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ABOLISHING THE PRICE SQUEEZE AS A THEORY OF ANTITRUST LIABILITY

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ABSTRACT

A "price squeeze," or "margin squeeze," is a theory of antitrust liability under section 2 of the Sherman Act that concerns a vertically integrated monopolist that sells its upstream bottleneck input to firms that compete with the monopolist's production of a downstream product sold to end users. At issue is the size of the margin between the monopolist's input price and its retail price. Recent antitrust price-squeeze cases have split the U.S. Courts of Appeals. The D.C. Circuit has concluded that, because a vertically integrated monopolist may refuse to provide its upstream inputs to its downstream competitors, it may raise the price of its upstream inputs without incurring antitrust liability. On the other hand, the Ninth Circuit's 2007 *linkLine* decision rejected such reasoning, notwithstanding *Trinko*. Predicated on Judge Learned Hand's opinion in *Alcoa*, *linkLine* subordinates the protection of consumers to the protection of competitors. It requires access-pricing analysis that more resembles the work of a public utilities commission than that of a federal judge in an antitrust case. Further, the antitrust laws are concerned with the competitive *process*, not its end results. The inability of a single firm to stay in business is irrelevant as a matter of antitrust law unless the behavior inducing that firm to exit the market also harms the competitive process. The Supreme Court should reverse *linkLine* and resolve the circuit split. It should revisit *Alcoa* and explain why alleging a price squeeze neither states a claim in American

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antitrust law nor justifies deviation from the principles announced in *Brooke Group* and *Trinko*.

JEL: K21; L12

I. INTRODUCTION

The United States and Europe appear to be taking divergent approaches to new theories of liability for monopolization. Consumer harm is not always a prerequisite for liability under European law.[1] Recognition of this divergence comes at an important moment for American antitrust jurisprudence. The Supreme Court of the United States would greatly help the lower courts correctly apply the law of monopolization to novel business practices, particularly business practices in network industries subject to rapid technological innovation, if the Court first were to revisit a hoary doctrine that currently divides the Courts of Appeals and obscures the proper role of consumer welfare in the law of monopolization.

A "price squeeze," or "margin squeeze," is a theory of antitrust liability that concerns the pricing practices of a vertically integrated monopolist that sells its upstream bottleneck input to firms that compete with the monopolist in the production of a downstream product sold to end users. At issue is the size of the margin between the input price and the price that the monopolist charges in the downstream market for the end product incorporating that particular input.

In the typical price-squeeze case, a competitor finds that the margin between the monopolist's wholesale price and retail price is too small to enable the competitor to achieve its desired level of profit. Sometimes the margin is even negative. The competitor then attacks the pricing policy under section 2 of the Sherman Act[2] on the rationale that the monopolist is monopolizing the downstream market or, less often, on the rationale that the monopolist is using unlawful means to maintain its existing monopoly over the bottleneck input.

In a price-squeeze or margin-squeeze case, the vertically integrated monopolist is allegedly the sole source of the bottleneck input and may or may not have monopoly power in downstream markets. Analysis of a price-squeeze or margin-squeeze complaint under section 2 of the Sherman Act would require precise identification of the specific markets affected and the manner in which the alleged price or margin squeeze assists the integrated monopolist in obtaining or maintaining monopoly power in the markets allegedly monopolized. In cases in which a price squeeze is alleged, precise definitions of the relevant retail market and the relevant market for

[1] *See* Nicholas Economides & Ioannis Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States at the Aftermath of the* Microsoft *Cases*, 75 ANTITRUST L.J. (forthcoming 2008).

[2] 15 U.S.C. § 2.

the bottleneck input are critical and may raise subtle and challenging antitrust policy questions not yet well recognized in the case law. If the defendant has retail rivals that are able but unwilling to provide the supposedly bottleneck input, is the one competitor who is willing to provide access voluntarily a "monopolist" for the "bottleneck" input because it is the only source from which the plaintiff can obtain that input? If the defendant is not providing access to the alleged "bottleneck" input, but is required by regulatory compulsion to provide access although its rivals (due to asymmetrical regulation) are not, should the legality of the defendant's wholesale price for the input be dictated by regulatory laws establishing a duty to deal or by antitrust laws that do not? Does a price-squeeze theory requiring analysis of both relevant markets and the relationships between them facilitate or complicate correct application of the law? Should antitrust law serve as a means to impose duties on the alleged "input monopolist" to deal on terms different from those required by its regulator or acceptable to it on voluntary terms?

Apart from such questions of market definition, the question arises whether the price-squeeze concept aids or hinders coherent analysis under section 2 of the Sherman Act. If the monopolist's retail price is predatory or if its wholesale price is so high as to constitute a refusal to deal in a situation in which the monopolist has a duty to do so, then the monopolist's conduct can be challenged under existing precedents governing either predatory pricing or refusals to deal. One issue addressed in this article is whether the combination of a *nonpredatory* retail price and a lawful wholesale price can be characterized as exclusionary conduct under section 2 based on analysis of the margin between the two prices. Stated differently, is such an analysis superfluous and unnecessary, or does it add value by extending section 2 condemnation to conduct that might otherwise escape condemnation under existing precedents relating to retail pricing and duties to deal? After the Supreme Court's 2004 decision in *Trinko*, it should go without saying that a "squeeze" that neither causes nor threatens the monopolization of an identifiable market cannot pass muster under section 2.[3] In this regard, United States antitrust laws differ significantly from the laws of jurisdictions adopting "abuse of dominance" as a competition law violation.[4]

[3] *See* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 n.4 (2004) [hereinafter *Trinko*] (labeling a claim "monopoly leveraging" does not dispense with the requirement that the plaintiff demonstrate a "dangerous probability of success" in monopolizing a second market).

[4] Although Article 82 of the EC Treaty may be characterized as the European Union's equivalent to section 2 of the Sherman Act, it penalizes the "abuse of dominance" rather than illegal acquisition or maintenance of monopoly power. Article 82 begins with a single sentence stating the concept: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States." It continues: "Such abuse may, in particular, consist in .... directly or indirectly

The price-squeeze theory of antitrust liability should be abolished in American antitrust law. The theory is incompatible with contemporary antitrust jurisprudence, and on economic grounds the threat of such liability discourages investment, retail price competition, and the voluntary provision of inputs on negotiated terms by vertically integrated monopolists to current and potential rivals otherwise unable to obtain or self-provide them. If a vertically integrated monopolist willing to provide inputs to rivals at a negotiated price exposes itself to a potential price-squeeze claim when it lowers its retail prices, it faces a strong disincentive to deal at all.

The correct economic framework for analyzing price squeezes exists in the voluminous literature on access pricing in regulated network industries. However, the complexity of such access-pricing proceedings underscores why it would be extremely difficult for a court—rather than an industry-specific regulatory agency, like the Federal Communications Commission (FCC) or a state public utilities commission (PUC)—to tackle a pricing problem that has challenged regulators and academic economists and generated thousands of pages of regulatory rulings and years of administrative and appellate litigation.

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. Alternatively, when a regulator has no authority to consider downstream competition in regulating prices charged by a regulated monopolist for access to the bottleneck input, has no authority over the prices charged by the monopolist for access to the bottleneck input, or has no regulatory authority over the monopolist at all, an antitrust court may consider only whether there is an *antitrust* duty—as distinguished from a *regulatory* duty—to deal and whether the price charged for the input constitutes a constructive refusal to deal in accordance with the antitrust duty. In either case, a court may consider whether an unregulated retail price itself is predatory in light of the state of competition in the retail market.

In general, when a rival complains that a regulated bottleneck provider's pricing is "squeezing" its margins, the real complaint is either that an unregulated downstream retail price is too low (that is, predatory) or that the regulator has erred by permitting an access price for the bottleneck input that is too high. By using the term "squeeze," the complaining rival thus seeks to restrain retail price competition between itself and the provider of the bottleneck input (fixing or stabilizing the regulated monopolist's retail prices) or,

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imposing unfair purchase or selling prices or other unfair trading conditions . . . ." *Id.* This article does not discuss the viability of the price-squeeze theory of liability under the "abuse of dominance" doctrine under Article 82.

in the alternative, to second-guess, collaterally attack, and nullify the decisions of the legislators and regulators responsible for establishing the regulatory regime.

When a rival complains that a bottleneck provider's unregulated price for access to the bottleneck input and its retail prices "squeeze" the rival's margins, the legality of each price can be tested separately in accordance with the rules applicable to that price. If the result is that the bottleneck input price is lawful and that the retail price is nonpredatory, then predicating antitrust liability under section 2 under a price-squeeze or margin-squeeze theory would violate the principles of either *Brooke Group*,[5] *Trinko*, or both. Accordingly, the existence of price-squeeze or margin-squeeze cases before the Supreme Court issued these controlling decisions should have no bearing on the current viability of "squeeze" theory. The same should be true of references in post-*Trinko* cases to "squeeze" theory based on cases decided before *Trinko.*

The fountainhead of antitrust's pre-*Trinko* price-squeeze jurisprudence is Judge Learned Hand's 1945 opinion in *Alcoa*.[6] Under *Alcoa*, a vertically integrated monopolist must charge downstream competitors not more than a "fair price" for its bottleneck input, and it must charge end users a retail price for its downstream product that is high enough to ensure that its competitors can match that price and still make a "living profit."[7] Put differently, *Alcoa* imposed two pricing constraints on the vertically integrated monopolist: a price ceiling for its input and a price floor for its output.

