

Thoughts on Challenging Existing Precedent

by Allyson N. Ho and Bahar Shariati

As the saying goes, to make an omelet, you have to break a few eggs. But asking a court to overrule its own precedent is never easy, and most advocates do so only when backed against a wall and deprived of other alternatives. Crafting successful arguments for overruling precedent requires careful attention to the particular facts, circumstances, and legal doctrines at issue. There is no “one size fits all” approach, but one thing is clear. It is not enough just to argue that a particular precedent is wrong. Successful arguments have focused on demonstrating that, in addition, the precedent at issue has proven unworkable over time, the doctrinal basis of the precedent has been eroded by subsequent developments, or that the practical implications of overruling the precedent do not require keeping it on the books. Indeed, rather than expressly asking for a precedent to be overruled, some advocates have stopped short of attacking prior precedent head-on—arguing more narrowly that it simply shouldn’t apply in a particular context or circumstance.

Two good examples of each approach are *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), both antitrust cases that the Supreme Court decided during the same term. In the former, Leegin expressly asked for a nearly 100-year-old precedent to be overruled, and the Court helpfully complied. In the latter, the advocates argued more narrowly that prior precedent should not be applied in the specific context of that case, and it was not. A look at the arguments that succeeded in both cases is helpful in understanding how best to approach the difficult task of getting out from under unfavorable precedent.

Leegin: Ask and You Shall Receive

In *Leegin*, the challenged precedent had been engrained in antitrust jurisprudence for almost a century. Long ago, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373

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(1911), the Court had held that vertical price restraints were per se illegal under section 1 of the Sherman Act. In a 5–4 decision, the Court in *Leegin* agreed to overrule *Dr. Miles* and held instead that vertical price restraints should be judged on their own facts under the rule of reason.

First, a little background. In *Dr. Miles*, the Supreme Court established the rule that it is per se illegal for a manufacturer and distributor to set the minimum price at which a distributor must sell a product, rendering unnecessary any showing that there was no anticompetitive effect resulting from the minimum price agreement. In that case, the company manufactured medicines, which it would sell only to distributors who agreed to resell the medicines at a set price. The Court deemed the manufacturer’s control over the resale price of the product unlawful under the common-law rule that “a general restraint upon alienation is ordinarily invalid.” *Dr. Miles*, 220 U.S. at 383.

The Court revisited that precedent in *Leegin*, which involved an agreement between Leegin Creative Leather Products, Inc., and PSKS, Inc., a corporation that operated a women’s apparel store, Kay’s Kloset. Beginning in 1991, Leegin designed, manufactured, and distributed leather goods and accessories under the brand name “Brighton.” *Leegin*, 551 U.S. at 882. Kay’s Kloset promoted Brighton products and eventually became the premier Brighton retailer in Lewisville, Texas, owing 40–50 percent of its profits to the brand. *Id.* at 883.

In 1997, Leegin instituted a new policy geared toward strengthening the Brighton brand. The new policy stated that Leegin would no longer sell its Brighton products to retailers that discounted Brighton goods below the suggested prices for the products—with the exception that retailers could discount inventory that was not selling and that the retailer had no intention of reordering. In 2002, Leegin discovered that Kay’s Kloset was marking down its entire inventory of

Brighton products by 20 percent. After the retailer refused to stop doing so, Leegin stopped selling Brighton products to the store. PSKS sued Leegin for violating the antitrust laws by entering into agreements with retailers to sell its products at prices fixed by Leegin.

At trial, Leegin planned to introduce expert testimony on the pro-competitive effects of its pricing policy, but the district court excluded the testimony under the per se rule established in *Dr. Miles*. The jury ultimately found for PSKS and awarded it \$1.2 million in damages, which was trebled under 15 U.S.C. § 15(a) and, with attorney fees, resulted in a judgment of nearly \$4 million. Although Leegin argued on appeal that the rule of reason should have applied to its agreements with its retailers, the Fifth Circuit affirmed the judgment in reliance on the precedent established in *Dr. Miles* that required courts to apply a per se rule against vertical price-fixing agreements. The Supreme Court granted certiorari to determine whether those agreements should continue to be treated as unlawful per se.

