

US Supreme Court to address price squeeze issues

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Introduction

Under US antitrust law a price squeeze occurs ‘when a vertically integrated company sets its prices or rates at the first (or “upstream”) level so high that its customers cannot compete with it in the second-level (or “downstream”) market’.¹ Although price squeeze claims have been recognised under US antitrust laws for more than 60 years,² they remain a controversial subject. At present, there is a split among the US Circuit Courts of Appeal³ and a rare public disagreement by the two US federal enforcement agencies.⁴ Not surprisingly, there also is the potential for significant divergence between the United States and the European Union on this issue.

The next few months should bring much needed clarification on this subject. On 8 December 2008, the US Supreme Court will hear oral argument in *Pacific Bell Tel Co v linkLine Communications*,⁵ a case that will address the legal standard to be applied in price squeeze claims. The Supreme Court’s decision in *linkLine* will provide an interesting point of comparison with the recent *Deutsche Telekom* decision by the European Court of First Instance (‘CFI’) confirming that a margin squeeze is a valid claim under EU law.⁶ Given the possibility that the Supreme Court will reject, or at a minimum, significantly limit this theory, price/margin squeezes may become another area of dominant firm conduct characterised by divergence between the United States and Europe.

As we approach a new US presidential administration, the *linkLine* decision offers an excellent vehicle for assessing the philosophical underpinnings of US antitrust law. A group of prominent antitrust scholars argued in an amicus brief in support of defendants that if the Ninth Circuit decision is allowed to stand it will ‘put antitrust at war with itself to a degree not witnessed’ for more than three decades.⁷ The professors argued that ‘[c]ompelling an income transfer from a vertically integrated firm to its downstream competitors does not advance the Sherman Act’s consumer-welfare

goal’.⁸ In a paper expanding on the arguments raised in the amicus brief, Gregory Sidak was even more blunt, calling the price squeeze theory ‘ill-considered, obsolete, and pernicious’.⁹

This strong language underscores a core policy in US antitrust law elucidated by the US Supreme Court that the Sherman Act should protect consumer welfare, not competitor welfare.¹⁰ By contrast, a common refrain is that competition law in the European Union is more inclined to protect competitors than competition. With that in mind, the antitrust scholars point to the European experience with price squeeze cases, noting that ‘[m]ore than ever before, the United States and Europe appear to be at a fork in the road over whether the law of monopolisation exists to protect consumers or to ensure that a specified number of firms will profitably populate a market’.¹¹

Apart from its substantive outcome, the *linkLine* case also is significant for the insights it provides into US federal antitrust policy. *linkLine* has triggered a rare public disagreement between the two US federal antitrust agencies regarding the position to take before the Supreme Court. In response to the Court’s request for the views of the United States on the question of *certiorari*, the US Department of Justice Antitrust Division (‘DOJ’) filed an amicus brief urging the Supreme Court to review the case, while a majority of the US Federal Trade Commission (‘FTC’), which normally would join such a filing, opposed the petition for *certiorari*.¹²

The FTC asserted that 60 years of US case law had already confirmed the existence of price squeezes, but the DOJ argued that modern antitrust jurisprudence does not accept a price squeeze theory that lacks allegations of predatory pricing.¹³ According to the DOJ, a starting point for understanding the legal issues raised by *linkLine* is the Supreme Court’s 2004 decision in *Verizon Communications Inc v Law Offices of Curtis V Trinko*,¹⁴ which circumscribed a plaintiff’s ability to prevail against a monopolist for a refusal to deal. Following *Trinko*, the DOJ argued that since an

integrated vertical firm is free to refuse to deal with its competitors, it made no sense to allow a price squeeze claim without also pleading facts that establish the separate violation of predatory pricing.

Factual background of the linkLine dispute

Pacific Bell is the incumbent telephone provider in a number of western US states, and also provides various data transmission services, including digital subscriber line ('DSL') intranet service to retail customers using its telecommunications infrastructure. Plaintiff linkLine is an internet service provider ('ISP') that leased DSL transport from Pacific Bell on a wholesale basis and sold DSL access to retail customers.

In 2003, linkLine filed an antitrust complaint in a federal district court alleging that Pacific Bell had monopolised and attempted to monopolise the provision of the DSL internet services in violation of section 2 of the Sherman Act.¹⁵ linkLine asserted that Pacific Bell had created a 'price squeeze by charging ISPs a high wholesale price in relation to the price at which defendants were providing retail [DSL] services', and that this price squeeze placed linkLine at a serious competitive disadvantage.¹⁶ The complaint also alleged other improper conduct by Pacific Bell, including refusal to deal and denial of access to an essential facility.¹⁷

In the district court, Pacific Bell moved for judgment on the pleadings, asserting that the Supreme Court's decision in *Trinko*¹⁸ required judgment in Pacific Bell's favour. According to Pacific Bell, *Trinko*:

'bars a plaintiff from claiming a violation of § 2 of the Sherman Antitrust 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'.¹⁹

In a 19 October 2004 order, the district court granted the defendants' motion to dismiss with respect to the refusal to deal and essential facilities allegations, finding those claims barred by *Trinko*.²⁰ However, it denied the motion as to the price squeeze claim, holding that:

