

SOME PREDICTIONS ABOUT FUTURE ANTITRUST ENFORCEMENT

*Robert Pitofsky**

INTRODUCTION

I have been given the challenge of discussing what antitrust enforcement is likely to be over the next four or eight years. Reckless people in the past have accepted that kind of challenge and lived to regret it. In any event, to make such predictions, I believe it is essential to talk about enforcement in the past—to look at where we have been—in order to talk sensibly about the future. Before I begin this exercise, let me emphasize that I speak for myself. I do not speak for the Obama administration or any of its members.

This role is actually easier than I anticipated. Somewhat to my surprise, I learned in the process of preparing this piece that President-elect Obama has talked often about antitrust. His major themes are that the last eight years have witnessed the most serious under-enforcement of antitrust in the last half century,¹ and he attributes that in part to the fact that many of the people appointed to enforce American antitrust during the Bush administration did not really believe in the mission of antitrust (i.e., did not believe that vigorous enforcement would do more good than harm).² My interpretation is that President-elect Obama is not proposing major new legislation but rather is talking about enforcing the laws as written. The President-elect's conclusion of under-enforcement appears to be across the board.

Before I go further, I should note that I, too, think that there has been less enforcement during the Bush administration than should have been the

* Sheehy Professor of Law, Georgetown University Law School; formerly Chairman of the Federal Trade Commission. Remarks presented at the George Mason Law Review Twelfth Annual Symposium on Antitrust, Washington, D.C., Dec. 4, 2008. My thanks to Jon Rackson for much help in turning these conference remarks into a written article.

¹ See, e.g., Senator Barack Obama, Statement for the American Antitrust Institute (Feb. 20, 2008), available at <http://www.antitrustinstitute.org/Archives/obama2.ashx> (follow "Read Senator Obama's Statement on Antitrust here" hyperlink) ("Regrettably, the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century.").

² In May 2008, Senator Obama told an audience: "We're going to have an antitrust division in the Justice Department that actually believes in antitrust law. We haven't had that for the last seven, eight years." Jeff Mason, *Obama Eyes Media with Promise of Antitrust Push*, REUTERS, May 19, 2008, available at <http://uk.reuters.com/article/oilRpt/idUKN1849107920080518>.

case, but I would qualify that conclusion in several ways. First, there has been a difference in the level of enforcement between the Department of Justice, Antitrust Division (“DOJ”), and the Federal Trade Commission (“FTC”). The FTC seems to have been carrying out its job reasonably well, and I’m not just referring to statistics, but also the quality of enforcement. Also, as far as the Antitrust Division is concerned, any reservations I have about the level of enforcement do not extend to cartel enforcement, where I believe the DOJ has been as good or better than almost any administration in my recollection.³ A key part of the reason for more active enforcement is the energizing of the leniency program in recent years.⁴ That program has been an enormous success. The problem in the past has been detecting the existence of cartels, but that is not nearly the same problem today because members of a cartel struggle to be first to get in the door of the Department of Justice in order to receive lenient treatment by disclosing the existence of the cartel.

In addition, there has been energy and originality in the way in which the current Antitrust Division has enforced the rules against price-fixing and market division. It has taken to heart the directive essentially given by Congress in 1998 that antitrust enforcement requires tough remedies. Congress did that by changing the maximum time in jail for antitrust violators from three years to ten years and changing the maximum fine from \$10 million to \$100 million.⁵ In effect, those legislative changes indicated there is no reason to treat price-fixing any more leniently than other kinds of white collar crime.

I propose to discuss past and likely future enforcement levels in three areas of antitrust: dominant firm behavior, mergers, and vertical distribution arrangements.

³ See, e.g., Scott D. Hammond, Deputy Assistant Att’y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, Presentation Before the ABA Section of Antitrust Law: Recent Developments, Trends, and Milestones in The Antitrust Division’s Criminal Enforcement Program (Mar. 26, 2008), available at <http://www.usdoj.gov/atr/public/speeches/232716.pdf>.

