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Supreme Court in search of limiting principles

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Supreme Court in search of limiting principles

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Abstract

US antitrust law evolves as the common law does: through experience, not logic. US statutes are framed in broad, almost constitutional terms, leaving the courts to define how those laws should be applied to an ever-changing economy and how new learning should be integrated into their application. Yet over the years, the Supreme Court has come to hear fewer and fewer antitrust cases, allowing the lower courts to develop antitrust doctrine until a split among the lower courts requires the high court to step in to resolve the conflict. It is for this reason that the Supreme Court's 2004 term was so noteworthy. The Court heard four antitrust cases, two of which – Verizon v Law Offices of Curtis V Trinko (124 S Ct 872 (2004)) and F Hoffmann-LaRoche Ltd v Empagran (124 S Ct 2359 (2004)) – produced important decisions that will serve to define the limits of antitrust intervention for decades. It was disappointing that the Court declined to hear another case, 3M Co v LePage's Inc (124 S Ct 2932 (2004)), which raised issues as to the antitrust treatment of bundled discounts by dominant firms, leaving antitrust lawyers uncertain as to how to counsel clients in this area.

Supreme Court in search of limiting principles

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Trinko

Trinko was the first substantive decision by the Supreme Court in a monopolization case in over a decade. In it, the Court faced fundamental questions about the nature of monopolization and, in particular, about the extent to which a dominant firm must assist rivals in competing against it. The Court's decision strictly circumscribed two expansive theories of antitrust liability, *essential facilities* and *monopoly leveraging*, and provided guidance on the limits of Section 2 of the Sherman Act generally.

Trinko arose in the context of the Telecommunications Act of 1996, which requires incumbent local exchange carriers, such as Verizon, to share their networks with competitors on terms set by federal and state regulators. In *Trinko*, the customer of a competitor brought a class action alleging that Verizon had violated Section 2 of the Sherman Act by failing to provide adequate service in provisioning new orders. The district court dismissed the suit, but the Second Circuit reversed, holding that the plaintiff had alleged the necessary elements of both an essential facilities and a monopoly leveraging claim. The Supreme Court reversed.

As to the essential facilities claim, the Court again declined to either endorse or repudiate that doctrine as such, but its opinion circumscribes a monopolist's duty to deal with competitors so narrowly as to leave little room for the doctrine to operate. The Court begins by noting that monopoly pricing is not only lawful, but is also "an important element of the free market system" because "[t]he opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." The Court continues by noting that compelling even dominant firms to share the source of their advantage raises three concerns. First, it "is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." Second, "[en]forced sharing… requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited." Third, "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion."

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Applying these principles, the Court held that its prior decisions in *Aspen Highlands* and *Otter Tail Power* define "the outer boundaries" of antitrust liability for refusals to deal. The Court read those cases as imposing a duty to deal with a competitor under the

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antitrust laws only where the competitor can show that: (a) the monopolist was foregoing a prior profitable course of dealing with the rival; and (b) the monopolist was unwilling to deal with the rival even on the same terms on which it dealt with the public generally. Even where those conditions are met, the Court questioned whether a duty to deal should be imposed under the antitrust laws if another regulatory regime grants access to the monopolist's facilities on terms designed to promote competition. In such a case, the costs of antitrust intervention – including the risk of false positives and the difficulty of administering the terms of access – are likely to outweigh the incremental benefits.

The Court disposed of the monopoly leveraging claim in a footnote, holding that the court of appeals had erred in not requiring the plaintiff to allege a "dangerous probability of success" in monopolizing a second market, as required by *Spectrum Sports, Inc v McQuillan* (506 US 447, 459 (1993)). In addition, the Court noted that leveraging presupposes anticompetitive conduct, which it had already found was not present.

Empagran

Empagran provided the Court its first opportunity since *Hartford Fire Ins Co v California* (509 US 764 (1993)), decided over a decade ago, to address the application of the US antitrust laws to conduct occurring outside the US. The case arose from a class action seeking treble damages under the US antitrust laws for injuries suffered by companies that purchased vitamins entirely outside US commerce at prices inflated by a worldwide cartel of vitamin makers that had fixed prices both in the US and in other countries. The district court dismissed the suit for lack of subject-matter jurisdiction, but the DC Circuit reversed.

