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Appellate Advocacy in Antitrust Cases: Lessons from the Supreme Court

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IT IS NO SECRET THAT RECENT YEARS have seen an upsurge in the Supreme Court's level of interest and involvement in antitrust cases. In the last five full Terms (October 2003–June 2008), the Court decided nine antitrust cases.[1] To put that number in context, in the five preceding Terms (October 1998–June 2003), the Court decided only two antitrust cases.[2]

There can be little doubt that the Justices have shown a greater willingness, and apparently see a greater need, to grapple with antitrust issues than was true only a few years earlier. Those developments may be partially attributable to changes in personnel at the Court, most significantly the presence and role of Chief Justice Roberts, whose private-practice experience may make him well-attuned to the importance of clear guidance from the Court in the antitrust area.

It is also no secret that the Court's recent antitrust cases reveal some discernible trends—the most obvious being the fact that in each one of these cases the Court ruled for the defendant, generally by lopsided margins. In addition, in each of these nine cases the defendant was also the petitioner—the party who persuaded the Court to grant certiorari. If past is prologue, that fact suggests that the most important battle for antitrust litigants at the Supreme Court is fought at the certiorari stage, where the Court is deciding which cases to hear on the merits.

But even with the Court's enhanced interest in antitrust jurisprudence, convincing the Court to hear a case in this area is no small feat. The Court receives more than 8,000 petitions for writs of certiorari every Term, but hears and decides only 70–80 cases on the merits—less than one percent of the total. The odds are somewhat better in the antitrust area, but still fairly low: From September 2002 to October 2008, 94 petitions were filed that presented issues of antitrust law; the Court granted certiorari in only ten, a rate of less than 11 percent.[3] The list of denied petitions includes several high-profile cases, including the Third Circuit's decision in *LePage's*[4] and the Eleventh Circuit's decision in *Schering-Plough*.[5]

While persuading the Supreme Court to grant review is never easy, an understanding of the types of arguments and considerations that appear to have been successful in past cases may help improve the odds. In this article we analyze the Court's recent decisions for clues to the types of issues and arguments that seem to pique the Court's interest at the certiorari stage, and follow those clues to identify some issues that seem ripe for review by the Court down the road.

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Some Key Certiorari Considerations in Antitrust Cases

The Importance of the Government's Role. When filing a certiorari petition in an antitrust case, it is important for the petitioner to bear in mind the key role of the Solicitor General's office at the certiorari stage through the filing of "invitation briefs." Since 2002, the Solicitor General has filed eleven amicus curiae briefs in antitrust cases expressing the government's view regarding the decision whether to grant certiorari, ten of them at the invitation of the Court.[6] In every case, the Court's decision to grant or deny certiorari was consistent with the Solicitor General's recommendation. That is a remarkable record, especially considering that the FTC was the petitioner in one of the cases in which the Solicitor General recommended the denial of certiorari.[7]

A keen understanding of the Solicitor General's decision-making process is, therefore, an important qualification for counsel who seek certiorari in antitrust cases. In light of that reality, it is not surprising that, in each of the last ten antitrust cases before the Court, the lead counsel for the petitioner was an alumnus of the Solicitor General's office.[8]

Persuading other agencies and DOJ components can be important as well. The Solicitor General's Office consults closely with the Antitrust Division in assessing antitrust cases, and generally with the FTC as well, although the recent disagreements between the FTC and the Solicitor General suggest that the Antitrust Division may be more influential. Depending on the issue, the Solicitor General may also consult with other interested agencies, such as the Federal Communications Commission, the Securities and Exchange Commission, and the Patent and Trademark Office. With the increasing entanglement of antitrust and regulatory issues (discussed below), these agencies' views will likely influence the Solicitor General's position as well.

The Role of Circuit Splits. As every Supreme Court practitioner knows, the most promising basis for seeking certiorari typically is the existence of a conflict among the circuits on the question presented. The Supreme Court Rules provide that the Court will grant a petition "only for compelling reasons," the first of which is that "a United States court of appeals has entered a decision in conflict with the

decision of another United States court of appeals on the same important matter."[9] According to Justice Ginsburg, in a "typical" year, 70 percent of the cases decided by the Court involve a conflict in the lower appellate courts.[10]

The recent antitrust cases, however, do not fit the pattern. Of the nine antitrust cases decided in the past five Terms, only one—*Empagran*[11]—involved a bona fide circuit split. Thus, the mere absence of a conflict among the circuits should not dissuade antitrust litigants from seeking to persuade the Supreme Court to grant review. Successful petitioners have, instead, made other arguments to convince the Court that their issue is worthy of review.

1. Circuit-Specific Issues. Some antitrust issues occur frequently—or almost exclusively—in a particular circuit. In such circumstances, petitioners have been successful in arguing that the Court need not wait for a circuit conflict to arise. For example, in *Credit Suisse*,[12] the petitioners asked the Court to review a Second Circuit holding that securities firms are not entitled to antitrust immunity for certain types of horizontal conduct regulated by the SEC. Despite the lack of a circuit conflict, the Solicitor General recommended that the Court grant certiorari. He explained that, in the absence of Supreme Court review, "the standards announced by the decision below will likely govern all, or nearly all, cases raising similar issues in the future, because venue in such suits will generally lie within the Second Circuit."[13]

The petitioners made a similar argument successfully in *Independent Ink*, which arose from the Federal Circuit. As the petitioner explained, most cases involving the tying of a patented product also involve patent infringement claims.[14] Because it possesses exclusive jurisdiction over patent appeals (and reviews antitrust issues even when the patent issues have been resolved),[15] the Federal Circuit would consider most of the appeals raising the issue.

