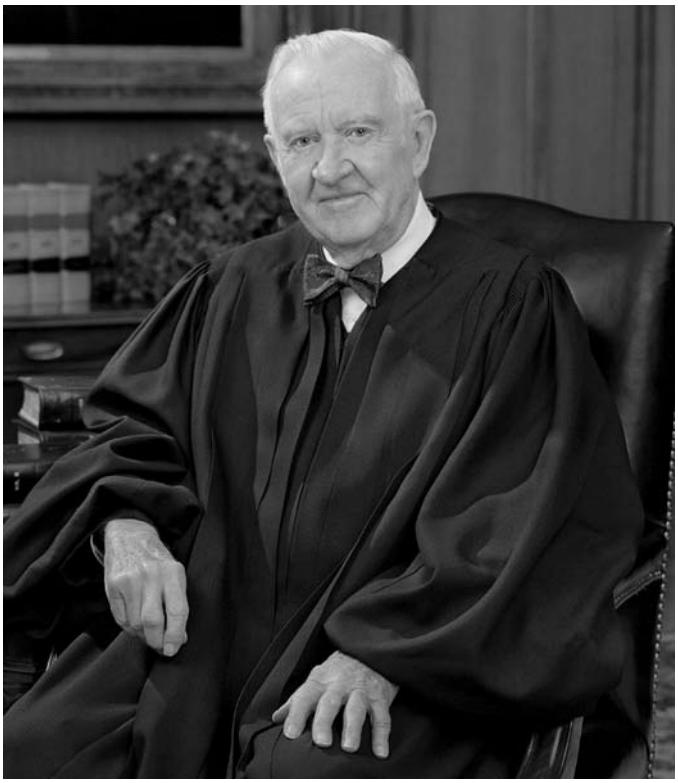
Justice Stevens' Antitrust Legacy

BY ROBERT A. SKITOL AND KENNETH M. VORRASI



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ON APRIL 9, JOHN PAUL STEVENS, an Associate Justice of the U.S. Supreme Court for nearly thirty-five years, informed President Obama of his intention to step down from the nation's highest bench the day after the Court's term ends in June. Elevated from the U.S. Court of Appeals for the Seventh Circuit by President Ford to the seat previously held by Justice William O. Douglas, Justice Stevens was a prominent antitrust practitioner, lecturer, and author before he was even Judge Stevens. That important period of Stevens' career—the 1950s and 1960s—may well be regarded by many members of today's antitrust bar as prehistoric; it certainly was pre-Chicago School and fundamentally populist in its later stages, producing such decisions as *Schwinn*,[1] *Utah Pie*,[2] and *Von's Grocery*.[3] Over the course of nearly three-and-a-half decades on the Supreme Court, Justice Stevens played a leading role in transitioning from those "dark ages" into today's more economics-based jurisprudence, which is widely regarded as better calibrated to protecting competition than the more formalistic approaches of earlier eras.

Justice Stevens authored fifteen majority opinions,[4] six concurring opinions,[5] and fourteen dissenting opinions[6] in antitrust cases over the course of his tenure. As Professor Alan Meese has observed, Stevens' role in the evolution of antitrust law during this period transcends his own writings: in particular, in his second year as an Associate Justice he provided the critical fourth vote to grant certiorari and the critical fifth vote for the majority opinion in *GTE Sylvania*,[7] which Professor Meese calls "the most important antitrust decision in the last 50 years . . . ."[8] He also might have had considerable influence in building majorities and in the negotiation of decision rationales in many other antitrust cases before the Court over the past three decades.

Justice Stevens continued to deepen his contribution to antitrust jurisprudence in his last days as an Associate Justice. In the Court's unanimous decision in *American Needle, Inc. v. NFL*, issued one month before the close of the 2009 Term, Stevens wrote that the trademark licensing activities of the NFL and its member teams "constitute concerted action that is not categorically beyond the coverage of § 1" of the Sherman Act.[9] He emphasized the Court's rejection of "formalistic distinctions" in determining whether the parties were a single entity "in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."[10] Rejecting the NFL's argument for immunity from Section 1 scrutiny, he observed that the NFL teams' common interests were insufficient because "illegal restraints often are in the common interests of the parties to the restraint,"[11] and noted that "the mere fact the teams operate jointly in some sense does not mean that they are immune."[12]

