



Federal Trade Commission

The Supreme Court's Antitrust Jurisprudence: Will The Past Be Prologue?

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before

**The Antitrust Section of the Connecticut Bar Association
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Two years ago I shared some thoughts about the Supreme Court with members of the Minnesota State Bar Antitrust Section. I'd like to do the same thing with you this evening. But before I do so let me say that the airport in Minneapolis-St. Paul is more efficient in moving snow than any airport I've ever visited. The morning of my remarks, a blizzard blanketed the Midwest, and by lunch time I didn't think there was a chance I'd make it back to Washington that night. I told my host how I felt, and he replied "Don't worry. We have the most efficient snow removal equipment in the world, and you'll be fine." Sure enough, after the remarks, a taxi with chains bulldozed its way through the drifts to the airport, my plane (from San Diego) landed only 15 minutes late, they de-iced it, we skidded down a snowy runway, and I made it back to

¹ The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Amanda Reeves, for her invaluable assistance preparing this paper.

Washington almost on time. But I don't want to do it again. So let's hope that Spring has sprung in Connecticut!

My remarks, like my remarks in Minneapolis, can be broken down into three parts. First, I will address where the Supreme Court, in light of its most recent orders in antitrust cases, stands today in terms of antitrust jurisprudence. Second, I will address how and why I believe the Court got where it is. Third, I will close by offering some thoughts on the open antitrust issues that I expect the Court will address in the near future.

I.

To begin with, the Court has issued important orders in three antitrust cases during the past year – all during the last week of February. The first order was its February 25, 2009 decision in *linkLine*.¹ In *linkLine*, the Court held that an integrated defendant (i.e., one that serves as both a manufacturer and a distributor) cannot be liable under Section 2 of the Sherman Act for engaging in a “price squeeze.” As you may know, a “price squeeze” occurs when a defendant sells a product at wholesale to a downstream competitor at a price that disables that competitor from competing profitably with the defendant in the retail market. Petitioner linkLine Communications argued that AT&T had engaged in a price squeeze when AT&T provided wholesale DSL transport services to its competitor internet service providers at a high price and simultaneously sold those same services directly to consumers at retail for a low price. As a competitor to AT&T, linkLine claimed that AT&T's conduct prevented it from purchasing and reselling DSL at a price that was competitive with AT&T's price. The defendants, with the Solicitor General's blessing, argued that the Court's decisions in *Brooke Group* and *Trinko* foreclosed linkLine's application of Section 2 to price squeeze claims.

¹ *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S.Ct. 1109 (2009).

A unanimous Supreme Court held that the Ninth Circuit erred in allowing the claim to proceed, though the justices split 5-4 in their rationale. Led by Chief Justice Roberts, five justices followed the defendants' lead by viewing the plaintiffs' Section 2 price squeeze claim as raising two separate doctrinal questions: First, did AT&T have a duty under the antitrust laws to deal with its competitors? Second, did AT&T violate Section 2 by engaging in downstream pricing practices that forced out a competitor? Separating the price squeeze claim into two separate questions provided Chief Justice Roberts with a straightforward path for resolving the Section 2 question because, under dicta in *Trinko*, a defendant does not have an antitrust duty to deal and, under *Brooke Group*, downstream pricing can only constitute a Section 2 violation if the plaintiff proves that the defendant engaged in below cost pricing. Thus, because AT&T did not violate a duty to deal vis-à-vis its competitors and arguably did not engage in predatory pricing vis-à-vis its retail purchasers, Chief Justice Roberts reasoned that linkLine's price squeeze claim had no basis under Section 2.²

To be sure, the *linkLine* appeal did not require the Court to reach so far. First, pursuant to *Trinko*, the Court could have held that because AT&T, like the defendant in *Trinko*, was a regulated utility, a Section 2 claim was improper because a defendant's conduct is less likely to be exclusionary when it is subject to a regulatory scheme that already protects consumers by deterring and remedying anticompetitive harm. Indeed, this was the position that Justice Breyer took in a concurring opinion, joined by Justices Stevens, Souter, and Ginsberg.³ Justice Breyer,

² The majority did remand the case to enable the lower court to determine whether plaintiff could allege that AT&T engaged in predatory pricing, but it expressed doubt over whether the plaintiff could plausibly plead a predatory pricing claim under the rigorous pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

³ *linkLine*, 129 S. Ct. at 1123, 1124 (refusing to answer whether Section 2 permits a price squeeze claim and noting that "[w]hen a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the

therefore, would not have reached whether a Section 2 price squeeze claim was viable in the context of an unregulated utility and would have simply remanded the case for the lower courts to determine whether the defendants engaged in predatory pricing under *Brooke Group*.⁴

Second and along the same lines, the Court would not have been out on a limb had it decided to reserve the question of whether an unregulated utility was subject to a price squeeze claim under Section 2. In his 1945 decision for the Second Circuit in *Alcoa*, for example, Judge Learned Hand held that an unregulated defendant with monopoly power may violate Section 2 when that defendant engages in a price squeeze.⁵ And, as the Ninth Circuit recognized in *linkLine*, Judge Hand was not alone: the Third, Seventh, and Eighth Circuits had all likewise so held.⁶

Third, as *linkLine* pointed out, in denying the defendant's motion for summary judgment, the Ninth Circuit seemingly had held that AT&T's wholesale pricing could be considered to be below its cost and hence a violation of Section 2 under *Brooke Group*. Thus, the Court could properly have considered the case as raising the more limited question of the scope of the duty to

benefits"); see also *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 26-29 (1st Cir. 1990) (Breyer, J.).