2. Take This Case or There Won't Be Another. Antitrust litigation is expensive and unpredictable. Given that reality, petitioners sometimes argue that the cost and risks of litigation will lead most defendants to settle cases raising a particular issue, and thus there will be few if any future opportunities for Supreme Court review.[16] Such arguments can have considerable merit. Once a particular federal court of appeals has upheld a new theory of antitrust liability, for example, defendants sued in that circuit are likely to settle rather than face the high costs and long odds of litigating the case all the way to the Supreme Court, and plaintiffs are likely to utilize the Sherman Act's venue provisions to bring suit in that circuit whenever possible.[17] Moreover, district courts in other circuits will often follow the one existing appellate precedent, potentially forcing defendants to take cases all the way through trial and appeal if they desire to challenge the underlying theory. The Supreme Court seems sensitive to these types of arguments, given its recent concern for the cost of discovery in antitrust litigation.[18]

The petitioner in *Leegin* made a similar argument in asking the Court to grant review to consider overruling the venerable per se ban on minimum resale price maintenance (RPM). The petitioner argued that the case presented a "rare opportunity" for the Court to address the RPM question, because governing Supreme Court precedent created "powerful incentives for the manufacturer to settle" in light of the "asymmetrical risk and rewards for the defendant."[19] The Court evidently agreed.

3. Recurring Issues. The more frequently an issue arises—and the more businesses that will be affected by the lower court's decision—the more likely the Court is to hear a case, even absent a circuit conflict. In *Weyerhaeuser*, for example, despite the fact that there were few, if any, reported decisions on predatory buying, the petitioners argued that similar lawsuits could be "expected to arise with some frequency" because the Ninth Circuit's decision applied to "procurement decisions of every kind of business purchasing every kind of input, including produce, natural resources, livestock, sophisticated components, even skilled employees."[20]

In other cases, the Solicitor General has urged the Court to deny certiorari because the particular conduct at issue was infrequent or unique. For example, in *LePage's* the Solicitor General wrote that "[w]hile bundled rebates may be a common business practice, it is not clear that monopolists commonly bundle rebates for products over which they have monopolies with products over which they do not."[21] Similarly, the Solicitor General recommended that the Court deny review in *Andrx Pharmaceuticals, Inc. v. Kroger Company*[22] because the conduct at issue was "rare" outside the market for generic drugs.[23]

The Role of Academic Scholarship. The existence, or lack, of scholarly opinion addressing the issue presented in the petition appears to be one of the most important factors in the Court's decision whether to grant certiorari in an antitrust case. There is probably no other area of the law in which the Court so frequently relies on academic scholarship. We divide academic scholarship into two (sometimes overlapping) groups: economists and legal scholars.

"We're supposed to count economists?"[24] Notwithstanding Justice Breyer's asserted skepticism, the Court in recent years has frequently looked to the majority views of economists to help resolve antitrust issues, and appears likely to continue to do so.[25] Even at the Supreme Court level, antitrust law is increasingly becoming an area of applied economics. But that does not mean that the Court is a forum for economic debate. The Court usually prefers to wait until there is a clear majority view among economists before it is willing to rely on their perspective. At oral argument in *linkLine*, Justice Souter asked the petitioner whether "the fashion of economics [is] at a stage where we can say that there is a clear consensus supporting your argument" that a price squeeze is not a Section 2 violation.[26] If there were not a consensus, Justice Souter suggested that "the only sensible thing" is to leave the Ninth Circuit rule in place.[27] Similarly, the substantial academic consensus against per se treatment for RPM undoubtedly played a major role in persuading the Court to

reconsider (and ultimately overrule) *Dr. Miles*.[28] And the lack of scholarly opinion likely helped doom the petition in *LePage's*. In his invitation brief, the Solicitor General specifically recommended that the Court wait for the "economic analysis to develop further" before it considered the bundling issue.[29]

Legal Scholars. Justice Breyer's comment cited above suggests, however, that there is some reluctance to place too much reliance on the views of economists, and there is considerable reason to believe that some Justices may place greater weight on the writings of legal academics in the antitrust area. Their writings tend to be more accessible to generalist judges than the frequently abstruse writings of economists, and the Justices (and their law clerks) may simply be more comfortable citing a legal treatise than an economics paper.

