NOTES

FILLING THE GAPS: A PRINCIPLED APPROACH TO ANTITRUST ENFORCEMENT PROVIDES A NECESSARY COMPLEMENT TO THE TELECOMMUNICATIONS ACT OF 1996

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The Telecommunications Act of 1996 (TCA or 1996 Act) aims to secure lower prices and higher quality services for consumers through vigorous competition among telecommunications carriers. Yet consumers have not enjoyed such results, in part due to carriers' noncompliance with the 1996 Act. Regrettably, statutory gaps in the rules for remedying violations of the TCA have left consumers largely without recourse. In this Note, Daniel L. Cendan responds to the shortcomings of the TCA by discussing a circuit split that the Supreme Court will resolve this October 2003 term in Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp. *Cendan concludes that the Court should affirm* Trinko*'s holding that a complaint alleging sustained anticompetitive conduct—grounded in behavior that may be distinctly categorized as a violation of the 1996 Act—states a cause of action for exclusionary conduct that violates Section 2 of the Sherman Act. Cendan proposes that the antitrust laws, by shoring up the TCA's weaknesses, provide a necessary complement to the TCA. Because not every violation of the TCA is a violation of the antitrust laws, a principled approach to antitrust enforcement should permit those complaints pleading a sustained course of anticompetitive conduct—under either a "refusal to deal" or "essential facilities" theory of liability—to survive a motion to dismiss for failure to state an antitrust claim; in contrast, courts should dismiss complaints that allege violations of the antitrust laws for mere isolated conduct that may have harmed competitors. Cendan concludes that whereas the TCA has failed to rigorously enforce consumer rights, the antitrust laws will provide fundamental consumer protection, both in acting as a deterrent to anticompetitive behavior and in providing remedies that are unavailable under the 1996 Act.*

INTRODUCTION

This term the Supreme Court will resolve a circuit split involving significant issues concerning the interplay between the antitrust laws and the Telecommunications Act of 1996 (TCA or 1996 Act).[1] In *Law*

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.,[2] the Second Circuit held that a complaint alleging sustained anticompetitive conduct—grounded in behavior that may be distinctly categorized as a violation of the 1996 Act—successfully pleads exclusionary conduct that violates Section 2 of the Sherman Act.[3] By contrast, the Seventh Circuit, in *Goldwasser v. Ameritech Corp.*,[4] dismissed a lawsuit premised on a similar complaint. This Note explores the circuit split and concludes that the *Trinko* opinion should be affirmed. The Note first provides justification for such an outcome and then recommends an approach to antitrust enforcement that may allay concerns over antitrust interference with the TCA's deregulatory scheme.

The TCA marked the beginning of a new era. Congress and the Federal Communications Commission (FCC) took on the responsibilities of deregulating the telecommunications industry and injecting competition into local telecommunications services markets that had been dominated by state-sanctioned, local monopolies. Because the TCA was welcomed with high expectations, the considerable disappointment in its actual results thus far is unsurprising. Instead of a robust, competitive telecommunications industry, FCC Chairman Michael K. Powell has declared the industry to be in a state of utter crisis.[5] Many entrants into the telecommunications market went bankrupt or lost a substantial fraction of their market capitalization; many surviving telecommunications providers struggle under substantial debt burdens.[6] Some point to faulty business plans as the cause of this telecommunications bust.[7] Others, including aggrieved consumers, blame the incumbent telecommunications carriers for stalling or refusing to deal with rival competitors in derogation of their statutory obligations under the 1996 Act.[8]

Both consumers and failing competitors have brought suits against the incumbent carriers, alleging noncompliance with the 1996 Act. Plaintiffs additionally have alleged that the carriers have violated the antitrust laws—that in refusing to deal with rival firms, the defen-

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[2] 305 F.3d 89 (2d Cir. 2002), cert. granted, 123 S. Ct. 1480 (2003).

[3] 15 U.S.C. § 2 (2000).

[4] 222 F.3d 390 (7th Cir. 2000).

[5] Yochi J. Dreazen, FCC's Powell Says Telecom "Crisis" May Allow a Bell to Buy WorldCom, Wall St. J., July 15, 2002, at A1.

[6] See Robert W. Crandall & J. Gregory Sidak, Is Structural Separation of Incumbent Local Exchange Carriers Necessary for Competition?, 19 Yale J. on Reg. 335, 337 (2002); Yochi J. Dreazen & Shawn Young, FCC Plans to Erase a Key Rule Aiding Local Phone Competition, Wall St. J., Jan. 6, 2003, at A1 ("The CLECs tried the 'build it and they will come' approach, and those companies are now bankrupt.").

[7] See Crandall & Sidak, supra note 6, at 389-99.

[8] See infra Part II; infra notes 66-69, 92-93, 108-09 and accompanying text.

dant carriers have engaged in anticompetitive conduct designed to maintain their monopoly power. As noted above, a circuit split developed as courts decided these lawsuits. The Seventh Circuit, in *Goldwasser*, denied plaintiffs relief, holding that the defendant telephone company's alleged failure to comply with the deregulation provisions of the 1996 Act was not subject to a remedy under the antitrust laws. By contrast, the Second and Eleventh Circuits, in *Trinko* and *Covad Communications Co. v. BellSouth Corp.*[9] respectively, held that an antitrust claim can be brought based on allegations of anticompetitive conduct that were intertwined with the obligations imposed by the 1996 Act; the plaintiffs' complaints satisfied the exceedingly low threshold required to survive a motion to dismiss. The Supreme Court granted certiorari to address this issue and will decide this term whether the Second Circuit erred in reversing the district court's dismissal of plaintiffs' antitrust claims.[10]

This Note proposes a third approach to antitrust enforcement in the telecommunications industry, but the *Goldwasser* and *Trinko/Covad* analyses are instructive in examining the interplay between the TCA and the antitrust laws. The Note begins, in Part I, by outlining the major provisions of the two statutes that are primarily responsible for ensuring competition within the telecommunications industry. The TCA is a deregulation statute meant to end telephone companies' local monopolies over telecommunications services. The 1996 Act provides obligations above and beyond those expected in most competitive markets—such as demanding that telecommunications providers interconnect facilities and deal with rival firms on reasonable terms.[11] The Sherman Act and related antitrust laws, on the other hand, broadly reach all industries, providing minimum rules of conduct to prevent a firm's willful acquisition or maintenance of monopoly power in a relevant market.[12] Although the two statutes differ in scope, they share the same goal: guaranteeing a competitive marketplace.

Part II details the aforementioned circuit split, describing the rationale behind each court's decision. The *Goldwasser* court suggested that the antitrust laws added nothing to the deregulation envisioned by the TCA.[13] The court was concerned that plaintiffs would

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9 299 F.3d 1272 (11th Cir. 2002).

10 See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 123 S. Ct. 1480 (2003) (granting certiorari limited to the question, "Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?").

11 See infra Part I.A.

12 See infra Part I.B.

13 See infra note 79 and accompanying text.

use the antitrust laws to make an end run around the TCA's deregulatory regime. The court also appeared wary of the potential manipulation of antitrust doctrine in order to permit relief for conduct that was not traditionally considered monopolistic behavior—conduct that could be construed solely as a violation of the 1996 Act.[14] Essentially, the court was concerned that a failure to comply with the special, affirmative duties of the 1996 Act not be equated with a failure to comply with the antitrust laws.[15] This Note suggests no such equivalency and, instead, points out that the antitrust laws traditionally have recognized certain refusals to deal as violations of the Sherman Act.[16] Recognizing this, the *Trinko* and *Covad* courts held that the allegations sufficiently stated claims under antitrust doctrine that were distinct from claims arising from the 1996 Act. Thus, the plaintiffs had freestanding antitrust claims—the mere fact that the disputed conduct might also have violated the 1996 Act did not preclude the antitrust actions.[17]

In Part III, the Note develops its central thesis: The antitrust laws provide a necessary complement to the TCA by shoring up its weaknesses. The Note explains that the enactment of a special deregulatory scheme for the telecommunications industry did not render the more general protections of the antitrust laws wholly inapplicable to that industry,[18] and it proposes that strict adherence to a principled approach to antitrust enforcement can allay fears that prospective plaintiffs will be able to undermine the deregulatory scheme of the 1996 Act or that the antitrust enforcers will muddy the deregulation envisioned by the TCA.[19] That is, while the alleged conduct—which may be a TCA violation—might allow plaintiffs to survive a motion to dismiss their antitrust claims,[20] the courts should not stretch antitrust doctrine to guarantee that plaintiffs will prevail on the merits.[21] The burdens of proving monopolization or attempts to monopolize under the antitrust laws are considerable, and relief should be limited to

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[14] See infra note 168.

[15] See infra note 87 and accompanying text.

[16] See infra notes 54-57 and accompanying text.

[17] Indeed, the Second Circuit aptly noted that the plaintiffs' antitrust claim did not mention the Telecommunications Act of 1996 (TCA or 1996 Act) at all. The allegations—while describing conduct that might also violate the TCA—supported an antitrust claim under several theories. Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89, 108 (2d Cir. 2002), cert. granted, 123 S. Ct. 1480 (2003); see also infra text accompanying notes 164-65.

[18] See infra Part III.A.

[19] See infra Part III.B.3.

[20] For instance, the alleged conduct might state a claim under the essential facilities doctrine. See infra notes 59-60 and accompanying text.

[21] See infra notes 166-73 and accompanying text.

actual violations in order to maintain the integrity of the antitrust laws.[22] Furthermore, by limiting antitrust remedies to monetary damages in order to retroactively compensate for prior misconduct, courts will not risk overstepping the 1996 Act's deregulation; by avoiding injunctive relief, antitrust enforcers can prevent confusion or conflict with FCC regulations.[23] Such an approach to antitrust enforcement will not render the 1996 Act a nullity. Indeed, the antitrust laws will *reinforce* the TCA by serving as a necessary gap filler for situations where the TCA fails to provide rules for remedying certain 1996 Act violations; therefore, the antitrust laws provide an essential enforcement mechanism to remedy anticompetitive behavior.[24]

I
STATUTORY BACKGROUND

Two major statutes focus on promoting competition and provide most, if not all, of the protections against anticompetitive activities in the telecommunications market. Section A of this Part describes the 1996 Act and its interconnection requirements—intended to promote competition and the rapid development of new telecommunications technologies. Section B explains the Sherman Act and the antitrust laws' more general protections from attempted or actual abuses of monopoly power.

