Refusals to Deal After *Trinko*

By: Aton Arbisser

KAYE SCHOLER LLP

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) ("Trinko")

Unanimous decision with 6 of the 9 justices joining Justice Scalia's opinion.

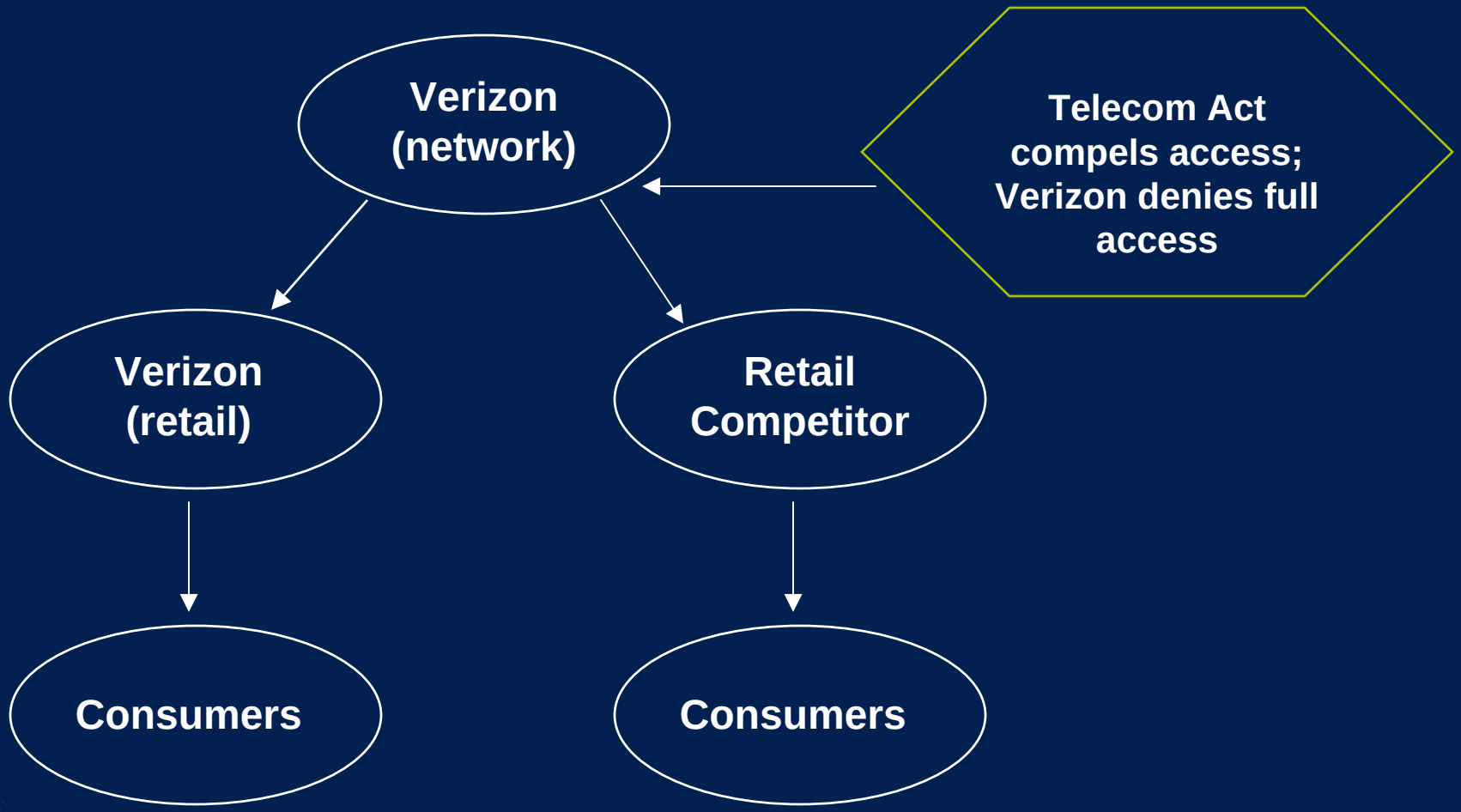
Refusals to deal presumptively lawful

Exceptions rare

- *Aspen Skiing* at or near the boundary
- Essential facilities?

