Institutional Design and Federal Antitrust Enforcement Agencies: Renovation or Revolution?

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Institutional design, properly defined, both circumscribes and defines the practice of antitrust law in the United States. The structure of antitrust law and enforcement in the United States reflects so many disparate strands of political thought and expression that it seems almost impossible that it could function, much less cohere. But that very mixture of currents and cross-currents is quintessentially American—and keeps the importance of institutional design very much alive and significant in U.S. antitrust law. And although fundamental reinvention is unlikely, incremental changes are both possible and desirable, particularly those within the discretion of the enforcement agencies themselves. Below, we discuss what kinds of changes may be useful for the enforcement agencies to consider.

I. INTRODUCTION

Institutional design is a term that would seem completely irrelevant to most practitioners who make their living in antitrust law in the United States. For many, it is a topic confined to academic circles (at least in the United States), a craft applied to many countries whose borders or governmental structure did not exist when the Sherman Act (and, in many cases, the Clayton Act) emerged, and a possibility whose moment has passed in a country with a dysfunctional legislative branch and a conservative judiciary.[2]

But institutional design, properly defined, both circumscribes and defines the practice of antitrust law in the United States. The structure of antitrust law and enforcement in the United States reflects so many disparate strands of political thought and expression that it seems almost impossible that it could function, much less cohere. But that very mixture of currents and cross-currents is quintessentially American.

At the center of the antitrust enterprise in the United States are the Sherman Act and Clayton Act, which are wonderfully broad, terse statutes that confer substantial enforcement discretion on the executive branch. The existence of two federal enforcement agencies (the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC")) reflects the modern progressive belief in expert agencies (hence the existence of the FTC) and the desire to avoid making enforcement of the antitrust laws at the DOJ captive to the political party resident in the White House (which oversees the Department of Justice) or to the current bent of the federal judiciary.

Private attorneys general, as well as state attorneys general, ("AGs") also provide an additional safeguard against a lack of aggressive enforcement or scarce enforcement resources. The legislature cannot force executive branches or independent agencies to enforce their antitrust laws, but it can and does allow private parties and state AGs to pick up any slack during

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eras where the executive agencies may opt to be less active. And at the very top of the antitrust pyramid is the federal judiciary, which provides the same constraint on overreach—whether by private or governmental plaintiffs—that it is supposed to provide in other aspects of our daily lives.

More importantly, institutional design, appropriately imagined, is a continuing organic process that encompasses not only the structural parameters of U.S. antitrust law but also the internal machinery of U.S. enforcement agencies. Here, we depart from fundamental aspects of design, defined by Congress and bounded by the judiciary, to decisions within the discretion of the enforcement agencies. In some respects, and in some eras, the agencies have dramatically expanded their authority beyond what many believed were appropriate boundaries. In other instances, the agencies have acted to protect the integrity of their investigational and enforcement processes by reducing unnecessary burdens, refining and publicizing evolving standards for enforcement, and otherwise refusing to exercise the maximum extent of their substantive or procedural authority even when convenient to do otherwise. The staffs of the agencies exercise this sort of discretion every single day, applying far more sophisticated standards to their investigations and reducing unnecessary procedural burdens on parties even when a matter becomes adversarial.

MORE IMPORTANTLY, INSTITUTIONAL DESIGN, APPROPRIATELY IMAGINED, IS A CONTINUING ORGANIC PROCESS THAT ENCOMPASSES NOT ONLY THE STRUCTURAL PARAMETERS OF U.S. ANTITRUST LAW BUT ALSO THE INTERNAL MACHINERY OF U.S. ENFORCEMENT AGENCIES

In this light, institutional design is very much alive and important in U.S. antitrust law. And although fundamental reinvention is unlikely, incremental changes are both possible and desirable, particularly those within the discretion of the enforcement agencies themselves. Further progress can and should be made.

Below, I discuss what kinds of changes may be useful for the enforcement agencies to consider. First, I identify central objectives for antitrust enforcement agencies. Second, I examine whether and how the agencies have achieved these objectives in the merger review process, and what changes may allow them to enhance their performance in meeting the central objectives that we identify. Third, I compare agency performance in the civil non-merger context, and explain how the FTC could enhance its speed and impact by doing less and trusting the federal judiciary to do more. I also address why these changes would not render either of the agencies irrelevant, and why they do not require or justify fundamental reallocations of authority between the DOJ and FTC.

A final section discusses how and why the federal antitrust enforcement agencies should enjoy at least equal footing with sister federal agencies with respect to competition issues. Unfortunately, the Supreme Court has gone in precisely the opposite direction without any justification. Perhaps more frequent self-restraint at the antitrust agencies would lead the Supreme Court to restore balance between the antitrust agencies and other authorities with respect to authority over competition issues. In the interim, the

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enforcement agencies can and will continue to develop relationships which will protect and advance the values of competition in other parts of the federal government.

II. IMPORTANT OBJECTIVES FOR ANTITRUST ENFORCEMENT AGENCIES

A full discussion of the objectives of antitrust enforcement agencies (and antitrust law itself) is obviously beyond the scope of this article. But a quick discussion of important enforcement agency objectives is essential before evaluating agency performance, analyzing the impact of structure on performance, and recommending revisions in design.

The most important aspect of agency performance is accuracy. The agencies have a substantial independent incentive to select cases appropriately, particularly when resources are scarce. But the full array of non-pecuniary incentives for agencies and staffers can produce results that are just as biased as decision-making based solely on economic self-interest.

Judicial review (based on a balanced, adversarial process) is ultimately the most important guarantor that agencies will select their cases appropriately. All are aware that courts occasionally produce opinions that fall well short of the mark. But more often than not, this is the result of poor advocacy, not poor judgment. The question is not whether the agencies have more expertise than judges, or fewer economic incentives than their private adversaries. One could say the same with respect to multiple aspects of law enforcement and regulation. The question is whether the agencies can show that the outcome they seek —whether criminal, civil, or equitable—is supported by evidence reviewed by an independent federal judge with life tenure. Limitations on judicial review and authority marginally increase the likelihood of agency overreach.

THE MOST IMPORTANT ASPECT OF AGENCY PERFORMANCE IS ACCURACY

Another important dimension of agency performance is doctrinal flexibility. This not only enables agencies to limit their own case selection appropriately, but also to expand the range of tools to use in investigations and enforcement. There is very little in the way of institutional design that can directly enhance the ability of the agencies to encourage and use novel legal and economic thinking in their activities. But the adversarial nature of the litigation process, coupled with judicial review and supremacy, creates an important incentive for the agencies to find appropriate vehicles for challenging the doctrinal status quo. Again, more judicial review, not less judicial review, is likely to enhance the ability of the agencies to respond to new issues and thinking.

