

PACIFIC BELL v. LINKLINE: PRICE SQUEEZING AND THE LIMITS OF JUDICIAL ADMINISTRABILITY

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I. INTRODUCTION

On September 11, 2007, a Ninth Circuit panel held in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, that linkLine’s “price squeeze” claim against Pacific Bell stated a valid cause of action under Section 2 of the Sherman Act (“Section 2”).¹ As DSL providers, linkLine and the other respondents (“linkLine”) purchased wholesale network access (“DSL transport”) from Pacific Bell and competed against Pacific Bell in the retail DSL market. linkLine alleged that Pacific Bell had raised the price of DSL transport and concurrently lowered the price of its retail DSL to squeeze linkLine’s profit margins and drive it out of the California market.² The court rejected Pacific Bell’s motion for judgment on the pleadings and found that linkLine’s price squeeze claim survived the Supreme Court’s ruling in *Verizon Communications v. Law Offices of Curtis Trinko*,³ which held that Verizon’s alleged violation of a statutory duty to deal was not a cause of action under Section 2.⁴ On June 23, 2008, the Supreme Court

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1. *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 503 F.3d 876, 877 (9th Cir. 2007); 15 U.S.C.A. § 2 (West 2008) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .”).

2. *linkLine*, 503 F.3d at 877–78.

3. *Verizon Commc’ns, Inc. v. Law Offices of Curtis Trinko*, 540 U.S. 398, 416 (2004).

4. *See linkLine*, 503 F.3d at 883 (“First, as the Eleventh Circuit has underscored, *Trinko* did not involve a price squeezing theory. Indeed, *Trinko* took great care to explain that in this particular regulatory context, ‘claims that satisfy established antitrust standards’ are preserved. Because a price squeeze theory formed part of the fabric of traditional antitrust law prior to *Trinko*, those claims should remain viable notwithstanding either the telecommunications statutes or *Trinko*.” (citations omitted)).

granted Pacific Bell's petition for a writ of certiorari to review the Ninth Circuit's ruling.⁵

II. FACTS

"Broadband" internet, with its high download speeds and reliability, is the most popular means of accessing the internet among residential and commercial customers.⁶ Digital subscriber lines ("DSL") are among the most popular forms of broadband and offer reception speeds about fifty times faster than dialup connections.⁷ Unlike other forms of broadband, DSL can be provided over existing telephone infrastructure.⁸ Pacific Bell provides retail DSL service to residential and commercial customers.⁹ Pacific Bell also owns the "last-mile" connections in most of California; these lines run from Pacific Bell's central offices to customers' homes or offices. These "last-mile" connections, because of their natural monopoly characteristics, are considered "essential" facilities.¹⁰ Because they do not own the last mile connections necessary to reach customers, non-affiliated DSL providers, like linkLine, must purchase DSL transport, i.e., access to last-mile connections, from Pacific Bell.¹¹ To ensure that incumbents such as Pacific Bell do not abuse their control of essential facilities and extend their monopolies to downstream markets such as retail DSL, the Federal Communications Commission ("FCC") has enacted a series of regulations under the Communications Act of 1934.¹² FCC rules require that landline phone monopolies that provide DSL service must also provide DSL transport to non-affiliated providers on a non-discriminatory basis.¹³

linkLine alleged that, in spite of the FCC's regulatory regime, Pacific Bell abused its ownership and control of essential facilities in

5. *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 503 F.3d 876 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2957 (June 23, 2008) (No. 07-512).

6. Joint Appendix at 15, *linkLine*, 128 S. Ct. 2957 (No. 07-512).

7. *Id.* at 15–16.

8. *Id.* at 15.

9. *Id.* at 16.

10. Phillip Areeda, *Essential Facilities: A Principle in Need of Some Limiting Principles*, 58 ANTITRUST L.J. 841 (1989) ("A single firm's facility . . . is 'essential' only when it is both critical to the plaintiff's competitive vitality and the plaintiff is essential for competition in the marketplace. 'Critical to the plaintiff's competitive vitality' means that the plaintiff cannot compete effectively without it and that duplication or practical alternatives are not available.").