⁴ *Id.* at 1124-25.

⁵ *United States v. Aluminum Co. of America* ("Alcoa"), 148 F.2d 416, 430 (2d Cir. 1945).

⁶ See *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 809-11 (3d Cir. 1984) (price squeeze is only an antitrust violation if plaintiffs can show that "the defendants deliberately produced the effect" to "destroy its competition"); *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 983-85 (7th Cir. 1980) (antitrust liability can lie for price squeezes in regulated industry upon a showing of specific anticompetitive intent); *Lansdale v. Philadelphia Electric Co.*, 692 F.2d 307, 309-10 (3d Cir. 1982); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178-79 (8th Cir. 1982) (antitrust liability can still lie for price squeezes even when rates are regulated).

deal after *Trinko*. The Court, however, took none of these steps and, as a result, price squeeze claims are no longer cognizable in the United States under Section 2.⁷

The second important order that the Court has issued in 2009 was its order denying the Commission's Petition for Certiorari in *Rambus*.⁸ *Rambus* was a standard-setting case. The Commission found that, in violation of Section 2, Rambus engaged in a deceptive course of conduct respecting patent applications covering its technology and that, but for that conduct, (1) Rambus' technology would not have been incorporated into the standard (allegedly locking licensees into that technology), or (2) the standard setting organization (the JEDEC) would have required Rambus to license its technology for a reasonable and nondiscriminatory royalty (called a "RAND commitment") before the standard was adopted.

The D.C. Circuit, however, saw the case differently and reversed.⁹ The court held that, even if Rambus had disclosed its intellectual property to the standard setting organization, the Commission failed to find that the standard setting organization would not have standardized Rambus' technologies anyway. Further, the court reasoned that, even if Rambus had engaged in deception, there was no harm to competition because "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition."¹⁰

The Solicitor General refused to seek certiorari – a decision with which the Commission disagreed – and so, pursuant to unique statutory authority that does not make us beholden to the

⁷ For a different view in Europe, see Francisco Enrique Gonzalez-Diaz and Jorge Padilla, "The *linkLine* Judgment—A European Perspective," *Global Competition Review* (April 2009); Cecilio Madero et al., "Margin Squeeze Abuses: The EU Perspective," *Global Competition Review* (April 2009).

⁸ Order denying certiorari, *Federal Trade Comm'n v. Rambus Inc.*, No. 08-684 (Feb. 23, 2008).

⁹ *Rambus, Inc. v. Federal Trade Comm'n*, 522 F.3d 456 (D.C. Cir. 2008).

¹⁰ *Id.* at 468.

Solicitor General,¹¹ we went it alone. Our Petition raised two questions: First, whether the D.C. Circuit erred in its causation requirement by rejecting as a basis for liability the Commission's finding that *but for* Rambus' deception, the standard setting organization would have obtained a RAND commitment from Rambus *or* would have adopted an alternative technology? Under the D.C. Circuit's rule, the Commission was required to prove that, but for Rambus' deception, one of those events would have occurred. Second, the Petition raised the question of whether the D.C. Circuit erred in holding that the avoidance of a RAND commitment (and Rambus' deceptive course of conduct) was not a Section 2 violation. Rambus responded by emphasizing, among other things, that the Solicitor General had not joined in the Commission's Petition, that the D.C. Circuit expressed doubts about whether Rambus had engaged in deceptive conduct, and, finally, that the questions presented regarding Rambus' conduct in the standard setting context were beyond the scope of Section 2 more generally.

As you may know, the *Rambus* story did not end as I hoped. On February 23, 2009, the Court denied the Commission's Petition. Although, as is typically the case, the Court did not describe the reasons for its order, I am willing to hazard a guess that there were at least two reasons for that decision. For one, as Rambus pointed out in its brief, the Solicitor General did not join the Petition. That fact alone may have been determinative in the Court's view. Further, as Rambus also pointed out, the Petition raised questions that focused on Section 2's application in the narrow standard setting context. Thus, it may be that the denial of the Petition is not

¹¹ Section 16(a)(3) of the FTC Act provides, *inter alia*, that where (as was the case in *Rambus*) the Commission has been represented in the court of appeals by its own attorneys, it may be represented in like manner before the Supreme Court if the Solicitor General declines to file a petition for certiorari. 15 U.S.C. § 56(a)(3). The Commission had previously exercised this authority on three occasions. See *Federal Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Federal Trade Comm'n v. Schering-Plough; Corp.*, 548 U.S. 919 (2006).

necessarily an endorsement of the D.C. Circuit's decision as much as a reflection of the Court's view that the issues presented were not worthy of certiorari. As I will discuss in a moment, these factors may be important in understanding the forces at work in the Court's antitrust jurisprudence.

