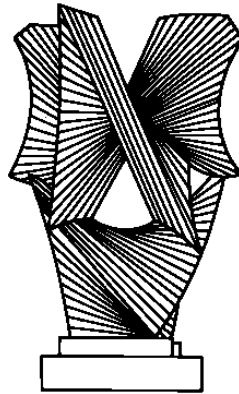


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## Understanding Statutory Bundles: Does the Sherman Act Come with the 1996 Telecommunications Act?

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## Understanding Statutory Bundles: Does the Sherman Act Come with the 1996 Telecommunications Act?

*Randal C. Picker\**

Three recent appellate decisions—*Goldwasser*, *Trinko* and *Covad*—have addressed the interplay of the 1996 Telecommunications Act and the antitrust laws. This area raises questions of both substantive law and standing. This essay focuses on standing and in particular the question of how the antitrust doctrine in *Illinois Brick* should apply to situations in which there is an alleged breach of an access duty owed by an incumbent local exchange carrier. That access duty might arise under the 1996 Act itself or under applicable antitrust doctrines, such as the essential facilities doctrine or the duty to deal with competitors seen in *Aspen Skiing*. The essay sets forth a model of access duties leading to entry and Cournot duopoly and evaluates outcomes when that access duty is breached. The essay discusses various approaches to allocating suit rights depending on the purpose of enforcing the duty. I argue that the *Illinois Brick* doctrine which bars suits by consumers as indirect purchasers should have little application to the breach of access situation as the de facto compensation rationale of *Illinois Brick* won't operate when the entrant has been denied the mandated access.

As we approach seven years under the Telecommunications Act of 1996, we are developing a meaningful case law about how the Act works. The Act has been to the Supreme Court twice—and for better or worse—will probably be back soon.<sup>1</sup> One issue that will almost certainly go to the Court in the near future is the question of how the antitrust laws and the 1996 Act should be integrated. Three appellate courts have addressed this question—two in the last six months—and other circuits will soon get their swings in.

Section I of the paper briefly sets out the issues seen in the three leading appellate decisions. Section II sets out a simple model of the social welfare consequences of an access breach and various approaches to assigning lawsuit rights to entrants and consumers. Section III matches up the results of the model with how the substantive law of antitrust and the 1996 Act interact together and with standing rules for telecommunications and antitrust, and in particular, the antitrust doctrine in *Illinois Brick*, which bars consumers from suing their remote sellers—manufacturers typically but here possibly the local exchange carrier required by the 1996 Act to give access to unbundled network elements.

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<sup>1</sup> *AT&T Corp v. Iowa Utilities Board*, 525 U.S. 366 (1999) and *Verizon Communications v. Federal Communications Commission*, 122 S.Ct. 1646 (2002). For skeptical commentary about the utility the Supreme Court's efforts in those cases, see Douglas Lichtman & Randal C. Picker, Entry Policy in Local Telecommunications: Iowa Utilities and Veri-

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## I. A Quick Tour of the Cases

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To plunge in and set the scene quickly, in mid-2000, the Seventh Circuit issued its decision in *Goldwasser v. Ameritech Corp.*<sup>2</sup> In *Goldwasser*, consumer plaintiffs brought a class-action complaint against their local phone company. The complaint set forth 20 alleged violations of the 1996 Act. These were alleged as violations of the Act itself, and without more, as violations of Section 2 of the Sherman Act, which bars monopolization and attempted monopolization. The plaintiffs sought treble damages for the Sherman Act violations and declaratory and injunctive relief. The district court dismissed the complaint under the filed rate doctrine, which, under certain circumstances, protects from inquiry rates authorized by a regulator,<sup>3</sup> and for lack of antitrust standing.

