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 Supreme Court are likely to be

[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* decision[15] was an outlier by describing it as marking the outer boundary of the court's Section 2 antitrust jurisprudence. And, the opinion cast

---

[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.").

[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 122-1200 Tc0t9FnT7600 0.0000 TD(Rick Rule,

[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

[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.

[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 unregulat

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

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

---

[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).

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

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

[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).