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# ***The Antitrust Enterprise: Principle and Execution:*** **An Introduction**

Herbert Hovenkamp \*

On April 1, 2005, the University of Iowa College of Law hosted a symposium entitled *The Antitrust Enterprise: Principle and Execution*.<sup>1</sup> The general topic of the symposium was the effective administration of the antitrust laws, focusing on four areas: exclusionary practices, intellectual property, private enforcement, and antitrust reform.

Greg Werden of the Antitrust Division of the United States Department of Justice spoke on a panel concerned with unilateral exclusionary practices under section 2 of the Sherman Act. He elaborated his “no economic sense” test for exclusionary conduct. Under that test a dominant firm’s unilateral conduct that injures its rivals is not unlawful unless the conduct would make no economic sense but for its tendency to eliminate or lessen competition.<sup>2</sup> This test places a significant burden on plaintiffs and results in only a small proportion of conduct being deemed unlawfully exclusionary, but Werden argues that it is necessary to limit the false positives to which section 2 claims have seemed particularly conducive. This is true, Werden argues, even though some of the conduct that survives such a test in fact harms consumers.

By contrast, Craig Wildfang, a lawyer with the Minneapolis firm of Robins, Kaplan, Miller & Ciresi, argues that a more aggressive, pro-plaintiff test is necessary to deal with claims of anticompetitive discounting.<sup>3</sup> Focusing mainly on the Eighth Circuit’s decision in *Concord Boat*,<sup>4</sup> Wildfang argues that volume or “market share” discounts can be used anticompetitively to deprive rivals of sufficient output to enable them to attain minimum efficient scales of production. As a result, rivals face higher costs and the dominant firm can then increase its own prices under the umbrella thus created.

Professor James Speta of Northwestern University Law School examines one particular aspect of the Supreme Court’s *Aspen* and *Trinko* decisions,<sup>5</sup> considering whether antitrust should provide a remedy when a utility refuses to sell to a rival even at the same retail price that is offered to non-competitor customers.<sup>6</sup> As Professor Speta notes, the duty of common carriers to serve all customers on nondiscriminatory terms is

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1. The title was taken from HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2006).

2. Gregory J. Werden, *The “No Economic Sense” Test for Exclusionary Conduct*, 31 J. CORP. L. 293 (2006).

3. K. Craig Wildfang, *Predatory Conduct Under Section 2 of the Sherman Act: Do Recent Cases Illuminate the Boundaries?*, 31 J. CORP. L. 323 (2006).

4. *Concord Boat Co. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), cert. denied, 531 U.S. 979 (2000).

5. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

6. James B. Speta, *Resale Requirements and the Intersection of Antitrust and Regulated Industries*, 31 J. CORP. L. 307 (2006).

well established in the law of public utilities. In addition, some regulatory provisions, including the 1996 Telecommunications Act, require firms under their jurisdiction to set specific, lower wholesale rates to those wishing to resell in competition with the seller. While these are well established regulatory requirements, Professor Speta notes, they are not “customary antitrust goals.”<sup>7</sup> Indeed, the Telecommunications Act was an “experiment” in encouraging new entry by requiring incumbent firms to sell to rival downstream sellers at very low rates in order to “accelerate” the move from single-firm dominance to competition in the telecommunications sector. However, “antitrust law does not attempt such experiments.”<sup>8</sup> Professor Speta concludes that, while some of *Trinko*’s conclusions about refusals to deal seem misplaced, the concern about appropriate antitrust remedies for public utility refusal to deal is not. Effective remedies are too complex to be administered by generalist antitrust courts. Such “essential facilities” problems are best “left to legislators and regulators.”<sup>9</sup>

In a panel devoted to intellectual property rights and antitrust policy, Michael A. Carrier, professor of law at Rutgers-Camden, examined the implications of the Supreme Court’s *Trinko* decision<sup>10</sup> for the law of intellectual property and antitrust.<sup>11</sup> Carrier concludes that *Trinko*’s language, which was unnecessarily hostile to refusal to deal claims, virtually forecloses any possibility that courts can condemn refusals to license IP rights under the Sherman Act. Carrier also laments the fact that the Court’s discussion of antitrust doctrine was overly broad and unnecessary to the outcome of that decision. Insofar as the refusal to license IP is concerned, Carrier argues that the Court’s decision tended to short circuit the debate rather than resolve it

April Franco and Matthew Mitchell, professors of economics at the University of Iowa, followed with a paper on employment mobility laws and their effect on competition.<sup>12</sup> Noncompetition covenants tend to do two things at the same time. First, they tend to protect the investment of the employer who is protected by the covenant and to that extent to make new entry more profitable. Second, however, they tend to make entry by new firms more difficult because of the greater difficulty in recruiting suitable employees. Franco and Mitchell find that in moderately competitive markets noncompetition agreements tend to reduce the amount of competition, but that the tendency is reversed in both noncompetitive and highly competitive markets. For example, in portions of the computer industry in California, which is hostile toward noncompetition agreements, there are a high number of new firms created by spin-outs from older firms. The number in Massachusetts, which enforces such covenants under a traditional rule of reason, is much less. A much higher percentage of the new firms there are created de novo.

