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SUPREME COURT ROUNDTABLE

Introduction

BY MICHAEL C. NAUGHTON

THE SUPREME COURT HAS HAD A VERY ACTIVE antitrust docket over the last two years, issuing a number of important decisions clarifying, modifying, and in some cases overturning, established antitrust precedents. These decisions raise a number of interesting questions. Does the Supreme Court have an antitrust agenda, and if so what is it? If not an explicit agenda, what themes or directions do these decisions reveal? And how do these decisions affect the practical advice practitioners provide their clients regarding antitrust risks from business decisions?

To explore and discuss these and other questions, ANTITRUST Editorial Chair Mark Whitener and Articles Editor Andrew Gavil moderated a roundtable discussion among antitrust lawyers who have distinctive perspectives on the Court's recent antitrust jurisprudence. Scott Hemphill, a law professor, and Ron Stern, a corporate antitrust counsel, both served as Supreme Court law clerks; Jan McDavid is an antitrust lawyer whose work includes an active Supreme Court amicus practice; and Andy Pincus has argued a number of cases before the Court, including two antitrust cases in the last two terms, *Weyerhaeuser*[1] and *Illinois Tool Works*.[2]

One of the many interesting themes of the roundtable discussion is that the Court's recent decisions appear to exhibit a continuing concern for minimizing false positives in antitrust cases. Reasons identified for the Court's concern with false positives include both the risk of restraining procompetitive market activity and the high cost of antitrust litigation and related discovery. This discussion tackled a number of difficult questions. What is the empirical basis for the concern with false positives? In the move to minimize false positives, has the Court ignored or minimized the risk of false negatives? Does the trend toward limiting false positives reflect the notion that the Court treats antitrust as common law? And in this context, can many of the recent decisions be viewed as an effort to clean up and conform antitrust law to recent antitrust agency and academic thinking? Or, instead, is it possible that the Court in some instances is imposing overly simplistic and possibly outmoded thinking in its effort to improve the application and administration of the antitrust law?

The discussion of *Weyerhaeuser* offers one example where many of the above questions were raised. The application of the *Brooke Group*[3] predation test to predatory buying was viewed as a clear step in the direction of decreasing false positives relative to the "unfair price" standard of the Ninth Circuit. It was also seen as improving ease of administration—both in terms of lowering litigation costs and providing simpler advice to market participants. However, some participants saw questions remaining. For example, in conforming to the *Brooke Group* standard, has the Court ignored more recent literature on strategic behavior critical of the latter test, which may indicate that such a test is too simplistic and overly prone to false negatives? And what can *Weyerhaeuser* tell us about how the Court might decide a bundled pricing predation case should such a case is heard?

Leegin[4] was also discussed in some detail, in some ways as an outlier with respect to recent trends. Application of the rule of reason to resale price maintenance (RPM) may be consistent with a move toward eliminating false positives, but that may be where *Leegin*'s conformance with recent trends ends. Any move away from a per se rule was viewed as likely to increase litigation costs, complicate compliance guidance for market participants, and at least initially create some uncertainty. For example, how will the federal rule of reason approach interact with state RPM law? In a rule of reason balancing, what will count as procompetitive rationales? Will this balancing depend on what other manufacturers or retailers are doing and, if so, how will market participants assess antitrust risk? Justice Breyer's dissent in *Leegin* also generated an interesting discussion of the role of stare decisis in assessing the factors to be considered in applying, or in this case deciding to no longer apply, a per se rule.

Many other topics and issues were discussed, ranging from the theoretical to practical counseling advice. Among these additional topics were the potential impact of *Twombly* on raising the hurdles to pass the pleading stage, both in antitrust and beyond; how the Court views the role of regulation versus antitrust in guiding and modifying market behavior; the role of the Solicitor General and antitrust agencies in advising or guiding the Court both at the certiorari and merits stage; the future of the "per se" tying rule in light of *Illinois Tool Works* and *Leegin*; and whether the recent decisions indicate any change in how broadly the Court is inclined to decide antitrust cases. ■

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[1] Weyerhaeuser Co. v. Ross-Simons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

[2] Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

[3] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[4] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

ROUNDTABLE DISCUSSION

Antitrust and the Roberts Court

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MARK WHITENER: The Supreme Court has decided an unusually large number of antitrust cases in recent years—seven in the past two terms alone—even while its overall docket has been decreasing. Does the Court have an antitrust agenda, or is there some other explanation for this?

ANDREW PINCUS: I don't think there is an agenda. Rather, the focus on antitrust appears to be the result of the coming together of several factors. First, several of the justices have a keen interest in the subject. Obviously, Justices Breyer and Scalia have long been involved in antitrust; Justice Alito wrote opinions in a number of antitrust cases when he was on the Third Circuit; Chief Justice Roberts was involved in antitrust cases when he was in private practice; and Justice Stevens has been interested in antitrust since before he went on the bench. So there is a core group of justices interested in the subject.

Second, the Court has had some catching up to do jurisprudentially in terms of sweeping some old cobwebs out of the corners of antitrust law. A number of the Court's recent decisions dealt with precedents based on old antitrust thinking that really hadn't been brought into the modern era of antitrust analysis.

Third, the Court increasingly is conscious of the costs of erroneous legal standards, both in terms of their effect on primary conduct and the litigation burden that they impose. The impact of such legal rules on primary conduct—in terms of deterring procompetitive activity—often is most apparent in the antitrust context.

JANET McDAVID: I want to second some of what Andy said. I worked with John Roberts on a number of antitrust cases when he was in private practice. I think he understands the practical implications of bad law in this area for companies that are attempting to comply with antitrust laws.

RON STERN: I believe that another important factor is the role played by the Solicitor General, the Antitrust Division, the Federal Trade Commission, and the private bar through amicus briefs explaining the importance of these cases to the Court.

SCOTT HEMPHILL: I see how *Leegin*[1] clears out cobwebs, and *Weyerhaeuser*[2] too. What else?

ANDREW GAVIL: *Illinois Tool Works*.[3]

McDAVID: I think *Twombly*[4] is an example of the Court understanding the costs of antitrust litigation.

PINCUS: Yes, *Twombly* was to a large extent about the impact of broad statements in some of the Court's prior opinions, such as *Conley*,[5] and the resulting effect on both primary conduct and litigation in the antitrust context.

GAVIL: Are there new elements of interest to the Court? And here I am thinking about the relationship between regulation and antitrust. That was not a traditional component that would lend itself to cleaning up. Is that something new that has emerged at the Court in the antitrust area?

McDAVID: I think we also should add *Trinko*[6] to this discussion. In fact, I found the relationship between regulation and antitrust in both *Trinko* and *Credit Suisse*[7] surprising.

Those of us who advise on antitrust issues tend to think of antitrust as part of the framework that allows us to move away from regulation with its risk of regulatory capture, towards an unregulated free market. Now, however, we have the Court in these cases expressing a preference for regulation over antitrust. I found that surprising.

HEMPHILL: There are echoes of *Trinko* in both of the term's procedural antitrust-and-regulation cases. In *Credit Suisse*, like *Trinko*, antitrust gives way where the regulator is already a steward of the antitrust function, and the incremental value of antitrust seems slight. And in *Twombly*, again like *Trinko*, there is a broadly shared willingness to get rid of the case at the pleading stage, this time in Section 1 rather than, as in *Trinko*, Section 2.

