

**Testimony of David A. Balto,
Senior Fellow, Center for American Progress Action Fund**

**“A Progressive Vision for Antitrust Enforcement to Protect the Opportunities
for Small Businesses and to Protect Consumers”**

**Before the House Small Business Committee Hearing on “Small Business
Competition Policy: Are Markets Open for Entrepreneurs?”**

Thursday, September 25, 2008

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Introduction

I am pleased to submit this written testimony on behalf of the Center for American Progress and the Consumer Federation of America¹ about the impact of antitrust enforcement on small businesses and entrepreneurs.

As I suggest in my testimony, over the past several years antitrust enforcement has gone on a misguided detour in failing to fully recognize the concerns of small businesses and entrepreneurs. When dealing with antitrust issues concerning small businesses and entrepreneurs, the antitrust enforcers always bring out the shop-worn bromide from Justice Brennan, that “antitrust laws protect competition, and not competitors.”² That certainly is true, but in doing so, the antitrust agencies have become increasingly insensitive to the legitimate competitive concerns of small businesses, placing these businesses into a “disfavored class” for antitrust enforcement. This is a serious error, not only for these small businesses, but also for the American economy generally and for consumers.

My testimony today is based on over a quarter century as an antitrust practitioner, the majority of which was spent as an enforcer in the Antitrust Division of the Department of Justice, and in several senior management positions, including Policy Director at the Federal Trade Commission (“FTC”). I regularly practice before both the agencies, and frequently appear on behalf of small businesses and associations of small businesses, including pharmacies, healthcare providers, medical device manufacturers, truck stops, supermarkets, farmers, and others.

I want to make it clear at the outset that I am not criticizing the dedicated staff attorneys of the FTC, or the Antitrust Division of the Department of Justice, or even the individuals who set the enforcement agenda. For periods of time in the past, antitrust enforcement was somewhat misguided, and in some respects, attempted to protect competitors rather than competition. For example, in the 1960s the FTC brought countless Robinson-Patman enforcement actions, which

¹ Consumer Federation of America (“CFA”) is the nation’s largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior citizen, low income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

² *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

may ultimately have led to higher prices for consumers. Perhaps one might have envisioned at that point that small businesses were sort of a “protected class” receiving undue recognition by antitrust enforcers. Those policies were clearly reversed during the 1980s with more sensible antitrust enforcement.

Unfortunately, the pendulum of antitrust enforcement has swung too far, with antitrust enforcers being increasingly unresponsive to the concerns raised by small businesses. In some respects as described in my testimony small business has become a “disfavored class.” That is why the Committee’s hearing on this issue is so crucial. By failing to recognize the legitimate concerns of small businesses and entrepreneurs, antitrust enforcement fails to live up to its mission to protect competitive markets and to protect consumers.

The problem identified in today’s hearing was illuminated in an extremely thoughtful article by Professor Warren Grimes “The Sherman Act’s Unintended Bias Against Lilliputians: Small Players’ Collective Action as a Counter To Relational Market Power.”³ Professor Grimes observes that:

There is a systemic bias against small players in modern markets. Large power players are ubiquitous. Because power checks power, big firms are relatively comfortable in dealing with fellow giants. Small players, in contrast, usually lack countervailing leverage and are likely targets of strategic behavior by power players. Antitrust law and policy has contributed to this bias. [A]ntitrust is relatively intolerant of collective action that would allow small players to achieve countervailing power. Doctrinal developments over the past three decades have exacerbated the problem by limiting small players access to antitrust remedies for power abuses. Well-intentioned but overreaching screening rules now limit the small player’s ability to establish claims such as predatory pricing or an unlawful tie-in, even when the conduct produces unambiguously anticompetitive effects.

.....

So who falls into this class of Lilliputians that are victimized by this Sherman Act bias? Among the disfavored are professionals (such as doctors or lawyers) who practice individually or in small groups and must do business with power buyers of their services; small businesses (such as independent pharmacies or bookstore owners) that confront power buyers or sellers; small franchisees that have ongoing dealings with a powerful franchisor; small farmers or ranchers that sell their output to power buyers; and any independent contractor that sells services to a power buyer (such as a taxicab or truck owner that sells his services to a large taxicab or trucking firm).

The purpose of my testimony today is to begin to outline a progressive vision of how to reverse this unintended bias against small business in the interpretation and enforcement of the antitrust laws.

