

The Supreme Court's Antitrust Future: New Directions or Revisiting Old Cases?

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Predicting future Supreme Court actions in any area of the law is, at best, an uncertain exercise. Antitrust law, given its breadth and scope, is even less certain. Doctrine in one area may move little, if at all. Doctrine in other areas may develop quickly. And sometimes, Court-related predictions tell us as much about the prognosticator's aspirations for antitrust law as they do about the Court's. A few truths about the current Court, however, make possible some generalizations.

The Court's Pro-Business Bias Will Generally Continue

The Court is now undeniably "conservative" in a way that would be comfortable to the Reagan Administration. Five Republican appointees—Chief Justice John Roberts, joined by Associate Justices Anthony Kennedy, Antonin Scalia, Clarence Thomas, and Samuel Alito—anchor a solidly conservative and pro-business majority for this Court.

As a result, I suspect a greater number of cases coming before the Court will present issues of substantial importance to the American business community. We are likely to continue to see the Court defer to American businesses by granting more freedom from what they characterize as burdensome lawsuits. That relief will sometimes take the form of changes in legal standards themselves. At other times, it may be the product of procedural rulings, such as more stringent application of statutes of limitation, heightened pleading and proof standards, or greater evidentiary deference.

Still I concur with the view that "[r]ecent breakthrough victories for business in tort, antitrust, and other areas of the law can't be explained totally by the Court's overall conservative majority."¹ And another anomaly: it has been reported that a specialized segment of the Supreme Court bar now represents an increasing proportion of the cases accepted for argument,² which may also be affecting the outcome of those cases. I will leave it to others to try to figure out whether the Court is taking more cases from those firms because of their strong advocacy skills, or because the clients who can afford their services happen to have interests that coincide with the economic preferences of the Court.

Reluctance to Take on New Cases Until Lower Courts Can Digest Its Recent Decisions

The Supreme Court has weighed in on several important issues in its last few terms. To name only a few, it heightened pleading standards under Section 1 of the Sherman Act³ in *Twombly*.⁴ It enun-

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¹ Tony Mauro, *High Court Bar Means Business*, LEGAL TIMES, Oct. 22, 2007, at 1, 7 (citing Georgetown University Law Professor Richard Lazarus).

² *Id.*

³ 15 U.S.C. § 1.

⁴ Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

ciated a legal standard for monopsony predation in *Weyerhaeuser*.⁵ It addressed resort to American antitrust law remedies by foreign nationals regarding transactions in foreign markets in *Empagran*.⁶ The Court examined a novel issue under the Robinson-Patman Act⁷ when it reviewed the bidding conduct at issue in *Reeder-Simco*.⁸ The Court also dealt with the intersection between antitrust law and other federal regulatory regimes in *Credit Suisse*⁹ and *Trinko*.¹⁰ Finally, at the end of last term, the Court authorized its own experiment with vertical minimum price fixing when it abandoned per se illegality for that conduct in the *Leegin* case.¹¹

It would not be surprising if the Court were to stop and take a breath. That would give the lower courts an opportunity to digest the Court's recent output. Such a pause will give the lower courts time to begin integrating these new teachings into doctrine in a wide variety of cases. The Court may prefer to watch and wait, and see what develops out of its recent cases, before doing more. Accordingly, I predict that the Court will not take as many antitrust cases in its next couple of terms as it did in recent years.

This prediction is consistent with what the Court did regarding the issue of "but-for" jurisdiction in *Empagran*.¹² But-for jurisdiction refers to the plaintiffs' argument that vitamins, the price-fixed goods at issue, were fungible commodity products selling in international markets. Fixing the prices of vitamins in the United States was a necessary condition to fixing them in foreign markets. Accordingly, injury in foreign market transactions could not occur unless prices in the United States had been fixed. Plaintiffs claimed that this interdependence linked foreign injury to domestic conduct in the United States sufficient to create jurisdiction for that injury in US courts. The Court easily could have dealt with the plaintiffs' "but-for" jurisdiction argument itself as the issue had been briefed by the parties, but still chose to remand that issue to the court of appeals.¹³

The Importance of the Government's Amicus Role—the *Schering* Case

Even in light of the foregoing factors, the hardest thing to predict about the Supreme Court's future antitrust agenda is which areas of antitrust law it will actually choose to address. This used to be simplified because the Expediting Act¹⁴ allowed automatic direct appeals to the Court of civil antitrust cases brought by the Antitrust Division of the U.S. Department of Justice. Since the Expediting Act was amended in 1974¹⁵ to eliminate that right of automatic appeal, the number of antitrust cases accepted by the Court each term has dwindled substantially; the disputes have been predominantly between private parties; and the cases finding their way to the Court no longer reflect the enforcement agenda of the current Administration in the way they once might have done. We can no longer simply look at the federal government's case selection, then sit back

⁵ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

⁶ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

⁷ Act of June 19, 1936, Chap. 592, 49 Stat. 1526, 15 U.S.C. §§ 13–13b, 21 (a).

