***Viamedia v. Comcast*: Fresh Air for Stale Monopolization Law**

Randy M. Stutz[*]

Refusals to deal by a monopolist are the subject of considerable disagreement among antitrust practitioners. Strict adherents of the Chicago School philosophy, who focus on administrative burdens, the threat of overdeterrence, and the potential to discourage innovation, tend to be skeptical of refusal-to-deal theories and maintain that "unconditional refusals to deal with competitors should not play a meaningful part in section 2 enforcement."[1] The American Antitrust Institute (AAI), in contrast, has argued that monopolists should be held liable for refusals to deal when (1) the refusal helps preserve or extend monopoly power; (2) the monopolist discriminates between the competitor and other customers, has previously dealt voluntarily with the competitor, or otherwise demonstrates a predatory intent; and (3) the anticompetitive effects are not prevented by procompetitive benefits to consumers.[2]

On February 23, 2020, in a long-awaited decision in *Viamedia v. Comcast*, the Seventh Circuit followed AAI's recommendations and reversed a district court's dismissal of a plaintiff's refusal-to-deal claim against a monopolist in the market for commercial advertising slots on cable television networks. This commentary briefly discusses the allegations in the case, the issues on appeal, the Seventh Circuit's refusal-to-deal holding, and the holding's implications. It concludes that the court's opinion is a substantial and important victory for competition and consumers.

To be sure, the court's holding is cabined in certain respects and relies heavily on the standard of review applicable to a defendant's motion to dismiss a refusal-to-deal claim on the pleadings. For that reason, it is not a good candidate for Supreme Court review. The opinion is unlikely to usher in a new era of solicitude for refusal-to-deal claims; such cases likely will remain unduly difficult for plaintiffs to bring and (especially) to win. Philosophically, however, the opinion represents significant progress in eroding an ingrained bias in the courts that gives unwarranted deference to even implausible efficiencies defenses in monopolization cases. And the opinion makes important advancements in the law by declaring that a plausible refusal-to-deal claim is not defeated on the pleadings by a theoretical efficiency defense, and that the defendant-friendly "profit-sacrifice" and "no-economic sense" tests are "relevant but should not always be dispositive" in refusal-to-deal cases.[3]

I. Background

Viamedia involved the sale by local cable companies and other multi-video program distributors (MVPDs) of "Spot Cable Avails," which are two-to-three-minute commercial advertising slots on cable networks that are sold to advertisers. A portion of those avails are sold

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[*] Randy M. Stutz is Vice President of Legal Advocacy at the American Antitrust Institute (AAI). Stutz assisted Hilliard & Shadowen partner Richard Brunell in drafting [AAI's amicus brief in support of Viamedia].

[1] U.S. Dept. of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), http://www.justice.gov/sites/default/files/atr/ lega-cy/2009/05/11/236681.pdf

[2] *See* Restoring Monopoly and Exclusion as Core Competition Concerns 18, Am. Antitrust Inst. (2016), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Monopolizationfinal_0-1.pdf.

[3] The opinion has not yet been reported. This commentary quotes from the slip onion but does not provide pin cites.

through regional "interconnects," or platforms that provide a single access point for advertisers to purchase ads capable of reaching all MVPD subscribers within a designated market area (DMA).

The plaintiff, Viamedia, facilitates the sale of Spot Cable Avails by offering "ad representation services" to smaller MVPDs, including targeted local advertising sales, spot insertion, encoding, validation, IT, monitoring, traffic, billing, and collection services. Comcast, a large and powerful MVPD, controls the interconnects in several DMAs and is vertically integrated into the ad representation services market. For many years, Comcast, like other interconnect managers, had an open access policy in order to maximize the reach of the interconnects.

Relying on tying, refusal-to-deal, and exclusive dealing theories, Viamedia alleged that Comcast, in an effort to monopolize the market for ad representation services, terminated its interconnection agreement with Viamedia and insisted that MVPDs seeking to use its interconnects employ Comcast, rather than Viamedia, for their ad representation services. The Northern District of Illinois first granted a motion to dismiss the refusal-to-deal claim and later granted summary judgment to Comcast on the remaining tying and exclusive-dealing claims.