³ Warren Grimes, *The Sherman Act’s Unintended Bias Against Lilliputians: Small Players’ Collective Action As A Counter To Relational Market Power*, 69 *Antitrust L.J.* 195 (2001).

The Crucial Role of Small Business in the U.S. Economy

The American economy is based on the idea of the American Dream – anyone can make it. That is why small businesses and entrepreneurship are such a dominating factor in the American economy. Small businesses are critical to the American economy, employing millions and serving as the linchpin to competition in almost every market. Over 99% of independent enterprises employ less than 500 people with the workers for these enterprises totaling 50.8 million workers, 52% of privately employed workers in the United States. In addition, employment among Fortune 500 companies has fallen to its lowest level of less than 9% of the private workforce today compared with 20% in 1980.

Small businesses are also the prime place for growth in the American economy. Over the last few decades, three quarters of the new jobs in the economy were within small business enterprise. Since 1998, between 60-80% of net new jobs have annually been provided by small businesses. Economic history demonstrates that it is small business that is the entrepreneur, the risk taker, the aggressive price cutter, the innovator. For example, “small businesses’ patents are twice as likely as those from the larger firms to be among the 1 percent most cited; small businesses employ 39 percent of high-tech workers such as scientists, engineers, and information technology workers, generating the majority of innovations that come from U.S. companies; and these businesses are able to pioneer new alliances and partnerships, in contrast to large businesses with demarcated competitive interests, as shown by biotechnology companies vis-à-vis the U.S. pharmaceutical giants.”⁴

Small businesses are more flexible than large corporations, especially in their ability to respond quickly to changing economic and technological conditions. They often know their customers personally and are especially suited to meet local needs. Small businesses respond more easily and rapidly to the ever-changing needs of consumers and the economy as a whole. They are also more innovative than larger businesses, producing 13 to 14 times more patents than larger firms.

The rapid technological advancements brought forth by start-up firms and other small businesses in recent years have taught us that when small businesses are allowed to compete on a level playing field, they bring new products and services to the market, often at a greater rate of innovation and lower prices than those of their competitors. When antitrust enforcement fails to adequately address the concerns of small businesses, however, consumers are deprived of the benefits of these smaller, more nimble competitors. In failing to fully recognize the concerns of small businesses, the antitrust enforcers dampen these voices of innovation and competition, ultimately failing to protect competition and consumers. This failure in antitrust enforcement needs to be reversed.

Today I will outline three substantive areas and two procedural areas in which current antitrust enforcement needs to be adjusted. I will close my testimony with several practical suggestions about how the agencies can address these issues.

⁴ Derek Leebaert, *How Small Businesses Contribute to U.S. Economic Expansion*, available at <http://usinfo.state.gov/journals/ites/0106/ijee/leebaert.htm>.

Substantive Issues

The Department of Justice Approach to Dominant Firm Cases is Misguided

Perhaps in no area is antitrust enforcement as important for small businesses as enforcement against exclusionary conduct by dominant firms. Dominant firms can engage in a wide variety of practices that limit the ability of entrepreneurs to either enter or expand. Some of these practices may, in essence, be procompetitive, resulting in lower prices to consumers. However, a wide variety of these practices may limit the opportunities for small businesses to effectively compete.

The Committee has heard testimony both from automobile repair part manufacturers and medical device manufacturers about how a wide variety of practices by dominant firms limit their ability to compete. The Committee should recognize that these small businesses play a critical role in making these markets competitive. Their efforts to develop new products offer lower prices or better services are crucial to consumers. This is true in not only these markets, but also numerous other markets.

Earlier this month, the DOJ issued a report on dominant firm conduct,⁵ which attempted to provide de facto rules of *per se* legality for dominant firms. These rules will basically permit exclusionary conduct by monopolists unless the small firm can demonstrate that the anticompetitive effects are “disproportionately” greater than the procompetitive potential of the exclusionary conduct. Not only are the standards articulated by the DOJ inconsistent with the law and sound antitrust and economic policy, but also these rules would give monopolists free reign to crush new or existing rivals.

I must admit as an antitrust practitioner who was invited to testify before the hearings, I found the report a bit stunning. Certainly there are areas of antitrust enforcement that need reform, and markets that are not behaving entirely competitively. But the area of dominant firm conduct is not one of them. There is barely any evidence that uncertainty in antitrust law has dampened the ability of dominant firms to compete aggressively. Moreover, in the seven years of the Bush Administration, the DOJ has brought no monopolization cases of any consequence. In contrast, the previous Administration brought dominant firm cases challenging a wide variety of anticompetitive conduct by dominant firms such as Microsoft, American Airlines, Visa and MasterCard.

