

ANTITRUST LITIGATOR



THE SUPREME COURT'S RENEWED INTEREST IN ANTITRUST AND INTELLECTUAL PROPERTY LAW

BY: JAMES C. HO*

My first observation is that this is not just a new court – it is also a newly polarized court. It's often said that a new justice means a new court. That is doubly true here. But although our new Chief enjoyed somewhat of a honeymoon period during October Term 2005, that appears to have ended this Term. More than a third of the 67 signed decisions issued this Term were decided by a 5-4 vote – a greater rate of division than in any recent term.

Moreover, the battle lines on the Court have hardened. Of the 23 cases decided by a 5-4 vote, 19 of them fell along traditional coalition lines. Remarkably, Justice Kennedy enjoyed a perfect 23 for 23 record in cases decided on a 5-4 vote.

Even Justice O'Connor never enjoyed such a perfect record during her 24 years on the Court. And of 67 signed opinions this Term, Justice Kennedy was on the winning side in all but 2.

The second observation I would like to make is about our two new justices and how they are relating to their new colleagues. In particular, I want to note their approach to precedent.

On the one hand, the two new justices are generally voting on the same side as Justices Scalia and Thomas. That itself is, of course, a noteworthy development. In particular, the replacement of Justice O'Connor with Justice Alito has already

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begun to have a major impact on a wide range of issues. As Justice Breyer said on the last day of the Term: "It is not often in the law that so few have so quickly changed so much." He uttered those words in the context of reading his dissent from two school integration decisions, but he could have easily been describing the entire Term.

But just because they are voting on the same side doesn't mean they are voting in the same way. And perhaps the biggest difference between our two new justices and Justices Scalia and Thomas is their approach to precedent. Put simply, they have been, at least to date, much less inclined to overrule precedents than Justices Scalia and Thomas.

The final general observation I want to make is to note the size of the docket. On the one hand, it has been a remarkably diverse docket this Term – covering a broad cross section of the legal landscape, if not of American life. But this Term's docket of argued cases, although wide-ranging, was also far from full. During the Chief's first Term, the Court decided, by one count, just 71 cases with signed opinions – the lowest since the Civil War – and fewer than half the number argued and decided as recently as the mid-1980s. And the current Term resulted in just 67.

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How do these three observations apply to the Court's business docket? In many ways, they seem to apply in reverse.

First, despite the Court's generally shrinking docket, there has actually been a remarkable uptick in antitrust and intellectual property rulings in recent years. The Court has decided a remarkable seven antitrust cases over the past two Terms – making these last two Terms the most active antitrust years at the Court since October Term 1992, when the Court decided four antitrust cases. The Court has also taken on five patent cases in the past two Terms. All

told, about half of this Term's docket involved issues relating in some substantial way to business. That is particularly remarkable given that it was just a few years ago that leading Supreme Court practitioners were regularly complaining about the Court's declining business docket.

I've also noted the greater polarization on the Court. But despite polarization in other areas, the Court's business docket appears to be consistently bringing the Court together. There is an emerging consensus on the Court that is

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increasingly skeptical of new theories of liability against corporate defendants. This skepticism is reflected in a number of the Court's rulings this Term – including decisions that increase policing of inadequately pleaded complaints filed against corporations, and that narrow the substantive scope of causes of action against big business, in areas ranging from antitrust to securities law to the False Claims Act. As Robin Conrad, the executive vice president of the National Chamber Litigation Center, proclaimed on behalf of the business community: "It's our best Supreme Court Term ever."

For example, in the seven antitrust cases decided over the past two Terms, the

Court rejected the antitrust claim in every one – by a combined vote of 51-9. If you remove the one antitrust case that was decided by a 5-4 vote, that leaves just five dissenting votes in the other six cases. Moreover, of those five dissenting votes, two came from Justice Thomas while three came from Justices Stevens and Ginsburg. If you follow conventional descriptions of the justices, that leaves a broad consensus in the middle of the Court generally hostile to broad antitrust liability.