'[B]ecause a price-squeeze claim is actionable under existing antitrust standards, and because the Ninth Circuit has upheld the viability of price-squeeze claims in the context of highly regulated industries, *Trinko* does not bar Plaintiff's price-squeeze claims.'²¹

The district court, however, did order linkLine to file an amended complaint detailing the specific evidence in support of its price squeeze claims.²² Shortly thereafter, linkLine filed its amended complaint, with the following

description of its price squeeze allegations:

[D]efendants unlawfully manipulated their dual role as vertically integrated monopolists as both a wholesale-monopoly supplier and retail competitor of plaintiffs for DSL by engaging in an unlawful price squeeze by intentionally charging independent ISPs 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 – and for a period by charging wholesale DSL prices to competing ISPs (such as plaintiffs) that actually exceeded the prices at which defendants' retail affiliate...was charging retail end-user customers for DSL services and necessary equipment – thereby making it impossible for independent ISP competitors such as plaintiffs to compete at the low retail prices set by defendants for combined DSL-Internet Service and necessary equipment provided to end-user customers.²³

Pacific Bell again moved to dismiss, arguing that any price squeeze claims must satisfy the twin requirements of *Brooke Group Ltd v Brown & Williamson Tobacco Corp*²⁴ of sales below cost and recoupment and that the amended complaint failed to do so.²⁵ The district court denied the motion but granted Pacific Bell's alternative request to certify its order for interlocutory appeal to the US Court of Appeals for the Ninth Circuit pursuant to 28 USC § 1292(b).²⁶ The district court stated:

'[T]he issue before the Ninth Circuit will not only be whether *Trinko* bars price squeeze claims generally but, more specifically, whether it bars predatory price squeeze claims (ie price squeeze claims which comply with the *Brooke Group* requirements).'²⁷

The Ninth Circuit granted permission to appeal and, in 2007, a divided panel affirmed the district court.²⁸ The majority opinion found that a price squeeze occurs 'when a vertically integrated company sets its prices or rates at the first (or "upstream") level so high that its customers cannot compete with it in the second-level (or "downstream") market'.²⁹ The panel majority acknowledged that federal courts have recognised the viability of such price-squeeze claims under the Sherman Act since *Alcoa*³⁰ and reaffirmed the Ninth Circuit's pre-*Trinko* holding in *City of Anaheim v Southern Cal Edison Co*³¹ decision, which held that price-squeeze claims are 'viable against monopolists in regulated industries' if the plaintiff proves 'specific intent on the part of the wholesale monopoly holder'.³²

The majority also found that '*Trinko* did not... completely eliminate the viability of a § 2 price squeeze theory in regulated industries'.³³ To the contrary, the

majority concluded that *Anaheim* was ‘consistent with *Trinko*’ in ‘reject[ing] the wholesale importation of antitrust theory as applicable to regulated industries’.³⁴ Because Ninth Circuit precedent ‘recognised the viability of [a price squeeze] theory, but carefully circumscribed it’, this precedent was not ‘clearly irreconcilable with [*Trinko*’s] reasoning or theory’.³⁵ The majority stated that in ‘any future application of *Anaheim*’ the court would ‘ensure consistency with *Trinko*’.³⁶ It concluded that it was ‘unclear at this juncture the extent to which [respondents are] basing [their] § 2 price squeezing theory on wholesale pricing, retail pricing, or both’.³⁷ But, ‘since [respondents] could prove facts, consistent with [their] complaint, that involve only unregulated behaviour at the retail level, [their] action or lawsuit survives a motion for judgment on the pleadings’.³⁸ The court thus concluded that the price squeeze allegation ‘states a potentially valid claim’ under section 2.³⁹

Judge Gould dissented, concluding that the district court should have dismissed the amended complaint in its entirety. He found that *Trinko* ‘takes the issues of wholesale pricing out of the case, and thus transforms what is left of any claim of “price squeeze”’.⁴⁰ He further concluded ‘the retail side of a price squeeze cannot be considered to create an antitrust violation if the retail pricing does not satisfy the requirements of *Brooke Group*’.⁴¹ According to Judge Gould, linkLine could state a valid claim only by alleging ‘market power in the retail market’, as well as the *Brooke Group* requisites for a predatory-pricing claim. Judge Gould concluded that the amended complaint did not satisfy those standards, although he found ‘just enough possibility of an injury’ to warrant permitting respondents a further opportunity to amend the complaint.⁴²

Supreme Court proceedings

On 17 October 2007, Pacific Bell petitioned the Supreme Court for a writ of *certiorari* and to reverse the Ninth Circuit.⁴³ In response to a request from the Court for the views of the United States, the DOJ filed an amicus brief urging that *certiorari* be granted and the Ninth Circuit decision overturned.⁴⁴ According to the DOJ, section 2 of the Sherman Act did not provide a cause of action for ‘price squeeze’ claims of the type at issue in *linkLine* – namely, allegations that a vertically integrated company with an alleged monopoly at the wholesale level, but with no antitrust duty to provide that wholesale input to its retail competitors, engaged in a ‘price squeeze’ by leaving insufficient margin between wholesale and retail prices to allow its retail competitors to compete.⁴⁵ The DOJ further argued that accepting such a price squeeze theory based solely on an inadequate margin between a defendant’s wholesale

and retail prices would recognise an antitrust claim involving no allegations of predatory pricing, no breach of an antitrust duty to deal, and no conduct that harms competition in a way the antitrust laws forbid.⁴⁶ Such a theory of liability could not be reconciled with this Court’s modern antitrust jurisprudence.⁴⁷