There is considerable evidence to support that hypothesis. Most saliently, there is a remarkably high degree of correlation between the Areeda-Hovenkamp treatise (and other writings by Professor Hovenkamp) and the Court's decisions. Justice Breyer has written that "practitioners would prefer to have two paragraphs of [the Areeda-Hovenkamp] treatise on their side than three Courts of Appeals or four Supreme Court Justices."[30] The Court has cited approvingly to the treatise and/or an article by Hovenkamp in eight of the last nine antitrust cases, with *Dagher* (one of the shortest Supreme Court opinions in recent memory) being the only exception.[31]

Less obvious, perhaps, is the fact that Hovenkamp's writings may also be influential at the certiorari stage. In each of the last ten antitrust cases in which the Court granted certiorari, the petitioner or the Solicitor General pointed to Hovenkamp as supporting the position being urged upon the Court.[32] For example, in *Independent Ink*, the petitioner cited the Areeda-Hovenkamp treatise several times as evidence that certiorari was warranted.[33] In *Weyerhaeuser*, the Solicitor General buttressed his argument that immediate Supreme Court review was necessary by pointing to a recently published article by Hovenkamp in which he called the Ninth Circuit's opinion "an antitrust disaster of enormous proportions."[34]

Obviously, there are many other scholars whose writings may influence the Court or particular Justices as well. Judges Bork and Posner, for example, are cited in many of the Court's opinions. But there can be no doubt that the existence and content of legal scholarship addressing the question presented plays an important role in the Court's analysis of antitrust cases, both at the certiorari stage and on the merits.

Framing the Substantive Antitrust Issue. The increase in the Court's antitrust docket suggests that the Court has a renewed interest in the subject. But that does not mean the Court is eager to pave new ground or change the law in dramatic and unanticipated ways. To be sure, two of the Court's recent antitrust cases—*Leegin* and *Independent Ink*—changed the law by overturning longstanding precedents, but those precedents had been undercut by intervening developments that rendered them inconsistent with modern antitrust understanding. Indeed, concern for avoiding such mistakes in the future may be motivating the Justices to be wary of changing the law too quickly or addressing conduct that is difficult to analyze under existing precedent, especially where the scholarly literature is not well-developed.

One Step at a Time. Particularly when asking the Court to reexamine precedent, petitioners should not swing for the fences; it's best to play "small-ball." Thus, in *Independent Ink*, although the precise question presented was whether market power should be presumed in a tying case when the tying product is patented, some observers hoped that the Court would go further and reject altogether the modified per se rule against tying. Several of the Justices' questions at oral argument further raised those hopes.[35] But the Court's opinion was limited to overruling the presumption of market power for patented products—leaving the issue of tying's modified per se status for another day.

Similarly, *Leegin*'s overruling of *Dr. Miles* occurred only at the end of a gradual, three-decade transformation of the per se treatment of vertical restraints. The Court began in 1977, holding in *Continental T.V., Inc. v. GTE Sylvania Inc.*[36] that the rule of reason applies to vertical territorial restraints. In reliance on *Sylvania*, the Court later extended the rule of reason to maximum price restraints in *State Oil Co. v. Khan*.[37] By the time the issue of minimum price restraints reached the Court in *Leegin*, therefore, the petitioner was able to argue that it was "untenable that resale price maintenance should continue to be treated under a vastly different legal standard than all other vertical restraints."[38] The Court agreed, and in overruling *Dr. Miles*, stated that "[t]he justifications for vertical price restraints are similar to those for other vertical restraints,"[39] thus emphasizing the incremental nature of the decision.

Been There, Done That. Another strategy that appears to have achieved success at the certiorari stage is convincing the Court that the conduct at issue is analogous to conduct with which the Court is already familiar. For example, although predatory bidding is a relatively novel antitrust violation, in *Weyerhaeuser* the petitioners and the Solicitor General argued that it is analytically similar to predatory pricing, and thus the Court should grant review to make clear that the preexisting *Brooke Group* test governed.

The petitioner in *linkLine* (again joined by the Solicitor General) also successfully employed this strategy. It took the complicated question of whether a price squeeze claim is viable under Section 2—a nuanced issue involving pricing theory, wholesale and retail markets, a separate regulatory regime, and a leading opinion by Judge Learned Hand—and reformulated it as a variation of the refusal-to-deal question that the Court answered a few years earlier in *Trinko*. Viewed in that light, the case would not require the Court to break dramatically new ground, so granting review was a relatively straightforward step.

On the other hand, the petitioner in *LePage's* could not convince the Court, or the Solicitor General, that the Court's

prior treatment of predatory pricing provided a sufficiently close analogy to bundling. The Solicitor General explained that the *Brooke Group* test would not "take account of potentially significant differences between predatory pricing and bundled rebates."[40] Instead, the Court would have needed to create a new test specifically for bundling, a prospect it was apparently not eager to undertake.

Similarly, the absence of a familiar framework was probably a factor in the Court's decision to deny certiorari in *Joblove v. Barr Laboratories*,[41] *FTC v. Schering-Plough*,[42] *Andrx Pharmaceuticals, Inc. v. Kroger Company*,[43] and *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*[44] Those cases presented the question whether a patent holder can settle a patent infringement suit by paying the alleged infringer to stay out of the market—a practice referred to as a "reverse payment." Reverse payments are a relatively new phenomenon attributed largely to the peculiarities of the Hatch-Waxman Act, which governs the introduction of generic drugs. The absence of any close preexisting doctrinal analogy may have led the Court to decline review in those cases.

