



Federal Trade Commission

A Modest Proposal for Modest Antitrust Decisions at the Supreme Court

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presented to the Antitrust Section
of the American Bar Association

Introduction

I am tempted to predict that the Supreme Court will issue blockbuster antitrust decisions in the next few years – on tying, horizontal price-fixing, mergers, monopolization and attempted monopolization. I am even tempted to advocate that course because I feel as passionate about those matters as most antitrust junkies do – even though I do not always share the views of my fellow junkies about what those blockbuster decisions should be.

But I am not going to do that for several reasons. First, I am not sure that the Court's recent track record supports that kind of prediction. To be sure, the Court has issued a lot of antitrust decisions in the last five years – more than it issued in the entire decade before that. But after sober reflection, the only antitrust holding that can fairly be described as a blockbuster holding was its holding in *Leegin*.² Its holding that resale price maintenance was not per se illegal not only reversed more than a century of case law dating back to *Dr. Miles*,³ but also

¹ The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor Kyle Andeer for his invaluable assistance in preparing this paper.

² *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

³ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

surprised – and dismayed – some observers.⁴ However, as others who have analyzed the *Leegin* decision closely have observed, the decision can be read as much as a decision reflecting the current Court’s views about *stare decisis* – and maybe about *Roe v. Wade*⁵ – as a momentous antitrust decision.⁶

Other than *Leegin*, the hallmark of the Roberts Supreme Court’s antitrust jurisprudence has been an effort to achieve consensus by fashioning narrow decisions. Take, for example, Justice Stevens’ opinion in *Illinois Tool Works*.⁷ In that case the Court could have reached out and held that tying was no longer to be treated as a per se or even a quasi-per se offense. But it did not. Instead, in that 8-0 decision, the Court simply held that “the mere fact that a tying product is patented does not support [a presumption of market power].”⁸ Or, consider Justice Thomas’ opinion in *Weyerhaeuser*.⁹ The Court could have fashioned a brand new rule for assessing the legality of alleged predatory bidding. It did not do that. Instead that 9-0 decision

⁴ See e.g., *Senate Subcommittee Hears Testimony on Impact of Leegin Decision on Retailing*, 93 BNA ANTITRUST & TRADE REGULATION REPORTER, 139-142 (July 2007); Pamela Jones Harbour, *The Supreme Court’s Antitrust Future: New Directions or Revisiting Old Cases?* THE ANTITRUST SOURCE at pp. 3-4 (Dec. 2007) available at <http://www.abanet.org/antitrust/at-source/07/12/Dec07-Harbour12-17.pdf>

⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶ Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?* 3 COMPETITION POLICY INTERNATIONAL 59, 66 (Autumn 2007); Andrew Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, 22 ANTITRUST 21, 24 (Fall 2007).

⁷ *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

⁸ *Id.* at 46 (“Today, we reach the same conclusion, and therefore hold that in all cases involving a tying arrangement the plaintiff must prove that the defendant has market power in the tying product.”).

⁹ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

simply held that the standards for predatory pricing articulated in *Brooke Group* also applied to predatory bidding claims.¹⁰ Or, examine what happened in *Dagher*.¹¹ The Court could have issued a cosmic decision about the antitrust principles applicable to joint ventures. It did not do that either. Instead that 8-0 decision just held that in the particular circumstances of that case the joint venture at issue was not per se illegal.¹²

Second, I consider consensus-building to be a virtue unto itself when decisions are made by a body, each of whose members has an equal vote. It is no mean feat to achieve a consensus in those circumstances. That is particularly so (and I say this advisedly) when the members of the decision-making body are all extraordinarily bright and able individuals who do not like to be taken for granted. But I would suggest that more is at stake here than just a desire for consensus on the part of the Chief Justice and his colleagues. I have been around Washington long enough now – and outside the Beltway for a lot longer, which is perhaps more significant – to hazard a guess that no matter what happens in the November 2008 election, a dramatic change in the composition of the Senate is unlikely. Or, to put a sharper point on it, I doubt that either party is likely to win enough Senate seats to break a filibuster. If that is the case, the antitrust decisions of the Court – in the near term at least – are likely not just to affect the federal case law but are also likely to influence who the members of the Court making that case law for the foreseeable future are likely to be. Personally I would like to see the debate on that score to focus on the merits of the nominees rather than on their ideologies. And blockbuster antitrust opinions are sometimes viewed as ideologically talismanic. Ask Professor Bork.