PINCUS: *Twombly* and *Credit Suisse* also demonstrate the Court's concern about manipulation of the litigation system. In both cases there were other ways to vindicate the enforcement interests that the plaintiffs claimed to be protecting. Those avenues had been closed to the plaintiffs—the Section 2 claim rejected by the Court in *Trinko* and the securities fraud claims rejected by the Second Circuit in *Credit Suisse*—and the remaining antitrust claims were asserted in what appeared to be a fall-back approach. That clearly had an impact on both of those decisions.

STERN: Going back a number of years, there are several cases addressing the relationship between the securities laws and antitrust laws. I do not believe that *Credit Suisse* broke any new ground. What I did find to be interesting, and consistent overall with some of the decisions during the last several terms, was the apparent desire to find an approach that was not too complex or too difficult to apply. The Solicitor General in *Credit Suisse* came up with a compromise between the SEC's position and the Antitrust Division's position, but the Court declined to accept it because it was viewed as unworkable.[8]

GAVIL: In the intellectual property area, the Court seems to be expressing a lot of skepticism about the overall regulatory scheme. And that would include the Federal Circuit, and by implication the Patent and Trademark Office. Is there an inconsistency between the decisions of the Court in the patent area with respect to its confidence in regulation and in antitrust cases like *Credit Suisse*? And if so, does that mean the Court is going to endorse regulation ad hoc when it has confidence in the particular regulatory agency but be more aggressive itself when it has less confidence?

HEMPHILL: The Court shows no explicit awareness that it's making dissimilar judgments about regulation in these different contexts, though I wouldn't go so far as to call it an inconsistency, given the different issues involved. One point of commonality is the Court's willingness to give lower courts increased flexibility to exercise judgment, rather than apply a rigid rule. That's true in *Leegin*, where a per se prohibition was replaced by a flexible standard, and also in *eBay v. MercExchange*,[9] where the Court, in overturning the Federal Circuit's contrary rule, said that lower courts need not always impose injunctive relief after a finding of patent infringement. In both contexts, this "reset" provides an opportunity for further development of the law.

McDAVID: If we go back several years, the Court gave no deference to the Federal Trade Commission in *California Dental*,[10] which was very surprising. And now we find the Court giving extraordinary deference to the Federal Communications Commission and Securities and Exchange Commission.

[T]he Court has had some catching up to do jurisprudentially in terms of sweeping some old cobwebs out of the corners of antitrust law. A number of the Court's recent decisions dealt with precedents based on old antitrust thinking that really hadn't been brought into the modern era of antitrust analysis.

—ANDREW PINCUS

PINCUS: I look at the IP cases somewhat differently. There is no agency with responsibility for enforcing patent rights. I think part of the Court's concern was that the Federal Circuit was acting like an administrative agency, engrafting rules onto the statute that had no basis in the statutory language. Those decisions might have been appropriate if the legal rules announced by the Federal Circuit had been issued as regulations by an agency empowered by Congress.

In the *eBay* case, for example, the Federal Circuit took the general standard for injunctive relief and said, "we're going to have a different standard for patent cases." And the Supreme Court said there was no basis for that decision. A court can't take upon itself the power to address what it perceives to be gaps in statutory language.

There was a similar problem in *KSR*,[11] which involved the statutory standard for determining obviousness. The Federal Circuit said, "we're going to develop a new standard." The Supreme Court is very conscious of not intruding on Congress's prerogatives in an area where, again, there is no regulator.

STERN: One additional comment on the issue of how the Court deals with regulation. I think you have to look at the alternative. I do not see an endorsement of any particular regulatory decision maker or regulatory scheme, but more a lack of confidence in resorting to private treble damage antitrust cases as the way to resolve issues. Often the regula-

tory scheme is merely viewed as better than this alternative.

WHITENER: Let's go back to an issue that Ron alluded to earlier—the role of the Solicitor General and the antitrust agencies. I'm interested in each of your thoughts about the Solicitor General's and the agencies' roles, both in helping to frame which cases the Court takes and how it decides them.

PINCUS: It is impossible to overstate the importance of the Solicitor General's role at both the certiorari stage—when the Court is deciding whether to take a case—and at the merits stage. There is increased interest by the Court in getting the views of the Solicitor General at the certiorari stage generally, but especially in the antitrust context because it's very hard for the Court to figure out whether a case is sufficiently important to justify a grant of review.

That is especially true in a case like *Weyerhaeuser*, where the importance of the issue did not rest on the proliferation of litigated cases but instead on the impact of the Ninth Circuit's decision on primary conduct—not just within the Ninth Circuit, but around the country. The Court really doesn't have an ability to make that sort of assessment itself. And so the Solicitor General's views on whether a particular decision poses a substantial risk of chilling pro-competitive conduct is very, very important.

Of course, at the merits stage the Solicitor General plays a different but equally important role by providing the views of the enforcement agencies on the proper legal rule. The expertise of those agencies is very important in shaping the law.

STERN: I agree with Andy's comments. It seems to me that another important role played by Solicitor General is to caution the Court when a case isn't an appropriate vehicle to address an important issue. For example, companies and the antitrust bar are very interested in issues related to bundled discounts. In my view, the Solicitor General appropriately cautioned the Court about taking the *3M v. LePage's*[12] case because of concerns about the factual record and the lack of appellate court decisions addressing this issue.

And that may fit into another theme here. I do not see the Court as pursuing an affirmative antitrust agenda to blaze new frontiers. Instead, as Andy Pincus noted, the Court is more focused on cleaning up cases wrongly decided or bringing the case law into line with the positions already taken by the federal antitrust agencies.

HEMPHILL: We also see the role of the Solicitor General quite vividly in antitrust challenges to patent settlements between rival drug makers. There has been a series of petitions for certiorari, most recently in *Joblove*.[13] As to each, the Solicitor General has opposed Supreme Court review,[14] and the Court has acted in accordance with the recommendation.

McDAVID: In the drug patent settlement cases, we also had divergent views of the two antitrust agencies, with the view of the Solicitor General prevailing when the Court refused to hear the cases.

HEMPHILL: Right. The Solicitor General's brief in *Joblove* might suggest at least a modest convergence in views. The brief did acknowledge that the Second Circuit had gone too far in rejecting liability.[15]

WHITENER: Any other comments on how the Court reacted to the Solicitor General's attempt to, in effect, mediate between the DOJ and the SEC in *Credit Suisse*?

PINCUS: It is important to emphasize Ron's point. The Court is very leery of rules that would be difficult to apply in litigation between private parties. The rule proposed by the Solicitor General was complicated and would have required fact finding and therefore would have been difficult to apply in the real world of litigation. The Court's opinion went into considerable detail about the cost that would entail. It was an interesting and somewhat unusual case in that both agencies' views had been aired in the lower courts because of the SEC's independent litigating authority in those courts. Often, intragovernment disputes about how a case should come out won't be as clear. The Solicitor General gets a huge amount of respect from the Court and the Court has made clear that it wants the Solicitor General to perform this mediating role. But the Court looked at the product and decided that it was just going to be too complicated.

WHITENER: There seems to be a consensus that this Court is not reaching out to pursue an affirmative antitrust agenda, but let's talk about what themes, if any, have emerged in terms of how the Court decided these cases.

One theme has been mentioned already. A number of the decisions talked about concerns with so-called false positives in antitrust cases and concerns about the nature of antitrust litigation, including the difficulty of controlling discovery. How important is this as a theme underlying some of these decisions?