11. *Id.*

12. Brief for Petitioner at 5, *linkLine*, 128 S. Ct. 2957 (No. 07-512).

13. *Id.* at 3.

violation of Section 2 of the Sherman Act.¹⁴ Specifically, linkLine claimed that Pacific Bell charged independent Internet Service Providers (“ISPs”) “wholesale prices that were too high in relation to prices at which [Pacific Bell was] providing retail DSL services and necessary equipment to end-user customers,” as part of a so-called price squeeze strategy.¹⁵ According to linkLine, Pacific Bell charged retail prices that were, on occasion, lower than the amount linkLine paid to Pacific Bell for DSL transport.¹⁶ The respondents asserted that if they matched Pacific Bell’s retail prices, they would not be able to cover their costs of providing service.¹⁷ Similarly, linkLine contended that Pacific Bell would not be able to earn a profit on its retail service if Pacific Bell were paying the same wholesale prices as the respondents.¹⁸ Through this strategy, linkLine argued, Pacific Bell sought to eliminate profit margins for non-affiliated DSL providers to drive them out of the market and to establish a monopoly in the retail DSL service market.¹⁹

III. LEGAL BACKGROUND

The Ninth Circuit based its ruling that linkLine’s price squeeze claim stated a valid Section 2 cause of action on a long line of cases dating back to 1945. In *United States v. Aluminum Co. of America* (“*Alcoa*”), the Second Circuit explained the mechanics of an anticompetitive price squeeze.²⁰ *Town of Concord v. Boston Edison Co.*²¹ and *City of Anaheim v. Southern California Edison Co.*²² examined the intersection of antitrust and regulation in the context of electricity and stressed that the presence of regulation reduces or even removes the need for antitrust remedies.²³ In cases with fact patterns virtually identical to those in *linkLine*, both the D.C.²⁴ and the Eleventh²⁵ Circuits recently considered price squeeze claims and denied relief to the plaintiffs. Lastly, although it did not directly

14. Joint Appendix, *supra* note 6, at 17–18.

15. *Id.* at 35.

16. *Id.*

17. *Id.*

18. *Id.* at 36.

19. *Id.* at 38.

20. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

21. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 30–31 (1st Cir. 1990).

22. *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1377 (9th Cir. 1992).

23. *Id.*

24. *Covad Commc’ns Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005).

25. *Covad Commc’ns Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050 (11th Cir. 2004).

address price squeezes, the Supreme Court's holding in *Verizon Communications v. Law Offices of Curtis Trinko* must be considered in any case at the intersection of antitrust and regulation.

A. *Alcoa: The Progenitor of Price Squeezes*

In *Alcoa*, defendant Alcoa was an unregulated firm that produced aluminum ingot, manufactured aluminum sheet using the ingot, and sold its ingot to other sheet rollers.²⁶ The government claimed, *inter alia*, that Alcoa raised the price of ingot it sold to rival sheet rollers and concurrently slashed the price of the sheet it produced.²⁷ The Second Circuit held that three elements must be satisfied for a successful price squeeze claim: 1) the firm conducting the squeeze has monopoly power at the first industry level; 2) its price at the first level is higher than a "fair price"; and 3) its price at the second level is so low that its competitors cannot match the price and still make "living profits."²⁸ The court found that Alcoa met the first element by monopolizing the market for aluminum ingot.²⁹ Upon an examination of aluminum ingot and sheet price data, the court also found that Alcoa's pricing practices had deprived rival sheet makers of a "living profit," thereby meeting the third element of the test.³⁰ This practice forced rival sheet manufacturers to leave the industry, thereby establishing the second element that Alcoa sold ingot to rivals at "higher than a 'fair price.'"³¹

B. *Price Squeezes in Fully Regulated Industries*

In *Town of Concord* and in *City of Anaheim*, the defendants were franchised utilities that generated, transmitted, and distributed electricity and that owned the entire relevant infrastructure.³² The plaintiffs were municipally-owned distribution companies that purchased power from the defendants and "wheeled" power from other generators over the defendants' transmission lines.³³ The Federal Energy Regulatory Commission and state public utility

26. *Alcoa*, 148 F.2d at 436.

27. *Id.* at 437-38.

28. *Id.*

29. *Id.* at 438.

30. *Id.*

31. *Id.*

32. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 19, 20 (1st Cir. 1990); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1375 (9th Cir. 1992).

