



Federal Trade Commission

The State of Antitrust in 2008

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The Roberts Court has quickly left its mark on antitrust with seven decisions in its first three terms.² I thought I would spend some time talking about three of these recent decisions – *Twombly*, *Weyerhaeuser*, and *Leegin* and then turn to the broader themes and lessons that can be drawn from the Court's recent antitrust jurisprudence.

I. Recent Developments at the Supreme Court

A. *Twombly*: A New Pleading Standard for antitrust cases?

Let me begin with *Bell Atlantic v. Twombly*.³ The Court granted certiorari to “address the

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 *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Texaco v. Fouad N. Dagher*, 547 U.S. 1 (2006); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S.Ct. 1069 (2007); *Bell Atlantic Corp. v. William Twombly et. al.*, 127 S.Ct. 1955 (2007); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Credit Suisse Sec. LLC v. Billing*, 127 S. Ct. 2383 (2007).

³ *Twombly*, 127 S.Ct. 1955.

proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”⁴

The complaint, a class action filed on behalf of tens of millions of consumers across the country, alleged that the Baby Bells had conspired to thwart competition promised by the 1996 Telecommunications Act. For example, the complaint alleged that the Baby Bells engaged in similar strategies to prevent new competitors from entering their local markets and that they had failed to take advantage of competitive opportunities in each other’s local markets.

The district court found that the complaint’s allegations were insufficient to state a claim under Section 1 of the Sherman Act. To survive a motion to dismiss, the district court held that the plaintiffs needed to allege additional facts that “tend to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.”⁵ The district court found the complaint inadequate because it failed to “allege facts . . . suggesting that refraining from competing in other territories . . . was contrary to [the defendants] apparent economic interests, and consequently [does] not raise an inference that [the defendants’] actions were the result of a conspiracy.”⁶ The Second Circuit reversed, finding that the district court tested the complaint by the wrong standard. It held that plaintiffs merely had to plead facts that “include conspiracy among the realm of plausible possibilities.”⁷

The Supreme Court reversed the Second Circuit. In a seven to two decision authored by Justice Souter, the Court held that “allegations of parallel conduct . . . must be placed in context that raises a suggestion of preceding agreement, not merely parallel conduct that could just as

⁴ *Id.* at 1963.

⁵ *Twombly v. Bell Atlantic Corp.*, 313 F.Supp.2d 174, 179 (S.D.N.Y. 2003).

⁶ *Id.* at 188.

⁷ *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2005).

well be independent action.”⁸ In reaching this conclusion, the Court extended the reasoning of its earlier decisions affirming directed verdicts or summary judgments in *Theatre Enterprises*⁹, *Monsanto*¹⁰, and *Matsushita*¹¹ to the pleading stage. In reaching its decision, the Court repeatedly emphasized the importance of plausibility in pleading a Section 1 claim – the need to allege enough facts to show that it there was an agreement. It found that allegations that merely suggested a conspiracy were insufficient. The Court concluded that “because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”¹²

Prior to *Twombly*, courts were often reluctant to dismiss complaints for failure to state a claim in light of the Court’s decision in *Conley v. Gibson*.¹³ In that case, Justice Black wrote that a motion to dismiss should be denied “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.”¹⁴ Courts interpreted that language as saying that any statement revealing the theory of the claim will suffice unless its

⁸ *Twombly*, 127 S.Ct. at 1966.

⁹ *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954) (an antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict).

¹⁰ *Monsanto Corp. v. Spray Rite Service Corp.* 465 U.S. 752 (1984) (proof of a Section 1 conspiracy must include evidence tending to exclude the possibility of independent action).

¹¹ *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (a plaintiff’s offer of conspiracy evidence at summary judgment must tend to rule out the possibility that the defendants were acting independently).

¹² *Twombly*, 127 S.Ct. at 1974.

¹³ *Conley v. Gibson*, 355 U.S. 41 (1957).

¹⁴ *Id.* at 45-46.

factual impossibility may be shown from the face of the pleadings. The Court in *Twombly* characterized this interpretation of *Conley*'s "no set of facts" language "as best forgotten as an incomplete, negative gloss on an accepted pleading standard."¹⁵

Yet the repudiation of *Conley* has created uncertainty in the lower courts as to the appropriate standard in the wake of *Twombly*.¹⁶ The question remains in the wake of *Twombly* whether the Court imposed a heightened standard for pleadings or whether it simply clarified the existing standard.¹⁷ In answering this question, it is important to remember that 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 independent action as it was with the existence of a conspiracy.¹⁸ The actual holding was simply that allegations of

¹⁵ *Twombly*, 127 S. Ct. at 1968.

