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Wilson Sonsini Goodrich & Rosati

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Although the U.S. Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*¹ circumscribed a plaintiff's ability to set forth a claim against a monopolist for a refusal to deal, the case left many unanswered questions with regard to the appropriate standards to apply in unilateral conduct cases.² One uncertainty created by the *Trinko* decision is whether a plaintiff can still set forth a viable claim for a "price squeeze" in a regulated industry. A price squeeze occurs where a dominant and integrated firm sells key inputs that it controls to its upstream competitors at high prices, and to downstream consumers at low prices, such that the upstream competitors are effectively "squeezed" out of downstream market because the high prices charged for the input make it impossible to compete in the downstream market.³

The U.S. Court of Appeals for the Ninth Circuit recently considered the price squeeze issue in *LinkLine Communications, Inc. v. SBC California*, and a divided court held that price squeeze claims remain viable post-*Trinko*.⁴ The *LinkLine* decision creates

* Jonathan M. Jacobson is a partner at Wilson Sonsini Goodrich & Rosati based in the firm's New York office. Valentina Rucker is an associate in Wilson Sonsini's Washington, DC office.

¹ *Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

² Address of Commissioner J. Thomas Rosch at George Mason University, *The Common Law of Section 2: Is It Still Alive and Well?*, Oct. 31, 2007, at 2, available at <http://www.law.gmu.edu/gmulawreview/documents/Roschaddress.pdf>.

³ PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 767c (2007 Supp.).

⁴ *LinkLine Comm'ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876 (9th Cir. 2007).

a circuit split: in contrast to decisions from the U.S. appeals courts for the DC and Eleventh Circuits, which have held that, post-*Trinko*, price squeeze claims only survive to the extent that the plaintiff alleges facts sufficient to state a claim for predatory pricing consistent with the Supreme Court’s *Brooke Group* standard, the Ninth Circuit held that a plaintiff can state a claim for a price squeeze post-*Trinko* regardless of whether it states a claim for predatory pricing under *Brooke Group*. Judge Gould dissented, concurring with the holdings of the DC and Eleventh Circuit decisions. Judge Gould’s opinion and the decisions of the DC and Eleventh Circuits apply a simple logic: if a dominant firm is free to refuse to deal with its competitors altogether under *Trinko*, then it also should be free to charge its competitors more for inputs it controls unless the “squeeze” violates *Brooke Group*—that is, unless the dominant firm prices to downstream retail customers below its costs and is likely to recoup its losses by charging supracompetitive prices after forcing its competitors to exit the market. Whether that conclusion is sound antitrust policy can be debated, but it does seem to follow from *Trinko*.

Price Squeeze Claims Pre-*Trinko*

Over the years, the standard for identifying an actionable price squeeze claim under Section 2 of the U.S. Sherman Act has evolved substantially. The first price squeeze case under Section 2 was *United States v. Aluminum Co. of America (Alcoa)*,⁵ where Judge Hand held that it was an unlawful exercise of Alcoa’s monopoly power to set input prices above the “fair price” while at the same time, setting retail prices so low as to prevent competitors from making “a living profit.”⁶ But that view did not endure for

⁵ 148 F.2d 416 (2d Cir. 1945).

⁶ AREEDA & HOVENKAMP, *supra* note 3, ¶ 767d2.

long. Later decisions made clear that “price squeezes are not necessarily unlawful”⁷ and attempted to create a framework by which to determine their legality under Section 2. Thus, in *Anaheim v. Southern California Edison Co.*,⁸ the Ninth Circuit held that price squeezes by regulated monopolies could violate Section 2 only if the plaintiff could demonstrate that the defendant specifically intended the price squeeze.⁹ And in *Bonjorno v. Kaiser Aluminum & Chem. Corp.*,¹⁰ the U.S. Court of Appeals for the Third Circuit required a plaintiff to demonstrate that the squeeze caused a “deliberately produced effect” and “was not the result of natural market forces ... or natural competition.”¹¹ Finally, in *Town of Concord v. Boston Edison Co.*, the U.S. Court of Appeals for the First Circuit took an even more restrictive approach, and held that price squeezes caused by a regulated utility do not violate Section 2 except in “exceptional circumstances.”¹²

Trinko

Although the *Trinko* decision did not specifically consider a price squeeze claim, the court’s treatment of unilateral refusals to deal is nonetheless illuminating because the two claims are analytically similar.¹³ The *Trinko* case arose from an Incumbent Local Exchange Carrier’s (ILEC’s) refusal to fulfill its duty to deal (imposed by the

⁷ ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 285 (6th ed. 2007).

