WASHINGTON ANTITRUST REPORT

Edited by
James Gattuso
Tom Miller

"Busting the Trustbusters Since '86"

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ANTITRUST AND THE 99TH CONGRESS

After considering a broad array of proposed reforms of the U.S. antitrust laws, the 99th Congress adjourned on October 25 without passing any major legislation in the area. In one sense, the Congress was disappointing for those favoring antitrust reform. However, it may have been more successful for reformers than at first appeared. Although no major reforms were enacted, the formal proposal by the Reagan Administration of a set of reform measures was itself a major step, and established a foundation for further debate in the coming years. Moreover, advocates of more restrictive antitrust rules failed to achieve any measurable success. Despite congressional grumblings about the Administration's "lax" antitrust enforcement, no legislation to turn back the clock on antitrust policy progressed significantly.

Due to the impending Democratic takeover of the Senate, prospects for antitrust reform promise to be more difficult during the 100th Congress. The Senate Judiciary Committee, to be chaired by Senator Joseph Biden (D-Del.), would seem to offer a much more hostile environment for reform advocates. Worse, Senator Howard Metzenbaum (D-Ohio), a vociferous opponent of antitrust reform, is expected to chair a newly-constituted antitrust subcommittee.

Still, many remain optimistic. The continuing trade deficit will be a major issue during the new congress, forcing it to look at ways to increase U.S. productivity — including antitrust reform. Surprisingly, Biden has spoken favorably of reform in this area, indicating it may indeed be on the agenda. (See "Quotable", p. 9).

Antitrust legislation considered by the 99th Congress included:

The Administration Proposals. These proposals were no doubt the major legislative development in antitrust during the 99th Congress. Throughout 1985, the question of whether to propose reform, and which reforms to advance, was a hotly debated topic within the Administration. Commerce Secretary Baldridge focused attention on the issue in March of 1985, when he proposed that Section 7 of the Clayton Act be abolished entirely. (He later modified his stance to advocate a relaxation of the Clayton Act). The Antitrust Division, under the leadership of Paul McGrath and Doug Ginsburg, preferred an assault on antitrust penalties. Last December, President Reagan approved a package of antitrust measures which embodied both approaches.

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The major proposals in this package included modification of Section 7 of the Clayton Act, abolition of treble damages for non-price-fixing offenses, payment of defendant's attorney's fees by plaintiffs in frivolous antitrust suits, amendment of trade laws to allow the President to temporarily exempt particular industries from the antitrust laws as a remedy in "Section 201" cases, and a liberalization of the Clayton Act restriction on interlocking directorates.

Except for S. 1300 (described below), no Administration-backed reform was reported out of committee. Nevertheless, Administration spokesmen remain hopeful, pointing out that the Senate held valuable and extensive hearings on the proposals. With the exception of the Section 201 proposal, each measure will be reintroduced next year.

Joint and Several Liability Reform. A bill to limit joint and several liability in antitrust suits, S. 1300, was approved by the Senate Judiciary Committee on May 8, on a 16-2 vote. Only Senators Kennedy and Metzenbaum opposed the measure. The legislation would have reduced the amount of damages which could be assessed in price-fixing cases by the share attributable to companies who settled out-of-court or who were not parties in the case. The bill was actively supported by a wide range of business organizations, as well as by the Administration, despite the latter's opposition to an earlier version of the legislation. Although the measure was not brought to a vote on the Senate floor, it will be reintroduced next year.

Railroad Antimonopoly Act. A bill to expand the antitrust laws to require railroads to allow competing railroads to use their track was adopted by the House Judiciary Committee last March, but it was effectively killed three months later when it was unfavorably reported by the House Energy and Commerce Committee (which has jurisdiction in rail regulation issues). Although supporters of rail reregulation now appear to be concentrating on more direct forms of regulation, this bill may yet be revived.

Foreign Trade Antitrust. S. 397, which would limit the application of U.S. antitrust laws in certain situations involving foreign trade, was reported by the Senate Judiciary Committee on September 18. The bill would have empowered federal judges to dismiss an antitrust action if they found it unreasonable in light of the significance of the violation compared to the same conduct abroad, its effects on the U.S., and other factors. The bill was not voted upon by the full Senate, but supporters intend to propose the measure again next year.

Physician Peer Review. Last November 14, President Reagan signed into law an omnibus health bill which included a provision protecting hospitals and physicians engaged in peer review from private antitrust damage suits. Many inside and outside the Administration urged Reagan to veto the legislation because it also set up a federally-funded no-fault compensation system for injuries caused by vaccines.

Beer Distributorships. Legislation which would have granted malt beverage manufacturers the right to grant exclusive territories to their distributors was withdrawn from the Senate floor in the closing days of Congress. The legislation, sponsored by Senator Dennis DeConcini (D-Ariz.), was approved by the Senate Judiciary Committee last March. On August 12, the Senate Appropriations Committee attached the bill as an amendment to the fiscal 1987 Treasury Department appropriations bill, thus bringing it to the

Senate floor. However, when opponents threatened to filibuster the measure, it was withdrawn on the condition that the bill be brought up for consideration in early 1987.

Illinois Brick. On June 5, the Senate Judiciary Committee rejected, 7-9, a bill which would have allowed states to bring price-fixing suits on behalf of consumers. This legislation would have partially overturned Illinois Brick v. Illinois, a 1977 Supreme Court decision holding that only direct purchasers of goods can recover damages for antitrust violations.

