

# The Supreme Court's Unfinished Antitrust Agenda

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The Supreme Court has reshaped the antitrust laws over the past thirty years but never more actively than over the past two, so it is natural to ask, "Is there anything left to decide?" Indeed there is; plenty of competition issues still demand attention. Some of these issues encompass more than antitrust alone while others—particularly in the realm of distribution—have lingered as the "low hanging fruit" that critics have eyed for years.

## Competition Issues Needing Attention

**Competition and Free Trade.** The most seismic issue in the new millennium is how to reconcile the "consumer welfare" goal of American antitrust law<sup>1</sup> with the pressures of international trade in a global economy. Should low prices for American consumers in the near term be of paramount concern, even at the expense of long-term domestic production and American jobs, or should American markets be open only to countries that suitably reciprocate (whatever that ought to mean)?<sup>2</sup>

There are those who argue that fixation with achieving the lowest prices for American consumers in the short term, without regard for the welfare of American producers, will leave the United States with nothing but global executives, Pilates instructors, and the unemployed.<sup>3</sup> This tension arises in enforcing the dumping laws.<sup>4</sup> It arises in merger review.<sup>5</sup> It arises in administrative determinations on the right to work.<sup>6</sup> It likely will arise in a growing number of arenas as global

<sup>1</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX* 7 (1993) ("[T]he only legitimate goal of antitrust is the maximization of consumer welfare."). See also William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *ANTITRUST L.J.* 377, 377 n.1 (2003); Thomas O. Barnett, Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Presentation to the George Mason University Law Review 11th Annual Symposium on Antitrust: Maximizing Welfare Through Technological Innovation (Oct. 31, 2007), available at <http://www.usdoj.gov/atr/public/speeches/227291.htm>.

<sup>2</sup> See WILLIAM J. BAUMOL, ROBERT E. LITAN & CARL J. SCHRAMM, *GOOD CAPITALISM, BAD CAPITALISM, AND THE ECONOMICS OF GROWTH AND PROSPERITY* 254–57 (2007) (arguing that although "[o]penness to trade and foreign direct investment . . . arouses the suspicion, and sometimes the enmity, of the general public," the benefits outweigh the costs).

<sup>3</sup> See John Harwood, *Republicans Grow Skeptical of Free Trade*, *WALL ST. J.*, Oct. 4, 2007, at A1; Thomas L. Friedman, *Big Ideas and No Boundaries*, *N.Y. TIMES*, Oct. 6, 2006, at A25 (noting that "an erosion of support for free trade is under way" in the United States).

<sup>4</sup> See LAURA D'ANDREA TYSON, *WHO'S BASHING WHOM?: TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES* 267–72 (1992) (criticizing anti-competitive effect of current anti-dumping laws and arguing for a test based on sales below marginal or average variable cost on the ground that "[e]ven in perfectly competitive markets, profit-maximizing firms with no significant market power may sometimes find it rational to price below average cost").

<sup>5</sup> See, e.g., Steven C. Sunshine, Deputy Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Statement Before the Subcommittee on Railroads Concerning Competitive Review of Railroad Mergers After ICC Sunset (Jan. 26, 1998), available at <http://www.usdoj.gov/atr/public/testimony/0056.htm> (noting that in evaluating railroad mergers, the Interstate Commerce Commission considered the merger's likely effects on railroad employees).

<sup>6</sup> See *FTC v. Equitable Res., Inc.*, 512 F. Supp. 2d 361, 364–65 (W.D. Pa. 2007) (upholding state administrative law judge's approval of merger between state-owned gas utilities on grounds that merger was in the "public interest" because, among other things, it would have a positive impact on customers, the utilities, employees and commerce), *on appeal*, No. 07-2499 (3d Cir.).

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economic rivalry takes center stage in the 21st century. Inevitably, some of these issues will come before the Supreme Court, although it is too soon to predict how or when, or in what order.

