

What's Next for the Supreme Court on Antitrust Issues?

Gary P. Zanfagna

When asked to write a Comment about “what’s next for the Supreme Court on antitrust?” I have to admit that my first thought was—are we really looking for more?

Since 2004, the Supreme Court has decided no fewer than nine antitrust cases—an unprecedented antitrust renaissance for the Supreme Court. Starting with *Trinko* in 2004, the Supreme Court has barely missed an opportunity to help with antitrust—*Trinko*,¹ *Empagran*,² *Independent Ink*,³ *Dagher*,⁴ *Volvo*,⁵ *Weyerhaeuser*,⁶ *Twombly*,⁷ *Credit Suisse*,⁸ and *Leegin*.⁹ Four cases in 2007 alone. All nine antitrust decisions by the Court were pro-defendant, in one way or another, softening the sting of the antitrust laws.

So my prediction of what is on the horizon for the Supreme Court on antitrust? Nothing. Aren't nine Supreme Court antitrust decisions in three years enough? As important as we all think antitrust is, there must be more pressing matters of constitutional magnitude facing the country.

Wish List

Prediction aside, what would be on my Supreme Court antitrust wish list? My list would be short. One topic: bundling. From my perspective as in-house counsel, one area that continues to present real antitrust risk is bundling. Post-*LePage's*, a multi-product company with a significant position in one or more products that engages in bundled rebates does so at its own peril.

*LePage's*¹⁰ is an utterly standardless decision that, without any guidance, declares bundled rebates unlawful whenever a smaller rival can't match the rebate because it doesn't offer a comparable breadth of products. *LePage's* can be read to stand for the proposition that Section 2 protects a smaller rival that can't keep pace. And *LePage's* has predictably fueled plaintiffs' bundling fire—*Masimo*,¹¹ *JBDL*,¹² *Applied Medical*,¹³ *PeaceHealth*.¹⁴ *LePage's* has significantly

¹ Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

² Empagran S.A. v. F. Hoffmann-LaRoche Ltd., 542 U.S. 155 (2004).

³ Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006).

⁴ Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

⁵ Volvo Trucks N. Am., Inc. v. Reeder Simco GMC, Inc., 546 U.S. 164 (2006).

⁶ Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

⁷ Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

⁸ Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).

⁹ Leegin Creative Leather Prods. v. PSKS, 127 S. Ct. 2705 (2007).

¹⁰ LePage's Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003), cert. denied, 124 S. Ct. 2932 (2004).

¹¹ Masimo Corp. v. Tyco Health Care Group, L.P., 2004 U.S. Dist. LEXIS 26915 (C.D. Cal. Dec. 15, 2004).

¹² J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 2005 WL 1396940 (S.D. Ohio June 13, 2005).

¹³ Applied Med. Resources Corp. v. Johnson & Johnson, Inc., 2006 U.S. Dist. LEXIS 12845 (C.D. Cal. Feb. 2, 2006).

¹⁴ Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007).

■
Gary Zanfagna is
 Associate General
 Counsel, Chief Antitrust
 Counsel, Honeywell
 International Inc., and
 former Editorial Chair of
 The Antitrust Source.

raised antitrust risk for any multi-product company with a significant position in one or more products that wants to compete aggressively on price by offering bundled discounts.

Is it time for the Supreme Court to revisit bundling? I thought it was ripe with *LePage's* in 2004. My view then was that there was sufficient guidance from *Ortho*¹⁵ and *SmithKline*¹⁶ for the Supreme Court to consider bundling and deal with *LePage's*. But the prevailing view at the time, including that of the Federal Trade Commission and the Department of Justice,¹⁷ was that the case law needed to develop and more needed to be understood about the competitive effects of bundling before the Court should weigh in.