The third significant order that the Court issued this year – on the same day that it denied the Commission's Petition in *Rambus* – was its request for the Solicitor General's views about whether the Court should hear an appeal from the Seventh Circuit's decision affirming summary judgment in the *American Needle* case.¹² The issue in *American Needle* is whether Adidas and the National Football League conspired to foreclose competition in the manufacture and sale of apparel bearing the logos of NFL football teams by entering into an agreement under which the NFL granted an exclusive license to Adidas to engage in the manufacture and sale of that apparel. Because it viewed the exclusive licensing agreement as a strictly vertical agreement between the NFL and Adidas (whose illegality would require evidence of market power that *American Needle* did not adduce), the district court granted summary judgment to the defendants.¹³ The Seventh Circuit affirmed. In a lengthy decision, the court held that the NFL had to be considered a single entity (and therefore incapable of conspiring with itself) instead of consisting of its separate football teams. The question presented by *American Needle*'s Petition is whether that holding was correct, as a matter of law.

I am recused from participating in the Commission's deliberations about what the Solicitor General should say because I was counsel for Adidas when I was in private practice (although the lion's share of the work was done by Tim Hardwicke in Latham's Chicago office). But I can and will comment about whether any unifying principles can be discerned from these

¹² *American Needle Inc. v. Nat'l Football League*, 358 F.3d 736 (7th Cir. 2008).

¹³ *American Needle Inc. v. New Orleans La. Saints*, 533 F. Supp. 2d 790 (N.D. Ill. 2007).

very different orders, and if so, what those unifying principles are. In a nutshell, I think these orders have three things in common. First, they demonstrate that the current Court continues to be extraordinarily interested in antitrust jurisprudence. Second, they show that the Solicitor General's views about that jurisprudence are extraordinarily important to the Court. Third, they suggest that although this Court prizes collegiality and likes to consider and decide cases unanimously, if at all possible, and with as many votes as possible (even if unanimity is not attainable), we may be witnessing a departure from this objective in the Court's antitrust jurisprudence for reasons that I will explain. Let me please elaborate.

II.

As to my first observation, it would not surprise me if the Court were to add *American Needle* to its docket for the 2009-2010 term because this Court has a deep interest in antitrust. The numbers speak for themselves. Whereas in the 15 terms prior to the 2003-2004 term, the Court averaged less than one antitrust case a year, over the last five terms, the Court has already decided 10 antitrust cases.¹⁴ That is a remarkable fact when you consider that, although the Court receives more than 8000 petitions for writs of certiorari every term, it decides only 70-80 cases – less than one percent of the petitions – on the merits. I have a few observations to share on why the Court has taken such an acute interest in antitrust.

¹⁴ The Court decided *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), during the 2003-2004 term. The Court did not decide any antitrust cases in its 2004-2005 term but it issued three opinions on antitrust during the 2005-2006 term. See *Volvo Trucks N. Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Texaco Inc. v. Dagher*, 126 S. Ct. 1276 (2006); *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281 (2006). The 2006-2007 term was the Court's most active term in the antitrust realm over the last three decades with the Court deciding four more cases. See *Weyerhaeuser Co. v. Ross Simmons Hardwood Lumber Co.*, 127 S.Ct. 1069 (2007); *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007); *Leegin Creative Leather Services v. PSKS*, 127 S.Ct. 2705 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S.Ct. 2383 (2007). The Court took a break from antitrust during the 2007-2008 term and then, most recently, decided *linkLine* during the 2008-2009 term.

For one thing, several of the current justices have a documented interest in the subject. Prior to his appointment, Justice Stevens served as Associate Counsel to the House Subcommittee on the Study of Monopoly Power in 1951 and on the Attorney General's Committee to Review the Antitrust Laws in 1955. Justice Stevens also worked in private practice, where he served as counsel of record in eighteen reported trial and appellate decisions involving antitrust and taught antitrust as a lecturer at Northwestern and the University of Chicago Law School. Justice Stevens has over two dozen antitrust opinions to his credit.¹⁵

Similarly, Justice Breyer served as a Special Assistant in the Antitrust Division and taught with Professors Areeda and Turner on the Harvard Law School faculty. Justice Breyer has authored several significant opinions on antitrust issues, including his recent dissent in *linkLine*.¹⁶

