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The U.S. Supreme Court has now decided 14 antitrust cases in a row in favor of the defendant. But this does not indicate an embrace of the conservative Chicago School over the moderate Harvard School. To the contrary, on every issue the Court has addressed where those two schools are in conflict, the Supreme Court has sided with the Harvard School. It has also sided with sound antitrust economics rather than with formalisms favoring plaintiffs or defendants.

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After a long antitrust slumber, the U.S. Supreme Court has become active again in antitrust law, deciding seven cases in the last two years. Since all seven of these cases were decided against the plaintiff, one might think the Court has finally decided to implement the highly conservative Chicago School of antitrust. But so far, it shows no signs of doing so. Rather, while its opinions indicate a determination to cut back on some excesses from an earlier era of pro-plaintiff antitrust decisions, they also indicate an embrace of the moderate Harvard School approach to such issues, rather than an embrace of Chicago School principles. They further indicate a clear embrace of using sound economic analysis to resolve antitrust issues, rather than a resort to either the old formalisms that favored plaintiffs, or new formalisms that try to favor defendants.

My apologies in advance to other great universities for referring to the schools of antitrust thought as the Harvard and Chicago Schools. Many notable scholars who fit these schools are at neither university. I employ the Harvard and Chicago School terminology simply because it is in such widespread usage, and has a historical significance that helps convey the gist of two antitrust philosophies.

I. *Leegin* and Vertical Distributional Restraints

Let's start with *Leegin*, the case that finally overruled *Dr. Miles* and the per se rule against vertical minimum price-fixing.¹ If anything was a topic of consensus among the Harvard and Chicago Schools, it was the proposition that this rule of per se illegality was misguided. But unlike the Harvard School, Chicago School scholars generally take the next step of insisting the proper rule is per se *legality*.² The Supreme Court indicated no sympathy for this position in *Leegin*. To the contrary, it was only able to muster a 5-4 majority to overrule *Dr. Miles* at all, and even the majority stressed the need for "diligent" rule of reason scrutiny.³

Notwithstanding the sharply divided result, the Court was actually in unanimous agreement that the relevant antitrust economics indicated that vertical minimum price-fixing could have both anticompetitive effects and pro-competitive efficiencies.⁴ Given that this is the classic recipe for applying rule of reason review, what was the dispute about? Basically the dissent took the position that,

1 *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

2 Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 9, 23-26 (1981); ROBERT H. BORK, *THE ANTITRUST PARADOX* 288 (1978) ("every vertical restraint should be completely lawful"); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1700-01 (1986) ("Chicago School . . . seems to favor little other than prosecuting plain vanilla cartels and mergers to monopoly").

3 *Leegin*, 127 S. Ct. at 2719.

4 *Id.* at 2714-20; *id.* at 2727-30 (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

given the mixed economic theory, the case should be resolved, not by the traditional test for deciding whether to apply per se scrutiny, but rather by the empirical evidence or by the doctrine of stare decisis. Neither argument was persuasive, though the strongest grounds for rebuttal were missed by the majority. Those grounds are worth reviewing in detail because the persuasiveness of this holding remains relevant to states or other nations deciding whether to follow this decision, as well as to Congress in deciding whether to override it statutorily.

The empirical evidence stressed by the dissent was that:

- (1) during the period of the Fair Trade Acts, retail prices were higher in states that had passed statutes allowing vertical minimum price-fixing than in states that had not; and
- (2) retail prices were lower after repeal of those acts than before.⁵

The majority offered the true, but rather weak, response that higher prices might be pro-competitive if they were coupled with more services that consumers wanted.⁶ The more powerful response would have been that this empirical evidence addressed the wrong question, because it compared prices in states with per se illegality to prices in states with a rule of per se legality. A rule of per se legality is likely to allow more anticompetitive effects than a rule of reason that remains available to redress anticompetitive forms of the conduct. Thus, the price effects of switching from per se illegality to per se legality are not the same as switching from a rule of per se illegality to a rule of reason, which was the relevant issue here. These studies do, however, provide powerful empirical refutation of the Chicago School position favoring per se legality.

As for stare decisis, it seems rather late in the day to argue that judicial interpretations of antitrust laws should be governed by a strong rule of statutory stare decisis.⁷ As the majority correctly noted, the text of the U.S. Sherman Act incorporates capacious common law language that has long been thought to effectively delegate antitrust issues to the Courts for ongoing common law resolution.⁸ As a matter of practice, the Court, in fact, overrules antitrust decisions in common

5 *Id.* at 2727-28 (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

6 *Id.* at 2718-19.

7 See generally EINER ELHAUGE, STATUTORY DEFAULT RULES 211-24 (Harvard Univ. Press 2008) (forthcoming) (explaining theoretical basis for a fairly strong doctrine of statutory stare decisis, but noting the several grounds for exceptions to this basis and doctrine).

