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The Developing Antitrust Legacy of the Roberts Court

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JOHN G. ROBERTS, JR. HAS NOW completed nine terms as Chief Justice of the United States. During this period, he presided over a Supreme Court that decided 14 antitrust cases, and we believe it is timely to offer observations on the antitrust jurisprudence of the Roberts Court and its developing legacy. Of course, the composition of the Court has changed over this period—Justices O'Connor, Souter, and Stevens retired while Justices Alito, Sotomayor, and Kagan arrived. And there is every reason to expect Chief Justice Roberts to continue in his role for many more years. Nonetheless, the Court's antitrust decisions over the last nine terms reveal some significant and even surprising trends likely to continue during the remainder of his tenure.

The Decisions in a Nutshell

In the first term of the Roberts Court (2005–06), the Court decided three antitrust cases:

■ *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,[1] holding, in an opinion by Justice Ginsburg, for a 7–2 majority that a manufacturer could not be liable for secondary-line price discrimination under the Robinson-Patman Act (RPA) absent evidence that the favored and disfavored resellers were competing for sales to the "same" customers and thereby resulting in diversion of sales or profits from the disfavored to the favored customers. "Absent actual competition with a favored" reseller, a disfavored reseller "cannot establish the competitive injury required under the Act."[2]

The opinion contains a significant amount of dicta suggesting that the Court interprets and will continue to interpret the RPA to ensure its consistency with antitrust law generally and the Sherman Act in particular: "Interbrand competition . . . is the 'primary concern of antitrust law'" and the "Robinson-Patman Act signals no large departure from that main concern"; the Court will "resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*"; in the case before it, "there is no evidence that any favored purchaser possesses market power"; Volvo's "selective price discounting fosters competition among suppliers of different brands"; and "[b]y declining to extend Robinson-Patman's governance to such cases, we continue to construe the Act 'consistently with broader policies of the antitrust laws.'"[3]

■ *Texaco Inc. v. Dagher*,[4] holding in an opinion by Justice Thomas for a unanimous Court that pricing decisions within a joint venture between Texaco and Shell could not be challenged as unlawful price fixing because, *inter alia*, the ancillary restraints doctrine applies only to restraints external to a joint venture. Texaco and Shell, in their capacities as joint venture partners, agreed that the venture should price both of the brands of gasoline to be sold by their venture at the same price. Rejecting the retailer plaintiffs' per se illegality argument, the Court held the joint venture partners' agreement to be "little more than price setting by a single-entity albeit within" a joint venture context.[5] As a single entity, a joint venture "must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price."[6]

■ *Illinois Tool Works Inc. v. Independent Ink, Inc.*,[7] holding in an opinion by Justice Stevens for a unanimous Court that in all cases challenging tying arrangements—including cases in which the tying product is patented—the plaintiff must prove market power in the tying product, and a patent does not give rise to any presumption that market power is present. The Court reviewed in detail its own long history of hostility toward tying arrangements generally and tying arrangements involving patents in particular. The "lesson to be learned" from that history and associated "academic commentary" is that "[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market"; Congress, the agencies, "and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee"; the Court has now reached "the same conclusion, and therefore hold[s] that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."[8]

In the second term (2006–07), the Court decided four antitrust cases:

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■ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[9] holding in an opinion by Justice Thomas for a unanimous Court that "predatory bidding" or "monopsonization" claims (involving acquisition of buyer market power) are governed by the same principles as predatory pricing claims (involving acquisition of seller market power) as set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[10] including required showings of below-cost pricing and likelihood of recouping the investment in the predation scheme. Two key quotes from the *Weyerhaeuser* decision are: "In a predatory-bidding scheme, a purchaser of inputs 'bids up the market price of a critical input to such high levels that rival buyers cannot survive (or compete as vigorously) and, as a result, the predating buyer acquires . . . monopsony power'";[11] and "the general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding convince us that our two-pronged *Brooke Group* test should apply to predatory bidding claims."[12] Thus, a plaintiff must prove (a) the defendant bid up the price of the input in question to the extent that its own output was sold below its own cost and (b) there was a "dangerous probability of recouping the losses . . . through the exercise of monopsony power," presumably by forcing input prices down below competitive levels.[13]

■ *Bell Atlantic Corp. v. Twombly*,[14] holding in an opinion by Justice Souter for a seven-Justice majority that a complaint alleging violation of Section 1 of the Sherman Act should be dismissed at the pleading stage absent specific factual matter "plausibly suggesting" the existence of an unlawful agreement. This new standard calls for enough facts to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[15] Indeed, the expense and history of abuse of the discovery process in antitrust cases were the clear impetuses for this decision: "proceeding to antitrust discovery can be expensive"; "the success of judicial supervision in checking discovery abuse has been on the modest side"; and "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."[16]

