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U.S. Antitrust 2025: How Have We Handled The Bulletproof Cartels?

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I. INTRODUCTION

There is a tendency, especially among those of us who count ourselves as antitrust lawyers or economists, to think that the antitrust laws were handed down by the benevolent gods on Mount Olympus, and that they are the only guidance that we need in the areas in which they apply.² Certainly, there may be robust debate around the edges, and the economists will litter the field with their formulae, but at the core there is almost no argument—horizontal cartels are evil. And except for a few free market diehards, the consensus is that such evil should be eradicated by the law.

The problem arises when factors other than competition demand their day in the sun. When a crisis erupts, and the government elects to intervene forcefully in the economy, we are reminded that the antitrust laws were a political response to a set of conditions in the late 1800s and early 1900s. That they have retained vitality and effectiveness for over 100 years is a testimony to their wisdom,³ but that doesn't mean that other factors aren't important.

The responses to the economic meltdown of 2008-2009, and the Health Care reform law passed in 2010, have created a new set of imperatives that need to be balanced against traditional antitrust doctrine. In finance, accounting, and now health care, we are seeing the rise of a small number of powerful, government-protected, enterprises. If these groups share information, even talk about prices, are they doing something illegal (as antitrust would say) or simply what they were created to do (see the discussion of Accountable Care Organizations (“ACOs”) below)?

If the government wants them to coordinate their activities for policy reasons, is there still a role for antitrust? Or have we created what are, in effect, government-sanctioned, bulletproof, cartels? And what, if anything, should we do about that, so that when we look back from 2025 we can smile rather than cringe?

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² Justice Hugo Black of the United States Supreme Court, called the Sherman Act “a comprehensive charter of economic liberty”, *Northern Pacific Rail Co. v. U.S.*, 356 U. S. 1, 4 (1958), and Justice Marshall described the Sherman Act as “the Magna Carta of free enterprise”, *U.S. v. Topco*, 405 U.S. 596, 610 (1972). These are not modest claims.

³ We will avert our eyes from oddities such as Fair Trade Laws (which allowed vertical price-fixing) and the Robinson Patman Act (which put restraints on sellers in order to control large buyers).

II. ENFORCEMENT APPROACHES IN U.S. CARTEL LAW

U.S. anti-cartel law has had a simple focus for many years. We ratchet up the fines, and throw some people in jail.⁴ Recently Douglas Ginsburg and Joshua Wright published a provocative article arguing for increased punishment of business people who participate in cartels, with correspondingly less emphasis on corporate fines (which simply penalize shareholders and other non-malefactors).⁵ But, even here, the assumption is that we are dealing with “normal” cartels. We cannot and should not ignore those, to be sure. But we may be facing a different kind of cartel here to which our normal approaches may not apply.

We do have some “government protected conduct” defenses under current law. A defendant can argue that its conduct should not be condemned because it was requested or authorized by the government,⁶ and we have the Webb-Pomerene Act that specifically allows export cartels.⁷ Finally, specific statutes allow for antitrust overrides in the interest of national defense.⁸ It would not seem to be too much of a stretch to argue for a similar override in the interest of overall economic stability. Congressional enactment is the clearest way to do this, but we may be moving down that path indirectly.

III. TOO BIG TO FAIL

Perhaps the precursor to the current issues surrounding institutions deemed “too big” or “too vital” to fail arose in the accounting profession. Whereas 30 years ago we had the “Big 8” accounting firms to which listed companies could turn for auditing and other services, mergers gradually reduced this to the Big 5. When the government indicted Arthur Andersen and caused its collapse, we went down to the Big 4.⁹ What this means from a customer standpoint is that none of the remaining firms can be allowed to fail or go out of business, or there will be too few firms left to allow for proper rotation of auditors (much less any competition on fees, etc.).¹⁰ Indeed, the U.S. Chamber of Commerce has called on the regulatory bodies to expand the number of firms out there.¹¹

So, what if the Big 4 agree to fix prices? Will you drive one or more of them out of business? Perhaps when you reach this point, you need to combine antitrust (surely the Big 4 should not be allowed to merge into the Big 3, or Big 2) with explicit regulation of conduct.

We reached this situation with accounting firms sort of by accident. But in the financial meltdown of 2008-2009, certain institutions were specifically designated as “too big” (or too vital) to fail. The U.S. Government propped them up and then purported to impose special controls

⁴ See, generally, Connor, *Anti-Cartel Enforcement by DOJ*, 5 (1) COMPETITION L. REV., p. 89 *et seq.* (2008). See, also, AAI Report, *An Average of 50 International Cartels Discovered Each Year* (8/16/2009), available at http://www.antitrustinstitute.org/files/Breakout%20Report-International%20Cartels_081620091847.pdf.

⁵ Ginsburg & Wright, *Antitrust Sanctions*, 6(2) COMPETITION POL'Y INT'L (Autumn 2010).

⁶ See, ABA ANTITRUST LAW DEVELOPMENTS at 1208-1211 (6th Ed. 2007).

⁷ 15 U.S.C. Sections 61-66, *id.*, pp. 1211-1213.

⁸ See the Defense Production Act of 1950, § 708; 50 U.S.C. § 2158.

⁹ See, *History of the Major Accounting Firms* (May 30, 2010), available at <http://www.suite101.com/content/history-of-the-big-accounting-firms-a219924>.

¹⁰ See, *The Big Four: Too Few to Fail* (11/10/2010), available at <http://accountingonion.typepad.com/theaccountingonion/2010/11/the-big-four-too-few-to-fail.html>.