33. *Town of Concord*, 915 F.2d at 20; *City of Anaheim*, 955 F.2d at 1376.

commissions regulated the defendants at the wholesale and retail levels, respectively.³⁴ The municipalities alleged that, in spite of this comprehensive regulatory oversight, the defendants had manipulated their regulatory filings to eliminate the plaintiffs' profit margins.³⁵

In *Town of Concord*, the First Circuit rejected the plaintiff's price squeeze claim, basing its ruling on the presence of comprehensive regulation. In dicta, the court described the economics of price squeezing, which are not always anticompetitive and, in fact, can be procompetitive.³⁶ First, by driving out less efficient independent competitors in the downstream market, price squeezes can save economic resources so that they can be used elsewhere in a more productive capacity.³⁷ Second, when independent monopolies exist at the upstream and the downstream levels, price squeezes can increase consumer welfare.³⁸ Under this 'vertical separation,' monopoly markups are added at each stage of production; consequently, consumers pay a higher final price.³⁹ The replacement of the two independent monopolies by a single integrated monopoly can eliminate this so-called double marginalization problem.⁴⁰

On the other hand, price squeezes can also have anticompetitive effects. First, they can eliminate downstream rivals and thus reduce non-price competition, which is an important competitive dimension in many industries.⁴¹ Second, a price squeeze permits the upstream monopolist to extend its monopoly power into the downstream market; this reduces the likelihood of a new competitor successfully entering the market and so fortifies the monopolist's existing market power.⁴² Given the ambiguous effects of price squeezes, only a detailed factual inquiry can determine the exact consumer welfare effects of a specific allegation of price squeezing.

Because both levels of the market were regulated, the court in *Town of Concord* reasoned that these administrative processes can prevent anticompetitive price squeezes.⁴³ Although the court stressed

34. *Town of Concord*, 915 F.2d at 20; *City of Anaheim*, 955 F.2d at 1375.

35. *Town of Concord*, 915 F.2d at 20–21; *City of Anaheim*, 955 F.2d at 1376.

36. *Town of Concord*, 915 F.2d at 23.

37. *Id.* at 23–24.

38. *Id.* at 24.

39. *Id.*

40. LUIS M.B. CABRAL, INTRODUCTION TO INDUSTRIAL ORGANIZATION 190–92 (2000).

41. *Town of Concord*, 915 F.2d at 24.

42. *Id.*

43. *Id.* at 25.

that institutional considerations required it to deny this plaintiff's claim, it did not categorically reject all price squeeze claims.⁴⁴ The court held only that *full* regulation bars price squeeze claims,⁴⁵ and that price squeeze claims in unregulated or partly regulated industries may still warrant antitrust scrutiny.⁴⁶

In contrast to the First Circuit, the Ninth Circuit, in *City of Anaheim*, held that the mere presence of full regulatory oversight does not categorically bar price squeeze claims.⁴⁷ The court found that regulation alters the calculus for the judiciary when it considers antitrust claims, and said that “concerns [of anticompetitive price squeezes] are attenuated in the electrical industry whose rates are regulated at both the wholesale and retail levels.”⁴⁸ The court reasoned that because of regulatory imperfections, a regulated monopolist could still “manipulate its filings . . . in a manner that causes a, at least temporary, squeeze which might be just as effective as one perpetrated by an unregulated actor.”⁴⁹ To prevent antitrust from unduly encroaching on the territory of regulation, the court required plaintiffs to prove specific intent when alleging price squeezes in regulated environments.⁵⁰ The City of Anaheim's price squeeze claim was rejected because the court found that Edison was legitimately maximizing its own profits, not improperly forcing the plaintiff out of the retail distribution business.⁵¹

C. Price Squeezes in the DSL Market

The D.C. Circuit in *Covad Communications Co. v. Bell Atlantic Corp.* and the Eleventh Circuit in *Covad Communications Co. v. BellSouth Corp.*, each considered allegations essentially identical to those of *linkLine*.⁵² In both cases, a vertically-integrated DSL provider allegedly raised the price of DSL transport and simultaneously reduced the price of its retail DSL.⁵³

44. *Id.* at 29.

45. *Id.*

46. *Id.*

47. *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1377 (9th Cir. 1992).

48. *Id.*

49. *Id.*

50. *Id.* at 1378.