The Seventh Circuit affirmed the dismissal. The Court noted that while antitrust does impose some obligations on an incumbent to deal with other firms—seen most notably in *Terminal Railroad* and *Aspen Skiing*<sup>4</sup>—those duties are relatively limited. In contrast, the 1996 Act creates broad sharing obligations based on status—status as a local exchange carrier or an incumbent local exchange carrier—without regard to any showing of monopolization under Section 2. Regardless of your views of the controversial essential facilities doctrine,<sup>5</sup> there is little doubt that the detailed access obligations of the 1996 Act go far beyond whatever access rights exist under the antitrust laws, as the Seventh Circuit quickly found. That meant that to just allege a violation of the access rules of the 1996 Act, without more, insufficiently alleged a violation of the Sherman Act.

The Seventh Circuit went on to consider whether a properly alleged essential facilities claim could be maintained notwithstanding the 1996 Act. The plaintiffs indeed did allege that they had made out such claims. The Court held that access obligations imposed through antitrust litigation could conflict with those imposed under the Act by state commissions or the FCC and that the more specific regulations set forth in the 1996 Act took “precedence over the general antitrust laws.”<sup>6</sup> The Seventh Circuit noted that the antitrust savings clause contained in the Act<sup>7</sup> would

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zon (forthcoming, *The Supreme Court Review*, 2003).

<sup>2</sup> 222 F.3d 390 (7th Cir. 2000).

<sup>3</sup> Reaffirmed by the Supreme Court in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986).

<sup>4</sup> *United States v. Terminal Railroad Ass’n*, 224 U.S. 383 (1912); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>5</sup> Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *Antitrust L.J.* 841 (1990); Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak are Misguided*, 68 *Antitrust L.J.* 659 (2001).

<sup>6</sup> *Goldwasser*, 222 F.3d at 401.

operate elsewhere, where less detailed regulation posed less of a potential for conflict between the antitrust laws and the 1996 Act.

The Second Circuit jumped in mid-2002 in its decision in *Trinko*.<sup>8</sup> AT&T had entered into an interconnection agreement with NYNEX pursuant to Sec. 252 of the 1996 Act. That agreement, which was approved by a New York state commission,<sup>9</sup> contained a dispute resolutions clause setting forth the “exclusive remedy” for violations of the agreement. AT&T soon alleged breach and on March 9, 2000, Bell Atlantic—NYNEX’s successor after a merger—entered into a consent decree regarding the alleged violations, plus it paid \$3 million to the United States and \$10 million to AT&T and other competitor for losses.

Soon after that, *Trinko* filed a class action against Bell Atlantic—now Verizon after a merger with GTE—alleging violations of the 1996 Act and the Sherman Act. The district court dismissed based on a conflict between the antitrust laws and the 1996 Act and on the view that *Trinko* was seeking to assert rights that belonged to AT&T. On appeal to the Second Circuit, a number of issues were raised, most of which are not the focus of this essay and which I shall therefore ignore.<sup>10</sup> The Second Circuit turned to whether *Trinko* could satisfy the rules for antitrust standing under the doctrine of *Illinois Brick*, which announced a rule barring indirect purchasers from pursuing antitrust claims against their indirect sellers (a consumer buyer from a retailer didn’t have antitrust standing to sue the manufacturer).<sup>11</sup> I pursue that issue in more detail below. On the antitrust claims themselves, the Second Circuit found that *Trinko* had alleged independent antitrust claims—that is, claims that did not allege antitrust violations merely because of violations of the interconnection rules of the 1996 Act. That distinguished *Trinko* from *Goldwasser*, where the antitrust claims were purely derivative of the 1996 Act.

This therefore squarely presented a situation where the same act might violate both the antitrust laws and the 1996 Act. Under prior Second Circuit caselaw, the court would not find implicit immunity through the 1996 Act from the antitrust laws absent “plain repugnancy.” And for the court to reach that conclusion, it would have to do so in the face of a specific savings clause contained in the 1996 Act which provides that “nothing in this Act or the amendments made by

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<sup>7</sup> 47 U.S.C. § 152, Historical and Statutory Notes.

<sup>8</sup> *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 294 F.3d 307 (2nd Cir. 2002), cert petition pending.

<sup>9</sup> Order Approving Interconnection Agreement, Case 96-C-0723, 1997 WL 410707 (N.Y.P.S.C. June 10, 1997).