■ *Credit Suisse Securities (USA) LLC v. Billing*,[17] holding in an opinion by Justice Breyer for six Justices (one concurrence, one dissent, and one nonparticipation) that a Sherman Act challenge to investment bankers' underwriting practices was incompatible with and therefore "implicitly" precluded by securities laws applying to those same practices. The underlying concern was not one of any necessary conflict—the practices challenged in the antitrust suit were also unlawful under the securities laws. Rather, the problem was a complete lack of confidence in the ability of antitrust litigation processes to deal appropriately with matters of such complexity and importance to the economy as the securities underwriting business: "to permit antitrust actions . . . threatens serious securities-related harm"; "antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different non-expert judges and different non-expert juries"; "it will prove difficult for those many different courts to reach consistent results"; there is "an unusually high risk that different courts will evaluate similar factual circumstances differently"; "antitrust courts are likely to make unusually serious mistakes" in this area; and "the threat of antitrust mistakes . . . means that underwriters must act in ways that will avoid . . . a wide range of joint conduct that the securities law permits or encourages . . . ."[18]

■ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[19] holding in an opinion by Justice Kennedy for a five-Justice majority that the longstanding rule of per se illegality for minimum resale price maintenance should be replaced by antitrust's rule of reason standard. The majority opinion, however, emphasized that vertical price restraints may have a variety of anticompetitive as well as procompetitive effects and courts should be "diligent in eliminating their anticompetitive uses from the market."[20]

After highlighting several market conditions warranting serious concern, the majority invited courts to develop a "litigation structure to ensure" the rule of reason "operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[21] Perhaps most important, the opinion expressly encourages courts to "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."[22]

The Roberts Court did not decide any antitrust cases in the third term (2007–08). In the fourth term (2008–09), the Court decided one antitrust case, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*,[23] holding in an opinion by Chief Justice Roberts for five Justices but with Justice Breyer concurring in an opinion joined by all others that "price squeeze" claims charging a dominant company with imposing on a competitor too high a price for upstream inputs while competing downstream with too low a price (not alleged to be below-cost and thus not "predatory" under *Brooke Group*) are viable only if the plaintiff can meet the demanding standards for proving a refusal to deal with a rival in the upstream market in violation of Section 2 of the Sherman Act, which are set forth in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*.[24]

Indeed, the Roberts opinion can be read as placing an exclamation point around Justice Scalia's *Trinko* opinion in its hostility toward refusal to deal claims: there are only "rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct"; there is "no meaningful distinction between the 'insufficient assistance' claims we rejected in *Trinko* and the plaintiffs' price-squeeze claims in the instant case"; "a firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors"; "[i]f AT&T had simply

stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act"; and "[i]f both the wholesale and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price."[25]

In the fifth term (2009–10), there was one antitrust decision, *American Needle, Inc. v. National Football League*,[26] holding in an opinion by Justice Stevens for a unanimous Court that the grant of exclusive licenses for trademarks owned by all 32 NFL teams through a joint venture owned by those teams constituted concerted action cognizable under Section 1 of the Sherman Act because it deprived the marketplace of multiple independent centers of decision-making, and the teams for that reason cannot rely upon the "single entity" defense under the *Copperweld* doctrine. Notably, however, the opinion emphasized that the restraint at issue "must be judged according to the flexible Rule of Reason"; that that "Rule of Reason may not require a detailed analysis" and "can sometimes be applied in the twinkling of an eye"; and that "interest in maintaining a competitive balance" among NFL teams is "unquestionably an interest that may well justify a variety of collective decisions made by the teams."[27] It has been suggested that this language invites the evolution of a "[new] 'quick look' for defendants" or for joint ventures generally.[28]

The Court did not decide any antitrust cases in Chief Justice Roberts's sixth or seventh terms (2010–11, 2011–12). In the eighth term (2012–13), the Court issued four antitrust decisions:

- *FTC v. Phoebe Putney Health System, Inc.*,[29] holding in an opinion by Justice Sotomayor for a unanimous Court that a Georgia state hospital authority was not entitled to state action immunity against an FTC challenge to its acquisition of a competing hospital under Section 5 of the FTC Act and Section 7 of the Clayton Act because there was "no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership."[30]

The Court thus effectively heightened barriers to a local government entity's invocation of the state action doctrine: while the law there at issue "does allow the [Hospital Authority of Albany-Douglas County] to acquire hospitals, it does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that will substantially lessen competition"; a legislature's "ability to anticipate" an anticompetitive effect from a local entity's exercise of a granted power "falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative."[31] Indeed, the Court added, even if "the anticompetitive use" of the granted powers was "foreseeable," that would not suffice for immunity to apply when "only a relatively small subset of the conduct permitted . . . has the potential to negatively affect competition."[32]

