

Sea Change or High Tide: Introduction to What's Next at the Supreme Court

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By any standard, the last two years have seen a remarkable resurgence of interest in antitrust on the part of the Supreme Court. In producing more antitrust decisions in these two terms than it had in the rest of the last decade, the Court has given both practitioners and scholars plenty to debate:

- In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹ the Court overturned the longstanding and much debated per se rule against minimum resale price maintenance agreements.
- In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,² the Court extended the standard of *Brooke Group*³ from predatory pricing to predatory bidding because the two practices are economically similar.
- In *Credit Suisse Securities (USA) LLC v. Billing*,⁴ the Court held that the securities laws prevent application of the antitrust laws to allegedly collusive conduct by underwriters involved in the IPO process.
- In *Bell Atlantic Corporation v. Twombly*,⁵ the Court held that a Sherman Act complaint must allege sufficient facts to create plausible grounds for inferring that an illegal agreement existed.
- In *Illinois Tool Works Inc. v. Independent Ink, Inc.*,⁶ the Court held that the mere fact that a tying product is patented does not support a presumption of market power in the patented product, and further held that in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.
- In *Texaco Inc. v. Dagher*,⁷ the Court held that it is not per se illegal under Section 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products.
- In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,⁸ the Court held that a manufacturer could not be liable for secondary-line price discrimination under the Robinson-Patman Act, absent proof that it discriminated between dealers contemporaneously competing to resell its product to the same retail customer.

¹ 127 S. Ct. 2705 (2007).

² 127 S. Ct. 1069 (2007).

³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

⁴ 127 S. Ct. 2383 (2007).

⁵ 127 S. Ct. 1955 (2007).

⁶ 547 U.S. 28 (2006).

⁷ 547 U.S. 1 (2006).

⁸ 546 U.S. 164 (2006).

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Is this surfeit of new authority the start of an era in which the Court will show sustained interest in issues of antitrust or are we seeing only a temporary upswing before the Court moves on to other fields? More importantly, what is next, or should be next, for the Court?

Some of the best antitrust lawyers and leaders in the ABA Section of Antitrust Law take on these difficult questions, and in doing so, offer insight not only into where the Court is going, but also where it has come from.⁹ ●

⁹ The articles in this symposium are revised and expanded versions of comments presented by the authors at an ABA Section of Antitrust Law program, Whistler, British Columbia, August 16, 2007.

Antitrust in the Supreme Court: What Lies Ahead

Joseph Angland

Over its last few terms, the Supreme Court, in decisions such as *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹ and *Illinois Tool Works Inc. v. Independent Ink, Inc.*,² has cleaned up much of the detritus of an earlier, less economically enlightened era of antitrust jurisprudence. At this point, I believe that the Court should, and perhaps will, focus on issues of more recent vintage.

To begin with, the Court should address bundled pricing. *LePage's Inc. v. 3M Co.*³ was an analytic disaster. The problem was not that the court of appeals adopted the wrong test for appraising whether bundled pricing by a firm with monopoly power violated Section 2 of the Sherman Act, but that it found liability without articulating any meaningful test.⁴ It permitted a jury to deem pricing by a firm with monopoly power to be anticompetitive, even if price exceeded any relevant definition of cost, simply because such pricing injured a competitor.⁵ This focus on harm to a competitor rather than harm to competition is anathema to modern antitrust thinking. By effectively permitting a jury to condemn almost any bundled discounting by a firm with—or with a dangerous probability of obtaining—monopoly power, the decision fails to provide firms with meaningful guidance and it deters procompetitive discounting. Moreover, it creates a price umbrella under which less efficient firms can operate and thereby increases prices to the detriment of consumers.

It is not surprising that the decision had virtually no defenders. What was somewhat surprising was that the Federal Trade Commission and the Department of Justice, while acknowledging that the decision was wrong, requested that the Supreme Court not review it because more time was required for the lower courts and the academic literature to consider what test was best in such cases.⁶

The issue has percolated long enough. Bundled pricing has been addressed extensively in the academic literature, it was the object of one of the major recommendations of the Antitrust Modernization Commission, and it has been considered by several lower courts.⁷ With the Ninth Circuit's decision in *Cascade Health Solutions v. PeaceHealth*,⁸ we now have a stark conflict between the Third and Ninth Circuits. One can quarrel with whether the Ninth Circuit got it precisely

¹ 127 S. Ct. 2705 (2007).

² 547 U.S. 28 (2006).

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

⁴ *Id.*

⁵ *See id.* at 156–57.

⁶ Brief for the United States as Amicus Curiae, *3M Co. v. LePage's Inc.*, No. 02-1865 (U.S. May 28, 2004), available at <http://www.usdoj.gov/atr/cases/f203900/203900.pdf>.

⁷ *E.g.*, Daniel Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. CHI. L. REV. 243 (2005); ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 94–100 (2007), available at <http://www.amc.gov>.

⁸ 502 F.3d 895 (9th Cir. 2007).

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correct in *Cascade*—e.g., whether recoupment should be required or whether average variable cost should always be the controlling cost standard. The key point, however is that *Cascade* adopted a coherent test with which dominant firms can endeavor to comply and pursuant to which competition, rather than a disgruntled competitor, is given priority.⁹ The Supreme Court should make clear that *LePage's* non-test is simply wrong. Regardless of whether it fully embraces the test set forth in *Cascade*, adopts some variation of it, or simply acknowledges that the *Cascade* test is one acceptable standard, the Court should make clear that bundled pricing cannot give rise to a Section 2 violation absent some form of below-cost pricing under some type of price attribution rule.

On a related note, the Court should consider the price-squeeze issues raised by the Ninth Circuit's recent decision in *linkLine Communications, Inc. v. SBC California, Inc.*¹⁰ *linkLine* would punish a dominant firm whose above-cost pricing to a downstream competitor makes it difficult for that competitor to compete effectively in the downstream market. It is difficult to square *linkLine* with decisions, such as *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*¹¹ and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,¹² which are solicitous of aggressive pricing and condemn it only when below-cost pricing results. It is not obvious why a different test should apply simply because the defendant is a supplier to the plaintiff and thereby determines a portion of the plaintiff's costs. It is also difficult to square *linkLine* with *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,¹³ in that it appears that *linkLine* would find a price squeeze violation even where, under *Trinko*, the dominant firm could simply refuse to sell to the competitor at all. Such a result is puzzling, and the Court should resolve this apparent conflict. *linkLine* would also give the Court an opportunity to clarify the impact of a regulatory scheme on the antitrust analysis, a subject about which *Trinko* left some uncertainty and *Credit Suisse Securities (USA) LLC v. Billing*¹⁴ raised some eyebrows.

The Supreme Court also should weigh in on patent settlements. As it stands, we have a split not only among the circuits, but between the federal enforcement agencies as well, regarding the test that should be applied to so-called reverse payment settlements—i.e., settlements of patent infringement suits in which the party challenging the patent receives a substantial payment in exchange for agreeing to remain out of the market for some period of time. The Sixth Circuit condemned one such payment under a per se rule in *Louisiana Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (In re Cardizem CD Antitrust Litigation)*,¹⁵ whereas the Eleventh Circuit applied the rule of reason to such a settlement in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*¹⁶ and upheld another alleged reverse payment settlement in *Schering-Plough Corp. v. FTC.*¹⁷ The Second Circuit went even further in *Joblove v. Barr Labs, Inc. (In re Tamoxifen Citrate Antitrust Litigation)*,¹⁸ effectively holding that any settlement that was not more restrictive than the original

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⁹ See *id.* at 914–20.

¹⁰ 503 F.3d 876 (9th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 17, 2007) (No. 07-512).

¹¹ 509 U.S. 209 (1993).

¹² 127 S. Ct. 1069 (2007).

¹³ 540 U.S. 398 (2004).

¹⁴ 127 S. Ct. 2383 (2007).

¹⁵ 332 F.3d 896, 900 (6th Cir. 2003).

¹⁶ 344 F.3d 1294, 1305 (11th Cir. 2003).

¹⁷ 402 F.3d 1056, 1065–76 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2929 (2006).

¹⁸ 466 F.3d 187, 212–13 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 3001 (2007).

patent could not be anticompetitive (apparently without regard to whether the original patent would have been upheld). Meanwhile, in a rare show of discord between our two federal enforcement agencies, the Department of Justice, while acknowledging that some patent settlements could raise antitrust concerns, pointedly failed to support the FTC's petition for a writ of certiorari in *Schering-Plough*, underscoring the divergent ways that these agencies evaluate reverse payment settlements.

An appropriate reverse payment case would permit the Court to address several key issues that arise in such cases, including (1) whether a settlement that is not more restrictive than the original patent is per se legal, (2) whether the answer to the foregoing question depends upon whether the basis for the patent litigation is noninfringement or invalidity of the patent, (3) whether reverse payment settlements are per se legal unless the pursuit of the patent infringement suit (or defense of the patent in a declaratory judgment action) would be objectively baseless, and (4) assuming that per se legality does not apply, whether a rule of per se illegality applies if consideration (other than an effective reduction of the patent term) is provided to the patent challenger to remain out of the market for some period.

[T]he Court should address whether the overlap between a factual claim in support of class certification and a factual claim on the merits bars the court from appraising the claim on the class certification motion.

These issues require answers. The split among the courts and between the agencies regarding the applicable standard creates risk for patent holders (and challengers) that undermine the incentives that the patent system is designed to provide. Whatever the ultimate test, patent holders and challengers will benefit from clarity in this now particularly muddy area.

Finally, unless the courts of appeals sort out the conflict that remains among them, I think the Supreme Court should address a procedural issue applicable to federal cases generally but of particular significance in antitrust cases: the standard to be applied when appraising a motion for class certification. More specifically, the Court should address whether the overlap between a factual claim in support of class certification and a factual claim on the merits bars the court from appraising the claim on the class certification motion. By invoking the mantra that "the merits are not in issue at the class certification stage," many courts have created a virtual immunity from review for any claim at the class certification stage that might be an issue on the merits. For example, if a plaintiff attempted to show that common issues predominated by contending that there was a national market and thus the same market definition and monopoly power issues applied to all class members, some courts applying the standard would refrain from considering an argument that numerous local geographic markets were involved and thus there were actually individual rather than common issues regarding market definition and monopoly power. They would decline to consider the defendant's argument, no matter how frivolous the argument in favor of a national market appeared to be, because market definition is part of the merits analysis.

This approach finds support in neither logic nor Supreme Court precedent. As several appellate courts have held in recent years, both sound judicial management and the language of the Federal Rules of Civil Procedure require that a court make a finding about whether the "predominance" test is satisfied, and the court thus should not blindly accept a plaintiff's argument merely because it happens to overlap with a merits issue.¹⁹ Several of those courts have convincingly demonstrated that the Supreme Court's admonition regarding the consideration of the merits at the class certification stage prohibits only the consideration of merits issues that are not relevant to the specific issues that Rule 23 requires courts to consider at that stage—e.g., predominance.²⁰

¹⁹ *E.g.*, *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

²⁰ *E.g.*, *id.* at 41.

Unfortunately, while a wave of rationality has swept through the courts on this issue in the last few years, there are some apparent holdouts. For example, the First Circuit, in *Waste Management Holdings, Inc. v. Mowbray*,²¹ interpreted relevant Supreme Court precedent as prohibiting a district court from inquiring at the class certification stage into a merits-related issue, as the Ninth Circuit did in *Dukes v. Wal-Mart, Inc.*²² It may be that all the circuits will fall in line on this issue over the next year or so, but if they do not, the Supreme Court should take a case to make clear that a court may not duck its responsibilities under Rule 23 just because a plaintiff invokes the word “merits.”

Over the last few years, the Supreme Court has addressed several of the vestiges of earlier eras of antitrust, and in doing so it enhanced the coherency of antitrust law. One hopes that the Court’s interest in antitrust issues will persist and that it will address some or all of the issues discussed above. ●

²¹ 208 F.3d 288 (1st Cir. 2000).

²² 474 F.3d 1214, 1227 (9th Cir. 2007).

Whither Antitrust in the Supreme Court?

Susan S. DeSanti

A consideration of “what next?” for the Supreme Court requires first a look at recent Supreme Court opinions, not only to identify the issues just put to rest, at least for the time being, but also to assess the Court’s attitude toward antitrust law. For the most part, the Court’s recent decisions describe antitrust as a costly and mistake-prone doctrine, to be applied (if at all) only by experts capable of a specialized evaluation of the competitive circumstances at issue.