8 *Leegin*, 127 S. Ct. at 2720-21; ELHAUGE (2008), *supra* note 7, at 29, 215.

law fashion all the time.⁹ Indeed, in this very area, the Court had already overruled the per se rules against vertical maximum price-fixing and vertical non-price restraints.¹⁰ The dissent tried to argue that the statute repealing the Fair Trade Acts indicated a legislative preference for bringing back the per se ban on vertical minimum price-fixing,¹¹ but the majority was right that the repeal could more plausibly be read as indicating a preference for returning the issue to federal courts for common law resolution.¹²

The dissent fell back on the argument that this was too dramatic a doctrinal shift to be justifiable as gradual common law decision-making.¹³ The majority responded by noting that the decisions overruling the per se rules against vertical maximum price-fixing and vertical non-price restraints were based on reasoning that was equally applicable to the per se rule against vertical minimum price-fixing, and had left the latter a lonely outlier that did not seem to fit the surrounding doctrinal landscape.¹⁴ But that argument was not totally convincing because the mix of anticompetitive effects to pro-competitive ones was somewhat worse for vertical minimum price-fixing, and the per se rule against it had existed for five decades before the other vertical per se rules made their appearance on the antitrust law scene.¹⁵

Once again, I think the majority missed a more powerful argument. The bigger problem of doctrinal fit was that, given recent Supreme Court precedent, the per se rule against *horizontal* price-fixing no longer applies in cases where such price-fixing allegedly advances the pro-competitive purposes of a productive business relationship.¹⁶ Adhering to *Dr. Miles* would thus have meant having

9 See, e.g., *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006) (overruling the old doctrine that market power in a tying case could be inferred from the existence of a patent); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (overruling the doctrine that a corporation could conspire with a wholly owned subsidiary); *U.S. Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977) (holding that the per se rule against tying required independent proof of tying market power, even though prior cases had not required such proof).

10 See *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977) (overruling per se rule against vertical non-price restraints); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling per se rule against vertical maximum price-fixing).

11 *Leegin*, 127 S. Ct. at 2732-33 (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

12 *Id.* at 2723-24.

13 *Id.* at 2737 (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

14 *Id.* at 2721-22.

15 *Id.* at 2736-37. (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

16 The current horizontal doctrine is largely the product of three cases. In *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979), the Court held that the per se rule does not apply if horizontal price-fixing advances the pro-competitive purposes of a productive business relation. In

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antitrust law treat vertical minimum price-fixing that allegedly advances the pro-competitive purposes of a productive business relationship between a supplier and distributor *worse* than the law treats horizontal price-fixing that allegedly advances the pro-competitive purposes of a productive business relationship. While vertical minimum price-fixing may be marginally more likely to be anticompetitive than other vertical distributional restraints, there can be no doubt that it is far less likely to be anticompetitive than horizontal price-fixing. Thus, if horizontal price-fixing gets rule of reason scrutiny when it is allegedly ancillary to a productive business relationship, it would be perverse to give stricter scrutiny to vertical price-fixing, which is always ancillary to some permissible business relationship between the manufacturer and dealer.

As for the dissent's claim that overruling *Dr. Miles* would create a sea change in legal practice, the majority responded that enforcement of *Dr. Miles* was limited by two doctrines.¹⁷ First, under *Business Electronics*, ambiguous agreements (including even a vertical agreement to terminate a retailer because of price-fixing) were interpreted to constitute a vertical non-price agreement subject to rule of reason scrutiny rather than *per se* scrutiny.¹⁸ Second, under *Colgate* and *Monsanto*, if a supplier demanded that its dealers adhere to minimum resale prices and those dealers acquiesced by complying with the minimum resale prices, it was not deemed a vertical agreement at all.¹⁹

footnote 16 cont'd

Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), the Court made clear that the mere existence of some productive business relation was not sufficient to oust the *per se* rule. Rather, it held that the *per se* rule continues to apply if the price-fixing is not alleged to advance the pro-competitive purposes of that relationship. The fact that the price-fixing advances pro-competitive justifications that are unrelated to the productive business relationship does not create any exception to the *per se* rule. Then, in *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984), the Court held that the *per se* rule does not apply if the horizontal price-fixing or output restraint is alleged to advance the pro-competitive purposes of a productive business relation, although it also made clear that such an alleged connection might be rejected on possibly abbreviated rule-of-reason review. See generally EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW & ECONOMICS* 190-91 (Foundation Press 2007) (summarizing the current contours of the horizontal doctrine).

¹⁷ *Leegin*, 127 S. Ct. at 2721-22.

¹⁸ *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

¹⁹ *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

All true, but once again more powerful responses were left unmentioned. The reality is that there was little real enforcement of the per se rule against vertical minimum price-fixing. The reasons are plain once one considers the possible categories of litigants. U.S. enforcement agencies rarely, if ever, brought actions against vertical minimum price-fixing because they were persuaded by the economic critique of *Dr. Miles*. Rival manufacturers or retailers lack standing to bring suit against vertical minimum price-fixing, because they cannot show antitrust injury given that they would actually benefit if such an agreement caused other manufacturers or retailers to charge anticompetitively high prices.²⁰ Consumers do have antitrust standing, but to prove injury and damages they must prove a net anticompetitive effect, which requires satisfying an effective rule of reason that negated the practical advantage of any per se rule on liability. And, in fact, consumers hardly ever brought such suits.