However, Judge Hand's key concept—that a *competitor* is entitled to receive a "living profit"—is irreconcilable with the consumer-welfare objective of antitrust law that the Supreme Court and the antitrust enforcement agencies have emphasized for at least three decades. The irreconcilable logic of *Alcoa* is more than a matter of academic speculation. Mandating access to the bottleneck input or facilities or intellectual property of a vertically integrated firm at an administratively or judicially determined "fair price" is arguably the most enticing remedy sought in monopolization litigation today. A new generation of antitrust price-squeeze cases in the telecommunications industry has divided the U.S. Court of Appeals, with some circuits producing rulings in conflict with recent Supreme Court decisions on monopolization and the D.C. Circuit producing the analytically correct rule. In January 2008, the Supreme Court invited the Solicitor General to file an *amicus* brief on whether the Court should grant a writ of certiorari in one such case.[8] It is timely for the Supreme Court to revisit *Alcoa* and to explain

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

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

[7] *Id.* at 437–48.

[8] Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc., 127 S. Ct. 1137 (2008) (invitation for the Solicitor General to file a brief *amicus curiae* on behalf of the United States regarding the grant of a writ of certiorari).

why alleging a price squeeze neither states a claim in American antitrust law nor justifies deviation from the principles announced in *Brooke Group* and *Trinko*.

II. THE CURRENT SPLIT AMONG CIRCUITS

Since 2003, several price-squeeze cases in the telecommunications industry with virtually identical fact patterns have generated disparate analytical approaches across the circuits. In each case, the plaintiff is an Internet service provider (ISP) that sells digital subscriber line (DSL) service to retail consumers so that they can have high-speed Internet connections. The defendants are incumbent local exchange carriers (ILECs) or affiliates providing broadband and ISP services.[9] The ILECs own and operate local wireline telephone networks. To supply retail DSL-based high-speed Internet service, an ISP must either have access to some of the facilities that are a part of the ILEC wireline network used in providing telecommunications services to end users or locate alternative means of achieving the functions performed by those facilities.

In telecommunications jargon, the ISP's claim is that it needs to purchase DSL "transport" over the ILEC's copper loop serving the customer's premises. The ILEC is vertically integrated in the sense that it (or an affiliate[10]) also sells its own retail DSL service to a substantial number of consumers in its local exchange service territory. In other words, for its own retail DSL subscribers, the ILEC serves as both the network operator providing DSL transport and the ISP. Figure 1 summarizes in schematic terms the relationships between the ILEC and the ISP with respect to their inputs and outputs.

Typically, the price-squeeze plaintiff will allege that there are no alternative sources of supply and that the defendant ILEC is a monopolist for a bottleneck input that the plaintiff must use to compete effectively. On a motion to dismiss, such allegations may be treated by courts as factual propositions to be accepted as true for the purposes of deciding the motion even if they are not true. The ILECs, of course, are not the only providers of broadband services in the United States and face competition from cable television providers for both voice and high-speed Internet services. Consequently, it is doubtful as a matter of antitrust jurisprudence that an ILEC is a monopolist in the provision of high-speed Internet access, because cable modem service is a facilities-based alternative for providing residential customers with high-speed Internet access. However, as a result of asymmetric regulation and the failure of cable companies and other

[9] The defendants are usually subsidiaries of AT&T, Verizon, or companies acquired by AT&T or Verizon after the suit was brought. For example, the defendants in *linkLine* are AT&T subsidiaries.

[10] For the purposes of this article, the ILEC and its affiliates, including its ISP affiliate, collectively will be referred to as the "ILEC," although they may be legally separate entities.

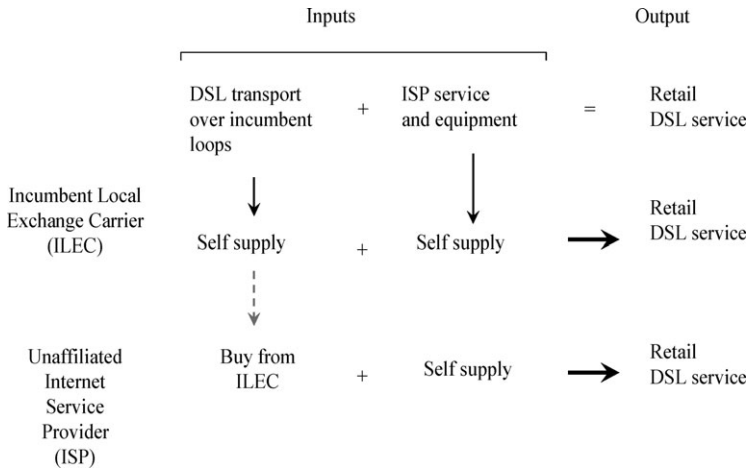

Figure 1. The typical fact pattern for the telecommunications price-squeeze cases.

providers to offer the alleged bottleneck inputs, the ILECs have been (with few exceptions) the only firms providing access to the ISPs that subsequently sued them. Of course, if the market for the end product is already competitive, then the imposition of antitrust liability for a price squeeze cannot make it more so. Nevertheless, because each of these price-squeeze decisions has arisen from an appeal from a motion to dismiss under Rule 12(b)(6), the various circuit courts have accepted as true the ISP's unproven assertion that the ILEC possessed monopoly power in a relevant product market and geographic market.

It is a separate question, outside the scope of this article, whether such an unproven assertion would, by extension, survive the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*, which elevated the economic rigor of pleading requirements under section 1 of the Sherman Act due to concerns that ultimately unmeritorious claims could nonetheless impose substantial discovery costs on defendants and thus chill behavior that benefits consumers.[11] In any event, due to the nature of the procedures applicable to motions to dismiss, it is critical that antitrust jurisprudence clarify the status of price-squeeze theory rather than promote unmeritorious litigation based on allegations of fact, which, though ultimately unsupportable, cannot be tested at this stage of the litigation.

[11] 127 S. Ct. 1955 (2007). The Court observed that, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* at 1966. Notwithstanding its ruling in *linkLine* in September 2007, the Ninth Circuit, citing *Twombly*, said in March 2008 that "discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." Kendall v. VISA U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008).

A critical fact in these cases is that, during the period in question, the FCC *compelled* ILECs, pursuant to the agency's interpretation of the Telecommunications Act of 1996, to sell "unbundled" DSL transport service to ISPs at a regulated price, on a nondiscriminatory basis, so that ISPs could offer DSL service in competition with the ILEC's own DSL service.[12] As a matter of regulatory coercion rather than voluntary exchange originating in a competitive environment, the ILECs leased wholesale DSL access to ISPs while competing with the ISPs at the retail level, selling DSL access directly to individual consumers.[13]

A. Price-Squeeze Decisions Preceding *linkLine*

Before 2007, three circuits had issued decisions in cases fitting the generic fact pattern just described. In *Covad Communications Company v. Bell Atlantic Corp.*,[14] the D.C. Circuit in 2005 rejected the claim that Bell Atlantic had raised its wholesale prices and lowered its retail prices such that its retail competitor, Covad, could not make a profit on its DSL service. In an opinion written by Judge Douglas Ginsburg, the D.C. Circuit reasoned that, because under the antitrust laws a vertically integrated monopolist retains the greater power to refuse to provide its upstream inputs to its downstream competitors, it naturally retains the lesser power to raise the price of its upstream inputs without incurring antitrust liability.[15] Citing the Areeda–Hovenkamp treatise, Judge Ginsburg concluded that "it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal" or to determine the nonprice terms of dealing.[16]

The Fourth Circuit in 2003 reached a similar conclusion in *Cavalier Telephone, LLC v. Verizon Virginia, Inc.*[17] A competitive local exchange carrier (CLEC) named Cavalier sued Verizon for allegedly anticompetitive conduct related to its regulatory obligations as an ILEC to supply unbundled DSL transport. In *Cavalier*, which predates *Trinko*,[18] the Fourth

[12] *See* Review of Regulatory Requirements for Incumbent LEC Broadband Telecomm. Servs., 17 F.C.C.R. 27,000 ¶ 18 (2002).

[13] The Supreme Court's discussion of affirmative duties to deal in *Aspen Skiing* arose in the context of a prior *voluntary* course of dealing. The Court wrote: "In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604 (1985).

[14] 398 F.3d 666 (D.C. Cir. 2005).

[15] *Id.* at 673.

[16] *Id.* (quoting 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 767c3, at 129–30 (2d ed. 2002)).

[17] 330 F.3d 176 (4th Cir. 2003).

[18] 540 U.S. 398 (2004).

