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The Strategic Abuse of the Antitrust Laws

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Abstract. This paper identifies seven ways that firms strategically use the antitrust laws to further their own interests. Each of the seven abuses is illustrated with several examples.

Keywords:

1. Introduction

Digital Equipment Corp. began contemplating a lawsuit against Intel in 1990, when the firm's attempt to persuade Intel to incorporate Digital technology as part of its next-generation chip design ended in failure. Alpha, then Digital's flagship product, was at the time the fastest chip in the industry. In spite of Alpha's relative superiority, more computers, including computers manufactured by Digital itself, employed Intel's lower-powered Pentium chip than Digital's counterpart. In 1997, Digital threatened Intel with antitrust action in a bold attempt to reposition itself in the computer industry. Robert B. Palmer, Digital's chief executive, refused to deny analysts' suggestions that the lawsuit was in fact a veiled strategic effort to prevent Intel from developing competing technology in the microprocessor market. However, the competition to develop a high powered, next generation chip that would become industry standard was intensifying, and in discussing their motivations for the suit, Digital executives repeatedly labeled Intel a monopoly. Digital also launched an aggressive public relations campaign against Intel seeking to bolster these claims. A Digital press release stated: "Intel has strengthened its monopoly in the x86 market and is seeking to extend its monopoly to higher-performance microprocessors." (Rubenstein, 1997) The Federal Trade Commission also began a broad inquiry into Intel's business practices searching for potential antitrust violations. To avoid further scrutiny, damage to its public reputation, and potential punitive action, Intel was left with

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Disclaimer: R. Preston McAfee was asked to render expert opinions in the cited cases of Great Northern v. Georgia-Pacific, Longhorn Partners v. Holly Corp and Peregrine/Neon v. BMC Software.

little choice but to reach private settlement with Digital. In the final agreement, Digital received $700 million from Intel in exchange for a chip producing plant, guaranteed discounts on chip purchases from Intel, and continued access to Intel's Pentium chips. The final two stipulations were vital, as in fiscal 1997, Digital's sales from personal computers incorporating Intel's Pentium chip exceeded $2.2 billion, and accounted for nearly 25% of Digital's total revenues. Digital had not only successfully slowed Intel's entry into the high-powered chip market, and forced it to acquire Digital chip technology, but added handsomely to its cash reserves.

This example portrays one potential way firms exploit antitrust law for competitive and strategic benefit. The strategic use of the antitrust laws is an important management phenomenon which to date has received surprisingly little attention from business strategy researchers. In the present study, a taxonomy of the exploitation of the antitrust laws for strategic purposes is provided, and illustrated with examples.

2. A Taxonomy of Strategic Uses of the Antitrust Laws

There are two main antitrust laws.[2] The Sherman Act of 1890 prevents

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade …

The Sherman Act also makes the "attempt to monopolize" a felony, and includes criminal penalties as well as fines. The Clayton Act of 1914 makes a variety of anticompetitive behaviors illegal. It does not carry criminal penalties, but does permit trebled damage awards. Section 2 of the Clayton act, known as the Robinson-Patman Act due to a 1936 amendment, prohibits price discrimination that would lessen competition. Thus, a supplier that charges one retailer more than another would violate Section 2 of the Clayton Act, unless they have a good excuse. Acceptable excuses include that the price difference is attributable to cost differences, or that the price difference is a response to meeting competition. Section 3 prohibits a long list of exclusionary practices that lessen competition, and has been interpreted to exclude:

- Tying (must buy one good to get another).

- Requirements Tying (buyer agrees to buy all its needs from the seller).

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2. The following discussion is based on McAfee, 2003, p. 204-14. The authors are not attorneys and this discussion does not represent a legal opinion but our best summary of relevant laws in practice.

• Exclusive Dealing (buyer aggress to deal only with the seller).

• Exclusive Territories (buyer agrees to operate only in a specified region).

• Resale Price Maintenance (buyer agrees to a minimum resale price).

• Predatory Pricing (pricing below cost to eliminate a competitor).

In order to violate Section 3 of the Clayton Act, these activities must reduce competition or exclude or eliminate a viable competitor.

Section 4 of the Clayton Act explicitly permits private antitrust litigation, and makes plaintiffs entitled to treble damages (three times the actual damage) plus the cost of bringing the suit. Consumers and firms in the same line of commerce who are injured by exclusionary conduct have legal standing to sue. Shareholders, employees of an injured firm, and suppliers of other inputs to the injured firm cannot sue. Generally, directly injured parties have standing to sue and indirectly injured parties do not.

