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1. *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398*

Client/Matter: -None-

Search Terms: "antitrust law"

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Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jan 01, 1891 to Dec 31, 2022; Court: Supreme Court

Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP

Supreme Court of the United States

October 14, 2003, Argued ; January 13, 2004, Decided

No. 02-682

Reporter
540 U.S. 398 *; 124 S. Ct. 872 **; 157 L. Ed. 2d 823 ***; 2004 U.S. LEXIS 657 ****; 72 U.S.L.W. 4114; 2004-1 Trade Cas. (CCH) P74,241; 17 Fla. L. Weekly Fed. S 91; 31 Comm. Reg. (P & F) 542

VERIZON COMMUNICATIONS INC., Petitioner v. LAW OFFICES OF CURTIS V. TRINKO, LLP

Subsequent History: Complaint dismissed at *Law Offices of Curtis V. Trinko, LLP v. Verizon Communs. Inc., 2006 U.S. Dist. LEXIS 71101 (S.D.N.Y., Sept. 27, 2006)*

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89, 2002 U.S. App. LEXIS 12233 (2d Cir. N.Y., 2002)

Disposition: Reversed and remanded.

Core Terms

antitrust, FCC, incumbent, customers, orders, rivals, anti trust law, monopoly, sharing, anticompetitive, interconnection, long-distance, competitors, network, consent decree, allegations, regulation, facilities, Skiing, ticket, terms, fill, antitrust claim, authorization, damages, cases

Case Summary

Procedural Posture

Respondent local telephone service customer sued petitioner incumbent local exchange carrier (incumbent LEC), alleging violations of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act and the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The district court dismissed the complaint. The United States Court of Appeals for the Second Circuit reinstated the complaint in part, including the antitrust claim. Certiorari was granted.

Overview

The customer alleged that the incumbent LEC filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LECs' ability to enter and compete in the market for local telephone service. The Court determined that the complaint alleging breach of the incumbent LEC's duty under the Telecommunications Act of 1996 to share its network with competitors failed to state a claim under *§ 2* of the Sherman Act. The incumbent LEC's alleged insufficient assistance in the provision of service to rivals was not a recognized antitrust claim under existing refusal-to-deal precedents. Traditional antitrust principles did not justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.

Outcome
The Court reversed the appellate court's judgment and remanded the case for further proceedings.

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN1[] Communications, Telecommunications Act

Central to the scheme of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, is the incumbent local exchange carrier's obligation under 47 U.S.C.S. § 251(c) to share its network with competitors, including provision of access to individual elements of the network on an "unbundled" basis. 47 U.S.C.S. § 251(c)(3).

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN2[] Introducing Competition, Duties of Incumbent Carriers & Resellers

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, imposes a large number of duties upon incumbent local exchange carriers (LECs) -- above and beyond those basic responsibilities it imposes upon all carriers, such as assuring number portability and providing access to rights-of-way, 47 U.S.C.S. § 251(b)(2), (4). Under the sharing duties of 47 U.S.C.S. § 251(c), incumbent LECs are required to offer three kinds of access. Perhaps most intrusive, is the duty to offer access to unbundled network elements (UNEs) on "just, reasonable, and nondiscriminatory" terms, § 251(c)(3), a phrase that the Federal Communications Commission has interpreted to mean a price reflecting long-run incremental cost. A rival can interconnect its own facilities with those of the incumbent LEC, or it can simply purchase services at wholesale from the incumbent and resell them to consumers. 47 U.S.C.S. § 251(c)(2), (4). The Act also imposes upon incumbents the duty to allow physical "collocation" -- that is, to permit a competitor to locate and install its equipment on the incumbent's premises -- which makes feasible interconnection and access to UNEs. 47 U.S.C.S. § 251(c)(6).

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > Federal Acts > Federal Communications Act > Federal Preemption

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN3[] Regulated Industries, Communications

Section 601(b)(1) of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, is an antitrust-specific saving clause providing that nothing in the Act or the amendments made by the Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. 110 Stat. 143, 47 U.S.C.S. § 152, note. This bars a finding of implied immunity. The saving clause preserves those claims that satisfy established antitrust standards. But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act modify, impair, or supersede the applicability of the antitrust laws.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN4[] Scope, Monopolization Offenses

Section 2 (15 U.S.C.S. § 2) of the Sherman Act declares that a firm shall not "monopolize" or "attempt to monopolize." 15 U.S.C.S. § 2. It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices -- at least for a short period -- is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN5 **Monopolies & Monopolization, Actual Monopolization**

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers.

Antitrust & Trade Law > Sherman Act > General Overview

HN6 **Antitrust & Trade Law, Sherman Act**

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.

Antitrust & Trade Law > Sherman Act > General Overview

HN7 **Antitrust & Trade Law, Sherman Act**

The high value that is placed on the right to refuse to deal with other firms does not mean that the right is unqualified. Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2 (15 U.S.C.S. § 2) of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN8 **Antitrust & Trade Law, Sherman Act**

Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. Careful account must be taken of the pervasive federal and state regulation characteristic of the industry. Antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies. One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, there is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2 (15 U.S.C.S. § 2) of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Communications Law > ... > Telephone Services > Long Distance Telephone Services > General Overview

HN9 **Antitrust & Trade Law, Sherman Act**

In certain circumstances, regulation significantly diminishes the likelihood of major antitrust harm.

Communications Law > ... > Telephone Services > Long Distance Telephone Services > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Communications Law > Federal Acts > Federal Communications Act > Penalties

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > Regulators > US Federal Communications Commission > General Overview

Communications Law > Public Enforcement > Orders & Hearings > Judicial Review

HN10 **Telephone Services, Long Distance Telephone Services**

Commitments to provide access to unbundled network elements are enforceable by the Federal Communications Commission through continuing oversight; a failure to meet an authorization condition can result in an order that the deficiency be corrected, in the imposition of penalties, or in the suspension or revocation of long-distance approval. *47 U.S.C.S. § 271(d)(6)(A)*.

Antitrust & Trade Law > Sherman Act > General Overview

HN11 **Antitrust & Trade Law, Sherman Act**

Under the best of circumstances, applying the requirements of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act can be difficult because the means of illicit exclusion, like the means of legitimate competition, are myriad. Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect. The cost of false positives counsels against an undue expansion of *§ 2* liability.

Antitrust & Trade Law > Sherman Act > General Overview

HN12 **Antitrust & Trade Law, Sherman Act**

No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by ***antitrust law*** when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN13 **Monopolies & Monopolization, Attempts to Monopolize**

The Sherman Act is indeed the Magna Carta of free enterprise, but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.