¹⁰ Id. at 1078.

¹¹ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

¹² Id. at 8.

Third (and this will be the burden of my remarks today), it seems to me that the Court has plenty of work to do just to clarify its recent antitrust decisions. As I will describe in more detail, there are plenty of ambiguities in those decisions. I think the Court is likely to proceed pretty incrementally by eliminating some of those ambiguities. Beyond that, I would suggest that that is how the Court should proceed. That is so not only in order to continue to build consensus respecting its antitrust jurisprudence, but to avoid creating antitrust litmus tests for future Court nominees. There is too much disparity in the economics that are supposed to serve as the underpinnings of modern antitrust analysis to justify the creation of such litmus tests.

Let me now turn to the ambiguities that I have in mind.

Trinko

Ambiguities abound in *Trinko*.¹³ To begin with, Justice Scalia seemed to consider monopoly power to be the engine driving innovation.¹⁴ Additionally, the opinion implied that the Court's earlier *Aspen Skiing* decision¹⁵ was an outlier by describing it as marking the outer boundary of the court's Section 2 antitrust jurisprudence.¹⁶ And, the opinion cast a dark cloud over the vitality of the essential facilities doctrine when it declared that the Court had neither confirmed or rejected the doctrine in analyzing the legality of Section 2 claims based on a refusal

¹³ *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

¹⁴ *Id.* at 407 (“[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system.”).

¹⁵ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585, 602 (1985).

¹⁶ *Trinko*, 540 U.S. at 409 (“*Aspen Skiing* is at or near the outer boundary of Section 2 liability.”).

to deal with rivals.¹⁷

These ambiguities are reflected in the post-*Trinko* positions of some distinguished antitrust practitioners and in the decisions of the regional federal courts. In their testimony in the recent joint Justice Department-Federal Trade Commission hearings respecting Section 2 of the Sherman Act, Hew Pate and Rick Rule – both former Assistant Attorney Generals in charge of the Antitrust Division – stumped for the repudiation of *Aspen Skiing* and a rule of per se legality or at least presumptive legality for refusals to deal and related claims.¹⁸ On the other hand, there are those, including a former Chairman of the Federal Trade Commission, that have championed *Aspen Skiing* and the essential facilities doctrine.¹⁹ As for the lower federal courts, for the most part they have continued to apply both *Aspen Skiing*²⁰ and the essential facilities doctrine in the

¹⁷ Id. at 411 (“We have never recognized [the essential facilities doctrine] and we find no need either to recognize it or to repudiate it here.”).

¹⁸ See Testimony of Hew Pate, Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Hearings of Refusals to Deal Transcript at 31 (July 18, 2006) available at website at <http://www.ftc.gov/os/sectiontwohearings/docs/60718FTC.pdf> (“With respect to refusals to deal, or as I prefer to think of it, duties to assist competitors, all have the right to take a different tack. I think in the wake of *Trinko*, as we have seen lower courts try to make sense of, and cabin the *Aspen* decision, that the time has come for *Aspen* to be overruled, and that the law would be better with it off the books.”); Testimony of Rick Rule, Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Conclusion of Hearings, Transcript at 122-123 (May 8, 2007) available at <http://www.ftc.gov/os/sectiontwohearings/docs/070508trans.pdf>.

¹⁹ See Testimony of Robert Pitofsky, Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Hearings of Refusals to Deal Transcript at 28 (July 18, 2006) available at website at <http://www.ftc.gov/os/sectiontwohearings/docs/60718FTC.pdf>.

²⁰ See *American Central Eastern Texas Gas Co. v. American Central Gas Companies Inc.*, 93 Fed. Appx. 1, 9-10 (5th Cir. 2004) (“the Court notes that Duke refused to deal in the context of a prior course of dealing with ACET. Further, there was no regulatory regime in this case to ensure Duke’s actions were competitive.”); *Covad Communications Co. v. Bell Atlantic*, 398 F.3d 666, 675-76 (D.C. Cir. 2005).

wake of *Trinko*.²¹ *Trinko* has yet to gain much traction outside of the regulated telecommunications context in which it arose.