Our assessment of Justice Stevens' antitrust legacy highlights nine of his majority opinions: four that established critical foundations for today's law of horizontal restraints;[13] three that collectively transformed the law on tying arrangements;[14] his *Aspen Skiing* opinion, which may now be the single most important monopolization precedent for antitrust plaintiffs;[15] and his *Associated General Contractors* opinion, which remains one of the most significant antitrust standing precedents for antitrust defendants.[16] We also briefly comment upon his most recent dissenting opinions, in *Volvo*[17] and *Twombly*.[18]

Horizontal Restraints Decisions

The treatment of horizontal restraints under Section 1 of the Sherman Act remained largely unchanged throughout the 20th century prior to Justice Stevens' arrival on the Supreme

Robert Skitol, an Associate Editor of ANTITRUST, *is a partner and Kenneth Vorrasi is an associate in the Antitrust Practice Group at Drinker Biddle & Reath LLP in Washington, DC.*

Court. Throughout this period, antitrust analysis categorized agreements among competitors in two main ways. Certain "naked" restraints—price fixing, market divisions and customer allocations, and group boycotts—were condemned as per se illegal without regard to or examination of any procompetitive effects. In the words of the Court, such restraints have a "pernicious effect on competition and lack any redeeming virtue";[19] they have "no purpose except stifling of competition";[20] and they "always or almost always tend to restrict competition and decrease output."[21] All other restraints among competitors were subject to a "rule of reason" analysis, which examines whether the restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[22] Under the rule of reason, one must evaluate "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[23]

That rigidity eventually gave way to the more fluid and more sophisticated horizontal restraints regime that prevails today. The evolution of the law in that direction was largely driven by four opinions of Justice Stevens.

The first of Justice Stevens' contributions in this area came less than three years after he joined the Court. In 1978, in *National Society of Professional Engineers v. United States*,[24] the Court faced a challenge to rules set by an association of engineers that prohibited competitive bidding through an agreement not to discuss prices for engineering services until after a prospective client selected the engineer.[25] Although the agreement among competing engineers restricted price, the association argued that it should not be condemned as unlawful per se but should instead be subject to a rule of reason analysis because the agreement protected the quality of engineering services and thus the health and safety of the public.[26]

Writing for the majority, Justice Stevens explained that the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason."[27] Rather, the rule of reason "focuses directly on the challenged restraint's impact on competitive conditions"[28] and examines "whether the challenged agreement is one that promotes competition or one that suppresses competition."[29] In rejecting the association's justifications, which had been proffered in an effort to bring the agreement out from under the per se rule, Justice Stevens declared that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement, [which] . . . operates as an absolute ban on competitive bidding . . . ."[30] As he concluded, "On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act."[31] While the Court condemned the association's rules, *Professional Engineers* departed from prior decisions in that the Court gave consideration to justifications for a price restraint before concluding that it was illegal per se.

Four years after *Professional Engineers*, in 1982, Justice Stevens again considered justifications proffered in defense of a horizontal agreement among professionals, this time one among competing doctors to set maximum prices for services in *Arizona v. Maricopa County Medical Society*.[32] The Court rejected the doctors' argument that their justifications could help them avoid the Sherman Act's per se ban on agreements to fix prices. Justice Stevens explained that this "argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."[33] As in *Professional Engineers*, the Court in *Maricopa County* was unwilling to undertake a lengthy rule of reason analysis for agreements that it deemed to be naked restraints.

Two years later, in 1984, the Court in *NCAA v. Board of Regents* examined whether the NCAA's restrictions on the number of college football games that member institutions could offer to be televised were per se unlawful.[34] Writing for the majority, Justice Stevens acknowledged that the NCAA's restraints undeniably created a limitation on output, but he determined that the application of the per se rule to such restraints would be inappropriate, given that some restraints among college football programs were "essential if the product is to be available at all."[35] The Court recognized that many of the NCAA's rules and regulations—such as those on how football is played and the academic eligibility of students—help to create, preserve, and market the product of college football and "hence can be viewed as procompetitive."[36]