A. The Telecommunications Act of 1996

On February 8, 1996, President William Clinton signed the TCA into law at an historic ceremony at the Library of Congress.[25] Marking the significance of the TCA, President Clinton described the 1996 Act as "truly revolutionary legislation that will bring the future to our doorstep."[26] Vice President Albert Gore, Jr., a committed advocate of the TCA, "hailed the [1996 Act] for its competitive ele-

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[22] See infra notes 166-80 and accompanying text.

[23] See infra notes 153-59, 181 and accompanying text.

[24] See infra notes 136-45 and accompanying text.

[25] See Remarks on Signing the Telecommunications Act of 1996, 1996 Pub. Papers 185, 185-86 (Feb. 8) (noting how TCA's signing was perhaps "the only time in American history a piece of legislation has been signed [at the Library of Congress] and perhaps the first time in three decades when one has been signed on Capitol Hill").

[26] Id. at 186; see also William J. Clinton, Statement on Signing the Telecommunications Act of 1996, 1996 Pub. Papers 188, 189 (Feb. 8) ("[The TCA] . . . places a strong emphasis on competition in both local and long distance telephone markets, making it possible for the regional Bell companies to offer long distance service, provided that . . . they have opened up their local networks to competitors such as long distance companies, cable operators and others.").

ments."[27] And pundits lauded the 1996 Act for making several important changes to the telecommunications market that were meant to encourage competition and deregulate the industry.[28] While these comments accurately describe certain provisions of the TCA and Congress's underlying intent, it remains to be seen whether the 1996 Act ever will fulfill these lofty expectations.[29]

Prior to the 1996 Act's passage, local telephone companies were granted state-sanctioned monopolies over local phone service markets.[30] At the time, these monopolies were thought to be efficient in preventing the wasteful and unwarranted duplication of physical facilities, such as telephone wires or poles. Regulation at the state level monitored the local telephone services and protected consumers. Over time, Congress decided that state-sanctioned local monopolies were not as desirable as a fully competitive, deregulated market. Congress enacted the TCA to introduce competition in the telecommunications market.[31] The TCA encourages new entry by imposing

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27 Hold the Phone: Consumers May Wind Up on the Short End of the New Federal Telecommunications Law, Newsday (Long Island), Feb. 8, 1996, at A46.

28 See, e.g., Philip M. Burgess, Telecom Policy Pro-Consumer, Rocky Mtn. News, Feb. 8, 1996, at 37A, LEXIS, Nexis Library, RMTNEW File (outlining five pro-consumer benefits under TCA); Congress Maps a Telecom Future, Chi. Trib., Feb. 6, 1996, at 14 ("While the Telecommunications Act of 1996 isn't perfect, its overall thrust is clearly deregulatory and pro-competitive. It removes long-standing monopoly protection for local telephone service and cable TV and allows local phone companies, long-distance providers and cable operators to go after each other's customers. And it puts national telecommunications policy back in the hands of Congress where it belongs, instead of in the courts."); Mike Mills, Ushering in a New Age in Communications: Clinton Signs "Revolutionary" Bill into Law at a Ceremony Packed with Symbolism, Wash. Post, Feb. 9, 1996, at C1 (discussing how "many communications companies rushed to show how eager they were to compete" after 1996 Act's signing).

29 See supra notes 5-8 and accompanying text. Part III.B.3, infra, suggests an approach to help move the telecommunications industry closer to the 1996 Act's desired deregulated and competitive market.

30 This arrangement resulted from the consent decree signed between AT&T and the United States in 1982, which split AT&T from its local subsidiaries. United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). Prior to 1982, AT&T had an effectively national monopoly in markets for local phone service, long-distance phone service, and telephone equipment. The consent decree allocated these separate markets among AT&T and its newly independent local subsidiaries, which are collectively identified as the "Baby Bells." (There were seven Baby Bells at the time of the 1996 Act's passage: Bell Atlantic, NYNEX, BellSouth, Southwestern Bell, Pacific Bell, US WEST, and Ameritech. Today, four remain: Verizon, SBC, BellSouth, and Qwest.) AT&T continued to provide long-distance phone service but soon had to contend with new competitors, as companies such as MCI and Sprint entered the market. The Baby Bells were granted local monopolies over their respective local telephone service markets. See generally Stuart M. Benjamin et al., Telecommunications Law & Policy 641-79 (2001) (describing history and results of AT&T breakup).

31 See Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (stating in preamble that purpose of 1996 Act is "[t]o promote competition and reduce regulation in order to secure lower

particular duties on telecommunications carriers to cooperate and reasonably deal with each other. The TCA attempts to place entering companies in a position where they can compete effectively with the incumbent companies that benefited from the monopoly period.

The critical provisions in furtherance of these goals are found in Part II of the 1996 Act, entitled "Development of Competitive Markets." Section 251(a) imposes on all telecommunications carriers[32] a general duty to interconnect directly or indirectly with each other's facilities and equipment.[33] Each carrier is required to allow requesting carriers to physically link their communications networks to its network for the mutual exchange of traffic. Such interconnection is necessary so customers of one company can call customers served by another company. Without interconnection obligations, all customers would have to choose the same company in order to communicate; then, carriers—as sole providers—would be able to monopolize telecommunications markets.

Section 251(b) more specifically enumerates the duties of each local exchange carrier (LEC).[34] Each of these requirements enables one LEC to provide its services without fear of exclusion from another LEC's facilities or equipment. The rules attempt to make it more difficult for one LEC to clog transmissions provided by a competing carrier. That is to say, one LEC with market power is less able to abuse its power by restricting access—or threatening to restrict access—to the critical facilities and equipment that a smaller rival needs to remain in the market, or by dictating unreasonable terms to a smaller competitor in exchange for access.

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prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

[32] A telecommunications carrier includes "any provider of telecommunications services." 47 U.S.C. § 153(44) (2000). Telecommunications service "means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Telecommunications are "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[33] 47 U.S.C. § 251(a).

[34] Local exchange carriers, or LECs, include "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26).

Section 251(b) requires each LEC to resell its telecommunications services on reasonable and nondiscriminatory terms; to provide number portability (defined at 47 U.S.C. § 153(30)) to the extent technically feasible; to offer dialing parity to competing providers; to afford access to the poles, ducts, conduits, and rights-of-way to competing telecommunications services providers; and to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b).

Section 251(c) imposes additional duties on incumbent LECs (ILECs)[35] who benefit from already having established themselves in the market and having obtained requisite networking elements for supplying their telecommunications services. Inter alia, these duties require ILECs to interconnect their facilities and equipment with those of any requesting competitive LEC (CLEC) at any feasible point within the ILEC's network. Additionally, those services must be provided at no lower quality than the ILEC itself receives, and those services must be provided on reasonable and nondiscriminatory rates and terms.[36] And because the telephone network is comprised of individual network elements, such as local switches[37] and local loops,[38] the statute also requires ILECs to "unbundle" these telephone networks to grant CLECs access to individual elements, which gives innovative CLECs the opportunity to combine particular elements into new bundled packages for consumers. In short, the addi-

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35 Incumbent LECs, defined at 47 U.S.C. § 251(h), include the Baby Bells. See supra note 30.

36 Section 251(c) details the ILEC's duties: (1) the duty to negotiate in good faith to fulfill its duties under Section 251(b); (2) the duty to interconnect its facilities and equipment with those of any requesting competitive LEC (CLEC) at any feasible point within the ILEC's network—additionally, those services must be provided at no lower quality than the ILEC itself receives, and those services must be provided on reasonable and nondiscriminatory rates and terms; (3) the duty to provide a requesting CLEC unbundled access to network elements at any technically feasible point at rates, terms, and conditions that are just, reasonable, and nondiscriminatory; (4) the duty to offer CLECs, at wholesale rates, any services that the ILEC sells at retail; (5) the duty to provide reasonable public notice of changes in the ILEC's services that would affect others using the ILEC's facilities or networks or that would affect the interoperability of those facilities or networks; and (6) the duty to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the LEC (i.e., physically placing or arranging equipment at the LEC premises to achieve interconnectedness) on reasonable and nondiscriminatory rates and terms, with an exception for virtual collocation (i.e., using technology to support collaboration across distances, as though the carriers were physically collocated) if the LEC demonstrates that physical collocation is impractical for technical reasons or space limitations. 47 U.S.C. § 251(c).

37 "The switch is a telephone company's central computer that processes cross-connections for telephone calls and makes routing decisions on the basis of some parameter, such as the digits dialed by the customer." Jerry A. Hausman & J. Gregory Sidak, A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks, 109 Yale L.J. 417, 487 (1999). Switches also can provide consumers with features including call waiting, call forwarding, and caller ID.

38 The local loop, as described by the Second Circuit, is

> the wireline—a twisted pair of copper wires, coaxial cable, fiber optic cable, or the like—that links the customer's premises to a central switching station, from which calls are routed to their ultimate destination. In plain English, loops are the wires that connect telephones to the switches that direct calls to their destination.

Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89, 94 (2d Cir. 2002), cert. granted, 123 S. Ct. 1480 (2003) (internal quotations omitted).

tional provisions in Section 251(c) help to level the playing field, thereby encouraging both entry into the telecommunications market and the rapid deployment of new telecommunications technologies.[39]

Thus, Sections 251(a), (b), and (c) require the ILEC to interconnect its facilities and equipment to requesting CLECs on reasonable terms, as provided by the TCA. The CLECs can then obtain nondiscriminatory access to the poles and rights-of-way to deploy their own facilities. Access to the extant local switch and loops also ensures that the CLEC will not have to build a new local network to gain access to the consumers' homes or businesses. With this access, the CLECs can compete effectively with the local ILECs. Because the introduction of competing firms gives consumers the ability to swap telephone service providers, all firms are forced to improve their services and attractively package and price their services; to remain stagnant would give customers incentive to drop one provider and pick up another provider's services. These provisions, in sum, focus on protecting and promoting competition, in fulfillment of the TCA's ultimate goal of securing lower prices and higher quality services for telecommunications consumers.[40]

B. The Sherman Act

The Sherman Act,[41] the first federal antitrust statute, was passed, in part, because of Congress's desire to end great aggregations of capital,[42] although examiners of the Sherman Act's legislative history continue to debate the underlying congressional intent.[43] Some consider the antitrust laws a reflection of the philosophy of "economic

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[39] Without the TCA, CLECs would have to duplicate the local switch or loops, build new poles, or obtain additional rights-of-way. The financial burden of such startup costs is prohibitively expensive for most entrant CLECs. See Bart Ziegler, Out of the Loop, Wall St. J., Sept. 21, 1998, at R6 (noting lack of competition in local telephony despite TCA; estimating cost of $3000 to $5000 per home to duplicate local telephone network). The TCA essentially eliminates a financial barrier to entry that would otherwise make it impossible for a CLEC to compete effectively with an ILEC that has an established network (and that also enjoyed a monopoly period in which to recover its original startup costs without competition).