A third important dimension of agency performance is legitimacy, which also includes factors like transparency, consistency, and self-restraint. Even when agencies are arriving at more accurate or innovative outcomes, their decisions may lack appropriate legitimacy or impact if they are unclear, misunderstood, easily distinguishable, inapplicable to other

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THE U.S. MERGER REVIEW PROCESS IS A PRODUCT OF A FLAWED STRUCTURAL DESIGN AND REMARKABLE INSTITUTIONAL ADAPTATION

cases, or the result of coercive tactics or circumstances. The enforcement agencies have understood for years that their ability to have an impact on the business community can depend significantly on the perceived legitimacy of their decision-making. Unfortunately, traditional institutional design can have very little impact on legitimacy without subjecting multiple staff decisions to judicial review (even though many today are not even subject to review by agency management). The ability of the agencies to achieve these objectives depends largely on their willingness to implement controls that may serve their longer-term interests while compromising shorter-term objectives.

A fourth important dimension is efficiency—arriving at good decisions in a manner that avoids unnecessary delay and cost. Up to a point, efficiency and accuracy can coexist as objectives. But those who would complain about the cost of investigations and litigation should consider the alternative—*per se* rules against potentially ambiguous conduct, presumptions against mergers that may be benign, and a considerably slower growth in our understanding of how competition truly works. The real problems in the U.S. system arise when the agencies impose significant costs and delays without producing good or accurate results, or when they obtain results by imposing greater costs in an effort that avoids judicial review.

III. FEDERAL ANTITRUST ENFORCEMENT: MERGER REVIEW

The U.S. merger review process is a product of a flawed structural design and remarkable institutional adaptation. Merger review rests on four fundamental pillars:

1. Section 7 of the Clayton Act, passed in 1950, sets the substantive standard by permitting challenges to mergers and acquisitions that may substantially reduce competition. This facilitates challenges to deals even before they have actually resulted in anticompetitive effects.[3]

2. The Supreme Court decision in *United States vs. General Dynamics*[4] underscored the importance of analyzing the importance not only of evaluating what would be likely to happen in the future as a result of the deal, but also of comparing the deal's potential impact with what would have happened absent the acquisition. This focus on the but-for world substantially increases the complexity and richness of merger review.

3. The Hart-Scott-Rodino Act, which requires companies involved in deals that meet certain thresholds to obtain agency review and approval before closing. The agencies have substantial discretion to issue requests for additional information before letting certain potentially problematic deals close, which gives them extraordinary leverage in public-company deals.

4. Judicial review, as the agencies must pursue preliminary injunctive relief from an independent federal court if they have chosen to challenge mergers after a request for additional information.

The flaws in the design are obvious: (1) the existence of two enforcement agencies compel the agencies to allocate matters, industries, and/or enforcement responsibilities; (2) the ability to issue Second Requests without any meaningful judicial constraint confers extraordinary leverage on the enforcement agencies to delay or kill deals; and (3) preliminary injunction trials after a Second Request do not make sense if confined to market definition and market shares.

THE INCREASING SUBSTANTIVE SOPHISTICATION OF THE ENFORCEMENT AGENCIES IS ATTRIBUTABLE LARGELY TO THE LEGAL REQUIREMENT OF OBTAINING INJUNCTIVE RELIEF FROM INDEPENDENT FEDERAL COURTS

Fortunately, the enforcement agencies have, for the most part, adapted extraordinarily well to the pre-merger system. They have allocated industries in a manner that makes sense. They have devised a system for clearing transactions that cross categories over which each has principal enforcement responsibility. Their staffs have accumulated expertise in particular industries, demonstrated flexibility in negotiating Second Requests, and structured remedies that resolve competitive problems short of litigation or full-stop injunctions. Most significantly, the agencies have formulated and revised guidelines for horizontal mergers that reflect increasing sophistication well beyond what traditional antitrust law has required.[5]

The increasing substantive sophistication of the enforcement agencies is attributable largely to the legal requirement of obtaining injunctive relief from independent federal courts. While sometimes criticized for implausible market definitions,[6] the agencies have also offered greater quantitative sophistication (in the form of economic data and analysis) and more qualitative richness (with better and deeper interpretation of ordinary-course documents).[7] When chided for facile presumptions based on share and concentration, the agencies responded with richer variations of competitive effects analysis, based on unilateral theories of harm and more sophisticated models of coordinated interaction.[8] When rejected for burden-shifting on issues like entry and efficiencies,[9] the agencies responded with their own evidence on why entry or efficiencies would not be sufficient to deter or reverse anticompetitive effects.[10]

The best example of how judicial review has dramatically improved agency performance is in the hospital merger context. Only after the agencies lost seven consecutive hospital mergers in federal court did the FTC reconsider its approach to litigating them. Using important doctrinal innovations from leading health care and antitrust economists, agency staff retooled and began challenging transactions with a different approach to geographic market definition and competitive effects analysis. The most recent litigated hospital merger challenges against *Promedica,*[11] *OSF,*[12] *Phoebe Putney,*[13] and *St. Luke's*[14] reflect a substantially more modern and persuasive approach to challenging hospital mergers, each with a different flavor of enforcement. Not surprisingly, the agencies have prevailed in every one of these challenges. With greater sophistication has come impressive exercises of prosecutorial discretion, with the agencies closing investigations in a number

WITH GREATER SOPHISTICATION HAS COME IMPRESSIVE EXERCISES OF PROSECUTORIAL DISCRETION, WITH THE AGENCIES CLOSING INVESTIGATIONS IN A NUMBER OF RELATIVELY HIGH-PROFILE TRANSACTIONS AT THE SAME TIME THAT THEY WERE EXPANDING THEIR CREDIBILITY WITH VICTORIES ACROSS THE FULL SPECTRUM OF ENFORCEMENT THEORIES

of relatively high-profile transactions at the same time that they were expanding their credibility with victories across the full spectrum of enforcement theories.[15] Thus, although there remain a number of open, legitimate questions about specific aspects of the Commission's hospital merger enforcement program.

Other areas of merger enforcement could benefit from comparable litigation efforts. In the pharmaceutical, biotechnology, and life sciences space, the FTC staff has done an extraordinarily good job of articulating and applying evolving theories of potential anticompetitive effects. But there is no doubt that the crucible of litigation would provide additional public benefits in this context, either legitimizing or circumscribing some of the agency's more aggressive enforcement efforts. The FTC has not retreated or ducked these challenges, going to court in cases like *Thoratec/Heartware*[16] and *Lundbeck.*[17] But in *Thoratec*, the parties abandoned a transaction that would almost certainly be enjoined, and in *Lundbeck*, the district court and appellate court did not deal with antitrust issues with a steady or credible hand. The answer to poor or disappointing judicial decisions is to litigate more, not less, at least in appropriate cases. Unfortunately, the vast majority of pharmaceutical and medical device transactions raising any significant antitrust issues are resolved with surgical divestitures with little or no impact on the underlying transaction.