⁸ *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

⁹ *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

¹⁰ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

¹¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

¹² *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

¹³ *Id.* at 175.

¹⁴ Act of Feb. 11, 1903, ch. 544, § 1, 32 Stat. 823.

¹⁵ Antitrust Procedures and Penalties Act—Expediting Act, Pub. L. 93-528, § 4, 88 Stat. 1708 (1974).

and sagely pronounce which of those cases are likely to make their way to the Court over time.

That said, it is still true that the government influences the Court's antitrust docket through positions taken as *amicus curiae*, although that influence is neither as direct nor as predictable as direct appeals were. In deciding what private cases to accept for review, the Solicitor General, via *amicus* filings, still has an important influence on the antitrust cases the Court accepts for review. The Court often seeks the advice of the Solicitor General and frequently follows that advice.

The Federal Trade Commission tried, albeit unsuccessfully, to lengthen the Court's antitrust docket when it sought review of the Eleventh Circuit's decision in the *Schering* case.¹⁶ The case involved so-called reverse or exclusion payments in the context of a patent dispute settlement. The Commission's appeal asked the Court to determine whether the Commission had applied the proper legal standard in its evaluation of the propriety of payments by a patent holder to a party challenging the validity of the patent, whereby the patent challenger has agreed to delay its entry into the market for a period of time in consideration of the payments. The Commission, in its administrative opinion, found that Schering's payments to the challengers were improper, but the Eleventh Circuit disagreed.¹⁷ The Commission filed for Court review without the participation of the Solicitor General.¹⁸ After seeking and receiving the contrary views of the Solicitor General, the Court declined to review the case.

I hope, but cannot predict, that the Court will find an exclusion payments case it deems worthy of review. Since the Eleventh Circuit's decision in *Schering*, the number of patent settlements involving exclusion payments has been increasing.¹⁹ I worry that patent settlements might become a convenient pretext for other, broader assaults on competition. Unless the Court provides some definitive guidance, there is a very real likelihood that creative counsel will be able to use patent "settlements" as camouflage for a host of consumer-unfriendly outcomes.

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Collateral Fallout from the *Leegin* Decision

Another case that may influence the direction of what's next for the Supreme Court is *Leegin*. To say that I think a majority of the Court made a mistake in *Leegin* would be an understatement.²⁰ I do not, however, want to address the obvious *Leegin* topics, such as the proper legal standard for minimum vertical price fixing, allocations of burden of proof, and the absence of empirical support for the *Leegin* outcome. Rather, I want to focus on two collateral issues that may now arise with the demise of a *per se* rule of illegality for minimum vertical price fixing: First, *Leegin* potentially revitalizes the state action and Twenty-First Amendment defenses to price fixing that had been rejected in the *Midcal* case;²¹ and second, *Leegin* seems to remove any foundation for

¹⁶ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2929 (2006).

¹⁷ *Id.* at 1076.

¹⁸ *Schering*, Petition for a Writ of Certiorari, FTC Docket No. 05-273 (Aug. 29, 2005), available at <http://www.ftc.gov/os/2005/08/050829scheringploughpet.pdf>.

¹⁹ Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Exclusion Payments to Settle Pharmaceutical Patent Cases: They're B-a-a-a-ck!, Remarks Before the Second Annual In-House Counsel's Forum on Pharmaceuticals Antitrust (Apr. 24, 2006), available at <http://www.ftc.gov/speeches/leibowitz/060424PharmaSpeechACL.pdf>.

²⁰ Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, The Illegality of Vertical Minimum Price Fixing, Open Letter to the Supreme Court of the United States (Feb. 26, 2007), available at <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf>; Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, The *Leegin* Decision: The End of Consumer Discounts or Good Antitrust Policy?, Testimony Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Committee on the Judiciary, 110th Cong. (July 31, 2007), available at <http://www.ftc.gov/speeches/harbour/070731test.pdf>.