Lawyers' Edition Display

Decision

[*823]** Complaint--alleging, as to local telephone service, that incumbent local exchange carrier had breached its duty, under Telecommunications Act of 1996, to share incumbent's network with competitors--held not to state valid antitrust claim under 15 USCS § 2.

Summary

With respect to local telephone service, the Telecommunications Act of 1996, in 47 USCS § 251(c), required each incumbent local exchange carrier to share its network with competitors, including, under 47 USCS § 251(c)(3), the provision of access to individual "unbundled" network elements (UNEs). These § 251(c) requirements were beyond the basic responsibilities which the 1996 Act, in provisions such as 47 USCS § 251(b), imposed upon all carriers. Also, the 1996 Act, in 47 USCS § 252, required such incumbents to sign interconnection agreements with rivals, with compulsory arbitration if the terms could not be completely agreed upon. Moreover, in order for an incumbent to enter the potentially lucrative market for long-distance service, the 1996 Act, under 47 USCS § 271, required satisfaction of a competitive checklist, which included such an incumbent's nondiscriminatory provision of access to the UNEs offered pursuant to § 251(c). In addition, the 1996 Act contained an antitrust-specific saving clause (47 USCS § 152 note), which provided that "nothing in this Act or the amendments made by this Act [would] be construed to modify, impair, or supersede the applicability of any of the antitrust laws."

The incumbent local exchange carrier for New York state had, as one of the incumbent's § 251(c)(3) obligations, the provision of access to operations support systems (OSS), used to provide services to customers and to insure quality. Also, after this incumbent applied to provide long-distance service in the state, an eventual § 271 authorization by the Federal Communications Commission (FCC) discussed the incumbent's commitments to provide access to UNEs, including the provision of OSS. Moreover, the incumbent **[***824]** subjected itself to oversight by the state's public service commission (PSC). When several competitors complained about alleged deficiencies in the incumbent's OSS-related servicing of local-telephone orders, the FCC and PSC responded by (1) imposing substantial financial penalties, and (2) establishing measurements and reporting requirements to gauge the incumbent's remediation.

The day after the incumbent had entered into a consent decree with the FCC on this subject, a New York City law firm, which was assertedly a local-telephone-service customer of another company, filed a complaint in the United States District Court for the Southern District of New York, on the purported behalf of the law firm and a class of similarly situated customers. As later amended, the complaint (1) asserted claims under various state and federal laws, including an antitrust claim under § 2 of the Sherman Act (15 USCS § 2), which prohibited monopolizing or attempting to monopolize; (2) sought damages and injunctive relief; (3) alleged that the incumbent had breached its 1996 Act duty to share the incumbent's network with competitors; and (4) set forth, as the complaint's single example of the incumbent's alleged failure to provide adequate access, the OSS failure that had resulted in the FCC consent decree and some PSC orders.

However, the District Court (1) dismissed the complaint in its entirety; and (2) as to the antitrust portion, concluded that the law firm's allegations of the incumbent's deficient assistance to rivals failed to satisfy the requirements of § 2 (123 F. Supp. 2d 738).

On appeal, the United States Court of Appeals for the Second Circuit--in vacating in part and in ordering a remand--(1) effectively reinstated the law firm's complaint in part, including the antitrust claim; and (2) expressed the view that the complaint's allegations described conduct that might support a § 2 antitrust claim "under a number of theories" (305 F.3d 89).

The United States Supreme Court granted certiorari limited to the antitrust issue (*538 U.S. 905, 155 L. Ed. 2d 224, 123 S. Ct. 1480*).

Then, on certiorari, the Supreme Court reversed and remanded. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and O'Connor, Kennedy, Ginsburg, and Breyer, JJ., it was held that the law firm, in alleging that the incumbent had breached its 1996 Act duty to share the incumbent's network with competitors, failed to state a valid antitrust claim under § 2 of the Sherman Act, for among other factors:

(1) Just as the 1996 Act, through its antitrust-specific saving clause, preserved claims that satisfied existing antitrust standards, the 1996 Act did not create new claims that went beyond existing antitrust standards.

(2) The allegations in the law firm's complaint did not fit within the existing refusal-to-deal exceptions already recognized by the Supreme Court, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating § 2.

(3) Moreover, the allegations in the law firm's complaint did not provide a basis, under traditional antitrust principles, for the Supreme Court to recognize a new refusal-to-deal exception, whereby the incumbent's alleged refusal **[***825]** to cooperate with the

incumbent's rivals could properly constitute anticompetitive conduct violating § 2.

Stevens, J., joined by Souter and Thomas, JJ., concurring in the judgment, expressed the view that (1) even if the allegations in the law firm's complaint were assumed to be true, the law firm was not a covered "person," under the Supreme Court's precedents, within the meaning of § 4 of the Clayton Act (15 USCS § 15), which provided for the treble-damages remedy which the law firm sought; and (2) the Supreme Court ought not to go beyond this threshold question in the case at hand.

Headnotes

COMMUNICATIONS §22 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- local telephone service -- claim that incumbent failed to share network > Headnote:
LEdHN[1A] [1A] LEdHN[1B] [1B] LEdHN[1C] [1C] LEdHN[1D] [1D] LEdHN[1E] [1E] LEdHN[1F] [1F] LEdHN[1G] [1G] LEdHN[1H] [1H] LEdHN[1I] [1I]

With respect to local telephone service, a Federal District Court complaint by a law firm against an incumbent local exchange carrier failed to state a valid antitrust claim under § 2 of the Sherman Act (15 USCS § 2), which prohibited monopolizing or attempting to monopolize, for:

(1) In the complaint, the law firm, which was assertedly a local-telephone-service customer of another company, alleged that the incumbent had breached its duty, under some Telecommunications Act of 1996 provisions (codified at 47 USCS §§ 251, 252, and 271), to share the incumbent's network with competitors.

(2) Just as the 1996 Act, through an antitrust-specific saving clause (47 USCS § 152 note), preserved claims that satisfied existing antitrust standards, the 1996 Act did not create new claims that went beyond existing antitrust standards.

(3) The allegations in the law firm's complaint did not fit within the existing refusal-to-deal exceptions already recognized by the United States Supreme Court, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating § 2.

(4) Moreover, the allegations in the law firm's complaint did not provide a basis, under traditional antitrust principles, for the Supreme Court to recognize a new refusal-to-deal exception, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating § 2.

(5) Even if the law firm's complaint otherwise might have been thought to state a valid § 2 claim under a "monopoly leveraging" theory, such leveraging presupposed anticompetitive conduct, which, in the case at hand, could only be the refusal-to-deal claim that was being rejected.