Importantly, Justice Stevens disavowed a sharp distinction between the per se rule and a rule of reason analysis, explaining that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."[37] He highlighted that "there is often no bright line separating per se from Rule of Reason analysis."[38] Consistent with this rejection of the idea that the analysis of horizontal restraints must proceed down the "either/or" path of either summary rejection as per se unlawful or a more involved rule of reason analysis, the Court proceeded to make short work of the NCAA's restraints even after deciding not to apply the per se rule. Indeed, because the restraints at issue had a "significant potential for anticompetitive effects,"[39] the Court concluded that the plaintiff did not even have to establish that the NCAA had market power:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[40]

Justice Stevens' truncated rule of reason analysis in *NCAA* is today known as a "quick look." A "quick look" analysis is used when the application of the per se rule would not be appropriate—for example because the restraint at issue is not "one that would always or almost always tend to restrict

competition and decrease output" rather than "increase economic efficiency"[41]—but a comprehensive assessment of competitive effects is not needed to determine that the anticompetitive effects of a restraint outweigh any procompetitive benefits.[42]

After *NCAA*, the Court applied a quick look analysis again in *FTC v. Indiana Federation of Dentists* to condemn a restraint on output among competing dentists that lacked a credible justification.[43] The Court last addressed the quick look concept in *California Dental Association v. FTC*, and rejected its application to a set of advertising restraints adopted by a professional dental association, observing that the restraints at issue "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[44] At the same time, the Court did not require a full-blown rule of reason analysis because, in its view, not every case in which the per se rule should not apply automatically requires "plenary market examination."[45] Instead, under Section 1, what "is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."[46] The Federal Trade Commission's embrace of the quick look standard has in recent years been upheld by the D.C. Circuit in *PolyGram Holding Inc. v. FTC*[47] and by the Fifth Circuit in *North Texas Specialty Physicians v. FTC*.[48]

Justice Stevens' final opinion on horizontal restraints in some respects ended where he started. In *FTC v. Superior Court Trial Lawyers Association*, the Court examined an agreement among members of a lawyers' association to refrain from representing indigent criminals until the D.C. government increased their compensation.[49] Justice Stevens on behalf of the majority declared the restraint illegal per se, finding that the "horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output."[50] Given the clear anticompetitive effects of a restraint of this sort, as in *Professional Engineers* and *Maricopa County* the Court had no difficulty condemning the association's agreement as per se unlawful. Justice Stevens' opinion in *Trial Lawyers* is a reminder that, despite the development in Section 1 analysis over the past thirty-five years, naked restraints among competitors are still per se unlawful under the Sherman Act.

Tying Decisions

Prior to Justice Stevens' arrival at the Supreme Court, a long line of Court decisions made it quite easy for antitrust plaintiffs to challenge tying arrangements of all kinds. In 1969, the Court summed up its accumulated jurisprudence in *Fortner Enterprises, Inc. v. U.S. Steel Corp.* (*Fortner I*) with the proposition that, "because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie."[51] The only significant condition to illegality was "appreciable economic power" in the tying product, a condition seemingly met by a showing that the product was "unique" in some manner attractive to some customers.[52] Between 1977 and 2006, however, Justice Stevens authored three opinions for the Court that have collectively moved the antitrust treatment of tying arrangements from something close to per se illegality to something not far from rule of reason consideration.

In *U.S. Steel Corp. v. Fortner Enterprises, Inc.* (*Fortner II*), the Court upheld a tying arrangement on the merits. The issue in the case was whether the uniquely attractive nature of a seller's financing terms (the tying product), conditioned upon purchase of the seller's prefabricated homes (the tied product), established "appreciable economic power" in the tying product sufficient to find the tying arrangement unlawful.[53] Justice Stevens began his analysis by observing that the Court's precedents "do not require that the defendant have a monopoly or even a dominant position throughout the market for a tying product."[54] As he explained, those decisions focused attention instead on whether the seller has "the power . . . to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market."[55] The question, he continued, "is whether the seller has some advantage not shared by his competitors in the market for the tying product."[56] Without that advantage, "the seller's product does not have the kind of uniqueness" sufficient to establish the power required to find tying illegal.[57] Since the record in the case failed to establish that the seller enjoyed any advantage of that sort, the Stevens decision reversed the lower court's judgment of liability.[58] In short, mere "uniqueness" would no longer suffice to establish the requisite "economic" power; something closer to "market" power would be necessary.

