

Submission to the Department of Justice/USDA Workshops.
Agriculture and Antitrust Enforcement Issues in our 21st Century Economy

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I. Introduction and Overview

A. Qualifications and Background

I am associate vice president for academic personnel and professor of law at Wayne State University, where I have long taught courses in antitrust and consumer law. I also serve as of counsel to Covington & Burling, the firm with which I practiced before I entered academia.¹

My career has been devoted in large part to competition and consumer law and policy. I graduated from Yale College in 1972, *magna cum laude*, with honors in Political Science and Economics. I graduated from Harvard Law School in 1975, *cum laude*, after studying antitrust with Philip Areeda and administrative law with Stephen Breyer. My first position was as attorney advisor to a Commissioner of the Federal Trade Commission. Thereafter I practiced with Covington & Burling before joining the Wayne Law faculty. Since joining Wayne Law, I have taught as a visiting professor at the Universities of Michigan, Pennsylvania, and Utrecht (the Netherlands).

I have authored, co-authored, or co-edited a long series of publications on competition and consumer law. Books listed on my C.V. include ABA ANTITRUST SECTION, CONSUMER PROTECTION LAW DEVELOPMENTS (2009) (member of editorial board); ANTITRUST LAW: POLICY

¹ Although this submission reflects my individual views, it is submitted at the request of and with funding provided by the American Meat Institute. These views are personal and do not necessarily reflect the views of any organization with which I am or have been associated.

AND PRACTICE (4th edition 2008) (w. Rogers, Patterson & Anderson); ANTITRUST LAW AND ECONOMICS IN A NUTSHELL (5th ed. 2004) (w. Gellhorn & Kovacic) (*translated into Spanish and published in Mexico by Comisión Federal de Competencia Mexico, USAID, and the US Embassy* (2008)); and ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (2d ed. 1984) (member of editorial board). My work on the 1984 book resulted in my winning the American Bar Association Section of Antitrust Law, Fiftieth Anniversary Publications Award (2002).

During the first part of the Clinton Administration, I served as General Counsel to the Federal Trade Commission, a position to which I was appointed by Chairman Robert Pitofsky. As general counsel, I was the Commission's principal legal advisor, and worked on the full array of Commission activities including the amendment of the Merger Guidelines. I was given the Federal Trade Commission Award for Distinguished Service in 1997.

My work in competition law has resulted in my serving three three-year terms on the Council of the American Bar Association Section of Antitrust Law as well as a three-year term on the Council of the ABA Section of Administrative Law & Regulatory Policy. I am a member of the American Law Institute, a former chair of the Association of American Law Schools Section on Antitrust and Economic Regulation, and a Senior Fellow of the American Antitrust Institute. I served as counsel to the American Bar Association Section of Antitrust Law, Special Committee on the Role of the Federal Trade Commission (1988-89).

I speak widely on competition law and policy issues in the U.S. and abroad. My academic service has included giving advice to U.S. and foreign government officials. Only recently I testified as a panelist at the DOJ/FTC Horizontal Merger Guidelines Review Project

(2009). Previous testimony includes presentations before the Antitrust Modernization Commission, the DOJ/FTC Hearings on Single-Firm Conduct, and at FTC workshops.

B. Overview

This testimony sets forth a simple but important point: the U.S. antitrust laws have stood the test of time and neither need to be nor should be amended to apply more stringent standards to particular industries. The genius of the antitrust laws is the establishment of a common law system of adjudication that allows for adaptation to meet evolving needs and learning. That system cannot work properly if tensions about the proper application of the law are met, not by evolution of general standards, but by subjecting different parts of the economy to different rules.

II. Testimony

A. The Special Nature of Antitrust Law

“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). Yet for all their importance, the critical parts of what we know as the antitrust laws are surprisingly brief and of the broadest possible applicability. Each year I tell my students that almost the entire antitrust course concerns the application of three short statutory provisions: Sherman Act Section 1 and 2, and Clayton Act Section 7. The critical wording is magisterial: contracts, combinations, and conspiracies in restraint of trade are illegal; it is unlawful to “monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize;” and acquisitions where “the effect of

such acquisition may be substantially to lessen competition” are not permitted. 15 U.S.C. §§ 1 & 2; *id.* § 18.²

The unusual nature of the antitrust laws was described by Chief Justice Hughes in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933): “As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.” As Professor Herbert Hovenkamp has written, the Sherman Act “can be regarded as ‘enabling’ legislation—an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways. The standards to be applied always have and probably always will shift as ideology, technology and the American economy changes.” HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 53 (3d ed. 1994).

