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Antitrust and the Roberts Court

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ALTHOUGH THE SUPREME COURT'S overall caseload has shrunk under Chief Justice Roberts,[1] the Court's antitrust docket strikingly has tripled. Since 2005, when Chief Justice Roberts succeeded William Rehnquist, the Court has taken 14 antitrust cases, compared to just five decided by the Rehnquist Court between 1993 and 2003.[2] The Supreme Court's renewed interest in antitrust law is welcome. Numerous important issues in the antitrust field remain unsettled. The common-law nature of American antitrust law, moreover, benefits from greater Supreme Court guidance.

Some view competition law in general, and antitrust law in particular, as chiefly a form of administrative regulation—a field governed by rules and decisions formulated by the antitrust enforcement agencies.[3] Competition law, it is sometimes decried, merely involves predicting the positions regulators will take. The structure of competition law enforcement overseas—typically an agency model with limited judicial review—and the prominence of agency-driven merger enforcement domestically reinforce this perception.

But the depiction of U.S. antitrust law as primarily a matter of administrative regulation is fundamentally wrong. The structure of American antitrust enforcement is at its essence a judicial enforcement (or "law enforcement") model. Private attorneys general bring the vast majority of antitrust cases.[4] Likewise, the Department of Justice must bring suit in federal court in order to vindicate its views of antitrust law. Even the Federal Trade Commission, which can proceed administratively, ultimately is subject to judicial review.

Just as in other areas of the law, the federal courts have the last word on the meaning of our antitrust laws.[5] The Court has interpreted the Sherman and Clayton Acts as creating a species of common law, the meaning of which can evolve with changing conditions, which gives the federal courts a critical role in fashioning our competition laws. As Professor Areeda put it, Congress "invest[ed] the federal courts with a jurisdiction to create and develop an 'antitrust law' in the manner of the common law courts."[6] Tellingly, even in merger control, where the view of antitrust as administrative regulation has the most purchase, federal courts can and do render important decisions that shape the field and determine outcomes.

Viewed from this perspective, the Supreme Court's recent rediscovery of antitrust reaffirms the vital importance of the federal courts in the dynamic process of common-law development that characterizes our antitrust laws.[7] In this piece, we explore three themes emerging from this reengagement: the Roberts Court's (1) raising the bar to class actions, a development that transcends antitrust; (2) resistance to specialized rules in favor of broad standards, a development that reinforces the importance of evolution of antitrust law in the lower courts; and (3) protection of price competition, which marks the continuation of a longstanding theme.

Raising the Class Action Bar

In its first decade, the Roberts Court has consistently raised the threshold for plaintiffs seeking to pursue class actions. Although non-antitrust cases illustrate the trend as well, it is not mere coincidence, given the prevalence and nature of contemporary antitrust class action litigation, that a trilogy of antitrust cases provided vehicles for the Court's key decisions in this area: (1) *Bell Atlantic Corp. v. Twombly*, which cracked down on notice pleading (a watershed decision that, of course, transcends both class actions and antitrust); (2) *Comcast Corp. v. Behrend*, which requires putative plaintiff classes to offer, at the class-certification stage, a competent damages model tied to their theory of liability; and (3) *American Express Co. v. Italian Colors Restaurant*, which upheld class action waivers in arbitration agreements. Collectively, these decisions impose significant new obstacles to sustaining class actions under Rule 23.

Bell Atlantic v. Twombly. In *Twombly*, the Court upheld dismissal of a putative class action alleging that local telephone carriers conspired in violation of Sherman Act Section 1.[8] In a landmark decision, the Court held that mere "notice pleading" does not satisfy Federal Rule of Civil Procedure 8. The federal rules require not merely notice of a claim, but rather a "show[ing] that the pleader is entitled to relief."[9] To avoid dismissal, a plaintiff must allege "enough factual matter (taken as true)" to "raise a right to relief above the speculative level."[10] The Court emphasized that the complaint must show a "*plausible* entitlement to relief," not "the

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possibility that a plaintiff might later establish some set of undisclosed facts to support recovery."[11]