In addition to underscoring the recent changes in antitrust law that supported overturning *Dr. Miles*, Leegin's briefing in the Supreme Court methodically addressed and eliminated each reason for retaining the rule—adopting a divide-and-conquer approach to attacking the unfavorable precedent. See Brief for Petitioner at 2, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480), 2007 WL 160780, at *1 (Jan. 22, 2007). And in pressing the Court to overrule *Dr. Miles*, Leegin took full advantage of the climate of change in antitrust law generally by pointing out that the Court had already abandoned per se rules against other vertical agreements, which were similarly based on the rule against restraints on alienation.

Marshaling similar cases in which the rule against restraints on alienation had been applied to other types of manufacturer agreements with retailers, Leegin argued that there was no economic justification for the per se treatment of vertical resale price-maintenance agreements either, pointing to economic analyses finding that resale price maintenance has pro-competitive effects. Leegin did not shy away from acknowledging that not every use of resale price maintenance is necessarily pro-competitive. Rather, it contended that occasional anticompetitive use is not a sufficient basis for retaining the per se rule.

Indeed, Leegin went further and focused on the practical (and harmful) consequences of retaining the per se rule. That rule, Leegin argued, forces manufacturers to resort to other restraints to achieve pricing agreements—an inefficient approach that ultimately leads to increased costs borne by consumers. Furthermore, Leegin argued, the inefficiencies created by the per se rule placed a heavier burden on small businesses, new entrants, and innovators in the market competing for brand recognition—thereby giving a competitive edge to larger incumbents.

By pointing to cases acknowledging the dynamic nature of antitrust law and emphasizing that the law should be updated to reflect modern conditions in trade, Leegin argued that stare decisis did not command leaving the outdated per se rule in place. Leegin debunked the notion that merely because Congress has not acted to adopt legislation overruling *Dr. Miles*, it has somehow indicated its approval of the per se rule. Instead, Leegin argued that Congress had given courts a broad mandate in the Sherman Act to shape its application. Bolstering

that point, Leegin pointed to other antitrust rules and doctrines that had since been cast aside by the Court without comment from Congress, even though Congress had acted in areas surrounding those rules on more than one occasion.

Leegin did not blink in the face of PSKS's administrative convenience argument that the per se rule should prevail because it is clear and easily enforceable. Instead, Leegin argued that courts would be more than capable of applying the rule of reason to resale price-maintenance agreements. And Leegin took the argument a step further by pointing out that the new rule would actually result in less litigation. By requiring plaintiffs to demonstrate that the agreement has a negative effect on competition—instead of making those agreements per se illegal—plaintiffs would think twice before bringing suit, Leegin argued, thus easing the burden on courts. Going beyond simply identifying the problem and moving to the harder task of actually providing a solution, Leegin offered the court a test—based on cases that had rejected the per se rule in similar contexts—that future courts could use in implementing the new rule of reason.

So, which arguments did the Court find persuasive in ultimately agreeing to discard a nearly century-old doctrine of antitrust jurisprudence? Perhaps not surprisingly, the Court latched onto Leegin's first, and strongest, argument for overturning *Dr. Miles*—that more recent jurisprudence and developments in antitrust law had eroded the antiquated legal doctrine on which *Dr. Miles* was based and favored an analysis based on the economic effects of vertical agreements. *Leegin*, 551 U.S. at 888–89. The Court examined literature and studies by economists and acknowledged the pro-competitive effects of the agreements. The Court also considered the anti-competitive effects of the agreements but ultimately agreed with Leegin that despite the risks of unlawful conduct arising from the agreements, it could not be stated with confidence that resale price-maintenance agreements would almost always tend to restrict competition.

