

Litigation Practice

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Litigation Alert

Supreme Court Rejects “Price Squeeze” Antitrust Claim

By Lisa C. Sullivan

The Supreme Court’s unanimous decision in an antitrust case rendered it significantly more difficult for plaintiffs to state a “price squeeze” monopolization claim. In its February 25, 2009, decision in *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*, the Supreme Court held that, unless there is an antitrust duty to deal with competitors, a company does not violate Section 2 of the Sherman Act with a price squeeze.

What Is a “Price Squeeze”?

A price squeeze becomes possible when a vertically-integrated company operates in both the wholesale and retail markets. In dealing with its rivals in the wholesale market, the company sets its prices high. At the same time, at the retail level, the company sets its prices low. This conduct “squeezes” the amount of profits the rivals can make – the rivals must pay the higher price to purchase necessary input, but also must offer customers a low price to stay competitive. The resulting low profit margin may make it difficult for rivals to compete at all.

Factual Background of *LinkLine*

The plaintiffs, LinkLine and other internet service providers (the “ISPs”), were in the business of providing retail DSL service. The ISPs, however, did not have the infrastructure or facilities to provide DSL service. Rather, defendant AT&T controlled the lines that connect homes and businesses to the telephone network. Until 2005, the FCC had required incumbent phone companies to sell transmission services to independent ISPs. After the FCC abandoned this requirement, however, AT&T remained bound by a condition imposed in connection with a merger to continue to provide these services.

The ISPs’ lawsuit alleged that AT&T set a high price for independent ISPs to purchase DSL transport service. At the same time, they alleged that AT&T set a low retail price for customers of DSL internet service, which low price the ISPs needed to come close to in order to stay competitive. The resulting “price squeeze” allegedly impacted the ISPs’ ability to compete. The ISPs alleged that this constituted unlawful monopolization under Section 2 of the Sherman Act.

Supreme Court Decision

The Supreme Court reversed the Ninth Circuit’s decision affirming the denial of AT&T’s motion for judgment on the pleadings. In a unanimous decision, the Supreme Court held that the ISPs’ “price-squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level.”

Claims at the Wholesale Level: *Trinko*

The pronouncement that this was a “meritless claim at the wholesale level” derived from another recent Supreme Court antitrust decision: *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). In *Trinko*, the Court held that if a company has no antitrust duty to deal with its rivals, it also has no duty to deal with its rivals on favorable terms. In that case, although defendant Verizon was required by FCC law to share its phone network with competitors, Verizon had no duty under the antitrust laws to provide certain levels of service. In *LinkLine*, both the district court and the Ninth Circuit had not found *Trinko* controlling because it did not specifically address “price squeeze” claims.

The Supreme Court clarified that *Trinko* is equally applicable to price squeeze claims, noting that the “nub of the complaint in both *Trinko* and this case is identical – the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing effectively in the retail market. *Trinko* holds that such claims are not cognizable under the Sherman Act in the absence of an antitrust duty to deal.” Thus, to state a proper “price squeeze” monopolization claim, a plaintiff must first allege an antitrust duty to deal – which is rare.

Claims at the Retail Level: *Brooke Group*

The Supreme Court did not end its analysis there. Instead, it also addressed why this was a “meritless claim at the retail level.” Here, again, the Court relied on another fairly recent decision, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In *Brooke Group*, the Court outlined two requirements for an antitrust claim based on allegations of predatory pricing: (1) The alleged monopolist’s retail prices must be below an appropriate measure of cost; and (2) there must be a dangerous probability that the alleged monopolist will be able to recoup its investment in below-cost pricing.

Applying *Brooke Group* to the ISPs’ price squeeze claim, the Supreme Court held, “Recognizing a price-squeeze claim where the defendant’s retail price remains above cost would invite the precise harm we sought to avoid in *Brooke Group*: Firms might raise their retail prices or refrain from aggressive price competition to avoid potential antitrust liability.” Thus, to state a proper price squeeze monopolization claim, a plaintiff must allege not only an antitrust duty to deal, but also the existence of predatory pricing.

Articulating a Bright-Line Rule

The Supreme Court’s decision “emphasized the importance of clear rules in antitrust law.” The Court found “troubling” the possibility that, absent this decision, companies would have “no safe harbor for their pricing practices.” In price squeeze cases, juries would be charged with determining what a “fair” profit margin was – no small task. The Court concluded there was no need “to endorse a new theory of liability.”

Implications of *LinkLine*

The *LinkLine* decision is significant. For would-be antitrust plaintiffs, it is now more difficult to state a claim for monopolization under a price squeeze theory. A price squeeze plaintiff must allege both an antitrust duty to deal and predatory pricing. Each of these is difficult to prove.

For companies confronting the terms on which they will deal with rivals, on the other hand, the *LinkLine* decision is yet another step down a path the Supreme Court has taken in recent years allowing companies to act unilaterally. This trend includes not only *Trinko* and *Brooke Group*, discussed above, but also decisions eliminating *per se* liability for setting both maximum and minimum resale prices. Companies can have more confidence that – so long as they abide by the Court’s “clear rules” – they can minimize antitrust liability.

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