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Viamedia: Seventh Circuit Makes Dismissal of Refusal to Deal Claims Very Difficult

Steven J. Cernak (Bona Law PC) · Wednesday, March 25th, 2020

Last month, the Seventh Circuit in *Viamedia Inc. v. Comcast Corp.*[1] found that 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. On March 23, 2020, Comcast petitioned the Seventh Circuit for rehearing en banc.

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 cable 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 Sherman Act 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.[2] 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.

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."[3] The first element was not contested here. The conduct element is very controversial and has resisted attempts by courts and commentators to develop a general definition. 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, that standard starts with *Aspen Skiing*. There, the defendant owned three of the four ski mountains in the Aspen area while the plaintiff owned the fourth. For years, a joint ski pass for all four mountains was offered to – and popular with – skiers. 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"[4] 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.[5]

The Court affirmed the jury's finding of monopolization,[6] listing several factors 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"[7] 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 distinguished *Aspen Skiing* in 2004's *Trinko*.[8] 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."[9] In a line destined to be repeated in every refusal to deal opinion, brief, and article, the Court then described *Aspen Skiing* as "at or near the outer boundary of §2 liability."[10] 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.[11]

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 for an anticompetitive end."[12] The court followed the Tenth Circuit's *Novell**[13]* opinion by then-Judge Gorsuch in finding that Viamedia needed to allege that Comcast's actions were "irrational but for its anticompetitive effect" or "serve no rational procompetitive purpose."[14] The court found that replacing Viamedia as an intermediary between Comcast and the other cable companies reduced Comcast's short-run revenues from interconnect fees but offered "potentially improved efficiency" for ad placement in the long-run.[15] As a result, the allegations did not meet *Aspen Skiing*'s limited exception to the general rule and so had to 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 (the dissent disagreed on the tying claim) but offered two slightly different explanations. 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.[16] 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."[17] The majority explicitly followed the D.C. Circuit's opinion in *Covad*[18] in finding that a plaintiff must just allege that defendant's refusal to deal was "predatory" and Viamedia met that standard. Comcast's argument that its refusal was not "irrational but for its anticompetitive effect" was one for summary judgment.[19]

The dissent concurred with that result but its opinion nicely illuminated the key pleading question that is "up for debate" among lower courts.[20] The dissent noted 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:

[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.[21]

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."[22] In rejecting that result, the dissent effectively applied the former and required only that a plaintiff plausibly allege anticompetitive conduct to survive a motion to dismiss.[23]

Lessons from *Viamedia*

Theories of Section 2 liability have been severely limited in recent decades, especially by Court opinions that impose burdens on plaintiffs that often seem practically impossible to meet.[24] 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.

The "termination of a prior voluntary course of dealing" element seems to be necessary, though not sufficient, to a successful refusal to deal claim. Avoiding such situations in practice, however, can be difficult. 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.

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."[25] 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-plead refusal to deal claims will survive to discovery.

[1] *Viamedia, Inc. v. Comcast Corp.*, (CCH) 2020-1 Trade Cases ¶81,098, 2020 U.S. App. LEXIS 5469 (7th Cir. Feb. 24, 2020).

[2] (CCH) 2017-2 Trade Cases ¶80,056, 2017 U.S. Dist. LEXIS 24213 (N.D. Ill. Feb. 22, 2017).

[3] *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

[4] *Aspen Skiing*, 472 U.S. at 593.

[5] 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.

[6] *Id.*, at 611.

[7] *Id.*, at 603.

[8] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

[9] *Id*, at 408.

[10] *Id.*, at 409.

[11] *Id.*

[12] *Viamedia Inc. v. Comcast, Corp.*, 2017 U.S. Dist. LEXIS 24213, *11 (N.D. Ill. Feb. 22, 2017).

[13] *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013).

[14] *Viamedia Inc.*, at *13.

[15] *Id.*, at *14.

[16] *Viamedia, Inc. v. Comcast Corp.*, 2020 U.S. App. LEXIS 5469, at *69.

[17] *Id.*, at *75, quoting *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

[18] *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005) (Ginsburg, CJ).

[19] *Viamedia*, at *70-75.

[20] *Id.*, at *139.

[21] *Id.*, at *137-138.

[22] *Id.*, at *139.

[23] *Id.*, at *141.

[24] *See, e.g., Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (predatory pricing), *Pacific Bell Telephone Co. v. linkLine Commun's. Inc.*, 555 U.S. 438 (2009) (price squeezes).

[25] *Charych v. Siriusware, Inc.* 2018 U.S. Dist. LEXIS 128341, at *21 (E.D. N.Y. July 30, 2018).

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