Applying this principle to the facts before it, the Court refused to find a conspiracy sufficiently pled from allegations that it viewed as identifying mere parallel conduct without sufficient other indicia of an agreement. Emphasizing the lack of "any independent allegation of actual agreement" to engage in anticompetitive behavior, the Court reasoned that the claims of conscious parallelism did not tend to show "anything more than the natural, unilateral reaction of each [company] intent on keeping its regional dominance."[12] To survive a motion to dismiss, the Court held, plaintiffs charging a conspiracy need to plead "plausible grounds to infer an agreement."[13]

Two years after *Twombly*, the Court provided further elaboration in *Ashcroft v. Iqbal*.[14] *Iqbal* stands for the proposition that a judge must ignore (in the Court's words, "reject") conclusory allegations and determine whether the remaining factual allegations state a claim.[15] Thus, a court now must begin the Rule 8(a)(2) analysis "by identifying the allegations in the complaint that are not entitled to the assumption of truth."[16] After setting deficient allegations aside, a judge must then determine if the facts in the complaint "plausibly suggest an entitlement to relief."[17] Although lower federal courts continue to wrestle with how to apply what is colloquially known as "*Twiqbal*" in particular factual settings,[18] the decisions clearly and substantially raised the pleading bar.

While the impact of *Twiqbal* beyond antitrust has been indisputably enormous, it is revealing that the Court raised the pleading bar in the context of an antitrust class action, and did so in significant part *because of* that context. The majority stressed the "hold up" power class action antitrust plaintiffs can wield if flimsy allegations survive a motion to dismiss.[19] The asymmetric discovery burdens of class actions, the Court observed, can cause defendants to settle even "anemic," unmeritorious claims, once a class has been certified.[20] Antitrust law, where parallel action can be consistent with both virtuous competition and unlawful collusion and where class action plaintiffs wield the additional threat of treble damages, provided the perfect setting for the Court to redress this imbalance. Thus, the Court concluded, "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim."[21]

In short, while the demise of notice pleading is undoubtedly part and parcel of a broader program to crack down on perceived abuses of the class action system,[22] the antitrust context served as a catalyst for the Court to take action.

Comcast. In its 5–4 *Comcast* decision, the Court again decided an issue of recurring and special importance to antitrust class actions—whether, as part of class certification, an expert's damages model must be tightly tied to the underlying theory of liability[23]—but its holding is already being felt beyond the confines of antitrust. Comcast initially sought review of a generic question concerning class certification under Rule 23(b)(3): "whether a district court may certify a class action without resolving 'merits arguments' that bear on [Rule] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)."[24] But the Court granted certiorari on a different question more specifically geared to antitrust class actions: "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[25] Ultimately, the Court ruled that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to th[e] theory" of liability.[26]

Like *Twombly*, *Comcast* fits into the larger pattern of the Roberts Court's class action decisions. Under this line of cases, as the Court explained in *Wal-Mart*, courts must subject a motion seeking class certification under Rule 23 to a "rigorous analysis," even when that inquiry "entail[s] some overlap with the merits of the plaintiff's underlying claim."[27] The antitrust backdrop of *Comcast* nonetheless played a significant role in the case's outcome. Notably, *Comcast* stands in some tension with the Court's 2011 decision in *Erica P. John Fund, Inc. v. Halliburton Co.*[28] There the Court held that plaintiffs in a putative securities fraud class action were not required at the class-certification stage to provide evidence of loss causation as part of the requirement to demonstrate the preponderance of common issues.[29] With *Comcast* on the books, the Court is now reviewing the *Erica P. John Fund* case this Term. Although the question presented by the petition is whether to pull back from *Basic v. Levinson*'s presumption of reliance when a stock trades in an efficient market,[30] the Court's questions at oral argument indicated that the proper resolution might be to require plaintiffs to come forward with evidence that the alleged fraud had an effect on the stock's price (a close cousin to "loss causation").[31] In other words, *Comcast*'s recognition of a problem in the antitrust context may point the Court in a new direction in this second go-round in the securities fraud context.