This phenomenon is not unique to life sciences deals—many transactions raise issues relating to only a small portion of the deal, imposing delay on parties, and uncertainty for all affected parties, including employees, suppliers, and customers. At the end of this protracted period of review, the parties often settle to avoid still further delay, regardless of the underlying merits.

The increasing frequency of quick consents in arguably marginal circumstances has led to much grousing in the private bar about the increasingly regulatory nature of federal antitrust enforcement (in contrast to a law enforcement model).[18] Although the agencies are making better and more informed decisions based on the documents, data, and information obtained from Second Requests, they can use their leverage to force consents and remedies without effective judicial review. Transparency of merger best efforts provisions, the amount of time required to get through the Second Request and litigation processes, and the insignificant portion of overlap in multiple public company deals confer so much leverage to the enforcement agencies that judicial review is sometimes not a meaningful alternative. When judicial review is no longer a meaningful alternative, the agency—particularly staff—acts without fear of constraint.

TTHE INCREASING FREQUENCY OF QUICK CONSENTS IN ARGUABLY MARGINAL CIRCUMSTANCES HAS LED TO MUCH GROUSING IN THE PRIVATE BAR ABOUT THE INCREASINGLY REGULATORY NATURE OF FEDERAL ANTITRUST ENFORCEMENT (IN CONTRAST TO A LAW ENFORCEMENT MODEL)

Thus, although courts have a positive impact as a constraint on agency overreach, the HSR process itself may confer too much leverage to ensure that judicial review and constraint is as meaningful as it could be. What could be done to make review more meaningful while retaining the benefits of broader discovery and more sophisticated analysis?

First, the agencies themselves could impose more limits on their initial investigations, requiring their

staffs to request documents from fewer custodians and less data. Although they have done this before,[19] they could agree to go still further. For example, in exchange for more limited production obligations, parties could agree not to use other information, data, and documents that are not provided to staff. After one month of HSR review parties could pull and refile, and could spend the second month collecting and producing documents and data for a quick look Second Request The staff would take an additional four to six weeks to review the material, then give the Commission and DOJ two weeks to decide whether to pursue injunctive relief. Parties agreeing to a track like this would proceed directly to district court, litigating preliminary relief on a very basic record with limited testimony. Both district and appellate court review of agency action would be more likely to occur in multiple cases.

Second, agencies and the courts could accelerate the timetable for merger litigation. During the initial investigation, and after their recommendations to pursue preliminary injunctive relief, the agencies could and should share their discovery with private parties. This would not only reduce the amount of time that parties must spend in discovery during preliminary injunction litigation, but would also increase the accuracy and legitimacy of agency decision-making. Unilateral, asymmetric discovery may have justifications during the bulk of an investigation, but once the agency staff have indicated a desire to pursue injunctive relief, they should be obliged to share discovery to the same extent they would be required to disclose their evidence in federal litigation. This avoids one of two extremes—that staff exaggerates the power of their evidence in engaging with the parties, or that parties systematically underestimate the weight and force of staff's evidence.

THIS WOULD NOT ONLY REDUCE THE AMOUNT OF TIME THAT PARTIES MUST SPEND IN DISCOVERY DURING PRELIMINARY INJUNCTION LITIGATION, BUT WOULD ALSO INCREASE THE ACCURACY AND LEGITIMACY OF AGENCY DECISION-MAKING

Third, the federal courts should be the final word on these issues, regardless of whether the DOJ or the FTC brings the case. The FTC should return to its traditional position that it does not have a lower standard for obtaining preliminary injunctive relief than the DOJ, even if it is correct that it may be entitled to receive injunctive relief under a lower standard. Here's why:

1. The Commission's aggressive pursuit of a lower standard creates a preposterous divergence in the treatment of mergers depending on whether parties, industries, or matters belong to the DOJ or FTC under their clearance agreement.[20] This undermines the legitimacy of FTC actions, particularly consent decrees obtained through inappropriate leverage gained from the unabashed exercise of maximum prosecutorial power.[21]

2. This lower standard is based on a fundamentally flawed premise that the FTC's expertise is greater or necessary for adjudicating merger cases. Many would argue that there is plenty of evidence to the contrary. Moreover, if the Commission's expertise cannot be duplicated by DOJ, why is DOJ reviewing any mergers?

3. The related positions that the FTC has begun to take in these cases—that it need not settle on

relevant market definitions, and that it need not offer substantial evidence of anticompetitive effect—are impossible to reconcile with either the extraordinary amount of discovery that the agency has already enjoyed in its investigation and the alleged expertise that would justify judicial deference to its allegedly superior adjudicative capabilities. Notably, this injunctive authority under 13(b) arose before the Hart-Scott-Rodino Act, which already essentially confers almost unlimited power on the agencies to enjoin a transaction while they investigate it.

SIMILARLY, THE CONTINUING USE OF MARKET SHARES AND RELATED PRESUMPTIONS IS NOT ONLY INCONSISTENT WITH HOW THE AGENCIES INTERNALLY EVALUATE MOST TRANSACTIONS, BUT ALSO GROSSLY INAPPROPRIATE IN LIGHT OF THE DISCOVERY THE AGENCY OBTAINS IN SECOND REQUESTS

Other actions and statements from the FTC are also flatly inconsistent with the broad and lengthy discovery that the agencies undertake during Second Request review. For example, some at the Commission continue to use a threshold for authorizing complaints that is far too low given the information at its disposal—whether there is "reason to believe" that the transaction or behavior may violate antitrust law. In the merger context, this is a proper standard for determining whether a Second Request is appropriate, not whether the pursuit of an injunction is appropriate. Similarly, the continuing use of market shares and related presumptions is not only inconsistent with how the agencies internally evaluate most transactions, but also grossly inappropriate in light of the discovery the agency obtains in Second Requests.

The desire to win is understandable for all of us. So too is the impulse for an agency to assert the full extent of powers when so many assert so confidently that their legal powers fall well short of their exercise. But even if we agree that an exercise of power is permitted, we need not agree that it is appropriate or prudent.

REFERENCES TO INCIPIENCY ARE IRRELEVANT IN THE HSR ERA: ALL HSR-RELATED MERGER REVIEW OCCURS BEFORE TRANSACTIONS RESULT IN ANTICOMPETITIVE EFFECTS

Bypassing federal judicial review, or limiting it to issues decided by the Supreme Court over 50 years ago,[22] does nothing more than validate the most extreme criticisms of the merger review process and the enforcement agencies. Further these actions cast a long, unfortunate shadow over an extraordinary effort by hundreds of people at both agencies to make a horribly designed structure relatively efficient, sophisticated, and even dynamic.[23]

Thus, the FTC should join the DOJ in seeking injunctive relief in federal court on an aggressive timetable consistent with the extraordinary amount of discovery that staffs obtain through the HSR process. Moreover, they should not try to circumvent judicial review any further or differently by suggesting they bear anything less than a burden of showing that the merger is more likely than not to reduce competition in a relevant market.