Section 7 prohibits mergers that lessen competition. The lessening of competition is a somewhat clearer standard than the problematic "attempt to monopolize" language of the Sherman Act. Section 7 can be used privately to block mergers of rivals.

The focus of the present study is private litigation against other firms. Such private litigation creates a potential tool for harassing, harming and extorting payments from other firms. In our review of cases, we have identified seven distinct purposes, all unrelated to the social goal of promoting competition, to which the antitrust laws can be put. The potential for antitrust laws to be misused exists because antitrust cases are complicated and expensive to defend. Much of the behavior proscribed by the antitrust laws is subject to the "rule of reason," in which a class of behavior is illegal if it doesn't have a pro-competitive explanation. The prohibition on price discrimination in Section 2 of the Clayton Act is an example of a rule of reason analysis. Consequently, defendants in antitrust suits can be compelled to provide explanations and analysis of their behavior, produce a mountain of documents sometimes running into the tens of millions of pages, and have their executives spend days or even weeks in depositions and preparation for depositions. The nature of antitrust lawsuits is that it can be much more expensive to defend against a lawsuit than to bring a suit, although the threat of countersuits makes this more symmetric. This feature – more expensive to defend than to bring – makes the antitrust laws a useful strategic tool in attacking a rival.

The seven strategic uses of the antitrust laws that we have identified are:

1. Extort funds from a successful rival.

2. Change the terms of the contract.

3. Punish non-cooperative behavior.

4. Respond to an existing lawsuit.

5. Prevent a hostile takeover.

6. Discourage the entry of a rival.

7. Prevent a successful firm from competing vigorously.

The first two represent a taking – “give me something (cash, better contract terms) and I won’t expose your vulnerability to an antitrust lawsuit”. It should not be obvious that such extortion would work – what stops other firms from bringing suit? In order for it to work, it must be that the plaintiff has a unique standing – no other firm is so well positioned to bring the suit, perhaps because other firms in the industry could not have been injured by the defendant’s behavior.

The third use of the antitrust laws exploits the expensive nature of antitrust litigation, and the fact that it may be much cheaper to bring a suit than to defend against a suit. The modern theory (e.g. Abreu, Pearce and Stachetti, 1990) of cooperation requires punishments for misbehavior, and the theory emphasizes the problem that punishment harms the punisher. Thus, the theory points to the problem that even when a firm fails to cooperate, rivals may want to avoid the punishment. This is most easily understood in the context of cooperation on price, but applies equally to other forms of cooperation such as jointly lobbying the government for favorable laws. Price cooperation is usually supported by the threat of a price war, which is ruinous for all industry participants. Thus, if a firm violates a cooperative agreement, perhaps by taking more than their share of the market, the rivals would hesitate to launch a price war to punish the miscreant, because all would lose from the war. The ideal punishment harms the punished firm but not the punishers. Launching an antitrust suit may be relatively inexpensive to the punisher and yet impose significant costs on the punished firm. In this way, antitrust lawsuits are useful punishments for the purpose of enforcing cooperative agreements.

When a firm has a legitimate grievance against another firm, such as patent infringement or trademark infringement, one way for the defendant to defend themselves is to attack in response. Antitrust suits are frequently filed in response to other suits, because they balance the settlement process (“you drop yours and I’ll drop mine”) and they permit discovery against the plaintiff, thereby making the imposition of costs more symmetric. This is the fourth strategic use of the antitrust laws.

Because mergers within an industry (“horizontal mergers”) result in increased market concentration, an antitrust suit is a natural defense against a hostile takeover. Antitrust lawsuits generally require extensive discovery and may take years to investigate. Consequently, the antitrust laws often create an effective defense against a takeover, because the time horizon is too long for the acquirer. Moreover, an antitrust lawsuit may give the target firm time to execute other defenses like poison pills (spinning off valuable assets) or spending cash needed for a leveraged buyout by the acquirer.

The antitrust laws were formulated to promote and enhance competition. However, the last two uses turn the laws on their head and use the antitrust laws to *prevent* competition.[3] In one case, entry of a large and efficient firm is discouraged by threatening the firm with a suit claiming the attempt to monopolize. The last, but not least, use of the antitrust laws is to discourage an efficient firm from competing as effectively as it could otherwise. A successful firm is potentially vulnerable to less successful rivals alleging intent to monopolize, and less successful rivals can use successful firm's vulnerability to inhibit competition.

