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A group of academics filed a brief in October urging the U.S. Supreme Court to grant the petition for certiorari in *Pacific Bell Telephone Company v. linkLine Communications*, No. 07-512.[1] In and of itself, this is not surprising. Academics often file briefs urging the Court to grant review, and antitrust cases in particular seem to attract a fairly high degree of academic interest.[2] But the coalition of academics supporting this particular petition is uncommonly broad. Gregory Sidak, Robert Bork, Robert Crandall, and William Baumol, among others, are signed on. And the tone of the brief is quite strident. According to the brief, the case below, if it stands, will "put antitrust at war with itself to a degree not witnessed" for more than three decades.[3]

Someone without any background in antitrust might be tempted to disregard the Scholars' Brief as hyperbolic. From a distance, *linkLine* seems an unlikely candidate for

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[1] Brief of Amici Curiae Professors and Scholars in Law and Economics in Support of Petitioners, Pacific Bell Tel. Co. v. linkLine Commc'ns, (No. 07-512) [hereinafter Scholars' Brief]. The brief was distributed January 2, 2008 for conference on January 18, 2008.

[2] *See, e.g.*, Brief of Amici Curiae Economics Professors in Support of Respondent, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682); Brief of Law Professors as Amici Curiae supporting Respondent, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682); Motion of Antitrust Scholars for Leave to File Brief and Brief as Amici Curiae in Support of Petitioners, Texaco, Inc. v. Dagher, 547 U.S. 1 (2006) (Nos. 04-805, 04-814).

[3] Scholars' Brief, *supra* note 1, at 4.

starting any kind of war. The opinion of the panel majority below consumes less than ten full pages in the Federal Reporter. And it confronts what seems like an esoteric question, even for antitrust lawyers:

> [W]hether the Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), bars a plaintiff from claiming a violation of § 2 of the Sherman Act by virtue of an alleged price squeeze perpetrated by a competitor who also serves as the plaintiff's supplier at the wholesale level, but who has no duty to deal with the plaintiff absent statutory compulsion.[4]

The most unusual feature of the opinion below—at least when compared with the thousands of other federal appellate court opinions issued each year—is the existence of a dissenting opinion. U.S. Court of Appeals decisions are almost always unanimous, and even excluding unpublished decisions, dissents are quite rare.[5] Although Judge Ronald M. Gould felt strongly enough about the decision below to disagree publicly with his colleagues, his dissent is understated. It casts the difference between its analysis and that of the majority in highly technical terms, obliquely criticizing the majority for failing to hold the plaintiff in this case to "the standards of *Brooke Group*."[6]

Although their brief is a tad alarmist, the academics are right. The panel majority's decision in *linkLine*, for all its seeming modesty, represents a major step backward in antitrust analysis. It is a throwback to the era in which courts routinely handed down antitrust opinions that were directly contrary to the interests of consumers.

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[4] linkLine Commc'ns, Inc. v. SBC California, Inc., 503 F.3d 876, 877 (9th Cir. 2007).

[5] *See* Stefanie A. Lindquist, *Bureaucratization and Balkanization: the Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 688 Table 3 (2007).

[6] *linkLine*, 503 F.3d at 887 (Gould, J., dissenting) (referencing Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)).

The Supreme Court should issue the writ of certiorari to take the case and, one hopes, reverse it.

I. The Panel Majority: The Right Answer to the Wrong Question

Essentially all of the problems with the panel majority's analysis can be found in its forty word statement of the issue. The panel majority boils the case down to the question of whether *Trinko* bars a competitor from basing a claim under Section 2 of the Sherman Act on allegations of a "price squeeze."[7] The answer to this narrow question, as the panel majority concludes, is no.[8] Although the panel majority gets the "right" answer, it asks the wrong question.

Trinko does not, by itself, prevent a plaintiff from pursuing a claim of monopolization or attempted monopolization based on allegations of a "price squeeze." *Trinko*, on its face, addresses a much different issue—whether a telecommunication company's failure to comply fully with an applicable regulatory regime amounts, without more, to a violation of Section 2 of the Sherman Act.[9] The phrase "price squeeze" does not appear in *Trinko*, and the opinion cites only one case, *Concord v. Boston Edison Co.*,[10] that even confronted allegations of a price squeeze.[11]

But to say that *Trinko* does not bar the claim is not to say that plaintiffs actually alleged facts sufficient to survive a motion to dismiss. It is here that the panel majority's analysis falls flat. Section 2 cases have historically been based on a wide range of

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[7] *linkLine*, 503 F.3d at 877.

[8] *Id.* at 885.

[9] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 401 (2004).

[10] 915 F.2d 17 (1st Cir. 1990).

