

## High Court Antitrust Trends - Sans Stevens

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With the impending retirement of Justice John Paul Stevens, the Supreme Court is not only losing its senior member but also its preeminent antitrust expert. In his prior career, Justice Stevens was a private antitrust lawyer in Chicago, and briefly taught antitrust law at the University of Chicago. Justice Stevens was the author of many important antitrust decisions, including: *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (invalidating the NCAA's restrictions on licensing of college football telecasts); *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (requiring market power and foreclosure of a substantial volume of commerce in order to find a tying violation); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (clarifying standard for unlawful monopolization); and the recent decision in *American Needle, Inc. v. National Football League*, No. 08-661, \_\_\_ U.S. \_\_\_, (May 24, 2010) (rejecting the NFL's single entity defense and holding its product licensing agreements subject to the Rule of Reason).

Although Justice Stevens is sometimes credited (or blamed) for encouraging the Court to embrace the Chicago School approach to antitrust and economic issues, there is no doubt that he has been on the pro-enforcement end of the spectrum on the Court, particularly in recent years as the Court has become increasingly conservative.

Solicitor General Elena Kagan, assuming that she is confirmed as Justice Stevens' replacement on the Court, is unlikely to exert nearly as powerful an influence on antitrust jurisprudence. She would not bring an antitrust background to the Court, and her views about antitrust enforcement are sketchy at best, although perhaps they will be fleshed out at her confirmation hearing. It would not be surprising if Ms. Kagan, at least initially, largely defers to the views of other Justices on the Court's so-called "liberal" wing who have a broader background in antitrust or in business litigation, such as Justices Breyer and Sotomayor. The current balance of the Court in antitrust cases is unlikely to be shifted by Ms. Kagan.

*American Needle* was the first plaintiffs' victory in the Court in nearly twenty years, and broke a string of well over a dozen defense victories. Surprisingly, in light of the frequent divisions among the Justices in other high-profile cases, the opinion was unanimous. However, *American Needle* is probably not the beginning of a swing of the pendulum back in favor of antitrust plaintiffs. The NFL clearly overreached with its single-entity defense, and the Court's holding that the challenged conduct must be evaluated under the Rule of Reason was not surprising. Moreover, one suspects that the imminent

retirement of Justice Stevens may have had something to do with his fellow Justices' unanimous endorsement of his last major antitrust opinion.

The pro-defense tilt of the Court in antitrust cases is likely to continue, particularly in private cases, because a significant majority of today's Court is not at all sympathetic to antitrust plaintiffs. This was not always the case. In the past, the Supreme Court often emphasized the fundamental role of private litigation in the enforcement of the antitrust laws. "Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). "The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). "Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); and "[b]y offering potential litigants the prospect of a recovery of three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'" *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 262 (1972).

Government antitrust enforcers still sometimes rely on private litigation to compensate victims of antitrust violations, and defendants have avoided paying restitution to cartel victims by invoking their exposure in parallel civil litigation. For example, recent criminal plea agreements approved by courts in the Air Cargo and LCD cartel investigations did not require the defendants to provide restitution to the cartel victims, because of the existence of parallel class action litigation. See, e.g., Plea Agreement, *United States v. Societe Air France, et al.*, Case No. 08-CR-00181 (D.D.C.) (July 22, 2008) at ¶ 11; Plea Agreement, *United States v. LG Display Co., et al.*, Case No. 08-CR-0803 (N.D. Cal.) (Dec. 8, 2008) at ¶ 12 (\$400 million criminal fine for price-fixing LCD display panels, but no restitution sought by the government "[i]n light of the civil class action cases filed against the defendants").

In recent years, however, far from issuing paeans to the virtues of private antitrust enforcement, the Court more often has expressed concerns about the supposed abusive potential of private litigation to deter pro-competitive conduct, and the powerlessness of courts to prevent it. See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559, 560 n. 6 (2007) (announcing a heightened pleading standard, and stating that "the threat of discovery abuse will push cost-conscious defendants to settle even anemic cases... Given the system we have, the hope of effective judicial supervision is slim."); *Credit Suisse Sec. (USA) LLC v. Billings*, 551 U.S. 264, 282 (2007) (holding that the securities laws impliedly preempted an antitrust claim, and stating that "...antitrust courts are likely to make unusually

serious mistakes..."); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 904 (2007) (overruling the longstanding per se rule against resale price maintenance, and calling it “a flawed antitrust doctrine that serves the interests of lawyers...”)

Justice Stevens did not share these views. He wrote the dissenting opinion in *Twombly*, and joined Justice Breyer’s dissenting opinion in *Leegin*. He concurred in the judgment in *Credit Suisse*, but criticized the majority’s reliance on the so-called “burdens of antitrust litigation” and the potential for antitrust courts to make “serious mistakes,” stating that in his view these considerations should play no role in the analysis. *Credit Suisse*, 551 U.S. at 287 (Stevens, J., concurring in the judgment).

The assertions that private antitrust litigation deters pro-competitive conduct and that the *in terrorem* threat of treble damages and massive class action liability forces defendants to settle clearly frivolous cases, while accepted as givens by conservative commentators and judges, have been criticized because they lack empirical support. See, e.g., Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. Law Rev. 879 (2008); *Restoring the Legitimacy of Private Enforcement*, in *The Next Antitrust Agenda: The American Antitrust Institute’s Transition Report on Competition Policy to the 44<sup>th</sup> President*, 219-246 (Albert A. Foer, ed., 2008).

It is significant that *Twombly* was decided by a 7-2 majority, with a majority opinion authored by Justice Souter. Justice Breyer, another member of what is commonly considered the liberal wing of the Court, authored the majority opinion on behalf of six justices in *Credit Suisse*. Obviously, whatever the empirical support may be, the concerns about the potential abuses of private litigation and their potential to chill pro-competitive conduct are shared by a solid majority of the current Court. As long as that is the case, private plaintiffs can continue to expect rough going. While someone like Judge Diane Wood of the Seventh Circuit, who has an extensive background with antitrust issues, might have bucked this trend had she been appointed, it is less likely that Elena Kagan will do so.

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