The upshot was that the per se rule against vertical minimum price-fixing was generally invoked only by dealers themselves, as in *Leegin*, either in a suit brought to challenge their termination for noncompliance, or defensively to avoid enforcement of such an agreement. This did not provide that much enforcement where dealers were willing participants. It might even have produced the anticompetitive effect of making manufacturers reluctant to replace dealers who are performing poorly for other reasons, because those dealers could bring a lawsuit claiming their termination was for non-compliance with resale price agreements, taking advantage of a per se rule that did not require them to show any actual anticompetitive effect on the market. Ending such suits hardly seems like a big change, nor an unsalutary one.

Relatedly, the dissent also stressed reliance on the old per se rule.²¹ The majority responded by stating that:

- (1) reliance interests could not justify retaining an inefficient rule;
- (2) any reliance was fairly weak because doctrines like *Monsanto* allowed minimum prices to be fixed in other ways;
- (3) the fair trade laws meant vertical minimum price-fixing was legal in most states until 1975, thus making the length of time not that different from the overruled doctrine on vertical maximum price-fixing, and no more than 10 percent of goods were covered by vertical minimum price-fixing when it was legal.²²

²⁰ *Atlantic Richfield v. U.S.A Petroleum*, 495 U.S. 328 (1990).

²¹ *Leegin*, 127 S. Ct. at 2735-36 (Breyer, J, dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

²² *Id.* at 2724-25.

All these points could have been made more powerfully. The first point, the dissent noted, amounted to just bare assertion without reasoning.²³ But there is a strong theoretical basis for the majority's assertion, which it unfortunately failed to cite. Mainly, scholarship by academics like Professor Kaplow has shown that

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if a legal change would be efficient, then the law should require parties to bear the risk of legal change, rather than making their reliance a reason to avoid that change, because forcing parties to bear that risk produces the optimal level of reliance.²⁴ More recent work by Professor Shavell emphasizes that reliance may nonetheless provide grounds not to change the law when reliance increases the costs or reduces the benefits of a legal change, such as when a technological investment makes a shift to new pollution controls more costly or less beneficial.²⁵ The reason is that, in such cases, the reliance can alter whether the legal change is, in fact, efficient. Here, there seemed to be little reason to think that any reliance on the per se rule of illegality would alter whether efficiency would be advanced better by a rule of reason.

The second point was fine as far as it went, but could have been made more forcefully, given the lack of real enforcement, noted above, even for clear vertical minimum price-fixing. The third point was also accurate, but the dissent persuasively noted that 10 percent today would constitute US\$300 billion of trade—hardly chopped liver.²⁶ The stronger response would have been that the dissent offered no grounds to think that reliance meaningfully differed depending on whether the overruled doctrine had been around for 96 years, as in the present case, or for 10 or 29 years respectively, as with the per se rules against vertical non-price and maximum price restraints that were overruled in *GTE Sylvania* and *Khan*. One would think that any meaningful economic reliance at the time of an overruling decision would likely have been incurred within the prior ten years.

So, it seems clear that, under standard Harvard School principles, the majority was right to overrule the per se rule against vertical minimum price-fixing. The puzzle is what provoked a vigorous dissent from Justice Breyer; one of the world's most sophisticated antitrust justices, whose opinions generally have been fully

23 *Id.* at 2735 (Breyer, J, dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

24 See ELHAUGE (2008), *supra* note 7, at 306-07 (summarizing literature and its implications for reliance arguments in statutory interpretation).

25 *Id.* at 307-08.

26 *Leegin*, 127 S. Ct. at 2735-36 (Breyer, J, dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

within the Harvard School. Part of the reason may be that the majority failed to express the stronger grounds for its conclusion that I just described. But the fact that Breyer's dissent referred no less than six times to the stare decisis considerations that were cited in a case about restrictions on issue-advocacy ads by a right-to-life group made one wonder whether the *Leegin* case had gotten mixed up with larger political disputes about abortion and campaign finance regulation.²⁷

In any event, several features of the Court opinion made clear that it was embracing only the moderate Harvard School critique of *Dr. Miles*, and not the more extreme Chicago School critique. The Chicago School critique rests largely on the notion that, because manufacturers generally want to minimize retail markups, they have optimal incentives to weigh any adverse effects on retail markups against any pro-competitive efficiencies. Thus, that School argues, a rule of per se legality would be better because courts are unlikely to weigh the anticompetitive and pro-competitive effects better than manufacturers with optimal incentives. The Court recognized that this was true "in general" and "usually," but not always.²⁸ Instead, the Court emphasized that manufacturers would lack optimal incentives when vertical minimum price-fixing helped facilitate price coordination among manufacturers or the vertical exclusion of smaller rivals, and that vertical minimum price-fixing might reflect the incentives of retailers, which are not pro-competitive.²⁹ If vertical minimum price-fixing were really per se legal, then such anticompetitive usages of it (which are possible without any horizontal agreement) would be immune from antitrust enforcement.