**Mergers.** Mergers are sure to come before the Court, which has not examined mergers since *Marine Bancorporation*<sup>7</sup> and *General Dynamics*.<sup>8</sup> Likely candidates to command the Court's attention are efficiencies,<sup>9</sup> refinements in market definition<sup>10</sup> and, again, the significance of global competition.<sup>11</sup> Will the Court endorse the treatment of efficiencies found in the Merger Guidelines?<sup>12</sup> Would the Court endorse any of the market definition approaches argued unsuccessfully by the Department of Justice and Federal Trade Commission in recent cases?<sup>13</sup> Would the Court ignore nationality in merger decisions if other countries incubate and coddle "national champions" that compete in the relevant market?<sup>14</sup> Are the prices paid by American consumers the only gauge? Will the Court provide guidance?

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**Application of State Antitrust Law to Interstate Commerce.** There is inconsistency in the current case law as to whether state antitrust law can apply to commerce with little nexus to the particular state. A recent decision by the Texas Supreme Court overturned a decision below and limited the reach of the Texas antitrust laws.<sup>15</sup> So long as the antitrust laws of some states present more attractive alternatives than others,<sup>16</sup> litigants will test the limits of each law's reach and one of these spats eventually will reach the Supreme Court. Will any state be permitted to provide remedies to out-of-state residents?

**Preemption of State Antitrust Law.** The issue of preempting state antitrust law arises repeatedly, in such contexts as preempting *Illinois Brick*<sup>17</sup> repealer statutes<sup>18</sup> or preempting state efforts to depart from *Colgate*,<sup>19</sup> *Leegin*,<sup>20</sup> or federal legislation.<sup>21</sup> The exact context in which preemption will

<sup>7</sup> United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

<sup>8</sup> United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

<sup>9</sup> See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (1992, rev. 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

<sup>10</sup> See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 344 & nn.131–32 (6th ed. 2007) (citing cases).

<sup>11</sup> See Press Release, U.S. Dep't of Justice, Department of Justice Antitrust Division Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/215326.htm](http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm) (noting that merger of two large U.S. appliance manufacturers would not raise appliance prices because of competition from foreign manufacturers).

<sup>12</sup> See Merger Guidelines, *supra* note 9, § 4.

<sup>13</sup> See, e.g., FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007), *appeal docketed*; United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

<sup>14</sup> See Fed. Trade Comm'n, Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation (July 1997), available at <http://www.ftc.gov/opa/1997/07/boeingsta.shtml>.

<sup>15</sup> Coca-Cola co. v. Harmar Bottling Co., 218 S.W.3d 671 (Tex. 2006). *Cf.* Sw. Bell Tel. Co. v. Superior Payphones, Ltd, 2006-1 Trade Cas. (CCH) ¶ 75,165 (Tex. Ct. App., 13th Dist. 2006). See also California v. Infineon Tech., AG, No. C 06-4333 PJH, 2007 WL 2523363 (N.D. Cal. Aug. 31, 2007).

<sup>16</sup> Compare Bunker's Glass Co. v. Pilkington PLC, 75 P.3d 99 (Ariz. 2003) (indirect purchasers can sue for antitrust damages under Arizona Antitrust Act), with Minuteman LLC v. Microsoft Corp., 795 A.2d 833 (N.H. 2002) (New Hampshire law follows *Illinois Brick*, prohibiting antitrust suits by indirect purchasers). See also 6 Trade Reg. Rep. ¶ 30,000 (listing relevant state statutes).

<sup>17</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>18</sup> See *supra* note 16.

<sup>19</sup> United States v. Colgate & Co., 250 U.S. 300 (1919).

<sup>20</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

<sup>21</sup> *E.g.*, the Soft Drink Interbrand Competition Act, 15 U.S.C. § 3501 et seq.

be confronted is uncertain, but somewhere between *ARC America*<sup>22</sup> and *American Stores*,<sup>23</sup> the issue is heading for a showdown. For years, a debate has been raging—most recently before the Antitrust Modernization Commission<sup>24</sup>—as to whether state antitrust enforcement fills a vacuum created by lapses in federal enforcement or creates chaos by raising the specter of inconsistent and even conflicting enforcement decisions.<sup>25</sup> Ultimately, the Supreme Court will need to supply some resolution.