51. *Id.* at 1379.

52. *Covad Commc'ns Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005); *Covad Commc'ns Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050 (11th Cir. 2004).

53. *Bell Atlantic*, 398 F.3d at 673; *BellSouth*, 374 F.3d at 1050.

In *Bell Atlantic*, the D.C. Circuit held that the Supreme Court's ruling in *Trinko* barred price squeezes.⁵⁴ Swiftly dismissing Covad's price squeeze claim, the court stated that "it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal."⁵⁵ In *BellSouth*, the Eleventh Circuit ostensibly allowed Covad's price squeeze claim to proceed.⁵⁶ The court, however, confused price squeezing with predatory pricing, two similar-sounding practices that are clearly distinguishable from each other. The focus in a predatory pricing claim is on the defendant's pricing conduct; in a price squeezing claim, the focus is on how the defendant's conduct reduced or eliminated the plaintiff's profit margins. The Eleventh Circuit described Covad's claim as a price squeeze and yet applied the test for predatory pricing.⁵⁷ The court allowed Covad's claim to survive summary judgment because it satisfied the two-prong test for *predation* set out in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*: 1) BellSouth priced its DSL below an appropriate measure of its costs; and 2) BellSouth had a dangerous probability of recovering its losses from the below-cost pricing.⁵⁸ Covad's claim survived BellSouth's motion to dismiss because it met the criteria for a predatory pricing claim, not because it met the criteria for price squeezing.

D. Trinko: The Intersection Between Antitrust and Regulation

In the Supreme Court's landmark *Trinko* decision, the respondent alleged that Verizon had, *inter alia*, failed to provide a landline telephone rival with adequate access to its network,⁵⁹ and that Verizon's breach of its statutory duty to share also constituted a violation of Section 2.⁶⁰ The Supreme Court held that Verizon's refusal to deal with a rival in the landline telephone market was not an antitrust violation.⁶¹ An underpinning of the Court's decision was the FCC's regulatory oversight of Verizon.⁶² The Court reasoned that the

54. *Bell Atlantic*, 398 F.3d at 673.

55. *Id.* (citing 3A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 129 (2d ed. 2002)).

56. *BellSouth*, 374 F.3d at 1050.

57. *Id.*

58. *Id.* at 1051 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993)).

59. *Verizon Comm'ns, Inc. v. Law Offices of Curtis Trinko*, 540 U.S. 398, 404-05 (2004).

60. *Id.* at 405.

61. *Id.* at 415.

62. *Id.* at 411-13.

FCC's oversight reduced the likelihood of anticompetitive conduct and found that, in fact, the regulatory regime had worked as intended in this particular instance.⁶³ Because of this regulatory structure, the marginal benefit of Section 2 liability as a "backstop" against anticompetitive conduct would be slight and therefore did not warrant incurring the potentially significant administrative and error costs associated with antitrust litigation.⁶⁴

IV. HOLDING

In *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, the Ninth Circuit rejected Pacific Bell's motion to dismiss and held that price squeeze allegations in *partially*-regulated industries do state a valid cause of action under Section 2.⁶⁵ The court held that price squeezes are consistent with *Trinko* and with a significant body of appellate-level rulings.⁶⁶ The majority's opinion elicited a strong dissent from Judge Ronald Gould.⁶⁷

The majority emphasized that *Trinko* did not involve price squeezes and that the Supreme Court "took great care to explain that in this particular regulatory context, 'claims that satisfy established antitrust standards' are preserved."⁶⁸ The majority found that the *Trinko* court—though it stressed the existence of a regulatory structure when it rejected the plaintiff's claim—did not hold that regulation was a *per se* bar on antitrust claims.⁶⁹ Rather, the existence of a regulatory structure was just "one factor of particular importance" for a court to consider when deciding antitrust matters.⁷⁰

63. *Id.* at 413 ("The regulatory response to the OSS failure complained of in respondent's suit provides a vivid example of how the regulatory regime operates. When several competitive LECs complained about deficiencies in Verizon's servicing of orders, the FCC and PSC responded.").

64. *Id.* at 414 ("Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.'" (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001))).

65. *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 503 F.3d 876, 885 (9th Cir. 2007).

66. *Id.* at 883.

67. *Id.* at 885.