Regulation reduces risk that conduct will be found anticompetitive

Conduct at Issue in *Trinko*



KAYE SCHOLER LLP

Refusal to deal presumptively lawful

"as a general matter, the *Sherman Act* 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'"

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004), *quoting United States v. Colgate & Co*., 250 U.S. 300, 307 (1919).

KAYE SCHOLER LLP

"very cautious in recognizing . . . exceptions"

Trinko at 408.

"*Aspen Skiing* is at or near the outer boundary of §*2* liability." "limited exception"

- Termination of voluntary (and *presumptively profitable*) course of dealing
- Unwillingness to sell even at retail prices
- Sacrifice of short-term profits for anticompetitive end

Trinko at 409.

KAYE SCHOLER LLP

very cautious in recognizing exceptions

Essential facilities “never recognized” by Supreme Court

- “indispensable requirement” of “unavailability of access to the essential facility”
- “essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms” (*quoting* Areeda)

Trinko at 411.

KAYE SCHOLER LLP

very cautious in recognizing exceptions

- Regulation that deters anticompetitive conduct, makes antitrust enforcement less necessary
- Risk of false positives
  - investment included among “very conduct the antitrust laws were designed to protect”
- “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.” (*quoting* Areeda)
  - e.g., setting price for unbundled service

Trinko at 414-15.

KAYE SCHOLER LLP

Rule of Reason v. Profit Sacrifice

1. Balancing:
   - Anticompetitive Effects?
   - Offsetting Efficiencies?
   - Less Restrictive Alternatives?
   - Net balance?

   Example:
   - Harm = 10, Benefit = 5; net anticompetitive.
2. Profit Sacrifice:
   - Asks whether conduct rational absent gaining market power.
   - Exonerates conduct that may be on balance anticompetitive.

   Example:
   - Harm = 10, Benefit = 5, Cost to Defendant = 2;net profitable.
   - Therefore, no profit sacrifice.

KAYE SCHOLER LLP

The Spectrum of Section 2 Standards

False Positives and Enforcement Costs High

False Positives and Enforcement Costs Lows

Plaintiff's Burden

Higher ⟷ Lower

Per se lawful ⟷ Almost per se unlawful

Monopoly Pricing (Trinko/Alcoa/ Microsoft)	Below Cost Pricing (Barry Wright)	Refusal to Deal (Trinko)	Exclusionary Agreements (Microsoft)	Fraud on Regulators (Walker Process)

KAYE SCHOLER LLP

Just Say “Yes”

Consider raising price rather than terminating a pre-existing relationship.

ASAP Paging Inc. v. Centurytel of San Marcos Inc., 137 Fed. Appx. 694 (5th Cir. 2005)

Deal or no deal?

- Does the company have monopoly power?
- Is this a pre-existing relationship?
- Is this relationship/proposal profitable?
- Are there efficiencies to be gained by refusing to deal?
- Is there regulatory oversight?

Exercising IP Rights

- Licensing
  - Can choose to license or not license as you wish
  - Make any refusal to license just that – do not condition a license on purchase of other products, rights or services
- Protected Products
  - Refusal to sell a patented product will raise suspicion of “profit sacrifice”
  - What is the business justification?

Antitrust Modernization Commission

- No substantive changes recommended:

  "18. In general, firms have no duty to deal with a rival in the same market."

Conclusion

1. Refusals to deal generally lawful.
2. Exceptions limited
   - *Aspen Skiing* (pre-existing, profitable relationship)
   - Regulation weighs against exception
3. Where pre-existing relationship is not profitable, raise prices rather than terminate

Aton Arbisser 310.788.1015
email: aarbisser@kayescholer.com
Kaye Scholer LLP
1999 Avenue of the Stars
Los Angeles, California 90067

- Specializes in antitrust and consumer class actions. Frequently counsels, lectures, and writes on those subjects, including Cal.Bus.& Prof.C. §17200.
- Wrote winning argument in *California v. Texaco Inc*., convincing the California Supreme Court that the state's antitrust laws did not apply to a multibillion-dollar merger.
- Nationally recognized for his successes in defending product liability cases, including winning the first-in-the-nation trial involving PPA (an over-the-counter decongestant removed from the market at the FDA's request), named by the *National Law Journal* as one of the "Top 10 Defense Verdicts of 2004." Mr. Arbisser successfully argued the appeal in that case in February 2007.

Kaye Scholer refers to Kaye Scholer LLP and its affiliates operating in various jurisdictions.