Circuit reasoned that because, in the absence of the Telecommunications Act, Verizon "would not have been obligated to rent its facilities and provide access to its elements to competitors to enable them to enter the market," it is of no consequence under the Sherman Act that Verizon does not provide its facilities in a manner and at a price preferred by Cavalier.[19]

In contrast, in *Covad Communications Co. v. BellSouth Corp.*,[20] the Eleventh Circuit held in 2004 that a vertically integrated monopolist can incur liability for a price squeeze even where the monopolist has no antitrust duty to deal with its downstream competitors. However, the Eleventh Circuit's holding primarily rested on the slender reed that *Trinko* did not "specifically bar" price-squeeze claims.[21] Thus, the court did not confront the illogic of an antitrust paradigm where an upstream monopolist may refuse to provide an essential input to its downstream competitors but may not increase the price of that input where the result of the increase is to narrow the margin between the input price and retail price significantly. At the same time, however, the Eleventh Circuit did not recognize a price squeeze predicated on *Alcoa*'s price-squeeze elements. Rather, the court required that a price-squeeze allegation conform to the pleading requirements for a predatory-pricing claim under *Brooke Group*.[22] Thus, the court in fact did not recognize a traditional price-squeeze claim. Instead, it allowed the claim to proceed only as a predatory-pricing allegation, albeit one that misconstrues the concept of price predation by equating a profit-sacrifice allegation with an allegation of pricing below cost. In this respect, the Eleventh Circuit ignored *Brooke Group*'s principle that courts should not discourage "a price cut" and "force . . . firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices."[23] Moreover, the court's predatory-pricing theory is flawed in a respect similar to a traditional price-squeeze theory in that, to determine whether the profit earned in the retail market is sufficiently nonpredatory, the theory requires judges or juries to allocate a vertically integrated firm's common network costs between the firm's wholesale operations and its retail operations, a fact-intensive task that has required the expertise of industry-specific regulators for a century and that judges and juries are understandably less equipped to resolve.

B. The *LinkLine* Decision

The three preceding DSL price-squeeze cases provide the backdrop for the most controversial case of this kind, *linkLine Communications, Inc. v. SBC*

[19] 330 F.3d at 190.
[20] 374 F.3d 1044 (11th Cir. 2004).
[21] *Id.* at 1050.
[22] *Id.*
[23] *Brooke Group* 509 U.S. at 224.

California, Inc.,[24] decided by the Ninth Circuit in September 2007. The decision examined whether *Trinko* bars a claim under section 2 of the Sherman Act predicated on an alleged price squeeze perpetrated by a vertically integrated firm that is required by regulation to share bottleneck facilities with its downstream competitors. The Ninth Circuit held that, although *Trinko* prevents a plaintiff from alleging a price squeeze predicated on anticompetitive conduct that is the subject of regulation, the presence of regulation in the relevant wholesale or retail market does not by itself bar the claim.[25]

1. The District Court's Rulings

In its amended complaint,[26] filed in the Central District of California, linkLine alleged that SBC monopolized and attempted to monopolize the retail DSL markets in the geographic region in which the California PUC had authorized SBC to provide retail services.[27] According to the complaint, the alleged price squeeze occurred when SBC charged linkLine wholesale prices that were unfairly high relative to the prices at which SBC sold retail DSL services and equipment.[28] Moreover, linkLine alleged that for a period of time SBC charged wholesale DSL prices that exceeded the prices that SBC charged for retail DSL service.[29] linkLine did not allege that the original wholesale DSL price was too high; instead, linkLine alleged that, as SBC reduced its retail prices, SBC had a duty to reduce its wholesale prices. As a consequence of SBC's failure to do so, linkLine contended, it became impossible for linkLine to compete with SBC in the retail market.[30] The complaint accused SBC of "deliberately sacrificing" retail profits through price cuts in the retail market, while offsetting those profit sacrifices by raising prices in the wholesale market.[31] (The theory that SBC could recover lost profits from mass market sales to large numbers of customers by raising wholesale prices to niche market ISP players such as linkLine seems improbable. However, the purpose of this article is to address not the

[24] 503 F.3d 876 (9th Cir. 2007). Although the case has multiple plaintiffs and defendants, for ease of exposition I will simplify the facts to concern a dispute between linkLine and SBC.

[25] *Id.* at 884–85.

[26] The district court construed linkLine's original complaint as alleging three different forms of anticompetitive conduct: a refusal to deal, a denial of access to an essential facility, and a price squeeze. *Id.* at 878–79. The court dismissed the refusal to deal and denial of access to an essential facility allegations as barred by *Trinko*, and ordered linkLine to file an amended complaint limited to the price-squeeze claim. *Id.*

[27] LinkLine Commc'ns, Inc. v. SBC Cal., Inc., No. 03-5265, at 6 (C.D. Cal. Apr. 1, 2005) (order granting SBC's motion to strike and certifying order for interlocutory appeal and denying SBC's motion to dismiss).

[28] *Id.*

[29] *Id.* at 6–7.

[30] *Id.* at 7.

[31] *Id.*

plausibility of linkLine's pleadings, but rather the utility of price-squeeze analysis in assessing claims such as those made in *linkLine*.)

linkLine further alleged that SBC engaged in anticompetitive conduct that demonstrated a specific intent to monopolize the retail DSL market.[32] All of the conduct in this portion of the complaint stemmed from the duties that FCC regulations imposed on SBC to assist downstream competitors. Thus, for example, the complaint alleged that SBC deliberately mishandled linkLine's retail DSL customers that connected to SBC's network.[33] The complaint concluded that the price squeeze, combined with the anticompetitive conduct at the wholesale level, caused linkLine damages exceeding $40 million.[34]

SBC moved to strike the portion of linkLine's complaint alleging anticompetitive conduct stemming from SBC's servicing of linkLine's customers that access SBC's network (that is, the conduct allegedly evidencing a specific intent to monopolize).[35] The allegations related to this conduct, SBC argued, restated linkLine's claims of refusal to deal and denial of access to an essential facility, which the district court had previously dismissed as barred by *Trinko*.[36] Additionally, SBC asked the district court to dismiss linkLine's price-squeeze claim for failing to allege facts sufficient to state an antitrust claim.[37] Finally, SBC asked that the court certify an order for interlocutory appeal.[38]

The district court first addressed SBC's motion to strike the specific intent allegations. The court began by restating its reasoning for its previous dismissal of linkLine's "insufficient assistance to rivals" allegations. The court noted that *Trinko* established a rule that, "where there has been no prior course of voluntary dealings between the parties," a monopolist's refusal to deal with a competitor does not "have any probative value as evidence of anticompetitive intent."[39] *Trinko*'s reasoning, the court stated, applies just as forcefully to price-squeeze claims as it does to refusal-to-deal claims.[40] Accordingly, the court granted SBC's motion to strike linkLine's specific-intent allegations.

Next, the district court addressed SBC's motion to dismiss the remaining price-squeeze allegations. SBC had argued that the Supreme Court's test for predatory pricing in *Brooke Group*, which requires that a plaintiff show that a

[32] *Id.* at 8–9. To set up its price-squeeze theory, linkLine postulated the existence of a retail DSL market in which retail cable modem ISP service is not considered a substitute for retail DSL ISP service.
[33] *Id.* at 8.
[34] *Id.* at 9.
[35] *Id.*
[36] *Id.* at 10.
[37] *Id.* at 9.
[38] *Id.*
[39] *Id.* at 11.
[40] *Id.* at 12.

defendant priced below a relevant measure of cost and had a dangerous probability of recouping its predatory losses, applies to linkLine's price-squeeze allegations.[41] The district court agreed, observing that, although the Supreme Court in *Brooke Group* did not explicitly extend its holding to price-squeeze claims, at least one circuit—the Eleventh Circuit in *Covad Communications v. BellSouth Corp.*—had done so.[42] Moreover, the court found strong policy arguments for applying *Brooke Group* to price-squeeze claims. The court noted that the recoupment prong of the *Brooke Group* test ensures that the law does not penalize a firm's reduction of prices in the market, which enhances consumer welfare.[43] This concern applies to price squeezes as well, the court reasoned, because "a price squeeze is vicious only if the wholesale-level monopolist is able to achieve or has a dangerous probability of achieving dominant market position at the retail level as a result."[44]

However, the district court ultimately denied SBC's motion to dismiss because, according to the court, linkLine's complaint alleged facts sufficient to satisfy the two prongs of the *Brooke Group* test. Addressing the "below cost pricing" prong, the court found that this element was met by the portion of the complaint alleging that the defendants were "deliberately sacrificing profits" to "impede and exclude competition" from linkLine.[45]

Next, the court asked whether the complaint sufficiently alleged facts to meet the recoupment prong. Noting that recoupment was more problematic for linkLine's theory of liability, the court nevertheless found that linkLine sufficiently alleged a dangerous probability of success because the complaint alleged that SBC's anticompetitive conduct effectively eliminated "competition in the provision of Internet services . . . in [SBC's] California service areas."[46] The court inferred from this elimination of competition that SBC could impose price increases sufficient to recoup any predatory losses.[47]

Notwithstanding its denial of SBC's motion to dismiss, the district court certified SBC's order for an interlocutory appeal. The court reasoned that "[t]he question of whether *Trinko* bars price squeeze claims in a fully regulated industry" is a pure question of law, the resolution of which would "materially affect the outcome" of the litigation because a holding that *Trinko* bars price-squeeze claims would terminate linkLine's suit.[48] Moreover, the court observed that a circuit split existed on the issue, citing

[41] linkLine Commc'ns, Inc. v. SBC Cal., Inc., CV 03-5265 SVW, at 12 (C.D. Cal. April 1, 2005) (order granting SBC's motion to strike and certifying order for interlocutory appeal and denying SBC's motion to dismiss).

