Three Years After *Verizon v. Trinko*: Broad Dissatisfaction with the Whole Thrust of Refusal to Deal Law

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When the Supreme Court granted certiorari in *Verizon Communications v. Law Offices of Curtis V. Trinko* in 2003, many observers naturally assumed the Court would thereupon clarify and narrow the circumstances under which a dominant firm’s refusal to deal with a competitor could violate Section 2 of the Sherman Act. Yet, in the immediate wake of the Court’s 2004 opinion, I suggested in this publication that the result generated more questions than answers and would likely expand opportunities for mischievous litigation in this area. Today, after more than three years of experience with lower courts’ applications of the Court’s ruling, *Trinko* has proven to be among the least satisfactory antitrust opinions of the Supreme Court in the past three decades. It has unsettled more than it has settled; made the law less rather than more predictable; and exacerbated more than resolved the most contentious controversies in monopolization and attempted monopolization cases.

**Decision in a Nutshell**

*Trinko* was a consumer class action on behalf of New York City customers of AT&T in its capacity as a new-entrant local phone service provider competing with Verizon, the incumbent monopoly local service provider. Plaintiffs claimed that Verizon refused to provide AT&T with access to its systems and support operations in a reasonable manner, thereby impairing AT&T’s ability to provide competitive services. They challenged this refusal as both a violation of Verizon’s regulatory obligations under the Telecommunications Act of 1996 and exclusionary conduct in violation of Section 2 of the Sherman Act. Verizon moved to dismiss the Telecom Act claim on the ground that plaintiffs lacked standing to sue under that statute and that violations of it were subject to regulatory remedies; Verizon moved to dismiss the Sherman Act claim on the ground that a mere failure to meet Telecom Act obligations to cooperate with competitors did not constitute the “willful acquisition or maintenance” of monopoly power necessary for a Section 2 violation. On those grounds, the district court dismissed both claims.

The Second Circuit affirmed the dismissal of the Telecom Act claim, but reversed the dismissal of the Sherman Act claim, remanding for further proceedings. The latter ruling rested on the determination that the allegations could establish Section 2 liability under either the essential facilities doctrine or the monopoly leveraging doctrine. The Supreme Court then reversed that holding, thereby bringing the case to an end.

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Justice Scalia, writing for a six-Justice majority, explained that the Telecom Act neither fore-closed nor created new antitrust liabilities in light of the Act's savings clause to the effect that nothing therein “shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”

He then turned to the question whether Verizon's alleged refusal to cooperate with its competitor (in the manner prescribed by the Telecom Act) “violate[d] preexisting antitrust standards.”

The starting point on that issue was a sweeping restatement of the Colgate holding that 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 the parties with whom he will deal." Justice Scalia acknowledged that this right is not unqualified but emphasized that “[w]e have been very cautious in recognizing” exceptions.

Justice Scalia then discussed and distinguished at some length the Court's 1985 decision in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., a recognized exception involving termination of a voluntary and “presumably profitable” course of dealing that made it a case “at or near the outer boundary of § 2 liability.”

Aspen concerned a ski area consisting of four mountains. Aspen Skiing, the owner of three of them, discontinued a longstanding cooperative arrangement with plaintiff Highlands, owner of the fourth mountain, under which both firms offered a joint multi-day all-area ski ticket. Aspen Skiing thereafter refused even to allow plaintiff to purchase tickets for skiing on defendant's mountains at the retail price. The Aspen Court upheld a jury verdict for plaintiff, concluding that Aspen Skiing “elected to forgo” short-run benefits “because it was more interested in reducing competition . . . over the long run by harming its smaller competitor.” By contrast, in Trinko, Verizon never voluntarily assisted its rivals and would not have done so absent the compulsion of the Telecom Act. The dispositive difference to the Trinko Court was that Aspen's conduct “suggested a willingness to forsake short-term profits to achieve an anticompetitive end” while no such factor was present in the Verizon situation.

Justice Scalia also discussed and distinguished an earlier major refusal to deal precedent in which the Court upheld liability, Otter Tail Power Co. v. United States. There the defendant refused to transmit a rival's electric power over the defendant's transmission lines to enable the rival to compete with the defendant in the sale of power to various municipalities. The key distinction, according to the Trinko Court, was that Otter Tail “was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers.” By contrast, in Trinko, “the services allegedly withheld [by Verizon] are not otherwise marketed or available to the public.”