McDAVID: I think it is true in a number of the recent antitrust cases. But as I was re-reading *Leegin*, I was struck by the fact that in some ways *Leegin* runs counter to that trend because the simple rule has not prevailed in resale price maintenance cases. Instead we now have a rule of reason analysis in RPM cases, requiring market definition and an analysis of market shares and business rationales and weighing procompetitive effects versus anticompetitive effects. The Court has in fact opted for the more complicated option rather than the simple rule under *Dr. Miles*,[16] which simply considered whether there was an agreement.

Justice Breyer's dissent really was critical of the majority in large part because of the administrative issues.[17] He indicated that if the Court was writing on a clean slate, a somewhat different outcome might have been appropriate. But because

of almost 100 years of precedents, and the complicated nature of litigating a rule of reason case, he would have retained the per se rule.

So in general, I think you're right, Mark. But I was really quite struck by *Leegin* being the outlier on that point.

PINCUS: All of those factors are incredibly important. False positives arise in many areas of the law but the concern is highlighted in antitrust because the entire purpose of antitrust is to protect legitimate competition. If the rules adopted or the process used to enforce them actually deter that very competition, that is a very significant obstacle to accomplishing the goals underlying the antitrust laws. As a result, there is a stronger focus on the risk of false positives in antitrust than in other areas of law, and appropriately so.

These concerns are reflected in the way the Court grapples with antitrust cases: there is a very significant attempt to assess the real-world impact of the various legal rules. Certainly in the two cases that I argued—*Illinois Tool Works* and *Weyerhaeuser*—many of the Court's questions at argument focused on the potential effects of the various rules for which the parties were contending. An important area of concern was how the legal standards would play out in the real world.

The Court appears to feel responsible for shaping a coherent, workable set of rules in the antitrust area. At the margin, the Court will act to bend and reshape the various statutes in order to create a more coherent and workable antitrust scheme.

—RONALD STERN

STERN: I was struck in looking back over these decisions by the notion that the Court does treat antitrust law as common law. The Court appears to feel responsible for shaping a coherent, workable set of rules in the antitrust area. At the margin, the Court will act to bend and reshape the various statutes in order to create a more coherent and workable antitrust scheme.

This tendency is illustrated by the additional section that Justice Ginsburg added to her opinion last term in the *Volvo* Robinson-Patman Act case.[18] She went out of her way to say that the Court would interpret the Robinson-Patman Act whenever possible to be consistent with the overall focus of the antitrust laws on the protection of competition rather than competitors.

McDAVID: There also have been concerns about the role of private litigation in antitrust, and particularly concerns that private antitrust litigation can be unmanageable. This affected the decisions in *Trinko*, *Twombly*, *Credit Suisse*, and *Weyerhaeuser*.

HEMPHILL: *Weyerhaeuser* and *Leegin* take contrasting views about the capacity of lower courts to separate wheat from chaff. *Weyerhaeuser*, like *Brooke Group*[19] before it, is premised on the idea that this task is hard. *Leegin*, on the other hand, entrusts courts with exactly that role.

Perhaps the most surprising part of *Leegin* is the dissent.[20] Justice Breyer insisted that even if he were writing on a clean slate, he would endorse a per se rule. The four dissenting Justices omitted and implicitly rejected the usual requirement for a per se rule, noted in the Court's opinion, that per se treatment is reserved for conduct that would "always or almost always tend to restrict competition."[21] Instead, the dissenters endorsed an open-ended weighing to determine whether a per se rule should be applied. That's a remarkable break from past practice.

PINCUS: I think the dissent in *Leegin* has to be viewed in the context of the other decisions issued at the end of the Court's term. Justice Breyer seemed to go out of his way to de-emphasize the quite long line of antitrust decisions dealing with the special rules of stare decisis applicable in the antitrust context. He referred to them in passing but most of his focus was on the campaign financing case.[22] His statement from the bench on the last day of the Term indicated his concern about the number of areas in which the Court had reversed course. That may well have influenced his view about whether it was appropriate to overrule *Dr. Miles*.

McDAVID: I agree with that, Andy. I think that Justice Breyer's dissent in *Leegin* was strongly influenced by the fact that the decision was issued on the same day as the Seattle school desegregation case, in which he also issued an impassioned dissent.[23]

HEMPHILL: So you would take not too seriously the conclusion at the end of the first part of the dissent, that "if forced to decide now, at most I might agree that the per se rule should be slightly modified to allow an exception for . . . 'new entry'"?[24]

STERN: I read the first part of Justice Breyer's dissent as a transition to the key discussion of stare decisis. I did not think that Justice Breyer offered a very spirited or credible defense of the merits of a per se rule for minimum resale price maintenance. I believe that a close reading of his dissent actually suggests that minimum resale price agreements are only a threat to competition when the agreements are imposed on manufacturers by retailers.

GAVIL: I want to follow up on a previous question on the theme of false positives and ask a two-part question. We clearly have seen a thirty-year period of correction in the substance of antitrust law now. And yet the Court continues to endorse arguments made by the government and by defendants that treble damages over-incentivize antitrust cases,

inviting weak and frivolous cases, and that juries and judges cannot understand the cases. And now in *Twombly*, the Court expressed the view that district court judges can't even reasonably manage discovery.

Is there any empirical basis today for those sorts of assumptions about antitrust, or is the Court proceeding based on assumptions that might have been true thirty years ago but are less of a concern today precisely because of all of the corrections made to doctrine by the Court over the last thirty years?

And the second part of the question is, why does the Court hardly ever mention false negatives? Has that fallen off the realm of concern for the Court at this point?

The Court's decisions create a troubling contrast here. On the one hand, *Leegin* adopts modern economic reasoning in overturning *Dr. Miles*. But on the other hand, the Court's approach to predation, whether conducted by a buyer or a seller, is quite wooden.

—SCOTT HEMPHILL

HEMPHILL: The Court's decisions create a troubling contrast here. On the one hand, *Leegin* adopts modern economic reasoning in overturning *Dr. Miles*. But on the other hand, the Court's approach to predation, whether conducted by a buyer or a seller, is quite wooden.

Early predation cases like *Matsushita* invoked a "consensus among commentators that predatory pricing is rarely tried, and even more rarely successful."[25] Perhaps that consensus existed when *Matsushita* was decided. But more recent scholarship shows that predation does occur in theory and practice. Where, as in *Weyerhaeuser*, the Court omits reference to the "consensus among commentators," but skips straight to the "rarely tried, rarely successful"[26] mantra, there is reason to worry that the absorption of economic thinking is uneven and—relatedly—that the Court may neglect a real risk of false negatives.

PINCUS: Actually, I think the decisions are quite consistent. The Court acknowledged in *Brooke Group* that predation can occur without below-cost pricing. But it concluded that the cost of reaching that conduct in private litigation—in terms of chilling legitimate competitive behavior—was too great. Thus, the Court did recognize the economic analysis, but also took account of the real-world costs of litigation rules that effectively preclude termination of a case prior to trial.

It is interesting to compare the Court's approach in the securities and antitrust contexts. Securities regulation is different in that the enforcement agency has authority separate from the causes of action that may be invoked by private plaintiffs. The SEC has gotten very generous interpretations of that separate statutory authority because such decisions do not automatically expand the scope of private causes of action.