References to incipiency are irrelevant in the HSR era: all HSR-related merger review occurs before transactions result in anticompetitive effects. And the fact that the courts do not require the agencies to prove potential anticompetitive effects with certainty does not mean that mere possibilities should suffice.

The agencies should prove that anticompetitive effects are at least reasonably probable, which, under any reasonable interpretation of the Clayton Act in the HSR era, must mean more likely than not.

IV. CIVIL NONMERGER ENFORCEMENT

The structure of civil non-merger enforcement in the United States bears some superficial similarities to the merger enforcement structure. Two federal antitrust agencies share enforcement responsibilities and generally allocate oversight of particular industries (and in some cases, companies) to either agency depending on their traditional focus and staff expertise (which now parallels the division to which the agencies agreed for merger enforcement). Each enforces Section 1 and 2 of the Sherman Act, and theoretically is able to enforce the Robinson-Patman Act and Section 3 of the Clayton Act.

THIS HAS LED FEDERAL COURTS TO BE SKEPTICAL NOT ONLY OF PRIVATE ANTITRUST CHALLENGES, BUT OF ANTITRUST LAW ITSELF, WITH DRAMATIC ADVERSE CONSEQUENCES FOR THE DEVELOPMENT OF SOUND ANTITRUST LAW

There are, however, significant differences between the merger and civil non-merger enforcement regimes. First, private plaintiffs assume a far more important role in the number, nature, and importance of challenges under Section 1 of the Sherman Act. Absent leadership from the agencies, the development of Sherman Act jurisprudence can arise in contexts that may have little to do with preserving consumer welfare, and can be brought by private parties and attorneys whose expertise is often inferior to agency lawyers and whose incentives may lead to challenges in cases with no merit. This has led federal courts to be skeptical not only of private antitrust challenges, but of antitrust law itself, with dramatic adverse consequences for the development of sound antitrust law and the ability of the agencies to conduct their core mission vis-à-vis other federal and state governmental entities.

THIRD, THE STATUTORY STRUCTURE FOR FEDERAL AGENCY ENFORCEMENT PROVIDES A POTENTIALLY MORE EXPANSIVE ROLE FOR THE FTC TO DEVELOP CIVIL NON-MERGER ANTITRUST LAW

Second, in non-merger areas, the agencies often lack the leverage provided by the waiting period requirements of the HSR regime. Private parties are better positioned to resist overbroad information requests, and delay compliance with agency requests. This can significantly delay agency non-merger investigations and challenges, perhaps even rendering agency action moot. This also increases the importance of private plaintiffs in the solution of distinct antitrust issues, as they are often more willing than agencies to commence legal proceedings without full or even marginal visibility into the facts underlying their case.

Third, the statutory structure for federal agency enforcement provides a potentially more expansive role for the FTC to develop civil non-merger antitrust law. Historically, increasing congressional frustration with DOJ's incentive and ability to prosecute antitrust challenges under the Sherman Act, coupled with extraordinary optimism about the ability of an independent agency to become an effective prosecutor and adjudicator of antitrust issues, led to the creation of the FTC itself.[25] Armed with a variety of investigative powers and adjudicative responsibilities, the FTC can seek to go beyond the Sherman Act in challenging

particular species of business practices, notably under Section 5 of the FTC Act. It also enjoys substantial home court advantages in making sure that its view of the law becomes the law of the land.

Finally, judicial review is a far more meaningful option in the non-merger context, substantially increasing the legitimacy of federal enforcement actions in two important respects. First, when parties settle despite the ability to obtain judicial review of their behavior, the consent in non-merger contexts is more likely to reflect a realistic appraisal of underlying merits. That is especially true when the agencies do not seek monetary relief. Second, when the agencies prevail, they often obtain opinions that vindicate their views of the law, and are far less distinguishable than opinions in the merger context, which are generally more driven by facts and often *sui generis*.

MORE EFFECTIVE NON-MERGER ENFORCEMENT WOULD ENHANCE THE LEADERSHIP OF THE AGENCIES IN DEVELOPING ANTITRUST LAW

As with the federal merger review system, no legislation is required to improve federal antitrust enforcement in the civil non-merger context. The agencies have all the tools required to perform effectively, and private parties have sufficient access to judicial review to ensure adequate protection against any potential overreach by the agencies. The primary question that the agencies face is how to improve their selection of investigations, as well as their pace, which would conserve resources, enhance their ability to litigate a broader array of non-merger issues, and make relief more timely and meaningful in those cases where enforcement is appropriate.

More effective non-merger enforcement would enhance the leadership of the agencies in developing antitrust law. It could also limit the substantial collateral damage that private antitrust litigation causes to the agencies in their efforts not only to enforce the Sherman Act in courts, but also to advance the competition mission with other federal authorities and state governments.

AT THE END, THE CASE PRODUCED ONE OF THE GREAT MODERN OPINIONS IN ANTITRUST LAW

V. THE RECENT DOJ CIVIL NON-MERGER ENFORCEMENT RECORD

Below, we evaluate the performance of both the DOJ and the FTC over the past 15 years. The demonstrable success of DOJ in bringing a variety of enforcement actions under both Section 1 and 2 of the Sherman Act raises substantial questions about whether the FTC requires greater authority to achieve effective enforcement outcomes. Indeed, the FTC's record in several crucial areas of competition law and policy suggests, ironically, that exercising greater authority has substantially undermined the effectiveness of its efforts. Contrary to the view of some commentators, the FTC has acted consistently with its statutory mandate, and its failure to achieve timely, meaningful, or pervasive impact in cases involving standard-setting deception and Hatch-Waxman settlements should lead the agency to consider whether it should make its enforcement process leaner and more agile.

The DOJ has had a remarkable level of success across industries and issues over the past 15 years.

THE ABILITY OF THE DOJ TO PROSECUTE THESE INVESTIGATIONS AND CHALLENGES UNDER THE SHERMAN ACT SUGGEST THAT THERE ARE NO SUBSTANTIAL LEGAL IMPEDIMENTS TO BRINGING CHALLENGES BASED ON NOVEL LEGAL THEORIES OR NOVEL BUSINESS PRACTICES

No discussion of contemporary antitrust enforcement is complete without an examination of the DOJ's case against Microsoft. What began as an attempt to enforce a consent decree blossomed into a full-blown Section 2 case that involved almost every conceivable issue that can arise in a Sherman Act proceeding. At the end, the case produced one of the great modern opinions in antitrust law,[26] involving one of the most important companies in the world, in a case that any business would ignore only at their own peril. The commercial impact of the case and remedy was immense;[27] the legal impact of effective enforcement went well beyond the defendant itself. Arguably, the most extraordinary aspect of the case was its rapidity through every aspect of the antitrust enforcement system. The DOJ was able to achieve an important public benefit, principally in the form of validation from an en banc panel of the D.C. Circuit.

