

Antitrust Update

EXECUTIVE SUMMARY

Recent U.S. Supreme Court decisions in antitrust cases such as *Bell Atlantic v. Twombly*, *Credit Suisse v. Billing*, and *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.* signal some notable departures from longstanding case law and attitudes toward antitrust enforcement. Meanwhile, the Ninth Circuit recently ruled on the practice of bundled discounts in *Cascade Health Solutions v. PeaceHealth*, creating a circuit split that makes it ripe for future Supreme Court review.

Our panel of experts from Northern and Southern California discusses how these decisions have affected their practice, as well as trends in overseas competition law. They are Tom Hixson and Colin West of Bingham McCutchen; Jesse Markham of Holme Roberts & Owen; Joseph Saveri of Lief, Cabraser, Heimann & Bernstein; and Sean Gates of Morrison & Foerster. The roundtable was moderated by freelance writer Bernice Yeung and reported for Barkley Court Reporters by Krishanna DeRita.

MODERATOR: What is the impact of U.S. Supreme Court antitrust decisions from the past year on your practice?

SAVERI: *Twombly* has had the greatest impact on my practice. It's a case about pleading standards in antitrust cases, and among other things, it held that allegations of parallel practices plus conclusory allegations of an agreement, are insufficient to state a cause of action under antitrust law. From a plaintiffs' perspective, *Twombly* ushers in a period of attacks on more than adequate pleadings. And while there has been greater scrutiny of antitrust complaints, very few that would have been sufficient before *Twombly* are being thrown out, so it's done very little other than to delay the proceedings and run up the cost for all parties.

HIXSON: Although *Twombly* itself was an antitrust case, the lower courts have pretty uniformly applied it to all types of cases because its discussion of Rule 8 of the Federal Rules of Civil Procedure would seem to apply to federal court pleading standards generally. It remains to be seen whether *Twombly* will have the effect contemplated by the Court, of

screening out unmeritorious cases prior to discovery. Another open issue is to what extent, if any, it will have on state courts. California state courts have, at least nominally, applied a fact-pleading standard that was theoretically more restrictive than federal-notice pleading. Whether *Twombly* ups the ante in California and other state courts is an open question.

WEST: Many state courts, following the Supreme Court's lead, patterned their dismissal standards almost word-for-word on the standard laid out in *Conley vs. Gibson*, which *Twombly* repudiated. It will be interesting to see whether any state courts will again follow the Court's lead, and abandon *Conley*.

I do not think it is premature to say that *Twombly* has genuinely raised the pleadings bar. Many recent cases dismissed under *Twombly* would undoubtedly have passed muster before it. One that springs to mind immediately is the Second Circuit's *In re Elevator Antitrust Litigation* decision from last year, which involved fairly detailed allegations of collusive activity, as well as investigations by European antitrust authorities into the allegedly anticompetitive conduct. The

fact that more antitrust cases are being dismissed should not be surprising. One of the Court's stated purposes behind deciding *Twombly* the way it did was to weed out unmeritorious claims in order to ease the burden of discovery.

MARKHAM: *Twombly* presents a practical problem to plaintiffs who are filing complaints based upon investigatory activity by antitrust enforcement agencies. We have seen this in a number of industries where numerous class actions lawsuits were filed in state and federal courts based on the fact that the European Union and the Department of Justice were investigating a small number of companies within that industry. I don't think these complaints would pass muster under *Twombly*.

Aside from filtering out some complaints, or at least delaying them until there's more factual information available to the plaintiffs to withstand a *Twombly* motion, the other interesting implication has to do with what might be called the hapless defendant, where a company is sued simply because it's part of an industry under investigation. I suspect that *Twombly* will be raised on behalf of those defendants.

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GATES: *Twombly* raises the question: If the court grants leave to amend and is insisting that plaintiffs plead the “what, when and by whom,” of an alleged conspiracy, should the court allow limited discovery on those issues? In *Graphics Processing Units* and *Netflix* the courts did just that. This seems contrary to one of the Court’s primary concerns in *Twombly*, but the lower courts seem to be struggling with the fact that the details of an alleged conspiracy are often not public.

Another question is what “plus” factors the courts will find sufficient to withstand a *Twombly* motion. The courts have focused on the details of the alleged agreement, but plaintiffs have traditionally relied on other “plus” factors to infer an agreement from parallel conduct.

MARKHAM: When you take the Supreme Court cases from the past year all together, there’s a clear signaling to the lower courts a surprising, and perhaps troubling, distrust for antitrust enforcement. There’s great concern about false positives. In the *Credit Suisse* decision, for example, there’s an almost inexplicable turnaround. The rule for centuries has been that the implied repeal of any statute is disfavored. What we are told now is that the regulatory law displaces competition law if the regulatory law might interact poorly with antitrust law. The Supreme Court seems to be expressing a concern that courts and juries will get it wrong, and expressing an unexpected preference for regulators over courts.