⁸ 955 F.2d 1373, 1378 (9th Cir. 1992).

⁹ See also *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980) (finding illegal price squeeze where the defendant had a specific intent to create a price squeeze).

¹⁰ 752 F.2d 802 (3d Cir. 1984).

¹¹ *Id.* at 809.

¹² 915 F.2d 17, 29 (1st Cir. 1990). The court did not define what those circumstances are.

¹³ AREEDA & HOVENKAMP, *supra* note 3, ¶ 787c3 (“[A]nalytically, the claim of a price or supply squeeze is not very different from the vertically integrated firm’s refusal to deal with an upstream or downstream rival.”).

Telecommunications Act of 1996) with a Competitive Local Exchange Carrier (CLEC) by providing the CLEC with access to its systems and support operations in a reasonable manner, thus hampering the CLEC's ability to compete. The Supreme Court held that the ILEC's refusal to provide assistance to competitors in violation of the Telecommunications Act of 1996 did not state a claim under the Sherman Act.¹⁴

The Supreme Court noted that Telecommunications Act did not add or subtract from traditional principles of antitrust law and held that the defendant had no duty to deal with the CLEC given the absence of a preexisting, voluntary (and presumably profitable) relationship between the defendant and the CLEC.¹⁵ Although *Trinko* did not specifically address a price squeeze, the decision begs the question of whether a defendant in a regulated industry can be liable under Section 2 for charging a high price to its downstream competitor (creating the "squeeze") when the defendant could lawfully refuse to deal with that competitor altogether instead. As Professors Areeda and Hovenkamp conclude, "it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal."¹⁶ Because the ability to refuse to deal must necessarily include the lesser ability to charge higher prices, if a defendant has no duty to deal under *Trinko*, then there should be no liability if a defendant charges its competitors more for an input that it was not required to supply in the first place. Post-*Trinko*, therefore, the question for the lower courts was whether the price squeeze decisions in *Anaheim*, *Bojorno*, and *Town of Concord* survived, or whether

¹⁴ Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

¹⁵ *Id.* at 409-10 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)).

¹⁶ 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 767c3 (2d ed. 2002).

a plaintiff could no longer state a claim for a price squeeze, absent a showing of predatory pricing under the *Brooke Group* standard.

Price Squeeze Claims Post-Trinko

The decision in *LinkLine* creates a circuit split with the Ninth Circuit on one side and the Eleventh and DC Circuits on the other.¹⁷ All three courts were presented with almost identical facts: a digital subscriber line (DSL) service provider or an Internet service provider (ISP)—a downstream competitor and an upstream buyer—brought antitrust claims against a vertically integrated ILEC for unlawfully maintaining monopoly power in the downstream market by charging too much for a critical input, while at the same time, charging downstream customers far less. While the Ninth Circuit adopted the conclusion that price squeeze claims remain viable under Section 2 post *Trinko*, the DC Circuit, Eleventh Circuit and Judge Gould’s dissent agreed that a price squeeze claim is precluded where there is no duty to deal under *Trinko*, and that the plaintiff must make out a case for predatory pricing under *Brooke Group* for a price squeeze claim to proceed.

The Eleventh Circuit was the first to address the price squeeze issue and concluded that although the plaintiff’s “price squeezing claim survive[d *Trinko*]”, it did so *only* “because it is based on traditional antitrust doctrine and is not specifically barred by [the decision].”¹⁸ In that case—*Covad Communications v. BellSouth Corporation*—the Eleventh Circuit dismissed the plaintiff’s refusal to deal claim under *Trinko*, and allowed

¹⁷ *LinkLine Comm’ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876 (9th Cir. 2007) (holding that a price squeeze claim survive *Trinko*); *Covad Comm’ns Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005) (holding that a price squeeze does not survive unless states a claim under *Brooke Group*); *Covad Comm’ns Co. v. BellSouth Corp.*, 374 F.3d 1044 (11th Cir. 2004) (holding that a price squeeze does not survive unless states a claim under *Brooke Group*).

