

The Legacy Justice Stevens Left On Antitrust

By **Matthew Perlman**

Law360 (July 19, 2019, 4:56 PM EDT) -- The late Justice John Paul Stevens made use of his antitrust roots frequently during his tenure on the U.S. Supreme Court, penning more than two dozen majority opinions and dissents that helped shape modern antitrust law.

Before joining the bench, Justice Stevens was an antitrust litigator, taught antitrust law in Chicago and served on a national committee in the mid-1950s that studied the practice area. The justice tapped that expertise during his time on the bench to pen several important majority opinions and dissents that injected much-needed structure and nuance into antitrust case law.

One particular refinement instigated by Stevens clarified how the major legal standards governing antitrust cases should be considered. Spencer Weber Waller, a professor at Loyola University Chicago School of Law, told Law360 that Justice Stevens helped correct a discomfiting trend at the time — antitrust decisions generally turned on which legal standard applied to a particular case.

Defendants usually won when activity was viewed through a rule of reason analysis, which gives defendants a chance to show their conduct was, overall, helpful rather than hurtful to competition. Plaintiffs largely prevailed only in “per se” cases, which target activity that is unequivocally illegal and all that needs to be proven is the defendant committed the alleged act.

"He was critically important in creating a modern antitrust world where, beyond the per se stuff, plaintiffs can win when they can show some serious harm to competition," Waller said. "That's an antitrust that's maybe more of a spectrum between hard presumptions ... He brought meaning to that middle ground."

Ruler of Reason

One of Justice Stevens' early antitrust opinions came in 1978 in a case brought by the federal government against the National Society of Professional Engineers over allegations the group's ethical rules suppressed competition by prohibiting members from submitting competitive bids on engineering contracts. The rules prevented engineers from discussing prices with customers until after they had been selected for a project.

The professional body argued that the rules were needed to prevent deceptively low bids that could result in inferior work and ultimately endanger the public.

The majority analyzed the ethics requirements through the rule of reason, finding that in a professional context, such restrictions can benefit competition and should not be deemed unlawful per se.

This allowed for the court to consider the justifications offered by the engineers.

The opinion went against the engineering group anyway, with Stevens concluding that the group argued competition itself created the risk of shoddy work, which "confirms, rather than refutes, the anticompetitive purpose and effect of its agreement."

Even though Stevens ruled against the engineers' defense, "he does so by explaining, in ways that continue to resonate, that the central focus of antitrust should be competition," said Andrew Gavil, a senior of counsel for Crowell & Moring LLP and a faculty member at Howard University School of Law.

That case and another that followed helped establish the current framework for judging antitrust claims under the rule of reason. Justice Stevens also wrote for the majority in *NCAA v. Board of Regents*, a 1984 case involving National Collegiate Athletic Association rules that limited the number of college football games to be broadcast on television in order to protect stadium attendance.

The majority found that while the restriction reduced the number of games available for telecast, hurting competition for TV rights, the arrangement wasn't automatically, or per se, illegal.

This gave the NCAA a chance to justify the rules, but Justice Stevens again found the defenses unpersuasive.

"[B]y curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted, rather than enhanced, the place of intercollegiate athletics in the nation's life," the opinion said.

Gavil said Stevens' opinions in the NCAA and engineer cases put competition at the center of antitrust analysis and provided the framework for the "modern rule of reason."

"Nuanced, textured, but also rooted in principle," Gavil said of the analyses.

Harry First, a professor at New York University School of Law and co-director of the school's Competition, Innovation and Information Law Program, told Law360 that Justice Stevens reached the bench when the time was ripe for rethinking the rule of reason framework.

The court was beginning to weigh more antitrust allegations through the rule of reason, but the cases took a long time to litigate because defendants were allowed to put forward all sorts of evidence to justify their behavior.

"His opinions were important in trying to shape how that was going to go if you weren't going to have a strict per se rule," First said.

Stephen Calkins, a professor at Wayne State University Law School, told Law360 that the justice's efforts also helped establish when and how to apply per se analyses.

For instance, he convinced his colleagues to apply the per se test in *FTC v. Superior Ct. TLA*, a 1990 case

involving a group of attorneys that regularly served as court-appointed counsel for indigent defendants in District of Columbia criminal cases. The majority found the group violated the Sherman Act by agreeing not to provide representation until they received a raise.

