

***MAYER, BROWN, ROWE & MAW'S
SUPREME COURT DOCKET REPORT
OCTOBER TERM, 2002 – NUMBER 10***

Today the Supreme Court granted certiorari in one case of potential interest to the business community. Amicus briefs in support of the petitioner are due on Thursday, April 24, 2003, and amicus briefs in support of the respondent are due on Monday, May 26, 2003.* Any questions about this case should be directed to Miriam Nemetz (202-263-3253) or Robert Bronston (202-263-3244) in our Washington office.

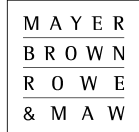
Telecommunications Act of 1996 – Antitrust Violations. The Supreme Court granted certiorari in *Verizon Telecommunications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682, to decide whether purchasers of local telephone service may bring an antitrust claim against a local telephone service provider based on allegations that the defendant failed to satisfy its obligations under the Telecommunications Act of 1996 (the “1996 Act”) to provide competitors with access to local network elements.

The 1996 Act requires telephone companies that formerly held state-sanctioned local monopolies to provide competitors with access to their local network infrastructure. Bell Atlantic (now Verizon), as the incumbent local exchange carrier (“ILEC”) in its region, provided competing local exchange carrier (“CLEC”) AT&T access to its network through an interconnection agreement approved by the state regulatory authority. Plaintiff Trinko, which purchased local telephone service from AT&T, sued Bell Atlantic in federal district court, contending that it had been damaged because Bell Atlantic had not afforded AT&T sufficient access to its network. Among other claims, Trinko contended that Bell Atlantic’s conduct violated Section 2 of the Sherman Act, 15 U.S.C. § 2. The district court granted Bell Atlantic’s motion to dismiss, rejecting Bell Atlantic’s argument that the plaintiff lacked standing, but concluding that the complaint did not state a valid Section 2 claim because “[t]he affirmative duties imposed by the Telecommunications Act are not coterminous with the duty of a monopolist to refrain from exclusionary practices.” *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 123 F. Supp. 2d 738, 742 (S.D.N.Y. 2000).

The Second Circuit reversed. *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2002). The court of appeals agreed with the district court that the plaintiff had antitrust standing. *Id.* at 107. It also agreed that a plaintiff cannot state an antitrust claim simply by alleging that the defendant has violated its duties under the 1996 Act. Nonetheless, the court concluded, the allegations in the complaint “describe conduct that may support an antitrust claim under a number of theories.” *Id.* at 108. For example, the court reasoned, the allegations that

* If the Court sets the deadline for the respondent’s brief under the revisions to its rules that go into effect on May 1, 2003, then briefs in support of the respondent will be due on Thursday, May 29, 2003.

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Bell Atlantic failed to provide competitors with reasonable access to its “local loop,” which is essential to competing in the local telephone service market, may state a claim under the “essential facilities” doctrine. *Id.* The court also stated that the plaintiff may have a “monopoly leveraging” claim, because the complaint alleges that the defendant used its monopoly power in the wholesale market in which it sells access to its local loop to gain a competitive advantage in the retail market for local telephone service. *Id.*

The Second Circuit recognized that its decision conflicts with *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), in which the Seventh Circuit affirmed the dismissal of a similar action on the ground that the antitrust allegations “appear to be inextricably linked to claims under the 1996 Act,” and that the 1996 Act “must take precedence over the general antitrust laws, where the two are covering precisely the same field.” *Id.* at 401.

This case is very significant to all ILECs, because it will determine whether they are subject to antitrust claims by customers contending that they failed to give competing telephone companies sufficient access to their networks – claims that have been raised in many putative class actions that have been filed across the country. Because the Second Circuit’s decision expanded the scope of the essential facilities and monopoly leveraging doctrines and eroded established limits on antitrust standing, the case also is of broader interest to all firms with significant market shares.

Mayer, Brown, Rowe & Maw, which represented the defendant in *Goldwasser*, filed an amicus brief on behalf of BellSouth Corporation, SBC Communications, Inc., and United States Telecom Association in support of petitioner Verizon in this case.

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The Supreme Court requested the views of the Solicitor General in the following case of interest to the business community:

Household Credit Services v. Pfennig, No. 02-857: The question presented is whether the Sixth Circuit erred in ruling that the fee a credit card company charges its customer for each month the customer’s balance exceeds the customer’s credit limit is a “finance charge” that must be disclosed under the Truth in Lending Act.

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