¹⁵ See, e.g., *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1555 (2007) (dissent); *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007) (concurrence); *Volvo Trucks*, 546 U.S. 164 (2006) (dissent); *Brown v. Pro Football*, 518 U.S. 231 (1996) (dissent); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (dissent); *California v. American Stores*, 495 U.S. 271 (1990); *Cargill v. Monfort of Colorado*, 479 U.S. 104 (1986) (dissent); *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985); *Jefferson Parish v. Hyde*, 466 U.S. 2 (1984); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *BMI v. Columbia Broadcasting*, 441 U.S. 1 (1979) (dissent). Justice Stevens has also written several articles on topics related to antitrust. John Paul Stevens, *Exemptions from Antitrust Coverage*, 37 ANTITRUST L.J. 706 (1972); John Paul Stevens, *Cost Justification*, 8 ANTITRUST BULL. 413 (1963); John Paul Stevens, *The Regulation of Railroads*, 19 ANTITRUST L.J. 355 (1961); John Paul Stevens, *The Robinson-Patman Act Prohibitions*, 38 CHICAGO BAR REC. 310 (1956); John Paul Stevens, *Tying Arrangements*, in NORTHWESTERN ANTITRUST CONFERENCE ON THE ANTITRUST LAWS AND THE ATTORNEY GENERAL'S COMMITTEE REPORT (1955); John Paul Stevens, *Defense of Meeting the Lower Price of a Competitor*, in 1953 SUMMER INSTITUTE ON FEDERAL ANTITRUST LAWS, University of Michigan Law School; *Book Review*, 28 NOTRE DAME L. REV. 430 (1952)(reviewing AMERICAN BAR ASSOCIATION - SECTION OF ANTITRUST LAW: PROCEEDINGS AT THE ANNUAL MEETING SAN FRANCISCO, CALIFORNIA, SEPTEMBER 17-18, 1952).

¹⁶ See *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S.Ct. 1109 (2009); *Leegin Creative Leather Services v. PSKS*, 127 S.Ct. 2705 (2007) (dissent); *Credit Suisse First Boston Ltd. v. Billing*, 127 S.Ct. 2383 (2007); *Empagran*, 542 U.S. 155 (2004); *Brown*, 518 U.S. 231 (1996); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990); *Grappone, Inc. v. Subaru of*

Chief Justice Roberts likewise handled a number of antitrust cases while in private practice¹⁷ and – in contrast to Chief Justice Rehnquist who, in his 19 years as Chief Justice wrote just one antitrust decision which was a dissent largely on federalism grounds¹⁸ – Chief Justice Roberts recently authored his first antitrust opinion when he wrote for the majority in *linkLine* after just three years at the Court. These three justices are not alone: the other six justices have likewise written important antitrust decisions as members of appellate courts and while on the Supreme Court.¹⁹

Apart from this pronounced interest in antitrust, I also suspect that the Roberts Court has had a heightened interest in antitrust because the Court has had some housekeeping to do. Antitrust cases raise complex, difficult questions that are generally at the intersection of law, economics, and business strategy – an intersection where the law is frequently evolving. The century-old antitrust laws are decidedly vague and unlike many other areas of law where there are detailed statutes and regulations, Congress has left the lawmaking in the antitrust realm to the

New England, 858 F.2d 792 (1st. Cir. 1988); *Kartell v. Blue Shield of Massachusetts*, 749 F.2d 922 (1st Cir. 1984).

¹⁷ See *Commonwealth of Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004) (represented the states in the remedy proceedings); *In re Independent Service Organizations Antitrust Litigation*, *CSU, L.L.C. v. Xerox*, 203 F.3d 1322 (Fed. Cir. 2000) (represented CSU); *Intergraph Corp. v. Intel*, 195 F.3d 1346 (Fed. Cir. 1999) (was on the brief for appellee Intergraph); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (as the Principal Deputy Solicitor General, he argued for the United States as *amicus curiae*).

¹⁸ *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

¹⁹ See *Leegin*, 127 S.Ct. 2705 (Kennedy, J.); *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007) (Souter, J.); *Weyerhaeuser*, 127 S. Ct. 1069 (2007) (Thomas, J.); *Credit Suisse v. Billing*, 127 S.Ct. 2383 (2007) (Thomas, J.) (dissent); *Volvo Trucks*, 546 U.S. 164 (2006) (Ginsburg, J.); *Dagher*, 126 S. Ct. 1276 (2006) (Thomas, J.); *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (Scalia, J.); *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (Souter, J.); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (Kennedy, J.); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1992) (Scalia, J.); *LePage's Inc. v. 3M Corp.*, 324 F.3d 141 (3d Cir. 2003) (Judge Alito in dissent); *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990) (Judge Thomas).

courts. In the 1990s, however, the Supreme Court issued fewer antitrust decisions than in any single decade since Congress first enacted the antitrust laws in the 1890s.²⁰ The turn of the millennium therefore brought with it many open questions that were ripe to resolve.

My second observation is that, in selecting which antitrust cases to review and how to resolve those cases on the merits, this Court has relied heavily on the Solicitor General's views. The Solicitor General is often nicknamed the "tenth justice" and that title has been particularly apt when it comes to antitrust. By my count, the Solicitor General has submitted amicus briefs at the certiorari or merits phase in every antitrust case that the Court has ultimately accepted for review since 2002. During that period, in all eleven antitrust cases where the Solicitor General expressed a view on whether to grant or deny certiorari, the Court followed the Solicitor General's advice.²¹ And in the ten antitrust matters decided since 2004, a majority of the Court agreed with the Solicitor General's ultimate conclusion on the outcome – if not always on the reasoning behind those conclusions.

