

# What *Should* Be Next at the Supreme Court?

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In asking “What’s next at the Supreme Court,” we can focus on what we think will be next or on what should be next. This note addresses a few topics where the law is unclear, and where illumination from on high could be beneficial, namely: (1) the per se rule for tying; (2) the appropriate standard for bundling; (3) standards for class certification; and (4) class action waivers and other provisions ancillary to arbitration clauses. The degree to which the Court’s guidance would be helpful, however, is somewhat unclear given the apparently hostile approach to antitrust enforcement that seems to emanate from some of the Court’s more recent decisions. Consumers might be better off if some of these important unresolved issues remain open a bit longer.

## Tying

The per se rule for tying, if it even exists at all today, is clearly doomed. In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,<sup>1</sup> the Supreme Court pointedly recognized that tying arrangements are not invariably anticompetitive—as per se analysis requires. The Court also noted the potential efficiencies associated with tying, and acknowledged expressly that, “over the years . . . this Court’s strong disapproval of tying arrangements has substantially diminished.”<sup>2</sup> Yet notwithstanding *Illinois Tool*, courts still refer to tying as, at least potentially, a per se offense.<sup>3</sup> And many cases are progressing through the courts on that basis. In the wake of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>4</sup> tying is the only vertical restraint in which per se analysis has not been eliminated conclusively. It is a virtual certainty that the Court will finally inter the per se tying rule at the next opportunity, and doing so soon should be regarded as among the Court’s highest antitrust priorities.

## Bundling

There is now a sharp conflict in the circuits as to the appropriate standard for evaluating bundled pricing arrangements under Section 2 of the Sherman Act. The Third Circuit’s 2003 decision in *LePage’s, Inc. v. 3M*,<sup>5</sup> created significant controversy by apparently holding that a multi-product firm’s bundled pricing may be found to violate Section 2 on the basis of nothing more than an adverse impact on single-product rivals. Certiorari was sought in that case, but the Solicitor General (following Supreme Court invitation of his views) counseled that the issue had not been developed sufficiently in the lower courts, and the writ was denied.<sup>6</sup> Since then, there have been several cases decided in the district courts—with conflicting results.<sup>7</sup>

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<sup>1</sup> 547 U.S. 28, 33–37 (2006).

<sup>2</sup> *Id.* at 35.

<sup>3</sup> See, e.g., *Park v. Thomson Corp.*, 2007-1 Trade Cas. (CCH) ¶ 75,552 (S.D.N.Y. 2007).

<sup>4</sup> 127 S. Ct. 2705 (2007).

<sup>5</sup> 324 F.3d 141 (3d Cir. 2003) (en banc).

<sup>6</sup> *3M Co. v. LePage’s, Inc.*, 542 U.S. 953 (2004).

<sup>7</sup> See Jonathan M. Jacobson, *Exploring the Antitrust Modernization Commission’s Proposed Test for Bundled Pricing*, ANTITRUST, Summer 2007, at 23, 23 n.2 (citing cases).

The most significant recent development was the Ninth Circuit's September 2007 decision in *Cascade Health Solutions v. PeaceHealth*.<sup>8</sup> The *PeaceHealth* court expressly rejected *LePage's* and adopted instead a variant of the test proposed by the Antitrust Modernization Commission, Professor Herbert Hovenkamp, and others. Under the *PeaceHealth* court's standard, bundled pricing may violate Section 2 if it has the requisite adverse effect on competition and if, "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."<sup>9</sup>

In analyzing the appropriate test for bundling arrangements, there are basically four approaches (although each has a multiplicity of nuances and variants). One is the *LePage's* approach. Another is a simple rule of reason, or consumer welfare effects, analysis. A third couples rule of reason analysis with a discount attribution screen, as proposed by numerous commentators and adopted in *PeaceHealth*. A fourth approach, urged largely by telecom firms, is one that would condemn bundled pricing only in circumstances where the total price charged for all the products in the bundle is below the incremental cost of the total bundle.<sup>10</sup>

The bundling issue is one that arises constantly in counseling clients, and the uncertainty in the law arising out of the *LePage's-PeaceHealth* conflict makes counseling—and resulting business behavior—quite difficult. The issue, moreover, has now been the subject of extensive analysis—several cases, numerous articles, hearings before the Antitrust Modernization Commission, and hearings before the Federal Trade Commission and Department of Justice. There is no longer any reason to deny certiorari if and when an appropriate case comes along.