It is difficult to interpret and understand the DOJ’s absolute reversal of enforcement policy towards dominant firms. It was not as if there was any evidence that suggested that dominant firms were being inhibited from competing effectively, or that consumers were ultimately being harmed because dominant firms had to refrain from competition. Simply put, the DOJ report attempts to solve a problem that did not exist. In doing so, it created more harm than good.

⁵ US Dept. of Justice, *Competition and Monopoly: Single-Firm Competition Under Section 2 of the Sherman Act* (September 2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

The DOJ has perpetuated its misguided enforcement policy by engaging in lopsided advocacy as *amicus curiae* before our courts. During the Bush Administration the DOJ has authored numerous amicus briefs before the courts in antitrust cases. In all but one case, the DOJ favored the defendants, arguing for a minimalist interpretation of antitrust law. The DOJ monopolization report is an attempt to author an amicus brief for the ages, perpetuating their one-sided philosophy of a minimalist antitrust law far beyond the tenure of the Bush Administration.

Fortunately, a majority of the FTC Commissioners issued an 11-page statement setting out the serious flaws of the DOJ monopolization report.⁶ The Commissioners presented two key concerns. First, “the U.S. Supreme Court has declared that the welfare of *consumers* is the primary goal of the antitrust laws. However, the Department’s Report is chiefly concerned with firms that enjoy monopoly or near monopoly power, and prescribes a legal regime that places these firms’ interests ahead of the interests of consumers. At almost every turn, the Department would place a thumb on the scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders.” Second the Commissioners observe that the report “seriously overstates the level of legal, economic, and academic consensus regarding Section 2.” Thus, the Commissioners caution that the DOJ’s approach if “adopted by the courts, would be a blueprint for radically weakened enforcement of Section 2 of the Sherman Act.”

As I recommend below, this Committee and Congress should not stand by as DOJ attempts to vanquish Section 2 as a vital tool of antitrust enforcement. This Committee should recommend to Congress that they affirmatively reject the DOJ Report.

Fortunately, the FTC has continued to bring monopolization cases in a sensible manner during the current Administration. However, the Committee should recognize that the FTC does not have jurisdiction over all industries, and some industries are solely within the jurisdiction of the Antitrust Division of the DOJ. The imbalance in dominant firm enforcement between the FTC and DOJ should be addressed and resolved in the next Administration.

One place for the new Administration to start is the area of medical devices. This Committee heard the testimony of the Medical Device Manufacturers Association on the contracting practices by Group Purchasing Organizations and other conduct by dominant firms to foreclose smaller innovative rivals from the market. Examples of alleged exclusionary practices include sole-source contracts, market share discounts, and bundling of products so hospitals must purchase the bulk of their supplies from a single vendor to qualify for a discount on any one product. The FTC and DOJ received significant testimony at their 2003 healthcare hearings about how these practices deterred innovation and price competition in various medical device markets. Over a dozen private suits have been brought, some successfully, by small innovative medical device manufacturers against exclusionary practices by GPOs and device manufacturers. Yet in spite of that hearing testimony and these numerous private actions, the FTC has not challenged this type of conduct.

⁶ Statement available at <http://www.ftc.gov/opa/2008/09/Section2.shtm>.

The Failure of the Agencies to Recognize the Harm of Buyer Power

In numerous markets, especially healthcare and agriculture markets, providers of services and goods face dominant buyers. Often the role of dominant buyers can be procompetitive in forcing suppliers to reduce costs and become more efficient. Moreover, powerful buyers sometimes can prevent sellers from being able to collude, either explicitly or tacitly. But buyer power poses issues that are different from the existence of seller power and can harm consumers.

However, the antitrust agencies have failed to adequately grapple with buyer power issues. Let me provide several examples:

- There has been no Robinson-Patman price discrimination enforcement actions during the current Administration.⁷
- The antitrust agencies have brought no challenges to any agricultural processing merger even though all agricultural processing markets have become much more concentrated.
- In the past 10 years, there have been over 400 health insurance mergers; however the DOJ has only challenged three of those mergers, requiring relatively modest divestitures.
- In a recent Congressionally-mandated report, the FTC blessed the exclusionary practices of the PBM industry, which have squeezed independent pharmacists, without bringing any benefit to consumers.