RECENT ANTITRUST RULINGS

No Absolute Rule Denying Competitors' Standing

On December 9, the Supreme Court raised the threshold for competitors seeking to enjoin proposed mergers, but it declined to rule out their standing to challenge acquisitions on the basis of "necessarily speculative claims of post-acquisition predatory pricing." In Cargill, Inc. v. Monsort of Colorado, Inc., a 6-2 majority overturned an injunction against the merger of the second-largest and third-largest firms in the beef-packing industry. Justice William Brennan's majority opinion ruled that Monsort (the fifth-largest firm) had failed to show it faced a real anticompetitive threat "of the type the antitrust laws were designed to prevent." Monsort's allegations of a post-merger "price-cost squeeze" that would narrow its profit margins meraly constituted damage due to more vigorous competition, and was not forbidden by the antitrust laws. At the same time, the court stopped short of adopting the Justice Department's amicus argument that competitors should be denied standing to challenge mergers on predatory pricing grounds.

Physicians' Peer Pressure

On September 30, the Ninth Circuit held in Patrick v. Burget that the state action doctrine shielded an Oregon peer review process from Sherman Act scrutiny. The court overturned a $1.9 million treble damage award for injuries suffered by an Oregon physician as a result of a peer review process which recommended suspension of his hospital staff privileges. The court ruled that the alleged bad faith of the defendants was irrelevant because (1) Oregon mandated peer review by statute, thereby stating an affirmatively expressed policy to replace pure competition with some regulation by competitors, and (2) the process was supervised actively by the state, through the Board of Medical Examiners and the Oregon courts.

Just three weeks before, on September 9, a federal district court in Pennsylvania had found that the state action doctrine did not apply to a hospital's refusal to reappoint a physician to its medical staff and allow him an associate on the staff. Posner v. Lankenau Hospital concluded that Pennsylvania's Peer Review Protection Act did not clearly intend to permit "anticompetitive" activity (denial of medical staff privileges on other than professional or ethical grounds) as a necessary consequence of hospital regulation.

The budding legal controversy over private antitrust challenges to medical peer review, however, appears to have been neutralized by recent passage of the Omnibus Health Act (see "Antitrust And The 99th Congress", above).

More Airlines' Urge To Merge

The Department of Transportation (D.O.T.) gave final clearance to three more airline merger proposals. On October 1, D.O.T. granted final approval to Texas Air's takeover of Eastern Airlines. The department cited Pan Am's ability to operate a competitive hourly shuttle service in the Northeast, after having purchased additional airport landing slots in New York and Washington from Texas Air. (See Washington Antitrust Report, No. 1, regarding D.O.T.'s reversal of earlier decision to reject the takeover).

On October 24, D.O.T. gave quick final approval to the acquisition by Texas Air of People Express and the assets of People's subsidiary, Frontier Airlines. The department speeded up its decision because of People Express' "extremely precarious financial condition." D.O.T. agreed with the Justice Department's view that the merger would not lessen competition substantially in the Newark and Denver markets, and concluded that People's current national market share "probably overstates its future competitive significance, and hence the likely effect of this transaction on concentration in the national market."

A third proposed acquisition, Delta Air Lines' takeover of Western Airlines, received final approval by D.O.T. on December 11. The department noted that Delta and Western compete in only a few markets, that each carrier has "at most only a minor presence" in hubs operated by the other, and that there was no evidence of barriers preventing other carriers from entering these markets.

Two other proposed acquisitions are awaiting D.O.T. approval. On November 17, American Airlines agreed to acquire AirCal. On December 8, USAir announced its plans to acquire Pacific Southwest Airlines.

RECENT WORKS

*Peter Boettke, Antitrust and International Trade, Citizens for a Sound Economy Issue Alert No. 12, December 17, 1986. Boettke, a doctoral candidate at George Mason University's Center for the Study of Market Processes. summarizes the Reagan Administration's proposed antitrust reforms, arguing that they are a step in the right direction. Available from Citizens for a Sound Economy, 122 "C" St., N.W., Washington, D.C. 20001, (202) 638-1401.

*Timothy Brennan, Understanding "Raising Rivals' Costs", Economic Analysis Group Discussion Paper 86-16, U.S. Department of Justice, Antitrust Division, September 26, 1986. Professor Brennan argues that, as a relatively new theory of non-price predation, Raising Rivals' Costs (RRC) will add little that is not already subsumed in current antitrust theories, while increasing litigation, deterring otherwise efficient vertical contracts, and misdirecting analyses of potentially anticompetitive practices. He worries that RRC may be misused to dress the erroneous doctrines of "foreclosure" and "exclusion" in the uniform of microeconomic theory. Available from Economic Analysis Group, Antitrust Division, U.S. Department of Justice, Judiciary Center Building, Room 11453, 555 4th St., N.W., Washington, D.C. 20001, (202) 724-6665.

*Thomas J. DiLorenzo, The Rhetoric of Antitrust, Center for the Study of American Business, Contemporary Issue Series No. 22, November 1986. In this pamphlet, DiLorenzo, a CSAB visiting scholar, attacks a variety of antitrust notions, including the "domino effect" theory of mergers, foreclosure, squeezing, price discrimination, and predatory pricing. Available from the Center for the Study of American Business, Washington University, Campus Box 1208, St. Louis, Missouri 63130, (314) 889-5630.

*Thomas W. Hazlett, "Is Antitrust Anticompetitive", 9 Harvard Journal of Law and Public Policy 277 (Spring 1986) & Yale Brozen, "The Antitrust Tradition: Entrepreneurial Restraint", 9 Harvard Journal of Law and Public Policy 337 (Spring 1986). In his article, Dr. Hazlitt, an assistant professor of economics at the University of California, Berkeley, chronicles the rise and decline of the market concentration doctrine, from its beginnings in the 1930s, through the work of Demsetz rebutting the theory, to its apparent rejection (among economists) today. Hazlitt also comments on a range of allegedly restrictive business practices and particular court cases. He concludes that the antitrust laws "operate to the detriment of competition and the consumer," and that "perhaps the most effective proconsumer program would be to consider federal enforcement of the antitrust laws to be a per se restraint of trade."