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5 Id. at 407.
7 Trinko, 540 U.S. at 408.
9 Trinko, 540 U.S. at 409.
11 Trinko, 540 U.S. at 409.
13 Id.
14 Id.
On those grounds, the Court held that "Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim . . . ."15 And this conclusion, the Court continued, "would be unchanged even if we considered to be established law the ‘essential facilities’ doctrine crafted by some lower courts . . . ."16 As the Court explained, the “indispensable requirement” under that doctrine is unavailability of access to an essential facility, an element missing in this situation in light of the Telecom Act’s imposition of access obligations.17

The Court explained why it did not believe traditional antitrust principles justified “adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.”18 The Court emphasized the presence of a “regulatory structure designed to deter and remedy anticompetitive harm,” leading to a judgment that the “slight benefits” of antitrust intervention are outweighed by the costs and risks of any court’s attempted enforcement of “detailed sharing obligations.”19 In a footnote on that point, the Court then disposed of the Second Circuit’s suggestion that plaintiffs could rely on a monopoly leveraging theory: “To the extent the Court of Appeals dispensed with a requirement that there be a ‘dangerous probability of success’ in monopolizing a second market, it erred.”20

My Earlier Commentary

My initial effort at analysis of the opinion, only four months after its issuance, highlighted three new questions from it. First, I asked whether short-term profit sacrifice would now be the definitive test for when a refusal to deal can be the basis for a Section 2 claim. My answer was yes and no. On the one hand, Justice Scalia did sharply distinguish between liability in Aspen and non-liability in Trinko on the ground that profit sacrifice was present in the former but not in the latter situation. And he provided several reasons why, absent that factor, it would be a bad idea to make a monopolist’s refusal to share or cooperate with rivals an antitrust offense: lessening investment incentives, requiring courts to act as central planners, facilitating collusion. On the other hand, profit sacrifice is both underinclusive and overinclusive as a standard of general applicability. In some circumstances, a refusal to deal without any profit sacrifice can bring about exclusionary effects without any efficiency justification; in other circumstances, a refusal to deal entailing some profit sacrifice could be justified by legitimate business reasons.21

Second, I asked whether the Court had now newly elevated motive or intent as a central element in Section 2 law in contrast to lower courts’ recent preference for a focus on effects in Section 2 cases. Again, my answer was yes and no. On the one hand, the Court did emphasize motive/intent differences between Aspen and Trinko. A related message from the Trinko opinion seemed

15 Id.
16 Id.
17 Id. at 411.
18 Id.
19 Id. at 415.
20 Id. at 415 n.4 (citing Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993)). There was no dissenting opinion. Justice Stevens, joined by Justices Souter and Thomas, wrote separately to concur in the judgment on the ground that the complaint should have been dismissed for plaintiffs’ lack of standing, without reaching the merits of the allegations. In their view, the plaintiffs’ alleged injury was “purely derivative” of the alleged injury to AT&T, precluding standing under Associated General Contractors of California, Inc. v. California. State Council of Carpenters, 459 U.S. 519 (1983).
21 Skitol, supra note 3, at 3–4.
to be that discontinuance of an existing relationship would now be considerably more vulnerable to a Section 2 claim than a refusal to initiate a relationship of any kind: an inference of anticompetitive animus is plausible in the former but not in the latter. On the other hand, it seemed inconceivable that Justice Scalia and his colleagues meant to diminish the fundamental place of effects evidence in Section 2 cases. Thus, the more likely message might be that the Court had now made proof of bad intent an additional significant burden on plaintiffs rather than diminishing the longstanding significant burden of proving anticompetitive effect.22

Third, I asked whether the essential facilities and monopoly leveraging doctrines would remain viable grounds for Section 2 claims. This time I answered no and yes. On the one hand, the Court was not subtle about its disdain for both doctrines. While expressly declining either to recognize or to repudiate the essential facilities doctrine, the Court cited approvingly to Professor Areeda’s slashing attack on it. The monopoly leveraging doctrine was given short shrift: “leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.”23 On the other hand, more robust versions of both doctrines survive and can be grounds for future Section 2 cases consistent with the thrust of Justice Scalia’s opinion. His reason for rejecting the essential facilities argument on the Trinko facts, for example, was that a necessary element—unavailability of access to essential facilities—was not met since the applicable telecom regulatory regime ensured that access. In markets without that regulatory protection, a monopolist’s denial of rivals’ access to resources necessary for competition could still be a sound basis for Section 2 liability.24