II. AAI's Arguments for Reversal

In an amicus brief joined by Public Knowledge (PK), AAI argued that the district court applied an overly demanding test for refusals to deal. The lower court had overread the Supreme Court's defendant-friendly *Trinko* decision to hold that a refusal-to-deal claim can only be brought if a plaintiff shows that the monopolist's conduct has no *potential* rational purpose. It faulted Viamedia for "failing to demonstrate through its allegations that Comcast's conduct was 'irrational but for its anticompetitive effects,'" insofar as eliminating Viamedia from the market "offer[ed] potentially improved efficiency."

AAI maintained that a plaintiff need not show that a monopolist's refusal to deal serves *no* potential procompetitive purpose. Rather, the court should have given more weight to the fact that Comcast's refusal to deal enabled it to extend or preserve its monopoly in markets for ad representations services, and that it acted with a predatory intent by sacrificing profits and discriminating on the basis of rivalry (i.e., by being willing to deal with non-competitors but not with rivals).

The brief also argued that the district court erred in accepting Comcast's "disintermediation" defense, namely that Comcast's refusal to deal was potentially procompetitive because it eliminated Viamedia as a middleman. A "potential" procompetitive justification is insufficient; defendants have the burden to prove efficiencies as a matter of fact, and here, the efficiencies were doubtful since MVPDs preferred to use an independent company like Viamedia rather than Comcast, their largest rival, as their ad representative.

III. The Seventh Circuit's Holding

In a meticulous, 105-page opinion authored by Judge Hamilton, the Seventh Circuit unanimously reversed the district court's dismissal of Viamedia's refusal-to-deal claim and embraced the arguments in AAI's brief.[4] The court began by emphasizing the continuing validity of the Supreme Court's holdings in *Lorrain Journal* and *Aspen Skiing*, which the Court expressly upheld in *Trinko* despite expressing skepticism of refusal-to-deal claims. The court explained that the primary factors to determine whether such a claim is within *Aspen Skiing*'s narrow bounds are (1) a preexisting relationship supporting a presumption that a joint arrangement was efficient and profitable; (2) evidence that similar joint arrangements are used in comparable competitive markets (leading to the inference that they satisfy consumer demand); and (3) evidence that the defendant decided to forego profitable transactions for the sake of harming rivals.

The court emphasized that, when these factors point towards anticompetitive harm, it is nonetheless essential to weigh possible procompetitive justifications, including any beneficial impacts on consumers or competition itself. However, the Court found it "[c]ritical to this case" that, under the Supreme Court's holding in *Aspen Skiing*, procompetitive justifications are factual issues to be resolved by a jury, and not on a defendant's motion to dismiss. Notably, the court observed that several defendant-friendly decisions like then-Judge Gorsuch's opinion in *Novell* were decided after a full trial on the merits and were distinguishable on that basis.

After making a detailed side-by-side comparison of the facts alleged by Viamedia and the facts found at trial in *Aspen Skiing*, the court held that "Viamedia has presented a case that is well within those bounds and appears stronger than *Aspen Skiing*." The court quipped that, "unless the [Supreme] Court meant to limit *Aspen Skiing* to ski resorts, we see no sound basis to distinguish Viamedia's case as a matter of law."

The court also debunked Comcast's argument—supported in an amicus brief by the Antitrust Division of the Department of Justice (DOJ), but which the Federal Trade Commission notably did not join—that the case could be decided on the pleadings under an unforgiving legal standard applicable to refusal-to-deal cases. The court held that Comcast's contention that liability can be foreclosed by evidence of a *potential* efficiency misreads both the facts and law of *Aspen Skiing*. For one, *Aspen Skiing* expressly relied on an *inference* that Ski Co. was not motivated by efficiency concerns. For two, *Novell* and another similar opinion cited by Comcast involved a factual dispute over the existence of procompetitive justifications that was resolved *after* trial.

