



## ANTITRUST UPDATE | FEBRUARY 27, 2009

### PACIFIC BELL TELEPHONE CO. V. LINKLINE COMMUNICATIONS, INC.: THE SUPREME COURT REJECTS PRICE SQUEEZES AS AN ANTITRUST THEORY

#### OVERVIEW

In *linkLine*, the question before the Supreme Court was “whether . . . a price-squeeze claim may be brought under §2 of the Sherman Act when the defendant is under no antitrust obligation to sell the inputs to the plaintiff in the first place.” On February 25, 2009, the Court held “no such claim may be brought.”

#### BACKGROUND

The petitioner AT&T was a provider of digital subscriber line (“DSL”) service which owned much of the infrastructure and facilities needed to provide DSL service in California, but which was required, as a regulatory matter, to provide wholesale service to competitors including plaintiffs. The plaintiffs alleged that AT&T “squeezed” their margins by charging them a high price for wholesale DSL service while charging its own customers a low retail price, which left no room for the independent providers to compete profitably. The district court held that AT&T had no antitrust duty to deal with plaintiffs, but denied AT&T’s motions to dismiss the price squeeze claims. The district court also certified for interlocutory appeal the question whether “*Trinko* bars price squeeze claims where the parties are compelled to deal under the federal communications laws.” Affirming the district court, the Ninth Circuit held that plaintiffs could state such a claim because “a price squeeze theory formed part of the fabric of traditional antitrust law prior to *Trinko*.”

#### IN THE SUPREME COURT

A unanimous Supreme Court reversed, holding that the plaintiffs were foreclosed from challenging allegedly inflated wholesale prices by a “straightforward application” of the Court’s 2004 *Trinko* decision and must meet the very high *Brooke Group* test to prevail on their challenge to allegedly unfairly discounted retail prices.

Setting the stage, the Court stated that there are “rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct,” such as charging “predatory” prices (“below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses”) or in the “limited circumstances” in which a firm’s unilateral refusal to deal falls within *Aspen Skiing* based on a prior profitable course of dealing. Here, the Court observed, the challenge “focuses on retail prices—where there is no predatory pricing—and the terms of dealing—where there is no duty to deal. Plaintiffs’ price-squeeze claims challenge a *different* type of unilateral conduct in which a firm ‘squeezes’ the profit margins of its competitors.” The Court, applying *Trinko*, then rejected the challenge to high wholesale prices because “a firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors.”

Turning to the retail side, the Court rejected the claim that AT&T’s prices were “too low.” Instead, the Court observed, “we have carefully limited” §2 claims based on low prices to the circumstances set out in *Brooke Group*, namely, below-cost pricing and likelihood of recoupment. Importantly, the Court reaffirmed

its earlier view: “Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.”

In the Court’s view, plaintiffs “tried to join a wholesale claim that cannot succeed with a retail claim that cannot succeed, and alchemize them into a new form of antitrust liability never before recognized by this Court,” which in its new form would not succeed.

## IMPLICATIONS

In *linkLine*, the Court continued its recent efforts to curtail the proliferation of antitrust litigation in the federal courts (see, e.g., *Trinko*, *Twombly*). Notably, the Court went out of its way to rule on the §2 issue presented in this case, despite the fact that the appeal had arguably been mooted by the plaintiffs’ amended complaint. While the new Administration may harbor ambitions of extending regulatory enforcement of §2, it does so in the face of a unified Court that is quickly moving in the opposite direction. In *linkLine*, the Court rejected price-squeeze claims as a redundant “new theory of liability,” counseling future plaintiffs to rely instead on established §2 doctrine to redress alleged harm.

*linkLine* is not limited to its facts, however. After *linkLine*, even if a dominant firm may be alleged to have a duty to deal under *Aspen Ski*, a §2 claim by a disgruntled customer/competitor could not rest on allegations that the vertically integrated supplier’s retail prices were “too low” absent allegations that the prices were below cost. Furthermore, *linkLine* casts doubt on the viability of bundled pricing claims based on *LePage’s*. *linkLine* may well be argued to preclude such claims when the plaintiff attacking bundled discounts offered by a dominant firm cannot advance a theory consistent with *Brooke Group*.

## FOR FURTHER INFORMATION:

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