American Express. In *American Express Co. v. Italian Colors Restaurant*, a putative class action challenging conduct under Section 1 of the Sherman Act, the Roberts Court reaffirmed and expanded earlier decisions from outside the antitrust context enforcing mandatory arbitration provisions and class action waivers.[32] The Court had held two years earlier in *AT&T Mobility LLC v. Concepcion*, a false advertising case, that the Federal Arbitration Act preempts states from conditioning the enforceability of arbitration agreements on classwide arbitration being available.[33] In *American Express*, a putative class of merchants sought damages for American Express conduct challenged as an unlawful tying arrangement.[34] The defendants asked the district court to

enforce a mandatory arbitration provision and a class action waiver. In the Second Circuit, the plaintiffs successfully argued that *Concepcion* was inapplicable to federal antitrust tying claims because a class waiver would preclude the merchants from "effectively vindicating [their] federal statutory rights in the arbitral forum."[35] The Supreme Court reversed, holding that plaintiffs' statutory antitrust claims were controlled by what the Court described as a straightforward application of *Concepcion*.[36]

Although *Concepcion*'s disposition has significant ramifications outside antitrust, *American Express* highlights *Concepcion*'s significant impact on antitrust enforcement. Many companies, consumer-facing and otherwise, reacted to the decisions by adding class action waivers to their standard terms and conditions. Although plaintiffs argued that only the class action mechanism would allow them to vindicate effectively the antitrust laws as private attorneys general, the Court held that merchants must pursue their Sherman Act claims individually and in arbitration. Similar enforcement of such waivers could preclude class actions in many direct-purchaser cases going forward. The Supreme Court surely recognized that reality. Indeed, Justice Kagan, in dissent, accused the majority of trying to neuter class actions: "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled."[37]

Whether or not Justice Kagan's critique is accurate, the Roberts Court's class action trilogy reflects the Court's insistence that representative actions, especially in the antitrust context, hew closely (in the Court's view) to the requirements that Congress specified, so that their settlement value reflects the underlying merits, rather than mere "hold up" value. As Justice Scalia put it in *American Express*:

> Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice. But to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational.[38]

It is worth noting that the holding in another Supreme Court antitrust "mass action" case, which went against the defendants, may prove the larger point. In *Mississippi ex rel. Hood v. AU Optronics Corp.*,[39] the Court held—based on rigorous textual analysis of the Class Action Fairness Act[40]—that a state attorney general's *parens patriae* price-fixing suit could not be removed by the defendant to federal court.[41] *Hood* may increase the leverage of state attorneys general in matters also subject to class action suits.[42] Nonetheless, the Court's reasoning in *Hood* fits with the Roberts Court's broader themes of federalism and textualism, including enforcing the procedural rules as Congress wrote them.

Resistance to Specialized Rules

Although a common-law field, antitrust law is not exclusively a collection of common-law standards. Antitrust also boasts specialized rules.[43] Some are long-standing, such as the per se rule against price fixing. Others, illustrated by *Brooke Group*'s test for predatory pricing, are of more recent vintage. A striking aspect of the Roberts Court's antitrust jurisprudence is its general resistance to specialized antitrust rules, outside the price-competition context. The Court not only has dismantled longstanding doctrines but also generally favored applying broad Rule of Reason analysis in important areas.

Continuing the Per Se Rule Dismantlement Project. Some of antitrust's older, specialized rules have been subject to the long-standing criticism of marching "out of step" with more modern antitrust principles. The presumption that intellectual property automatically confers market power in tying claims has been one. The per se rule against retail price maintenance is another. The Rehnquist Court ended the per se rule against *maximum* retail price maintenance in *State Oil Co. v. Khan* in 1997,[44] but it was the Roberts Court that completed the job of dismantling these per se rules in *Illinois Tool Works* and *Leegin*.

Illinois Tool Works, Inc. v. Independent Ink, Inc. marked the demise of the market power presumption in patent tying claims, a presumption the Court termed a historical "vestige."[45] The presumption had provided patent tying plaintiffs with a shortcut to establishing the "essential characteristic" of an invalid tying arrangement: that the defendant enjoyed tying product market power sufficient to force a tie.[46] The presumption originated outside antitrust law as an aspect of the patent misuse defense. But, the Court observed, Congress eliminated any such presumption in the misuse setting by amending the Patent Act in 1988.[47] Recognizing that Congress thereby obliterated the foundations of the market power presumption in patent tying cases, the Court unanimously held that plaintiffs must prove actual market power, the same standard that applies to non-patent ties.[48] Notably, however, the Court in *Illinois Tool Works* did not take the occasion to completely dismantle the multi-step per se rule applicable to tying, an opportunity it previously also declined in *Kodak* and *Jefferson Parish*.[49]