Resolving a circuit split, the Supreme Court held that courts cannot exercise subject-matter jurisdiction when the plaintiff's antitrust injury occurs entirely outside US commerce and is "independent" of any effect in US commerce. The Court based its decision on the language of the Foreign Trade Antitrust Improvements Act of 1982, which expressly limits the jurisdiction of the US courts to claims that: (1) arise from conduct that has "a direct, substantial, and reasonably foreseeable effect" on US domestic or import/export commerce; and where (2) "such effect gives rise to a claim" under the US antitrust laws. The key issue of statutory construction was whether the reference to "a claim" requires that the plaintiff's claim arise from the effect on US commerce or whether it would be enough that another victim of the cartel who was injured in US commerce would have a claim under the antitrust laws. The Court resolved this issue by holding that the language requires that the plaintiff's claim itself arise from the effect on US commerce, invoking the well-established rule of statutory construction that a statute should not be interpreted to extend the reach of US law extraterritorially unless the intent to do so is clearly stated. The Court also relied on principles of international comity, citing the concerns raised in *amici* briefs by eight foreign jurisdictions that extending US treble damage class actions to purchases made outside US commerce might unreasonably interfere with their right to regulate their own commerce.

The Supreme Court remanded the case to the DC Circuit on the issue of whether the plaintiffs had sufficiently alleged that their injuries arose from the effect on US commerce. The plaintiffs had argued in the Supreme Court that because the market for bulk vitamins is global, the cartel would not have been able to raise prices in foreign markets without also raising prices in the US and that, therefore, their injuries were not independent of the effect on US commerce. On remand, the court of appeals is to consider whether plaintiffs preserved this argument and, if they did, whether such an indirect effect would be enough to establish jurisdiction and standing under the antitrust laws. By leaving this issue unresolved, the Court has left considerable uncertainty as to the scope of its decision, because it would be easy for foreign plaintiffs in multinational cartel cases to allege such indirect effects. The first lower court to consider this issue, the Second Circuit in *Sniado v Bank Austria AG* (2004 WL 1753473 (2d Cir Aug 4 2004)) held that the plaintiff in that case had not sufficiently alleged that there was any effect on US commerce that contributed to his injury. The issue is now before the DC Circuit in *Empagran* and should be decided there within the next year.

LePage's

Having adopted limiting principles for refusal-to-deal claims in *Trinko* and for the extraterritorial reach of the US antitrust laws in *Empagran*, the Court ducked an invitation to do likewise with respect to monopolization claims based on bundled discounts in *LePage's*. LePage's is a private label tape maker that brought a monopolization claim alleging that 3M had unlawfully used its monopoly on branded transparent tape to gain a competitive advantage in private label tape through the use

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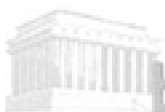
of bundled rebates – rebates that offered larger rebates when customers met sales targets across several 3M product lines or agreed to carry 3M tape exclusively. 3M countered that its rebates were legal because it never priced below cost, even if the total amount of all bundled rebates were allocated just to private label tape. Despite this argument, a jury found 3M liable and awarded LePage's more than $68 million in damages. A three-judge panel of the Third Circuit Court of Appeals reversed, agreeing with 3M that, because the discounts were above cost, an equally efficient rival could match those rebates and they could not, therefore, be anticompetitive. The Third Circuit, sitting *en banc*, reinstated the jury verdict.

Although the Supreme Court denies *certiorari* in most cases, its refusal to hear *LePage's* is disappointing. It leaves companies with large market shares at sea in designing discount programmes that comply with the antitrust laws. Bundled discounts, such as the ones offered by 3M, are nearly ubiquitous – from discounts on sports season tickets to corporate discounts on airline tickets – and consumers benefit from those discounts. Such discounts, so long as they are above cost, are unlikely to harm competition because they cannot, by definition, exclude equally efficient rivals. Allowing the Third Circuit's *en banc* decision to stand is likely to make firms with large market shares think twice about extending these types of discounts to consumers. The result will be to discourage large firms from sharing their greater efficiencies with customers through lower prices – an outcome directly at odds with the purposes of the antitrust laws.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