The opinion of the Court [in *Jefferson Parish*], authored by Justice Stevens, established a detailed framework for evaluating a tie's legality. However, while four concurring Justices argued that the per se rule should no longer apply to ties, Justice Stevens and his four colleagues in the majority were not willing to go that far . . . .

In *Jefferson Parish Hospital District No. 2 v. Hyde*, the issue was whether a hospital's tying of its surgical services with its anesthesia services was unlawful tying.[59] The opinion of the Court, authored by Justice Stevens, established a detailed framework for evaluating a tie's legality. However, while four concurring Justices argued that the per se rule should no longer apply to ties,[60] Justice Stevens and his four colleagues in the majority were not willing to go that far: "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unac-

ceptable risk of stifling competition and therefore are unreasonable 'per se.'"[61]

But if "certain tying arrangements" are per se unlawful, how is a court to determine whether a given tie qualifies for such categorical treatment? Justice Stevens began with the observation that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."[62] Put another way, unlawful tying occurs when "the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market."[63] Stevens elaborated that per se prohibition is appropriate only "if anticompetitive forcing is likely."[64] For example, he suggested,

> if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power . . . . Thus, the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful.[65]

Since the record at issue failed to establish the defendant's market power in the relevant hospital or surgical services market, the Stevens decision reversed the lower court's holding that the hospital had committed a per se illegal tying violation.[66]

In *Illinois Tool Works Inc. v. Independent Ink, Inc.*, the Court considered tying between a patented inkjet printer and unpatented replacement ink.[67] The issue was whether an ink competitor challenging that tie could rely upon a presumption that a patent confers market power in support of its challenge. As indicated above, Justice Stevens appeared to endorse such a presumption in *Jefferson Parish*. This time around, Stevens, on behalf of a unanimous Court, rejected the presumption and the whole array of precedents cited by those who argued for its validity: "a patent does not necessarily confer market power upon the patentee";[68] and, accordingly, "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."[69] He characterized the presumption as an outmoded "vestige of the Court's historical distrust of tying arrangements"[70] and rejected a proffered alternative rebuttable presumption in the case of a "requirements" tie entailing price discrimination, declaring that even such arrangements, absent proof of market power, "are fully consistent with a free, competitive market."[71]

That last comment captured an attitudinal sea change throughout the antitrust community, from the extreme hostility toward tying arrangements that permeated pre-1977 precedents to today's jurisprudential acceptance of the potential for legitimate and even procompetitive justifications for ties of all kinds. Justice Stevens was a leading architect of this transformation over almost three decades from *Fortner II* to *Jefferson Parish to Illinois Tool Works*.

Monopolization Law

Justice Stevens' 1985 opinion for a unanimous Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[72] established some parameters for when a dominant firm's refusal to deal or continue dealing with a competitor can constitute unlawful monopolization under Section 2 of the Sherman Act. Beyond that, however, its pronouncements on evidence regarding anticompetitive intent, business justification, and profit sacrifice have strongly influenced the broader debate over how to define exclusionary conduct generally for Section 2 purposes.

Aspen Skiing Co. (Ski Co.) owned three of the four mountains suitable for downhill skiing in Aspen, Colorado. It discontinued what had been a longstanding cooperative arrangement with Highlands, owner of the only other Aspen mountain, under which both firms had marketed "All-Aspen" six-day tickets. Highlands' share of the relevant Aspen Skiing market declined precipitously.

The case came to the Court from the Tenth Circuit's affirmance of a district court's entry of judgment on a jury verdict upholding Highlands' claim that the discontinuance constituted unlawful monopolization.[73] Justice Stevens began his analysis by agreeing with Ski Co. "that even a firm with monopoly power has no duty to engage in joint marketing with a competitor,"[74] but he quickly added that this does not mean a refusal to cooperate in any given case "may not have evidentiary significance" or "may not give rise to liability in certain circumstances."[75] To ascertain whether Ski Co.'s discontinuance of cooperation could properly be found to be one such circumstance, warranting a conclusion that it was "exclusionary" or "predatory" for Section 2 purposes, he called for examination of the effect "on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself."[76] He easily found record support for the requisite adverse effect on consumers and on Highlands;[77] the bulk of his opinion was devoted to considering the effect on Ski Co.[78]