With the exception of the FTC's Section 5 authority, that is not true in antitrust. The Division's authority under the Sherman Act, for example, is essentially co-extensive with private claims. The Court's decisions reflect the concern that it simply is not possible to have any confidence that in private litigation, at the end of the day the case is going to be brought, and the very substantial transaction costs incurred, only when there is a high likelihood that wrongdoing actually is present. There is skepticism that private plaintiffs are going to be focused on—or even be able to—determine whether they have a real claim before initiating the litigation process. And there is equal skepticism that the discovery/jury process will be able to separate illegitimate cases from legitimate ones.

STERN: My reaction to Andy Gavil's earlier question is that the focus on limiting false positives is a proper one in terms of trying to cabin-in a system that has a long history of abuse. I don't see a rush to ignore false negatives or to ignore the underlying importance of protecting competition. I think the Court generally has been very careful here, waiting for a consensus to build in the academic community and at the federal antitrust agencies before taking antitrust cases. The Court largely has been cleaning up out-of-date decisions and has not been rushing into more difficult areas that are still much more up in the air.

I think this is a sound approach because problems can arise when the Court gets out front with decisions that are a reaction to the facts of a particular case. It can then take years for the lower courts and the Supreme Court to pare back an ill-considered precedent. Before such decisions are finally overruled or rendered a dead letter, a lot of harm can be done.

McDAVID: Let's remember that the Court in *Trinko* failed to accept the invitation of the Solicitor General to adopt a much more restrictive approach to Section 2—the profit sacrifice test—which would have narrowed the scope of Section 2 to a far greater extent.

HEMPHILL: Although the rule urged by the government at the merits stage was not the same as the rule it suggested at the petition stage.

WHITENER: Some have pointed out that the analysis in *Trinko* has in fact inadvertently facilitated refusal to deal cases. A recent article by Bob Skitol described how plaintiffs have examined the grounds on which the claims in *Trinko* failed, argued that their claims could be distinguished, and survived dismissal or summary judgment with their refusal to deal claims.[27] It isn't clear that *Trinko* was entirely successful in cabining in future claims based on concerns about false positives.

McDAVID: I think one other element that is lurking in a lot of these cases is concern about class action abuse. That issue

was never directly presented in these cases, but many of these issues arise in the context of class actions in which the potential for abusive litigation is really pretty extraordinary.

GAVIL: Let me push a little bit further on this, listening to all of your responses. Many of you appear to think that there still are abuses of litigation and that weak cases are still being brought. What empirical bases do you have for any of those assumptions, other than your personal experiences largely as defense lawyers? Is there some concern here that the Court is pursuing, as Justice Stevens says in his dissent in *Twombly*, the mere arguments of lawyers?[28] And that the arguments of lawyers are largely shaped by the defense bar, which now clearly perceives that the Court is hypersensitive to false positives?

So, every brief is going to say something about false positives. And the question is—is there really any empirical basis for it? Does the Court know how many antitrust cases are being filed in the federal system each year? Does the Court know the percentage of those cases that are being dismissed as truly frivolous? Does the Court know the cost of discovery and whether or not it is somehow excessive compared to the potential damages in some of those cases?

If the Court doesn't know any of those things, if the Court is just making assumptions and creating legal rules based on non-empirical assumptions, then should we as a bar be concerned? Isn't that necessarily going to lead to false negatives?

McDAVID: I'm not aware of empirical data on any of those issues. My empirical data are derived from cases in which I'm involved. In one of those cases the plaintiffs are citing *Twombly* as a case of that favors the plaintiff, which is an extraordinary interpretation of *Twombly*.

PINCUS: A very optimistic interpretation. There also have been a number of motions to dismiss in the wake of *Twombly*.

I'd imagine there is some data available, but I'm not familiar with it. I know that in the area of securities class actions there is a very substantial amount of data. I also am familiar with empirical data and a lot of anecdotal data about the cost and burdens of discovery. And I think in the electronic era, those costs and burdens are multiplying exponentially, notwithstanding the changes in the Civil Rules.

It certainly is telling that securities class actions never go to trial. They are always settled. That tells me that that we cannot depend on private actions to separate the illegitimate claims from the legitimate ones, and provide guidance going forward as to permissible reasonable behavior. Because, unless every single case that survives the motion to dismiss is meritorious—which I doubt—you're not getting any guidance there.

What this data shows is that the downside risk of taking the case to trial is huge. And so, there's a negotiation and there's some settlement number that makes everybody happy. That's the reality of the system today.

McDAVID: In some ways this may go back to the fact that John Roberts was involved in litigation while in practice, so he understands the practical implications of litigation.

WHITENER: And if I recall correctly, his practice as an appellate advocate was in the mold of, "I take the first litigant who comes in the door." And he did a fair amount of plaintiff's work.

McDAVID: He handled both plaintiff and defense cases. For example, he argued *Microsoft*[29] in the D.C. Circuit for the state attorneys general.

WHITENER: It seems pretty clear, though, that he emerged with a defense counsel's view of antitrust litigation.

McDAVID: I think he emerged from these experiences with an understanding of how antitrust litigation works, and of the cost and burdens it imposes on the parties.

HEMPHILL: The Court's attention to false positives relies upon a somewhat older theoretical literature. I'm not aware of a sizable empirical literature making the point.

WHITENER: Let's turn to how the Court has approached analytical issues, starting with the question of whether, in antitrust cases, the Court has followed the typical approach of deciding cases on relatively narrow grounds, only resolving the issues that are necessary to decide the case.

Going back to one of Ron's comments about the *Volvo* Robinson-Patman case, Justice Ginsburg arguably decided that case on narrower grounds than some defense counsel would have preferred. There were broader ways she might have resolved the case that would have swept away other types of claims. And yet she also made broad comments suggesting that the Robinson-Patman Act should be interpreted consistently with the other antitrust laws.[30] In *Weyerhaeuser*, some have argued that the decision actually swept more broadly in rejecting the claims in that case than it might have. Any thoughts on whether the Court is taking a narrow or a broad approach to case resolution in antitrust?

McDAVID: I would add *Trinko* to that trilogy because it's the dicta in *Trinko* that are really sweeping, not the holding, which was fairly predictable and rather narrow.

PINCUS: I'm not sure there is a trend. Take *Dagher*,[31] for example, which was an extraordinarily narrow decision. I don't think it is possible to reach any broad conclusions from these tea leaves. The rulings in individual cases are influenced by a number of factors.

Going back to the first question, this is not a Court with an antitrust agenda. It is not looking to remake antitrust law broadly and therefore impact the law as widely as possible with each decision. The Court is addressing discrete ques-

tions, and the way it disposes of each one depends on the views of the various Justices who make up the majority—and especially the Justice writing the opinion—in terms of how broadly they wish to sweep.

HEMPHILL: Take *Weyerhaeuser*. Is the Court's opinion broad or narrow? The Court's strong endorsement of *Brooke Group* is broad, compared to a simple disapproval of the district court's jury instruction, which had asked the jury to decide whether the relevant price was "fair." But on the other hand, the Court sent conflicting signals about an important issue: is antitrust meant to protect total surplus or only consumer surplus? It's hard to make sense of buy-side predation without taking a view on that question, and in this sense the Court's opinion was narrow.