Recent Themes. A number of recurring substantive themes can be distilled from the successful petitions for certiorari in recent antitrust cases. Those themes recur frequently in the Court's opinions in those cases, suggesting that they likely played a role in the Court's decision to grant certiorari (as well as its ruling on the merits). The themes are often interrelated, but the general categories laid out below should provide useful guidance to litigants seeking to frame petitions in a manner best calculated to appeal to the Court.

Avoiding False Positives. The Court is clearly interested in reviewing antitrust rules that have the potential to punish procompetitive conduct. Thus, the Court has repeatedly granted certiorari to enforce the principle that per se treatment is appropriate only after the courts have "considerable experience with the type of restraint at issue" and "can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason."[45] Experience—through case law and academic literature—is increasingly informing the Court that there are very few practices that are exclusively anticompetitive. *Leegin* and *Dagher* are illustrative. In *Leegin*, the petitioner argued that there are significant procompetitive justifications for the RPM conduct at issue, and that a rule prohibiting such conduct frustrates the very purpose of the antitrust laws.[46] Similarly, in *Dagher*, the petitioner argued that the Court should grant certiorari because the Ninth Circuit's decision would "have a broad and highly disruptive impact on the formation of procompetitive business enterprises."[47]

Outside the context of per se rules, the Court has similarly shown its continuing concern about the need to avoid false positives resulting from legal rules that are not sufficiently protective of procompetitive conduct. In *Weyerhaeuser*, for example, the petitioner and the Solicitor General argued that certiorari was warranted because the Ninth Circuit's legal rule, while not a per se prohibition, would inevitably have the effect of condemning procompetitive efforts by businesses to expand output through increased purchases of inputs.[48] Similarly, in *Volvo*, a case involving secondary-line price discrimination under the Robinson-Patman Act, the petitioner urged the Court to review the case because the Eighth Circuit's rule would "push manufacturers toward greater price uniformity," lessening interbrand competition.[49] The Court agreed, justifying its narrow interpretation of the statute in part on the ground that interbrand competition "is the 'primary concern of antitrust law.'"[50] Whenever possible, therefore, petitioners should explain to the Court how the rule adopted by the lower court creates an unacceptable risk of false positives.

The Chilling Effects of Vague Rules. The Court also appears to find persuasive reasons to grant review when the rule adopted by the lower court is so vague that it may tend to chill pro-competitive conduct, because businesses (advised by competent antitrust counsel) will hesitate to engage in conduct that approaches the "gray area" out of fear of potential liability. For example, under the Ninth Circuit's opinion in *Weyerhaeuser*, a defendant could be found liable for predatory buying if a jury found that the defendant purchased more raw materials "than it needed" or paid more "than necessary," such that competitors could not buy inputs at a "fair price."[51] As the petitioners argued: "Businesses cannot know how to comply with a subjective standard that hinges liability on whether a jury believes that prices paid for materials are 'necessary' or 'fair.'"[52] The Solicitor General agreed, encouraging the Court to take the case for that reason, notwithstanding the absence of a circuit conflict.[53]

The Court also seems concerned with procedural rules that (in combination with the high cost of antitrust litigation) may permit plaintiffs to extract settlements in meritless cases, further chilling procompetitive conduct. This theme was likely the driving force behind the Court's decision to consider *Twombly* and, to a lesser extent, *Credit Suisse*. Indeed, the petitioners in *Twombly* argued that the case merited review because antitrust cases are a "serpentine labyrinth[] in which discovery is a bottomless pit," and the lower court's rule would "encourage[] the filing of suits solely to extract settlements that enrich attorneys at the expense of consumers and the economy as a whole."[54]

Relying on the Regulators. One of the more interesting aspects of the Court's recent cases has been the interplay between antitrust law and other regulatory regimes. Indeed, the petitioners in four of the recent cases (*Trinko*, *Credit Suisse*, *Twombly*, and *linkLine*) were participants in highly regulated industries. Two separate themes are suggested by the Court's grants of certiorari in these cases.

1. Regulators not courts. First, the Court has shown an increasing willingness to cede competition policy to specialized administrative agencies, in part out of concern that the added complexities of the regulatory regime increase the risk of incorrect decisions by generalist judges and lay juries. This concern appears to have been the driving force behind *Credit*

Suisse. Although the alleged anticompetitive conduct in that case was prohibited by both the Sherman Act and by SEC regulations, the Court concluded that the potential conflict between the two regimes resulted in antitrust immunity. The Court expressed concern that the line between procompetitive and anticompetitive conduct was "fine" and "complex," making it "difficult for someone" (i.e., judges and juries) to decide which side of the line the defendant's conduct falls on.[55] Failing to yield exclusive jurisdiction to the securities laws would thus result in a "chilling effect."[56]

2. Regulation as a safety net. As noted above, the Court is often hesitant to address exclusionary practices with which it is unfamiliar. But that concern may have less weight when the case involves a regulated industry, because the Court knows that there is an alternative regime in place to prohibit truly anticompetitive conduct. For example, the Court's opinion in *Trinko*, although not necessarily limited to the regulatory context, noted that it was working within a "regulatory framework" that "significantly diminishes the likelihood of major antitrust harm."[57]

Similarly, the existence of regulation as a safety net was front and center in the *linkLine* oral argument. The petitioners argued that regardless of whether an industry is regulated, there is no "price squeeze" claim under Section 2 if there is no antitrust duty to deal.[58] Justices Souter and Breyer seemed dubious about the breadth of that argument, each suggesting that any pro-defendant decision on price-squeeze claims be limited to cases in which significant regulation is present.[59] These statements suggest that at least some Justices feel more comfortable in reaching pro-defendant outcomes if there is a separate regulatory regime in place to minimize any anticompetitive effect.