SAVERI: That last point is particularly important. Starting with *Matsushita*, some courts expressed the view that juries couldn’t be trusted to resolve the complex issues presented by antitrust cases. *Twombly* moved that forward to the pleadings stage by allowing judges to act as a gatekeeper. But in *Credit Suisse*, the Supreme Court seems to express distrust even in the district court judges. Antitrust enforcement has depended significantly on private litigation, but in *Credit Suisse* the Supreme Court demonstrates some hostility to that basic idea.

WEST: *Twombly* and *Credit Suisse* both limit private plaintiffs’ ability to challenge allegedly anti-competitive conduct, and both effectively shift enforcement responsibilities to government. After *Twombly*, plaintiffs may need specific evidence of collusion before even filing a Section 1 complaint. Getting such evidence without discovery is diffi-

cult, so private conspiracy cases will need to follow on government investigations to an even greater extent than they do now. *Credit Suisse*, in essence, says that there are certain sectors of the economy that are essentially off limits to private antitrust suits.

HIXSON: A related question raised by *Credit Suisse* is to what extent federal courts will feel that they need to look at how effective government agencies are in regulating areas within the scope of their authority. The *Credit Suisse* test for implied antitrust immunity looks at more than just the existence of an agency’s regulatory authority over the conduct in question, but also at whether the agency has, in fact, exercised that authority. That is a more searching inquiry, and there’s not a lot of guidance on how courts are supposed to do that.

SAVERI: That creates a tough situation when it comes to regulatory bodies that decide to not act in a particular scenario. Now there’s an argument that the decision not to do anything was in and of itself a regulatory decision. These are the kind of tensions that *Credit Suisse* sets up.

GATES: Another Supreme Court case from 2007 is *Weyerhaeuser*, which involved predatory bidding. This case also demonstrates the Court’s concern for false positives and creating bright-line rules as to when a company, especially in a unilateral conduct case, has crossed the line. Another important implication of *Weyerhaeuser*, which didn’t get much play, is that the Court implicitly adopted the total welfare standard for competitive harm, as opposed to a consumer welfare standard. It was a predatory bidding case and the Court didn’t look at how the conduct affected end consumers of the product; the Court looked at whether there was harm at the manufacturer level. This could have important consequences in other contexts, especially merger cases.

MODERATOR: What kind of legal issues do bundled discounts present given the Ninth Circuit ruling in *Cascade Health Solutions*?

HIXSON: In its February amended opinion, the Ninth Circuit provided guidance for companies that are evaluating what kinds of bundled discounts they can provide without running afoul of Section 2 of the Sherman Act. The court held that proving that a bundled discount is exclusionary or



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predatory for the purposes of a monopolization or an attempted monopolization claim, requires showing that after you allocate the discount the defendant gives on the entire bundle to just the competitive product, the defendant then sold the competitive product below average variable cost. This standard, although not perfect, is preferable to the Third Circuit's standard in *LePage*, which seemed to condemn all bundled discounts as exclusionary for purposes of a Section 2 claim, regardless of whether the price was above or below cost.

WEST: The Antitrust Modernization Committee (AMC), recommended something closer to a *Brooke Group* analysis. In addition to attribution of the entire discount, the AMC would require the possibility of recoupment and a showing of competitive injury. It will be interesting to see if any other circuits follow the Ninth Circuit or instead go with the AMC's recommendations regarding the three-pronged analysis for bundled discounts.

MARKHAM: I think *Cascade Health* is going to be adopted very broadly. I'm not sure, however, whether this is the right resolution to the dilemma. The Ninth Circuit tried to create a rule that's workable, but there's often an intractable problem with allocating costs—for example, how much of the CEO's salary is to be allocated to the cost of a roll of transparent tape? We've already experienced that problem under the state Unfair Practices Act, and it is generally not a workable standard where a company deals in a wide array of products.

WEST: Given the Supreme Court's recent rulings, if it were to resolve the circuit split on bundled discounts, I think its resolution would be much closer to the Ninth Circuit's analysis than to *LePage's*. As I mentioned earlier, the AMC has recommended that something akin to a *Brooke Group* analysis would be appropriate in bundled discount cases. In light of *Weyerhaeuser*, which closely tracked the *Brooke Group* analysis, I wouldn't be surprised if the Supreme Court adopted something close to the AMC's recommendations. If the Court does take the issue up, it will also be interesting to see if it finally decides what cost measure should be applied to determine whether there is predation, or if it chooses to remain silent on that issue.

