Federal Trade Commission

A New Direction for Antitrust at the Supreme Court?

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The Supreme Court may issue as many as five antitrust decisions this term – an unprecedented number in recent years. To give one a sense a perspective, in the fifteen years prior to the 2003-2004 term the Court averaged less than a single antitrust decision a year. At the conclusion of the current term the Court may have ten antitrust decisions to its credit since the 2003-2004 term.[2]

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[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I would like to express my gratitude to Kyle Andeer, my Attorney Advisor, for his invaluable contributions to this paper.

[2] The Court decided *Trinko* and *Empagran* during the 2003-2004. *See* Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004). The Court did not decide any antitrust cases in its 2004-2005 term but it issued three opinions on antitrust during the 2005-2006 term. *See* Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006); Texaco v. Fouad N. Dagher, 126 S. Ct. 1276 (2006); Illinois Took Works Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006). The current term is shaping up to be one of the most active in the last three decades. Thus far in the 2006-2007 term the Supreme Court has issued one opinion, heard argument in one other antitrust matter, granted cert on two others (oral argument is scheduled for later this month), and has yet to decide whether to grant cert on one other case. *See* Weyerhaeuser v. Ross Simmons, 549 U.S. ___ (2007); Bell Atlantic v. Twombly, 425 F.3d 99 (2d Cir. 2005), *cert granted* 126 S.Ct. 2965 (2006); PSKS v. Leegin Creative Leather Services, 171 Fed. Appx 464 (5th Cir. 2006), *cert granted* 127 S.Ct. 763 (2006); Billing v. Credit Suisse First Boston, Ltd., 426 F.3d 130 (2d Cir. 2005), *cert granted* 126 S.Ct. 2916 (2006); In re Tamoxifen Antitrust Litigation, 466 F.3d 187 (2d Cir. 2006).

antitrust decisions. In *Dagher*, the plaintiffs challenged the pricing practice of an otherwise legitimate joint venture as a *per se* violation of the Sherman Act. Texaco and Shell had formed a joint venture that combined their retailing and refining assets on the West Coast. The joint venture had a unitary pricing scheme, but it sold its products under both the Shell and Texaco brand names. Justice Thomas, writing for a unanimous Court, held that the pricing practices of an otherwise legitimate joint venture should be analyzed under the rule of reason.

The Court next turned its attention to the Robinson-Patman Act – the perpetual whipping boy of antitrust.[5] The Court's decision in *Volvo Trucks* toughened the competitive injury requirement in secondary line cases. Justice Ginsburg, joined by six of her fellow justices, held that the plaintiff must show that it actually competed with a favored dealer. The Court refused to draw an inference of competitive injury from evidence that other dealers had received greater discounts when pursuing sales.

In the last of the three cases – *Illinois Tool Works v. Independent Ink* – the Court revisited the presumption that a patent confers market power in tying cases. Justice Stevens, writing for a unanimous Court, held that a patent does not necessarily confer market power upon a patentee –

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[5] The Antitrust Modernization Committee may recommend that Congress repeal the Robinson-Patman Act. *See* Antitrust Modernization Commission, Tentative Recommendations, at p.19 (Jan. 11, 2007), *available at* http://www.amc.gov/pdf/meetings/list_of_recommendations_jan_11v3.pdf; *see also* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Statement before the Antitrust Modernization Commission (Mar. 21, 2006) ("The Commission should seriously consider recommending the repeal of the Robinson-Patman Act, the overall purpose of which stands in contrast to the recognized goals of modern antitrust law - the protection and enhancement of consumer welfare"); Thomas Barnett, Assistant Attorney General, Testimony before the Antitrust Modernization Commission, Tr. at 56 (Mar. 21, 2006) ("I don't believe the administration has formed a formal position on that, but I'm not in a position to argue with or disagree with the analysis set forth by my illustrious colleague [Chairman Majoras]") http://www.amc.gov/commission_hearings/pdf/060321_FTC_DoJ_Transcript_reform.pdf

that the plaintiff must prove that the defendant has market power in the tying product.