Two decisions in the spring of 2007 illustrate the trend. In *Bell Atlantic Corp. v. Twombly*,¹ Justice Souter’s majority opinion decried the enormous expense of discovery in antitrust cases, which judges have been unsuccessful in managing, according to the Court, and which can lead defendants to settle “even anemic cases” long before summary judgment motions are filed.² For these reasons among others, the Court articulated a new and arguably higher standard for pleading, dismissing an antitrust complaint where plaintiffs had not “nudged their claims across the line from conceivable to plausible.”³ In *Credit Suisse Securities (USA) LLC v. Billing*,⁴ Justice Breyer’s majority opinion stated that in certain securities contexts, “antitrust courts are likely to make unusually serious mistakes”⁵ (note the implication that antitrust courts *usually* make serious mistakes), such that “to allow an antitrust lawsuit [concerning conduct related to the marketing of new securities] would threaten serious harm to the efficient functioning of the securities markets.”⁶ Far better, the Court concluded, to leave these matters in the hands of the securities experts.⁷ The Court declared antitrust law impliedly repealed as “incompatible” with securities law in that context.⁸

These opinions are not ringing endorsements of antitrust law application by federal courts or juries. Regardless of improvements in antitrust doctrine to consider economic complexities before finding liability, the Court finds antitrust still too mistake-prone in particular circumstances and certainly only more costly as a result of its increased complexity. This view suggests the Court will look for antitrust cases that offer the opportunity further to confine antitrust doctrine. Although the Court appears already to have done much of its pruning, opportunities still exist. And perhaps the Court is just in a “pruning” mood; as discussed further below, the Court’s recent patent decisions reflect an interest in restricting the application of patent law as well.

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¹ 127 S. Ct. 1955 (2007).

² *Id.* at 1967.

³ *Id.* at 1974.

⁴ 127 S. Ct. 2383 (2007).

⁵ *Id.* at 2396.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 2397.

From Implied Antitrust Immunity to State Action?

As noted above, in *Credit Suisse*, the Court held that antitrust law was impliedly repealed in the context of conduct related to marketing new securities that was subject to the securities regulatory regime.⁹ This result may have been presaged in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*.¹⁰ There, the Court held that Verizon's alleged breach of its duties under the 1996 Telecommunications Act to share its network with competitors did not state a claim under Section 2 of the Sherman Act.¹¹ The 1996 Telecommunications Act contains an explicit savings clause through which Congress mandated that antitrust laws should continue to be applied, despite the regulatory scheme established by the Act.¹² Prevented from implying antitrust immunity for conduct covered by the Act, the Court nevertheless took into account the "existence of a regulatory structure designed to deter and remedy anticompetitive harm" in deciding that Section 2 of the Sherman Act did not outlaw unilateral refusals to deal such as Verizon's.¹³

Credit Suisse raises the question whether the Court similarly will take a more favorable view toward other doctrines that protect regulated activity from antitrust scrutiny.

Some—including the Antitrust Modernization Commission (AMC)—have argued that *Trinko* is best understood simply as a limit on refusal to deal claims under Section 2 of the Sherman Act, not as a decision in which the Court found a way to avoid application of the antitrust laws, despite the explicit savings clause in the 1996 Telecommunications Act.¹⁴ That interpretation becomes more questionable after *Credit Suisse*, a case in which the Court went through contortions to demonstrate that, where both securities and antitrust laws disapproved virtually identical conduct, application of antitrust law would be "practically incompatible" with application of securities law.¹⁵

In addition, *Credit Suisse* raises the question whether the Court similarly will take a more favorable view toward other doctrines that protect regulated activity from antitrust scrutiny. One of the recent cases brought by the Federal Trade Commission could provide a vehicle to answer that question, at least as to the state action doctrine. In *FTC v. Equitable Resources, Inc.*, the Third Circuit is now considering whether a proposed merger of two local gas distribution companies in western Pennsylvania is immune from antitrust scrutiny under the state action doctrine.¹⁶ The FTC challenged the proposed transaction as a merger to monopoly.¹⁷ The parties claimed their conduct was protected by the state action doctrine.¹⁸ Under the Supreme Court's decision in *California Retail Liquor Dealers Association v. Midcal*, private parties may take advantage of the state action doctrine only if their conduct is pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition, and the policy is "actively supervised" by the state.¹⁹

⁹ *Id.*

¹⁰ 540 U.S. 398 (2004).

¹¹ *Id.* at 415–16.

¹² *Id.* at 406.

¹³ *Id.* at 412.

¹⁴ ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 340–41 (2007) [hereinafter AMC REPORT], available at http://www.amc.gov/report_recommendation/amc_finalreport.pdf.

¹⁵ *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2393 (2007).

¹⁶ Opening Brief of Appellant, *FTC v. Equitable Res., Inc.*, No. 07-2499 (3d Cir. July 6, 2007) [hereinafter Appellant Opening Brief].

¹⁷ *Id.* at 36.

¹⁸ Reply Brief of Appellant at 1–2, *FTC v. Equitable Res., Inc.*, No. 07-2499 (3d Cir. Aug. 17, 2007) [hereinafter Appellant Reply Brief].

¹⁹ 445 U.S. 97, 105 (1980).

The merging parties in *Equitable Resources* argued the transaction had been approved by the Pennsylvania Public Utility Commission (PPUC) under a “clearly articulated” state policy to displace competition,²⁰ and the PPUC would “actively supervise” the merged entity’s rates, costs, earnings, terms of service, and service quality.²¹ The district court agreed,²² and the FTC appealed the district court’s decision to the Third Circuit.²³

The FTC’s arguments in *Equitable Resources* parallel those made in the FTC Staff’s State Action Report.²⁴ The FTC asserts that *Midcal* requires a showing that the state has authorized the specific type of anticompetitive conduct that has been challenged.²⁵ In particular, according to the FTC, “The [district] court should have assessed whether the Pennsylvania legislature had clearly articulated any policy to displace the antitrust laws with respect to anticompetitive acquisitions by public utilities.”²⁶ (The AMC similarly recommended that, for the state action doctrine to immunize conduct by entities that are not sovereign states, courts should require that those entities act pursuant to a clearly articulated state policy “deliberately intended to displace competition *in the manner at issue.*”²⁷)

In *Equitable Resources*, the FTC further argues that the second part of the *Midcal* test—active state supervision—also requires a more targeted inquiry: whether the state will supervise the particular conduct likely to cause antitrust competitive injury.²⁸ The FTC alleges the PPUC does not regulate the particular conduct likely to cause anticompetitive effects—that is, certain customers’ loss of discounts and high quality service.²⁹

Whoever wins or loses in the Third Circuit, a petition for certiorari may be filed. The last time the FTC was before the Supreme Court on a state action issue, in *FTC v. Ticor Title Insurance Co.*,³⁰ the agency succeeded in persuading the Court that alleged horizontal price fixing by defendant title insurance companies did not merit state action immunity, because active state supervision was absent.³¹ Among other things, the Court in *Ticor* noted that “state-action immunity is disfavored, much as are repeals by implication [of the antitrust laws].”³² After *Credit Suisse*, however, repeals by implication of the antitrust laws no longer seem disfavored; does state action immunity remain disfavored? Leaving aside the particular facts in *Equitable Resources*, the Court’s shift toward a more benign view of regulation and a more skeptical view of antitrust law suggests the FTC would likely have a more difficult time today persuading the Court to adopt the FTC’s position than it did in *Ticor*.

²⁰ Appellant Reply Brief, *supra* note 18, at 3.

²¹ *Id.* at 20.

²² *FTC v. Equitable Res., Inc.*, 512 F. Supp. 2d 361, 371 (W.D. Pa. 2007).

²³ Appellant Opening Brief, *supra* note 16.

²⁴ FEDERAL TRADE COMM’N STAFF, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

²⁵ Appellant Opening Brief, *supra* note 16, at 9.

²⁶ *Id.*

²⁷ AMC REPORT, *supra* note 14, at 24 (emphasis added).

²⁸ Appellant Opening Brief, *supra* note 16, at 30.

²⁹ *Id.* at 30–31.

³⁰ 504 U.S. 621 (1992).

³¹ *Id.* at 638.

³² *Ticor*, 504 U.S. at 636.

From Tying to Bundled Discounts?

In *Illinois Tool Works, Inc. v. Independent Ink*,³³ the Court explained not only that one could not assume market power from the mere existence of a patent, but also that “[o]ver the years, this Court’s strong disapproval of tying agreements has substantially diminished.”³⁴ The Court may consider this language a sufficient signal for the lower courts to develop tying law in the direction the Court wishes.

For bundled discounts, however, the current law is in conflict. In *LePage’s Inc. v. 3M Co.*,³⁵ the Third Circuit held the bundled discounts at issue violated Section 2 of the Sherman Act. There, the plaintiff contested bundled rebates that the defendant offered when customers made purchases across a number of the defendant’s product lines.³⁶ The Third Circuit described the “principal anti-competitive effect” of the rebates as their potential “to foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.”³⁷ The Third Circuit’s decision has been widely criticized as focusing simply on harm to the single product competitor without considering whether the conduct in question constituted harm to competition.³⁸

The criticisms of *LePage’s* alerted the Ninth Circuit to the controversy, and the court therefore invited amicus briefs on the proper antitrust evaluation of the bundled discounts at issue in *Cascade Health Solutions v. PeaceHealth*.³⁹ In that case, the Ninth Circuit ultimately adopted the first part of a three-part test for bundled discounts advocated by the AMC.⁴⁰ The first part of that test requires a factfinder to allocate the full amount of the discounts given on the entire bundle to just the competitive product and determine whether the resulting price is below the defendant’s incremental cost to produce the product.⁴¹ If it is, then the Ninth Circuit would find the bundled discount to constitute exclusionary conduct under Section 2.⁴² Application of this test, however, would result in liability only if the bundled discounts had the potential to exclude a hypothetical equally efficient producer of the competitive product(s).⁴³

Thus, two courts of appeals have conflicting approaches to bundled discounts, and the stage is set for a Supreme Court ruling to choose the proper approach. The Ninth Circuit’s cost-based approach is more in line with the Court’s cost-based tests for predatory pricing,⁴⁴ a type of exclusionary conduct that, like bundled discounts, may be defined as “pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing compe-

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³³ 547 U.S. 28 (2006).

³⁴ *Id.* at 35 (2006).

³⁵ 324 F.3d 141 (3d Cir. 2003) (en banc).

³⁶ *Id.* at 144–45.

³⁷ *Id.* at 155.

³⁸ *E.g.*, AMC REPORT, *supra* note 14, at 97.

³⁹ 502 F.3d 895 (9th Cir. 2007).

⁴⁰ *Id.* at 919 (citing AMC REPORT, *supra* note 14, at 99–100).

⁴¹ *Id.*

⁴² *Id.* The AMC would ask two further questions before a finding of liability could be reached: (1) whether the defendant is likely to recoup the short-term losses from offering the bundled discounts, and (2) whether the bundled discounts had or are likely to have an adverse effect on competition. AMC REPORT, *supra* note 14, at 99–100.

⁴³ *PeaceHealth*, 502 F.3d at 919.

⁴⁴ *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993).

tition in the long run.”⁴⁵ As the AMC acknowledged, however, the cost-based test the Commission proposed and the Ninth Circuit adopted could generate false negatives—that is, the standard “would permit bundled discounts that could exclude a less efficient competitor, even if the less efficient competitor had provided some constraint on pricing of the competitive product.”⁴⁶ Nonetheless, the Court would likely agree with the Commission that the danger of such false negatives was outweighed by “the difficulties of identifying [circumstances in which a less efficient competitor had provided some constraint on pricing], the lack of predictability and administrability in any standard that would capture such instances, and the undesirability of a test that would protect less efficient competitors,”⁴⁷ and would likely adopt the Ninth Circuit or another cost-based standard for the antitrust analysis of bundled discounts.

Further Pruning Patent Law?

In April of this year, in *KSR International Co. v. Teleflex, Inc.*,⁴⁸ the Court issued a unanimous decision on “obviousness” under patent law, the most important decision on this issue in four decades. The Court addressed when a patent application should be rejected, or an existing patent should be invalidated, because the underlying subject matter is “obvious,” a term of art in patent law. Under the Patent Act, a patent may not issue where “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made *to a person having ordinary skill in the art to which said subject matter pertains.*”⁴⁹ The Supreme Court found that the Court of Appeals for the Federal Circuit had adopted and applied too rigid a test for obviousness, resulting in an erroneous ruling that upheld the patent in question as non-obvious.⁵⁰

The Court remanded the case and reminded the Federal Circuit to take another look at Supreme Court precedent on “obviousness.” In addition, the Court stated: “[T]he results of ordinary innovation are not the subject of exclusive rights under the patent laws. Were it otherwise patents might stifle, rather than promote, the progress of useful arts,” which the Constitution specifies that patents should promote.⁵¹ As the FTC noted in its 2003 report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, patents on obvious subject matter can preclude innovation that competition might otherwise have encouraged.⁵² The Court’s ruling in *KSR* now leaves greater room for competition to encourage “ordinary innovation.”

Showing a continued interest in patent law, the Supreme Court this fall granted certiorari in *Quanta Computer, Inc. v. LG Electronics, Inc.*,⁵³ another case that will test the scope of the exclusive rights granted under the patent laws. That case involves whether and, if so, when, a patentee may bring an infringement suit to enforce restrictions on a patented article after an authorized sale. LG had granted Intel a license to make and sell specialized components using certain LG

⁴⁵ *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986).

⁴⁶ AMC REPORT, *supra* note 14, at 100.

⁴⁷ *See id.*

⁴⁸ 127 S. Ct. 1727 (2007).

⁴⁹ 35 U.S.C. § 103 (emphasis added).

⁵⁰ *KSR*, 127 S. Ct. at 1739.

⁵¹ *Id.* at 1746.