There are no doubt good reasons for the Court's interest in the Solicitor General's views when it comes to antitrust and I will speculate here on just a few. For one, antitrust cases,

²⁰ "The Antitrust Legacy of the Rehnquist-O'Connor Court," 20 Antitrust Magazine 3, 9 (Summer 2006).

²¹ In the following six cases, the Court denied the Petition consistent with the Solicitor General's recommendation: *Dee-K Enters., Inc. v. Heveafil SDN. BHD.*, 537 U.S. 1102 (2003); *In re Cardizem Antitrust Litig.*, 332 F.3d 886 (6th Cir. 2003), *cert denied Andrx Pharmaceuticals, Inc. v. Kroger*, 540 U.S. 1160 (2004); *3M Co. v. LePage's, Inc.*, 324 F.3d 141, *cert. denied* 540 U.S. 807 (2003); *Monsanto Co. v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004), *cert denied McFarling v. Monsanto*, 543 U.S. 923 (2004); *Schering-Plough Corp. v. Federal Trade Comm'n*, 402 F.3d 1056 (11th Cir. 2005), *cert denied Federal Trade Comm'n v. Schering-Plough Corp.*, 126 S.Ct. 2929 (2006); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006), *cert denied Jablove v. Barr Labs. Inc.*, 127 S.Ct. 3001 (2007). In the following five cases, the Court granted the Petition consistent with the Solicitor General's recommendation: *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 546 U.S. 1028 (2005); *Texaco Inc. v. Dagher*, 543 U.S. 1143 (2005); *Credit Suisse First Boston Ltd. v. Billing*, 127 S.Ct. 2383 (2007); *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 128 S.Ct. 1137 (2008).

particularly in the Section 2 single firm conduct arena, can have far-reaching effects on how businesses operate – even in the absence of a circuit split, which is typically the main reason why the Court accepts cases for review. However, it is likely hard for the Court to decide on its own which decisions have such far-ranging effects and may chill pro-competitive conduct. The Court’s single firm conduct decisions in *Brooke Group*, *Trinko*, *Weyerhaeuser*, and *linkLine* are illustrative – in *Brooke Group* and *Weyerhaeuser*, the petitioners did not identify a circuit split and in *Trinko* and *linkLine*, the petitioners argued that the Second and Ninth Circuit decisions respectively each conflicted with a decision from just one other appellate court. Nonetheless, in all four cases the Solicitor General recommended that the Court grant the petition for certiorari; in all four cases the Court agreed.

Along the same lines, the Court relies on the Solicitor General’s guidance on when a particular case that raises an issue that is ripe for review is nevertheless not an appropriate vehicle to decide that issue. The Third Circuit’s decision in *3M v. LePage’s*, for example, seemed like a good candidate for Supreme Court review because it raised important questions concerning the legality of bundled discounts that grew out of the Supreme Court’s decision in *Brooke Group*. The Solicitor General, however, cautioned the Court against taking the case because of concerns about the factual record and because an insufficient number of courts had yet to weigh in. Following the Solicitor General’s lead, the Court refused to hear the case. Likewise, the Solicitor General has weighed in against the public and private plaintiffs in conjunction with three petitions for certiorari in so called “reverse payment” cases – cases in which a brand name pharmaceutical company with a patent has made a payment to the generic company challenging the validity of the patent and whether it was being infringed. In all three

instances, consistent with the Solicitor General's recommendation, the Court denied the Petition.²²

Further, I suspect, as has historically been the case, I suspect that the Court is, in part, deferential to the Solicitor General because both of former President George W. Bush's appointees to the Court served in the Solicitor General's office – Chief Justice Roberts served as Principal Deputy Solicitor General from 1989 to 1993, and Justice Alito served as Assistant Solicitor General from 1981 to 1985.

In light of the Solicitor General's decisive role, it is not surprising that the Court followed the Solicitor General's views in *linkLine*; nor is it surprising that the Court asked for the Solicitor General's views in *American Needle*. Similarly, it would not be surprising if the Solicitor General's refusal to join the Commission's petition in *Rambus* weighed against the Petition.

My third observation is that this Court, at least until recently, seemed to prize unanimity. As you may recall, the Rehnquist Court not only frequently issued 5-4, but also issued splintered decisions where there were only majorities as to certain parts of certain opinions. The Roberts Court, at least in its infancy, has moved away from that practice in the antitrust realm by fashioning narrow decisions to achieve a consensus. Take, for example, Justice Stevens' opinion in *Illinois Tool Works*.²³ In that case the Court could have reached out and held that tying was no longer to be treated as a per se or even a quasi-per se offense. But it did not. Instead, in that 8-0 decision, the Court simply held that “the mere fact that a tying product is patented does not

²² *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006); *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370 (2d Cir. 2005) (Pooler, J., dissenting), *amended*, 466 F.3d 187 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 3001 (2007).