In finding that the boycott constituted a naked restraint on trade, the opinion said the purpose of the plan was to "obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services."

He also wrote for the majority in *Arizona v. Maricopa County Medical Society* in 1982, finding that the per se rule applied to an agreement that set a maximum fee doctors could charge.

"You can't study modern antitrust without reading a lot of the wisdom of Justice Stevens," Calkins said.

Unilateral Conductor

In addition to his majority opinions on agreements between competitors, which are addressed in Section 1 of the Sherman Act, Justice Stevens also wrote an important decision regarding cases brought under Section 2, which prohibits monopolization and attempts to monopolize a market.

In the *Aspen Skiing v. Aspen Highlands Skiing* case in 1985, the court sided with the owner of a ski resort that sued a rival who stopped selling joint tickets that allowed skiers to access both owners' properties. The rival was demanding a greater share of the revenue.

Writing for the majority, Stevens found the rival had an antitrust duty to deal because it had no valid business reason for its exclusionary conduct beyond reducing competition.

First noted that the *Aspen Skiing* ruling has been controversial and faced a serious challenge in 2003 when the high court decided *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*. Although the justices didn't overturn it, they didn't fully embrace it either. There, a phone customer accused Verizon of discriminating against customers of AT&T by providing worse service when their calls were carried over Verizon lines. But the justices found Verizon didn't violate antitrust law by shirking a duty to fully share its network with competitors.

The majority said the duty to deal with competitors spelled out in *Aspen Skiing* is "near the outer boundary" of liability and declined to apply it in *Trinko*.

Justice Stevens issued a concurring opinion, but argued that the case should have been tossed because the customer lacked standing to sue, not because Verizon's conduct was above board.

Despite this reining in, the *Aspen Skiing* ruling continues to influence the courts. U.S. District Judge Lucy Koh partly relied on the case in her May decision in the Federal Trade Commission's enforcement action against chipmaker Qualcomm Inc. over its licensing practices for standard essential patents.

Among the allegations in that case is Qualcomm was obligated to provide licenses to rival cellular modem chip manufacturers through agreements it made when its patents were incorporated into industry standards. The U.S. Department of Justice filed a brief supporting Qualcomm's appeal of that decision, arguing *Aspen Skiing* does not apply and that the district court's "erroneous expansion" of the ruling threatens to chill competition.

Aspen Skiing "is an important case involving Section 2 and unilateral conduct, but it's also one that does stir up controversy," First said.

Supreme Dissenter

Justice Stevens also penned dissenting opinions in more than a dozen antitrust cases. An early dissent came in a 1979 case brought by CBS Inc. against performance right organizations the American Society of Composers, Authors and Publishers and Broadcast Music Inc.

CBS alleged the blanket licenses provided by the organizations for the right to perform any of the compositions in their repertories constituted illegal price-fixing.

The court's majority found that the blanket licenses were not a per se violation, but sent the case back down to the lower courts for a rule of reason analysis. Justice Stevens dissented, writing that while he agreed the rule of reason should be employed, there was no need for remand because he found enough evidence to show the licenses are anti-competitive even under that standard.

"He generally had the same operating framework, even if he was in dissent," Waller said.

The justice later penned a 1993 dissent in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, a case in which the majority sided with defendants accused of pricing generic cigarettes below cost. After re-weighing the trial evidence, the majority placed the burden on plaintiffs to show in a predatory pricing case that the price was below cost and that the accused company expected to recoup its losses.

Justice Stevens found the burden to be too high.

Gavil said both the CBS and Brooke dissents show the practical experience Justice Stevens brought to the bench and that he was troubled "when the court goes off in theory that's detached from the record in the case."

Justice Stevens also dissented from the majority in the 2007 decision on *Bell Atlantic Corp. v. Twombly*, a class action alleging major telecommunications companies had worked to disadvantage smaller phone companies in order to keep prices high. That case made it harder for plaintiffs to bring cases by heightening the pleading standard after the court found that parallel conduct, absent an agreement, was not enough to survive a motion to dismiss.

The dissenting opinion argued that the bar was again placed too high.

"An important thing to capture here is that he helped to make antitrust more sophisticated, and better grounded, without injecting ideology," Gavil said.

--Editing by Kelly Duncan and Philip Shea.