¹⁶ 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); 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.").

¹⁷ 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).

¹⁸ *Twombly*, 127 S.Ct. 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.").

parallel conduct alone are insufficient to plead a violation of Section 1.¹⁹ That context should not be ignored by the courts interpreting *Twombly*. Indeed the Court 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.”²⁰

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.”²¹ The other observations in the opinion were merely *dictum* (or, as we were taught during the first year of law school, *obiter dictum*).

Whatever the impact of *Twombly*, it is clear that its impact is unlikely to be limited to Sherman Act, Section 1 claims or even all antitrust claims. Courts have sought to apply *Twombly* in a variety of different cases.²²

¹⁹ *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.”).

²⁰ *Id.* at 1972.

²¹ *Id.* at 1974.

²² *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).

B. *Weyerhaeuser*: Another victory for the *Brooke Group* champions?

Let me next turn to *Weyerhaeuser*. The Court took the case to address the standard for predatory bidding or purchasing claims under Section 2 of the Sherman Act.²³ The distinction between predatory conduct and good-old fashioned competition under Section 2 has been a hot issue in recent years. The conduct in *Weyerhaeuser*, while relatively unique in that it focused on buying behavior, provided an opportunity for the Court to once again weigh in on the debate.

In *Weyerhaeuser*, a large saw mill operator in the Pacific Northwest was accused of driving out its rivals by simultaneously bidding up the price of inputs (alder sawlogs) and cutting the prices on the output (alder lumber). The jury, in a special verdict, found that the plaintiff had failed to prove that alder lumber was a distinct product market from all hardwood lumber and thus *Weyerhaeuser* lacked market power in the output market. However, the jury did find that the plaintiff had established its predatory bidding claim. *Weyerhaeuser* appealed on the grounds that the district court had improperly instructed the jury that it could find liability under Section 2 if it concluded that *Weyerhaeuser* “purchased more logs than it needed, or paid a higher price for logs than necessary in order to prevent [Ross Simmons] from obtaining the logs they needed at a fair price.”²⁴

Justice Thomas, writing for a unanimous Court, held that predatory bidding claims, like predatory pricing claims, were subject to the *Brooke Group* standard.²⁵ First, the plaintiff must

²³ *Weyerhaeuser*, 127 S.Ct 1069; *see also* J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, “Monopsony and the Meaning of “Consumer Welfare” A Closer Look at *Weyerhaeuser*,” Address Before the 2006 Milton Handler Annual Antitrust Review (Dec. 7, 2006), *available at* <http://www.ftc.gov/speeches/rosch/061207miltonhandlerremarks.pdf>.

²⁴ *Weyerhaeuser*, 127 S.Ct at 1073.

²⁵ In *Brooke Group*, the Court addressed the appropriate standard for evaluating allegations of predatory pricing under § 2 of the Sherman Act. “First a plaintiff seeking to

prove that the predator's bidding on the buy side (in this case, alder hardwoods) caused the cost of the relevant output (all hardwood lumber) to rise above the revenues generated in the sale of those outputs. Only higher bidding that leads to below-cost pricing in the *relevant output* market will suffice as a basis for liability for predatory bidding. Second, the plaintiff must also prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power.

One question raised by *Weyerhaeuser* is whether it signals a broader application of *Brooke Group*. There are those who will argue that *Weyerhaeuser* signaled an intent to apply the *Brooke Group* standard broadly to a variety of pricing practices.²⁶ The argument for a broad application of *Brooke Group* is not new. For example, in *LePage's v. 3M*, 3M argued that its bundled rebate program should be evaluated under *Brooke Group* because “after *Brooke Group*, no conduct by a monopolist who sells its product above cost -- no matter how exclusionary the conduct -- can constitute monopolization in violation of §2 of the Sherman Act.”²⁷ The Third Circuit rejected that argument and the Supreme Court denied certiorari.²⁸

establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.” Second, a plaintiff must demonstrate that “the competitor had . . . a dangerous probabilit[y] of recouping its investment in below-cost prices.” *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993).

