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ANTITRUST ADVISORY

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Verizon Communications Inc. v. Trinko, No. 02-682 (U.S. January 13, 2004)

In January, a solid majority of the Supreme Court addressed, and limited, the circumstances in which one competitor is obligated under the antitrust laws to cooperate with a rival. The implications of that decision to the basic question of a monopolist's duty to deal are being reviewed and debated—is finding an intent to monopolize now a requirement under §2 of The Sherman Act? Is the “essential facilities” doctrine dead? We thought it useful to point out a few possible implications of the decision that may be of great importance, but are not so obvious.

The most notable discussion in the *Verizon Communications* case involves an attempt to make sense of the leading case of *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 422 U.S. 585 (1985) (the case is left intact but placed “at or near the outer boundary of §2 liability,” slip op. at 8), and the significance of an applicable regulatory structure to concurrent antitrust liability (the “existence of a regulatory structure designed to deter and remedy anticompetitive harm” counsels against duplicative antitrust rules, *id.* at 12). Antitrust is essentially a common-law field in terms of its development, however, and the case law tends to follow the broader themes and tendencies that the Supreme Court displays in its opinions. In this regard there are three potential developments that we think the *Verizon Communications* case may suggest.

First, it appears unlikely that the Court, as presently constituted, will ever hold that the owner of a patent or trademark will have to license its intellectual property to a competitor. In keeping with what has become the perceived teaching of *Aspen Skiing*, however, there could still be circumstances under which an IP holder that has created a market for sales to third party competitors of products protected by its patents may not be free to shut that market down entirely.

Second, the opinion may put the brakes on a very significant legal development that has arisen in the post-Enron era—the willingness of agencies and courts to pursue what is characterized as “gaming the system” as violations of law. This Court places a notable emphasis on not extending antitrust (and presumably other

regulatory schemes) into areas where defining the violation and crafting a remedy are difficult. Theories that require a finding that a private actor's conduct was not consistent with the "spirit" of a regulation seem less attractive candidates for adoption by lower courts. The decision may thus be felt most strongly by the Federal Trade Commission, which has been a leader in seeking to condemn "gaming the system." With *Verizon Communications*, and two recent decisions by Administrative Law Judges (in *Unocal* and *Rambus, Inc.*) declining to find violations premised in part on such a theory, abuse of the regulatory system may again be viewed principally as a problem for lawmakers, not judges.

Finally, the *Verizon Communications* decision may have special applicability to the growing tendency of the enforcement agencies, notably the FTC, to apply antitrust penalties on top of remedies established under specific regulatory schemes. Whether the Court's rather expansive discussion of the "implied immunity" doctrine might apply to the Hatch-Waxman Act, defining the relationship between branded and generic drugs, is a specific case in point. The Court made clear that federal courts should defer to supervisory agencies in regulatory schemes that specifically address and seek to remedy issues of monopolization. The role of the Food and Drug Administration under the Hatch-Waxman Act has similarities and differences to that of the Federal Communications Commission under the statute addressed in *Verizon Communications*. Interesting arguments could be made as to the FTC's jurisdiction to engage in at least some of the work it has undertaken to reshape competition in the pharmaceutical industry. Similar arguments might be made as to other industries.

This advisory is for informational purposes only and is not intended as legal advice. For further information, please contact James B. Kobak, Jr., Co-Chair of the Antitrust Practice Group and member of the Intellectual Property and Pharmaceuticals and Healthcare Practice Groups at 212.837.6757, kobak@hugheshubbard.com.