²³ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

support [a presumption of market power].”²⁴ Or, consider Justice Thomas’ opinion in *Weyerhaeuser*.²⁵ The Court could have fashioned a brand new rule for assessing the legality of alleged predatory bidding. It did not do that. Instead that 9-0 decision simply held that the standards for predatory pricing articulated in *Brooke Group* also applied to predatory bidding claims.²⁶ Or, examine what happened in *Dagher*.²⁷ The Court could have issued a cosmic decision about the antitrust principles applicable to joint ventures. Again, it did not. Instead that 8-0 decision just held that in the particular circumstances of that case the joint venture at issue was not per se illegal.²⁸

However, in its *Leegin* decision, issued in 2007, the Court divided 5-4, to overturn more than a century of precedent holding that resale price maintenance (where a producer sets its resellers’ prices) is *per se* illegal. Justice Breyer wrote a stinging dissent, and (as in *linkLine*) he was joined by Justices Stevens, Souter and Ginsburg.²⁹ Some have speculated that the dissent had more to do with *stare decisis* and *Roe v. Wade* than with resale price maintenance. But, be that as it may, Justice Breyer may have fallen off the majority’s bandwagon in antitrust cases after that decision. [*LinkLine* (which, though unanimous, was functionally a 5-4 decision) suggests that is so. Thus, I am left to wonder if the honeymoon is over because, as I noted, the Court could have decided that case on considerably more narrow grounds than it did. Only time will tell.

²⁴ *Id.* at 46 (“Today, we reach the same conclusion, and therefore hold that in all cases involving a tying arrangement the plaintiff must prove that the defendant has market power in the tying product.”).

²⁵ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

²⁶ *Id.* at 1078.

²⁷ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

²⁸ *Id.* at 8.

²⁹ *Leegin*, 127 S. Ct. at 2725.

III.

Finally, I would like to close by offering my thoughts on what lies on the horizon.

To start, there are some obvious open questions that the Court has not yet ruled on, but that I do expect the Court to take up in the next few years assuming the right case presents itself. First, the Court has been chipping away at the *per se* rule for tying, most recently with its 2006 decision in *Illinois Tool Works*.³⁰ As the Court noted in *Illinois Tool Works*, “[m]any tying arrangements, even those involving patents and requirement ties, are fully consistent with a free, competitive market.”³¹ Lower courts have taken these cues and carved out more exceptions. For example, the D.C. Circuit in *Microsoft* held that the integration of additional software functionality (sometimes called “technological tying”) should be analyzed under the rule of reason.³² I would not be surprised to see the Court formally reject *per se* treatment for tying in the very near future.

Second, there is continued debate about the appropriate measure of a defendant’s costs under the Court’s 1992 decision in *Brooke Group*.³³ *Brooke Group* articulated a two-part test for predatory pricing claims under which the plaintiff must show, first, that the defendant priced its products below an appropriate measure of its costs, and, second, that there was a dangerous probability that the defendant would recoup its investment in below-cost prices.³⁴ Although *Brooke Group* is now 17 years old, lower courts continue to debate the appropriate measure of

³⁰ *Illinois Tool Works*, 547 U.S. 28.

³¹ *Id.* at 45.

³² *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (applying the rule of reason to the bundling of operating systems and applications software).

³³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The *Brooke Group* Court itself had no need to address this issue because the parties agreed that the relevant measure of cost was average variable cost.

³⁴ *Id.* at 222-224.

cost that should be used in these cases. The Court has had several opportunities to address this question, including in an appeal from the Sixth Circuit’s 2005 decision in *Spirit Airlines*,³⁵ but that petition was dismissed because Northwest Airlines’ attorneys miscalculated the 90-day deadline and filed it late – the sort of error that no doubt keeps many of you up worrying at night. Some amici also asked the Court to address the issue in 2007 when it evaluated *Brooke Group*’s application to claims of predatory buying in *Weyerhaeuser*, but the Court passed. I continue to expect that the Court will address this issue sooner rather than later.

Third, in light of *Weyerhaeuser*, *Trinko*, and *linkLine* – each of which have applied *Brooke Group* to limit Section 2’s reach – this Court may confront the extent to which pricing practices like single product loyalty discounts and multi-product bundling are analyzed under *Brooke Group*, on the one hand, or as exclusive dealing practices, on the other. To date, no case involving loyalty discounts or bundling has yet to garner the Supreme Court’s attention. Indeed, thus far only one appellate lower court has held that loyalty rebate schemes – where discounts are tied to purchases of a single product – are subject to the *Brooke Group* standard.³⁶

In contrast, courts have had a knottier time sorting out whether bundled rebates – where rebates are tied to the purchase of multiple products bundled and discounted together – are likewise governed by *Brooke Group*. In *Brooke Group*’s wake, lower courts initially rejected the view that a plaintiff must show that the defendant engaged in below cost pricing (as *Brooke Group* required in the predatory pricing context) in order to prove that a defendant’s practice of

³⁵ *Spirit Airlines v. Northwest Airlines*, 431 F.3d 917, 952 (6th Cir. 2005). As in *Spirit Airlines*, all of the circuit courts adopt a variation of the Areeda-Turner test, that is that prices below average variable cost are deemed predatory and prices above average variable cost are deemed non-predatory. However, there is debate whether Areeda-Turner is a bright-line test or whether there is some wiggle room.