68. *Id.* at 883 (quoting *Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko*, 540 U.S. 398, 406 (2004)).

69. *Id.*

70. *Id.*

The Ninth Circuit then looked to how other circuits had applied *Trinko* to price squeeze claims, but found no definitive guidance.⁷¹

The court also saw no need to reconsider its *City of Anaheim v. Southern California Edison Co.* ruling in light of *Trinko*. Both *City of Anaheim* and *Trinko* viewed regulation as an *important* factor, but not a *dispositive* one, when a court ruled on an antitrust claim.⁷² Although *City of Anaheim* urged caution before imposing antitrust liability on a regulated company, the court also acknowledged that price squeezes could arise even in fully regulated sectors because of deceptive and fraudulent rate filings.⁷³ The court held that if price squeezes could be implemented in *fully*-regulated sectors they could, by implication, also occur in *partially*-regulated industries.⁷⁴ The court underscored that although wholesale rates are subject to FCC regulation, retail prices are determined entirely by market forces and face no external constraint other than the antitrust laws.⁷⁵

Judge Gould's dissent argued that *Trinko* did bar price squeeze claims because a monopolist that can refuse to deal under the antitrust laws, by extension, also enjoys complete discretion over pricing.⁷⁶ If, however, the plaintiffs could establish a predatory pricing claim that satisfied the requirements of the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* test, Judge Gould noted, their complaint would survive a summary judgment motion.⁷⁷

V. ANALYSIS

For both economic and institutional-competence reasons, the Ninth Circuit erred in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, by allowing the plaintiffs' price squeeze claim to proceed. First, the court failed to adequately examine the economics of price squeezing and ignored the possibility that it can be procompetitive. Second, the Ninth Circuit's ruling will force the federal courts to act as direct price administrators, which is a

71. *Id.* at 881 (“[The *Trinko*] holding raised the question of whether a price squeeze is merely another term of the deal governed by the Supreme Court's analysis in *Trinko*, or whether it is something else. The D.C. and Eleventh Circuits have offered conflicting answers to that question.”).

72. *Id.* at 883.

73. *Id.* at 883–84.

74. *Id.* at 884.

75. *Id.* at 885.

76. *Id.*

77. *Id.* at 887.

problematic requirement that is especially unnecessary in markets in which specialized regulatory agencies already perform this function. The Ninth Circuit's ruling thus creates the exact situation the *Trinko* court sought to avoid: supplementary antitrust remedies that are likely to provide only slight marginal benefits but that will impose potentially significant administrative and economic costs.⁷⁸

A. *The Shaky Economic Foundations of the Ninth Circuit's Ruling*

Perhaps because the opinion did not consider *Town of Concord v. Boston Edison Co.*,⁷⁹ the Ninth Circuit did not recognize the uncertain economic effects of price squeezes. As then-Judge Breyer wrote in *Town of Concord*, price squeezes, unlike, for example, collusion, can have both anticompetitive and procompetitive effects.⁸⁰ In their complaint, the *linkLine* respondents failed to specifically state how the price squeeze harmed competition, and instead gave only conclusory statements about the anticompetitive effects on the marketplace.⁸¹ By focusing strictly on the plaintiff's claims of harm to itself rather than on harm to the overall competitive process, the court ignored modern antitrust's goal of promoting consumer welfare.⁸²

When the court allowed the respondents' price squeeze claim to survive Pacific Bell's motion to dismiss, it disregarded the possibility that price squeezing can, in fact, be procompetitive. First, price squeezes can increase consumer surplus in markets in which separate monopolies exist at the upstream and downstream levels.⁸³ The upstream monopolist, through a price squeeze, can expand downstream and eliminate the independent downstream monopolist.⁸⁴ Although these price squeezes harm the downstream monopolist,

78. *Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko*, 540 U.S. 398, 414 (2004) ("Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.'" quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir 2001)).

79. *Town of Concord* lays out the economics and institutional considerations in adjudicating price squeeze claims more thoroughly than any recent court opinion. See *supra* Part III.B.

80. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 24–25 (1st Cir. 1990).

81. Brief in Opposition at 1, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 128 S. Ct. 2957 (2007) (No. 07–512).

82. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

83. *Town of Concord*, 915 F.2d at 25.

