ANTITRUST POLICY IN THE NEW ADMINISTRATION

George Mason Law Review's Twelfth Annual Symposium on Antitrust Law sponsored by WilmerHale and Criterion Economics LLC

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INTRODUCTION

The *George Mason Law Review* hosted its Twelfth Annual Symposium on Antitrust Law on December 4, 2008. The Symposium was held at the Ronald Reagan Building & International Trade Center in Washington, D.C., with support from the law firm of WilmerHale and from Criterion Economics LLC. The Symposium brought together a distinguished group of scholars and practitioners to discuss the effect of a new administration on the development of antitrust policy, and attracted judges, academics, policymakers, antitrust analysts, and practitioners as participants.

After Daniel D. Polsby, Dean and Foundation Professor of Law at George Mason University School of Law, welcomed the participants, A. Douglas Melamed, a partner at WilmerHale, gave the opening remarks and introduction. The Honorable Douglas H. Ginsburg gave the keynote address. After providing a brief overview of the history of antitrust law, he discussed current trends in the antitrust field, the future of per se rules, and the movement toward a rule of reason analysis. The morning's two panels followed Judge Ginsburg's address.

PANEL ONE: THE RULE OF REASON—HOW CAN IT BE STRENGTHENED?

Moderator:
William J. Kolasky, *Partner, WilmerHale*
Speakers:
Einer Elhauge, *Petrie Professor of Law, Harvard Law School*
Abbott ("Tad") B. Lipsky, Jr., *Partner, Latham & Watkins LLP*
Discussants:
Michael A. Carrier, *Professor of Law, Rutgers University School of Law-Camden*
Eric L. Cramer, *Shareholder, Berger & Montague, P.C.*

Einer Elhauge

Professor Elhauge opened the first panel, focusing the discussion on the conceptual foundations for the restraint of trade in order to provide more structure to the open-ended rule of reason approach. Professor Elhauge argued that antitrust law is too complacent about the principal incoherent doctrines. One doctrine comes from section 1 of the Sherman Act, which suggests that every contract or agreement in restraint of trade is unique and every unreasonable restraint to trading is illegal. The concept that "every [agreement] in restraint of trade" is illegal cannot mean what it literally says, explained Professor Elhauge, so the word "unreasonable" is inserted.

The second doctrine involves the notion that there is effectively no difference between the per se rule and the rule of reason. Some suggest that although the per se rule excludes justifications, if a justification exists, the per se rule does not apply. The rule of reason summarily condemns restraints of trade that are naked of any justification. Thus, if a defendant offers no plausible procompetitive justification for a particular agreement, no proof of anticompetitive effects is required. However, if the defendant does offer a plausible justification, proof is required. The important question is what counts as a procompetitive justification, but there is no real difference in structure to the rule of liability.

In closing, Professor Elhauge discussed the opportunity to structure a rule of reason inquiry by separating the theoretical inquiry from the empirical inquiry. First, a plaintiff must allege some anticompetitive theory. Defendants must then offer a plausible procompetitive theory that advances productive business relationships or professional self-regulation. If defendants do not do this, they lose; but if they do, the court must examine the empirical issues. Here, the plaintiff must produce evidence of anticompetitive effects or market power before the defendant must produce evidence of procompetitive effects. Once both are produced, then the burden of persuasion is on the plaintiff. This is less restrictive than an alternative theory. Thus, the proper inquiry should turn on whether the argument is theoretical or empirical.

Abbott B. Lipsky, Jr.

Mr. Lipsky's paper presented an interesting contrast with Professor Elhauge's approach. He began by tracing the history of the per se rule. Cases at the Supreme Court level used to be easy to decide because there was a long list of per se rules established in the 1950s, 1960s, and early 1970s. However, these rules were relatively easy to discard in light of changing views of the purposes of antitrust law and the increasing prevalence of the rudiments of economic analysis in the law. The Court in *Conti-*

nental T.V., Inc. v. GTE Sylvania, Inc.[1] for the first time stated that an antitrust rule not properly hinged to competitive effect is inferior. Since then, the types of conduct falling under the per se category are shrinking.