Implications for the Future

In light of the signals sent by the Court's grants of certiorari during the past five Terms, and the inferences we have drawn from those decisions, it is possible to make some judgments about the types of antitrust issues that may next attract the Court's attention.

Bundled Discounts. All of the factors that likely convinced the Court to deny certiorari in *LePage's* are now gone. The Ninth Circuit's decision in *Cascade Health Solutions v. PeaceHealth*[60] announced a different test for bundled discounts from the approach followed in *LePage's*, effectively giving rise to a circuit conflict on the question. Moreover, there is now a considerable body of academic literature on the topic. Indeed, the Ninth Circuit adopted a version of the "discount attribution" approach that has been advocated by Hovenkamp and others.[61] The Antitrust Modernization Commission has weighed in with a similar test that includes a recoupment requirement.[62] And the Antitrust Division has now taken a position, offering a nuanced approach that varies depending on the feasibility of bundle-to-bundle competition.[63] (Of course, it remains to be seen whether the new Administration will back away from this position, perhaps offering yet another perspective on the question.)

Finally, the nature of this issue—including the risk that an unduly low threshold for bundling claims will chill procompetitive discounting, and the obvious need for clear legal rules to guide business practices in this area—makes it a close fit for the Court's areas of antitrust concern.

Tying. The Court's trend away from per se rules (in the absence of horizontal agreements) suggests that the remnants of the per se ban on tying may attract the Court's attention at some point, and the Justices' questions during the oral argument in *Independent Ink* suggest a live interest in that issue at the Court. Justice Breyer noted that a per se rule does not make sense given the possible procompetitive justifications for tying,[64] and Chief Justice Roberts flatly asked the government whether the per se rule should be abandoned.[65] Justice Stevens also raised that question a number of times.[66] Like *Leegin* and *Independent Ink*, the academic commentary on this issue is one-sided, with prominent scholars arguing against the per se rule.[67] While the need for review of this issue may not be as acute as in the bundling context, it would not be surprising to see the Court tackle this issue before long.

Reverse Payments. This issue continues to arise, with the Federal Circuit's decision in *In re Ciprofloxacin Hydrochloride Antitrust Litigation* being the latest, and most defendant-friendly, appellate decision on the question.[68] This decision immunizes reverse-payment settlements from challenge as long as the agreement between the generic and brand-name drug manufacturers was within the "scope" of the patent, and—rejecting much of the academic literature[69] and the view of the Solicitor General[70]—holds that courts should not consider the strength of the patent but should assume its validity.[71] The fact remains, however, that the situation is largely a creature of statute, and the Court may be waiting to see if Congress steps in.

Absent legislative action, the Court may decide that its guidance is warranted. Although reverse payments are rare outside of the pharmaceutical industry, the number of certiorari petitions alone demonstrates that this issue is a recurring one. Moreover, the FTC continues to bring new enforcement actions in circuits that have yet to address the issue, no doubt hoping to create a wider circuit conflict so as to increase the chances of Supreme Court review.[72] Should the issue reach the Supreme Court, moreover, the FTC is likely to find an ally in the new Solicitor General. During his campaign, President Obama stated that his "administration will ensure that the law effectively prevents anticompetitive agreements that artificially retard the entry of generic pharmaceuticals onto the market."[73]

Predatory Pricing—Cost Issues. In *Brooke Group*, the Court held that prices are predatory if they are below an "appropriate" measure of cost and recoupment is unlikely.[74] But because the parties agreed to use average variable cost in that case, the Court did not provide guidance on the question of what measure is most "appropriate."[75] Unless the circuits suddenly coalesce around a single standard, the Court will

probably need to revisit this issue in the not-too-distant future. The absence of a clear, consistent rule could chill procompetitive conduct by forcing companies to price their goods at a level high enough to meet the strictest standard—average total cost.[76] The Court may also be encouraged to consider the issue given the emerging consensus among economists, legal scholars, and the Department of Justice that average avoidable cost is the appropriate measure.[77]

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Predicting the Court's future course is notoriously difficult, but the foregoing discussion outlines emerging trends from the Court's recent antitrust decisions at the certiorari stage. Future petitioners hoping to obtain Supreme Court review would be well-advised to consider the same points in an effort to follow the paths that have led to success for other antitrust litigants in recent years. ■

[1] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007); Credit Suisse Sec. (USA), LLC v. Billing, 127 S. Ct. 2383 (2007); Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007); Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Texaco Inc. v. Dagher, 547 U.S. 1 (2006); Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); Verizon Commc'ns Inc. v. Curtis V. Trinko, LLP, 540 U.S. 398 (2004). Note that for the purposes of this article we do not include *U.S. Postal Service v. Flamingo Industries (U.S.A.) Ltd.*, 540 U.S. 736 (2004). Although that case involved the question whether the U.S. Postal Service could be sued under the Sherman Act, the Court's analysis of the dispositive issue—whether the Postal Service is part of the U.S. Government—does not provide insight into the Court's antitrust jurisprudence generally.