In his comment on Hazlitt's article in the same issue, Dr. Brozen, professor of business economics at the University of Chicago, argues that antitrust has "itself become a restraint on trade." He also shows that although American industry was not becoming more concentrated during the last 50 years, the myth of increasing concentration led to a harmful strengthening of the antitrust laws and policies over the last generation. Brozen concludes by advocating elimination of private enforcement of antitrust laws.

*Thomas R. Hurdick, The Legal System and Professional Sports: Offensive Interference?, Washington Legal Foundation Legal Backgrounder, October 24, 1986. Hurdick, a WLF M.J. Murdock Fellow, argues that the recent Ninth Circuit decision requiring the Oakland/L.A. Raiders to pay the NFL a fee for the privilege of moving to Los Angeles interferes with business decisions and "leave[s] sports-hungry cities incapable of exercising their free choice through the marketplace." Available from the Washington Legal Foundation, 1705 N St., N.W., Washington, D.C. 20036, (202) 857-0240.

*D. Bruce Johnsen, The Madison Oil Case: A Study of Cartel Behavior, unpublished, June 4, 1986. In this paper, Professor Johnsen outlines his forthcoming dissertation on the landmark price-fixing case U.S. v. Socony-Vacuum, in which numerous major oil companies were found guilty of fixing prices in the Midwest during the depression. Available from D. Bruce Johnsen, Texas A&M University, College of Business Administration, College Station, Texas 77843, (409) 845-4851.

*Mark Leddy, "Recent Merger Cases Reflect Revolution in Antitrust Policy", Legal Times, November 3, 1986. In this article in Washington's weekly newspaper for the legal profession, Leddy, a former deputy assistant attorney general in the Reagan Administration, provides a thoughtful and balanced summary of the changes in federal merger policy over the years.

*Fred S. McChesney, "Law's Honour Lost: The Plight of Antitrust", 31 The Antitrust Bulletin 359, (Summer 1986). Professor McChesney, an Olin Fellow in Law and Economics at the University of Chicago Law School, terms the system of antitrust law and enforcement a vestigial organ, "increasingly seen as either irrelevant or, worse, deleterious to competition." He

singles out three continuing deficiencies of traditional antitrust analysis: (1) viewing the world in structural terms, (2) dogged adherence to per se rules, and (3) courts' inability to distinguish procompetive from anticompetitve contracts. McChesney concludes that antitrust is a system manipulable by some producers and their politicians to the detriment of competing producers.

*Sheldon L. Richman, "Beer and the Antitrust Laws", unpublished. Richman, director of public affairs at George Mason University's Institute for Humane Studies, argues in favor of legislation permitting exclusive territories for beer distributors. Available from Sheldon Richman, Institute for Humane Studies, George Mason University, 4210 Roberts Road, Fairfax, Virginia 22030, (703) 323-1055.

*Marius Schwartz, The Perverse Effects of The Robinson-Patman Act, Economic Analysis Group Discussion Paper 86-12, U.S. Department of Justice, Antitrust Division, July 30, 1986. In this paper, Professor Schwartz argues that the ambiguity of the Robinson-Patman Act and its case law induced uncertainty about the legality of competitive pricing and various business practices, and created a tendency to "play it safe" and preserve the status quo. Reviewing the act on its 50th anniversary, he finds that it condemns legitimate price differences, strikes down efficient business arrangements, stifflea promotional activity, induces inefficient buying practices, and overprotects competitors. Schwartz contends that Robinson-Patman may have weakened the competitive position of many small buyers by inducing practices (vertical integration, exclusive dealing, product differentiation) which are generally more readily available to large firms. Available from Economic Analysis Group, Antitrust Division, U.S. Department of Justice, Judiciary Center Building, Room 11453, 555 4th St., N.W., Washington, D.C. 20001, (202) 724-6665.

*William F. Shughart II and Robert D. Tollison, The Employment Consequences of the Sherman and Clayton Acts, unpublished, Center for Study of Public Choice, George Mason University, March 1986. In this empirical study of antitrust enforcement activity from 1947 to 1981, Shughart and Tollison find that an increase of 1 percent in Sherman and Clayton Act cases instituted was matched by a rise in the unemployment rate of between 0.14 percent and 0.20 percent. They conclude that Justice Department antitrust enforcement is unpredictable but, more often than not, attacks efficient contractual arrangements in the economy. Available from William F. Shughart II, George Mason University, 4400 University Drive, Fairfax, Virginia 22030, (703) 323-2790.

*E. Thomas Sullivan, The Antitrust Division as a Market Regulator, Center for the Study of American Business Occasional Paper No. 57, December 1986. Sullivan, a professor of law at Washington University, reviews the legislative history of the antitrust laws, concluding that the Antitrust Division was intended to be a law enforcement agency, not a regulatory agency. The division's current practice of negotiating rather than litigating merger cases, he argues, has made it a regulatory agency. Under a deregulation-minded administration, says Sullivan, this is more efficient for both government and business. In another administration, he warns, such a practice could become a form of industrial policy. Available from the Center for the Study of American Business, Washington University, Campus Box 1208, St. Louis, Missouri 63130, (314) 889-5630. An expanded version of this article will also be appearing in volume 64 of the Washington University Law Quarterly, to be published early next year.