Michael A. Carrier

Professor Carrier began his discussion by noting that the per se rule becomes less and less important each year, and the rule of reason concomitantly becomes more important. There remain, however, interesting and difficult questions that need to be resolved regarding the rule of reason. What is the role of the quick look type of analysis? When does the burden shift from one party to the other? What is the role of balancing?

Professor Carrier focused his discussion on four points. First, Professor Carrier discussed what led him to look more deeply at the application of the rule of reason. Second, Professor Carrier turned his attention to Professor Elhauge's and Mr. Lipsky's presentations, pointing out that "everything old is new again." Now that per se rules have been washed away, contended Professor Carrier, we are left with the rule of reason. Perhaps, therefore, some of the old cases, such as *Chicago Board of Trade v. United States*[2] and *Addyston Pipe & Steel Co. v. United States*,[3] could bear a little resuscitation. Third, Professor Carrier discussed the issue of how one should analyze rule of reason questions. Finally, Professor Carrier closed his remarks by exploring the question of how to flesh out the rule of reason framework itself.

Eric L. Cramer

Mr. Cramer concluded the first panel by emphasizing that the rule of reason should not be in conflict where a plaintiff can get tripped up at various points, especially in cases where proving anticompetitive effects or where anticompetitive effects are relatively clear.

Mr. Cramer discussed his experiences as a plaintiff's class action lawyer, and argued that courts should be cognizant of the hoops that plaintiffs are asked to jump through in bringing their cases. The whole point of defining the relevant market is to see whether it is possible that the conduct at issue can cause anticompetitive effects. However, there are cases where we know that there are anticompetitive effects.[4] In fact, defendants often admit

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1 433 U.S. 36 (1977).

2 246 U.S. 231 (1918).

3 85 F. 271 (6th Cir. 1898).

4 As an example, Mr. Cramer discussed his experience as an attorney representing direct purchasers suing pharmaceutical companies for delaying or impeding the entry of generics into the market.

that there are anticompetitive effects to certain agreements, arguing instead that there is no violation of the antitrust laws. Proving a relevant market, argued Mr. Cramer, serves as a distraction.

PANEL TWO: MERGER ENFORCEMENT—EMERGING ISSUES

Moderator:
Alden F. Abbott, *Associate Director, Bureau of Competition, U.S. Federal Trade Commission*
Speakers:
James A. Langenfeld, *Director, LECG, LLC*
J. Gregory Sidak, *President, Criterion Economics LLC*
Discussant:[5]
Gregory J. Werden, *Senior Economic Counsel, Antitrust Division, U.S. Department of Justice*

The second panel discussed whether the Obama administration should support changes in merger analysis, and specifically, whether the existing set of guidelines is the appropriate tool for merger analysis.

James A. Langenfeld

Dr. Langenfeld argued that, on balance, the benefits of a new set of Merger Guidelines outweigh the costs. Dr. Langenfeld began with a brief history of the development of the 1968 Merger Guidelines, demonstrating that the original Guidelines were influential in their time and continue to have some relevance today through state codification of the Guidelines' mode of analysis. These Guidelines were then amended in 1984 by the Department of Justice ("DOJ").

Although the non-horizontal merger guidelines have not changed since 1984, Dr. Langenfeld noted that antitrust law has continued to develop in that time. Antitrust litigation is often based on new economic theories, and Dr. Langenfeld explained that the role of foreclosures has especially changed merger analysis. Of the last five challenged vertical mergers, none has been challenged under the 1984 Guidelines. Overall, Dr. Langenfeld concluded that the Guidelines no longer explain merger analysis.

Even though they may be outdated, Dr. Langenfeld cautioned that revising the Guidelines has disadvantages. First, Dr. Langenfeld noted that

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In these cases, the pharmaceutical company would pay the generic manufacturer not to come to market with its product.

5 Deborah Platt Majoras, Vice President and General Counsel, Procter & Gamble Company, was also scheduled to be a discussant on this panel. However, she was unable to attend.

new guidelines would likely be costly and time-consuming to produce, estimating that at least two years would be required to develop new guidelines. Additionally, recent research has shown that new guidelines would be based on problematic models. Antitrust models have strong assumptions built into them, and although these assumptions are generally true, their inaccuracies can create inefficient results.