The DOJ also characterised the Ninth Circuit’s holding as erroneous and in conflict with the decisions of other courts of appeals.⁴⁸ For example, the Eleventh Circuit in *Covad Communs Co v Bell South Corp* rejected the viability of a traditional, standalone price squeeze claim based on the margin between wholesale and retail prices, arguing instead that to survive *Trinko* a price squeeze complaint ‘must contain allegations...of price predation’.⁴⁹ Similarly, the DC Circuit in *Covad Communs Co v Bell Atlantic Corp*⁵⁰ held that price squeeze claims based solely on the margin between retail and wholesale prices are not viable, and observed that ‘it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal’.⁵¹ The DOJ concluded that Supreme Court review and reversal was warranted because the Ninth Circuit’s endorsement of such a theory threatens to chill retail price-cutting by vertically integrated firms and encourage litigation designed to protect competitors at the expense of competition, thereby undermining the pro-competitive purposes of the antitrust laws and harming consumers.⁵²

In a surprising case of public disagreement between the two federal antitrust agencies, the FTC did not join in the amicus brief. By a three–nil vote (Chairman William Kovacic recused), a majority of the FTC Commissioners declined

‘to join the US Department of Justice in recommending that the US Supreme Court review the Ninth Circuit’s decision...because we disagree with DOJ’s analysis, and because this case does not appear to be worthy of review at this time.’⁵³

The FTC also issued a public statement describing the reasons for its decision.⁵⁴ According to the FTC,

‘[t]he holding of the Ninth Circuit is unquestionably correct, and indeed merely echoes what other courts of appeals have held on the narrow issue presented to the court below: that claims of predatory price squeeze in a partially regulated industry remain viable after *Trinko*’.⁵⁵

The FTC also characterised the *linkLine* theory of price squeezes as ‘not novel’.⁵⁶ In the FTC’s view, the Ninth Circuit’s decision was fully consistent with Judge Hand’s decision in *United States v Aluminum Co of America*,⁵⁷ and Justice (then Judge) Breyer’s decision in *Town of Concord v Boston Edison Co*.⁵⁸ The FTC found no basis

to reject this jurisprudence. The FTC also objected to the fact that the case would come to the Court at the pleadings stage:

‘That procedural posture not only deprives the Court of a fully developed record, but adds a further layer of complexity to the proper legal question presented. One of the central issues in this case will be which measure of [Pacific Bell’s] wholesale costs is appropriate for predation analysis – a factual determination that has yet to be made by the district court. Thus, even if the Court goes beyond the actual question presented to consider the predation allegations in the amended complaint (with the attendant possibility for jurisdictional infirmity), it can hardly opine usefully on the issue without benefit of an appropriate measure of cost.’⁵⁹

The FTC majority concluded:

‘There is no apparent justification, based on only a partial record of the plaintiffs’ pleadings in this case, for turning back 60 years of case law that embraces price-squeeze claims under Section 2 of the Sherman Act.’⁶⁰

In addition to the DOJ brief, there were a significant number of other amici curiae filings submitted in support of Pacific Bell.⁶¹ In particular, a number of prominent professors and scholars in law and economics filed an amicus brief in support of Pacific Bell’s position that rejected standalone price squeeze claims.⁶² They agreed with Judge Gould’s dissent in *linkLine* that *Trinko* ‘takes the issues of wholesale pricing out of the case’, leaving plaintiffs with only one theory of harm: predatory pricing at the retail level.⁶³ They also agreed with the DC Circuit’s views in *Covad Communications*, following the Areeda-Hovenkamp treatise, that ‘it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal’.⁶⁴ Adding several policy-based arguments, they also explained that price-squeeze theory is already a part of American law, but in the area of public utility regulation – not antitrust law. Deciding price squeeze cases, they argue, is more appropriate for factually intensive regulatory proceedings as recognised in *Town of Concord v Boston Edison Co*, in which the court noted that a price squeeze case requires a court to ‘act[] like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years’.⁶⁵

Although the scholars’ amicus brief did not directly cite to it, their arguments also echoed the rationale of the Supreme Court in *Credit Suisse Securities LLP v Billing*,⁶⁶ a suit alleging anti-competitive practices in the context of an IPO. There, the Supreme

Court ‘interpret[ed] the securities laws as implicitly precluding the application of the antitrust laws to the conduct alleged in this case’.⁶⁷ The Court in *Credit Suisse* decided that there should be immunity from the antitrust because of:

(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct [and] (4) that [...] the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.⁶⁸

Another concern voiced by the antitrust scholars was that past European experience with price squeeze cases demonstrates the ‘economic and factual complexity of correctly implementing the imputation analysis in an antitrust case’.⁶⁹ The scholars went on to explain that a price squeeze test would make it

‘necessary to hypothesise what an efficient competitor would be and then determine whether the defendant’s wholesale and retail prices permit the efficient competitor to earn some level of profit deemed to be sufficient’.⁷⁰

They concluded that this analysis only highlights that the primary European concern is protecting competitors and not consumers and that, once again, this type of analysis is more appropriate for a regulatory agency and not a federal judge.