Have we learned more since *LePage's*? Yes. There have been considerable contributions to the understanding of bundling from academics, economists, and antitrust practitioners since *LePage's*. In particular, the Antitrust Modernization Commission (AMC) devoted great energy and thinking to this topic and received significant input from a wide variety of leading antitrust scholars. At the end of their process, the AMC unanimously recommended a three-part test for assessing whether a bundled rebate was exclusionary under Section 2.¹⁸

Without getting into a detailed discussion of the AMC's proposed test, I note that I'm in favor of the proposed test, which I would call a modified *Ortho* attribution test. I think the AMC test is as good as any test proposed for assessing bundled rebates, and it's the test I've been using (at least the first prong) to counsel on bundled rebates for some time.

Have there been developments in the case law since *LePage's*? Yes. *Masimo II*¹⁹ revisited and re-thought *Masimo I's*²⁰ following of *LePage's*. *JBDL*²¹ flatly rejected *LePage's*. *Applied Medical's*²² jury verdict eventually got beyond *LePage's*. And most significantly, the Ninth Circuit in *PeaceHealth*²³ asked for amicus briefs on the right standard for bundling, and then rejected *LePage's* in favor of the AMC's proposed test.²⁴ *PeaceHealth* presently is on petition for rehearing en banc in the Ninth Circuit.

So my antitrust wish list for the Supreme Court is short—bundling. It's quite possible that the Court will eventually have the opportunity to revisit bundling and fix *LePage's* with *PeaceHealth*. That would be my single Supreme Court antitrust wish. From my in-house perspective, that would be a very good thing.

My antitrust wish list for the Supreme Court is short—bundling.

¹⁵ *Ortho Diagnostics Sys., Inc. v. Abbott Labs, Inc.*, 920 F. Supp. 455 (S.D.N.Y. 1996).

¹⁶ *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd*, 575 F.2d. 1056 (3d Cir. 1978).

¹⁷ Brief for the United States as Amicus Curiae, 3M Co. v. *LePage's Inc.*, No. 02-1865 (U.S. May 24, 2004), available at <http://www.usdoj.gov/atr/cases/f203900/203900.pdf>.

¹⁸ ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 83 (Recommendation 17) (2007), available at http://www.amc.gov/report_recommendation/amc_final_report.pdf. The elements of the three part test are: (1) after allocating all discounts attributable to the entire bundle to the competitive product, the defendant sold the competitive product below its incremental cost for that product; (2) the defendant is likely to recoup these losses; and (3) the bundled discount is likely to have an adverse effect on competition.

¹⁹ *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2006 U.S. Dist. LEXIS 29977 (C.D. Cal. Mar. 22, 2006) (motion for new trial granted).

²⁰ *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2004 U.S. Dist. LEXIS 26915 (C.D. Cal. Dec. 15, 2004).

²¹ *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 2005 WL 1396940 (S.D. Ohio June 13, 2005).

²² Civil Minutes—Trial, *Applied Medical Resources Corp. v. Johnson & Johnson, Inc.*, No. SAVC 03-1329-JVS (C.D. Cal. Aug. 29, 2006) (jury verdict in favor of defendants).

²³ *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007).

²⁴ The author's employer, Honeywell, supported an amicus brief in *PeaceHealth* advocating the AMC's proposed test.

What About Refusals to Deal? The AMC identified refusals to deal as another area that could use further guidance from the courts. The Supreme Court in *Trinko*²⁵ did stop short of an unqualified unilateral right to refuse to deal with your rival. As in-house counsel, I'd like to have that right, or at least absolute clarity on the limited exceptions to the general rule of no duty to deal with a rival. But I don't think that is realistic.

From my perspective, *Trinko* certainly helps. I don't think *Trinko* is revolutionary, but I do think it confirms the status quo that was already generally understood and provides some modest help in understanding the outer limits. Let me explain.

I see no need for

Supreme Court

guidance in merger

analysis. What would

the Court add? As the

AMC report observes,

there is a general

consensus that the

framework for

analyzing mergers

used by the antitrust

agencies and the courts

is basically sound.