Leegin Creative Leather Products Inc. v. PSKS Inc.,[50] in which the Court picked up where *Khan* left off, presented a closer case. Over a vigorous dissent, a bare 5–4 majority held that minimum retail price maintenance should be evaluated under the rule of reason, overruling the century-old decision in *Dr. Miles*.[51] Invoking what it viewed as persuasive justifications for minimum resale price maintenance articulated by "respected authorities in the economics literature," the majority rejected *stare decisis* as grounds for continued adherence to *Dr. Miles*' per se rule condemning minimum price maintenance.[52] Justice Breyer's dissent argued in vain that such agreements may have "serious anticompetitive consequences," and that any benefit from such agreements in preventing retailers from free riding on other retailers' investments was outweighed by the administrative difficulties of applying the rule of reason.[53] Given that the Court

was not writing on a "blank slate, but on a slate that begins with *Dr. Miles* and goes on to list a century's worth of similar cases,"[54] the dissent argued the competitive effects were too uncertain to justify overruling such a "well-established" precedent.[55]

Even where per se rules persist, the Roberts Court refused to extend them. In *Texaco Inc. v. Dagher*, for example, the Court held that the per se rule against price fixing did not apply to a price agreement that, as a functional matter, was the conduct of a single firm.[56] Any Section 1 challenge to the defendant joint venture's policy of selling gasoline under two brand names at a uniform price, the Court ruled, required evaluation under the rule of reason.[57]

Encouraging Percolation. Decisions such as *Leegin* also expose a related theme of the Roberts Court's antitrust jurisprudence—allowing unsettled issues of how to apply the rule of reason to percolate in the lower courts. The Court's refusal to take up the analysis applicable to loyalty discounts in *LePage's*, although just before the Roberts Court, is one example.[58] The Third Circuit's often-criticized decision upheld a jury verdict holding a defendant liable under Sherman Act Section 2 for bundled discounting, regardless whether the bundle qualified as predatory under the Supreme Court's *Brooke Group* test.[59] By allowing *LePage's* to stand, the Court gave other tribunals the opportunity to fashion a more nuanced inquiry. The Ninth Circuit did precisely that in *PeaceHealth*,[60] where it rejected *LePage's* and held that bundled discounts constitute exclusionary conduct only if the discounts result in prices below the defendant's costs as measured by the "discount attribution" standard.[61]

FTC v. Actavis, Inc. is another example.[62] There the Court took up the long-simmering issue of how to analyze under the antitrust laws the settlement of a patent infringement suit between brand-name and generic drug manufacturers where the settlement contained restraints beyond prohibiting practicing the patents at issue. The Eleventh Circuit affirmed dismissal of a suit brought by the FTC, finding the settlement lawful because its terms remained within the "scope of the patent."[63] In the Supreme Court, both sides proposed a specialized rule: the FTC suggested a "quick look" treatment of reverse payments; the defense argued for the Eleventh Circuit's per se legality for conduct within the "scope of the patent."[64] The Court rejected both.[65] The Court left lower courts to grapple with a range of issues, including what constitutes a reverse payment,[66] whether a showing of patent invalidity or infringement can be a defense,[67] and how to structure rule-of-reason inquiries to avoid "antitrust theories too abbreviated to permit proper analysis" or "consideration of every possible fact or theory."[68]

American Needle v. National Football League reflects a similar theme.[69] There, the Court rejected the NFL's argument that it comprised a single entity for purposes of evaluating a challenge to the joint licensing of trademarks, instead holding that each league team comprised an independent economic actor. Having found sufficient concerted action to trigger Section 1, the Court further concluded that "per se rules of illegality are inapplicable" to the NFL's restraints because of the league's need to cooperate to produce its product.[70] The restraints are thus to be "judged according to the flexible Rule of Reason."[71] As with reverse payments after *Actavis*, *American Needle* gave lower courts few clear guidelines as they grapple with the question when a joint venture should be treated as a single firm (uncertainty compounded by the refusal to entirely oust Section 1 in *Dagher*),[72] as well as the contours of rule of reason analysis.[73]

