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2-14-2005

What Do Exit Polls and Flu Vaccine Shortages Have in Common?

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Recommended Citation

What Do Exit Polls and Flu Vaccine Shortages Have in Common?, 647 FTC:WATCH 12 (February 12, 2005)

in the media 'seek to extinguish ... free speech rights' ... Nice try. But infomercials are advertisements."

Commercial Alert quoted CBS chairman Leslie Moonves in 2003: "I saw 'Minority Report,' Steven Spielberg's movie — that had more product placement than any TV show I've ever seen. So my phrase is, 'If it's good enough for Spielberg, it's good enough for us.' So you're going to see more and more of that ... instead of Ray Romano sitting there with a can of nondescript soda, he'll be drinking a Diet Pepsi."

The aai Column

What do exit polls and flu vaccine shortages have in common?

Albert A. Foer, Robert Lande, & F.M. Scherer*

In 2004, exit polls failed to predict and analyze properly the outcome of the presidential election. Also in 2004, the inability of one company to deliver flu vaccine supplies left a substantial portion of U.S. citizens at risk this winter. Were these events simply unrelated examples of mistakes and bad luck? More likely, they reflect an increasingly serious problem lurking behind our national economic policy: dismissal of the value of diversity.

Diverse, competing voices in mainstream broadcast media are critical for a vibrant, healthy and well-informed U.S. democracy. Yet on three important occasions, the major media combined their exit polling operations into one organization that had spectacular failures. The Voter News Service (VNS) was a joint venture between five major TV news organizations -- ABC, CBS, NBC, Fox, and CNN, and the Associated Press -- designed to produce and analyze election exit polling information. It was the only national firm that compiled polling data taken as voters left voting booths.

Until the 1988 election, the major news organizations did their own exit polling and made their election predictions independently. As a cost saving measure, in the early 1990s they combined their operations, and since then all have relied on a single joint venture to produce the same data and models, rather than competing to predict election results most accurately.

Relying on the Voter News Service's information in 2000, the networks first called the election in favor of Vice President Albert Gore, Jr., a few hours later called it for George W. Bush and finally admitted that neither candidate had clearly prevailed.

Despite criticisms by the American Antitrust Institute and others, the major newsgathering organizations decided to keep their exit polling operations together. During the 2002 elections the new VNS computer system failed to work properly. Although the networks were spared from televised embarrassment in 2002, the malfunctioning VNS again deprived the public of accurate exit poll electoral analysis.

In 2004, the name of the exit poll joint venture was changed to the "National Election Pool", but it was the same six companies in the same monopoly bed. Although this time they utilized two respected polling companies, there still was no competition in exit polling, and they relied upon only one source — the Associated Press — for vote tallying. The polling results again were misleading and distorted. As Gary Langer, director of polling for ABC News, afterwards wrote: "A poorly devised exit poll question and a dose of spin are threatening to undermine our understanding of the 2004 presidential election." The monopoly approach was no doubt "efficient" since it saved the news media money. But it was dramatically inefficient in terms of its usefulness for political reporting and analysis.

A parallel situation occurred in the market for flu vaccines. Only two companies — Chiron and Aventis-Pasteur — were contracted to supply influenza vaccine. But Chiron's plant developed contamination problems and Aventis-Pasteur was unable significantly to increase production beyond its planned output, causing stringent rationing of vaccine.

As was the case with the malfunctioning exit polls, this had happened many times before. Immunization programs in the U.S. have repeatedly experienced vaccine production failures that have led to shortages, rationing, and black markets. These have been caused by many specific events over the years, but at the core the problem has always been that only a small number of firms have produced any given vaccine. This virtually guaranteed that a significant problem with the production of any supplier would precipitate large shortfalls and rationing.

There have been many reasons why we have relied on such a small number of producers. In addition to cost savings, mergers, liability risks, relatively small markets, and government policies (or their absence) have apparently played a role. Regardless of the cause, once one company's flu vaccine production has failed, it is too late for the others to produce enough. If there had been many producers, however, the failure of one would probably not have made a large difference.

The exit polling and flu vaccine examples show how our society is placed at risk by policies that favor excessively high levels of market concentration. Today's almost *laissez faire* approach shows that competition policy has traveled a long way from the 1960's, when antitrust too often protected specific competitors instead of the competitive process. But now the pendulum has swung too far in the other direction. "Efficiency" is the misdirected mantra of today's competition policy, even when it leads to unduly high levels of economic concentration. The better policy would be for the government to take whatever steps are needed to assure that production is not limited to a monopoly or a small handful of producers. Sometimes one can carry all the eggs in one basket without tripping. But when tripping occurs there is nothing efficient about the results.

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Briefs

President Bush's proposed budgets for the FTC and the Justice Dept.'s Antitrust Division in FY 2006 (commencing October 1), anticipate funding the agencies at "current services" levels. Meaning that, factoring in inflation, they are neither increased nor decreased. The FTC's allocation, $211 million is offset by anticipated income from Hart-Scott-Rodino filing fees of $116 million and $23 million from Do-Not-Call List registrations, leaving the cost to taxpayers at approximately $72 million.

Slotting fees, Middle East division: According to an account in an electronic antitrust newsletter distributed by Sheppard Mullin (D.C.) on February 7, "On January 5, Israeli Antitrust Authority General Director Dror Strum announced the finalization of rules that prohibit, among other things, slotting allowances and category captaincy arrangements between large retailers and suppliers. Mr. Strum originally announced these rules in May 2003, but had provided time for industry to appeal." <http://www.antitrustlawblog.com/>

Zoloft bottleneck: Continuing to oppose pharmaceutical company delays in Hatch-Waxman Act filings, the FTC has filed an *amicus curiae* brief in *Teva Pharmaceuticals* v. *Pfizer*. The FTC brief supports Teva's petition for a declaratory judgment against Pfizer. Hatch-Waxman rules prescribe a rigid time and event schedule for introduction of new generic drugs, but Teva (and the FTC) say that Pfizer created a "bottleneck" in the schedule by not suing Teva according to that schedule. That bottleneck slowed Teva's introduction of a generic version of Pfizer's blockbuster Zoloft, the FTC said. Lower courts held there was no "actual controversy," but the FTC said Pfizer's inaction "just as surely delays Teva from receiving FDA approval to market a product" as if Pfizer *had* sued Teva. The filing is John Graubert's first *amicus* as Acting General Counsel; another signatory on the FTC's brief is Lore Unt, FTC Counsel for Intellectual Property. (FTC Press Release, Feb. 11; FTC File No. P042112; contact Lawrence DeMille-Wagman, 202-326-2448)

Box office antitrust: A recent paper wonders why, since the 1970's, at any given movie theatre, one