While there may be other strategic uses of the antitrust laws, these seven appear to incorporate all the major abuses we encountered in our survey of private antitrust litigation. Of course, plaintiffs would generally consider that there were legitimate antitrust violations, and sometimes there are such violations. In addition, the motives of plaintiffs generally aren't evidence; even if the plaintiff's purpose is to inhibit competition or extort a settlement, the case will be decided on its own merits.

3. Examples of the Seven Strategic Uses of the Antitrust Laws

3.1. Extort a Settlement from a Successful Rival

Firms can and do attack rivals through the strategic use of antitrust litigation designed to extract hefty financial settlements. A recent noteworthy example involves privately held Conwood Sales, marketer of such cigarette brands as Kodiak and Cougar, which brought an antitrust suit against its leading competitor, U.S. Tobacco. Conwood alleged that, under U.S. Tobacco's category-management plan tactics, its in-store display racks were removed by U.S. Tobacco employees, and that adequate retail space wasn't provided for its discount brands. Conwood's strategy against its largest rival paid off handsomely when the U.S. Circuit Court of Appeals upheld a record $1.05 billion antitrust verdict against U.S. Tobacco, and the Supreme Court refused to intervene (Teinowitz, 2003).

A successful antitrust suit by the U.S. government often brings a swarm of private plaintiffs. Hanover Shoe[4] is an example where this strategy was

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3. The potential use of the antitrust laws to inhibit competition is recognized in Baumol and Ordover, 1985.
4. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

successfully employed. Hanover filed a private antitrust suit seeking treble damages against United for allegedly monopolizing the shoe industry in violation of Section 2 of the Sherman Act by means of its practice of leasing and refusing to sell its shoe machinery. For its primary evidence, Hanover submitted the previous District Court findings in which United had been successfully prosecuted on the same grounds by the U.S. government. In 1968, the Supreme Court awarded Hanover the maximum treble damages applicable under the statute of limitations.

Microsoft appears an obvious target for this strategy as it has been the target of repeated antitrust lawsuits. In January of 2002, on the heels of Microsoft's antitrust settlement with the Justice Department and several states, AOL (through its subsidiary Netscape Communications) filed a private antitrust suit against Microsoft. The suit cited seven counts since 1995 in which Microsoft committed illegal acts and requested punitive damages as well as injunctive relief. AOL's strategy of using antitrust litigation to extract a hefty settlement from its leading rival was well rewarded. Just sixteen months after the suit was filed, Microsoft not only agreed to settle the case, but to pay AOL $750 million in the process (Carney, 2003).

Subsequent to this result, other firms have been encouraged to adopt a similar strategy. Sun Microsystems has filed a private antitrust suit against Microsoft seeking damages of over $1 billion, an amount which could be tripled under federal law (Gonsalves, 2002), while Be Incorporated filed suit alleging that Microsoft was responsible for destroying its business (Mook, 2002). Microsoft subsequently agreed to settle with Be for $23 million in addition to legal fees (Lawson, 2003). In December of 2003, RealNetworks also filed a $1 billion antitrust suit against Microsoft (Peterson & Dudley, 2003), using wording which closely followed that used by Netscape in its 2002 lawsuit.

Firms appear more likely to bring antitrust litigation against other firms when a particular antitrust strategy has proven highly successful. The $1.05 billion decision against U.S. Tobacco, for example, has resulted in a dramatic increase in the number of private antitrust suits challenging category management plans. As one prominent example, R.J. Reynolds cited the U.S. Tobacco decision when it later challenged the category management plan of its leading rival, Philip Morris USA, on antitrust grounds.

Wal-Mart's 8 year old lawsuit against Visa U.S.A. and MasterCard International exemplifies the enormous potential strategic importance of antitrust suits to business firms. Even though it has yet to go to trial, more than 430 depositions have already been taken, versus only roughly 80 in the Microsoft antitrust case, and five million pages of documents have been produced in discovery (Lee, 2003). This massive legal maneuvering is a direct result of the dire financial consequences Visa and MasterCard face in the event of a loss, and of the sizeable financial gain Wal-Mart may receive should its strategy eventually succeed. A loss to Visa and MasterCard may result in the potential unbundling of credit card from debit card acceptance, and in the payment of billions of dollars in damages to Wal-Mart. Antitrust litigation, when pursued as a strategy, often involves extremely high stakes which increase its strategic and competitive importance to firms.