³⁶ See, e.g., *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), cert. denied, 531 U.S. 749 (2000).

bundling violates Section 2. Thus in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), an en banc Third Circuit – with then Judge Alito dissenting – held that *Brooke Group* did not set out a general rule that all discounting practices resulting in above-cost pricing were *per se* legal.³⁷ Following the Solicitor General's advice, the Court refused to hear the defendant's appeal.³⁸

More recently, it appears that the tide may be turning – at least a little bit. In its 2007 decision in *PeaceHealth*, the Ninth Circuit rejected *LePage's* and held that defendant's bundling practices did not violate Section 2.³⁹ In so holding, however, the Ninth Circuit did not fully embrace the *Brooke Group* standard. Indeed, it distinguished *Brooke Group* as involving nothing more than single product predatory pricing and read its application fairly narrowly.⁴⁰ Instead, the Ninth Circuit declared that “[t]o prove that a bundled discount was exclusionary or predatory for the purposes of a monopolization or attempted monopolization claim under Section 2 of the Sherman Act, the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant

³⁷ In *LePage's*, the Third Circuit confronted challenges to exclusive dealing and bundled discount practices. At trial, the jury found that the defendant's exclusive dealing agreements did not violate Section 1 or Section 3, but that those same agreements and the defendant's bundled discounting program violated Section 2. The en banc Third Circuit affirmed the jury's verdict after it concluded that 3M's exclusive dealing arrangements and bundled rebates allowed it to exclude *LePage's* from the market in violation of Section 2. The court found that it was impossible for *LePage's* to meet 3M's discounts because it did not sell the same array of products.

³⁸ *LePage's*, 324 F.3d 141, *cert. denied* 542 U.S. 95 (2004); *see also Ortho Diagnostic Sys., Inc. v. Abbott Lab., Inc.*, 920 F. Supp. 455 (S.D.N.Y.); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

³⁹ *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007).

⁴⁰ *Id.* at 912.

sold the competitive product or products below its average variable cost of producing them.”⁴¹ It also explicitly refused to require proof of recoupment.

It remains to be seen whether the Supreme Court would agree with the Ninth Circuit’s assessment in *PeaceHealth* or whether there are limits as to how far *Brooke Group* extends when it comes to the legality of bundling or multi-product discounts. It will be interesting to see how this area of law continues to evolve.

Apart from this low-hanging fruit so to speak, there are broader open issues that remain on the Court’s horizon and which I would not be surprised to see the regional federal appellate courts and Supreme Court grapple with in the upcoming years. One of those issues is how the courts should treat retail price maintenance claims in light of *Leegin*’s holding that resale price maintenance was not per se illegal and was instead subject to the rule of reason.⁴² The wild card here traces back to Justice Souter’s decision in *California Dental*, where Justice Souter acknowledged that conduct that was not per se illegal did not necessarily have to be judged under a full blown rule of reason to be considered illegal under Section 1.⁴³ Justice Souter did not, however, address what that lesser standard should be or what kind of analysis would suffice in those circumstances. Justice Kennedy imported these ambiguities into *Leegin* when he hinted that a truncated rule of reason analysis might be acceptable, stating that standards could be developed based on the courts’ experience with the practice over time and that “presumptions” might be appropriate.⁴⁴ These broad statements, however, have only muddied the waters by

⁴¹ *Id.*

⁴² *Leegin*, 127 S. Ct. at 2705.

⁴³ *California Dental Ass’n v. Federal Trade Comm’n*, 526 U.S. 756 (1999).

⁴⁴ *Leegin*, 127 S. Ct. at 2720.

creating uncertainty respecting what, if any, truncated rule of reason analysis might be applicable in future resale price maintenance cases.⁴⁵

Judge Ginsburg on the D.C. Circuit arguably introduced some order into this chaos in his opinion in the Three Tenors case where he essentially adopted former Federal Trade Commission Chairman Muris' truncated rule of reason construct.⁴⁶ Under that analysis, if the challenged practice is "inherently suspect" under Section 1, the burden shifts to the defendant to demonstrate that there is a legitimate justification for it based on its efficiencies. If such a justification is shown, the burden shifts back to the party challenging the restraint to show that, even so, it is on balance anticompetitive in effect. More recently, the Fifth Circuit also applied this truncated rule of reason in its *North Texas Specialty Physicians* decision.⁴⁷ It may be that this approach is what Justice Kennedy ultimately had in mind for testing resale price maintenance claims. And I would not be shocked if the Court were to grant certiorari in some future resale price maintenance case or even in a case not involving resale price maintenance in order to cast more light on whether a truncated rule of reason analysis is appropriate in the circumstances and/or what form that analysis should take.