Nuanced Treatment of Antitrust Exemptions. Cases like *Actavis* can also be viewed through the lens of "exemption" from the antitrust laws: there, the issue was framed as whether the anticompetitive effects of a reverse settlement should be measured "solely against patent law policy" or by measuring them against "procompetitive antitrust policies as well."[74] The Court made clear that both considerations deserve equal weight.[75] The Roberts Court's decisions in formal antitrust exemption cases similarly reveal no broad philosophy to favor or disfavor antitrust when its doctrines arguably clash with other regulatory mechanisms.

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In *Credit Suisse Securities LLC v. Billing*, the Court held that an antitrust plaintiff could not bring a tying claim to challenge IPO underwriting practices because doing so would be "clearly incompatible" with the Exchange Act and SEC regulations.[76] The SEC already prohibited anticompetitive conduct and routinely used that regulatory authority.[77] The Court accordingly concluded that there was a "diminished need for antitrust enforcement to address anticompetitive conduct" in the securities context and antitrust claims created "a substantial risk of injury to the securities markets."[78] By contrast, in *FTC v. Phoebe Putney Health System, Inc.*, the Court refused to exempt certain hospital mergers from the antitrust laws even though one of the parties was a state actor. Looking to the structure of the Georgia law creating public hospital authorities, the Court determined that state-action immunity was inappropriate where the law did not "clearly articulate" a policy allowing hospitals to engage in the anticompetitive conduct.[79]

Rather than evincing a philosophy on when antitrust must "give way," both decisions reflected a fact-specific, nuanced treatment of exemptions. With the grant of certiorari in

North Carolina State Board of Dental Examiners v. FTC for the coming Term, the Court will determine whether the North Carolina Board of Dental Examiners is exempt from antitrust scrutiny under the state action doctrine. The FTC challenged the Board's actions to exclude non-dentists from providing teeth-whitening services, arguing that the Board is not immune where it is "dominated" by practicing dentists who benefit from the exclusion of competition and the state does not "actively supervise[]" the Board's activities.[80] The Board, meanwhile, argues that as an "official state regulatory board created by state law," it is a "state agency" entitled to state action immunity under *Town of Hallie v. City of Eau Claire*.[81] The antitrust community will see whether the Roberts Court continues a fact-specific, nuanced approach to exemptions or adopts a broader rule in cases in which market participants attempt to cloak their anticompetitive conduct with the state's purported imprimatur.

Protecting Price Competition

The Roberts Court has also continued to shape antitrust doctrines to protect price competition. The Court's efforts here date back at least to 1993, when the Court decided *Brooke Group* and *Spectrum Sports*. *Brooke Group* recognized the dangers of competitors misusing antitrust litigation to chill competition by requiring plaintiffs alleging predatory pricing to demonstrate (1) that a defendant's prices are below an appropriate measure of its costs, and (2) there is a "dangerous probability" that the defendant will recoup its losses.[82] Likewise, *Spectrum Sports* held that a defendant is liable for attempted monopolization only if the plaintiff proves the anticompetitive conduct has "a dangerous probability of achieving monopoly power."[83] In a trilogy of cases—*linkLine*, *Weyerhaeuser*, and *Volvo*—the Roberts Court pressed forward in its program to prevent antitrust rules and presumptions from interfering with a manufacturer's freedom to set prices.

In *linkLine*, the Court rejected a "price-squeeze" claim predicated on low retail prices. The plaintiff DSL Internet providers leased wholesale DSL transport infrastructure from the defendant AT&T.[84] AT&T also competed with the plaintiffs by selling DSL service at the retail level. The plaintiffs alleged that AT&T violated Sherman Act Section 2 by subjecting them to a "price squeeze"—setting a high wholesale price for DSL transport to the plaintiffs and a competing low retail price for DSL service to customers. The Court treated the case as predetermined by *Brooke Group* and *Trinko*, its recent refusal-to-deal decision.[85] *Trinko* held that a defendant has no antitrust duty to deal under terms and conditions preferred by rivals. The *linkLine* plaintiffs accordingly lacked any claim for AT&T's failure to provide wholesale DSL transport services at a specific price.[86] Likewise, because *Brooke Group* held that above-cost pricing is lawful, the plaintiffs failed to allege that AT&T's DSL retail prices were predatory.[87] Thus, the Court reasoned, "Plaintiffs' price-squeeze claim . . . is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level."[88]

Notably, in the pricing area, unlike others, the Court has seemed to favor bright-line rules (that favor price competition).

