



THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

Price Squeeze Claims Succumb to Need for “Clear Rules”

Thomas Barnett, Shimica Gaskins, and John Graubert

Covington & Burling, LLP

Price Squeeze Claims Succumb to Need for “Clear Rules”

Thomas Barnett, Shimica Gaskins, and John Graubert*

In February, the United States Supreme Court in *linkLine*¹ rejected “price squeeze” claims of illegal monopolization—further undermining the continuing viability of Judge Learned Hand’s decision in *Alcoa*.² The decision eliminates all price squeeze antitrust claims against defendants that have no antitrust duty to deal with competitors and reinforces several trends in recent Supreme Court decisions in the antitrust area. The implications of the decisions are most clear in industries subject to regulatory oversight.

I. PACIFIC BELL TELEPHONE CO. V. LINKLINE COMMUNICATIONS, INC.

Prior to 2005, the Federal Communications Commission (“FCC”) required local phone companies to provide independent internet service providers (“ISPs”) access to their networks and equipment. Petitioner, Pacific Bell Telephone Co. (“AT&T”), owned the necessary facilities to provide digital subscriber line (“DSL”) service. As a condition for a recent merger, the FCC required AT&T to continue to provide wholesale DSL service to ISPs.³

Respondents were four ISPs in California who were AT&T’s competitors in the retail market. They needed access to AT&T’s facilities to supply DSL service to their own customers and, therefore, entered into contracts with AT&T allowing Respondents access to AT&T’s DSL transport service at wholesale prices.⁴ Respondents filed suit under § 2 of the Sherman Act alleging that AT&T was “squeezing” them out of the retail market for DSL service. Respondents alleged that AT&T set wholesale prices at so high a price relative to the price of its retail DSL service that Respondents could no longer compete with AT&T at the retail level. According to Respondents, this price squeezing behavior violated antitrust law by placing them at a competitive disadvantage and allowing AT&T to unlawfully monopolize the retail DSL market.⁵

*The authors practice in the Antitrust and Consumer Protection Group at Covington & Burling, LLP. Mr. Barnett participated in the *amicus* filings in the Supreme Court by the Department of Justice in the *linkLine* case.

¹Pacific Bell Telephone Co. v. linkLine Communications, Inc., 129 S. Ct. 1109 (2009).

²United States v. Aluminum Co. of America² (148 F.2d 416 (2d. Cir. 1945).

³*linkLine*, *supra* note 1 at 1115.

⁴*Id.*

⁵*Id.*

After the Respondents' filed their complaint, the Supreme Court issued its decision in *Trinko*.⁶ The *Trinko* case concerned Verizon's provision of certain services to companies that sold retail telephone services in competition with Verizon. Similar to the situation in *linkLine*, the FCC required Verizon to provide these services to its rivals. The plaintiffs alleged that "Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers" of its competitors, making it difficult for its rivals to compete in the market.⁷ The alleged conduct likely could have violated Verizon's FCC obligations. The Supreme Court held that the existence of an FCC obligation to provide services to a competitor did not create an antitrust duty to deal and that establishing a violation of the FCC obligation therefore did not establish a violation of the antitrust laws.⁸

On the heels of *Trinko*, AT&T moved for judgment on the pleadings.⁹ The district court found that AT&T, like Verizon, had an FCC duty to deal with its competitors, but not an antitrust duty to deal with the Respondents. The court nevertheless found that *Trinko* did not foreclose a price squeeze claim. At the district court's behest, Respondents then filed an amended complaint providing greater detail about their price squeeze claims, and AT&T moved to dismiss.¹⁰ Finding that Respondents' amended price squeeze allegations could be construed to meet the elements of a predatory pricing claim under *Brooke Group*, the district court denied the motion without deciding whether Respondents' were required to meet the *Brooke Group* standard.¹¹

On interlocutory appeal of the district court decision on the first complaint, the Ninth Circuit affirmed. The Ninth Circuit accepted that AT&T had no antitrust duty to deal with Respondents, but reasoned that *Trinko* had not involved a price squeezing theory and that price squeeze claims were a part "of the fabric of traditional antitrust law" that survived *Trinko*.¹² While acknowledging that the *Trinko* decision might preclude some price squeeze claims, the court provided little guidance on what price squeeze claims should survive when there is no antitrust duty to deal.

In a dissenting opinion, Judge Gould noted that "the notion of a 'price squeeze' is itself in a squeeze" between *Trinko* and *Brooke Group*.¹³ Judge Gould concluded that

⁶Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

⁷*Id.* at 404.

⁸*Id.* at 410.

⁹*linkLine*, *supra* note 1 at 1116.

¹⁰*Id.*

¹¹See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (holding that predatory pricing claims must meet two requirements: below cost retail pricing and a "dangerous probability" that the defendant will recoup any lost profits).

¹²*linkLine Communications, Inc. v. SBC California*, 503 F.3d 876, 883 (9th Cir. 2007).

¹³*Id.* at 886.