84. *Id.*

they benefit consumers by eliminating the double marginalization problem whereby consumers have to pay two levels of monopoly profits.⁸⁵ The replacement of two independent monopolies with a single monopoly thus results in lower prices.⁸⁶ Second, price squeezes can eliminate inefficient downstream competitors and induce the reallocation of these economic resources to more productive uses elsewhere.⁸⁷ By adopting a permissible stance towards price squeeze claims, the Ninth Circuit ruling, in some circumstances, frustrates the possibility of welfare-enhancing conduct.

In addition to potentially preventing efficiency-enhancing vertical integration and market exit, the threat of price squeeze liability may also deter procompetitive price cuts at the retail level. Vertically-integrated firms may worry that if they slash retail prices, they will invite allegations of price squeezing from downstream competitors.⁸⁸ Even if they ultimately prevail in court, firms may maintain supracompetitive retail prices to avoid the significant costs of defending themselves against such price squeeze claims. Although these higher retail prices ensure the continued profitability of downstream competitors, they are unambiguously bad for consumers and social welfare. The court, in rejecting Pacific Bell's motion for judgment on the pleadings, returned to the competition policy of the mid-twentieth century in which antitrust was, according to a leading scholar, at "war with itself."⁸⁹

The court also speciously applied the *Trinko* ruling. If a monopolist has no general duty to deal with a rival, it is illogical to require that it deal under specific terms when it voluntarily chooses to

85. CABRAL, *supra* note 40, at 190–92.

86. *Id.*

87. *Town of Concord*, 915 F.2d at 24–25.

88. J. Gregory Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, 4 J. COMPETITION L. & ECON. 279, 297 (2008).

89. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 7 (1978) ("Certain [antitrust doctrines] preserve competition, while others suppress it, resulting in a policy at war with itself."); Robert Pitofsky, Chairman, Fed. Trade Comm'n, *An Antitrust Progress Report for the FTC: Past, Present and Future*, Remarks Before the Antitrust 1996 Conference (Mar. 4, 1996), available at <http://www.ftc.gov/speeches/pitofsky/speech4.shtml> ("Riding the crest of World War II successes and implementing the pent-up technology of the 1930s and the war years, American industry seemed invincible. In that frame of mind why not err on the side of preserving large numbers of rivals, and limiting their collaboration? Even if efficiency or innovation suffered what did that matter?" (quoting Phillip Areeda, *Antitrust Law as Industrial Policy: Should Judges and Juries Make It?* in *ANTITRUST INNOVATION AND COMPETITIVENESS* 35 (Jorde & Teece eds., 1992))).

deal.⁹⁰ Such a rule will only deter voluntary dealing in the future, as courts may impose liability on those transactions because of alleged price squeezing.⁹¹ Instead of dealing (and risking antitrust liability), vertically-integrated firms with an upstream monopoly may simply refuse to deal with downstream rivals, or to deal only insofar as required by regulation.⁹² Thus, price squeezing, without an affirmative duty to deal, may have the perverse effect of discouraging welfare-enhancing inter-firm dealing.

Additionally, the Ninth Circuit found a split between the D.C. and Eleventh Circuits because it misread the Eleventh Circuit's holding in *BellSouth* and failed to appreciate the substantive economic differences between price squeezing and predatory pricing. The *BellSouth* court allowed the price squeeze to proceed if the plaintiff could satisfy the two-part *Brooke Group* test, which applies to *predatory pricing* claims.⁹³ To establish such claims, the plaintiff must show that: 1) the defendant priced its product below an appropriate measure of its costs; and 2) the defendant had a dangerous probability of recovering its losses from the below-cost pricing.⁹⁴ In adjudicating predatory pricing claims, courts look to whether the *defendant* priced its product below its *own* costs. Courts deciding price squeeze claims, however, consider whether the defendant's pricing conduct reduced or eliminated the *plaintiff's* profit margins. Given the test it applied, the Eleventh Circuit legitimately allowed Covad's complaint to survive summary judgment as a predatory pricing claim, not as a price squeezing claim. The Ninth Circuit failed to recognize this semantic error of its sister circuit and so mistakenly found a decisional split where none actually existed.