Stevens highlighted Ski Co.'s failure, in light of its prior course of dealing with Highlands, to "persuade the jury that its conduct was justified by any normal business purpose."[79] The jury, he suggested, "may well have concluded that Ski Co. elected to forgo . . . short-run benefits [of the All-Aspen ticket] because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor."[80] Such a conclusion, he added, was "strongly supported by Ski Co.'s failure to offer any efficiency justification whatever . . . ."[81] In short, the evidence supported "an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[82] The Court thereupon affirmed the judgment of a Section 2 violation.[83]

The following year, Judge Richard Posner interpreted the *Aspen* opinion as signifying that dominant firms should expect courts to find a duty to deal with rivals where "cooperation is indispensable to effective competition."[84] Six years

later, in *Eastman Kodak Co. v. Image Technical Services, Inc.*,[85] the Court cited *Aspen* for the sweeping proposition that the right to refuse to deal with competitors "exists only if there are legitimate competitive reasons for the refusal."[86] The Court thereby ignored Justice Stevens' starting point in *Aspen* that even a monopolist has no general duty to deal with a competitor.

In contrast, in its most recent pronouncement on *Aspen*, the 2004 *Verizon Communications Inc. v. Trinko* decision,[87] a differently minded Court interpreted *Aspen* in a markedly narrower manner. Specifically, it characterized the case as "at or near the outer boundary of § 2 liability" and suggested that its essential feature was Ski Co.'s "unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing" which indicated "a willingness to forsake short-term profits to achieve an anticompetitive end."[88] A recent author took his cue from that comment to interpret *Aspen* as imposing liability in "a narrow set of conditions—notably, a profitable prior course of dealing with the plaintiff coupled with absence of a procompetitive explanation for changing course . . . ."[89] Another author has interpreted *Aspen* in light of post-*Trinko* caselaw as supporting a more flexible "totality of facts and circumstances" standard with liability ultimately turning on "whether the conduct lacks a business justification."[90]

We may soon see efforts to bring *Aspen* in from the "outer boundary of § 2 liability" to which it was consigned by *Trinko*. In May 2009, Assistant Attorney General Christine Varney publicly committed the Antitrust Division to an aggressive Section 2 enforcement agenda and identified *Aspen* as one of the "leading cases" that would continue to "provide important guidance" in the place of the Department's Section 2 Report, which AAG Varney withdrew in that same speech.[91] Should AAG Varney's aggressive Section 2 enforcement agenda and post-*Trinko* embrace of *Aspen* bear fruit, the results may enhance Justice Stevens' legacy on monopolization law.

Standing Law

Justice Stevens also made important contributions to the development of the doctrine of antitrust standing. Generally speaking, private plaintiffs pursuing antitrust claims must satisfy the standing requirements of Sections 4 and 16 of the Clayton Act, which authorize private parties to seek damages and injunctive relief for violations of the federal antitrust laws.[92] As the Supreme Court held in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, this requires the plaintiff to "prove antitrust injury, [or] injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[93] Proof of antitrust injury is required in all antitrust actions and the Supreme Court has decided a series of cases since *Brunswick* that circumscribe the types of injuries for which private antitrust plaintiffs can seek relief under the Sherman and Clayton Acts. These decisions call, most importantly, for evaluating the relationship between a plaintiff's alleged harm and the alleged wrongdoing by defendants to determine whether the plaintiff is a proper party to pursue the particular claim at issue.

One of the leading decisions on antitrust standing is Justice Stevens' majority opinion in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* (*AGC*).[94] The "*AGC* test," a balancing test devised by Justice Stevens in his opinion, enumerates several factors to be considered when "evaluat[ing] the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them" to determine whether a plaintiff who has alleged an injury under the antitrust laws has standing.[95] The *AGC* factors Justice Stevens described are: the nature of the injury alleged (i.e., antitrust injury); the directness of the injury; the speculative nature of the harm; the risk of duplicative recovery; and the complexity in apportioning damages.[96] Justice Stevens declared that consideration of these factors is a threshold inquiry necessary to determine whether a given plaintiff "is a proper party to bring a private antitrust action."[97] After evaluating these factors, the Court in *AGC* ultimately held that the plaintiff unions lacked standing to bring their Section 1 conspiracy claims against the defendant association of general contractors and its members.[98]