⁵² FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, *Executive Summary* 3, ch. 4 at 4–6, ch. 5 at 2–4 (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

⁵³ 128 S. Ct. 28 (2007).

patents. The license agreement, however, specifically disclaimed any express or implied license for acts of infringement that might occur when a third party to which Intel sold its LG-patented products combined them with other, non-Intel components; indeed, the license required Intel to notify purchasers of this limitation.⁵⁴

Under Supreme Court cases, the patent exhaustion doctrine, also known as the first-sale doctrine, prohibits a patentee who sells a machine embodying the invention (either directly or through an authorized licensee) from bringing a patent infringement suit against the purchasers for using the machine for its only reasonable use or for reselling the machine to others. In *LG Electronics*, the district court held, among other things, that LG could not enforce certain of its patent claims against Quanta, a manufacturer that had combined LG-patented Intel products with non-Intel products, because those claims were “exhausted” by the license that LG had granted Intel to sell products embodying LG’s patents.⁵⁵ In reaching its decision, the district court emphasized that the relevant licensed Intel components were essential to LG’s patented invention and had no reasonable use that did not practice LG’s patents.⁵⁶ The Federal Circuit reversed the district court’s holding on this point, on the ground that the patent-exhaustion doctrine does not apply to “an expressly conditional sale”—that is, a sale that is subject to an express limitation on the right to use or to resell the patented invention.⁵⁷

The Solicitor General recommended that the Court grant certiorari to review the Federal Circuit’s decision, arguing that the Federal Circuit’s expansion of the circumstances in which a patentee may use a patent infringement suit (as opposed to a suit for breach of contract) to enforce restrictions on a patented article after an authorized sale “is difficult to reconcile with the reasoning of this Court’s cases.”⁵⁸ Among other things, the Solicitor General noted, “The Federal Circuit’s approach also has the potential to erode downstream competition by permitting patentees to avoid antitrust scrutiny of restrictions on the use and resale of products embodying their inventions—restrictions that would be enforceable as a matter of patent law in the Federal Circuit.”⁵⁹ This would contrast with current practice, under which a patentee may negotiate contractual restrictions with downstream purchasers but the patentee does not automatically have the right to apply such restrictions as a matter of patent law.

This case provides yet another opportunity for the Court to limit the Federal Circuit’s expansive interpretation of the scope of patents and thus to facilitate competition. To allow a patentee automatically to apply any condition on all downstream purchases of the patented product would add uncertainty to those purchases at best, and could impose anticompetitive restrictions to competition involving the patented product *as a matter of patent law* at worst. Given the Court’s recent patent decisions, such as *KSR*, there is reason to believe that the Court understands the competition implications of the Federal Circuit’s approach to the doctrine of patent exhaustion and has granted certiorari in *LG Electronics* to undo the Federal Circuit’s method of avoiding the application of that doctrine. Overruling the Federal Circuit on this issue would be the best outcome for competition and consumers. ●

⁵⁴ *LG Elecs., Inc. v. Bizcom Elecs., Inc.*, 453 F.3d 1364, 1368 (Fed. Cir. 2006).

⁵⁵ *LG Elecs., Inc. v. Asustek Computer, Inc.*, 248 F. Supp. 2d 912, 917–18 (N.D. Cal. 2003).

⁵⁶ *Id.*

⁵⁷ *Bizcom Electronics*, 453 F.3d at 1370.

⁵⁸ Brief for the United States as Amicus Curiae at 17, *Quanta Computer, Inc. v. LG Electronics, Inc.*, No. 06-937 (U.S. Aug. 24, 2007), available at <http://www.usdoj.gov/atr/cases/f225500/225544.htm>.

⁵⁹ *Id.* at 18.

The Supreme Court's Antitrust Future: New Directions or Revisiting Old Cases?

Pamela Jones Harbour

Predicting future Supreme Court actions in any area of the law is, at best, an uncertain exercise. Antitrust law, given its breadth and scope, is even less certain. Doctrine in one area may move little, if at all. Doctrine in other areas may develop quickly. And sometimes, Court-related predictions tell us as much about the prognosticator's aspirations for antitrust law as they do about the Court's. A few truths about the current Court, however, make possible some generalizations.

The Court's Pro-Business Bias Will Generally Continue

The Court is now undeniably "conservative" in a way that would be comfortable to the Reagan Administration. Five Republican appointees—Chief Justice John Roberts, joined by Associate Justices Anthony Kennedy, Antonin Scalia, Clarence Thomas, and Samuel Alito—anchor a solidly conservative and pro-business majority for this Court.

As a result, I suspect a greater number of cases coming before the Court will present issues of substantial importance to the American business community. We are likely to continue to see the Court defer to American businesses by granting more freedom from what they characterize as burdensome lawsuits. That relief will sometimes take the form of changes in legal standards themselves. At other times, it may be the product of procedural rulings, such as more stringent application of statutes of limitation, heightened pleading and proof standards, or greater evidentiary deference.

Still I concur with the view that "[r]ecent breakthrough victories for business in tort, antitrust, and other areas of the law can't be explained totally by the Court's overall conservative majority."¹ And another anomaly: it has been reported that a specialized segment of the Supreme Court bar now represents an increasing proportion of the cases accepted for argument,² which may also be affecting the outcome of those cases. I will leave it to others to try to figure out whether the Court is taking more cases from those firms because of their strong advocacy skills, or because the clients who can afford their services happen to have interests that coincide with the economic preferences of the Court.

Reluctance to Take on New Cases Until Lower Courts Can Digest Its Recent Decisions

The Supreme Court has weighed in on several important issues in its last few terms. To name only a few, it heightened pleading standards under Section 1 of the Sherman Act³ in *Twombly*.⁴ It enun-

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¹ Tony Mauro, *High Court Bar Means Business*, LEGAL TIMES, Oct. 22, 2007, at 1, 7 (citing Georgetown University Law Professor Richard Lazarus).

² *Id.*

³ 15 U.S.C. § 1.

⁴ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

ciated a legal standard for monopsony predation in *Weyerhaeuser*.⁵ It addressed resort to American antitrust law remedies by foreign nationals regarding transactions in foreign markets in *Empagran*.⁶ The Court examined a novel issue under the Robinson-Patman Act⁷ when it reviewed the bidding conduct at issue in *Reeder-Simco*.⁸ The Court also dealt with the intersection between antitrust law and other federal regulatory regimes in *Credit Suisse*⁹ and *Trinko*.¹⁰ Finally, at the end of last term, the Court authorized its own experiment with vertical minimum price fixing when it abandoned per se illegality for that conduct in the *Leegin* case.¹¹

It would not be surprising if the Court were to stop and take a breath. That would give the lower courts an opportunity to digest the Court's recent output. Such a pause will give the lower courts time to begin integrating these new teachings into doctrine in a wide variety of cases. The Court may prefer to watch and wait, and see what develops out of its recent cases, before doing more. Accordingly, I predict that the Court will not take as many antitrust cases in its next couple of terms as it did in recent years.

This prediction is consistent with what the Court did regarding the issue of "but-for" jurisdiction in *Empagran*.¹² But-for jurisdiction refers to the plaintiffs' argument that vitamins, the price-fixed goods at issue, were fungible commodity products selling in international markets. Fixing the prices of vitamins in the United States was a necessary condition to fixing them in foreign markets. Accordingly, injury in foreign market transactions could not occur unless prices in the United States had been fixed. Plaintiffs claimed that this interdependence linked foreign injury to domestic conduct in the United States sufficient to create jurisdiction for that injury in US courts. The Court easily could have dealt with the plaintiffs' "but-for" jurisdiction argument itself as the issue had been briefed by the parties, but still chose to remand that issue to the court of appeals.¹³

The Importance of the Government's Amicus Role—the *Schering* Case

Even in light of the foregoing factors, the hardest thing to predict about the Supreme Court's future antitrust agenda is which areas of antitrust law it will actually choose to address. This used to be simplified because the Expediting Act¹⁴ allowed automatic direct appeals to the Court of civil antitrust cases brought by the Antitrust Division of the U.S. Department of Justice. Since the Expediting Act was amended in 1974¹⁵ to eliminate that right of automatic appeal, the number of antitrust cases accepted by the Court each term has dwindled substantially; the disputes have been predominantly between private parties; and the cases finding their way to the Court no longer reflect the enforcement agenda of the current Administration in the way they once might have done. We can no longer simply look at the federal government's case selection, then sit back

⁵ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

⁶ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

⁷ Act of June 19, 1936, Chap. 592, 49 Stat. 1526, 15 U.S.C. §§ 13–13b, 21 (a).

⁸ *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

⁹ *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

¹⁰ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

¹¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

¹² *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

¹³ *Id.* at 175.

¹⁴ Act of Feb. 11, 1903, ch. 544, § 1, 32 Stat. 823.

¹⁵ Antitrust Procedures and Penalties Act—Expediting Act, Pub. L. 93-528, § 4, 88 Stat. 1708 (1974).

and sagely pronounce which of those cases are likely to make their way to the Court over time.

That said, it is still true that the government influences the Court's antitrust docket through positions taken as *amicus curiae*, although that influence is neither as direct nor as predictable as direct appeals were. In deciding what private cases to accept for review, the Solicitor General, via *amicus* filings, still has an important influence on the antitrust cases the Court accepts for review. The Court often seeks the advice of the Solicitor General and frequently follows that advice.

The Federal Trade Commission tried, albeit unsuccessfully, to lengthen the Court's antitrust docket when it sought review of the Eleventh Circuit's decision in the *Schering* case.¹⁶ The case involved so-called reverse or exclusion payments in the context of a patent dispute settlement. The Commission's appeal asked the Court to determine whether the Commission had applied the proper legal standard in its evaluation of the propriety of payments by a patent holder to a party challenging the validity of the patent, whereby the patent challenger has agreed to delay its entry into the market for a period of time in consideration of the payments. The Commission, in its administrative opinion, found that Schering's payments to the challengers were improper, but the Eleventh Circuit disagreed.¹⁷ The Commission filed for Court review without the participation of the Solicitor General.¹⁸ After seeking and receiving the contrary views of the Solicitor General, the Court declined to review the case.

I hope, but cannot predict, that the Court will find an exclusion payments case it deems worthy of review. Since the Eleventh Circuit's decision in *Schering*, the number of patent settlements involving exclusion payments has been increasing.¹⁹ I worry that patent settlements might become a convenient pretext for other, broader assaults on competition. Unless the Court provides some definitive guidance, there is a very real likelihood that creative counsel will be able to use patent "settlements" as camouflage for a host of consumer-unfriendly outcomes.

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Collateral Fallout from the *Leegin* Decision

Another case that may influence the direction of what's next for the Supreme Court is *Leegin*. To say that I think a majority of the Court made a mistake in *Leegin* would be an understatement.²⁰ I do not, however, want to address the obvious *Leegin* topics, such as the proper legal standard for minimum vertical price fixing, allocations of burden of proof, and the absence of empirical support for the *Leegin* outcome. Rather, I want to focus on two collateral issues that may now arise with the demise of a *per se* rule of illegality for minimum vertical price fixing: First, *Leegin* potentially revitalizes the state action and Twenty-First Amendment defenses to price fixing that had been rejected in the *Midcal* case;²¹ and second, *Leegin* seems to remove any foundation for

¹⁶ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2929 (2006).

¹⁷ *Id.* at 1076.

¹⁸ *Schering*, Petition for a Writ of Certiorari, FTC Docket No. 05-273 (Aug. 29, 2005), available at <http://www.ftc.gov/os/2005/08/050829scheringploughpet.pdf>.

¹⁹ Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Exclusion Payments to Settle Pharmaceutical Patent Cases: They're B-a-a-a-ck!, Remarks Before the Second Annual In-House Counsel's Forum on Pharmaceuticals Antitrust (Apr. 24, 2006), available at <http://www.ftc.gov/speeches/leibowitz/060424PharmaSpeechACL.pdf>.

²⁰ Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, The Illegality of Vertical Minimum Price Fixing, Open Letter to the Supreme Court of the United States (Feb. 26, 2007), available at <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf>; Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, The *Leegin* Decision: The End of Consumer Discounts or Good Antitrust Policy?, Testimony Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Committee on the Judiciary, 110th Cong. (July 31, 2007), available at <http://www.ftc.gov/speeches/harbour/070731test.pdf>.

²¹ *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Justice Holmes's exemption of major league baseball from the reach of the antitrust laws.²² These issues might not have been in the Court's crosshairs when it issued the *Leegin* decision but their revival may be the unexpected fallout of the ruling.

The Scope of the State Action and Twenty-First Amendment Defenses in Liquor Pricing. In simplified form, the California wine regulations at issue in *Midcal* required each wine producer to file schedules with the state setting the prices at which wine merchants or wholesalers would offer its wines for sale to retailers. The Court observed that wine producers were setting these prices "according to their own economic interests . . . [and] the state's role is restricted to enforcing the prices specified by the producers."²³ The lower court had enjoined enforcement of the regulations, and the Court was asked to decide whether that injunctive relief was proper.

