Antitrust during the Clinton Administration: An Assessment

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Abstract

The Clinton administration did bring a new activism to antitrust. There were cases brought that probably would not have been initiated during the previous regimes. But the elements of continuity were strong as well. There certainly was no revolutionary overturning of the major directions of the previous regimes; and there was no return to the populism and small business protection enthusiasm that had sometimes colored antitrust policy prior to the 1980s. But there were missed opportunities as well.

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I. Introduction

Any assessment of the antitrust record of a presidential administration must necessarily involve subjective judgments about the merits of cases brought and not brought, as well as about the broad sweep of policy and perspective. This essay will be no exception.[1]

Let us begin with some historical perspective from ten years ago. The Clinton administration took office in early 1993 after twelve years of Republican control of the White House. Among the Democratic complaints of those dozen years of control was that the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) had been lax in antitrust enforcement. Too many mergers had been permitted, allowing market concentration to rise too high in too many industries; the airlines were a notable example.[2] Also,

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[1] For other retrospectives, see Balto (1999), Litan and Shapiro (2002), and Pitofsky (2002a, 2002b).

[2] The airlines were, however, also an ambiguous example. The formal antitrust enforcer, the DOJ, had opposed two high-profile airline mergers in the 1980s: Northwest-Republic, and TWA-Ozark. However, unlike most mergers, as a consequence of the Airline Deregulation Act of 1978 (passed by a Democratic Congress and signed by a Democratic President!), ultimate approval authority for airline mergers rested with the U.S. Department of Transportation, which approved them over the Division's objections. The law has since been changed to give the DOJ standard Clayton Act authority with respect to airline mergers.

inadequate enforcement of vertical restraint (such as tying, exclusive dealing, and refusals to deal) and predatory behavior prohibitions was a second complaint. A new activism in antitrust policy and enforcement was promised.

As will be argued below, there was a new activism. There were cases brought that probably would not have been initiated during the previous regimes. But the elements of continuity were strong as well.[3] There certainly was no revolutionary overturning of the major directions of the previous regimes; and there was no return to the populism and small business protection enthusiasm that had sometimes colored antitrust policy prior to the 1980s.

[3] One important element of continuity was the prominent use of economics and economists in antitrust litigation. For a discussion, see Kwoka and White (1999a, 2004). For a longer view concerning the rise of economics at the DOJ and FTC, see Eisner (1991).

II. A Methodological Issue

One important methodological issue should be addressed at the beginning: how to judge the stringency (or laxness) of antitrust enforcement.

Such judgments cannot be made on the basis solely of "body counts" of numbers of cases initiated or litigated.[4] This important point is readily apparent in the context of merger enforcement:[5] Regardless of the legal standards that are being enforced, if the standards themselves are unchanging and are clearly known to the private bar and all ambiguities are absent, then no potentially illegal mergers would ever be proposed: Since an illegal merger would surely be rejected by enforcers, the merger partners would just be wasting their time, and knowledgeable legal counsel would prevent their going forward. And with no illegal mergers ever being proposed, there would be no enforcement actions.[6]

An immediate implication is that, for a given level of enforcement *effort*, the number of enforcement *actions* (and litigation generally) will be related to the extent of uncertainties and ambiguities perceived by defendants as to legal outcomes (Baxter 1980; Priest and Klein 1984; Salop and White 1986; White 1988).

Of course, an outcome of no enforcement actions could result also from an absence of

[4] Discussions of antitrust policy that include case counts are common; for a recent discussion, see Litan and Shapiro (2002); for an older discussion, see Eisner (1991).

[5] In addition to their case counts, Litan and Shapiro (2002) also acknowledge that certainty with respect to merger standards can reduce litigation.

[6] As a further elaboration on the pattern of merger enforcement actions: Until the passage of the Hart-Scott-Rodino (HSR) amendments to the Clayton Act in 1976, the enforcement agencies sometimes found out about mergers late and had to scramble to sue and seek a preliminary injunction to forestall mergers that were deemed potentially anti-competitive -- and then negotiate to determine if a divestiture could solve the antitrust problem. With the HSR pre-notification procedures in place, a "fix it first" policy was far more feasible, and legal challenges diminished.

enforcement effort. But this second means of "achieving" no enforcement actions highlights the ambiguity of the relevance of a count of the number of enforcement actions and of any change in the number of enforcement actions per unit of time. If the number of enforcement actions is "low", this could arise from lax enforcement efforts *or* from high clarity as to the nature of the legal standards.[7] Similarly, if enforcement actions decrease from one year to the next, this could arise because of decreased enforcement efforts *or* because of increased clarity as to the nature of the legal standards.

Accordingly, in the absence of more information, counts of legal actions by themselves ought not to carry much weight. Instead, to ascertain the stringency of enforcement, one must discern the nature (or the "line") of the legal standards (what behavior is challenged; what behavior is unchallenged) and the *consistency* with which those standards are enforced.

In order to drive this point home, let us consider the assumptions that would justify using counts of enforcement actions as indicators of enforcement vigor. Suppose that there is a constant background flow of "crimes" that is invariant to the amount of enforcement effort (or the uncertainty of enforcement, etc.). If that is so, then enforcement involves "scooping into" the flow, and more enforcement effort will result in more "scoops" and thus in more enforcement actions; and the latter can be used as an indicator of the former. But note that this notion of a constant background flow of crimes is inconsistent with the notion of deterrence -- that enforcement can deter crimes and thus affect the flow.[8] Consequently, anyone who believes in deterrence ought not to believe in the "constant flow" model and thus should not place great weight on counts of

[7] This high clarity may be due to a high number of enforcement actions in earlier periods, the outcomes of which helped clarify the legal standard.

[8] Again, if there are no police patrolling a neighborhood there will be no arrests; but also, if the police blanket a neighborhood, so that criminals are deterred, there will be no arrests.

enforcement actions as indicators of enforcement vigor or stringency.[9]

We usually do not have measures of the flow of background criminal activity nor of the actual (enforced) boundary between acceptable and prohibited behavior; but we do have data on enforcement actions, and it is tempting to use the latter to infer something about the stringency of enforcement. But those inferences are, at best, tenuous.

[9] Also, there may be exogenous influences on the flow of crimes -- e.g., exogenously driven changes in attitudes on the part of criminals -- that, for any given level of enforcement effort, affect the number of enforcement actions.

III. The Goals, Ambiguities, and Dilemmas of Antitrust

The broad goals of antitrust should be to encourage greater efficiency in the U.S. economy by checking the inefficiencies that arise as a consequence of the exercise of market power.[10] But when the exercise of market power may also involve greater production efficiency, tradeoffs may be necessary (as is illustrated in Williamson 1968).[11] And where there are alternative explanations for a specific business practice -- one efficiency-enhancing and the other anti-competitive – judgments as to the legitimacy of the practice may be quite difficult.

Even those who agree with these broad goals for antitrust[12] may differ in their approach to enforcement, because of their differing beliefs/predilections as to:

-- the empirical ease of entry, or of expansion by smaller firms, that would constrain the exercise of market power;

-- the degree to which oligopolistic coordination can cause small-numbers markets to deviate from competitive norms;

-- the extent and importance of the efficiency advantages that accompany mergers and that accompany enterprise size generally;

-- the extent and importance of the efficiency advantages that accompany various vertical restraints and other business practices; and

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[10] This is consistent with the positions found in Posner (1976), Bork (1978), and Litan and Shapiro (2002).