*Stephen J. K. Walters, "Reciprocity Reexamined: The Consolidated Foods Case," 29 Journal of Law and Economics 423 (1986). Dr. Walters, a professor of economics at Loyola College in Baltimore, reviews the 1965 Supreme Court case F.T.C. v. Consolidated Foods, and argues that the reciprocal dealing the court found illegal actually contributed to economic efficiency. He concludes that the "presumption of evil that now attaches to [reciprocal dealing] is ill founded and unsupported in theory or in fact."

OPINION & EDITORIAL

*Warren Brookes, "Beware of Boesky Backlash", The Washington Times, November 26, 1986. Syndicated columnist Brookes warns that the Boesky case may stiffen opposition to the Administration's proposed antitrust reforms, and, citing the IBM case, argues that most antitrust cases are just corporate "protectionism."

*Terry Calvani, "Antitrust Policy And The Common Man", The National Law Journal, November 24, 1986. In this fanfare for the common man, FTC member Calvani argues that an efficiency-oriented antitrust policy that protects the interests of consumers will be far more helpful to the average citizen than policies seeking to protect small business or redistribute wealth. Since the least fortunate Americans must devote a greater portion of their income to consumption, notes Calvani, they have the most to lose from antitrust policies that discourage innovation, raise costs and prices, or otherwise restrict consumer convenience and choice.

*Stephen Chapman, "Who Picks Up the Tab if the Beer Monopoly Bill Passes? A Proven Way to Market Suds", and Stephen Greene, "Putting Limits on Competition", The Washington Times, September 24, 1986. In these related articles, Chapman argues in favor of allowing beer brewers to establish exclusive distributorships for their product, while Greene maintains that "what is good for the beer barons would be bad for beer drinkers."

*Nathaniel C. Nash, "U.S.'s 'Fix-It' Antitrust Policy", The New York Times, September 16, 1986. Nash argues that the current policy of antitrust enforcement -- trying to "fix" otherwise objectionable mergers by negotiating specific divestitures -- has made the antitrust agencies regulators rather than prosecutors. The result is "a kind of hidden industrial policy."

*Thomas Sowell, "The Monopoly Bogeyman", The Washington Times, October 20, 1986. In this article, Dr. Sowell argues that despite recent concern over newspaper "monopolies", there has never been such a diversity of newspapers available across the country.

*"Predatory Fantasies", The Wall Street Journal, December 11, 1986. This editorial on the Cargill decision concludes that "respect for economic realities is necessary ... if a country wants to avoid swimming stubbornly toward oblivion on the sea of its own rhetoric."

(Copies of each of the above are attached to this issue of the Washington Antitrust Report).

CONGRESSIONAL HEARINGS

Merger Law Reform: Hearings Before the Committee on the Judiciary, United States Senate, 99th Cong., 2nd Sess. (1986). Transcript of hearings on the Reagan Administration merger law reform proposals held last April and May.

Antitrust Remedies Reform: Hearings of the Committee on the Judiciary, United States Senate, 99th Cong., 2nd Sess. (1986). Transcript of hearings on the Administration's antitrust remedy reform proposals held last March, April, and May.

The Antitrust Improvements Act of 1986 (Illinois Brick): Hearing of the Committee on the Judiciary, United States Senate, 99th Cong., 2nd Sess. (1986). Transcript of a hearing held on June 3 on a bill to partially overturn the Supreme Court decision in Illinois Brick.

(The above hearings are available from the U.S. Government Printing Office).

PROJECTS UNDERWAY

*Geoffrey Swaebe, Jr., an attorney with the New York State Department of Justice, is preparing a paper on "The Diverging Paths of Federal and State Antitrust Enforcement Authorities", to be published by the Washington Legal Foundation. Swaebe will argue that the differing antitrust policies now being followed by federal and state authorities create difficulty for businesses trying to follow the law. For more information, contact Mike McDonald, Washington Legal Foundation, 1705 N St., N.W., Washington, D.C. 20036, (202) 857-0240.

*Tom DiLorenzo of the Center for the Study of American Business is preparing a paper on "The Origins of Antitrust: Reasons for Reform". He will argue that the "trusts" of the late 19th century, contrary to popular opinion, actually caused prices to fall and output to expand. Their effect on efficiency, he will maintain, was similar to today's corporate takeovers. For more information, contact Thomas J. DiLorenzo, Center for the Study of American Business, Washington University, Campus Box 1208, St. Louis, Missouri 63130, (314) 889-5630.

NOTABLE

"The First Thing We Do, Let's Kill All The Lawyers ..."

In response to a surge in merger filings by companies trying to avoid tax changes taking effect on January 1, the Justice Department has transferred initial antitrust screening of all proposed mergers from its lawyers to its economists. An apprehensive Washington Post ("Justice Shifts Antitrust Responsibilities", December 11, 1986) quotes Washington attorney Jack Blum: "They're taking the people least likely to object to a merger and giving them the first review, and taking the people most likely to object out of the picture." Another triumph of comparative advantage.

GAO's Mild Gas Attack

A GAO study finds that domestic gasoline price hikes in early 1985 were not due to the Texaco/Getty and Chevron/Gulf mergers of 1984. Although lapsing into market concentration analysis ("the required divestitures eliminated the increase in concentration exceeding the merger guidelines"), GAO cites several non-merger causes for the price increases, such as increased U.S. dependence on foreign oil and the required reduction of lead content in gasoline. The report (RCED-86-165BR) is available from the U.S. General Accounting Office, P.O. Box 6015, Gaithersburg, Maryland 20877, (202) 275-6241.

QUOTABLE

"The antitrust laws were written for a different era. For steel and even chemicals, it's no longer competition for domestic markets, it's competition on a global scale."