The *Midcal* Court began its analysis by asking "[t]he threshold question . . . whether California's plan for wine pricing violates the Sherman Act."²⁴ In 1980, the answer to that question was a clear "yes"—based on the rule of per se illegality established by the Court's 1911 *Dr. Miles* decision²⁵ and its progeny. But today, under the unstructured rule of reason test announced in *Leegin*,²⁶ it is not clear that the answer to this question would be the same. The *Leegin* majority showed deference to the pricing discretion of manufacturers;²⁷ the California regulatory system at issue in *Midcal* showed the same deference by leaving the producer's pricing discretion wholly unencumbered. Indeed, the *Midcal* Court described California's role as being limited to the provision of a relatively cost-free enforcement mechanism²⁸—which, presumably, was efficient.

It is difficult to fathom why the Court would want to inhibit an efficiently implemented exercise of pricing discretion of a type to which it already has demonstrated a willingness to grant substantial deference. Further, no author with whom I am familiar has ever believed the rule of reason to be plaintiff-friendly. That, in turn, makes it unlikely that many plaintiffs will be able to challenge successfully a vertical minimum price fixing regulatory system. In other words, in the post-*Leegin* era, it will be a rare case indeed in which a plaintiff will be able to answer the *Midcal* Court's threshold question in the affirmative. And if one cannot make it past the threshold question of *Midcal*, the classic two-pronged analysis for state action becomes irrelevant.

The provisions of the Twenty-First Amendment did not protect the California regulatory system from antitrust liability in *Midcal*.²⁹ It is, however, fairly arguable post-*Leegin* that the Twenty-First Amendment would now save California's regulations from antitrust attack, even if state action still did not.

The Twenty-First Amendment repealed prohibition and vested the states with significant regulatory discretion. The *Midcal* Court, however, did not demarcate a bright-line test to draw the line between state and federal powers to regulate liquor prices.³⁰ Rather, the Court's test for reconciling "competing state and federal interests" required "careful scrutiny of those concerns in a 'con-

²² Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

²³ *Midcal*, 445 U.S. at 101.

²⁴ *Id.* at 102.

²⁵ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

²⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2725 (2007).

²⁷ *Id.* at 2718.

²⁸ *Midcal*, 445 U.S. at 101.

²⁹ *Id.* at 114.

³⁰ *Id.* at 110.

crete case.”³¹ In the “concrete case” of *Midcal*, the Court found that California’s interests in producer-controlled vertical minimum price fixing was “less substantial than the national policy in favor of competition,” as defined by *Dr. Miles*’s per se prohibition of vertical minimum price fixing.³²

Today, however, if one were to attempt to balance California’s regulatory system against the national policy in favor of competition as it is defined by *Leegin*, one might reach a different result. A court would be hard-pressed to find that California’s policy of promoting resale price maintenance—at prices set in accordance with the producers’ unbridled economic discretion—would be outweighed by the *Leegin* Court’s policy of promoting resale prices set in accordance with the producers’ economic discretion as “disciplined” by the rule of reason.

Two years after its decision in *Midcal*, the Court faced the question of whether the Sherman Act preempted another California liquor regulation when it decided *Rice v. Norman Williams*.³³ The Court found that a rule of reason standard would apply to determine Sherman Act liability for complying with California’s regulation prohibiting an importer from bringing a distiller’s brands into California without having been designated to do so by the distiller.³⁴ The Court held that preemption of a state regulation by the Sherman Act could only occur when the state regulation compelled an actor to engage in conduct that was per se unlawful under the Sherman Act because “[a]nalysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.”

Rice decided a different, albeit related, question than the Twenty-First Amendment question presented in *Midcal*, but *Rice* is nonetheless instructive for Twenty-First Amendment analysis. When balancing federal versus state sovereign interests, the balance materially shifts in favor of the states when the rule of reason, rather than a per se standard, is applied. As state regulators and the industries they regulate begin to appreciate the implications of *Leegin*, we may see a new round of state action and constitutional issues percolating up to the Court.

Can the Antitrust Exemption for Baseball Survive Leegin? If *Leegin* taught us nothing else, it tells us that we should classify as “endangered species” old cases based on rationales that allegedly cannot be reconciled with modern antitrust analysis. Justice Holmes’s 1922 decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*³⁵ is just such a case.³⁶

Holmes distinguished travel between cities to play games from the local exhibition of the games, and found baseball to be “purely state affairs;” the movement between cities was too incidental to bring local exhibitions within the jurisdictional reach of the Sherman Act.³⁷ A year later in the *Keith Vaudeville* case, however, Holmes found that local exhibitions of vaudeville acts might involve incidentals (presumably, travel between theaters) that would rise “to a magnitude that

³¹ *Id.* (citing *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964)).

³² *Id.* at 113.

³³ *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

³⁴ *Id.* at 662.

³⁵ 259 U.S. 200 (1922).

³⁶ See generally Robert A. Schwinger, *Will ‘Leegin’ Pave the Way for Ending Baseball’s Antitrust Exemption?*, LAW.COM (Aug. 8, 2007), <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1186477607823>.

³⁷ *Federal Baseball*, 259 U.S. at 208–09.

requires [them] to be considered independently.”³⁸ Since then, the Court has twice reaffirmed *Federal Baseball* on the basis of stare decisis,³⁹ while declining to extend the rule to local exhibitions of vaudeville,⁴⁰ professional boxing,⁴¹ professional football,⁴² or professional basketball.⁴³ While the Court has described the baseball exemption as an “aberration,”⁴⁴ thus far the Court has left it to Congress to deal with, if at all.

The analytical logic of the *Leegin* decision should lead to the demise of the baseball exemption. Even the Court itself criticizes the baseball rule. It is, therefore, not necessary here to recite the voluminous criticisms of the exemption that exist in the literature. It is an old decision based on conceptions of interstate commerce that are today, at best, quaint. If the Court has as loose a regard for the reliance interests of baseball club owners as it had for discount merchant investors in *Leegin*,⁴⁵ stare decisis should not constrain the Court. Plaintiffs in *Leegin* could make a stronger case for Congressional reliance⁴⁶ than could baseball owners.

Finally, the very nature of the baseball product has changed since 1922. Local exhibition in 1922 was limited by the visual acuity of each person within sight of the game. Justice Holmes does not mention in *Federal Baseball* whether telegraph, telephone, or radio redistribution of accounts of the games was available at the time. But the intervening advent of radio and television broadcasting of baseball games, both interstate and international in character, has placed the product within the reach of the vast majority of its viewers only through the use of various instrumentalities of interstate commerce. Given that, it is simply absurd to retain the notion that the incidental effects of baseball on commerce are outweighed by the local nature of the exhibition. Unless the Court is willing to say that investments in professional baseball are socially or economically superior to investments in discount retailing, it is difficult to articulate a principled distinction that could save the baseball exemption from the inescapable logic of *Leegin*. There is, thus, at least some hope for societal good from the *Leegin* decision.

* * * * *

At the end of the day, only time will tell whether we will see a new flood of state action cases or a successful assault on the baseball exemption. Stay tuned . . . ●

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³⁸ Hart v. B.F. Keith Vaudeville Exch., 262 U.S. 271 (1923).

³⁹ Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam).

⁴⁰ Hart, 262 U.S. at 273–74.

⁴¹ United States v. Int’l Boxing Club of New York, Inc., 348 U.S. 236, 242–44 (1955).

⁴² Radovich v. Nat’l Football League, 352 U.S. 445, 451–52 (1957).

⁴³ Haywood v. Nat’l Basketball Ass’n, 401 U.S. 1204, 1205–06 (1971).

⁴⁴ Flood, 407 U.S. at 282–84.

⁴⁵ Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2735 (2007) (Breyer, J., dissenting).

⁴⁶ *Id.* at 2723–24 (Kennedy, J.), 2732 (Breyer, J., dissenting).

What *Should* Be Next at the Supreme Court?

Jonathan M. Jacobson

In asking “What’s next at the Supreme Court,” we can focus on what we think will be next or on what should be next. This note addresses a few topics where the law is unclear, and where illumination from on high could be beneficial, namely: (1) the per se rule for tying; (2) the appropriate standard for bundling; (3) standards for class certification; and (4) class action waivers and other provisions ancillary to arbitration clauses. The degree to which the Court’s guidance would be helpful, however, is somewhat unclear given the apparently hostile approach to antitrust enforcement that seems to emanate from some of the Court’s more recent decisions. Consumers might be better off if some of these important unresolved issues remain open a bit longer.

Tying

The per se rule for tying, if it even exists at all today, is clearly doomed. In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,¹ the Supreme Court pointedly recognized that tying arrangements are not invariably anticompetitive—as per se analysis requires. The Court also noted the potential efficiencies associated with tying, and acknowledged expressly that, “over the years . . . this Court’s strong disapproval of tying arrangements has substantially diminished.”² Yet notwithstanding *Illinois Tool*, courts still refer to tying as, at least potentially, a per se offense.³ And many cases are progressing through the courts on that basis. In the wake of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,⁴ tying is the only vertical restraint in which per se analysis has not been eliminated conclusively. It is a virtual certainty that the Court will finally inter the per se tying rule at the next opportunity, and doing so soon should be regarded as among the Court’s highest antitrust priorities.

Bundling

There is now a sharp conflict in the circuits as to the appropriate standard for evaluating bundled pricing arrangements under Section 2 of the Sherman Act. The Third Circuit’s 2003 decision in *LePage’s, Inc. v. 3M*,⁵ created significant controversy by apparently holding that a multi-product firm’s bundled pricing may be found to violate Section 2 on the basis of nothing more than an adverse impact on single-product rivals. Certiorari was sought in that case, but the Solicitor General (following Supreme Court invitation of his views) counseled that the issue had not been developed sufficiently in the lower courts, and the writ was denied.⁶ Since then, there have been several cases decided in the district courts—with conflicting results.⁷

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¹ 547 U.S. 28, 33–37 (2006).

² *Id.* at 35.

³ See, e.g., *Park v. Thomson Corp.*, 2007-1 Trade Cas. (CCH) ¶ 75,552 (S.D.N.Y. 2007).

⁴ 127 S. Ct. 2705 (2007).

⁵ 324 F.3d 141 (3d Cir. 2003) (en banc).

⁶ *3M Co. v. LePage’s, Inc.*, 542 U.S. 953 (2004).

⁷ See Jonathan M. Jacobson, *Exploring the Antitrust Modernization Commission’s Proposed Test for Bundled Pricing*, ANTITRUST, Summer 2007, at 23, 23 n.2 (citing cases).

The most significant recent development was the Ninth Circuit's September 2007 decision in *Cascade Health Solutions v. PeaceHealth*.⁸ The *PeaceHealth* court expressly rejected *LePage's* and adopted instead a variant of the test proposed by the Antitrust Modernization Commission, Professor Herbert Hovenkamp, and others. Under the *PeaceHealth* court's standard, bundled pricing may violate Section 2 if it has the requisite adverse effect on competition and if, "after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them."⁹

In analyzing the appropriate test for bundling arrangements, there are basically four approaches (although each has a multiplicity of nuances and variants). One is the *LePage's* approach. Another is a simple rule of reason, or consumer welfare effects, analysis. A third couples rule of reason analysis with a discount attribution screen, as proposed by numerous commentators and adopted in *PeaceHealth*. A fourth approach, urged largely by telecom firms, is one that would condemn bundled pricing only in circumstances where the total price charged for all the products in the bundle is below the incremental cost of the total bundle.¹⁰

The bundling issue is one that arises constantly in counseling clients, and the uncertainty in the law arising out of the *LePage's-PeaceHealth* conflict makes counseling—and resulting business behavior—quite difficult. The issue, moreover, has now been the subject of extensive analysis—several cases, numerous articles, hearings before the Antitrust Modernization Commission, and hearings before the Federal Trade Commission and Department of Justice. There is no longer any reason to deny certiorari if and when an appropriate case comes along.

Class Certification

There are important intercircuit conflicts on a number of questions that arise in virtually every class certification antitrust case. One is the extent to which the *Eisen* case¹¹ requires the court to accept the complaint's allegations as true in making the class certification decision. *Eisen* established that a court considering class certification may not "conduct a preliminary inquiry into the merits of a suit."¹² Some courts have interpreted that mandate broadly, effectively treating a motion for class certification like a motion to dismiss under Rule 12(b)(6). Other courts, including most of the more recent cases, have held otherwise, ruling that a plaintiff seeking class certification must prove, with evidence, any contested elements under Rule 23, whether or not those elements overlap with an issue going to the merits—and that *Eisen* means only that a court should not evaluate the merits to determine whether a case is "worthy" of certification.¹³ But cases adhering to at least some version of the older view persist,¹⁴ and the conflict is a serious practical problem.

⁸ 503 F.3d 895 (9th Cir. 2007).

⁹ *Id.* at 920.

¹⁰ A number of commentators, including this writer, have been sharply critical of this total cost versus total revenues approach because it applies the same test that would have been applicable in a predatory pricing challenge whether multiple products were bundled or not and, thus, makes the bundling aspect of the conduct irrelevant.

¹¹ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

¹² *Id.* at 177.

¹³ *See, e.g., In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

¹⁴ *See, e.g., Nat'l Fed'n of Blind v. Target Corp.*, No. L 06-1802, 2007 WL 2846462 (N.D. Cal. Oct. 2. 2007).

It is a virtual certainty that the Court will finally inter the per se tying rule at the next opportunity, and doing so soon should be regarded as among the Court's highest antitrust priorities.