Other Early Commentaries on Trinko

Subsequent to my publication, many other members of the antitrust bar and academia published more thorough analyses of Trinko and its implications. Most of these articles reflected far more certainty than mine about Trinko’s impact on refusal to deal law; but they also revealed sharp disagreements over the direction and extent of that impact.25 Thus, for example, one author dismissed Trinko’s importance as little more than “a restatement of the status quo ante of monopolization doctrine” and as announcing no “substantive change in Section 2 doctrine.”26 Another author opined that Trinko “planted the seed for a complete overhaul” of duty-to-deal law and predicted that “there will be few, if any, exceptions to the principle that a firm, even a monopolist, has absolutely no duty to sell to or cooperate with a potential competitor.”27 A third author argued that Trinko altered the law of Aspen in a “devious” manner, opening “wide the door to argument in every Section 2 case that the starting point is skepticism about

22 Id. at 4–5.
23 Trinko, 540 U.S. at 415 n.4.
24 Skitol, supra note 3, at 5–6.
26 Rubin, supra note 25, at 725.
27 Hay, supra note 25, at 528, 547.
Section 2 based on fear that courts will condemn ambiguous conduct that is in fact efficient.” 28

None of these many thoughtful authors anticipated how lower court interpretations of *Trinko* would evolve or the breadth and intensity of the resulting dissatisfaction with *Trinko*’s impact.

**Post- *Trinko* Case Law**

Lower court opinions applying *Trinko* over the past couple of years can be seen as expanding Section 2 liability in this area, a result that could not have been what Justice Scalia intended. In a significant range of circumstances, refusal to deal claims have now become easier rather than harder to sustain as antitrust plaintiffs have learned how to use *Trinko* to defeat early dismissal motions and even to survive the summary judgment stage. *Trinko*’s analysis of *Aspen* has become an instructive roadmap for plaintiffs asserting refusal to deal claims in situations involving discontinuance of voluntary relationships.

Indeed, lower courts have read *Trinko* as allowing plaintiffs to probe for evidence that a refusal to deal reflected a deliberate decision to sacrifice short-term profits for longer term anticompetitive benefits. Particularly where a plaintiff can show prior and “presumably profitable” dealings, the courts are interpreting such evidence as indicia of anticompetitive motive. If plaintiffs are unable to allege facts of that kind, their claims may be easily dismissed. 29 But where plaintiffs can allege prior voluntary dealing, or other indicia of anticompetitive intent, their claims can survive and lead to intrusive discovery processes. 30

One Fifth Circuit panel has held *Trinko*’s key lesson to be that courts in cases of this kind should determine whether a “business’s refusal to deal is based on anticompetitive motives versus a valid business strategy.” 31 An Eleventh Circuit panel stated that *Trinko* “effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim,” implying that that element alone may suffice to enable a plaintiff to proceed to the discovery stage. 32 Indeed, according to a Colorado district court, *Trinko* supports a Section 2 essential facilities claim “focused on the monopolistic intent of the defendant” if the defendant allegedly “(1) refused to provide a product that it had in the past, despite the fact that defendant would benefit financially from the transaction, and (2) chose to thereby sacrifice short-term gains in hopes of making long term monopolistic profits.” 33 Again, particularly in cases involving discontinuance of a prior relationship, these holdings almost ensure that a plaintiff can get to a jury on conflicting evidence of subjective intent.

*Trinko*’s impact on the interaction between antitrust law and regulatory regimes is less clear. The lower courts have issued conflicting decisions over the continued viability of “price squeeze” law

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28 Fox, supra note 25, at 169.


32 *Covad I*, 374 F.3d at 1049.

33 *Nobody in Particular Present*, 331 F. Supp. 2d at 1113.
as it has evolved in regulatory contexts. The conflict arises from the ease with which a vertically integrated monopolist’s allegedly excessive price for a nonintegrated rival’s use of its facilities can be characterized as a refusal to deal on reasonable terms that is then subjected to *Trinko*’s “motive” test. These same courts are also divided on whether the below-cost and recoupment elements of a price predation claim under *Brooke Group* should now apply to a price squeeze claim.