After *Associated General Contractors*, Justice Stevens authored two noteworthy dissenting opinions and one concurring opinion relating to antitrust standing. In *Cargill, Inc. v. Monfort of Colo., Inc.*, the Supreme Court held that a competitor lacked standing to seek an injunction of a proposed merger where plaintiff alleged that it would lose profits post-merger from increased price competition.[99] Justice Stevens dissented, arguing that for purposes of obtaining injunctive relief under Section 16 of the Clayton Act, "respondent's showing that it faced the threat of loss from an impending antitrust violation clearly conferred standing to obtain injunctive relief."[100]

Justice Stevens again dissented in the Court's later antitrust standing decision in *Atlantic Richfield Co. v. USA Petroleum Co.* (*ARCO*).[101] There, the Court held that the plaintiff independent gas station had not suffered antitrust injury as a result of an alleged vertical, maximum price-fixing conspiracy because, as a competitor, it was not harmed in the same way consumers would be from such conduct.[102] Justice Stevens disagreed that antitrust law did not afford a remedy to competing gas stations under these circumstances, contending that "[w]hen competitors are injured by illicit agreements among their rivals rather than by the free play of market forces, the antitrust laws protect competitors precisely for the purposes of protecting competition."[103]

Finally, in *Trinko*, Justice Stevens concurred in the Court's judgment reversing the lower court's reinstatement of monopolization claims against defendant Verizon.[104] Justice Stevens argued, however, that the Court should have dismissed plaintiff's claims on antitrust injury grounds, stating that "whatever antitrust injury respondent suffered because of Verizon's conduct was purely derivative of the injury that AT&T suf-

fered"[105] and "AT&T, as the direct victim of Verizon's alleged misconduct, is in a far better position than respondent to vindicate the public interest in enforcement of the antitrust laws."[106]

The evolution of the law of antitrust standing over the past thirty-five years has largely favored antitrust defendants, and today, antitrust standing is an important weapon in the arsenal of defendants confronting private treble damages actions. In particular, antitrust defendants often rely on Justice Stevens' *AGC* test to argue that plaintiffs are not proper parties to bring suit to enforce the antitrust laws and accordingly that the antitrust laws provide no remedy for plaintiffs' alleged injuries.

The Stevens Legacy

Judged from the perspective of the most important majority opinions that he authored in antitrust cases over the past three and a half decades, Justice Stevens defies characterization as either uniformly pro-plaintiff or uniformly pro-defendant. His opinions on horizontal restraints paved the way for today's "quick look" methodology that has made it easier for courts to find antitrust violations in circumstances where the per se rule does not quite fit but where the facts of the case do not require or justify a lengthy rule of reason analysis. His opinions moved the whole thrust of the law on tying arrangements closer to—if not actually to—the sort of rule of reason treatment that makes it more difficult for plaintiffs to prevail on such claims. On refusals to deal, *Aspen Skiing* remains to this day a lifeboat for plaintiffs' monopolization claims against dominant companies that terminate relationships with their rivals without providing a valid business justification for doing so.

On the other hand, *Associated General Contractors* introduced into antitrust standing law considerations that defendants have employed successfully against a wide array of antitrust claims. Notwithstanding these disparate results, Justice Stevens brought to all of his opinions for the majority in antitrust cases a sophisticated and practical approach to analysis of the issues at hand. And that, in the end, is the most important feature of his antitrust legacy.

It would be a mistake, however, to view Justice Stevens as an indifferent or "nonpartisan" participant in the long running debate over the direction of antitrust law. His two most recent dissenting opinions in antitrust cases, for example, evince passion for robust enforcement of the antitrust laws.