Respondents' amended complaint failed to meet *Trinko* or *Brooke Group's* requirements and that as a result, they could not sustain their so-called "price squeezing" claim.¹⁴

The Ninth Circuit's holding conflicted with the District of Columbia Circuit, which had held that *Trinko* bars price squeeze claims when the defendant has no antitrust duty to deal.¹⁵ In granting certiorari, the Supreme Court stated the issue clearly: "[W]hether a plaintiff can bring price-squeeze claims under § 2 of the Sherman Act when the defendant has no antitrust duty to deal with the plaintiff."¹⁶ In an opinion written by Chief Justice Roberts and joined by Justices Kennedy, Thomas, Scalia, and Alito, the Court found that price squeeze claims are *not* cognizable under the Sherman Act in the absence of an antitrust duty to deal. In so deciding, the Court focused on the first complaint and rejected Respondents' key assertion: That AT&T "must leave [Respondents] a 'fair' and 'adequate' margin between the wholesale price and retail price."¹⁷

Respondents claimed that AT&T abused its alleged monopoly power in the upstream (wholesale) market, but the Court stated that "[a] straightforward application of [its] recent decision in *Trinko* forecloses any challenge to AT&T's wholesale prices."¹⁸ Like *Trinko*, AT&T's duty to deal with Respondents only arose from FCC regulations, not antitrust law. And, under *Trinko*, without an antitrust duty to deal with, AT&T certainly has no obligation "to deal under terms and conditions favorable to its competitors."¹⁹

The Court also found no support in existing antitrust doctrine for Respondents' assertion that AT&T's retail prices were "too low."²⁰ To the contrary: "[C]utting prices in order to increase business is often the *very* essence of competition."²¹ (emphasis added). Accordingly, "[t]o avoid chilling aggressive price competition," the Court held, an antitrust plaintiff must prove predatory pricing claims under the *Brooke Group* standard, which requires showing that: "(1) 'the prices complained of are below an appropriate measure of [the defendant's] costs'; and (2) there is a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below cost prices."²² Thus, because Respondents failed to allege that AT&T's conduct met the *Brooke Group* standard, the

¹⁴*Id.* at 887.

¹⁵*See Covad Comm. Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673-674 (D.C. Cir. 2005).

¹⁶*linkLine*, *supra* note 1 at 1116-17.

¹⁷*Id.* at 1118. The Court noted some uncertainty as to whether the amended complaint was properly before the Court and rendered its decision based on a review of the first complaint. *Id.* at 1122 n.4. The Court also found unavailing efforts by the Respondents to render the case moot by representing that they would seek to meet the *Brooke Group* standards on remand. *Id.* at 117-18.

¹⁸*Id.* at 1119 (emphasis in original).

¹⁹*Id.*

²⁰*Id.* at 1120.

²¹*Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

²²*Id.* (quoting *Brooke Group*, *supra* note 11 at 222-24).

Court found that Respondents' price squeeze claim was "nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level."²³ The case was remanded to the district court to determine whether Respondents' amended complaint "states a claim . . . in light of the new pleading standards . . . in [Twombly,²⁴ and] whether plaintiffs should be given leave to amend their complaint to bring a claim under *Brooke Group* [.]"²⁵

Concurring in the result, Justice Breyer, writing for Justices Stevens, Souter, and Ginsburg, would have decided the case on a much narrower ground: A firm that purchases from a "regulated" firm, like AT&T, "cannot win an antitrust case simply by showing that it is 'squeezed' between the regulated firm's wholesale price . . . and its retail price[.]"²⁶ Moving beyond the views he expressed in *Town of Concord*,²⁷ where then-Circuit Judge Breyer found that regulation of both the wholesale and retail price obviated the risk of anticompetitive effects, Justice Breyer expressed confidence that regulation of the wholesale price alone would be sufficient.

II. IMPLICATIONS OF *LINKLINE*

A. *No Antitrust Duty to Deal, No Price Squeeze Claim*

Under *linkLine*, a plaintiff cannot bring a price squeeze claim when the defendant has no antitrust duty to deal with the plaintiff. In most cases, the presence of a regulator with jurisdiction to compel and regulate such dealings precludes an antitrust duty to deal. Thus, vertically-integrated companies subject to regulation with respect to competitor access should no longer fear price squeeze claims under the federal antitrust laws.

While the Court left open the possibility of other antitrust claims, such as predatory pricing claims that meet the standards set forth in *Brooke Group*, the reasoning in the decision raises some question about the viability of such other claims in this context. The *linkLine* Court reasoned that "[i]f AT&T had simply stopped providing DSL transport service to the [Respondents], it would not have run afoul of the Sherman Act."²⁸ Therefore, AT&T could not run afoul of the Sherman Act when it merely provided service to Respondents at prices they did not like.²⁹ Such a statement raises questions as to whether even predatory pricing claims are viable in this situation. If AT&T could have refused to deal with Respondents, which would have eliminated them from the retail DSL market, it is not clear that the Court would find a violation of the

²³*Id.*

²⁴*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

²⁵*linkLine*, *supra* note 1 at 1123.