¹⁸ *Covad v. BellSouth Corp.*, 374 F.3d at 1050.

the plaintiff to proceed with its price squeeze claim because it set forth a valid cause of action under *Brooke Group*. Thus, because the plaintiff was able to plead that the price squeeze resulted in prices charged “below an appropriate measure of its rival’s costs” and that the defendant had a “dangerous probability[] of recouping its investment in below-cost prices,” the claim survived.¹⁹

The DC Circuit reached a similar conclusion. In *Covad Communications v. Bell Atlantic Corporation*, the court adopted the Areeda and Hovenkamp standard, categorically holding that after *Trinko*, “it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal.”²⁰ Although the DC Circuit stated that a price squeeze claim is precluded by *Trinko*, it clarified in its denial of a rehearing—and seemingly agreed with the decision of the Eleventh Circuit in *Covad (Bell South)*—that if the “basic prerequisites for ... price predation” had been present, a claim for predatory pricing may have been able to proceed.²¹

The Ninth Circuit’s later opinion in *LinkLine* took a different course. The *LinkLine* court held that *Trinko* does not preclude a price squeeze claim under the standards articulated in the pre-*Trinko* price squeeze cases. The court noted that while *Trinko* involved a fully regulated industry, there was “no comparable regulatory attention

¹⁹ *Id.* (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993)). The *Brooke Group* standard should be applied to the retail prices charged by the regulated monopolist and the below-cost inquiry should consider whether the price charged by the regulated monopolist is below an appropriate level of the monopolist’s own costs. The Eleventh Circuit concluded that the plaintiff can show below-cost pricing by alleging that the plaintiff cannot meet the monopolist’s retail price without suffering losses. This standard seems misguided; predatory pricing analysis properly focuses on the defendant’s costs, not the plaintiff’s.

²⁰ *Covad Comm’ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005) (citations omitted).

²¹ *Covad Comm’ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005).

paid to the [unregulated] retail DSL market” at issue, and the plaintiff could prove “facts, consistent with its complaint, that involve only unregulated behavior at the retail level.”²² Thus, the Ninth Circuit held that if a plaintiff could demonstrate that the defendant *intended* to squeeze the plaintiff out of the market, the claim could proceed, regardless of whether it satisfied the standard in *Brooke Group*.

The Ninth Circuit decision was not unanimous; in his dissent, Judge Gould interpreted *Trinko* as “insulat[ing] from antitrust review the setting of the upstream price” and thus requiring allegations of “market power, below cost sales and probable potential for recoupment in the retail market,” before he would allow a case to proceed.²³ He concluded that the court should have dismissed the price squeeze claim (as pled), but allow the plaintiffs to amend their complaint if they “could assert in good faith” the standards of *Brooke Group*.²⁴

Conclusion

The Ninth Circuit’s decision creates a circuit split that may at some point need to be addressed by the Supreme Court. The Ninth Circuit held that, even though the Supreme Court greatly circumscribed unilateral refusals to deal in *Trinko*, the decision did not affect historic price squeeze jurisprudence, in direct conflict with the decisions of the DC and Eleventh Circuits. The Ninth Circuit’s decision seems inconsistent with

²² *LinkLine Comm’ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876, 885 (9th Cir. 2007).

²³ *Id.* at 886-87.

²⁴ *Id.* at 887. Judge Gould did note that he disagreed with the DC Circuit to the extent that it did not allow a plaintiff to state a claim under *Brooke Group*, however, as discussed above, the amended DC Circuit Court opinion specifically left open the question of whether a plaintiff could state a price squeeze claim under the *Brooke Group* standard, because the plaintiff in that case did not plead facts sufficient to state a claim under *Brooke Group*. Thus, there likely is no difference between Judge Gould’s reasoning and that of the DC Circuit, as clarified.

Trinko. Where a defendant can refuse to deal under *Trinko*, there should be no Section 2 liability for the prices the defendant charges downstream competitors should it choose to deal with them. The latter behavior is simply a subset of the former—refusing to deal being no different than charging an infinitely high price—and thus should be adjudged by the same standards. As Judge Gould noted in dissent in *LinkLine*, after *Trinko* and *Brooke Group*, “the case doesn’t get out of the antitrust law starting blocks if plaintiffs cannot make allegations showing that the retail prices charged by the [defendant] were predatory” (i.e., “if the plaintiffs in good faith cannot allege market power, below cost sales and probable potential recoupment in the retail market, then the case should not proceed”).²⁵

²⁵ *Id.* at 886.