U.S. Supreme Court Rejects Antitrust Price-Squeeze Claims

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In the latest of a series of decisions narrowing antitrust liability for unilateral conduct, the U.S. Supreme Court held that the U.S. antitrust laws generally do not forbid "price squeezes," whereby an integrated firm sets wholesale prices at a level that results in its wholesale customers being unable to compete with it at the retail level.

In *Pacific Bell Telephone Co. v. linkLINE Communications, Inc.*, No. 07-512 (Feb. 25, 2009), the Court held that "price squeeze" claims are not viable where the integrated firm had no antitrust duty to deal with its would-be downstream competitor. Absent an antitrust duty to deal, a plaintiff seeking to challenge a defendant's retail pricing as "too low" would have to establish a predatory pricing claim, such that the defendant's prices at the retail level were predatory in the sense that they were below the defendant's cost and could be expected to drive rivals out of the market, thereby permitting the defendant to recoup its losses on the below-cost sales.

The *Pacific Bell* decision should make it exceedingly difficult to pursue standalone price-squeeze claims under the U.S. antitrust laws absent a pre-existing duty to deal under antitrust law.

Background

The Federal Communications Commission ("FCC") required Pacific Bell to sell digital subscriber lines ("DSL"), a type of broadband service, at wholesale level. The FCC also regulated the prices that could be charged. linkLINE accused Pacific Bell of pricing its DSL services to competitors like linkLINE at prices that were so close to Pacific Bell's retail price that linkLINE could not compete with Pacific Bell at the retail level. linkLINE sued Pacific Bell under Section 2 of the Sherman Act, which prohibits the willful acquisition or maintenance of a monopoly. linkLINE alleged that Pacific Bell's pricing practices allowed insufficient margin for would-be competitors, and would thus squeeze it and other competitors out of the retail DSL market, to the detriment of consumers of DSL services. Pacific Bell appealed the lower courts' refusal to dismiss linkLINE's antitrust claims.

The Supreme Court's Decision

The Court held that a price-squeeze claim cannot be brought against a firm that is under no antitrust obligation to sell to the plaintiff in the first place. Writing for the Court, Chief Justice Roberts reviewed prior cases involving alleged antitrust duties to deal, which generally hold that "businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." The Court noted that Pacific Bell's duty to deal with linkLINE arose from FCC regulations, not from the antitrust laws, and was therefore not an "antitrust" duty to deal. Based on that conclusion, the Court held that a "straightforward application" of the Court's decision in *Verizon Communications Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) "foreclose[d] any challenge to AT&T's wholesale prices."

In *Trinko*, the Court rejected the application of the antitrust laws to the manner in which Verizon provided – or failed to provide – its competitors with access to network interconnection services. In *Pacific Bell*, the Court applied its holding in *Trinko* that the lack of an antitrust-based duty to deal doomed an antitrust claim based on the *level* of service provided to foreclose antitrust claims based on the *prices charged* for the service: "There is no meaningful distinction between the 'insufficient assistance' claims we rejected in *Trinko* and the plaintiffs' price-squeeze claims in the instant case."

The Court turned next to the retail side of the price-squeeze. By the time of oral argument, all of the parties to the case agreed that, to establish a violation on the retail side, linkLINE would, at a minimum, need to establish that Pacific Bell's prices were predatory under the standards of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U. S. 209 (1993). The Court agreed, and reiterated that proving a claim of predatory pricing under *Brooke Group* requires establishing (1) below-cost pricing and (2) that there is a dangerous probability that the defendant will ultimately be able to recoup the losses resulting from the below-cost pricing. Because linkLINE had not made such predatory pricing allegations in its original complaint, the Court held that that complaint did not state a viable claim. (It left to the district court on remand the question of whether linkLINE's amended complaint states a viable predatory pricing claim under the new pleading standard set out by the court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).)

The Court concluded with a discussion of how "institutional concerns … counsel against recognition" of price-squeeze claims. The Court highlighted its "repeat[ed] emphasis[on] the importance of clear rules in antitrust laws." The Court found troubling that a firm seeking to avoid a price-squeeze claim would have no "safe harbor" in its pricing, such as pricing above cost. "Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the interaction between these two prices that may result in a squeeze." Despite this dicta on the

administrability of price-squeeze claims, the court left open the possibility that a price-squeeze claim may be brought when a defendant has an antitrust duty to deal with the plaintiff, such as under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), though it remains to be seen how the doctrine will be applied in such circumstances.

Although all nine justices concurred in the judgment, Justices Breyer, Stevens, Souter, and Ginsburg did not join Chief Justice Roberts' majority opinion. Instead, Justice Breyer issued a brief concurring opinion, which the others joined, in which he argued in essence that the case should simply have been remanded to the district court to consider whether a predatory pricing claim could be pled. Although not explicitly stating the reason for not joining the majority opinion, Justice Breyer suggested that, given the unusual procedural posture of the case, the Court had treaded into "hypothetical questions" such as whether *Trinko* indeed foreclosed all potential price-squeeze claims where there was no antitrust duty to deal. Breyer agreed, however, that, at least in the case of a customer of a "regulated firm," there would be no antitrust claim based on a showing that the customer was squeezed "between the regulated firm's wholesale price (to the plaintiff) and its retail price (to customers for whose business both firms compete)."

The *Pacific Bell* decision follows other recent Supreme Court decisions on antitrust, including involving pleading standards, resale price maintenance, joint ventures, dominant firm conduct, predatory buying, and regulated industries, in which the Court has clarified (or, in some observers' eyes restricted) the reach of the U.S. antitrust laws. In each case, the Court has found in favor of the antitrust defendant.

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Please do not hesitate to contact any of the members of the firm's U.S. antitrust group for more information on the *Pacific Bell* decision, other recent Supreme Court antitrust cases, or any other antitrust developments.

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