

## The Overlooked Vitality of Antitrust Doctrine

The Open Markets Institute\* (OMI) welcomes the opportunity to offer its perspective for the FTC’s Hearings on Competition and Consumer Protection in the 21st Century (Project Number P181201). OMI submits this comment on developments in antitrust law since the Pitofsky hearings.

Across the U.S. economy, concentration has risen dramatically in recent decades.<sup>1</sup> Sectors ranging from agriculture to finance to transportation are more concentrated than they were in the 1990s.<sup>2</sup> This increase in concentration was not inevitable. To a significant degree, this rise in concentration is due to antitrust law, in several key areas, becoming friendlier to dominant firms over the past 20 years. This is not because of action by Congress, which has largely ignored antitrust law for the last generation. Instead it is due mainly to decisions by the Supreme Court and lower courts, which over this period have erected numerous obstacles to the enforcement of the antitrust laws.

Take Section 2 of the Sherman Act: The Supreme Court’s decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*<sup>3</sup> and *Pacific Bell Tel. Co. v. linkLine Communs., Inc.*<sup>4</sup> have practically barred most refusal-to-deal and related claims. Similarly, the Supreme Court has extended the restrictive predatory pricing test announced in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>5</sup> to predatory bidding claims against powerful buyers.<sup>6</sup> And earlier this summer, the Supreme Court embraced the two-sided markets

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\* The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The vigorous enforcement of the antitrust laws is essential to protecting the U.S. economy and democracy from monopoly and oligopoly. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public

<sup>1</sup> *Corporate Concentration*, ECONOMIST, Mar. 24, 2016, <https://www.economist.com/graphic-detail/2016/03/24/corporate-concentration>.

<sup>2</sup> COUNCIL OF ECON. ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414\\_cea\\_competition\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf); Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?* 36-38 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2612047](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047).

<sup>3</sup> See 540 U.S. 398, 407 (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period— is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth.”).

<sup>4</sup> See 555 U.S. 438, 454 (2009) (“An upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; antitrust law does not prohibit lawfully obtained monopolies from charging monopoly prices.”).

<sup>5</sup> 509 U.S. 209 (1993).

<sup>6</sup> *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

construct in *Ohio v. American Express Co.*,<sup>7</sup> a decision which could severely restrict the ability of plaintiffs to bring rule of reason cases.<sup>8</sup>

Even in the face of these judicial decisions restricting the ability of American consumers, entrepreneurs, suppliers, and workers to enforce antitrust law and protect the public from concentrated private power, many areas of antitrust law remain vital. And, arguably, the law on certain antitrust claims has become more favorable to the government and other plaintiffs since the mid-1990s. In cases alleging exclusionary conduct, plaintiffs, including the FTC, have won important victories challenging the exclusive dealing and tying of dominant firms and established positive precedents. On mergers, the lower courts continue to apply the strong anti-merger precedents from the 1960s and follow the incipency standard in the Clayton Act. Outside of the Sherman and Clayton Acts, the FTC has in Section 5 of the FTC Act a deep well of untapped statutory power on which to draw. While the Supreme Court has taken away some tools, the FTC, in particular, retains ample power with which to be an effective and vigorous enforcer of the antitrust laws.

## I. Notable Plaintiff Victories against Monopolies and Other Dominant Firms

Antitrust enforcers still have the authority to challenge a wide range of monopolistic practices. While the Supreme Court has rewritten a significant swath of monopolization law, the lower courts continue to issue decisions favorable to antitrust plaintiffs. These victories have come principally in cases alleging anticompetitive deception, exclusive dealing, loyalty rebates, and tying by firms with market power. And notwithstanding the Supreme Court's unfavorable decisions on, and hostility toward, predatory pricing and refusal-to-deal claims, plaintiffs have even won notable victories on such claims.