[11] Until the 1970s regulation was considered to be the policy solution for instances where efficiencies were unavoidably accompanied by the exercise of market power. But the difficulties and inefficiencies of regulation led to the deregulation movement of the 1970s and after. See, for example, Winston (1993).

[12] But not all would agree. Some would add a populist element, limiting the absolute size of firms and preserving small firms even at the expense of efficiency; others would favor efficiency when it benefits consumers but not when it benefits producers.

-- the importance of longer-run dynamic efficiency gains versus shorter-run static efficiency considerations.

For example, the structural relief policies advocated by Kaysen and Turner (1959) were driven by their general skepticism as to the prospects for entry (which, in turn, were largely driven by the evidence gathered by Bain (1956)), their strong concern about oligopolistic coordination, and their skepticism as to the significant advantages of size and of vertical restraints and other business practices; the far more restrained policies advocated by Bork (1978) reflected his substantially different views in each of these areas.

The differing views of the critics and the supporters of the major cases of the Clinton era are usually rooted in such differences in perspectives rather than in differences as to underlying goals.

IV. (Largely) Uncontroversial Successes

There were at least five areas in which the Clinton antitrust policies scored significant successes that are generally considered non-controversial.

A. Amnesty/leniency for first-confessors.

Active prosecution of horizontal price-fixing conspiracies is an important and often unsung (and under-appreciated) task of the DOJ. These prosecutions were actively pursued by previous administrations (and there generally were no complaints by Democratic critics about this aspect of antitrust enforcement); the Clinton Antitrust Division continued in this tradition and "bagged" some high profile (and high criminal fines) cases, including a number of international vitamins, food additives, and related cases and the Sotheby's-Christie's auction commissions conspiracy.

An important enforcement departure, however, was the announcement in August 1993 that the first conspirator to step forward with evidence concerning a price-fixing conspiracy would be eligible for leniency or amnesty in the subsequent prosecution, regardless of whether an investigation had begun or not. Leniency for the first to confess is general practice when prosecutors have otherwise weak evidence; this practice forms the basis for the well-known "prisoner's dilemma" of game theory, as well as for many episodes of television's "Law and Order" and other similar TV police/detective/prosecution dramas. But previously the leniency policy had applied only if an investigation had not yet begun. Since often the potential confessor did not know whether an investigation had been opened, this uncertainty discouraged confessions.

The new policy removed that uncertainty. It also freshly promoted the existence and availability of the amnesty/leniency possibility for conspirators with second thoughts. Though it is unclear how important this new policy was in helping "crack" many cases, it surely cannot have hurt and may well have helped. It definitely ought to be a permanent part of the antitrust enforcement of all future administrations.

B. The Merger Guidelines, and Merger Enforcement.

In 1982 the DOJ scrapped its "Merger Guidelines" that had been issued in 1968 and replaced it with a wholly reformulated "Merger Guidelines", a major contribution of which was its approach to market definition for merger analysis. The new Guidelines were controversial at the time. The state attorneys general, for example criticized it extensively and proposed their own set of guidelines. These new Guidelines were modified modestly in 1984 and again in 1992, when the FTC joined as their author, and the title was changed to "Horizontal Merger Guidelines".

The Clinton DOJ did not scrap or seriously modify these Guidelines. (This contrasted with its early decision to scrap the Reagan DOJ's "Vertical Restraint Guidelines," which had been issued in 1985.) The only change to the Merger Guidelines was a small modification in 1997, which attempted to clarify the kinds of evidence of efficiencies that would be considered as an offset to the prospects of market power.

Further, merger enforcement stringency by the DOJ and FTC was not appreciably different during the Clinton era as compared with its predecessors. The Guidelines have two (nominal) major decision points with respect to post-merger seller concentration as measured by the Herfindahl-Hirschman Index (HHI): For a merger with a post-merger seller concentration of 1000 or less, the merger is highly unlikely to be challenged. For a merger with a post-merger seller concentration of 1800, if the merger itself causes an increase in the HHI of 100 or more, there is a presumption that the merger is anti-competitive; whereas, if the increase in the HHI is between 50 and 100, there is heightened scrutiny of the merger. In either event, other factors (e.g., ease of entry, strong buyer power, difficulties of coordinated seller behavior) can overcome the presumption. For a "moderately concentrated" market with a post-merger seller concentration between 1000 and 1800 and a merger-based increase of over 100, the presumption of competitive concern is weaker.

By the late 1980s it was clear that the DOJ and the FTC were rarely (if ever) challenging mergers in markets with post-merger HHIs below 2000 and were approving mergers with substantially higher concentrations where the merging parties' claims of offsetting factors carried the day. This pattern continued through the Clinton era. There were, of course, high profile controversial mergers, some of which were challenged and some of which were approved (see the discussion below); but the same had been true before the Clinton era. As the methodological discussion presented above indicated, this pattern of occasional challenges is exactly what would be expected when there are empirical ambiguities and uncertainties as to market definition, oligopolistic coordination, conditions of entry, and post-merger efficiencies. The only way to know more precisely whether enforcement stringency changed appreciably during the Clinton era would be to compare the (pre- and post-Clinton) location of "the line" (e.g., in terms of HHI) separating those mergers that were challenged and those that were approved, holding constant the other conditions in the market. To this author's knowledge such a study (which would likely require information from the agencies' "cutting room floors" about investigated but unchallenged mergers) has never been done.

One other aspect of merger enforcement is worth noting: Despite an unprecedented merger wave during the late 1990s and many headline grabbing mergers among large companies, the Clinton era DOJ and FTC did not succumb to populist temptations to propose a ban on large conglomerate mergers.[13]

C. International information exchanges.

As companies have become larger and more global, and as many markets have become

[13] This contrasts with the Carter administration DOJ's endorsement of such a ban during a previous merger wave. See White (1981, ch. 15).

more global, issues of the extra-territorial reach of the U.S. antitrust laws, and even of investigations and information gathering, became more important. The Clinton DOJ and FTC successfully urged the passage of the International Antitrust Enforcement Cooperation Act of 1994 and cooperated extensively with their counterparts in Canada and the European Union concerning information sharing in investigations.

However, despite periodic consideration of the possibility of "harmonizing" U.S. antitrust policy with those of other countries, the Clinton administration resisted. Though harmonization may ease the conformance burdens on international companies (and has a nice ring to it), it does mean a loss of sovereignty and the near certainty that the harmonized policy will be different from the policy that the U.S. would choose unilaterally. Consequently, the Clinton administration's resistance to harmonization was surely the right choice.

D. Competition advocacy, and amicus briefs.

Though generally less well known than their litigation efforts, both the DOJ and the FTC have had active programs of taking pro-competition and efficiency advocacy positions in testimony, petitions, and filings before regulatory agencies and of filing *amicus* briefs in important appellate and Supreme Court cases. The Clinton era continued that tradition. The following are three examples, all to the good.[14]

1. The UP-SP merger (1996).[15] In 1995 the Union Pacific (UP) railroad proposed merging with the Southern Pacific (SP) railroad. Jurisdiction over the merger lay with the Interstate

[14] Litan and Shapiro (2002) provide two other examples: the DOJ's opposition in the 1990s to allowing the Bell Operating Companies to enter long distance service until they had shown adequately that they had opened their local service networks to competition; and the DOJ's cooperation with the Securities and Exchange Commission (SEC) in both agencies' investigation and prosecution of price-fixing in stock quotations on the Nasdaq.

[15] Greater detail about this case can be found in Kwoka and White (1999b) and White (2003).