Senator Joseph Biden, incoming chairman of Senate Judiciary Committee, saying that "antiquated" U.S. antitrust laws should be overhauled, during interview with Wilmington News-Journal, November 13, 1986.

"[T]rue predatory pricing is about as rare as a trustworthy Soviet -- and we have learned to be very skeptical of both."

FTC Chairman Daniel Oliver, September 23 speech to Antitrust & Trade Regulation Section, Dallas Bar Association.

"For a system of law that has been around for 100 years, inflicting less damage than before is not much to brag about. There is no evidence whatsoever that the world is better off with an antitrust system than it would be without one -- and some evidence that the reverse is true."

Dr. Fred S. McChesney, in "Law's Honour Lost: The Plight of Antitrust", The Antitrust Bulletin, (Summer 1986).

EDITORS' NOTE

The Washington Antitrust Report plans to compile an Antitrust Reader, composed of the leading antitrust reform articles of the last two decades. The editors would appreciate your recommendations regarding the five most influential articles that shaped your current views on antitrust. Please direct your comments to Editors, The Washington Antitrust Report, Competitive Enterprise Institute, 611 Pennsylvania Avenue, S.E., Washington, D.C. 20003, (202) 547-1010.

The Washington Times

November 26, 1986

WARREN BROOKES

Beware of Boesky backlash

The demise of Ivan Boesky has revived populist anti-merger juices in Washington at the very moment that both parties are also calling for America to become more "competitive."

Yet, with all its excesses, the whole corporate takeover process is precisely about pushing corporate managements to become more competitive, or face hostile takeover.

Last week's angry exchanges between Ohio congressional Democrats and Sir James Goldsmith, the great British entrepreneur, over his attempt to take over the Goodyear Tire & Rubber Co. shows how strong the emotions are running, oddly enough, to protect and insulate non-competitive managements.

The more immediate danger is that the Boesky scandal will harden opposition to administration proposals to reform our obsolete antitrust laws, which are giving other countries, especially Japan and Korea, a real competitive edge.

Four years ago last summer I made a "bargain purchase" of a U.S.-made personal computer with 64 kilobytes of internal memory for $2,400. IBM was not then even in the primitive PC market.

Last week, computer stores all over the East Coast were featuring an offer of a Korean-made, IBM-compatible system with 786 kilobytes of internal, and 20 megobytes of external memory for just $1,595, including a massive package of "free" software.

Warren Brookes is a nationally syndicated economics columnist.

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BROOKES

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This means that in just three years the cost per kilobyte of internal memory on personal computers has come down from nearly $38 to about $2, an almost 95 percent reduction in computing costs, in the most competitive market in the world.

This is why last August, despite its dominance of the PC market, IBM was forced to announce its fourth major price cut in the last two years to arrest its rapid decline in market share, which had slipped from 44 percent a year ago to 31 percent this summer.

This price cut coincided with the distressing news that "Big Blue's" earnings magic has apparently disappeared, with 1986 earnings now estimated at $6.0 billion, down two years in a row from its all-time high of $6.6 billion in 1984, as IBM's income curve has flattened out and dipped since then.

Yet, IBM itself is the victim of its own success, because its 1983 entry into the PC market gave that market the explosive technology and competitive impetus it needed.

The supreme irony is that the only reason IBM stayed out of this lucrative new field so long, was the 13-year-long U.S. Justice Department antitrust case brought against it in 1969 for "illegally monopolizing" the general purpose digital-computer-systems market — a case supposedly to "protect the consumer!"

As soon as the Reagan Justice Department dropped this endless exercise in 1982, IBM jumped into the burgeoning PC market with a far better product and system than anyone else, and it revolutionized personal computing overnight, but not before its overseas competition had already made massive inroads.

Even so, the administration took white heat from anachronistic liberals like Democratic Rep. Don Edwards of California, who accused them of "selling out." Yet, the biggest beneficiaries of IBM's release from this endless court burden were the American consumers, who are now enjoying a revolution in PC technology and software that is putting some of the most sophisticated capacity imaginable in the hands of classroom students for as little as $600-800 each.

What we should have learned from the IBM case is that in this worldwide marketplace, the whole notion of "monopoly power" is for the most part simply nonsense. Even a real "cartel" like OPEC couldn't long survive in a deregulated world oil market.

As Dr. D.T. Armentano, libertarian economist from the University of Hartford, argues in the latest of his vast array of assaults on antitrust law (*Anti-Trust Policy — The Case For Repeal*, CATO Institute):

"It was clear from the start that this government antitrust case and the many private antitrust cases against IBM were all fundamentally misguided. They were in brief [as most antitrust cases are] an attack on entrepreneurial success and efficiency. Clearly, IBM had not restricted production to raise prices and profits. On the contrary, IBM had achieved its considerable success and market share by taking unprecedented research and development risks, innovating superior products and developing and unsurpassed long-term corporate commitment to customer support services."

Even so, "IBM's share of domestic electronic data processing revenues declined from 78 percent in 1952 to 33 percent in 1972, hardly persuasive evidence of any 'monopolization.' "

In fact, the sole reason for the original attack on IBM was complaints by less-efficient competitors who simply wanted to restrain "Big Blue" so as to catch up and make more money for themselves.

This, ironically, is why 90 percent of all antitrust cases are brought — not by government, but by unhappy competitors trying to win in court what they can't win in the marketplace.

In short, most antitrust cases are corporate "protectionism," and it would be ironic, indeed, if a populist Congress wound up shielding such entrenched corporate managements.