Trinko enthusiastically embraces what we thought we already knew—that there is no general duty to deal with a rival.²⁶ *Trinko* also identifies a couple limited factual situations that could be, but not necessarily will be, problematic: One, terminating a prior (presumably profitable) course of dealing with a rival; and two, refusing to deal with a competitor-customer in the same way as one deals with a customer.²⁷ Finally, *Trinko* also references the short-term profit sacrifice test, which I read as a tool to understand what's really going on.²⁸

Without getting wrapped up in how the short-term profit sacrifice test is different from its cousin, the no economic sense test from DOJ, or whether either (or some other standard) is the one test for assessing refusals to deal (and other Section 2 exclusionary conduct), my view is that the Court's short-term profit sacrifice test is simply a tool for insight into the conduct. It certainly could be read to introduce an uncomfortable and unwelcome element of intent into the equation, but I wouldn't go that far. At the end of the day, we're trying to figure out whether conduct, such as a refusal to deal, which can be exclusionary, is anticompetitive. The short-term profit sacrifice test is simply a tool to help understand what's really going on.

So from my corporate counselor perspective, *Trinko* is not perfect guidance, but it does provide helpful guidance. *Trinko* teaches the following: It's generally okay to say "no" to a rival. Very importantly, before dealing with your rival, think hard about your ability (or inability) eventually to terminate such dealings. Whether you're starting to deal with a competitor, refusing to do so, or trying to terminate what you already started, explain to me why you're doing it—what's your legitimate business justification? And by the way, be careful what you write.

Short of an unqualified unilateral right to refuse to deal with your rival, which I don't think we're going to get, I'm fine with *Trinko*. It doesn't seem that complicated to me.

What About Merger Analysis? This is an obvious substantive antitrust area where the Supreme Court has not opined in over thirty years since *General Dynamics*²⁹ and *Citizens & Southern National Bank*³⁰ in 1975. But I see no need for Supreme Court guidance in merger analysis. What would the Court add? As the AMC report observes, there is a general consensus that the framework for analyzing mergers used by the antitrust agencies and the courts is basically sound. No doubt there can be disagreement on the outcome of various cases, but the basic analytical framework for merger review is known and generally accepted.

²⁵ Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

²⁶ *Id.* at 407–08.

²⁷ *Id.* at 408–10.

²⁸ *Id.*

²⁹ United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

³⁰ United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

What About Tying Analysis? Courts describe tying as per se unlawful.³¹ But not really. In order for a tie to be per se unlawful, courts require a showing of power in the tying product. Some might suggest that there is room here for the Supreme Court to clarify or clean up that tying arrangements should be (or really are) judged under the rule of reason. Per se condemnation of tying arrangements is neither accurate nor appropriate.

There is, however, already a general understanding that power is required in the tying product for the tie to be unlawful. Everyone knows that, and I don't see the need for Supreme Court clarification. If the Supreme Court's idea of clarifying is *Leegin*,³² I don't think we need it. We may or may not agree on whether the Court got it right by bringing the analysis for minimum resale price in line with maximum resale price and non-price vertical restraints, all under the rule of reason. But from my perspective, the practical consequence of *Leegin*, rightly or wrongly decided, is new legal risk—unchartered rule of reason analysis, state law enforcement, and enforcement from relevant foreign jurisdictions, including Canada, that still hold vertical price fixing per se illegal.³³ And by the way, try to explain to sales personnel why some price fixing is still very much illegal and some now may be okay, particularly when the line between customer and competitor can be quite blurred.

Conclusion

In sum, my prediction of what's next for antitrust at the Supreme Court can be summarized in one word: nothing. Nine decisions in three years are all we can reasonably expect for now. My Supreme Court wish list is short—bundling. Please clean up *LePage's*. ●

³¹ See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9–10 (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’”).

³² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

³³ See M. Russell Wofford, Jr. & Kristin Limarzi, *The Reach of Leegin: Will the States Resuscitate Dr. Miles*, ANTITRUST SOURCE, Oct. 2007, <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Wofford10-18f.pdf>.