¹¹ See, *Chamber of Commerce Offers Action Plan To Strengthen Auditing Profession*, available at <http://business.cch.com/securitieslaw/news/01-30-06c.asp>.

on them.¹² But the question remains, if two of these new behemoths (and the striking thing is that the institutions that were already huge were made larger as part of the financial rescue process) coordinate activity beyond what the Government tells them to do, what will our response be? And should we let the “too big” get even bigger? That would seem to be where things are going, given the advantages that the behemoths have over smaller banks in terms of cost of funds.¹³ After all, “too big to fail” is just a shorthand expression for “the government won’t let them fail.” They are the privileged children in the playground.

It is received wisdom, with which I would not argue here, that cartels work best when they are government protected.¹⁴ Are we now creating a new class of potential cartels, cartels that are bulletproof to antitrust because they were created by government action in a crisis, and serve government functions (no matter how misguided or inefficient we find that approach to be)? If so, what can we do to control them?

IV. THE EXAMPLE OF HEALTH CARE REFORM

A cornerstone of the health care reform law passed recently is the idea that doctors, clinics, and hospitals will join forces into ACOs and thereby become more efficient and hold down costs. They would be rewarded financially for doing so.¹⁵ The result is mergers of hospitals, clinics, and medical groups eager to do just what the government wants—increase cooperation, and more efficiently deliver health care to a broader population by reducing overlapping facilities, excess capacity, and all of the other things that you tend to find in a truly competitive market place. But those “bad” things are exactly what antitrust is designed to foster! Excess capacity normally drives down prices, and overlapping facilities spurs competition so that only the most efficient are supposed to survive.

People are afraid that the new “accountable care organizations” will end up stifling competition. What we need to acknowledge is that this may be exactly what the law and its sponsors intended—to replace competition as the guiding factor in the delivery of health care services. There is a lot of money at stake here. And we have two values that arguably are in conflict. Antitrust tells us that many competitors mean lower prices, and that cartels result in less competition and higher prices. But in health care, overcapacity and third party payment systems create a different dynamic. I want to have a specialist available on 24 hours notice, but that requires that there be more of that specialist type in my neighborhood/geographic market than will be needed most of the time. To satisfy patient demand may require some overcapacity. And before we antitrust types get too incensed over the idea of ACOs sucking the excess capacity out of the health care system, recall that one option in the debate was a “single payer” system, common outside of the United States, which ends up having government controlling the capacity

¹² See, e.g., *Trying to Rein In ‘Too Big to Fail’ Institutions*, available at <http://www.nytimes.com/2009/10/26/business/economy/26big.html>.

¹³ See, *Large Banks Still Have Financing Advantage*, available at <http://www.nytimes.com/2010/11/24/business/24views.html?src=busln&scp=1&sq=Too%20big%20to%20fail&st=cse>.

¹⁴ E.g., GEORGE STIGLER, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, quoted at <http://www.econlib.org/library/Enc1/Monopoly.html>.

¹⁵ This is not the place for an in depth discussion of the new health care law, but a fuller discussion of the law and its possible antitrust impact was published in the *New York Times* on November 20, 2011 and can be found in *Consumer Risks Feared as Health Law Spurs Mergers*, available at http://www.nytimes.com/2010/11/21/health/policy/21health.html?_r=1&ref=todayspaper

and cost of the health care system. Whatever its merits may be from a health policy standpoint, from an antitrust standpoint a single payer system is a monopoly begging to be broken up.

V. WHAT NEXT?

Perhaps by 2025 the economy will be robust and health care will be so well organized that we can simply break up the “too big to fail” financial institutions and be confident that there are enough ACOs operating to preserve competitive balance. Indeed, there are people who believe that even now any institution deemed “too big to fail” needs to be broken up into pieces that are small enough to fail without doing systemic damage.¹⁶ I confess that this argument, in a more basic form, has a certain appeal. The way to prevent the failure of one bank from taking down the system is to make sure that no bank is so big or so important that its failure *could* take down the system. But assuming that this nirvana has not yet arrived, here are some modest suggestions for our 2025 selves:

1. We need to recognize that antitrust is one value among many (an important one, time tested and validated, but not the only one). Tradeoffs have been and will be made. Doctrinal purity will lose to necessity every time.
2. If there is a felt need for stable organizations with the potential for conduct that will harm consumers, government should set up explicit regulatory structures to prevent or at least minimize such an outcome. Once you have ousted antitrust from its role as keeper of the flame of competition in an area, you can't ask her to somehow make your new structure behave. If there is a time for regulation; this would be it.
3. Those regulatory antitrust overrides need to be express and explicit, spelling out their dimensions as clearly as possible. If you are telling people to take radical steps that seemed legally risky under prior law, it is unfair and counterproductive to also ask them to put their financial or commercial lives at risk by doing what you asked them to do.
4. We should work to limit the areas where such competition overrides are necessary. Competition and antitrust have served us well for over 100 years. If we need to make exceptions, we shouldn't throw out more than we need to.

In the end, I remain with the true believers that antitrust broadly creates benefits to consumers in many areas. But even we must acknowledge that in a crisis, other values come to the forefront. We may have needed some bulletproof cartels in 2008 and 2009. But let's try to keep them narrow and well regulated, so that in 2025 we can look back and say that we did what we had to do, with the least amount of harm that we could cause.

¹⁶ See Kemp, *Too big to liquidate is too big to live* (September 3, 2010), available at <http://in.reuters.com/article/idINIndia-51267720100903>. For a more inflammatory stance, see, *We Must Break-up Too-Big-to-Fail Firms* (12/17/2009), available at <http://www.watchblog.com/democrats/archives/006827.html>.