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Busted Squeeze Play: U.S. Supreme Court Rules That "Price Squeeze" Claims Under Section 2 of the Sherman Act Are Not Viable in the Absence of a Duty to Deal or Predatory Pricing

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For purposes of the antitrust laws, a "price squeeze" occurs when a vertically integrated firm with market power at the wholesale level attempts to "squeeze" the profits of its competitors at the retail level. The firm does so by simultaneously raising the price of its goods to its wholesale customers and lowering the price at which it sells the same goods at the retail level. The firm's competitors at the retail level are thereby forced to pay more for the goods at issue and cut their retail prices for those goods. In *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 550 U.S. ___, No. 07-512 (Feb. 25, 2009), the United States Supreme Court addressed the viability of price squeeze claims made under Section 2 of the Sherman Act.

In *linkLine*, four Internet Service Providers (ISPs) who sold DSL access to retail customers sued four related AT&T entities that sold both wholesale DSL access to ISPs and retail DSL access to individual customers. The AT&T entities held a regional monopoly for wholesale (but not retail) DSL access, and were required to provide plaintiffs with access to their DSL transport services pursuant to an order issued by the Federal Communications Commission. AT&T was therefore both a supplier of DSL access to the plaintiffs at the wholesale level and a competitor of the plaintiffs at the retail level.

The plaintiffs alleged that AT&T created a price squeeze by charging them a high wholesale price for DSL access, and then undercutting them by charging retail customers prices below that wholesale price. The plaintiffs also alleged that they were unable to compete with AT&T because of the price squeeze, and that AT&T was attempting to obtain a monopoly in the market for DSL

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services at the retail level through the use of its monopoly for DSL services at the wholesale level.

The United States Supreme Court held in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) that except in extremely limited circumstances, the antitrust laws do not impose a duty upon a firm to deal with its competitors. The *linkLine* Court held that *Trinko* foreclosed any challenge by the plaintiffs to AT&T's wholesale prices, reasoning that while the FCC regulations compelled AT&T to deal with its wholesale customers, the antitrust laws did not compel AT&T to sell DSL access to them on favorable terms.

The Court then turned to the second component of the plaintiffs' price squeeze claim, which was that AT&T's retail prices were too low. The Court held that the plaintiffs' Sherman Act claim failed unless they could show that AT&T engaged in predatory pricing. This required the plaintiffs to prove that (1) "the prices complained of are below an appropriate measure of its rival's costs," and (2) "the competitor had … a dangerous probability of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The Court reasoned that ruling otherwise would deter firms from cutting their prices, which is conduct the antitrust laws are designed to encourage.

Justice John Roberts, who authored the majority opinion in *linkLine* for the Court, emphasized the importance of clear rules in antitrust law. Justice Roberts reasoned that if the Court recognized the plaintiffs' price squeeze claim, it would require lower courts to simultaneously police the wholesale and retail prices being charged in order to ensure rival firms were not being squeezed. If this were the case, courts would effectively become rate regulators, a role for which the judiciary is not suited. Moreover, there would be no way for lawyers to give their vertically integrated clients clear advice on how to avoid a price squeeze claim by charging a "fair" price to their competitors.

The *linkLine* case continues the winning streak in the U.S. Supreme Court for defendants in antitrust cases, and it provides clarity for vertically integrated firms who are potential targets for "price squeeze" claims. The Roberts Court has issued several decisions limiting the scope of the antitrust laws over the past three terms, and all signs indicate that it will continue to do so in the future.

FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

David Nemecek Mr. Nemecek has significant experience in the field of antitrust litigation, and has litigated class actions involving claims of price fixing and monopolization. He was a member of the trial team for two of the largest antitrust cases in California and Minnesota history. He also has experience litigating cases involving the California unfair competition laws, including claims involving California Business & Professions Code Section 17200, and false advertising claims brought pursuant to the Lanham Act and California Business & Professions Code Section 17500. Mr. Nemecek also provides compliance counseling relating to the antitrust and unfair competition laws, including sales, distribution and pricing counseling, as well as antitrust compliance relating to mergers and joint ventures, and intellectual property licensing issues.