Some people may suggest that price discrimination enforcement is wholly unnecessary. Indeed, the Antitrust Modernization Commission recommended that the Robinson-Patman Act be abolished. In a thoughtful forthcoming report, the American Antitrust Institute has explained why separate Robinson-Patman enforcement is necessary.⁸ The Report highlights the anticompetitive harm that can come about from price discrimination and cannot be addressed in the other antitrust statutes. The report also goes on to suggest reform of the Robinson-Patman statutes to assure that it does not prevent procompetitive conduct.

Let me provide two examples of the lack of price discrimination enforcement:

- Booksellers. Perhaps the most important area in which antitrust enforcement has failed to address competitive problems involves booksellers. Probably every member of this Committee enjoys the pleasure of shopping at an independent bookseller, but that opportunity unfortunately is becoming increasingly rare.

⁷ It is notable that the examples of enforcement that FTC Chairman Kovacic points to in his testimony (the McCormick Spice case and the study of slotting allowances) were initiatives of the Clinton Administration FTC.

⁸ The American Antitrust Institute, *Transition Report on Competition Policy to the 44th President of the United States*; see also American Antitrust Institute, *The Robinson-Patman Act Should be Reformed, Not Repealed* (July 1, 2005), available at <http://www.antitrustinstitute.org/archives/files/425.pdf>.

Independent booksellers provide an important source of competition, not only in terms of prices but variety, quality and additional services. Unfortunately because of the power of the bookstore chains, the market share of independent booksellers has dwindled from about a third, to approximately 9 percent today. Independent booksellers provide a crucial role in offering a diversity of selection, promotion and a wide variety of services, including serving smaller communities.

As the American Bookseller Association (“ABA”) noted in testimony before the Antitrust Modernization Commission,

The playing field is more level than it used to be, due in no small measure to Robinson-Patman enforcement by the American Booksellers Association against publishers and powerful buyers. Larger retailers still enjoy a significant unfair advantage in purchasing terms. Flaws in the Robinson-Patman Act can contribute to the inability of independent booksellers to obtain a completely level playing field, but despite its flaws the existing act has at least limited the unfair price advantages enjoyed by large retailers.⁹

The ABA noted that if the Act was abolished or narrowed, inevitably the larger retailers would dictate prices to publishers, and the gap in purchasing terms between small and large retailers would widen so much that a huge number of the remaining independent booksellers would go out of business.

- Truck Stop Payment Systems. In 2003, the House Appropriations Committee asked the FTC to investigate the existence of price discrimination in the truck stop payment systems market. That market is dominated by a single firm, Comdata. As condition of the approval of Comdata’s acquisition of a rival network, the FTC required Comdata to provide licenses to various firms to provide alternative network products. The FTC issued its study in August 2004 and suggested there were not competitive problems in this market.¹⁰ However, the FTC study was seriously deficient in many respects. For example, it failed to recognize that the merger divestiture requirement had failed to restore competition in the market.¹¹

⁹ Testimony of Bruce V. Spiva, Comments at the American Booksellers Association to the Antitrust Modernization Commission/Robinson-Patman Act Panel (July 25, 2005).

¹⁰ Letter to Hon. Ted Stevens and Hon. C.W Bill Young, U.S. Congress, re Fed. Trade Comm’n Staff Report on Certain Aspects of Competition in Commercial Trucking Fleet Cards and Truck Stop Operations (August 13, 2004).

¹¹ See Complaint at 81-85, *Flying J v. TA Operating Corp.*, Case No. 1:06cv00030 (D. Utah 2006)(identifying deficiencies of FTC study at ¶¶ 154-161). See also Testimony of J.H. Campbell on behalf of the National Grocers Association before the Antitrust Modernization Commission on the Robinson-Patman Act (July 25, 2005)(discussing why price discrimination in credit card fees is anticompetitive).

Over-Aggressive Enforcement against Collective Activities in Health Care

Although small businesses are frequently run by independent-minded business persons, they often need to work with other businesses in order to achieve economies of scale and scope to compete with larger rivals. The antitrust laws have generally been fairly flexible in permitting small businesses to engage in a wide variety of joint ventures, strategic alliances and other arrangements. These entities are especially important where small businesses attempt to compete with much larger rivals, which have some of those competitive advantages.