Despite these costs, Dr. Langenfeld argued that the benefits of new guidelines outweigh any concerns. First, the Obama administration is likely to increase its number of vertical merger cases, and if merger enforcement increases, the government should at least provide notice of its new antitrust standards. Second, new guidelines will allow the new administration to create consistent and predictable enforcement for antitrust regulations. Finally, even though the new guidelines might not be perfect, they would at least be an improvement over the current Guidelines. A new set of guidelines can be further revised as needed, but Dr. Langenfeld contended that too much time has passed to do nothing.

J. Gregory Sidak

Mr. Sidak argued in favor of new guidelines. Antitrust theory has developed since the Guidelines were last changed, and Mr. Sidak contended that they should be revised to incorporate a dynamic competition model into the merger analysis.

Mr. Sidak rejected a static interpretation of competition in which multiple firms compete based only on price. Instead, Mr. Sidak argued that antitrust is best understood through a perspective that analyzes competition within a dynamic process. As firms compete, some may temporarily achieve a position of dominance, but that market power can be displaced over time. Dominance in a dynamic process is achieved only through continual innovation.

Mr. Sidak gained firsthand experience with the Guidelines' failure to apply to current antitrust issues when he worked to defeat the XM and Sirius satellite radio merger. During the process, Mr. Sidak learned that the Guidelines were not applied literally, and instead he found himself analyzing a de facto kind of dynamic competition analysis. Mr. Sidak concluded that the Guidelines were given more of a "dynamic competition gloss" in the XM-Sirius merger case than can usually be derived from the actual text of the Guidelines.

Because antitrust enforcement agencies have succeeded in persuading federal courts to adopt the Guidelines, Mr. Sidak was troubled by the dynamic competition gloss placed on the Guidelines. Without any explicit updates to the Guidelines, judges have more discretion in interpreting them.

Citing *FTC v. Whole Foods Market, Inc.*,[6] in which both the majority and dissent argued that they were correctly applying the Merger Guidelines, Mr. Sidak argued that new Merger Guidelines are necessary to allow the Federal Trade Commission ("FTC") to state its views on antitrust regulation clearly and precisely.

Additionally, Mr. Sidak argued that the Guidelines should be revised to address antitrust regulations for technologically dynamic industries. For example, the Guidelines no longer address recent developments in the use of small but significant non-transitory increase in price ("SSNIP") tests in multi-sided markets. These issues are further complicated when companies such as Google have an ancillary revenue stream that allows them to collect revenue from one set of customers and then give away free products to another set of customers.

The recent restructuring of a collapsing economy also requires new guidelines in the Obama administration. This change could have implications for bankruptcy law and the failing firm doctrine in merger law. Mr. Sidak noted that the United States now has a much more European-styled economy with increased levels of state ownership and public enterprises. When the government becomes a shareholder in a company, Mr. Sidak suggested that the company's sole objective is no longer to maximize its profits; consequently, companies may now legitimately lose money if it is in the public's interest.

Gregory J. Werden

Dr. Werden responded to Mr. Sidak's analysis of a "brave new economic world" and opposed revisions to the Guidelines. Dr. Werden emphasized that the Guidelines were based on experience, and he discussed his involvement in the creation and development of various antitrust guidelines.

After giving a brief summary of the history of the Guidelines, Dr. Werden noted that they were originally created to be a "measured response to legal uncertainty." The Guidelines have since been revised, and Dr. Werden contended that the 1982 Guidelines were the best antitrust guidelines ever released. Later changes to the Guidelines were only minor.

Dr. Werden argued that the Obama administration should not change the Guidelines. The business community and merger practitioners adequately understand horizontal mergers. Although the Obama administration may change the enforcement of antitrust laws, it does not need to change the Guidelines themselves. Additionally, the Department of Justice and the Federal Trade Commission may have already addressed possible changes in their 2006 commentary that can be used as an alternative to the Guidelines.

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6 548 F.3d 1028 (D.C. Cir. 2008).