Speaking of private antitrust enforcement, Professor Randy Picker of the University of Chicago Law School writes about standing to sue in cases alleging anticompetitive

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7. *Id.* at 319.

8. *Id.*

9. *Id.* at 322.

10. *Trinko*, 540 U.S. at 398.

11. Michael A. Carrier, *Of Trinko, Tea Leaves, and Intellectual Property*, 31 J. CORP. L. 357 (2006).

12. April M. Franco & Matthew F. Mitchell, *Employment Mobility Laws and Competition*, 31 J. CORP. L. 375 (2006).

refusals to grant access, such as *Trinko*.<sup>13</sup> The question is posed because the direct victim of the refusal to deal in *Trinko* was a competitive local exchange carrier (AT&T)—that is, a competing telephone company that needed interconnection to the dominant firm's facilities to do business. However, the plaintiff was a putative class action made up of consumers, whose injury may have been real but it was also much less “direct.” Picker examines the relevance of the Supreme Court's *Illinois Brick* decision, which denies indirect purchasers a damages action for antitrust injuries suffered in the first instance by the direct purchaser, but passed on to the direct purchaser's customers.<sup>14</sup> Picker finds this question to be complex, and the outcome to depend on whether deterrence or compensation is the proper goal of private antitrust enforcement. In general, he concludes, consumer suits are most consistent with a compensation rationale, while suits by the directly injured firm are more consistent with deterrence. He writes:

[W]e could deter breach and compensate those harmed by the access breach by allowing the entrant to sue for lost profits and the consumers to sue for lost consumer surplus. At least within the confines of the model, these amounts are quite distinct and readily separable. Nothing in the analysis suggests a role for damage multipliers based on the need to gross up damages to adjust for undetected breaches, as we should expect entrants to catch breaches in ordinary course.<sup>15</sup>

Professors Roger Blair and Christine Piette of the University of Florida Economics Department also write about standing and antitrust injury in foreclosure cases.<sup>16</sup> Their economic analysis concludes that, based on a straightforward model of foreclosure, two groups suffer antitrust injury as a result, overcharged consumers and foreclosed entrants. They argue that both should have standing to assert damages actions. The authors do note, however, that proof of damages by foreclosed entrants is difficult, particularly if they are new entrants seeking lost “but-for” profits.

Speaking of antitrust reform, Professor Steve Calkins examines the Antitrust Modernization Commission by setting it within its historical context.<sup>17</sup> Calkins traces the unlikely series of events leading to the formation of the Commission, a bipartisan group commissioned to study the antitrust laws and make suggestions for reform. He notes that over the life of federal antitrust policy the national government has commissioned some half dozen reports evaluating the antitrust laws. Of these, by far the best known and most influential is the Attorney General's Report of 1955.<sup>18</sup> Calkins notes that, other than the Attorney General's Report, their conclusions have been cited only rarely by the courts. Measuring actual influence is far more difficult. Many of the recommendations made in these various reports were subsequently adopted by either Congress or the courts, but tracing out causation is difficult because of the absence of citation. Professor Calkins

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13. Randal C. Picker, *Mandatory Access Obligations and Standing*, 31 J. CORP. L. 387 (2006); see *Trinko*, 540 U.S. at 398.

14. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

15. Picker, *supra* note 13, at 396.

16. Roger D. Blair & Christine A. Piette, *Antitrust Injury and Standing in Foreclosure Cases*, 31 J. CORP. L. 401 (2006).

17. Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. CORP. L. 421 (2006).

18. REPORT OF THE U.S. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955).

concludes that “one cannot replicate the 1955 experience” of the Attorney General’s Report, the first congressionally commissioned study.<sup>19</sup> Commissions today face far greater challenges and the most likely result is that their findings will be explicitly ignored, although perhaps, and gradually, implicitly followed. More than anything else, Calkins cautions, the success or failure of a commissioned report seems to depend on happenstance: is the same administration who commissioned it going to be around long enough after publication to implement some of its recommendations? Will the authors be appointed to responsible positions in antitrust enforcement? Does the report’s recommendations coalesce with the views of the Supreme Court, or with those of Justices who are appointed soon after the report is published? Finally, Calkins notes that the reports seem to have been far more influential on matters of procedure than of substance.<sup>20</sup>

Professor Christopher Leslie’s paper examines the ways that government amnesty programs can be used to sow distrust among cartel members.<sup>21</sup> Leslie looks at variations on several games, and concludes that, while the government’s current amnesty program is an “excellent start,” more could be done to produce distrust among cartel members. The best strategy, he argues is to keep cartel members in a Prisoners Dilemma where the optimal strategy is to rat on fellow cartel members. This may require expansion of the amnesty program, including such things as rewarding firms that were reluctant to admit wrongdoing, giving amnesty to the first confessor even when the government already has enough evidence to convict him, and making cartel ringleaders eligible for amnesty.