Microsoft is important. And the application of traditional antitrust principles to a relatively novel technological context made the case complicated. Nevertheless, the DOJ's achievement in Microsoft is one of many in the past 15 years. Other crucial enforcement efforts include the following:

- The DOJ's successful challenge to VISA and MasterCard rules prohibiting members from issuing cards with other credit card networks.[28]

- The DOJ's traditional challenge to Dentsply's exclusive agreements, vindicated in the Third Circuit.[29]

- The DOJ's innovative (although unsuccessful) efforts to challenge above-cost pricing by American Airlines that allegedly impaired the efforts of new entrants to compete.[30]
- The DOJ's challenge to swap agreements involving the Village Voice and independent weeklies, a traditional horizontal restraints case in the context of acquisitions.[31]

- The DOJ's successful, widespread investigation into no-poach agreements among Silicon Valley employers.[32]

- The DOJ's rapid, (thus far) successful, and politically unpopular challenge to Apple's agreements with book publishers.[33]

- The DOJ's innovative, swift, and effective challenges to agreements between Verizon and cable companies, which would have reduced the incentive of Verizon and cable companies to compete more vigorously against each other.[34]

- The DOJs ongoing challenges to vertical agreements between merchants and payment systems allegedly reducing horizontal interbrand competition.[35]

Very few of these challenges involve conventional antitrust theories—arguably only the *Dentsply, Village Voice*, and *Apple* cases fit traditional antitrust molds. And in those cases, the DOJ moved rapidly and effectively to obtain timely relief. In Apple, the DOJ confronted and overcome substantial cross-currents. Other cases involved novel enforcement theories or the application of more traditional antitrust standards to very complicated facts. The ability of the DOJ to prosecute these investigations and challenges under the Sherman Act suggest that there are no substantial legal impediments to bringing challenges based on novel legal theories or novel business practices.

VI. THE FTC RECORD

Despite considerably more tools at its disposal, the FTC's civil non-merger enforcement record over the past 15 years is comparatively lackluster. To be sure, there have been important, successful enforcement efforts in a number of areas—real estate, state action immunity, and petitioning immunity. But despite the efforts of many dedicated employees, the FTC has faced substantial difficulty in shaking its historical reputation as a disappointment in its non-merger enforcement efforts.

First, the FTC still sometimes pursues marginal cases involving small or low-profile defendants or matters where enforcement will have little or no impact on courts or the business community.[36] Even when the defendants are higher-profile, the commercial impact and legal significance of the action can be painfully small. In the *Three Tenors*,[37] the FTC successfully applied the Quick Look to a restriction on competitive sales of an older recording in connection with the joint production and sale of a new recording. The D.C. Circuit usefully affirmed, and added yet another decision scaling back the free-rider defense in horizontal restraint cases.[38] But how much did the Commission spend in time and resources reminding the antitrust bar and business community that this sort of restriction was not permissible, and what else might the Commission have done with the resources?

Second, even the victories in *North Texas Physicians*,[39] *RealComp*,[40] and *North Carolina Dental*[41] took so long, and involved facts so convoluted, that they have had limited impact on areas of law or the economy in which they could and should have had greater impact. (Because the Supreme Court will review the *North Carolina Dental* decision, its impact could become more significant.) Moreover, it is very difficult to see how Part III adjudication is necessary in these cases. District and federal appellate courts can easily apply the Quick Look—indeed, federal courts did so in the release estate sector in 1980—in a case brought by the DOJ.[42] If anything, the Quick Look should be easier for district courts to apply than the rule of reason. The substantial expenditure of limited resources on Part III matters does not make much sense to outsiders in these contexts. And when one contrasts these cases with the DOJ challenges in the payment system cases, or the Verizon-cable-company agreements, the small legal and commercial impact of these expensive FTC enforcement actions becomes even more evident.

THIRD, EVEN WHEN THE STAKES HAVE BEEN MORE SIGNIFICANT, AND THE CONTEXT MORE APPROPRIATE FOR PART III AND SECTION 5, THE FTC'S ENFORCEMENT EFFORTS WERE NOT SUFFICIENTLY QUICK OR WELL-DEVELOPED TO BE EFFECTIVE

Third, even when the stakes have been more significant, and the context more appropriate for Part III and Section 5, the FTC's enforcement efforts were not sufficiently quick or well-developed to be effective. In *Rambus,*[43] the FTC took nine years to investigate and challenge standard-setting practices of a single defendant before a single standard-setting body from 1991 to 1996. Multiple parties were already challenging the validity and enforceability of Rambus patents. Nevertheless, the FTC continued to press the enforcement action through protracted administrative litigation, which predictably ended in long opinions resulting in the Commission's finding of liability after significant periods of time. The D.C. Circuit understandably rejected the Commission's findings, holding that the Commission, like any other plaintiff, should demonstrate that the allegedly illegal conduct actually resulted in anticompetitive effects, a position all the more legitimate in light of the years of investigation and litigation that had preceded appellate argument.[44]

UNFORTUNATELY, THE QUALITY OF THE DECISION DID NOT JUSTIFY THE TIME AND RESOURCES REQUIRED TO PRODUCE IT

Fourth, even when the FTC has obtained favorable settlements, it has lost substantial public benefits resulting from litigation. In two challenges involving Intel,[45] the FTC took aggressive positions on bundled pricing, unilateral refusals to deal, and allegedly unlawful product design. Although the defendants was obviously a high-profile target, the inability or willingness of the FTC to achieve its objectives through the judicial process undermined the impact and perceived legitimacy of these enforcement actions. Few antitrust lawyers are parsing the consent decrees in these cases for meaningful guideposts when advising leading companies. DOJ, by contrast, used enforcement actions against Microsoft and Apple to reaffirm important principles of antitrust law in novel factual contexts, articulating legal principles clearly, concisely, rapidly, and, in the view of the courts thus far, correctly.

Fifth, in an area where the FTC has invested the greatest amount of resources, it has won a battle but ultimately lost a war. In 1998, the FTC began investigating Hatch-Waxman settlement agreements. For a variety of reasons, the FTC moved slowly, eventually entering consent decrees in both cases.[46]

After settling the first two sets of agreements that it investigated, the FTC subsequently challenged a set of agreements between Schering-Plough and generic companies involving K-Dur.[47] Though the FTC did not apply the label of *per se* illegality to the arrangement, the opinion appeared to outsiders to take precisely that position. Taking advantage of their ability to choose their appellate court, the defendants selected the Eleventh Circuit, which had already ruled in an earlier appeal in private litigation that settlements within the scope of the patents at issue were presumptively lawful. Not surprisingly, the Eleventh Circuit showed no deference to the FTC's view of facts or law, and reversed.[48] The FTC watched as the Second and Federal Circuits reached similar results.[49]

In 2008, the FTC renewed its enforcement efforts in a challenge to Cephalon's settlements with four generic companies involving Provigil, going directly to district court.[50] Separately, the FTC challenged agreements between Solvay with generic companies involving Andro-Gel in district court. These were

transparent attempts to create circuit splits to expedite Supreme Court review of the issue.