Trinko's ambiguities are also reflected in the petition for certiorari that was recently filed in *linkLine*,²² as well as in the brief in support of granting that petition filed by a group of distinguished antitrust economists and law professors led by Professor Bork.²³ The petition asks the Court to consider the broad question whether, post-*Trinko*, a firm with monopoly power can be held liable under Section 2 if it engages in a price squeeze – i.e. if it sells to a rival at prices that are too high to enable the rival to compete with it in downstream markets where both sell.²⁴ The economists' brief urges the Court to answer that broad question in the negative, taking the position that an affirmative answer would not only violate *Trinko* but would emulate Article 82

²¹ See e.g., *Metronet Services Corp. v. Metronet Telemanagement Corp.*, 383 F.3d 1124, 1129 (9th Cir. 2004) (“The Court [in *Trinko*] reasoned, ‘the indispensable requirement for invoking the doctrine is the unavailability of access to the ‘essential facilities’; where access exists, the doctrine serves no purpose.’ Thus ‘essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.’”); *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F.Supp. 2d 1048 (D. Colo. 2004).

²² Brief for Writ of Certiorari, *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, No. 07-512 (Oct. 2007); see also *linkLine Communications, Inc. v. California*, 503 F.3d 876 (9th Cir. 2007).

²³ Brief of Amici Curiae Professors and Scholars in Law and Economics in Support of the Petitioners Writ of Certiorari, *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, No. 07-512 (Oct. 2007).

²⁴ Brief for Writ of Certiorari, *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, No. 07-512 (Oct. 2007) (“Question Presented. Whether a plaintiff states a claim under Section 2 of the Sherman Act by alleging that the defendant – a vertically integrated retail competitor with an alleged monopoly at the wholesale level but no antitrust duty to provide the wholesale input to competitors – engaged in a “price squeeze” by leaving insufficient margin between wholesale and retail prices to allow the plaintiff to compete.”).

law in the EC, which the economists roundly condemn.²⁵

Yet *Trinko* did not hold that a firm with monopoly power could always refuse to deal with a competitor, much less that such a firm could in the alternative subject its rival or rivals to a price squeeze with impunity. The opinion's ruminations about such a firm's duty to deal are *dictum*, or even, as we were taught in the first year of law school, *obiter dictum*. *Trinko* was instead concerned with the duty to deal of a *regulated* firm that enjoyed monopoly power. The holding in that case was simply that such a firm could refuse to deal with a rivals because consumers would be protected by the regulatory regime from any anticompetitive consequences flowing from that conduct.²⁶

There is, as the petition asserts, a split in the circuits about whether that holding extends to price squeezes.²⁷ In an opinion authored by Judge Ginsburg, the D.C. Circuit has held that there is no principled reason why *Trinko* should not be followed when the regulated firm's conduct is a price squeeze rather than an outright refusal to deal.²⁸ There is much to commend that view. On the other hand, the Eleventh Circuit and now the Ninth Circuit in *linkLine*, have

²⁵ Brief of Amici Curiae Professors and Scholars in Law and Economics in Support of the Petitioners Writ of Certiorari, *Pacific Bell Telephone Co. v. Linkline Communications, Inc.* at 4 (“More than ever before, the United States and Europe appear to be at a fork in the road over whether the law of monopolization exists to protect consumers or to ensure that a specified number of firms will profitably populate a market. The Ninth Circuit’s *linkLine* decision implicitly chooses the latter path, which leads to the Potemkin village of ‘managed competition.’”).

²⁶ *Trinko*, 540 U.S. at 412.

²⁷ Brief for Writ of Certiorari, *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, at 11 (“The Ninth Circuit’s determination that a price squeeze claim may proceed under Section 2 despite the absence of any duty to deal in the underlying wholesale input creates a square conflict with the D.C. Circuit.”).

²⁸ *Covad Communications Co. v. Bell Atlantic*, 398 F.3d 666, 675-76 (D.C. Cir. 2005).

held that before *Trinko*, price squeezes by firms with monopoly power were held illegal under Section 2 under various circumstances, and *Trinko* did not change that law.²⁹ There is much to commend that view, though it should be noted that the regional federal courts did not agree on what those circumstances should be where the firm was regulated.³⁰ Indeed, in his celebrated decision in *Town of Concord*, Judge (now Justice) Breyer held that the regulated firm could not be held liable for a price squeeze in the circumstances of that case.³¹

The Court has asked the Solicitor General for his views as to whether certiorari should be granted.³² I would not be surprised if the Court granted certiorari because there is a circuit split and because I expect the Solicitor General to recommend certiorari in those circumstances (and

²⁹ *Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050 (11th Cir. 2004); *linkLine Communications, Inc. v. California*, 503 F.3d 876 (9th Cir. 2007).

