *MCI Communications Corp. v. AT&T*,<sup>27</sup> as follows: "a monopolist may be required to assist rivals by sharing a facility if the monopolist can 'extend monopoly power from one stage of production to another.'" *Trinko* Amicus Brief at 12. Certainly Verizon agrees with that analysis. Verizon cites MCI's rejection of a demand that AT&T share access to its long distance network,<sup>28</sup> and interprets that rejection as having been based on MCI's desire to use elements of the long distance network in order to provide long distance service (as opposed to the Section 2 claim upheld *MCI*, in which MCI sought to use elements of the local telephone network in order to compete in the long distance market). Verizon, relying on that interpretation of *MCI*, argues that AT&T (from whose interactions with Verizon the plaintiff's claims arise) only participates at one level of one market, the same local service market in which Verizon competes, and asserts that there can be no essential facilities claim when the competitor merely provides the same service as the incumbent whose facilities it seeks to share. *Trinko* Pet. at 12 n.6 (referring to "the *rejected* (same-level, same-market) claim in *MCI*").

It is not clear that interpretation is correct: *MCI* first found that the long distance elements could not be essential facilities because MCI had shown the ability to duplicate them;<sup>29</sup> since they were not essential to competition, it was no stretch to conclude AT&T did not have to share them in order to foster competition in the same market. But were the Supreme Court to accept Verizon's reasoning, the Court could resolve the essential facilities claim on very narrow grounds applicable only to local service reseller competitors (those who participate, in Verizon's words, at the "same-market, same-level"). If it concluded AT&T simply did not participate in two markets, but only one, it could conclude that the *Trinko* plaintiffs simply did not plead an essential facilities or monopoly leveraging theory, without ever reaching the issues raised by Verizon and the government. The Supreme Court has declined prior opportunities to resolve these issues. *Trinko*'s procedural posture gives the Court the opening to do so again.

Even if the Supreme Court tackles the essential facilities and monopoly leveraging issues, it is not clear what the scope of its analysis would be. Facilities-based CLECs who compete in downstream markets present a different set of essential facilities and monopoly leveraging issues than resellers. As in *Alcoa*,<sup>30</sup> the seminal Section 2 "price squeeze" case, facilities-based downstream CLECs like *Covad* buy essential inputs from a monopolist in an upstream market and use those inputs to compete with that vertically integrated monopolist in a separate, downstream market. In this example, the upstream market is the local telephone network, controlled by the ILEC. The CLEC is not seeking simply to take that network and resell it. Instead, just as the competitors in *Alcoa* bought aluminum ingot in order to produce and sell aluminum sheet, the CLEC leases elements of an ILEC's network, combines them with its own facilities, and produces a new service (for exam-

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<sup>26</sup> See Petition for a Writ of Certiorari, *Covad*, Pet. App. at 55a.

<sup>27</sup> 708 F.2d 1081, 1132–33 (7th Cir. 1983).

<sup>28</sup> *Id.* at 1149.

<sup>29</sup> *Id.* at 1148.

<sup>30</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

ple, DSL) which competes with ILECs in another, downstream market. If the Supreme Court views the claims in *Trinko* as involving only one market, as Verizon itself argues, it is not clear whether *Trinko* could provide meaningful guidance for Section 2 claims by non-reseller competitors.

### **Conclusion**

*Trinko* is an intriguing case. It clearly presents the classic *Goldwasser* issue of whether the ILECs are absolved of antitrust liability for conduct also covered by the 1996 Act. And at first glance, it also appears to capture issues, such as monopoly leveraging and essential facilities, that have been the subject of extensive debate in the broader antitrust community but which have never received direct Supreme Court guidance. But on closer examination, it is unclear whether an indirect purchaser class action, being reviewed on a Rule 12 motion to dismiss, is the proper vehicle to address such weighty issues. The industry may be better served if the Supreme Court waits for a case with a more fully developed factual record, and a more widely applicable fact pattern, before it tackles those broader issues. ●