⁴ “A key factor has been the adoption of and convergence in leniency programs. The Antitrust Division’s leniency program continues to be our greatest source of cartel evidence. The Antitrust Division has had great success combining vigorous criminal prosecution with our leniency program in order to increase the likelihood of cartel detection and prosecution.” Thomas O. Barnett, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Presentation at the Georgetown Law Global Antitrust Enforcement Symposium: Global Antitrust Enforcement (Sept. 26, 2007), available at <http://www.usdoj.gov/atr/public/speeches/226334.pdf>; see also Hammond, *supra* note 3 (stating that “the Leniency Program is the Division’s most effective investigative tool” and going into detail about how it has been effective).

⁵ Antitrust Criminal Penalty Enforcement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 661, 668 (2004) (codified at 15 U.S.C. §§ 1-3).

I. DOMINANT FIRM BEHAVIOR

The Antitrust Division has not brought a case against a dominant firm in the last eight years. By comparison, seven major dominant firm cases were brought during the Clinton years, *Microsoft* and *Intel* being the leading examples.⁶

I suggest that future levels of enforcement depend largely on the resolution of tensions between two Supreme Court cases: *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,⁷ decided in 1985, and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,⁸ decided in 2004. Also, as I explain more fully below, the quarrel is not so much the result in the two cases—all Justices in *Trinko* agreed that the defendant had not violated the Sherman Act—but the fundamental policy issues that arose in connection with the opinion of Justice Scalia. His opinion included—in dicta—surprising concepts about the role of dominant firms in an antitrust environment.

Aspen involved four ski slopes on mountains in Colorado.⁹ Three of the slopes were owned by one company (Ski Co.) and the fourth slope by a second (Highlands).¹⁰ For many years there had been a joint ticket allowing skiers at their choice to use any slope they preferred.¹¹ Skiers appeared to be pleased with the arrangement.¹² The joint ticket arrangement was abruptly discontinued for reasons that were not persuasive to the Court and in the face of evidence that joint tickets were arranged by Ski Co. in other ski areas.¹³

The court in *Aspen* affirmed the view, long held in this country, that merely having a monopoly is not a violation of the antitrust laws.¹⁴ In addition, the plaintiff must demonstrate a second element: that the monopolist engaged in certain unacceptable conduct.¹⁵ Many believe that the rule that emerged from *Aspen* was that the second element could be described as “unreasonably exclusionary” and the absence of a plausible business justification would go a long way toward proving that the

⁶ See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam); *In re Intel Corp.*, 128 F.T.C. 213 (1999).

⁷ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 587 (1985) (“[T]he jury found that petitioner Aspen Skiing Company (Ski Co.) had monopolized the market for downhill skiing services in Aspen, Colorado.”).

⁸ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

⁹ *Aspen*, 472 U.S. at 587-88.

¹⁰ See *id.* at 589-90.

¹¹ See *id.* at 589, 592.

¹² See *id.* at 590-91.

¹³ See *id.* at 592-93.

¹⁴ See *id.* at 600, 604.

¹⁵ *Aspen*, 472 U.S. at 595-96, 604-05.

exclusion was unreasonable. To be sure, “unreasonably exclusionary” is somewhat vague and should be clarified by scholars or future cases.

Trinko was decided in 2004 and turned upon the unwillingness of a local exchange carrier (it was Verizon in this particular case) to make available its network to smaller, potentially competitive rivals.¹⁶ There was already a statute on the books providing that local exchange carriers had an obligation to do that.¹⁷ Verizon had been found to violate that law and paid a fine and damages, but another plaintiff wanted to look at the question from the point of view of antitrust.¹⁸ The Court was unanimous that the refusal to deal did not make out an antitrust violation.¹⁹ Justice Scalia wrote the Court’s opinion and among the things stated was that the process of achieving monopoly power is an important element of a free market.²⁰ If he had stopped there, most antitrust observers would have agreed. The effort to achieve market power often produces efficiencies that ultimately accrue to the advantage of consumers. But the commentary did not stop there; it went on to cover other matters involving very generous statements about monopoly power. The opinion noted that *Aspen* had proceeded to the very extreme edge of section 2,²¹ that the effort to achieve a monopoly attracts business acumen, induces risk-taking, and increases incentives to innovate.²² In sum, it describes the most lenient treatment of monopoly power that I can recall in the literature of the Supreme Court. An additional troublesome aspect is the absolute absence in the discussion of any dark side to monopoly. For example, any sensible monopolist is going to raise prices to consumers. Why would that not be the case if there is virtually no competition? Consumers directly or indirectly will pay more. Resources will be distorted and barriers to entry often will be raised.²³

Some of the rhetoric in the famous opinion by Judge Hand in *United States v. Aluminum Co. of America (Alcoa)*²⁴ really went too far. Among other things he said is that “immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress.”²⁵ I do not think of Microsoft and Intel as companies under the influence of a narcotic. They appear to be

¹⁶ See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402 (2004).