Dr. Werden then criticized Mr. Sidak's willingness to throw out the established Guidelines and to replace them with a new paradigm of competition. Dr. Werden noted that Mr. Sidak's analysis may be correct in some situations, especially in the development of new technologies in defense industries, but the current Guidelines are sufficiently flexible to include such anomalies. Contradicting Mr. Sidak's statement that the Guidelines are no longer relevant, Dr. Werden explained that the Guidelines do indeed still describe agencies' actions. Therefore, Dr. Werden concluded, the Obama administration should not change the established Guidelines for every unusual scenario that enforcement agencies may encounter. New guidelines should be issued only if "significant legal uncertainty exists" and the new guidelines would "substantially mitigate" such uncertainties. Dr. Werden doubted that either condition currently exists.

Regarding non-horizontal mergers, Dr. Werden did not believe that the business community had high anxieties over these issues. Although other countries have recently released non-horizontal merger guidelines, Dr. Werden argued that they did not provide any useful guidance. While the economic literature might be interesting in this area of the law, the literature is hard to apply in practice.

If the Obama administration wants to take action on non-horizontal mergers, Dr. Werden argued that it should do so by increasing the enforcement of the current laws. This will allow any policy changes to be announced before the increased enforcement begins. If the Obama administration insists on new guidelines, new non-horizontal guidelines should not be made at the beginning of a new administration, but should instead be based on several years of experience.

After Dr. Werden gave his prepared comments, Professor Elhague asked whether the Guidelines were responsible for the government's failure to win its merger cases in court. Dr. Werden responded that the Guidelines were not the reason that the government was losing its cases. Instead, Dr. Werden suggested that judges are highly skeptical of the government's position in merger cases. To improve its chances in court, Dr. Werden suggested that the government refine its use of merger simulation and improve the judges' understanding of economic analysis.

LUNCHEON ADDRESS: PROFESSOR ROBERT PITOFSKY, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Ashlie Lawton, the 2008-2009 Symposium Editor for the *George Mason Law Review*, introduced Professor Pitofsky as the speaker for the luncheon address. Professor Pitofsky was chairman of the FTC from 1995 to 2001 after serving in previous FTC positions. A transcript of Professor Pitofsky's remarks are available in this issue. Professor Pitofsky shed light on his predictions of antitrust during an Obama administration. He focused on the under-enforcement of antitrust laws during the Bush administration in three areas of enforcement: dominant firm behavior, mergers, and vertical distributions. Although Professor Pitofsky predicted that antitrust enforcement will increase in an Obama administration, he noted that it will not increase radically.

Professor Pitofsky first expressed his dismay that the FTC has not brought a dominant firm behavior case in the past eight years. By contrast, Professor Pitofsky pointed out that the Clinton administration had brought seven of these cases, and had focused on high-profile targets such as Microsoft and Intel. Professor Pitofsky also argued that the decrease in antitrust activity in dominant firm cases can also be attributed to a number of recently-appointed judges, who have not been as aggressive on antitrust issues as previous judges.

Professor Pitofsky predicted that the future development of antitrust law will focus on the tension between *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[7] and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.[8] *Aspen* held that merely having monopoly power is not a violation of antitrust law; *Aspen* also required a business's behavior to be "unreasonably exclusionary." Although there has been some talk that *Aspen* should be limited to "refusal to deal" cases, Professor Pitofsky explained that *Aspen* has already been applied outside of this context, and has a broad impact on antitrust law.

Professor Pitofsky believes that the rule established in *Aspen* will be compared to *Trinko*. Professor Pitofsky observed that Justice Antonin Scalia's majority opinion contained language that was overly deferential to monopoly power. Professor Pitofsky predicted that academics will continue to help the Court define the "unreasonably exclusionary" requirement.

Professor Pitofsky then analyzed the Bush administration's influence on mergers. He argued that antitrust laws on mergers are likely underenforced, but noted that the data and research on this issue have not yet reached a consensus. However, Professor Pitofsky cited a survey of twenty private sector lawyers who had overwhelmingly indicated that they can more easily conduct a merger today than they could ten years ago.

If the past eight years have been light on merger cases, Professor Pitofsky predicts only a modest increase in merger enforcement under the Obama administration. Judges will continue to demand significant proof of anticompetitive behavior, and the struggling economy will further protect companies because they can now assert that their mergers are a mere reaction to their current economic struggles.

Next, Professor Pitofsky analyzed the Bush administration's enforcement of vertical distribution regulations, but he noted that even the Clinton administration had only brought one case. This area of the law changed

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7 472 U.S. 585 (1985).