Far from embracing the Chicago School position that vertical minimum price-fixing should be per se legal, the Court affirmatively stated that "[v]ertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects."³⁰ Nor did the Court advocate a lax version of the rule of reason that could amount to a de facto rule of per se legality. To the contrary, the Court stressed that "resale price maintenance . . . does have economic dangers," and that in applying the rule of reason, courts "have to be diligent in eliminating their anticompetitive uses from the market."³¹

The Court's statements about how rule of reason review should be conducted reflected a further rejection of Chicago School principles. *Leegin* suggests various

27 *Id.* at 2731, 2734-35, 2737 (Breyer, J, dissenting, joined by Stevens, Souter & Ginsburg, JJ.) (citing six times to *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (Scalia, J., concurring in part and concurring in judgment)).

28 *Leegin*, 127 S. Ct. at 2718-19.

29 *Id.* at 2716-17.

30 *Id.* at 2717.

31 *Id.* at 2719.

things about how to conduct rule-of-reason analysis in future vertical minimum price-fixing cases. One is to dismiss cases where “only a few manufacturers lacking market power adopt the practice,” but to use more careful scrutiny “if many competing manufacturers adopt the practice.”³² This is quite similar to the long-established approach for vertical exclusionary restraints like exclusive dealing, where Supreme Court precedent dictates aggregating the shares covered by similar vertical restraints by other manufacturers in concentrated markets.³³ But Chicago School adherents have wrongly sought to change this well-established aggregation standard, based largely on odd formalisms.³⁴ A more balanced economic approach, going back to Harvard School exemplar Professor Areeda, shows that aggregation is, instead, the correct approach when the manufacturers are large players in concentrated markets.³⁵ *Leegin* indicates that the Supreme Court has not only rejected the Chicago School efforts to overrule this aggregation doctrine, but has extended the doctrine to vertical minimum price-fixing.

What lies in the future? One nice feature of *Leegin* is that it eliminates the need to continue drawing the confusing *Business Electronics* distinction between vertical price-fixing agreements and agreements to terminate dealers because of price-fixing, because both now get the same rule-of-reason scrutiny. Perhaps it is

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not too much to hope that *Leegin* might also eliminate the arguably even more confusing *Monsanto* distinction between vertical agreements and manufacturer demands followed by dealer acquiescence. That distinction was always hard to make sense of, given that demands and acquiescence could well suffice to show a binding legal contract, and especially given that *Monsanto* itself found an agreement even though the evidence in that case showed nothing but demands followed by acquiescence.³⁶ To the extent that the *Monsanto* distinction

made any sense at all, it seemed driven by a desire to narrow a per se rule that lacked a sound economic basis, and by a general sense that vertical price-fixing was less likely to be anticompetitive if initiated by the manufacturer. By overruling the per se rule, *Leegin* eliminates the motive to narrow that rule by finding non-agreements. Further, *Leegin* suggests that, rather than driving find-

³² *Id.*

³³ See ELHAUGE & GERADIN (2007), *supra* note 16, at 516-17 (collecting sources).

³⁴ *Id.* at 516 n. 20.

³⁵ *Id.* at 517-19.

³⁶ *Id.* at 794-95.

ings of non-agreement, whether the manufacturer or dealer initiated the vertical price-fixing restraint should instead be a factor considered in determining whether the restraint was likely to be anticompetitive under the rule of reason.³⁷

Softening the legal effect of who initiated the restraint makes sense. Even if a dealer initiated the restraint, dealers have incentives to offer terms that they think manufacturers will find efficient and profitable. Further, even if a manufacturer initiated the restraint, any individual manufacturer has incentives to get dealers to carry its products by offering terms it knows a powerful dealer or dealer cartel will find profitable, even if those profits come at the expense of consumer welfare. Moreover, the Court itself acknowledged that manufacturers could have their own anticompetitive incentives for imposing vertical minimum price-fixing.

II. *Weyerhaeuser* and Predatory Buying

Next consider *Weyerhaeuser*, the case that held that proving predatory buying requires evidence that the defendant overpaid so much for the inputs that the price of the predator's output was below cost.³⁸ This holding fit very well with the traditional Harvard School test, dating back to Professors Areeda and Turner, which requires evidence that predatory pricing be below cost.³⁹ But it fit very poorly with the traditional Chicago School argument that predatory pricing should be per se legal.⁴⁰

One might argue that stare decisis made the Court reluctant to adopt a rule of per se legality. But we have seen above that the stare decisis doctrine usually poses little constraint in antitrust cases. Further, stare decisis did not apply here at all because there was no Supreme Court precedent on predatory buying, just on predatory selling. The Court had the ready ground for distinction that predatory buying is, if anything, less likely to be harmful to consumers than predatory pricing, because it may be designed to create upstream monopsony power that might not meaningfully affect the downstream prices paid by consumers. Indeed, had the Court simply held that a predatory buying claim required proof that the conduct was likely to allow recoupment through enhanced monopoly power in

³⁷ *Leegin*, 127 S. Ct. at 2719-20.