***Business Method Patents and Their Competitive Effects.*** Critics of business method patents complain that one can get a patent on almost any notion, precluding a wide swath of competition.<sup>26</sup> It started with *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*<sup>27</sup> and “one-click” Internet checkout,<sup>28</sup> but business method patents today are being issued for surgical procedures and even tax advice.<sup>29</sup> Could a clever new “Colgate policy” be patented by a law firm today, so that no other firm could recommend it without paying a royalty? Legislation is being considered to curtail some especially controversial patents,<sup>30</sup> and the Federal Circuit recently made it more difficult to secure such patents,<sup>31</sup> but the Supreme Court has demonstrated that it is willing to step in if the Federal Circuit does not achieve solutions.<sup>32</sup> Unless the Federal Circuit or Congress adequately rationalizes this area of the law, the Supreme Court is likely to step in at some point and examine whether these patents amount to a recipe for “Easy-Bake” monopolization without fear of antitrust consequences. It is one thing to create exclusive rights through patents in order to encourage innovation and thereby to promote economic expansion and competition; it is not necessarily the same to confer exclusive rights on methods of competing. This makes it particularly important to apply the right test to the evaluation of such patents.

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<sup>22</sup> *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

<sup>23</sup> *California v. Am. Stores Co.*, 495 U.S. 271 (1990).

<sup>24</sup> ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 185–86 (2007), available at [http://www.amc.gov/report\\_recommendation/toc.htm](http://www.amc.gov/report_recommendation/toc.htm).

<sup>25</sup> See ABA SECTION OF ANTITRUST LAW, MONOGRAPH 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 5–8 (1988) (noting tension between enforcement of state and federal antitrust laws).

<sup>26</sup> See, e.g., Rochelle Cooper Dreyfuss, *Are Business Method Patents Bad for Business?*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 263 (2000).

<sup>27</sup> 149 F.3d 1368 (Fed. Cir. 1998).

<sup>28</sup> Carl Shapiro, *Patent System Reform: Economic Analysis and Critique*, 19 BERKELEY TECH. L.J. 1017, 1047 (2004) (“Amazon’s ‘one-click’ patent may be the most often criticized software patent.”).

<sup>29</sup> See Floyd Norris, *You Can’t Use that Tax Idea. It’s Patented*, N.Y. TIMES, Oct. 20, 2006, at C1.

<sup>30</sup> See Greg Hitt, *Ban on Tax-Plan Patents?*, WALL ST. J., Sept. 24, 2007, at A8.

<sup>31</sup> See *In re Comiskey*, No. 2006-1286, 2007 WL 2728361 (Fed. Cir. Sept. 20, 2007).

<sup>32</sup> See *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007) (reversing long-standing Federal Circuit precedent on the law of obviousness); *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (rejecting Federal Circuit’s longstanding precedent of requiring lower courts to issue permanent injunctions whenever infringement is found); see also Peter Lattman, *Court Hits Patent Holders*, WALL ST. J., Oct. 2, 2007, at A12; Thomas J. Scott, Jr. & Stephen T. Schreiner, *Planning for the Brave New World: Are Business Method Patents Going to Be Second Class Citizens?*, 19 INTELL. PROP. & TECH. L.J. 6 (2007).

**Piling-on Remedies.** Antitrust violators today can face fines of hundreds of millions of dollars,<sup>33</sup> plus treble damages<sup>34</sup> and, in certain instances, disgorgement,<sup>35</sup> restitution,<sup>36</sup> and the incarceration of their executives.<sup>37</sup> At what point, if any, does this become excessive? The Supreme Court previously has limited the amount of punitive damages that juries may award.<sup>38</sup> The Antitrust Modernization Commission has recommended that civil and criminal monetary remedies remain where they are today.<sup>39</sup> The demise of Arthur Andersen demonstrated how enforcement initiatives—not limited to antitrust enforcement—can result in the elimination of a major competitor.<sup>40</sup> Should a situation arise in which there is sufficient sympathy for the predicament of an antitrust defendant, the Supreme Court may step in.