Retractable Technologies, Inc., a small manufacturer of safety needles, was experiencing great difficulty increasing sales. In 2001, the Little Elm, Texas-based manufacturer filed a lawsuit in U.S. District Court charging that its primary competitors, including needle manufacturers Tyco Healthcare Group and Becton, Dickinson and Co., engaged in anticompetitive business practices which unfairly restricted RTI from entering the marketplace. The strategy proved successful as nearly all defendants, including Hospital alliances Premier, VHA and Novation, agreed to cash payments as well as separate provisions intended to facilitate sales and increase market share (Becker, 2003).

One unusual but apparently successful implementation of this strategy involved Information Resources, a market research firm. Unable to locate an acquirer for some time, Information Resources filed an antitrust suit against rival VNU's AC Nielsen seeking more than $350 million, subject to possible trebling which would dramatically increase any damages. The potential payoff from the lawsuit, which is entirely speculative, dwarfs any value the company has. However, the appeal provided was sufficient to Symphony Technology Group, which subsequently agreed to make the acquisition. Valuation under the terms of the acquisition is dependent almost entirely on the outcome of the antitrust litigation. Investor payoff hinges on Information Resources winning its antitrust suit against rival AC Nielsen, as Information Resources shareholders stand to receive contingent value rights entitling them to 60% of net proceeds in any future judgment or settlement (Neff, 2003).

3.2. Change the Terms of a Contract

Aspen Skiing[5] was owner of one of four major downhill skiing facilities in Aspen, Colorado, while Aspen Highlands owned the remaining three facilities. Each competitor customarily sold tickets permitting entrance to its own facilities, as well as an interchangeable all-Aspen ticket which could be used at any resort. Revenues were traditionally allocated from the all-Aspen ticket based upon the results of random-sample surveys to determine the number of skiers who used each mountain. Prior to the 1977-1978 ski season, Aspen Highlands offered its smaller competitor a fixed percentage of the ticket's gross revenues. When Aspen Skiing refused to accept the terms, Aspen Highlands discontinued selling the all-Aspen ticket and instead sold tickets strictly to its own mountains. Aspen Skiing, whose market share declined steadily thereafter, responded by filing an antitrust

5. Aspen Skiing Co. v. Aspen Highlands Skiing Corp. 472 U.S. 585 (1985).

suit alleging that its larger competitor had in effect monopolized the market for downhill skiing services. This legal strategy proved extremely successful. A jury returned a verdict in favor of Aspen Skiing, and the court entered a judgment for treble damages. The decision was affirmed by both the Court of Appeals and ultimately the Supreme Court.

Between 1972 and 1981, independent Texaco retailers purchased gasoline from Texaco at retail tank prices, during which period sales steadily declined. During that same period, Texaco supplied gasoline at a discount to Gull and Dompier, whose sales increased substantially. In 1976, the independent retailers filed suit against Texaco under the Robinson-Patman Amendments to the Clayton Act, alleging that the distributor discounts violated § 2(a) of the Act, which, among other things, forbids any person to "discriminate in price" between different purchasers of commodities, where the effect of such discrimination is to substantially injure competition. The independent retailers alleged that during the relevant period, Gull and Dompier were able to dramatically increase their sales volume as a direct result of the magnitude of discounts received. The strategy employed by the independent retailers was successful. Both the District Court and later the Court of Appeals, in 1990 in ruling for the independent retailers denied Texaco's claim that such discounts reflected the services performed by the purchaser for the supplier.

In Catalano,[6] a group of beer retailers were unhappy with having to make strictly cash payments to independent wholesalers. The beer retailers subsequently filed an antitrust suit against the wholesalers, charging that they had conspired to eliminate all short-term trade credits, and to accept only cash payments, either in advance or upon delivery. The beer retailers' strategy of using antitrust law to alter their agreed-upon terms of payment proved successful. In 1980, the Supreme Court held that the actions of the independent wholesales fell squarely within the traditional antitrust rule of per se illegality of price fixing and was therefore prohibited.

3.3. Punish Non-Cooperative Behavior

Straightforward legal cooperative agreements are usually enforced with contracts; illegal or difficult to define agreements must be supported through a threat of punishment for failure to perform. Illegal agreements, by their nature, will not be enforced by courts. Agreements that are difficult to define, such as "best efforts" type understandings, may also resist formalization in contracts and therefore be enforced by a punishment scheme. In either case, it is difficult for the researcher to know for sure that behavior is a punishment for non-cooperative behavior. Consequently, our examples in this category are more speculative than

6. Catalano, Inc., et al. v. Target Sales, Inc., et al. 446 U.S. 643 (1980).

those in other categories. It appears the antitrust laws are being used to punish non-cooperative behavior, but there may be other interpretations.