²¹ *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Justice Holmes's exemption of major league baseball from the reach of the antitrust laws.²² These issues might not have been in the Court's crosshairs when it issued the *Leegin* decision but their revival may be the unexpected fallout of the ruling.

The Scope of the State Action and Twenty-First Amendment Defenses in Liquor Pricing. In simplified form, the California wine regulations at issue in *Midcal* required each wine producer to file schedules with the state setting the prices at which wine merchants or wholesalers would offer its wines for sale to retailers. The Court observed that wine producers were setting these prices "according to their own economic interests . . . [and] the state's role is restricted to enforcing the prices specified by the producers."²³ The lower court had enjoined enforcement of the regulations, and the Court was asked to decide whether that injunctive relief was proper.

The *Midcal* Court began its analysis by asking "[t]he threshold question . . . whether California's plan for wine pricing violates the Sherman Act."²⁴ In 1980, the answer to that question was a clear "yes"—based on the rule of per se illegality established by the Court's 1911 *Dr. Miles* decision²⁵ and its progeny. But today, under the unstructured rule of reason test announced in *Leegin*,²⁶ it is not clear that the answer to this question would be the same. The *Leegin* majority showed deference to the pricing discretion of manufacturers;²⁷ the California regulatory system at issue in *Midcal* showed the same deference by leaving the producer's pricing discretion wholly unencumbered. Indeed, the *Midcal* Court described California's role as being limited to the provision of a relatively cost-free enforcement mechanism²⁸—which, presumably, was efficient.

It is difficult to fathom why the Court would want to inhibit an efficiently implemented exercise of pricing discretion of a type to which it already has demonstrated a willingness to grant substantial deference. Further, no author with whom I am familiar has ever believed the rule of reason to be plaintiff-friendly. That, in turn, makes it unlikely that many plaintiffs will be able to challenge successfully a vertical minimum price fixing regulatory system. In other words, in the post-*Leegin* era, it will be a rare case indeed in which a plaintiff will be able to answer the *Midcal* Court's threshold question in the affirmative. And if one cannot make it past the threshold question of *Midcal*, the classic two-pronged analysis for state action becomes irrelevant.

The provisions of the Twenty-First Amendment did not protect the California regulatory system from antitrust liability in *Midcal*.²⁹ It is, however, fairly arguable post-*Leegin* that the Twenty-First Amendment would now save California's regulations from antitrust attack, even if state action still did not.

The Twenty-First Amendment repealed prohibition and vested the states with significant regulatory discretion. The *Midcal* Court, however, did not demarcate a bright-line test to draw the line between state and federal powers to regulate liquor prices.³⁰ Rather, the Court's test for reconciling "competing state and federal interests" required "careful scrutiny of those concerns in a 'con-

²² Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

²³ *Midcal*, 445 U.S. at 101.

²⁴ *Id.* at 102.

²⁵ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

²⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2725 (2007).

²⁷ *Id.* at 2718.

²⁸ *Midcal*, 445 U.S. at 101.

²⁹ *Id.* at 114.

³⁰ *Id.* at 110.

crete case.”³¹ In the “concrete case” of *Midcal*, the Court found that California’s interests in producer-controlled vertical minimum price fixing was “less substantial than the national policy in favor of competition,” as defined by *Dr. Miles’s* per se prohibition of vertical minimum price fixing.³²

Today, however, if one were to attempt to balance California’s regulatory system against the national policy in favor of competition as it is defined by *Leegin*, one might reach a different result. A court would be hard-pressed to find that California’s policy of promoting resale price maintenance—at prices set in accordance with the producers’ unbridled economic discretion—would be outweighed by the *Leegin* Court’s policy of promoting resale prices set in accordance with the producers’ economic discretion as “disciplined” by the rule of reason.

Two years after its decision in *Midcal*, the Court faced the question of whether the Sherman Act preempted another California liquor regulation when it decided *Rice v. Norman Williams*.³³ The Court found that a rule of reason standard would apply to determine Sherman Act liability for complying with California’s regulation prohibiting an importer from bringing a distiller’s brands into California without having been designated to do so by the distiller.³⁴ The Court held that preemption of a state regulation by the Sherman Act could only occur when the state regulation compelled an actor to engage in conduct that was per se unlawful under the Sherman Act because “[a]nalysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.”