<sup>10</sup> These included whether *Trinko* had standing under the Communications Act to assert alleged violations of the anti-discrimination provisions of Sec. 202 of that Act—the Second Circuit found that he did—and whether *Trinko* had standing to assert an alleged violation of Sec. 251, where the court avoided the standing question as it concluded that the defendant had complied with Sec. 251 in entering into an interconnection agreement with AT&T.

<sup>11</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

this Act ... shall be construed to modify, impair or supercede the applicability of any of the anti-trust laws.”<sup>12</sup> The Second Circuit concluded that that makes the plain repugnancy notion an uphill fight.

The Second Circuit then considered the question of how antitrust remedies might intersect with the 1996 Act. The court saw damages in favor of consumers such as *Trinko* as unproblematic, as damages create no conflicting requirements. Indeed, the court viewed damages to *Trinko* as useful “consumer compensation” absent under the 1996 Act.<sup>13</sup> In contrast, the court saw injunctive remedies under the antitrust laws as possibly creating conflicts with the statutory interconnection requirements of the 1996 Act and thus urged “particular judicial restraint.”<sup>14</sup> Finally, the court made clear that it was not addressing the power of a potential entrant to pursue antitrust claims.<sup>15</sup> Instead, at the close of *Trinko*, we have consumers positioned to pursue antitrust claims and potential entrants proceeding under the interconnection regime of the 1996 Act.

One week later, in *Covad Communications Co. v. Bellsouth Corp.*,<sup>16</sup> the Eleventh Circuit held that an entrant could sue under both the 1996 and antitrust law for alleged breaches of interconnection duties. *Covad* properly alleged a series of antitrust claims—essential facilities, refusal to deal and a price squeeze—and the key question was whether those claims were preempted by the 1996 Act. The court followed the analysis in *Trinko*—plain repugnancy required, plus the savings clause analysis—added a tour of the legislative history, and rejected the analysis in *Goldwasser* to the extent that it conflicted with the analysis in *Covad*.

## II. Enforcing Access Rights

As a matter of first principles, it is hard to understand why we could not apply both the 1996 Telecommunications Act and the Sherman Act. Actually, that formulation is a little crude though it captures the spirit of the idea. Imagine access regulations consisting of detailed statutory mandates coupled with general fill-in powers. We normally understand fill-in powers to reflect the considerable costs of specifying ex ante rules that will apply to difficult-to-imagine future states of the world. So we legislate in specifics for the things that we understand now and build in flexibility to address changes in the future. This is a conventional way of describing incomplete contracts written by private parties. We might also understand general powers to allow legislative

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<sup>12</sup> 47 U.S.C. § 152, Historical and Statutory Notes.

<sup>13</sup> *Trinko* at 328.

<sup>14</sup> *Id.* at 329.

<sup>15</sup> *Id.* at 329 n.16.

<sup>16</sup> 299 F.3d 1272 (11th Cir. 2002)

deals to be reached when there might not be agreement on more specific language, where each side is betting on how the regulator will interpret the language.<sup>17</sup>

Note that put this way, we have said nothing about who should make decisions about implementing this mixed scheme of general and specific statutory mandates. One regulator? Two? A mix of federal and state regulators? Courts? Private plaintiffs? Put this way, these are obviously very broad questions that go far beyond the limited aims of this essay. So, to track the issues in *Goldwasser*, *Trinko* and *Covad*, focus on private plaintiffs and consider two natural candidates: the blocked competitor and consumers.

The competitor who does not receive access may—or may not—suffer lost profits. Consumers may be harmed as well, as consumer surplus might be higher absent the access breach. Some harmed consumers will be those who actually consume the end-product. These inframarginal consumers get as much of the good as they would have absent the breach, but they pay more for the good because of the reduction in competition caused by the access breach. From a social standpoint, we need to have a distributional metric to assess these consumers, as output hasn't changed for them and we have just transferred value from these consumers to the incumbent. We have a second group of consumers as well. These are consumers who would have purchased the good at the lower prices that would have resulted from competition under the mandated access.

