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REPORT FROM WASHINGTON

The Supreme Court Rejects the "Price Squeeze" Theory of Illegal Monopolization

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Yesterday, in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, No. 07-512, __ S. Ct. __ (Feb. 25, 2008), the United States Supreme Court held that a plaintiff cannot state a valid claim under Section 2 of the Sherman Act by alleging "price squeezing" when a defendant is under no antitrust obligation to sell goods or services to competitors. The decision effectively nullifies a line of precedent in the United States Circuit Courts of Appeal stretching back to Judge Learned Hand's opinion in the 1945 case *United States v. Aluminum Co. of Am.* (*Alcoa*), which first allowed such claims. 148 F.2d 416 (2d. Cir. 1945). Absent a duty to deal, plaintiffs will be held to the strict standard required for allegations of predatory pricing under *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

BACKGROUND

Plaintiffs—internet service providers ("ISPs") that sell digital subscriber line ("DSL") internet access to retail customers—purchased DSL at wholesale prices from Defendant AT&T, and competed in the retail market with DSL services provided by AT&T itself. Although AT&T was required by statute to provide wholesale DSL to Plaintiffs, AT&T allegedly created a "price squeeze" by charging ISPs a high wholesale price relative to the price at which Defendant provided competing retail services. Plaintiffs alleged that the price squeeze violated Section 2 of the Sherman Act. Defendant moved to dismiss the complaint, arguing that Plaintiffs failed to allege the elements of predatory pricing under *Brooke Group* necessary to support a price squeeze claim. Under the *Brooke Group* standard, Plaintiffs must allege that Defendant's pricing to the consumer is below an appropriate measure of its cost, and that Defendant has a dangerous probability of recouping the income lost by pricing below cost once its predatory low prices drive competitors out of the market. The district court refused to dismiss the amended complaint for failure to state

a claim, but granted Defendant's motion to certify the court's order for interlocutory appeal.

The Court of Appeals for the Ninth Circuit affirmed in a divided opinion, holding that Plaintiffs stated a valid price squeezing claim. According to the court, a price squeeze occurs when a vertically integrated company sets its wholesale prices or rates at so high a level that its competitors (which purchase from it at wholesale) cannot compete with it in the retail market. The court reasoned that price squeezing claims had been recognized by other federal appellate courts, and had been considered good law for over six decades under *Alcoa*, a case decided by the Second Circuit while sitting as the Supreme Court by designation. The Ninth Circuit's decision created a Circuit split by conflicting with decisions from the D.C. Circuit and Eleventh Circuits, both of which have held that price squeeze claims can survive only by pleading facts sufficient to state a claim under the *Brooke Group* standard.

The Supreme Court granted certiorari to resolve the issue. In their briefing before the Supreme Court, Plaintiffs reversed their original argument that a price squeeze claim could survive without alleging the *Brooke Group* elements. Plaintiffs asked the Court to vacate the Ninth Circuit's decision because it was incomplete, arguing that whether *Brooke Group* applied had yet to be decided below, and was not properly before the Supreme Court.

In its argument before the Supreme Court, Petitioner AT&T argued that the Court should reverse the Ninth Circuit decision and hold that AT&T had no duty under the antitrust laws to provide DSL at prices that allowed Plaintiffs a margin of profit. AT&T also argued that clear rules—such as the *Brooke Group* standard—were essential for businesses and that lack of clarity discourages competitors from engaging in cut-throat competition, which is the ultimate objective of the antitrust laws. Respondents and certain *amici curiae*, on the other hand, argued that the Ninth Circuit had not considered *Brooke Group*, and asked the Court to vacate the Ninth Circuit's opinion and remand to the district court.

THE DECISION

In the Opinion of the Court, written by Chief Justice Roberts and joined by Justices Kennedy, Thomas, Scalia, and Alito, the Supreme Court held in no uncertain terms that Plaintiffs failed to state a claim for a violation of Section 2 of the Sherman Act. The Court accordingly reversed the Ninth Circuit decision, and remanded the case to the district court to decide whether Plaintiffs can adequately allege a claim under the *Brooke Group* standard.

Noting that AT&T undisputedly owed no antitrust duty at the wholesale level, the Court found that Plaintiffs had no viable claim as to AT&T's wholesale behavior under the principles set forth in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U. S. 398, 410 (2004). According to the Court, "*Trinko* . . . makes clear that if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous." The Court held that Plaintiffs' price squeeze claims were indistinguishable from the "insufficient assistance" claims rejected in *Trinko*.

The Court similarly concluded that Plaintiffs had no viable claim against

AT&T as a result of its retail behavior. The Court observed the need to be cautious in recognizing a cause of action that could chill aggressive price competition, suggesting that "[r]ecognizing 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." As a result, the Court required Plaintiffs to sufficiently allege predatory pricing under *Brooke Group* in order to state a valid claim.

Taken together, the Court observed, Plaintiffs' price squeeze claim was simply an "amalgamation" of a meritless claim at the wholesale level and a meritless claim at the retail level. The Court concluded that Plaintiffs' combination of two meritless claims did not collectively state a viable antitrust cause of action.

In reaching its decision, the Court also was mindful of institutional concerns. First, the Court noted the importance of clear rules in antitrust law. Recognizing price squeeze claims would require courts to simultaneously police both wholesale and retail prices, which courts are not well-suited to do. Second, the Court was also concerned that firms would be unable to judge what behavior could give rise to liability under a price squeeze theory, noting that there is no guidance as to what behavior qualifies as a price squeeze.

Justice Breyer concurred in the result, and was joined by Justices Stevens, Souter, and Ginsburg. Justice Breyer would have decided the case on a narrower ground, holding that a purchaser from a regulated firm like AT&T "cannot win an antitrust case simply by showing that it is 'squeezed'" between the firm's wholesale and retail prices. The concurrence noted that "[w]hen a regulatory structure exists to deter and remedy anti-competitive harm, the costs of antitrust enforcement are likely to be greater than the benefits."

IMPLICATIONS

In *linkLine*, the Court clarified the extent to which antitrust laws apply to unilateral conduct by a vertically-integrated wholesale monopolist after *Trinko*. The Court clearly held that, absent a showing of predatory pricing, companies with no antitrust duty to deal have no obligation to sell their products to competitors in a manner that preserves their rivals' profit margins. The Court's decision relieves widespread confusion over the proper standard, and resolves a Circuit split between the Ninth Circuit and the D.C. and Eleventh Circuits.

The decision follows on the heels of a line of recent opinions limiting the reach of the antitrust laws, including *Weyerhaeuser v. Ross Simmons Hardwood Co.*, 549 U.S. 312 (2007) (limiting claims of predatory pricing), *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (setting a more restrictive pleading standard), *Credit Suisse Securities LLC v. Billing,* 127 S.Ct. 2383 (2007) (concluding that securities laws grant implied immunity from antitrust laws in some securities cases), and *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S.Ct. 2705 (2007) (overturning long-standing precedent barring vertical minimum price fixing). The decision suggests that the Court may continue limiting the reach of the antitrust laws and setting out clearer rules about the applicable standards for actionable behavior under the Sherman Act.

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