- *Comcast Corp. v. Behrend*,[33] holding in an opinion by Justice Scalia for five Justices that class action plaintiffs failed to meet their Rule 23(b)(3) burden of showing, for class certification purposes, that common questions would predominate over individual questions because their proffered damages model was not limited to effects of only the specific conduct on which their claim could rest—Comcast's alleged reduction of "overbuilder" competition in the Philadelphia area. The Court, in essence, required a showing at the certification stage of evidence that would be admissible at trial in order to meet the Rule 23(b)(3) test. Thus, "In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class."[34]
- *FTC v. Actavis Inc.*,[35] holding in an opinion by Justice Breyer for five Justices that challenges to "reverse-payment" settlements of patent infringement claims in the pharmaceutical industry should be assessed under neither the "scope of the patent" test resulting in virtual per se legality as advocated by the industry nor a "quick look" or "presumptive illegality" test as advocated by the FTC but rather under the rule of reason standard.

At the same time, however, the Breyer-led majority suggested parameters for a more streamlined and efficient rule of reason methodology for Section 1 generally. Thus, for example, in reverse-payment cases of the kind there at issue, the Breyer opinion suggests that a plaintiff could rely on little more than the fact of a "large" reverse payment to establish a presumption or inference of market power and anticompetitive effect sufficient to shift the burden to the defendant of establishing a procompetitive justification.[36] The Breyer opinion also emphasized that trial courts can structure antitrust litigation "so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences."[37]

- *American Express Co. v. Italian Colors Restaurant*,[38] holding in an opinion by Justice Scalia for a five-Justice majority that an antitrust class action challenging a tying arrangement within contracts between American Express and merchants should be dismissed because the contract at issue required disputes to be settled by individual arbitration and the Federal Arbitration Act (FAA) required enforcement of that provision despite the impracticality of "effective vindication" of merchants' rights under the antitrust laws on an individual adjudication basis. According to the Scalia-led majority, "courts must 'rigorously enforce' arbitration agreements according to their terms"; the "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim" and "do not 'evinc[e] an intention to preclude a waiver' of class-action procedure"; and a judge-made excep-

tion to the FAA that allows invalidation of an arbitration agreement that prevents "effective vindication" of a federal right does not apply to situations where it is simply "not worth the expense involved in proving a statutory remedy."[39]

Finally, in its ninth term, the Roberts Court issued its decision in *Mississippi* ex rel. *Hood v. AU Optronics Corp.*[40] There, in a unanimous opinion by Justice Sotomayor, the Court held that a state attorney general's *parens patriae* price-fixing suit in state court was not subject to mandatory removal to federal court because it was not a "mass action" as that term is used in the Class Action Fairness Act of 2005.

It has been suggested that this ruling will encourage not only more state attorneys general to pursue these kinds of *parens patriae* suits in state courts but also new kinds of collaboration between those state enforcers and private plaintiffs' counsel in those jurisdictions. This is because the ruling may provide a way to circumvent the enforceability of class action waivers under last term's decision in *American Express Co. v. Italian Colors Restaurant*.[41] "Now that state attorneys general have been given the green light to bring claims on behalf of consumers in state court, might they start using that ability more aggressively as an end around to deal with mandatory consumer arbitration provisions?"[42] In short, state attorneys general with assistance from the private plaintiffs' bar "can prosecute *Italian Colors*-style claims, even if the merchants themselves cannot do it because [they have] agreed to contracts with individual arbitration requirements."[43]

Initial Observations

1. Conventional wisdom suggests that the Roberts Court is sharply divided on all significant antitrust issues and driven by a majority that is always on the defendants' side. The results of our review are inconsistent with those generalizations. The Roberts Court chalks up three decisions that were unanimous on the plaintiffs' side (*American Needle*, *Phoebe Putney*, and *AU Optronics*); three others that were unanimous on the defendants' side (*Dagher*, *Illinois Tool Works*, and *Weyerhaeuser*); another one that was unanimous in the result in favor of the defendant, albeit with four Justices in a separate concurrence (*linkLine*); and another in favor of defendants that brought only a single dissent, as well as a single concurrence (*Credit Suisse*).

2. In short, eight out of 14 decisions reflect a substantial and reasonably consistent consensus about an important range of antitrust doctrines including the narrow scope for plaintiffs' offensive use of the ancillary restraints doctrine in joint venture situations (*Dagher*); the need to prove market power without the benefit of any presumption in every tying case including those involving a patent as the tying product (*Illinois Tool Works*); a liberal application of the implied exemption doctrine to claims involving securities industry practices (*Credit Suisse*); the narrow scope for the *Copperweld* "single entity" defense (*American Needle*); high barriers to successful invocation of state action immunity (*Phoebe Putney*); and adherence to *Brooke Group* and *Trinko* as central limitations on what can be challenged as "exclusionary" conduct under Section 2 of the Sherman Act (*Weyerhaeuser* and *linkLine*).