(6) It would be a serious mistake to conflate the goals of the 1996 Act and the Sherman Act, as (a) the 1996 Act--which was in some respects more ambitious than the antitrust laws--attempted to eliminate the monopolies enjoyed by the inheritors of a particular company's local-telephone-service franchise; but (b) § 2 of the Sherman Act sought **[***826]** merely to prevent unlawful monopolization.

(Stevens, Souter, and Thomas, JJ., dissented in part from this holding.)

COMMUNICATIONS §22 > -- Telecommunications Act of 1996 -- enforcement -- antitrust > Headnote:
LEdHN[2A] [2A] LEdHN[2B] [2B] LEdHN[2C] [2C]

Even though the Telecommunications Act of 1996, in 47 USCS § 251(c), imposed a large number of local-telephone-service duties upon incumbent local exchange carriers--beyond those basic responsibilities which the 1996 Act (in provisions such as 47 USCS § 251(b)) imposed upon all carriers--the circumstance that Congress created these duties did not automatically lead to the conclusion that these duties could be validly enforced by means of an antitrust claim (under provisions such as § 2 of the Sherman Act, 15 USCS § 2). In this regard, the 1996 Act, through an antitrust-specific saving clause (47 USCS § 152 note)--which provided that "nothing in this Act or the amendments made by this Act [would] be construed to modify, impair, or supersede the applicability of any of the antitrust laws"--(1) barred a finding of implied antitrust immunity,

and (2) preserved those claims that satisfied established antitrust standards, but (3) did not create new claims that went beyond existing antitrust standards.

COMMUNICATIONS §22 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- local telephone service -- claim that incumbent failed to share network > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]***LEdHN[3C]***[] [3C]***LEdHN[3D]***[] [3D]***LEdHN[3E]***[] [3E]

With respect to local telephone service, the allegations in a law firm's Federal District Court complaint against an incumbent local exchange carrier did not fit within the existing refusal-to-deal exceptions, already recognized by the United States Supreme Court, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating § 2 of the Sherman Act (*15 USCS § 2*)--which prohibited monopolizing or attempting to monopolize--for:

(1) In the complaint, the law firm, which was assertedly a local-telephone-service customer of another company, alleged that the incumbent had breached its duty, under some Telecommunications Act of 1996 provisions (codified at *47 USCS §§ 251*, *252*, and *271*), to share the incumbent's network with competitors.

(2) Because the complaint did not allege that the incumbent had voluntarily engaged in a course of dealing with the incumbent's rivals--or that the incumbent ever would have done so absent statutory compulsion--the incumbent's prior conduct shed no light upon the motivation of the incumbent's alleged refusal to deal, as to whether the incumbent's alleged regulatory lapses were prompted by (a) competitive zeal, or (b) anticompetitive malice.

(3) With respect to pricing behavior, the incumbent's alleged reluctance to interconnect at the cost-based rate of compensation available under *47 USCS § 251(c)(3)* told the Supreme Court nothing about dreams of monopoly.

(4) The sharing obligation imposed by the 1996 Act created something brand new--a wholesale market for leasing network elements--where (a) such "unbundled" elements, offered pursuant to *§ 251(c)(3)*, had existed only deep within the incumbent; (b) these elements were brought out on **[***827]** compulsion of the 1996 Act; and (c) these elements were offered not to consumers, but to rivals, and at considerable expense and effort.

(5) Even if the Supreme Court considered to be established law the "essential facilities" doctrine crafted by some lower courts--which doctrine the Supreme Court had never recognized and found no need to recognize, or to repudiate, in the case at hand--the 1996 Act's extensive provision for network access made it unnecessary to impose such a judicial doctrine of forced access.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > -- factors > Headnote:
LEdHN[4][] [4]

An antitrust violation of § 2 of the Sherman Act (*15 USCS § 2*), which declares that a firm shall not "monopolize" or "attempt to monopolize," requires, in addition to the possession of monopoly power in the relevant market, the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. For such purposes, the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only lawful, but also an important element of the free-market system. Thus, in order to safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful, under *§ 2*, unless such possession is accompanied by an element of anticompetitive conduct.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- refusal to deal > Headnote:
LEdHN[5][] [5]

For antitrust purposes, § 2 of the Sherman Act (*15 USCS § 2*)--which declares that a firm shall not "monopolize" or "attempt to monopolize"--does not, as a general matter, restrict the long-recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise independent discretion as to parties with whom the trader or manufacturer will deal.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- refusal to deal > Headnote: LEdHN[6] [6]

The high value that the United States Supreme Court has placed on a firm's right to refuse to deal with other firms does not mean that the right is unqualified for antitrust purposes. Thus, under certain circumstances, a firm's refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2 of the Sherman Act (15 USCS § 2), which prohibits monopolizing or attempting to monopolize.

COMMUNICATIONS §14 COMMUNICATIONS §22 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- local telephone service -- claim that incumbent failed to share network > Headnote: LEdHN[7A] [7A] LEdHN[7B] [7B] LEdHN[7C] [7C] LEdHN[7D] [7D]

With respect to local telephone service, the allegations in a law firm's Federal District Court complaint against an incumbent local exchange carrier did not provide a basis, under traditional antitrust principles, for the United States Supreme Court to recognize a new refusal-to-deal exception, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating § 2 of the Sherman Act (15 USCS § 2)--which prohibited monopolizing or attempting to monopolize--for:

(1) In the complaint, the law firm, which was assertedly a local-telephone-service customer of another **[***828]** company, alleged that the incumbent had breached its duty, under some Telecommunications Act of 1996 provisions (codified at 47 USCS §§ 251, 252, and 271), to share the incumbent's network with competitors.

(2) The regulatory regime that already existed in this industry was an effective steward of the antitrust function, where (a) in order for an incumbent to enter the potentially lucrative market for long-distance service, authorization by the Federal Communications Commission (FCC) required state-by-state satisfaction of § 271's competitive checklist, which included such an incumbent's nondiscriminatory provision of access to the "unbundled" network elements (UNEs) offered pursuant to 47 USCS § 251(c); (b) the FCC's eventual § 271 authorization for the incumbent in question to provide long-distance service in the state in question had discussed at great length the incumbent's commitments to provide access to UNEs, including the provision of operations support systems (OSS), used to provide services to customers and to insure quality; (c) the incumbent had also subjected itself to oversight by the state's public service commission (PSC); and (d) when several competitors had complained about alleged deficiencies in the incumbent's OSS-related servicing of local-telephone orders, the FCC and PSC had responded by (i) imposing substantial financial penalties, and (ii) establishing measurements and reporting requirements to gauge the incumbent's remediation.