The Court next rejected the counterargument that the per se rule should prevail on the ground of administrative convenience. It embraced Leegin's position that, in fact, the per se rule actually increases litigation costs by encouraging frivolous lawsuits against legitimate practices and has thus proved unworkable over time. In the end, neither the administrative convenience argument nor the sheer longevity of the per se rule was enough to save it. Although the majority considered the doctrine of stare decisis quite seriously, it ultimately concluded that the doctrine was not dispositive in this case because of the Court's historical role in developing the contours of the Sherman Act.

The lessons for successfully challenging precedent that can be gleaned from *Leegin* are many. First, look for other areas of the law in which courts have been willing to overrule similar existing precedent and analogize to those cases where possible. Leegin, for example, marshaled antitrust cases that had rejected the per se rule in similar agreements on the ground that the antiquated rationale for the rule was insufficient in light of the economic justifications for allowing such agreements. By drawing comparisons to those cases, Leegin ultimately persuaded the Court to adopt the same analysis—in part by framing the overruling of *Dr. Miles* not as a radical break with doctrine but as the logical next step in the progression away from per se rules more generally in the antitrust context.

Second, articulate why the rationale for the challenged precedent has lost its force—because the decisions on which it relied have themselves been overruled or cabined, because the challenged precedent was based on notions that have since been proved flawed or incorrect, or because it turned out to be unworkable in practice. Leegin, for example, demonstrated that the concerns that motivated the Court to adopt the per se rule in the first place had since been undercut because the agreements at issue no longer uniformly restrict competition, especially in today's economy. By showing the Court that the rationale for the existing rule no longer has force, Leegin made it much easier for the Court to discard the rule altogether.

Third, confront the weaknesses in your own argument for overruling the existing precedent—or, stated differently, be willing to acknowledge the advantages of the existing precedent, so as to demonstrate more persuasively that those advantages are not so great as to require keeping the precedent on the books. It will be the rare case indeed where existing precedent lacks any redeeming qualities whatsoever. The better approach is to acknowledge forthrightly the advantages of the existing rule and go on to demonstrate that those advantages are not enough to justify keeping the rule in place. By doing so, you show the court that it can trust you to be an honest broker in helping it reach the right answer, not simply the one you favor. That is exactly what Leegin did in acknowledging that not every use of resale price maintenance is necessarily pro-competitive and then going on to demonstrate that occasional anticompetitive uses did not warrant retaining the per se rule.

Finally, give the court comfort in overruling existing precedent by pointing out the benefits of the new rule you seek, not just the problems with the old one. Leegin, for example, argued that adopting the rule of reason would actually decrease litigation—always a welcome argument to courts concerned with burgeoning dockets and conserving judicial resources. That argument also proved a helpful counter to the primary rationale for retaining the per se rule—its administrative efficiency and ease of application for courts.

Twombly: Mend It, Don't End It

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court decided by a 7–2 majority to “retire” the oft-quoted language articulated 50 years earlier in *Conley v. Gibson*, 355 U.S. 41 (1957), which stated that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Unlike Leegin, however, Bell Atlantic did not expressly ask for the existing precedent (*Conley*) to be overruled. Instead, Bell Atlantic argued more narrowly that the “any set of facts” language should not apply to allegations of a conspiracy under section 1 of the Sherman Act, which requires a heightened pleading standard for plaintiffs to state a claim for relief. Brief for Petitioners at 12, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2474079, at *1 (Aug. 25, 2006). Bell Atlantic's approach to challenging existing precedent by seeking to narrow its application, rather than to overrule it outright, thus provides a helpful counterpart to the more explicit strategy of seeking to overrule *Dr. Miles* that succeeded in *Leegin*.

First, some background. Fifty years earlier in *Conley v. Gibson*, the Supreme Court reversed the dismissal of a civil rights complaint for lack of jurisdiction. Addressing all of the grounds advanced in support of dismissal, the Court

considered the argument that the complaint failed to state a claim upon which relief could be granted. *Conley*, 355 U.S. at 45–46. In determining that the complaint adequately stated a claim, the Court explained that in “appraising the sufficiency of the complaint,” it was bound to follow “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* As noted by the *Twombly* Court, that language had been “questioned, criticized, and explained away” for years after *Conley* was decided. *Twombly*, 550 U.S. at 562–63.

