



## ANTITRUST REFUSAL-TO-DEAL CASES: AT OR NEAR, BUT STILL NOT BEYOND, THE OUTER BOUNDARY OF SECTION 2

by Steven Cernak

Since at least 1919, U.S. courts have acknowledged “the long recognized right [of even a monopolist] freely to exercise his own independent discretion as to parties with whom he will deal.”<sup>1</sup> The U.S. Supreme Court most recently found an exception to that “long-recognized” right in 1985’s *Aspen Skiing* opinion<sup>2</sup>; however, that opinion was narrowed, but not overturned, by the Court itself as being “at or near the outer boundary of [Sherman Act] §2 liability.”<sup>3</sup> Since then, lower courts have struggled to define if a monopolist can ever be liable for monopolization for a “refusal to deal” with a rival and, if so, the elements that must be alleged and proven.

Last month, the Seventh Circuit in *Viamedia Inc. v. Comcast Corp.*<sup>4</sup> found that such refusal-to-deal claims can still be successfully alleged under Sherman Act Section 2 if plaintiff’s allegations mirror those in *Aspen Skiing* closely enough. If it stands, the opinion will make it much more difficult for monopolist defendants to dismiss such claims and avoid lengthy and expensive discovery.

### Facts and Allegations

Television networks broadcast their content through various distributors, especially cable companies. The networks control most television advertising time but cable companies receive two or three minutes each hour, called spot cable advertising. Cable companies sell some spot cable advertising that appears only on the local televisions in that cable company’s area. To reach an entire region, say, metro Detroit, all the cable companies in that area form an “interconnect” to sell advertising that will appear on televisions throughout the region. The interconnect is operated by the region’s largest cable company and the others pay a fee to participate. Some cable companies sell their spot cable advertising themselves while others hire a broker, called an ad rep.

Viamedia is an ad rep. Comcast is a cable company and an ad rep. Comcast operates the interconnects in Chicago and Detroit. Viamedia was an ad rep for two other companies in Chicago and Detroit. For ten years, Viamedia participated in those two interconnects on behalf of its clients. In 2012, the agreement authorizing that participation expired and Viamedia and Comcast could not agree on new terms. As a result, Viamedia and its two clients could not participate in those two interconnects. When Viamedia’s agreement with those two clients ended in 2015, Comcast reached an agreement to serve as an ad rep for them.

Viamedia sued Comcast and alleged a violation of Section 2 based on both refusal-to-deal and tying theories. Comcast successfully moved to dismiss the refusal-to-deal claim under both the original and amended complaint.<sup>5</sup> Discovery ensued on the tying claim and then Comcast successfully moved for summary judgment. Last month, the Seventh Circuit reversed both lower court decisions and remanded for further proceedings.

<sup>1</sup> *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

<sup>2</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>3</sup> *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

<sup>4</sup> *Viamedia, Inc. v. Comcast Corp.*, 2020 WL 79396 (7th Cir. Feb. 24, 2020).

<sup>5</sup> 2017 WL 698681 (N.D. Ill. Feb. 22, 2017).

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## Section 2 and Refusals to Deal

A successful monopolization claim requires proof that the defendant 1) has monopoly power in the relevant market and 2) acquired or maintained that power through exclusionary conduct, not “superior product, business acumen, or historic accident.”<sup>6</sup> The first element can be difficult to prove in any particular case but generally is not controversial and was not contested here. The conduct element is very controversial and has resisted attempts by courts and commentators to develop a general definition: “Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern.”<sup>7</sup> As a result, courts have focused on standards for determining when specific types of conduct can be judged “exclusionary.”

For refusals to deal by a monopolist, the standard that lower courts struggle to apply starts with *Aspen Skiing*. In that case, the defendant owned three of the four ski mountains in the Aspen area while the plaintiff owned the fourth. For years, even prior to when defendant controlled three mountains, a joint ski pass for all four mountains was offered to skiers. Customers enjoyed the convenience of purchasing up front while maintaining the ability to decide each day the mountain on which to ski.

The defendant effectively discontinued the joint arrangement by offering the plaintiff only a lower portion of the joint revenues. Plaintiff attempted to cobble together a replacement by offering to purchase at retail lift tickets to defendant’s mountains to combine with tickets to its own mountain. Defendant refused. Defendant’s justifications for its refusal “to support our competition”<sup>8</sup> included the difficulties of administering the joint ticket and splitting the revenues plus the alleged injury to its brand image from associating with the supposedly inferior services of plaintiff.<sup>9</sup>

At trial, the jury rejected defendant’s explanations and found that defendant had monopolized the market. The Court affirmed, finding the evidence “adequate to support the verdict under the instructions given.”<sup>10</sup> In doing so, the Court listed several factors, although without explaining the weight attributed to any of them. First, the defendant had voluntarily “elected to make an important change in a pattern of distribution that had originated in a competitive market”<sup>11</sup> that, presumably, was efficient and profitable. Second, defendant refused to sell tickets to plaintiff at retail, even when it could do so with no cost to itself and such a decision denied it immediate benefits. Finally, the evidence regarding defendant’s justifications for its actions was disputed and the jury chose to believe the plaintiff.

