

Sea Change or High Tide: Introduction to What's Next at the Supreme Court

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By any standard, the last two years have seen a remarkable resurgence of interest in antitrust on the part of the Supreme Court. In producing more antitrust decisions in these two terms than it had in the rest of the last decade, the Court has given both practitioners and scholars plenty to debate:

- In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹ the Court overturned the longstanding and much debated per se rule against minimum resale price maintenance agreements.
- In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,² the Court extended the standard of *Brooke Group*³ from predatory pricing to predatory bidding because the two practices are economically similar.
- In *Credit Suisse Securities (USA) LLC v. Billing*,⁴ the Court held that the securities laws prevent application of the antitrust laws to allegedly collusive conduct by underwriters involved in the IPO process.
- In *Bell Atlantic Corporation v. Twombly*,⁵ the Court held that a Sherman Act complaint must allege sufficient facts to create plausible grounds for inferring that an illegal agreement existed.
- In *Illinois Tool Works Inc. v. Independent Ink, Inc.*,⁶ the Court held that the mere fact that a tying product is patented does not support a presumption of market power in the patented product, and further held that in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.
- In *Texaco Inc. v. Dagher*,⁷ the Court held that it is not per se illegal under Section 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products.
- In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,⁸ the Court held that a manufacturer could not be liable for secondary-line price discrimination under the Robinson-Patman Act, absent proof that it discriminated between dealers contemporaneously competing to resell its product to the same retail customer.

¹ 127 S. Ct. 2705 (2007).

² 127 S. Ct. 1069 (2007).

³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

⁴ 127 S. Ct. 2383 (2007).

⁵ 127 S. Ct. 1955 (2007).

⁶ 547 U.S. 28 (2006).

⁷ 547 U.S. 1 (2006).

⁸ 546 U.S. 164 (2006).

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Is this surfeit of new authority the start of an era in which the Court will show sustained interest in issues of antitrust or are we seeing only a temporary upswing before the Court moves on to other fields? More importantly, what is next, or should be next, for the Court?

Some of the best antitrust lawyers and leaders in the ABA Section of Antitrust Law take on these difficult questions, and in doing so, offer insight not only into where the Court is going, but also where it has come from.⁹ ●

⁹ The articles in this symposium are revised and expanded versions of comments presented by the authors at an ABA Section of Antitrust Law program, Whistler, British Columbia, August 16, 2007.