### Class Certification

There are important intercircuit conflicts on a number of questions that arise in virtually every class certification antitrust case. One is the extent to which the *Eisen* case<sup>11</sup> requires the court to accept the complaint's allegations as true in making the class certification decision. *Eisen* established that a court considering class certification may not "conduct a preliminary inquiry into the merits of a suit."<sup>12</sup> Some courts have interpreted that mandate broadly, effectively treating a motion for class certification like a motion to dismiss under Rule 12(b)(6). Other courts, including most of the more recent cases, have held otherwise, ruling that a plaintiff seeking class certification must prove, with evidence, any contested elements under Rule 23, whether or not those elements overlap with an issue going to the merits—and that *Eisen* means only that a court should not evaluate the merits to determine whether a case is "worthy" of certification.<sup>13</sup> But cases adhering to at least some version of the older view persist,<sup>14</sup> and the conflict is a serious practical problem.

<sup>8</sup> 503 F.3d 895 (9th Cir. 2007).

<sup>9</sup> *Id.* at 920.

<sup>10</sup> A number of commentators, including this writer, have been sharply critical of this total cost versus total revenues approach because it applies the same test that would have been applicable in a predatory pricing challenge whether multiple products were bundled or not and, thus, makes the bundling aspect of the conduct irrelevant.

<sup>11</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

<sup>12</sup> *Id.* at 177.

<sup>13</sup> *See, e.g., In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

<sup>14</sup> *See, e.g., Nat'l Fed'n of Blind v. Target Corp.*, No. L 06-1802, 2007 WL 2846462 (N.D. Cal. Oct. 2. 2007).

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Another important circuit conflict has arisen just recently from the September 2007 decision of the Second Circuit in *Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc.*<sup>15</sup> Prior to *Cordes*, the courts had held uniformly that, because impact (or fact of injury) is an element of every private cause of action under the antitrust laws, a class action could not be certified if impact could not be established through common proof.<sup>16</sup> *Cordes*, however, says that common impact is just one component of the predominance inquiry under Rule 23(b)(3), and a class can be certified if common issues predominate *even if common impact cannot be shown*. Perhaps that might be true in theory, in cases with a class that barely passes the numerosity requirement; but in a typical antitrust case, with thousands of putative class members, the concept borders on the ridiculous. *Cordes* conflicts in this respect with all prior circuit court decisions to address the issue, and is already beginning to work mischief in cases pending in the Second Circuit. Until the error is corrected, one can only hope that district courts will recognize that finding predominance in an antitrust case without common impact is nothing more than a theoretical possibility with no counterpart in the real world.

*Cordes* also holds that it may be appropriate for a district court, in the exercise of its discretion, to certify an “issue class” under Rule 23(c)(4)—i.e., the issue whether there was an antitrust violation—even if common issues do not predominate and neither a damages class nor an equitable relief class can be certified under Rules 23(b)(3) and 23(b)(2). That holding, the court recognized, conflicts with the Fifth Circuit’s contrary decision in *Castano v. American Tobacco Co.*<sup>17</sup> It seems hard to imagine how certifying an issue class in an antitrust case could accomplish any good. Again, the *Cordes* decision is already causing mischief in the lower courts.

The Supreme Court has addressed general class certification standards infrequently. The Court has never analyzed certification in antitrust contexts in any detail. The result is that there are now serious conflicts in the lower courts on issues that arise in almost every case. It now seems time for the Supreme Court to step in.