In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, the Court effectively narrowed the scope of the Robinson-Patman Act by interpreting the competitive injury element of a R-P Act violation to require the charging of different prices to dealers competing for the same customer.[107] Justice Stevens complained that the majority was abandoning longstanding R-P Act jurisprudence establishing (1) the *Morton Salt* inference of competitive injury in a wide array of situations[108] and (2) the incipiency doctrine under which the statute requires only a "reasonable possibility" of competitive harm.[109] More fundamentally, he challenged the majority's disregard of the original intent of the R-P Act "to protect small retailers from the vigorous competition afforded by chainstores and other large volume purchasers."[110]

In *Bell Atlantic Corp. v. Twombly*, the Court made it materially more difficult for antitrust plaintiffs to survive the initial pleading stage and thus to begin any discovery process by requiring enough detail in the complaint to establish "plausibility" of the claim at issue.[111] Justice Stevens dissented over this "dramatic departure from settled procedural law."[112] In response to concerns expressed by the majority over alleged abuses of the private antitrust enforcement regime, he countered that "the fact that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that Congress intended to encourage, rather than discourage, private enforcement of the law."[113] In short, he said, it is "more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage."[114] He characterized the complaint that the majority rejected as setting forth a "profoundly serious" charge and asserted that, if "the allegation of conspiracy happens to be true, today's decision obstructs the congressional policy favoring competition that undergirds . . . the Sherman Act itself."[115]

Those are the words, in 2006 (*Volvo*) and 2007 (*Twombly*), of a Justice who cares deeply about the efficacy of the antitrust laws. Of course this is eminently appropriate since Justice Stevens occupied for so long not just the William Douglas seat, but, before that, the Louis Brandeis seat. Big shoes for any successor to fill. ■

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1 United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

2 Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967).

3 United States v. Von's Grocery Co., 384 U.S. 270 (1966).

4 Am. Needle, Inc. v. Nat'l Football League, No. 08-661 (U.S. May 24, 2010); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991); Texaco Inc. v. Hasbrouck, 496 U.S. 543 (1990); California v. Am. Stores Co., 495 U.S. 271 (1990); FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978); U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

5 Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007) (Stevens, J., concurring); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (Stevens, J., concurring); Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993) (Stevens, J., concurring); Rice v. Norman Williams Co., 458 U.S. 654 (1982) (Stevens, J., concurring); Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (Stevens, J., concurring in part, dissenting in part); United States v. U.S. Gypsum Co., 438 U.S. 422 (1978) (Stevens, J., concurring in part, dissenting in part).

6 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (Stevens, J., dissenting);

Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006) (Stevens, J., dissenting); Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Stevens, J., dissenting); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (Stevens, J., dissenting); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991) (Stevens, J., dissenting); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (Stevens, J., dissenting); Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988) (Stevens, J., dissenting); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986) (Stevens, J., dissenting); S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) (Stevens, J., dissenting); Hoover v. Ronwin, 466 U.S. 558 (1984) (Stevens, J., dissenting); Jefferson County Pharm. Ass'n, Inc. v. Abbott Labs., 460 U.S. 150 (1983) (Stevens, J., dissenting); Blue Shield of Va. v. McCready, 457 U.S. 465 (1982) (Stevens, J., dissenting); Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (Stevens, J., concurring in part, dissenting in part); United States v. U.S. Gypsum Co., 438 U.S. 422 (1978) (Stevens, J., concurring in part, dissenting in part).

[7] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[8] Hilary Russ, *Lesser-Known Stevens Rulings Changed Face of Law*, LAW360, Apr. 9, 2010, http://appellate.law360.com/articles/160130.

[9] Am. Needle, Inc. v. Nat'l Football League, No. 08-661, slip op. at 1 (U.S. May 24, 2010).

[10] *Id.* at 6.

[11] *Id.* at 13.

[12] *Id.* at 15.

[13] FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

[14] Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977).

[15] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[16] Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) (*AGC*).

[17] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006).

[18] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[19] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[20] White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

[21] Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 19–20 (1979) (*BMI*).

[22] Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).

[23] *GTE Sylvania*, 433 U.S. at 49.

[24] 435 U.S. 679 (1978).

[25] *Id.* at 682–83.

[26] *Id.* at 684–85.

[27] *Id.* at 688.

[28] *Id.*

[29] *Id.* at 691.

[30] *Id.* at 692.

[31] *Id.* at 693.

[32] *Maricopa County*, 457 U.S. 332.

[33] *Id.* at 351.

[34] *NCAA*, 468 U.S. 85.

[35] *Id.* at 101.

[36] *See id.* at 101–02.

[37] *Id.* at 104.

[38] *Id.* at 104 n.26.

