Unilateral Effects

A Case Study of the
Role of Economics
In
Antitrust Decision Making

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Major Themes

- What are the Economic Issues Relevant to Antitrust Decision Making?
- Who Decides These Issues?
- How Effective is the Use of Economics in Antitrust Decision Making?

Facts, Models and Econometrics

- Facts
  - *E.g.*, it costs $10,000,000 and takes a year to build a widget factory
- Models
  - *E.g.*, output is lower and price is higher in highly concentrated industries, *ceteris paribus*
- Statistical Tests
  - *E.g.*, the evidence justifies the assumption that 4FCR had no effect on the wholesale price of silicon-based widgets in the U.S. from 1Q 1990 to 4Q 2000 (*i.e.*, the data failed to reject the null hypothesis to the relevant degree of confidence)

Seldom-Discussed Points about Models and Statistical Tests

- The values of the estimated parameters and the validity of the statistical tests are contingent on the truth of the underlying model *(I.e.*, Garbage In/Garbage Out)

- Example: concentration/price and concentration/profit correlations – powerfully suggested by oligopoly models once regarded as canonical – demonstrated in a host of studies now viewed as discredited

- Skepticism regarding the model resulted from "better" analytical work (*e.g.*, Caves & Porter) supported by shift in surrounding approaches and attitudes

Economic Issues in Antitrust

- Decision Makers are Called Upon to Make Specific Findings and Inferences
  - Extent of the Market/Market Power
  - Procompetitive Justifications and Rationales for Conduct
- Every Litigant Tells a Story, Every Story Has a Model
- "Model"-Based Decisions of the Post-*Sylvania* Era
  - *Matsushita* – long-term predatory conspiracy
  - *State Oil v. Kahn* – maximum vertical price agreements
  - But see: *Brooke Group* – "oligopolistic disciplinary pricing"

Economists Don't Decide

- Under the law, agency officials, judges and/or juries decide.
- There is no existing institution that can resolve contending economic explanations on a time scale relevant to litigation
  - Peer reviewed scholarship
  - Long-term belief formation based on collective experience
- Until all judges become economists, there will be continuing tension between expert assessments and decision making by non-experts

Distant Thunder?

- Judicial dissatisfaction with advocacy economics
  - *Matsushita* – expert report rejected
  - *Brooke Group* – testimony disregarded
- *Daubert Quartet* – although none is an antitrust decision, arguably this series is extension of antitrust trend
- Justice Breyer
  - Remarks to AAAS, AEI regarding need for filtration of expert views – another expression of tension inherent in legal system where ultimate decisions are for non-expert courts
- Judge Posner
  - *HFCS,* an explicit plea for use of Rule 706 appointed experts by lower courts
  - Decisions remarking on theory, like *Asahi Glass v. Pentech Pharmaceuticals* and others too numerous to mention.

Unilateral Effects – A Case Study

- Foundational insight – customers of A can flee to B. If A merges with B, some A customers need a new escape
- Modeling real markets – assumptions hold numerous variables constant
- In any specific case, what econometric evidence would be sufficient to change a view suggested by (informed) intuition?
- Under what circumstances are non-expert decision-makers qualified to assess whether econometric evidence should be accepted as outcome-determinative?

Lessons of Experience

- Judgment on economic issues – market definition, market power, entry, competitive dynamics – is interactive (*see testimony of* Alfred E. Kahn in *New York v. Kraft (Nabisco*)
- " . . . experience is deceptive, reasoning difficult." – Hippocrates *Aphorisms*
- Narrow market definitions, focus on isolated time periods and "super slo-mo" dynamics will support theories of competitive harm in broad class of cases
- Tendency of positions to go to extremes – trains passing in the front office

Alternatives

- Enhanced reliance on "neutral" experts
  - Agency consultants – excluded from subsequent advocacy role?
  - Rule 706 – is this any way to earn a living?
- Peer review
- Experiments and studies
  - I.O. faculties
  - Federal Judicial Center?

Conclusion

- *United States v. Topco*: considering justifications throws antitrust and business planners into "the wilds of economic theory."
- Welcome to the "wilds."