[4] The Seventh Circuit also reversed the district court's summary judgment ruling on Viamedia's tying claim. The court followed AAI's suggestion to avoid extending the defendant-friendly *Matsushita* decision to mean that a plaintiff cannot avoid summary judgment unless it presents evidence that "tends to exclude" the possibility that the monopolist's conduct was lawful. The court squarely rejected Comcast's "tends to exclude" formulation, quoting *Eastman Kodak* for the proposition that "The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." It was sufficient that Viamedia's tying claim "is not economically implausible." In partial dissent, however, Judge Brennan would have upheld the district court's summary judgment ruling on Viamedia's tying claim.

More fundamentally, however, the court explained that Comcast "misunderstands the law" in arguing that "if a defendant merely postulates 'a valid business purpose—apparently including any business purpose a defendant could dream up, regardless of feasibility or value—that 'ends the inquiry.'" So long as *Twombly*'s plausibility standard is satisfied, a plaintiff adequately states a claim for relief under *Aspen Skiing* and *Lorrain Journal*. The court also held that the "no economic sense" test advanced by the DOJ, and which governed in *Novell*, "is relevant but should not always be dispositive because 'a short-term profit sacrifice is neither necessary nor sufficient for conduct to be exclusionary.'"

In a partial concurrence and partial dissent, Judge Brennan praised the majority opinion as "synoptic in its coverage, deeply researched, … meticulous in its consideration of the antitrust issues this case presents[, and …] deserv[ing] much respect." Although he characterized the question as open to debate, Judge Brennan agreed with the majority that the parties' competing explanations for challenged conduct cannot be resolved at the pleading stage. Thus, he agreed that an antitrust plaintiff like Viamedia should have the opportunity, "despite some efficiency justification proffered by an antitrust defendant," to show that "the rational or intended goal of the conduct was its anticompetitive impact," and that it is not sufficient for an antitrust defendant like Comcast "to put forward any evidence of some business reason for its conduct, regardless of potential anticompetitive effect." However, Judge Brennan disagreed with the majority's conclusion that the case was stronger than *Aspen Skiing*. He was more solicitous of the profit-sacrifice test and would have hewed more closely to the crabbed interpretation of Section 2 put forward by Judge Gorsuch in *Novell*.

IV. Implications for Monopolization Law

The Seventh Circuit's holding that "'a short-term profit sacrifice is neither necessary nor sufficient for conduct to be exclusionary'" in the context of a monopolist's refusal to deal is a sound and important development in the law.[5] The court set an example that other courts should follow in being willing to look beyond tropes and dogma about vertical efficiencies and examining whether facts and evidence show that claimed efficiencies actually exist.

At the same time, the dissent's eagerness to embrace even facially implausible efficiencies (like Comcast's claim to vertical integration efficiencies notwithstanding that it had *already* been vertically integrated for many years prior to engaging in the challenged conduct) shows how much work remains to be done in the courts. And notwithstanding that the majority opinion represents an enormous symbolic and philosophical victory for proponents of objective evaluations of vertical conduct, it is only an incremental victory insofar as the holding turns heavily on the standard of review applicable to a motion to dismiss a refusal-to-deal claim on the pleadings.

While some will wonder whether the Supreme Court, where *Novell*'s author is now part of a 5-4 conservative majority, will take up a further appeal, the case is an especially poor vehicle for certiorari, for two reasons. First, the holding turns heavily on the procedural posture

[5] Although not addressed in detail in this commentary, the Court's ruling on Viamedia's tying claim, in which it rejected the *Matsushita* standard applicable to inferences of conspiracy on summary judgment, is likewise sound and important.

and standard of review. Second, the court also held that Viamedia's allegations would have been sufficient under the no economic sense test, meaning the choice of test did not affect the outcome. Under the circumstances, granting cert at this stage of this case would be unusually activist, especially given the paucity of refusal-to-deal claims that are attempted let alone that succeed. However, interested observers should continue to monitor the case upon remand to the district court.