Eventually, the strategy bore fruit. The Supreme Court took the *Andro-Gel* case and reversed.[51] Unfortunately, the quality of the decision did not justify the time and resources required to produce it. The Supreme Court rejected the extreme position that any patent settlement within the nominal exclusionary scope of the patents-in-suit would be lawful. But it did not articulate any meaningful guidance on how lower courts should evaluate the impact of a settlement.[52] Thus, 16 years after the FTC began its enforcement efforts, we finally have a Supreme Court decision, but it is not useful for other cases, resulted from FTC action in district court (not Part III), and is not based on Section 5. It is hard to imagine that the DOJ could have done less simply using Sherman Act authority in district court. Indeed, more than a year after the Supreme Court decision, the FTC continues to litigate *Cephalon* in district court, now pressing for restitution while private plaintiffs press for treble damages.

THE FTC SHOULD ALSO CONTINUE ITS EFFORTS TO GUIDE THE DEVELOPMENT OF NON-MERGER LAW IN ITS AMICUS EFFORTS

Although the FTC felt vindicated by the *Actavis* decision, it should step back and seriously consider whether its textbook approach to investigation and prosecution served the public interest. This is not to second-guess the actual decisions the FTC actually made. Each step—settling the initial cases, collecting information and issuing reports, litigating in Part III, and pursuing challenges in federal court to avoid appellate forum-shopping and create circuit splits—made perfect legal sense and was a sound public policy decision. Cumulatively, however, the amount of time and resources required to obtain such a largely ambiguous opinion with little guidance for future cases seriously raises questions about whether the FTC should continue to press ahead with the protracted Part III litigation process.

Speculation about the feasibility or speed of an alternative course is unnecessary. Right when the FTC began its investigations, it was commencing a challenge in federal court to exclusive agreements that Mylan reached with active pharmaceutical ingredient suppliers, which enabled Mylan to corner three separate generic pharmaceutical markets and raise the prices of all three substantially. The FTC investigated the case rapidly, and went straight to district court to obtain rapid injunctive and other equitable relief.

PERHAPS THE MOST SUBSTANTIAL BASIS FOR CRITICIZING FEDERAL ANTITRUST AGENCY PERFORMANCE OUTSIDE THE MERGER CONTEXT IS THE RELATIVELY MODEST IMPACT THAT THE FTC AND DOJ HAVE HAD ON SISTER AGENCIES THROUGHOUT THE FEDERAL GOVERNMENT

There is no reason that the FTC could not pursue precisely the same kind of challenges in other cases going forward. Moreover, given the flexibility that courts have shown in DOJ's challenges under the Sherman Act, there is no obvious reason why the FTC must or should use authority under Section 5 as an independent source of doctrinal authority.

The FTC should also continue its efforts to guide the development of non-merger law in its amicus

efforts. In fact, one of the most effective enforcement victories over the past 15 years resulted from amicus efforts in private litigation,[54] followed by advocacy before the Federal Drug Administration ("FDA")[55] and in favor of legislative reform. In the Orange Book listing cases, the FTC identified potential weaknesses in the FDA patent notification system, which undermined the integrity of that process in several notable instances while also permitting branded firms to exclude competition that might otherwise have occurred. Broader amicus efforts, along with more effective collaboration with sister agencies, may enable the Commission to cover more substantive ground more credibly across the industries for which it bears primary enforcement responsibility.

VII. THE RELATIONSHIP OF THE AGENCIES TO OTHER FEDERAL AUTHORITIES

Perhaps the most substantial basis for criticizing federal antitrust agency performance outside the merger context is the relatively modest impact that the FTC and DOJ have had on sister agencies throughout the federal government. The role of other federal government entities as regulators and even as market participants can have a significant impact on the competitive structure and performance of industries and participants. Although the federal agencies have traditionally attempted to assert the importance, even hegemony, of competition as a public policy value, the recent role of the agencies has been low-profile at best.

This does not reflect the absence of opportunities from a competition policy perspective. In its capacity as the most important domestic customer of pharmaceuticals, health care services, rare earth minerals, and numerous high-technology defense industry products, the federal government would benefit from continuing counsel from antitrust enforcers on how to ensure that their upstream suppliers continue to be cost-competitive, innovative, and prevent bid-rigging among other ills.

THUS, IMMUNITY COULD APPLY EVEN WHEN THERE IS NO ACTUAL OR DIRECT CONFLICT BETWEEN ANTITRUST AND OTHER REGULATORY LAW

And in their capacity as industry regulators, numerous federal agencies would benefit from continuing collaboration with federal antitrust regulators to ensure that their regulatory activities do not unnecessarily reduce competition. That is especially true for agencies like the FDA and Department of Defense ("DOD"). But it is also true for governmental actors like the Federal Reserve, Securities and Exchange Commission ("SEC"), Federal Deposit Insurance Corp. ("FDIC"), and Treasury. The return of the DOJ to greater activism in the financial sector is welcome but long overdue.

One reason for the reticence of federal antitrust agencies in acting more directly in regulated sectors may be the Supreme Court's decision in *Credit Suisse Sec. (USA) L.L.C. v. Billing.*[57] There, the Supreme Court arguably articulated a more expansive doctrine of implied antitrust immunity at the intersection of securities law and antitrust law. Justice Breyer identified four factors that were crucial in determining whether implied antitrust immunity would apply to conduct:

1. the existence of regulatory authority to supervise the conduct at issue;

2. "evidence that the regulatory entities exercise that authority . . .";

3. "a resulting risk" that if antitrust and other laws, "if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct . . .;" and

4. whether the conflict affects "practices that lie squarely within an area" of activity that the other body of law seeks to regulate.

Thus, immunity could apply even when there is no actual or direct conflict between antitrust and other regulatory law. Indeed, in *Billings* itself, the challenged behavior also seemed to violate the securities laws.

This displacement of antitrust law and principles in circumstances where compliance with antitrust law would not undermine the spirit or letter of other federal regulation or law may have consequences that regulators at other agencies themselves may not welcome. Perhaps it is attributable to the skepticism that the Supreme Court has about private antitrust enforcement.[58]

Even in the shadow of *Billing*, the federal agencies may nevertheless continue to play an important role in preserving and expanding principles of competition in sectors regulated or dominated by the federal government as regulator or commercial actor. Outside of the intellectual property context, where the Supreme Court shares the knee-jerk hostility of antitrust agencies to the U.S. Patent and Trademark Office ("PTO") and even Federal Circuit, the DOJ and FTC will have to continue an approach based on deep knowledge, mutual respect, and more frequent, material collaboration with sister agencies in activities within and outside the enforcement agencies.