PINCUS: In *Weyerhaeuser* the Court did not accept the invitations of a number of parties to reach broadly and discuss the legal standard applicable to bundled pricing and other types of conduct, or to address broadly the standard for conduct violative of Section 2. The certiorari petition typically frames the issue before the Court. In that case, the government agreed that there was a particular problem with the Ninth Circuit's definition of predatory buying, and the Court addressed that issue without getting into the broader issues presented by some of the amici.

STERN: I agree with Andy Pincus. *Weyerhaeuser* would not have been worth taking for review unless the Court was going to address the legal framework for evaluating a claim of buyer-side predation.

WHITENER: I wonder if there is a difference between the lyrics and the music in some of these decisions—thinking of *Trinko*, for example, where Justice Scalia used sweeping pro-defendant dicta, but the way he actually resolved the case arguably has opened the door to more refusal to deal cases. Contrast *Weyerhaeuser*, where there was an invitation to take a very broad view, which the Court didn't accept. But the standard it announced, as I read it, essentially says that a buy-side predation case only passes muster if it satisfies the first prong of the *Brooke Group* test for a traditional output-side case, that is, below-cost output pricing.

HEMPHILL: After *Weyerhaeuser*, requirements for liability do seem unduly stringent in one respect. The Court, in the end of its opinion, treats recoupment as something that can occur only through lower input prices. But that ignores recoupment by exercising power in output markets. I'm curious what Andy Pincus thinks about that.

PINCUS: Our brief, the government's brief, and the Court's opinion all highlight the fact that there was a finding that Weyerhaeuser had no market power in the output market. There is accordingly an open question about the effect of the availability of recoupment through the output market. The Court mentions the finding regarding the output market and makes clear is not addressing the effect, if any, of contrary facts.[32] If you had a case tomorrow where there was power in the output market and the claim was the defendant was going to recoup by utilizing its power in the output market, rather than by driving down input prices, the issue then would have to be addressed.

WHITENER: Given *Weyerhaeuser*, can we expect the Court in the near future to take on a multi-product discount or bundled pricing case? And what if anything does *Weyerhaeuser* suggest about how the court might decide such a case? For example, is *Brooke Group* now a sort of super precedent for Section 2 cases? Is it likely that the court would apply some variation of *Brooke Group* to a bundled pricing case?

HEMPHILL: There's not much evidence that the Court is interested in announcing a single rule for exclusion cases—that is, to take a rule for predation, or tying, or refusals, and apply it to other types of exclusion that are functionally similar.

GAVIL: You mentioned earlier that the courts, in looking at a question like predatory pricing, have ignored a lot of the post-*Brooke Group* scholarship that has been critical both of *Brooke Group* itself and of the idea that above-cost pricing can never be exclusionary. Doesn't that suggest that if the Court wants to continue down the road with *Brooke Group*, as it did in *Weyerhaeuser*, that the next logical step would be to extend the *Brooke Group* below-cost plus recoupment standard to a case involving bundled rebates?

McDAVID: There are several issues in predatory pricing awaiting resolution, including bundling. In addition, the Court has left open the cost standard that should be applied in predatory pricing cases. The Court has not accepted multiple invitations to define precisely what the cost measure should be.

STERN: I would expect the Court to attempt to apply the basic principles of *Brooke Group* relating to pricing below cost and recoupment to bundled pricing claims. It seems to me that from a practical standpoint both *Brooke Group* tests can provide very helpful benchmarks to assist in counseling in the real world situations.

McDAVID: I think that's part of why the Court chose to hear *Weyerhaeuser*. The standard approved by the Ninth Circuit was effectively useless to any business attempting to evaluate whether its conduct was lawful.

PINCUS: Yes. And that's why the Ninth Circuit decision served as such an effective target—the standard endorsed by the court of appeals was totally wide open. It did not just pro-

mote false positives, but actually embraced liability for procompetitive conduct.

But much of the power of both *Brooke Group* and *Weyerhaeuser* comes from the centrality of single product pricing, and the core importance to preserving competitive markets of precluding any chill of that basic price competition. That notion does apply to bundling to some degree, but bundling obviously is one step removed from single product pricing. My intuition is that establishing recoupment as a standard that must be met in this context might be easier than prevailing on the below cost pricing element.

STERN: In the context of bundling where you are dealing with discounting of the monopoly product in an attempt to create an advantage in a separate market for a distinct competitive product, you are generally talking about a firm sacrificing profit it otherwise could have made on the monopoly product. I believe that, if one focuses on that loss or sacrifice, the principles from *Brooke Group* do provide potential guidance.

First, as some courts and commentators have advocated, we can allocate all of the bundled discounts to the competitive product and then determine whether the resulting net price of that product is still above its costs.[33] If so, then the *Brooke Group* element requiring below cost pricing should bar a claim.

Second, even if below cost, one would then look at the likelihood of recoupment element of *Brooke Group*. Unless the bundled discount could be shown to create monopoly power in the separate market for the competitive product and there is a likelihood that exercise of such power would enable the firm to recoup its loss on a net present value basis then, under the principles of *Brooke Group*, there should be no viable claim of predatory bundled discounting.

PINCUS: We need signposts that delineate safe areas—facts that give business people comfort that they are not in a dangerous area, knowing that if they go outside those safe areas there is a need for more nuanced analysis and discussion about the circumstances surrounding the decision to, for example, offer a bundled discount.

WHITENER: Let's talk about *Illinois Tool Works*—another case, Andy, that you argued successfully, so you get to go first. Conventional wisdom suggests that this is a classic clean-up decision involving an old rule that had largely already been abandoned but was still on the books. But what does the decision suggest about how the Court might deal in the future with the so-called per se rule for tying cases, and whether the Court is likely to require a full rule of reason analysis?

PINCUS: During the oral argument, Justice Stevens asked a series of questions about tying jurisprudence generally. His focus seemed to be whether the whole enterprise of defining tying liability makes economic sense in light of current learning and, in particular, whether the focus on market power in the tying product leads to sensible results.

I thought that the import of his line of questioning was that the legitimate area of concern related to tying really involves the risk that tying could be used in attempting to monopolize the tied product market through leveraging of the defendant's market power in the tying product market. That is the direction taken by some of the recent literature. Later in the argument, Justice Breyer asked a similar series of questions. This provides interesting insight into the interaction between the academy and the Court on these issues. It also shows the Court's willingness to act like a common law court, to pick up on Ron's earlier point, in assessing whether current legal rules make sense in light of recent learning.

Tying already has evolved from something that everybody believed was always wrongful, to something that under current law is not wrongful very often. That evolution could continue, with the Court concluding that if leveraging is the concern, we have other antitrust tools to address it that do not carry a per se label—a label that may create more confusion than benefit given the many factual predicates that must be shown for this unique form of per se liability to attach.

STERN: I think the Court would adopt a rule of reason approach for tying claims if it decided to take a case that presented the question, because that is essentially where its jurisprudence is going. The question I have is whether there will be a perceived need to address this question, since the appropriate analysis may just take place through the current law as part of the market power analysis.

McDAVID: The Court had a compelling invitation to reconsider the per se rule with respect to maximum resale price maintenance in *State Oil v. Khan*.[34] Judge Posner's opinion for the Seventh Circuit essentially functioned as a petition asking the Supreme Court to decide the case.[35] *Leegin* posed the issue of minimum resale price maintenance very starkly. It's hard to see a case coming up that will offer that kind of opportunity in the tying area because tying analysis already is significantly more nuanced.