Congress wisely thought it better to set out very general standards and then trust the courts to apply those standards in light of evolving economic understanding and particular facts. “Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.” *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978). Courts have accepted this assignment to shape what is known as antitrust law, whether

² Obviously my quoting selected words omits language, such as the need to affect interstate commerce, that can matter in individual cases. Also, where appropriate during the antitrust course—which is not often—I mention the more detailed language of parts of the Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission Act.

to make standards more stringent, *see, e.g., Topco*, or less, *see, e.g., State Oil Co. v. Khan*, 522 U.S. 3 (1997).

Antitrust evolves through agency decisions and through litigation followed by criticism and analysis. For review of the evolution of several rules, see Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1 (1998). I have previously likened our antitrust system to a conversation in which many parties participate in the search for truth. See Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625 (2001). In this conversation, the two federal agencies and state attorneys general play special parts.

A good example is provided by treatment of horizontal restraints. As I recounted in *In Praise of Antitrust Litigation*, the law moved from increasingly expansive application of the per se rule to more general reliance on the rule of reason, to a more nuanced application of a middle ground commonly known as the “quick look.” The “quick look” movement was partially rebuffed in *California Dental Ass’n v. FTC*, 526 U.S. 756 (1999) (a case in which I represented the FTC at an earlier stage). The FTC and the DOJ Antitrust Division responded by addressing the matter in their *Antitrust Guidelines for Collaborations Among Competitors* (2000), and then the FTC issued adjudicative opinions, upheld by the courts of appeals, that established an “inherently suspect” category of analysis. *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). What some regarded as a setback to enforcement seems to be on its way toward being overcome. All of this happened without legislation.

B. Merger Law

Merger law is a special part of antitrust law. It has seen substantial changes in enforcement standards and offers unusual opportunities to adjust to evolving understandings. At one time, mergers with quite small market shares were condemned, leaving Justice Potter Stewart famously to protest that “[t]he sole consistency that I can find is that in litigation under [Clayton Act] § 7, the Government always wins.” *United States v. Von’s Grocery Co.* 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). The Justice Department set out an approach to merger analysis in its 1968 Merger Guidelines, and then set out a quite different approach in its 1984 Merger Guidelines and in the joint DOJ-FTC 1992 Horizontal Merger Guidelines (revised with respect to efficiencies in 1997). As of this writing, the antitrust agencies are embarked on a substantial effort to update these guidelines.

The Government’s Merger Guidelines, although nominally only a statement of how the agencies evaluate mergers, in fact have substantial influence on courts. *See Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 431 n.11 (5th Cir. 2008) (“Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws.”); *United States v. Kinder*, 64 F.3d 757, 771 (2d Cir. 1995) (“Although it is widely acknowledged that the Merger Guidelines do not bind the judiciary in determining whether to sanction a corporate merger or acquisition for anticompetitive effect, courts commonly cite them as a benchmark of legality.”) (citation omitted). Because of the deference accorded the Merger Guidelines, the antitrust agencies are unusually able to influence the evolution of this body of law.

Consider how merger law has responded to three separate instances where there was concern that standards had become too permissive:

(1) In *United States v. Baker Hughes Inc.*, 909 F.2d 981 (D.C. Cir. 1990), and *United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984), courts rejected merger challenges based on analysis of entry barriers that some observers regarded as troubling. See, e.g., HOVENKAMP, *supra*, at § 12.6. The 1992 Horizontal Guidelines sharpened the discussion of entry analysis, with language very close to positions rejected by courts. See Hillary Greene, *Guidelines Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 800-801 (2006). Courts have responded by giving weight to the revised guidelines and upholding challenges to mergers. See, e.g., *FTC v. CCC Holding Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009); Hillary Greene, *supra*.

(2) During the 1980s and 1990s, courts rejected a series of challenges to hospital mergers (including ones on which I worked). See, e.g., Thomas L. Greaney, *Night Landings on an Aircraft Carrier: Hospital Mergers and Antitrust Law*, 23 AM. J.L. & MED. 191 (1997). The FTC responded by doing some merger retrospectives to improve our understanding of hospital mergers; commentators offered thoughts; and the FTC recently successfully challenged (post-consummation) a hospital merger in *Evanston Northwestern Healthcare Corp.*, Dkt. No. 9315 (FTC Aug. 6, 2007). Even more recently, the FTC filed a court complaint against a hospital merger that the parties abandoned, *Inova Health System Foundation*, Dkt. No. 9326 (FTC complaint filed May 9, 2008; merger abandoned), and it won a consent order undoing a closed hospital merger it alleged was anticompetitive, *Carilion Clinic*, Dkt. No. 9338 (FTC consent order Dec. 1, 2009).

(3) The government also suffered a setback in *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004), which rejected the government’s approach to unilateral effects analysis. Now the government is attempting to sharpen the unilateral effects discussion in the Merger Guidelines. All this happened without legislation.