The Court likewise extended *Brooke Group*'s predatory pricing principles to "predatory buying" in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*[89] There, a sawmill operator sued its competitor, alleging the defendant monopolized or attempted to monopolize the regional input market for alder sawlogs by buying more sawlogs then necessary, thereby bidding up the price and driving the plaintiff to bankruptcy. Noting that "predatory bidding mirrors predatory pricing in respects that we deemed significant" in *Brooke Group*, the Court vacated the jury verdict for the plaintiff and held that the *Brooke Group* predatory pricing test applied to predatory buying.[90] Predatory buying plaintiffs must therefore demonstrate that bidding prices "led to below-cost pricing of the predator's outputs" and the defendant has a "dangerous probability of recouping the losses."[91]

The Court continued to protect a manufacturer's freedom to price its products in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,[92] by cabining the Robinson-Patman Act. There, a Volvo truck dealer sued the manufacturer for giving rival Volvo dealers larger discounts in competitive bidding contests for retail customers. The evidence of price discrimination, however, showed that the larger discounts were not given in head-to-head competition, but only where Volvo dealers were not competing for the same customer, both Volvo bids were unsuccessful, or a larger discount was given only after a favored dealer won a bidding contest.[93] The Court held that "[a]bsent actual competition with a favored Volvo dealer,"[94] it would not apply the *Morton Salt* inference of competitive injury. "[I]nterbrand competition," the majority held, is the "'primary concern of antitrust law'" and the Robinson-Patman Act is "no large departure from that."[95] The Court thus not only confined Robinson-Patman liability in competitive bidding situations to instances of head-to-head competition, but also foreshadowed potential future limiting of the *Morton Salt* inference of competitive injury.

Notably, in the pricing area, unlike others, the Court has seemed to favor bright-line rules (that favor price competition).[96] As then-Judge Breyer observed in *Barry Wright*, legal "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."[97] In fashioning such rules, lawyers and judges must consider the "administrative virtues of simplicity" and its impact on legal tests on primary conduct.[98] At least in the pricing context, where unclear rules can

discourage price competition, the Roberts Court has heeded that admonition.

Conclusion

The Supreme Court's reengagement with antitrust law under Chief Justice Roberts is an important reminder that the federal judiciary plays a key role in the evolution of our antitrust laws. The Court's rediscovery of antitrust, moreover, illustrates the fundamentally common-law nature of our antitrust laws at work. As the detrimental impact of outmoded legal tests becomes apparent (such as the presumption of market power from patents or notice pleading), or understandings of economic behavior evolves (as with retail price maintenance or price discrimination), common-law courts adapt our antitrust law with the aim of protecting competition and consumer welfare. The antitrust community, all in the antitrust community hope, will benefit from the Supreme Court's continued willingness to shape antitrust principles in an ever-changing world. ■

[1] Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 24, 2010, at A1.

[2] *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 6 (2005).

[3] A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1250–52 (2005) (arguing "[a]ntitrust is better and more accurately understood to be a form of law enforcement, not regulation . . . because it depends on courts, not regulators, both for its enforcement and for its doctrinal evolution through a common-law type process").

[4] *See* Daniel Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 675–76 (2010) ("There are roughly ten private federal cases for every case brought by the Department of Justice or Federal Trade Commission.").

[5] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (The role of the Supreme Court is to "say what the law is.").

[6] 1 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 103d2, at 61–62 (3d ed. 2006); *see also* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the [Sherman Act's] broad mandate by drawing on common-law tradition.").

[7] Bus. Elecs. Corp. v. Sharp. Elecs. Corp., 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.").

[8] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565–68 (2007).

[9] FED. R. CIV. P. 8(a)(2).

[10] *Twombly*, 550 U.S. at 555–56.

