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Recent High Court Rulings Don't Deserve 'Pro-Business' Label

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Special to the Legal

Increasingly, commentators have labeled the current Supreme Court of the United States as "pro-business." For example, the cover story in the March 16, 2008, edition of the *New York Times Magazine* was entitled "Supreme Court, Inc." and discussed how it might appear to some that the nation's highest court has come to side with business. Such monikers do not fairly describe the court's recent antitrust jurisprudence for one simple reason: Businesses are both plaintiffs and defendants in antitrust cases.

A more accurate description is that the Supreme Court has recently clarified and perhaps, better articulated the standards for bringing antitrust claims that had become unclear through conflicting decisions in the federal circuit courts. It is not at all clear that the Supreme Court has a particular antitrust agenda, but more that the court is molding antitrust doctrine to better fit prevailing present economic theories than those of the past. During the last several decades, economics has become increasingly influential on antitrust — both in individual cases and in policy — and it is not surprising that the legal doctrine would lag behind the economic "wisdom." It often takes time for legal doctrine to change at the Supreme Court level as cases must be filed and litigated, and the Supreme Court often likes to let issues percolate with the federal circuit courts before weighing in on an issue. In some instances, it may be many years before the "appropriate" case arrives at the Supreme Court. In any event, the current Supreme Court (with some justices dissenting) appears comfortable with shifting the common law of antitrust to better fit economic theory.

The Supreme Court decided no less than four antitrust cases during its last term. The defendants prevailed in each case but in two cases the plaintiffs were businesses just like the defendants. First, in Leegin Creative Leather Products v. PSKS Inc., the Supreme Court addressed vertical minimum resale price maintenance agreements. These are agreements between manufacturers and retailers to set a product's minimum price. Before Leegin, these agreements were absolutely illegal — they were a per se antitrust violation, as established almost 100 years ago in Dr. Miles Medical Company v. John D. Park & Sons Company (1911).

The court did not hold that these agreements are legal but instead held that they should be evaluated under the rule-of-reason analysis. This more deferential approach involves a case-by-case comparison of pro-competitive benefits and anti-competitive harms. In contrast, under the earlier per se standard, the agreement is illegal even if there are substantial pro-competitive benefits that outweigh any harm. This change is significant for plaintiffs and defendants alike as a rule-of-reason claim is substantially more difficult and expensive to prove. Plaintiffs are thus much less likely to challenge these agreements.

Leegin follows previous cases that have chipped away at the *Dr. Miles* decision establishing per se condemnation for vertical agreements between manufacturers and retailers. In the last couple decades, the Supreme Court removed the per se label from maximum-resale-price maintenance agreements, dealer terminations for price-cutting, and vertical non-price restraints. Each of these decisions moved antitrust doctrine closer to prevailing economic theory. The *Leegin* decision, which involved the most pernicious category of vertical distribution agreements, represents the final chapter for these vertical agreements.

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This case involved a challenge to a pricing policy by a manufacturer, Leegin Creative Leather Products, for its Brighton brand. Leegin made each of its retailers pledge not to sell Brighton products below the suggested retail price. When Leegin discovered that one of its retailers, Kay's Kloset, was doing just that, it stopped selling to that 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. Kay's Kloset prevailed in the lower courts (under then-Supreme Court precedent).

Leegin, however, convinced a majority of the Supreme Court, which stressed the pro-competitive benefits of minimum-resale-pricing policies in its opinion. For example, the court noted that 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. The court did, however, caution that the agreements could create anti-competitive problems, like facilitating manufacturer or retailer cartels. In reaching its decision, the court made frequent use of economic theory and readily cited economic sources, including an amicus brief submitted by a group of economists. Four Justices dissented, led by Justice Stephen Breyer, mostly on stare decisis grounds.

Second, in *Bell Atlantic Corporation v. Twombly*, the Supreme Court addressed the pleading standard for plaintiffs alleging an antitrust conspiracy based upon circumstantial evidence. The court held that plaintiffs claiming an antitrust conspiracy cannot survive a motion to dismiss by merely alleging consciously parallel conduct and a bare allegation of conspiracy. A recent 9th U.S. Circuit Court of Appeals antitrust decision applying *Twombly* described these required allegations as "evidentiary facts." The 3rd Circuit recently said in *Phillips v. County of Allegheny* (2008) that the *Twombly* decision did not set a heightened pleading standard but that notice pleading under Rule 8(a) was still the prevailing federal rule.