PINCUS: Yes. Of course, the ability to bring an issue before the Supreme Court depends on raising it in the lower courts. And a case would be attractive to the Court if the factual context in which the legal issue arose is one in which the application of the existing tying rules leads to an economically nonsensical result. If that happens, I think there would be some interest on the Court in trying to rationalize the law in this area.

GAVIL: So, if a case were to come to the Supreme Court where a plaintiff has relied on the letter of *Jefferson Parish*,[36]

that is, it has demonstrated two products, a tie, market power in the tying product, and some significant impact on commerce, is it pretty clear that the Court will rely on *Illinois Tool Works* and throw out any remnants of the per se rule? Would the Court reject the idea that such a showing would be enough to establish a violation and require a consideration of the efficiency-related justifications for the tie-in?

McDAVID: I think it's hard to preserve a basis for a strict per se rule with respect to tying now because tying analysis already includes factors that go beyond the typical per se rule.

PINCUS: Right, I don't know if the Court would rely on *Illinois Tool Works*. I think it would rely on the jurisprudence that already has moved tying toward a rule of reason analysis. And I think it would look for a case in which someone had created a record that there were legitimate business justifications for the tie that would be considered in the rule of reason context but could not be considered under *Jefferson Parish*.

HEMPHILL: Another option open to the Court would be to reject the per se tying rule in some but not all cases, along the lines of the D.C. Circuit's opinion in *Microsoft*, which suggested a distinct tying rule for platform software.[37]

PINCUS: Some of the amici in *Leegin* urged that type of a step-by-step approach.

I think the reason that tying is different, and this came up in the *Illinois Tool Works* argument as well, is that the benefits from the per se rule that Justice Breyer discussed in *Leegin*—such as ease of administration—are not being realized in the tying context. There already is a very substantial amount of fact-specific analysis because of the need to define the market and show market power. So considering efficiencies would not be a dramatic change.

And I think a reasonable question to ask is, what is the purpose of the tying "per se" rule? We've whittled away the benefits of the per se rule because of the need for factual analysis to determine whether the per se rule applies. But we've leaving out consideration of information that could be highly relevant to screening out legitimate behavior. So the cost-benefit calculus seems quite different than in *Leegin*, where the Court eliminated a per se rule that really was a per se rule.

GAVIL: Let me ask a question that's based on a line in Justice Kennedy's opinion for the Court in *Leegin*. We've talked, in different forms today, about a lot of the ways in which antitrust analysis has become more complex. To the extent antitrust rules are more dependent on economics, antitrust cases require an economist, and in general the increasingly more common e-discovery is more expensive. All of those are factors that we have discussed. And the Court did express some awareness that, as a policy matter, applying the rule of reason is not a choice free from its own problems. Here is the sentence I would like each of you to comment on: "Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[38]

Should the Court's reference to presumptions be viewed as an invitation from the Court to the lower courts to find ways to abbreviate the rule of reason inquiry, to perhaps develop varying sorts of middle ground approaches—either to terminate cases easily or shift a burden to the defendant that doesn't involve every element of the offense? What does Justice Kennedy have in mind?

McDAVID: I suspect that in the context of resale price maintenance Justice Kennedy was probably thinking about market power as one basis for an efficient resolution of an RPM case. Unfortunately, market power isn't really a truncated approach because first we have to define a relevant market and then determine whether market power exists. But I assume that's the sort of shortcut that he was thinking of.

STERN: But in certain situations, such as the factual context in *Leegin* itself, a market power assessment would be quite straightforward. I believe that a market power element would be a useful screen to help structure the rule of reason analysis. Another potential screen discussed in the *Leegin* opinion is whether the minimum resale price agreement was initiated by retailers. I believe that over time some guidance will emerge as the process is applied by the courts. Hopefully, one will not face an open-ended balancing test every time a firm adopts a minimum resale price policy.

McDAVID: One issue with RPM that is going to complicate all of this for businesses is that state law on RPM remains unsettled. Until we sort through the relationship between federal law on resale price maintenance and state laws, businesses will face substantial uncertainty. In addition, multinational companies face risks because RPM remains illegal in many foreign countries.

WHITENER: Let's turn to the practical implications of *Leegin*. Imagine that you are counseling a client that wants to embark on a full-fledged minimum resale price policy, requiring agreements from dealers to adhere to minimum prices. What are your initial questions and initial guidance to the client?

McDAVID: The first questions I always ask clients are what is it you want to do, what is the rationale, and what is it that you want to achieve. I was actually counseling a client on RPM while *Leegin* was pending. When this client didn't have a rationale for RPM, we counseled against going that direction even though we fully expected that the Court in Leegin would adopt the rule of reason analysis, because you certainly need to have something procompetitive to put on one side of the scale to evaluate under the rule of reason.

So, I would do what I do with all of my clients in the context of a rule of reason analysis, which is to figure out what they propose to do and why. The answers to those questions will be critical to the analysis.

WHITENER: Suppose I'm a supplier that has a substantial share of sales of my product. I'm the first to go out to the market with a minimum resale pricing policy. I've articulated a sensible anti-free-riding, quality-of-service rationale. And while I don't know about every email that exists in my company, I don't think the retailers are the ones who've been pushing this. What risks remain even with those facts?

STERN: As Jan notes, state law risks remain. Unless you happen to have a client that operates in a very narrowly defined geographic area where you can adopt your policy and you won't have customers traveling to other states or ordering on the Internet, you will have to assess the state law exposure on a national basis.

WHITENER: Going back to Andy Gavil's question, could one read Justice Kennedy's comment in *Leegin* about presumptions to suggest not only screens that eliminate cases, but also presumptions that indicate there could be a problem—for example, where multiple manufacturers have adopted similar policies, or where retailers were the first to suggest that the policy might be a good idea? Even under federal law, are rule of reason claims likely to be more successful in the vertical minimum resale price area than they have been in other rule of reason contexts?

PINCUS: I think time will tell on that. I want to comment on the issue of a manufacturer-initiated program and the suggestion that the advice should be different if these programs are engaged in by multiple manufacturers or if they constitute at some point a significant proportion of whatever the relevant market is. This obviously poses a significant counseling problem. If the client's liability is in the hands of what other people do, that can be problematic because it may not be possible to know what those other people are doing. And if it makes sense for one manufacturer to do it, it may well make sense for other similarly situated manufacturers to employ a similar policy. There should be some limitations on the creation of a presumption or even finding a problem in that kind of situation, unless you find an underlying manufacturer cartel.

McDAVID: Another important open issue, which was put to the Court in *Leegin* but not decided, is the issue of dual distribution. I view dual distribution as a vertical arrangement, and I think most of us would take a similar view, but there is some contrary law.

GAVIL: Under *Dr. Miles*, a lot of other doctrines regarding proof of RPM agreements arose. I'm thinking of *Colgate*,[39] *Parke Davis*,[40] *Business Electronics*,[41] and *Monsanto*.[42] How much of those decisions survive the decision in *Leegin*? Putting aside the question of state law, is the *Colgate* approach still appropriate, even for someone who has engaged in an unreasonable example of resale price maintenance? Will *Colgate* still insulate them from liability? Justice Breyer suggests that it would, in his dissent. What's the state of proof of agreement? Is it now easier to prove agreement? Do you still have the unilateral conduct defense?