**What About *Kodak***?

As noted above, the *Trinko* opinion devotes considerable effort to distinguishing away two of the Court’s prior refusal to deal precedents, *Aspen* and *Otter Tail*. It is nonetheless completely silent about the Court’s more recent 1992 refusal to deal pronouncements in *Image Technical Services v. Eastman Kodak Co.*, which is clearly among the most controversial Section 2 decisions of the past 20 years. In *Kodak*, the Court declared the law to be that a monopolist’s “right” to refuse to deal with a competitor “exists only if there are legitimate competitive reasons for the refusal.” The *Kodak* Court’s formulation places the burden on the firm with monopoly power to justify its refusal rather than, as *Trinko* appears to prescribe, placing the burden upon the plaintiff competitor to prove an anticompetitive motive for the refusal. And the *Kodak* opinion’s express rejection of three proffered justifications for the refusal to deal there at issue as sufficient grounds for granting summary judgment suggests the Court was quite serious about this burden point.

The absence of any comment upon or even passing footnote reference to *Kodak* in the *Trinko* opinion is at least curious in light of Justice Scalia’s stinging dissent to the *Kodak* majority opinion. He complained, *inter alia*, about the result bringing “the sledgehammer of § 2 into play.” As his dissent predicted, *Kodak* has generated a large volume of litigation over “aftermarket” monopolization and attempted monopolization as well as tying claims, many of which have resulted in years of discovery before dismissal at the summary judgment stage. *Trinko* has not impeded the pursuit of *Kodak* aftermarket cases of this kind; unlike the *Trinko* case itself, these lawsuits have continued to survive early dismissal motions and to generate major costs for all parties involved before getting to summary judgment dispositions.

Pre-*Trinko* aftermarket case law generated a sharp conflict over the standard for determining when a refusal to share—or to continue sharing—patented parts or other intellectual property can be the basis for a Section 2 claim. The Ninth Circuit in 1997, in a later stage of the *Kodak* case, adopted a “rebuttable” presumption that a refusal to share intellectual property is supported by a valid business justification. The Ninth Circuit held that this presumption was rebutted on the record there at issue by evidence of subjective “bad” intent. In an almost identical case against

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36 Id. at 483 n.32.

37 Id. at 483–85.

38 Id. at 489.

39 See, e.g., *HDC Med., Inc. v. Minntech Corp.*, 2007-1 Trade Cas. (CCH) ¶ 75,567 (8th Cir. 2007); *Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 423 F.3d 374 (3d Cir. 2005).

40 *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997).
Xerox in 2000, the Federal Circuit established a virtually conclusive presumption against liability for such conduct and expressly rejected the Kodak allowance of subjective intent evidence.\(^{41}\)

Given the whole thrust and tone of *Trinko*, it seemed at first glance destined to accelerate resolution of the Kodak-Xerox divide. Instead, *Trinko* has intensified the conflict and expanded it into new directions, with fresh ammunition for both sides. *Trinko*’s focus on intent or motive would seem to support the Kodak approach; the larger focus on investment disincentives would seem to support the Xerox approach. Commentators remain deeply divided over this issue.\(^{42}\) It is thus now all the more regrettable that the Department of Justice and the Solicitor General persuaded the Court to deny certiorari in *Xerox*, losing the opportunity to resolve a critical issue at the intersection between antitrust and intellectual property law in 2001.\(^{43}\)

**FTC-DOJ Hearings**

Compelling evidence of today’s virtually unanimous dissatisfaction with *Trinko* and its impact on refusal to deal law can be found in the transcript and related submissions for a panel on refusals to deal under Section 2 in joint hearings held by the FTC and Department of Justice in July 2006.\(^{44}\) These materials reflect incisive perspectives from and extended dialogue among six antitrust practitioners and scholars: Bill Kolasky, Hew Pate, Bob Pitofsky, Steve Salop, Tom Walton, and Mark Whitener. There were sharp differences among them in their views on what the agencies should advocate and how refusal to deal law should ideally evolve over the years ahead. The main commonality among them was unhappiness with the post-*Trinko* state of affairs.