Yet, in one area, antitrust enforcement has taken a particularly misguided approach to collective conduct — that involving healthcare. The testimony that this Committee received from the American Medical Association documented how the approach taken by the DOJ and FTC has denied healthcare providers the ability to enter into a wide variety of potentially procompetitive arrangements.

Central to sound health care antitrust enforcement is establishing a balance among these important principles: (1) enforcement should focus on the sectors of the healthcare system with the greatest impact on consumers; (2) enforcement should focus on all segments of the healthcare distribution system; and (3) enforcement must be balanced with clear guidelines and advice to permit procompetitive conduct.

For example, in the 1990s federal antitrust enforcers tried to balance enforcement against healthcare providers with new enforcement efforts against exclusionary conduct by health insurers and other intermediaries such as PBMs. They recognized that health insurers had the power to harm competition and consumers through a wide variety of anticompetitive and exclusionary conduct. If health insurers are too powerful they can charge consumers excessive premiums or engage in other anticonsumer conduct. Consumers are very familiar with the types of egregious practices by insurers including rejection of preexisting conditions, preapproval provisions and discontinuation of coverage. In addition, health insurers with market power can reduce reimbursements substantially to healthcare providers, leading to a significant reduction in healthcare quality.

Similarly, the antitrust agencies in the 1990s attempted to facilitate collective activity by healthcare providers by issuing clearer guidance to permit collaboration by healthcare providers that was not anticompetitive. Three times during the 1990s the agencies revised their Healthcare Guidelines, in part based on the recognition that these markets were evolving and they needed to be flexible about the ability of providers to innovate and participate in the market. The agencies issued over 30 staff opinion letters, authorizing conduct by individual groups of providers.

Yet that balance in enforcement has been lost in the current Administration.

- All of the nonmerger enforcement actions have been brought against healthcare providers without a single action against a health insurer or PBM.
- Merger enforcement has been particularly lax. The agencies have permitted several hundred health insurance mergers and required modest divestitures in only two of those mergers. In one of those mergers, the United/Sierra merger, the

Chairman of this Committee raised concerns with the DOJ that their settlement was insufficient to protect consumers and healthcare providers. A similar trend of consolidation has occurred in the Pharmacy Benefit Manager market which is now dominated by three firms.

- The agencies have not revised their Healthcare Guidelines in the past 12 years even though they are clearly out of date in some respects. The Guidelines are premised upon a managed care model in which providers can collectively negotiate if they accept financial risk – a model that consumers and insurers no longer want. So providers that engaged in financial risk taking are in a now in a legal “no-mans land” where to secure legal status they have to ask for arrangements the market does not desire.
- The agencies have issued only three staff advisory opinion letters authorizing joint provider conduct. The significant downturn in favorable advice is not surprising. Securing the agencies’ approval is becoming increasingly more elaborate, complex and expensive and the agencies’ letters are increasingly detailed and complex. My understanding is that the cost of securing one of these business approval letters now clearly exceeds \$100,000 in attorneys’ fees, beyond the financial ability of most provider groups. More important, the types of arrangements that are permissible are so complex and expensive they can only be achieved by very large groups involving several hundred providers. Ironically, the agencies’ approach effectively forces providers to create groups so large they may have market power.

Particularly egregious is the lack of health insurance merger enforcement. As several consumer groups stated in testimony before this Committee last year:

As a result of lack of antitrust enforcement against health insurers an unabated flood of health insurance mergers has led to highly concentrated markets, higher premiums, and lower reimbursement. Skyrocketing premiums have put insurance out of reach for millions of consumers and thousands of small businesses and the number of uninsured Americans has increased to critical levels: over 47 million, or one out of seven Americans under age 65. As consumers have suffered from egregious deceptive and anticompetitive conduct by insurance companies, those companies have recorded record profits. The problems presented could not be starker or have a more severe impact on consumers.¹²

Although the number of actions brought by the agencies against healthcare providers are numerous, one can question the economic impact of the challenged conduct. Outside of healthcare, most government antitrust enforcement actions lead to private treble damage actions seeking to recover damages. Yet none of the healthcare provider cases brought in the current Administration have led to this type of follow on damage litigation. One can question if insurers were really harmed by this conduct, why did they not seek damages. Moreover, the impact on

¹² Statement on behalf of Consumer Federation of America, Consumers Union, and US PIRG to the House Small Business Committee (Oct 25, 2007). (Attachment A).