Last week, the Court issued its decision in *Weyerhaeuser* – the first case of the current term touching on antitrust.[6] That case addressed the appropriate standard for evaluating "predatory buying"claims under Section 2 of the Sherman Act.[7] The plaintiff in that case – a saw mill in the Pacific Northwest – alleged that Weyerhaeuser had purposely overpaid for inputs (alder sawlogs) and bought more than it needed in an effort to increase its rivals' costs and drive them out of business. The Court unanimously rejected the standard adopted by the lower courts and held that the plaintiffs' predatory bidding claims were subject to a test modeled on *Brooke Group*.[8] First, the plaintiff must 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. This raises an interesting question that was not explicitly addressed by the Court; what is the output benchmark. Here the relevant input market was alder hardwood; what was the relevant

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[6] *See Weyerhaeuse*r, 549 U.S. ___ (2007).

[7] I have previously discussed my thoughts on the appropriate standard for evaluating buy-side conduct. *See* 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.

[8] 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 establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below and 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).

[9] Oral argument in PSKS v. Leegin Creative Leather Services is scheduled for March 26, 2007 and Credit Suisse v. Billing will be heard on March 27, 2007. *See* http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMarch2007.pdf

[10] *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (a

currently pending before the Court is *Credit Suisse*. It involves two private class actions, in which respondents allege antitrust violations in the course of initial public offerings (IPOs) of securities, including allegations of illegal tie-ins and "laddering." The Second Circuit ruled that, on a motion to dismiss, the district court had erred in ruling that all of the alleged violations were impliedly immune from the antitrust laws because of IPO regulation by the Securities and Exchange Commission (SEC).

There is a chance that the Court will add a fifth antitrust matter to its docket this year. A petition for a writ of certiorari is pending in *In re Tamoxifen Antitrust Litigation.* This is the third case brought to the Court's doorstep that challenges the legality of patent litigation settlements in the pharmaceutical industry involving so-called "reverse payments."

II.

If cert is granted in *In re Tamoxifen*, the Court will have heard argument in ten antitrust matters in the last three years – a remarkable record of activity. In those cases, the Court addressed a broad range of issues – from vertical restraints, such as minimum resale price maintenance and tying claims, to horizontal restraints, such as joint venture activity, to single firm conduct. The breadth of issues addressed by these opinions has provided antitrust scholars plenty of grist to mull over.

I have a few observations to share. First, it is obvious that the current Justices are comfortable with antitrust. All the current justices have some antitrust experience, and a few, like Justices Stevens and Breyer, have a documented interest in the subject. Justice Stevens has played a significant role in the Court's antitrust jurisprudence with over two dozen antitrust

[11] *See, e.g., Volvo Trucks*, 546 U.S. 164 (2006) (dissent);Brown v. Pro Football, 518 U.S. 231 (1996) (dissent); California v. American Stores 495 U.S. 271 (1990); Cargill v. Monfort of Colorado, 479 U.S. 104 (1986) (dissent); Aspen Skiing v. Aspen Highlands Skiing, 472 U.S. 585 (1985); Jefferson Parish v. Hyde, 466 U.S. 2 (1984); Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); BMI v. Columbia Broadcasting, 441 U.S. 1 (1979) (dissent). Prior to joining the judiciary, Justice Stevens was a practicing antitrust attorney in Chicago, taught antitrust law at both University of Chicago and Northwestern, and served on government panels studying antitrust law.

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to the members of the Court – and their clerks. It raises difficult questions that have a profound impact on the nation's economy. Few areas of the law attract academics from so many disciplines – law, economics, business strategy – all have something to add to the debate.

Third, the common law nature of antitrust lends itself to reevaluation and reconsideration over time.[15] The drafters of the major antitrust statutes – the Sherman and Clayton Acts – left them vague, allowing the courts to give them substantive meaning. The Court's relative silence on antitrust in the 1990s led to a backlog. There were a number of issues that were ripe for reconsideration – among them the presumption that patents confer market power and the legality of minimum resale price maintenance practices.

