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The Ninth Circuit's majority opinion in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*[1] is a thoughtful and not at all unreasonable approach to the application of the antitrust laws to telecommunications. Should the U.S. Supreme Court grant certiorari review, the plaintiffs should be permitted to attempt to prove their Sherman Act Section 2 case based on facts "that involve only unregulated behavior at the retail level," as the U.S. Court of Appeals for the Ninth Circuit suggested.[2] On the other hand, should the Supreme Court accept review of *linkLine* in order to hold that *Trinko* bars a plaintiff from pursuing a Section 2 claim even for unregulated conduct in an unregulated retail market the result would not only be contrary to the reasoning in *Trinko* itself, but also alien to the traditions of antitrust law and inimical to the nation's pro-competitive aspirations for the telecommunications industry.

Judge Thomas' opinion begins, *Trinko*-like, with the proposition that the 1996 Telecommunications Act "neither added to nor subtracted from the class of punishable conduct under traditional antitrust laws,"[3] a proposition enshrined in the Act's antitrust

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[1] Petition for Certiorari Filed, 76 U.S.L.W. 3226 (Oct. 17, 2007) (No. 07-512).

[2] 503 F.3d at 885.

[3] 503 F.3d at 881.

savings clause.[4] The Court of Appeals relied on this principle to illuminate what the *Trinko* case did and did not do. After itemizing the defendants' alleged anticompetitive conduct, the court agreed with the district court that the plaintiffs' Section 2 theories for refusal to deal and for denial of access to an essential facility were not cognizable claims in light of *Trinko's* holding that no new claim for monopolization had been created—or, what is the same thing, no new *antitrust* duty to deal had come into existence—by virtue of the passage of the Telecommunications Act and its statutory compulsion for incumbent monopolists to provide wholesale services to new, competitive rivals.

The Ninth Circuit, however, following its own precedent in *City of Anaheim v. Southern California Edison Co.*,[5] and similar decisions in five other circuits that recognize a price squeeze by a monopolist as potentially actionable anticompetitive conduct under Section 2, even in a regulated industry, also agreed with the district court that *Anaheim* and cases like it remain viable after *Trinko*. The key issue in the *linkLine* case, then, is whether the Ninth Circuit correctly interpreted the effect of *Trinko* on *Anaheim* and other cases that recognize a Section 2 price squeeze theory in a (partially) regulated industry.

The chief distinction taking *Anaheim* and its ilk out from under the bar of *Trinko* is the specter of anticompetitive conduct *unrelated* to statutorily-compelled wholesale dealing. Such cases are outside the ambit of *Trinko* in the sense that such conduct could support antitrust liability before the 1996 Act and thus must continue to do so afterwards. A separate issue is whether or not the plaintiffs in *linkLine* will be able to prove conduct

[4] 47 U.S.C. § 152 note.

[5] 955 F.2d 1373 (9th Cir. 1992).

within the parameters laid down by the Court of Appeals ("unregulated behavior at the retail level"[6]) that is also sufficiently beyond the same practical and administrative considerations that animated *Trinko* ("what extent, if any, the responsible agencies have devoted attention to or had involvement in the complained of conduct"[7]).

In his dissent, Judge Gould stressed two principal points. First, the complaint apparently failed to allege that the SBC Entities possess market power in the retail market to set or influence prices. Second, by limiting the crux of the claim to the retail digital subscriber line (DSL) market, the plaintiffs' case must necessarily devolve into a predatory pricing case, in which liability under *Brooke Group* would require below-cost pricing and a reasonable prospect of recoupment. Both propositions appear to be mistaken.

According to Appellees' Brief before the Court of Appeals, the defendant Pacific Bell Internet Services (PBIS) had captured 80 percent of the retail DSL market in its service area.[8] Although the degree of substitutability between DSL, cable, and satellite broadband access (and, thus, the appropriate definition of the product market) is a factual issue, it is by no means clear that the defendants are entitled to a presumption that they lack market power on the retail level. If they do possess retail market power, the defendants' ability to engineer the spread between what the plaintiffs must pay for wholesale interconnection and the retail prices it must charge customers makes the question of whether the defendants' retail prices were below some measure of cost

[6] 503 F.3d at 885.

[7] *Id.*

[8] Brief of Appellee, filed Jan. 18, 2006, at 10.

irrelevant, because it takes the *linkLine* case out of the orbit of predatory pricing and into the well-recognized situation in which a firm with monopoly power on *both* the wholesale and retail levels uses its market power to drive its rivals out of business, not through predatorily low prices but through the elimination of the spread between wholesale and retail price that a rival must exploit to survive.

Stated differently, a claimed price squeeze in which evidence of anticompetitive conduct will be allowed only on the retail but not the wholesale level because of the legal effect of *Trinko* is *not* equivalent to predatory pricing because the mechanism of competitive harm is not the same. Interestingly, the defendant-petitioners and their *amici* appear to be urging the Supreme Court to review *linkLine* not simply to correct an erroneous interpretation of the effect of *Trinko* on *Anaheim* and other such cases but to eliminate *any* Section 2 claim based on a price squeeze, even in an entirely unregulated industry and even as against a dual, wholesale-retail monopolist, despite that the application of Section 2 in such circumstances is entirely reasonable and in keeping with the purposes and traditions of antitrust jurisprudence.

Thus, for example, the defendant-petitioners argue that the continued viability of a price squeeze claim against an integrated monopolist "would deprive the producer and consumers of the benefits of vertical integration."[9] The Brief of *Amici Curiae* Professors and Scholars in Law and Economics in Support of the Petitioners goes even further, claiming that "the Court's evolving jurisprudence based on consumer-welfare maximization implicitly overruled the competitor-welfare premise of *Alcoa's* price-

[9] Petition for Writ of Certiorari, filed Oct. 17, 2007, at 22.

squeeze analysis" (footnote omitted).[10] That *Alcoa* adopted a competitor welfare standard is, of course, merely *ipse dixit*—saying so doesn't make it so. While under appropriate circumstances the continued viability of a price squeeze claim under Section 2 may allow for the presence of competitors that might otherwise disappear if they were to be squeezed out of the market, such a result does not amount to the application of a competitor welfare standard.

More accurately, the elimination of a price squeeze as a viable Section 2 theory implicitly adopts an antitrust standard in which efficiency gains of vertically integrated monopolists will always outweigh consumer welfare gains from greater competition. This would be an unfortunate development and the Supreme Court ought to resist exhortations to move U.S. antitrust law in such a direction.

[10] William J. Baumol et al., Supreme Court Amicus Brief of Professors and Scholars in Law and Economics in Support of Certiorari, Pacific Bell Telephone Co. v. linkLine Communications, Inc., No. 07-512 (filed Nov. 16, 2007), *available at* http://ssrn.com/abstract=1030990.