Trucking Unlimited et al. (Trucking), a group of highway carriers, was experiencing difficulty gaining a foothold in the common carrier market in California. In particular, California Motor Transport Co. et al (California Motor), a consortium of California trucking firms, was thwarting Trucking's repeated efforts to successfully enter the new territory. California Motor was extremely successful in its vigorous lobbying campaign before state and federal proceedings, which were intended to prevent Trucking from gaining access to the California market.

In 1971, Trucking filed an antitrust suit against California Motor under section 4 of the Clayton Act seeking injunctive relief and damages. Trucking alleged that it had combined, by way of a massive, concerted and purposeful group campaign, to prevent Trucking from enjoying free and unlimited access to the agencies and courts in violation of the antitrust laws, in spite of the fact that the means used in violation were entirely lawful. While the District Court dismissed the complaint for failure to state a cause of action, the Court of Appeals reversed. It rule that while any carrier has the right of access to administrative agencies and courts to defeat applications of competitors for certificates as highway carriers, its First Amendment rights are not immunized from regulation when they are used as an integral part of conduct violating the antitrust laws. The power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them free and unlimited access to those tribunals. Trucking's strategic use of the antitrust laws to punish the non-cooperative behavior of its adversary was successful.

Omni Outdoor Advertising provides a counter example, as its attempt to engage a similar strategy failed. Omni a new firm attempting to enter the billboard advertising market in Columbia, South Carolina. The dominant market leader, Columbia Outdoor Advertising, controlled over 95% of all billboard advertising, and enjoyed cozy relations with city officials. Columbia Outdoor Advertising leveraged this dominance to wage an intensive lobbying campaign to restrict market growth, and therefore new entrants. The city government of Columbia subsequently agreed to a stringent ordinance on billboard advertising severely limiting the ability of new firms, including Omni, to enter the market. Omni Outdoor Advertising responded to these actions by bringing litigation under Sections 1 and 2 of the Sherman Act, charging that the new ordinances represented an anticompetitive conspiracy. Even though the jury agreed with Omni on all counts, the District Court ruled that the alleged activities remained outside the scope of federal antitrust laws. The Court of Appeals reversed, reinstating the verdict in favor of Omni, and in 1990 the case went before the Supreme Court.

In City of Columbia v. Omni Outdoor Advertising, Inc. 499 U.S. 365 (1991), the Supreme Court ruled that the city's actions, which were an implementation of state policy, were immune from federal antitrust liability. The Court explained that it is both "inevitable and desirable that public officials agree to do what one or another group of private citizens urges upon them" and that the Sherman Act "condemns trade restraints, not political activity". As a result, federal antitrust laws do not regulate the conduct of private individuals – even when they seek anticompetitive action from the government.

3.4. Respond to an Existing Lawsuit

Firms may co-opt antitrust law in order to counteract the negative impact of a lawsuit brought by a competitor. Lexmark, for example, first brought suit against Static Control Components, alleging that it illegally copied chips used to mate cartridges to Lexmark's printers. Lexmark, which complained that Static Control Components circumvented the "secret handshake" authentication software built into the devices by Lexmark, received a favorable ruling in District Court. A preliminary injunction was issued barring Static Control Components from making the chips used in replacement cartridges for two of Lexmark's laser printers. Unhappy with the outcome, Static Control Components immediately filed an antitrust suit against Lexmark the very same day, claiming that the firm was attempting to monopolize the cartridge market by forcing firms which remanufacture toner cartridges to leave the market.

Longhorn Partners (Longhorn) was in the initial stages of its $60 million project to refurbish a half-century-old pipeline. The Longhorn Pipeline, once completed, will transport gasoline, diesel and aviation fuel 700-miles from Houston to West Texas. Faced with the threat, Holly Corporation (Holly), an industry competitor based in Dallas, and two of its subsidiaries, launched a public relations campaign aimed at halting construction of the pipeline. Efforts included inducing farmers that owned land the Longhorn Pipeline transverses to sue in order to prevent gasoline from ever running through the pipeline (Haurwitz, 2002).

