

**Abolishing The Price Squeeze Cause of Action for Antitrust Plaintiffs:
*Pacific Bell Telephone Co., dba AT & T California, et al. v. Linkline
Communications, Inc., et al.***

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On February 25, 2009, the United States Supreme Court swiftly eliminated the price squeeze cause of action for claims against defendants who have no antitrust duty to deal with the plaintiff. A price squeeze occurs when a firm is vertically integrated and simultaneously uses market power in the wholesale market to raise the wholesale price of inputs and cut the retail price of the finished goods.¹ In *Linkline*, because the defendant did not lower retail prices below cost and had no duty to deal with the plaintiff at the wholesale level, the Supreme Court held that the plaintiff failed to state a valid claim under Section 2 of the Sherman Act.

Factual Context and Procedural History

The defendant (“AT&T”) owned a majority of the infrastructure and facilities necessary to provide digital subscriber line (“DSL”) service in California. DSL is a method of connecting to the internet at high speeds over telephone lines. Specifically, AT&T controlled the “last mile” lines that connect homes and businesses to the telephone network. DSL competitors had to access AT&T’s facilities in order to serve their customers. Furthermore, a condition of a recent merger required that AT&T provide wholesale DSL service to independent firms at a price no greater than AT&T’s DSL retail price.

AT&T participated in the retail and wholesale DSL market. It provided plaintiffs and other independent internet service providers (ISPs) with wholesale DSL service and it also sold DSL service directly to consumers at retail. The plaintiffs, four independent ISPs, competed with AT&T in the retail DSL market. They brought a claim under Section 2 of the Sherman Act alleging that AT&T engaged in anticompetitive conduct to maintain its monopoly over the California DSL market. In particular, the complaint alleged that AT&T squeezed the plaintiffs’ profit margins by setting high wholesale prices for DSL service and low retail price for DSL service. The plaintiff complained that these actions barred them from attaining reasonable profits and competing in the retail DSL market.

The District Court relied on *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* to deny the defendants motion to dismiss.² In *Trinko*, the Supreme Court held that a firm with no antitrust duty to deal with its rivals was under no

¹ *Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109, 1114 (2009).

² *Id.*; *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

obligation to provide those rivals with a “sufficient” level of service.³ Applying *Trinko*, the District Court reasoned that although AT&T had no duty to deal with the plaintiffs, *Trinko* did not involve price squeeze claims.⁴ The District Court requested that the plaintiff amend the complaint to include more details on the price squeeze claim. When AT&T again moved to dismiss that complaint, the District Court denied the motion but certified for interlocutory appeal the issue of whether “*Trinko* bars price squeeze claims where the parties are compelled to deal under the federal communication laws.”⁵ [Tommy, please verify this is right substantively]

The Court of Appeals for the Ninth Circuit affirmed the District Court, emphasizing that *Trinko* did not involve price squeezing. The court held that the plaintiffs’ complaint stated a valid claim under Section 2 of the Sherman Act. The Supreme Court then granted certiorari to address the issue of whether a plaintiff can bring a price squeeze claim under Section 2 when the defendant has no antitrust duty to deal with the plaintiff.

Discussion and Analysis

The Supreme Court reversed the Court of Appeals and held that AT&T did not engage in conduct contrary to Section 2. In reaching this conclusion, the Court independently examined the dual anticompetitive actions that AT&T allegedly performed to effectuate the price squeeze: (1) elevating wholesale prices, and (2) curtailing retail prices. The Court found that the holding in *Trinko* applied to foreclose any challenge to AT&T’s wholesale prices. And application of *Brooke Group* to the dropping of retail prices also barred the plaintiff from stating a valid claim.

Elevated Wholesale Prices Under Trinko

In this case, AT&T had a duty to deal with the plaintiffs under the Federal Communications Commission regulations, but not from the Sherman Act.⁶ The Court analogized the issues of *Linkline* to *Trinko*, and noted that both involved allegations of upstream monopolists abusing power in the wholesale market to thwart firms from competing in the retail market.⁷ *Trinko* held that such action is not valid under the Sherman act if there is no antitrust duty to deal. Applying this rule, the *Linkline* Court held that the plaintiffs’ complaint failed to constitute a legitimate legal basis deserving relief.