Commerce Commission (ICC), to be succeeded by the Surface Transportation Board (STB) in 1996. In its consideration of the merger, the ICC/STB accepted filings from interested parties. The DOJ filed a strong report (Majure 1996) opposing the merger and pointing out its serious anti-competitive aspects and the shortcomings of its promised efficiencies. Despite the objections of the DOJ and others, the STB approved the merger in July 1996. Within a year, as the UP began to absorb the SP's operations, the UP-SP experienced serious operational difficulties that at times froze a significant part of the nation's rail network west of the Mississippi and that lasted well over two years – raising serious questions as to the wisdom of the STB's decision.

2. NRSRO regulation.[16] In 1975 the Securities and Exchange Commission (SEC) created a regulatory category -- "nationally recognized statistical rating organization" (NRSRO) -- for bond rating firms whose ratings could be used for the purposes of financial regulation. It immediately grandfathered Moody's, Standard & Poor's (S&P), and Fitch into the category. During the next 17 years it permitted only four more entrants into the category, through informal procedures; but by 2000 the four entrants had merged among themselves and with Fitch, so that only the three original firms remained in the category.[17]

In 1997 the SEC proposed regulations that would formalize its criteria for permitting new firms to enter the NRSRO category (if it ever chose to permit more entrants). The DOJ filed a letter (USDOJ 1998) that pointed out the anti-competitive aspects of the proposed regulations. The SEC has not finalized those regulations -- nor has it permitted any new entrants into the category (since 1992!).

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[16] More detail on this matter can be found in White (2002).

[17] A bond-rating firm that does not have the NRSRO designation is at a severe disadvantage: The participants in the capital markets are much less likely to look to its ratings, since its rating cannot affect financial regulatory outcomes. See White (2002).

3. State Oil v. Khan.[18] Resale price maintenance (RPM) is a business practice whereby an "upstream" entity (e.g., a manufacturer) specifies the price at which a "downstream" entity (e.g., a distributor) can sell its product. Since the manufacturer also sets its own wholesale price on the item, RPM effectively sets the distributor's gross margin on the product. Though RPM usually consists of a manufacturer's specifying the minimum price that a distributor or retailer can charge, RPM sometimes involves instead the specification of a maximum price. Minimum-price RPM can be a way for the manufacturer to deal with free-riding problems among its distributors – e.g., with respect to information-provision and promotion efforts – but it may also serve as a cover for a horizontal price-fixing conspiracy among manufacturers or distributors (Telser 1960, White 1981). Maximum-price RPM is unlikely to be a cover for a conspiracy and can allow a manufacturer to restrain any market power that may be exercised by its distributors (e.g., because they are the sole distributor in a geographic area).

Minimum-price RPM (even by a single manufacturer) has been a per se violation of Section 1 of the Sherman Act since 1911[20] and is often loosely described as "vertical price fixing". In 1968 the Supreme Court added maximum-price RPM to the per se violation category.[21]

The Court had another opportunity to assess maximum RPM in the case of State Oil Co. v. Khan, 522 U.S. 3 (1997). The DOJ and the FTC filed a joint *amicus* brief that urged the Court to adopt instead a rule-of-reason approach for maximum RPM. The Supreme Court did just that in its decision. Perhaps the day will come when the same can happen to minimum RPM.

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[18] More detail on this case can be found in Bamberger (2004).

[19] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[20] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[21] Albrecht v. Herald Co., 390 U.S. 145 (1968).

E. Antitrust jurisdiction over pharmaceutical patent settlements.

Although negotiated settlements of private litigation disputes are often an efficient way of economizing on litigation costs (as well as saving court resources), settlements may sometimes have anti-competitive consequences. Suppose the following hypothetical set of facts: The holder of an important patent -- i.e., one that permits its owner to exercise market power (e.g., a unique pharmaceutical) -- is sued by a potential rival, who claims that patent is invalid. (Or the incumbent sues a rival for infringing on the patent.) After some initial discovery, the parties reach an agreement: In return for a payment from the incumbent to the challenger, the latter drops the suit and (a) goes away or (b) receives a license to sell the patented product from the incumbent on terms that leaves control over the market to the incumbent.

If the challenger's case is weak (or is revealed to be so after the initial discovery), the settlement and payment can be an efficient means of hastening the end of pointless and potentially wasteful litigation. But another possibility is present: Suppose that the challenger's case is strong. It is well understood that an incumbent monopolist should be willing to pay more to acquire (or defend) a crucial asset that preserves its monopoly than a challenger would be willing to pay for the same asset, because the challenger foresees its successful entry as involving a more competitive marketplace. The incumbent would thus find worthwhile the payment of a substantial sum -- up to the amount that the incumbent would be expected to lose if the challenger entered -- to a challenger with a strong legal case, in return for the challenger's agreement to go away, to delay its entry, or to enter on limited terms.[22]

One way to differentiate between the two possibilities is to look at the size of the settlement payment: If it is close to the size of the saved litigation expenses, the former scenario seems likely;

[22] The intricacies of federal pharmaceutical patent legislation add some extra protections for the incumbent in such instances. For a discussion, see Gilbert and Tom (2001) and Litan and Shapiro (2001).

if it is appreciably above those saved litigation costs and approaching a significant fraction of the incumbent's rents from a continued unchallenged position, then the latter scenario becomes more likely.

In the late 1990s the FTC challenged a number of patent settlement cases that it believed fit the latter interpretation of the settlements. These challenges are likely to -- and should -- continue.

V. The Controversial Cases

As was discussed in the Introduction there were cases that were pursued by the Clinton era DOJ and FTC, some of which (arguably) would not have been initiated by their predecessors. This section will discuss a few of the most important of these cases. A frequent theme will be "raising rivals' costs" (Salop and Scheffman 1983, 1987).

A. Microsoft.

The Microsoft case was surely the highest profile case of the Clinton era. The "case" was really two somewhat related actions, the second of which reached front-page headline status.

1. The first case.[23] In 1990 the FTC had opened an investigation of the proposed plan by Microsoft and IBM to develop future operating systems. When those joint efforts subsequently unraveled, the FTC's staff turned its attention to Microsoft's marketing practices, about which there had been many complaints by software rivals.

Three issues were especially prominent. First, Microsoft's contracts with some personal computer (PC) makers (often termed original equipment manufacturers, or OEMs) had required the latter to pay a per-unit fee for every PC that was shipped, regardless of whether Microsoft's operating systems (OSs) were installed on all of them. Also, some of its contracts ran for as long as five years. These practices raised barriers to entry (raised rivals' costs) by making it harder for a rival OS company to convince an OEM to experiment or sample its OS. Second, Microsoft was allowing some applications software developers to have early access to its Windows OS but requiring that those developers not collaborate with other producers of OSs for up to three years. Again, this raised rivals' costs and barriers to entry. Third, software applications rivals complained

[23] Further discussion can be found in White (1994) and Gilbert (1999).

that Microsoft's vertical integration of OS production and software application production gave it an unfair advantage in the development of the latter.[24]

In February 1993 the Commission itself deadlocked in a 2-2 vote as to whether to issue an order that would restrain Microsoft's behavior. Another vote in July again yielded a 2-2 tie.

The DOJ, however, in a virtually unprecedented action, decided to continue the investigation. In July 1994 the DOJ and Microsoft reached an agreement on a consent decree concerning the first two specific practices just discussed:[25] First, Microsoft agreed that its contracts with OEMs would require that the latter pay only for Microsoft OSs shipped on their PCs and that the contracts would run for no longer than a year. Second, Microsoft agreed that its testing agreements with applications software developers would not prevent the latter from working with other OS producers, so long as confidential information was not revealed, and that these agreements would not last any longer than a year. The third issue, concerning Microsoft's vertical integration into applications software, was left unaddressed.