(3) Under a realistic assessment, the cost of "false positives"--mistaken inferences and the resulting false condemnations--in such situations counseled against an undue expansion of § 2 liability, where (a) one false-positive risk was that an incumbent's failure to provide a service with sufficient alacrity might have nothing to do with the exclusion of competitors; (b) allegations of violations of § 251(c)(3) duties would be difficult for antitrust courts to evaluate; and (c) judicial oversight under the Sherman Act would seem destined to distort investment and to lead to a new layer of litigation, atop the variety of litigation routes already available to, and actively pursued by, competitors.

(4) Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of § 251 might be beyond the practical ability of a judicial tribunal to control, where (a) the effective remediation of such violations ordinarily would require continuing supervision of a highly detailed decree, such as the equitable decree sought by the law firm in the case at hand; and (b) an antitrust court was unlikely to be an effective day-to-day enforcer of such detailed sharing obligations.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §75 > -- concerted action -- remedy > Headnote: LEdHN[8A] [8A] LEdHN[8B] [8B]

For purposes of antitrust analysis under § 2 of the Sherman Act (15 USCS § 2)--which declares that a firm shall not "monopolize" or "attempt to monopolize"--concerted action (1) presents greater anticompetitive

concerns; and (2) is amenable to a remedy that does not require judicial estimation of free-market forces, by a court's simply requiring that the outsider be granted nondiscriminatory admission to the "club." **[***829]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > -- factors -- industry -- regulation > Headnote: ***LEdHN[9A]*** [9A]***LEdHN[9B]*** [9B]

Antitrust analysis under § 2 of the Sherman Act (15 USCS § 2), which prohibits monopolizing or attempting to monopolize, must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. Thus, careful account must be taken of the pervasive federal and state regulation characteristic of an industry. In addition, antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which the analysis applies. One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm, for (1) where such a structure exists, (a) the additional benefit to competition provided by antitrust enforcement will tend to be small, and (b) it will be less plausible that the antitrust laws contemplate such additional scrutiny; but (2) where, by contrast, there is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust are worth its sometimes considerable disadvantages. Moreover, just as regulatory context may serve as a basis for implied immunity, regulatory context may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > -- success > Headnote: ***LEdHN[10A]*** [10A]***LEdHN[10B]*** [10B]

In order for a "monopoly leveraging" antitrust claim to be valid under § 2 of the Sherman Act (15 USCS § 2), there must be a dangerous probability of success in monopolizing a second market.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > -- factors > Headnote: ***LEdHN[11]*** [11]

While the Sherman Act (15 USCS §§ 1 et seq.) is the "Magna Carta of free enterprise," the Sherman Act does not give judges the freedom to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition. **[***830]**

Syllabus

The Telecommunications Act of 1996

imposes upon an incumbent local exchange carrier (LEC) the obligation to share its telephone network with competitors, 47 U.S.C. § 251(c) [47 USCS § 251(c)], including the duty to provide access to individual network elements on an "unbundled" basis, see § 251(c)(3). New entrants, so-called competitive LECs, combine and resell these unbundled network elements (UNEs). Petitioner Verizon Communications Inc., the incumbent LEC in New York State, has signed interconnection agreements with rivals such as AT&T, as § 252 obliges it to do, detailing the terms on which it will make its network **[****2]** elements available. Part of Verizon's § 251(c)(3) UNE obligation is the provision of access to operations support systems (OSS), without which a rival cannot fill its customers' orders. Verizon's interconnection agreement, approved by the New York Public Service Commission (PSC), and its authorization to provide long-distance service, approved by the Federal Communications Commission (FCC), each specified the mechanics **[***831]** by which its OSS obligation would be met. When competitive LECs complained that Verizon was violating that obligation, the PSC and FCC opened parallel investigations, which led to the imposition of financial penalties, remediation measures, and additional reporting requirements on Verizon. Respondent, a local telephone service customer of AT&T, then filed this class action alleging, *inter alia*, that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs in violation of § 2 of the Sherman Act, 15 USC § 2 [15 USCS § 2]. The District Court dismissed the complaint, concluding that respondent's allegations of deficient assistance to rivals **[****3]** failed to satisfy § 2's requirements. The

Second Circuit reinstated the antitrust claim.

Held:

Respondent's complaint alleging breach of an incumbent LEC's 1996 Act duty to share its network with competitors does not state a claim under § 2 of the Sherman Act.

(a) The 1996 Act has no effect upon the application of traditional antitrust principles. Its saving clause--which provides that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws," 47 U.S.C. § 152, note [47 USCS § 152 note]--preserves claims that satisfy established antitrust standards, but does not create new claims that go beyond those standards.

(b) The activity of which respondent complains does not violate pre-existing antitrust standards. The leading case imposing § 2 liability for refusal to deal with competitors is Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847, in which the Court concluded that the defendant's termination of a voluntary agreement with the plaintiff suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Aspen* **[****4]** is at or near the outer boundary of § 2 liability, and the present case does not fit within the limited exception it recognized. Because the complaint does not allege that Verizon ever engaged in a voluntary course of dealing with its rivals, its prior conduct sheds no light upon whether its lapses from the legally compelled dealing were anticompetitive. Moreover, the *Aspen* defendant turned down its competitor's proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher, whereas Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) is uninformative. More fundamentally, the *Aspen* defendant refused to provide its competitor with a product it already sold at retail, whereas here the unbundled elements offered pursuant to § 251(c)(3) are not available to the public, but are provided to rivals under compulsion and at considerable expense. The Court's conclusion would not change even if it considered to be established law the "essential facilities" doctrine crafted by some lower courts. The indispensable requirement for invoking that doctrine is the unavailability of **[****5]** access to the "essential facilities"; where access exists, as it does here by virtue of the 1996 Act, the doctrine serves no purpose.

(c) Traditional antitrust principles do not justify adding the present case to the few existing exceptions **[***832]** from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. When there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Here Verizon was subject to oversight by the FCC and the PSC, both of which agencies responded to the OSS failure raised in respondent's complaint by imposing fines and other burdens on Verizon. Against the slight benefits of antitrust intervention here must be weighed a realistic assessment of its costs. Allegations of violations of § 251(c)(3) duties are both technical and extremely numerous, and hence difficult for antitrust courts to evaluate. Applying § 2's requirements to this **[****6]** regime can readily result in "false positive" mistaken inferences that chill the very conduct the antitrust laws are designed to protect. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348.

305 F.3d 89, reversed and remanded.

Counsel: Richard G. Taranto argued the cause for petitioner.

