

Antitrust in the Supreme Court: What Lies Ahead

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Over its last few terms, the Supreme Court, in decisions such as *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹ and *Illinois Tool Works Inc. v. Independent Ink, Inc.*,² has cleaned up much of the detritus of an earlier, less economically enlightened era of antitrust jurisprudence. At this point, I believe that the Court should, and perhaps will, focus on issues of more recent vintage.

To begin with, the Court should address bundled pricing. *LePage's Inc. v. 3M Co.*³ was an analytic disaster. The problem was not that the court of appeals adopted the wrong test for appraising whether bundled pricing by a firm with monopoly power violated Section 2 of the Sherman Act, but that it found liability without articulating any meaningful test.⁴ It permitted a jury to deem pricing by a firm with monopoly power to be anticompetitive, even if price exceeded any relevant definition of cost, simply because such pricing injured a competitor.⁵ This focus on harm to a competitor rather than harm to competition is anathema to modern antitrust thinking. By effectively permitting a jury to condemn almost any bundled discounting by a firm with—or with a dangerous probability of obtaining—monopoly power, the decision fails to provide firms with meaningful guidance and it deters procompetitive discounting. Moreover, it creates a price umbrella under which less efficient firms can operate and thereby increases prices to the detriment of consumers.

It is not surprising that the decision had virtually no defenders. What was somewhat surprising was that the Federal Trade Commission and the Department of Justice, while acknowledging that the decision was wrong, requested that the Supreme Court not review it because more time was required for the lower courts and the academic literature to consider what test was best in such cases.⁶

The issue has percolated long enough. Bundled pricing has been addressed extensively in the academic literature, it was the object of one of the major recommendations of the Antitrust Modernization Commission, and it has been considered by several lower courts.⁷ With the Ninth Circuit's decision in *Cascade Health Solutions v. PeaceHealth*,⁸ we now have a stark conflict between the Third and Ninth Circuits. One can quarrel with whether the Ninth Circuit got it precisely

¹ 127 S. Ct. 2705 (2007).

² 547 U.S. 28 (2006).

³ 324 F.3d 141 (3d Cir. 2003) (en banc).

⁴ *Id.*

⁵ *See id.* at 156–57.

⁶ Brief for the United States as Amicus Curiae, *3M Co. v. LePage's Inc.*, No. 02-1865 (U.S. May 28, 2004), available at <http://www.usdoj.gov/atr/cases/f203900/203900.pdf>.

⁷ *E.g.*, Daniel Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. CHI. L. REV. 243 (2005); ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 94–100 (2007), available at <http://www.amc.gov>.

⁸ 502 F.3d 895 (9th Cir. 2007).

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correct in *Cascade*—e.g., whether recoupment should be required or whether average variable cost should always be the controlling cost standard. The key point, however is that *Cascade* adopted a coherent test with which dominant firms can endeavor to comply and pursuant to which competition, rather than a disgruntled competitor, is given priority.⁹ The Supreme Court should make clear that *LePage's* non-test is simply wrong. Regardless of whether it fully embraces the test set forth in *Cascade*, adopts some variation of it, or simply acknowledges that the *Cascade* test is one acceptable standard, the Court should make clear that bundled pricing cannot give rise to a Section 2 violation absent some form of below-cost pricing under some type of price attribution rule.

On a related note, the Court should consider the price-squeeze issues raised by the Ninth Circuit's recent decision in *linkLine Communications, Inc. v. SBC California, Inc.*¹⁰ *linkLine* would punish a dominant firm whose above-cost pricing to a downstream competitor makes it difficult for that competitor to compete effectively in the downstream market. It is difficult to square *linkLine* with decisions, such as *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*¹¹ and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,¹² which are solicitous of aggressive pricing and condemn it only when below-cost pricing results. It is not obvious why a different test should apply simply because the defendant is a supplier to the plaintiff and thereby determines a portion of the plaintiff's costs. It is also difficult to square *linkLine* with *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,¹³ in that it appears that *linkLine* would find a price squeeze violation even where, under *Trinko*, the dominant firm could simply refuse to sell to the competitor at all. Such a result is puzzling, and the Court should resolve this apparent conflict. *linkLine* would also give the Court an opportunity to clarify the impact of a regulatory scheme on the antitrust analysis, a subject about which *Trinko* left some uncertainty and *Credit Suisse Securities (USA) LLC v. Billing*¹⁴ raised some eyebrows.

The Supreme Court also should weigh in on patent settlements. As it stands, we have a split not only among the circuits, but between the federal enforcement agencies as well, regarding the test that should be applied to so-called reverse payment settlements—i.e., settlements of patent infringement suits in which the party challenging the patent receives a substantial payment in exchange for agreeing to remain out of the market for some period of time. The Sixth Circuit condemned one such payment under a per se rule in *Louisiana Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (In re Cardizem CD Antitrust Litigation)*,¹⁵ whereas the Eleventh Circuit applied the rule of reason to such a settlement in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*¹⁶ and upheld another alleged reverse payment settlement in *Schering-Plough Corp. v. FTC.*¹⁷ The Second Circuit went even further in *Joblove v. Barr Labs, Inc. (In re Tamoxifen Citrate Antitrust Litigation)*,¹⁸ effectively holding that any settlement that was not more restrictive than the original

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⁹ See *id.* at 914–20.