³⁸ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, 127 S. Ct. 1069 (2007).

³⁹ Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Einer Elhaug, *Why Above-Cost Price Cuts to Drive out Entrants Do Not Signal Predation or Even Market Power – and the Implications for Defining Costs*, 112 YALE L.J. 681 (2003).

⁴⁰ BORK (1978), *supra* note 2, at 154; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 927 (1979); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

the downstream output market, that would have effectively eliminated any distinctive claim for predatory buying, because such a claim would require proof of the same elements that already prove predatory pricing:

- (1) below-cost pricing in the output market; and
- (2) a sufficient likelihood of recoupment through enhanced monopoly power in the downstream output market.

One might also object that the lawyers did not argue that predatory buying should be *per se* legal, just as they did not argue that vertical minimum price-fixing should be *per se* legal. But lawyers make arguments that they think will succeed, so if they did not make those arguments it must reflect their assessment that the Court would be unreceptive to them.

Other features of the opinion confirmed the Supreme Court's moderate, unconservative approach, to antitrust law. First, conservatives sometimes take the view (especially in merger cases) that because monopsony power lowers prices, it should be deemed less problematic than monopoly power. The *Weyerhaeuser* Court gave us a ringing rejection of this view, explicitly holding that it regarded monopsony and monopoly power as equivalent problems.⁴¹

Second, antitrust conservatives often take the view that antitrust law should not condemn conduct that creates anticompetitive effects upstream if that conduct could not have any anticompetitive effect downstream in consumer markets, and thus could not harm consumer welfare. The Court squarely rejected this theory, holding that it would suffice to prove illegal predatory pricing to prove both:

- (1) that input prices were bid up to a level that made the output below cost; and
- (2) that the defendant had a dangerous probability of recouping those losses with enhanced monopsony power in the upstream input market.

Weyerhaeuser thus makes it unnecessary to show that the predatory buying would impair rivals in the downstream output market enough to lead to the sort of enhanced monopoly power in that market that would lead to higher consumer prices.

For example, in *Weyerhaeuser* the input market for logs was regional, whereas the output market for finished lumber seems to have been national. The defendant, *Weyerhaeuser*, may not have had any monopoly power in the national output market, its conduct may not have affected national output prices at all, and eliminating one small rival like *Ross-Simmons* may not have enabled it to recoup any lost profits in the national output market. In contrast, in the regional input market for logs in the northwestern United States, *Weyerhaeuser* had a 65 percent buyer share and plausible monopsony power, it had allegedly raised

⁴¹ *Weyerhaeuser*, 127 S. Ct. at 1076.

prices on that input market, and driving rivals out of that regional input market might have allowed it to recoup lost profits by paying the regional mills a low monopsony price in the future. The Court held that proof of the latter would suffice, without any need to prove recoupment or the risk of higher prices in the downstream national output market. This holding, that upstream market harm suffices, was fully in line with past Supreme Court precedent on buyer cartels, and with lower court cases on buyer mergers.⁴² But *Weyerhaeuser* was the first Supreme Court case to confirm that this notion also applied to unilateral buyer conduct.

This holding also has clear implications for a price-squeeze claim. A predatory buying claim resembles a price-squeeze claim in that, in both instances, the defendant allegedly inflated input prices and left too small a differential between the upstream input price and the downstream output price for rivals to survive. Further, some older lower court decisions on price squeezes utilized a vague test quite similar to the lower court test that the *Weyerhaeuser* Court rejected: their test required only that the upstream price be higher than a fair price and make it hard for the actual rivals to compete.⁴³ The *Weyerhaeuser* decision indicates that the Court is likely to embrace the position that a price-squeeze claim should require evidence that the price differential between the upstream and downstream prices is lower than the defendant's incremental costs of engaging in the downstream activities.⁴⁴

THE *WEYERHAEUSER* DECISION INDICATES THAT THE COURT IS LIKELY TO EMBRACE THE POSITION THAT A PRICE-SQUEEZE CLAIM SHOULD REQUIRE EVIDENCE THAT THE PRICE DIFFERENTIAL BETWEEN THE UPSTREAM AND DOWNSTREAM PRICES IS LOWER THAN THE DEFENDANT'S INCREMENTAL COSTS OF ENGAGING IN THE DOWNSTREAM ACTIVITIES.

42 See *Mandeville Island Farms v. American Crystal Sugar*, 334 U.S. 219 (1948) (condemning a buying cartel in a regional sugar beet market without any proof that it would have a price effect on the downstream national market in refined sugar); *U.S. v. Pennzoil*, 252 F. Supp. 962 (D. Pa. 1965) (condemning a merger that created local monopsony power in Pennsylvania crude oil market even though it seemed unlikely to affect output in the downstream worldwide market for refined oil); *U.S. v. Rice Growers Ass'n*, 1986-2 Trade Cas. (CCH) ¶ 67,288 (E.D. Cal.) (condemning a merger that created local monopsony power in California paddy rice market even though it seemed unlikely to affect output in the downstream worldwide market for milled rice); ELHAUGE & GERADIN (2007), *supra* note 16, at 1013 ("Even without higher prices in a downstream market, the creation of monopsony power remains anticompetitive in the upstream market and harmful to sellers in it").