³⁰ Compare *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976, 985 (7th Cir. 1980) with *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 28 (1st Cir. 1990) (“In sum, the relevant antitrust considerations differ significantly, in degree and in kind, when a price squeeze occurs in a fully regulated as opposed to an unregulated industry. Indeed, these considerations, which are closely balanced in the ordinary price squeeze, change so significantly when the squeeze takes place in a fully regulated industry that, in our opinion, the legal consequences of the squeeze change as well. That is to say, a price squeeze in a fully regulated industry such as electricity will not normally constitute ‘exclusionary conduct’ under Sherman Act § 2.”).

³¹ *Town of Concord*, 915 F.2d at 22 (“For reasons we shall now set out, these principles lead us to conclude that a price squeeze of the sort at issue here does not ordinarily violate Sherman Act § 2 where the defendant's prices are regulated at both the primary and secondary levels. In so holding, we are not saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere. Rather, we are saying that, in light of regulatory rules, constraints, and practices, the price squeeze at issue here is not ordinarily exclusionary, and, for that reason, it does not violate the Sherman Act.”).

³² *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*, 76 U.S.L.W. 3392, 2008 U.S. LEXIS 1177 (Jan. 22, 2008) (“The Solicitor General is invited to file a brief in this case expressing the views of the United States.”).

the Court almost always follows the Solicitor General's advice).³³ However, I would urge the Court only to resolve the narrow question whether a regulated firm with monopoly power can lawfully engage in a price squeeze. That is the question at issue; that is a question on which the circuits are split; and I suspect that a consensus can be reached on the answer to that question. I would suggest that the Court eschew any broad pronouncements respecting the conduct of firms with monopoly power who are not regulated. Such broad pronouncements are unnecessary to resolve the ambiguity at issue in the case. They might fracture the Court. And they might serve as grist for the kind of antitrust litmus test for future Court nominees that I personally oppose.

Twombly

The Court's decision in *Twombly* is also very ambiguous.³⁴ In the wake of *Twombly*, there were at least two questions left unanswered by the Court. First, there was the matter of its application – did *Twombly* apply merely to conspiracy claims brought under Section 1 of the Sherman Act or did it apply universally to all pleadings? It appears thus far that the lower federal courts have applied *Twombly*'s teachings broadly – refusing to limit it merely to antitrust pleadings.³⁵

³³ J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "A New Direction for Antitrust at the Supreme Court?" Address Before the Antitrust Section of Minnesota State Bar (Mar. 1 2007) available at <http://www.ftc.gov/speeches/rosch/070301minnspeech.pdf>.

³⁴ *Bell Atlantic Corp. v. William Twombly et. al.*, 127 S.Ct. 1955 (2007).

³⁵ See, e.g., *Equal Employment Opportunity Comm'n v. Concentra Health Servs., Inc.*, No. 06-3436, 496 F.3d 773, 2007 U.S. App. LEXIS 18487, 2007 WL 2215764, at *2 - 9 (7th Cir. 2007) (Title VII retaliation); *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 n.2 (10th Cir. 2007); *Iqbal* 490 F.3d 143 (“[I]t would be cavalier to believe that the Court's rejection of the ‘no set of facts’ language from *Conley* . . . applies only to section 1 antitrust claims.”); *Phillips v. County of Allegheny*, 2008 U.S. App. LEXIS 2513, *19 (3d Cir. 2008) (“[W]e decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context.”). But see Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, NW. U. L. REV. COLLOQUY (2007) (“This Colloquy Post argues that

The trickier question still debated by the lower courts is the standard by which courts should judge pleadings in the wake of *Twombly*.³⁶ Did *Twombly* impose a heightened standard for pleadings or did it simply clarify the existing standard. Some of the confusion is grounded in the Court's repudiation of the "no set of facts" language in *Conley*.³⁷ Again, commentators and the regional federal courts have interpreted the Court's remarks in different ways.³⁸

Yet, again, the actual question posed – and resolved – in *Twombly* was very narrow. The case concerned only the sufficiency of the pleading of a conspiracy in a private treble damage action where the complaint simply alleged parallel conduct – conduct that was as consistent with

Twombly changed antitrust law by modifying the elements of an antitrust conspiracy claim, but did not rework pleading rules across the board. Although the Court briefly discussed *Conley v. Gibson*, its language differed only superficially from the existing law of civil procedure. Meanwhile, the concept of "plausibility," which attorneys and courts have begun to apply to all pleadings, is actually antitrust jargon.").