AND ALTHOUGH THE RELATIVE SPECIALIZATION OF EACH AGENCY'S STAFFS IS ARGUABLY THE RESULT OF HISTORICAL ACCIDENT, NOT INSTITUTIONAL DESIGN, IT IS PRECISELY THE KIND OF INCREMENTAL ADAPTATION THAT HAS MADE THE U.S. ANTITRUST AGENCIES SO EFFECTIVE

Fortunately, each of the agencies has experienced staff familiar with the regulatory and commercial terrain of the industries also regulated by sister agencies. In fact, it is this experience and familiarity that are the strongest guarantee that each of the agencies would continue to enjoy and merit an independent existence as a federal antitrust enforcement agency. And although the relative specialization of each agency's staffs is arguably the result of historical accident, not institutional design, it is precisely the kind of incremental adaptation that has made the U.S. antitrust agencies so effective. ▲

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[2] For others, institutional design has been a hot topic for some time, and certainly not confined to academic circles. For leading discussions of institutional design in the U.S. context, see Daniel A. Crane, The Institutional Structure of Antitrust Enforcement (2011); William E. Kovacic & David A.

Hyman, *Competition Agency Design: What's on the Menu?,* GW Faculty Publications & Other Works (Paper 628) (2012); William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance,* 110 Mich. L. Rev. 1019 (2012); D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 Geo. Mason L. Rev. 1055 (2010); Harry First, Eleanor M. Fox, & Daniel Hemli, *Procedural and Institutional Norms in Antitrust Enforcement: the U.S. System* in The Design of Competition Law Institutions: Global Norms, Local Choices (Eleanor M. Fox & Michael J. Trebilcock, eds., 2012). And though not discussed in terms of "institutional design," the ongoing debate over the relative expertise and roles of agencies and federal courts is an essential part of the dialog over agency structure and performance. *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 Fordham Intl. L.J. 788 (2013); Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, J. Antitrust Enforcement 1-22 (2012).

[3] See Deborah L. Feinstein, Director of FTC Bureau of Competition, *The Forward-Looking Nature of Merger Analysis*, pp. 2-3, *available at* http://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf (2014).

[4] 415 U.S. 486 (1974).

[5] *See* Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html (Aug. 19, 2010); Carl Shapiro, T*he 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, available at* http://www.justice.gov/atr/public/articles/263528.htm.

[6] United States v. Sungard Data Sys., 172 F. Supp. 2d 172 (D.D.C. 2001); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[7] FTC v. Staples. Inc., 970 F. Supp. 1066 (D.D.C. 1997); FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000); United States v. H&R Block, 833 F. Supp. 2d 36 (D.D.C. 2011).

[8] FTC v. CCC Holdings, 605 F. Supp. 2d 26 (D.D.C. 2009); FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008); United States v. Bazaarvoice, Inc., Case No. 13-cv-00133-WHO (N.D. Cal. Jan. 8, 2014), memo. op. at http://www.justice.gov/atr/cases/f302900/302948.pdf.

[9] United States v. Baker Hughes, Inc., 908 F. 2d 981 (D.C. Cir. 1990).

[10] FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); FTC v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998).

[11] Promedica Health System, Inc. v. FTC, Appeal No. 12-3583 (6th Cir. Apr. 22, 2014), *available at* http://www.ca6.uscourts.gov/opinions.pdf/14a0083p-06.pdf (affirming Commission on unilateral effects theory).

[12] FTC v. OSF Healthcare Sys., Inc., 852 F. Supp. 2d 1069 (N.D. Ill. 2012) (granting preliminary injunction based on coordinated effects theory).

[13] FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013) (holding that state action doctrine did not immunize hospital merger-to-monopoly from FTC challenge).

[14] Findings of Fact and Conclusions of Law, FTC v. St. Luke's Health System, Ltd., No. 13-cv-00116 (D. Idaho, Jan. 24, 2014), consolidated with lead case St. Alphonsus Medical Center-Nampa et al. v. St. Luke's Health System Ltd., No. 1:12-cv-00560 (D. Idaho, Jan. 24, 2014) *available at* http://www.ftc.gov/system/files/documents/cases/140124stlukesfindings.pdf

[15] Deborah L. Feinstein, FTC Bureau of Competition Director, *Antitrust Enforcement in Health Care:*

Proscription, Not Prescription, 14 (June 19, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf.

[16] *See* Administrative Complaint, In the Matter of Thoratec Corp., FTC Dkt. 9399 (2009) http://www.ftc.gov/sites/default/files/documents/cases/2009/07/090730thorateadminccmpt.pdf.

[17] FTC v. Lundbeck, Inc., 650 F.3d 1236 (8th Cir. 2011) (affirming rejection of FTC and State of Minnesota challenge to acquisition of two drugs allegedly permitting owner to raise prices substantially).

[18] Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Legislation*, 65 Antitrust L.J. 865 (1997); A. Douglas Melamed, *Antitrust: The New Regulation*, 10 Antitrust 13 (1995); E. Thomas Sullivan, T*he Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 Washington U. L.Q. 997 (1986).

[19] *See*, e.g., DOJ's Merger Review Process Initiative, *available at* http://www.justice.gov/atr/public/9300.htm; *see also* a similar initiative form the FTC, *available at* http://www.ftc.gov/sites/default/files/attachments/merger-review/mergerreviewprocess.pdf.

[20] *See* Nathan Chubb, *Agency Draw: How Serious Questions in Merger Review Could Lead to Enhanced Merger Enforcement*, 18 George Mason L. Rev. 533 (2011).

[21] *See* Joe Sims & Michael McFalls, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems?*, 69 Geo. Wash. L. Rev. 932 (2001). *But see also* Lawrence M. Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Consent Decrees*, 75 Antitrust L.J. 549 (2008); Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 Fordham L. Rev. 2647 (2013).

[22] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

[23] There are legitimate questions that others have asked from the opposite end of the spectrum, including fundamentally, whether there is structural bias towards under-enforcement. *See* Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck against Enforcement*, Utah L. Rev. 1 (2008). One solution is to defer substantially more to agency judgments about the appropriateness of injunctive relief in merger cases, akin to the deference allegedly shown to regulators in administrative rulemakings. But the structure of merger enforcement and civil non-merger enforcement itself demonstrates a congressional interest in compelling the agency to carry its burden of proving that criminal, injunctive, or other civil relief is appropriate. Moreover, one of the underlying assumptions of the argument—that the agencies have superior access to information—actually weights heavily in favor of allocating the burdens of proof and production on the agencies, not on private parties with limited discovery power. The argument for deference to the agencies is far stronger with respect to merger remedies, where the agencies have substantially more expertise and liability has either been proven or conceded.

