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Supreme Court's *Linkline* and *Trinko* Decisions Result in Tenth Circuit Dismissal of Section 2 Monopolization Case

The Tenth Circuit's recent dismissal of Section 2 monopolization and attempted monopolization claims in *Four Corners Nephrology Associates, P.C. v. Mercy Medical Center of Durango*, -- F.3d ---, 2009 WL 3085882 (10th Cir. Sep. 29, 2009), relied extensively on the Supreme Court's *Linkline* and *Trinko* decisions to hold that: (1) a hospital's refusal to allow a physician access to its nephrology facilities does not constitute anticompetitive conduct under Section 2 of the Sherman Act; and (2) the refusal does not constitute an injury of the type the antitrust laws were intended to prevent.

Four Corners involved efforts by a non-profit hospital defendant, Mercy Medical, to establish the hospital's first nephrology practice in Durango, Colorado. Before Mercy's endeavors, the nearest nephrology services were those provided by the plaintiff, Dr. Bevan, in New Mexico, a three-hour round trip for Durango residents. Although Dr. Bevan held consulting privileges at Mercy, the last time he had actually exercised those privileges was back in 1995. After repeated, unsuccessful attempts to persuade Dr. Bevan to establish a practice in Durango, Mercy managed to recruit another nephrologist. Once the new nephrologist was recruited, Dr. Bevan's consulting privileges at Mercy were automatically terminated pursuant to the hospital's bylaws. Upon learning of the termination, Dr. Bevan then sought to be granted full privileges at Mercy, on par with the newly-recruited nephrologist, despite having declined previous invitations from Mercy. When Mercy rejected Dr. Bevan's request and deemed its newly-recruited neprologist the sole provider of nephrology services at Mercy, Dr. Bevan brought suit, alleging that Mercy's actions amounted to an unlawful monopolization and/or attempted monopolization of the market for nephrology services in the Durango area.

The Tenth Circuit affirmed the district court's granting of summary judgment for Mercy, but on two independent grounds not considered by the district court.

First, the Tenth Circuit followed the U.S. Supreme Court's two recent decisions limiting Section 2 liability, *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S.Ct. 1109 (2009) and *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004), to hold that Mercy's refusal to deal with Dr. Bevan did not constitute anticompetitive conduct within the meaning of Section 2. As the Supreme Court had recently reiterated, the general rule is that a business, even a putative monopolist, has no antitrust duty to deal with its rivals.

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The Tenth Circuit also noted that, at times, Dr. Bevan characterized his claim as one for "monopoly leveraging," *i.e.*, Mercy was unlawfully using its monopoly over inpatient nephrology services to inhibit competition in outpatient dialysis services. While noting that some courts before *Trinko* had held that a monopolist could violate Section 2 by using its monopoly power in one market to achieve a competitive advantage in a second, related market, the Tenth Circuit observed that *Trinko* had rejected a similar "monopoly leveraging" claim where, as here, the only possible anticompetitive conduct is the refusal-to-deal claim already rejected by the Supreme Court.

Additionally, the court explained, Dr. Bevan's claim could also be characterized as an "essential facilities" claim. But, again, a similar claim was rejected in *Trinko*, where the Supreme Court held that Verizon's decision to deny a rival access to its own facilities to maximize its own short-term profits reflected "competitive zeal" rather than "anticompetitive malice." In rejecting Dr. Bevan's "essential facilities" claim, the Tenth Circuit acknowledged another Supreme Court decision, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), where a firm's unilateral refusal to deal with a competitor did in fact state a Section 2 claim. The Tenth Circuit, however, explained that the more recent decisions in *Linkline* and *Trinko* have distinguished *Aspen Skiing* as applying only in narrow circumstances where a firm terminates a voluntary course of dealing with a competitor, thereby suggesting a willingness to forsake short-term profits to achieve an anticompetitive end.

Second, the Tenth Circuit held that Dr. Bevan failed to allege the requisite antitrust injury, *i.e.*, injury to competition. That is, whatever injury Dr. Bevan may have suffered by Mercy's denial of access was no concern of the antitrust laws, "which protect consumers from suppliers rather than suppliers from each other." Indeed, the Tenth Circuit noted, Dr. Bevan's requested relief amounted to nothing more than asking the court to force Mercy to share its putative monopoly with Dr. Bevan, with no guarantee of increased competition or some other benefit to consumers in Durango. In rejecting the possibility that the court could impose certain terms which would ensure increased competition or some other consumer benefit, the Tenth Circuit again cited to the Supreme Court's admonitions in *Linkline* and *Trinko* that courts are ill-equipped to impose price, quantity and other terms of dealing.

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