the ultimate consumer is even more uncertain. The FTC has not done any studies to determine what the consumer impact has been of these numerous enforcement actions against providers. There is no evidence on whether these provider groups continued to exist or were disbanded. Nor is there any evidence of whether the actions enabled health insurers to secure lower rates from providers, or if these lower rates resulted in lower premiums for consumers.¹³ Nor is there any evidence if the enforcement actions perhaps weakened the quality of healthcare by decreasing compensation to healthcare providers. Simply there is no evidence that consumers have benefitted from these enforcement actions. Even more disturbing is the fact that many of the agencies' enforcement decisions have been directed at providers in rural areas. Given the shortage of health care services in many rural areas, we should be skeptical of any antitrust enforcement policy that further weakens the incentive and ability of providers to practice in rural areas.

This is not to suggest that healthcare providers should be given a free pass in price fixing or should be permitted to form otherwise illegal cartels. The enforcement agencies should continue to challenge clearly illegal conduct which has a significant adverse impact on consumers. But those efforts should focus on those segments of the market with the greatest threat of competitive harm: health insurance and other health care intermediaries.

We do not know about the reasons for the agencies nonenforcement decisions or the reasons for the change in enforcement priorities. But one reason for this imbalance may be an assumption that the interests of health insurers are coincident with that of consumers. Such a view would be misguided especially when dealing with for-profit insurers that are responsible to their shareholders. Lower rates from providers may simply be pocketed as higher profits, especially where health insurers have market power. And the evidence is indisputable that almost all metropolitan health insurance markets are highly concentrated.

Moreover, health insurers are not true fiduciaries for insurance subscribers. Plan sponsors may have a limited concern over the product based on the cost of the insurance, and not the quality of care. Consequently, health insurers can increase profits by reducing the level of service and denying medical procedures that physicians would normally perform based on professional judgment. Health insurers also prohibit providers from advising patients about medically necessary procedures that may be covered under other plans through physician "gag" clauses. That is why there have been countless consumer protection actions taken against health insurers. If competition among insurers diminishes, patients are more likely to pay for these procedures out-of-pocket or forego them entirely. Ultimately, the creation of monopsony power from the hundreds of health insurance mergers can adversely impact both the quantity and quality of health care.

Another part of the problem is that two separate agencies share healthcare jurisdiction: the FTC is responsible for issues on healthcare providers and hospitals; the DOJ is responsible for health insurance. Having a single agency responsible for both would better facilitate coordinated enforcement and a sound approach to both health insurance and provider issues.

¹³ Indeed, if the insurance market was concentrated, consumers might not receive any benefits from the lower rates secured by the health insurers.

Because of its bipartisan composition and its concurrent consumer protection jurisdiction, the FTC is best suited to take over the role of exclusive health care enforcer.

The agencies may respond that permitting provider collaboration to respond to potential monopsony power will not solve the problem. Rather they will suggest that such “countervailing power” will only lead to higher prices. They are wrong on two counts. First, countervailing power may permit providers to become better patient advocates, by enabling providers to bargain for the elimination of gag clauses and other provisions that limit the doctors ability to advocate for the patient. Second, as an economic matter permitting health care providers to secure countervailing bargaining power may be procompetitive. The effect of high physician market shares on consumer welfare depends on the pre-existing concentration of health plan purchasing power.¹⁴

Let me provide you with an example of where potential antitrust enforcement against a provider endeavor clearly harms consumers. We are all familiar with the role of pharmacy benefit managers in controlling healthcare costs. Several years ago, a group of pharmacies, under the direction of the National Association of Chain Drug Stores, attempted to form a rival pharmacy benefit manager to compete against the dominant PBMs in the market. The FTC conducted a long and expensive investigation, even though it was clear that the pharmacy-run PBM would not be capable of exercising any type of market power, or raising prices in any respect. The cost and time of the FTC investigation deterred the ability for that alternative to come to the marketplace.¹⁵

Process Issues

I wanted to raise several process-related issues, based on my experience of representing small businesses and entrepreneurs before the agencies.

I begin by recognizing that the staff of the agencies includes dedicated public servants, who take the enforcement of the antitrust laws seriously. However, on occasion, it is difficult for the concerns of small businesses to be fully recognized by the enforcement agencies. The agencies are used to dealing with large, sophisticated companies, which can hire expensive attorneys and economists to represent their interests. Small businesses, obviously, cannot afford that type of expensive endeavor. Moreover, small businesses are often unfamiliar with the workings of the agencies or the types of concerns that the agencies focus on.