**Limits of Criminal Enforcement.** The Sherman Act provides for criminal enforcement without regard to the nature of the violation.<sup>41</sup> Prosecutorial discretion has almost always kept criminal cases within the bounds of hard-core horizontal conspiracies.<sup>42</sup> The few excursions into areas like criminal prosecution of resale price maintenance have met with sharp criticism and little or no follow-through.<sup>43</sup> Yet there is no clear guidance and prosecutors arguably would have been within the strictures of the statute to have indicted the Ivy League college presidents or officers of the NCAA.<sup>44</sup> Should there be some parameters established by case law? Should they be coextensive with per se violations, and would that be enough? In *Illinois Tool Works*,<sup>45</sup> the Supreme Court

<sup>33</sup> See, e.g., Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004) (codified as amended at 15 U.S.C. §§ 1–3) (increasing the maximum Sherman Act corporate fine from \$10 million to \$100 million); Press Release, U.S. Dep’t of Justice, F. Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines For Participating in International Vitamin Cartel (May 20, 1999), available at [http://www.usdoj.gov/atr/public/press\\_releases/1999/2450.htm](http://www.usdoj.gov/atr/public/press_releases/1999/2450.htm) (highlighting pharmaceutical company’s agreement to plead guilty and pay \$500 million in criminal fines for leading a worldwide conspiracy to raise and fix prices for certain vitamins).

<sup>34</sup> 15 U.S.C. §§ 15, 15a (providing for treble damages in antitrust cases brought by private parties or the U.S. government).

<sup>35</sup> See Comments of John Graubert, Principal Deputy Gen. Counsel, Fed. Trade Comm’n, to the Antitrust Modernization Commission (Dec. 1, 2005), available at <http://www.ftc.gov/os/2005/12/051202civil.pdf> (“The [FTC’s] recourse to equitable disgorgement and restitution remedies in competition cases goes back many years, although it has exercised this authority sparingly.”); see also *FTC v. Mylan Lab., Inc.*, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (recognizing FTC authority to sue for disgorgement and other forms of equitable ancillary relief in competition case); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), to confirm FTC’s authority to obtain disgorgement and restitution); *FTC v. Robert J. Febré*, 128 F.3d 530, 537 (7th Cir. 1997) (same).

<sup>36</sup> See *supra* note 35.

<sup>37</sup> 15 U.S.C. § 2 (authorizing criminal penalties of up to ten years in prison for individuals violating the Sherman Act).

<sup>38</sup> See *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

<sup>39</sup> See ANTITRUST MODERNIZATION COMM’N, *supra* note 24, at 285–91 (civil remedies), 293–99 (criminal monetary remedies).

<sup>40</sup> See Kathleen F. Brickey, *Andersen’s Fall from Grace*, 81 WASH. U. L.Q. 917 (2004) (chronicling the demise of Arthur Andersen); David S. Hilzenrath, *Financial Watchdog Became an Enabler*, WASH. POST, Jun. 16, 2002, at A20 (same).

<sup>41</sup> 15 U.S.C. § 1; 1 ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 1 n.1 (“Both criminal and civil sanctions may be imposed for § 1 violations.”).

<sup>42</sup> ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 734–35 (noting that federal antitrust enforcement agencies have “a long-standing policy of seeking criminal indictments only in cases involving ‘hard-core,’ per se unlawful agreements . . . including horizontal price fixing”).

<sup>43</sup> See *United States v. Cuisinarts, Inc.*, Crim No. H-80-49, Civ. No. H-80-559, 1981-1 Trade Cas. (CCH) ¶ 63,979 (D. Conn. Dec. 19, 1980) (resulting in a plea of nolo contendere and a fine of \$250,000); *United States v. Mack Trucks, Inc.*, 5 CCH Trade Reg. Rep. ¶ 50,431 (investigation initiated by the DOJ under the Carter administration dropped by the Reagan administration); see also *U.S. Drops Trust Suits Against Mack, 2 Others*, N.Y. TIMES, July 9, 1981, at D1 (providing overview of Mack Trucks investigation).