²⁶ Indeed, at least one commentator suggests that the decision should be read as an endorsement of a general standard for exclusionary conduct. See Thomas Lambert, *Weyerhaeuser and the Search for Antitrust's Holy Grail*, 2006-2007 *Cato Supreme Court Review* 277 (2007) (arguing that “*Weyerhaeuser's* reasoning implicitly rejects the sacrifice-based, consumer welfare balancing, and raising rivals' costs tests for exclusionary conduct under Sherman Act Section 2 and implicitly endorses Judge Posner's equally efficient rival approach.”).

²⁷ *LePage's Inc. v. 3M*, 324 F.3d 141, 147 (3d Cir. 2003).

²⁸ *Id.* at 152 (“The opinion does not discuss, much less adopt, the proposition that a monopolist does not violate § 2 unless it sells below cost. Thus, nothing that the Supreme Court

Another example is the Eighth Circuit’s decision *Concord Boat*.²⁹ In that case, the defendant relied on *Brooke Group* and *Matsushita* to argue that its loyalty rebates and discount programs were legal because there was no proof that they were below cost.³⁰ While the Eighth Circuit reversed the district court and overturned the jury verdict against the defendant, it is by no means clear that it adopted the defendant’s position. To be sure, the court noted that “the Supreme Court in *Brooke Group* and *Matsushita* illustrate the general rule that above cost discounting is not anticompetitive.”³¹ However it did not appear to rule out such a challenge. Nor did it hold that volume discounts should be evaluated under *Brooke Group* (indeed it is unclear if the Eighth Circuit adopted any standard).³²

A more recent example is the Ninth Circuit’s *PeaceHealth* decision, issued this past September, that addressed the appropriate standard for bundled rebates.³³ There the Ninth Circuit rejected the standard articulated by the Third Circuit in *LePage’s*.³⁴ At the same time, however, it did not fully embrace the *Brooke Group* standard. Indeed, it distinguished *Brooke*

has written since *Brooke Group* dilutes the Court’s consistent holdings that a monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.”).

²⁹ *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.).

³⁰ Brief for Petitioner-Appellant at 23, *Concord Boat Corp. v. Brunswick Corp.* Nos. 98-3732 & 98-4042 (8th Cir. March 22, 1999).

³¹ *Concord Boat*, 207 F.3d at 1061.

³² *Id.* at 1063 (“discount programs were not exclusive dealing contracts and its customers were not required either to purchase 100% from Brunswick or to refrain from purchasing from competitors in order to receive the discount.”).

³³ *Cascade Health Solutions v. PeaceHealth*, 2007 U.S. App. LEXIS 21075 (9th Cir. 2007).

³⁴ *Id.* at *40 (the court cited the ubiquity of bundling and the Supreme Court’s “solicitude for price competition” in refusing to apply *LePage’s*).

Group as involving nothing more than single product predatory pricing and read its application fairly narrowly.³⁵ Instead, the court in that bundled pricing case declared that “[t]o prove that a bundled discount was exclusionary or predatory for the purposes of a monopolization or attempted monopolization claim under § 2 of the Sherman Act, the plaintiff must establish that, 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.”³⁶ It also explicitly refused to require proof of recoupment.³⁷

Defendants will continue to urge courts to apply *Brooke Group* to any pricing practice. Indeed, this issue will almost certainly be addressed in the ongoing litigation between AMD and Intel in the Third Circuit. Yet this effort to extend *Brooke Group* has overshadowed to some extent the scholarship that has emerged that questions the assumptions that underlie the Court’s decisions in *Matsushita* and *Brooke Group*.³⁸ Several courts have expressed some unease with

³⁵ *Id.* at *36 (“[I]n neither *Brooke Group* nor *Weyerhaeuser* did the Court go so far as to hold that in every case in which a plaintiff challenges low prices as exclusionary conduct the plaintiff must prove that those prices were below cost.”).

³⁶ *Id.* at *63-64.

³⁷ *Id.* at *63-64.