43 See *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 808-11 (3d Cir. 1984).

44 ELHAUGE & GERADIN (2007), *supra* note 16, at 457-58 (advocating this position and showing that other U.S. appellate courts, and prominent EC judgments, have adopted such a position).

III. *Twombly* and Horizontal Collusion

In *Twombly*, the Court made it clear that interdependent parallel conduct, or mere oligopolistic coordination, does not suffice to show an antitrust conspiracy under U.S. law.⁴⁵ This was widely understood before, but surprisingly had never been explicitly decided in prior Supreme Court decisions.⁴⁶ *Twombly* further held that a Sherman Act Section 1 complaint should be dismissed if it alleged only parallel conduct coupled with a bare assertion that a conspiracy existed. Some specific fact additional to parallel conduct (often called a “plus factor”) must not only be ultimately proven, but alleged in the complaint. This was the widespread practice of lower courts on pleading standards for antitrust conspiracies, but arguably conflicted with some older Supreme Court case law that stated a complaint should not be dismissed unless there was no doubt the plaintiff could prove no set of facts that would support his claim.

Twombly offered little guidance on what the necessary plus factors might be. My own reading is that other Supreme Court case law indicates that the requisite additional evidence could be provided not only by direct evidence of a conspiracy, but also by evidence that indicates that the parallel conduct either was implausible without an explicit agreement or followed common invitations or secret meetings.⁴⁷ The lower courts have sometimes gone beyond this to suggest that the requisite plus factor could be shown by a “motivation for common action”—that is, by some indication that the firms would have a disincentive to engage in the conduct unless others did the same.⁴⁸ The problem is that this plus factor is true for cases of pure oligopolistic coordination, when no conspiracy is inferred. Another plus factor the lower courts have sometimes used is evidence of adverse economic performance, like excessive prices or profits. But again this is true in cases of pure oligopoly. Thus, such plus factors now seem insufficient after *Twombly*.

All the above is consistent with the Harvard School, which has long concluded that antitrust law should not condemn oligopolistic coordination because firms in oligopolistic markets cannot avoid knowing that their prices are interdependent when each firm sets its own prices, and so it would be hard to define any prohibition in a way that tells firms how to behave.⁴⁹ However, it conflicts with Judge Posner’s Chicago School view that supra-competitive pricing by an

45 *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1964 (2007).

46 See ELHAUGE & GERADIN (2007), *supra* note 16, at 837.

47 See *id.* at 801-02.

48 See PHILLIP AREEDA, LOUIS KAPLOW, & AARON EDLIN, *ANTITRUST ANALYSIS* 226–31 (6th ed. 2004).

49 See Donald F. Turner, *The Definition of Agreement Under the Sherman Act*, 75 HARV. L. REV. 655 (1962).

oligopoly should be an antitrust violation, in part because he thinks it is unlikely to occur without an actual agreement.⁵⁰ The *Twombly* opinion's continued embrace of a per se rule for horizontal price-fixing also conflicts with Judge Easterbrook's Chicago School position that such agreements should not be illegal unless the conspirators are first proven to have market power.⁵¹

Perhaps the most interesting feature of *Twombly* is that it recognizes that oligopolistic coordination need not involve coordination on price, but can involve coordination on a strategy of not moving into the areas where rivals compete.⁵² This is important because antitrust conservatives often incorrectly assume that oligopolistic coordination and unilateral effects on a differentiated market are mutually exclusive theories. This erroneous assumption rests on the implicit premise that the only relevant coordination is coordination on price, a form of coordination that is difficult unless product offerings are homogeneous, which by definition cannot be true in a differentiated market, where firms have different geographic locations or product characteristics that have varying attractions to different consumers.

Twombly acknowledges that, rather than coordinate on price, firms might coordinate on a strategy of maintaining their differentiated status. If a market exhibits geographic differentiation, then (without any actual agreement) firms might nonetheless coordinate on a policy of not invading the geographic areas of other firms. When a market features product or brand differentiation, firms can coordinate on a policy of not moving into the "spatial" location of the other brands (i.e., refraining from adopting similar characteristics or brand advertising and pricing points). Thus, a merger on a differentiated market might be condemned on the ground that the merger makes it easier to coordinate on maintaining product or geographic differentiation. Proof of a differentiated market thus no longer undermines a theory of oligopolistic coordination.

IV. *Credit Suisse* and the Scope of Antitrust Law

Credit Suisse may be the least-heralded of this term's Supreme Court decisions, but is probably the most important because it has implications for the scope of *all* antitrust doctrines. In this case, the Court held that federal securities law precludes the application of antitrust law when the two are "clearly incompatible" given:

50 See Richard A. Posner, *Oligopoly and the Antitrust Laws*, 21 *STAN. L. REV.* 1562 (1969).

51 See Frank H. Easterbrook, *The Limits of Antitrust*, 63 *TEXAS L. REV.* 1 (1984), reprinted in 1(1) *COMPETITION POL'Y INT'L* 179 (2005). My own view is that, given costs and errors in adjudicating market power, a market power screen would worsen underdeterrence problems without lowering overdeterrence because naked horizontal price-fixing has no pro-competitive justification. ELHAUGE & GERADIN (2007), *supra* note 16, at 105-06.