[40] See supra note 31.

[41] 15 U.S.C. §§ 1-7 (2000).

[42] Senator John Sherman feared the helplessness of the individual before large concentrations of capital: "If the concentered powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities." 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman).

[43] See generally James May, The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History, 59 Antitrust L.J. 93 (1990) (reviewing leading scholarship on Sherman Act's history).

egalitarianism":[44] Congress was concerned with wealth distribution and political freedom, along with economic opportunity and competition.[45] Others propose that the Sherman Act reflected Congress's sole purpose of promoting economic efficiency, or consumer welfare maximization.[46] Still others argue that Congress passed the Sherman Act in accord with a broader framework of political, social, and economic interests. One scholar characterized this broader framework in terms of four major historical goals of antitrust: "(1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of the consumers, and (4) protection of the competition process as market governor."[47] Along with the body of antitrust case law that has developed since its passage in 1890, the Sherman Act protects the free market from threats to competition, which in turn protects the public from high monopoly prices and shoddy goods and services.[48]

Section 2 of the Sherman Act provides that it is a violation of the antitrust laws to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[49] The Supreme Court, in *United States v. Grinnell Corp.*,[50] declared that the offense of monopoly under Section 2 has two elements: "(1) the possession of monopoly power in [a] relevant market

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[44] Hans B. Thorelli, The Federal Antitrust Policy: Origination of an American Tradition 564-72 (1955); see also id. at 227 (stating that Congress likely intended small businesses to be immediate beneficiaries); cf. Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 65, 69-70 (1982) ("[T]he antitrust laws were passed primarily to further what may be called a distributive goal, the goal of preventing unfair acquisitions of consumers' wealth by firms with market power. . . . Congress implicitly declared that 'consumers' surplus' was the rightful entitlement of consumers; consumers were given the right to purchase competitively priced goods. Firms with market power were condemned because they acquired this property right without compensation to consumers.").

[45] See Thorelli, supra note 44, at 225-30, 570-72.

[46] See, e.g., Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 61-63 (1978).

[47] Eleanor M. Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140, 1182 (1981).

[48] Since there are no competitor firms, the monopolist—as the sole provider—need not worry about losing customers to rivals. Thus, the monopolist need not improve or maintain its goods and services to the same extent as necessary in the presence of rival firms. Furthermore, the monopolist can keep prices at the monopoly price, which typically is higher than prices observed in a competitive market. The monopoly price is the price at which a monopolist's profits are maximized; a firm charging a monopoly price cannot profitably increase its price. See Richard A. Posner, Antitrust Law: An Economic Perspective 241 (1976).

[49] 15 U.S.C. § 2 (2000).

[50] 384 U.S. 563 (1966).

and (2) 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."[51] Stated differently, an antitrust complainant must show both a structural element of monopoly power and anticompetitive conduct. Satisfying one of these prongs is not enough, and neither prong is easy to prove.[52] Moreover, the antitrust laws are concerned with harm to the competitive process which is passed on to *consumers*; the possibility of "harm to one or more *competitors* will not suffice."[53]

Courts long have recognized that a firm has no general obligation to deal with its competitors. In some circumstances, however, courts have imposed on monopolists a duty to deal. In *Otter Tail Power Co. v. United States*,[54] the Supreme Court articulated that refusing to deal with competitors may violate Section 2 of the Sherman Act when the refusal was "solely to prevent [competitors] from eroding its monopolistic position."[55] The Court further explained in a later case that while "[i]t is true that as a general matter a firm can refuse to deal with its competitors[,] . . . such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal."[56] Where a firm adopts exclusionary policies "as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated [Section] 2."[57] Nevertheless, "successful challenges to unilateral refusals to deal have been very rare."[58]

One particular subset of this special duty to deal is the essential facilities doctrine, which imposes liability when one firm that controls

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[51] Id. at 570-71.

[52] See, e.g., Goldwasser v. Ameritech Corp., 222 F.3d 390, 397 (7th Cir. 2000) (suggesting that while "it is *exceedingly difficult* to prove market power, or monopoly power directly [i.e., the first prong] . . . [doing so is] a snap compared to the second [prong]" (emphasis added)).

[53] United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

[54] 410 U.S. 366 (1973).

[55] Id. at 378; see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) ("[T]he right to refuse to deal with other firms does not mean that the right is unqualified.").

[56] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992); see also *Aspen Skiing Co.*, 472 U.S. at 600-05, 610 (holding that record supported "an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival").

[57] *Image Technical Servs., Inc.*, 504 U.S. at 483.

[58] A. Douglas Melamed & Ali M. Stoeppelwerth, The CSU Case: Facts, Formalism and the Intersection of Antitrust and Intellectual Property Law, 10 Geo. Mason L. Rev. 407, 419 (2002).

an essential facility[59] denies a second firm reasonable access to its products or services that the second firm needs in order to compete:

> The essential facilities doctrine is applied cautiously, usually in exceptional circumstances that meet strict requirements. Because the doctrine represents a divergence from the general rule that even a monopolist may choose with whom to deal, courts have established widely-adopted tests that parties must meet before a court will require a monopolist to grant its competitors access to an essential asset. Specifically, to establish antitrust liability under the essential facilities doctrine, a party must prove four factors: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors. This test for antitrust liability has been adopted by virtually every court to consider an essential facilities claim.[60]

This test is extremely difficult to satisfy, as plaintiffs must show that the defendant's facility is truly essential to competition. If it is shown that the plaintiff can duplicate or substitute other facilities for those of the defendant, then the facility is clearly not essential. Additionally, the essential facilities doctrine does not impose liability where the defendant can show that it is impractical to share its facilities—for instance, if sharing its facilities would inhibit defendant's service to its own customers.[61] Thus, only in "those rare and exceptional circumstances where a facility is truly essential to competition, the anticompetitive effects of denial of access are severe, and there is no business justification . . . [will] U.S. courts . . . impose antitrust liability for a monopolist's refusal to license access to an essential facility."[62]

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[59] An "essential facility" is one that is otherwise unavailable and cannot be reasonably or practically duplicated. See infra notes 60-61 and accompanying text. For example, in *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), the defendants unified substantially every railway terminal facility by which the traffic of St. Louis was served. The geographical and topographical situation made it impossible for any other railway company to pass through or even enter St. Louis without using the facilities entirely controlled by the defendants. Thus, the Court held the defendants were in violation of the Sherman Act and ordered the defendants to reorganize and to arrive at an agreement that would open their essential facilities to other railway companies. See id. at 409-12.

[60] Robert Pitofsky et al., The Essential Facilities Doctrine Under U.S. Antitrust Law, 70 Antitrust L.J. 443, 448-49 (2002) (internal quotations omitted). Pitofsky et al. describe notable essential facilities cases, including *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986); *MCI Communications v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983); and *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977). See Pitofsky et al., supra, at 446-47.

[61] See Pitofsky et al., supra note 60, at 450.

[62] Id. at 450-51 (noting that courts are particularly likely to impose liability when there is evidence of specific intent to injure rival).

While this overview of Section 2 of the Sherman Act does not do justice to the vast and complex body of antitrust law, it provides the necessary analytical framework for considering how the circuit courts are resolving the difficult question of whether the antitrust laws conflict with the TCA, a topic discussed next in Part II.

II
THE CIRCUIT SPLIT

The TCA marked the end of permissible monopolies in the telecommunications market, or so Congress thought. Since 1996, ILECs have been reluctant to interconnect their facilities with those of CLECs, or have done so lethargically.[63] In response, CLECs and consumers have brought suit against the ILECs both for violating the TCA and for violations of Section 2 of the Sherman Act. This Part describes the three leading cases arising from these disputes. The circuit courts have not agreed on a single interpretation of the relationship between the TCA and the antitrust laws. But, as mentioned above, the Supreme Court will pass judgment on this issue in the October 2003 term.[64]

A. The Seventh Circuit Spearheads the Debate: Goldwasser v. Ameritech Corp.

In *Goldwasser v. Ameritech Corp.*,[65] CLEC customers brought a class action against Ameritech, which, as the local ILEC, was under a duty to cooperate with CLECs trying to break into the market.[66] Plaintiffs alleged that Ameritech failed to meet its responsibilities under the TCA, thereby preventing competitors from entering the telecommunications market and offering cheaper services to con-

[63] See, e.g., John Bankston, BellSouth Awaits Vote on Services: PSC Says It Has Not Set Date for Deciding Whether Company Will Be Allowed to Provide Long Distance, Augusta Chronicle (Georgia), July 21, 2001, at D5, http://augustachronicle.com/stories/072101/bus_045-5685.000.shtml (describing CLEC complaints that ILEC BellSouth has been slow to interconnect networks); Karen Kaplan, PUC Says PacBell Isn't Ready for Long-Distance, L.A. Times, Oct. 6, 1998, at C1 (noting that state Public Utility Commission report "clearly shows that in critical areas like ordering systems, interconnection and collocation, [ILEC] SBC/PacBell continues to fall woefully short of its obligations and to delay bringing the benefits of a competitive market to the state" (internal quotations omitted)); D.R. Stewart, Bell Loses Ruling, Tulsa World, Jan. 30, 1999, LEXIS, Nexis Library, TLSWLD File (describing how ILEC Southwestern Bell has not dismantled barriers to local telephone markets and remarking that "interconnection has been slow and complex").

[64] See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 123 S. Ct. 1480 (2003).

[65] No. 97C6788, 1998 WL 60878 (N.D. Ill. Feb. 4, 1998).