### Ancillary Arbitration Clause Provisions

The enforceability of arbitration clauses in antitrust cases has been settled for more than twenty years. More recently, provisions ancillary to arbitration in standardized agreements—such as class action waivers—have come up for review, with occasionally conflicting results. Last year, in *Kristian v. Comcast Corp.*,<sup>18</sup> the First Circuit struck down a consumer contract provision precluding class actions (or class arbitrations) and the trebling of damages. The court reasoned that both provisions interfered unduly with the plaintiffs’ ability to vindicate their rights under the Sherman Act. In contrast, the Fourth Circuit, in *In re Cotton Yarn Antitrust Litigation*,<sup>19</sup> recently sustained a clause with a one-year statute of limitations that, at least potentially, could curb the period of recoverable damages significantly. And numerous courts of appeals have upheld class actions waivers in other statutory contexts.<sup>20</sup> At some point, the enforceability of these ancillary provisions will have to be taken up by the Court.

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<sup>15</sup> 502 F.3d 91 (2d Cir. 2007).

<sup>16</sup> See, e.g., *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005).

<sup>17</sup> 84 F.3d 734, 745 n.21 (5th Cir. 1996).

<sup>18</sup> 446 F.3d 25 (1st Cir. 2006).

<sup>19</sup> No. 05-2392, 2007 WL 2965586 (4th Cir. Oct. 12, 2007).

<sup>20</sup> *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 819 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000).

### Latest Portents—Decisions of the October Term 2006

The problem with suggesting types of cases the Supreme Court should take is that they might agree—and then get things deeply wrong. The Court's most recent term included decisions that are, at the very least, debatable, and that continue what might be viewed as disturbing trend of hostility to antitrust enforcement. Continuation (or, worse, acceleration) of that trend would bode ill for antitrust enforcement and, accordingly, for U.S. consumers.

Some of the Court's recent decisions were entirely uncontroversial. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,<sup>21</sup> like *Dagher* and *Independent Ink* the year before, was easy and plainly correct. *Twombly* was much more debatable in terms of its reasoning, but the Second Circuit's holding that conscious parallelism was sufficient to defeat a motion to dismiss obviously had to be reversed. The overruling of *Conley v. Gibson*<sup>22</sup> was a good deal more surprising, but the Court's articulation of a plausibility standard makes a lot of sense. The effects of *Twombly* will take many years to play out, but a reasonable guess is that the decision's effects will be incremental, not radical, and that the principal impact will be the positive one of weeding out cases that do not belong in court in any event. The one really disturbing aspect of *Twombly*, echoed and amplified in *Credit Suisse Securities (USA) LLC v. Billing*,<sup>23</sup> is the implication that antitrust litigation itself is bad, a point addressed below.

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The decision that caught the most attention and that has generated the most controversy to date is, of course, *Leegin*.<sup>24</sup> It is contrary to normal principles of statutory interpretation for the Court to discard a construction embraced by dozens of its own precedents in a context where Congress has clearly endorsed and relied on the Court's prior precedent for decades. But it is equally true that the underpinnings of the *Dr. Miles* rule had eroded dramatically over the years through the *Colgate* doctrine, especially as revived in *Monsanto*, and through the limitation in *Sharp* of per se condemnation only to agreements on specific prices or price levels.<sup>25</sup> And as the Ping amicus brief pointed out so effectively,<sup>26</sup> the *Dr. Miles* rule had led to the creation of vast and inefficient compliance structures in many companies. My own preference in *Leegin* would have been for a decision that applied the characterization analysis of *Broadcast Music, Inc. v. CBS, Inc.*,<sup>27</sup> to vertical price agreements so that only "naked" resale price restraints with no plausible efficiency justifications would be condemned per se. But that point was not argued, and the decision came out otherwise. In any event, it is hard to say that *Leegin* alone signals the end of effective antitrust enforcement. Many will applaud its outcome, and the decision's long-term impact on consumer welfare will not be known for many years.