It might help to have a little toy model to play with to talk through these issues. Consider an industry with a demand curve given by  $p = z - q$ . This obviously is just a very simple linear demand curve. Assume that the incumbent has a fixed marginal cost of  $c$  to produce each unit of the good in question. The incumbent has a blocking position, so absent an entrant gaining access to the incumbent's technology, the incumbent will have a monopoly.

If the incumbent monopolist maximizes profits, with a little math, we have enough information to calculate profits and consumer surplus. These are given by:

$$\Pi^M = \frac{1}{4}(z - c)^2, \quad CS^M = \frac{1}{8}(z - c)^2 \quad (1)$$

Overall social welfare is just the sum of the two.

Now make it possible for entry by giving the entrant access to the relevant technology at a per-unit cost of  $p_a$ . As is standard, we now need to make some assumptions about how the incumbent and the potential entrant will interact. Will the resulting competition be over price (Bertrand competition), perhaps over quantity (Cournot competition) and will it be simultaneous or in sequence (Stackelburg competition). These are standard questions for IO competition models, but

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<sup>17</sup> Cass R. Sunstein, *Incompletely Theorized Agreements* 108 Harv. L. Rev. 1733 (1995).

for now assume Cournot competition. Note now that entry means that the incumbent has two sources of revenue, from consumers from sales in the product market and from the entrant, from per unit input sales.

With a little more math, we can come up with more results. Start with the quantities that will be selected by the incumbent and the entrant:

$$q_i = \frac{1}{3}(z + p_a - 2c), q_e = \frac{1}{3}(z + c - 2p_a) \quad (2)$$

We know of course that the access price will alter the entrant's quantity but note the way in which it also alters the *incumbent's* final quantity. The incumbent's output is increasing in the access price. Higher access prices discourage entry creating greater space for the incumbent to produce.

Turn next to profits to profits and consumer surplus. These are fairly complex, so it might help to focus on a special case, namely where the regulator sets the price of access equal to the marginal cost ( $p_a = c$ ). Note that in that case, the incumbent and the entrant produce the same amount, as they face the same costs and sales to the entrant are neither a source of profit or loss for the incumbent. Profits for the incumbent and the entrant and consumers surplus are given by:

$$\Pi^i = \frac{1}{9}(z - c)^2, \Pi^e = \frac{1}{9}(z - c)^2, CS^a = \frac{2}{9}(z - c)^2 \quad (3)$$

In some sense, what we most care about are the changes relative to the first situation. Those are given by:

$$\Delta\Pi^i = -\frac{5}{36}(z - c)^2, \Delta\Pi^e = \frac{1}{9}(z - c)^2, \Delta CS = \frac{7}{72}(z - c)^2 \quad (4)$$

Together this gives the increase in overall social welfare that results from Cournot entry resulting in a duopoly when the access price is set at marginal cost:

$$\Delta SWF = \frac{5}{72}(z - c)^2 \quad (5)$$

Consumer surplus is up, profits are down and social welfare rises, though by less than the amount of the increase in consumer surplus. Some of the increase in consumer surplus arises from the additional consumers served with more competition. Another chunk of it is just a transfer away from producers to consumers. That part doesn't add to social welfare; only the additional output actually increases social welfare. Note also that entry transfers profits away from the incumbent to the entrant, but, as just noted, competition reduces overall profits to the benefit of consumers.

What does all of this say on our enforcement questions on access? We need to know what we are trying to accomplish. On these assumptions, we should expect the potential entrant to sue if

the incumbent fails to comply with its access obligations, assuming of course that the cost of litigating is less than the lost profits the entrant suffers. Indeed, within the toy model, the potential entrant has a slightly stronger incentive to sue than the consumers (all of  $1/72$ 's difference to be sure). If what we want is specific enforcement of the access obligation, we don't necessarily need both the entrant and the consumers to sue. One mechanism of enforcement may suffice, and all would benefit from the enforcement.