In *Twombly*, the Court had before it a trial court order dismissing a complaint against Bell Atlantic for failure to state a claim of an antitrust conspiracy through allegations of parallel conduct. As noted, Bell Atlantic never expressly asked for either *Conley* or the “any set of facts” standard to be overruled or discarded. Instead, it simply argued that the standard should not apply to allegations based on parallel conduct under sec-

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tion 1 of the Sherman Act, which requires a heightened pleading standard. Bell Atlantic argued that where a plaintiff makes such allegations and contends that the conduct is the result of a conspiracy, the plaintiff must also allege additional supporting facts that would establish a conspiracy or exclude the possibility that the conspirators acted independently. Antitrust jurisprudence, Bell Atlantic argued, does not permit courts to infer a conspiracy based on mere parallel conduct. Bell Atlantic thus challenged the Second Circuit's standard for judging the sufficiency of allegations of parallel conduct and maintained that the appellate court's focus on facts that a plaintiff may yet uncover through discovery—rather than on the facts actually alleged in the complaint—violated the Rule 12(b)(6) standard.

Before the Supreme Court, Bell Atlantic focused on two fundamental pleading requirements underlying Federal Rule of Civil Procedure 8 (and cases interpreting it) in arguing that the complaint must be dismissed. First, Bell Atlantic highlighted the long-standing requirement that a complaint must allege facts, not mere conclusions, in support of its claims. Second, Bell Atlantic underscored the familiar rule that in evaluating whether a plaintiff has alleged facts sufficient to support the claims alleged, courts must focus on the facts actually alleged in the complaint—not on those that the plaintiff may be able to prove later through discovery. Bell Atlantic emphasized that the notice pleading standard set forth in Rule 8 was never intended to do away with the requirement that a complaint contain factual allegations supporting the prima facie elements of the claims alleged.

Just as Leegin had pursued a strategy of marshaling cases in which the per se rule had been rejected in other contexts and then arguing by analogy that the same result should obtain in its case, Bell Atlantic assembled cases in which the Court

had deemed conclusory statements insufficient to satisfy Rule 8's requirement that plaintiffs plead factual allegations. Bell Atlantic pointed the Court not only to cases dealing with conspiracy and antitrust claims but also to cases in a variety of contexts, thereby illustrating the point in a much broader fashion.

Bell Atlantic then narrowed its focus to antitrust law in arguing what plaintiffs must show to prove a conspiracy based on parallel conduct. Drawing a distinction between parallel conduct based on unilateral action and parallel conduct based on concerted action, Bell Atlantic argued that the plaintiff had failed to satisfy the pleading standard for alleging a conspiracy under the Sherman Act by failing to allege facts showing that the parallel conduct was not a result of unilateral action. Bell Atlantic bolstered its argument by pointing to the practical implications of the Second Circuit's approach, that is, that allowing a plaintiff to plead a Sherman Act claim based solely on parallel conduct, without supporting facts excluding the possibility of unilateral action, is simply bad policy because doing so could subject a defendant to costly and protracted litigation for engaging in conduct legitimately based on sound and independently determined business judgment. Bell Atlantic thus attacked the Second Circuit's contrary reasoning by arguing that the "any set of facts" standard conflicted not only with Rule 8 but also with substantive antitrust law requirements because without a showing that the conduct was not unilateral (as antitrust law requires), there would always be a "set of facts" from which it could be inferred that parties engaging in parallel acts joined in a conspiracy.

Perhaps most effectively, Bell Atlantic argued that the Second Circuit's decision was inconsistent with *Conley* itself. As the Supreme Court ultimately agreed, *Conley* held that once a claim has been sufficiently alleged, any set of facts may support that claim as long as the facts are consistent with the allegations in the complaint. *Twombly*, 550 U.S. at 563. Rather than launching a broadside attack against the "any set of facts" language, then, Bell Atlantic took a less confrontational approach that focused on explaining why the Second Circuit had erred in construing the *Conley* language.