Longhorn Partners responded in 1998 by filing a $1 billion antitrust suit, alleging that Holly was attempting to delay the opening of its refined petroleum products pipeline (Billingsley, 2003). Holly and its Navajo Refining Co. L.P. unit responded with a lawsuit alleging tortious interference with existing business relations, malicious abuse of process, unfair competition, and conspiracy (Haurwitz, 2002). A state judge in El Paso ruled against Holly, stating that it had attempted to sabotage construction of the Longhorn Pipeline.

Holly Corp. has subsequently agreed to pay Longhorn $25 million, as well as to purchase 7,000 barrels of refined products daily for up to six years from the firm. The fuel will be transported through the Longhorn Pipeline- the same which Holly had engaged in extensive efforts to stop (Haurwitz, 2002).

BMC Software, a leading manufacturer of IT critical software, filed a lawsuit against several firms including Peregrine Bridge Transfer Corp. and Neon Systems, Inc. claiming over $200 million in damages due to the alleged misappropriation of trade secrets. The defendants, Peregrine, Neon et al, responded by filing an antitrust suit against BMC Software. In the case (BMC Software vs. Peregrine/Bridge Transfer Corp., Skunkware, Inc., Neon Systems, Inc., Wayne E. Fisher, and John J. Moores vs. BMC Software, Inc. and Max P. Watson), BMC's attempt to have the antitrust countersuit thrown out failed. BMC subsequently agreed to settle the case by paying Peregrine, Neon et al $30 million (BMC, 2000). In 2002, BMC agreed to acquire the Remedy business from Peregrine for $355 million in cash (BMC, 2002).

Under the terms of Zenith's original licensing agreement with Hazeltine Research, Inc. (HRI), Zenith was permitted to use all of HRI's patents. Upon its expiration in 1959, Zenith asserted it no longer required a license and refused to renew. HRI filed a patent infringement suit against Zenith the same year. Zenith responded by filing an antitrust suit against HRI seeking treble damages and injunctive relief.[7] Zenith charged that the HRI and foreign patent pools had refused to license the foreign patents to Zenith and other firms seeking to export American-made radios and television sets into foreign markets. The District Court ruled for Zenith on the original infringement action, and on the counterclaim held that HRI misused its domestic patents. Treble damages for nearly $35 million were awarded Zenith on the conspiracy claim, together with injunctive relief against further participation in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market. When the Court of Appeals reversed, the case went before the Supreme Court which reinstated the findings of the District Court in favor of Zenith.

Professional Real Estate Investors (PRE) operated resort hotels in which it rented videodiscs to guests for viewing in videodisc players located in each guest's room. PRE sought to develop a new market selling videodisc players to the hotel industry. Were they successful, PRE would have become direct competitors with the major motion picture studios (collectively, Columbia), which held copyrights on the motion pictures and licensed the transmission of the movies to hotel rooms. Columbia responded to this threat by filing suit against PRE,[8] charging the firm with engaging in copyright infringement. PRE countered by filing an antitrust suit against Columbia, charging that the firm's copyright litigation against it was merely a veiled attempt to monopolize and restrain trade in violation of Section 1 and 2 of the Sherman Act. In 1992, the case went before the Supreme Court, which ruled against PRE, and stated that the legality of a

7. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100 (1969).
8. Professional Real Estate Investor, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993).

lawsuit seeking governmental action does not depend upon whether or not the plaintiff's intentions were in fact anticompetitive.

3.5. Prevent a Hostile Takeover

Service Corporation International (SCI), which in 1996 owned approximately 2,864 funeral homes and 335 cemeteries, launched a friendly attempt to acquire its largest competitor, The Loewen Group Inc. (Loewen). The merger would have joined the world's two leading funeral home companies (Larson, 1996). When Loewen's board summarily rebuffed the offer just a week later, SCI followed with a generous $45 per share, $2.9 hostile bid directly to Loewen's shareholders. A day prior to announcing its hostile bid, SCI filed a preemptive suit in federal court seeking a declaratory judgment to ensure that Loewen would have no legal basis to file an antitrust suit challenging its takeover. SCI's legal strategy clearly acknowledged the potential strategic relevance that an antitrust suit may pose to a target firm seeking to prevent a hostile acquisition.

Loewen's board, however, did just that – they filed an antitrust suit to block the acquisition, but in federal court in the Eastern District of New York, the only circuit permitting a target to bring suit to enjoin a takeover on antitrust grounds. Had Loewen attempted to file its suit, for example, in the 5th Circuit, it would have been dismissed. With the competing suits pending, Loewen filed motion to dismiss the preemptive suit SCI had previously filed in Houston, while SCI filed a motion to dismiss Loewen's suit filed on antitrust grounds in New York. SCI's takeover attempt received a fatal wound when a court ruling gave Loewen the opportunity to pursue its antitrust litigation in the favorable venue of New York.