I focus on two process issues: (i) complaints of small businesses in merger investigations and (ii) merger divestitures.

¹⁴ See Roger Blair & Jill Herndon, *Physician Cooperative Bargaining Ventures: An Economic Analysis*, 71 Antitrust L.J. 989 (2004); Tom Campbell, *Bilateral Monopoly in Mergers*, 74 Antitrust L.J. 521 (2007).

¹⁵ In some situations, it might be appropriate to provide an antitrust exemption to permit healthcare providers to collectively negotiate with insurers. See Testimony of David Balto, The Impact of Our Antitrust Laws on Community Pharmacies and their Patients before the House Judiciary Committee Antitrust Task Force (Oct. 18, 2007)(advocating for antitrust exemption for community pharmacies).(Attachment B).

I. Complaints of Small Businesses in Merger Investigations

Merger investigations under the Hart-Scott-Rodino Act are an intense and complicated process. Because the agencies have a limited amount of time to investigate a proposed merger, there is a limited opportunity to contact customers and competitors. Although it is difficult for any individual practitioner to generalize, based on my experience in representing small businesses that were affected customers by proposed mergers, I have a concern that the agencies do not adequately survey the concerns of small businesses in evaluating the competitive effects of these mergers.

In part, this is understandable. Because of the time demands of the Hart-Scott-Rodino process, only a limited number of customers can be interviewed. Thus, the agencies almost always focus on the largest customers to determine the competitive impact of the merger. However, in many instances it may be the smallest customers who may be most vulnerable to the anticompetitive effects of the merger. Larger customers may have greater options and maybe less susceptible to anticompetitive harm from the merger.

It is also important for the agencies to credit the concerns of small businesses that are competitors of the merged firm. Too often those concerns are discredited because these small businesses are competitors of the merging parties and the agencies assume that they are complaining because they fear greater competition from the merged parties. While this concern contains a grain of truth, the assumption that smaller firms are necessarily less efficient than larger competitors is not always correct and, in any case, even competition from those firms that are operating at smaller-than-efficient benefits consumers by bringing new products and services to the market at competitive prices.

Often the interests of small businesses are aligned with consumers and should be fully recognized. Probably no example of this error of ignoring the complaints of small businesses is more significant than the complaints raised by local radio broadcasters against the XM-Sirius merger. The concerns raised by the local radio stations were particularly important because one cannot expect that the millions of consumers affected could readily complain to the antitrust enforcers. The DOJ and FCC were quick to dismiss the comments of local radio stations, arguing that these rivals would complain only if they expected heightened competitive pressure from the combined satellite radio provider. But this traditional, public choice assessment of merger opposition was shortsighted because it failed to recognize the complex, *two-sided* nature of radio markets. Radio stations bring together two audiences on their platform: listeners and advertisers. Local radio stations were concerned about the merged satellite firm selling additional local advertisements; they were not concerned about the prospect of the merged satellite firm lowering its subscription prices to end users. Stated differently, local radio stations were concerned about the merger effects on one side of the market only. Because satellite radio listeners perceive additional commercial time as a bad thing, the interests of the (complaining) local radio stations and end users were perfectly aligned. Unfortunately, the antitrust agencies failed to detect these aligned interests, and instead dismissed the complaints of local radio stations.

II. Merger Divestitures

In many cases, the antitrust agencies will attempt to resolve the competitive concerns of the merger by requiring the parties to restructure the acquisition and divest the assets of one of the two merging companies. Sometimes the parties are given a period of time after the merger is consummated to divest those assets. In other cases, the agencies will require the divestiture to be conducted almost simultaneously with the approval of the merger.

Again, because time is of the essence in securing these divestitures, merging parties may prefer to divest the assets to a large company, which can acquire all or most of the divested assets. For example, in a merger of supermarkets, in which the divestitures are necessary in several geographic markets, the merging parties may prefer to divest all those assets to a single buyer rather than going to the more lengthy process of finding individual buyers in each of the different metropolitan markets. In effect, the divestiture process, in some instances, provides an implicit preference for divestiture to a large, sophisticated buyer, rather than a small business.