The above examples all concern government setbacks in the courts. The system also adjusts, however, to perceived missteps by the agencies themselves. Indeed, these hearings are a prime example of what can follow when a presidential campaign highlights claimed laxness in enforcement policy. Not surprisingly, the Obama Justice Department has made clear its intention to be more aggressive in challenging mergers. Our system permits and, indeed, facilitates, these adjustments—without legislative change.

C. The Role of Congress

Over the years, Congress has taken an active role in antitrust enforcement. Through the appropriation and authorization processes, and through oversight hearings, Congress has let the agencies know its view on how they are performing and on how antitrust law, in general, is developing. See, e.g., Hearing on the State of the Airline Industry: the Potential Impact of Airline Mergers and Industry Consolidation, Before the Senate Committee on Commerce, Science & Transportation (Jan. 24, 2007); Senate Judiciary Committee Hearing, “Examining Health Care Mergers in Pennsylvania,” (April 9, 2007). The Government Accountability Office has conducted many studies related to competition. See, e.g., GAO Report, Energy Markets: Estimates of the Effects of Mergers and Market Concentration on Wholesale Gasoline Prices (June 2009).

What Congress has not generally done, thankfully, is to respond to concerns about under-enforcement by amending the antitrust laws to impose higher standards on particular industries. To be sure, concerns about over-enforcement have occasionally resulted in exemptions or partial exemptions, but this has been controversial.³ Where the concern has been about under-enforcement, Congress has properly responded through oversight and improved funding.

³ The American Bar Association Section of Antitrust Law has consistently taken the position that the special nature of the antitrust laws almost always makes industry-specific exemptions unnecessary and unwise. See, e.g., Statement of Ilene Knable Gotts on behalf of the American Bar Association Before the Subcommittee on Courts and Competition Policy of the House Judiciary Committee concerning H.R. 3596 "The Health Insurance Industry Antitrust Enforcement Act of 2009" 1 (Oct. 8, 2009):

The American Bar Association has repeatedly embraced the view that industry-specific exemptions from the antitrust laws are rarely justified, and that evidence that the exemption results in consumer benefit should exist to justify any such exemptions.

The underlying rationale for the American Bar Association's position – sometimes expressed and sometimes implied – is that the Sherman Act has served the nation well for nearly 120 years because it is a simple and very flexible statement of competition policy that is interpreted by the courts based on the facts and circumstances of each particular case. This flexibility eliminates, in most cases, the need for industry-specific exemptions. . . .;

ABA Section of Antitrust Law, Comments on the Railroad Antitrust Enforcement Act 2-3 (December 2008):

The Section believes that the common law process through which the antitrust laws promote both allocative efficiency and consumer welfare is flexible and evolutionary. It adapts to the unique circumstances of markets and industries, to changing technologies and circumstances, and to the development and growth of legal and economic theory. . . .

. . . Over a century of development has shown that the antitrust laws are the best guardian of competition, and are capable of growing to accommodate the unique characteristics of particular industries. . . .

This restraint has been beneficial for particular industries and for antitrust law in general. Where wrong decisions have been made and wrong results reached, it is probably because the law in general needs recalibration one way or another—not because there should be industry-specific standards. The majestic language of the antitrust laws can reach the right result without substantive amendment. Thus, the bi-partisan Antitrust Modernization Commission, after careful study, concluded that the antitrust laws, including merger law, were sufficiently flexible that the laws need not be revised to apply different rules “to industries in which innovation, intellectual property, and technological change are central features.” REPORT AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION (April 2007). Similarly, in THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY (October 2008), the American Antitrust Institute expressed concern about competition in agriculture but did not call for legislative change.⁴ As the ABA Antitrust Section commented in opposition to previously proposed legislative changes, “there is already in place a well developed and principled approach for evaluating competition issues that has withstood the test of time. This approach should not be tinkered with lightly.” Section of Antitrust Law, American Bar Association, Comments Relating to Proposed Agribusiness Legislation Pending Before the 106th Congress 10 (August 2000). Nor do competition concerns

⁴ I contributed modestly to this report.

require amendment of other statutes.⁵ Indeed, it is important to the evolution of antitrust standards that unhappiness about outcomes causes pushback on general standards.

D. Conclusion

My bottom line is simple. The antitrust system is majestically general and fully capable of evolving as needed to reach right results. If wrong results are being reached, the last thing Congress should do is to craft industry-specific rules. Doing so is both unnecessary and harmful, since it would remove part of the impetus for needed evolution in general standards.

⁵ Although I have not studied the Packers and Stockyards Act, 7 U.S.C. § 181 et seq., with the same care that I have studied the antitrust laws and thus cannot comment on particular issues or interpretations, there is no reason why the same laws that protect competition in most of the economy could not protect competition in agriculture. As noted more generally in this testimony, the antitrust laws are fully capable of addressing the particular facts of a wide variety of industries. Industry-specific legislation is rarely the right way to go.