Conventional wisdom suggests that the Roberts Court is sharply divided on all significant antitrust issues and driven by a majority that is always on the defendants' side. The results of our review are inconsistent with those generalizations.

3. Two decisions addressing Section 1 standards and eliciting sharp dissents—*Leegin* dealing with a vertical restraint and *Actavis* dealing with a horizontal restraint—actually reflect more commonality than difference in approach to the rule of reason generally. In *Leegin*, the Court overruled per se illegality for resale price maintenance but provided guidance for a streamlined rule of reason for these kinds of cases. In *Actavis*, the Court rejected presumptive illegality (as well as virtual per se legality) for reverse-payment settlements in pharmaceutical patent cases but provided guidance for a streamlined rule of reason for these kinds of cases. One might add *American Needle* to this discussion since it invites an abbreviated rule of reason approach to restraints in connection with joint ventures.[44]

4. Justice Kennedy was the only Justice on the winning side of all 14 antitrust decisions during the Roberts Court era to date, reflecting his crucial swing-vote status. Chief Justice Roberts was on the winning side in 13 of the decisions, the only exception being *Actavis*, in which he authored a sharp and extended dissent joined by two other Justices. This high degree of agreement with outcomes may be attributed to his skill in exercising his power to determine who authors the opinion in all cases in which he is in the majority. Kennedy wrote the opinion for the *Leegin* majority while Breyer wrote the dissenting opinion in that case; six years later, Breyer wrote the opinion for the *Actavis* majority but Kennedy joined in it. Notwithstanding Chief Justice Roberts's *Actavis* dissent, the Court as a whole appears committed to a future in which most Section 1 cases are tried under a rule of reason methodology that is far more manageable than the old and creaky *Chicago Board of Trade* "Kitchen Sink" scenario.[45]

5. Five of the 14 antitrust decisions of the Roberts Court to date involved one area in which there was strong consistency—class actions. It seems pretty clear that a majority of the Justices disfavor class actions generally, and antitrust class actions in particular. This concern is most evident in the Scalia opinions in *Comcast* and *Italian Colors* (in both of which he was joined by Roberts, Kennedy, Thomas, and Alito). But there are important footprints revealing that same attitude in the other three class action cases decided by the Roberts Court: Breyer joined the majority in *Twombly*, wrote

for an almost unanimous Court in *Credit Suisse*, and joined in Thomas's unanimous decision in *Dagher*. *Twombly*, with its significant elevation of pleading requirements, has already proved to be a serious setback for private antitrust plaintiffs generally and their attempts at class actions in particular. But *Italian Colors* could prove to be the single most important setback for class actions generally in a wide range of markets where arbitration agreements mandating waiver of class action rights could be imposed as broadly as in the credit card business involved in that case. This is indeed the core message in Justice Kagan's heated *Italian Colors* dissent.[46] (As noted above, the most recent *AU Optronics* decision may pave the way for some circumvention of that result.)

6. What, if anything, is worth saying about *Volvo*, the RPA decision released four months after Roberts became Chief Justice? It was just another in a long series of Supreme Court decisions narrowing the scope of liability under, and expanding defenses against, RPA claims—the fifth such decision since 1979.[47] Even Justice Stevens, author of the *Volvo* dissent, admitted his agreement "with Judge Bork's characterization" of the "statutory mission" of the RPA as based on "wholly mistaken economic theory."[48] While RPA cases continue to surface, *Volvo* has provided support for summary disposition of them in some situations.[49] In any event, it may well be a long time if ever before the Roberts Court takes on another RPA case.

7. What can be said about the role or influence of the Solicitor General of the United States in this antitrust jurisprudence during the Roberts era? While all of the first eight of the antitrust decisions of the Roberts Court involved private cases, the Bush administration's Solicitor General Paul Clement appeared on behalf of the United States as amicus curiae in all of them and the briefs filed under his leadership presented positions that the Court adopted in every one of those cases. The record in the six cases during the Obama administration was more mixed: SG Elena Kagan appeared in *American Needle* arguing for a standard the Court did not adopt; SG Donald Verrilli appeared as counsel for the FTC in *Phoebe Putney* where he prevailed and in *Actavis* where he won only a partial victory; the Court rejected his amicus position in *Italian Colors*; and he did not appear in either *Comcast* or *AU Optronics*.