²⁶*Id.* at 1124 (Breyer, J., concurring).

²⁷*Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990).

²⁸*linkLine*, *supra* note 1 at 1119.

²⁹*Id.*

antitrust laws if AT&T were to eliminate those Respondents from the retail market by any other means, including charging “predatorily” low retail prices.

B. The Role of Antitrust Law Absent A Regulatory Scheme

In the wake of *linkLine*, commentators have characterized the decision as the “death of the price squeeze offense.”³⁰ Such a statement may go too far. The key premise in both the *Trinko* and *linkLine* decisions was the absence of an antitrust duty to deal.³¹ This premise is likely to apply whenever there is a regulatory structure capable of addressing compulsory access between competitors. Outside the context of a regulated industry, the Court has left open the possibility that an antitrust duty to deal could exist, which would imply that a price squeeze claim might also be viable in such a circumstance.

The significance of this distinction may, however, have little practical importance for two reasons. First, the same set of facts that would support a price squeeze claim likely would, in many cases, support a claim for a *de facto* refusal to deal. Therefore, if the defendant has an antitrust duty to deal with a competitor, it faces antitrust risks from that duty regardless of whether it has a separate duty to avoid price squeezes.

Second, the circumstances under which antitrust duties to deal arise are extremely limited. The only Supreme Court decision finding a duty to deal remains *Aspen Skiing*.³² While the decision has not been overturned, the Court has described *Aspen Skiing* as “at or near the outer boundary of § 2 liability.”³³

C. The Status of Alcoa

One highly anticipated aspect of *linkLine* was the Court’s treatment of Judge Learned Hand’s decision in *Alcoa*.³⁴ Indeed, the Federal Trade Commission had taken the highly unusual step of issuing a public statement disagreeing with the *amicus* brief filed by the Solicitor General in *linkLine* and endorsing the continuing validity of the *Alcoa* decision. At oral argument, in response to a specific question from Justice Stevens, the advocate from the Solicitor General’s office indicated that the Court should overturn Judge Hand’s finding of price squeeze claims as an independent antitrust theory.³⁵ The Court’s decision certainly went far to undermine the continuing validity of *Alcoa*, but the Court limited itself to observing that, “[g]iven the developments in economic theory and

³⁰Press release, American Antitrust Institute, Death of The “Price Squeeze” Offense (February 27, 2009).

³¹*Trinko*, *supra* note 6 (finding that Verizon did not have a duty to deal in terms favorable to its competitors); *see also linkLine*, *supra* note 1 at 1119.

³²*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985).

³³*Trinko*, *supra* note 6 at 399.

³⁴*Alcoa*, *supra* note 2.

³⁵*Linkline*, *supra* note 1, Transcript of Oral Argument at 20.

antitrust jurisprudence since *Alcoa*, we find our most recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us.”³⁶

D. Clear and Workable Rules

linkLine continues the Court’s steady march, for over a decade, to articulate clear and administrable rules in Section 2 cases. Justice Roberts’ opinion explicitly noted that the Court has “repeatedly emphasized the importance of clear rules in antitrust law.”³⁷ In cases like *Trinko*, *Brooke Group*, *Nynex*,³⁸ and *Weyerhaeuser*,³⁹ the Court has striven to simplify difficult antitrust issues.

This effort addresses serious concerns with the administration of §2. One key advantage of clear rules is “clear specification of outcomes in advance.”⁴⁰ Businesses can conform their conduct more readily to clear and understandable guidelines, and counselors can advise their clients with more confidence when the relevant law is as objective as possible.

Perhaps more important, the Court is plainly concerned with the risk of enmeshing the courts in an unadministrable quagmire of regulating terms of dealing. Clear rules ensure that individual judges do not police wholesale and retail prices and “act as central planners, identifying the proper price, quantity, and other terms of dealing.”⁴¹ (One can only imagine how courts would differ in deciding, for instance, what constitutes a “proper” price.) As the *linkLine* Court noted, “It is difficult enough for courts to identify and remedy an alleged anticompetitive practice at one level, such as predatory pricing in retail markets or a violation of a duty-to-deal doctrine at the wholesale level.”⁴² Ascertaining a proper “margin” of profit that would be “fair” to competitors is even more challenging. In declining to permit courts to address such issues, the Court adhered to the admonition that “[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.”⁴³ Given that all of the justices have endorsed the desire to craft clear and workable rules for antitrust, we should expect to see continued emphasis on this concern for the indefinite future.

³⁶*Id.* at 1120 n.3.

³⁷*Id.* at 1120-21.

³⁸*Nynex Corp. v. Discon Inc.*, 528 U.S. 128 (1998).

³⁹*Weyerhaeuser v. Ross Simmons Hardwood Co.*, 549 U.S. 312 (2007)

⁴⁰See Cass Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1087 (2009).

⁴¹*linkLine*, *supra* note 1 at 1120-21.

⁴²*Id.*

⁴³*Id.* at 1121.