The patent docket has demonstrated even greater harmony. In the five patent cases decided over the past two Terms, the Court has reversed the Federal Circuit in all five, by a combined vote of 41-2. In the nine patent cases decided by the Court since 2002, the Federal Circuit was reversed in all nine.

To be fair, a high reversal rate might be expected in patent law. Because the Federal Circuit is the only patent appellate court in the nation, there are generally no circuit splits in patent law. Accordingly, one might theorize that a grant in a patent case from the Federal Circuit is typically a grant to reverse, rather than a grant to resolve a split.

Yet there does seem to be something going on here. Some justices seem to believe, rightly or wrongly, that the Federal Circuit has become too protective of patents. During oral argument in one patent case, the Chief Justice referred disparagingly to "a layer of Federal Circuit jargon that lawyers can then bandy back and forth," while Justice Scalia simply called it "gobbledygook." When counsel noted that every single major patent bar association in the country had filed in support of the Federal Circuit, the Chief retorted: "Well, which way does that cut? That just indicates that this is profitable for the patent bar." Justice Breyer joined the Chief's skepticism, wondering aloud whether the Federal Circuit had "leaned too far in the direction of never seeing a patent they didn't like."

The business docket of the Court also tells a different story with respect to the alignment of our two new justices. In divided cases, they are not as aligned with Justices Scalia and Thomas on the business docket as they are on other issues. In particular, Justice Alito has begun to display somewhat of an independent, pro-business streak.

This Term, the Court decided cases involving corporations challenging large punitive damage awards under the federal Due Process Clause and businesses objecting to state regulations under the dormant Commerce Clause and as a matter of federal preemption. Typically in such cases, a business litigant does not primarily cite Justices Scalia and Thomas – because in fact, those justices regularly vote against big business in these areas.

The two new justices have not readily aligned themselves with Justices Scalia and Thomas in these areas, as they have in others. Take punitive damages. Over the past decade, the Court has issued a series of closely divided rulings, establishing significant new constitutional rights for corporate defendants hit with large punitive damage awards. Justices Scalia and Thomas sharply dissented from these decisions, as did Justice Ginsburg. This Term, all eyes were on the new Chief and Justice Alito to see if they might join Justices Scalia, Thomas, and Ginsburg, and flip the Court on the issue of punitive damages in *Philip Morris v. Williams*.¹ They did not.

And with respect to the dormant Commerce Clause and federal preemption, Justice Alito appears to be charting a distinct course for himself so far. In two cases this past Term, he voted for business, for the dormant Commerce Clause (in *United Haulers*),² and for federal preemption (in *Watters*)³ – and against the new Chief and Justices Scalia and Thomas.

Finally, regarding the new justices' apparent aversion to overruling precedent, the Court's business docket again tells a different story. During the past two Terms, the Court has expressly overruled precedent in just three cases. But of those, two involved antitrust

precedents. Given that the Sherman Act has long been considered a delegation of common lawmaking authority to the federal courts to craft antitrust law, perhaps that is an understandably high ratio.

Last Term, in *Illinois Tool Works*,⁴ the Court recognized that the traditional presumption of market power applied to patents had become obsolete under the patent misuse doctrine. Accordingly, the Court overruled past precedents establishing a similar presumption of market power in the antitrust context.

This Term, in the only recent antitrust case decided by a 5-4 vote, the Court overruled the famous 1911 *Dr. Miles* precedent,⁵ which condemned resale price maintenance agreements as unlawful *per se*. In *Leegin Creative Leather Products v. PSKS*,⁶ the Court found that there may be pro-competitive aspects to resale price maintenance agreements under certain circumstances. Manufacturers may simply want their retailers to compete on customer service, rather than on price, for example. Accordingly, the Court held that such arrangements should be subject to the rule of reason, rather than *per se* invalidity. The decision reflects the Court's continuing view that antitrust law can promote interbrand competition by allowing greater restrictions on intrabrand competition.

The decisions in *Illinois Tool Works* and *Leegin* are good bookends for one another. Both involved the overruling of precedents established long ago. But in *Illinois Tool Works*, the vote was 8-0 (with Justice Alito not participating). The

decision was relatively straightforward in that the Court was essentially following Congress's lead in finding the market power presumption for patents obsolete. In *Leegin*, by contrast, four justices dissented, based on their view that Congress had expressed its support for *Dr. Miles* on a number of occasions.