That, of course, suggests that there could be a free rider problem associated with enforcement resulting in specific performance. If we start to factor some chance of legal error, consumers might elect not to bring suit on the hopes that the entrant would pursue its remedies and the entrant might do the same. Of course, one way to solve the free rider problem in that situation is to bar either the entrant or the consumers from bringing suit. If consumers were barred from asserting rights—again, either rights under the 1996 Act or the antitrust laws—we would concentrate the incentive to sue in the potential entrants, though we might need to worry about collective actions in that group as well.

In contrast, if the goal of enforcement is at least partially compensatory, then just allowing one suit would be a mistake. The entrant has lost profits from the wrongful denial of access, while the consumers have lost consumer surplus. The wrongful denial of access harms both, and, as a general matter, when a single act hurts multiple parties, each person gets to sue for their losses. This is particularly relevant here, where the possibility of profits is precisely what induces entry—exactly what the 1996 Act seeks to encourage—and the consumer surplus that flows to consumers from entry is one of the core aims of the Act. The 1996 Act seeks to foster entry to push the benefits of competition to consumers and to minimize the need to regulate prices in the retail market. Other than getting benefits to consumers, there is little reason to embrace the elaborate access rules of the 1996 Act.

Another possible goal is to deter ex ante breach by incumbents through the threat of ex post damages. Would we achieve that if only AT&T could sue in *Trinko* and it could only assert its damages? Quite plausibly not. Look at the formulations in equation (4). The incumbent loses more from competition than the entrant gains (a difference of  $1/36$  times the squared term). The incumbent could afford to pay the entrant's damages and have money left over. This just reflects the fact that as between the incumbent and the entrant, the incumbent's breach is efficient. The incumbent and the entrant don't want to compete since the benefits just flow to the consumers. In that framework, the interconnection agreement and its breach just operate as a mechanism for dividing up the monopoly rents. Suits by consumers alone wouldn't suffice either, as the incumbent loses more from competition than the consumers gain (a difference of  $3/72$  times the squared

term). We actually need the threat of both suits to deter the breach (or, at least the threat that both harms will be asserted).

An alternative approach would be to focus on the extra profits obtained by the incumbent from the access breach and require disgorgement. If we were merely seeking to deter the access breach and were not focusing on compensation to those harmed by the breach, we could assign the right to enforce that remedy to almost anyone. In reality, we would naturally look to entrants, consumers or regulators. Entrants may have the best information about whether a breach has taken place; they after all are squarely in the middle of trying to make the access right work and also have an insider's knowledge of the business. Regulators might see multiple alleged breaches across many cases, and thus would have a large numbers advantage in assessing access breakdowns. Consumers would seem to be least well situated to enforce a disgorgement remedy. They lack direct knowledge of the interaction between the incumbent and the entrant, aren't particularly knowledgeable about the operation of the industry, and may see only one case ever.

Whether we would require a multiplier ala antitrust treble damages depends on what we are trying to accomplish. It would be foolish to take on in this essay the large question of the merits of punitive damages.<sup>18</sup> Consider the under-detection rationale for punitive damages, namely, that imperfection detection of violations creates an incentive to breach even in the face of a disgorgement remedy, since some of the time the breacher will get away with it. Damage multiplying—treble damages or punitive damages generally—might adjust for that to restore a sufficient ex ante penalty to deter breach.<sup>19</sup>

We should think rationale has little role to play here, suggesting little reason for damage multipliers. Entrants should detect breaches naturally. They are calling the incumbent day by day to gain access to lines and other unbundled network elements. To be sure, the entrants may face some uncertainty, but this could just as easily result in too many claims for breach as in too few.

Here is what all of this suggests. If we are just looking for an injunction ordering performance of the access right, we can assign the right to sue to either the entrant or the consumers. It may make sense to assign it to one or the other to avoid free-riding issues, and the entrant is almost certainly better situated to know whether an access breach has taken place. If we are looking to deter breach through disgorgement, if we believe that avoiding multiple liability is important—as

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<sup>18</sup> See Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages*, 107 *Yale L.J.* 2071 (1998); A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 *Harv. L. Rev.* 869 (1998).