Supreme Court grants *certiorari*

The Supreme Court granted *certiorari* and accepted the case for review on 23 June 2008,⁷¹ agreeing to address the following question presented:

Whether a plaintiff states a claim under section 2 of the Sherman Act by alleging that the defendant – a vertically integrated retail competitor with an alleged monopoly at the wholesale level but no antitrust duty to provide the wholesale input to competitors – engaged in a ‘price squeeze’ by leaving insufficient margin between wholesale and retail prices to allow the plaintiff to compete.⁷²

The petitioners filed their merits brief on 28 August 2008, which rests primarily on the argument that section 2 of the Sherman Act places no obligation on a wholesale monopolist to assist its retail rivals by providing them with a sufficient margin to operate profitably – particularly when the wholesale monopolist has no antitrust duty to deal in the first place.⁷³ In their 14 October 2008 merits brief, the respondents argued

that their price squeeze claims are not barred by *Trinko* as they meet the requirements for a predatory retail pricing claim under *Brooke Group*.⁷⁴ Noting that

‘[t]here is no contrary authority suggesting that such a claim would be barred absent an antitrust duty to deal (where dealings are compelled by regulation) and it would be irrational to read *Trinko* as barring a *Brooke Group* claim challenging unregulated retail pricing conduct’,⁷⁵ the respondents asserted that the case should be remanded to the district court and they should be given leave to amend their complaint to allege a valid retail predatory pricing claim under *Brooke Group*.⁷⁶

Oral argument is set for 8 December 2008.

EU views on price squeezes⁷⁷

The Supreme Court’s deliberations in *linkLine* may be informed by the recent consideration of the European Union of similar price squeeze issues. In contrast to the current US debate, the EU position on price squeezes appears well-settled as a result of the 2008 decision in *Deutsche Telekom*.⁷⁸ In *Deutsche Telekom*, the CFI confirmed a 2003 decision in which the European Commission found that the German fixed incumbent telecommunications operator, Deutsche Telekom AG (‘DT’), had been abusing its dominant position in the market by implementing a margin squeeze in markets for wholesale access to the incumbent’s local network and retail access services.⁷⁹ This case demonstrates that the EC courts are comfortable with applying competition law in regulated telecommunications markets. It also clarified to some extent a number of issues surrounding the EC law on price squeezes, especially the margin squeeze test used by the EC courts.⁸⁰

DT is the incumbent telecommunications operator in Germany. Before the liberalisation of the telecommunications markets, DT held a legal monopoly in the retail provision of fixed-line telecommunication services.⁸¹ The German telecommunications market was liberalised in 1996, when the *Telekommunikationsgesetz* (German Law on telecommunications) came into force.⁸² Shortly after the market was opened to competition, the European Commission received a series of complaints in 1999 from 15 of DT’s competitors challenging its pricing.⁸³ Following up on those complaints, the Commission sent DT a series of requests for information and statements of objections during the 1999–2003 period, and then reached a decision on 21 May 2003.⁸⁴ In its decision, the Commission defined the relevant product or service markets as the local network access for DT’s competitors at the wholesale level (upstream market), and access to

narrowband connections (analogue and ISDN lines) and broadband connections (ADSL lines) at the retail level (downstream market).⁸⁵ The Commission found that DT held a dominant position in the upstream and downstream markets, and had charged abusive prices using a margin squeeze by charging its competitors prices for wholesale access that were higher than its prices for retail access to the local network.⁸⁶ DT appealed the Commission’s decision to the CFI.⁸⁷

In the *Deutsche Telekom* case, the CFI recognised for the first time that a margin squeeze is a distinct form of abuse and clarified the elements and methodology to be applied.⁸⁸ The CFI relied on the ‘equally efficient competitor’ test which asks whether

‘the [dominant firm] itself, or an undertaking just as efficient as the [dominant firm] would have been in a position to offer retail services otherwise than at a loss if had first been obliged to pay wholesale access charges as an internal transfer price, [...]’.⁸⁹

The CFI reasoned that the legality of a dominant firm’s practice cannot be based on competitors’ costs, because information on rivals’ costs is generally not known to the dominant firm.⁹⁰ Following this logic, the CFI seemed to reject the ‘hypothetical reasonably efficient test’ that would have required the CFI to consider the costs of DT’s competitors.⁹¹ But uncertainty about which test to apply still persists, as some commentators have argued that if ‘one accepts the premise that competition law must be applied to ensure equality of chances and opportunities between operators’ then that ‘premise becomes irreconcilable with an alleged ruling by the CFI to exclude the reasonably efficient competitor as a matter of principle’.⁹² Despite the uncertainty about the test to be used, the CFI’s methodology for defining margin squeezes implies that a margin squeeze can exist where the retail prices are not in and of themselves abusive – retail prices, therefore, need not be predatory.⁹³ In addition, DT’s prices were subject to regulatory approval by the German communication sector regulator (‘RegTP’), which the CFI held did not necessarily protect it against a Commission finding that it had engaged in a margin squeeze.⁹⁴