[42] *Id.* at 15 (citing Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1050 (11th Cir. 2004)).

[43] *Id.*

[44] *Id.* at 20.

[45] *Id.* at 26.

[46] *Id.* at 26–28.

[47] *Id.* at 28.

[48] *Id.* at 29.

Covad Communications Co. v. Bell Atlantic Corp.,[49] where the D.C. Circuit held that *Trinko* barred Covad from claiming a section 2 violation predicated on the theory that Bell Atlantic created a price squeeze by charging "a prohibitively high and discriminatory price for access to its loops" while charging low retail prices for retail DSL services.[50]

2. *The Ninth Circuit's Decision*

The Ninth Circuit affirmed. It noted that, before *Trinko*, the circuit allowed price-squeeze claims against monopolists in regulated industries.[51] In *City of Anaheim v. Southern California Edison Co.*,[52] the Ninth Circuit allowed a price-squeeze claim in a market where both wholesale and retail prices were regulated on the theory that a regulated firm could "manipulate its filings and requests in a manner that causes a, at least temporary, squeeze which might be just as effective as one perpetrated by an unregulated actor."[53] Although recognizing that *Trinko* might have affected the viability of *City of Anaheim* and similar holdings, the court concluded that *City of Anaheim* survives *Trinko*.[54]

[49] *Id.* at 30.
[50] Covad Commc'ns Co. v. Bell Atl. Corp., 398 F.3d 666, 673 (D.C. Cir. 2005).
[51] LinkLine Commc'ns, Inc. v. Cal., Inc., 503 F.3d 876, 880 (9th Cir. 2007).
[52] 955 F.2d 1373 (9th Cir. 1992).
[53] 503 F.3d at 880-81 (quoting *City of Anaheim*, 955 F.2d at 1377).
[54] *Id.* at 882. Apart from the question of whether such reasoning in *City of Anaheim* survives *Trinko*, the separate question arises of whether that reasoning had already been overruled by the Supreme Court's analysis in NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998). There, a downstream competitor alleged a *per se* unlawful boycott by a regulated telephone company, New York Telephone, which chose to buy certain services at allegedly inflated prices from its own downstream affiliate. Unobservant regulators allegedly permitted New York Telephone to recover the padded costs from ratepayers. Justice Breyer, writing for a unanimous Court, rejected the proposition that "hoodwinking regulators," *id.* at 132, stated an antitrust cause of action:

> We concede Discon's claim that [New York Telephone's] behavior hurt consumers by raising telephone service rates. But that consumer injury naturally flowed not so much from a less competitive market for removal services [for obsolete telephone equipment, supplied by New York Telephone's affiliate], as from the exercise of market power that is *lawfully* in the hands of a monopolist, namely, New York Telephone, combined with a deception worked upon the regulatory agency that prevented the agency from controlling New York Telephone's exercise of its monopoly power.
>
> To apply the *per se* rule here—where the buyer's decision, though not made for competitive reasons, composes part of a regulatory fraud—would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases. And that *per se* rule would discourage firms from changing suppliers—even where the competitive process itself does not suffer harm.

Id. at 129 (emphasis in original). Justice Breyer stressed that Discon had the burden of "alleg[ing] and prov[ing] harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself." *Id.* at 135. Remarkably, the Ninth Circuit's decision in *linkLine* contains no mention of *Discon* whatsoever.

In concluding that *City of Anaheim* survives *Trinko*, the Ninth Circuit observed that *Trinko* did not involve a price-squeeze theory and explicitly preserved antitrust claims predicated on "traditional" theories of anticompetitive conduct.[55] Moreover, the court noted that *Trinko* did not hold that a regulatory scheme was a *per se* bar to antitrust claims, but only that it is "[o]ne factor of particular importance" in an antitrust analysis.[56] According to the Ninth Circuit, the primary focus of a price-squeeze analysis after *Trinko* is not on the existence of a regulated market, but rather on the "nature of the regulatory structure at issue," taking account of "the particular industry and factual settings."[57]

In the case before it, the Ninth Circuit concluded that under the relevant regulatory structure there remained the possibility for the sort of anticompetitive conduct with which the Sherman Act is concerned. The court reasoned that, because the regulatory structure was designed to address only transactions at the wholesale level, "[a]ny restrictions on pricing at the retail level derive primarily from the antitrust laws."[58] Accordingly, the Ninth Circuit affirmed the district court's holding that linkLine's complaint survives a motion for judgment on the pleadings.[59] The district could reexamine the record when it was more fully developed to determine "whether the complained of behavior took place at the regulated wholesale level, the unregulated retail level, or some combination of the two, and to what extent, if any, the responsible agencies have devoted attention to or had involvement in the complained of conduct."[60]

Judge Ronald Gould dissented. He agreed with the district court that *Brooke Group* applied to the price-squeeze claim. He reasoned that, because *Trinko* removes from the court's review any of SBC's allegedly anticompetitive action at the regulated level—here, wholesale DSL transport—the only relevant conduct for the court's antitrust analysis is that occurring at the retail level, where the court's focus should naturally be on linkLine's allegations regarding SBC's retail pricing.[61] Accordingly, Judge Gould reasoned,

[55] *linkLine*, 503 F.3d at 882–83. In the district court, SBC had argued that *Trinko* held that its reasoning preserved only "well established" antitrust claims, rather than merely existing claims, and that because price-squeeze claims are no more well established than are refusal-to-deal claims, *Trinko*'s preservation of antitrust claims does not apply to price squeezes. LinkLine Commc'ns, Inc. v. SBC Cal., Inc., CV 03-5265 SVW, at 31 (C.D. Cal. April 1, 2005) (order granting SBC's motion to strike and certifying order for interlocutory appeal and denying SBC's motion to dismiss). The Ninth Circuit used *City of Anaheim* in *linkLine* to justify a "hoodwinking regulators" rationale for antitrust liability of the sort that the Supreme Court rejected in *Discon.* 525 U.S. at 132. *Discon* preceded *Trinko* by six years. It was therefore incongruous for the Ninth Circuit to characterize the reasoning of *City of Anaheim* as "well established" when the Supreme Court decided *Trinko* in 2004.

[56] *Id.* at 883 (quoting *Trinko*, 540 U.S. at 412).

[57] *Id.* at 883–84.

[58] *Id.* at 885.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 886.

to survive a motion to dismiss, linkLine's complaint must allege sufficient facts to show that SBC had market power in the retail market, was pricing retail services below cost, and had a dangerous probability of recouping the losses incurred from below-cost pricing.[62]

Judge Gould opined that linkLine's complaint was deficient on all three counts. First, the complaint did not specify that SBC had market power to influence the retail market price, and Judge Gould reasoned that any such power was likely constrained by regional competitors supplying retail Internet access by cable television or satellite connection.[63] Second, he disagreed with the district court's conclusion that linkLine sufficiently pleaded below-cost pricing, and thus he implicitly rejected the proposition that sacrificing profits is tantamount to below-cost pricing for purposes of *Brooke Group*'s first prong.[64] Finally, Judge Gould opined that "the complaint does not allege that [SBC], to the extent they had losses by selling below cost in the retail market, had any realistic prospect of recouping losses."[65]

Because of these deficiencies in linkLine's pleadings, Judge Gould would have dismissed the complaint. However, he would have done so without prejudice because the Ninth Circuit had not "heretofore held that there must be a showing of market power in the retail market, nor held that the standards of *Brooke Group* must be applied in assessing predation in the retail side of a 'price squeeze.'"[66]

III. THE TROUBLE WITH *LINKLINE*

Through its decision in *linkLine*, the Ninth Circuit has generated an inescapable conflict among circuits. Moreover, the Ninth Circuit's opinion is incompatible with the Supreme Court's reasoning in *Trinko*, *Weyerhaeuser*, *Brooke Group*, and *Discon.*[67] Judge Gould's dissent in *linkLine* persuasively reasons that *Trinko* "takes the issues of wholesale pricing out of the case," such that linkLine's only possible remaining theory of harm would be predatory pricing at the retail level—which linkLine did not allege.[68] The existence of a rule like *linkLine* has a pervasive impact on business behavior that, at the margin, affects competition and consumers. This deleterious effect extends beyond the telecommunications industry to affect all firms that do

[62] *Id.* at 885.
[63] *Id.*
[64] *Id.* at 885–86.
[65] *Id.* at 886.
[66] *Id.* at 887.
[67] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).
[68] linkLine Commc'ns Inc. v. Pac. Bell Tel. Co., 503 F.3d 876, 885 (9th Cir. 2007) (Gould, J., dissenting).

business in the Ninth Circuit. These reasons justify the Supreme Court's grant of certiorari in *linkLine* and its reversal of the Ninth Circuit's decision.