[24] Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

[25] *See generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1 (2003).

[26] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[27] Others have disagreed about the impact of the case, particularly the remedy. *See especially* Carl Shapiro, *Microsoft: A Remedial Failure*, 75 Antitrust L.J. 739 (2009). I am confident that the remedy was incomplete and imperfect, but even more confident that the public interest in the enforcement effort itself was immense.

[28] United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d. Cir. 2003).

[29] United States v. Dentsply Int'l, 399 F.3d 181 (3d Cir. 2005).

[30] United States v. AMR Corp., 335 F.3d 1009 (10th Cir. 2003).

[31] *See* http://www.justice.gov/atr/cases/f200600/200673.htm.

[32] *See*, e.g., Complaint in United States v. eBay, Inc., CV12 58690 (N.D. Cal. November 16, 2012), *available at* http://www.justice.gov/atr/cases/f288900/288918.pdf.

[33] United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *available at* http://www.justice.gov/atr/cases/f299200/299275.pdf.

[34] Final Judgment, United States and State of New York v. Verizon Communications, Inc. et al, Case 1:12-cv-01354 (RMC) (D.D.C. Aug. 13, 2013), *available at* http://www.justice.gov/atr/cases/f300000/300002.pdf.

[35] Complaint, United States v. American Express Co. at al (E.D.N.Y. Oct. 4, 2010), *available at* http://www.justice.gov/atr/cases/f262800/262864.htm.

[36] Fortunately, there are fewer examples today than 15 years ago, but there also continue to be matters that predictably lead to widespread puzzlement and scorn. *See, e.g.*, Kimberly Strassel, *Piano Sonata in FTC Minor*, *available at* http://online.wsj.com/news/articles/SB10001424052702303562904579224251626379422 (Nov. 28, 2013).

[37] PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

[38] *See also* Toys 'R' Us v. FTC, 221 F.3d 928 (7th Cir. 2000); Chicago Professional Sports Ltd Partnership v. NBA, 961 F.2d 667 (7th Cir. 1991).

[39] North Texas Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008).

[40] RealComp II Ltd. V. FTC, 635 F.3d 815 (6th Cir. 2011).

[41] North Carolina State Board of Dental Examiners v. FTC, 717 F.3d 359 (4th Cir. 2013), cert. granted, No. 13-534 (U.S. March 3, 2014).

[42] United States v. Realty Multi-List, 629 F. 2d 1351 (11th Cir. 1980).

[43] Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

[44] *Id.* at 467. Indeed, the D.C. Circuit noted that the FTC had not shown that the adoption of the same standard was not the likelier of two potential outcomes, *i.e.*, that the deception had more likely than not reduced competition. *Id.*

[45] In the Matter of Intel Corp., FTC Dkt. No. 9288, *available at* http://www.ftc.gov/enforcement/cases-proceedings/intel-corporation-matter; In the Matter of Intel Corp., FTC Dkt. No. 9341 (2010), *available at* http://www.ftc.gov/enforcement/cases-proceedings/061-0247/intel-corporation-matter.

[46] In the Matter of Hoechst Marion Roussel, Inc., et al, FTC Dkt. 9293 (2001), *available at* http://www.ftc.gov/enforcement/cases-proceedings/9810368/hoechst-marion-roussel-inc-carderm-capital-lp-andrx; In the Matter of Abbott Labs., et al, FTC Dkt. C-3945 (2000), *available at* http://www.ftc.gov/enforcement/cases-proceedings/9810395/abbott-laboratories-matter.

[47] In the Matter of Schering-Plough Corp., et al, FTC Dkt. 9297 (2003), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2003/12/031218commissionopinion.pdf.

[48] Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005).

[49] In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187 (2d Cir. 2006); In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed. Cir. 2008); *see also* In re: Ciprofloxacin Hydrochloride Antitrust Litig., 604 F.3d 98 (2d Cir. 2010). Judge Posner, sitting as a district judge, went still further in *Asahi Glass Co. v. Pentech Pharmaceuticals Inc.*, 289 F. Supp. 986 (N.D. Ill. 2003), essentially requiring plaintiffs to

show that the settlement (and underlying litigation) was essentially a sham.

[50] *See* Complaint in FTC v. Cephalon, Inc., initially filed in D.D.C. on February 13, 2008, *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/02/080213complaint.pdf. Eventually, the case was consolidated with private litigation involving essentially the same facts.

[51] FTC v. Actavis Inc., 570 U.S. ___ (June 17, 2013).

[52] Indeed, the antitrust bar read in *Actavis* that settlements could sometimes harm competition, that large payments from branded pharmaceutical companies to generic companies could skew incentives based solely on merits in the underlying patent litigation, that patent holders can have the ability to reach anticompetitive agreements, and that efficiencies may sometimes justify litigation settlement. All of these were pretty self-evident propositions to many in the patent and antitrust bar when these settlements first emerged. What the antitrust bar needed (or at least desired) was a clearer standard for counseling, or at least a workable standard for litigating. Unfortunately, the Court's opinion provides neither.

[53] See Amended Complaint, FTC v. Mylan Labs. Inc., et al, 1:98CV03114 (D.D.C. Feb. 8, 1999), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1999/02/mylanamencmp.htm.

[54] *See* Memorandum of Law of Federal Trade Commission as Amicus Curiae in SmithKline Beecham v. Apotex Corporation, Case No. 99-CV-4304, 00-CV-4888; 01-CV-159; 01-CV-2169 (E.D. Pa. 2003), *available at* http://www.ftc.gov/sites/default/files/documents/amicus_briefs/smithkline-beecham-corp.v.apotex-corp./smithklineamicus.pdf; Memorandum of Law of Amicus Curiae The Federal Trade Commission in Opposition to Defendant's Motion to Dismiss In re Busiprone Patent Litigation/In re Busiprone Antitrust Litigation (S.D.N.Y. 2002), *available at* http://www.ftc.gov/sites/default/files/documents/amicus_briefs/re-buspirone-antitrust-litigation/buspirone.pdf.

[55] See Statement of FTC Chairman Timothy Muris on FDA Proposals, *available at* http://www.ftc.gov/news-events/press-releases/2002/10/statement-federal-trade-commission-chairman-timothy-muris-fdas (Oct. 21, 2002).

[56] Prepared Testimony of Federal Trade Commission on Greater Access to Affordable Pharmaceuticals Act (Aug. 1, 2003), *available at* http://www.ftc.gov/public-statements/2003/08/prepared-statement-federal-trade-commission-greater-access-affordable.

[57] 551 U.S. 264 (2007).

[58] For an extremely persuasive critique of *Billing*, *see* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 Mich. L. Rev. 683 (2011).