³⁸ See Patrick Bolton, et. al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239 (2000); Jonathan Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 Antitrust L.J. 585 (1994); see also Testimony of Patrick Bolton, Section 2 Hearings: Predatory Pricing, Tr. at 58 (June 22, 2006) available at <http://www.ftc.gov/os/sectiontwohearings/docs/60622FTC.pdf> (“[T]here has been new scholarship started in the 1980s, rigorous economic scholarship based on rigorous game theory analysis showing exactly how predatory pricing strategy could be rational, and I think what I want to say is that where things have changed is that slowly, this literature is being brought in, is being acknowledged, and is being recognized, and so what I wanted to say is that, if anything, today, we should be less skeptical about the rationale for predatory pricing than we have been and that the Supreme Court has been in its *Brooke* decision and its *Matsushita* decision, which was based on older writing which couldn't be articulated using the tools of the modern game

the *Brooke Group* standard in light of that scholarship – although that unease has rarely led them to allow a predatory pricing claim to proceed to trial.³⁹ That may be changing. For example, *Spirit Airlines* shows that predatory pricing claims are not dead yet.⁴⁰ In that case, the Sixth Circuit reversed the district court’s grant of summary judgment for the defendant. In reaching that decision, the court clearly did not share the deep skepticism of predatory pricing schemes that has come to characterize the case law since *Matsushita* and *Brooke Group*. It will be interesting to see how this area of the law evolves in the coming years.

C. *Leegin*: A new standard for Resale Price Maintenance

Finally, let me turn to *Leegin* which was decided by a sharply divided Court.⁴¹ The allegations in the case were fairly straightforward. PSKS, a women’s apparel retailer in Texas, alleged that Leegin, a manufacturer of leather goods and accessories, had violated the antitrust laws by entering into agreements with retailers to charge only those prices fixed by Leegin. against vertical minimum price fixing agreements. Leegin had discovered that PSKS had been discounting below Leegin’s suggested prices. It asked PSKS to cease discounting and after that request was ignored Leegin stopped selling to PSKS. The jury found in favor of PSKS after the district court excluded any testimony to support Leegin’s position that the restrictions were pro-competitive. On appeal Leegin argued that the rule of reason should have applied to its vertical

theory.”).

³⁹ See, e.g., *AMR Corp.*, 335 F.3d at 1114-1115 (“Recent scholarship has challenged the notion that predatory pricing schemes are implausible and irrational. . . . Post-Chicago economists have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets. . . . Although this court approaches the matter with caution, we do not do so with the incredulity that once prevailed.”).

⁴⁰ *Spirit Airlines, Inc. v. Northwest Airlines, Inc.* 431 F.3d 917, 946 (6th Cir. 2005).

⁴¹ *Leegin*, 127 S. Ct. 2705 (2007).

price fixing agreements with retailers. The Fifth Circuit, relying on *Dr. Miles*, rejected that argument.

Prior to *Leegin*, agreements between a manufacturer and its distributors on the minimum price a distributor could charge for the manufacturer's goods were summarily condemned under the Sherman Act.⁴²

From my perspective, *Leegin* was merely the culmination of a thirty year effort by the Supreme Court to reshape the analysis of vertical restraints that began with *GTE Sylvania*. The Court has gradually retreated from *per se* rules for vertical restraints. This does not mean, however, that vertical restraints – and particularly resale price maintenance claims – are *per se* lawful. Nor does it necessarily mean that such claims need to be analyzed under a full blown rule of reason, including the need to define the relevant market and prove that market power exists in that relevant market.

Justice Souter's opinion in *California Dental* referred to 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 1.⁴³ That was fairly 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 meet for the circumstances of the case.⁴⁴ Presumably he would require that the economist's

⁴² *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁴³ *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999).

⁴⁴ *Id.* at 781.

opinion would pass muster under *Daubert*⁴⁵ and *Kumho Tire*⁴⁶, but the opinion does not even say that. And the opinion is entirely opaque about what would be “meet” 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 practice over time and that “presumptions” might be appropriate.⁴⁷ 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.⁴⁸

D. General Themes & Lessons

There a few general observations worth noting about the Court’s recent antitrust jurisprudence. First, the hallmark of the Roberts Supreme Court’s antitrust jurisprudence has

⁴⁵ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

⁴⁶ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

⁴⁷ *Leegin*, 127 S. Ct. at 2720.

