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COURT URGED TO BAR "PRICE SQUEEZE" CLAIMS UNDER ANTITRUST LAWS

(Pacific Bell Telephone Co. v. linkLine Communications, No. 02-1865)

The Washington Legal Foundation this week urged the U.S. Supreme Court to overturn a lower-court decision that authorizes antitrust claims against dominant firms that engage in so-called "price-squeezes" -- *i.e.*, they sell their products at a price allegedly too low to allow competitors to make a profit.

In a brief filed in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, WLF argued that consumers benefit when companies lower their prices and that companies should not be punished for engaging in price competition that is good for consumers. WLF argued that the lower-court decision, unless reversed on appeal, will chill pro-consumer price cuts by companies that seek to avoid potential antitrust liability. Mark J. Botti, Anthony W. Swisher, and Paul B. Hewitt, attorneys with the Washington, D.C. office of the law firm Akin Gump Straus Hauer & Feld, provided invaluable pro bono assistance to WLF in preparing the brief.

"The point of the antitrust laws is to protect competition, not competitors," said WLF Chief Counsel Richard A. Samp after filing WLF's brief. "Some companies may suffer severe losses when a rival competes by slashing its prices, but antitrust law is not intended to stop such competition, which benefits the economy as a whole," Samp said.

The case involves an antitrust suit filed against Pacific Bell Telephone Co., which is the dominant provider of DSL lines in California. Federal Communications Commission regulations require telecommunications companies such as Pacific Bell to provide access to DSL lines to companies that wish to offer DSL services to the general public. One such company is linkLine Communications, Inc. In addition to providing wholesale access to its DSL lines, Pacific Bell provides retail DSL services to the general public.

In its antitrust suit against Pacific Bell, linkLine alleges that Pacific Bell has engaged in a "price squeeze" that makes it impossible for linkLine to make a profit. In other words, linkLine alleges that Pacific Bell has charged it a high wholesale price relative to the prices at which Pacific Bell has provided retail DSL services. linkLine accuses Pacific Bell of wrongfully exercising its monopoly power in the wholesale DSL market to drive linkLine out of the retail DSL market.

A federal district court in California denied Pacific Bell's motion to dismiss the case. The U.S. Court of Appeals for the Ninth Circuit affirmed. The Supreme Court then agreed to review the Ninth Circuit's decision.

In its brief, WLF argued that recognition of a "price squeeze" claim cuts against modern antitrust law. WLF noted that the Supreme Court's 2004 *Trinko* decision held that a monopolist does not violate the antitrust laws by refusing to offer its facilities to a competitor, regardless whether it has an obligation to do so under some other law. WLF argued that in light of the absence of an antitrust obligation to deal with competitors, it makes no sense to impose on a company that provides competitors with access to its monopoly product an obligation to avoid a "price squeeze" that cuts into its competitors' profitability. If companies are required to ensure their competitors' profits, then they will be required to keep their retail prices artificially high, WLF argued -- a result that cannot be good for consumers.

WLF argued that linkLine's "price squeeze" claim is akin to "predatory pricing" claims of a type the Court has long since rejected. WLF argued that the Court should order dismissal of the suit and reaffirm its bright-line rule that even dominant firms may not be found liable for "predatory pricing" so long as they sell their products above cost. The Supreme Court established that rule in its 1993 *Brooke Group* decision; WLF argued that the Ninth Circuit's efforts to distinguish *Brooke Group* were unpersuasive. WLF noted that there is no allegation that Pacific Bell is offering its retail DSL services at below-cost prices.

WLF also argued that the Ninth Circuit's decision, by condemning some above-cost price cutting, will discourage price cuts by firms that fear incurring antitrust liability. WLF argued that bright-line rules are particularly important in this area, because leaving open the possibility that companies engaged in pro-competitive price cutting will be found liable for a "price squeeze" will chill the very conduct that the antitrust laws are designed to protect.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared in the federal courts to address the proper scope of the antitrust laws.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.