8. Finally, since our topic is the Roberts Court legacy, we should add a few words about the two antitrust opinions that the Chief Justice himself authored in this period—for the majority in *linkLine* and for the dissent in *Actavis*. Both opinions evince a strong preference for clear, unambiguous antitrust rules and a high capacity for definitive, sharp-edged dispositions of the antitrust issues at hand. In *linkLine*, he summed up the plaintiffs' price-squeeze claim as an attempt "to join a wholesale claim that cannot succeed with a retail claim that cannot succeed, and alchemize them into a new form of antitrust liability," concluding that "[t]wo wrong claims do not make one that is right."[50]

And, in *Actavis*, he criticized the majority for a decision that "departs from the settled approach separating patent and antitrust law, weakens the protections afforded to innovators by patents, frustrates the public policy in favor of settling, and likely undermines the very policy it seeks to promote by forcing generics who step into the litigation ring to do so without the prospect of cash settlements."[51] As indicated in a later section of this article, these comments reflect longstanding perspectives on antitrust law generally as revealed in an article he authored almost 20 years ago. We return to the importance of these two Roberts opinions in the final sections below.

The Roberts vs. Rehnquist/O'Connor Legacy

In 2006, ANTITRUST magazine published an edited version of a Roundtable Discussion at a Conference Board Program, "The Antitrust Legacy of the Rehnquist/O'Connor Court."[52] Participants included William Kovacic, Thomas Kauper, Hewitt Pate, and Robert Pitofsky. Caution is warranted in any comparison of their observations about the Rehnquist/O'Connor legacy to our observations about the still-unfolding Roberts legacy: they were addressing more than twice the number of antitrust decisions over more than three times the number of terms than we have in hand for our current analysis. There are nonetheless comparisons of interest in terms of both continuity and change from the Rehnquist/O'Connor era to the Roberts era.

Several panelists highlighted the steady retreat from per se rules to reliance upon the rule of reason for both vertical and horizontal restraints. The Rehnquist/O'Connor Court did a great deal to chip away at the per se rule against resale price maintenance in particular in such cases as *Monsanto*, *Sharp*, and *Khan*.[53] As noted above, the Roberts Court took the logical but dramatic next step in that course, overruling the per se rule altogether in its *Leegin* decision.

The Rehnquist/O'Connor Court also devoted considerable energy to the evolution of strict standing and antitrust injury doctrines and to fresh thinking about summary judgment standards in antitrust cases such as *Matsushita*, *Cargill*, *Atlantic Richfield Co.*, and *Monsanto*.[54] The cumulative effect was severe constraint upon opportunities for private plaintiffs to litigate antitrust claims. Viewed in that light, one can see a further tightening of the noose on private antitrust litigation generally in how the Roberts Court has approached and decided cases involving antitrust class actions, particularly in last term's *Comcast* and *Italian Colors* decisions.

In Bill Kovacic's view, the "most striking theme in the Rehnquist/O'Connor era is that the most important developments in doctrine cannot be explained in terms of a conservative takeover of the Court."[55] More specifically, many of the "key adjustments" in doctrines and standards "enjoyed support across the philosophical spectrum, and some shifts could not have happened if the Court's liberal coalitions had not joined the effort."[56] He noted, for example, that Justice Brennan joined in *Northwest Wholesale Stationers*, *Cargill*, and *Atlantic Richfield Co.*; both Brennan and Marshall joined

in *Sharp*; and Breyer joined in *Trinko*.[57] We have made a similar point about the Roberts Court generally. On the other hand, we have also noted sharp divides among the members of the Roberts Court in two of its most important decisions to date, *Leegin* and *Actavis*, with Justice Breyer authoring the *Leegin* dissent and the Chief Justice authoring the *Actavis* dissent. There is no true counterpart to the depth and severity of the split in those cases during the Rehnquist/O'Connor era.

Finally, several of the panelists in 2006 commented on the strong interest of the Rehnquist/O'Connor Court in a robust role for the state action doctrine and related federalism principles—shown in such cases as *Southern Motor Carriers*, *City of Columbia*, *City of Berkeley*, and *ARC America*.[58] Justice Sotomayor's opinion on behalf of a unanimous Court in *Phoebe Putney*, significantly limiting the availability of state action immunity, would seem to signal a break by the Roberts Court from that position of the Rehnquist/O'Connor Court. And that break may soon take on the appearance of a mini-trend: the Court recently granted certiorari to review another state action immunity case in its upcoming term, the Fourth Circuit's 2013 decision in *North Carolina State Board of Dental Examiners v. FTC*.[59] While *Phoebe Putney* resulted in a stricter application of the "clear articulation" requirement for immunity to apply, *North Carolina State Board of Dental Examiners* will provide an opportunity for the Court to extend the "active state supervision" requirement to regulatory bodies governed by private competitors, such as practicing dentists.