52 *Twombly*, 127 S. Ct. at 1972.

“(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; . . . (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct . . . [and] (4) [that] . . . the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.”⁵³

The Court emphasized that the possible conflict need not be a present one. Even if the federal securities agency currently prohibits precisely the same conduct that antitrust law prohibits, it suffices for an antitrust exemption that, in the future:

- (a) the agency could create a conflict by choosing to exercise its regulatory authority differently; or
- (b) the agency and antitrust courts might interpret or apply their similar prohibitions differently.⁵⁴

None of this deviated much from the implied exemption law of past cases. If the *Credit Suisse* test can be generalized to areas outside of SEC cases, it indicates that an implied antitrust exemption applies if:

- (1) a federal non-antitrust agency has an exercised power to regulate the relevant conduct; and
- (2) current or future agency choices about how to exercise or apply that power might create a risk of a conflict with antitrust standards on conduct that is squarely within the core area covered by the non-antitrust law.

Two features indicated, however, that the Court was trying to cabin this implied exemption doctrine a bit. First, limiting any implied exemption to the core areas covered by non-antitrust laws indicated a potential narrowing of implied exemption law. Second, the Court suggested in several places that the potential-conflict exemption test might be unique to securities law.⁵⁵ Perhaps in the future we will talk of a “securities exemption” in the same way that we now talk about the labor or insurance exemptions, that is, as a *sui generis* exemption doctrine with its own elements that do not extend to other sorts of cases.

53 *Credit Suisse Securities v. Billing*, 127 S. Ct. 2383, 2392 (2007).

54 *Id.* at 2390-91, 2394-96.

55 *Id.* at 2389, 2392.

One can see why the Court was worried about applying this standard outside of securities cases. Given the extent of modern federal regulation, it may well be the case that, in most of our economy, some agency has the power to regulate some conduct that might also constitute an antitrust violation. If all such conduct were exempt from antitrust scrutiny, then there could well be little left to the antitrust laws. Further, usually the U.S. Congress has authorized the relevant agency to regulate the conduct in some more limited way, or based on more limited standards that are unrelated to competitive concerns. It seems implausible that in such cases Congress really meant to oust antitrust review, or that doing so would be socially desirable. Instead, Congress may well have intended to express even more concern about the relevant conduct, by indicating it was undesirable not only under competition standards, but under other normative standards as well. In any event, nothing in this opinion indicated any embrace of Chicago School principles, which, if anything tends to be hostile to regulation on the ground that it is likely to reflect anticompetitive interest group capture.⁵⁶

GIVEN THE EXTENT OF MODERN FEDERAL REGULATION, IT MAY WELL BE THE CASE THAT, IN MOST OF OUR ECONOMY, SOME AGENCY HAS THE POWER TO REGULATE SOME CONDUCT THAT MIGHT ALSO CONSTITUTE AN ANTITRUST VIOLATION. IF ALL SUCH CONDUCT WERE EXEMPT FROM ANTITRUST SCRUTINY, THEN THERE COULD WELL BE LITTLE LEFT TO THE ANTITRUST LAWS.

V. Prior Terms

One might think all the above is just an aberration, reflecting the particular cases decided this term. But the same general conclusion holds for other Supreme Court cases decided in recent terms. In 2006, the Court decided three cases, *Texaco*, *Volvo*, and *Illinois Tool Works*. In *Texaco Inc. v. Dagher*, the Court held that it was not per se illegal for an otherwise lawful joint venture to set the prices at which it sells its products.⁵⁷ This case raised no split between the Chicago and Harvard Schools, given that both schools treat joint ventures under the rule of reason, especially since setting prices for the jointly made products was an unavoidable feature of the joint venture.⁵⁸

⁵⁶ BORK (1978), *supra* note 2, at 347-64; Frank H. Easterbrook, *The Supreme Court, 1983 Term-Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 51-54 (1984).

⁵⁷ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

⁵⁸ See ELHAUGE & GERADIN (2007), *supra* note 16, at 96-97 (noting that the price-fixing would be joint even if the joint venture set different prices for the two brands).

In *Volvo*, the Court held that the Robinson-Patman Act prohibition on anti-competitive price discrimination does not apply unless the discrimination is between dealers selling to the same customer.⁵⁹ Again, the case raised no real split between the Harvard and Chicago Schools, both of which disdain current Robinson-Patman Act law because, under *Morton Salt*, it infers an anticompetitive effect from the mere existence of secondary-line price discrimination.⁶⁰ Although both schools treat that law as bad economics required by a misguided populist statute, the oddity is that, in fact, the statutory text is explicitly contrary to this conclusion in *Morton Salt*.⁶¹ Perhaps in the future, a proper textualist interpretation of the Robinson-Patman Act will restore it to a state of economic rationality.