The CFI decision is presently on appeal to the European Court of Justice.⁹⁵ Central to the appeal is the argument that the RegTP repeatedly examined the purported margin squeeze and, accordingly, DT had the ‘right to assume that its conduct was not anti-competitive’.⁹⁶ DT also argued that the equally efficient competitor test used by the CFI as the generally applicable standard of comparison could not be used in a situation where the dominant undertaking and its competitors operate under different regulatory and actual competitive conditions.⁹⁷

Outcome of Supreme Court review

Although it always is dangerous to offer predictions about how the Supreme Court will decide a case, the clear trend in antitrust cases in the modern era has been reversal of the decision below and a ruling in favour of the antitrust defendants.⁹⁸ (This trend has been particularly pronounced in review of cases from the Ninth Circuit.⁹⁹) Thus, the conventional wisdom suggests that the Ninth Circuit ruling will be reversed and that the Supreme Court will limit the ability of plaintiffs to bring future price squeeze claims.

There are a number of ways in which the Court could reach this result, however, and it will be interesting to observe the particular path it takes. Among the things to look for in the Court's decision are the following:

1. whether the Court will continue its recent practice of resolving antitrust cases through a very narrow holding focused on the specific issue before it;
2. whether price squeeze claims will be entirely subsumed within the broader category of duty to deal issues;
3. whether different standards will be applied to price squeeze claims in regulated versus non-regulated industries;
4. whether the Brooke Group requirements of sales below cost and recoupment will be made an explicit part of any price squeeze recovery;
5. whether the Supreme Court will use its opinion to provide any further guidance on the level of market power necessary to sustain Section 2 claims;
6. whether the Court will return to the theme that has surfaced in a number of its recent decisions – the risk of imposing inappropriate regulatory burdens on antitrust courts.¹⁰⁰

Regardless of the outcome of *linkLine*, the legal and economic issues associated with price squeezes are likely to continue to attract the attention of antitrust lawyers, scholars and economists. Thus, *linkLine* is a case to watch, and the Supreme Court opinion that will be issued in 2009 has the potential to influence not simply Sherman Act section 2 jurisprudence in the United States, but also Article 82 claims and other abuse of dominance cases around the globe.

Notes

* Ms Fenton is a partner and Mr Hollman is an associate in the Washington DC office of Jones Day. Jones Day represented Pacific Bell in the lower court proceedings discussed herein. The views expressed in this article are those of Ms Fenton and Mr Hollman, and not of their firm or any firm client.

1 2–27 Von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 27.04[1] (2d ed Matthew Bender 2007). These claims also are sometimes referred to as 'margin squeezes'.

