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A Tale of Two Antitrust Agencies

David Balto (Law Offices of David A. Balto) · Sunday, November 17th, 2013

Charles Dickens' famous novel *A Tale of Two Cities* begins with "It was the best of times, it was the worst of times." Dickens' brilliant prose could have been describing our twin antitrust enforcement agencies.

This Friday the House Judiciary Committee held a hearing to evaluate antitrust enforcement. After a period of inactivity, the Department of Justice (DOJ) has found its footing successfully litigating in court and providing real consumer benefits that affect Americans' pocket books. The Federal Trade Commission (FTC), on the other hand, has failed to show the same progress and is falling behind in its mission.

Our story begins under the previous administration where there was an unprecedented timidity to litigate. The DOJ did not bring any monopolization cases during the full eight years of the Bush presidency and went five years without litigating a single merger case - one of the longest litigation droughts in history.

The failure to litigate harmed consumers as markets became more concentrated and monopolies charged supra-competitive prices. Look at health insurance where a flood of mergers led to a rise in premiums by 87 percent in the last six years of Bush's presidency. Failing to be a tough antitrust cop causes future harms as the nation's antitrust laws cease to be a deter anticompetitive conduct.

President Obama made good on his promise to strengthen antitrust enforcement. The number of criminal cases has more than doubled. In 2012, the antitrust division's criminal program obtained the highest amount of fines ever in a single year at \$1.14 billion. This is also the second time during the Obama administration the criminal fines have exceeded \$1 billion. The DOJ also succeeded in securing longer prison sentences for those who violated the antitrust criminal statutes.

Perhaps the best example of why antitrust enforcement matters is the DOJ case against a conspiracy by Apple and major publishers to raise the price of ebooks. While the past administration never had the gumption to go to court to challenge illegal conduct by dominant firms, the Obama enforcers were willing to battle the best lawyers in court. After a long trial, the DOJ won on all counts. Not only did their case force down the price of ebooks by over 40 percent, but it also shows there is a strong cop willing to go to court to protect consumer pocketbooks no matter how strong the adversary.

In merger enforcement the DOJ has also demonstrated the willingness to fight in court to protect consumers even against the largest mergers. In the past two years it went to court to challenge mergers between USAirways & American Airlines, Anheuser Busch & Modelo and AT&T & T-Mobile. Again, the willingness and ability to litigate strengthened antitrust enforcement and brought real benefits to consumers.

Although the FTC has had some success, the FTC's competition enforcement has been far less effective at providing real consumer benefits.

The FTC did prevail in two Supreme Court cases last year involving rural hospital mergers and pharmaceutical patent settlements. These established important precedents but the FTC jurisdiction is far broader than these two areas. While the FTC spends almost as much on its efforts on competition enforcement as DOJ, its results are far less impressive. Merger enforcement stands out. While DOJ has been aggressive in the past year, the FTC cleared the Express Scripts/Medco (Pharmacy Benefit Manager), BP/Tesoro (refinery), Universal/EMI (recorded music), and Office Depot/Office Max mergers - even though similar mergers were challenged in the Clinton administration. There is already evidence the Express Scripts/Medco merger has led to higher prices and less patient choice.

Rather than litigating, the FTC often relies on remedies but these often fail to fully protect consumers. Take the Hertz/Dollar Thrifty merger: Even though this was every bit as problematic as the USAirways/American Airlines merger, the FTC allowed the merger to proceed on the condition that Hertz sell the Advantage brand. This was far less than a half a loaf solution. Advantage has now filed for bankruptcy less than six months after the FTC negotiated this deal and prices have risen as a result.

Or look at anticompetitive conduct. In spite of numerous investigations the FTC has no case that even begins to resemble the pocketbook benefits of the Apple case.

The FTC is blessed with dedicated and talented enforcers. Congress established the FTC in part because they wanted a stronger antitrust cop than the Justice Department. Today the reverse is true. The FTC needs to reinvigorate its antitrust enforcement agenda to make a real difference to consumers.

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