Critics of the consent decree (many of them software applications developers) complained that the decree did little to address Microsoft's basic market power in either OSs or in applications software. They convinced Judge Stanley Sporkin to stay the decree February 1995,[26] but that decision was overturned four months later by the D.C. Circuit Court of Appeals,[27] and the decree came into effect.

An incidental provision of the decree, which was not central to its major thrust, restricted

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[24] Microsoft argued that there were efficiency justifications for all of these practices.

[25] Simultaneously Microsoft reached a similar agreement with the European Union's Competition Directorate.

[26] U.S. v. Microsoft Corp., 159 F.R.D. 318 (1995).

[27] U.S. v. Microsoft Corp., 56 F.3d 1448 (1995).

Microsoft from tying other software products to its OS. But the decree also did not prevent Microsoft from selling integrated products. The tension between these two provisions led to the second and more substantial Microsoft case.

2. The second case.[28] In October 1997 the DOJ sued Microsoft, claiming that it was violating the terms of the consent decree by tying its browser, the Internet Explorer (IE), to its Windows OS. After an initial victory in federal district court,[29] the DOJ lost on appeal in the D.C. Circuit.[30] In the meantime the DOJ had reformulated its case into a more general Sherman Act Section 2 tying and monopolization case, which was filed in May 1998. The DOJ was joined in this suit by nineteen state attorneys general. The case was handled expeditiously by Judge Thomas Penfield Jackson and went to trial in the spring of 1999. Judge Jackson issued his "Findings of Fact"[31] in November 1999, largely siding with the DOJ and the states. He then asked Judge Richard A. Posner to mediate, but Judge Posner was unable to find sufficient common ground among the parties. Judge Jackson issued his "Conclusions of Law"[32] in April 2000, which found Microsoft guilty. Two months later he ordered the break-up of the company into two separate companies: an "operating systems" company, and an "applications software plus browser" company.

Microsoft appealed to the D.C. Circuit. In June 2001 the D.C. Circuit, with seven judges sitting en banc, decided unanimously[33] that Microsoft was guilty of violating Section 2 of the

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[28] Further details and arguments can be found in Evans et al. (2000), White (2001), Gilbert and Katz (2001), Klein (2001), Whinston (2001), Brennan (2001), and Rubinfeld (2004).

[29] U.S. v. Microsoft Corp., 980 F. Supp. 537 (1997).

[30] U.S. v. Microsoft Corp., 147 F.3d 935 (1998).

[31] U.S. v. Microsoft Corp., 84 F.Supp. 2d 9 (1999).

[32] U.S. v. Microsoft Corp., 87 F.Supp. 2d 30 (2000).

[33] U.S. v. Microsoft Corp., 253 F.3d 34 (2001). The unanimous decision included Judge Douglas Ginsburg, who had been the Assistant Attorney General for Antitrust during the middle of the Reagan administration.

Sherman Act for the reasons discussed below, though it overturned Judge Jackson's dissolution order. In the fall of 2001 the DOJ and about half of the states signed a consent decree with Microsoft; but nine of the states wanted a tougher remedy, and their pursuit of that remedy delayed a final settlement. In November 2002 Judge Colleen Kollar-Kotelly approved the settlement,[34] but two states have chosen to appeal that decision.

Though the DOJ at times has not presented its story as coherently as one might like,[35] the essential features of its case run as follows:[36]

- With a 80-90% market share of the OS market, Microsoft has had and continues to have market power. The claim that software markets were dynamic and fluid, with market power fleeting at best, was not valid for this case.[37]

- A buttressing of that market power comes from the installed base/applications barrier to entry: Since PC users care about having large numbers of applications software programs available and compatible with their OS, since the switching costs to a new (incompatible) OS are substantial, and since software applications developers would write their software primarily for the dominant OS (and creating compatibility with, or "porting to", other OSs was costly), this placed any smaller OS producer or potential entrant at a substantial disadvantage. Far fewer software applications would be available for use alongside any entrant OS.

- In 1995 and 1996, Microsoft saw the combination of the Netscape Navigator browser plus Sun Microsystems' Java flexible programming language ("write once, run anywhere") as a major

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[34] U.S. v. Microsoft Corp., 2002-2 Trade Cas. (CCH) ¶73851.

[35] See, for example, the critique found in Brennan (2002).

[36] This summary is consistent with the circuit court's opinion.

[37] The DOJ similarly rejected such arguments in objecting to Microsoft's proposal to acquire Intuit in 1995. For a discussion of that case, see Horvitz (1996).

threat to its market power *in the OS market*. If applications software developers saw the Navigator/Java combination as the major platform for using the World Wide Web, they would begin writing their software so that it would be able to work with (be compatible with) the Navigator/Java combination, and then other OS producers would only have to make their OS compatible with the Navigator/Java combination and would be at a lesser installed-base disadvantage.

- Microsoft offered a market sharing arrangement to Netscape in June 1995, but Netscape refused.

- Microsoft then went out of its way to make life difficult for Netscape: by tying its newly developed browser (the Internet Explorer, or IE) to its operating system and then technologically integrating IE into Windows, insisting that OEMs not delete IE and not feature/distribute the Netscape Navigator, inducing Intel to cease work on software that could make entry by other OS producers easier, and inducing Internet service providers (ISPs) to feature IE and not Netscape Navigator. In essence, it was raising rivals' costs with a vengeance.

- Microsoft also made Java a less-than-universal language by developing its own version of Java that was incompatible with other operating systems, thereby weakening the universality and overall attractiveness of the Navigator/Java combination.[38]

In essence, then, a dominant firm, in a market (OSs) where entry was difficult, was going out of its way to disadvantage a firm that produced a complementary product because that product could provide the basis for a major challenge to the dominant firm's core market power position. It was thereby raising its rivals' costs, buttressing its core position, and likely deterring future such entrants.

[38] Microsoft defended its actions by arguing that it did not have market power and that there were efficiency and customer convenience justifications for what it did – and no consumer harm. See, for example, Evans et al. (2000), Klein (2001), and Chang et al. (2003).

Seen this way, Microsoft's actions -- on the heels of the behavior that had been the basis for the first case's consent decree -- constituted a serious violation of Section 2 of the Sherman Act and deserved the challenge that it received.

B. American Airlines.[39]

Perhaps the second most controversial case initiated during the Clinton antitrust era was the DOJ's predatory behavior case brought against American Airlines.

In the two-plus decades since the Airline Deregulation Act of 1978, few airline entrants have been able to sustain themselves as serious rivals to the large incumbent airlines. Partly the hub-and-spokes route structure that developed shortly after deregulation has proved to be an effective way of taking advantage of the network economies of an air transport system (which entrants find more difficult to replicate). But also, entrants have found that incumbent carriers have dropped their prices and expanded their flight frequencies in city-pair markets in response to entry, only to reverse course after the entrant retreats and ceases serving the city-pair. The entrants (and their champions) have frequently cried "predation". In response, the Department of Transportation proposed a set of regulations that would have set limits on such behavior, but then backed away from final promulgation.