- 2 See eg, *United States v Aluminum Co of America*, 148 F 2d 415, 437–38 (2d Cir 1945) ('*Alcoa*').
- 3 The Ninth Circuit recognises the validity of a price squeeze claim, while the DC and Eleventh Circuits view price squeeze theories as requiring a plaintiff to allege facts that state a claim for predatory pricing. Compare *Pacific Bell Tel Co v linkLine Comms*, 503 F 3d 876, 887 (9th Cir 2007) with *Covad Communs Co v Bell South Corp*, 374 F 3d 1044, 1050 (11th Cir 2004), cert denied, 544 US 904 (rejecting the viability of a traditional, standalone price squeeze claim based on the margin between wholesale and retail prices; to survive *Trinko* a price squeeze complaint 'must contain allegations...of price predation') and *Covad Communs Co v Bell Atlantic Corp*, 398 F 3d 666, 673–674 (DC Cir 2005) (price squeeze claims based solely on the margin between retail and wholesale prices are not viable; 'it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolisation is free to refuse to deal') (quoting 3A Areeda & Hovenkamp, *Antitrust Law* 767c3, at 129–30 (2d ed 2002)) .
- 4 Brief for the United States as Amicus Curiae Supporting Petitioners, *Pacific Bell Tel Co v linkLine Comms, Inc*, No 07-512, 2008 WL 2155265 (22 May 2008), available at www.usdoj.gov/atr/cases/f233500/233594.htm [hereinafter DOJ Amicus Brief]; Statement of the Federal Trade Commission Declining To Join the U.S. Department of Justice Recommendation That the United States Supreme Court Review the Decision of the Court of Appeals for the Ninth Circuit in *linkLine Comms v Pacific Bell Telephone Company* (23 May 2008), available at www.ftc.gov/opa/2008/05/linkline.shtm [hereinafter FTC Statement].
- 5 *Pacific Bell Tel Co v linkLine Comms.*, 503 F.3d 876 (9th Cir 2007), cert granted, 128 S Ct 2957 (2008).
- 6 See Case T-271/03, *Deutsche Telekom AG v Comm'n*, 2008 ECJ EUR-Lex LEXIS 634 (10 April 2008).
- 7 Brief of Amici Curiae Professors and Scholars in Law and Economics in Support of the Petitioners, No 07-512, 2007 WL 4125499, at *4 (3 September 2008).
- 8 *Ibid* at *10.
- 9 J Gregory Sidak, 'Abolishing the Price Squeeze as a Theory of Antitrust Liability' (2008) 4 J Competition L & Econ 279, 307.
- 10 *Brown Shoe Co v US*, 370 US 294, 320 ('the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition'); see also *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993) ('It is axiomatic that the antitrust laws were passed for "the protection of competition, not competitors".') (quoting *Brown Shoe Co*, 370 US at 320).
- 11 *Supra* n 7 at *4.
- 12 See DOJ Amicus Brief and FTC Statement, *supra* n 4.
- 13 FTC Statement, *supra* n 4 at 4.
- 14 540 US 398 (2004).
- 15 Complaint at 22, *linkLine Comms, Inc v SBC Ca, Inc*, No 03-5265 SVW, 2003 WL 25284389 (CD Cal 24 July 2003).
- 16 *Ibid* at 23(a).
- 17 *Ibid* at 23.
- 18 540 US 398 (2004).
- 19 503 F 3d at 877.
- 20 *linkLine Comms v SBC Ca, Inc* No CV 03-5265, 2004 US Dist. LEXIS 30761 (CD Cal 19 October 2004).
- 21 *Ibid* at *48.
- 22 *Ibid* at *49.
- 23 First Am Compl, at 25(A) (1), *linkLine Comms, Inc v SBC Cal, Inc*, No CV03-5265 SVW, 2004 WL 5503772 (CD Cal 7 December 2004).
- 24 509 US 209 (1993).
- 25 Mem in Supp of Def's Mot to Strike Portions of Pl's First Am Compl, to Dismiss the First Am Compl, or to Certify 20 October 2004, Order for Interlocutory Appeal, *linkLine Comms, Inc v SBC Cal, Inc*, No CV03-5265 SVW, 2004 WL 5503772 (14 January 2005).
- 26 Order Granting in Part and Denying in Part Def's Mot to Strike Portions of Pl's First Am Compl, to Dismiss the First Am Compl, or to Certify 20 October 2004, Order for Interlocutory Appeal, *linkLine Comms, Inc v SBC Cal, Inc*, No CV03-5265 SVW, 2004 WL 5503772 (4 April 2005).