"Antitrust Policy and the Common Man"

The National Law Journal

November 24, 1986

BY TERRY CALVANI
Special to The National Law Journal

ROBERT BLAKEY recently asserted that the antitrust policy of the current administration, among other things, reflects a temporal victory for the wealthy in an asserted "struggle between the less privileged and the more privileged." (NLJ, Oct. 13.)

Although somewhat abstruse, Professor Blakey's argument raises legitimate questions concerning the goals of the federal antitrust laws. I nevertheless disagree with the simple assumption of Professor Blakey and so many others that resolving these questions in favor of an efficiency-oriented antitrust policy, as has the current administration, disadvantages the common man. In fact, quite the opposite is true.

The appropriate ends of federal antitrust enforcement have been the subject of much debate over the years. One oft-cited object of an antitrust policy, considered by many to be "populist," is the elimination of wealth transfers between the buyers and sellers of supracompetitively priced goods.

Price is equal to marginal cost in a competitive environment. When price exceeds marginal cost, buyers pay more for goods and sellers obtain a greater return on each unit produced and sold. These transfer payments between buyers and sellers represent the surplus that some customers are willing and able to pay for a particular good or service that exceeds the competitive price.

Since some buyers value the good or service more highly than its competitive price, the issue is to whom does this surplus rightfully belong? Those who suggest that the elimination of the consumer-producer transfer payment is an appropriate antitrust objective, presumably believe that this surplus more properly belongs to buyers than to sellers. As one commentator has observed, "Since these monopoly profits accrue to the corporate stockholders and corporate executives who largely come from the upper income groups, income inequality is increased."

ELIMINATION OF the consumer-producer payment, however, is a less-compelling argument than it might otherwise seem.

One strong objection to the consumer-producer transfer payment as the focus of antitrust policy is

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Mr. Calvani is a member of the Federal Trade Commission. The views expressed in this article are those of the author and not necessarily those of the FTC or any other commissioner.

Reagan Administration Holds Common Man in High Esteem

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that it presumes too much; in fact, we know too little to generalize about the actual identities of consumers and producers in monopolistic industries. While existing data establish that the average income of consumers is less than the average income of stockholders, this evidence is not sufficient to conclude that a policy which reduces monopoly profits will bring about a more equal distribution of income.

In some industries, corporate shareholders may not come from upper-income groups, but may consist in large measure of blue-collar pension funds or charitable organizations. At the same time, buyers in certain industries, such as those that produce "luxury" goods, may be relatively wealthy. Aggregate statistics on income for consumers and shareholders say little with reference to particular industries, yet antitrust enforcement must be targeted at the actions of specific firms in particular industries.

Thus, even those convinced of the equity of income redistribution ought to hesitate about implementing wealth transfer as an antitrust goal until they know more about the identities of the parties involved. In fact, it is difficult to effectively redistribute wealth using the federal antitrust laws, and dangerous to generalize about the distributive effects of antitrust enforcement.

Another commonly suggested objective of the federal antitrust laws, considered by many to be "populist," is the preservation of small business. The Jeffersonian village merchant and yeoman farmer are very much a part of the American fabric. A classical exposition of this view is contained in Justice Louis D. Brandeis' "The Curse of Bigness," written in 1934, and a good many courts have in the past endorsed this policy as an important antitrust objective.

IT IS IMPORTANT to note, however, that the protection of small business may come at a significant cost to the consuming public. Let me illustrate by referring to a discussion I had not too long ago with a government representative of a Western trading partner at an international meeting.

The foreign representative indicated that his government was considering an antitrust measure that would limit the number of square feet that a grocery store could occupy. When questioned about the relationship between the proposed measure and antitrust, the representative replied that if supermarkets were permitted to locate and expand within his country, its citizens could be expected to patronize such stores because of their lower prices.

The antitrust objective still unapparent, I posed the question again. The representative then indicated that since consumers might patronize the supermarkets, the small bakers and butchers would suffer the consequences. Obviously, while having as its objective the protection of small business, the proposed law would come at a cost to the nation's citizens in the form of higher prices. Indeed, one might convincingly argue that the proposed measure would effect income redistribution from poor consumers of food to middle-class merchants.

In fact, manufacturing some goods at the lowest per-unit costs requires large firms that can take advantage of economies of scale in production. For example, automobiles were expensive to manufacture and priced so only the wealthy could afford them until Henry Ford established assembly lines and large manufacturing plants, which

> An antitrust policy that protects the interests of consumers is more helpful than the policies that can actually harm consumers.

produced low-cost cars that virtually everyone could afford. Car buyers would have to pay a heavy price if antitrust laws merely protected small businesses. Thus, antitrust protection of small business could actually decrease the welfare of the common man.

THE ANTITRUST objective embodied in current administration enforcement policy is the achievement of allocative or economic efficiency.

This doctrine seeks to preserve competition in the marketplace and thereby to maximize consumer welfare by providing the optimal number and variety of goods and services to consumers. Antitrust enforcement is thus designed to protect consumers against anticompetitive restriction of output by firms that would deny them the goods and service they desire at competitive prices. At the same time, the laws are no longer invoked to place anti-competitive, consumer-harming shackles on the competitive process.

An antitrust policy that thus protects the interests of consumers is, in my estimation, far more helpful to the average citizen than policies that can actually harm consumers, such as one that preserves small business.

Every American is a consumer and stands to lose from a federal enforcement posture that discourages innovation, raises costs and prices, or otherwise restricts consumer convenience and choice. In fact, it may be the least fortunate members of society that benefit the most from a competition-oriented antitrust policy, since a greater percentage of their income must be devoted to consumption.

In sum, any "struggle between the less privileged and the more privileged" in this country cannot credibly be attributed to the antitrust policy of the Reagan administration. At the Federal Trade Commission and the Department of Justice, at least these days, the common man is held in high esteem.

