Federal Trade Commission

The State of Antitrust in 2008

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The Roberts Court has quickly left its mark on

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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 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 Took 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

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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).

[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.

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

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[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.").

[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 leave

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

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[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]

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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*

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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

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[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

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. . .

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

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[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*. The Court could have fashioned a brand new rule for assessing the

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[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).

[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 (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) (le

[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, I

for antitrust practitioners regardless of what the Supreme Court does.