- 27 **Order at 32**, *linkLine*, 2004 WL 5503772 (4 April 2005).
- 28 *linkLine*, 503 F 3d at 884.
- 29 *Ibid* at 880 (quoting 2–27 Von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 27.04[1] (2d ed Matthew Bender, 2007)).
- 30 *US v Aluminum Co of Am*, 148 F 2d, 148 F 2d 416 (2d Cir 1945).
- 31 **955 F 2d 1373 (1992)**.
- 32 *linkLine*, 503 F 3d at 880, 883.
- 33 *Ibid* at 883.
- 34 *Ibid*.
- 35 *Ibid* at 884.
- 36 *Ibid*.
- 37 *Ibid* at 885.
- 38 *Ibid*.
- 39 *Ibid*.
- 40 *Ibid* at 886.
- 41 *Ibid* at 887.
- 42 *Ibid*.
- 43 **Petition for a Writ of Certiorari**, *Pacific Bell Tel Co v linkLine Comms, Inc*, 2007 WL 3028933 (No 07-512) (17 October 2007).
- 44 **Brief for the United States as Amicus Curiae**, *Pacific Bell Tel Co v linkLine Comms, Inc*, 2008 WL 2155265 (No 07-512) (22 May 2008), available at www.usdoj.gov/atr/cases/f233500/233594.htm.
- 45 *Ibid* at 7.
- 46 *Ibid*.
- 47 *Ibid*.
- 48 *Ibid* at 15.
- 49 **374 F 3d 1044, 1050 (11th Cir 2004)**, cert denied, 544 US 904.
- 50 **398 F 3d 666, 673–74 (DC Cir 2005)**.
- 51 **Brief for the United States as Amicus Curiae** at 16, 2008 WL 2155265 (quoting 3A Phillip E Areeda & Herbert Hovenkamp, *Antitrust Law*, 767c5 at 129–130 (2d ed 2002)).
- 52 *Ibid* at 7.
- 53 **See Statement of the Federal Trade Commission Declining To Join the US Department of Justice Recommendation That the United States Supreme Court Review the Decision of the Court of Appeals for the Ninth Circuit in linkLine Comms v Pacific Bell Telephone Company** (23 May 2008) at 1, available at www.ftc.gov/opa/2008/05/linkline.shtm [hereinafter FTC Statement].
- 54 *Ibid*.
- 55 *Ibid* at 3.
- 56 *Ibid*.
- 57 **148 F 2d 416 (2nd Cir 1945)**.
- 58 **915 F 2d 17 (1st Cir 1990)**; **FTC Statement at 3**.
- 59 **FTC Statement at 6**.
- 60 *Ibid*.
- 61 **Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae in Support of the Petitioners**, No 07-512, 2008 WL 41554540, at *2 ('The decision should be reversed for three reasons. First, the Ninth Circuit's decision is contrary to the interests of consumers...Second, determining a wholesale price that is fair relative to retail pricing is an exercise for which courts are ill-suited...Finally, the reasoning in *Trinko* is incompatible with the ruling below.'). Brief for Verizon Communications Inc and the National Association of Manufacturers as Amici Curiae Supporting Petitioners, No 07-512, 2008 WL 4154538, at *17 (4 September 2008) ('A price squeeze theory of Section 2 liability should be rejected categorically because the potential competitive gain from recognising a price squeeze inquiry is hard to identify even theoretically and at best slim, the separation of wheat from chaff is unreliable and costly, courts would have to take on an unsuitable role...'). Brief of the Washington Legal Foundation as Amicus Curiae in Support of Petitioners, No 07-512, 2008 WL 4154539, at *1 ('The "price squeeze" claim recognised by the court below not only confounds precedent but also frustrates the animating purpose of the antitrust laws – to enhance competition. In short, the Ninth Circuit's holding will significantly chill legitimate, procompetitive conduct by imposing liability based upon facts that are unknown and unknowable to a business when it decides to set prices at the wholesale and retail levels.'). Brief for Abbott Laboratories as Amicus Curiae in Support of Petitioners, No 07-512, 2008 WL 4154537 at *3 (4 September 2008) ('Under this Court's precedents, as well as economic sense, Judge Gould was right.').
- 62 **Brief of Amici Curiae Professors and Scholars in Law and Economics**, *supra* n 7.
- 63 *Ibid* at *1.
- 64 *Ibid* (see *supra* n 54).
- 65 *Ibid* at *5 (quoting *Town of Concord*, 915 F 2d 17 at 25); see also Brief for Verizon, *supra* n 61 at *23 ('The regulatory inquiries required by recognition of a price squeeze claim are plainly not suitable for decision by judges and juries in antitrust cases.').
- 66 **127 S Ct 2383 (2007)**.
- 67 *Credit Suisse Securities (USA) LLC v Billing*, 127 S Ct 2383, 2387 (2007).
- 68 *Ibid* at 2392.
- 69 **Brief of Amici Curiae Professors and Scholars in Law and Economics**, *supra* n 7 at *6.
- 70 *Ibid*.
- 71 *Pacific Bell Tel Co v linkLine Comms, Inc*, 128 S Ct 2957 (12 June 2008).
- 72 **Petition for a Writ of Certiorari**, 2007 WL 3028933 (17 October 2007).
- 73 **Brief for Petitioners**, *Pacific Bell Tel Co v linkLine Comms, Inc*, 2008 WL 4063963 (No 07-512) (28 August 2008).
- 74 **Brief for Respondents**, *Pacific Bell Tel Co v linkLine Comms, Inc*, 2008 WL 4606588 (No 07-512) (14 October 2008).
- 75 *Ibid* at *14.
- 76 *Ibid* at * 41; two *Amicus Curiae* briefs were filed in support of Respondents: Brief of Amicus Curiae COMPTEL in Support of Respondents, *Pacific Bell Tel Co v linkLine Comms, Inc*, 2008 WL 4606588 (No 07-512) (21 October 2008) (arguing, inter alia, that the case is moot as both petitioners and respondents agree that that the respondents' price squeeze claim survives *Trinko* if it meets the requirements of a predatory retail pricing claim under *Brooke Group*, and the Court, therefore, should decline to address the merits of the case); Brief of the American Antitrust Institute as Amicus Curiae in Support of Dismissal of the Writ of Affirmance, 2008 WL 4606588 (No 07-512) (21 October 2008) (arguing that the case is now moot as respondents have abandoned their price squeeze claim, but that, nonetheless, a price squeeze claim is consistent with modern antitrust policy and survives *Trinko*).
- 77 **For a fuller discussion on the treatment of price squeezes in the European Union**, see D Geradin & R O'Donoghue, 'The Current Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector' (GCLC Working Paper, No 04/05, 2005) and Milena Stoyanova, 'Regulatory and competition law approaches to price squeeze access pricing in the telecommunications sector' (October 2005) Eur Competition J 347.
- 78 **See Case T-271/03, Deutsche Telekom AG v Comm'n**, 2008 ECJ EUR-Lex LEXIS 634 (10 April 2008) [hereinafter *Deutsche Telekom*].
- 79 *Ibid*.
- 80 **Another example of a margin squeeze case that preceded the CFI's Deutsche Telekom decision was the Commission's 2007 Telefónica finding**. See Commission Decision of 4 July 2007, Case COMP/38.784 – *Wanadoo España v Telefónica*, 2008 OJ (C 83) 5 (hereinafter '*Telefónica Decision*'). The Commission found that Telefónica held a dominant position in both the regional and national markets in Spain for wholesale and retail broadband access. The case relied heavily on the Commission's 2003 Deutsche Telekom decision but did not resolve which margin squeeze test to apply. See Commission Decision of 21 May 2003, Case COMP/C-137.451 – *Comm'n v Deutsche Telekom (AG)*, 2003 OJ (L 263) 9 (hereinafter '*DT Commission Decision*'). In *Telefónica*, the Commission applied the 'equally efficient competitor' test but left open the possibility of the 'hypothetical reasonably efficient competitor test'. See *Telefónica Decision* at 311. For a broader discussion of the *Telefónica Decision*, see Simon Genevaz, 'Margin Squeeze after Deutsche Telekom' (May 2008) 1 *GCP Magazine* at 13.
- 81 *Deutsche Telekom* at *3.
- 82 **Telekommunikationsgesetz [TKG] [German Law on Telecommunications]**, 25 July 1996 BGBl. I at 1120 (FRG).
- 83 *Deutsche Telekom* at *12.
- 84 *DT Commission Decision*.
- 85 *Ibid* at 91.