[11] *Trinko*, 540 U.S. at 411–12.

conduct, including predatory pricing, price squeezes exclusive dealing arrangements, frivolous litigation, and even otherwise tortious conducts such as fraud or industrial sabotage.[12] But Section 2 of the Sherman Act does not prohibit any of these things. Rather, as the Supreme Court observed in *Trinko*, Section 2 of the Sherman Act "declares that a firm shall not 'monopolize' or 'attempt to monopolize.'"[13]

Even possession of monopoly power does not trigger liability under Section 2.[14] The ability to charge monopoly prices—i.e., prices that enable a firm to collect extraordinary profits—helps to fuel the rivalry among firms that is the essence of competition. The ability to charge monopoly prices, as *Trinko* notes, encourages firms and entrepreneurs to take risks and make investments from which consumers ultimately benefit. Thus, a firm, even a firm that has obtained monopoly power, will not violate Section 2 unless "[the power] is accompanied by an element of anticompetitive *conduct*."[15]

Precisely what "anticompetitive conduct" means in the context of a claim under Section 2 of the Sherman Act is a somewhat open question. Although the Sherman Act celebrated its centennial more than a decade ago, courts have not yet defined precisely the point at which a firm's competitive efforts cross the line from legitimate to illegitimate. And some despair over whether this boundary can ever be marked with the

[12] AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS (SIXTH), ch. 2 (American Bar Ass'n, eds., 6th ed. 2007).

[13] *Trinko*, 540 U.S. at 878.

[14] ANTITRUST LAW DEVELOPMENTS (SIXTH), *supra* note 12, at 240.

[15] *Trinko*, 540 U.S. at 879 (emphasis added).

precision necessary to make the effort to police non-fraudulent unilateral conduct is worth pursuing.[16]

Nevertheless, courts have provided enough of a sense of what a firm must do in order to violate the Sherman Act or to at least guide the inquiry. Earlier last year, for example, the Ninth Circuit held that "[a]nticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way."[17] In *Concord v. Boston Edison*, then-Chief Judge Breyer offered some texture to this same general point, explaining that conduct is anticompetitive "when it obstructs the achievement of competition's basic goals-lower prices, better products, and more efficient production methods."[18]

This, then, is the question that the panel majority in *linkLine* should have asked—whether plaintiffs in *linkLine* had alleged facts that, if true, would have shown that the defendant had done something that can be said with some degree of certainty to make consumers worse off than they would otherwise have been. The law professors and academics who joined the Scholars' Brief are right to be concerned that the panel majority did not feel compelled by thirty years worth of antitrust precedent to ask this question.

II. The Dissent: Getting It Right, But Leaving Some Gaps

The next question, of course, is what would have happened had the panel majority posed the right question. Judge Gould's dissent largely answers this question. His dissent

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[16] *See* Richard A. Epstein & Thomas P. Brown, *The War on Plastic*, REGULATION (Fall 2006), at 16.

[17] Cascade Health Solutions v. PeaceHealth, 502 F.3d 895, 904 (9th Cir. 2007).

[18] Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990).

portrays the plaintiffs as caught between two important antitrust cases from the Supreme Court—*Trinko* on the one hand and *Brooke Group* on the other. If Judge Gould's dissent had carried the day, the case would have been remanded to the district court to see whether the plaintiffs could have alleged facts, consistent with their obligations under Rule 11, to satisfy the predation and recoupment requirements of *Brooke Group*. The dissent is not, however, without its flaws. In particular, it skips quickly from the characterization of the case as a "price squeeze" to the test for predatory pricing. And although the conclusion is ultimately right, some links in the chain of analysis are worth filling in.

The first, and arguably most important link, is an explanation of what a price squeeze is. A price squeeze arises when

(1) a firm operates at two levels of a single industry, and

(2) its customers at the first level are its competitors at the second level.[19]

The most famous price squeeze in antitrust history involved Alcoa and the production of aluminum.[20] For much of the early part of the 20th century, Alcoa was essentially the only producer of aluminum ingot in the United States. The U.S. Department of Justice brought an antitrust case against Alcoa in the 1940s, complaining, among other things, that Alcoa had set too a high a price for its aluminum ingot relative to the price of its aluminum sheet. Alcoa's margin between ingot and sheet left too little margin for the competing

[19] ANTITRUST LAW DEVELOPMENTS (SIXTH), *supra* note 12, at 285–86.

[20] United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945).

makers of aluminum sheet that apparently needed to purchase ingot from Alcoa to make, as Judge Hand phrased it, a "living profit."[21]

Although the United States won the price squeeze claim against Alcoa, few believe that price squeezes pose a competitive threat outside of regulated industries. The charge that an unregulated monopolist has implemented a price squeeze is really no different from the charge that the unregulated monopolist has vertically integrated from one market to another. Such vertical integration may injure the unregulated monopolist's competitors in the second market, but it can be expected, on balance, to benefit consumers.[22] Moreover, as then-Chief Judge Breyer explained in *Concord v. Boston Edison*, any effort to police price squeezes in unregulated industries necessarily forces courts to determine prices of products that compete in separate, albeit related, markets. And this is an exercise for which courts and juries are spectacularly ill-equipped.[23]

For this reason, price squeezing claims have long been relegated to regulated industries. And even there, the rationale for the ban is weak and attenuated. In the absence of force or fraud, the case for government intervention necessarily rests on the existence of some bottleneck that cannot otherwise be replicated. In the telecommunications industry, for example, the supposed "bottleneck" has long been thought to be the "last-mile" access to homes and businesses that telephone companies necessarily maintain in order to provide telephone service to their customers. Of course,

[21] *Id.* at 438.