Thus, for example, Pitofsky and Salop were sharply critical of the *Trinko* opinion’s excessive hostility to the whole idea of an antitrust duty to deal of any sort; they had harsh words for Justice Scalia’s pronouncements about investment disincentives, courts acting as central planners, collusion concerns, and false positives. Their expressed preference for law development was in the direction of a more open and effects-based rule of reason analysis for this area generally. On the other hand, Pate and Whitener were sharply critical of the way *Trinko* gave new life to *Aspen* and has thereby enabled continuation of litigation over refusal to deal claims with a focus upon intent evidence. Their expressed preference for law development was in the direction of per se legality for unilateral (unconditional) refusals to deal generally, including discontinuance of prior relationships and also including refusals to share non-intellectual property as well as intellectual property assets. Pate and Whitener would thus simply overrule *Aspen*.

There was also considerable disagreement among the six panelists over the utility of *Trinko*’s focus on the “profit sacrifice” element, highlighting problems with it as a Section 2 standard. The panelists also disagreed about *Trinko*’s impact on Section 2 issues beyond refusals to deal, such as the appropriate treatment of exclusive dealing and of “conditional” licensing. They also debated the appropriate role (if any) for the essential facilities doctrine in the post-*Trinko* world. While Bill Kolasky provided several fresh and creative ideas for a structured middle-ground rule of rea-

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\(^{43}\) See Brief for the United States as Amicus Curiae, CSU L.L.C. v. Xerox Corp., Supreme Court Dkt. 00-62 (Jan. 2001).

son approach to this area generally, he also captured the central problem with any application of Section 2 to refusals to deal that are unaccompanied by other conduct of an exclusionary nature:

There really is a more fundamental point, and that is the language and the congressional intent underlying Section 2. Section 2 is designed to prohibit affirmative conduct that is designed to gain a monopoly through improper means. And I don’t think that you can use Section 2 to impose an affirmative duty on someone to share unless they have taken affirmative acts to acquire or maintain their monopoly by improper means. Simply not sharing is not an affirmative act.45

I cannot adequately summarize here the full thrust of those presentations and exchanges that will now provide a robust record for the agencies’ eventual report. Some overarching observations that the agencies might well discern from it, however, are that Trinko has done at least as much harm as good, the post-Trinko state of affairs is unsound, and some new direction is desirable.

The AMC Weighs In

The prevailing state of refusal to deal law received four pages of attention in the April 2007 report and recommendations of the Antitrust Modernization Commission (AMC).46 The AMC was appropriately diplomatic but nonetheless clear about problems with the Trinko legacy:

Although the Court’s decision in Trinko provided some guidance on the factors that might suggest liability for a refusal to deal with a rival, the decision is far from definitive. Businesses need better guidance from the courts on how to avoid antitrust scrutiny for a refusal to deal with a rival.47

As the AMC thereafter observed, the Trinko Court appeared to suggest that two circumstances warrant exceptions to the “no duty” rule: termination of a voluntary course of dealing and refusal to provide to a customer rival the same service provided to other customers. As its report then highlighted, however, the Court “did not explain what additional factors would be required to establish Section 2 liability in such circumstances.”48

The AMC went on to summarize three alternative approaches advanced in the course of its hearings on this subject: (a) a rule of reason test centered on a pricing benchmark; (b) a “no economic sense” or “profit sacrifice” test; and (c) “an examination of whether the conduct or pricing at issue is coercive or provides incentives.”49 The AMC declined to recommend any of them. The AMC’s only conclusion on this subject was neither surprising nor particularly enlightening:

The Commission endorses the longstanding principle that, in general, firms have no duty to deal with a rival in the same market. To the extent that circumstances exist in which firms may be liable for a refusal to deal with a rival in the same market, the courts should further clarify those circumstances.50

45 Id. at 102.
47 Id. at 101.
48 Id. at 102.
49 Id.
50 Id. at 104.
Judge Posner’s Solution

We were better off 21 years ago when Judge Posner issued his opinion in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*\(^{51}\) In that case, a seller of telex terminals had come to rely on help from Western Union sales personnel for leads to telex service customers. Western Union terminated the help so that it could sell more of its own terminals. The Seventh Circuit reversed a Section 2 judgment for the seller. Judge Posner explained why Section 2 liability should not rest on any distinction between an initial refusal to deal and a discontinuance of prior dealings, nor on evidence of “bad” intent. He also interpreted *Aspen* in a manner than avoids all (or most) of the mischief that *Trinko*’s less thoughtful interpretation has generated.