- 86 *Ibid* at 1, 57, 96, 102–3.
- 87 *Deutsche Telekom*, *supra* n 6.
- 88 Pierre-André Buigues, ‘Margin Squeeze in Regulated Industries: The CFI Judgment in the Deutsche Telekom Case’ (July 2008) 1 *GCP Magazine* at 3.
- 89 *Ibid* at *86.
- 90 *Ibid*.
- 91 See Bernard Amory & Alexandre Verheyden, ‘Comments on the CFI’s recent ruling in *Deutsche Telekom v Commission*’ (May 2008) 1 *GCP Magazine* at 14.
- 92 *Ibid* at 14–15.
- 93 See Peter Alexiadis, ‘“Informative and Interesting”: The CFI Rules in *Deutsche Telekom v European Commission*’ (May 2008) 1 *GCP Magazine* at 4.
- 94 See *Deutsche Telekom* at ¶ 89.
- 95 See Case C-280/08, Appeal brought on 26 June 2008 by Deutsche Telekom AG against the judgment delivered by the Court of First Instance on 10 April 2008 in Case T-271/03, Case C-280/08, 2008 O.J. (C223) 31.
- 96 *Ibid*.
- 97 *Ibid*.
- 98 Defendants have not lost a Supreme Court antitrust case since *FTC v Ticor Title Insurance Co*, 504 US 621 (1992). There have been 18 defence wins since the *Ticor* case. See *Leegin Creative Leather Products v PSKS*, 127 S Ct 2705 (2007); *Credit Suisse Securities Billing*, 127 S Ct 2383 (2007); *Twombly v Bell Atl*, 127 S Ct 1955 (2007); *Weyerhaeuser Co v Ross-Simons Hardwood Lumber Co, Inc*, 127 S Ct 1069 (2007); *Illinois Tool Works, Inc v Independent Ink*, 547 US 28 (2006); *Texaco Inc v Dagher*, 547 US 1 (2006); *Volvo v Reeder Simco GSM*, 546 US 164 (2006); *Empagran v F Hoffman-LaRoche*, 542 US 155 (2004); *USPS v Flamingo Ind*, 540 US 736 (2004); *Verizon v Trinko*, 540 US 398 (2004); *California Dental Assn v FTC*, 526 US 756 (1999); *NYNEX Corp v Discon, Inc*, 525 US 128 (1998); *State Oil v Khan*, 522 US 3 (1997); *Brown v Pro Football, Inc*, 518 US 231 (1996); *Hartford Fire Insurance Co v California*, 509 US 764 (1993); *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993); *Prof Real Estate Investors v Columbia Pictures Indus*, 508 US 49 (1993); *Spectrum Sports, Inc v McQuillan*, 506 US 447 (1993).
- 99 Since 1992, the following Ninth Circuit antitrust cases have been vacated or reversed by the Supreme Court: *Confederated Tribes of Siletz Indians of Or v Weyerhaeuser Co*, 411 F 3d 1030 (9th Cir 2005); *Dagher v Saudi Refining, Inc*, 369 F 3d 1108 (9th Cir 2004); *Flamingo Industries (USA) Ltd v US Postal Service*, 302 F 3d 985 (9th Cir 2002); *California Dental Ass’n v FTC*, 128 F 3d 720 (9th Cir 1997); *In re Insurance Antitrust Litig*, 938 F 2d 919 (1991); *McQuillan v Sorbothane, Inc*, 907 F 2d 154 (9th Cir 1990). The only affirmation of a Ninth Circuit antitrust decision during this period was *Columbia Pictures Indus, Inc v Prof Real Estate Investors, Inc*, 944 F 2d 1525 (9th Cir 1991).
- 100 See eg, *Trinko*, 540 US at 408 (antitrust law rejects imposing duties that would ‘require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited’); *Credit Suisse Securities*, 127 S Ct. at *2395 (‘Further, antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate similar fact patterns consistently. The result is an unusually high risk that different courts will evaluate similar factual circumstances differently.’); Herbert Hovenkamp, ‘Antitrust Violations in Securities Markets’ (2003) 28 J Corp L 607, 629 (‘Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another...’).