[2] California Dental Ass'n v. FTC, 526 U.S. 756 (1999); Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998).

[3] In addition to the nine cases listed above, the Court's decision in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, was still pending when this article went to press. 503 F.3d 876 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2957 (2008) (No. 07-512).

[4] LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 2932 (2004).

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

[6] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 128 S. Ct. 1137 (2008); Joblove v. Barr Labs. Inc., 127 S. Ct. 1868 (2007); FTC v. Schering-Plough Corp., 546 U.S. 974 (2005); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 546 U.S. 1028 (2005); Credit Suisse First Boston Ltd. v. Billing, 547 U.S. 1205 (2006); Texaco Inc. v. Dagher, 543 U.S. 1143 (2005); McFarling v. Monsanto Co., 543 U.S. 923 (2004); Andrx Pharm. Inc. v. Kroger Co., 540 U.S. 1160 (2004); 3M Co. v. LePage's Inc., 540 U.S. 807 (2003); Dee-K Enters., Inc. v. Heveafil SDN. BHD., 537 U.S. 1102 (2003); Brief for the U.S. and the FTC as Amici Curiae, Verizon Commc'ns Inc. v. Curtis V. Trinko, LLP, 538 U.S. 905 (Dec. 2002) (No. 02-682).

[7] *Schering-Plough*, 402 F.3d 1056. Indeed, the Solicitor General and the FTC have apparently parted ways in a number of recent antitrust cases. In addition to *Schering-Plough*, where the FTC and the Solicitor General took opposite positions regarding the certworthiness of the case, the FTC openly disagreed with the Solicitor General's position regarding certiorari in *linkLine*. *See* Statement of the Federal Trade Commission declining to join the U.S. Department of Justice in recommending that the U.S. Supreme Court review the Ninth Circuit's decision in *linkLine Communications, Inc. v. Pacific Bell Telephone Co.*, 503 F.3d 876 (9th Cir. 2007), *available at* http://www.ftc.gov/os/2008/05/P072104stmt.pdf. Additionally, the FTC did not sign the Solicitor General's briefs recommending a grant of certiorari in *Credit Suisse* and a denial of certiorari in *Joblove* and *McFarling*, perhaps suggesting the FTC's disagreement with the government's position in one or more of those cases. The absence of FTC support (or, for that matter, active FTC opposition) has not had any impact on the Court's willingness to accept the recommendations of the Solicitor General, at least to date.

[8] Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1532 (2008). *See also* Petition for Writ of Certiorari, Pacific Bell Telephone Co. v. linkLine Communications, Inc., No. 07-512 (U.S. Oct. 17, 2007) [hereinafter linkLine Cert. Petition] (lead counsel Michael Kellogg was assistant to the Solictor General from 1987–89; attorney profile, *available at* http://www.khhte.com/attorneys_view.php?id=94). Note that Lazarus includes *Flamingo Industries and Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), as antitrust cases; we do not.

[9] SUP. CT. R. 10(a). *See also* SUP. CT. R. 10(b) ("a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals").

[10] Justice Ruth Bader Ginsburg, Speech at the Annual Dinner of the American Law Institute (May 19, 1994), *available at* http://gos.sbc.edu/g/ginsburg.html.

[11] F. Hoffmann-La Roche Ltd. v. Empagran, 542 U.S. 155 (2004).

[12] Credit Suisse First Boston (USA) Ltd. v. Billing, 127 S. Ct. 2383 (2007).

[13] Brief for the U.S. as Amicus Curiae at 9, Credit Suisse Sec. (USA) v. Billing, 551 U.S. 264 (2006) (No. 05-1157) [hereinafter Credit Suisse U.S. Cert. Br.].

[14] Petition for Writ of Certiorari at 12, 24–25, Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 1002 (2005) (No. 04-1329) [hereinafter Independent Ink Cert. Petition].

[15] Korody-Colyer Corp. v. General Motors Corp., 828 F.2d 1572, 1574 (Fed. Cir. 1987). *See also* HERBERT HOVENKAMP, MARK JANIS & MARK LEMLEY, IP AND ANTITRUST § 5.2b (2002 & 2007 Supp.).

[16] Likewise, plaintiffs who seek Supreme Court review could argue that the court of appeals decision being challenged will so chill the assertion of similar legal theories in the future that the issue is unlikely to be presented to the Supreme Court again.

[17] *See, e.g.*, Petition for Writ of Certioriari at 27, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007) (No. 05-381) [hereinafter Weyerhaeuser Cert. Petition] (arguing that review was warranted because "the Sherman Act's liberal venue provisions allow any firm conducting a national business to be sued in the Ninth Circuit").

[18] *See, e.g.*, *Twombly*, 127 S. Ct. at 1966–67.

[19] Petition for Writ of Certiorari at 29–30, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 217 S. Ct. 2705 (2006) (No. 06-480) [hereinafter Leegin Cert. Petition].

[20] Weyerhaeuser Cert. Petition 27–28.