GATES: With bundled discounts, there's a need to balance two potentials: One where it's beneficial

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for consumers, and the other where there's anti-competitive harm. Under the AMC analysis, the recoupment and competitive injury elements are significant parts of that balance. The Ninth Circuit rejected the recoupment element, stating that bundled discounts allow for "simultaneous" recoupment. But as a recent Economic Analysis Group paper points out, the recoupment requirement is a necessary part of the analysis; it asks whether there are sufficient barriers to entry such that the practice is profitable. The court also held that the competitive injury element is redundant of the antitrust injury requirement, but the two concepts are different. What is clear is that the courts and the AMC were trying to come up with a bright-line rule that can be administrable.

SAVERI: While this appears to be a bright-line rule, I think it's a very difficult rule to apply in practice. The discovery relating to costs and the analysis of it is complicated and expensive. I think an issue that remains after *Cascade Health* is how these issues get resolved in the context of private litigation. The determination of costs and how you apply *Cascade Health* is something that's probably going to have to be done with juries, or perhaps at summary judgment.

MODERATOR: How do you see competition law developing overseas?

MARKHAM: U.S. antitrust rules are more permissive of business activity than they once were. The United States rather aggressively exported antitrust policy, particularly in the wake of World War II. But the antitrust policy we exported is not the antitrust policy we now have. One effect is that, for purposes of compliance, it's no longer sensible to focus on U.S. rules because many businesses are operating globally.

The other point I would make, which cuts in the other direction, is that the world continues to

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follow the United States when it comes to cartel enforcement. Everyone has seen the genius behind Gary Spratling's amnesty-type program, where essentially, the first to confess to cartel activity gets a much lighter legal burden. The logic of it is brilliant and it works well, and so we have seen cartel enforcement expanding around the world.

GATES: There are significant differences in competition laws around the world, and I think a lot of it is driven by historical context. Many of the different approaches come from regimes in which you have had state-run monopolies. In addition, in Europe, they face certain issues because they are trying to unify numerous countries with distinct interests. As a result, they may see the efficacy of the free market and the durability of market power differently than we do. The differences in the underlying assumptions drive the differences in competition laws and enforcement.

From a policy perspective, there needs to be some uniformity. The U.S. has been making great strides in that direction through technical assistance and other efforts. Nonetheless, there will likely be more activity from foreign enforcement agencies in cases that the U.S. has chosen not to pursue.

SAVERI: An additional significant development is that the procedural laws are being changed overseas, albeit gradually, to set the stage for more private enforcement of the antitrust laws. In the next few years, we'll see more attempts to develop policies and practices that enable private parties to seek to enforce competition law abroad.

One of the biggest impediments to enforcement overseas is the ability to do contingency fee work and the presence of the English Rule. The existence or the lack of a treble damage remedy abroad isn't that much of a disincentive. I think particularly in the cartel cases that have been brought, single damages alone are enough to whet the appetite of plaintiff lawyers. This is going to be an area where there's going to be a lot of activity and it's going to be hard to predict whether American lawyers and lawyers from abroad will meet in U.S. courts or in foreign courts.

WEST: Outside the U.S., Canada is the furthest along in vigorous private enforcement of antitrust laws, particularly in the cartel context. It is likely not a coincidence that, compared to many other jurisdictions, Canada has relatively well-developed

class action mechanisms, which are very similar to ours. The absence of treble damages does not appear to be much of a factor, although the theoretical availability of prejudgment interest (which is not available under the Sherman Act) may offset that. This suggests that those countries who welcome class actions will see the most vigorous private enforcement.

GATES: We tend to forget that the vast majority of antitrust enforcement in the United States is done via private plaintiffs, and there's probably more antitrust enforcement in the United States than in foreign jurisdictions because of that fact alone. But the question is whether foreign countries want to, in effect, deputize plaintiffs to become private attorneys general to enforce the competition laws. It's not clear that this is a concept that is going to be accepted overseas. Even if they do, what are they going to do with pretrial discovery?

MARKHAM: We can expect to see private enforcement spread into Europe, and U.S. plaintiff law firms are already betting on that and opening up offices there. A big issue going forward is pretrial discovery. As Joe [Saveri] mentioned, not only is the substantive law important, but also the kind of practices that are put in place for enforcement because without pretrial discovery, there won't be any private enforcement—and Europe is not going to move swiftly to open up private discovery.

HIXSON: I think this highlights an issue we discussed earlier, which is the increasing clash between civil discovery in the United States in private cases and the desire of governments that are conducting investigations or administering an amnesty program, which don't necessarily want all of that information and all of those documents ending up in the class action plaintiffs' hands while investigations are ongoing.

If private enforcement continues to be focused largely in the United States, then that's going to be a source of tension between foreign jurisdictions that want to be able to conduct their investigations and come up with results, and not necessarily have the documents and information they obtain in their investigation sent to class action plaintiffs in the United States who are suing the same company here. Some of the courts have been struggling with that now, but there isn't clear-cut guidance from the Supreme Court about how they are supposed to handle that tension. ■



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