Predation has been a troubling issue for antitrust. In principle, the concept of predation is clear: In a market where, say, a dominant firm exercises market power, and where entry is difficult, the dominant firm may find it worthwhile to set prices and/or product offerings in a way that is designed specifically to drive a smaller rival from the market. It does so in the expectation that, after the rival's exit, the dominant firm becomes even more dominant and its prices can be raised so as to recoup whatever sacrifices were entailed to chase away the rival. Also, the incumbent thereby

[39] Further discussion of this case can be found in Edlin and Farrell (2004).

attains or increases its reputation for chasing away entrants, which will discourage future entry in this or in other markets and thus adds to the recoupment from the initial actions. This "investment-cum-recoupment" scenario is often portrayed in terms of pricing, but it can apply to non-price behavior as well.[40] However, it may be difficult to distinguish between such predatory behavior and simply aggressive competitive behavior, which the antitrust laws ought not to discourage.

In an effort to forestall such discouragements of aggressive but legitimate competitive behavior, Areeda and Turner (1975) developed their suggested rule that prices at or above per-unit variable costs should be considered a "safe harbor" defense against predation claims; their rule was at least partially in response to legal and regulatory decisions that claimed that predation was occurring when prices were below average costs (or below "fully allocated costs", with the joint costs of a multi-product firm being allocated in some wholly arbitrary fashion). But the Areeda-Turner rule would nevertheless protect some truly predatory pricing forays. And it has no natural non-price analog.

As a more general rule, Ordover and Willig (1981, 1999) have formulated an approach where the question to ask is, "Was the dominant firm's actions the more profitable choice for it *only* on the assumption that the rival would exit (and recoupment could occur)? Equivalently, *on the assumption instead that the rival would remain in the market*, was there another known-at-the-time course of action (other than the one that the dominant firm actually took) that would have been more profitable?" If the answer to this question is "yes", then the action was predatory.

Against this backdrop, let us review the American Airlines case. In 1995-1997, American faced competition from small low-cost entrants (Vanguard, Western Pacific, and SunJet) on a few of the routes to and from its major hub, Dallas-Fort Worth International Airport (DFW). In

[40] Indeed, the Microsoft case can be interpreted through this lens – i.e., that Microsoft's actions constituted an investment in anticipation of a recoupment that would occur because of a strengthened market position in the OS market because of a weakened Netscape.

response to their entry, American lowered its prices to meet the entrants' prices. Subsequently, American also expanded its flight frequencies; and it entered a route, DFW-Long Beach (CA), that it had previously abandoned as unprofitable but that was then being served by SunJet.

In each instance the entrant failed to survive; and after its exit, "American generally resumed its prior marketing strategy, and in certain markets reduced the number of flights and raised its prices, roughly to levels comparable to those prior to the period of low fare competition."[41]

The DOJ sued American in May 1999, under Section 2 of the Sherman Act, claiming that its actions were predatory. Specifically, the DOJ did *not* claim that American's pricing actions alone were predatory. Instead, it claimed as predatory American's second-stage expansions of low-fare seat availability and capacity; i.e., that the expansions made no business sense unless those actions would cause the entrants to exit from their city-pair markets and that American knew that an alternative strategy of sticking to its initial response (of simply lowering fares to meet those of the entrants) would be more profitable (if the entrant did not exit).

American, in response, claimed that its prices were at or above route-level variable unit costs; that the routes remained profitable; that it had matched but not undercut the entrants' prices; and that the DOJ's theory of "recoupment" was speculative. In early 2001, American filed for summary judgment; in April 2001 Judge J. Thomas Marten granted it.[42] The DOJ has appealed this decision to the Tenth Circuit Court of Appeals. At this writing, an appellate decision has not yet been issued.

It is important that predatory behavior cases not deteriorate into cases that simply protect inefficient entrants and discourage aggressive competitive behavior. Accordingly, such cases should be reserved for situations where there is a dominant firm or seller concentration is quite

[41] U.S. v. AMR Corp. et al., 140 F.Supp. 2d 1141, 1144 (2001).

[42] U.S. v. AMR Corp. et al., 140 F.Supp. 2d 1141 (2001).

high, where entry is difficult, and where recoupment in the same market in the future or in related markets is a realistic possibility.[43] Further, the Ordover-Willig test is a superior tool for identifying predatory behavior, especially of the non-price sort. In these respects the American Airlines case qualifies as an important case that pushes these ideas into the judicial arena. It definitely should have been initiated.

C. Visa/Mastercard.

The Visa and MasterCard credit card networks are each worldwide joint ventures of thousands of banks. Many banks, especially in the U.S., belong to both networks and issue the cards of both. The DOJ's suit, brought in 1998, alleged two important (but largely unrelated) points: First, the networks allowed banks that were major issuers of credit cards in one network to be on the board of directors of the other network. This governance structure, the DOJ argued, dulled competition between the two networks, especially in the area of innovation. Second, since the early 1990s both networks had had rules that prohibited their U.S. members from issuing the cards of any other network -- except that Visa permitted its member banks to issue MasterCards, and vice-versa. This limited exclusivity (or "duality") made entry or expansion by other card networks more difficult (raising rivals' costs), since banks as issuers were an important route for issuance.

The case was tried in federal district court in 2000, and Judge Barbara S. Jones issued a decision in April 2001. Judge Jones found for the card networks on the governance issue but found for the DOJ on the restricted exclusivity issue.[44] The DOJ has decided that it will not appeal its loss on the governance issue, but Visa and MasterCard are appealing their loss on the exclusivity issue.

[43] There is an interesting and important empirical question as to how the effects of building a reputation for not tolerating entrants can be measured and quantified.

[44] U.S. v. Visa U.S.A. Inc., et al., 163 F.Supp. 2d 322 (2001).

Both issues were worth raising and pursuing.

D. Intel.[45]

In June 1998 the FTC initiated an administrative proceeding against Intel. The FTC charged that Intel had abused its position of market power in microprocessors by withdrawing from cooperative information sharing arrangements with three of its customers: the Intergraph Corporation, the Digital Equipment Corporation, and Compaq. The FTC claimed that Intel's behavior discouraged those three companies from developing technology that might offer competition to Intel in microprocessors.

Intel, in its defense, argued that these companies were suing it, in challenges to its intellectual property rights on its microprocessors, and that Intel could legitimately protect its intellectual property, including refusing to deal with companies that were legally challenging it.

The FTC's charges were settled with a consent order, in which Intel agreed that it would continue to provide its trade secrets and advance product samples to customers that were suing it for patent infringement; but Intel's obligation ceased if the customer sought an injunction against Intel's manufacture and sale of its microprocessors (which is what Intel cared the most about).

Since the Intel action was brought at about the same time as the DOJ was litigating its Microsoft case, there were questions being raised as to whether the enforcement agencies were hostile to the leading firms in "high-tech" industries and "the New Economy". But, like many of the other cases discussed in this section, a focus on raising rivals' costs puts the case in a less hostile framework.

E. Toys "R" Us.[46]

[45] Further discussion of this case can be found in Litan and Shapiro (2002), Pitofsky (2002b), and Shapiro (2004).

During the early 1990s Toys "R" Us (TRU), the largest retailer of toys in the U.S., persuaded leading toy manufacturers to restrict the range of toys that they sold to a category of TRU's competitors: "warehouse clubs" -- low cost, high volume retailers. TRU's goal was to restrict the competition that it faced from the warehouse clubs in popular-selling toys. The FTC in May 1996 charged that TRU's efforts constituted an illegal vertical restraint and also that TRU had become the communications "hub" in a "hub-and-spokes" horizontal conspiracy among the toy manufacturers (each of whom needed assurance that the others were going along) to restrict toy sales to the warehouse clubs.