McDAVID: One of the ironies of the *Dr. Miles* and *Colgate* line of cases was that it led to courts twisting themselves into pretzels to avoid finding an agreement on resale prices because that was outcome-dispositive. We spent all of our time in RPM cases focusing on whether there was a pristine, unilateral refusal to sell to dealers who would not adhere to resale prices, rather than considering the competitive effects of the conduct. Even after *Leegin*, *Colgate* remains good law, and some companies may choose to continue existing *Colgate* policies.

GAVIL: There is an argument based on comments made by the majority that both *Monsanto* and *Business Electronics* have been effectively overruled. Will defendants still argue in any kind of resale price maintenance case that the plaintiff has to satisfy the elevated proof of agreement standards of those cases?

STERN: I would certainly assume that the existing decisions regarding proof of an agreement have not been changed by *Leegin*. Firms may elect to follow the *Colgate* approach even after *Leegin* in view of the state law risks that we have discussed. That should not be more difficult just because *Dr. Miles* has been overruled.

McDAVID: *Twombly* probably tells us that the *Colgate* line of cases is not dead.

WHITENER: Let's turn to the practical implications of pleading a Section 1 conspiracy in the aftermath of *Twombly*. How does *Twombly* affect counseling and litigation in the Section 1 area?

McDAVID: I think *Twombly* is likely to have the greatest effect of any of the cases we've been talking about today, and the effect of *Twombly* is likely to go far beyond the antitrust area.

PINCUS: *Twombly* is going to have a huge impact across the board—not only in antitrust cases. That is why half of the questions at the argument had nothing to do with antitrust law. Justices were concerned about the impact of ruling for the defendant in *Twombly* on plaintiffs' ability to assert civil rights claims as well as claims in other areas of the law.

Both the argument and the decision emphasized one of the themes we've been discussing—the huge transaction costs

that are imposed by starting up the litigation engine and the need to have something more than just saying "and there was a conspiracy" in order to start that big engine going. On this specific question, I don't think a plaintiff can allege something on information and belief without any basis. The plaintiff needs underlying facts. You can't file a lawsuit and say "Gee, I don't know anything but I think because of what these people are doing in the market there's a conspiracy somewhere here and I'd like to the opportunity to go and find it."

That is exactly the argument that was rejected in *Twombly*. This was a market in which, in order to compete, a company would have to make legal arguments (about the meaning of the Communications Act) that would open its home market to penetration by other companies. It would be bizarre to infer that these companies would have put at risk their home turf where they had a very substantial market share, on the off chance that doing that might get them some benefits in other markets down the road. I think the Court was heavily influenced by the fact that this was a market where the inference of conspiracy made no sense because of the applicable regulatory regime.

HEMPHILL: And part of what *Twombly* demonstrates is the lack of a coherent basis for the agreement requirement of Section 1. Markets that are conducive to collusion make agreement easier to achieve but also unnecessary to sustain higher prices.

McDAVID: Prior to *Twombly*, the moment there was a press reference to a grand jury investigation, the plaintiffs' bar started filing lawsuits. It's not clear whether that's going to happen now or whether they are going to have to wait at least a little while longer to see whether the investigation leads to an indictment.

STERN: I was struck by the way in which the Court dealt with the Notebaert allegation in the complaint.[43] The Court majority appeared to accept an expansive role for the judge in going beyond the face of the allegation to look at the quotation in context and to examine other articles in order to take judicial notice at the pleading stage enabling the judge to grant a motion to dismiss the complaint. So I think one real wild card is whether *Twombly* will be seen as giving the trial judge the green light to take a more activist approach to assessing specific, factual allegations in the pleadings on motions to dismiss.

HEMPHILL: And that's an important change in emphasis—the indication, which appears in *Trinko* too, that the pleading stage is a useful place in an antitrust case to prune a district court's busy docket.

PINCUS: That is extremely important because, by the summary judgment stage, the huge costs associated with discovery have been incurred. If what you're trying to do is to stop bad cases from going forward and imposing costs on innocent people, waiting until the summary judgment stage doesn't really make a lot of sense.

I don't think one can really appreciate how bizarre our system appears to the rest of the world until you've explained to a foreign client the fact that once a complaint has been filed, the client's belief that every material allegation is false does not matter. If those allegations are sufficient to state a claim, the client likely will not be able to dispose of the case without incurring several million dollars in costs that it will never be able to recover. Compared to litigation systems in other countries, ours is a very strange system. I think there has been a reaction to the fact that costs have escalated substantially and to trial judges who either don't have the time or won't put in the time to supervise discovery effectively so that discovery is targeted on issues that could end the case.

Realistically, the motion to dismiss stage is the only place to exercise control. The instrument may be blunt, and it is possible that cases may be dismissed in which discovery might find relevant facts. But I think there is an effort to look at the system and rationalize its costs.

GAVIL: Do you envision *Twombly* moving to be a general pleading standard that goes beyond conspiracy in antitrust cases? For example, there is already one district court opinion that has cited *Twombly* as a basis for dismissing a complaint on the ground that the allegations with respect to standing were insufficiently particular.[44] Is *Twombly* going to become a general elevated pleading standard for every component of an antitrust case, from standing to damages?

PINCUS: *Twombly* really represents conspiracy catching up with the Court's treatment of other issues. With respect to standing, we already had *Associated General Contractors*[45] and the other cases that really took a fairly hard line on standing, just as *Dura*[46] took a hard look at alleging loss causation in the securities context.

STERN: My sense is that prior to *Twombly*, very conclusory allegations with respect to conspiracy were enough to survive a motion to dismiss.

McDAVID: I think the pleading requirement for standing has been pretty clear for quite some time, so I would be surprised to see that change very much. The standards for pleading fact of damage also require careful pleading, while it has always been far easier to allege quantum of damage.

GAVIL: Is *Twombly* likely to be cited as well in Section 2 cases to support demands for more in terms of pleadings on market definition and market power, in every element of the claim?

PINCUS: I think the issue is one that will take a while to work

out because you're going to have a lot of different district judges who will view this as an opportunity perhaps to manage their docket in different ways. Until the courts of appeal provides some guidance, my guess is we are going to get a diversity of approaches.

The other interesting thing about *Twombly* is that when the Second Circuit reversed, it did so in an opinion that was not fully supportive of the result, but indicated that its hands were tied by the language of Rule 8 and by Supreme Court precedent. And the Court took that invitation to step in and address the issue itself.

GAVIL: We've talked about *Jefferson Parish* and the law on tying. Are there other areas of antitrust that remain for the Court to "clean up?" Are there other significant antitrust precedents that you think are ripe for reconsideration by the Court at this point?

McDAVID: One area that the Court hasn't touched in a very long time is mergers. It's hard to see how a merger case is going to reach the Court because they are all disposed of on motions for preliminary injunction and often there is no appeal.

Perhaps one of the cases that the Federal Trade Commission has litigated in an administrative context, such as *Chicago Bridge and Iron*,[47] might make its way to the Court. Until that happens, however, *Philadelphia National Bank*[48] stands as the governing standard.

STERN: I think *Kodak*[49] is a good candidate for clean up. It has been narrowed by subsequent lower court decisions and it has been subject to a lot of criticism by academics.

GAVIL: It is ironic that given all of the language from the Court about the supposed excesses of private litigation, it seems from our discussions that both *Twombly* and *Leegin* are going to result in more litigation. *Leegin* is particularly ironic because the per se rule has provided a fairly low level of activity. Will abandoning the per se rule invite more aggressive action on the part of suppliers, which might lead to more lawsuits precisely because there are some unanswered questions here?