³⁶ Phillips v. County of Allegheny, 2008 U.S. App. LEXIS 2513, *18 (3d Cir. 2008) ("The more difficult question raised by *Twombly* is whether the Supreme Court imposed a new 'plausibility' requirement at the pleading stage that materially alters the notice pleading regime."); *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007) (*Twombly* created "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings."); *Transhorn, Ltd. v. United Techs. Corp. (In re Elevator Antitrust Litigation)*, 502 F.3d 47, 50 (2d Cir. 2007) ("'Considerable uncertainty' surrounds the breadth of the Supreme Court's recent decision in *Twombly*"); *Schaffhauser v. Citibank (S.D.) N.A.*, 2007 U.S. Dist. LEXIS 69220 (M.D. Pa. 2007) ("The effect of *Bell Atlantic* on the pleading standards under the Federal Rules of Civil Procedure remains to be seen.").

³⁷ *Bell Atlantic*, 127 S. Ct. at 1968 ("the accepted rule that a complaint should not be dismissed for failure to state a claim 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" stating that the 'no set of facts' language 'has earned retirement' and 'is best forgotten.'").

³⁸ William Kolasky and David Olsky, *Bell Atlantic Corp. v. Twombly: Laying Conley v. Gibson to Rest*, 22 ANTITRUST 27 (Fall 2007) ("The manner in which the Court applied its new 'plausibility' standard in *Twombly* itself shows that this new standard will impose a substantially higher burden on plaintiffs."); J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, presented at the ABA Fall Forum (2007).

independent action as it was with the existence of a conspiracy.³⁹ The actual holding in the case was simply that allegations of parallel conduct alone are insufficient to plead a violation of Section 1.⁴⁰ That context should not be ignored by the courts interpreting *Twombly*. For example, the Court in *Twombly* noted that “[i]n a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement.”⁴¹

It seems to me that the Court in *Twombly* was merely clarifying the standard under Rule 8 rather than fashioning a new standard out of whole cloth. The complaint in that case simply stretched *Conley*'s “no set of facts” test to its breaking point. The Court emphasized that it was not requiring “heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”⁴² The other observations in the opinion were merely *dictum* (or *obiter dictum*).

I would not be startled if the Court were to grant certiorari in some future case to clarify the scope of its intentions respecting the sufficiency of pleadings in antitrust cases.⁴³ In fact, I

³⁹ Id. at 1961 (“the question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.”)

⁴⁰ Id. at 1970 (“When we look for plausibility in this complaint, we agree with the District Court that plaintiffs’ claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs.”)

⁴¹ Id. at 1972.

⁴² Id. at 1974.

⁴³ Phillips, 2008 U.S. App. LEXIS 2513, *19 (“The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come.”)

think it would be helpful if the Court did that. However, I would hope that the case it takes would be one that would allow it to rule on narrow grounds. I do not think, for example, that it is either necessary or advisable for the Court to take a civil case that is not an antitrust case for that purpose. Rule 8 seems to be pretty clear that specificity in pleadings is not required in civil cases generally. Nor do I think it necessary or advisable for the Court to take an antitrust case for that purpose if the clarification of *Twombly*'s ambiguity would require the Court to make new substantive law in the process. Fortunately, *Twombly* did not require the Court to do that. As Justice Souter observed, the substantive antitrust principles involved had been resolved in the Court's earlier decisions.⁴⁴ However, that is not always the case. For example, in its recent decision in *Newcal Industries, Inc. v. IKON Office Solution*⁴⁵, in ruling on the sufficiency of a treble damage complaint, the Ninth Circuit adopted its prior reading of the substantive law in *Kodak* instead of the Third Circuit's reading of that law.⁴⁶

There is little doubt in my mind that kind of decision fracture the Court, and it might incite some in the antitrust bar to urge that future Court nominees pledge allegiance to one or the other of those views of the substantive law.

⁴⁴ Id at 1964 (“An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, see *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, see *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).”).

⁴⁵ *Newcal Indus. v. Ikon Office Solution*, 2008 U.S. App. LEXIS 1257 (9th Cir. 2008).

⁴⁶ *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 436-37 (3d Cir. 1997).