B. The Ninth Circuit's Disregard for Considerations of Institutional Competence

By allowing the plaintiffs' complaint to survive summary judgment, the Ninth Circuit overestimated the institutional competence of the federal judiciary and underestimated the capabilities of the FCC. Price squeeze claims typically involve

90. Dennis Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, 4 J. COMPETITION L. & ECON. 271, 276-77 (2008).

91. *Id.*

92. *Id.*

93. *Covad Commc'ns Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050 (11th Cir. 2004).

94. *Id.*

questions of what Judge Learned Hand in *Alcoa* termed “fair prices” and “living profits.”⁹⁵ Even aside from the question of whether finding liability for price squeezes is good or bad economics, the determinations necessary to adjudicate these cases are likely beyond the expertise of the federal courts’ generalist judges. In *Town of Concord*, then-Judge Breyer, an expert in antitrust and regulation, stated as much, conceding that resolving such complex matters was extremely difficult for federal judges.⁹⁶ The challenge becomes even greater when the issue of liability is left to a jury. If price squeeze cases are decided on the basis of crude intuition, judges and juries risk condemning price squeezes that are, in fact, procompetitive.

Antitrust and regulation have the same ultimate aims: “low and economically efficient prices, innovation, and efficient production methods.”⁹⁷ In markets in which the antitrust laws are the only constraint on dominant firms, requiring judges to act as price regulators *may* be a necessity, in spite of the institutional shortcomings of the federal judiciary in this realm. In markets with at least some regulatory oversight, however, the need for judges to set prices is much less compelling. Regulatory agencies have both specialized knowledge of their assigned industry and in-house experts well-versed in the economics of price regulation.⁹⁸ Even if administrative bodies regulate only the upstream market, they may still be able to consider retail prices, either when prospectively setting wholesale prices or when retrospectively reviewing the propriety of those prices.⁹⁹ Moreover, price regulation, given the inherently dynamic nature of markets, is an ongoing process—a “fair price”

95. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 436 (2d Cir. 1945).

96. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (“But how is a judge or jury to determine a ‘fair price?’ Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition ‘would have set’ were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years?”).

97. *Id.* at 22.

98. *See Sidak*, *supra* note 88, at 295 (“In public utility regulation, the price-squeeze issue arises in proceedings concerning ‘access pricing’ and ‘imputation.’ Extensive economic literature exists on how regulators would maximize consumer welfare in the pricing of bottleneck inputs that a vertically integrated monopolist sells to its competitors in a downstream market.”) (footnote omitted).

99. *See id.* at 282 (“When the duty to deal arises from regulatory compulsion, rather than from a prior course of voluntary dealing, and when a regulator has authority to consider downstream competition in regulating prices charged by a regulated monopolist for access to a bottleneck input, there is no occasion for a court to consider further the relationship between the input price and retail prices.”).

today may not be a “fair price” next week. Although courts are well-suited to provide one-time remedies such as damages or injunctions, they are ill-equipped to handle the day-to-day monitoring that price regulation requires.¹⁰⁰ Just as they are better at making the necessary price determinations, regulatory agencies like the FCC are more qualified to perform the required daily oversight for price squeeze remedies than are the federal courts.

VI. ARGUMENTS AND DISPOSITION

A. *Strengths & Weaknesses of Pacific Bell's Case*

The strengths of Pacific Bell's case have largely been described above. First, its brief accurately points out that the Ninth Circuit erroneously found a circuit split on the question of price squeezing.¹⁰¹ Although the D.C. Circuit expressly rejected Covad's price squeeze claim in *Bell Atlantic*, the Eleventh Circuit incorrectly described the plaintiff's predatory pricing allegations as price squeezing allegations.¹⁰² The former allegations inquire into the defendant's profit margins, while the latter examines the plaintiff's profit margins. Second, Pacific Bell rightly argued that the Ninth Circuit's decision to allow a price squeeze claim in light of *Verizon Communications v. Law Offices of Curtis Trinko* was economically unsound.¹⁰³ If a monopolist has no antitrust duty to deal with rivals, requiring it to deal on court-specified terms will only deter it from engaging in those voluntary transactions.¹⁰⁴

The economics that Pacific Bell used in its brief, though partly correct, neglected the possible harms of price squeezes. Imposing liability for price squeezes can have anticompetitive effects. For example, liability can deter price cutting and efficiency-enhancing vertical integration.¹⁰⁵ Price squeezes, however, can reduce consumer welfare under certain conditions. They, for instance, can eliminate

100. *Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko*, 540 U.S. 398, 415 (2004) (“An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.”).