Judge Posner began with the proposition that “a firm with lawful monopoly power has no general duty to help its competitors” and then defined the key issue as follows: “If a monopolist does extend a helping hand, though not required to do so, and later withdraws it . . ., does he incur antitrust liability?”\(^{52}\) His “no” answer was explained as follows:

> Since Western Union had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made Western Union’s encouraging gestures the fulcrum of an antitrust violation. Then no firm would dare to attempt a graceful exit from a market in which it was a major seller . . . . [I]f Western Union had known that by distributing a list of rival vendors it was undertaking a journey from which there could be no turning back—a journey it could not even interrupt momentarily—it would have been foolish to have embarked.\(^{53}\)

What was described as “the most dramatic document in the case” involved a Western Union official saying “‘these turkeys . . . ought to be flushed.’”\(^{54}\) Judge Posner explained why it was entitled to no weight: “[I]f conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors (‘these turkeys’) is irrelevant.”\(^{55}\) As he then observed, “that Western Union wanted to ‘flush these turkeys’ tells us nothing about the lawfulness of its conduct”; the question was “not whether Western Union withdrew the vendor list in order to make money at the expense of Olympia, which of course it did, but whether such withdrawal was an objectively anticompetitive act.”\(^{56}\) And his response was that “[i]t was not, once the basic premise that monopolists are not required to help their competitors, but need only refrain from anticompetitive acts such as denial of access to essential facilities, is granted.”\(^{57}\)

Judge Posner’s favorable reference to the essential facilities doctrine is of some interest in light of *Trinko*’s disparaging comments on it. Suffice it to say that Judge Posner appeared quite comfortable with the general idea of liability for a refusal to share an essential facility under circumstances that his own circuit prescribed in *MCI* three years earlier.\(^{58}\)

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51 797 F.2d 370 (7th Cir. 1986).
52 Id. at 376.
53 Id. at 376, 378.
54 Id. at 377.
55 Id. at 379.
56 Id.
57 Id. at 380.
58 MCI Commc’ns Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983). *MCI* prescribed four elements necessary to establish liability under the essential facilities doctrine: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.” Id. at 1132–33.
The essential facilities reference is also relevant to the way he undertook to distinguish Aspen at an earlier point in the opinion. While Aspen as presented to the Supreme Court did not rest on the essential facilities doctrine, Posner’s interpretation of the Aspen rationale for liability rests on the same general principle: “If [Aspen] stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition.” And his reading of the Aspen opinion was supportive of that interpretation:

The joint ticket had originated at a time when there was competition among the different ski mountains at Aspen, and similar tickets were offered at other multi-mountain ski areas. . . . In other words, competition required some cooperation among competitors. Aspen Highlands is . . . like the essential-facility cases in that the plaintiff could not compete with the defendant without being able to offer its customers access to the defendant’s larger facilities.

In short, under Judge Posner’s analysis, neither prior dealing nor “anticompetitive” motive or intent is entitled to much, if any, weight. What matters is whether the defendant refuses to cooperate with a competitor in circumstances where that cooperation is necessary for effective competition, resulting in either threatened or actual monopolization of the market at issue.

**Conclusion**

Today, three years after the Trinko decision, most observers probably believe that the Court reached the correct result on the allegations of the complaint at issue. But few if any informed observers can like the proffered rationale or many aspects of the Trinko opinion. The overall tone of deep hostility to duties to deal generally offends those who support a more expansive scope for Section 2 in a variety of refusal to deal situations. The “reinterpretation” of Aspen as a precedent supporting claims involving discontinuance of prior voluntary arrangements and anything akin to a profit sacrifice motive offends those who believe refusal to deal claims should never or at least almost never survive the Rule 12(b) stage. Both factions as well as those in the middle should want to see the courts move more in the direction of the Posner analysis in Olympia Leasing over the years ahead.

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59 Olympia Equipment Leasing, 797 F.2d at 379.
60 Id. at 377.
61 One prominent exception is Eleanor Fox who argues at some length that Trinko was a stronger case for Section 2 liability than Aspen: “the Trinko facts fit the Aspen principle better than do the Aspen facts” and this is because “Verizon clearly had monopoly power; it engaged in exclusionary conduct without efficiency justification; and it did so solely to impair the quality of the service provided by its competitors and, thus, to preserve its own monopoly”; in contrast, “Aspen Skiing may have lacked monopoly power; its refusal to agree to a more balanced allocation of revenues with Highlands may have been efficiency-justified as a normal exercise of contract rights, and the imposed duty to deal was a mandate for the market’s only two competitors to collude on price.” Fox, supra note 25, at 166–67.