TRU's defense was that it did not have market power in the sale of toys (or in the purchase of toys from manufacturers) and that it provided valuable promotion services for toys on which the warehouse clubs were free riding (and hence TRU was justified in obtaining restrictions on the sales of competitive toys to the free riders).

The case was initially heard by an FTC administrative law judge, who found in favor of the FTC's charges in September 1997.[47] TRU appealed to the full Commission, who decided unanimously (4-0, one seat being vacant) in 1998 that TRU had indeed violated the antitrust laws.[48] TRU then appealed to the Seventh Circuit. In August 2000 that court affirmed the FTC's decision in finding that TRU's vertical efforts and its role in the horizontal boycott had violated Section 5 of the FTC Act and Section 1 of the Sherman Act.[49]

TRU's actions can be interpreted loosely as an effort to achieve a resale price maintenance (RPM) arrangement for toys. A frequent efficiency justification for RPM is that it is a way of

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[46] Further discussion of this case can be found in Carlton (1999) and Scherer (2004).

[47] In the Matter of Toys "R" US, initial decision, September 25, 1997.

[48] In the matter of Toys “R” Us, Opinion of the Commission, 126 FTC 415 (1998).

[49] Toys "R" Us, Inc. v. Federal Trade Commission, 221 F.3d 928 (2000).

dealing with the problem of free riding by rivals on information services provided at the point of sale (Telser 1960); and this was indeed a major part of TRU's defense. But three layers of judicial review were unconvinced, pointing out that the toy manufacturers paid for advertising, warehousing, and other services.[50] Further, the horizontal conspiracy aspect of the case (TRU assured each of the toy manufacturers that TRU was talking to the others and telling them the same things) is troubling.[51] Also, these multilateral assurances undermine the free-riding argument: If each manufacturer valued the services that TRU provided to its toys, it should not have needed assurance that the others were participating.

Also, as an alternative to the free-riding argument, the possibility of RPM's being used to cover a conspiracy among the initiators has been generally acknowledged (Telser 1960). Here, though, the initiator was a single firm (and it orchestrated a conspiracy among its suppliers). But if that firm has sufficient market power vis-a-vis its suppliers to get them to cooperate in disadvantaging its rivals, then a single initiator can well replace a conspiracy of initiators.[52]

However, as is true in many vertical restraints cases, there remains a fuzzy border between illegal activity and Colgate's[53] promise that "In the absence of any purpose to create or maintain a monopoly, the [Sherman] [A]ct does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances

[50] There might still be elements of TRU's reputation for stocking worthwhile toys that could be costly to TRU and could be important to toy manufacturers, but for which they do not directly reimburse TRU.

[51] The case carries the echoes of Interstate Circuit, Inc., et al. v. U.S., 305 U.S. 223 (1939).

[52] As was true in Interstate Circuit, Inc., et al. v. U.S., 306 U.S. 223 (1939); and Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[53] U.S. v. Colgate & Co., 250 U.S. 300 (1919).

under which he will refuse to sell..." Suppose that TRU had simply told each manufacturer that it would not buy toys that were also sold to the warehouse clubs; what then? Or TRU simply did not buy such toys, but let the manufacturers figure out why; what then? Or TRU bought a few such toys but stocked them in the back of their stores where the lighting was dim; what then?

The boundaries between acceptable and illegal vertical behavior will surely continue to bedevil antitrust law.

F. Dentsply.[54]

In January 1999 the DOJ filed suit against Dentsply International, charging that this manufacturer of artificial teeth had refused to sell its teeth to dealers who carried certain lines of competing teeth and that these actions impaired the ability of other tooth manufacturers to develop or maintain an adequate dealer network and raised barriers to entry. In April 2000 Dentsply moved for summary judgment, arguing that rival tooth manufacturers could use other channels of distribution and that its dealers could cease carrying its teeth at any time and carry other manufacturers' teeth instead. In March 2001, Judge Susan L. Robinson denied Dentsply's motion.[55] The case went to trial in April 2002; a decision is awaited.

This was another important case involving the raising of rivals' costs.

G. Staples/Office Depot.[56]

In September 1996 Staples, which had the largest chain of office superstores (OSSs), proposed to buy Office Depot, the next largest chain. At first, the proposed merger appeared

[54] Further discussion of this case can be found in Litan and Shapiro (2001) and Katz (2002).

[55] 2001-1 Trade Cas. (CCH) ¶73247.

[56] Further discussion of this case can be found in Dalkir and Warren-Boulton (1999), Baker (1999), and White (2003).

competitively benign, since the two chains together accounted for less than 10% of all office supplies sold nationally. But FTC compilations of simple price comparisons across metropolitan areas of some standard office supply products showed that prices charged by Staples or Office Depot were highest where either was the sole OSS chain in the area, lower when there were two OSS chains,[57] and lower still when all three OSS chains were present. More sophisticated econometrics supported these simple price comparisons.[58]

These results showed that OSSs were a separate product market and that metropolitan areas were a relevant geographic market; and they showed that the merger would likely have anti-competitive consequences for those metropolitan areas where Staples and Office Depot were both present (and where the merger would thus have a 3-to-2 or 2-to-1 structural outcome). Further, the FTC was highly skeptical as to the efficiency claims offered by the merger partners.

Following the FTC's rejection of a divestiture offer by the parties, the Commission voted to seek a preliminary injunction in April 1997. The case went to trial in June 1997, and at the end of that month Judge Thomas Hogan found for the FTC.

The Staples case was an important one for demonstrating the way in which simple but powerful price comparison data could empirically define markets and show the potential for anti-competitive outcomes.

H. MCI WorldCom/Sprint.[59]

In October 1999 MCI WorldCom and Sprint -- the second and third largest long distance

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[57] In addition to Staples and Office Depot, there was one other significant OSS chain: OfficeMax.

[58] For some disputation concerning these results, see Hausman and Leonard (n.d.) and Baker (1999).

[59] Further discussion of this case can be found in Pelcovits (2004).

telephone companies in the U.S. -- announced their intention to merge. The two companies were also the first and second largest providers of Internet backbone service.

The DOJ opposed the merger, arguing that only AT&T, MCI WorldCom, and Sprint ("the Big Three") had the nationwide telephone networks that were important for customers and that the Big Three were a separate market from the smaller long-distance carriers that had emerged in the 1980s and 1990s. In essence, the DOJ argued that for telephone service – separately for the “mass market” of residential and small business customers and for the large business market -- this was a 3-to-2 merger and was anti-competitive. The DOJ was also concerned about Internet backbone service, arguing that the combined firm would become dominant and could refuse to interconnect with other providers, thereby strengthening its dominance yet further. The European Commission was similarly concerned about the prospective combined firm's dominance of the Internet backbone.

MCI WorldCom and Sprint argued in their defense that the smaller firms in the telephone business would discipline any efforts to raise prices above competitive levels, that the merger would achieve significant economies for the merged entity, and that they were willing to divest Sprint's share of the Internet backbone service.

The DOJ was not convinced by the parties' arguments, and in June 2000 announced that it would oppose the merger. At about the same time the European Commission announced that it did not believe that the spun off Internet backbone capacity would result in as strong competition as it would under the ownership of a freestanding Sprint and therefore opposed the merger.[60]

[60] This resembled the position that the DOJ had adopted in Microsoft's proposal to acquire Intuit in 1995. When Microsoft proposed to spin off its Money software (which competed with Intuit's Quicken) as a possible way to make the acquisition palatable, the DOJ responded that the spinoff would mean that Money would be in weaker hands and thus less of a competitive threat to Quicken than was true under the status quo. In the face of DOJ's opposition, the proposed acquisition was withdrawn.