8 540 U.S. 398 (2004).

recently in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[9] in which the Court decided to apply the rule of reason to vertical minimum price agreement cases instead of applying the per se rule. Interestingly, after *Leegin*, states have become more aggressive in their antitrust enforcement because *Leegin* does not apply to their enforcement of antitrust laws. On minimum resale price maintenance cases, however, the Bush administration easily fell behind the Clinton administration. Professor Pitofsky expected the number of these cases to increase under an Obama administration.

Professor Pitofksy discussed his expectations for the future of antitrust, analyzing several statements made by then U.S. senator Barack Obama on antitrust in an attempt to derive general themes on his administration's antitrust positions. Like Professor Pitofsky, President Obama has criticized the current performance of the FTC, and has stated that antitrust enforcement is lacking because the Bush administration did not believe in the mission of antitrust laws. Professor Pitofsky believes that President Obama will enforce the current laws instead of trying to create new antitrust laws or regulations. As corroborating evidence, Professor Pitofsky observed that, as a senator, Obama never proposed or suggested new antitrust regulation or revisions to the Guidelines.

Lastly, Professor Pitofsky discussed other branches of government that will also shape antitrust law. The Supreme Court, Professor Pitofsky noted, has likely affected the types and numbers of cases brought before it. Congress, too, can affect antitrust laws. Congress recently increased fines and jail time for antitrust violations to raise punishments to the level of other white collar crimes. Professor Pitofsky also articulated his hopes that Congress will repeal the Robinson-Patman Act,[10] although he does not expect the Obama administration to bring any cases under this Act even if it remains on the books. Professor Pitofsky also predicted that the political fallout from the recent economic collapse will affect antitrust regulation, although he remains unsure whether the recent outcry for business regulation will specifically translate to political momentum for antitrust regulation.

CLOSING ADDRESS: WILLIAM E. KOVACIC, CHAIRMAN, U.S. FEDERAL TRADE COMMISSION[11]

As a former professor at George Mason University School of Law, Mr. Kovacic began by thanking the *George Mason Law Review* for hosting the Twelfth Annual Symposium on Antitrust Law. He then gave a vigorous response to Professor Pitofsky's criticism of the FTC's current perform-

9 551 U.S. 877 (2007).

10 Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13).

11 Mr. Kovacic served as FTC Chairman from March 30, 2008, to March 30, 2009. Mr. Kovacic is currently a commissioner at the FTC.

ance. A transcript of Chairman Kovacic's remarks are provided in this issue. Chairman Kovacic began by summarizing recent commentary on the FTC, which ranged from high praise to harsh criticism. While the *Global Competition Review* ranked the FTC as one of the best agencies in the world, other commentators have criticized the FTC quite harshly. Chairman Kovacic quoted the blunt criticism of former senator Obama, Professor Pitofsky, and Mr. Kolasky as they declared the FTC to be one of the worst government agencies and that it has reached a fifty-year low in terms of performance.

According to Chairman Kovacic, those criticizing the FTC fail to judge the agency based on properly-defined standards. Instead, criticism of the FTC is based on its "rate of activity" and the number of cases that it initiates. "Bonus points" are given when the FTC is involved in high profile cases, but critics ignore smaller cases—even when they make more substantive contributions to the development of antitrust law. The criteria used to determine the success of an agency, averred Chairman Kovacic, should be adjusted not only to weigh the performance of the FTC, but also to provide guidelines for the future allocation of resources within the government.

On a broader level, an agency should be judged by its ability to improve economic performance and social welfare. Specifically, this is demonstrated when an agency promotes transparency, accountability, internal quality control, and minimization of compliance costs. A good measurement of the FTC's performance should place more emphasis on the FTC's capital investments in institutional capacity. The FTC has been working to build knowledge and improve the infrastructure of competition authority relationships and recruit the best antitrust experts available. Additionally, more value should be given to the FTC's non-litigation programs. This advocacy and research allows the FTC to create novel solutions to antitrust issues, and Chairman Kovacic noted that the Supreme Court has already cited some of the FTC's understated successes.

CONCLUSION

Overall, the Symposium was a great success. The Symposium participants and audience left with a deeper understanding of the history and current trends in antitrust law and what antitrust law will look like, or should look like, in the new administration.