<sup>19</sup> For a discussion along these lines for antitrust treble damages, see Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* 646 (2nd ed., West Group, 1999).

we often do<sup>20</sup>— we should again assign the right to sue and the entrant again has better information. In the alternative, we could deter breach and compensate those harmed by the access breach by letting the entrant sue for lost profits and the consumers sue for lost consumer surplus. At least within the confines of the model, these amounts are quite distinct and readily separable. Nothing in the analysis suggests a role for damage multipliers based on the need to gross up damages to adjust for undetected breaches, as we should expect entrants to catch breaches in ordinary course.

### III. Matching the Model and the Law

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The discussion so far has been fairly abstract. The model in Section II traces out the consequences of an “access breach” which results in less competition than would otherwise take place and assesses ways of (i) calculating damages/penalties depending in part on whether we are seeking to compensate those harm or just deter breaches in the first place, and (ii) assigning enforcement rights depending on why we are trying to accomplish. Both the incumbent and the entrant can set price to consumers, though I did treat the access price by the entrant as being set by regulators. We should consider how this abstract set up matches with the substantive law of access and standing doctrine.

#### *A. Integrating Antitrust Substantive Law and the 1996 Act*

*Goldwasser*, *Trinko* and *Covad* consist of the standard antitrust claim soup, a mix of things thrown together in the hopes that something good will result. Goldwasser seemingly stated no independent antitrust claims, apparently in the hope that he could make the possibly easier showing of a breach of the 1996 Act’s access rules and then morph that into an antitrust violation. The Seventh Circuit appropriately saw through that: access “rights” under the antitrust laws are notoriously difficult to pin down and require a substantial showing of market power and typically depend on the existence of an essential facility. The 1996 Act just imposes access rights on an assortment of local exchange carriers, and so there is a large difference between the substantive antitrust doctrine of access and that under the 1996 Act.

Of course, Goldwasser just pled poorly, or more likely, strategically. *Trinko* did better, or at least the Second Circuit thought that he did. The court saw in the complaint a possible essential facilities claim and a possible monopoly leveraging claim. Certainly a careful complaint could allege an essential facilities claim, as such claims have succeeded before when telcom entrants have sought access to an incumbent’s facilities.<sup>21</sup> The monopoly leveraging claims turns on the

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<sup>20</sup> See William M. Landes & Richard A. Posner, Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*, 46 U. Chi. L. Rev. 602 (1979) and the cases cited therein.

<sup>21</sup> *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

idea that Bell Atlantic had monopoly power in the wholesale market for local loop access and that it was seeking to leverage that power into a competitive advantage in the retail market.

Finally, Covad adds to the essential facilities claims a distinct refusal to deal claim based upon alleged denied access and a price squeeze claim based on wholesale prices that were alleged to be impermissibly high. The refusal to deal claim emerges from the fact that in *Aspen Skiing*, the Supreme Court specifically disclaimed reliance on the essential facilities doctrine in finding that Aspen Skiing had a duty to deal with its competitor.<sup>22</sup> As if one uncertain antitrust access doctrine wasn't enough!

We should consider the ways in which these antitrust claims might conflict with the 1996 Act. For our purposes, the independent antitrust status of these claims probably shouldn't matter too much. So, for example, whether monopoly leveraging is or isn't a good antitrust doctrine is separate and apart from how it should intersect with the 1996 Act. Our concern should be the way in which enforcing otherwise applicable antitrust doctrines might undercut the operation of the Sec. 251 access rules.

As suggested above, I find no conceptual conflict between the detailed access rules of Sec. 251 and the contingent, general access rules of antitrust law. In the law, we often set forth a series of particular rules and confer on an authority—be it court or regulator—the ability to fill in gaps. When we do that, we routinely face the issue of how to police the regulators to ensure that they are honestly filling in the terms of the intentionally incomplete scheme set forth by Congress and not overturning that scheme.

