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Weil, Gotshal & Manges LLP

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Though antitrust cases have appeared with surprising frequency on the U.S. Supreme Court's docket in recent years, certain issues of real interest to practitioners and especially businesspersons continue to elude scrutiny. (Bundling, anyone?) However, the Court's February 25, 2009 decision in *linkLine*¹—a purported “price squeeze” action, the lone antitrust matter on the Court's current docket, and its tenth consecutive ruling in favor of a private antitrust defendant over the past five years²—can afford little comfort to plaintiffs pursuing claims under Section 2 of the Sherman Act.

linkLine involves allegations that AT&T is a monopolist in much of California of “DSL” (digital subscriber line) services, by which high-speed connections to the Internet are accomplished over telephone lines. A recent merger condition imposed by the Federal Communications Commission obligated AT&T to provide wholesale DSL transport services to independent internet service providers (“ISPs”) which provide DSL services to consumers at retail. In addition to selling DSL transport services at wholesale, AT&T competes with ISPs in providing retail DSL services.

The *linkLine* plaintiffs are four such independent ISPs competing with AT&T in the retail DSL market, who claimed that AT&T violated Section 2 by allegedly setting a high wholesale price for DSL transport services sold to independent ISPs and a low retail price for its own DSL internet services to consumers—thus squeezing the profit margins for plaintiffs trying to purchase DSL transport services in order to compete with AT&T in the retail DSL market. Price squeeze plaintiffs historically have asserted that “defendants must leave them a ‘fair’ or ‘adequate’ margin between the wholesale price and the retail price.”³ According to the *linkLine* plaintiffs, the squeeze here “exclude[d]

* Scott Martin is a litigation partner in the New York office of Weil, Gotshal & Manges LLP and a member of the firm's antitrust practice group.

¹ Pacific Bell Telephone Co. v. linkLine Communications, Inc., 129 S. Ct. 1109 (2009).

² In addition to *linkLine* and the *Trinko* and *Twombly* decisions discussed *infra*, see Credit Suisse Securities USA (LLC) v. Billing, 551 U.S. 264, 127 S. Ct. 2383 (2007); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705 (2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 127 S. Ct. 1069 (2007); Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281 (2006); Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276 (2006); Volvo Trucks N.A., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 126 S. Ct. 860 (2006); and F. Hoffmann La Roche v. Empagran, 542 U.S. 155, 124 S. Ct. 2359 (2004).

³ *Id.* at 1118.

and unreasonably impede[d] competition” and allowed AT&T to “preserve and maintain its monopoly control of DSL access to the Internet.”⁴

Writing a majority opinion joined by Justices Scalia, Kennedy, Thomas, and Alito, Chief Justice Roberts reasoned that AT&T’s conduct did not violate Section 2 as a price squeeze for the most fundamental of reasons—one rooted in a 90-year-old precedent still on terra firma, the *Colgate*⁵ decision: AT&T was under no general antitrust duty to deal with the plaintiffs *at all*,⁶ so the prices it charged at wholesale, if it elected to deal with plaintiffs in the first place, did not give rise to a violation. Notably, in a motion for judgment on the pleadings at the district court level, AT&T had argued that the Supreme Court’s decision in the 2004 *Trinko*⁷ case foreclosed plaintiffs’ claims, citing its holding that a firm with no antitrust duty to deal with rivals cannot be challenged under the antitrust laws for providing “insufficient assistance.”⁸

However, the district court, and the Ninth Circuit on interlocutory appeal, held that *Trinko* did not address the viability of price-squeeze claims, and certiorari was granted on that question: whether a plaintiff can bring price-squeeze claims under Section 2 in the absence of an antitrust duty to deal. The issue was readily resolved by the Court:

“the reasoning of *Trinko* applies with equal force to price-squeeze claims. . . . If AT&T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Under these circumstances, AT&T was not required to offer this service at the wholesale prices the plaintiffs would have preferred.”⁹

Having disposed of the “upstream” component of the price-squeeze claim, Chief Justice Roberts turned to the other half of the equation: “the assertion that the defendant’s *retail* prices are ‘too low.’”¹⁰ Of course, survival prospects have been especially dim for claims challenging low prices since the Court’s 1993 *Brooke Group*¹¹ decision, and the Court made clear in *linkLine* that there could be no unlawful price squeeze unless *Brooke Group*’s predatory pricing requirements were met—*i.e.*, that AT&T’s retail DSL prices were below an appropriate measure of its costs *and* there was a

⁴ *Id.* at 1115 (citation omitted).

