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High Court Rulings Have Limited Antitrust Liability

Tuesday, Aug 28, 2007 --- A highlight of the Supreme Court's 2006-2007 term was the renewed attention to significant issues of antitrust law. The Court's antitrust focus, though, was not an invitation to plaintiff's bar to engage in more private enforcement actions.

The Court decided four important cases in which it: limited antitrust liability for predatory buying (Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S.Ct. 1069 (2007)); jettisoned the century-old per se prohibition against vertical resale price maintenance (Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S.Ct. 2806 (2007)); raised pleading standards in Section 1 cases (and at the same time overruled a longstanding principle of procedural law as set forth in Conley v. Gibson, 355 U.S. 41 (1957) (Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007)); and held that, in an antitrust class action, the securities laws precluded antitrust liability (Credit Suisse Securities (USA) LLC v. Billing, 127 S.Ct. 2383 (2007)).

In short, the Court limited substantive antitrust liability, made it more difficult for antitrust plaintiffs to get to court, and to stay in court.

A majority of the justices seem to believe that a freely competitive marketplace is best-protected through the functioning of market forces themselves, not by private antitrust litigation or by applying strict antitrust rules.

Indeed, as these four opinions demonstrate, the majority has concluded that, rather than protecting competition or enhancing consumer welfare, rules of antitrust liability and liberal pleading often deter genuinely pro-competitive behavior by forcing cost-conscious defendants to settle antitrust challenges to arguably pro-competitive conduct in order to avoid huge discovery costs.

Interestingly, the Court's equally significant patent decisions of the past two terms provide a different but parallel window on its view of how best to protect a competitive marketplace.

While eschewing private antitrust actions as a means of preserving vibrant competition, the Court at the same time demonstrated substantial concern about over-enforcement of patent rules and proliferation of "obvious" or otherwise invalid patents whose function is fundamentally anti-competitive.

To protect competition in the patent area, the Court has not hesitated to restrict the imposition of injunctions (eBay, Inc. v. MercExchange LLC, 126 S.Ct. 1837 (2006)), to allow licensees to sue for patent invalidity (Medimmune, Inc. v. Genentech, Inc., 127 S.Ct. 764 (2006)), or to hold a

patent invalid as “obvious” (KSR Inter. Co. v. Teleflex, Inc., 127 S.Ct. 1727 (2007)). In KSR, it observed that “[w]ere it otherwise, patents might stifle, rather than promote, the progress of useful arts.” Id. at 1746.

In sum, the 2006-2007 term demonstrates that, while the justices are not hesitant to cut off overboard or invalid intellectual property claims to protect competition, they are distrustful of applying antitrust rules directly to economic behavior, preferring to leave resolution of competitive issues to markets and not judges.

Last term’s four antitrust decisions fall into roughly two groups. The first two cases directly address substantive antitrust rules; the second two focus primarily on a plaintiff’s access to the courts.

* Weyerhaeuser *

In Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., a unanimous Court declined to fashion a different rule for “predatory buying” from the rule for “predatory pricing” that it had articulated in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 1135 (1993).

In Brooke Group, the Court established strict standards for proof of competitive injury that results from a rival’s low prices; the alleged predator must have priced below its rival’s costs and must also have a dangerous probability of recouping its investment.

These requirements show the Court’s skepticism with respect to claims of predatory pricing, as price reductions are often no more than the result of vigorous competition that benefits consumers.

In Weyerhaeuser, the Court found “predatory buying” analytically similar to predatory pricing, id. at 1076, and showed the same skepticism. It went even further to observe that “actions taken in a predatory-bidding scheme are often “he very essence of competition.” Id. at 1076 (multiple citations omitted).

In short, it viewed the market itself, rather than application of antitrust rules, as the best bulwark against anti-competitive predation.

* Leegin *

Leegin Creative Leather Products Inc. v. PSKS Inc. is particularly significant to manufacturers and retailers and to intellectual property owners and licensees. In Leegin, a five-to-four Court decision held that vertical price restraints are to be judged by the rule of reason.

Under the rule of reason, a vertical price restraint will be found to violate federal antitrust law only if, after weighing all the circumstances, a fact-finder concludes that the restraint’s anti-competitive impact outweighs its pro-competitive effects. While all such restraints may not survive antitrust

scrutiny, they are no longer deemed illegal on their face.

The case involved the not unusual scenario in which a retailer began selling the plaintiff's premium line at discount prices, violating Leegin's pricing policy to which the retailer had agreed. Leegin contended that its policy was pro-competitive because it encouraged retailers to promote and protect the brand.

The trial court refused to allow Leegin the opportunity to defend its policy based on the Supreme Court's nearly century-old holding in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), that vertical minimum resale price maintenance agreements are per se antitrust violations.

Writing for the majority, Justice Kennedy explained that the Court reserved the per se rule for restraints that in all or almost all instances have predominantly anti-competitive effects.