The Court clarified and distinguished *Aspen Skiing* in 2004’s *Trinko*. First, the Court emphasized the usual rule that even a monopolist can refuse to deal with anyone, including a rival, and that the Court had been “very cautious in recognizing ... exceptions.”<sup>12</sup> In a line destined to be repeated in every refusal-to-deal opinion, brief, and article (including this one), the Court then described *Aspen Skiing* as “at or near the outer boundary of §2 liability.”<sup>13</sup> The *Trinko* Court emphasized the *Aspen Skiing* defendant’s unilateral decision to terminate a “voluntary (and thus presumably profitable) course of dealing” and its “willingness to forego short-term profits to achieve an anti-competitive end” as evidenced by its refusal to sell tickets to the plaintiff even at retail prices.<sup>14</sup>

Multiple lower courts have tried to apply the Court’s teaching from *Aspen Skiing* and *Trinko*. Perhaps the leading case is the Tenth Circuit’s opinion in *Novell, Inc. v. Microsoft Corp.*, authored by then-Judge Gorsuch.<sup>15</sup>

<sup>6</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

<sup>7</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

<sup>8</sup> *Aspen Skiing*, 472 U.S. at 593.

<sup>9</sup> For background on facts of the case, see *Aspen Skiing: Product Differentiation and Thwarting Free Riding as Monopolization* by Priest/Lewinsohn in *Antitrust Stories* by Fox/Crane, Foundation Press 2007.

<sup>10</sup> *Id.* at 611.

<sup>11</sup> *Id.* at 603.

<sup>12</sup> *Trinko*, 540 U.S. at 408.

<sup>13</sup> *Id.* at 409.

<sup>14</sup> *Id.*

<sup>15</sup> 731 F.3d 1064 (10th Cir. 2013).

Like in *Trinko*, the court emphasized that plaintiffs must show the defendant terminated a pre-existing voluntary course of dealing and that such a decision suggested “a willingness to forego short-term profits to achieve an anti-competitive end.”<sup>16</sup> The Tenth Circuit noted, however, that a monopolist might “forego short-term profits” for a pro-competitive end; therefore, the plaintiff also needed to show that this particular decision was part of a larger anticompetitive scheme, such as driving out or disciplining a rival. “Put simply, the monopolist’s conduct must be irrational but for its anticompetitive effect.”<sup>17</sup>

Two even more recent cases have granted or affirmed motions to dismiss where the plaintiff failed to properly allege that the monopolist’s refusal to deal was “irrational but for an anticompetitive purpose.”<sup>18</sup> In both cases, however, a pre-existing voluntary course of dealing was also absent.

### District Court Opinion

In dismissing Viamedia’s refusal-to-deal claim, the district court acknowledged that Comcast had terminated a voluntary course of dealing when it did not renew the interconnect agreement; however, the court found that Viamedia did not allege that Comcast had forsaken “short-term profits to achieve an anticompetitive end.”<sup>19</sup> The court followed the Tenth Circuit’s *Novell* opinion in finding that Viamedia needed to allege that Comcast’s actions were “irrational but for its anticompetitive effect” or “serve no rational procompetitive purpose.”<sup>20</sup> The court found that Comcast replacing Viamedia as an intermediary between it and the cable companies reduced Comcast’s short-run revenues from interconnect fees but offered “potentially improved efficiency” for ad placement in the long run.<sup>21</sup> As a result, the allegations did not meet the court’s view of *Aspen Skiing*’s limited exception to the general rule and so must be dismissed.

### Seventh Circuit Opinions

All three judges on the Seventh Circuit panel agreed that the district court erred in dismissing the refusal-to-deal claim but offered two slightly different explanations. (The dissenting judge would have upheld Comcast’s summary judgment victory on the tying claim.) The majority reminded Comcast that the *Aspen Skiing* and *Novell* opinions were reviews of jury verdicts that weighed evidence of the rationales and effects of the defendants’ actions after weeks-long trials.<sup>22</sup> While the *Trinko* opinion upheld a motion to dismiss, it did so, according to the majority, because the plaintiff’s allegation of “defendant’s prior conduct sheds no light upon [whether its actions] were prompted not by competitive zeal but competitive malice.”<sup>23</sup> The majority explicitly followed the D.C. Circuit’s opinion in *Covad*<sup>24</sup> in finding that all a plaintiff must allege is that defendant’s refusal to deal was “predatory” or anticompetitive. Viamedia’s allegations met that standard. Comcast’s argument that its refusal was not “irrational but for its anticompetitive effect” was one for a motion for summary judgment, not dismissal.<sup>25</sup>

The dissent concurred with the majority on the remand of the refusal-to-deal claim but its opinion nicely illuminates the key pleading question that is “up for debate” among lower courts.<sup>26</sup> The dissent notes that the district court interchangeably found that Viamedia must show that Comcast’s conduct was “irrational but for its anticompetitive effect” or served “no rational procompetitive purpose.” The dissent saw subtle but key differences between the two phrases:

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<sup>16</sup> *Id.* at 1075.