Back to the Future

In 1994, distinguished private practitioner John G. Roberts, Jr. published an article reviewing the decisions of the Supreme Court's 1992–93 term in aid of finding an answer to the question of "Do We Have a Conservative Supreme Court?"[60] His comments therein on two of the Court's antitrust decisions of that term may provide some insight into not only the antitrust record of the Roberts Court to date but also Chief Justice Roberts's objectives for further development of antitrust jurisprudence over the remainder of his tenure. He introduced the topic by observing that, during the 1992–93 term, "the Court seemed to regain its equilibrium after the dizzying *Kodak* decision" of 1992.[61] As he expressed it, in contrast to the reliance in *Kodak* on "dubious if not implausible economic theory," the Court had "returned to a regime in which the objective economic realities of the marketplace take precedence over fuzzy economic theorizing or the conspiracy theories of plaintiffs' lawyers."[62] He deemed this to be "bad news for professors and lawyers, good news for business."[63]

Mr. Roberts then commented on *Spectrum Sports, Inc. v. McQuillan*,[64] in which the Court overturned an attempted monopolization verdict because the plaintiff failed to show the requisite dangerous probability of success in achieving a monopoly. He emphasized that the ruling focused "on objective market conditions, rather than any subjective evil intent on the part of the defendant."[65] The defendant "may be a dastardly villain and have every intent to monopolize" but that is of no Sherman Act concern if that goal is not a realistic prospect. He called the decision of "great practical significance" in helping to "short-circuit unworthy cases before the Dickensian spectacle unfolds of countless lawyers poring over millions of documents and going through hundreds of depositions in search of evidence of evil intent."[66]

Mr. Roberts also commented on *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[67] in which the Court rejected the proffered economic theory as adequate support for the price predation claim at issue. He cited a "remarkable paragraph," in which the Court's conclusion from the evidentiary record that the theory "when judged against the realities of the market does not provide an adequate basis for a finding of liability."[68] He observed that the Court's examination of the record in such depth was "rare indeed" and confirmed "the conscious retreat from *Kodak*: courts should focus more on concrete economic realities and less on abstract economic theory in deciding whether to submit a case to the jury."[69] Amen.

The Importance of Roberts's *linkLine* Opinion

Roberts's exceptionally enthusiastic praise for the 1993 *Brooke Group* decision in his above-quoted 1994 article makes all the more interesting and significant his strong reliance on *Brooke Group* in his own *linkLine* opinion for the majority in 2009. As one commentator explained the result in *linkLine*, the Court there "eliminated from antitrust purview an entire class of claims, holding that conduct previously characterized as a 'price squeeze' would not violate Section 2 of the Sherman Act unless a plaintiff could prove that the defendant had" an antitrust duty to deal with the plaintiff at the wholesale level "or engaged in predatory pricing under the standards established in *Brooke Group Ltd.*" at the retail level.[70]

As the Chief Justice explained the holding, "Recognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the precise harm the Court sought to avoid in *Brooke Group*: Firms might raise retail prices or refrain from aggressive price competition to avoid potential antitrust liability."[71] Indeed, he emphasized, the Sherman Act "does not forbid—indeed, it encourages—aggressive price competition at the retail level, as long as the prices being charged are not predatory" (again citing to *Brooke Group*).[72] In sum, "If both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price."[73]

As indicated earlier in this article, the Roberts Court also applied *Brooke Group* to "predatory bidding" in its 2007 *Weyerhaeuser* decision. But *linkLine* may come to be seen as a critical turning point in the Court's jurisprudence on

Section 2 standards for "exclusionary" conduct generally. Beginning several years before *linkLine* and continuing to the present, there have been conflicting decisions among the lower courts and robust debate throughout the antitrust community over appropriate rules for such dominant firm practices as loyalty rebates, market share discounts, and "bundled" pricing. There has been a sharp divide between proponents of a "price-cost" test based on *Brooke Group* or a variation upon it, which would make it very difficult to challenge these practices, and proponents of a more general rule of reason test akin to standards for exclusive dealing, which would establish broader limits on them.[74] Prospects for success of the price-cost test were surely enhanced by the *linkLine* decision.

Indeed, a petition for certiorari from the Third Circuit's 2013 decision in favor of plaintiffs in *ZF Meritor LLC v. Eaton Corp.*[75] applying exclusive dealing standards to a loyalty discount scheme relied heavily on *linkLine* in its argument for review and reversal. Although the Court denied that petition, there will surely be other opportunities for the Court to extend the *linkLine* thinking and its elevation of *Brooke Group* into these practices. In fact, the Court recently had before it a petition for certiorari to review the Tenth Circuit's 2013 decision in *Novell, Inc. v. Microsoft Corp.*[76] That decision held that a monopolist's refusal to deal with a rival can be unlawful under Section 2 only if the refusal entailed a short-term profit sacrifice. It could have become the vehicle for extending price predation thinking into nonprice conduct generally, but Novell's petition for certiorari was denied this past April. Nonetheless, opening the door to that extension may still become one of the most important features of the antitrust legacy of the Roberts Court.