The Washington Times
September 24, 1986

Who picks up the tab if the beer monopoly bill passes?

STEPHEN GREEN

Putting limits on competition

Like the mythical phoenix that rises from its own ashes, a beer monopoly bill that epitomizes special-interest legislation has been resurrected in the Senate.

During the last three sessions of Congress, the malt beverage industry has lobbied for a law that would allow brewers to eliminate competition among beer distributors.

In the two previous sessions and for most of the current one, consumer advocates have managed to derail the legislative proposals that would exempt the beer industry from antitrust statutes. But now the legislation that would inevitably lead to unjustifiable increases in the price of beer has gone to the Senate floor. It may slip through the Senate without one hearing or a single word of floor debate.

The beer bill had been considered dead and safely buried in the judiciary committees of the House and Senate. The revival of this insidious legislation is testimony to the persistence and influence of the lobbying organization known as the National Beer Wholesalers' Association.

In a recent letter to its members, the association has bragged of its unexpected success in moving the so-called Malt Beverage Interbrand Competition Act a "step closer to enactment" with a "strategy that was planned and carried out in strict confidence."

The letter reveals the surreptitious manner in which the association managed to circumvent the normal legislative process and attach the beer measure to an appropriations bill.

The ostensible purpose of the bill is to provide needed funds for the operation of the Treasury Department and several other government agencies.

According to the association letter, both Republican Sen. James Abdnor of South Dakota, chairman of the Treasury Appropriations subcommittee, and Sen. Dennis DeConcini of Arizona, the ranking Democrat, agreed to enlist in the cause of the beer barons.

Thanks to the efforts of Mr. Abdnor and Mr. DeConcini, the Treasury appropriations bill came before the subcommittee with the beer provision already in place. With no mention of beer, the subcommittee approved the bill and sent it to the full committee for consideration.

Beer wholesalers in states which have senators on the Appropriations Committee were mobilized to participate in what the association letter describes as a "massive outpouring of calls" to Washington. The bill was approved by the full committee without a vote on the beer provision.

As Congress comes under pressure to finish its work and adjourn, it is increasingly likely that remaining appropriation bills will be pushed through as quickly as possible.

The association, in its letter, has claimed a "major victory." But what is good for the beer barons would be would be bad for beer drinkers.

As they have in the past, the beer barons say the legislation is required to assure them control over the quality of the beer they produce. But it is evident that the real reason is to give the beer barons more control over their products' prices.

Various studies have determined that the beer bill is anti-consumer and inflationary. If antitrust immunity is granted to beer distributorship monopolies, retailers will not be able to shop around for the best price. The increased costs to the retailers ultimately will be passed along to consumers.

A preview of what would occur has taken place in New York, where the creation of monopoly distributorships for several brands of beer has led to price increases of nearly 36 percent.

In contrast, beer prices plummeted some 20 percent when monopoly distributorships were outlawed in Indiana.

But what is good for the beer barons would be would be bad for beer drinkers.

The Justice Department and the National Association of Attorneys General have requested the Senate to delete the beer monopoly provision, inasmuch as it would be a fundamental alteration and weakening of the nation's antitrust laws.

The U.S. Small Business Administration has recognized that the beer bill is "special-interest legislation in its purest form."

The question now is whether the Senate will succumb to the blandishments of the beer lobby or stand up for competition and for America's beer drinkers.

Stephen Green, managing editor of Copley News Service's Washington bureau, is a nationally syndicated columnist.

STEPHEN CHAPMAN

A proven way to market suds

Monopoly is a dirty word in the American lexicon. So when the beer industry asked for an exemption from antitrust laws, allowing beer to be marketed through distributors enjoying geographic monopolies, Congress resisted.

The resistance comes from misunderstanding the industry and the point of antitrust laws. Now, after several years of jockeying, the Senate is considering a bill that includes the exemption, which deserves approval.

The practice in question is a well-established way of selling beer. Brewers market their products through only one distributor in each city or region, preventing competition among different wholesalers carrying the same brand of beer.

But it stands on uncertain legal ground. In 1977, the Supreme Court said arrangements like this, which previously had been regarded as a clear violation of the antitrust laws, were illegal only if they could be shown to stifle competition. It conceded that such practices often "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products," thus serving the interests of consumers.

But a growing number of legal scholars take that insight a step further, arguing that because the practice invariably promotes competition, it should be free from scrutiny. Rather than wait for an across-the-board change, the beer industry wants an exemption to protect it from costly lawsuits. Until Congress gets around to revising antitrust policy, the exemption makes sense.

Critics say exclusive franchises are bad for consumers. In this view, they only relieve wholesalers of the worry that other wholesalers will offer the same brand of beer at a lower price. This bill, say its opponents, will only further dampen competition in an industry whose four biggest producers control 80 percent of the market. If it passes, they predict soaring beer prices.

It's easy to see why distributors prefer exclusive territories. But why would the breweries go along? The monopoly profits, after all, are captured at the retail level by the wholesaler. What, in this scenario, does the brewery gain? It doesn't get a higher wholesale price, but it does get a reduction in total sales, which means lower profits.

Only a stupid brewer would go along with that, and the people running Miller and Anheuser-Busch aren't known for stupidity. If they had the power to boost their earnings by cutting output and raising prices, they would do it themselves, not let distributors do it for them. They grant exclusive franchises only because they get something back. What they get is not monopoly profits, but a competitive asset.

In exchange for granting a distributor sole rights to the product, the brewery imposes certain conditions. One is to spend money advertising and promoting its beer, in order to maximize sales. Another is to provide the beer to any retail outlet that wants it, however small. Another is to visit stores selling the beer to make sure they are displaying, refrigerating, and rotating it properly.