<sup>44</sup> See *Deregulating the Ivy League*, N.Y. TIMES, May 26, 1991 (“To avoid being charged under the Sherman Antitrust Act [Ivy League schools] agreed to stop sharing information on offering financial aid.”); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); see also *Gonzalez v. St. Margaret’s House Housing Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989).

<sup>45</sup> *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

recently observed that tying can be “a federal crime punishable by up to 10 years in prison.”<sup>46</sup> Conceivably, the Court was just trying to make a point, but sooner or later, there is bound to be an example of overzealous criminal enforcement that may force the Supreme Court to announce a pragmatic rule of interpretation, comparable to its injection of “unreasonable” into the notion of “every contract, combination . . . , or conspiracy, in restraint of trade . . . .”<sup>47</sup>

**Amnesty/Leniency.** Amnesty and leniency programs undoubtedly have been the chief drivers of cartel enforcement in recent years,<sup>48</sup> but are the outcomes always fair? If one of the architects of a cartel turns in its followers and gets off with single damages and no fine, providing it a competitive advantage in the market, is this a suitable result? What if the race to the agency is manipulated<sup>49</sup>—can that constitute an anticompetitive act in itself? There already has been some dissatisfaction with the amnesty/leniency program,<sup>50</sup> and if there ever is evidence that the system is being abused—either by the government or by private parties—an issue may emerge that will be appropriate for Supreme Court intervention.

The “low hanging fruit”

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### Low Hanging Fruit

The “low hanging fruit” inviting Supreme Court attention is bunched in the area of distribution:

**Tying.** Is it time to shut the door on the last remaining remnant of the per se rule against tying? In *Jefferson Parish*,<sup>51</sup> the Court remarked that tying continues to be per se unlawful where the defendant possesses the power to force buyers to purchase the tied product by virtue of the unique nature of the tying product. In *Illinois Tool Works*,<sup>52</sup> the Court made clear that not all patented products possess this level of uniqueness, but did not hold that tying could never be per se unlawful and lower courts have continued to entertain that possibility.<sup>53</sup> Nevertheless, in recent cases in which the Supreme Court has provided a laundry list of per se offenses, tying is never included.<sup>54</sup> Has it been eliminated by the principle of *expressio unius*? In any event, is it time to remove any doubt, so that lower courts will stop pausing over this issue?

<sup>46</sup> *Id.* at 42.

<sup>47</sup> See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); see also *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>48</sup> See, e.g., Thomas O. Barnett, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy (Sept. 14, 2006), available at <http://www.usdoj.gov/atr/public/speeches/218336.wpd> (“Amnesty programs are invaluable in detecting cartels and in collecting the evidence necessary to obtain a conviction.”).

<sup>49</sup> See Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453 (2006) (noting that the corporate “race to confess” is often won by a small amount of time); see also *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3rd Cir. 2006).

<sup>50</sup> See, e.g., M. Ryan Williams, Recent Developments, *The Devil They Know: The DOJ's Flawed Antitrust Leniency Program and Its Curious Pursuit of Stolt-Nielsen*, 85 N.C. L. REV. 974, 1002 (2007); Holman W. Jenkins Jr., *If Sergio Leone Made a Movie About Antitrust . . .*, WALL ST. J., Oct. 25, 2006, at A15.

<sup>51</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (“It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se.’”).

<sup>52</sup> 547 U.S. 28.

<sup>53</sup> See, e.g., *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 487 F. Supp. 2d 861 (E.D. Ky. 2007); *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090 (N.D. Cal. 2006).