The cases suggest that the courts are sensitive to these issues. The antitrust savings clause of the 1996 Act suggests that the courts have the duty to continue to apply antitrust law to access situations. The *Trinko* majority captures this exactly when it expresses concern about injunctive relief “disrupting the regulatory scheme” and the need for courts to exercise restraint where injunctive relief is appropriate.<sup>23</sup>

### *B. Standing*

Section II focused on the consequences of an access breach. Quite intentionally, nothing in that analysis turns on the source of the duty, that is, whether the access obligation flows from antitrust or from the 1996 Act. The lost profits and consumer surplus follow from the denial of access that allows the monopoly to continue.

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<sup>22</sup> *Aspen Skiing*, 472 U.S. at 611 n. 44 (1985).

<sup>23</sup> *Trinko* at 330.

We have two standing questions to consider. The first is purely internal to telecommunications law, namely, who has standing to assert claims for violations of the interconnection rules set forth in Sec. 251. The analysis in Section II suggests that standing rules should follow quickly on once we figure out our general approach to remedies for access breaches. There is little reason to think that that analysis should not carry over as well to telecommunications law proper. That is not my focus here, so I will not pursue it, especially since the disagreement in *Trinko* between the majority and the dissent suggests that the statutory and doctrinal issues are not simple.

So turn instead to the antitrust standing rule set forth in *Illinois Brick*. That case bars indirect purchasers from pursuing antitrust actions “up the chain,” so a consumer buying from a retailer who in turn had purchased from a manufacturer could not sue the manufacturer. *Illinois Brick* meshes with *Hanover Shoe*<sup>24</sup> in which the Supreme Court held that a defendant in an antitrust action could not bar a claim on the basis that the overcharged plaintiff had been able to “pass on” the overcharges to its customers and hence had suffered no damages from the antitrust violation.

The rule in *Illinois Brick* is typically defended as avoiding the risk of multiple liability.<sup>25</sup> At least within the stark confines of the model here, we don’t face that problem. We can cleanly separate out the lost profits that a potential entrant will suffer from the reduction in consumer surplus inflicted on consumers who lose the benefit of competition between the incumbent and the entrant.

In *Trinko*, the Second Circuit noted that the interconnection cases present a different setting than that usually addressed by *Illinois Brick*. AT&T did purchase inputs from Bell Atlantic, but it was not “solely” a customer of Bell Atlantic. Instead, local loop access in hand, AT&T immediately competed with Bell Atlantic.<sup>26</sup> This sufficed, in the Second Circuit’s view, to take *Trinko* outside of *Illinois Brick* so as to permit *Trinko* to satisfy the standard for antitrust standing.

We should consider this analysis. The conventional defense of *Illinois Brick* focuses on the expected behavior of the firm purchasing the input, which is then resold to consumers. The purchasing firm realizes that it is being overcharged; that each purchase brings with it treble damages which therefore effectively lowers the price of the input; and that competition among input purchasers pushes the benefits of the damages claim to consumers.<sup>27</sup> The success of this mechanism obviously depends on a fine sense of how antitrust works—oh good, we have noticed that they

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<sup>24</sup> *Hanover Shoe Co. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

<sup>25</sup> See Landes and Posner, *supra* note 20.

<sup>26</sup> *Trinko* at 324-25.

<sup>27</sup> See Landes and Posner, *supra* note 20, at 605-06.

are overcharging us, so go buy more and announce a sale price for our customers—but there is a more basic point as we try to carry this analysis to the interconnection access rules.

This vision of *Illinois Brick* assumes ready access to the input. The whole point of the 1996 Act's interconnection rules is that entrants find a hard time getting access. In the extreme case, the denial of access is total and no damages are passed to consumer's buying from the entrant because there is no entrant and there are no sales by the entrant. In the less extreme case, the denial of access is at least partial. Moreover, in the situation addressed by the 1996 Act, competition is minimal, so there may be no press to pass on damages to customers, plus it is uncertain whether the entrant can actually assert antitrust damages at all. Recall that *Trinko* didn't face this issue and left it open, while *Covad* clearly holds that an entrant can assert antitrust claims. Put slightly differently, this is not an overcharge situation. To the extent that the entrant is able to get access, the price of access will be set pursuant to the pricing rules of Sec. 252 as implemented by state public utility commissions. And that price may very well be protected from inquiry under the filed rate doctrine.