Rice decided a different, albeit related, question than the Twenty-First Amendment question presented in *Midcal*, but *Rice* is nonetheless instructive for Twenty-First Amendment analysis. When balancing federal versus state sovereign interests, the balance materially shifts in favor of the states when the rule of reason, rather than a per se standard, is applied. As state regulators and the industries they regulate begin to appreciate the implications of *Leegin*, we may see a new round of state action and constitutional issues percolating up to the Court.

Can the Antitrust Exemption for Baseball Survive Leegin? If *Leegin* taught us nothing else, it tells us that we should classify as “endangered species” old cases based on rationales that allegedly cannot be reconciled with modern antitrust analysis. Justice Holmes’s 1922 decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*³⁵ is just such a case.³⁶

Holmes distinguished travel between cities to play games from the local exhibition of the games, and found baseball to be “purely state affairs;” the movement between cities was too incidental to bring local exhibitions within the jurisdictional reach of the Sherman Act.³⁷ A year later in the *Keith Vaudeville* case, however, Holmes found that local exhibitions of vaudeville acts might involve incidentals (presumably, travel between theaters) that would rise “to a magnitude that

³¹ *Id.* (citing *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964)).

³² *Id.* at 113.

³³ *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

³⁴ *Id.* at 662.

³⁵ 259 U.S. 200 (1922).

³⁶ See generally Robert A. Schwinger, *Will ‘Leegin’ Pave the Way for Ending Baseball’s Antitrust Exemption?*, LAW.COM (Aug. 8, 2007), <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1186477607823>.

³⁷ *Federal Baseball*, 259 U.S. at 208–09.

requires [them] to be considered independently.”³⁸ Since then, the Court has twice reaffirmed *Federal Baseball* on the basis of stare decisis,³⁹ while declining to extend the rule to local exhibitions of vaudeville,⁴⁰ professional boxing,⁴¹ professional football,⁴² or professional basketball.⁴³ While the Court has described the baseball exemption as an “aberration,”⁴⁴ thus far the Court has left it to Congress to deal with, if at all.

The analytical logic of the *Leegin* decision should lead to the demise of the baseball exemption. Even the Court itself criticizes the baseball rule. It is, therefore, not necessary here to recite the voluminous criticisms of the exemption that exist in the literature. It is an old decision based on conceptions of interstate commerce that are today, at best, quaint. If the Court has as loose a regard for the reliance interests of baseball club owners as it had for discount merchant investors in *Leegin*,⁴⁵ stare decisis should not constrain the Court. Plaintiffs in *Leegin* could make a stronger case for Congressional reliance⁴⁶ than could baseball owners.

Finally, the very nature of the baseball product has changed since 1922. Local exhibition in 1922 was limited by the visual acuity of each person within sight of the game. Justice Holmes does not mention in *Federal Baseball* whether telegraph, telephone, or radio redistribution of accounts of the games was available at the time. But the intervening advent of radio and television broadcasting of baseball games, both interstate and international in character, has placed the product within the reach of the vast majority of its viewers only through the use of various instrumentalities of interstate commerce. Given that, it is simply absurd to retain the notion that the incidental effects of baseball on commerce are outweighed by the local nature of the exhibition. Unless the Court is willing to say that investments in professional baseball are socially or economically superior to investments in discount retailing, it is difficult to articulate a principled distinction that could save the baseball exemption from the inescapable logic of *Leegin*. There is, thus, at least some hope for societal good from the *Leegin* decision.

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At the end of the day, only time will tell whether we will see a new flood of state action cases or a successful assault on the baseball exemption. Stay tuned . . . ●

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³⁸ Hart v. B.F. Keith Vaudeville Exch., 262 U.S. 271 (1923).

³⁹ Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam).

⁴⁰ Hart, 262 U.S. at 273–74.

⁴¹ United States v. Int’l Boxing Club of New York, Inc., 348 U.S. 236, 242–44 (1955).

⁴² Radovich v. Nat’l Football League, 352 U.S. 445, 451–52 (1957).

⁴³ Haywood v. Nat’l Basketball Ass’n, 401 U.S. 1204, 1205–06 (1971).

⁴⁴ Flood, 407 U.S. at 282–84.

⁴⁵ Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2735 (2007) (Breyer, J., dissenting).

⁴⁶ *Id.* at 2723–24 (Kennedy, J.), 2732 (Breyer, J., dissenting).