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Supreme Court Decisions Weaken Antitrust Laws

A Defendant-Friendly Term

By Carl Hittinger and Jarod Bona

The United States Supreme Court decided four antitrust cases last term that will substantially affect business practices and litigation. All four cases favored antitrust defendants and will raise the barriers for plaintiffs bringing antitrust actions in the future.

In Leegin Creative Leather Products v. PSKS, Inc., the Supreme Court, changing its almost one-hundred year policy, made it more difficult for antitrust plaintiffs to challenge vertical minimum resale price maintenance agreements between manufacturers and retailers.

In Credit Suisse Securities v. Billing, the Supreme Court held that certain IPO stock underwriting practices are immune from antirust scrutiny.

In Bell Atlantic Corporation v. Twombly, the Supreme Court made it more difficult for plaintiffs alleging an antitrust conspiracy based upon circumstantial evidence to survive a motion to dismiss.

Finally, in Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co., the Court applied the strict standards previously established for predatory pricing claims to predatory buying claims.

Each of these cases may have some immediate impact, but the long-term effect will depend on reactions by a number of actors, including states, Congress, lower courts, plaintiff attorneys and businesses. This was a noteworthy term for antitrust law in the Supreme Court.

COURT ELEVATES "RULE OF REASON"

Before the Supreme Court decided Leegin, an agreement between a manufacturer and a retailer to set a product's minimum retail price – also known as minimum resale price maintenance – was a per se violation of the federal antitrust laws. It was absolutely illegal. Now the same agreement is subject to a "rule of reason" analysis, which involves a case-by-case comparison of pro-competitive benefits and anti-competitive harms.

The change is significant, as a rule-of-reason claim is much more difficult and expensive to prove, and plaintiffs are thus less likely to challenge these agreements.

The Leegin decision represents the final chapter for vertical agreements between manufacturers and retailers in their move from per se condemnation to individualized rule-of-reason review. In the last couple of decades, the Supreme Court has removed the per se label from maximum-resale-price maintenance (State Oil Company v. Khan), dealer terminations for price-cutting (Business Electronics Corporation v. Sharp Electronics Corporation), and vertical non-price restraints (Continental T.V., Inc. v. GTE Sylvania, Inc.). Now, to the delight of many economic commentators, the Court has removed the per se label from minimum resale price policies and overturned almost one hundred years of precedent.

Leegin involved a pricing policy by the manufacturer of a brand called Brighton, whereby Leegin refused to sell to retailers that discounted its brand below suggested retail prices. Leegin discovered that one of its retailers – Kay's Kloset – was selling Brighton below the suggested retail price. After Kay's Kloset refused Leegin's request that it stop discounting the Brighton brand, Leegin stopped selling to the retailer. Kay's Kloset then sued Leegin, alleging that Leegin committed a per se antitrust violation by entering vertical agreements with its retailers to set minimum prices.

In its detailed opinion, a majority of the Court stressed the pro-competitive benefits of minimum-resale-pricing policies. For example, these policies may strengthen competition among different brands by encouraging retail services and eliminating discounter free-riding of retailers that have invested in services or a reputation for quality. But the Court also cautioned that the policy could create anti-competitive problems, like facilitating manufacturer or retailer cartels.

It is important to remember the Supreme Court did not declare that minimum resale pricing policies are legal. This is far from a green light for manufacturers to develop resale-pricing floors. Indeed, the Court suggested that lower courts could devise special rules or presumptions for these policies, which could lead to elevated scrutiny in some courts.

Also, many states, including New York and California, have antitrust laws that still explicitly prohibit these minimum price policies. Some states may follow the federal decision, and other states could depart from it.

SEC REGS V. ANTITRUST LAWS

The Supreme Court in Credit Suisse declared particular IPO stock underwriting practices off-limits to the antitrust laws because these laws were implicitly preempted by the securities laws.

This case involved a class action claim by securities purchasers that several underwriters violated antitrust laws because their "tie-in" and "laddering" arrangements grossly inflated the prices of the affected securities. Plaintiffs alleged that major investment banks and institutional investors conspired to inflate IPO prices for technology companies during the internet boom.

The Credit Suisse decision should reduce antitrust exposure for securities firms, and may have potential consequences on other regulated areas where the legislative scheme is similarly silent on antitrust immunity.

Justice Breyer, writing for the Court, distilled the critical question to determine whether it should be implied the antitrust laws are preempted here: Are the securities laws "clearly incompatible" with the application of the antitrust laws?