Professor John L. Solow and J.D. candidate Daniel Fletcher write about the Supreme Court’s *Daubert* decision<sup>22</sup> and the use of expert economists in the courtroom.<sup>23</sup> They note that economics is a somewhat different science than the Supreme Court had in mind when it developed the *Daubert* criteria. Solow and Fletcher note that there is somewhat less consensus among economists about the issues that matter in antitrust cases than there might be about other sciences in other forms of litigation. And unfortunately, the technical debates between opposing antitrust economists are likely to pass over the heads of juries. A more fundamental problem, however, is that the laboratory testing model that the Supreme Court had in mind when it established the *Daubert* criteria is not well suited to economics, even empirical economics. The economist cannot put people into a laboratory under controlled conditions and observe how they behave. Rather, she must take economic actors as they are found in the real world. This makes precise re-creation of conditions impossible and deprives economics of some of the criteria of testability that we associate with the harder sciences. In economics, variables that the expert would like to have may simply be unavailable, and they cannot be “supplied,” as they would be in a laboratory. Finally, the conditions for control of experiments, in which all other relevant variables are held constant, rarely exist in the economic world which is the economist’s laboratory. Error rates, an important consideration under *Daubert*, are also problematic.

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19. Calkins, *supra* note 17, at 444.

20. *Id.* at 447.

21. Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453 (2006).

22. *Daubert v. Merrill Dow Pharms.*, 509 U.S. 579 (1993).

23. John L. Solow & Daniel Fletcher, *Doing Good Economics in the Courtroom: Thoughts on Daubert and Expert Testimony in Antitrust*, 31 J. CORP. L. 489 (2006).

The concept implies replication of a test under more-or-less identical conditions to see whether outcomes are consistently predictable. But such replication is seldom possible in the observable economic world.

FTC Commissioner William E. Kovacic writes about ex post evaluation as a mechanism for improving the performance of government regulators of competition.<sup>24</sup> He believes that performance can be improved if evaluators ask two simple questions: “First, did the agency’s interventions produce good results? Second, did the agency’s managerial processes help ensure that the agency selected initiatives that would yield good outcomes?”<sup>25</sup> Kovacic concludes:

Encouraging government bodies to conduct performance evaluations is not only good public policy, it is likely to be a key ingredient of future attempts by competition authorities to demonstrate the value of competition law to broader audiences. In existing competition systems, as well as in jurisdictions considering the adoption of a competition law, a number of observers decline to assume as a matter of theory, or accept as an article of faith, that the enforcement of a competition law yields socially useful results. An a priori presumption of efficacy is a weak substitute for a systematic assessment of outcomes.<sup>26</sup>

These are all very good papers. One conclusion that resonates best with my own views is Greg Werden’s:

To maximize the consumer benefits from competition, it is essential to allow some conduct to go unremedied even though it harms consumers. Doing otherwise would chill risk taking and aggressively competitive conduct from which consumers benefit greatly.<sup>27</sup>

Antitrust is a much more modest enterprise today than it was several decades ago. Those administering the antitrust laws are generally more aware that antitrust is a form of regulation—a type of market intervention in an economy whose core is private markets and government nonintervention. Market intervention must be justified and the justifications by and large are not moral ones. Punishing unfair behavior is not antitrust’s role. Its purpose is to make markets perform more competitively, and intervention is justified only when it moves us toward that goal.

Administrability is key because antitrust is a justifiable enterprise only if court intervention can make markets work better. The sad fact is that economists are often convinced that a certain practice can be anticompetitive, at least part of the time. However, antitrust is forced to leave the practice alone because it has not developed rules that can reliably distinguish anticompetitive results or remedy them effectively.

In order to justify government intervention against a firm that has been successful in the market a court must be able to do better than simply observe conduct that is consistent with an anticompetitive explanation and let a jury decide the issue by a “preponderance”

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24. William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503 (2006).

25. *Id.* at 505.

26. *Id.*

27. Werden, *supra* note 2, at 305.

of the evidence. If antitrust policy goals are to be furthered, the anticompetitive explanation must be substantially more robust than alternative, more benign, or procompetitive explanations. Failing this, antitrust policy will operate so as to chill procompetitive conduct.

When a particular form of behavior is too complex for reliable analysis, then the only defensible antitrust rule is to let the market rather than the courts control. Of course, Congress can always intervene, and further development in our tools of analysis may permit more definite conclusions later. But a court is in hazardous territory when it assumes that it can make society wealthier by condemning a practice whose competitive effects are poorly understood. The basic rule should be nonintervention unless the court is confident that it has identified anticompetitive conduct and can apply an effective remedy.