[11] *Id.* at 559, 561 (emphasis added; internal quotation marks and alterations omitted).

[12] *Id.* at 564–66.

[13] *Id.* at 556.

[14] 556 U.S. 662 (2009).

[15] *Id.* at 681.

[16] *Id.* at 680.

[17] *Id.* at 682.

[18] RHJ Med. Ctr., Inc. v. City of DuBois, 754 F. Supp. 2d 723, 730 (W.D. Pa. 2010) ("*Twiqbal*" is the "new sheriff in town."); *see* Lonny Hoffman, Twombly *and* Iqbal's *Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2012) (discussing Federal Judicial Center's empirical study of impact of *Twombly* and *Iqbal*, its conclusions, and its limitations).

[19] *Twombly*, 550 U.S. at 559.

[20] *Id.*

[21] *Id.* at 560–61 (internal citations and quotation marks omitted).

[22] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[23] Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

[24] *Id.* at 1435 (Ginsburg, J., dissenting) (quoting Pet. for Cert. at i).

[25] 133 S. Ct. 24 (2012) (granting cert.) (emphasis added).

[26] *Comcast*, 133 S. Ct. at 1433.

[27] *Wal-Mart*, 131 S. Ct. at 2541, 2551 (2011); *see also Amchem Products*, 521 U.S. at 591.

[28] 131 S. Ct. 2179 (2011).

[29] *Id.* at 2186.

[30] Erica P. John Fund Inc. v. Halliburton Co., 718 F.3d 423 (5th Cir. 2013), *cert. granted*, 134 S. Ct. 636 (2013).

[31] *E.g.*, Transcript of Oral Argument at 53–54, Halliburton Co. v. Erica P. John Fund Inc., No. 13-317 (U.S. Mar. 5, 2014).

[32] 133 S. Ct. 2304 (2013).

[33] 563 U.S. 321 (2011).

[34] *American Express*, 133 S. Ct. at 2308.

[35] *In re* Am. Express Merchants' Litig., 667 F.3d 204, 216 (2d Cir. 2012).

[36] *American Express*, 133 S. Ct. at 2312.

[37] *Id.* at 2320 (Kagan, J., dissenting).

[38] *Id.* at 2309 (Scalia, J. for the Court).

[39] 134 S. Ct. 736 (2014).

[40] 28 U.S.C. §§ 1332(d), 1453, 1711–15.

[41] *Hood*, 134 S. Ct. at 741–44.

[42] *See* Jane Willis & Lauren Graber, *Supreme Court Keeps AG 'Class Actions' in State Court*, CORP. COUNSEL (Mar. 2014).

[43] *See generally* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 455 (2006).

[44] State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("[W]e have expressed reluctance to adopt per se rules . . . 'where the economic impact of certain practices is not immediately obvious.'") (quoting FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 458–59 (1986)).

[45] Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 46 (2006) (holding "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product").

[46] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) ("Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.").

[47] *Illinois Tool Works*, 547 U.S. at 41.

[48] *Id.* at 46.

[49] *Jefferson Parish*, 466 U.S. at 9 ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable '*per se*.'"); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461–62 (1992) (applying per se rule articulated in *Jefferson Parish* and denying summary judgment to defendant).

[50] 551 U.S. 877 (2007).

[51] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[52] *Leegin*, 551 U.S. at 900.

[53] *Id.* at 910–11, 915–16 ("How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*.").

[54] *Id.* at 918 ("I am not aware of any case in which this Court has overturned so well-established a statutory precedent.").

[55] *Id.* The dissent's emphasis on stare decisis exposed an undercurrent of tension on the Court regarding the appropriate circumstances for overturning constitutional and statutory precedents, a dispute evident from two other controversial decisions issued in the 2007 term, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

[56] 547 U.S. 1, 6 (2006) ("[T]he pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products.").

[57] *Id.* at 7.

[58] LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc), *cert. denied*, 542 U.S. 953 (2004).

[59] *Id.* at 151–52 (holding *Brooke Group* inapplicable to evaluating exclusionary bundling where defendant was monopolist).

[60] Cascade Health Solutions Inc. v. PeaceHealth, Inc., 515 F.3d 883, 903 (9th Cir. 2007).