Furthermore, although the lower courts discarded *Trinko* because it did not address price squeeze claims, the Supreme Court noted that “the reasoning of *Trinko* applies with equal force to price-squeeze claims.”⁸ The alleged deficient conduct in

³ *Trinko*, 540 U.S. at 410.

⁴ *Linkline*, 129 S. Ct. at 1116.

⁵ *Id.*

⁶ *Id.* at 1119.

⁷ *Id.*

⁸ *Id.*

Trinko – providing inferior service – had the same effect as AT&T’s conduct: squeezing competitors’ profits. In both cases, if a firm has no duty to deal in the wholesale market, it is not responsible for dealing under terms that are favorable to its competitors.

Depressed Retail Prices Under Brooke Group

As the seminal case on predatory pricing, *Brooke Group* articulated the thin line between price increases that exemplify the spirit of competition and ones that aim to anticompetitively exclude firms from the market.⁹ On one hand, decreasing prices to attract customers is the “very essence of competition.”¹⁰ An overly sensitive regulatory scheme would punish and ultimately chill the behavior that the antitrust laws are meant to protect. In contrast, severely decreasing price with the intention to drive other competitors out of the market or prevent entry from potential newcomers constitutes an antitrust violation. Thus, *Brooke Group* took into account these competing concerns when it set forth the conventional test for predatory pricing claims. To constitute predatory pricing, a plaintiff must demonstrate that: (1) the prices complained of are below an appropriate measure of the rival’s costs, and (2) there is a “dangerous probability” that the defendant will be able to recoup its “investment” in below cost prices.¹¹

In *Linkline*, the Supreme Court applied this two-prong test to find that because the defendant’s retail prices were above cost, no anticompetitive conduct occurred.¹² To hold otherwise would run afoul of *Brooke Group*’s emphasis on encouraging firms to vigorously compete on the merits to increase quality and lower price for end consumers.

The Status of Price Squeezes As a Tool for Antitrust Plaintiffs

The *Linkline* Court effectively signaled the inadequacy of price squeezes as a viable cause of action for plaintiffs in the future. The Court discussed the difficulty for courts to find either predatory pricing in the retail level or violations of the duty to deal at the wholesale level; because price squeeze claims require courts to find both of these violations at the same time, it would be like “aiming at a moving target.”¹³ In essence, the Court recognized it would be practically implausible for plaintiffs to establish effectively that the defendant simultaneously violated both of these doctrines.¹⁴

Moreover, the Supreme Court disposed of the leading standards for finding price squeezes as “lack[ing] any grounding in [] antitrust jurisprudence.”¹⁵ As a result, the

⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).

¹⁰ *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹¹ *Brooke Group*, 509 U.S. at 222-24.

¹² *Linkline*, 129 S. Ct. at 1120.

¹³ *Id.* at 1121.

¹⁴ *Id.*

¹⁵ *Id.* at 1121-22. Specifically, the Court dismissed the standard that the defendant must leave its rivals a “fair” or “adequate” margin between the wholesale and retail price. *Id.* at 1121. The Court underscored the lack of guidance this standard provides courts and litigants: “[H]ow is a judge or jury to determine a ‘fair price?’” *Id.* In addition, the Court discussed the “transfer price test,” which finds a presumption of a

Court held that if the wholesale price and retail price are independently lawful, no antitrust liability will attach simply because the wholesale price of a vertically integrated firm is higher than its retail price. In other words, the Court found there was no separate harm caused by price squeezes “above and beyond” the harm caused by predatory pricing at the retail level or refusals to deal at the wholesale level.¹⁶

Conclusion

In sum, instead of analyzing the price squeeze claim as a whole, the Supreme Court split up the wholesale and retail level conduct to find that AT&T did not violate Section 2. The Supreme Court reasoned that the “meritless claim at the retail level” and the “meritless claim at the wholesale level” necessitated dismissing the plaintiff’s claim. This holding was supported by the lack of a duty to deal at the wholesale level and a lack of predatory pricing at the retail level.

price squeeze if the upstream monopolist could not have made a profit by selling at its retail rates if it purchased inputs at its own wholesale rates. *Id.* at 1122.

¹⁶ *Id.*