⁴⁸ 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. See also In the Matter of Nine West Group, Docket No. 3937, Order Granting in Part Petition to Reopen and Modify Order, May 6, 2008 (Commission modifies 2000 Order which had prohibited Nine West from engaging in minimum resale price maintenance).

been an effort to achieve consensus by fashioning narrow decisions. Take, for example, Justice Stevens' opinion in *Illinois Tool Works*.⁴⁹ 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.]"⁵⁰ Or, consider Justice Thomas' opinion in *Weyerhaeuser*.⁵¹ 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 simply held that the standards for predatory pricing articulated in *Brooke Group* also applied to predatory bidding claims.⁵² I see *Leegin* as an outlier rather than the beginning of a new trend. The stinging dissent in *Leegin* authored by Justice Breyer and joined by three other Justices also garnered a fair amount of attention. However, as others have noted, the dissent may have been driven as much or more by the majority's treatment of *stare decisis* as it was by substantive differences over antitrust law.⁵³

Second, the Solicitor General's office has played a very important role in shaping the Court's recent antitrust jurisprudence. The Court, to an even greater degree than in the past,

⁴⁹ *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

⁵⁰ *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.").

⁵¹ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

⁵² *Id.* at 1078.

⁵³ 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).

values the current Administration’s input on antitrust. If one wants to predict where a majority of the Court will come out on an issue, the Solicitor General’s briefs are a good place to start. By my count, the Solicitor General has submitted amicus briefs in at least fourteen antitrust matters since 2002. In five cases it urged the Court to deny certiorari – and in all five instances the Supreme Court followed that advice.⁵⁴ In the five antitrust matters decided since 2004, a majority of the Court agreed with the Solicitor General’s ultimate conclusion on the outcome – if not always on the reasoning behind those conclusions.⁵⁵

Third, the Court’s recent decisions reflect some concern with the private enforcement of the antitrust laws and the ability of the courts to reach the right answer in private cases. In *Twombly*, Justice Stevens writing in dissent noted that “[t]wo practical concerns presumably explain the Court’s dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when

⁵⁴ See *Den Norske Stats Oljeselskap As v. HeereMAC v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert denied* *Statoil ASA v. HeereMAC v.o.f.* 534 U.S. 1127 (2002) (Precursor to *Empagran*); *In re Cardizem Antitrust Litigation*, 332 F.3d 886 (6th Cir. 2003), *cert denied* *Andrx Pharmaceuticals, Inc. v. Kroger*, 543 U.S. 939 (2004) (patent settlement); *LePage’s*, 324 F.3d 141, *cert. denied* 542 U.S. 95 (2004) (legality of bundled discounts under Section 2); *Monsanto Co. v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004), *cert denied* *McFarling v. Monsanto* 125 (2005) (tying/patent misuse); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied* *Federal Trade Commission v. Schering-Plough Corp.* 126 S.Ct. 2929 (2006).

⁵⁵ *Credit Suisse* marked a rare rejection by the Court of the Solicitor General’s position on an antitrust issue. The Solicitor General had urged the Court to remand the case to the district court to allow it to determine whether there was an actual conflict between the private antitrust claim and the regulatory regime. In doing so, the Solicitor General noted that the court might require the plaintiff to allege additional facts that would clarify that the allegations were not based on immune conduct. Brief of United States as Amicus Curiae Supporting Vacatur, *Credit Suisse Securities LLC v. Billing*, (Sup. Ct. No. 05-1157) (filed Jan. 2007) available at <http://www.usdoj.gov/atr/cases/f221000/221024.pdf>.

they in fact merely made similar independent decisions.”⁵⁶ The decision of the Court in *Leegin* (and *Credit Suisse*) support that observation.⁵⁷ That is not surprising. Commentators (and the federal courts) have long expressed concerns about the burdens and expense of private litigation.⁵⁸

IV. What’s Next for the Supreme Court

It looks as if the current term will pass without a single antitrust decision from the Court. That has not stopped the speculation about what might be next on the Court’s agenda. Recently I participated in a panel discussion on what might be next for the Supreme Court. One panelist suggested an ambitious antitrust agenda for the Roberts Court in the coming years – from the retirement of the *per se* rule against tying to addressing market definition in mergers.⁵⁹ There is no doubt that the Court has chipped away at the *per se* rule against tying. As recently as two

⁵⁶ *Twombly*, 127 S.Ct. at 1966-1967 and 1975.

⁵⁷ *Leegin*, 127 S. Ct. at 2723 (“In sum, it is a flawed antitrust doctrine that serves the interests of lawyers.”); *see also Credit Suisse*, 127 S. Ct. 2383.

