Department of Justice

THE FUTURE OF GOVERNMENT ENFORCEMENT
OF SECTION 2 OF THE SHERMAN ACT

REMARKS OF JAMES F. RILL
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
DEPARTMENT OF JUSTICE

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It is a pleasure to be here with you this afternoon, to see so many old friends, and to share some informal thoughts about Section 2.

Perhaps more than any other area of antitrust law, it is very difficult to generalize about Section 2 of the Sherman Act. This difficulty is reflected in the ABA Task Force Report for the Antitrust Division which could only recommend that more resources be devoted to determining what types of Section 2 cases should be considered. But generalize I must since today's topic is future government enforcement of Section 2 and any detailed discussion of specific future DOJ enforcement actions would be inappropriate.

I.

Let me begin with a few words of background. Section 2 is, of course, centrally concerned with conduct designed to secure, retain or extend a monopoly. Cases under this section, in contrast to Section 1 cases, usually involve single-firm conduct; and the context for the conduct is usually one of monopoly power either threatened or achieved.

Although monopolization or attempt cases are infrequent, past suits under Section 2 have embraced some our most important industries and largest companies, including AT&T, Alcoa, IBM, Kodak, Standard Oil, and American Tobacco Company.

Against this background, my first generalization concerns perspective. An antitrust enforcer, in my view, needs to confront potential Section 2 cases with a balance of interest and caution. Interest in such cases is readily explained. Monopolies, like cartels, have ample incentive to do harm by raising price and restricting output. But whereas a price-fixing conspiracy standing alone may well spur new entry or undermine itself through cheating, the monopolist may engage in exclusionary or predatory conduct to perpetuate the monopoly. Indeed, monopoly power may find its source in laws restricting competition or in natural monopoly conditions in an industry; and in such cases market forces alone are even less likely to dissipate power.

Yet at the same time there are also reasons for caution, as noted in last year's ABA Task Force Report on the Antitrust Division. Where agreements or mergers are the targets of enforcement, the enforcer can take some comfort in the thought that the claimed efficiencies can often be realized, if they exist, through alternative means, most notably internal growth. Where Section 2 is directed at unilateral conduct, no such safeguard exists. Further, there is a vast array of business conduct that may damage a competitor but advance competition; and the criteria for distinguishing efficient from anticompetitive conduct are in many cases far from clear. Finally, an illegal agreement or merger can be barred, but in Section 2 cases remedy problems abound, whether the aim is to restrain conduct handicapping competitors or to dissolve a company into eight parts. In sum, Section 2 needs to be approached not timidly but surely with a sense of sobriety.

My second generalization concerns focus. The first place I would look in searching for monopoly power, although certainly not the only place, is in regulated industries, a term that I will use somewhat loosely to encompass all types of direct relationships between business and government. In some cases, regulation may be the very root of monopoly power, whether the regulation takes the form of an exclusive franchise for taxis at an airport, a key computer patent, or import restrictions protecting a dominant U.S. producer. In other cases, such as a local distribution of electric power, regulation may merely serve to flag the presence of a natural monopoly. Whatever its source, such monopoly power surely does not warrant automatic condemnation; but it may well warrant a careful second look.

The presence of regulation may have other implications as well. As I earlier noted, it is likely to raise doubts that market forces alone will erode the monopoly. In addition, where monopoly power is conferred by government regulation, there may be less concern that Section 2 litigation is discouraging desirable private investments that happened to produce a business whose dominance is merely the reward of its own success. On the other hand, where litigation is undertaken in the shadow of regulation, enforcers have a separate responsibility to see that antitrust does not become a vehicle for overriding choices made by legislatures or authorized agencies to prefer other values to competition. One other consequence of regulation, to which I now want to turn in more detail, is the initial choice it poses to the Department: whether to proceed by competitive advocacy or through antitrust litigation.

II.

The Department has two different means of attacking Section 2 violations, litigation and competition advocacy, and it sometimes may choose both routes. Federal court litigation under Section 2 can be used to attack the offending conduct or structural concerns. Competition advocacy -- an appearance by the Department before the appropriate regulatory body to seek changes in the regulatory scheme -- can be used to attack the offending conduct or structural concerns or to attack the regulatory source of the monopoly power.

There is a range of considerations that affect the Department's decision as to which course to follow, but let me review briefly some of the major ones.

Legal doctrines, such as express or implied repeal of the antitrust laws, immunity and state action may limit or unnecessarily complicate federal court challenges to alleged monopolization involving regulated industries. Competition advocacy may be the more effective vehicle where these doctrines come into play. However, I should warn you that the Department views each of these doctrines narrowly. Our recent amicus brief in the state insurance litigation demonstrates our commitment to narrow construction of partial repeal of the antitrust laws by statute. We have similarly urged caution in the application of the state action doctrine and in inferring immunity from a statutory scheme that does not explicitly grant it.