Another important circuit conflict has arisen just recently from the September 2007 decision of the Second Circuit in *Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc.*¹⁵ Prior to *Cordes*, the courts had held uniformly that, because impact (or fact of injury) is an element of every private cause of action under the antitrust laws, a class action could not be certified if impact could not be established through common proof.¹⁶ *Cordes*, however, says that common impact is just one component of the predominance inquiry under Rule 23(b)(3), and a class can be certified if common issues predominate *even if common impact cannot be shown*. Perhaps that might be true in theory, in cases with a class that barely passes the numerosity requirement; but in a typical antitrust case, with thousands of putative class members, the concept borders on the ridiculous. *Cordes* conflicts in this respect with all prior circuit court decisions to address the issue, and is already beginning to work mischief in cases pending in the Second Circuit. Until the error is corrected, one can only hope that district courts will recognize that finding predominance in an antitrust case without common impact is nothing more than a theoretical possibility with no counterpart in the real world.

Cordes also holds that it may be appropriate for a district court, in the exercise of its discretion, to certify an “issue class” under Rule 23(c)(4)—i.e., the issue whether there was an antitrust violation—even if common issues do not predominate and neither a damages class nor an equitable relief class can be certified under Rules 23(b)(3) and 23(b)(2). That holding, the court recognized, conflicts with the Fifth Circuit’s contrary decision in *Castano v. American Tobacco Co.*¹⁷ It seems hard to imagine how certifying an issue class in an antitrust case could accomplish any good. Again, the *Cordes* decision is already causing mischief in the lower courts.

The Supreme Court has addressed general class certification standards infrequently. The Court has never analyzed certification in antitrust contexts in any detail. The result is that there are now serious conflicts in the lower courts on issues that arise in almost every case. It now seems time for the Supreme Court to step in.

Ancillary Arbitration Clause Provisions

The enforceability of arbitration clauses in antitrust cases has been settled for more than twenty years. More recently, provisions ancillary to arbitration in standardized agreements—such as class action waivers—have come up for review, with occasionally conflicting results. Last year, in *Kristian v. Comcast Corp.*,¹⁸ the First Circuit struck down a consumer contract provision precluding class actions (or class arbitrations) and the trebling of damages. The court reasoned that both provisions interfered unduly with the plaintiffs’ ability to vindicate their rights under the Sherman Act. In contrast, the Fourth Circuit, in *In re Cotton Yarn Antitrust Litigation*,¹⁹ recently sustained a clause with a one-year statute of limitations that, at least potentially, could curb the period of recoverable damages significantly. And numerous courts of appeals have upheld class actions waivers in other statutory contexts.²⁰ At some point, the enforceability of these ancillary provisions will have to be taken up by the Court.

¹⁵ 502 F.3d 91 (2d Cir. 2007).

¹⁶ See, e.g., *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005).

¹⁷ 84 F.3d 734, 745 n.21 (5th Cir. 1996).

¹⁸ 446 F.3d 25 (1st Cir. 2006).

¹⁹ No. 05-2392, 2007 WL 2965586 (4th Cir. Oct. 12, 2007).

²⁰ *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 819 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000).

Latest Portents—Decisions of the October Term 2006

The problem with suggesting types of cases the Supreme Court should take is that they might agree—and then get things deeply wrong. The Court's most recent term included decisions that are, at the very least, debatable, and that continue what might be viewed as disturbing trend of hostility to antitrust enforcement. Continuation (or, worse, acceleration) of that trend would bode ill for antitrust enforcement and, accordingly, for U.S. consumers.

Some of the Court's recent decisions were entirely uncontroversial. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,²¹ like *Dagher* and *Independent Ink* the year before, was easy and plainly correct. *Twombly* was much more debatable in terms of its reasoning, but the Second Circuit's holding that conscious parallelism was sufficient to defeat a motion to dismiss obviously had to be reversed. The overruling of *Conley v. Gibson*²² was a good deal more surprising, but the Court's articulation of a plausibility standard makes a lot of sense. The effects of *Twombly* will take many years to play out, but a reasonable guess is that the decision's effects will be incremental, not radical, and that the principal impact will be the positive one of weeding out cases that do not belong in court in any event. The one really disturbing aspect of *Twombly*, echoed and amplified in *Credit Suisse Securities (USA) LLC v. Billing*,²³ is the implication that antitrust litigation itself is bad, a point addressed below.

The problem with suggesting types of cases the Supreme Court should take is that they might agree—and then get things deeply wrong.

The decision that caught the most attention and that has generated the most controversy to date is, of course, *Leegin*.²⁴ It is contrary to normal principles of statutory interpretation for the Court to discard a construction embraced by dozens of its own precedents in a context where Congress has clearly endorsed and relied on the Court's prior precedent for decades. But it is equally true that the underpinnings of the *Dr. Miles* rule had eroded dramatically over the years through the *Colgate* doctrine, especially as revived in *Monsanto*, and through the limitation in *Sharp* of per se condemnation only to agreements on specific prices or price levels.²⁵ And as the Ping amicus brief pointed out so effectively,²⁶ the *Dr. Miles* rule had led to the creation of vast and inefficient compliance structures in many companies. My own preference in *Leegin* would have been for a decision that applied the characterization analysis of *Broadcast Music, Inc. v. CBS, Inc.*,²⁷ to vertical price agreements so that only "naked" resale price restraints with no plausible efficiency justifications would be condemned per se. But that point was not argued, and the decision came out otherwise. In any event, it is hard to say that *Leegin* alone signals the end of effective antitrust enforcement. Many will applaud its outcome, and the decision's long-term impact on consumer welfare will not be known for many years.

The truly problematic decision is *Billing*. The decision cut back sharply, to the point of practical overruling, decades of implied immunity cases—allowing immunity to be implied on the basis of *potential inconsistency* (perhaps from no more than the presence of regulation) rather than the

²¹ 127 S. Ct. 1069 (2007).

²² 355 U.S. 41 (1957).

²³ 127 S. Ct. 2383 (2007).

²⁴ 127 S. Ct. 2705.

²⁵ See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

²⁶ Brief of Ping, Inc. as Amicus Curiae in Support of Petitioner, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480 (Jan. 22, 2007), available at http://www.abanet.org/antitrust/at-conversation/pdf/Leegin_PING_Amicus.pdf.

²⁷ 441 U.S. 1 (1979).

“plain repugnancy” the Court’s prior (and often unanimous) decisions had required.²⁸ Three years earlier, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,²⁹ the Court had suggested that regulation was preferable to antitrust in determining market outcomes:

Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. . . . One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. . . . The regulatory framework that exists in this case demonstrates how, in certain circumstances, “regulation significantly diminishes the likelihood of major antitrust harm.”³⁰

The most troubling aspect of *Billing* is that it makes clear that *Trinko*’s analysis was no aberration. Thus, in *Billing*, the Court said that, even though both the securities laws and the antitrust laws prohibit the challenged conduct, “to permit antitrust actions such as the present one *still* threatens serious securities-related harm.”³¹ The Court added that, because of SEC enforcement, “any enforcement-related need for an antitrust lawsuit is unusually small.”³² In *Trinko*, the Court pointedly noted what it called the “considerable disadvantages” of antitrust, and commented that the “cost of false positives” must be weighed “against the slight benefits of antitrust intervention.”³³ Likewise, in *Billing*, the Court cited as grounds for implied immunity the “fear [of securities firms that anticompetitive conduct] could lead to an antitrust lawsuit and the risk of treble damages,”³⁴ a fear that could be applicable to any firm in any industry, regulated or not, and one which Congress affirmatively sought to instill to encourage compliance with the law. *Billing*, especially coming on the heels of *Trinko*, seems to suggest that the Court is affirmatively hostile to antitrust.

All four decisions this year—*Weyerhaeuser*, *Twombly*, *Billing*, and *Leegin*—were wins for the defense. That in itself is not unusual or in any way problematic. But it is well to keep in mind that there has not been a “plaintiff antitrust law win” in the Supreme Court since 1993 in *Hartford Fire Insurance Company v. California*.³⁵ That statistic is unique in antitrust history. We had the era of Chief Justice Peckham, and later the Depression era that gave us *Appalachian Coals, Inc. v. United States*,³⁶ but there has never before been a period in which antitrust enforcement has received such persistently negative treatment in the Supreme Court. Nor, at least since the Holmes dissent in *Northern Securities*, have we seen affirmative expressions of actual hostility to antitrust. The combination of *Billing* and *Trinko* in that respect seems chilling.

Given all of the Court’s recent decisions, maybe it is just as well that the important unresolved issues addressed at the outset of this note stay unresolved, at least for now. Perhaps the best outcome that we can reasonably hope for in most cases is the well-known phrase “certiorari denied.” ●

²⁸ See, e.g., *Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378 (1981).

²⁹ 540 U.S. 398 (2004).

³⁰ *Id.* at 411–12 (quoting earlier precedent).

³¹ 127 S. Ct. at 2394.

³² *Id.* at 2386.

³³ 540 U.S. at 412–14.

³⁴ 127 S. Ct. at 2396.

³⁵ 509 U.S. 764 (1993).

³⁶ 288 U.S. 344 (1933).

Can Water Run Uphill?

Predictions About Future Antitrust Appeals

J. Robert Robertson

It is nearly impossible to predict the types of antitrust cases that might be heard by the Supreme Court or by any court of appeals. A few years ago, as an editor, I worked with a few authors who thought they had a hot antitrust topic: buyer power. The *Weyerhaeuser* case,¹ which raised this issue, was in its infancy but soon headed into an appeal in the Ninth Circuit and then to the Supreme Court. The authors' articles were right on target and became the leading support in the opinions of both the Ninth Circuit and the Supreme Court.² These authors' prescience was admirable. But when I look back on that process, the one driving force was not the interesting idea; it was the fact that this interesting idea was appealed. Thus, to make predictions about what kinds of antitrust cases the U.S. Supreme Court or courts of appeals may decide, I believe it is important to consider which kinds of cases are more likely to find their way up the appellate ladder.

Cases that Are Not Appealed Do Not Count

First, a reality check: Many interesting topics in the antitrust field are unresolved, but few will ever be heard on appeal. For example, as much as we antitrust lawyers love to discuss the merits (or lack thereof) of the Robinson-Patman Act, it is unlikely that the courts will ever provide clear rules in that area. Few cases are ever brought under the Act, and fewer still are appealed. And when the Supreme Court had a chance to clear up the law in the area, it created more ambiguity than answers.³

Another example of an interesting issue that took years to get to the Court can be found in the recent *Leegin* case, in which the Court decided to change the law of resale price maintenance that had been in effect for nearly one hundred years.⁴ Commentators had been complaining about the unreasonableness of a per se rule against resale price maintenance for at least twenty years.⁵ So why did it take so long? The law prior to *Leegin* was more than interesting: it was central to the

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¹ *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005), *vacated*, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

² John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L.J. 625, 652 (2005) (cited by both courts); Roger G. Noll, "Buyer Power" and Economic Policy, 72 ANTITRUST L.J. 589, 591 (2005) (cited by the Supreme Court); Richard O. Zerbe, Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717, 724 (2005) (cited by the Ninth Circuit); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 672 (2005) (cited by both courts).

³ See *Volvo Trucks North Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2725 (2007).

⁵ See Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 158 (1984) ("What the Court decides from 1911 to 1926, and reconsiders in the 1960s, it can review yet again in the 1980s. And everyone should expect it to do so."); see also Frank Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 887–90 (1981); Herbert Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 IOWA L. REV. 451, 452–56 (1984); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 803–04 (1987).

advice that most antitrust practitioners gave their clients. The likely reason that the issue had not been decided sooner is that the issue had rarely made it to the appellate level.⁶

Other interesting cases are simply not heard by the Supreme Court or are not appealed—even by the losing government agency. *Schering-Plough* is a good example of an important case that the Supreme Court declined to take,⁷ and many recent cases that the Federal Trade Commission or the Department of Justice lost were never appealed. New law will never be developed if the agencies refuse to appeal their losses. But recent developments may show a change in direction for the agencies. For example, the FTC recently appealed its district court losses in *Whole Foods* and in *Equitable Resources*.⁸ Whether the agency loses or wins, in my view, is not as important as having the case heard on appeal with a result that adds clarity to the law.

New law will never be developed if the agencies refuse to appeal their losses. But recent developments may show a change in direction for the agencies.

What Kinds of Antitrust Cases Are Appealed?

In antitrust litigation, almost all cases settle, but three types of cases seem to be more likely to go to trial and then on to an appeal: intellectual property cases, cases involving remedies, and merger cases. These categories often overlap, but recent trends seem to indicate that more litigation, and hence increased chances for appeals, may occur in these general areas.

Aside from a few tying cases, for years there was a disconnect between intellectual property law and antitrust law. However, over the past few years, what one sees in the practice and in the agencies is a growing convergence of the two areas. For example, the agencies have taken on Rambus and Microsoft, and high-tech companies are suing each other over patent rights and antitrust counterclaims at an ever-increasing rate. In the past, these kinds of cases were rarely litigated and appealed. The consent decree in the *Dell* case is a great example. *Dell* is often cited as an example of a standard-setting case involving fraud, yet the FTC apparently never had any evidence of actual fraud.⁹ One can only wonder what the result and the law would have been if the case had been fully litigated and appealed.