101. Brief for the Petitioner, *supra* note 12, at 11.

102. See *Covad Commc'ns Co. v. BellSouth Corp.*, 374 F.3d 1044, 1051 (11th Cir. 2004) (applying the two-part *Brooke Group* test for predatory pricing).

103. Brief for the Petitioner, *supra* note 12, at 28.

104. *Id.*

105. See *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 23 (1st Cir. 1990).

equally efficient rivals and thereby chill non-price competition.¹⁰⁶ Exclusionary price squeezes may also entrench existing monopolies by creating significant barriers to entry at two market levels, instead of at just one.¹⁰⁷ Although price squeezes can be procompetitive, their effects may not always be benign.

B. Strengths & Weaknesses of linkLine's Case

Although price squeezes can remain a useful, economically-sound antitrust doctrine, linkLine's allegations are replete with the flaws of an earlier generation of antitrust thought. As its complaint correctly alleges, price squeezes can be harmful to the competitive process and to consumer welfare. Yet, linkLine's allegations made no mention of either particular harm to consumers or why price squeezes are especially pernicious in the markets for broadband and DSL internet access. The gravamen of its complaint focused on harm to itself as an independent, profitable firm.¹⁰⁸ linkLine did not cite specific harm to competition or consumers, such as higher prices for DSL or broadband service, or meaningful reduction in consumer choice, but rather inferred harm to competition because it felt disadvantaged.¹⁰⁹ Modern antitrust, however, is focused on preventing and deterring harm to the broader competitive process.¹¹⁰ Individual plaintiffs are granted relief only insofar as their claims are in furtherance of this larger goal.¹¹¹

Like the Ninth Circuit, linkLine understated the institutional difficulties that courts have when they adjudicate price squeeze claims. Price squeezes are substantially more difficult to detect and to remedy than predatory pricing. Predatory pricing requires that a court determine whether the defendant's prices are below an appropriate measure of its costs—a question involving intense expert battles over an appropriate measure of the defendant's costs, but a question that

106. *Id.*

107. *Id.* at 24.

108. Brief in Opposition, *supra* note 81, at 10.

109. *Id.* at 4.

110. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

111. *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21–22 (1st Cir. 1990) (“[A] practice is not ‘anticompetitive’ simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm’s fortunes at the expense of its competitors. Rather, a practice is ‘anticompetitive’ only if it harms the competitive process.”).

ultimately has a yes-no answer. As then-Judge Breyer noted, price squeezes require calculations of “fair prices” and “living profits.”¹¹² Regulatory bodies are vastly more qualified to make these complex economic and financial judgments than are judges and juries.

C. Likely Disposition

The Supreme Court will likely hold that price squeezing is not a valid cause of action in partially-regulated industries. The existence of regulatory oversight from the FCC greatly mitigates the need for antitrust remedies to deter anticompetitive conduct. In unregulated markets, however, dominant firms may be able to achieve anticompetitive ends using price squeezes. In these markets, antitrust scrutiny of pricing conduct, in spite of its imperfections, may be necessary to preserve non-price competition and ease of entry for new firms. Given the possibility that price squeezing can be anticompetitive under certain circumstances and the Court’s prior reluctance in *Trinko* to overturn decades-old precedent,¹¹³ the Court in *linkLine* will likely issue a narrow holding and reject the call by a group of prominent economic and legal scholars to hold that price squeezes are always *per se* legal.¹¹⁴ Instead, the Court will probably hold that price squeezing is *per se* legal in sectors with at least partial regulatory oversight but that it still gives rise to Section 2 claims in fully unregulated industries.

112. *See id.* at 25.

113. *Verizon Commc’ns, Inc. v. Law Offices of Curtis Trinko*, 540 U.S. 398, 409 (2004). Rather than overrule its prior duty-to-deal decision in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985), the Court said that “*Aspen Skiing* is at or near the outer boundary of § 2 liability.”

114. Brief of Amici Curiae Professors and Scholars in Law and Economics in support of the Petitioners at 8, *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 128 S. Ct. 2957 (Sep. 3, 2008) (No. 07-512).