Theodore B. Olson argued the cause for the United States, as amicus curiae, by special leave of court.

Donald B. Verrilli, Jr. argued the cause for respondent.

Judges: Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Kennedy, Ginsburg, and Breyer, JJ., joined. Stevens, J., filed an opinion concurring in the judgment, in which Souter and Thomas, JJ., joined.

Opinion by: SCALIA

Opinion

[*401] **[**875]** Justice **Scalia** delivered the opinion of the Court.

LEdHN[1A][↑] [1A] The *Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56*, imposes certain duties upon incumbent local telephone companies in order to facilitate market entry by competitors, and establishes a complex regime for monitoring and enforcement. In this case we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act, 26 Stat 209.

I

[*402] Petitioner Verizon Communications Inc. is the incumbent local exchange carrier (LEC) serving New York State. Before the 1996 Act, Verizon, [1] like **[****7]** other incumbent LECs, enjoyed an exclusive franchise within its local service area. The 1996 Act sought to "uproo[t]" the incumbent LECs' monopoly and to introduce competition in its place. *Verizon Communs., Inc. v. FCC, 535 U.S. 467, 488, 152 L. Ed. 2d 701, 122 S. Ct. 1646 (2002)*. HN1[↑] Central to the scheme of the Act is the incumbent LEC's **[**876]** obligation under *47 U.S.C. § 251(c)* [*47 USCS § 251(c)*] to share its network with competitors, see *AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*, including provision of access to individual elements of the network on an "unbundled" basis. *§ 251(c)(3)*. New entrants, so-called competitive **[***833]** LECs, resell these unbundled network elements (UNEs), recombined with each other or with elements belonging to the LECs.

[**8]** Verizon, like other incumbent LECs, has taken two significant steps within the Act's framework in the direction of increased competition. First, Verizon has signed interconnection agreements with rivals such as AT&T, as it is obliged to do under *§ 252*, detailing the terms on which it will make its network elements available. (Because Verizon and AT&T could not agree upon terms, the open issues were subjected to compulsory arbitration under *§§ 252(b) and (c)*.) In 1997, the state regulator, New York's Public Service Commission (PSC), approved Verizon's interconnection agreement with AT&T.

Second, Verizon has taken advantage of the opportunity provided by the 1996 Act for incumbent LECs to enter the long-distance market (from which they had long been excluded). That required Verizon to satisfy, among other things, a 14-item checklist of statutory requirements, which **[*403]** includes compliance with the Act's network-sharing duties. *§§ 271(d)(3)(A) and (c)(2)(B)*. Checklist item two, for example, includes "nondiscriminatory access to network elements in accordance with the requirements" of *§ 251(c)(3)*. *§ 271(c)(2)(B)(ii)*. Whereas the state regulator approves an interconnection agreement, **[****9]** for long-distance approval the incumbent LEC applies to the Federal Communications Commission (FCC). In December 1999, the FCC approved Verizon's *§ 271* application for New York.

Part of Verizon's UNE obligation under *§ 251(c)(3)* is the provision of access to operations support systems (OSS), a set of systems used by incumbent LECs to provide services to customers and ensure quality. Verizon's interconnection agreement and long-distance authorization each specified the mechanics by which its OSS obligation would be met. As relevant here, a competitive LEC sends orders for service through an electronic interface with Verizon's ordering system, and as Verizon completes certain steps in filling the order, it sends confirmation back through the same interface. Without OSS access a rival cannot fill its customers' orders.

In late 1999, competitive LECs complained to regulators that many orders were going unfilled, in violation of Verizon's obligation to provide access to OSS functions. The PSC and FCC opened parallel investigations, which led to a series of orders by the PSC and a consent decree with the FCC. [2] Under the FCC consent decree, Verizon undertook **[*404]** to make a "voluntary contribution" **[****10]** to the U. S. Treasury in the

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[1] In 1996, NYNEX was the incumbent LEC for New York State. NYNEX subsequently merged with Bell Atlantic Corporation, and the merged entity retained the Bell Atlantic name; a further merger produced Verizon. We use "Verizon" to refer to NYNEX and Bell Atlantic as well.

[2] Order Directing Improvements To Wholesale Service Performance, *MCI Worldcom, Inc.* v *Bell Atlantic-New York*, Nos. 00-C-0008, 00-C-0009, 2000 WL 363378 (N. Y. PSC, Feb. 11, 2000); Order Directing Market Adjustments and Amending Performance Assurance Plan, *MCI Worldcom, Inc.* v *Bell Atlantic-New York*, Nos. 00-C-0008, 00-C-0009, 99-C-0949, 2000 WL 517633 (N. Y. PSC, Mar. 23, 2000); Order Addressing OSS Issues, *MCI Worldcom, Inc.* v *Bell Atlantic-New York*, Nos. 00-C-0008, 00-C-0009, 99-C-0949, 2000 WL 1531916 (N. Y. PSC, July 27, 2000); *In re Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service In the State of New York, 15 FCC Rcd. 5413 (2000)* (Order); *id.*, at 5415 (Consent Decree).

amount of $3 million, **[**877]** 15 FCC Rcd. 5415, 5421, P16 (2000); under the PSC orders, Verizon incurred liability to the competitive LECs in the amount of $10 **[***834]** million. Under the consent decree and orders, Verizon was subjected to new performance measurements and new reporting requirements to the FCC and PSC, with additional penalties for continued noncompliance. In June 2000, the FCC terminated the consent decree. Enforcement Bureau Announces that Bell Atlantic Has Satisfied Consent Decree Regarding Electronic Ordering Systems in New York (June 20, 2000), http://www.fcc.gov/eb/News_Releases/bellatlet.html (all Internet materials as visited Dec. 12, 2003, and available in Clerk of Court's case file). The next month the PSC relieved Verizon of the heightened reporting requirement. Order Addressing OSS Issues, *MCI Worldcom, Inc.* v *Bell Atlantic-New York*, Nos. 00-C-0008, 00-C-0009, 99-C-0949, 2000 WL 1531916 (N. Y. PSC, July 27, 2000).

