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In an article for this publication last year, I argued that the Supreme Court should grant certiorari in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.* and reverse the Ninth Circuit's decision.[1] The case involved a "price squeeze" claim: linkLine, a DSL customer of AT&T at the wholesale level and a DSL competitor of AT&T at the retail level, alleged that AT&T had "squeezed" linkLine's margins. That is, linkLine alleged that the difference between the wholesale prices charged by AT&T and the retail prices AT&T offered to customers did not provide linkLine sufficient returns to effectively compete with AT&T. The Ninth Circuit ruled that such a claim was permissible under the antitrust laws.

I argued that the Ninth Circuit's holding—in essence, that linkLine could prove a violation of the antitrust laws by demonstrating that AT&T had priced in a manner that was "unfair"—would create unneeded confusion regarding the circumstances under which price cutting was permissible. Without clear standards, firms with ostensible market power may be discouraged from lowering prices to consumers for fear of running afoul of the antitrust laws. I further argued that the Court should clarify once and for all that its test in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[2] applies to all claims relating to a firm's unilateral pricing decision, not just those claims that might be categorized as alleging "predatory pricing." Under the *Brooke Group* standard, any plaintiff alleging that a competitor caused it antitrust harm through its unilateral pricing (whether through a "price squeeze" or through "bundling" practices) should need to demonstrate that the defendant (a) priced below an identifiable measure of its cost, and (b) had a dangerous probability of recouping its losses after the plaintiff left the market.

The Supreme Court granted certiorari soon after the publication of that article. On February 25, 2009, the Court reversed.[3] Much of the commentary published since that decision has focused on the first part of the Court's ruling. Specifically the Court

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[1] David Olsky, *Comment on* LinkLine: *A Call for Clarity*, 1(1) GCP MAGAZINE (Jan-08), available at http://www.globalcompetitionpolicy.org/index.php?id=786&action=907.

[2] 509 U.S. 209, 224-26 (1993).

[3] Pac. Bell Tel. Co. v. LinkLine Comm'ns, Inc., 129 S. Ct. 1109 (2009).

held that, per its earlier ruling in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[4] AT&T had no antitrust duty to deal with linkLine at the wholesale level.[5]

More far reaching, however, is likely the second part of the Court's ruling—that any claim that AT&T undercut linkLine's pricing at the retail level must meet the strictures of the *Brooke Group* test. In so holding, the Court provided the clearest statement yet that *Brooke Group* was intended to apply to any suit brought by a competitor in which the crux of the claim is that the defendant caused harm through its pricing.[6] Moreover, the Court expounded on the virtues of providing clear rules to firms, rather than having the judiciary determine what constitutes a "fair" price—a task better left to a government agency, or, better yet, the market.[7]

So, is the law now clear for firms considering whether to provide price discounts, and the manner in which to provide those discounts? The answer: sort of. The Supreme Court's unabashed affirmation of *Brooke Group* is reassuring, but at least two major complications remain.

First, in the years since *Brooke Group* was decided the Third Circuit and others have ruled that claims of bundling of separate products—a practice that at least provides the appearance of offering lower prices to customers[8]—need not meet the *Brooke Group* test for predatory pricing. Indeed, the Third Circuit's ruling in *LePage's Inc. v. 3M Co.*,[9] which held that a plaintiff asserting a bundling claim need not prove that the defendant priced below a measure of its cost, was premised in part on its understanding that *Brooke Group* applied only to the Robinson-Patman Act, not to Section 2 of the Sherman Act, and did not apply to pricing by monopolists.[10] Until the Supreme Court explicitly overrules this precedent, aggressive plaintiffs—including, perhaps, the Federal Trade Commission—may still attempt to bring antitrust claims on bundling theories, without regard to whether the bundle was priced below a measure of the defendant's cost. Courts that have not previously encountered such bundling cases, however, might be hesitant to follow *3M* given *linkLine's* broad application of the *Brooke Group* standard.[11]

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[4] 540 U.S. 398 (2004).

[5] *Pac. Bell*, 129 S. Ct. at 1119.

[6] *Id.* at 1123 (*Brooke Group* holds "that low prices are only actionable under the Sherman Act when the prices are below cost and there is a dangerous probability that the predator will be able to recoup the profits it loses from the low prices.").

[7] *Id.* at 1120-21.

[8] In certain circumstances, bundled pricing might not, in fact, involve an overall discount to the customer. For example, a firm might increase the price of a stand-alone product to make the bundled rebate superficially appear beneficial to the customer, without lowering overall price.

[9] 324 F.3d 141 (3d Cir. 2003) (en banc).

[10] *Id.* at 151-52.

[11] The Ninth Circuit, for example, ruled that a plaintiff asserting a bundling claim must demonstrate that the defendant priced "below an appropriate measure of the defendant's costs." Cascade Health Solutions v. Peacehealth, 515 F.3d 883, 903 (9th Cir. 2009) (amended opinion).

Second, the *Brooke Group* test tends to be more straightforward in theory than in practice. Having determined that a firm cannot be liable under the antitrust laws for pricing below some measure of its costs, the Court still has not set forth what measure of costs is appropriate for this inquiry. Most courts hold that a defendant cannot be liable unless it priced below its average variable cost, but even that measure can be pliable. Deciding what constitutes a "variable" cost rather than a "fixed" cost is typically fact intensive and may vary from case to case. Some parties might argue that a variable cost only includes the costs required to manufacture the last unit of output; others would include additional capital costs required to manufacture the marginal units at issue. Courts might be inclined to throw up their hands and leave the determination to a battle of the experts before the jury, thus diminishing (if not extinguishing) the benefit of the safe harbor supposedly provided by *Brooke Group*.

That said, the Court's declaration that the *Brooke Group* test applies to all antitrust claims relating to unilateral pricing is a significant step forward. Further, the Court's emphasis on clear rules that can be applied by firms in real time provides helpful guidance to lower courts considering all manner of unilateral conduct claims. More importantly, the Court has again emphasized that antitrust law is as much about the nature of the *law* as it is about the nature of antitrust economics. New theories abound about the potentially harmful nature of different types of firm conduct, but courts should not determine that such conduct violates the antitrust laws without first weighing the administrative costs and potential collateral consequences of doing so.