HEMPHILL: On the other hand, if the *Colgate* rule still applies, that will continue to provide strong protection from liability.

McDAVID: Remember that the real parties in interest in some of these cases are the members of the plaintiffs' bar. So, the question becomes how much of an investment are they prepared to make, given the change in the risk/reward equation.

STERN: I would take issue with Andy Gavil's suggestion that *Twombly* is going to lead to more litigation. It may be that there will be more motions to dismiss, but I think if you consider it in a dynamic sense, there probably will be fewer questionable complaints filed. Even with regard to the complaints that are filed, there may well be less litigation in terms of the length, cost, and complexity because more marginal complaints will be dismissed at the pleading stage.

[T]his Court seems to understand the implications of its opinions for real world business decisions, and also understands that some of the lower court opinions are having some impact.

—JANET McDAVID

WHITENER: My last question is to ask each of you how you would summarize the impact of these Supreme Court cases from your differing perspectives. Andy, let's start with you. As a Supreme Court advocate, what do you take away from these decisions?

PINCUS: A couple of points. First, the Court's antitrust decisions confirm its willingness to take account of the economic learning while refusing to become a prisoner of every detail of economic analysis. The Justices are conscious of the fact that their job is to formulate legal rules, not to write a series of economic rules into the law. They want to understand the economic analysis, but also consider other factors, such as the administrative costs of particular rules, how effective a rule will be in separating legitimate and illegitimate conduct in the real world of litigation, and the extent to which a rule is consistent with Congress's expressed intent.

Second, the importance of an issue is not necessarily measured by how much litigation there is about it. A significant effect on primary conduct—either directly or indirectly through the imposition of litigation costs—may be a reason for the Court to step in.

Third, the Court has made clear—in *Illinois Tool Works* and *Leegin*—that it is willing to reconsider established rules that have been undercut by more recent economic analysis and the Court's own decisions. It does not have an agenda but it may be receptive to efforts to frame issues in a way that draws upon the concerns the Court has invoked in its decisions reconsidering such rules.

HEMPHILL: I'm interested in what the Court, in the process of cleaning out cobwebs, has left unsaid. *Weyerhaeuser*, or most of it, follows from *Brooke Group*. Yet the Court didn't resolve the crucial question of whether producer surplus counts in the analysis. *Leegin* fits the rest of the Court's vertical contracting jurisprudence, but the Court ignored Justice Breyer's audacious challenge to the usual, stringent, "always or almost always" condition for per se condemnation. And these decisions may prove to have less commercial impor-

tance than an issue the Court has repeatedly declined to decide, namely "pay-for-delay" patent settlements between rival drug makers, which reallocate many billions of dollars between consumers and drug makers.

McDAVID: I think this Court seems to understand the implications of its opinions for real world business decisions, and also understands that some of the lower court opinions are having some impact. There was no standard that businesses could follow in decisions that impose liability because a company pays a price that was higher than a fair price or bought more of an input than they needed, so the Court stepped in to clarify the standard.

Prior to *Leegin*, a manufacturer was in the position where its only alternatives were either (a) to continue to do business with a distributor that no longer shares its business model or (b) simply terminate that distributor. The recent cases indicate that the Court seems to understand that it needs provide some guidance to businesses that actually can be applied in the real world.

STERN: My primary reaction to the set of Supreme Court decisions during the last two terms is that the consensus that has been developing in U.S. antitrust law is now more firmly established. One of the real issues has been the gap between the position of the federal antitrust agencies and the state of the Supreme Court case law.

In the merger context, this gap is not as important because the number of private challenges to mergers is very, very small. But in the counseling context outside of the merger area, having regulators taking the position that a patent does not create a presumption of market power while there was a Supreme Court case holding to the contrary made life more difficult.

So, I think the Court's decisions during the last two terms have removed important inconsistencies and reinforced the emerging consensus. I think that is important because increasingly among the other key issues that one sees from a counseling standpoint is a globalizing world with a growing number of different competition regimes.

The consensus view that has emerged in the U.S. about what the right approach is to competition law is now on a sounder footing to compete in the marketplace of global ideas. So I think it's a very welcome development. ■

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

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

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

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

5 Conley v. Gibson, 355 U.S. 41 (1957).

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

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

8 *Credit Suisse*, 127 S. Ct. at 2397.

9 eBay Inc. v. MercExchange, LLC, 126 S. Ct. 1837 (2006).

10 California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

11 KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727 (2007).

12 LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003).

13 Joblove v. Barr Labs., Inc. (*In re* Tamoxifen Citrate Antitrust Litig.), 466 F.3d 187 (2d Cir 2006), *petition for cert. filed*, 2006 WL 3694387 (U.S. Dec. 13, 2006) (No. 06-830).

14 *See, e.g.*, Brief for the United States as Amicus Curiae, Joblove v. Barr Labs., Inc. (*In re* Tamoxifen Citrate Antitrust Litig.), 127 S. Ct. 3001 (2007) (No. 06-830), *available at* http://www.usdoj.gov/osg/briefs/2006/2pet/6invit/2006-0830.pet.ami.inv.pdf.

15 *Id.* at 12.

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

17 *Leegin*, 127 S. Ct. at 2730–31.

18 Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180–81 (2006).

19 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

20 *Leegin*, 127 S. Ct. at 2725 (Breyer, J., dissenting).

21 *Id.* at 2713 (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988)).

22 *Leegin*, 127 S. Ct. at 2734–37 (citing Federal Election Comm'n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007)).

23 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting).

24 *Leegin*, 127 S. Ct. at 2731.

25 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

26 *Weyerhaeuser*, 127 S. Ct. at 1077 (quoting *Brooke Group*, 509 U.S. at 226).

27 Robert A. Skitol, *Three Years After* Verizon v. Trinko*: Broad Dissatisfaction with the Whole Thrust of Refusal to Deal Law*, ANTITRUST SOURCE, Apr. 2007, http://www.abanet.org/antitrust/at-source/07/04/Apr07-Skitol4=27f.pdf.

28 *Twombly*, 127 S. Ct. at 1983.

29 United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

30 *Volvo*, 546 U.S. at 181.

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

32 *Weyerhaeuser*, 127 S. Ct. at 1076.

33 *See, e.g.*, Jonathan M. Jacobson, *Exploring the Antitrust Modernization Commission's Proposed Test for Bundled Pricing*, ANTITRUST, Summer 2007, at 28 n.21.

34 522 U.S. 3 (1997).

35 Khan v. State Oil Co., 93 F.3d 1358 (7th Cir. 1996).

36 Jefferson Parish Hosp. Dist. No. 2. v. Hyde, 466 U.S. 2 (1984).

37 *Microsoft*, 253 F.3d at 94.

38 *Leegin*, 127 S. Ct. at 2720.

39 United States v. Colgate & Co., 250 U.S. 300 (1919).

40 United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

41 Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

42 Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

43 *Twombly*, 127 S. Ct. at 1972 n.13.

44 Hydril Co., L.P. v. Grant Prideco, L.P., No. H-05-0337, 2007 WL 1791663 (S.D. Tex. June 19, 2007).

45 Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519 (1983).

46 Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005).

47 Chicago Bridge & Iron Co., 2004 F.T.C. 250 (2004).

48 United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

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