The Court identified four elements from previous cases that are necessary to preempt the antitrust laws: An area of conduct squarely within the heartland of securities regulation; clear and adequate SEC authority to regulate; active and ongoing agency regulation; and serious conflict between the antitrust and securities regimes.

Only the fourth element, whether there was a serious conflict between the two areas of law, was in dispute.

The Supreme Court indeed found a conflict in Credit Suisse, because permitting antitrust actions in this context would threaten serious securities-related harm, and the SEC is an active regulator and takes competition into account when reaching its decisions.

Significantly, the Court's decision did not depend upon whether the SEC would prosecute the conduct at issue. The Court found that antitrust enforcement would lead to securities-related harm because the lines separating permissible from impermissible conduct under the securities laws are fine, requiring securities related expertise for appropriate interpretation; because the same types of evidence of the conduct in question could give rise to contradictory inferences under each regime; and because the risk of inconsistent or seriously mistaken court results is high; and allowing antitrust lawsuits would chill other conduct by underwriters that the securities law permit and encourage.

PLAINTIFFS FOILED

In Twombly, the Supreme Court sharply elevated standards for pleading an antitrust conspiracy, and perhaps other complex federal actions. More specifically, the Court held that plaintiffs claiming an antitrust conspiracy cannot survive a motion to dismiss unless they allege more than a bare allegation of conspiracy and that defendants engaged in consciously parallel behavior.

In its holding, the Court said that it was retiring the often quoted language of Conley v. Gibson (1957), that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Instead, plaintiffs must allege a factual basis for a claim to relief that is "plausible" on its face. The lower courts have now begun debating the shape of this elevated standard, but so far it is clear that this new standard applies to both antitrust and non-antitrust cases.

In Twombly, plaintiffs brought a class action alleging that five local telephone companies violated the antitrust laws by engaging in "parallel conduct" in their respective service areas to limit the growth of competitors and by not competing against one another outside of their local territories. The Court held that the complaint did not allege a plausible conspiracy in these circumstances, because there were independent non-conspiratorial reasons for the parallel conduct, and plaintiffs alleged nothing more.

The Court also made some pronouncements about discovery that may provide defendants in complex antitrust cases with an excellent argument for a discovery stay pending motions to dismiss. The Court acknowledged that "proceeding to antitrust discovery can be expensive" and that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings."

It will take some time for the lower courts to sort out exactly what Twombly changes, but thus far most courts acknowledge that Twombly makes it harder for plaintiffs to survive a motion to dismiss.

PREDATORY PRACTICE REDEFINED

After the Weyerhauser ruling, plaintiffs suing under the antitrust laws for predatory buying practices are subject to the same high standard for predatory selling cases that the Supreme Court set in Brooks Group Limited. v. Williamson Tobacco Corporation over fourteen years ago. Namely, the Weyerhaeuser Court held that plaintiffs must demonstrate (1) that alleged predatory bidding led to below-cost pricing of the predator's outputs and (2) that there is a dangerous probability that the predator will be able to recoup its loses from selling its outputs below cost.

Predatory selling cases are based on the premise that the defendant reduces the sale price of its product (its output) to below cost, hoping to drive competitors out of business. Then, with competition "vanquished," the predator raises output prices. Predatory buying cases are based on the same premise, except that, as alleged in this case, the defendant is accused of using its dominant position in the market as a buyer to bid up the price of inputs to drive its competitors out of business.

In this case a sawmill, Ross-Simmons Hardwood Lumber, accused its competitor, Weyerhaeuser, of violating the antitrust laws by engaging in predatory buying – purchasing more raw materials than needed at prices higher than necessary by using its "market power on the buy side or input side of the market." Ross-Simmons alleged that this practice eventually drove it out of business.

The trial court did not require Ross-Simmons to prove that Weyerhaeuser would eventually recoup its loses, and as a result, the jury returned a verdict for Ross-Simmons. The Supreme Court reversed the verdict, holding that a predatory-buying plaintiff must prove that the defendant could recoup its loses from selling outputs below cost even when the plaintiff is driven out of business.

The Supreme Court held that the analytical foundation of both predatory buying and selling justifies stringent treatment. First, a rational business rarely makes the financial sacrifice necessary for either predatory buying or predatory selling. Second, the actions taken in predatory buying and predatory selling are often "the very essence of competition." Finally, failed predatory buying or selling often results in lower prices for consumers.

In conclusion, all four antitrust decisions by the Supreme Court make it more difficult for plaintiffs to bring individual or class action litigation, and they in turn provide greater protection for defendant businesses.

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