Barely three months after announcing its handsome offer to pay shareholders of its biggest rival $45 per share, SCI was forced to withdraw its bid. In spite of the fact that the strategy had been fully anticipated by SCI, Loewen's swift filing of an antitrust suit to block the hostile bid, strengthened by favorable rulings from two federal judges, proved insurmountable (Jones, 2003).

In 1989, Georgia Pacific made an unsolicited tender offer to buy Great Northern Nekoosa (Great Northern) for $3.7 billion, which Great Northern ardently opposed (Paul et al, 1989). Georgia Pacific filed suit against the firm in Maine federal district court, seeking a judicial declaration that Great Northern's anti-takeover defenses, such as a large poison pill, violated state and federal law, as well as the Board's fiduciary duty to Great Northern shareholders. The CEO of Georgia Pacific also met with the governor of Maine to promise that a takeover would not lead to mill closings, though internal company documents suggested otherwise. Great Northern's next line of defense, however, was later recognized as it most effective. Shareholders launched an antitrust suit against Georgia Pacific in Connecticut federal district court in order to stave off the unwanted acquisition. Had the case against it succeeded, Georgia Pacific would have been forced to divest of significant paper company holdings prior to the acquisition. Due to this potential threat from the antitrust suit, Georgia-Pacific sweetened its acquisition offer to over $5 billion, $1.7 billion more than the original offer, and Great Northern accepted.

The entire essence of the antitrust laws is to protect customers. Consequently, in order to stave off Oracle's hostile bid, PeopleSoft, without filing an antitrust suit of its own, has aggressively lobbied its own customers and the public to make their views known to the Department of Justice. The Justice Department is more likely to scrutinize a transaction if there have been issues raised by customers. In this case, the threat of antitrust litigation appears to have been effective as the merger is currently stalled (Vaas, 2003).

3.6. Discourage the Entry of a Rival

Smaller, regional firms may utilize antitrust legislation in order to curtail aggressive price competition from larger national firms. In Utah Pie,[9] three large firms engaged in a complex, coordinated scheme to increase market share by undercutting the pricing structure of a local bakery, the Utah Pie Co. Utah Pie filed an antitrust suit against its larger competitors, charging that they enacted a coordinated pricing scheme and were guilty of engaging in conspiracy under Section 1 and 2 of the Sherman Act and violation of Section 2(a) of the Clayton Act (as amended by the Robinson-Patman Act). The suit went all the way to the Supreme Court, which ruled in favor of the Utah Pie Co., reasoning that although Section 2(a) does not forbid per se price competition, it does forbid such competition where it erodes competition. The smaller Utah Pie Co. successfully defended itself against three formidable market entrants, achieving a favorable outcome which competition alone ordinarily would not have produced.

In Charlottesville, North Carolina, a group of real estate brokers decided to start their own magazine enabling them to market real estate to potential home buyers. The local newspaper filed suit on the basis of group boycott anti trust theory, alleging that the brokers agreed amongst themselves not to place real estate advertisements in the newspaper. Although the real estate brokers ultimately won the suit, their legal fees exceeded $1.2 million, a relatively large sum.

In 1978, TWA launched an aggressive campaign intended to convince city officials to deny Mark Aero, Inc., a small regional airline, access to an important airport. TWA's lobbying efforts proved to be highly effective, as Mark Aero was refused access to the market. Mark Aero responded by filing suit against TWA, charging that its actions ran afoul of antitrust law. However, the Court of the 8th Circuit ruled in favor of TWA, stating that its conduct constituted an effort to

9. Utah Pie Co. v. Continental Baking, 386 U.S. 685 (1967).

influence city officials in political judgments, and therefore was protected by U.S. Constitution First Amendment rights of free speech and petition.[10] In a similar case, an employer's association and a labor union actively lobbied a city board to prevent a group of restaurant franchise owners from being able to secure the permits necessary for opening a restaurant. In Franchise Reality Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, the franchise holders sued the restaurant employer's association and the labor union, charging their actions violated the Sherman Antitrust Act. The Court held that even if their sole motivation was to eliminate competition, and even if the action of the city board was in fact erroneous, the actions of the association and the labor union did not constitute a violation of the Antitrust Act and were protected by the U.S. Constitution First Amendment right to petition the government.