Remedy issues may also affect the choice between litigation and competition advocacy. Where monopoly power is dependent on government regulation, the most effective remedy may be to eliminate or reform the regulation, a task that can only be accomplished through competition advocacy. Alternatively, the regulatory agency may not have the power to impose an effective remedy. In Otter Tail, litigation was thought to be necessary because the FERC could not order wheeling. On the other hand, the agency may have power and expertise to impose a regulatory solution that would be difficult or impossible for the Department to effect, as, for example, where access to monopoly facilities requires the setting of reasonable compensation.

Finally, staff resources are an important constraint for all agencies in a time of heavy workloads and severe budget limitations. Where an agency is likely to adopt a competitive solution, the Department may find it more efficient to file a brief with the agency instead of bringing a full-scale court case. Where the agency's approach or authority precludes such a solution, the argument for antitrust relief may be far stronger. Let me now say a few words about the litigation route.

III.

In Section 2 litigation, the courts have tended to stress three different issues and on each a brief word might be useful.

First, and deservedly at the threshold, is the requirement of monopoly power or, in the case of attempt, evidence of proximity and potential.

To my mind, the requirement serves a double purpose: it directs our attention to challenged conduct in the context where it is most likely to do competitive harm; and it serves as a screen for cases where the threat of harm is reduced and intervention may be more likely to chill hard competition. How much power is enough, and how to measure power, are futher questions; but here the case law and the merger guidelines offer at least a foothold for analysis.

Monopoly power, it should be remembered, may have to be tested in more than one market. In some regulated industries, power in the franchised or natural monopoly market may be easily discerned; but if the anticompetitive story involves the use of that power to achieve or enhance power in an adjacent market, a separate issue is presented. Certainly the greatest threat in such a case is not the mere exercise of legally achieved monopoly power in an indirect setting, but rather its use to create new market power. In yet a further variant, one might have to be concerned that an advantage gained in the adjacent market might be used to reinforce monopoly power in the original market as well.

Second, by far the most difficult issue in Section 2 analysis is likely to be the delineation of forbidden conduct. Except in very unusual circumstances, even a monopolist is not and should not be deprived of the opportunity to compete in its own and in adjacent markets. Production efficiency and pro-consumer initiatives themselves can build or reinforce market power.

And even where identical conduct is involved, its effects may be benign or ominous depending on surrounding conditions, such as the size of the actors and conditions of entry. In a sense, and I take no comfort in this admission, each case is a puzzle that has to be analyzed on its own facts.

What needs to be stressed, in evaluating conduct, is a sense of modesty about the state of our own knowledge. If we have learned anything from airline deregulation, it is that new opportunities for competition can be accompanied by new devices for thwarting it; and we may be learning precisely the same lesson as new technologies emerge to compete with cable. At the same time, modesty does not mean paralysis: one of the first lessons of antitrust is that it is very hard to undo a bad transaction or reawaken competition after it has been suppressed.

Third and last is the subject of intent. Formally, only the offense of attempted monopolization has a specific intent requirement, and since even that intent is often inferred from conduct, its independent importance may be open to doubt. What might be useful, however, is to distinguish this formal requirement from two other issues that are readily confused. One is generalized statements of zeal or aggression that can be unearthed in many business file searches, statements whose value in analysis is likely to be pretty limited whatever their jury appeal. The other is explanations of the actual purpose of disputed conduct; while skepticism may be warranted in some cases, these expressions of intent can be very useful to reinforce or undermine specific claims of efficiency or harm advanced by litigants.

IV.

Let me in closing make clear to you that our interest in Section 2 is far from an abstraction. Although I cannot discuss in detail cases still under consideration, our concern with monopoly power has informed potential litigation reported in the press as well as filings already made with agencies.

You have probably read about our investigations involving the air transportation markets. Among other things we are looking at the impact on air transportation markets of practices of certain hub carriers with respect to airport expansion. For example, it might be the case, and the facts are not yet in, that a hub carrier has agreed with an airport operator to establish control over deployment and expansion of airport facilities, aiding the carrier to reinforce its dominant position in air transport markets to and from the city.

Late last year we made a filing with the Department of Transportation suggesting the need for further review of regulations relating to computer reservation systems. In our comments we suggested that regulatory reform, or perhaps more drastic action, was required to deal with competitive problems in the computer reservation system industry that may be undermining competition in air transportation markets.

In the cable industry, a recent Department filing suggested that the FCC's current definition of effective competition -- three over-the-air networks -- is an inadequate basis for determining when regulation of cable franchises may be necessary.

Of course, Section 2 analysis does not always cut in favor of interventionist policies. One need only look at the Department's record on proposed waivers of various line of business restrictions in the AT&T Modified Final Judgment. For example, the Department recommended removal of the information services restrictions. After reviewing technological, market and regulatory development the Department concluded that there was no longer a substantial risk to competition in the market for information services warranting a ban on BOC entry except pursuant to case-by-case waivers. This is not to say that information services activities at the BOC's are immune from the antitrust laws, merely that they no longer warranted the strictures of the MFJ.

CONCLUSION

Section 2 is a fascinating area of the law. As an antitrust enforcer however, I balance my interest in this area with caution over the potential impact of specific enforcement efforts. Nevertheless Section 2 remains a part of the Department's enforcement activities.

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