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Leegin was the closest and final antitrust decision handed down this Term – announced, in fact, on the very last day of the Term. But there were three other antitrust decisions handed down this Term, decided by much larger margins.

The Court unanimously reversed the Ninth Circuit in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,⁷ a predatory bidding case. The Court had previously expressed its skepticism of predatory pricing claims in its 1993 decision in *Brooke Group v. Brown & Williamson*.⁸ *Brooke Group* established a two-part test that plaintiffs must meet in order to state a claim of predatory pricing. First, low prices are not enough; the alleged predator must be shown to be engaging in below-cost pricing. Second, plaintiffs must demonstrate a dangerous probability that the alleged predator will be able to recoup those losses through supercompetitive pricing, once one's rivals are eliminated as a result of the predation. This is a high standard of proof for plaintiffs, inspired by Chicago school skepticism that predatory activity can ever be successful.

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In *Weyerhaeuser*, the Court applied the same two-part test to predation on the buy side of the market. The Court held that the predatory buyer must bid up prices so high that the sale price of their own goods is overtaken by input costs. In addition, to state a claim for predatory bidding, those costs must later be recoverable once rivals are eliminated, either by charging their consumers supercompetitive prices, or by exploiting their new-found monopsony power over their suppliers.

In *Bell Atlantic v. Twombly*,⁹ the plaintiffs alleged that the Baby Bells had conspired in violation of Section 1 of the Sherman Act. The Court reiterated that parallel conduct between competitors is alone not enough to state a Section 1 claim of conspiracy. There must be actual evidence of agreement. In this case, the Baby Bells could have engaged in the alleged conduct unilaterally and in their own self-interest. Accordingly, the Court concluded that it was not enough for the plaintiffs to simply allege the existence of an agreement; they were also required to allege facts about the agreement, sufficient to make it plausible – and not merely conceivable – that they could be entitled to relief.

In rejecting the complaint in *Twombly*, the Court also demonstrated its continuing concern with inadequately pleaded complaints – particularly in cases where there is a high risk of expensive discovery and *in terrorem* settlements. The decision is reminiscent, for example, of the securities fraud ruling in *Dura Pharmaceuticals v. Broudo*¹⁰ just two Terms ago.

Finally, in *Credit Suisse First Boston v. Billing*,¹¹ the Court rejected an antitrust class action suit against 10 leading investment banks for administering certain IPOs with the blessing of the SEC. The Court granted implied antitrust immunity, recognizing the need to allow federal officials to regulate the stock market without fear that their efforts will be undermined by antitrust law.

The Court also decided three patent cases this Term. Starting on the procedural side of the docket, in *MedImmune Inc. v. Genentech Inc.*,¹² the

Court held that a patent licensee has standing to seek declaratory judgment invalidating a patent, even while it continues to pay licensing royalties “under protest” to the holder of the purported patent. Under this ruling, the licensee need not breach the license in order to sue.

This ruling has important practical implications. Under the Federal Circuit’s contrary rule requiring breach, licenseholders had to risk exposure to triple damages, as well as the potential loss of licensing rights in a subsequent patent infringement suit, in order to challenge the patent’s validity. That rule put a chill on efforts to invalidate patents. As Justice Scalia explained in his opinion for the Court, a person need not violate a criminal statute in order to challenge its validity, so long as the government has threatened to take action against the would-be lawbreaker. Likewise, Article III of the Constitution does not require a plaintiff to “bet the farm” in order to challenge the validity of a patent.

The *MedImmune* decision is reminiscent of last Term’s *eBay v. MercExchange*,¹³ in which the Court rejected another Federal Circuit rule of procedure that had the effect of increasing the value of patents. In *eBay*, the Supreme Court rejected the Federal Circuit’s rule of virtually automatic injunctions in patent infringement cases, and instead held that the traditional equitable four-factor test for injunctive relief applies.