California Dental /Leegin

The ambiguities I have in mind with respect to *Leegin* really trace back to Justice Souter's opinion in *California Dental*.⁴⁷ There the opinion referred to certain earlier decisions of the Court holding that conduct that was not per se illegal did not necessarily have to be judged under a full blown rule of reason before the conduct could be considered illegal under Section 1.⁴⁸ That was pretty non-controversial. However, the opinion then declined to describe when something less than a full blown rule of reason analysis would be appropriate or what kind of analysis would suffice in those circumstances. Instead, Justice Souter just said that something less than a full blown analysis would require an economist's blessing and that the analysis required should be mete for the circumstances of the case.⁴⁹ Presumably he would require that the economist's opinion would pass muster under *Daubert*⁵⁰ and *Kumho Tire*⁵¹, but the opinion does not even say that. And the opinion is entirely opaque about what would be "mete" for any particular case.

These ambiguities were imported into Justice Kennedy's recent decision in *Leegin*. There of course the Court held that a rule of reason analysis was appropriate in assessing the legality of resale price maintenance. It also broadly hinted that a truncated rule of reason analysis might be acceptable, stating that standards could be developed based on the courts' experience with the

⁴⁷ See, *Leegin*, 127 S. Ct. 2705; *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

⁴⁸ *California Dental Ass'n*, 526 U.S. at 770.

⁴⁹ *Id.* at 781.

⁵⁰ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

⁵¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

practice over time and that “presumptions” might be appropriate.⁵² All this has led, however, to great uncertainty respecting what, if any, truncated rule of reason analysis might be applicable in future resale price maintenance cases.⁵³

Judge Ginsburg arguably introduced some order into this chaos in his opinion in the Three Tenors case.⁵⁴ There he essentially adopted former Federal Trade Commission Chairman Muris’ truncated rule of reason construct. Under that analysis, if the challenged practice is “inherently suspect” under Section 1, the burden shifts to the defendant to demonstrate that there is a legitimate justification for it based on its efficiencies. If such a justification is shown, the burden shifts back to the party challenging the restraint to show that, even so, it is on balance anticompetitive in effect.⁵⁵ It may be that this approach is what Justice Kennedy ultimately had in mind for testing resale price maintenance claims. After all, the very purpose of the practice is to peg resale prices at a point that is higher than they would otherwise be. Arguably, therefore, the participants in a resale price maintenance program should have to justify that price effect. But Justice Kennedy did not spell that out.

⁵² Leegin, 127 S. Ct. at 2720.

⁵³ See Robert Hubbard, *Protecting Consumers Post-Leegin*, 22 ANTITRUST 41, 42 (Fall 2007); Marina Lao, *Leegin and Resale Price Maintenance: A Model for Emulation or for Caution for the World?* p. 8 (November 2007) available at http://law.shu.edu/faculty/fulltime_faculty/laomarin/publications/leegin_rpm.pdf (“Because the *Leegin* majority took pains to warn courts to recognize and prohibit the anticompetitive uses of RPM, its admonition may (hopefully) encourage lower courts to decline to apply the full rule of reason and adopt, instead, the more flexible “quick-look” rule of reason that is now frequently employed in horizontal restraint cases.”); Brief for William S. Comanor and Frederic M. Scherer As Amici Curiae Supporting Neither Party, *Leegin Creative Leather Products, Inc. v. PSKS* (2007) available at http://www.antitrustinstitute.org/archives/files/aai-%20Leegin,%20Comanor%20&%20Scherer%20amicus%20brief_021820071955.pdf

⁵⁴ *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (2005).

⁵⁵ *Id.* at 35-36.

I would not be shocked if the Court were to grant certiorari in some future resale price maintenance case or even in a case not involving resale price maintenance in order to cast more light on whether a truncated rule of reason analysis is appropriate in the circumstances and/ or what form that analysis should take. Indeed, I would recommend that the Court do that. To be sure, that might threaten consensus-building at the Court. The diverse opinions of the Court in *California Dental* and *Leegin* themselves do not inspire much confidence on that score. However, as matters now stand litigants and the courts are at sea on the fundamental question as to what the rules of evaluation are when a practice is challenged on something other than a per se basis. That is not a healthy state of affairs. However, I would like to see the Court limit review to what a truncated rule of reason analysis should be. Judge Ginsburg has given us a thoughtful paradigm to consider for virtually all cases, and the members of the court might be able to set aside their differences and rally around that paradigm.