The recent increase in patent-related antitrust cases may change this trend. First, the high-stakes nature of patent cases means that losses are likely to be appealed. Second, many district courts (such as the Eastern District of Texas and the Western District of Wisconsin) have found ways to streamline patent litigation, resulting in more trials. As more of these cases also involve antitrust counterclaims, the chances for an appeal of antitrust issues through intellectual property cases appear to be increasing. It is also important to note that many of these cases focus on technology issues in critical industries related to telecommunications or computers. Perhaps because of the high stakes involved in these cases, companies involved in these industries tend to litigate fiercely, without the usual caution that one sees in other kinds of commercial litigation. For example, Broadcom and Qualcomm litigate against each other in nearly every forum possible, and as

⁶ The Court could have taken on the issue in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), but the case was decided on the issue of standing. It appears that the next previous, closest case on point was *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983), but the issue of whether resale price maintenance was a per se offense was barely addressed by the court.

⁷ *Schering Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005) (rejecting the Commission's theory that settlements of patent claims were anticompetitive shams), *cert. denied*, 126 S. Ct. 2929 (2006).

⁸ *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC v. Equitable Res., Inc.*, 2007-1 Trade Cas. (CCH) ¶ 75,716, 2007 WL 1500046 (W.D. Pa. May 21, 2007).

⁹ *Dell Computer Corp.*, 121 F.T.C. 616, 628-31 (1996) (Azcuena, Comm'r, dissenting).

a result antitrust issues are being raised on appeal.¹⁰ In short, over the past few years many antitrust appeals have arisen from the intellectual property field, and that trend should continue.

A second area in which the appellate courts and perhaps the Supreme Court may be more active is antitrust remedies. *Chicago Bridge*¹¹ in the merger area and *Rambus*¹² in the intellectual property area are good examples. What the proper remedy is in antitrust cases is an issue that the Supreme Court addressed decades ago in such cases as the *Ford* case,¹³ but there is still plenty of uncertainty in the law. For example, in a merger case brought by the FTC, does Section 11(b) of the Clayton Act mean what it says—that the FTC must order a divestiture upon finding a violation of Section 7?¹⁴ Or does the FTC or a court have discretion to determine whatever remedy is appropriate to resolve the competitive harm, as the FTC attempted to do in the *ENH* case?¹⁵ The nature of the remedies in antitrust cases involving patents is also an area that needs clarification and is an issue likely to find its way into the appellate courts, if not the Supreme Court. The *Rambus* case, which is currently on appeal, is a good example.

Finally, the Supreme Court and the courts of appeals have added little to merger law in the last few years. Little has changed in Supreme Court merger law since *General Dynamics*—or even since *Brown Shoe* and *Philadelphia National Bank*.¹⁶ And yet there is little resemblance between those cases and current merger practice at the agencies and in the district courts, even though all three cases are probably still good law.

But merger law will remain unchanged if cases are not appealed. As we all know, many merger cases have been brought and lost by the antitrust agencies over the past five years. Many of those were never appealed.¹⁷ Clearly, there are differences in how courts, even in the same district, handle these cases. But we will not see any more clarity in the law until the government agencies show their willingness to fight on appeal.¹⁸ The problem with the agencies' reluctance to appeal is that the standards for litigation and negotiation with the government (often resulting in consent decrees or informal resolutions of merger investigations) bear little relationship to the law

¹⁰ See, e.g., *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007) (reversing dismissal of an antitrust claim involving standard setting).

¹¹ *Chicago Bridge & Iron*, FTC Docket No. 9300 (Jan. 6, 2005) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9300/050106opinionpublicrecordversion9300.pdf>, amended by Order Granting in Part and Denying in Part Respondents' Petition for Reconsideration of the Final Order (Aug. 30, 2005), available at <http://www.ftc.gov/os/adjpro/d9300/050830ordergranting.pdf>. The case is now on appeal in the Fifth Circuit (case no. 05-60192), and the Commission's brief is available at <http://www.ftc.gov/os/adjpro/d9300/index.shtm>.

¹² *Rambus Inc.*, FTC Docket No. 9302, available at <http://www.ftc.gov/os/adjpro/d9302/index.shtm>, on appeal, Nos. 07-1086 and 07-1124 (D.C. Cir.).

¹³ *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

¹⁴ 15 U.S.C. § 21(c) states that:

[If] the Commission . . . shall be of the opinion that any of the provisions of [Section 7] have been or are being violated, it shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the . . . assets, held . . . in the manner and within the time fixed by said order.

¹⁵ *Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Oct. 20, 1995) (Initial Decision), available at <http://www.ftc.gov/os/adjpro/d9315/051020initialdecision.pdf>. The Commission opinion is available at <http://www.ftc.gov/opa/2007/08/evanston.shtm>.

¹⁶ *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

¹⁷ For example, the FTC did not appeal its losses in *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004), and *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶ 75,725, 2007 WL 1793441 (D.N.M. May 29, 2007). The Antitrust Division did not appeal its loss in *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

¹⁸ The agencies' reluctance to appeal has a preclusive effect in the merger area because few cases are ever brought under Section 7 by private parties.

that might have resulted if the issues had been decided through litigation and appeal. If the agencies appeal more of their losses, the courts, and perhaps even the Supreme Court, may address the lingering issues that exist in the merger area and make the outcomes in these cases more predictable. I should add, however, that there are three merger cases currently wending their way through the courts. The FTC has appealed its loss in *Whole Foods* to the D.C. Circuit and its loss in *Equitable Resources* to the Third Circuit, while the respondent in *Chicago Bridge* has appealed to the Fifth Circuit. With these and other merger cases on the horizon, the courts of appeals or the Supreme Court could readdress this area of the law—perhaps clarifying the power of the FTC to stop mergers pending administrative review or to address the ability of the FTC or the courts to create broad remedies to resolve violations of Section 7.

Conclusion

No one can know what the Supreme Court or the courts of appeals will do when it comes to antitrust. Many of us have been surprised by the number of Supreme Court antitrust cases in the past few years. These cases may be enough for the Court at this point. But intellectual property cases, cases involving remedies, and even merger cases are beginning to find their way into the appellate courts. These types of cases involve legal issues that have yet to be resolved in any meaningful way by the Supreme Court. Thus, if any new antitrust cases are heard by the Court, there is a reasonable chance that these kinds of cases will be among them. ●

The Supreme Court's Unfinished Antitrust Agenda

Richard M. Steuer

The Supreme Court has reshaped the antitrust laws over the past thirty years but never more actively than over the past two, so it is natural to ask, "Is there anything left to decide?" Indeed there is; plenty of competition issues still demand attention. Some of these issues encompass more than antitrust alone while others—particularly in the realm of distribution—have lingered as the "low hanging fruit" that critics have eyed for years.

Competition Issues Needing Attention

Competition and Free Trade. The most seismic issue in the new millennium is how to reconcile the "consumer welfare" goal of American antitrust law¹ with the pressures of international trade in a global economy. Should low prices for American consumers in the near term be of paramount concern, even at the expense of long-term domestic production and American jobs, or should American markets be open only to countries that suitably reciprocate (whatever that ought to mean)?²

There are those who argue that fixation with achieving the lowest prices for American consumers in the short term, without regard for the welfare of American producers, will leave the United States with nothing but global executives, Pilates instructors, and the unemployed.³ This tension arises in enforcing the dumping laws.⁴ It arises in merger review.⁵ It arises in administrative determinations on the right to work.⁶ It likely will arise in a growing number of arenas as global

¹ ROBERT H. BORK, *THE ANTITRUST PARADOX* 7 (1993) ("[T]he only legitimate goal of antitrust is the maximization of consumer welfare."). See also William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *ANTITRUST L.J.* 377, 377 n.1 (2003); Thomas O. Barnett, Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Presentation to the George Mason University Law Review 11th Annual Symposium on Antitrust: Maximizing Welfare Through Technological Innovation (Oct. 31, 2007), available at <http://www.usdoj.gov/atr/public/speeches/227291.htm>.

² See WILLIAM J. BAUMOL, ROBERT E. LITAN & CARL J. SCHRAMM, *GOOD CAPITALISM, BAD CAPITALISM, AND THE ECONOMICS OF GROWTH AND PROSPERITY* 254–57 (2007) (arguing that although "[o]penness to trade and foreign direct investment . . . arouses the suspicion, and sometimes the enmity, of the general public," the benefits outweigh the costs).

³ See John Harwood, *Republicans Grow Skeptical of Free Trade*, WALL ST. J., Oct. 4, 2007, at A1; Thomas L. Friedman, *Big Ideas and No Boundaries*, N.Y. TIMES, Oct. 6, 2006, at A25 (noting that "an erosion of support for free trade is under way" in the United States).

⁴ See LAURA D'ANDREA TYSON, *WHO'S BASHING WHOM?: TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES* 267–72 (1992) (criticizing anti-competitive effect of current anti-dumping laws and arguing for a test based on sales below marginal or average variable cost on the ground that "[e]ven in perfectly competitive markets, profit-maximizing firms with no significant market power may sometimes find it rational to price below average cost").

⁵ See, e.g., Steven C. Sunshine, Deputy Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Statement Before the Subcommittee on Railroads Concerning Competitive Review of Railroad Mergers After ICC Sunset (Jan. 26, 1998), available at <http://www.usdoj.gov/atr/public/testimony/0056.htm> (noting that in evaluating railroad mergers, the Interstate Commerce Commission considered the merger's likely effects on railroad employees).

⁶ See *FTC v. Equitable Res., Inc.*, 512 F. Supp. 2d 361, 364–65 (W.D. Pa. 2007) (upholding state administrative law judge's approval of merger between state-owned gas utilities on grounds that merger was in the "public interest" because, among other things, it would have a positive impact on customers, the utilities, employees and commerce), *on appeal*, No. 07-2499 (3d Cir.).

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economic rivalry takes center stage in the 21st century. Inevitably, some of these issues will come before the Supreme Court, although it is too soon to predict how or when, or in what order.

Mergers. Mergers are sure to come before the Court, which has not examined mergers since *Marine Bancorporation*⁷ and *General Dynamics*.⁸ Likely candidates to command the Court's attention are efficiencies,⁹ refinements in market definition¹⁰ and, again, the significance of global competition.¹¹ Will the Court endorse the treatment of efficiencies found in the Merger Guidelines?¹² Would the Court endorse any of the market definition approaches argued unsuccessfully by the Department of Justice and Federal Trade Commission in recent cases?¹³ Would the Court ignore nationality in merger decisions if other countries incubate and coddle "national champions" that compete in the relevant market?¹⁴ Are the prices paid by American consumers the only gauge? Will the Court provide guidance?

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Application of State Antitrust Law to Interstate Commerce. There is inconsistency in the current case law as to whether state antitrust law can apply to commerce with little nexus to the particular state. A recent decision by the Texas Supreme Court overturned a decision below and limited the reach of the Texas antitrust laws.¹⁵ So long as the antitrust laws of some states present more attractive alternatives than others,¹⁶ litigants will test the limits of each law's reach and one of these spats eventually will reach the Supreme Court. Will any state be permitted to provide remedies to out-of-state residents?

Preemption of State Antitrust Law. The issue of preempting state antitrust law arises repeatedly, in such contexts as preempting *Illinois Brick*¹⁷ repealer statutes¹⁸ or preempting state efforts to depart from *Colgate*,¹⁹ *Leegin*,²⁰ or federal legislation.²¹ The exact context in which preemption will

⁷ United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

⁸ United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

⁹ See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (1992, rev. 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

¹⁰ See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 344 & nn.131–32 (6th ed. 2007) (citing cases).

¹¹ See Press Release, U.S. Dep't of Justice, Department of Justice Antitrust Division Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006), available at http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm (noting that merger of two large U.S. appliance manufacturers would not raise appliance prices because of competition from foreign manufacturers).

¹² See Merger Guidelines, *supra* note 9, § 4.

¹³ See, e.g., FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007), *appeal docketed*; United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

¹⁴ See Fed. Trade Comm'n, Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation (July 1997), available at <http://www.ftc.gov/opa/1997/07/boeingsta.shtml>.

¹⁵ Coca-Cola co. v. Harmar Bottling Co., 218 S.W.3d 671 (Tex. 2006). *Cf.* Sw. Bell Tel. Co. v. Superior Payphones, Ltd, 2006-1 Trade Cas. (CCH) ¶ 75,165 (Tex. Ct. App., 13th Dist. 2006). See also California v. Infineon Tech., AG, No. C 06-4333 PJH, 2007 WL 2523363 (N.D. Cal. Aug. 31, 2007).

¹⁶ Compare Bunker's Glass Co. v. Pilkington PLC, 75 P.3d 99 (Ariz. 2003) (indirect purchasers can sue for antitrust damages under Arizona Antitrust Act), with Minuteman LLC v. Microsoft Corp., 795 A.2d 833 (N.H. 2002) (New Hampshire law follows *Illinois Brick*, prohibiting antitrust suits by indirect purchasers). See also 6 Trade Reg. Rep. ¶ 30,000 (listing relevant state statutes).

¹⁷ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁸ See *supra* note 16.

¹⁹ United States v. Colgate & Co., 250 U.S. 300 (1919).

²⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

²¹ *E.g.*, the Soft Drink Interbrand Competition Act, 15 U.S.C. § 3501 et seq.

be confronted is uncertain, but somewhere between *ARC America*²² and *American Stores*,²³ the issue is heading for a showdown. For years, a debate has been raging—most recently before the Antitrust Modernization Commission²⁴—as to whether state antitrust enforcement fills a vacuum created by lapses in federal enforcement or creates chaos by raising the specter of inconsistent and even conflicting enforcement decisions.²⁵ Ultimately, the Supreme Court will need to supply some resolution.

Business Method Patents and Their Competitive Effects. Critics of business method patents complain that one can get a patent on almost any notion, precluding a wide swath of competition.²⁶ It started with *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*²⁷ and “one-click” Internet checkout,²⁸ but business method patents today are being issued for surgical procedures and even tax advice.²⁹ Could a clever new “Colgate policy” be patented by a law firm today, so that no other firm could recommend it without paying a royalty? Legislation is being considered to curtail some especially controversial patents,³⁰ and the Federal Circuit recently made it more difficult to secure such patents,³¹ but the Supreme Court has demonstrated that it is willing to step in if the Federal Circuit does not achieve solutions.³² Unless the Federal Circuit or Congress adequately rationalizes this area of the law, the Supreme Court is likely to step in at some point and examine whether these patents amount to a recipe for “Easy-Bake” monopolization without fear of antitrust consequences. It is one thing to create exclusive rights through patents in order to encourage innovation and thereby to promote economic expansion and competition; it is not necessarily the same to confer exclusive rights on methods of competing. This makes it particularly important to apply the right test to the evaluation of such patents.

²² *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

²³ *California v. Am. Stores Co.*, 495 U.S. 271 (1990).

²⁴ ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 185–86 (2007), available at http://www.amc.gov/report_recommendation/toc.htm.

²⁵ See ABA SECTION OF ANTITRUST LAW, MONOGRAPH 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 5–8 (1988) (noting tension between enforcement of state and federal antitrust laws).

²⁶ See, e.g., Rochelle Cooper Dreyfuss, *Are Business Method Patents Bad for Business?*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 263 (2000).

²⁷ 149 F.3d 1368 (Fed. Cir. 1998).

²⁸ Carl Shapiro, *Patent System Reform: Economic Analysis and Critique*, 19 BERKELEY TECH. L.J. 1017, 1047 (2004) (“Amazon’s ‘one-click’ patent may be the most often criticized software patent.”).

²⁹ See Floyd Norris, *You Can’t Use that Tax Idea. It’s Patented*, N.Y. TIMES, Oct. 20, 2006, at C1.

³⁰ See Greg Hitt, *Ban on Tax-Plan Patents?*, WALL ST. J., Sept. 24, 2007, at A8.

³¹ See *In re Comiskey*, No. 2006-1286, 2007 WL 2728361 (Fed. Cir. Sept. 20, 2007).

³² See *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007) (reversing long-standing Federal Circuit precedent on the law of obviousness); *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (rejecting Federal Circuit’s longstanding precedent of requiring lower courts to issue permanent injunctions whenever infringement is found); see also Peter Lattman, *Court Hits Patent Holders*, WALL ST. J., Oct. 2, 2007, at A12; Thomas J. Scott, Jr. & Stephen T. Schreiner, *Planning for the Brave New World: Are Business Method Patents Going to Be Second Class Citizens?*, 19 INTELL. PROP. & TECH. L.J. 6 (2007).

Piling-on Remedies. Antitrust violators today can face fines of hundreds of millions of dollars,³³ plus treble damages³⁴ and, in certain instances, disgorgement,³⁵ restitution,³⁶ and the incarceration of their executives.³⁷ At what point, if any, does this become excessive? The Supreme Court previously has limited the amount of punitive damages that juries may award.³⁸ The Antitrust Modernization Commission has recommended that civil and criminal monetary remedies remain where they are today.³⁹ The demise of Arthur Andersen demonstrated how enforcement initiatives—not limited to antitrust enforcement—can result in the elimination of a major competitor.⁴⁰ Should a situation arise in which there is sufficient sympathy for the predicament of an antitrust defendant, the Supreme Court may step in.

Limits of Criminal Enforcement. The Sherman Act provides for criminal enforcement without regard to the nature of the violation.⁴¹ Prosecutorial discretion has almost always kept criminal cases within the bounds of hard-core horizontal conspiracies.⁴² The few excursions into areas like criminal prosecution of resale price maintenance have met with sharp criticism and little or no follow-through.⁴³ Yet there is no clear guidance and prosecutors arguably would have been within the strictures of the statute to have indicted the Ivy League college presidents or officers of the NCAA.⁴⁴ Should there be some parameters established by case law? Should they be coextensive with per se violations, and would that be enough? In *Illinois Tool Works*,⁴⁵ the Supreme Court

³³ See, e.g., Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004) (codified as amended at 15 U.S.C. §§ 1–3) (increasing the maximum Sherman Act corporate fine from \$10 million to \$100 million); Press Release, U.S. Dep’t of Justice, F. Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines For Participating in International Vitamin Cartel (May 20, 1999), available at http://www.usdoj.gov/atr/public/press_releases/1999/2450.htm (highlighting pharmaceutical company’s agreement to plead guilty and pay \$500 million in criminal fines for leading a worldwide conspiracy to raise and fix prices for certain vitamins).

³⁴ 15 U.S.C. §§ 15, 15a (providing for treble damages in antitrust cases brought by private parties or the U.S. government).

³⁵ See Comments of John Graubert, Principal Deputy Gen. Counsel, Fed. Trade Comm’n, to the Antitrust Modernization Commission (Dec. 1, 2005), available at <http://www.ftc.gov/os/2005/12/051202civil.pdf> (“The [FTC’s] recourse to equitable disgorgement and restitution remedies in competition cases goes back many years, although it has exercised this authority sparingly.”); see also *FTC v. Mylan Lab., Inc.*, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (recognizing FTC authority to sue for disgorgement and other forms of equitable ancillary relief in competition case); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), to confirm FTC’s authority to obtain disgorgement and restitution); *FTC v. Robert J. Febré*, 128 F.3d 530, 537 (7th Cir. 1997) (same).

³⁶ See *supra* note 35.

³⁷ 15 U.S.C. § 2 (authorizing criminal penalties of up to ten years in prison for individuals violating the Sherman Act).

³⁸ See *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

³⁹ See ANTITRUST MODERNIZATION COMM’N, *supra* note 24, at 285–91 (civil remedies), 293–99 (criminal monetary remedies).

⁴⁰ See Kathleen F. Brickey, *Andersen’s Fall from Grace*, 81 WASH. U. L.Q. 917 (2004) (chronicling the demise of Arthur Andersen); David S. Hilzenrath, *Financial Watchdog Became an Enabler*, WASH. POST, Jun. 16, 2002, at A20 (same).

⁴¹ 15 U.S.C. § 1; 1 ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 1 n.1 (“Both criminal and civil sanctions may be imposed for § 1 violations.”).

⁴² ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 734–35 (noting that federal antitrust enforcement agencies have “a long-standing policy of seeking criminal indictments only in cases involving ‘hard-core,’ per se unlawful agreements . . . including horizontal price fixing”).

⁴³ See *United States v. Cuisinarts, Inc.*, Crim No. H-80-49, Civ. No. H-80-559, 1981-1 Trade Cas. (CCH) ¶ 63,979 (D. Conn. Dec. 19, 1980) (resulting in a plea of nolo contendere and a fine of \$250,000); *United States v. Mack Trucks, Inc.*, 5 CCH Trade Reg. Rep. ¶ 50,431 (investigation initiated by the DOJ under the Carter administration dropped by the Reagan administration); see also *U.S. Drops Trust Suits Against Mack, 2 Others*, N.Y. TIMES, July 9, 1981, at D1 (providing overview of Mack Trucks investigation).

⁴⁴ See *Deregulating the Ivy League*, N.Y. TIMES, May 26, 1991 (“To avoid being charged under the Sherman Antitrust Act [Ivy League schools] agreed to stop sharing information on offering financial aid.”); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); see also *Gonzalez v. St. Margaret’s House Housing Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989).

⁴⁵ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

recently observed that tying can be “a federal crime punishable by up to 10 years in prison.”⁴⁶ Conceivably, the Court was just trying to make a point, but sooner or later, there is bound to be an example of overzealous criminal enforcement that may force the Supreme Court to announce a pragmatic rule of interpretation, comparable to its injection of “unreasonable” into the notion of “every contract, combination . . . , or conspiracy, in restraint of trade”⁴⁷

Amnesty/Leniency. Amnesty and leniency programs undoubtedly have been the chief drivers of cartel enforcement in recent years,⁴⁸ but are the outcomes always fair? If one of the architects of a cartel turns in its followers and gets off with single damages and no fine, providing it a competitive advantage in the market, is this a suitable result? What if the race to the agency is manipulated⁴⁹—can that constitute an anticompetitive act in itself? There already has been some dissatisfaction with the amnesty/leniency program,⁵⁰ and if there ever is evidence that the system is being abused—either by the government or by private parties—an issue may emerge that will be appropriate for Supreme Court intervention.

The “low hanging fruit”

inviting Supreme Court

attention is bunched

in the area of

distribution . . .

Low Hanging Fruit

The “low hanging fruit” inviting Supreme Court attention is bunched in the area of distribution:

Tying. Is it time to shut the door on the last remaining remnant of the per se rule against tying? In *Jefferson Parish*,⁵¹ the Court remarked that tying continues to be per se unlawful where the defendant possesses the power to force buyers to purchase the tied product by virtue of the unique nature of the tying product. In *Illinois Tool Works*,⁵² the Court made clear that not all patented products possess this level of uniqueness, but did not hold that tying could never be per se unlawful and lower courts have continued to entertain that possibility.⁵³ Nevertheless, in recent cases in which the Supreme Court has provided a laundry list of per se offenses, tying is never included.⁵⁴ Has it been eliminated by the principle of *expressio unius*? In any event, is it time to remove any doubt, so that lower courts will stop pausing over this issue?

⁴⁶ *Id.* at 42.

⁴⁷ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); see also *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

⁴⁸ See, e.g., Thomas O. Barnett, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy (Sept. 14, 2006), available at <http://www.usdoj.gov/atr/public/speeches/218336.wpd> (“Amnesty programs are invaluable in detecting cartels and in collecting the evidence necessary to obtain a conviction.”).

⁴⁹ See Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453 (2006) (noting that the corporate “race to confess” is often won by a small amount of time); see also *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3rd Cir. 2006).

⁵⁰ See, e.g., M. Ryan Williams, Recent Developments, *The Devil They Know: The DOJ's Flawed Antitrust Leniency Program and Its Curious Pursuit of Stolt-Nielsen*, 85 N.C. L. REV. 974, 1002 (2007); Holman W. Jenkins Jr., *If Sergio Leone Made a Movie About Antitrust . . .*, WALL ST. J., Oct. 25, 2006, at A15.

⁵¹ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (“It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se.’”).

⁵² 547 U.S. 28.

⁵³ See, e.g., *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 487 F. Supp. 2d 861 (E.D. Ky. 2007); *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090 (N.D. Cal. 2006).

⁵⁴ See, e.g., *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Leegin*, 127 S. Ct. 2705; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

Exclusive Dealing/Bundling/Loyalty Discounts. Critics have been clamoring for the Supreme Court to take a bundling case ever since *LePage's*⁵⁵ was decided by the Third Circuit. Subsequent decisions have dispelled many of the questions that case provoked,⁵⁶ but there is little doubt that the Court will be strongly encouraged to visit the topic of bundling at every opportunity it gets. Loyalty discounts, which can serve to encourage exclusive dealing, also may attract the Court's attention with enough prodding.⁵⁷ Is this subject too hot to handle? Are there good bundles and bad bundles? Did the Ninth Circuit set the right standard in the *PeaceHealth* case?⁵⁸

"Most Favored Nations" Clauses as Antitrust Violations. Ever since antitrust enforcers first began to view "Most Favored Nations" clauses as vertical restraints,⁵⁹ the impact and treatment of these clauses have been the subject of substantial debate.⁶⁰ These clauses can apply to either buyers or sellers, and there seems to be considerable uncertainty as to whether each is more likely to raise or depress prices, and whether to do anything about it. Can the Court end this confusion?

Sealy/Topco. Finally, the per se rule against competitors or potential competitors forming a new brand and agreeing not to compete with respect to that brand demands reexamination. Surely, there are cases in which such confederations are unreasonably anticompetitive, but there are other situations in which such arrangements are likely to be procompetitive. Some of these already have been the subjects of favorable business review letters,⁶¹ and both the *Broadcast Music*⁶² and *NCAA*⁶³ decisions at least suggest that the per se rule no longer should apply. Nevertheless, *Sealy*⁶⁴ and *Topco*⁶⁵ remain on the books. Should any court see fit to apply the per se rule to such ventures in the future, the Supreme Court might well take the opportunity to refine the law in this area further. Will there be a more flexible rule?

That is a lot. The Supreme Court has not shied away from confronting big antitrust issues in recent years, but some mighty big issues remain. ●

⁵⁵ *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).

⁵⁶ See *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007).