Multiple courts of appeals have held that deception, fraud, and other tortious conduct can violate the antitrust laws. In *Conwood Co. v. U.S. Tobacco Co.*, the Sixth Circuit affirmed a jury verdict against the dominant producer of moist snuff.<sup>9</sup> The court held that the company engaged in illegal monopolization by systematically making misrepresentations about a rival's products and destroying the display racks of this rival.<sup>10</sup> The Third Circuit, reviewing allegations of misleading promises by the owner of standard essential patents, held that deception can give rise to a monopolization claim.<sup>11</sup>

Plaintiffs have also won significant victories in monopolization suits alleging exclusive dealing. The FTC successfully sued a dominant manufacturer of ductile iron pipe fittings for using exclusive contracts with distributors as a means of keeping rival producers out of the

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<sup>7</sup> 138 S. Ct. 2274 (2018).

<sup>8</sup> Lina Khan, *The Supreme Court Just Quietly Gutted Antitrust Law*, VOX, July 3, 2018, <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony>.

<sup>9</sup> 290 F.3d 768 (6th Cir. 2002).

<sup>10</sup> *Id.* at 787-88.

<sup>11</sup> *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007).

market.<sup>12</sup> The Third Circuit has issued two important decisions restricting monopolists' use of exclusive dealing arrangements.<sup>13</sup> In an en banc decision, the Third Circuit also held that a dominant manufacturer's use of conditional pricing practices, which foreclosed rivals, could constitute illegal monopolization.<sup>14</sup> In a key decision, the D.C. Circuit has held that total foreclosure is not necessary for finding exclusive dealing to be a Section 2 violation. The court stated that a monopolist's exclusive dealing can give rise to a Section 2 violation "even though the contracts foreclose less than [a] roughly 40% or 50% share."<sup>15</sup> Like its sister circuits, the Fourth Circuit has ruled that under long-standing Supreme Court precedent exclusive dealing can give rise to a monopolization cause of action.<sup>16</sup>

The law on tying remains relatively favorable to the government and other antitrust enforcers. The Supreme Court has established a quasi-per se rule for tying. In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, the Court held that tying is per se illegal when a firm has market power in the tying product market and "anticompetitive forcing is likely."<sup>17</sup> The Court affirmed this conditional per se rule in *Eastman Kodak Co. v. Image Technical Services, Inc.*<sup>18</sup> and followed it in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*<sup>19</sup> Some lower courts have declined to apply this quasi-per se rule to technology markets but have held that tying can still be illegal under the rule of reason.<sup>20</sup> Other courts interpret the quasi-per se rule to be a presumption of illegality: firms with market power can rebut a prima facie case of illegal tying by showing that their tying had procompetitive effects.<sup>21</sup>

Even as the Supreme Court has severely restricted the ability of plaintiffs to bring predatory pricing and refusal-to-deal claims, plaintiffs have won notable victories in these areas. As two leading antitrust scholars have written, "predation cases are not hopeless."<sup>22</sup> In *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, Spirit Airlines defeated Northwest's motion for summary judgment on a predatory pricing claim.<sup>23</sup> The Sixth Circuit held that Spirit Airlines had presented enough facts to establish that Northwest may have engaged in predatory pricing on certain routes out of its Detroit hub.<sup>24</sup> And other plaintiffs have survived defendant's motion to dismiss on predation claims.<sup>25</sup> Despite the long shadow of *Trinko* and *linkLine*, plaintiffs still win

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<sup>12</sup> *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015).

<sup>13</sup> *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *United States v. Dentsply Int'l*, 399 F.3d 181 (3d Cir. 2005).

<sup>14</sup> *LePage's Inc. v. 3M*, 324 F.3d 131 (3d Cir. 2003) (en banc).

<sup>15</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001) (per curiam).

<sup>16</sup> *E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc.*, 637 F.3d 435 (4th Cir. 2011).

<sup>17</sup> 466 U.S. 2, 16 (1984).

<sup>18</sup> 504 U.S. 451, 464 (1992).