⁵⁸ *See* II P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 332, p. 154 (1st ed. 1978) (“[C]lass action[s] . . . can consume massive judicial resources, result in enormous loss for all parties, and threaten gigantic recoveries. A class action can be the vehicle for strike suits designed to coerce a settlement.”); *see also* *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (“the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.”); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 528, n.17 (1983) (“Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”); *Franchise Realty Interstate Corp. v. Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976) (“The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case.”).

⁵⁹ Greg Werden, *Next Steps in the Evolution of Antitrust Law: What to Expect from the Roberts Court*, ABA Antitrust Spring Meeting (Mar. 2008).

years ago the Court noted that “[m]any tying arrangements, even those involving patents and requirement ties, are fully consistent with a free, competitive market.”⁶⁰ Yet the fight over *stare decisis* in *Leegin* suggests that this Court may not be ready to completely abandon the *per se* rule against tying just yet. The consensus that has been the hallmark of the Court’s recent cases may be lacking for some of the more ambitious proposals.

At that same panel I suggested the Court take a more modest approach.⁶¹ Take for example the Ninth Circuit’s decision in *linkLine*. In that case, the Ninth Circuit held that price squeezes by firms with monopoly power were held illegal under Section 2 under various circumstances.⁶² The defendant in that case argued that *Trinko* barred liability. A petition of certiorari is currently pending before the Court in that case and several amici have already weighed in urging the Court to grant the petition.⁶³ A brief filed by a group of economists and law professors have urged 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

⁶⁰ *Illinois Tool Works*, 547 U.S. at 45.

⁶¹ J. Thomas Rosch, A Modest Proposal for Modest Antitrust Decisions at the Supreme Court, ABA Antitrust Spring Meeting (Mar. 2008) available at <http://www.ftc.gov/speeches/rosch/080327modest.pdf>

⁶² *linkLine Communications, Inc. v. California*, 503 F.3d 876 (9th Cir. 2007).

⁶³ 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.”).

markets where both sell.⁶⁴ 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 law in the EC, which the economists roundly condemn.⁶⁵

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 *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.⁶⁶

I would not be surprised if the Court granted certiorari if the Solicitor General recommends it (because, as I say, the Court almost always follows the Solicitor General's advice).⁶⁷ However, I would urge the Court only to resolve the narrow question whether a regulated firm with monopoly power can lawfully engage in a predatory price squeeze. That is

⁶⁴ 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).

⁶⁵ 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.’”).

⁶⁶ *Trinko*, 540 U.S. at 412.

⁶⁷ 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>.

the question at issue; that is the narrow question posed by the Ninth Circuit's decision, 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.

V. Conclusion

The Supreme Court has an obvious influence on the application of the antitrust laws, but it is important that influence not be overstated. The Court has rarely granted certiorari in antitrust cases over the last thirty years and it remains to be seen whether the recent spurt of cases is a renewed focus on antitrust or simply a statistical blip.⁶⁸ As a result, there are only a handful of Supreme Court decisions that address Section 2 of the Sherman Act and it is unclear whether even those decisions have general application. That brings me to the second reason for why I believe there is still life in Section 2 – the lower federal appellate courts.

The lack of clear guidance from the Supreme Court and the common law nature of the Sherman Act means that the appellate courts play an important role in shaping the contours of Section 2. In the last ten years, courts around the country have issued a number of important decisions that have expanded the scope of liability under Section 2 and have often read Supreme Court precedent fairly narrowly. As long as that remains true, times will continue to be exciting

⁶⁸ The Court has denied cert in several recent cases that provided an opportunity for the Court to weigh in on several important Section 2 issues. *See, e.g.*, *Dentsply Int'l, Inc. v. United States*, 126 S. Ct. 1023 (2006); *3M v. LePage's Inc.*, 124 S. Ct. 2932 (2003); *Microsoft Corp. v. United States*, 534 U.S. 952 (2001); *Concord Boat Corp. v. Brunswick Corp.* 531 U.S. 979 (2000). The true test may be in the coming years as there are a number of interesting Section 2 cases winding their way through the appellate courts. *See, e.g.*, *Broadcom, Cascade Health Solutions v. PeaceHealth*, 2007 U.S. App. LEXIS 21075, * 40 (9th Cir. 2007); *Rambus v. FTC*, (D.C. Cir.); *linkLine Communications, Inc. v. California, Inc.*, 2007 U.S. App. LEXIS 21719 (9th Cir. 2007).

for antitrust practitioners regardless of what the Supreme Court does.