An even larger reason than those described above makes it imperative that the Court reverse *linkLine*. The Ninth Circuit's decision implicates the normative foundation of modern Sherman Act jurisprudence: that antitrust law exists to advance consumer welfare. Three points deserve attention:

(1) Any rule of price-squeeze liability that threatens liability based on the claim that the difference between a firm's upstream and downstream prices leaves downstream rivals an insufficient profit margin substitutes a rule of competitor welfare for consumer welfare.
(2) Properly understood, a price squeeze is a regulatory issue, which makes sense only as a rule of price regulation in an industry already subject to duties to deal and to control by institutionally competent regulators. Attempting to implement regulatory policy through section 2 of the Sherman Act is ill-advised, both because it makes no sense for courts to re-regulate deregulated or lightly regulated industries, and because courts lack the institutional competence to implement regulation.
(3) The Ninth Circuit's rule is of pressing concern precisely because it will deter efficiency-enhancing conduct and competitive pricing. Vertical integration and partial integration are ubiquitous, and firms need to be able to make decisions about such integration without the threat of liability. Vertically integrated firms likewise need to be free to cut retail prices (as long as the prices are not predatory) without concern for rivals—the point of *Brooke Group*. Moreover, the Ninth Circuit's standard is so vague and open-ended that it creates uncertainty and invites litigation; it also permits imposition of liability based on apparently subjective evaluation of disputed and hard-to-prove facts, which will lead to a substantial risk of false positives. Indeed, if the price of supplying a rival is a cessation of vigorous price competition with a rival, then price-squeeze doctrine could provide a means for firms to circumvent *per se* liability under section 1 of the Sherman Act for price fixing. After all, if wholesale prices must be reduced each time that retail prices are reduced, so as to preserve profit margins of those participants who depend on rivals as a source of supply, then there may be an outbreak of peaceful price stability in the industry resulting from a chilling effect on price reduction. That result would harm consumers.

It is not possible to advance consumer welfare with an antitrust rule that punishes a firm for failing to ensure its competitors' profitability. If *linkLine* stands, the lower federal courts will have put antitrust at war with itself to a degree not witnessed since the years before the Court's conscious decision,

three decades or more ago, to infuse antitrust law with greater economic rigor so that it might better advance consumer welfare.

The alternative to consumer-welfare maximization is the view that antitrust law is simply one more tool of industrial policy, and thus its application may permissibly compromise consumer welfare to advance the welfare of competitors. Other nations evidently consider this normative proposition to be appropriate, if recent developments in the European Union are a valid indication. More than ever before, the United States and Europe appear to be at a fork in the road over whether the law of monopolization exists to protect consumers or to ensure that a specified number of firms will profitably populate a market. The Ninth Circuit's *linkLine* decision implicitly chooses the latter path, which leads to the Potemkin village of "managed competition."[69]

To say that American antitrust law does not—and should not—recognize a cause of action for a price squeeze by a firm that owes no duty to deal with rivals is not to say that one cannot find the concept of a price squeeze embraced somewhere else in American law. One can. In public utility regulation, the price-squeeze issue arises in proceedings concerning "access pricing" and "imputation."[70] 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. But three points about price-squeeze regulation bear emphasis.

First, these cases are highly technical *regulatory* proceedings that are typically protracted and factually intensive. As then-Judge Breyer noted in *Town of Concord*, 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

[69] *See* Robert W. Crandall & Hal J. Singer, *Life Support for Unaffiliated ISPs?*, REGULATION, Fall 2005, at 46. Some, on both sides of the Atlantic, may argue that Europe is moving closer to a consumer-welfare model. One might say that, given the stage of development of European competition law, addressing as it does many industries that have been dominated by state-owned or state-granted monopolies, an emphasis at the level of the European Commission on abuse of dominance—as opposed to consumer welfare—has been an expedient, perhaps necessary, means to break down the barriers resulting from member-state competition laws that insulate favored national players that exploit their dominant positions. So, one might argue, as European competition law progresses, an interpretation of abuse of dominance to protect competitors will give way to an American-style interpretation of abuse of dominance to protect consumers. This argument would be more persuasive if the notable targets of recent EC abuse-of-dominance cases were not American multinational corporations doing business in Europe.

[70] *See, e.g.*, WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY (MIT Press 1994); William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 YALE J. ON REG. 171 (1994); William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors: Rejoinder and Epilogue*, 12 YALE J. ON REG. 177 (1995); Jerry A. Hausman & Timothy J. Tardiff, *Efficient Local Exchange Competition*, 40 ANTITRUST BULL. 529 (1995).

years."[71] Price-squeeze cases are precisely the kinds of proceedings that would be unwieldy to attempt to replicate through antitrust litigation. Imputation analysis requires the estimation of incremental cost. Econometric estimation of that nature demands a kind of quantitative expertise that a judge or jury is not likely to possess. Even so ambitious and invasive a monopolization case as the Bell System divestiture did not attempt to use antitrust law as a tool for regulating the price of wholesale services supplied by monopoly local exchange carriers.[72]

Second, these regulatory proceedings arise because the vertically integrated firm has a preexisting regulatory duty to deal with competitors in a downstream market. This feature is the element of compulsion that was so critical to the Court's reasoning in *Trinko*.[73]

Third, the experience with price-squeeze cases brought by national competition authorities in Europe under Article 82 of the Treaty of Rome reveals the economic and factual complexity of correctly implementing the imputation analysis in an antitrust case. It becomes necessary to hypothesize 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.[74] This kind of analysis, however, merely underscores (1) that the primary concern in price-squeeze cases is not consumers, but competitors, and (2) that, in the American setting, the requisite analysis more resembles the work of a public utilities commission than that of a federal judge presiding over an antitrust case. By definition, the judge's job as de facto rate regulator would never end because external forces will compel wholesale and retail prices to change over time, such that a given profit margin may shrink and jeopardize the survival of competitors. The perverse outcome is that price-squeeze litigation becomes a kind of enduring cost-of-service regulation that taxes the resources of a

[71] Town of Concord v. Boston Ed. Co., 915 F.2d 17, 25 (1st Cir. 1990).

[72] United States v. AT&T Corp., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom*. Maryland v. United States, 460 U.S. 1001 (1983).

[73] *See Trinko*, 540 U.S. at 412–16.

[74] *See* Deutsche Telekom AG v. Commission, Case T-271/03, Judgment of the Court of First Instance (April 10, 2008). For legal and economic analyses of other recent European price-squeeze cases, see Michele Polo, *Price Squeeze: Lessons from the* Telecom Italia *Case*, 3 J. COMPETITION L. & ECON. 453 (2007); Laura Ferrari Bravo & Paolo Siciliani, *Exclusionary Pricing and Consumer Harm: The European Commission's Practice in the DSL Market*, 3 J. COMPETITION L. & ECON. 243 (2007); Damien Geradin & Robert O'Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector*, 1 J. COMPETITION L. & ECON. 355 (2005); Pietro Crocioni & Cento Veljanovski, *Price Squeezes, Foreclosure and Competition Law: Principles and Guidelines*, 4 J. NETWORK INDUS. 28 (2003). Dennis Carlton observes that, "just as in the case of predatory pricing, any sensible price squeeze theory must use the costs of an efficient firm in applying the financial viability test." *See* Dennis W. Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, 4 J. COMPETITION L. & ECON. 271 (2008).

single district judge. Again, the lessons learned from the difficulties of having a district judge administer the AT&T divestiture decree for twelve years counsel against using antitrust consent decrees to regulate prices.[75]

One perverse ramification of ensuring profit margins for competitors under a price-squeeze theory is that, to avoid liability for monopolization, the vertically integrated monopolist faces an incentive to behave like a price fixer. Before it files its antitrust lawsuit alleging a price squeeze, the downstream competitor will ask or demand that the monopolist eliminate the squeeze that resulted when the monopolist reduced its retail price. Of course, any suggestion by the downstream competitor that the monopolist raise its retail price to eliminate the price squeeze is equivalent to solicitation of price fixing. The vertically integrated monopolist must navigate between the Scylla of monopolization liability and the Charybdis of price-fixing liability. The only safe course is to forbear from cutting prices to consumers. Thus, the price-squeeze theory of liability produces a result even more perverse than the misuse of judicial resources: it permits the misuse of an antitrust doctrine as vehicle for keeping retail prices high.[76]

The determination by a court of the adequacy of a competitor's profit margin under a price-squeeze theory of liability would generate material disputes of fact among expert economic witnesses. The Telecommunications Act of 1996 provides an instructive analogy that provoked multiple opinions in *AT&T Corp. v. Iowa Utilities Board*.[77] There, the statute (applied in a regulatory proceeding) entitled a competitor to access any one or more of an incumbent local exchange carrier's unbundled network elements at a regulated price if that competitor would be "impaired" in its ability to supply a (downstream) telecommunications service in the event that the competitor

[75] A separate question is whether it is a violation of the separation of powers for a court to regulate prices through its administration of a consent decree, because ratemaking is considered a legislative function. *See* Farrell Malone & J. Gregory Sidak, *Should Antitrust Consent Decrees Regulate Post-Merger Pricing?*, 3 J. COMPETITION L. & ECON. 471 (2007).

[76] Dennis Carlton observes that another perverse alternative available to the vertically integrated monopolist—whether it is regulated or unregulated—seeking to avoid price-squeeze liability is to exit the downstream market:

> Where there is a duty to deal under the antitrust laws, application of the theory is likely to create incentives for inefficiency as firms either raise price or *cease production* to avoid liability. Where there is no duty to deal under the antitrust laws, application of the theory is likely to lead to *withdrawal of goods from the market* to the detriment of consumers as firms cease dealing with each other in order not to trigger liability.

Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?, supra* note 74, at 278 (emphasis added). However, exit is not so simple for a regulated firm. The firm often has an "obligation to serve" as a matter of state public utility law and thus faces a statutory or regulatory barrier to exit. *See* J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES (1997).

[77] 525 U.S. 366 (1999).

were denied access to a particular network element (at the regulated price). Congress did not attempt to provide a precise economic definition of "impairment." It is a measure of the complexity of administering that concept that Justices Scalia, Breyer, and Souter debated how much of a cost disadvantage would be enough to trigger the "impairment" standard.[78] That question admitted no easy answer—and it received none in multiple remands to the Federal Communications Commission over the course of many years. Yet the determination of "impairment" under the Telecommunications Act fundamentally resembles the line of economic analysis that a court would need to undertake in a price-squeeze case based on the Sherman Act.

Shortly after *Iowa Utilities Board*, some scholars on telecommunications regulation argued that the "impairment" exercise should be regarded as unproductive unless it could be shown that finding "impairment" and granting a competitor access to the incumbent's bottleneck element at a regulated price would increase consumer welfare in the downstream market.[79] In other words, if there were no causal connection between assisting competitors and improving consumer welfare, then the regulatory intervention would be strictly a wealth transfer from the incumbent (and its customers) to entrants. The same criticism applies to an antitrust cause of action for price squeeze. The theory of price squeeze is dissonant with consumer-welfare maximization for the simple but perverse reason that, as conceived by the Ninth Circuit in *linkLine*, harm to consumer welfare is irrelevant to the imposition of antitrust liability.

IV. PRICE SQUEEZES BY UNREGULATED MONOPOLISTS

The price-squeeze theory is not limited to regulated industries. According to *Aspen Skiing*, a duty to deal may arise from the monopolist's prior course of dealing with the downstream competitor.[80] At the outset, it is important to ask whether the theory makes any economic sense whatsoever. If an unregulated, vertically integrated firm truly is a monopolist in the supply of the bottleneck input, and if downstream competitors use that input in fixed proportion to their production of the retail product, then the "one monopoly profit theory" implies that the vertically integrated firm has no incentive to attempt the price squeeze. It could extract all available monopoly rent by raising the price of the bottleneck input. It need not manipulate the margin between that price and the retail price.[81]

[78] *Id.* at 392, 399–400, 416–18.

[79] *See* Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417 (1999).

[80] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[81] *See* Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, *supra* note 74, at 275.

But assume for sake of argument that the price-squeeze theory has some plausibility in the case of the unregulated monopolist. It remains the case that, as a matter of law, nothing in *Aspen Skiing* suggests that the duty to deal arising from a prior course of dealings encompasses a secondary duty to preserve a profitable margin for the downstream competitor—either by maintaining prices at existing levels or, if retail prices are reduced, by simultaneously reducing wholesale prices to match the retail price reductions. *Aspen Skiing* does express concern that an unregulated monopolist might sell the bottleneck input to a downstream competitor with which it has had previous, consensual business dealings for more than the retail price that the monopolist charges consumers. But suppose that, instead of refusing to deal with its downstream competitor altogether, Aspen Skiing had first sold lift tickets to the competitor at a discounted price and then lowered its own retail price without lowering the price charged to its competitor at wholesale. First, the price differential would be reduced. Eventually, it would be eliminated, with Aspen Skiing's competitor paying the full retail price. And then, it might happen that the prices at which Aspen Skiing agreed to sell to its competitor would be higher than the prices charged to retail customers for direct sales. But did the Supreme Court's decision in *Aspen Skiing* suggest that proof that the initial price arrangement was profitable required the monopolist to lower its wholesale prices each time it reduced its own retail prices in the absence of a contractual commitment to do so? Surely not.

Put differently, one cannot extrapolate from *Aspen Skiing* a theory of liability for price squeeze by an unregulated monopolist—and for good reason. The remedy required by such a theory is fundamentally different from the remedy that *Aspen Skiing* imposes when an unlawful refusal to deal occurs. In a refusal-to-deal case, the remedy (on a prospective basis) is an injunction compelling the monopolist to deal. If a voluntary, contractual transaction previously existed between the monopolist and its downstream competitor for the sale of access to the monopolist's bottleneck input, then that market transaction implies that a renewed contractual relationship may be profitable for the monopolist—provided, and it is a significant assumption, that production or demand conditions have not exogenously changed in the market since the earlier contractual relationship was in effect. However, the court does not attempt to regulate the prices, terms, and conditions—subject only to the condition that, in the absence of a persuasive showing of some legitimate business rationale by the monopolist, it may be hard to justify a wholesale price that exceeds its retail price. (In the next section, I discuss several such legitimate business rationales for why the margin may be small or even negative.)

In contrast to the remedy for an unlawful refusal to deal, the remedy under a price-squeeze theory requires the court to regulate prices. Because a price squeeze is the theory, the court's price regulation could involve either lowering the wholesale price or raising retail prices. It would be perverse if

an agreement to supply a competitor could serve as a basis for restraining price competition and keeping retail prices high. That result would surely be declared to violate section 1 of the Sherman Act if the parties were to agree to it. Could a firm enter into a voluntary agreement with a rival along the following lines: "I will supply you and, in consideration of your agreement to purchase inputs from me, I agree that I will not reduce my retail prices during the term of this agreement unless you also lower yours"? Surely not.

Of course, price regulation is only part of the supervision that a court would be required to undertake. The lesson learned by public utilities commissions is that price regulation may be ineffective if the regulated firm is free to alter terms and conditions of service (including quality). Thus, price regulation necessarily begets regulation of the nonprice attributes of service. Given that the monopolist in a case like *Aspen Skiing* or *Alcoa* is *unregulated*, a court that is attempting to ensure that a profit margin exists for downstream competitors must therefore start from scratch in its role as de facto industry regulator. All of the challenges of continuous judicial supervision of access pricing for the bottleneck input are necessarily magnified when the court attempts to regulate the wholesale and retail prices of a monopolist that the legislature has declined to subject to public utility regulation.

V. WHY MIGHT THE MARGIN BE SMALL OR NEGATIVE?

Downstream competitors in price-squeeze cases impute anticompetitive motives to input prices that cause their profit margins to be small or negative. Negative margins, in particular, may strike persons unfamiliar with economic reasoning as especially damning. However, low or negative margins may be entirely consistent with conduct that increases productive efficiency, consumer surplus, or both. In other words, the price "squeeze" may reflect the efficient workings of the market and the effective response to consumer demand.

The failure to analyze price-squeeze complaints as an access-pricing problem is compounded by a naïve portrayal of the pricing decisions of a multiproduct firm. In any network industry—including telecommunications—common costs are large because of the economies of scope associated with the sunk costs of building the network. When a firm makes more than two products—which, again, is the case in telecommunications—the firm faces the challenge, as explained in Gerald Faulhaber's seminal article, of recovering not only the costs incurred in common among all products made by the firm, but also each mathematical combination of two or more products.[82] Yet price-squeeze cases in antitrust law typically discuss only two products—the retail product and the upstream input necessary to produce

[82] Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprise*, 65 AM. ECON. REV. 966 (1975). For a 30-year retrospective on the acceptance and application of Faulhaber's

it. In reality, however, the typical defendant in such a case is a multiproduct firm producing far more than two products.

Ramsey pricing analysis is relevant here. Ever since Frank Ramsey's classic article[83] from 1927 was rediscovered by Marcel Boiteux[84] and by William Baumol and David Bradford,[85] lawyers and economists in regulated network industries have well understood that inverse-elasticity pricing is an efficient, nonarbitrary method for a multiproduct monopolist to recover its common costs while causing the least distortion to consumer behavior.[86] An antitrust rule that arbitrarily required the multiproduct firm to lower its prices for bottleneck inputs and raise its prices for retail services to end users would confound this least-distortionary means of recovering common costs.

Of course, ordinary Ramsey analysis is complicated when cross-price-elastic demand implies that complementary revenue streams are affected by the prices of the input and output being examined under the price-squeeze test. The key insight here concerning complementary revenue streams is that the opportunity cost of losing the customer relationship may far exceed the avoided cost of retailing the output—an issue whose significance will become clear momentarily.

A related problem concerns the level of confidence that one has in defining the relevant product market when extensive product integration occurs in the face of rapid technological innovation. For example, if cable television operators bundle multichannel video distribution, voice telephony, and broadband Internet access into a single monthly package, does it make sense to evaluate an allegation of a price squeeze by an ILEC in the context of a narrowly defined market consisting solely of retail DSL service? As competition increasingly occurs among bundles of services or functionalities, the task of analyzing an alleged price squeeze against a firm that seeks to offer only one of those services or functionalities becomes more and more hypothetical. In the counterfactual world in which no alleged price squeeze occurred, it is not clear that *any* firm could profitably offer the service in question on a stand-alone basis as long as other firms were offering it as part of a bundle of services.

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cross-subsidization analysis by regulators, see Gerald R. Faulhaber, *Cross-Subsidy Analysis with More Than Two Services*, 2 J. COMPETITION L. & ECON. 441 (2005).

[83] Frank Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47 (1927).

[84] The relevance of Ramsey's seminal article to public utility pricing was first enunciated in Marcel Boiteux, *Sur la Gestion des Monoples Publics Astreints à l'Equilibre Budgétaire*, 24 ECONOMETRICA 22 (1956), *republished in English as* Marcel Boiteux, *On the Management of Public Monopolies Subject to Budgetary Constraints*, 3 J. ECON. THEORY 219 (1971).