[66] See supra note 36.

sumers.[67] Concurrently, plaintiffs contended that Ameritech unlawfully was maintaining monopoly power in violation of Section 2 of the Sherman Act by not meeting those obligations.[68] Plaintiffs' theory was that Ameritech's failure to comply with its TCA duties was sufficient to state a Section 2 claim.[69]

The Seventh Circuit rejected the plaintiffs' antitrust theory and affirmed the district court's decision, which had granted Ameritech's motion to dismiss for failure to state an antitrust claim.[70] Plaintiffs argued that the inclusion of an antitrust savings clause within the 1996 Act proved that Congress intended antitrust suits to cover precisely the type of violation alleged in their complaint.[71] The plaintiffs, as consumers, argued that Ameritech, in failing to satisfy its TCA duties to the CLECs, had engaged in anticompetitive conduct designed to maintain its monopoly power, and that plaintiffs were harmed as Ameritech therefore was able to overcharge consumers. The court, while recognizing the existence of the savings clause, did not agree with plaintiffs' conclusion regarding its application.[72] The court reasoned that "the fundamental fallacy in the plaintiffs' theory is [in

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[67] See Goldwasser v. Ameritech Corp., 222 F.3d 390, 394-95 (7th Cir. 2000); *Goldwasser*, 1998 WL 60878, at *2.

[68] See *Goldwasser*, 222 F.3d at 394-95; *Goldwasser*, 1998 WL 60878, at *2.

[69] See *Goldwasser*, 222 F.3d at 395.

[70] See id. at 402; *Goldwasser*, 1998 WL 60878, at *1. The Seventh Circuit also rejected the plaintiffs' claim under the TCA. The telecommunications laws do permit lawsuits for damages to be brought by "[a]ny person claiming to be damaged by any common carrier." 47 U.S.C. § 207 (2000). Under this provision, CLECs can bring suit against ILECs for failing to comply with their specific duties under the TCA, such as interconnecting their facilities. By contrast, consumers do not have facilities or equipment to interconnect. Plaintiffs' lawsuit, therefore, was reduced to a claim for *overcharges* that the ILEC had been able to impose upon them as a result of its failure to carry out its responsibilities under the TCA. Such a claim of overcharges is blocked by "the filed rate doctrine, which bars courts from reexamining the reasonableness of rates that have been filed with regulatory commissions." *Goldwasser*, 222 F.3d at 402. Thus, consumers are not entitled to damages under the TCA when their claims merely allege overcharging and question the reasonableness of rates.

[71] See *Goldwasser*, 222 F.3d at 396. The savings clause provides 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." 47 U.S.C. § 152 (2000).

[72] The Seventh Circuit explained:

> Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law. Such a conclusion would be troublesome at best given the antitrust savings clause in the statute. It is that the 1996 Act imposes duties on the ILECs that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either; they are simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets, consistently with universal service (which, we note, competitive markets would not necessarily assure).

Goldwasser, 222 F.3d at 401.

assuming] that the duties the 1996 Act imposes on ILECs are coterminous with the duty of a monopolist to refrain from exclusionary practices. They are not."[73] The court recognized that plaintiffs may bring an antitrust claim; however, they must allege facts specific to an antitrust claim.[74]

The court went further and rejected plaintiffs' antitrust claim on its own terms as well. Although the court acknowledged that "there is nothing in the rules of antitrust standing that prevents [plaintiffs] from suing,"[75] it concluded that plaintiffs' essential facilities argument could not survive as a pure antitrust claim when freed from the specific regulatory requirements imposed by the TCA.[76] Without the regulatory obligations imposed on the ILECs, there was no freestanding antitrust claim. In other words, when allegations of antitrust violations are "inextricably linked"[77] to claims under the TCA, then—without more—the antitrust suit cannot survive. Thus, alleged violations of the TCA should be examined under the specific enforcement structure provided by that act itself: The TCA "must take precedence over the general antitrust laws, where the two are covering precisely the same field."[78] The antitrust laws did not add anything to the oversight already available under the 1996 Act.[79]

Nevertheless, the *Goldwasser* court acknowledged that the antitrust laws are applicable to telecommunications markets to which the TCA's regulatory regime had not yet extended.[80] In such situations, the questionable activities would not fall under the 1996 Act itself. Rather, the potential violations would be freestanding antitrust claims, and courts confidently could apply the antitrust laws without fear of interfering with the specific regulatory scheme of the TCA or molding the antitrust doctrine to account for activities not traditionally considered anticompetitive. Correspondingly, once the FCC dismantles its regulatory regime over previously regulated telecommunications markets, then the antitrust laws will step in to provide a legal check on the telecommunications market.[81]

The potential for abuse appears to have motivated the Seventh Circuit's decision: Consumers could use the TCA as a springboard to impose antitrust remedies on ILECs for failing to perform duties that,

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73 Id. at 399.
74 See id. at 396.
75 Id.
76 Id. at 401.
77 Id.
78 Id.
79 Id.
80 Id.
81 See id. at 401-02. Of course, the TCA is likely to be in effect for a long time to come.

absent the regulation, are considered neither anticompetitive nor in violation of the antitrust laws.[82] The 1996 Act was not a "simple antitrust solution to the problem of restricted competition"[83] in certain telecommunications markets. The duties imposed by the TCA, the court reasoned, were *exceptions* to the ordinary course of business. For instance, a company normally is not required to provide competitors with services or products, and refusing to deal with a competitor generally is not considered a violation of the antitrust laws.[84] By contrast, the TCA imposes responsibilities exceeding those of ordinary competitive markets: An ILEC *must* provide requesting CLECs with access to its network elements.[85] The TCA strays even farther from normal competitive markets by requiring ILECs to deal with CLECs on terms that are just, reasonable, and nondiscriminatory.[86] The court considered it "both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws."[87]

Because the TCA "imposes duties on the ILECs that are not found in the antitrust laws[,]"[88] the only question that remained was "whether anything plaintiffs have alleged can be divorced from its 1996 Act context such that it states a freestanding antitrust claim."[89] And plaintiffs did not obtain relief, since the Seventh Circuit did not find any independent antitrust claim that was not inextricably linked to a TCA claim.[90]

B. The Second and Eleventh Circuits Weigh In: Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp. *and* Covad Communications Co. v. BellSouth Corp.

Other circuits took note of the *Goldwasser* opinion and disagreed with the Seventh Circuit's analysis of the intersection of the TCA and the Sherman Act. The Second Circuit's opinion in *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.* and the Eleventh Circuit's opinion in *Covad Communications Co. v. BellSouth Corp.* both rejected *Goldwasser*'s reasoning and instead ruled that the antitrust

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82 See id. at 401.

83 Id. at 399.

84 See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992) ("It is true that as a general matter a firm can refuse to deal with its competitors."); supra notes 54-58, 62 and accompanying text.

85 See 47 U.S.C. § 251(c)(3) (2000); supra Part I.A.

86 See supra Part I.A.

87 *Goldwasser*, 222 F.3d at 400.

88 Id. at 401.

89 Id.

90 See id.

laws are applicable to situations where plaintiffs allege conduct that violates the 1996 Act.[91] This Section discusses these decisions in turn, highlighting the courts' rationales for declining to adopt the Seventh Circuit's view.

The *Trinko* plaintiffs—like those in *Goldwasser*—were consumers bringing a class action suit against Bell Atlantic, the ILEC. The plaintiffs claimed that they were injured when Bell Atlantic denied its competitors equal access to its local network, and filed an action alleging violations under both the TCA and the Sherman Act.[92] Because Bell Atlantic did not satisfy its TCA duties to the CLECs, the plaintiffs received poor service. Additionally, plaintiffs alleged that Bell Atlantic intended to exclude competition from the market and that Bell Atlantic had no valid business reason to justify its anticompetitive behavior.[93] Plaintiffs' complaint was thus similar to that of the class in *Goldwasser*; accordingly, the *Trinko* district court relied on *Goldwasser* when ruling in Bell Atlantic's favor, using language similar to that in the *Goldwasser* opinion: "The affirmative duties imposed by the Telecommunications Act are not coterminous with the duty of a monopolist to refrain from exclusionary practices."[94] Therefore, the district court, finding that plaintiffs failed to make a sufficient allegation of willful acquisition or maintenance of monopoly power by Bell Atlantic, only considered Bell Atlantic's actions as potential violations of the 1996 Act. And since plaintiffs lacked standing under the TCA for their damages claim, the district court dismissed the suit.[95]

On appeal, the Second Circuit reversed the district court's dismissal of plaintiffs' antitrust claim.[96] In its analysis, the Second Circuit agreed with the Seventh Circuit that a plaintiff cannot state an antitrust claim by alleging merely that a defendant violated its duties under the TCA.[97] But the Second Circuit recognized that those violations might also be characterized as sustained anticompetitive conduct showing monopolization or attempted monopolization.[98] In this way, the Second Circuit explicitly disagreed with the *Goldwasser* decision.

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[91] See Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89, 109 (2d Cir. 2002), cert. granted, 123 S. Ct. 1480 (2003); Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272, 1282 (11th Cir. 2002).

[92] See *Trinko*, 305 F.3d at 93.

[93] See id. at 95.

[94] Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 123 F. Supp. 2d 738, 742 (S.D.N.Y. 2000), aff'd in part and vacated in part, 305 F.3d 89 (2d Cir. 2002), cert. granted, 123 S. Ct. 1480 (2003).

[95] See id. at 744-45.

[96] See *Trinko*, 305 F.3d at 113.

[97] See id. at 108.

[98] See id. at 108-09.

The court remained unconvinced by the Seventh Circuit's emphasis on whether the TCA and antitrust claims were inextricably linked, stating that there is no requirement that allegations making out an antitrust claim must not rely on allegations that might also state claims under other statutes.[99] Instead, the *Trinko* court reasoned that absent a "plain repugnancy" between the Sherman Act and the TCA, the antitrust claims were sustainable.[100] And, the court found no plain repugnancy between the Acts.[101] Thus, the Second Circuit concluded that there was nothing in the TCA to suggest that 1996 Act violations could not simultaneously be violations of the antitrust laws.[102] According to *Trinko*, then, the Seventh Circuit made a mistake by denying freestanding antitrust actions just because those actions might have stated a separate claim under the 1996 Act.