Brooke Group

I hesitate to suggest that *Brooke Group*⁵⁶ is at all ambiguous because so many Chicago School adherents are clamoring for its adoption in any challenge involving a pricing practice – loyalty discounts and bundled discounts to name but two recent examples.⁵⁷ Yet there are two fundamental ambiguities in that opinion. First, although the opinion says that liability for predatory pricing requires proof of below-cost pricing, it does not define what that means.

⁵⁶ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

⁵⁷ Daniel A. Crane, *Multiproduct Discounting: A Myth of Nonprice Predation*, 72 U. CHI. L. REV. 27 (2005) (“If one believes in conventional predatory pricing theory, package discounting should be included as a narrower subset of the broader theory. Above-cost effective prices in the competitive market (after reallocation of discounts from the other markets) should be a safe harbor for any multiproduct firm. Any other legal rule will discourage discounting to the detriment of consumers.”).

Specifically, it did not define whether the defendant's prices must be above its total costs or some measure of its average variable costs. This has created uncertainty in the lower courts. In the second *American Airlines* case, for example, the Kansas federal district court believed that the average variable cost for the route as a whole was the only appropriate measure of costs because the route was the alleged market.⁵⁸ However, in the *Spirit Airlines* case, the Sixth Circuit did not embrace that approach.⁵⁹

Second, the Court's opinion also did not spell out whether there could be liability for predatory pricing when the defendant's prices simply meet, and do not beat, the prices of its rival. The Robinson-Patman Act, of course, specifically provides a safe harbor under those circumstances if the predatory pricing claim is brought under that Act (as *Brooke Group* was).⁶⁰ However, predatory pricing claims can also be brought under Section 2 of the Sherman Act. In fact, most predatory pricing claims are Section 2 claims. Although the Kansas federal district court adopted the same safe harbor in the *American Airlines* case, which was a Section 2 case, on appeal the Tenth Circuit expressly declined to embrace that safe harbor.⁶¹

I would not be amazed to see the Court grant certiorari to clear up these ambiguities. I would applaud it if it did so. Weighing against that is the fact that predatory pricing cases are rarely brought these days. However, the *Spirit Airlines* decision shows that predatory pricing claims are not dead. As long as they are alive, as *Brooke Group* itself says, it is very important that there be certainty in this area of antitrust law, lest consumers be injured inadvertently. For

⁵⁸ United States v. AMR Corp., 140 F.Supp. 2d 1141, 1196, 1198-200, 1202-03 (D.Kan. 2001).

⁵⁹ Spirit Airlines, Inc. v. Northwest Airlines, Inc. 431 F.3d 917, 946 (6th Cir. 2005).

⁶⁰ Brooke Group, 509 U.S. at 219; see also 15 U.S.C. § 13(a).

⁶¹ United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).

this reason, I think members of the Court would be apt to join together to clarify the law in these respects.

Conclusion

This discussion of the ambiguities in the Court’s recent antitrust decisions is illustrative, not exhaustive. The Court in *Volvo Trucks*, for example, once again emphasized the importance of applying the Robinson-Patman Act consistently with the other antitrust statutes.⁶² In that respect it hinted that proof of real competitive injury might be required to establish liability. But it stopped short of resolving the ongoing split in the circuits about whether competitive injury can be found where vigorous interbrand competition exists.⁶³ However, it is not at all clear whether the court will – or should – clarify that anytime soon. As the dissent in *Volvo* suggest, consensus among the members of this court seems hard to achieve in Robinson-Patman Act decisions. Beyond that, moreover, the Act is a political live wire. Touching it might not only threaten consensus-building in antitrust jurisprudence at the Court but might also distort future debates about who the members of the Court responsible for that jurisprudence should be.

⁶² *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (“we continue to construe the Act ‘consistently with broader policies of the antitrust laws.’”).

⁶³ The Third, Ninth, and Eleventh Circuits have all held that a showing of a sustained and substantial price discrimination targeting a particular competitor satisfies the competitive injury requirement. *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653 (9th Cir. 1995); *JF Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990); *Alan’s of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990). However, the D.C. Circuit, along with the Eighth and Tenth Circuits, have held that a showing of price discrimination merely creates a presumption of competitive injury that can be rebutted by a showing that the market remains competitive. *See Bosie Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8 th Cir. 1986); *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380 (10th Cir. 1985).