⁵ *U.S. v. Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465 (1919) (as a general rule, businesses are free to choose the parties with whom they deal).

⁶ In *linkLine*, a duty to deal had been imposed upon AT&T, but that duty arose under federal communications law, not antitrust law.

⁷ *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S. Ct. 872 (2004).

⁸ *Id.* at 410, 124 S. Ct. at 872. In *Trinko*, defendant Verizon was alleged to have denied its competitors access to network interconnection support services.

⁹ *linkLine*, 129 S. Ct. at 1119 (emphasis added).

¹⁰ *Id.* (emphasis in original).

¹¹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578 (1993). Although *Brooke Group* involved Robinson-Patman Act claims, it has resonated perhaps even more loudly in Section 2, albeit with a requirement of a somewhat more difficult showing (dangerous probability) for recoupment.

“dangerous probability” that AT&T would be able to recoup its “investment” in such below-cost prices.¹² *linkLine* was not a case in which the pleading at issue would satisfy the *Brooke Group* test,¹³ and the Court was unwilling to recognize a price-squeeze claim for retail pricing above cost, lest firms “refrain from aggressive price competition to avoid potential antitrust liability.”¹⁴

In short, by separately employing *Brooke Group* and *Trinko* to dissect the alleged price squeeze, the Court found the claim to be “nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level;” in the absence of predatory pricing at retail and an antitrust duty to deal at wholesale, “a firm is certainly not required to price *both* of these services in a manner that preserves its rivals’ profit margins.”¹⁵

Of course, price-squeeze claims have been recognized by the Circuit Courts for decades, dating back to Judge Hand’s opinion in *Alcoa*,¹⁶ based upon retail prices that were higher than a “fair price.”¹⁷ Similar to Justice Souter’s polite pronouncement two years ago that the “no set of facts” pleading standard had “earned its retirement”¹⁸ after a half-century, Chief Justice Roberts in *linkLine* observed that “[g]iven developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us.”¹⁹

As a practical matter, *linkLine* represents the end of the price squeeze as an independent antitrust claim. If the wholesale and retail prices are independently lawful, the monopolist avoids liability under a price-squeeze theory. And faced with the *Aspen Skiing*²⁰ precedent that is virtually *sui generis* insofar as the limited circumstances in which an antitrust duty to deal with a rival may arise,²¹ coupled with a predatory

¹² *linkLine*, 129 S. Ct. at 1120 (citing *Brooke Group*, 509 U.S. at 222-224).

¹³ The issue was addressed in what the Court conceded was an “unusual posture” because the plaintiffs asserted before the Court that they agreed with a dissenting opinion below that price-squeeze claims must satisfy *Brooke Group*; plaintiffs thus “ask[ed] for a mulligan” by having the decision below in their favor vacated and the case remanded with instructions to grant them leave to amend to allege a *Brooke Group* claim. See *linkLine*, 129 S. Ct. at 1117.

¹⁴ *Id.* at 1120.

¹⁵ *Id.* (emphasis in original).

¹⁶ *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

¹⁷ See *id.* at 438.

¹⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563, 127 S. Ct. 1955, 1969 (2007) (referring to *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957)).

¹⁹ *linkLine*, 129 S. Ct. at 1120 n.3.

²⁰ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S. Ct. 1847 (1985) (describing certain limited circumstances in which a firm’s unilateral refusal to deal with a competitor can lead to antitrust liability).

²¹ Indeed, what was a narrow set of circumstances may now be almost imperceptibly thin. In *Trinko*, the Court characterized *Aspen Skiing* as residing “at or near the outer boundary of Section 2 liability.” 540 U.S. at 409. And this year, the Tenth Circuit’s decision affirming dismissal of the complaint in *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188 (2009)—which, like *Aspen Skiing*, involved alleged monopolization by a ski resort that terminated a prior course of dealing with a rival—distinguished *Aspen Skiing* on the ground that the defendant had a valid business reason for the termination whereas the defendant in *Aspen Skiing* was willing to forsake short-term profits to achieve an anticompetitive goal.

pricing test that consistently has doomed plaintiffs to ultimate failure since it was adopted 16 years ago, even the most aggressive price squeezers have little to fear so long as their retail prices are above cost.