The Second Circuit was concerned with the gap in remedies for the *Trinko* plaintiffs, who could not sue under the TCA. As discussed above,[103] Sections 251(b) and (c) of the 1996 Act impose obligations on ILECs to grant interconnection agreements with competitors. In *Trinko*, Bell Atlantic already had negotiated separate interconnection agreements with several CLECs.[104] Because of these negotiated agreements, the court determined that the LECs had contracted around the TCA obligations in Section 251,[105] and that the *Trinko* plaintiffs therefore had no cause of action for injuries thought to stem from Section 251.[106] Any violation of the interconnection agreement could be only a violation of that agreement—and not the TCA. The court reasoned that "the antitrust laws are the only place where [the *Trinko* plaintiffs have] a remedy for damage caused by the allegedly anticompetitive behavior . . . . Thus, in this case, the antitrust laws serve the purpose of affording the consumer compensation that the Telecommunications Act does not provide."[107] This fact made it all the more important to permit plaintiffs their antitrust suit.

In *Covad*, CLECs themselves brought an antitrust suit instead of solely relying on the regulatory process provided by the TCA. Covad Communications Company and Dieca Communications, Inc. (collec-

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99 See id. at 109.

100 See id. For further discussion on "plain repugnancy" standard, see infra Part III.A.

101 See *Trinko*, 305 F.3d at 109.

102 See id.

103 See supra notes 34-38 and accompanying text.

104 See *Trinko*, 305 F.3d at 102.

105 See id. at 103.

106 See id. at 108. Cf. Goldwasser v. Ameritech Corp., 222 F.3d 390, 402 (7th Cir. 2000) (holding that under filed rate doctrine, plaintiff-consumers did not have relief under TCA for claims of overcharging by ILECs).

107 *Trinko*, 305 F.3d at 110.

tively "Covad"), CLECs who sought to provide high-speed Digital Subscriber Line (DSL) Internet services,[108] brought suit against BellSouth, an ILEC, alleging that BellSouth failed to fulfill its 1996 Act obligations. Covad also claimed that BellSouth aimed to stifle competition and maintain its monopoly over the local market.[109]

The Eleventh Circuit, paralleling the Second Circuit,[110] found nothing to suggest a plain repugnancy between the 1996 Act and the antitrust laws.[111] Whereas the district court—relying on *Goldwasser*—dismissed Covad's claims, the Eleventh Circuit reversed, holding that an antitrust claim can be brought based on allegations of anticompetitive conduct that are intertwined with obligations established by the TCA.[112] The *Covad* court determined that so long as CLEC plaintiffs pleaded the requisite facts to support an antitrust claim,[113] their Sherman Act claim could survive a motion to dismiss.[114] The Eleventh Circuit concluded that the allegations in the complaint were sufficient to state a claim under the antitrust laws and remanded the case to the district court to decide whether any antitrust violation in fact had occurred.[115]

To summarize, the courts in *Trinko* and *Covad* disagreed with the *Goldwasser* court's conclusion that allegations making out an antitrust claim must not be premised on activities inextricably linked to claims that could have been asserted under the 1996 Act. In contrast to the *Goldwasser* court, the *Trinko* and *Covad* courts recognized that the antitrust laws add to the oversight already available under the 1996 Act. In the next Part, this Note discusses whether there is an easy answer to the circuit split and identifies several issues worthy of consideration as antitrust enforcement in the telecommunications industry evolves.

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[108] See Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272, 1276 (11th Cir. 2002). DSL is "a technology that allows consumers and businesses to transmit and receive data over existing copper phone lines. Covad's DSL service competes directly with BellSouth's own DSL and other retail data services . . . ." Id.

[109] See id. at 1277.

[110] See supra notes 96-102 and accompanying text.

[111] See *Covad*, 299 F.3d at 1280-81.

[112] Id. at 1282.

[113] For instance, plaintiffs may plead that the ILEC's refusals to comply with its statutory obligations under the TCA constituted sustained anticompetitive behavior to monopolize or attempt to monopolize the telecommunications market.

[114] See *Covad*, 299 F.3d at 1283.

[115] See id. at 1292.

III

THE ANTITRUST LAWS AUGMENT THE PROCOMPETITIVE AND DEREGULATORY GOALS OF THE 1996 ACT

This Part first explains that the enactment of a special deregulatory scheme for the telecommunications industry did not render the more general protections of the antitrust laws wholly inapplicable to that industry. That is, the mere fact that the 1996 Act imposes special obligations on telecommunications providers does not render those providers implicitly immune from antitrust scrutiny. Section B answers the Seventh Circuit's concerns that the application of the antitrust laws to violations of the TCA might confuse the industry or render FCC regulations inoperable. After describing the nature of deregulation in Subsection B.1, the Note, in Subsection B.2, explains that the antitrust laws supplement the TCA by serving as gap fillers where the TCA fails to provide adequate relief. Subsection B.2 also addresses concerns that permitting antitrust suits to survive an ILEC's motion to dismiss might interfere with the TCA's deregulatory scheme. Finally, Subsection B.3 suggests that the inevitable shift in oversight responsibility from the FCC to the antitrust enforcers must take place with caution and an eye toward achieving the 1996 Act's objective of deregulating the telecommunications industry. It concludes that a principled approach to applying the combined enforcement mechanisms of the TCA and antitrust laws will avoid chaos within the telecommunications industry.

A. The Absence of a Plain Repugnancy

The Supreme Court, in *United States v. Philadelphia National Bank*,[116] declared that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[117] Thus, the Court has

> long recognized that the antitrust laws represent a fundamental national economic policy and [has] therefore concluded that [it] cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. [The Court has], therefore, declined to construe special industry regulations as an implied repeal of the antitrust

[116] 374 U.S. 321 (1963).

[117] Id. at 350-51.

> laws even when the regulatory statute did not contain an accommodation provision . . . .[118]

Consequently, it is unlikely that a regulatory scheme will render the antitrust laws inapplicable to its industry in the absence of an explicit provision exempting certain activities from the Sherman Act.[119] There is no such exemption within the statutory language of the 1996 Act.

Accordingly, there is a rather heavy burden on a party claiming that the TCA and antitrust laws are in plain repugnancy. Moreover, this burden is raised considerably in light of the fact that the TCA includes an accommodation provision that explicitly *saves* activities under the telecommunications act from being immunized from antitrust scrutiny. This "savings clause" can be found at Section 601 of the 1996 Act: "[N]othing 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."[120] With such clear statutory language, a court easily can conclude that this clause alone justifies the applicability of the antitrust laws to situations also regulated under the TCA.[121]

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[118] Carnation Co. v. Pac. Westbound Conference, 383 U.S. 213, 218 (1965) (holding that enactment of regulatory scheme for particular aspects of shipping industry did not render more general provisions of antitrust laws inapplicable to entire industry).

[119] See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 421 (1986) (stating that certain activities "are not immunized from antitrust scrutiny simply because they occur in a regulated industry, and that exemptions from the antitrust laws are strictly construed and strongly disfavored").

Some commentators, however, have noted situations where compliance with a regulatory scheme can exempt certain activities from antitrust scrutiny. See, e.g., Jonathan Lechter et al., Antitrust Violations, 39 Am. Crim. L. Rev. 225, 254 (2002) ("[C]ourts have held particular defendants to be exempt from antitrust liability upon a showing that the defendants *conformed* to regulatory law." (emphasis added)). The Supreme Court has held particular vertical restraints to be immune from antitrust liability in order to avoid conflicting judgments with the SEC. See id. (discussing *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 721-22 (1975)). In the rate regulation context, courts have similarly noted that "[s]o long as defendants stay within the framework of the rate agreement and conform their rates to those approved by the [Interstate Commerce] Commission, it cannot make a difference that their underlying intent may be anti-competitive." Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1458-59 (6th Cir. 1988); see also Phonetele, Inc. v. AT&T Co., 664 F.2d 716, 733 (9th Cir. 1981) (recognizing that "where conduct is compelled by the regulatory agency, not implying antitrust immunity would be unfair to the regulated entity and would frustrate agency policies").

[120] Telecommunications Act of 1996 § 601(b)(1), Pub. L. No. 104-104, 110 Stat. 56, 143 (1996) (appended as note to 47 U.S.C. § 152 (2000)).

[121] Even the *Goldwasser* court agreed on this point: "Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law." Goldwasser v. Ameritech Corp., 222 F.3d 390, 401 (7th Cir. 2000).

If skeptical of the plain language of the statutory text, a court can rely further on the legislative history surrounding the TCA.[122] Both the Senate and House recognized that the 1996 Act did not grant immunity from any antitrust action.[123] President Clinton emphasized the antitrust savings clause when signing the TCA into law.[124] And the FCC—the agency responsible for implementing the 1996 Act—explicitly stipulated that "nothing in [the relevant sections of the TCA] or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law."[125] In the words of the Eleventh Circuit: "Thus, both the legislative and executive branches recognized that the antitrust laws would coexist alongside the [1996] Act."[126] In sum, there is unequivocal support in both the plain language of the statute and the legislative history for the proposition that the TCA and antitrust laws shall concurrently operate.

B. The Deregulatory Scheme Envisioned Under the TCA Is Not Undermined by the Application of the Antitrust Laws

Just because there is no plain repugnancy, however, does not force the conclusion that the antitrust laws must provide relief to plaintiffs alleging violations of duties imposed by the TCA. But it does suggest that it is premature to dismiss a lawsuit merely because conduct giving rise to an alleged antitrust violation is also a violation of the 1996 Act. This Section responds to the Seventh Circuit's concerns that allowing a suit to survive a motion to dismiss might impede

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[122] While concluding that the plain statutory language was sufficient to decide the "plain repugnancy" issue, the *Covad* court nonetheless provided a comprehensive review of the legislative history of the 1996 Act, "reflecting that the President, the Congress, the Department of Justice, and the FCC have emphasized the critical need for the antitrust laws to work in conjunction with the 1996 Act in order to spur competition in the telecommunications industry." Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272, 1281-82 (11th Cir. 2002).

[123] See, e.g., H.R. Conf. Rep. No. 104-458, at 200-01 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 214-15 (discussing how Savings Clause prevents parties from asserting that TCA grants antitrust immunity or impliedly preempts other laws); S. Rep. No. 104-23, at 17 (1995) ("[T]he provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill."); see also *Covad*, 299 F.3d at 1281 ("Throughout the legislative record, Congress repeatedly emphasized that ILECs like BellSouth remain subject to antitrust enforcement[.]").