My favorite case name of the Term is *Microsoft v. AT&T*¹⁴ – it’s the corporate equivalent of a heavyweight boxing match. Microsoft was conceded to have infringed a software patent held by AT&T involving the digital processing of recorded speech. The question before the Court was simply whether Microsoft could be held liable for activities outside the United States.

Ordinarily, the federal Patent Act does not apply to foreign manufacturing and sales of a patented invention. But in 1984, Congress adopted an exception making it an act of infringement to supply “components” of a patented invention from the United States if those components are simply “combined”

abroad to form the patented invention. The Federal Circuit construed the exception expansively to cover foreign copying and installation of software code from a master version supplied from the United States.

By a 7-1 vote (with the Chief recused), the Court reversed, finding that merely supplying software code from within the United States, for copying and installation on computers abroad, does not constitute supplying a “component” from the United States that can be “combined” abroad. In essence, the Court viewed the mere copying of software code as lacking the tangible, physical dimensions intended by the exception contained in the patent statute. The Court further noted that its conclusion is reinforced by the presumption against applying statutes extraterritorially.

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Microsoft v. AT&T may have an impressive caption, but *KSR Int’l v. Teleflex Inc.*¹⁵ appears to be the real blockbuster patent decision of the Term. *KSR* addresses a fundamental question in patent law: What can be patented? Specifically, what is too obvious to be the subject matter of a patent?

Congress has stated that the subject matter of a patent cannot be “obvious” to a person of “ordinary skill” in the pertinent field. Under Federal Circuit law, combining “prior art” to produce a new invention is not too “obvious” for purposes of securing patent protection, so long as there is no explicit “teaching, suggestion, or motivation” for

combining the prior art at the time of the invention – such as published articles in scientific journals or technical manuals describing or suggesting the combination.

In a unanimous decision written by Justice Kennedy, the Court ruled that parties challenging the validity of a patent claim are not limited to the rigid and formalistic Federal Circuit test, but may also establish that a patent claim is obvious – and thus invalid – based on “common sense,” looking to what would have been obvious to the person of ordinary skill in the art. As a result, courts now enjoy greater discretion to consider any relevant fact to determine that an invention is too obvious to warrant a patent.

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Despite this increasing activity in the antitrust and patent docket over the past two Terms, the trend may not persist. Prior to adjourning for its summer recess, the Court did not grant a single petition for October Term 2007 involving either antitrust or intellectual property law. But with the greater

discretion vested in lower courts, and greater uncertainty in the state of the law launched by Supreme Court decisions like *eBay*, *KSR*, and *Leegin*, there should be no shortage of work for antitrust and patent lawyers. ■

ENDNOTES

Editors' Note: This article was adapted from a speech given by Mr. Ho on July 17, 2007 to the Antitrust & Trade Regulation Section of the Dallas Bar Association.

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- ¹ *Philip Morris v. Williams*, 127 S.Ct. 1057 (2007).
- ² *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt.*, 127 S.Ct. 1786 (2007).
- ³ *Watters v. Wachovia Bank N.A.*, 127 S.Ct. 1559 (2007).
- ⁴ *Illinois Tool Works v. Independent Ink, Inc.*, 547 U.S. 28 (2006).
- ⁵ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).
- ⁶ *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S.Ct. 2705 (2007).
- ⁷ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S.Ct. 1069 (2007).

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- ⁸ *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).
 - ⁹ *Bell Atlantic v. Twombly*, 127 S.Ct. 1955 (2007).
 - ¹⁰ *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005).
 - ¹¹ *Credit Suisse First Boston v. Billing*, 127 S.Ct. 2383 (2007).
 - ¹² *MedImmune Inc. v. Genentech Inc.*, 127 S.Ct. 764 (2007).
 - ¹³ *eBay v. MercExchange*, 126 S.Ct. 1837 (2006).
 - ¹⁴ *Microsoft Corp. v. AT&T Corp.*, 127 S.Ct. 1746 (2007).
 - ¹⁵ *KSR Int'l v. Teleflex Inc.*, 127 S.Ct. 1727 (2007).