AntitrustConnect Blog

The Roberts Court, Enforcement Agencies and "The Limits of Antitrust"

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Finding a unifying theory to explain (almost) all the decisions of the Supreme Court in a substantive area can be a difficult task. Alden Abbott and Thom Lambert's new article accomplishes it for the antitrust decisions of the Roberts Court.[1] They contend that these opinions can be seen as the Court implementing Professor (now Judge) Easterbrook's seminal 1984 article *The Limits of Antitrust*.[2] By comparison, the authors believe that the enforcement agencies in the same time period have shown less deference to any such limits. While that conflict might portend future difficulties for the agencies in front of the Court, the one acknowledged exception to the theory was a big win for the FTC.

The authors summarize the Easterbrook article as an admonition to antitrust courts and enforcers to forego a search for perfect rules and try to optimize both error and decision costs. Courts should strive to reduce both false negatives – a mistaken acquittal of anticompetitive behavior or a "Type II error" – and false positives – a mistaken conviction of procompetitive behavior or a "Type I error." Attempting to reduce those error costs, however, might require even more discovery, expert testimony and complicated models and so drive up the costs of decisions by adjudicators (and compliance by potential defendants). As a result, Easterbrook suggested that antitrust rules optimize the size and frequency of any errors with the difficulty in administering them.

The authors claim that all but one of the antitrust opinions rendered by the Court since Chief Justice Roberts joined in 2005 can be explained by the Court following Easterbrook's advice. For some of the opinions, the evidence is explicit. For instance, the Court in 2007's *Weyerhaeuser*[3] applied a version of *Brooke Group*'s[4] predatory pricing test to avoid the Type I error of chilling aggressive input bidding by a monopolist, which could be done for "myriad legitimate reasons—ranging from benign to affirmatively procompetitive." That test also reduced decision costs as compared to the open-ended test proposed by the lower court as courts did not need to determine if the monopsonist "purchased more [inputs] than necessary, in order to prevent [input market rivals] from obtaining the [inputs] they needed at a fair price."

In *Independent Ink*[5] and *Leegin*[6], the Court accepted higher decision costs for, according to the authors, much lower error costs. Certainly, the presumption in place before Independent Ink – a patent owner has market power – is easier to administer than requiring a court to determine market power; however, that presumption also went most of the way to meeting the test for illegal tying and so arguably prevented pro-competitive conduct by patent holders. Similarly, the per se prohibition against resale pricing agreements was easier to administer than the rule of reason in

place since *Leegin*; however, that blanket prohibition prevented arguably pro-competitive pricing arrangements.

The authors spend time explaining how the 2009 *LinkLine*[7] opinion is meant to reduce both decision and error costs when judging price squeeze allegations. Because it is the only antitrust majority opinion written by Chief Justice Roberts, however, it is surprising that the authors do not quote the portion of the opinion that seems to refer to decision costs: "Institutional concerns also counsel against recognition of such claims. We have repeatedly emphasized the importance of clear rules in antitrust law."

The authors also give short shrift to the decision costs issue in *North Carolina Dental*[8]. Certainly, the Court's decision to require active supervision of actions by state entities that are controlled by market participants will reduce Type II errors as fewer anticompetitive actions by such boards will go unchallenged. Determining when such boards are "controlled" by "market participants" and how "active" the supervision must be, on the other hand, will be more difficult to administer than just accepting a state legislature's designation. The authors describe those costs as "minor compared to the benefits from reducing Type II errors." They simply ignore Justice Alito's passionate dissent where he describes the Court's new test as "a morass" and lists several paragraphs of questions that lower courts (and before them, state legislatures and agencies) must answer to apply the test. While those increased decision costs still might be outweighed by the decrease in immunized anticompetitive activity, I think at least some analysis is necessary to reach that conclusion.

The authors compare the consistency of these court opinions with several examples of FTC or DOJ actions from the same timeframe that do not seem to recognize any "limits of antitrust." Their prime example is the 2008 Section 2 Report, originally issued by the DOJ and which acknowledged the inevitability of errors but suggested standards designed to minimize them and yet be administrable. A majority of the FTC commissioners refused to endorse the Report and the new head of the DOJ Antitrust Division pulled it in 2009:

> "The Report sounds a call of great skepticism regarding the ability of antitrust enforcers—as well as antitrust courts—to distinguish between anticompetitive acts and lawful conduct, and raises the related concern that the failure to make proper distinctions may lead to "over-deterrence" with regard to potentially procompetitive conduct. I do not share these concerns. I strongly believe that antitrust enforcers are able to separate the wheat from the chaff in identifying exclusionary and predatory acts."

The only action of the agencies criticized by the authors and still live is the FTC's decision in *McWane*[9]. For more detail on the facts of the case, see the prior post here. The authors see the decision as failing to require adequate evidence in support of a theory of harm and ignoring actual market evidence suggesting an absence of such harm. Such hostility to exclusive dealing arrangements "is likely to discourage their use—despite their general efficiency—and thereby enhance Type I error costs." The article was written before the 11th Circuit supported the FTC majority in *McWane*; presumably, the authors would have the same view of that opinion.

Before thinking that this analysis means the Court is likely to hear *McWane* and reverse the FTC,

go back to the first line of this post: this theory can explain almost all these opinions. The authors admit in a footnote that they cannot explain *FTC v. Actavis*[10], in which the Court largely agreed with the FTC's position regarding reverse payments. It is disappointing that the authors don't struggle more to explain this anomaly, especially because Chief Justice Roberts dissented and quoted his *LinkLine* opinion ("We have repeatedly emphasized the importance of clear rules in antitrust law.") to criticize the higher decision costs the majority opinion will impose on lower courts: "[T]he majority declares that such questions should henceforth be scrutinized by antitrust law's unruly rule of reason. Good luck to the district courts that must [apply such a rule]."

So does the theory apply only to Roberts, not the entire Roberts Court? Then how do you explain the Chief Justice joining the majority in *North Carolina Dental* in the face of Justice Alito's decision cost dissent? Or does the theory not apply when the FTC is a party, as in *North Carolina Dental* and *Actavis*? And what does the theory and any exceptions tell us about the Court's likely reaction to a cert petition in *McWane*?

While I wish the authors had taken on those questions as well, I think they have done all of us a great service by offering a theory that unifies nearly all recent antitrust opinions from the Supreme Court. As a result, I think we have a better understanding of those opinions and, perhaps, a better sense of how this Court would handle future antitrust cases.

1. *Recognizing the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies*, Journal of Competition Law and Economics (forthcoming) and available at http://ssrn.com/abstract=2596660.

2. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

3. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

4. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

5. *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

6. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

7. *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*, 555 U.S. 438 (2009).

8. *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101, 2015 WL 773331 (Feb. 25, 2015).

9. Opinion of the Commission, In re McWane, Inc., No. 9351 (F.T.C. Jan. 30, 2014).

[10] 133 S. Ct. 2223 (2013).

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