That approach appeared to resonate with the 7–2 majority of the Court, which agreed with Bell Atlantic that the Second Circuit had erroneously read *Conley*'s "any set of facts" language out of context and in conflict with the "proper pleading standard." *Twombly*, 550 U.S. at 561. The Court further agreed that the "any set of facts" standard was intended to be applied once a claim has already been established. The *Conley* language "so often quoted fails to mention this understanding on the part of the Court," the majority noted, adding that "after puzzling the profession for 50 years, this famous observation has earned its retirement." *Id.* The Court stopped short of overruling *Conley*, explaining instead that the case properly "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Id.* Indeed, in a per curiam opinion issued just weeks after *Twombly*, the Court appeared to go out of its way to confirm *Conley*'s continued vitality by expressly quoting language from that case in reversing the dismissal of a section 1983 civil rights complaint alleging deliberate indifference to a prisoner's serious medical needs. See *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam). Later, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court clarified that *Twombly*'s holding applies outside the antitrust context, as well.

What are the lessons to be gleaned from *Twombly* in

successfully challenging existing precedent? First, make every good-faith attempt to distinguish existing precedent in addition to or as an alternative to arguing for outright reversal. To be sure, distinguishing existing precedent is not always an option—in *Leegin*, for example, there was simply no way around the *Dr. Miles* per se rule. But, in most cases, it will make more sense to try to get out from under unfavorable precedent by attempting to distinguish it and seeking its overruling only as a last resort. In *Twombly*, for example, Bell Atlantic focused on the distinctiveness of antitrust law and the conflict that would result from reflexively applying *Conley*'s "any set of facts" language in that context.

Second, analyze the setting in which the troubling language or problematic rule appears in the existing precedent itself. It may be possible to argue, as Bell Atlantic did in *Twombly*, that the lower court simply misconstrued or misapplied the existing precedent. Taking that tack relieved Bell Atlantic of the need to criticize *Conley* overtly while still providing the Court an opportunity to consider whether the language at issue—however defensible in its original context—had nonetheless proved the source of needless "confusion" and thus become unworkable.

Third, explain the practical consequences of applying existing precedent in the circumstances of your case. In *Twombly*, Bell Atlantic argued to great effect that allowing plaintiffs to plead a Sherman Act claim based solely on parallel conduct could subject defendants to costly and prolonged litigation for engaging in conduct legitimately based on sound business judgment. Similarly, *Leegin* successfully argued that retaining the per se rule would increase litigation rather than aid judicial administration. Both cases underscore the importance of assuaging any "better the devil you know" concerns by giving the court comfort about the practical implications of departing from existing precedent, whether you've asked for it to be overruled outright or just narrowly limited in its application to the case at hand.

Conclusion

Taken together, the different approaches to challenging existing precedent in *Leegin* and *Twombly* provide a useful guide to dealing successfully with unfavorable precedent. In deciding which strategies to employ—when to ask a court expressly to overrule an existing precedent, for example, or when to rely instead on efforts to distinguish it—there is no substitute for knowledge of the particular court and its members. That understanding is essential to gleaning whether a court is more likely to be persuaded by sweeping arguments that a precedent should be overruled or by a more modest, incremental approach. And, as a general matter, courts are unlikely to revisit or overrule existing precedent in the absence of a specific request to do so.

As *Leegin* and *Twombly* teach, the most successful arguments for challenging existing precedent recognize that it is not enough to argue merely that the prior precedent was wrongly decided. What is required is a thoughtful demonstration that the precedent has proven unworkable over time, has seen its foundations eroded by subsequent developments, or simply has no application in certain contexts. And if you can show the court that, as a practical matter, retaining the existing precedent will actually have harmful consequences, you'll be that much closer to sending the troublesome precedent into a well-deserved retirement. □