In the face of this opposition, the proposed merger partners called off the merger, rather than contest the issue in court. In the wake of the subsequent accounting debacle and bankruptcy filing by MCI WorldCom in 2002, it was widely believed that the failure of this merger to go forward was a crucial event that brought on that outcome. The merger momentum of the company was slowed, which thereby revealed the underlying weak management, poor cost controls, and low profitability of MCI WorldCom. The accounting manipulations by senior executives were a desperate effort to cover these inadequacies.

I. Heinz/Beech-Nut.[61]

Virtually all of jarred baby food is produced by only three companies: Gerber, Heinz, and Beech-Nut. The dominant firm is Gerber, with about two-thirds of the market; the other two split the remainder, with Heinz, though it is perceived by consumers as a "value" brand, having a slight market share edge over Beech-Nut (which is perceived as a "premium" brand).

In February 2000 Heinz proposed to acquire Beech-Nut. The parties argued that their competition with each other was quite limited and that their ability to compete with Gerber was restricted as well: Heinz by its "value" brand image, Beech-Nut by its antiquated production facilities and high costs, and both by their respective (largely non-overlapping) regional orientations and lack of nationwide presence. They argued that this merger would provide Beech-Nut with access to Heinz's low-cost production technology and allow Heinz to go forward with two innovative ideas in producing baby food, which were more likely to be successful if marketed nationwide under the Beech-Nut name (which would occur post-merger, since Heinz would convert all of its production and sales to the Beech-Nut brand name).

Thus, the parties argued, even though the merger appeared to be a 3-to-2 merger, with a

[61] Further discussion of this case can be found in Baker (2004).

resulting quite high HHI, competition would actually be invigorated, since the combined firm would be able to compete aggressively against Gerber in ways that neither could before the merger. The lower production costs and important innovations gave them an incentive to expand sales by reducing prices, rather than tacitly colluding with Gerber at higher prices but reduced volume.

The FTC was not convinced, however. The Commission argued that there was significant wholesale competition between the parties for space on supermarkets' shelves and saw post-merger concentration as quite high (the nationwide HHI would rise by 510 points to 5285), with very high entry barriers. And the FTC was suspicious of the parties' efficiencies claims and argued that those efficiencies might well be achievable by the parties without a merger.

In July 2000 the FTC voted to seek a preliminary injunction to stop the merger. The parties contested the action, and a five-day trial was held in late August and early September. In October Judge James Robertson issued an opinion siding with the parties and largely accepting their arguments.[62] The FTC appealed to the D.C. Circuit. In April 2001, a unanimous panel reversed the district court and supported the FTC.[63]

The Heinz case represents a good example of the dilemma faced by judicial merger analysis when post-merger market concentration is high: how and when to accept the merging parties' promises of post-merger efficiencies. Before a merger, promises are easy to make; but assurance as to post-merger follow-through is impossible. Further, unexpected problems in combining two disparate organizations (as clearly was the case in the UP-SP merger discussed above) may foil even the best-intended plans for post-merger efficiencies.

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[62] FTC v. H.J. Heinz Co., 116 F.Supp. 2d 190 (2000).

[63] FTC v. H.J. Heinz Co., 246 F.3d 708 (2001).

VI. Some Disappointments and Missed Opportunities

A. Bell Atlantic/NYNEX.[64]

In April 1996 Bell Atlantic and NYNEX announced an agreement to merge. They were the two large and contiguous providers of local telephone service along the eastern seaboard: NYNEX, from Maine through New York; and Bell Atlantic, from New Jersey through Virginia.

The merger was reviewed by the DOJ, by the Federal Communications Commission (FCC), and by thirteen state regulatory commissions. In April 1997 the DOJ announced that it would not object to the merger. The thirteen state commissions also cleared the merger. After examining the merger against a "public interest" standard, the FCC insisted on some commitments by the merging entity that would (arguably) make entry into local service easier and approved the merger in August 1997.

A crucial antitrust issue was whether Bell Atlantic was an important potential entrant into NYNEX's local service markets, especially New York City and its suburbs. As can be found in Brenner (1999), there was a strong case to be made that Bell Atlantic was the best situated entrant and most likely to be successful. Further, by early 1997 it was already clear that one of the major promises of the proponents of the Telecommunications Act of 1996 -- that the Act would open up competition in local service markets -- was greatly overstated. A challenge to the merger, on potential competition grounds, would have been worthwhile. It might well have succeeded, and we might well see Bell Atlantic today with its own facilities competing with NYNEX in New York and other Northeast cities.

B. Hospital mergers.

[64] More details on this matter can be found in Brenner (1999).

Both the DOJ and the FTC have lost a string of hospital mergers. Competition in local markets among hospitals surely does matter, even in the presence of health insurance for patients, since hospitals can compete for health insurance contracts and for affiliations with local physicians. It is a disappointment that the agencies have not been more convincing.

C. California Dental.[65]

In July 1993 the FTC issued an administrative complaint against the California Dental Association (CDA), charging that the CDA had violated Sec. 5 of the FTC Act by placing unreasonable restrictions on its members' advertising of price and quality claims. An FTC administrative law judge issued an opinion supporting this charge in July 1995. The CDA appealed to the full Commission, which in March 1996 determined that the CDA's actions did indeed violate the FTC Act.[66]

The CDA appealed to the Ninth Circuit, which (by a 2-1 vote) supported the FTC's decision in July 1997.[67] An issue in the appeal was whether the FTC was required to conduct a full-scale rule-of-reason analysis, or whether an abbreviated (or "quick look", "truncated", "abbreviated", or "structured rule of reason") inquiry was sufficient for this type of allegation. The Ninth Circuit affirmed that the FTC's abbreviated inquiry had been sufficient.

The CDA appealed to the Supreme Court, which granted certiorari and in May 1999 entered an opinion (on a 5-4 vote) that reversed the appellate court on this issue[68] and remanded the case to

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[65] Further discussion of this case can be found in Calkins (2000) and Muris (2000).

[66] In re California Dental Association, 121 F.T.C. 190 (1996).

[67] California Dental Association v. FTC, 128 F.3d 720 (1997).

[68] California Dental Association v. FTC, 526 U.S. 756 (1999). The other issue on appeal was whether the FTC had jurisdiction over the CDA, since the latter is a non-profit association. The Ninth Circuit had said that the FTC did have jurisdiction, and the Supreme Court unanimously affirmed that position.

the Ninth Circuit. The Supreme Court majority argued that the FTC's inquiry had not been sufficient.

On remand the Ninth Circuit gave more credence to the CDA's arguments and directed that the FTC drop the case.[69] In early 2001 the FTC decided not to appeal, and it dismissed the case.

Since the Supreme Court had earlier endorsed a "quick look" approach in a number of cases,[70] its reversal here was somewhat surprising and certainly distressing. A full-scale rule-of-reason trial is costly and should be avoided where the plaintiff can combine the theory and the evidence to support a strong presumption that the practice is anti-competitive. Unfortunately, the FTC chose not to provide much in the way of evidence. It did not ask an economist to testify; there was no empirical evidence on the adverse effects of the restraints; there was no evidence to define local markets; there was no evidence on market power. These were all strategic case management decisions by the FTC.[71] That the FTC failed to provide sufficient evidence to convince the Supreme Court may prove to have been a costly error indeed.