[**11]** Respondent Law Offices of Curtis V. Trinko, LLP, a New York City law firm, was a local telephone service customer of AT&T. The day after Verizon entered its consent decree with the FCC, respondent filed a complaint in the District Court for the Southern District of New York, on behalf of itself and a class of similarly situated customers. See App. 12-33. The complaint, as later amended, *id.*, at 34-50, alleged that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LECs' ability to enter and compete in the market for local telephone service. See, *e.g., id.*, at 34-35, 46-47, PP 1, 2, 52, 54. According to the complaint, Verizon "has filled orders of [competitive LEC] customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for [competitive LEC] customers . . ., and has systematically failed to inform [competitive **[*405]** LECs] of the status of their customers' orders." *Id.*, at 39, P 21. The complaint set forth a single example of the **[****12]** alleged "failure to provide adequate access to [competitive LECs]," namely the OSS failure that resulted in the FCC consent decree and PSC orders. *Id.*, at 40, P 22. It asserted that the result of Verizon's improper "behavior with respect to providing access to its local loop" was to "deter potential customers [of rivals] from switching." *Id.*, 35, 47, PP2, 57. The complaint sought damages and injunctive relief for violation of § 2 of the Sherman Act, 15 USC § 2 [15 USCS § 2], pursuant to the remedy provisions of §§ 4 and 16 of the Clayton Act, 38 Stat 731, as amended, 15 USC §§ 15, 26 [15 USCS §§ 15, 26. The complaint also alleged violations of the 1996 Act, § 202(a) of the Communications Act of 1934, 48 Stat 1064, as amended, 47 U.S.C. § 151 et seq. [47 USCS §§ 151 et seq.], and state law.

The District Court dismissed the complaint in its entirety. As to the antitrust portion, it concluded that respondent's allegations of deficient assistance to rivals failed to satisfy the requirements of § 2. The Court of Appeals for the Second Circuit reinstated the complaint in part, including the antitrust claim. 305 F.3d 89, 113 (2002). We granted **[****13]** certiorari, limited to the question whether the Court of Appeals erred in reversing the District Court's dismissal of respondent's antitrust claims.*538 U.S. 905, 538 U.S. 905, 155 L. Ed. 2d 224, 123 S. Ct. 1480 (2003)*.

[*835]** II

LEdHN[1B][↑] [1B] LEdHN[2A][↑] [2A] To decide this case, we must first determine what effect (if any) the 1996 Act has upon the application of traditional antitrust principles. HN2[↑] The Act imposes a large number of duties upon incumbent LECs--above and beyond those basic responsibilities **[**878]** it imposes upon all carriers, such as assuring number portability and providing access to rights-of-way, see 47 U.S.C. §§ 251(b)(2), (4) [47 USCS §§ 251(b)(2), (4)]. Under the sharing duties of § 251(c), incumbent LECs are required to offer three kinds of access. Already noted, and perhaps most intrusive, is the duty to offer access to UNEs on "just, reasonable, and nondiscriminatory" **[*406]** terms, § 251(c)(3), a phrase that the FCC has interpreted to mean a price reflecting long-run incremental cost. See Verizon Communs., Inc. v. FCC, 535 U.S. 467, at 495-496, 152 L. Ed. 2d 701, 122 S. Ct. 1646. A rival can interconnect its own facilities with those of the incumbent LEC, or it can simply purchase services at wholesale from the incumbent and resell them to consumers. See §§ 251(c)(2), **[****14]** (4). The Act also imposes upon incumbents the duty to allow physical "collocation"--that is, to permit a competitor to locate and install its equipment on the incumbent's premises--which makes feasible interconnection and access to UNEs. See § 251(c)(6).

LEdHN[2B][↑] [2B] That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim. Indeed, a detailed regulatory scheme

such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. See, *e.g.,* United States v. National Ass'n. of Sec. Dealers, Inc., 422 U.S. 694, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975); Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975). In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme "that might be voiced by courts exercising jurisdiction under the antitrust laws." United States v. National Ass'n. of Sec. Dealers, Inc., supra, 422 U.S. 694 at 734, 45 L. Ed. 2d 486, 95 S. Ct. 2427. **[****15]**

Congress, however, precluded that interpretation. Section 601(b)(1) of the 1996 Act ***HN3***[⬆] is an antitrust-specific saving clause providing that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 110 Stat 143, 47 U.S.C. § 152, note [47 USCS § 152 note]. This bars a finding of implied immunity. As the FCC has put the point, the saving clause preserves those "claims that satisfy established antitrust standards." Brief for United States and the Federal **[*407]** Communications Commission as *Amici Curiae* Supporting Neither Party in No. 02-7057, *Covad Communications Co.* v *Bell Atlantic Corp.* (CADC), p 8.

LEdHN[1C][⬆] [1C] ***LEdHN[2C]***[⬆] [2C] But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act "modify, impair, or supersede the applicability" of the antitrust **[***836]** laws. We turn, then, to whether the activity of which respondent complains violates pre-existing antitrust standards.

III

LEdHN[1D][⬆] [1D] ***LEdHN[3A]***[⬆] [3A] ***LEdHN[4]***[⬆] [4] The complaint alleges that Verizon denied interconnection **[****16]** services to rivals in order to limit entry. If that allegation states an antitrust claim at all, it does so ***HN4***[⬆] under § 2 of the Sherman Act, 15 USC § 2 [15 USCS § 2], which declares that a firm shall not "monopolize" or "attempt to monopolize." *Ibid.* It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior **[**879]** product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.*

LEdHN[5][⬆] [5] Firms ***HN5***[⬆] may acquire **[****17]** monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose **[*408]** of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing--a role for which they are illsuited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, ***HN6***[⬆] 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." United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919).

LEdHN[3B][⬆] [3B] ***LEdHN[6]***[⬆] [6] ***LEdHN[7A]***[⬆] [7A] However, ***HN7***[⬆] "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). **[****18]** Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles,

for recognizing a new one.

LEdHN[3C][↑] [3C] The leading case for § 2 liability based on refusal to cooperate with a rival, and the case upon which **[***837]** respondent understandably places greatest reliance, is *Aspen Skiing, supra.* The Aspen ski area consisted of four mountain areas. The defendant, who owned three of those areas, and the plaintiff, who owned the fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint **[*409]** offering, tried a variety of increasingly desperate measures to re-create **[****19]** the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. *Id., 472 U.S. 585 at 593-594, 86 L. Ed. 2d 467, 105 S.Ct. 2847*. The defendant refused even that. We upheld a jury verdict for the plaintiff, reasoning that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Id., 472 U.S. 585 at 608, 86 L. Ed. 2d 467, 105 S. Ct. 2847*.

Aspen Skiing is at or near the outer boundary of § 2 liability. The Court there found significance in the defendant's decision **[**880]** to cease participation in a cooperative venture. See *id., 472 U.S. 585 at 608, 610-611, 86 L. Ed. 2d 467, 105 S. Ct. 2847*. The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Ibid.* Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent.

The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing.* The complaint does not allege that **[****20]** Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal--upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.