⁵⁷ See *Editorial, F.T.C. Goes AWOL*, N.Y. TIMES, Oct. 29, 2007, at A18 (criticizing the FTC's failure to open an investigation into Intel's alleged practice of providing loyalty discounts); Barbara Bruckmann, *Discounts, Discrimination, and Exclusive Dealing: Issues Under the Robinson-Patman Act*, 68 ANTITRUST L.J. 253 (2000); Richard M. Steuer, *Discounts and Exclusive Dealing*, ANTITRUST, Spring 1993, at 28.

⁵⁸ See *PeaceHealth*, 502 F.3d at 916 (adopting "discount attribution" standard).

⁵⁹ See *United States v. Delta Dental Plan of Ariz., Inc.*, 59 Fed. Reg. 5210 (Dep't of Justice Jan. 26, 1995) (proposed final judgment forcing Arizona dental plan to drop a most-favored nation clause from contracts with dentists); see also Richard M. Steuer, *Counseling Without Case Law*, 60 ANTITRUST L.J. 823, 850-51 (1995).

⁶⁰ See generally Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 ANTITRUST L.J. 517 (1996) (describing ways in which "Most Favored Nations" clauses might harm competition).

⁶¹ See U.S. Dep't of Justice, Antitrust Div., Response to Linen Systems for Healthcare, LLC's Request for Business Review Letter (Aug. 8, 2006), available at <http://www.usdoj.gov/atr/public/busreview/217690.htm> (approving of proposed joint venture of regional textile maintenance companies to market textile rental and laundry services to specialized healthcare client); U.S. Dep't of Justice, Antitrust Div., Response to Container America, LLC's Request for Business Review Letter (Mar. 8, 2000), available at <http://www.usdoj.gov/atr/public/busreview/4287.htm> (approving of proposed creation and operation of joint selling and purchasing vehicle for five regional manufacturers of steel drums).

⁶² *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

⁶³ *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

⁶⁴ *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

⁶⁵ *United States v. Topco Assocs.*, 405 U.S. 596 (1972).

What's Next for the Supreme Court on Antitrust Issues?

Gary P. Zanfagna

When asked to write a Comment about “what’s next for the Supreme Court on antitrust?” I have to admit that my first thought was—are we really looking for more?

Since 2004, the Supreme Court has decided no fewer than nine antitrust cases—an unprecedented antitrust renaissance for the Supreme Court. Starting with *Trinko* in 2004, the Supreme Court has barely missed an opportunity to help with antitrust—*Trinko*,¹ *Empagran*,² *Independent Ink*,³ *Dagher*,⁴ *Volvo*,⁵ *Weyerhaeuser*,⁶ *Twombly*,⁷ *Credit Suisse*,⁸ and *Leegin*.⁹ Four cases in 2007 alone. All nine antitrust decisions by the Court were pro-defendant, in one way or another, softening the sting of the antitrust laws.

So my prediction of what is on the horizon for the Supreme Court on antitrust? Nothing. Aren't nine Supreme Court antitrust decisions in three years enough? As important as we all think antitrust is, there must be more pressing matters of constitutional magnitude facing the country.

Wish List

Prediction aside, what would be on my Supreme Court antitrust wish list? My list would be short. One topic: bundling. From my perspective as in-house counsel, one area that continues to present real antitrust risk is bundling. Post-*LePage's*, a multi-product company with a significant position in one or more products that engages in bundled rebates does so at its own peril.

*LePage's*¹⁰ is an utterly standardless decision that, without any guidance, declares bundled rebates unlawful whenever a smaller rival can't match the rebate because it doesn't offer a comparable breadth of products. *LePage's* can be read to stand for the proposition that Section 2 protects a smaller rival that can't keep pace. And *LePage's* has predictably fueled plaintiffs' bundling fire—*Masimo*,¹¹ *JBDL*,¹² *Applied Medical*,¹³ *PeaceHealth*.¹⁴ *LePage's* has significantly

¹ Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

² Empagran S.A. v. F. Hoffmann-LaRoche Ltd., 542 U.S. 155 (2004).

³ Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006).

⁴ Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

⁵ Volvo Trucks N. Am., Inc. v. Reeder Simco GMC, Inc., 546 U.S. 164 (2006).

⁶ Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

⁷ Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

⁸ Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).

⁹ Leegin Creative Leather Prods. v. PSKS, 127 S. Ct. 2705 (2007).

¹⁰ LePage's Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003), cert. denied, 124 S. Ct. 2932 (2004).

¹¹ Masimo Corp. v. Tyco Health Care Group, L.P., 2004 U.S. Dist. LEXIS 26915 (C.D. Cal. Dec. 15, 2004).

¹² J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 2005 WL 1396940 (S.D. Ohio June 13, 2005).

¹³ Applied Med. Resources Corp. v. Johnson & Johnson, Inc., 2006 U.S. Dist. LEXIS 12845 (C.D. Cal. Feb. 2, 2006).

¹⁴ Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007).

■
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raised antitrust risk for any multi-product company with a significant position in one or more products that wants to compete aggressively on price by offering bundled discounts.

Is it time for the Supreme Court to revisit bundling? I thought it was ripe with *LePage's* in 2004. My view then was that there was sufficient guidance from *Ortho*¹⁵ and *SmithKline*¹⁶ for the Supreme Court to consider bundling and deal with *LePage's*. But the prevailing view at the time, including that of the Federal Trade Commission and the Department of Justice,¹⁷ was that the case law needed to develop and more needed to be understood about the competitive effects of bundling before the Court should weigh in.

Have we learned more since *LePage's*? Yes. There have been considerable contributions to the understanding of bundling from academics, economists, and antitrust practitioners since *LePage's*. In particular, the Antitrust Modernization Commission (AMC) devoted great energy and thinking to this topic and received significant input from a wide variety of leading antitrust scholars. At the end of their process, the AMC unanimously recommended a three-part test for assessing whether a bundled rebate was exclusionary under Section 2.¹⁸

Without getting into a detailed discussion of the AMC's proposed test, I note that I'm in favor of the proposed test, which I would call a modified *Ortho* attribution test. I think the AMC test is as good as any test proposed for assessing bundled rebates, and it's the test I've been using (at least the first prong) to counsel on bundled rebates for some time.

Have there been developments in the case law since *LePage's*? Yes. *Masimo II*¹⁹ revisited and re-thought *Masimo I's*²⁰ following of *LePage's*. *JBDL*²¹ flatly rejected *LePage's*. *Applied Medical's*²² jury verdict eventually got beyond *LePage's*. And most significantly, the Ninth Circuit in *PeaceHealth*²³ asked for amicus briefs on the right standard for bundling, and then rejected *LePage's* in favor of the AMC's proposed test.²⁴ *PeaceHealth* presently is on petition for rehearing en banc in the Ninth Circuit.

So my antitrust wish list for the Supreme Court is short—bundling. It's quite possible that the Court will eventually have the opportunity to revisit bundling and fix *LePage's* with *PeaceHealth*. That would be my single Supreme Court antitrust wish. From my in-house perspective, that would be a very good thing.

*My antitrust wish list
for the Supreme Court
is short—bundling.*

¹⁵ *Ortho Diagnostics Sys., Inc. v. Abbott Labs, Inc.*, 920 F. Supp. 455 (S.D.N.Y. 1996).

¹⁶ *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd*, 575 F.2d. 1056 (3d Cir. 1978).

¹⁷ Brief for the United States as Amicus Curiae, 3M Co. v. *LePage's Inc.*, No. 02-1865 (U.S. May 24, 2004), available at <http://www.usdoj.gov/atr/cases/f203900/203900.pdf>.

¹⁸ ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 83 (Recommendation 17) (2007), available at http://www.amc.gov/report_recommendation/amc_final_report.pdf. The elements of the three part test are: (1) after allocating all discounts attributable to the entire bundle to the competitive product, the defendant sold the competitive product below its incremental cost for that product; (2) the defendant is likely to recoup these losses; and (3) the bundled discount is likely to have an adverse effect on competition.

¹⁹ *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2006 U.S. Dist. LEXIS 29977 (C.D. Cal. Mar. 22, 2006) (motion for new trial granted).

²⁰ *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2004 U.S. Dist. LEXIS 26915 (C.D. Cal. Dec. 15, 2004).

²¹ *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 2005 WL 1396940 (S.D. Ohio June 13, 2005).

²² Civil Minutes—Trial, *Applied Medical Resources Corp. v. Johnson & Johnson, Inc.*, No. SAVC 03-1329-JVS (C.D. Cal. Aug. 29, 2006) (jury verdict in favor of defendants).

²³ *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007).

²⁴ The author's employer, Honeywell, supported an amicus brief in *PeaceHealth* advocating the AMC's proposed test.

I see no need for Supreme Court guidance in merger analysis. What would the Court add? As the AMC report observes, there is a general consensus that the framework for analyzing mergers used by the antitrust agencies and the courts is basically sound.

What About Refusals to Deal? The AMC identified refusals to deal as another area that could use further guidance from the courts. The Supreme Court in *Trinko*²⁵ did stop short of an unqualified unilateral right to refuse to deal with your rival. As in-house counsel, I'd like to have that right, or at least absolute clarity on the limited exceptions to the general rule of no duty to deal with a rival. But I don't think that is realistic.

From my perspective, *Trinko* certainly helps. I don't think *Trinko* is revolutionary, but I do think it confirms the status quo that was already generally understood and provides some modest help in understanding the outer limits. Let me explain.

Trinko enthusiastically embraces what we thought we already knew—that there is no general duty to deal with a rival.²⁶ *Trinko* also identifies a couple limited factual situations that could be, but not necessarily will be, problematic: One, terminating a prior (presumably profitable) course of dealing with a rival; and two, refusing to deal with a competitor-customer in the same way as one deals with a customer.²⁷ Finally, *Trinko* also references the short-term profit sacrifice test, which I read as a tool to understand what's really going on.²⁸

Without getting wrapped up in how the short-term profit sacrifice test is different from its cousin, the no economic sense test from DOJ, or whether either (or some other standard) is the one test for assessing refusals to deal (and other Section 2 exclusionary conduct), my view is that the Court's short-term profit sacrifice test is simply a tool for insight into the conduct. It certainly could be read to introduce an uncomfortable and unwelcome element of intent into the equation, but I wouldn't go that far. At the end of the day, we're trying to figure out whether conduct, such as a refusal to deal, which can be exclusionary, is anticompetitive. The short-term profit sacrifice test is simply a tool to help understand what's really going on.

So from my corporate counselor perspective, *Trinko* is not perfect guidance, but it does provide helpful guidance. *Trinko* teaches the following: It's generally okay to say "no" to a rival. Very importantly, before dealing with your rival, think hard about your ability (or inability) eventually to terminate such dealings. Whether you're starting to deal with a competitor, refusing to do so, or trying to terminate what you already started, explain to me why you're doing it—what's your legitimate business justification? And by the way, be careful what you write.

Short of an unqualified unilateral right to refuse to deal with your rival, which I don't think we're going to get, I'm fine with *Trinko*. It doesn't seem that complicated to me.

What About Merger Analysis? This is an obvious substantive antitrust area where the Supreme Court has not opined in over thirty years since *General Dynamics*²⁹ and *Citizens & Southern National Bank*³⁰ in 1975. But I see no need for Supreme Court guidance in merger analysis. What would the Court add? As the AMC report observes, there is a general consensus that the framework for analyzing mergers used by the antitrust agencies and the courts is basically sound. No doubt there can be disagreement on the outcome of various cases, but the basic analytical framework for merger review is known and generally accepted.

²⁵ Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

²⁶ *Id.* at 407–08.

²⁷ *Id.* at 408–10.

²⁸ *Id.*

²⁹ United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

³⁰ United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

What About Tying Analysis? Courts describe tying as per se unlawful.³¹ But not really. In order for a tie to be per se unlawful, courts require a showing of power in the tying product. Some might suggest that there is room here for the Supreme Court to clarify or clean up that tying arrangements should be (or really are) judged under the rule of reason. Per se condemnation of tying arrangements is neither accurate nor appropriate.

There is, however, already a general understanding that power is required in the tying product for the tie to be unlawful. Everyone knows that, and I don't see the need for Supreme Court clarification. If the Supreme Court's idea of clarifying is *Leegin*,³² I don't think we need it. We may or may not agree on whether the Court got it right by bringing the analysis for minimum resale price in line with maximum resale price and non-price vertical restraints, all under the rule of reason. But from my perspective, the practical consequence of *Leegin*, rightly or wrongly decided, is new legal risk—unchartered rule of reason analysis, state law enforcement, and enforcement from relevant foreign jurisdictions, including Canada, that still hold vertical price fixing per se illegal.³³ And by the way, try to explain to sales personnel why some price fixing is still very much illegal and some now may be okay, particularly when the line between customer and competitor can be quite blurred.

Conclusion

In sum, my prediction of what's next for antitrust at the Supreme Court can be summarized in one word: nothing. Nine decisions in three years are all we can reasonably expect for now. My Supreme Court wish list is short—bundling. Please clean up *LePage*'s. ●

³¹ See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9–10 (1984) (“It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se’”).

³² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

³³ See M. Russell Wofford, Jr. & Kristin Limarzi, *The Reach of Leegin: Will the States Resuscitate Dr. Miles*, ANTITRUST SOURCE, Oct. 2007, <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Wofford10-18f.pdf>.