[21] Brief for the U.S. as Amicus Curiae at 19, 3M Co. v. LePage's Inc., 542 U.S. 953 (2004) (No. 02-1865) [hereinafter LePage's U.S. Cert. Br.].

[22] 332 F.3d 896 (6th Cir. 2003), *cert. denied*, 125 S. Ct. 307 (2003).

[23] Brief for the U.S. as Amicus Curiae at 16–17, Andrx Pharm., Inc. v. Kroger Co., 543 U.S. 939 (2004) (No. 03-779) [hereinafter Andrx's U.S. Cert. Br.].

[24] Transcript of Oral Argument at 8, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (quoting Justice Breyer) [hereinafter Leegin Oral Argument Tr.].

[25] *See, e.g.*, *Leegin*, 127 S. Ct. at 2714–15; State Oil Co. v. Khan, 522 U.S. 3, 15–18 (1997).

[26] Transcript of Oral Argument at 16, *linkLine*, No. 07-512 [hereinafter linkLine Oral Argument Tr.].

[27] *Id.*

[28] *Leegin*, 127 S. Ct. at 2714–15.

[29] LePage's U.S. Cert. Br. at 19.

[30] Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 890 (1996).

[31] *Leegin*, 127 S. Ct. at 2715, 2717 (citing HOVENKAMP, THE ANTITRUST ENTERPRISE; PRINCIPLE AND EXECUTION 184–91 (2005)); *id.* 2717, 2724 (citing 8 AREEDA & HOVENKAMP, ANTITRUST LAW 47, 298 (2d ed. 2004)); Credit

Suisse, 127 S. Ct. at 2395 (citing Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 629 (2003)); *Twombly*, 127 S. Ct. at 1964, 1966 n.4 (citing 6 AREEDA & HOVENKAMP, ANTITRUST LAW ¶¶ 1433a, 1425 (2d ed. 2003); *id.* at 1973 (citing AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 307d (2006 Supp.); *Weyerhaeuser*, 127 S. Ct. at 1076 (citing Herbert Hovenkamp, *The Law of Exclusionary Pricing*, 2 COMPETITION POL'Y INT'L, Spring 2006, at 21, 35)); *Indep. Ink*, 547 U.S. at 42, 43 n.4, 45 (citing 10 AREEDA, HOVENKAMP, & ELHAUGE, ANTITRUST LAW ¶¶ 1737, 1769, 1711 (2d ed. 2004)); *id.* at 43 n.4 (citing 1 HOVENKAMP, JANIS, & LEMLEY, IP AND ANTITRUST § 4.2a (2005 Supp.)); *Volvo*, 546 U.S. at 175, 181 n.5 (citing 14 HOVENKAMP, ANTITRUST LAW ¶¶ 2302, 2301a, 2333c (2d ed. 2006)); *Empagran*, 542 U.S. at 166–67 (quoting extensively from AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 273, at 51–52 (Supp. 2003)); *Trinko*, 540 U.S. at 411 (quoting AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 773e, at 150 (2003 Supp.)); *id.* (citing 1A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 240c3, at 12 (2d ed.2000)).

[32] linkLine Cert. Petition at 13 (quoting 3A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 767c3, at 129–30 (2d ed. 2002)); Brief for the U.S. as Amicus Curiae at 12, Pac. Bell Tel. Co. v. linkLine Commc'n, No. 07-512 (U.S. May 22, 2008) [hereinafter linkLine U.S. Cert. Br.] (quoting 3A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 767c5, at 129–30 (2d ed. 2002)); Leegin Cert. Petition 10 n.4 (citing 8 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 1611 (2d ed. 2004); Brief for the U.S. as Amicus Curiae at 19 n.13, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 548 U.S. 903 (2006) (No. 05-381 [hereinafter Weyerhaeuser U.S. Cert. Brief] (citing Herbert Hovenkamp, *The Law of Exclusionary Pricing*, COMPETITION POL'Y INT'L, Spring 2006, at 21, 35–38); Petition for Writ of Certiorari at 28, Credit Suisse Sec. (USA) v. Billing, 551 U.S. 264 (2006) (No. 05-1157) [hereinafter Credit Suisse Cert. Petition] (quoting Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 632–33 (2003)); Petition for Writ of Certiorari at 12, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2006) (No. 05-1126) (quoting 6 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 1410a (2d. ed. 2002)); Petition for Writ of Certiorari at 9, Texaco, Inc. v. Dagher, 547 U.S. 1 (2005) (No. 04-805) [hereinafter Dagher Cert. Petition] (quoting 13 HOVENKAMP, ANTITRUST LAW ¶ 2132c, at 180 (2d ed. 2005)); Petition for Writ of Certiorari at 15, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2005) (No. 04-905) [hereinafter Volvo Cert. Petition] (quoting 14 HOVENKAMP, ANTITRUST LAW ¶ 2300 (1999)); Petition for Writ of Certiorari at 15 n.9, Verizon Commc'ns, Inc. v. Trinko, 540 U.S. 398 (2002) (No. 02-682) [hereinafter Trinko Cert. Petition] (quoting 3A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 771c, at 173 (2d ed. 2002)); Petition for Writ of Certiorari, at 16, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2003) (No. 03-724) [hereinafter Empagran Cert. Petition] (quoting 1A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 272h, at 358–59 (2d ed. 2000)).