Chief Justice Roberts took care to explain the importance of the Court's rationale for evaluating price squeezes in light of "more pertinent" recent jurisprudence (as opposed to a previously articulated standard among the lower courts that was dependent upon whether rivals have a "fair" or "adequate" margin between the wholesale and retail prices) in terms of establishing clear rules of antitrust law and a safe harbor for firms that seek to avoid price-squeeze liability.²² More fundamentally, however, the decision reflects the Court's aversion to potentially creating false positives of potential liability and chilling price competition through antitrust jurisprudence. That does not bode well for plaintiffs in other unilateral conduct cases involving dominant company defendants.

With respect to bundling, for example, the amorphous standard of exclusionary conduct found in the Third Circuit's *LePage's*²³ decision—a case with no showing that the plaintiff-rival had to sell below cost, only that certain key accounts were lost—certainly would not survive scrutiny under the Court's stated concern for providing clear rules of antitrust law. Moreover, neither *LePage's* (which involved no allegations of below-cost sales by the defendant) nor the Ninth Circuit's *PeaceHealth*²⁴ decision would pass a "strict" application of the *Brooke Group* test. Under *PeaceHealth*, Section 2 liability for a bundled price offered by a monopolist potentially lies when an imputed price of the bundled (competitive) product—attributing to it all of the discounts for the bundle, including those for the bundling (monopoly) product—would be below cost.²⁵ That potential liability may exist even if the bundle and each of the products within it separately are priced above cost, circumstances which instead would seem to merit a safe harbor under *Brooke Group*, and indeed may ultimately frame the relevant standard if the Court addresses bundling in the near future.

Similarly, the Court's broad application of *Trinko*—putting to rest any expectation that the holding might be limited to the telecommunications regulatory scheme or otherwise to an extension of potential Section 2 liability to the claims at issue there—puts in perspective the earlier statement of *Trinko's* author, Justice Scalia, that "[w]here a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as pro-competitive—can take on exclusionary

²² See *linkLine*, 129 S. Ct. at 1120-21.

²³ *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003).

²⁴ *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007).

²⁵ Notably, *PeaceHealth*, unlike *Brooke Group* (or the approach to bundling recommended by the Antitrust Modernization Commission) also does not have a separate recoupment requirement.

connotations when practiced by a monopolist.”²⁶ Assuming that lens does not focus on a monopolist’s behavior in the absence of an antitrust duty to deal, further reflection may be warranted on the continued “pertinence” of a number of other long-undisturbed decisions—what of the impermissible refusal to deal in *Lorain Journal*,²⁷ to note just one example? As characterized by supporters of the Court’s more recent decisions, having courts rather than markets determine “how many players a particular industry ‘needs’” is the sort of “industrial planning” that may be popular with European regulators, but they contend should have no place in modern American antitrust jurisprudence.²⁸

In the short term, meanwhile, the *linkLine* plaintiffs themselves were presented with quite a challenge on remand concerning leave to amend their Complaint to try to state a *Brooke Group* predatory pricing claim. The Court’s admonishment may well sum up the steep hill faced by Section 2 plaintiffs in the future: “if AT&T could bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market.”²⁹

²⁶ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 488, 112 S. Ct. 2072, 2093 (1992) (Scalia, J., dissenting).

²⁷ In *Lorain Journal Co. v. U.S.*, 342 U.S. 143 (1951), an Ohio town’s sole daily newspaper, reaching about 99 percent of the residents, refused to deal with local businesses that advertised with a nearby radio station, as a result of which various merchants abandoned plans to advertise with the station. In connection with the Section 2 claims, the Supreme Court found that the newspaper had attempted to destroy the radio station as a competitor in order to maintain a monopoly position with respect to local advertising. Given the near-complete market power involved, the circumstances of *Lorain Journal* may exist in the rarefied air of *Aspen Skiing*, and even beg for an argument that access was denied to an “essential facility.” However, assuming somewhat less exceptional facts or any business justification for the exercise of *Colgate* rights, the plaintiff’s chances look substantially dimmer.

²⁸ See *Supreme Opportunity*, at wsj.com, Jan. 26, 2008.

²⁹ *linkLine*, 129 S. Ct. at 1123.