But the Court concluded there are many procompetitive justifications for a manufacturer's—or a licensor's—use of minimum resale prices. Among others, vertical resale price restraints may encourage retailers to invest in services or promotional efforts that aid the manufacturer or licensor in competing against rival brands.

Thus, even where a vertical price restraint results in increased prices, consumers may ultimately be better off through increased choice of brands and service levels. In the case of intellectual property licenses, resale price maintenance may also facilitate the licensor's control of product quality.

But some vertical price restraints may have anti-competitive effects, and not all such agreements will be upheld. This caused the dissenting judges to predict that the decision will raise prices and create "legal turbulence," as lower courts are now required to examine competitive circumstances rather than automatically applying a bright-line rule and condemning resale price maintenance as per se unlawful.

The view that markets function best when left alone, rather than when circumscribed by outmoded "bright line" rules, prevailed.

* Twombly *

Turning to the Court's two procedural antitrust decisions, the most far-reaching was Bell Atlantic Corp. v. Twombly, which refashioned the rules of antitrust pleading.

As Justice John Paul Stevens pointed out in his dissent, Twombly establishes no new principle of antitrust law. "The answer to that question has been settled for more than 50 years . ... As Theatre Enterprises Inc. v. Paramount Film Distributing Corp., 340 U.S. 337 (1954)] held, parallel conduct is circumstantial evidence admissible on the issue of conspiracy, but

is not itself illegal." Id. at 1974.

Twombly's significance is in its tightening of federal pleading standards. The plaintiffs in Bell Atlantic alleged that regional Bell operating companies had conspired to inhibit the growth of local exchange carries and to refrain from head-to-head competition.

The district court held that the plaintiffs' complaint alleged lawful parallel business conduct, rather than an unlawful conspiracy, and dismissed the complaint.

The Court of Appeals reversed.

The Supreme Court, in a decision written by Justice David H. Souter, held that claims pleaded in federal court must allege factual statements that, if proved, would provide the grounds for plaintiffs' entitlement to relief.

Applying that principle in the context of an antitrust conspiracy claim, the Court held that a complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made," if an antitrust plaintiff is to survive a motion to dismiss. Id. at 1959. Mere allegations of parallel conduct are insufficient.

In announcing its new "plausible-suggestion" pleading standard, the Court retreated from Conley v. Gibson's statement that the "accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 35 U.S. 41, 45-46 (1957).

About the "no set of facts" language, the Court pronounced that "the phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 1969 (emphasis added).

The Court's opinion addressed case management issues, particularly the costly nature of antitrust discovery. Recognizing that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before summary judgment," the Court explained, "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim." Id. at 1966 (internal quotation marks omitted).

In a strongly worded dissent, Justice Stevens joined by Justice Ruth Bader Ginsburg, accused the Court of revising Rule 8's well-established pleading standard without going through the rules amendment process.

As a practical matter, Bell Atlantic will provide defendants with more

opportunities to seek and secure an early dismissal. Lower courts are likely to face an increasing number of dismissal motions requiring them to sift the "plausible" from the "speculative." Because such motions are decided on the pleadings prior to discovery, the decision allows "gate-keeper" judges to determine a complaint's fate early, before the parties engage in costly discovery—and on their own. Whether that process protects competition remains to be seen.

* Credit Suisse *

Credit Suisse Securities (USA) LLC v. Billing further restricts antitrust actions. This case was a class action against underwriting firms that market and distribute newly issued securities. Concluding that there existed a "plain repugnancy," id. at 2387, between the antitrust action and securities law and noting the comprehensive authority of the SEC to regulate such matters, Justice Breyer wrote for the Court:

"We believe it fair to conclude that, where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets." Id. at 2396.

Credit Suisse is significant not only for its exclusion of antitrust actions from the securities arena—it suggests that in other pervasively regulated areas (such as energy), where there is no specific antitrust savings clause, courts may find "plain repugnancies" between the antitrust claims and the federal framework, limiting other categories of antitrust actions.

* Conclusion *

The Post-Chicago School framework for antitrust analysis continues to posit that consumer welfare is the goal of antitrust.

A number of commentators have questioned whether last term's substantive and procedural decisions are in any way consumer-friendly. While making it more difficult for a plaintiff to prove a substantive predatory buying or vertical restraint claim, the real significance of this term is the procedural limits the cases impose on would-be plaintiffs and the barriers to litigation that they raise.

The rationale of the Court's recent antitrust jurisprudence is that consumer welfare is better served in an unregulated competitive environment (in which intellectual property claims are constrained) rather than by a regime of strict prohibitions and active private antitrust enforcement.

Distinguishing between aggressive but legitimate competition and conduct that transgresses the Sherman Act is no easy (or low-cost) task. And one

need not look long to find examples of discovery abuse in antitrust cases.

By making it more difficult to get to court in the first place, these four decisions exemplify an unwillingness to leave those questions and case management issues in the hands of juries and the lower courts, where they have long resided.

How much more difficult that task will be depends on how the lower courts apply these four significant decisions.

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