[124] See William J. Clinton, Statement on Signing the Telecommunications Act of 1996, 1996 Pub. Papers 188, 189 (Feb. 8) ("The Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemakings or orders, the antitrust laws continue to apply fully.").

[125] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15,499, 15,565 (Aug. 8, 1996) (first report and order).

[126] *Covad*, 299 F.3d at 1282.

the TCA's deregulatory scheme or flood the courts with antitrust cases if plaintiffs can make an end run around the TCA's enforcement scheme.

1. The Special Nature of a Deregulatory Regime

The TCA is a deregulation statute—its provisions restructure the telecommunications industry by imposing interconnection obligations,[127] punishing ILEC noncompliance with those obligations, and reducing governmental control of the telecommunications industry, in order to eventually release the industry to the invisible hand of the free market. Thus, the 1996 Act is transitional in nature.[128] As the telecommunications market becomes more competitive, antitrust laws will play a greater role.[129] That is not to say that antitrust magically appears out of thin air. Antitrust laws are always operative, lurking in the shadows of the regulatory scheme and protecting the market from threats to competition.[130] It is just that as the regulations phase out, antitrust enforcement mechanisms come to the fore and are more readily recognizable as the remaining outlet for remedial relief: As the FCC reduces its regulatory oversight, the antitrust enforcers will "become the principal arbiters of the competitive rules of the road."[131] Eventually, when the deregulation is complete, the competitive aspects of the telecommunications industry will be monitored like all competitive markets—solely by the antitrust laws.

Like transition phases in other industries, the period from regulation to competition is "inevitable and enormously important. What

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[127] 47 U.S.C. § 251 (2000); see supra notes 32-39 and accompanying text.

[128] See Charles D. Cosson, You Say You Want a Revolution? Fact and Fiction Regarding Broadband CMRS and Local Competition, 7 CommLaw Conspectus 233, 243 (1999) (describing TCA as transitional mechanism in telecommunications "revolution" towards procompetitive, deregulatory telecommunications environment); Michael K. Powell, Communications Policy Leadership for the Next Century, 50 Fed. Comm. L.J. 529, 530 (1998) ("The 1996 Act is lengthy and complex. It will be difficult for us to implement fully and to give effect to the Act's some 750,000 words, and it will likely be quite some time before we realize fully the fruits of our efforts. . . . Revolutions rarely take place overnight.").

[129] Cf. Ray S. Bolze, Drawing Back the Regulatory Curtain: Antitrust Issues and Hypothetical Problems, in Utility Restructuring 2002: Negotiating, Structuring & Documenting the Deal 17, 27 (PLI Corp. Law and Practice Course Handbook Series No. B0-01JN, 2002), WL 1341 PLI/Corp 17 (reviewing increased role for antitrust during deregulation of electric power market); Stuart M. Reynolds, Jr., The Relationship of Antitrust Laws to Regulated Industries and Intellectual Property in the New Marketplace, 4 Tul. J. Tech. & Intell. Prop. 1, 11-21 (2002) (addressing relationship between antitrust and regulation in power industry and discussing antitrust laws' greater role as deregulation occurs).

[130] Reynolds, supra note 129, at 2 ("Traditional rules of antitrust apply even in highly regulated industries . . . .").

[131] Stanley M. Gorinson, Deregulation in Telecommunications: Competition or Confusion?, 47 Fed. Law. 24, 27 (2000).

happens in the transition determines not only whether there will be a promised land but, if so, the nature of its terrain."[132] Because the antitrust laws provide minimum guidelines of conduct that protect a mature market from threats to competition,[133] the antitrust laws help shape the terrain of the telecommunications market: "The [1996] Act injects competition into telecommunications with a burst. But with competition also comes the antitrust law to provide the rules of conduct. The antitrust focus will now achieve a new status for telecommunications."[134] Because of the importance of the transition phase, courts should be particularly careful when monitoring questionable activities alleged in lawsuits against industry players. Courts should apply antitrust doctrine in a principled manner—as a powerful device to provide relief for particular sustained anticompetitive behavior that can devastate the transition.[135]

2. *The Antitrust Laws Fill the 1996 Act's Remedial Gaps*

Almost immediately after the 1996 Act was enacted into law, commentators recognized that antitrust undoubtedly would continue to play a role in the telecommunications industry, as "there is considerable room for antitrust violations" along with violations of the TCA itself.[136] Indeed, the 1996 Act's focus on introducing competition into local exchange service was thought to be a return to the type of competition that prevailed among LECs in the early part of the twentieth century, when the antitrust laws protected local exchange services markets from monopolistic behavior.[137] Moreover, the antitrust laws

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132 Albert A. Foer, Electricity: Notes on the Transition Phase, 33 Loy. U. Chi. L.J. 813, 813 (2002) (discussing importance of transition phase in deregulation of electricity).

133 See supra Part I.B. (discussing Sherman Act).

134 Douglas B. McFadden, Antitrust and Communications: Changes After the Telecommunications Act of 1996, 49 Fed. Comm. L.J. 457, 472 (1997).

135 See infra Part III.B.3.

136 George J. Alexander, Antitrust and the Telephone Industry After the Telecommunications Act of 1996, 12 Santa Clara Computer & High Tech. L.J. 227, 252 (1996). In addition to monopolization or attempted monopolization claims, there is also considerable room for claims of restraint of trade under Section 1 of the Sherman Act: "There may be a proliferation of agreements to fix prices, divide territories, boycott competitors, tie products to services, and make exclusive dealing until a market grows strong enough to make them infeasible. . . . These are the sorts of claims that antitrust would normally resolve in an unregulated market." Id.

137 See McFadden, supra note 134, at 458-60. McFadden describes the telecommunications industry's evolution from the early twentieth century, when antitrust laws protected competition among the multiple LECs, to the passage of the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.), which provided for local monopolies in local exchange services. See also supra note 30. The 1996 Act injected competition back into the telecommunications industry by mandating ILECs to interconnect their facilities with those of CLECs. See supra Part I.A.

provide rules of conduct for competitive markets; as such, they steer LECs away from activities that damage free markets through the concentration of economic power.[138] Congress supplemented these general behavioral rules with the specific duties of the 1996 Act, prescribing particular conduct that it deemed necessary to disperse local exchange services among several providers.[139] The specific duties of the TCA, together with the broad rules of conduct presented by the antitrust laws, encourage competition in the market for local exchange services. When LECs conduct their activities in ways contradictory to these laws, plaintiffs can seek relief in the courts.

Appropriate remedies, however, might be hard to find within the confines of the 1996 Act. There are several shortcomings of the TCA, including its "critical statutory gaps—such as the substantive rules for remedying violations of the Act."[140] Without adequate enforcement mechanisms, firms will not be deterred from violating either the TCA or the antitrust laws: "Without meaningful remedies for breach of interconnection agreements, an incumbent provider may decide that risking weak legal sanctions makes more sense than enabling its competitors to win over its customers."[141] Yet, if violations of the 1996 Act can provide the basis for antitrust liability—if plaintiffs are permitted to show that there was market power and willful acquisition or maintenance of that power—then the fear of treble damages might lead an LEC to think twice before hindering competitors' access to its facilities.

The 1996 Act is not a panacea. This Note has already indicated that neither the plaintiffs in *Goldwasser* nor those in *Trinko* had any available remedy under the TCA.[142] Consumers sought relief for past harm caused by uncooperative companies violating the TCA's duties to interconnect. They looked to the TCA for help, but found none. Therefore, they turned to the antitrust laws—the underlying code that protects the competitive market and consumers.

Whereas the TCA has failed to provide adequate consumer protection, the antitrust laws can act as a deterrent to anticompetitive behavior and can provide remedies that are unavailable under the

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138 See generally supra Part I.B; see also McFadden, supra note 134, at 472.

139 See supra Part I.A.

140 Philip J. Weiser, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692, 1694 (2001). Weiser argues that while "the Telecom Act holds out the promise of an innovative regulatory regime that fits market realities and provides a model of a cooperative federalism, it leaves the FCC, the state agencies, and the courts with considerable work to get there." Id. at 1743.

141 Id. at 1757.

142 See supra notes 70-72 and accompanying text; supra notes 103-07 and accompanying text.

1996 Act. The antitrust laws are necessary gap fillers and provide an essential enforcement mechanism to remedy allegedly anticompetitive behavior. Thus, antitrust claims cannot be foreclosed when courts decide disputes based on sustained ILEC violations of the 1996 Act. When ILECs fail to comply with their statutory duties under the TCA—and when such failure satisfies *Grinnell*'s two-pronged test[143]—then the antitrust laws should be employed as "light regulation"[144] of the telecommunications industry's transition towards a mature market.[145] It goes against the very object and purpose of the deregulatory scheme to suggest that antitrust has no relevant role in protecting both consumer interests and the transition from local monopolies to a competitive market.

Characterized this way, the antitrust laws act like regulation.[146] The antitrust laws require LECs to behave competitively. Predatory pricing, for example, long has been recognized as anticompetitive behavior.[147] If a firm with monopoly power is found to engage in this conduct, the penalties could be severe.[148] The mere presence of antitrust laws may therefore deter firms from lowering their prices to drive out competitors—a kind of "light regulation."[149]

This similarity has led some commentators—and courts like the Seventh Circuit—to be skeptical when considering the role of antitrust laws, concluding that vigorous antitrust enforcement might blur

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[143] See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); supra note 51 and accompanying text.

[144] See infra note 149 and accompanying text.

[145] See supra Part III.B.1; supra notes 132-34.

[146] Some go further: "Antitrust *is* economic regulation. Its essence is the regulation of certain kinds of economic relations .... Antitrust thus regulates the same things that other forms of regulation have traditionally covered." Fred S. McChesney, Be True to Your School: Chicago's Contradictory Views of Antitrust and Regulation, in The Causes and Consequences of Antitrust: The Public-Choice Perspective 323, 328 (Fred S. McChesney & William F. Shughart II eds., 1995) (emphasis added).

[147] See generally Thomas A. Piraino, Jr., Identifying Monopolists' Illegal Conduct Under the Sherman Act, 75 N.Y.U. L. Rev. 809, 841-44 (2000). "Predatory pricing" is found where a firm lowers its prices in order to eliminate a current competitor in the market or to prevent new firms from entering the market. See id.

