

***Pacific Bell Telephone Co. v. linkLine Communications:*
Supreme Court Limits Price-Squeeze Antitrust Claims**

March 2, 2009

On February 25, the U.S. Supreme Court released its opinion in *Pacific Bell Telephone Co. v. linkLine Communications*, a closely watched case challenging the pricing policies of Pacific Bell (which became AT&T) in relation to DSL Internet services. In its opinion, the Court adopted a new two-part standard for assessing “price-squeeze” antitrust claims. Lower courts had previously interpreted the antitrust laws to prohibit vertically integrated firms from charging wholesale prices that prevented downstream rivals from competing at the retail level. Specifically, courts had found antitrust violations where the wholesale prices were “too high” in relation to low retail prices to allow firms purchasing from the integrated producer at wholesale from earning a “fair profit” through retail sales.

In *linkLine*, however, the Supreme Court held that vertically integrated producers are not subject to antitrust liability for such “price-squeezes” unless they (1) had an “antitrust duty to deal” with their competitors at the wholesale level, and (2) engaged in “predatory pricing” at the retail level of competition. As a practical matter, this standard effectively forecloses “price-squeeze” antitrust claims except in the most extreme circumstances.

The plaintiffs in *linkLine*, four independent Internet service providers, compete with AT&T for the sale of DSL Internet services to consumers in California. They rely on AT&T’s “infrastructure and facilities” (e.g., phone lines and switches) to carry their DSL Internet services to customers, and pay AT&T a fee for the use of those facilities. AT&T is required by the Federal Communications Commission (FCC) to sell DSL transport services to independent providers of DSL Internet services in California such as the plaintiffs in *linkLine*. The plaintiffs in *linkLine* allege AT&T set a “high wholesale price” for the DSL transmission services it provided to the plaintiffs while setting a “low retail price” for DSL Internet services, “squeezing” their profits and undermining retail DSL competition.

The plaintiffs filed suit in the Central District of California, contending that AT&T’s pricing policies constituted an illegal “price-squeeze” in violation of Section 2 of the Sherman Act. AT&T moved to dismiss the complaint, arguing that the Supreme Court’s 2004 decision in *Verizon v. Trinko* barred “price-squeeze” claims absent a specific antitrust duty to deal with competitors at the wholesale level. The district court denied the motion but certified the decision for interlocutory appeal to the Ninth Circuit. A divided Ninth Circuit panel affirmed the district court’s decision, holding that *Trinko* did not address “price-squeeze” claims and did not mandate dismissal of the *linkLine* complaint.

The Ninth Circuit's decision created a circuit split with the D.C. Circuit, which held in *Covad v. Bell Atlantic* (2005) that *Trinko* bars precisely the type of "price-squeeze" claims at issue in *linkLine*. The Supreme Court granted certiorari in order to address the split among the federal circuits on this issue.

The Supreme Court also viewed plaintiffs' "price-squeeze" claim as an "amalgamation" of a wholesale and retail claim and evaluated the two components separately. As for the high wholesale price allegation, the Court held that its ruling in *Trinko* "applie[d] with equal force to price-squeeze claims," and that there could be no "price-squeeze" liability in the absence of an "antitrust duty to deal." In *Trinko*, the Court held that FCC requirements to provide network access to competitors on fair and reasonable terms did not create an independent "antitrust duty to deal." Absent such an "antitrust duty to deal," the Court held, there could be no antitrust liability for failing to comply with the FCC requirements.

The Court was clear, moreover, that the antitrust laws very rarely impose a duty on companies to deal with their competitors. *linkLine* extends that holding to "price-squeeze" claims and makes explicit that companies lacking an "antitrust duty to deal" are also free under the antitrust laws to charge their customers whatever price the market will bear, regardless of what FCC or other regulatory rules may require. Violation of FCC or other regulatory rules should be remedied through application of those regulatory rules, rather than through application of the antitrust laws.

Moreover, the Court held that even if a vertically integrated firm has an "antitrust duty to deal," it would not face antitrust liability under a price-squeeze theory unless its retail prices were "predatory." Prices are considered predatory if (1) "the prices complained of" are "below an appropriate measure of its rival's costs," and (2) there exists "a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost prices. In this case, the operative complaint did not allege either of these elements.

The *linkLine* decision clarifies and narrows the scope of liability under Section 2 of the Sherman Act for so-called "price-squeeze" claims. By limiting "price-squeeze" claims to circumstances in which a vertically integrated firm has an "antitrust duty to deal" with its competitors, the Court effectively foreclosed all but the most extreme of such cases. As the Court made clear in *Trinko*, the antitrust laws very rarely impose a "duty to deal" with competitors. Even in cases involving such a duty, moreover, the difficult standards for establishing "predatory pricing" at the retail level will make it very difficult for antitrust plaintiffs to succeed on a "price-squeeze" theory.

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