LEdHN[3D][↑] [3D] LEdHN[8A][↑] [8A] The specific nature of what the 1996 Act compels makes this case different from *Aspen Skiing* in a more fundamental **[*410]** way. In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail--to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*, another case relied upon by respondent, **[****21]** the defendant 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. *Id., 410 U.S. 366 at 370-371, 377-378, 35 L. Ed. 2d 359, 93 S. Ct. 1022*. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act **[***838]** created "something brand new"--"the wholesale market for leasing network elements." *Verizon Communs., Inc. v. FCC, 535 U.S. 467, at 528, 152 L. Ed. 2d 701, 122 S. Ct. 1646*. The unbundled elements offered pursuant to *§ 251(c)(3)* exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort. New systems must be designed and implemented simply to make that access possible--indeed, it is the failure of one of those systems that prompted the present complaint. [3]

[**22]** LEdHN[1E][↑] [1E] LEdHN[3E][↑] [3E] We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. See generally Areeda,

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[3] LEdHN[8B][↑] [8B] Respondent also relies upon *United States v. Terminal R. Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912)*, and *Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945)*. These cases involved *concerted* action, which presents greater anticompetitive concerns and is amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club.

Essential Facilities: An Epithet **[*411]** in Need of **[**881]** Limiting Principles, 58 Antitrust L. J. 841 (1989). We have never recognized such a doctrine, see Aspen Skiing Co., 472 U.S. 585 at 611, n. 44, 86 L. Ed. 2d 467, 105 S. Ct. 2847; AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 at 428, 142 L. Ed. 2d 834, 119 S. Ct. 721 (opinion of Breyer, J.), and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that "essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate **[****23]** its scope and terms." P. Areeda & H. Hovenkamp, ***Antitrust Law***, p 150, P 773e (2003 Supp.). Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general § 2 argument, we reject it.

IV

LEdHN[1F][↑] [1F] ***LEdHN[7B]***[↑] [7B] ***LEdHN[9A]***[↑] [9A] Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. ***HN8***[↑] Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. As we have noted, "careful account must be taken of the pervasive federal and state regulation characteristic of the industry." United States v. Citizens & Southern Nat. Bank, 422 U.S. 86, 91, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975); see also IA P. Areeda & H. Hovenkamp, ***Antitrust Law***, p 12, P 240c3 (2d ed. **[***839]** 2000). "[A]ntitrust analysis must sensitively recognize and reflect **[****24]** the distinctive economic and legal setting of the regulated industry to which it applies." Concord v. Boston Edison Co., 915 F.2d 17, 22 ***[*412]*** (CA1 1990) (Breyer, C. J.) (internal quotation marks omitted).

LEdHN[9B][↑] [9B] One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, "[t]here is nothing built into the regulatory scheme which performs the antitrust function," Silver v. New York Stock Exchange, 373 U.S. 341, 358, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963), the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, see, *e.g.,* United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 at 730-735, 45 L. Ed. 2d 486, 95 S. Ct. 2427, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.

LEdHN[7C][↑] [7C] The regulatory framework that exists in this case demonstrates **[****25]** how, ***HN9***[↑] in certain circumstances, "regulation significantly diminishes the likelihood of major antitrust harm." Concord v. Boston Edison Co., supra, at 25. Consider, for example, the statutory restrictions upon Verizon's entry into the potentially lucrative market for long-distance service. To be allowed to enter the long-distance market in the first place, an incumbent LEC must be on good behavior in its local market. Authorization by the FCC requires state-by-state satisfaction of § 271's competitive checklist, which as we have noted includes the nondiscriminatory provision of access to **[**882]** UNEs. Section 271 applications to provide long-distance service have now been approved for incumbent LECs in 47 States and the District of Columbia. See FCC Authorizes SBC to Provide Long Distance Service in Illinois, Indiana, Ohio and Wisconsin (Oct. 15, 2003), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239978A1.pdf.

The FCC's § 271 authorization order for Verizon to provide long-distance service in New York discussed at great length Verizon's commitments to provide access to UNEs, including **[*413]** the provision of OSS. **[****26]** *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd. 3953, 3989-4077, PP82-228 (1999)* (Memorandum Opinion and Order) (hereinafter *In re Application*). ***HN10***[↑] Those commitments are enforceable by the FCC through continuing oversight; a failure to meet an authorization condition can result in an order that the deficiency be corrected, in the imposition of penalties, or in the suspension or revocation of long-distance approval. See 47 U.S.C. § 271(d)(6)(A) [47 USCS § 271(d)(6)(A)]. Verizon also subjected itself to oversight by the PSC

under a so-called "Performance Assurance Plan" (PAP). See *In re New York Telephone Co., 197 P. U. R. 4th 266, 280-281 (N. Y. PSC, 1999)* (Order Adopting the Amended PAP). The PAP, which by its terms became binding upon FCC approval, provides specific financial penalties in the event of **[***840]** Verizon's failure to achieve detailed performance requirements. The FCC described Verizon's having entered into a PAP as a significant factor in its *§ 271* authorization, because that provided "a strong financial incentive for post-entry compliance **[****27]** with the *section 271* checklist," and prevented "'backsliding.'" *In re Application 3958-3959, PP8, 12.*

The regulatory response to the OSS failure complained of in respondent's suit provides a vivid example of how the regulatory regime operates. When several competitive LECs complained about deficiencies in Verizon's servicing of orders, the FCC and PSC responded. The FCC soon concluded that Verizon was in breach of its sharing duties under *§ 251(c)*, imposed a substantial fine, and set up sophisticated measurements to gauge remediation, with weekly reporting requirements and specific penalties for failure. The PSC found Verizon in violation of the PAP even earlier, and imposed additional financial penalties and measurements with *daily* reporting requirements. In short, the regime was an effective steward of the antitrust function.

[*414] Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. ***HN11***[↑] Under the best of circumstances, applying the requirements of *§ 2* "can be difficult" because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (CADC 2001)* **[****28]** (en banc) *(per curiam).* Mistaken inferences and the resulting false condemnations "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. The cost of false positives counsels against an undue expansion of *§ 2* liability. One false-positive risk is that an incumbent LEC's failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of *§ 251(c)(3)* duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly **[**883]** changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. *Amici* States have filed a brief asserting that competitive LECs are threatened with "death by a thousand cuts," Brief for New York et al. as *Amici Curiae* 10 (internal quotation marks omitted)--the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the **[****29]** *Sherman Act* would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs.