[148] Possible monetary remedies for violations of Section 2 of the Sherman Act include treble damages, fines, and disgorgement of monopoly profits. The provision for treble damages is found in Section 4 of the Clayton Act. 15 U.S.C. § 15 (2000).

[149] See Robert H. Lande, Professor Waller's Un-American Approach to Antitrust, 32 Loy. U. Chi. L.J. 137, 144 (2000). Lande recognizes that viewing "antitrust as another light form of regulation . . . would have the advantage of being more accurate" and discusses how "the perception of antitrust as a form of light regulation could make it easier for the United States to engage in worthwhile economic deregulation." Id. This Note develops the foregoing concept in Part III.B.3, arguing that the antitrust laws must apply in conjunction with the provisions of the TCA; otherwise, the 1996 Act's objective of true deregulation will remain unrealized.

the specific provisions of "heavy regulation," such as those of the TCA. That is to say, if the antitrust laws are "regulating" the same industry that the TCA is regulating, then what happens when the same conduct runs afoul of one but not the other? This Note already pointed out that courts find antitrust immunity when antitrust enforcement results in a party being punished for complying with a regulatory scheme.[150] Yet, what if the consequences of a court ruling are less obvious? Court-applied antitrust remedies may undermine a well-conceived regulatory scheme. For instance, suppose a party is in violation of the antitrust laws,[151] and the court enjoins the party from continued violations, either by ordering the party to undertake specific remedial measures in the future or by preventing that party from continuing its present conduct. This injunctive relief might prevent that party from future compliance with regulations or agency decisions. The injunction also might interfere tangentially with other aspects of the regulated industry in ways that might not be immediately apparent. Also, injunctive relief might compel an ILEC to perform above and beyond the imposed obligations within the TCA. Such potential divergence between conduct mandated by the court and that by the regulation is not merely fanciful and can call into question the logic of applying the breadth of antitrust remedies to a regulated industry.[152]

With such potential for confusion, it seems appropriate to maintain a judicial posture in which courts, acting as antitrust enforcers, do not prospectively "regulate" answers to complicated questions under the TCA by using injunctive relief, but remedy only prior violations with one-time monetary relief. Indeed, courts resolving a variety of suits in telecommunications and other industries have been hesitant to issue injunctions where such issuance might further confuse the industry by introducing court orders contradictory to, or overlapping with, the relevant regulations.[153] The common thread throughout

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150 See supra note 119.

151 This example assumes that the violation is not the consequence of that party's compliance with relevant regulations.

152 See, e.g., *Goldwasser*, 222 F.3d at 401; infra note 175 and accompanying text (describing Judge Tjoflat's concerns over effects of federal court injunctions with regards to TCA).

153 See, e.g., Mich. Bell Tel. Co. v. MFS Intelenet, Inc., 16 F. Supp. 2d 828 (W.D. Mich. 1998) (denying preliminary injunction where it would frustrate competitive purpose of LEC duty to establish reciprocal compensation arrangements for transport and termination of telecommunications, as provided in 47 U.S.C. § 251(b)(5)); Woodlands Telecommunications Corp. v. AT&T Co., 447 F. Supp. 1261, 1266 (S.D. Tex. 1978) (stating that where FCC has acted and directed carrier to interconnect, antitrust laws should not be used to interfere with FCC determination); see also Rizzo v. Goode, 423 U.S. 362, 378-80 (1976) (holding that district court erred in granting injunctive relief that would interfere with

these examples, and the aforementioned concerns, is skepticism of the ability of antitrust enforcers to craft appropriate remedies for violations under the regulatory scheme.[154]

Yet this skepticism does not militate in favor of prohibiting courts from providing relief for anticompetitive conduct in a manner that avoids problematic interference with the TCA. The Second Circuit in *Trinko* even suggested there might be an analytical distinction between suits seeking damages and suits seeking injunctive relief.[155] In the ways described above,[156] injunctive relief in the telecommunications industry might disrupt the 1996 Act's regulatory scheme. As such, courts are well-advised to exercise "particular judicial restraint"[157] when considering whether to grant injunctive relief. "Courts may not be suited to order particular actions by telecommunications carriers to make the local markets more competitive, particularly when there is a specific regulatory scheme meant to serve the same purpose."[158] This Note suggests that by tailoring one-time relief to retroactively compensate individuals for damages caused by past misconduct, courts can avoid problematic interference with the TCA. Antitrust suits for monetary damages are unlikely to disturb the regulatory proceedings mandated by the TCA: "Awarding damages for the willful maintenance of monopoly power would not substantially interfere with the regulatory scheme envisioned by the Telecommunications Act."[159]

3. *A Principled Approach to the Enforcement of the TCA and the Antitrust Laws*

The *Goldwasser* court suggested that the antitrust laws added nothing to telecommunications deregulation under the 1996 Act.[160]

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authority of executive branch or local governmental agency); Atlanta Gas Light Co. v. Fed. Power Comm'n, 476 F.2d 142 (5th Cir. 1973) (upholding dismissal of complaint for specific performance and injunctive relief where such order would have constituted unwarranted interference with lawful regulatory authority); Hartwell Corp. v. Super. Ct., 38 P.3d 1098 (Cal. 2002) (holding that court injunction would clearly conflict with Public Utilities Commission decision and interfere with regulation but that jury award of damages on finding of past violations would not affect agency's jurisdictional role).

154 But, as this Note will suggest later, courts can allay such fears by relying solely on monetary damages instead of injunctive relief that might possibly interfere with FCC regulations. See infra notes 155-59 and accompanying text; infra Part III.B.3.

155 See Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89, 111-13 (2d Cir. 2002), cert. granted, 123 S. Ct. 1480 (2003).

156 See supra notes 151-53 and accompanying text.

157 *Trinko*, 305 F.3d at 111.

158 Id. at 113.

159 Id. at 111.

160 See Goldwasser v. Ameritech Corp., 222 F.3d 390, 401 (7th Cir. 2000); supra note 79 and accompanying text.

This Note has responded that antitrust plays a crucial role in structuring the telecommunications industry.[161] The antitrust laws provide a minimum standard of conduct for LECs. Furthermore, the antitrust laws fill the statutory gaps regarding remedies for violations of the 1996 Act. The 1996 Act, on the other hand, provides obligations above and beyond those expected in most competitive markets.[162] The *Goldwasser* court did not want a failure to comply with those additional duties to be equated with a failure to comply with the antitrust laws.[163] The *Trinko* and *Covad* courts did not suggest such an equivalency, and neither does this Note. The Second Circuit recognized that

> the plaintiff's antitrust claim does not merely allege that the defendant violated section 251 [of the TCA]. In fact, it does not mention section 251 at all. The allegations in the amended complaint describe conduct that may support an antitrust claim under a number of theories. While some of this conduct might also violate section 251, these are not merely allegations that section 251 has been violated.[164]

Thus, the *Goldwasser*, *Trinko*, and *Covad* plaintiffs may have freestanding antitrust claims, regardless of whether the alleged anticompetitive conduct arose from a failure to meet obligations imposed by the 1996 Act. Since the TCA does not confer immunity from the antitrust laws, those claims must be subject to review under the Sherman Act.

This Note, therefore, maintains that the Supreme Court should affirm *Trinko*'s holding that plaintiffs stated a claim under the antitrust laws. A complaint pleading a sustained course of anticompetitive conduct—under either a "refusal to deal" or "essential facilities" theory of liability[165]—is sufficient to state a claim under Section 2 of the Sherman Act.

Nevertheless, this Note cautions that successfully pleading a Section 2 violation is very different than prevailing on the merits after developing a factual record. For instance, claims of a violation of some duty to deal are a "source of endless confusion."[166] As was discussed above,[167] courts often are reluctant to find refusals to deal to

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161 See supra Parts III.B.1 & III.B.2.

162 See supra Part I.A.

163 See *Goldwasser*, 222 F.3d at 401; supra note 87 and accompanying text.

164 *Trinko*, 305 F.3d at 108.

165 Antitrust doctrine traditionally recognizes certain refusals to deal as violations of Section 2 of the Sherman Act. See supra notes 54-57 and accompanying text.

166 Glen O. Robinson, On Refusing to Deal with Rivals, 87 Cornell L. Rev. 1177, 1230 (2002).

167 See supra notes 58-62 and accompanying text.

be anticompetitive,[168] an understandable consequence of the intuition that forcing rivals to deal with each other "threatens to put antitrust at war with itself."[169] Indeed, if free markets expected rivals to deal with each other, the 1996 Act and its affirmative demand that LECs interconnect and deal with competitors on reasonable terms would not have been necessary at all.

Antitrust analysis focuses on sustained anticompetitive conduct; an isolated violation will not suffice. Therefore, courts will not be flooded with antitrust suits: Just because complaints *can* survive a motion to dismiss does not mean they *will* survive. As the Second Circuit highlighted in *Trinko*:

> We do not suggest that any or every disruption in local phone service would support an essential facilities claim. For example, a minor, isolated, and accidental disruption in access to an essential facility would be insufficient as a matter of law to establish an antitrust violation. There must be sufficient evidence to conclude that the defendant controlling the essential facility denied or disrupted a competitor's access to that facility with the intention of maintaining its monopoly power.[170]

Thus, this Note advises courts to adhere to a principled approach to antitrust enforcement when assessing motions to dismiss and claims of alleged anticompetitive conduct on a developed factual record. That is, while plaintiffs can attempt to prove a Sherman Act claim, courts carefully should consider the entire situation—including attempts to comply with the TCA. For instance, if an LEC's computer system mistakenly malfunctioned and resulted in the LEC's failure to comply with a TCA obligation, this might not be enough to prove, or even state, an antitrust violation. And if the LEC not only recognized its error but also made reparation to competitors and to the FCC as a sanction, there might be even less need to award monetary damages in an antitrust suit—these self-imposed remedial measures might alone cure the competitive defect.[171]

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[168] The *Goldwasser* court pointed out that "even a monopolist is entitled to compete; it need not lie down and play dead, as it watches the quality of its products deteriorate and its customers be disaffected." 222 F.3d at 397. The court recognized that there is no duty to deal unless it can be shown that the refusal is part of a broader effort to maintain a monopoly. The court refused to accept plaintiffs' argument that noncompliance with the 1996 Act's obligations to deal was enough to show such a broader effort. The noncompliance was, therefore, not a violation of the antitrust laws; it was merely a violation of the TCA. Unfortunately, plaintiffs, as consumers, could not prevail under the TCA. See supra note 70.