<sup>54</sup> See, e.g., *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Leegin*, 127 S. Ct. 2705; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

**Exclusive Dealing/Bundling/Loyalty Discounts.** Critics have been clamoring for the Supreme Court to take a bundling case ever since *LePage's*<sup>55</sup> was decided by the Third Circuit. Subsequent decisions have dispelled many of the questions that case provoked,<sup>56</sup> but there is little doubt that the Court will be strongly encouraged to visit the topic of bundling at every opportunity it gets. Loyalty discounts, which can serve to encourage exclusive dealing, also may attract the Court's attention with enough prodding.<sup>57</sup> Is this subject too hot to handle? Are there good bundles and bad bundles? Did the Ninth Circuit set the right standard in the *PeaceHealth* case?<sup>58</sup>

**"Most Favored Nations" Clauses as Antitrust Violations.** Ever since antitrust enforcers first began to view "Most Favored Nations" clauses as vertical restraints,<sup>59</sup> the impact and treatment of these clauses have been the subject of substantial debate.<sup>60</sup> These clauses can apply to either buyers or sellers, and there seems to be considerable uncertainty as to whether each is more likely to raise or depress prices, and whether to do anything about it. Can the Court end this confusion?

**Sealy/Topco.** Finally, the per se rule against competitors or potential competitors forming a new brand and agreeing not to compete with respect to that brand demands reexamination. Surely, there are cases in which such confederations are unreasonably anticompetitive, but there are other situations in which such arrangements are likely to be procompetitive. Some of these already have been the subjects of favorable business review letters,<sup>61</sup> and both the *Broadcast Music*<sup>62</sup> and *NCAA*<sup>63</sup> decisions at least suggest that the per se rule no longer should apply. Nevertheless, *Sealy*<sup>64</sup> and *Topco*<sup>65</sup> remain on the books. Should any court see fit to apply the per se rule to such ventures in the future, the Supreme Court might well take the opportunity to refine the law in this area further. Will there be a more flexible rule?

That is a lot. The Supreme Court has not shied away from confronting big antitrust issues in recent years, but some mighty big issues remain. ●

<sup>55</sup> *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).

<sup>56</sup> See *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007).

<sup>57</sup> See *Editorial, F.T.C. Goes AWOL*, N.Y. TIMES, Oct. 29, 2007, at A18 (criticizing the FTC's failure to open an investigation into Intel's alleged practice of providing loyalty discounts); Barbara Bruckmann, *Discounts, Discrimination, and Exclusive Dealing: Issues Under the Robinson-Patman Act*, 68 ANTITRUST L.J. 253 (2000); Richard M. Steuer, *Discounts and Exclusive Dealing*, ANTITRUST, Spring 1993, at 28.

<sup>58</sup> See *PeaceHealth*, 502 F.3d at 916 (adopting "discount attribution" standard).

<sup>59</sup> See *United States v. Delta Dental Plan of Ariz., Inc.*, 59 Fed. Reg. 5210 (Dep't of Justice Jan. 26, 1995) (proposed final judgment forcing Arizona dental plan to drop a most-favored nation clause from contracts with dentists); see also Richard M. Steuer, *Counseling Without Case Law*, 60 ANTITRUST L.J. 823, 850-51 (1995).

<sup>60</sup> See generally Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 ANTITRUST L.J. 517 (1996) (describing ways in which "Most Favored Nations" clauses might harm competition).

<sup>61</sup> See U.S. Dep't of Justice, Antitrust Div., Response to Linen Systems for Healthcare, LLC's Request for Business Review Letter (Aug. 8, 2006), available at <http://www.usdoj.gov/atr/public/busreview/217690.htm> (approving of proposed joint venture of regional textile maintenance companies to market textile rental and laundry services to specialized healthcare client); U.S. Dep't of Justice, Antitrust Div., Response to Container America, LLC's Request for Business Review Letter (Mar. 8, 2000), available at <http://www.usdoj.gov/atr/public/busreview/4287.htm> (approving of proposed creation and operation of joint selling and purchasing vehicle for five regional manufacturers of steel drums).

<sup>62</sup> *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

<sup>63</sup> *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

<sup>64</sup> *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

<sup>65</sup> *United States v. Topco Assocs.*, 405 U.S. 596 (1972).