<sup>19</sup> 547 U.S. 28, 36-37 (2006).

<sup>20</sup> *E.g.*, *Microsoft*, 253 F.3d at 95-96.

<sup>21</sup> *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 271-72 (6th Cir. 2015).

<sup>22</sup> C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 *YALE L.J.* 2048, 2063 (2018).

<sup>23</sup> 431 F.3d 917 (6th Cir. 2005).

<sup>24</sup> *Id.* at 950-51.

<sup>25</sup> *Beech-Nut Nutrition Corp. v. Gerber Products Co.*, 69 Fed. Appx. 350 (9th Cir. 2003).

cases that resemble refusal-to-deal claims. In a 2015 decision, the Second Circuit held that a branded drug manufacturer’s decision to suspend sales of an existing drug as a means of moving the market to a reformulated version and thereby blocking generic competition violated the antitrust laws.<sup>26</sup> Critically, the court affirmed the district court’s decision ordering the drug company to continue selling the old formulation on the same terms.<sup>27</sup>

## II. The Continued Vitality of Venerable Anti-Merger Precedents

The lower courts continue to follow the Supreme Court’s landmark anti-merger decisions from the 1960s. Importantly, in several cases, the courts have continued to apply the structural presumption of illegality for major mergers in highly concentrated markets and rejected or questioned the availability of the efficiencies defenses for anticompetitive mergers.

The courts of appeals still often apply a structural presumption against horizontal mergers in highly concentrated markets. Articulated in the Supreme Court’s decision in *United States v. Philadelphia National Bank*, this presumption holds that the government (or other challenger) establishes a prima facie case if it shows that a merger results in a firm “controlling an undue percentage share of the market.”<sup>28</sup> The Court stated that a 30% market share qualifies as “an undue percentage share” and noted that even 20% may be sufficient.<sup>29</sup> Multiple courts of appeals have applied the presumption in favor of the government. For example, in *Polypore International Inc. v. FTC*, the Eleventh Circuit applied the *Philadelphia National Bank* presumption in upholding the FTC’s determination that a horizontal merger in a highly concentrated market is presumptively illegal.<sup>30</sup> The D.C. Circuit has also applied a structural presumption of illegality.<sup>31</sup> And so, notwithstanding the shift in federal merger policy toward a more standards-like, effects-based approach,<sup>32</sup> the courts continue to look to structural thresholds when deciding merger cases.

While the agencies have embraced efficiencies in the Horizontal Merger Guidelines,<sup>33</sup> the courts continue to question or reject the availability of this defense to illegal mergers. The Supreme Court was unambiguous when presented this defense in the 1960s. In three influential decisions, the Court barred this defense. The Court concluded that Congress in enacting the Clayton Act sought to preserve competitive market structures, even if that meant sacrificing the possible attainment of economies through mergers and acquisitions.<sup>34</sup> Given this still-valid

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<sup>26</sup> *New York v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015).

<sup>27</sup> *Id.* at 662-63.

<sup>28</sup> 374 U.S. 321, 363 (1963).

<sup>29</sup> *Id.* at 364, n.41.

<sup>30</sup> 686 F.3d 1208, 1216 (11th Cir. 2012).

<sup>31</sup> *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001).

<sup>32</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES §§ 6-7 (2010).

<sup>33</sup> *Id.* at § 10.