[33] *E.g.*, Independent Ink Cert. Petition at 19 (quoting 10 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 1737c, at 82 (2d ed. 2004).

[34] Weyerhaeuser U.S. Cert. Br. at 19 n.13 (citing Hovenkamp, *The Law of Exclusionary Pricing*, COMPETITION POL'Y INT'L, Spring 2006, at 21, 35–38); *see also id.* at 13 n.4. In contrast, when the Solicitor General recommended that the Court deny certiorari in *LePage*'s, Hovenkamp's commentary was not critical of the Third Circuit's opinion. He wrote that the Third Circuit was "quite correct" that *Brooke Group* does not apply to bundling and that "the majority's treatment seems consistent with our definition of exclusionary conduct." PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 749, at 133, 141 (Supp. 2003). Perhaps more important for the decision to grant or deny certiorari, Hovenkamp did not propose an alternative test; he simply acknowledged that the "formulation of an administrable rule that does not overreach and condemn competitive conduct" is "difficult." *Id.* at 141.

[35] *See infra* notes 64–66.

[36] 433 U.S. 36 (1977).

[37] 522 U.S. 3 (1997).

[38] Leegin Cert. Petition at 14.

[39] 127 S. Ct. at 2715.

[40] LePage's U.S. Cert. Br. at 12.

[41] 466 F.3d 187 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 3001 (2007).

[42] 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2929 (2006).

[43] 332 F.3d 896 (6th Cir. 2003), *cert. denied*, 125 S. Ct. 307 (2004).

[44] 344 F.3d 1294, 1310 (11th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004).

[45] *Leegin*, 127 S. Ct. at 2713.

[46] Leegin Cert. Petition at 4.

[47] Dagher Cert. Petition at 18.

[48] Weyerhaeuser Cert. Petition at 25–26.

[49] Volvo Cert. Petition at 27–28.

[50] *Volvo*, 546 U.S. at 180.

[51] Weyerhaeuser Cert. Petition at 2.

[52] *Id.*

[53] Weyerhaeuser U.S. Cert. Br. at 20.

[54] Twombly Cert. Petition at 26–27 (internal quotations omitted).

[55] 127 S. Ct. at 2394.

[56] *Id.* at 2396.

[57] 540 U.S. at 412 (internal quotation omitted).

[58] linkLine Oral Argument Tr. at 15–16.

[59] *Id.* at 11–12, 21.

[60] 515 F.3d 883, 910 (9th Cir. 2008).

[61] *See id.* at 906.

[62] *Id.* at 910 n.21.

[63] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 105 (2008), *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf.

[64] Transcript of Oral Argument at 17, *Independent Ink*, 547 U.S. 28 (No. 04-1329).

[65] *Id.* at 27.

[66] *Id.* at 19.

[67] *E.g.*, HOVENKAMP, JANIS & LEMLEY, *supra* note 15, § 4.2, at 4-52 (Supp. 2007) ("As a matter of appropriate competition policy . . . appropriate rule of reason treatment of ties should look at *both* the defendant's market power and the extent to which the tie in question forecloses competition, much as we do in the law of exclusive dealing.").

[68] *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed. Cir. 2008).

[69] *See, e.g.*, HOVENKAMP, JANIS & LEMLEY, *supra* note 15, § 7.4e2 (Supp. 2007).

[70] Brief for the U.S. as Amicus Curiae at 12–13, Joblove v. Barr Labs, Inc., 127 S. Ct. 3001 (2007) (No. 06-830).

[71] *In re Ciprofloxacin*, 544 F.3d at 1337.

[72] In 2008, the FTC filed a reverse payment case that is currently pending in the Eastern District of Pennsylvania, meaning that any appeal would go to the Third Circuit. *See* FTC v. Cephalon, Civ. No. 08-CV-2141 (E.D.Pa.); Press Release, Fed. Trade Comm'n, FTC Sues Cephalon, Inc. for Unlawfully Blocking Sale of Lower-Cost Generic Versions of Branded Drug Until 2012, *available at* http://www.ftc.gov/opa/2008/02/ceph.shtm. In early 2009, the FTC filed another case, this time in California, meaning that any appeal would go to the Ninth Circuit. *See* FTC v. Watson Pharms., Inc., Civil No. CV-09-00598 (C.D. Cal.); Press Release, Fed. Trade Comm'n, FTC Sues Drug Companies for Unlawfully Conspiring to Delay the Sale of Generic AndroGel Until 2015, *available at* http://www.ftc.gov/opa/2009/02/androgel.shtm.

[73] Statement of then-Senator Barack Obama for the American Antitrust Institute, *available at* http://www.antitrustinstitute.org/archives/files/aai%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

[74] 509 U.S. 209, 222 (1993).

[75] *Id.* at 223 n.1.

[76] *See* McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1500 (11th Cir. 1988) (adopting average total cost as the appropriate price/cost test).

[77] *See* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY, *supra* note 63, ch. 4, at 65–67 (2008), *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf (advocating the use of average avoidable cost and noting that it is the "emerging consensus" among economists); 3A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 740a (3d ed. 2008) (advocating the use of average avoidable cost).