⁴⁵ See Robert Hubbard, Protecting Consumers Post-Leegin, 22 ANTITRUST 41, 42 (Fall 2007); Marina Lao, Leegin and Resale Price Maintenance: A Model for Emulation or for Caution for the World? p. 8 (November 2007) available at http://law.shu.edu/faculty/fulltime_faculty/laomarin/publications/leegin_rpm.pdf ("Because the Leegin majority took pains to warn courts to recognize and prohibit the anticompetitive uses of RPM, its admonition may (hopefully) encourage lower courts to decline to apply the full rule of reason and adopt, instead, the more flexible "quick-look" rule of reason that is now frequently employed in horizontal restraint cases."); Brief for William S. Comanor and Frederic M. Scherer As Amici Curiae Supporting Neither Party, *Leegin Creative Leather Products, Inc. v. PSKS* (2007) available at http://www.antitrustinstitute.org/archives/files/aai-%20Leegin,%20Comanor%20&%20Scherer%20amicus%20brief_021820071955.pdf.

⁴⁶ *Polygram Holding, Inc. v. Federal Trade Comm'n*, 416 F.3d 29 (D.C. Cir. 2005).

⁴⁷ *North Texas Specialty Physicians v. Federal Trade Comm'n*, 528 F.3d 346 (5th Cir. 2008).

From my perspective, the other large open question looming ahead is the scope of the Commission's powers under Section 5 of the Federal Trade Commission Act, which provides the Commission with broad power to challenge "any unfair method of competition."⁴⁸ In its 1972 decision in *Sperry & Hutchinson*, the Supreme Court held that, although Section 5 gives the FTC power to enforce Sections 1 and 2 of the Sherman Act, Section 5 is not merely co-extensive with these other antitrust statutes.⁴⁹ But the gaping question *S&H* left open is, if Section 5 extends beyond Sections 1 and 2, how far does it go? A trilogy of appellate court decisions from the early 1980s offered some limiting principles, including the Ninth Circuit's teaching in *Boise Cascade* that Section 5 cannot reach conduct that Section 1 and 2 reach simply because there is a failure of proof⁵⁰ and the Second Circuit's teachings in the *Official Airline Guides* and *Dupont* cases that Section 5 does not apply to conduct that cannot, in context, be considered to be oppressive and injurious to consumers at least in the long run.⁵¹ Beyond those limiting principles, however, there are still many tough questions that remain. For example, in the Commission's recent *N-Data* consent decree, a majority of the Commission found a violation of Section 5 because the defendant's conduct in the context of standard setting was uniquely likely to harm consumers, even if it did not rise to the level of exclusionary conduct required under

⁴⁸ 15 U.S.C. § 45(a)(1). For a more extensive summary of my thoughts on Section 5, see J. Thomas Rosch, "The FTC's Section 5 Hearings: New Standards for Unilateral Conduct?" (March 25, 2009), available at <http://www.ftc.gov/speeches/rosch/090325abaspring.pdf>; J. Thomas Rosch, "Welcoming Remarks at FTC Section 5 Workshop" (October 17, 2008), available at <http://www.ftc.gov/speeches/rosch/081017section5wksp.pdf>.

⁴⁹ *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

⁵⁰ *Boise Cascade v. Federal Trade Comm'n*, 637 F.2d 573, 581-82 (9th Cir. 1980).

⁵¹ *Official Airline Guides v. Federal Trade Comm'n*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. Federal Trade Comm'n*, 729 F.2d 128 (2d Cir. 1984).

Section 2.⁵² As the panel that I participated on at the Antitrust Section’s Spring Meeting made clear, there is vigorous debate as to whether that use of Section 5 was correct. Similarly, although the Court’s 1984 *Jefferson Parish* decision rejected the view that the Sherman and Clayton Acts permit claims based on a reduction in consumer choice⁵³ – such as might result from practices or transactions that deprive customers of non-price competition – it is arguable that, subject to certain limiting principles, such practices might create liability under Section 5. Again, the jury is still out on whether that is so. I expect that, in the upcoming future, as the Commission continues to bring more Section 5 cases, the appellate courts and eventually the Supreme Court will weigh in again on these hard questions.

In conclusion, the Court is perhaps blessed with an embarrassment of riches when it comes to hard, open question of antitrust law. It would not surprise me if the Court was to address many of these issues in the years to come. In resolving these questions, it seems clear that the Court will give considerable weight to the Solicitor General’s views, including requesting those views when they are not initially provided. What seems less clear after *linkLine* is whether consensus-building is something that will still carry the day. While I do expect that the Court will make every effort to strive towards unanimity, it may be the case that some of these issues turn on deep-seated philosophical differences about economics and the role that the courts should play in regulating the free markets that prove too difficult to reach broad agreement on. It will be fun to see how this all plays out.

⁵² *In the Matter of Negotiated Data Solutions, LLC*, Docket No. C-4234, (Consent Order accepted September 23, 2008), available at <http://www.ftc.gov/opa/2008/09/nds.shtm>.

⁵³ *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 30-31 (1984).