[39] *Id.* at 104. Five years before *NCAA*, Justice Stevens reached a similar conclusion regarding the antitrust viability of a blanket copyright license to music in *BMI*, 441 U.S. 1 (1979). There, after assessing the defendants' efficiency justifications for the blanket license, the Court held that it was not per se illegal and remanded the case for an examination under the rule of reason. *Id.* at 24–25. While Justice Stevens agreed with the Court's conclusion that the rule of reason applied, he dissented, arguing that based on the record the blanket license had "a significant adverse impact on competition." *Id.* at 25–26 (Stevens, J., dissenting).

[40] *NCAA*, 468 U.S. 85, 109 (quoting *Professional Engineers*, 435 U.S. at 692).

[41] *BMI*, 441 U.S. at 19–20 (internal quotations and citations omitted).

[42] *See, e.g.*, Geoffrey D. Oliver, *Of Tenors, Real Estate Brokers and Golf Clubs: A Quick Look at Truncated Rule of Reason Analysis*, ANTITRUST, Spring 2010, at 40; David L. Meyer, *The FTC's New "Rule of Reason":* Realcomp *and the Expanding Scope of "Inherently Suspect" Analysis*, ANTITRUST, Spring 2010, at 47.

[43] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–64 (1986).

[44] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999).

[45] *Id.* at 779.

[46] *Id.* at 781.

[47] PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

[48] N. Texas Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008).

[49] *Superior Court Trial Lawyers*, 493 U.S. 411.

[50] *Id.* at 423.

[51] 394 U.S. 495, 503 (1969).

[52] *Id.*

[53] 429 U.S. 610 (1977).

[54] *Id.* at 620.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 620–21.

[58] *Id.* at 622.

[59] 466 U.S. 2 (1984).

[60] *Id.* at 35 (O'Connor, J., concurring).

[61] *Id.* at 9 (majority opinion).

[62] *Id.* at 12.

[63] *Id.* at 13–14.

[64] *Id.* at 16.

[65] *Id.*

[66] *Id.* at 31–32.

[67] 547 U.S. 28 (2006).

[68] *Id.* at 45.

[69] *Id.* at 46.

[70] *Id.* at 38.

[71] *Id.* at 45.

[72] 472 U.S. 585 (1985).

[73] *Id.* at 585.

[74] *Id.* at 600.

[75] *Id.* at 601.

[76] *Id.* at 605.

[77] *Id.* at 586.

[78] *Id.* at 608–11.

[79] *Id.* at 608.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 610–11.

[83] *Id.* at 611.

[84] Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986).

[85] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

[86] *Id.* at 483 n.32.

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

[88] *Id.* at 409.

[89] Howard A. Shelanski, *Unilateral Refusals to Deal in Intellectual and Other Property*, 76 ANTITRUST L.J. 369, 373 (2009).

[90] Ellen Meriwether, *Putting the "Squeeze" on Refusal to Deal Cases: Lessons from* Trinko *and* Linkline, ANTITRUST, Spring 2010, at 69.

[91] Christine A. Varney, Ass't Atty Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the Center for American Progress, Vigorous Antitrust Enforcement in This Challenging Era 5 (May 11, 2009), *available at* http://www.justice.gov/atr/public/speeches/245711.htm.

[92] *See* 15 U.S.C. §§ 15(a), 26.

[93] 429 U.S. 477, 489 (1977).

[94] *AGC*, 459 U.S. 519.

[95] *Id.* at 535.

[96] *Id.* at 537–45.

[97] *Id.* at 535 n.31.

[98] *Id.* at 545–46.

[99] 479 U.S. 104, 12 (1986).

[100] *Id.* at 126 (Stevens, J., dissenting).

[101] 495 U.S. 328 (1990).

[102] *Id.* at 346–46.

[103] *Id.* at 353 (Stevens, J., dissenting).

[104] *Trinko*, 540 U.S. 398.

[105] *Id.* at 417 (Stevens, J., dissenting).

[106] *Id.*

[107] 546 U.S. 164 (2006).

[108] *Id.* at 185–87 (Stevens, J., dissenting).

[109] *Id.*

[110] *Id.* at 187.

[111] 550 U.S. 544, 545–46 (2007).

[112] *Id.* at 573 (Stevens, J., dissenting).

[113] *Id.* at 587.

[114] *Id.*

[115] *Id.* at 597.

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