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David Olsky

Wilmer Hale LLP

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In *linkLine Communications, Inc. v. SBC California, Inc.*,[1] the U.S. Court of Appeals for the Ninth Circuit ruled that an antitrust plaintiff may bring a "price squeeze" claim (i.e., a claim that a monopolist in an upstream market charged too much for an input to customers that are also the monopolist's competitors in the downstream market) even when the alleged monopolist had no legal duty to deal with its competitors. In doing so, the court provided no standards as to how the factfinder would determine whether the monopolist had charged a "fair" price to the plaintiff in the upstream market (or to its own customers in the downstream market). The only restriction placed by the Ninth Circuit on bringing this claim was that the plaintiff demonstrate that the defendant had a "specific intent" and set prices to "serve its monopolistic purposes."

In their compelling amicus brief urging the U.S. Supreme Court to grant certiorari, a group of professors and scholars led by Robert Bork and J. Gregory Sidak characterize the Ninth Circuit *linkLine* decision as:

> put[ting] antitrust at war with itself to a degree not witnessed since the years before the Court's conscious decision, three decades or more ago, to infuse antitrust law with greater economic rigor so that it might better advance consumer welfare.[2]

* David Olsky is a counsel in the Antitrust and Competition Department at Wilmer Hale LLP.

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

[2] 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), at 4.

Thomas P. Brown echoes this sentiment in his excellent piece for this issue, writing that *linkLine* is a "major step backward in antitrust analysis."[3]

One could argue with their characterization of *linkLine*'s potential influence—price squeeze cases are a rarity—but the sentiment is right. Setting aside the issue of whether a price squeeze claim is ever permissible when a monopolist has no duty to deal with its competitors, the Ninth Circuit's failure in *linkLine* to provide any objective standards as to how the factfinder shall determine a "fair price" creates great uncertainty about the potential for antitrust liability whenever a monopolist lowers its price to retail customers—uncertainty that may discourage firms with market power from enacting pro-competitive price cuts. Indeed, even over the last two decades when the use of economic analysis in antitrust opinions has become commonplace, the lower courts still come to different conclusions as to how and to what extent they should apply the antitrust laws to single-firm pricing decisions. This failure to employ a consistent objective standard to all single-firm pricing decisions plays havoc with the expectations of market players.

The Supreme Court adopted a clear objective standard in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[4] at least with regard to predatory pricing cases. In that case, the Supreme Court firmly established that for predatory pricing claims, the plaintiff must prove:

(a) that the defendant priced below some measure of its costs, and

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[3] Thomas P. Brown, *linkLine v. SBC: Back to the Future*, GCP MAGAZINE, no. 1, Jan. 2008, at 3, *at* www.globalcompetitionpolicy.org.

[4] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

(b) the probability that the defendant would recoup its investment after the competitor left the market.

Without proof of those two fundamental components, price cuts are beneficial to consumers and/or impossible for courts to condemn without unduly chilling pro-competitive price cuts.

The requirements of below-cost pricing and recoupment as formulated in *Brooke Group* logically extend to any theory of antitrust liability that turns on the fairness of single-firm pricing decisions, whether that theory is labeled "predatory pricing," "price squeeze," or "bundling," to name a few. The point made in *Brooke Group* is that the courts should not, on the basis of the antitrust laws, intervene in a single firm's unilateral pricing decisions unless the plaintiff can demonstrate that the defendant has crossed an objective threshold past which the harm to consumers cannot be disputed.

In the years since *Brooke Group* was decided, however, a number of courts have narrowly construed *Brooke Group* to apply to only one type of single-firm pricing claim (predatory pricing), and permitted plaintiffs to bring other types of single-firm pricing claims (e.g., price squeezes, bundling) without imposing any objective standards beyond the nebulous condition that firm's pricing not be "predatory." Some courts (including the Ninth Circuit in *linkLine*) have been loath to overturn their own precedent without a clearer expression from the Court on the circumstances in which *Brooke Group* applies outside of the context in which that case arose.

The most prominent examples, in addition to *linkLine*, are *LePage's Inc. v. 3M*[5] and *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*.[6] In *LePage's*, the U.S. Court of Appeals for the Third Circuit upheld a verdict for a competitor plaintiff on a bundling claim despite the fact that the plaintiff neither alleged nor proved that the defendant priced below an objective standard of its costs. In *Spirit Airlines*, the U.S. Court of Appeals for the Sixth Circuit, citing *LePage's*, ruled explicitly that monopolists may be liable for above-cost discounts to their customers when those discounts have detrimental effects on competitors.[7] The fundamental underpinning of those two decisions, however, was that *Brooke Group* was brought under the Robinson-Patman Act and that Section 2 of the U.S. Sherman Act, by contrast, has a broader prohibition on "predatory" conduct by defendants. *LePage's* and *Spirit Airlines* thus have been undermined by the Supreme Court's recent decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[8] which held that *Brooke Group* applied to a Section 2 claim alleging predatory bidding by a monopolist.

Even after *Weyerhaeuser*, however, the lower courts and the agencies remain uncertain on the reach of *Brooke Group*, and also on whether factfinders may consider evidence of subjective intent when determining liability for single-firm pricing policies. J. Thomas Rosch, a Commissioner at the U.S. Federal Trade Commission, for example,

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[5] LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003).

[6] 431 F.3d 917 (6th Cir. 2005).

[7] *Id.* at 953. ("In sum, even if the jury were to find that Northwest's prices exceeded an appropriate measure of average variable costs, the jury must also consider the market structure in this controversy to determine if Northwest's deep price discounts in response to Spirit's entry and the accompanying expansion of its capacity on these routes injured competition by causing Spirit's departure from this market and allowing Northwest to recoup its losses and to enjoy monopoly power as a result.").

[8] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

citing lower court rulings and selected language from the *Weyerhaeuser* decision, recently declared that "inferences can properly be drawn from evidence about a defendant's state of mind even in predatory pricing cases under Section 2."[9] To be fair to the Ninth Circuit, which frequently takes it on the chin from antitrust scholars, the continuing confusion over how to apply *Brooke Group* is in part due to the Supreme Court's silence on the issue. The Court did not review *LePage's* or *Spirit Airlines*. The *Weyerhaeuser* decision closely followed the facts of the case, providing little guidance on how future courts should review other theories relating to single-firm pricing (such as a price squeeze).

linkLine appears to be an ideal vehicle for the Court to set forth guiding principles on this important issue. For too long, courts have come to contradictory conclusions on how to apply *Brooke Group* to theories of antitrust liability for single-firm pricing that do not follow exactly the classic "predatory pricing" scheme. With the outpouring of support from scholars and the business community, the Court will hopefully grant certiorari and use *linkLine* as a vehicle to provide clarity on the circumstances under which firms can be held liable for their unilateral pricing decisions.

[9] J. Thomas Rosch, Commissioner, U.S. Federal Trade Commission, The Common Law of Section 2: Is It Still Alive and Well?, Speech at the George Mason Law Review 11th Annual Antitrust Symposium, Washington, DC (Oct. 31, 2007), at 4-5, *available at* http://www.ftc.gov/speeches/rosch/071031gmlr.pdf.