The truly problematic decision is *Billing*. The decision cut back sharply, to the point of practical overruling, decades of implied immunity cases—allowing immunity to be implied on the basis of *potential inconsistency* (perhaps from no more than the presence of regulation) rather than the

<sup>21</sup> 127 S. Ct. 1069 (2007).

<sup>22</sup> 355 U.S. 41 (1957).

<sup>23</sup> 127 S. Ct. 2383 (2007).

<sup>24</sup> 127 S. Ct. 2705.

<sup>25</sup> See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

<sup>26</sup> Brief of Ping, Inc. as Amicus Curiae in Support of Petitioner, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480 (Jan. 22, 2007), available at [http://www.abanet.org/antitrust/at-conversation/pdf/Leegin\\_PING\\_Amicus.pdf](http://www.abanet.org/antitrust/at-conversation/pdf/Leegin_PING_Amicus.pdf).

<sup>27</sup> 441 U.S. 1 (1979).

“plain repugnancy” the Court’s prior (and often unanimous) decisions had required.<sup>28</sup> Three years earlier, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,<sup>29</sup> the Court had suggested that regulation was preferable to antitrust in determining market outcomes:

Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. . . . One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. . . . The regulatory framework that exists in this case demonstrates how, in certain circumstances, “regulation significantly diminishes the likelihood of major antitrust harm.”<sup>30</sup>

The most troubling aspect of *Billing* is that it makes clear that *Trinko*’s analysis was no aberration. Thus, in *Billing*, the Court said that, even though both the securities laws and the antitrust laws prohibit the challenged conduct, “to permit antitrust actions such as the present one *still* threatens serious securities-related harm.”<sup>31</sup> The Court added that, because of SEC enforcement, “any enforcement-related need for an antitrust lawsuit is unusually small.”<sup>32</sup> In *Trinko*, the Court pointedly noted what it called the “considerable disadvantages” of antitrust, and commented that the “cost of false positives” must be weighed “against the slight benefits of antitrust intervention.”<sup>33</sup> Likewise, in *Billing*, the Court cited as grounds for implied immunity the “fear [of securities firms that anticompetitive conduct] could lead to an antitrust lawsuit and the risk of treble damages,”<sup>34</sup> a fear that could be applicable to any firm in any industry, regulated or not, and one which Congress affirmatively sought to instill to encourage compliance with the law. *Billing*, especially coming on the heels of *Trinko*, seems to suggest that the Court is affirmatively hostile to antitrust.

All four decisions this year—*Weyerhaeuser*, *Twombly*, *Billing*, and *Leegin*—were wins for the defense. That in itself is not unusual or in any way problematic. But it is well to keep in mind that there has not been a “plaintiff antitrust law win” in the Supreme Court since 1993 in *Hartford Fire Insurance Company v. California*.<sup>35</sup> That statistic is unique in antitrust history. We had the era of Chief Justice Peckham, and later the Depression era that gave us *Appalachian Coals, Inc. v. United States*,<sup>36</sup> but there has never before been a period in which antitrust enforcement has received such persistently negative treatment in the Supreme Court. Nor, at least since the Holmes dissent in *Northern Securities*, have we seen affirmative expressions of actual hostility to antitrust. The combination of *Billing* and *Trinko* in that respect seems chilling.

Given all of the Court’s recent decisions, maybe it is just as well that the important unresolved issues addressed at the outset of this note stay unresolved, at least for now. Perhaps the best outcome that we can reasonably hope for in most cases is the well-known phrase “certiorari denied.” ●

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<sup>28</sup> See, e.g., *Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378 (1981).

<sup>29</sup> 540 U.S. 398 (2004).

<sup>30</sup> *Id.* at 411–12 (quoting earlier precedent).

<sup>31</sup> 127 S. Ct. at 2394.

<sup>32</sup> *Id.* at 2386.

<sup>33</sup> 540 U.S. at 412–14.

<sup>34</sup> 127 S. Ct. at 2396.

<sup>35</sup> 509 U.S. 764 (1993).

<sup>36</sup> 288 U.S. 344 (1933).