At the same time, the court stated in *Twombly* 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." It is this non-antitrust foray into basic civil procedure that may have persuaded courts to apply *Twombly* in non-antitrust cases, since the Supreme Court's decision.

Twombly resulted from 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 each other outside of their local territories. The Supreme Court held that the complaint should be dismissed because plaintiffs did not allege a plausible conspiracy as there were independent non-conspiratorial reasons for the parallel conduct, and plaintiffs alleged nothing more.

In describing its decision, 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."

Third, in *Credit Suisse Securities v. Billing*, the Supreme Court held that certain initial public offering stock underwriting practices were immune from antitrust scrutiny. This case arose from a class action claim by securities purchasers that several underwriters violated antitrust laws because their "tie-in" and "laddering" arrangements grossly inflated IPO prices for technology companies during the Internet boom.

In *Credit Suisse*, the court analyzed whether the securities laws are clearly incompatible with the application of the antitrust laws. The Supreme Court held that permitting antitrust actions in this context would indeed create securities-related harm. This is 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; because the risk of inconsistent or seriously mistaken results is high; and allowing antitrust lawsuits would chill other conduct by underwriters that the securities law permits and encourages. Just as significant, the Securities and Exchange Commission is an active regulator that takes competition into account when reaching its decisions.

Finally, in *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Company*, the court made it more difficult for plaintiffs to sue for predatory buying by applying the same strict standards it applied to predatory pricing claims. This decision was not a surprise as economic theory disfavors these claims. The *Weyerhaeuser* court held — similar to predatory pricing claims — that plaintiffs must demonstrate that (1) the alleged predatory bidding led to higher input prices that rival buyers cannot survive, and (2) that there is a dangerous probability that the predator will be able to recoup its loses by restricting input prices with its monopsony power.

This cause of action is based upon the premise that the defendant uses its dominant position in the market as a buyer to bid up the price of inputs to drive its competitors out of business. Then, with competition eliminated, the defendant forces input prices lower. In this case, the plaintiff business accused its competitor business of purchasing more raw materials than needed at prices higher than necessary, eventually driving the plaintiff out of business. The trial court did not require the plaintiff to prove that the defendant could eventually recoup its loses from the higher input prices, and the jury returned a verdict in favor of the plaintiff. The Supreme Court reversed the verdict, holding that — just as in a predatory selling case — the plaintiff must prove that the defendant can recoup its loses.

Predatory buying and selling claims are disfavored under economic theory, and now, antitrust doctrine. This is because a rational business rarely makes the financial sacrifice necessary for either predatory buying or sell-

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ing. And the alleged actions are often "the very essence of competition," as the defendant is either offering to pay more, or selling for less.

It is unclear what antitrust issue the Supreme Court will address next but a "price squeeze" case in the 9th Circuit has some potential. In *Linkline Communications, Inc. v. SBC California*, the 9th Circuit departed from the District of Columbia Circuit and held that a price squeeze theory creates a viable claim for a regulated entity. A price squeeze occurs when a vertically integrated entity with alleged monopoly power at the wholesale level leaves an insufficient margin between wholesale and retail prices to allow its retail competitors to compete. This can occur because the entity has market power at the wholesale level and can raise wholesale prices to its retail competitors, thus increasing their input costs so they cannot compete with the entity at the retail level. The 9th Circuit permitted the "price squeeze" case to go forward despite the Supreme Court's earlier decision that these wholesalers did not even have to deal with their retail competitors.

The Supreme Court grants few petitions for certiorari, but in the *Linkline* case, the court recently invited the solicitor general to file a brief expressing the views of the U.S. That is typically a sign that the court is seriously considering granting review. This might be one worth watching.

Is the current Supreme Court becoming more pro-business? The antitrust laws were passed to protect consumers as well as competing businesses. That means big and small businesses can, and often do, bring antitrust claims to protect their rights. The federal and state governments are often plaintiffs in civil antitrust cases. Does this mean the Supreme Court is anti-government? The answer is no to both questions. The Supreme Court is just doing its job of clarifying doctrine and resolving conflicts so businesses and consumers can hopefully conduct their affairs nationwide with legal clarity. •

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