We should step back to see how well this analysis meshes with Supreme Court doctrine, especially as seen in the Court's last extended look at *Illinois Brick, Kansas v. Utilicorp United, Inc.*<sup>28</sup> In that case, the Court declined to carve out an exception for regulated industries to the general rule in *Illinois Brick*. Kansas and Missouri sought to assert parens patriae claims on behalf of residential consumers who bought natural gas from regulated public utilities. The states argued that the utilities passed through 100 per cent of their costs, and hence, if natural gas producers had overcharged the utilities, consumer should recover.

The states also argued that the harms to the utilities and the consumers were separable and therefore there was no risk of multiple recoveries. The Court declined to consider that point, believing that the additional litigation burdens of allowing more parties dwarfed any possible benefit of doing so.<sup>29</sup> That was especially true, in the Court's view, as the new litigants who would be added under the proposed exception—consumers—lacked expertise and experience.<sup>30</sup>

Finally, the Court saw a substantial burden in embracing a case-by-case, industry-by-industry inquiry into whether *Illinois Brick* would apply. The core point of *Illinois Brick* was to simplify already complex antitrust litigation. Any exception to the rule would require a substantial inquiry as to whether the exception had been met or not, and that would increase the burden on the courts and on litigants.

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<sup>28</sup> 497 U.S. 199 (1990).

<sup>29</sup> *Id.* at 213.

I am not sure that there is a particularly good response to that. There might be much to be said in favor of a “balanced budget” approach to doctrinal wrinkles. So you want to add an exception to *Illinois Brick*? That will increase burdens on courts and litigants, so what other doctrine are you willing to give up to pay for the new wrinkle? It is folly to think that we can continually add doctrinal refinements and not suffer any cost—either direct litigation costs or error costs—from the increased complexity. That is the Court’s essential message in *Utilicorp United* and I am hard-pressed to believe that the Court is wrong.

It may be too slick a response to say that we can avoid that here by treating the issue in *Trinko* as being about telecommunications standing. The idea would be to leave *Illinois Brick* alone in antitrust, but when we approach to the question of standing proper in telecommunications, ignore the underlying message of the *Illinois Brick* cases and allow both entrant and consumers to sue. It is perhaps fair to say that the Court’s concern in *Utilicorp United* was the classification burden of a case-by-case *Illinois Brick*. If Congress chooses to do that classification for the courts—as it could through clear standing rules in telecommunications regarding entrants and consumers—the case-by-case burden would be avoided.<sup>31</sup>

## Conclusion

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The recent telecommunications trio of *Goldwasser*, *Trinko* and *Covad* raise interesting questions about the intersection of antitrust law and the 1996 Telecommunications Act. There are some nice questions about how to interleave the substance of the two regimes, but I have not considered those issues here. Instead, I have focused on the standing issues posed by a breach of an access obligation. As just a matter of analytics, I think there is much to be said in favor of calling off the standard *Illinois Brick* rule in the breach of access situation. In the extreme case of a full breach of the access duty, there is no way in which the pass through idea that supports *Illinois Brick* can function. Instead, consumers are harmed through any incremental market power that the incumbent can exercise because of the competition avoided though the denial of access. Whether we would want to confer standing on consumers would then depend on making precise what we were seeking to accomplish through our antitrust remedies—for example, deterrence of breach vs. compensation for those breaches.

That said, the Supreme Court has expressed an understandable reluctance to add wrinkles to the *Illinois Brick* doctrine. I do not know exactly how many refinements to antitrust doctrine we

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<sup>30</sup> *Id.* at 215.

<sup>31</sup> Again, I haven’t considered here whether Congress has actually done this in the 1996 Act itself on the question of standing to assert breach of the access duties of the Act.

can afford, but I do think that the Supreme Court is well-situated to gauge when enough is enough. That we have already reached that point seems to be the central message of *Utilicorp United*, one that comes across sufficiently loudly that even a relatively tone-deaf academic can hear it.

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