<sup>34</sup> *See Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”); *Philadelphia Nat’l Bank*, 374 U.S. at 371 (“We are clear . . . that a merger the effect of which ‘may be substantially to lessen competition’ is not saved because, on some

precedent, the lower courts have fallen into two camps. Some courts have treated an efficiencies defense as inconsistent with Supreme Court rulings on the issue,<sup>35</sup> while others have tentatively recognized it.<sup>36</sup>

### III. The Untapped Potential of Section 5 of the FTC Act

In Section 5 of the FTC Act, the FTC has exceptional power to make and remake antitrust policy. The competition prong of Section 5 is expansive and outlaws “unfair methods of competition.”<sup>37</sup> Whereas the courts are the primary interpreters of the Sherman and Clayton Acts, the FTC is the principal interpreter of Section 5. In enacting the FTC Act and creating the FTC, Congress delegated authority to the FTC to articulate the meaning of “unfair methods of competition.”<sup>38</sup> Furthermore, the FTC’s interpretation of the open-ended prohibition in Section 5 is entitled to the deferential *Chevron* standard of review in court.<sup>39</sup> The FTC has the authority to write competition rules<sup>40</sup> under the process established in the Administrative Procedures Act and does not have to comply with the more onerous procedures in the Magnuson-Moss Act.<sup>41</sup>

The FTC must use Section 5 to protect and restore competitive markets. The FTC can use Section 5 to remake and revive antitrust law.<sup>42</sup> Indeed, the FTC could use Section 5 to overthrow the ahistorical consumer welfare approach to antitrust and restore the broader legislative purposes of the FTC Act and other federal antitrust laws. For instance, the FTC could write regulations prohibiting horizontal and vertical consolidation in concentrated markets and exclusionary practices, such as predatory pricing, by dominant firms.<sup>43</sup> Importantly, these rules would be entitled to *Chevron* deference in court.

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ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.”); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (“Possible economies cannot be used as a defense to illegality.”).

<sup>35</sup> *E.g.*, *FTC v. Penn State Hershey Medical Ctr.*, 838 F.3d 327, 348 (3d Cir. 2016).

<sup>36</sup> *E.g.*, *Heinz*, 246 F.3d at 720.

<sup>37</sup> 15 U.S.C. § 45.

<sup>38</sup> *See* *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 245 (1972) (“[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”).

<sup>39</sup> *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See also* Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 237 (1980) (“The judicial decisions which have reviewed [the FTC Act’s] legislative history confirm that the Commission has, as it must have, considerable flexibility in determining which particular acts or practices will constitute ‘unfair methods of competition.’”).

<sup>40</sup> *National Petroleum Refiners Association v. FTC*, 482 F.2d 672, 697-98 (D.C. Cir. 1973).

<sup>41</sup> Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 234 (2014).

<sup>42</sup> Sandeep Vaheesan, *Resurrecting a “Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission*, 19 U. PA. BUS. L.J. 645 (2017).

<sup>43</sup> *Id.* at 676-84.

## Conclusion

Given antitrust developments, especially at the Supreme Court, since 1995, the FTC and other antitrust plaintiffs have good reason to be careful in pursuing merger and especially monopoly lawsuits. In the *Trinko* and *linkLine* decisions, the Supreme Court rewrote doctrine to protect monopolists and other dominant firms from refusal-to-deal claims. Similarly, the Supreme Court has extended the restrictive *Brooke Group* test for seller-side predatory pricing to buyer-side predatory bidding claims. And the Supreme Court's most recent antitrust pronouncement—*Ohio v. American Express Co.*—could severely restrict the ability of plaintiffs to bring rule of reason cases going forward.

Yet, the FTC should not adopt a posture of passivity and choose non-enforcement outside of garden-variety price-fixing and other horizontal collusion cases. Important areas of antitrust law remain vital and have arguably become more enforcement friendly since the mid-1990s. In monopolization cases, plaintiffs, including the FTC, have won important victories challenging the exclusive dealing and tying of dominant firms and established positive precedents. On mergers, lower courts continue to apply the strong anti-merger precedents from the 1960s and follow the incipiency standard in the Clayton Act. Most importantly, the FTC has in Section 5 of the FTC Act a deep well of untapped statutory power on which to draw. The FTC should seek to use its full suite of legal authorities (under the Sherman, Clayton, and FTC Acts) to challenge anticompetitive mergers and exclusionary conduct and protect and restore fair, competitive markets.