[85] *See* William J. Baumol & David F. Bradford, *Optimal Departures from Marginal Cost Pricing*, 60 AM. ECON. REV. 265 (1970).

[86] *See, e.g.*, JEAN-JACQUES LAFFONT & JEAN TIROLE, COMPETITION IN TELECOMMUNICATIONS 60–65 (MIT Press 2000).

As noted earlier, the literature on access pricing—and on the efficient component pricing rule (ECPR), in particular—is the proper economic framework for understanding price-squeeze claims. The top-down version of the ECPR holds that:

$$\text{Access price to competitor} = \text{incumbent's retail price} - \text{incumbent's avoided cost}$$

In a price-squeeze case, the access price is the wholesale price. It is the price at which the defendant firm would willingly grant its competitors wholesale access to its bottleneck input. Under what economic conditions would the incumbent charge a competitor a wholesale (access) price that exceeded the retail price charged to end users? In other words, the relevant question concerns when the following inequality holds:

$$\text{Access price to competitor} - \text{incumbent's retail price} > 0$$

By rearranging terms in the equation for the top-down version of the ECPR, the generic answer becomes obvious. The margin becomes negative when

$$\text{Incumbent's avoided cost} < 0$$

The margin will be negative because the incumbent firm, on net, incurs rather than avoids costs when selling a unit of wholesale access to a downstream competitor. First, if the avoided activity is subject to substantial economies of scale, then little cost (relating to billing and collection, advertising, and so forth) is avoided by eliminating a given retail customer. It bears emphasis, however, that economies of scale would reduce the size of the incumbent's avoided cost, but they alone would not make that avoided cost negative. A second factor is that there may be substantial costs required of the incumbent on the margin to provision the bottleneck input on a wholesale basis for sale to downstream competitors.

A third and more powerful insight comes from understanding that a negative avoided cost for the incumbent encompasses a (positive) opportunity cost—benefits that the incumbent necessarily forgoes by virtue of undertaking the wholesale transaction and displacing a retail transaction. Suppose that the wholesale input is used to produce other retail products that compete with the incumbent's services, which had contributed significant operating margins with which the incumbent recovered the common cost of its network. A specific example is voice over Internet protocol (VoIP) telephony. VoIP and other packet-switched services permit arbitrage of regulated rate structures that were predicated, in the spirit of Ramsey pricing, on higher margins being earned on relatively price-inelastic services. An ILEC's loss of the DSL customer to an unaffiliated ISP means that the ILEC faces a high probability of losing the revenue streams associated with voice

telephony and with ancillary products generating substantial net revenues—such as vertical services (caller ID, voicemail, call forwarding, and the like), Internet advertising, and value-added services generally. An ILEC's opportunity cost of losing the customer account is not limited to the net revenues earned on plain old telephone service, but rather encompasses the net revenues that the ILEC could earn on a wide range of subscriber-funded and advertiser-funded services targeted at that customer, currently and in the foreseeable future.

VI. *ALCOA*'S LIVING PROFIT VERSUS THE SUPREME COURT'S CONSUMER-WELFARE JURISPRUDENCE

The Ninth Circuit in *linkLine* is incorrect to the extent that it reads *Alcoa* to have imposed section 2 liability under a price-squeeze theory for an attempt to monopolize the downstream (aluminum sheet) market. It is too abbreviated for the Ninth Circuit to characterize *Alcoa* as "holding [Alcoa's] price squeeze unlawful,"[87] and then to assert that "a price squeeze theory formed part of the fabric of traditional antitrust law prior to *Trinko* . . . ."[88] linkLine alleged that SBC used its retail pricing of broadband Internet access (aluminum sheet) and its pricing of DSL transport (aluminum ingot) to monopolize broadband Internet access (aluminum sheet). In *Alcoa*, however, the Second Circuit said that the price squeeze, which it found to deny downstream competitors a "living profit" in violation of section 2 of the Sherman Act, "was not part of an attempt to monopolize the 'sheet' market."[89] Because the analogy to sheet aluminum in *linkLine* is broadband Internet access (not DSL transport), *Alcoa* does not support the position of either linkLine or the Ninth Circuit that the alleged price squeeze potentially violates section 2 *with respect to the market for broadband Internet access.*

Moreover, *Alcoa*'s concern over preserving a "living profit" for Alcoa's competitors could not be farther removed from the contemporary consumer-welfare orientation of antitrust law. The Court in *Trinko* considered *Aspen Skiing* to be on the ragged edge of viability as a theory of antitrust liability.[90] The "living profit" reasoning of *Alcoa* should be sufficient to confirm that, sometime during the intervening 62 years, the Court's evolving jurisprudence based on consumer-welfare maximization implicitly overruled the competitor-welfare premise of *Alcoa*'s price-squeeze analysis.[91] For example, in *Trinko* the Supreme Court said that courts should not act as

[87] *linkLine*, 503 F.3d at 880.
[88] *Id.* at 883.
[89] *Alcoa*, 148 F.2d at 438.
[90] *Trinko*, 540 U.S. at 399.
[91] Compare, for example, how the D.C. Circuit in Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 226 (D.C. Cir. 1986) (Bork, J.), reasoned that, by 1986, certain

"central planners."[92] However, to determine a "fair price" and a "living profit"—two of the three elements of a prima facie price-squeeze claim under *Alcoa*—a court must do just that. Forcing a firm to share its resources with downstream competitors, and dictating "fair prices" for those resources, strains the resources of the judiciary, as the Court has noted.

In *Alcoa*, the Second Circuit asserted that the purpose of the Sherman Act is to "preserve, for its own sake and *in spite of possible cost*, an organization of industry in small units."[93] All of the legal analysis in *Alcoa* that builds from this premise is suspect in light of the fact that, at least three decades ago, the Supreme Court emphatically expressed a different normative objective for antitrust law. Writing in *The Antitrust Paradox* in 1978, Robert Bork observed that Judge Hand in *Alcoa* "seems to be asserting the right to trade off consumer welfare for unarticulated social values."[94] Though not commenting specifically on the price-squeeze aspect of the case, Judge Richard Posner wrote in 2001 that *Alcoa*'s vision of the purpose of section 2 of the Sherman Act is "discredited," "defunct," and "no longer the law."[95] Today, *Alcoa*'s view of the normative purpose of antitrust law more closely resembles Europe's perspective than America's. In *NCAA*,[96] *Trinko*, and many other cases, the Supreme Court has endorsed the view that the Sherman Act's concern is consumer welfare, not competitor welfare. Compelling an income transfer from a vertically integrated firm (or its customers) to its downstream competitors does not advance the Sherman Act's consumer-welfare goal.

VII. THE OBVIOUS PATH NOT CHOSEN: *TOWN OF CONCORD*

In light of the weak foundation for the price-squeeze theory of liability, it is startling that the Ninth Circuit in *linkLine* never discussed the First Circuit's decision in *Town of Concord*,[97] written in 1990 by then-Judge Breyer. The Ninth Circuit relied on decisions from the Second, Third, Seventh, and Eighth Circuits—but its survey of the pertinent law on price squeezes did not reach Judge Breyer's extended analysis in *Town of Concord*.

Supreme Court decisions had been implicitly overruled by the analysis contained in the Court's more recent cases embracing the consumer-welfare approach.

[92] *Trinko*, 540 U.S. at 408.

[93] *Alcoa*, 148 F.2d at 429 (emphasis added).

[94] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 52 (1978). Bork elsewhere concluded: "The *Alcoa* decision . . . stands revealed as a thoroughly perverse judicial tour de force, contrary to the legislative intent of the Sherman Act, the great 1911 cases that formulated the 'rule of reason,' and the entire spirit of antitrust." *Id.* at 170.

[95] RICHARD A. POSNER, ANTITRUST LAW 103, 196, 250, 263 (2d ed. 2001).

[96] NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984).

[97] Town of Concord v. Boston Ed. Co., 915 F.2d 17 (1st Cir. 1990).

Town of Concord is the single most informative opinion in American antitrust jurisprudence for understanding the law and economics relevant to evaluating a price-squeeze claim. Although the holding in *Town of Concord* is limited to a situation in which the alleged monopolist's wholesale and retail prices were both regulated, the rationale of the decision is entirely consistent with the proper analysis of price-squeeze allegations in other contexts as well. It is no surprise that the Supreme Court's decision in *Trinko* quotes liberally from *Town of Concord* and confirms the correctness of its reasoning that the antitrust laws are concerned with the competitive process, not its end results. Judge Breyer wrote that "a price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent [downstream firm] to cover its costs and stay in business."[98] Dennis Carlton similarly defines a price squeeze to require the successful exclusion of competitors from the downstream market: "A price squeeze occurs when a vertically integrated firm supplies an input to its downstream competitors at a price that generates a profit margin so low that *the competitors* exit the downstream market."[99] The Breyer-Carlton definition of a price squeeze implies that even the exit of *multiple* competitors as a result of the alleged price squeeze is irrelevant if such exit does not reduce consumer welfare. Judge Breyer emphasized in *Town of Concord* that the inability of a single firm to stay in business is irrelevant as a matter of antitrust law unless the behavior inducing that firm to exit the market also harms the competitive process:

> We shall compare the [alleged price squeeze's] likely anticompetitive effects with its potentially legitimate business justifications. In doing so, we shall bear in mind that 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. It harms that process when it obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods.[100]

Put differently, a price squeeze by a firm lacking market power cannot possibly rise to the level of an antitrust violation because it has no chance of reducing consumer welfare. It should be dismissed on the pleadings, by an extension of the reasoning in *Twombly*. Similarly, even a price squeeze by a firm possessing market power should not violate section 2 of the Sherman Act if such pricing can be shown to offer consumers "lower prices, better products, [or] more efficient production methods."[101]

[98] *Id.* at 18.