[169] Robinson, supra note 166, at 1230.

[170] Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89, 108 n.11 (2d Cir. 2002), cert. granted, 123 S. Ct. 1480 (2003).

[171] Judge Sack suggested this in his partial concurrence and dissent in *Trinko*:

Additionally, antitrust cases based on some duty to deal consist of limited holdings, and the more specific essential facilities doctrine is often hard to satisfy: "[I]t is generally quite difficult to prove that a particular monopolist has control over an essential facility. To do so, one would have to prove that duplication of the facility would be economically unfeasible and that denial of its use inflicts a severe handicap on potential market entrants."[172] Yet, local exchange services can be—and have been—successfully duplicated. If a defendant LEC demonstrates that such duplicated facilities can substitute for its own, then the antitrust claim fails. Therefore, this Note challenges courts to be especially mindful when examining antitrust cases premised on "refusal to deal" or "essential facilities" theories of liability. The antitrust laws are a powerful tool, providing important safeguards against abusive attempts at monopolization. Because of their importance, and because the duty to deal is supposed to be exceptional, courts should avoid stretching antitrust doctrine in order to mold or fit the antitrust laws to particular allegations within the telecommunications industry.

Courts should be wary of possible abuses and mindful that antitrust laws protect competition, not individual competitors.[173] That is, isolated conduct that is anticompetitive—and that even violates the TCA—is not sufficient to prevail under Section 2 of the Sherman Act. Although individual *competitors* might be injured by such conduct, the antitrust laws are not concerned unless plaintiffs can prove a sustained course of conduct that harms *competition*. Without such behavior, there is no need for the antitrust laws to intervene.

Much of this Note's focus has been on consumer protection because consumers—harmed when competition breaks down because

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> The defendant thus insists that this case concerns a computer malfunction that led to a failure to confirm orders by AT&T to the defendant, and no more. The defendant further underscores the fact that it has already paid ten million dollars to CLECs, including AT&T, to compensate them for the injury that they suffered as a result, and $3 million to the FCC as a sanction for any misconduct for which the defendant is responsible. If indeed the plaintiff's claim rests only on the order confirmation failure, and the evidence shows that service lapses were temporary and a consequence of technical flaws alone, it may be that summary judgment will ultimately be available to the defendant on the Sherman Act claim. Evidence of service lapses, absent other indicia of predatory conduct, may not be enough to establish an attempt to injure competition or gain a competitive advantage.

Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 309 F.3d 71, 73 (2d Cir. 2002) (Sack, J., concurring in part and dissenting in part).

[172] Matthew L. Cantor, The Current Battle Over Antitrust Enforcement of the Baby Bells, 10 No. 1 Andrews Antitrust Litig. Rep. 13 (2002), WL 10 No. 1 Andrews Antitrust Litig. Rep. 13.

[173] See supra note 53 and accompanying text.

of anticompetitive conduct—often have no outlet for relief apart from the antitrust laws.[174] By contrast, LECs do fall within the 1996 Act's regulatory process. It is possible that LECs might use the antitrust laws as a backdoor to obtain TCA relief; some have questioned why "a CLEC [would] ever sue only in contract when it can jettison the regulatory scheme for treble damages in federal court."[175] As the *Goldwasser* court cautioned, "[t]he elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action."[176] However, if courts remain careful not to stretch the antitrust doctrine, then LECs might not find relief as easily as they otherwise might have hoped. "Plausible hypotheses for the CLEC's problems do not require the assumption of anticompetitive behavior by the ILECs."[177] Evidence that the CLECs' difficulties were the result of internal business failures also can cut away at antitrust theories that ILECs willfully acquired or maintained monopoly power that caused CLEC failures.[178] For example, empirical research supports "the conclusion that building one's own network is likely the best platform strategy for long-term revenue growth."[179] It is likely that by building its own network, the CLEC can improve upon the ILEC's products and services. By choosing not to do so—even though the 1996 Act itself encourages that choice—the CLEC simply might not

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[174] See supra notes 146-49 and accompanying text; see also Brief for Amici Curiae States of New York, Connecticut, Kansas, Maine, Maryland, Minnesota, Nevada and Utah at 1-2, Covad Communications Co. v. Bell Atl. Corp., 299 F.3d 1272 (11th Cir. 2002) (No. 02-7057) [hereinafter Covad Brief] (emphasizing role of antitrust laws in protecting consumer interests).

[175] Covad Communications Co. v. BellSouth Corp., 314 F.3d 1282, 1290 (11th Cir. 2002) (Tjoflat, J., dissenting from denial of en banc rehearing).

[176] Goldwasser v. Ameritech Corp., 222 F.3d 390, 401 (7th Cir. 2000).

[177] Crandall & Sidak, supra note 6, at 335. The article points out that "the many failures of individual CLECs assuredly flow from defects in their own business strategies, management, and financing rather than from violations of antitrust law or the Telecommunications Act by the ILECs." Id. at 411. Additionally, "although many CLECs have failed since 1996, the CLEC industry has made substantial inroads into the market for local telecommunications, and, thus, CLECs as a group have, as the FCC has documented, captured a rapidly growing share of the local exchange market from the ILECs." Id. Finally, the article warns that "quite apart from its ostensible purposes, mandatory structural separation of the ILECs can facilitate a sophisticated and anticompetitive strategy of the large CLECs . . . to raise the costs of their rivals, the ILECs." Id.

[178] If, for instance, the ILECs merely offered a superior product to that of the CLECs, then the second prong of the analysis under Section 2 of the Sherman Act would not be satisfied. Or, if CLECs have made substantial inroads into the local telecommunications market, then the ILEC might no longer possess monopoly power because of the substitutability of the services—such evidence might be sufficient to defeat the first prong of the antitrust analysis. See supra Part I.B.

[179] Crandall & Sidak, supra note 6, at 392.

be able to offer a competitive product that attracts customers away from the ILEC.[180] If a defendant ILEC could prove these kinds of facts, while showing that it was not hindering the CLECs' access to its facilities, it would go a long way toward showing that the CLECs' failures were more a result of poor strategy than anticompetitive harm.

This Note further recommends that courts steer clear of injunctive remedies, in order to avoid potential confusion within the industry and to avoid rendering FCC regulations inoperable.[181] Nevertheless, courts, as antitrust enforcers, can use monetary damages in order to provide remedies for damage caused by clear anticompetitive behavior of the past. In this way, consumers, as well as CLECs without other options, can still obtain relief for anticompetitive conduct that goes against the spirit of the TCA. A court can also exercise discretion before awarding monetary damages to CLECs, limiting potential awards and referring claims for agency review to enforce the 1996 Act's requirements. And without injunctive relief, CLECs will have to use the 1996 Act's enforcement mechanism in order to compel ILECs to interconnect and deal reasonably. Accordingly, the regulatory enforcement structure still might prove to be the most fruitful path for most CLECs.

Consequently, the antitrust laws will act as light regulation in order to ensure that telecommunications service providers satisfy the minimum standards of competitive behavior while the deregulatory scheme unfolds. This approach, by permitting antitrust suits to survive a motion to dismiss and be assessed on a developed factual record, respects the congressional intent behind the TCA. Additionally, there is no need to foreclose the antitrust analysis because of fears of interference with the TCA's deregulatory regime so long as courts are mindful of this Note's two recommendations: First, courts should avoid stretching antitrust doctrine to fit or mold antitrust laws to particular allegations within the telecommunications industry—essential facilities claims are difficult to sustain. Second, courts should

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[180] Crandall and Sidak advise CLECs that "[j]ust changing the nameplate on the service is not typically a very good strategy for attracting customers." Id. at 393. Moreover, Crandall and Sidak "reviewed the evidence that CLECs that deliberately built out their own networks, having carefully analyzed competition and consumer demand before entry, were able to increase revenues and continue to attract capital" and found that

> [s]everal of the more successful CLECs combined resale and the leasing of unbundled network elements with the construction of their own networks, but none of these firms relies exclusively on [unbundled network elements] or resale and these firms added more facilities-based elements over time to improve upon the product that the ILECs offer.

Id. at 398.

[181] See supra notes 154-59 and accompanying text.

limit relief to monetary damages in order to avoid potential interference caused by injunctive remedies.

CONCLUSION

Should the Supreme Court choose to reverse *Trinko*, its decision will present several problems, the most pressing of which is that consumers will be left largely without recourse because of the statutory gaps in the rules for remedying violations of the TCA. And while the TCA does impose duties beyond those normally found in a competitive market, the telecommunications market is still far from deregulated. The 1996 Act's purpose, therefore, is not being realized: Instead of mature markets with several service providers vigorously competing for customers, the ILECs are maintaining their dominant status in those telecommunications markets. As such, these ILEC defendants still might possess monopoly power and still might engage in activities that further their monopolistic power—by refusing to comply with the TCA, they are potentially closing off essential facilities. This traditionally is considered a violation of the antitrust laws, regardless of whether it is also possible to categorize that activity as a special "duty" under the TCA. If the Supreme Court reverses, Congress therefore should step in to address these problems.

If, however, the Supreme Court affirms the Second Circuit's decision in *Trinko*, it will have made the right decision: "Where . . . Congress intended to preserve antitrust scrutiny despite the passage of regulatory legislation, the antitrust laws should not be interpreted to permit cases to be dismissed on the pleadings, without any factual inquiry into whether a real, unjustified threat of harm to competition—and, hence, to consumers—exists."[182] A factual record must be developed for a court to adequately assess whether certain conduct harmed competition. This Note further advises lower courts applying *Trinko* not to stretch antitrust doctrine in order to provide relief for isolated incidents—such allegations would be insufficient to establish an antitrust violation. Instead, courts carefully must analyze the antitrust claims to conclude that the defendant's sustained failure to comply with its TCA duties was a monopolization or attempt at monopolization.

Antitrust suits must not be excluded merely because they are linked to duties imposed by the TCA. Antitrust suits will provide an additional check on the TCA deregulatory process, ensuring that it is not complacent, but rather that it blossoms into a vigorous deregulation regime that truly advances consumer interests.

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[182] Covad Brief, supra note 174, at 2.