The third case, *Illinois Tool Works*, held that the market power necessary to prove illegal tying must be directly proven, rather than inferred from the mere existence of a patent.⁶² This holding was once again squarely within the Harvard School, which had long advocated the same position,⁶³ as was the Court's suggestion that pro-competitive justifications might be admissible in a tying case.⁶⁴ However, the opinion nowhere suggested any enthusiasm for overruling the doctrine that tying could be illegal based on market power in the tying product, without proof of substantial foreclosure in the tied product.⁶⁵ Even less did it indicate any inclination to adopt the Chicago position that tying should be treated as per se legal.⁶⁶ Which is all to the good, because modern economic analysis shows that the Chicago position that tying could not increase monopoly profits is based on limited assumptions that seldom apply to real markets.⁶⁷

59 *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

60 *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

61 See ELHAUGE & GERADIN (2007), *supra* note 16, at 758, 772.

62 *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

63 See PHILLIP AREEDA, EINER ELHAUGE, & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1737 (1996).

64 See ELHAUGE & GERADIN (2007), *supra* note 16, at 553 (discussing this language from *Illinois Tool*); AREEDA ET AL. (1966), *supra* note 63, at ¶ 1760 (1996) (arguing that justifications should be admissible).

65 See ELHAUGE & GERADIN (2007), *supra* note 16, at 545-48, 553 (noting that this doctrine makes sense if antitrust doctrine takes the view that either price discrimination or squeezing out consumer surplus is anticompetitive).

66 See BORK (1978), *supra* note 2, at 380-81; Posner (1979), *supra* note 40, at 926.

67 See ELHAUGE & GERADIN (2007), *supra* note 16, at 544-51.

2005 saw no Supreme Court antitrust cases. In 2004, there were three. *Empagran* held that the U.S. antitrust laws did not apply to a claim of anticompetitive injuries suffered in foreign nations that were independent of any U.S. effects.⁶⁸ *Flamingo* held that the U.S. Postal Service could not be an antitrust defendant.⁶⁹ Both were jurisdictional issues on which there was no Harvard-Chicago split. *Trinko* was more substantive, holding that a monopolist's duty to deal did not extend to cases where the monopolist had not voluntarily offered the relevant product on the demanded terms to either the plaintiff or anyone else in the past.⁷⁰ But the Court did not adopt the position of many Chicago School scholars that unilateral refusals to deal should be per se legal.⁷¹ Indeed, far from overruling the *Aspen* duty to deal, it held that *Aspen* was "at or near the outer boundary" of the antitrust duty to deal, thus not only confirming its continued validity, but also indicating that such a duty might even be extended beyond *Aspen*.⁷²

And before 2004? From 2000-2003, there were no Supreme Court antitrust decisions, and there were only four from 1994-1999, none of which raised any conflict between the Harvard and Chicago schools. In 1999, *California Dental* held that abbreviated rule of reason condemnation could not be applied when the defendants offered a theoretically plausible pro-competitive justification for their restraint on advertising.⁷³ In 1998, *Discon* held that the per se rule against boycotts did not apply to a vertical agreement to refuse to deal with a third party.⁷⁴ In 1997, *Khan* overruled the per se rule against vertical maximum price-fixing.⁷⁵ Finally, the 1996 *Brown* case held that the labor exemption applied to agreements between employers that were engaged in collective bargaining with unions.⁷⁶ The Harvard School is consistent with all of these positions, and I know of no place where the Chicago School has taken a contrary position.

68 *F. Hoffmann-la Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162–63 (2004).

69 See *United States Postal Service v. Flamingo Indus. (U.S.A) Ltd.*, 540 U.S. 736 (2004).

70 See *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 409 (2004).

71 See RICHARD A. POSNER, *ANTITRUST LAW* 242-44 (2d ed. 2001); Easterbrook (1986), *supra* note 2, at 1700-01.

72 *Trinko*, 540 U.S. at 409. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

73 See *California Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999). See generally ELHAUGE & GERADIN (2007), *supra* note 16, at 190-91 (explaining how *California Dental* fits within the doctrinal landscape of horizontal restraint cases).

74 *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

75 *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

76 *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

VI. Conclusion

Since 1994, every U.S. Supreme Court antitrust case has been consistent with the rule that the antitrust defendant always wins. That is a remarkable fourteen cases in a row. But none has ever sided with the Chicago School over the Harvard School on any issue in which the two are in conflict. To the contrary, to the extent the Supreme Court has picked sides in this debate, it has always sided with the Harvard School. Last year's term was no exception.

Although I have not done so here, one could extend this analysis to every Supreme Court case since the 1970's, when the Chicago-Harvard split became clear. None of this is to deny that the reasoning of Chicago School theorists has often been quite influential with the Court, and has been highly valuable in helping move the Court away from some of the ill-founded anti-defendant positions established during earlier formalist periods. But when it comes to actual conclusions, the Court has been much more comfortable with the moderate prescriptions of the Harvard School than with the radical revolution advocated by the Chicago School. ▼