[99] Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, *supra* note 74, at 271 (emphasis added).

[100] *Town of Concord*, 915 F.2d at 21–22 (citations omitted).

[101] *Id.*

In *Town of Concord*, the First Circuit rejected a price-squeeze claim for reasons that implicate the validity of *Alcoa*. First, the court noted that a price squeeze can have procompetitive effects: "the primary-level monopolist might carry out its second-level activities more efficiently than its independent competitors," thereby eliminating less efficient second-level competitors from the market, which results in lower prices and saves economic resources.[102] Moreover, if a second-level firm is itself a monopolist, it is desirable to allow the upstream monopolist to squeeze out the downstream monopolist, because the downstream monopolist, in its effort to extract its own monopoly rents, can increase the price of the end product beyond the price that results from having only one firm attempting to extract of monopoly rent (either at the wholesale level or retail level).[103] For this reason, antitrust scholars applaud the elimination of this phenomenon of "double marginalization."[104]

Second, foreshadowing the Supreme Court's concerns in *Trinko*, Judge Breyer highlighted the adverse administrative considerations that counsel against recognizing price-squeeze claims. These administrative considerations implicate *Alcoa*'s core elements: a "fair price" for the wholesale product and a "living profit" for second-level competitors. Questioning the practicality of administering remedies for an unlawful price squeeze, Judge Breyer asked rhetorically how a judge or jury could determine a fair price or a proper price gap between the wholesale and retail prices.[105] What *Trinko* recognized as a fatal flaw in a refusal-to-deal theory—namely, that "[e]nforced sharing also requires 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"[106]—is, as *Town of Concord* indicates, just as fatal for an *Alcoa* price-squeeze claim. As Dennis Carlton has explained, to determine a "fair price" or a "living profit" for firms that meet some threshold level of efficiency, courts must "become a type of regulatory body setting complex terms ... in an area where, unlike a regulatory body, the courts have no special expertise."[107]

VIII. CONCLUSION

Trinko underscores the significance of avoiding theories that require courts to act as "central planners" and stresses that courts should balance "a realistic assessment of" the costs of "antitrust intervention," including the

[102] *Id.* at 24.
[103] *Id.* at 24–25.
[104] *See, e.g.*, 3A AREEDA & HOVENKAMP, *supra* note 16, ¶ 758b at 30.
[105] *Town of Concord*, 915 F.2d at 25.
[106] *Trinko*, 540 U.S. at 408.
[107] Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen Skiing *and* Kodak *Are Misguided*, 68 ANTITRUST L.J. 659, 662 (2001).

likelihood of "[m]istaken inferences and the resulting false condemnations" that "chill the very conduct the antitrust laws are designed to protect."[108] As *Town of Concord* makes clear, an *Alcoa* price squeeze can in fact be motivated by procompetitive intentions, and can have substantial procompetitive effects. The price-squeeze theory of liability threatens these effects. This threat, and the extreme difficulties of applying the test in a way that precludes less-efficient firms from using the antitrust laws as a crutch, "counsels against an undue expansion of § 2 liability" to encompass price-squeeze claims.[109]

The Supreme Court should clarify that the proper response to a price-squeeze allegation is a regulatory undertaking, not an antitrust cause of action. Clear, consistent rules are needed that provide meaningful guidance to the business community, to the courts, to litigants, and to prospective litigants. The rules for civil liability under the antitrust law must not promote lawsuits that penalize appropriate, procompetitive conduct. The price-squeeze theory of liability meets none of those objectives. On the pricing of inputs, it conflicts with the refusal-to-deal principles that the Court established in *Trinko*. On retail pricing, it conflicts with the general principle that the Court enunciated in *Brooke Group* that nonpredatory retail prices should not be challenged. Thus, the price-squeeze theory of antitrust liability provides courts and litigants an excuse to depart from *Trinko*, *Brooke Group*, or both by recasting claims appropriately analyzed as refusal-to-deal cases or predation cases as something different—price-squeeze claims.[110] Finally, as Dennis Carlton notes, "the inquiry as to whether a price squeeze leads to competitive harm necessarily must be conducted ex post, which therefore makes it impossible for a firm to know in advance whether its pricing practices will be anticompetitive."[111]

The price-squeeze theory of liability undermines the basic proposition that the evils attacked by section 2 of the Sherman Act are uses of anticompetitive conduct to obtain and maintain monopoly power, not some sort of open-ended "abuse" of lawfully obtained monopoly power. When regulatory agencies regulate either wholesale prices or retail prices (or both), the price-squeeze doctrine invites antitrust courts to collaterally attack, second-guess, and nullify the decisions of the expert agencies in the areas of their legislatively delegated expertise. For antitrust law to achieve its appropriate purposes, the courts must retire ill-considered, obsolete, and pernicious doctrines, such as the price-squeeze theory of liability, that clutter and confuse

[108] *Trinko*, 540 U.S. at 408, 414.

[109] *Id.*

[110] Furthermore, asserting that a price squeeze justifies a different analysis because it effectuates some sort of "abuse of dominance" conflicts with Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

[111] Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, *supra* note 74, at 276.

the law by encouraging judicial decision making by label rather than by reasoned economic analysis.

linkLine provides the Supreme Court with the opportunity to resolve a circuit conflict that promotes inappropriate litigation and prevents the early dismissal of unmeritorious cases. In *linkLine*, regulation required the vertically integrated firm to provide access, and it did so. Its rivals in the retail market (cable televisions companies providing high-speed Internet access) were not placed under comparable regulatory duties and did not provide ISPs access. The access price that the vertically integrated firm charged met the regulatory requirements. When, due to competition from other facilities-based providers of high-speed Internet access, the vertically integrated firm lowered its retail prices to consumers, the downstream competitor complained about a price squeeze. That complaint could be interpreted as the downstream competitor's invitation to the vertically integrated firm to stabilize retail prices and abstain from price cuts. After all, one way for the vertically integrated firm to prevent a price-squeeze claim from being filed against it is to raise retail prices to provide a price umbrella for its downstream competitors. If, instead of threatening litigation if the price squeeze persisted, the downstream competitor had instead proposed a retail pricing agreement that would preclude the vertically integrated firm from lowering retail prices during the term of the contract, or from lowering retail prices without also lowering its wholesale prices in an equal amount, a court or antitrust enforcement agency would likely view the agreement as a *per se* violation of section 1 of the Sherman Act. Clearly, it does not advance consumer welfare to recognize an antitrust cause of action that enables competitors to obtain relief compelling the defendant to raise retail prices. Antitrust courts do not exist to make peace among competitors by serving as cartel masters.

If, however, the problem was with the access price for the bottleneck input, then the appropriate complaint of the downstream competitor should not be that a price squeeze has occurred, but that the vertically integrated firm has violated a duty to deal—which, in *linkLine*, would imply a duty by the ILEC to create a new supply arrangement to replace the earlier arrangement established by regulatory fiat. That remedy, however, is well outside the scope of *Aspen Skiing*, because that case involved changes to a pre-established course of dealing unilaterally undertaken by a vertically integrated monopolist, rather than the creation of a new affirmative duty to deal on different terms at the request of the downstream competitor. If there is a complaint about wholesale price levels, the complaint should be taken to the regulatory authority. It should not be the responsibility of courts, interpreting the antitrust laws, to override those regulators or to create new ad hoc duties to deal or to adjust existing deals where no such duties existed before—either as a result of freely negotiated deals in a competitive market (as in *Aspen Skiing*) or as a result of regulatory compulsion.

Antitrust courts do not exist to provide broad opportunities to regulate and second-guess the business decisions of firms or to review and nullify the decisions of regulators in the areas that the legislature has entrusted to them. Because the price-squeeze theory of antitrust liability serves no purpose other than to penalize firms whose actions are appropriate under the Supreme Court's refusal-to-deal and retail pricing precedents, the Court should abolish the price-squeeze theory of liability. The Sherman Act penalizes the illegal acquisition and maintenance of monopoly power, not the use of lawfully obtained monopoly power. To the extent that there is to be regulation of the pricing decisions of dominant firms, that regulation should be entrusted to regulators, not antitrust courts. Courts exist to resolve cases and controversies, not to regulate businesses that have lawfully acquired or maintained monopoly power.

It is neither feasible nor advisable to use antitrust law to make a vertically integrated firm responsible for ensuring the profitability of its competitors in the downstream market. Such a rule would create a powerful incentive for the vertically integrated firm to raise its retail price to reduce the risk of antitrust lawsuits by unprofitable downstream competitors. That result is antithetical to the consumer-welfare objective that animates American antitrust law.