This same finding was the result of Miller & Son Paving, Inc. v. Wrightstown Township Civic Association (US Court of Appeals, 1978). When a local civic association initiated administrative proceedings against a quarry operation in order to prevent it from entering the local market, the quarry firm responded by filing an antitrust suit against the civic association. The Court ruled that attempts to influence the enforcement or passage of legislation are not actionable under the Sherman Antitrust Act.

3.7. Prevent a Successful Firm from Competing Vigorously

The setting for a landmark legal case,[11] a group of railroad firms facing increased competition from the trucking industry. The railroad firms, along with their trade association, responded by hiring a public relations company to enact an aggressive smear campaign against the trucking industry. The campaign involved an aggressive lobbying effort to obtain legislation harmful to the trucking industry, was based on inaccurate information, and utilized paid actors who were presented as spontaneous individuals offering objective opinions. Noerr Motor Freight brought antitrust litigation against the railroads, claiming their orchestrated campaign represented an attempt to restrain trade and monopolize a segment of the freight market in violation of Section 1 and 2 of the Sherman Act. The District Court ruled in favor of Noerr Motor Freight. However, in 1960, the Supreme Court ruled that even though the railroads' campaign included the use of propaganda, was orchestrated to appear as the spontaneously expressed views of independent persons, and was effective in damaging the trucking industry, it nevertheless did not violate the Sherman Act.

Under increased competitive pressure from several independent service organizations (ISO's) in the market to service its own equipment, Kodak limited the availability of replacement parts to decrease the ability of ISO's to effectively

10. (US Court of Appeals, 1978).
11. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961).

compete against it. The ISO's responded by bringing an antitrust suit against Kodak, charging that the firm unlawfully tied the sale of service for its machines to the sale of parts, in violation of Section 1 of the Sherman Act, and was in violation of Section 2 by attempting to monopolize the sale of service and parts. The District Court ruled for Kodak, the Court of Appeals reversed, and the case went to the Supreme Court.[12] The strategy employed by the ISO's was successful, as the Supreme Court held that Kodak used its control over parts to strengthen its monopoly over the service market, and that it lacked valid business rationale to justify its activities.

Liggett was the original market leader in the economy market segment of cigarettes. The firm developed a complete line of generic cigarettes which were priced 30% below their branded counterpart. Brown & Williamson later entered the economy market segment in direct competition with Liggett. The result was a price war in which Brown & Williamson sold their generic cigarettes at a loss. Liggett responded by filing an antitrust suit claiming that Brown & Williamson was utilizing a predatory pricing scheme in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. While a jury ruled in favor of Liggett, the District Court and the Court of Appeals held that Brown & Williamson was entitled to judgment as a matter of law.

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 US 209 (1993) went before the Supreme Court, which stated that the plaintiff must not only prove that the prices are below its rival's costs, but also that the competitor had a reasonable chance to recoup its investment in below-cost pricing. Lacking recoupment, the Court held that predatory pricing enhances rather than harms consumer welfare. This requires an estimate of the alleged predation's cost, a detailed analysis of the alleged pricing scheme, and an accurate understanding of the market. The Court held that while it is reasonable to conclude that B&W, in pricing its generics below cost for 18 months, intended to injure competition, evidence was insufficient to determine that it had a reasonable chance of recouping its losses.

4. Conclusion

The antitrust laws were formulated with the purpose of promoting competition. As with many laws, there are serious unintended consequences of these laws. There are several uses of the antitrust laws that have nothing to do with promoting competition, and at least two uses whose purpose is reducing competition. This paper has provided a taxonomy of private uses of the antitrust laws, and provided detailed examples of all of these uses. Such a taxonomy is useful for firms considering the strategic use of the antitrust laws or generally considering means

12. Eastman Kodak v. Image Technical Servs., 504 U.S. 451 (1992).

of implementing strategic goals. In addition, a taxonomy is useful for evaluating alternative legal regimes as a means of reducing the unintended consequences.

The antitrust laws are an important strategic tool for private firms, and formulators of business strategy need to be familiar with these laws and their uses for three distinct reasons. First, the laws may have direct application – a firm may be able to use the laws to its own advantage. Second, one needs to consider the strategy employed by rival firms, and protect against the use of the antitrust laws by rivals. Third, firms are always vulnerable to lawsuits by the government as well, and the antitrust laws provide an important part of the environment in which strategy is formulated.

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