D. Aluminum.

In 1993 the American and European aluminum producers were complaining about the over-capacity and low prices that were prevailing, largely attributable to Russian aluminum producers entering world markets. Political pressure grew to do something. The trade representatives of the U.S., the European Union, Norway, Canada, Australia, and Russia met in late 1993 and early 1994

[69] California Dental Association v. FTC, 224 F.3d 942 (2000).

[70] National Society of Professional Engineers v. U.S., 435 U.S. 679 (1978); NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

[71] By contrast, in Massachusetts Board of Registration in Optometry, 110 FTC 549 (1988), which was also a "quick look" case, substantially more evidence was offered by the F.T.C.

to try to agree to a cartel-like agreement on a reduction in capacity. They finally agreed in late January 1994 (Du Bois and Norton 1994).

Trade restrictions and antitrust are almost always antithetical. As usual, there were political arguments in defense of the cartel agreement: that this agreement forestalled anti-dumping filings by the U.S. aluminum companies (and some equivalent actions in Europe), which would have been worse. Perhaps. But anti-dumping actions are (unfortunately) by now a regular part of the political landscape. Cartel agreements are not, and ought not to become so. This was a big step, and a big risk, in the wrong direction.

Though the Clinton antitrust enforcement agencies may not have been directly involved, the aluminum cartel was nevertheless a step backward for antitrust principles.

E. Vertical restraints.

Recall that an early action by the DOJ during the Clinton era was to rescind the "Vertical Restraint Guidelines" that had been issued in 1985. Unfortunately, neither the DOJ nor the FTC during the Clinton era issued anything to replace them.

Vertical issues have been and continue to be a difficult area for antitrust. Partly this is a terminological issue: Many of the words and phrases in the vertical area -- e.g., "tying", "foreclosure", "refusal to deal" -- have a somewhat sinister sound and are easily (if often mistakenly) transformed by plaintiffs' counsel into an anti-competitive characterization. Partly there is often analytical confusion: The nature of the vertical practices are sometimes confusing, and it may be difficult to ascertain exactly who is doing what to whom. And partly there are almost always at least two potential explanations for or interpretations of a vertical practice: It may promote efficiency by dealing with free riding, restricting opportunistic behavior, or reducing transactions costs; but it may also raise rivals' costs. If the latter has a significant effect on the market, then the practice deserves closer scrutiny.

It would have been (and still would be) valuable to have a publicly available set of analytically rigorous principles that the DOJ and/or the FTC would use in weighing when to bring cases that involve vertical issues (whether restraints or mergers). The noting of the analytical similarity among many of the vertical practices that have different names should be part of this effort (White 1989). The presence of market power as a starting point for any serious legal consideration ought to be another component.[72] Smart lawyers and economists at the enforcement agencies could surely find more principles that could provide valuable guidance for the private sector and contribute to the orderly development of judicial decisions.

It is a disappointment that the Clinton era agencies did not try to do so.

F. Market definition in monopolization cases.[73]

Since the early 1980s antitrust economics has operated in a paradigm vacuum with respect to the definition of the market in monopolization cases, including vertical restraints and predatory behavior. As a precursor to a monopolization case, one must find that the defendant is exercising market power; and in order to do that, one must generally specify a market.

The 1982 "Merger Guidelines" (and its subsequent revisions) laid out a paradigm that has proved durable *for analyzing prospective mergers*. That paradigm asks whether a group of sellers, if they acted jointly as a monopolist, could successfully increase prices from their current (or otherwise likely future) levels by at least a small but significant amount. In essence, the paradigm defines a market as a group of sellers that has the potential to act as a monopoly.

But that paradigm generally *cannot* be used to define a market where the charge is that the

[72] But see the discussion in the following section. Also, an insistence on the presence of market power would call into question the per se treatment of minimum RPM -- or at least put it into the same category as the "per se" treatment of tying. But that would be all to the good.

[73] This section draws on White (1999, 2000).

defendant is *already* exercising market power (and the charged act has created or enhanced his exercise of market power).[74] The reason lies in the heart of microeconomics' monopoly theory: If a monopolist is maximizing its profits, then it is maintaining its price at a level that is consistent with that maximization. To ask whether it could raise its price even higher so as to increase profits is to ask a question to which the answer -- *even for a monopolist* -- ought always to be "No". Equivalently, a price increase test for asking whether a firm is exercising market power commits the well-known "cellophane fallacy":[75] A monopolist and a competitive firm should *both* be expected to answer the question with a "No", and thus the question cannot distinguish between the two.

Until the early 1980s, a primary source of evidence supporting claims of monopolization and thus of addressing the market definition question was profitability data. Thus, for example, in contrast to du Pont's claim that it did not exercise market power because its cellophane had only a small share – about 17% -- of the "flexible wrapping materials" market, Stocking and Mueller (1955) argued that du Pont indeed had market power in cellophane (and thus cellophane was a relevant market) by comparing its reported profits in producing and selling cellophane with the much lower levels that it reported in producing and selling rayon (where it had a comparable market share in producing and selling rayon[76] and faced 15-18 rival firms that produced the same item).[77] Through the 1970s, a major component of monopolization cases was profit rates.

This line of analysis received a serious blow from articles by Benston (1982) and Fisher and

[74] As Werden (2000) points out, however, the "Merger Guidelines" paradigm could be used to define a market where the charge is that the defendant's *prospective* actions will allow it to monopolize the market.

[75] Derived from the Supreme Court's mistaken asking of this question in U.S. v. E.I. du Pont de Nemours and Co., 351 U.S. 377 (1956); see Stocking and Mueller (1955).

[76] See Markham (1952).

[77] Stocking and Mueller (1955) also examined du Pont's business strategy for cellophane and its pricing pattern.

McGowan (1983), who argued that standard accounting data could not be trusted to reveal the excess profits that would be expected from the exercise of market power. Shaken by these arguments, economists reduced their use of profit data as indicators of the exercise of market power. *But they developed no general paradigm to replace the distrusted profit data.*

Sometimes sufficient price data may be available and can be used to delineate markets and indicate the presence or absence of the exercise of market power.[78] Or there may be unique features of the product and its environment that can help delineate the market. Still, the excess profits (rents) component of the economists' standard monopoly paradigm has been severely hobbled as an empirical tool, but nothing has been offered to replace it (and too often economists who should know better commit the cellophane fallacy by offering a price-increase test as a way of defining a market and indicating the presence or absence of market power in a monopolization case).

The Clinton era enforcement agencies could have addressed this vacuum and clarified this murky area. It is disappointing that they did not.

[78] To return to the Staples-Office Depot merger discussed above, the price data showed that prices for office products sold by OSSs were higher in metropolitan areas where only a single OSS was present. Thus, one could infer that OSSs in metropolitan areas were a relevant market, not only for merger analysis but also for monopoly analysis, and that a single OSS in a metropolitan area was exercising market power.

VII. Conclusion

The Clinton era did embody a more active approach to antitrust enforcement than did its predecessors. But there were important elements of continuity. Further, many of the controversial cases that were initiated during this period had a solid analytical foundation, often based on some variant of the concept of raising rivals' costs. There were disappointments as well.

In sum, the Clinton era of antitrust enforcement is likely to be seen by future generations of antitrust analysts as neither one of radical upheaval nor of do-nothing complacency. Instead, it is likely to be seen as an era in which some important initiatives were taken and foundations laid but also a time when some opportunities were missed.

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