The Importance of Roberts's *Actavis* Dissent

As discussed above, Justice Breyer's 2013 opinion for a five-Justice majority in *FTC v. Actavis* rejected the Eleventh Circuit's rule of virtual immunity from antitrust scrutiny of "pay-for-delay" patent settlements when the alleged anticompetitive effects fall within the scope of the exclusionary potential of the patent at issue. The Chief Justice authored a sharp dissent joined by Justices Scalia and Thomas strongly defending the virtual immunity standard. The dissent reflects an "absolutist" stance that can be expected to intensify debate over a growing array of issues at the intersection of patent and antitrust law in the years ahead.

Justice Breyer's rejection of the Eleventh Circuit's standard rested in substantial part on rejection of the concept of determining antitrust legality in such a case "by measuring [a patent] settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well."[77] In Breyer's view, antitrust decisions between the 1920s and 1960s exemplify a longstanding "accommodation" and "balance" between the antitrust and patent laws.[78] The Chief Justice challenged that whole idea. As he framed the matter, a patent carves out an exception to the applicability of antitrust law so the correct approach to the pay-for-delay settlement issue was to ask whether the settlement gives the patent owner monopoly power beyond that conferred by the patent.[79]

The Chief Justice emphasized that a patent "provides an exception to antitrust law, and the scope of the patent . . . forms the zone within which the patent holder may operate without facing antitrust liability."[80] Disagreeing with Breyer's reading of the Court's past patent-related antitrust decisions, Roberts argued that they established the proposition that "antitrust law has no business prying into a patent settlement so long as that settlement confers to the patent holder no monopoly power beyond what the patent itself conferred."[81]

The Chief Justice concluded that the majority was departing "from the settled approach separating patent and antitrust law," weakening patent protections for innovators and "frustrat[ing] the public policy in favor of" settlements.[82] Roberts would have preferred to "keep things as they were and not subject basic questions of patent law to an unbounded inquiry under antitrust law, with its treble damages and famously burdensome discovery."[83]

That ideological divide between Breyer and Roberts can be expected to resurface and become a central issue between them in the course of deciding future cases at the intersection of patent and antitrust law. There will surely be difficult cases of this ilk coming to the Court in the years to come. Some of them are now before lower courts and under close scrutiny at both of the federal antitrust agencies. They include (a) alleged "hold-up" conduct by owners of standard-essential patents that are subject to so-called "FRAND" license commitments and (b) alleged abuses of various kinds in the enforcement of vast patent portfolios by "patent assertion entities" (called "patent trolls" in less polite company). There are sharp differences in the antitrust community over whether these and other "aggressive" patent enforcement strategies present issues cognizable under the Sherman, Clayton, and FTC Acts.[84] It seems only a matter of time before the Roberts and Breyer factions of the Court are called upon to wrestle with these types of issues. ■

1 546 U.S. 164 (2006).

2 *Id.* at 177.

3 *Id.* at 180–81.

4 547 U.S. 1 (2006).

5 *Id.* at 6.

6 *Id.* at 7.

7 547 U.S. 28 (2006).

8 *Id.* at 45–46.

9 549 U.S. 312 (2007).

10 509 U.S. 209 (1993).

11 *Weyerhaeuser*, 549 U.S. at 320 (quoting John Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L.J. 625, 652 (2005)).

12 *Id.* at 325.

[13] *Id.*

[14] 550 U.S. 544 (2007).

[15] *Id.* at 556.

[16] *Id.* at 559.

[17] 551 U.S. 264 (2007).

[18] *Id.* at 279–82.

[19] 551 U.S. 877 (2007).

[20] *Id.* at 897.

[21] *Id.* at 898.

[22] *Id.* at 898–99.

[23] 555 U.S. 438 (2009).

[24] 540 U.S. 398 (2004).

[25] *linkLine*, 555 U.S. at 448–55.

[26] 560 U.S. 183 (2010).

[27] *Id.* at 203–04.

[28] James A. Keyte, American Needle*: A New Quick Look for Joint Ventures*, ANTITRUST, Fall 2010, at 48.

[29] 133 S. Ct. 1003 (2013).

[30] *Id.* at 1011.

[31] *Id.* at 1012–14.

[32] *Id.* at 1014.

[33] 133 S. Ct. 1426 (2013).