¹⁷ See *id.*

¹⁸ See *id.* at 404.

¹⁹ See *id.* at 408.

²⁰ *Id.* at 407.

²¹ *Id.* at 409.

²² *Trinko*, 540 U.S. at 407.

²³ Harvey J. Goldschmid, *Comment on Herbert Hovenkamp and the Dominant Firm: The Chicago School Has Made Us Too Cautious About False Positives and the Use of Section 2 of the Sherman Act*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 123, 124 (Robert Pitofsky ed., 2008).

²⁴ 148 F.2d 416 (2d Cir. 1945).

²⁵ *Id.* at 427.

exceptionally innovative and competitively aggressive in various ways. I would question, however, whether section 2 enforcement, on balance, does more harm than good, or whether section 2 should be repealed. I do not believe the free market alone can control exclusionary behavior by monopolists.

So where is law enforcement likely to go from here? One major monopoly case per year, for seven years, as was the case during the Clinton administration? I doubt it. First, many of the more inviting targets have already been challenged. They are under consent orders or court-imposed orders and these restrictions seem to be working fairly well. Also, I think the judges who have been appointed over the last eight years are not likely to be as aggressive as judges appointed earlier. Enforcement officials will be aware that their burden in demonstrating illegal monopoly behavior will be heavy and their evidence very carefully examined.

I expect that, at least for the time being, courts will continue expressly or by implication to apply the *Aspen* rule of “unreasonably exclusionary.” It is a kind of rule of reason and does give the defendant an opportunity to offer an efficiency defense or other business justification. Will there be more enforcement actions against dominant firms than in the last eight years? If you accept that the enforcement level at the Department of Justice has been zero, it is not an exceptionally bold prediction to say that enforcement will increase. I believe there continues to be a significant role for enforcement of section 2 in curbing the excesses of dominant firms, but academics and judges should continue to add clarity to the “unreasonably exclusionary” rule.

II. MERGERS

There is disagreement about whether merger enforcement has declined significantly over the last four to eight years. The last chapter of a recently published book entitled *How the Chicago School Overshot the Mark*²⁶ concludes that enforcement against horizontal mergers has declined significantly.²⁷ George Mason’s distinguished professor Timothy Muris has concluded those statistics do not hold up when you examine the data more carefully.²⁸

I am somewhat influenced by a survey that was reproduced in *How the Chicago School Overshot the Mark* in which twenty private sector lawyers were asked to designate on a range of one to five whether in their view

²⁶ Jonathon B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK*, *supra* note 23, at 235.

²⁷ *Id.* at 266.

²⁸ Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement Over Time and Between Agencies*, 22 *ANTITRUST* 37 (2008).

mergers were easier to get through the Department of Justice during the Bush administration than ten years previously. The result of this survey was that the lawyers on average thought at a level of 4.9 that it was easier to get mergers through the enforcement authorities.²⁹

Will merger enforcement increase in coming years? I believe there will be a modest increase, but I do not see an avalanche of merger cases. Again, enforcement officials will recognize that many courts are likely to tilt substantially in a conservative direction and realize they cannot succeed without exceptionally strong cases. A second hard-to-measure factor is the state of the economy. Many firms will seek merger partners in order to remain viable in a sharply declining economy. The incidence of legitimate claims of failing firm or flailing firm is likely to increase.