[61] *Id.* at 906 ("Under [the discount attribution] standard, the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products.").

[62] FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

[63] FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1312 (11th Cir. 2012) (holding reverse settlement agreements are generally "immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent").

[64] *Actavis*, 133 S. Ct. at 2230–31, 2237.

[65] *Id.*

[66] *Compare In re* Lipitor Antitrust Litig., MDL No. 2332, 2013 WL 4780496, at *26 (D.N.J. Sept. 5, 2013) (noting that "nothing in *Actavis* strictly requires that [an actionable reverse] payment be in the form of money") *with In re* Lamictal Direct Purchaser Antitrust Litig., No. 12-cv-995 (WHW), 2014 WL 282755, at *7–9 (D.N.J. Jan. 24, 2014) (reverse payment "involve[s] an exchange of money"), *appeal docketed*, No. 14-1243 (3d Cir. Feb. 17, 2014).

[67] Brief for Fed. Trade Comm'n as Amicus Curiae Supporting Plaintiffs at 15, *In re* Effexor XR Antitrust Litig., No. 3:11-cv-05479 (D.N.J. Aug. 14, 2013) (ECF No. 236-2) ("A finding of patent invalidity or noninfringement would not limit Wyeth's right to market its FDA-approved product as a generic. Thus, Wyeth's commitment not to sell an authorized generic cannot be characterized as merely a compromise of claims raised in the litigation.").

[68] *Actavis*, 133 S. Ct. at 2238.

[69] Am. Needle Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

[70] *Id.* at 203.

[71] *Id.*

[72] *Dagher*, 547 U.S. at 7.

[73] *American Needle*, 560 U.S. at 195 ("'[S]ubstance, not form, should determine whether a[n] . . . . entity is capable of conspiring under § 1'") (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 773 n.21 (1984)).

[74] *Actavis*, 133 S. Ct. at 2231.

[75] *Id.* (noting "courts must "'balance the privileges of [the patent holder] and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize'" (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 390–91 (1948))).

[76] Credit Suisse Secs. LLC v. Billing, 551 U.S. 264, 285 (2007).

[77] *Id.* at 275 (citing Gordon v. NYSE, Inc., 422 U.S. 659 (1975) and United States v. NASD, Inc., 422 U.S. 694 (1975)).

[78] *Id.* at 284.

[79] FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1016–17 (2013).

[80] Br. of Resp't Fed. Trade Comm'n at 13, N.C. State Bd. of Dental Examiners v. FTC, 2014 WL 262245, at *13 (Cir. Jan. 22, 2014), *cert. granted*, 134 S. Ct. 1491 (No. 13-534) (Mar. 3, 2014).

[81] Pet. for a Writ of Cert. of N.C. State Bd. of Dental Examiners at 2–3, N.C. State Bd. of Dental Examiners v. FTC, 2014 WL 801099 (Oct. 25, 2013) (No. 13-534), 2013 WL 5819559, at *2–3 (citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46–47 (1985)).

[82] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).

[83] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 458 (1993).

[84] Pac. Bell. Tel. Co. v. linkline Commc'ns Inc., 555 U.S. 438, 442–44 (2009).

[85] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409–10 (2004) ("Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents.").

[86] *linkLine*, 540 U.S. at 457 ("[P]laintiffs have not stated a duty-to-deal claim under *Trinko* and have not stated a predatory pricing claim under *Brooke Group*.").

[87] *Id.* at 451.

[88] *Id.* at 452.

[89] 549 U.S. 312 (2007).

[90] *Id.* at 315–17, 323.

[91] *Id.* at 325–26.

[92] 546 U.S. 164 (2006).

[93] *Id.* at 177–80.

[94] *Id.* at 177.

[95] *Id.* at 179–81 (internal citations and quotations omitted).

[96] *Volvo* reflects an exception. There, the Court refused to adopt the argument, advanced by both Volvo and the United States, that the Robinson-Patman "Act does not reach markets characterized by competitive bidding and special-order sales." *Id.* at 180.

[97] Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983).

[98] *Id.* at 235 (noting that judges must "ask ourselves what advice a lawyer . . . would have to give a client firm considering procompetitive price-cutting tactics").