[22] *See*, *e.g.*, Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV. 1822, 1838 (2007) ("Even post-Chicago economic theorists recognize that vertical exclusion can yield substantial efficiencies").

[23] *Concord*, 915 F.2d at 25.

innovation and competition have proved the "last-mile" to be more vulnerable to competition than might have been thought. Cable companies and wireless providers have found ways to reach consumers that completely by-pass the route into homes and businesses long controlled by telephone companies.

Even assuming the existence of a bottleneck, however, the potential gains from compulsory access are limited. Compulsory sharing will only systematically improve consumer welfare to the extent that competition at the second (i.e., non-bottleneck) level fosters competition upstream. Even this rationale for compulsory access harbors a dash of inconsistency. If entry downstream is enough to make the upstream bottleneck vulnerable, then entry or the threat of entry at both levels should limit the upstream firm's ability to charge monopoly prices for the upstream bottleneck. Compulsory sharing will only diminish the incentive to make the investments necessary to compete upstream.[24] Nevertheless, it is conceivable that a firm faced with this sort of regulatory regime would choose to protect its upstream monopoly by engaging in price predation. Basically, the incumbent would set the price of the downstream product low enough to deter entry into the downstream market. And in that context, a judicially administered ban on price squeezing could support the overall regulatory effort.

But this analysis sets the stage for Judge Gould's coup de grace. If we assume that linkLine has some right to access the facility on which its downstream service relies, this does not mean that SBC's decision to set a low retail price violates the antitrust laws. As

[24] *See* Spulber & Yoo, *supra* note 22, at 1844-45 ("Forcing the monopolist to share its input rescues other firms from having to undertake the risk associated with supplying the relevant input for themselves.").

Judge Gould observes, *Trinko* puts the wholesale pricing of the service off-limits.[25] If the plaintiff wants a lower price for that service, it has to complain to the relevant administrative agency. And the downstream—or retail—price only violates the antitrust laws to the extent that the plaintiff is prepared to allege and prove that those prices are predatory within the meaning of *Brooke Group*. In other words, the plaintiff must allege that the defendant has market power in the downstream market, that it has set its price below an appropriate measure of cost, and that it has a reasonable likelihood of recouping those costs.

As Judge Gould observes, however, linkLine's complaint does not contain any such allegations. linkLine offers an *Alcoa*-style price squeeze. Its amended complaint focuses exclusively on the margin between SBC's wholesale digital subscriber line (DSL) price and its retail price:

> [D]efendants unlawfully manipulated their dual role … as both a wholesale-monopoly supplier and retail competitor of plaintiffs for DSL … by intentionally charging independent ISPs [Internet service provider] wholesale prices that were too high in relation to prices at which defendants were providing retail DSL services and necessary equipment to end-user customers ….[26]

linkLine does not contend, in other words, that SBC's prices were predatorily low. Absent such allegations, SBC's low prices would have benefited consumers, and it would be perverse to invoke the antitrust laws to punish SBC for doing that.

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[25] linkLine Commc'ns, Inc. v. SBC California, Inc., 503 F.3d 876, 886 (9th Cir. 2007) (Gould, J., dissenting).

[26] *Id.* at 879.

III. An Outcome Worth Fixing

In the end, there is a larger point. As I have noted with Richard Epstein in an earlier article, the antitrust laws work best in the context of horizontal agreements such as price fixing and bid-rigging.[27] In those contexts, we have a strong intuition of how markets would perform in the absence of the challenged restraints and can feel comfortable that elimination will make consumers better off.

No such intuition supports the attack on purely unilateral action. To be sure, it is possible, in this post-Chicago world, to specify assumptions on which otherwise benign conduct might injure consumers. But these assumptions do not generalize. All we can say with confidence in any particular case is that conduct might or might not benefit consumers. And this is not a sound basis for government intervention or even the threat of government intervention given the enormous costs associated with administering the antitrust laws.

The arrangements that are the ultimate source of the objection—SBC's contracts with its DSL buying customers—are the product of voluntary interaction. No one is compelled to purchase DSL from SBC, and there is no suggestion that SBC secured its customers through fraud. Instead, SBC is accused of attracting its customers by setting low, but not predatorily low, prices. Although it is possible to imagine circumstances in which government intervention can improve upon the outcomes reached by consenting adult consumers, this is not one. Put slightly differently, and with apologies to Professor

[27] *See* Epstein & Brown, *supra* note 16, at 16.

Bork, if this is a basis for an antitrust suit, then antitrust is once again "a policy at war with itself."[28]

[28] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).