III. VERTICAL DISTRIBUTION

With respect to tie-in sales, exclusive dealing contracts, vertical customer or territorial allocation, and maximum and minimum resale price maintenance, I understand the level of enforcement at both agencies during the Bush administration has been zero. To be fair, vertical distribution was not a major target of antitrust enforcement during the Clinton years. For example, I believe there were only a few cases involving exclusive dealing.³⁰ On the other hand, the charges of tie-in sales against Microsoft were at the heart of that case and offered an opportunity to clarify the law in that area, and there were frequent minimum resale price maintenance cases brought by the Federal Trade Commission.³¹ Of course the Supreme Court in *Leegin*³² eliminated the per se rule against minimum resale price maintenance in favor of a rule of reason. But can it be that there has not been a single company with substantial market power and lacking a free rider or other business defense that enforced a program of minimum resale price maintenance? Let's assume (as I do not) that the *Leegin* decision to

²⁹ Baker & Shapiro, *supra* note 26, at 247.

³⁰ The Clinton administration brought three cases involving exclusive dealing. One was *In re Waterous Co.*, 122 F.T.C. 414 (1996), which ended with an FTC order dated November 22, 1996. *See also* *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 190 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001) (per curiam).

³¹ *See, e.g., In re Sony Music Entm't Inc.*, No. 971-0070, 2000 WL 689147 (F.T.C. May 10, 2000), (complaint and agreement containing consent order); *In re Nine West Group Inc.*, No. 981-0386, 2000 WL 250227 (F.T.C. Mar. 6, 2000), *available at* <http://www2.ftc.gov/os/2000/03/9westagree.htm> (complaint and agreement containing consent order to cease and desist); *In re Am. Cyanamid Co.*, 123 F.T.C. 1257 (1997). The *Nine West* consent order was modified in the wake of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). *In re Nine West Group Inc.*, No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008) (order granting in part petition to reopen and modify order issued Apr. 11, 2000).

³² 551 U.S. 877.

move to a rule of reason was correct. Is it possible in eight years that neither agency could find a minimum resale price maintenance program that would have been illegal under a rule of reason approach? It seems to me that this is an indication of the kind of ideology—essentially per se legality for minimum resale price maintenance—that made enforcement in this area unlikely during the past eight years.

CONCLUSION

Where are we likely to go in the future? As I have already indicated, except for tie-in sales and minimum resale price maintenance, there has been little enforcement against vertical arrangements not just in the last eight years, but in the last sixteen. The most interesting question relates to resale price maintenance. Senator Kohl has reintroduced a bill in Congress that would reverse the result in *Leegin*.³³ Discounters are popular outlets, especially in a difficult economy, and the bill may have considerable support. As to federal enforcement, once again I am asked boldly to predict whether the enforcement level will remain close to zero in the next four years. Of course it will not. Like the enforcement during the Clinton years it will be cautious and targets will be carefully selected. On the other hand, even if just one or two cases are filed in an area, that sends a signal to the private sector to be much more cautious about recommending certain kinds of behavior.

Let me conclude with something that is aspirational rather than predictive. Few today would attempt to defend some of the more extreme decisions during the 1960s (the Warren Court years) and many are very critical of the under-enforcement of antitrust, especially during the last several years of the Reagan administration.³⁴ I would hope there would be renewed attention to the question of whether there is a middle ground that would avoid the extremes of the 1960s and the extremes of the 1980s. For example, in the 1960s, virtually no attention was paid to defense claims that there were efficiencies that justified the transaction. I believe that was the wrong approach. Also, complexities in antitrust enforcement have been introduced by the great increase in global competition. It would be welcome if there were a restoration of a debate that sought an antitrust policy that was vigorous but attentive to the kind of defenses that have been offered and are often ignored.

³³ Discount Pricing Consumer Protection Act, S. 148, 111th Cong. (2009). Senator Kohl introduced an identical bill in the 110th Congress in 2007. S. 2261, 110th Cong. (2007).

³⁴ See Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 23, at 40, for an exceptionally balanced review of these periods of extreme over- and under-enforcement.

The bottom line to this exercise in prediction is that I believe that antitrust enforcement will increase, but not radically so. There will not be an avalanche of cases. I think in general, President-elect Obama, while he has said there are serious areas of under-enforcement, tends to be moderate in virtually every approach he takes to regulatory issues and is likely to appoint essentially moderate people to head the two antitrust enforcement agencies.