LEdHN[1G][↑] [1G] ***LEdHN[7D]***[↑] [7D] ***LEdHN[10A]***[↑] [10A] Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of *§ 251* may be, as we have concluded with respect to above-cost predatory pricing schemes, "beyond the practical ability of a judicial tribunal to control." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*. Effective **[*415]** remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think **[***841]** that Professor Areeda got it exactly right: ***HN12***[↑] "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by ***antitrust law*** when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." Areeda, 58 Antitrust L. J., at 853. In this case, respondent has requested an equitable decree to "[p]reliminarily and permanently enjoi[n] [Verizon] **[****30]** from providing access to the local loop market . . . to [rivals] on terms and conditions that are not as favorable" as those that Verizon enjoys. App. 49-50. An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations. [4]

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[4] ***LEdHN[1H]***[↑] [1H] ***LEdHN[10B]***[↑] [10B] The Court of Appeals also thought that respondent's complaint might state a claim under a "monopoly leveraging" theory (a theory barely discussed by respondent, see Brief for Respondent 24, n 10). We disagree. 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, *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. In any event, leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.

LEdHN[1I][⬆] [1I] *LEdHN[11]*[⬆] [11] The 1996 Act is in an important respect much more ambitious than the antitrust laws. It attempts "*to eliminate the monopolies* enjoyed by the inheritors **[****31]** of AT&T's local franchises." *Verizon Communs., Inc. v. FCC, 535 U.S. 467, at 476, 152 L. Ed. 2d 701, 122 S. Ct. 1646* (emphasis added). *Section 2 of the Sherman Act*, by contrast, seeks merely to prevent *unlawful monopolization.* It would be a serious mistake to conflate the two goals. *The Sherman Act* ***HN13***[⬆] is indeed the "Magna Carta of free enterprise," *United States v. Topco Associates, Inc., 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*, but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some **[*416]** other approach might yield greater competition. We conclude that respondent's complaint fails to state a claim under the *Sherman Act*. [5]

[**32]** **[**884]** Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: STEVENS

Concur

Justice **Stevens,** with whom Justice **Souter** and Justice **Thomas** join, concurring in the judgment.

In complex cases it is usually wise to begin by deciding whether the plaintiff has standing to maintain the action. Respondent, the plaintiff in this case, is a local telephone service customer of AT&T. Its complaint alleges that it has received unsatisfactory service because Verizon has engaged in conduct that adversely affects AT&T's ability to serve its customers, in violation of § 2 of the Sherman Act. *15 USC § 2* [*15 USCS § 2*]. Respondent seeks from Verizon treble damages, a remedy that § 4 of **[***842]** the Clayton Act makes available to "any person who has been injured in his business or property." *15 USC § 15* [*15 USCS § 15*]. The threshold question presented by the complaint is whether, assuming the truth of its allegations, respondent is a "person" within the meaning of *§ 4*.

Respondent would unquestionably be such a "person" if we interpreted the text of the statute literally. But we have eschewed **[****33]** a literal reading of *§ 4*, particularly in cases in which there is only an indirect relationship between the defendant's alleged misconduct and the plaintiff's asserted injury. *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 529-535, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. In such cases, "the importance of avoiding either the risk of duplicate recoveries **[*417]** on the one hand, or the danger of complex apportionment of damages on the other," weighs heavily against a literal reading of *§ 4*. *Id., 459 U.S. 519 at 543-544, 74 L. Ed. 2d 723, 103 S. Ct. 897*. Our interpretation of *§ 4* has thus adhered to Justice Holmes' observation that the "general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533, 62 L. Ed. 451, 38 S. Ct. 186 (1918)*.

I would not go beyond the first step in this case. Although respondent contends that its injuries were, like the plaintiff's injuries in *Blue Shield of Va. v. McCready, 457 U.S. 465, 479, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*, "the very means by which . . . [Verizon] sought to achieve its illegal ends," it remains the case that whatever antitrust injury respondent suffered because of Verizon's **[****34]** conduct was purely derivative of the injury that AT&T suffered. And for that reason, respondent's suit, unlike *McCready*, runs both the risk of duplicative recoveries and the danger of complex apportionment of damages. The task of determining the monetary value of the harm caused to respondent by AT&T's inferior service, the portion of that harm attributable to Verizon's misconduct, whether all or just some of such possible misconduct was prohibited by the *Sherman Act*, and what offset, if any, should be allowed to make room for a recovery that would make AT&T whole, is certain to be daunting. AT&T, as the direct victim of Verizon's alleged misconduct, is in a far better position than respondent to vindicate the public interest in enforcement of the antitrust laws. Denying a remedy to AT&T's customer is not likely to leave a significant antitrust violation undetected or unremedied, and will serve the strong interest "in keeping the scope of complex antitrust trials within judicially manageable limits." *Associated Gen. Contractors, 459 U.S. 519 at 543, 74 L. Ed. 2d 723, 103 S. Ct. 897*.

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[5] Our disposition makes it unnecessary to consider petitioner's alternative contention that respondent lacks antitrust standing. See *Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 97, and n 2, 140 L. Ed. 2d 210, 118 S. Ct. 1003* (1998); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 456, 38 L. Ed. 2d 646, 94 S. Ct. 690 (1974)*.

In my judgment, our reasoning in *Associated General Contractors* requires us to reverse the judgment of the Court **[****35]** of Appeals. **[**885]** I would not decide the merits of the *§ 2* **[*418]** claim unless and until such a claim is advanced by either AT&T or a similarly situated competitive local exchange carrier.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 113-115, 260; *74 Am Jur 2d, Telecommunications §§ 25*, 26, 45, 48, 53

15 USCS § 2; *47 USCS §§ 152* note, 251, 252, 271

L Ed Digest, Communications § 22; Restraints of Trade, Monopolies, and Unfair Trade Practices § 30.3

L Ed Index, Refusal or Denial; Telecommunications Act of 1996; Telephones and Telegraphs

Annotation References

Standing to sue, under § 4 of the Clayton Act (*15 USCS § 15* **[****36]**) and predecessor statute, to recover treble damages for antitrust violation--Supreme Court cases. *73 L Ed 2d 1427*.

Propriety and scope of injunctive relief in federal antitrust case--Supreme Court cases. *55 L Ed 2d 892*.

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L Ed 2d 841*.

Antitrust immunity under Federal Communications Act of 1934 (*47 USCS §§ 151 et seq.*) of communications carrier for acts involving interconnections with other communications carriers and equipment. 59 ALR Fed 239.

Refusals to deal as violations of the federal antitrust laws (*15 USCS §§ 1*, *2*, *13*). 41 ALR Fed 175.

Comment Note.--What constitutes "attempt to monopolize," within meaning of § 2 of Sherman Act (*15 USCS § 2*). 27 ALR Fed 762.