Fourth, the explosion of private antitrust litigation – particularly class action litigation – in recent years has attracted a sophisticated and well funded plaintiffs bar. The combination of deep pocketed defendants and the prospect of treble damages have led some plaintiff attorneys to test the outer boundaries of the law. One could read the Court's decisions in *Trinko*, *Empagran*, *Dagher*, and *Twombly* as an effort to define those boundaries more clearly.

One last observation I would make is on the role of the Solicitor General's office in the development of the Court's antitrust jurisprudence. The Court, to an even greater degree than in the past, 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 cert – and in all five instances the

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[15] *See State Oil*, 522 U.S. at 21 ("The general assumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common law tradition.").

[16] *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 (6 th 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 (11 th Cir. 2005), *cert. denied* Federal Trade Commission v. Schering-Plough Corp. 126 S.Ct. 2929 (2006).

[17] *See* United States v. Von's Grocery Store, 384 U.S. 270, 301 (1966) (In his dissent, Justice Stewart criticized the majority's assertion that its work was consistent with the

Third, the interpretation of the competitive injury requirement in Robinson-Patman Act cases continues to divide the circuit courts. Some courts require a showing that there is a showing of injury to competition, others have held that evidence of injury to a competitor may be enough.[22] The Court in *Volvo Trucks* stated that it "would resist interpretation geared more to the protection of existing *competitorin*

[22] 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).

[23] *Volvo Trucks*, 546 U.S. at __.

[24] A decision endorsing *Boise Cascade* – and rejecting *Chroma Lighting* – might overrule the *Morton Salt* presumption as well.

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Justice Thomas – one of the court's "strict constructionists" – dissented from the majority's opinion.

Fourth, a hotly debated issue that the Court should take on at some point is the legal standard for evaluating a firm's refusal to license intellectual property under Section 2. The split between the Ninth Circuit's decision in *Kodak* and the Federal Circuit's decision in the *Xerox* case continues to fester.[25] *Kodak* prohibits a monopolist from refusing to deal in order to create or maintain a monopoly absent a legitimate business justification. The case is criticized because the Ninth Circuit rejected Kodak's proffered business justification on the grounds that it was largely pretextual. The Federal Circuit came to a very different conclusion several years later. It concluded that a firm could refuse to license its intellectual property – that its refusal was immunized from antitrust scrutiny.[26] The Court has remained silent on this issue. Some have argued that after *Trinko* there is no liability for unilateral refusals to license patents.

It remains to be seen whether the Court will tackle some of these controversial issues dividing the antitrust bar. The recent cases were decided on fairly narrow grounds and with one or two exceptions those decisions were not all that controversial. Some have speculated that the addition of Chief Justice Roberts and Justice Alito may lead the Court to take on some of the

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[25] *See*, In re Independent Service Organizations Antitrust Litigation ("Xerox"), 203 F.3d 1322 (Fed. Cir. 2000); Intel v. Intergraph, 195 F.3d 1346 (Fed. Cir. 1999); Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997). Chief Justice John Roberts represented the plaintiffs on appeal in both the Xerox case and the Intel case when he was in private practice.

[26] The opinion suggested that a patent holder would be subject to antitrust liability under only three circumstances: (1) where it had fraudulently obtained the patent; (2) where it had fraudulently engaged in infringement litigation; and (3) where it had attempted to enlarge the scope of its patent by, for example, tying the sale of the patented good to the sale of an unpatented good. *Xerox,* 203 F.3d at 1327.

more controversial antitrust issues. I think that remains to be seen. The Court's dynamics have not shifted all that greatly – at least in terms of antitrust. The Court may wait until Justice Stevens retires from the Court to take on some of these issues. He has staked out his position on some of the most controversial issues – tying and refusals to deal for example – and his fellow justices may not be willing to take him on directly.