<sup>17</sup> *Id.*

<sup>18</sup> *Siva v. Am. Bd. of Radiology*, 2019 WL 6130818, at \*9 (N.D. Ill. Nov. 19, 2019); see also *Charych v. Siriusware, Inc.* 2018 WL 4870906, at \*7 (E.D. N.Y. July 30, 2018) (“legitimate business purposes of defendants’ actions ... are self-evident from the allegations of the complaint”), *affd.*, *Charych v. Siriusware, Inc.*, 790 Fed. Appx. 299 (2d Cir. 2019).

<sup>19</sup> *Viamedia Inc. v. Comcast, Corp.*, 2017 WL 698681, at \*3.

<sup>20</sup> *Id.* at \*4.

<sup>21</sup> *Id.* at \*5.

<sup>22</sup> *Viamedia, Inc. v. Comcast Corp.*, 2020 WL 79396, at \*22.

<sup>23</sup> *Id.* at \*24, quoting *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

<sup>24</sup> *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005) (Ginsburg, CJ).

<sup>25</sup> *Viamedia* at \*45-46.

<sup>26</sup> *Id.* at \*46.

[T]he former provides an antitrust plaintiff the opportunity to argue that, despite some efficiency justification proffered by an antitrust defendant, the rational or intended goal of the conduct was its anticompetitive impact. The latter, in contrast, requires the antitrust defendant to put forward any evidence of some business reason for its conduct, regardless of potential anticompetitive effect.<sup>27</sup>

According to the dissent, the district court applied the latter, credited Comcast’s potential procompetitive purpose, and dismissed the claim. But in doing so, the district court “effectively held the plaintiff ... cannot ... ever advance past the pleading stage when a defendant asserts a procompetitive justification[.]”<sup>28</sup> In rejecting that result, the dissent effectively applied the former and required a plaintiff only to plausibly allege anticompetitive conduct to survive a motion to dismiss. The dissent joined the majority in finding that Viamedia met that standard.<sup>29</sup>

### Key Takeaways

Theories of Section 2 liability have been severely limited in recent decades, especially by Supreme Court opinions that impose burdens on plaintiffs that often seem practically impossible to meet.<sup>30</sup> This case shows that, despite *Trinko*’s “at or near the outer boundary” description of *Aspen Skiing*, refusals to deal are not in that category. A plaintiff who convinces a court that its facts are effectively on all fours with those in *Aspen Skiing* can prevail.

The “termination of a prior voluntary course of dealing” element seems to be necessary, though not sufficient, to a successful refusal-to-deal claim; however, avoiding such situations in business can be practically difficult. Recall that the joint ski-pass ticket was in place well before the defendant in *Aspen Skiing* acquired all three of its ski mountains and supposedly gained monopoly power. Unfortunately, the best way for a monopolist to avoid suspicious terminations of such agreements could be to forego entering them in the first place, which might mean foregoing efficient and procompetitive collaborations.

Clarifications of *Aspen Skiing* in opinions like *Novell* that not all decisions to forego short-term profits are anticompetitive have been helpful for defendants and have further focused these cases on monopolist actions that truly harm competition, not just competitors. As this case shows, however, the debate over whether any particular refusal by a monopolist will eventually benefit competition and consumers can take years and lots of money to resolve.

Finally, if it stands and gains support in other circuits, this opinion will make it much more difficult for a monopolist defendant to dismiss such a claim at the pleading stage and avoid expensive discovery. On a motion to dismiss, the defendant will not be able to prevail by simply asserting that some rational potential procompetitive purpose or effect “is self-evident from the complaint.”<sup>31</sup> Instead, the defendant moving to dismiss on the pleadings will have to show that the allegations do not raise *any* plausible anticompetitive purpose or effect, a much more difficult burden. As a result, more well-pleaded refusal-to-deal claims will survive to discovery.

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<sup>27</sup> *Id.* at \*45.

<sup>28</sup> *Id.* at \*46.

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

<sup>30</sup> See, e.g., *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (predatory pricing) and *Pacific Bell Telephone Co. v. LinkLine Commun’s. Inc.*, 555 U.S. 438 (2009) (price squeezes).

<sup>31</sup> *Charych v. Siriusware, Inc.*, 2018 WL 4870906, at \*7 (E.D. N.Y. July 30, 2018).