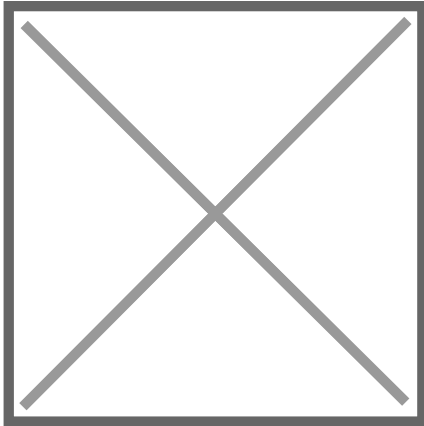

SEC v. Edwards (02-1196), Verizon Communications v. Law Offices of Curtis Trinko (02-682), Illinois v. Lidster (02-1060) and Regal Cinemas Inc. v. Stewmon (03-641)

Greetings Court fans!

Three opinions today, and some follow-up from yesterday's order list. I'll begin with the opinions

First, in ***SEC v. Edwards*** **(02-1196),** a unanimous Court held that a moneymaking scheme that offers a fixed (rather than a variable) rate of return can be an investment contract and thus a "security" subject to federal securities laws. Mr. Edwards sold payphones to the public under a sale/lease-back arrangement. For an initial investment of $7000, purchasers received $82/month. Unsurprisingly, this business plan failed and Edwards' company went broke. (When was the last time you saw a payphone?) The SEC sued Edwards alleging that he had violated various securities laws, but he countered that his scheme was not subject to the securities laws because it offered a fixed rate of return. Specifically, he argued that it was not an investment contract and thus not a "security" subject to regulation. Although the Eleventh Circuit agreed with him, the Supreme Court reversed. In an opinion by Justice O'Connor, the Court noted that the purpose of the securities laws was to regulate *investments*, in whatever form they were made. To this end, the Court had established the test for investment contracts in *SEC v. WJ Howey*. Under that test, the question is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. After perusing the background and application of this test over the years, the Court concluded that there was nothing in this test that would distinguish between promises of fixed returns and promises of variable returns. Thus, as the SEC has consistently held, a scheme offering a fixed rate of return can be an investment

contract. End of story.

Second, in another case involving phones, ***Verizon Communications v. Law Offices of Curtis Trinko*** **(02-682),** the Court held that a party cannot state a claim for violation of the antitrust laws merely by claiming that the defendant violated sections of the Telecommunications Act (the Act). The Act was an ambitious attempt to introduce competition into telecommunications. Much simplified, the Act requires the incumbent phone companies (here, Verizon) to share their networks with competitors, who may then resell telephone services to the public. This obligation is enforced by state public utility commissions (regulating the agreements between incumbents and competitors) and the FCC (regulating incumbents' access to the long distance market in part by requiring the incumbents to share their networks). Although Verizon took steps to share its network with AT&T and others in New York, the competitors complained that Verizon was not fulfilling its statutory obligations. Ultimately, these complaints were resolved by a series of orders from the state commission and a consent decree with the FCC. The day after Verizon entered the consent decree, respondent — a customer of AT&T — filed suit against Verizon claiming that its failure to play nicely with AT&T as required by the Act violated Section 2 of the Sherman Act. The Second Circuit rejected Verizon's motion to dismiss this claim, but today the Supreme Court reversed.

In an opinion by Scalia (for everyone but Stevens, Thomas and Souter), the Court began by noting that an express savings clause in the Act precluded any argument that the Act created a form of antitrust immunity. The question is thus whether Verizon's conduct violates the antitrust laws. Specifically, the question is whether Verizon's alleged refusal to share its network with its rivals violates the antitrust laws even though the law usually does not force competitors to cooperate with each other. In answering this question in the negative, Scalia took pains to limit the leading case finding liability in a refusal-to-deal, *Aspen Skiing*, describing that decision as "at or near the outer boundary of [section] 2 liability." Verizon's conduct, according to Scalia, does not fall with the limited refusal-to-deal exception. Verizon had not voluntarily engaged in any course of dealing with its rivals, and more fundamentally, unlike *Aspen Skiing*, the services that Verizon had allegedly refused to provide were not otherwise available to the public. Thus, Verizon's alleged insufficient assistance in the provision of service to rivals does not state a claim under the refusal-to-deal principles. Scalia noted also that this conclusion would not change if the Court were to consider the claim under an "essential facilities" theory. The Court refused to recognize or repudiate that theory, noting only that that theory is inapplicable where (as here) access to the facilities exists through the Act. Finally, Scalia concluded the opinion by rejecting any argument that the Court should create a new exception to the proposition that there is no duty to aid competitors. In reaching this conclusion, Scalia placed heavy emphasis on the presence of a regulatory structure designed to deter and remedy anticompetitive conduct, a structure that worked in this case. This expert regulatory structure is far superior, according to Scalia, to blunt judicial regulation through the antitrust laws.

Justice Stevens (for himself, Souter and Thomas) concurred. He would have found that respondent, as the customer of a competitor, lacked antitrust standing and would not have reached the merits of the claim.

Third, in ***Illinois v. Lidster*** **(02-1060),** the Court upheld the constitutionality of a police checkpoint. After a hit-and-run accident, police set up a roadblock to stop motorists and ask for their assistance in solving the crime. Lidster was stopped by the roadblock and was quickly arrested for driving under the influence. On appeal, Lidster claimed that the roadblock violated the Fourth Amendment and the Illinois Supreme Court agreed. Today, in an opinion by Breyer (for everyone but Stevens, Souter and Ginsburg), the Court reversed. Breyer began by rejecting the argument that *Indianapolis v. Edmond* controlled this case. In *Edmond*, the police had set up a checkpoint to look for evidence of crime, and the Court held that that checkpoint violated the Fourth Amendment. This case is different, according to Breyer because the purpose of the stop was not to find out if the drivers had committed crimes but rather to ask for help in solving a crime. Information-seeking highway stops are less intrusive and less likely to provoke anxiety. Breyer concluded the opinion by holding that the checkpoint was reasonable and thus constitutional. The police were investigating a crime that resulted in a human death, the checkpoint advanced the police investigation, and the stops

were brief. Under these circumstances, there was no Fourth Amendment problem. Justice Stevens (joined by Souter and Ginsburg) agrees that *Edmond* does not control but would not have reached the reasonableness issue. Stevens would remand to the Illinois Supreme Court to decide that issue in the first instance.

Finally, yesterday, the Court asked the Solicitor General to weigh in on the application and enforceability of Dept. of Justice regulations that implement the Americans with Disabilities Act as applied to movie theaters. ***Regal Cinemas Inc. v. Stewmon*** **(03-641).**

That's all for now. Thanks for reading!

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