[34] *Id.* at 1435.

[35] 133 S. Ct. 2223 (2013).

[36] *Id.* at 2234–36.

[37] *Id.* at 2238.

[38] 133 S. Ct. 2304 (2013).

[39] *Id.* at 2309, 2311.

[40] 134 S. Ct. 736 (2014).

[41] 133 S. Ct. 2304.

[42] *High Court's CAFA Ruling Paves Way for More AG Suits*, LAW360 (Jan. 14, 2014), http://www.law360.com/articles/501145/high-court-s-cafa-ruling-paves-way-for-more-ag-suits.

[43] *Id.*

[44] *See* Keyte, *supra* note 28.

[45] Bd. of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918); *see* Tr. at 28, 37, Oral Argument Before Supreme Court of the United States, Mar. 25, 2013, FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013) (reference to "Kitchen Sink" approach).

[46] *Italian Colors*, 133 S. Ct. at 2313.

[47] The other four were *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990); and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[48] *Volvo*, 546 U.S. at 187.

[49] *See, e.g.*, Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1021 (9th Cir. 2013).

[50] *linkLine*, 555 U.S. at 457.

[51] *Actavis*, 133 S. Ct. at 2247.

[52] *The Antitrust Legacy of the Rehnquist/O'Connor Court*, ANTITRUST, Summer 2006, at 8.

[53] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988); State Oil Co. v. Khan, 522 U.S. 3 (1997).

[54] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); *Monsanto*, 465 U.S. 752.

[55] *The Antitrust Legacy of the Rehnquist/O'Connor Court*, *supra* note 52, at 9.

[56] *Id.* at 10.

[57] Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co., 472 U.S. 284 (1985); *Cargill*, 479 U.S. at 105; *Atlantic Richfield Co.*, 495 U.S. at 331; *Trinko*, 540 U.S. at 400.

[58] S. Motor Carriers Rate Conf. v. United States, 471 U.S. 48 (1985); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); Fisher v. City of Berkeley, 475 U.S. 260 (1986); California v. ARC Am. Corp., 490 U.S. 93 (1989).

[59] 717 F.3d 359 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 1491 (2014).

[60] John G. Roberts, Jr., Symposium: Do We Have a Conservative Supreme Court?, The 1992–93 Supreme Court, National Legal Center for the Public Interest [hereinafter Roberts Article]. Our thanks to Hew Pate for calling our attention to this article in the course of the 2006 Conference on The Antitrust Legacy of the Rehnquist/O'Connor Court.

[61] *Id.* at 6.

[62] *Id.*

[63] *Id.*

[64] 506 U.S. 447 (1993).

[65] Roberts Article, *supra* note 60, at 6.

[66] *Id.*

[67] 509 U.S. 209 (1993).

[68] Roberts Article, *supra* note 60, at 6.

[69] *Id.*

[70] Ellen Meriwether, *Putting the 'Squeeze' on Refusal to Deal Cases: Lessons from* Trinko *and* linkLine, ANTITRUST, Spring 2010, at 65.

[71] *linkLine*, 555 U.S. at 440.

[72] *Id.* at 455.

[73] *Id.*

[74] *Compare* Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008), and NicSand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007), *with* LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003), and Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256 (2d Cir. 2001). *See generally* U.S. DEPARTMENT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT, CH. 6 "BUNDLED DISCOUNTS AND SINGLE-PRODUCT LOYALTY DISCOUNTS" (2008) [hereinafter DOJ Section 2 Report], *available at* http://www.justice.gov/atr/public/reports/236681.pdf; FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), *available at* http://www.ftc.gov/news-events/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-and; ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS 81, Ch. I-C, "Exclusionary Conduct" (2007), *available at* http://www.meatami.com/ht/a/GetDocumentAction/i/2465.

[75] 696 F.3d 254 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (2013).

[76] 731 F.3d 1064 (10th Cir. 2013), *cert. denied*, 2014 U.S. LEXIS 2960 (Apr. 28, 2014).

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

[78] *Id.* at 2231–33.

[79] *Id.* at 2238.

[80] *Id.*

[81] *Id.* at 2243.

[82] *Id.* at 2247.

[83] *Id.*

[84] *See, e.g.*, Renata Hesse, Deputy Ass't Att'y Gen., Antitrust Div., Address, The Art of Persuasion: Competition Advocacy at the Intersection of Antitrust and Intellectual Property," (Nov. 8, 2013), *available at* http://www.justice.gov/atr/public/speeches/301596.pdf; Joshua D. Wright, Remarks Before the Center for the Protection of Intellectual Property Inaugural Academic Conference: SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts, (Sep. 12, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ssos-frand-and-antitrust-lessons-economics-incomplete-contracts/130912cpip.pdf.