Anything that leads the merging parties to prefer large over small business buyers may be an unfortunate result for consumers. A precedential FTC study of merger divestitures in the mid-1990s found that small businesses were more likely to be successful acquirers of divested assets than larger businesses. The reasons are intuitively obvious. For a small business, the acquisition of a divested business will be a more significant investment, one in which it will be more committed than some larger entity. Placing small businesses at an implicit disadvantage in the divestiture process, which may ultimately lead to more divestitures to larger businesses, may not ultimately be beneficial to consumers.

Recommendations

Again, I want to emphasize the commitment of individuals in the antitrust enforcement agencies to the proper enforcement of the antitrust laws. Yet, I believe, and based on my experience in representing parties before the agencies, that they need to be increasingly sensitive to the concerns raised by small businesses. As I have suggested above, substantively the agencies should give greater attention to the conduct of dominant firms and anticompetitive uses of buyer power. In addition, the priorities in the healthcare arena need to be realigned.

Here are four recommendations to improve the process of antitrust enforcement at the agencies for small businesses:

(1) Appoint a small business ombudsman at the FTC.

Some of the problems facing small business entities are one of information and communication. Small business entities may be unaware of the best fashion to articulate their competitive concerns to the agencies. In addition, it would be useful for the agencies to have an individual responsible for evaluating the agencies approach to the concerns raised by small businesses. Thus, the FTC should consider appointing a small business ombudsman to deal directly with small businesses that raise competitive concerns, both in merger and non-merger investigations. In addition, the small business ombudsman can prepare a regular report for the Commission on how issues concerning small businesses are addressed.

- (2) The Committee should recommend to the House that it issue a statement regarding the DOJ's monopolization report.

As suggested by three FTC commissioners, the DOJ monopolization report does not reflect current antitrust law, and provides a road map for dominant firms to engage in exclusionary conduct.

Congress should not stand by idly as the DOJ attempts to rewrite the antitrust laws and to severely weaken the scope of Section 2 enforcement. This Committee should recommend to the House of Representatives that it issue a statement criticizing the approach taken in the DOJ report. This would be similar to the approach taken in December 1985, where Congress added language to a proposed public law criticizing the 1985 DOJ vertical restraint guidelines.¹⁶ Such a statement would be instructive, both to the courts and future antitrust administrations about the proper enforcement of Section II.

- (3) The FTC should conduct a study of the merger divestiture process and its impact on small businesses.

The FTC's 1998 divestiture report provided tremendous insight into the divestiture process. My own intuitive sense, based on my representation of parties in the divestiture process is that divestitures to small businesses have continued to be more successful than to divestitures to larger business entities. But anecdotal information cannot substitute for true empirical analysis. The FTC should conduct an update of their 1998 divestiture report, with a particular focus of the impact of divestitures and other merger remedies on small businesses.

- (4) Merger Process

The FTC and DOJ should make a significant effort to solicit and incorporate the views of small businesses in their analysis of the competitive impact of proposed mergers. In some cases, the FTC and DOJ should try new investigatory methods, such as holding ad hoc meetings with groups of small businesses in order to secure information about the impact of the merger. The DOJ and FTC should also intensify their recent efforts to increase transparency in the merger-review process. Too often, advocacy before the agencies is a game of "inside baseball," dominated by those companies with the resources to hire high-priced lawyers with connections to agency staff. Increasing transparency by making guidelines and enforcement decisions public *and* easily accessible, would benefit smaller businesses with more modest legal budgets. The agencies should also consider publishing helpful tips for businesses and their lawyers who are not as familiar with agency practice.

¹⁶ Congress stated that the 1985 DOJ Vertical Restraints Guidelines "(1) are not an accurate expression of the Federal antitrust laws or of congressional intent with regard to the application of such laws to resale price maintenance and other vertical restraints of trade; (2) shall not be accorded any force of law or be treated by the courts of the United States as binding or persuasive; and (3) should be recalled by the Attorney General." PL 99-180, 1985 HR 2965.

Conclusion

The unintended bias against small business in antitrust enforcement costs both competition and consumers. Too often the antitrust laws and enforcement agencies fail to recognize the critical role of small businesses in providing competition and increased choices for consumers. Our parents could dream that we would have every opportunity to create our own businesses and bring new competition to the market. If we are going to be able to pass these dreams on to our children and grandchildren, it is absolutely imperative that small businesses and their concerns receive fair treatment in the antitrust agencies and the courts. The antitrust bias against small business must be reversed.