¹⁰ 503 F.3d 876 (9th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 17, 2007) (No. 07-512).

¹¹ 509 U.S. 209 (1993).

¹² 127 S. Ct. 1069 (2007).

¹³ 540 U.S. 398 (2004).

¹⁴ 127 S. Ct. 2383 (2007).

¹⁵ 332 F.3d 896, 900 (6th Cir. 2003).

¹⁶ 344 F.3d 1294, 1305 (11th Cir. 2003).

¹⁷ 402 F.3d 1056, 1065–76 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2929 (2006).

¹⁸ 466 F.3d 187, 212–13 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 3001 (2007).

patent could not be anticompetitive (apparently without regard to whether the original patent would have been upheld). Meanwhile, in a rare show of discord between our two federal enforcement agencies, the Department of Justice, while acknowledging that some patent settlements could raise antitrust concerns, pointedly failed to support the FTC's petition for a writ of certiorari in *Schering-Plough*, underscoring the divergent ways that these agencies evaluate reverse payment settlements.

An appropriate reverse payment case would permit the Court to address several key issues that arise in such cases, including (1) whether a settlement that is not more restrictive than the original patent is per se legal, (2) whether the answer to the foregoing question depends upon whether the basis for the patent litigation is noninfringement or invalidity of the patent, (3) whether reverse payment settlements are per se legal unless the pursuit of the patent infringement suit (or defense of the patent in a declaratory judgment action) would be objectively baseless, and (4) assuming that per se legality does not apply, whether a rule of per se illegality applies if consideration (other than an effective reduction of the patent term) is provided to the patent challenger to remain out of the market for some period.

[T]he Court should address whether the overlap between a factual claim in support of class certification and a factual claim on the merits bars the court from appraising the claim on the class certification motion.

These issues require answers. The split among the courts and between the agencies regarding the applicable standard creates risk for patent holders (and challengers) that undermine the incentives that the patent system is designed to provide. Whatever the ultimate test, patent holders and challengers will benefit from clarity in this now particularly muddy area.

Finally, unless the courts of appeals sort out the conflict that remains among them, I think the Supreme Court should address a procedural issue applicable to federal cases generally but of particular significance in antitrust cases: the standard to be applied when appraising a motion for class certification. More specifically, the Court should address whether the overlap between a factual claim in support of class certification and a factual claim on the merits bars the court from appraising the claim on the class certification motion. By invoking the mantra that "the merits are not in issue at the class certification stage," many courts have created a virtual immunity from review for any claim at the class certification stage that might be an issue on the merits. For example, if a plaintiff attempted to show that common issues predominated by contending that there was a national market and thus the same market definition and monopoly power issues applied to all class members, some courts applying the standard would refrain from considering an argument that numerous local geographic markets were involved and thus there were actually individual rather than common issues regarding market definition and monopoly power. They would decline to consider the defendant's argument, no matter how frivolous the argument in favor of a national market appeared to be, because market definition is part of the merits analysis.

This approach finds support in neither logic nor Supreme Court precedent. As several appellate courts have held in recent years, both sound judicial management and the language of the Federal Rules of Civil Procedure require that a court make a finding about whether the "predominance" test is satisfied, and the court thus should not blindly accept a plaintiff's argument merely because it happens to overlap with a merits issue.¹⁹ Several of those courts have convincingly demonstrated that the Supreme Court's admonition regarding the consideration of the merits at the class certification stage prohibits only the consideration of merits issues that are not relevant to the specific issues that Rule 23 requires courts to consider at that stage—e.g., predominance.²⁰

¹⁹ *E.g.*, *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

²⁰ *E.g.*, *id.* at 41.

Unfortunately, while a wave of rationality has swept through the courts on this issue in the last few years, there are some apparent holdouts. For example, the First Circuit, in *Waste Management Holdings, Inc. v. Mowbray*,²¹ interpreted relevant Supreme Court precedent as prohibiting a district court from inquiring at the class certification stage into a merits-related issue, as the Ninth Circuit did in *Dukes v. Wal-Mart, Inc.*²² It may be that all the circuits will fall in line on this issue over the next year or so, but if they do not, the Supreme Court should take a case to make clear that a court may not duck its responsibilities under Rule 23 just because a plaintiff invokes the word “merits.”

Over the last few years, the Supreme Court has addressed several of the vestiges of earlier eras of antitrust, and in doing so it enhanced the coherency of antitrust law. One hopes that the Court’s interest in antitrust issues will persist and that it will address some or all of the issues discussed above. ●

²¹ 208 F.3d 288 (1st Cir. 2000).

²² 474 F.3d 1214, 1227 (9th Cir. 2007).