All of these tasks cost money. But the exclusive franchise makes it worthwhile for distributors because they reap the benefits of their investment.

In a city where there were 10 Budweiser distributors instead of one, no one of them would spend much on advertising or promotion, because in doing so it would pay 100 percent of the cost and get only 10 percent of the benefit. And each wholesaler would have an incentive to cut costs by spurning small purchasers and skimping on monitoring retail outlets.

While the arrangement may prevent competition among sellers of the same beer, it stimulates competition among sellers of different beers. By aligning the interests of the wholesalers with those of the brewery, exclusive franchises drive them to maximize sales. A market in which the rivals are trying to maximize sales is the antithesis of monopoly or oligopoly.

Contrary to what the opponents charge, there is plenty of interbrand competition in the American beer industry. That's why you see so many ads on television, as each tries to attract customers away from other beers. If that's not enough to keep the big breweries honest, there's the growing pressure from imports.

If the system of exclusive franchises didn't benefit consumers, it wouldn't have lasted. It would have collapsed under the onslaught of new breweries using cheaper, better distribution methods, enabling them to charge lower prices for the same quality of beer. That it survives in a vigorously competitive industry is strong evidence that it promotes efficiency. The antitrust laws should defer to the verdict of consumers.

Stephen Chapman is a nationally syndicated columnist.

Business and the Law

Nathaniel C. Nash

U.S.'s 'Fix-It' Antitrust Policy

WASHINGTON

ON Aug. 28, the Federal Government rejected the proposed $675 million acquisition of Eastern Air Lines by the Texas Air Corporation, asserting that it would significantly reduce competition in the Northeast shuttle markets. But in rejecting a deal that would have created the nation's biggest airline, the Department of Transportation clearly signaled to the two carriers that there was a way to "fix" the merger to make it acceptable to the Reagan Administration.

Last Friday, two and a half weeks later, Texas Air announced that it had agreed to sell additional landing and takeoff slots at La Guardia Airport in New York to Pan American World Airways, a move that would reportedly enable Pan Am to operate a fully competitive shuttle service with Eastern's and should meet the Government's objections. Approval by the Transportation Department was expected, although it was not immediately clear if yesterday's offer by Texas Air to acquire People Express would complicate the Eastern deal.

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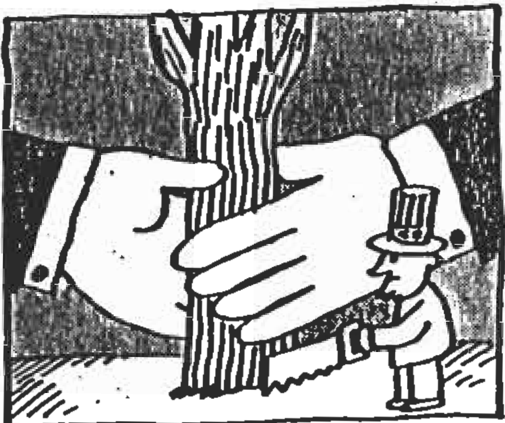
More and more, as corporate America seeks ways to grow by merger, this scenario of negotiating what is an "acceptable" deal under the Government's interpretation of the nation's merger laws is the mark of the Reagan Administration's antitrust enforcement policy. "Unlike any past administration, we've developed a fix-it-first doctrine for antitrust policy," said Charles F. Rule, Deputy Assistant Attorney General at the Justice Department's antitrust division. "Why stop an entire merger if simply one-tenth of the assets create an anticompetitive problem?"

Antitrust lawyers observe that the Administration has shown a remarkable willingness to negotiate with companies that are proposing mergers both because of its ideological preference for staying out of the marketplace as much as possible and because many of its officials believe strongly that mergers can cause efficiencies within the economy and should be encouraged. "Rather than try to block the entire merger, they target in on some particular problem and ask that a business be spun off," said Susan Blumenfeld, an attorney at Willkie Farr & Gallagher and a former official at the Federal Trade Commission.


Stuart Goldenberg

Mr. Rule noted that, in the past, if the Government thought that a merger would reduce competition in some areas, it generally had to oppose the entire transaction. That meant that large deals had to be completely undone or prevented even when the offending components were small.

He cited as an example the $5 billion merger in 1985 between the Allied Corporation and Signal Companies. "After studying it, we decided that there were 50 different markets with potential overlaps," Mr. Rule said. "But after looking into those markets, we found that only the market for jet engine starters created antitrust problems." He noted that, after negotiations with the Government, the companies had to spin off only $100 million worth of assets, a small amount compared with the entire merger.

But some see potential problems with the "fix-it-first" approach. They say it encourages companies to experiment with outlandish mergers in the hope that, after negotiations with the Government, the companies might be able to acquire more than they would have thought possible otherwise. They also question the long-term competitiveness of the components that are either spun off or sold and suggest that, in the end, competition may be lost anyway. They note that the Government cannot make the company acquiring the components continue operating them and that the acquiring company may be much less inclined to invest new capital if it is required.

"I don't know if we have enough accumulated evidence of what has happened to all these spinoffs that have been done to accomplish all those mergers, but then you would get an indication of how much you really preserve competition," said Sanford M. Litvack, a partner at Donovan Leisure Newton & Irvine in New York and President Carter's top antitrust official from 1979 through 1981.

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The Administration's "fix-it" policy on mergers has also been described as a kind of hidden industrial policy by which the shape of entire industries can be molded by the Government. Some antitrust lawyers also questioned whether the Justice Department and the F.T.C. were playing appropriate roles in negotiating a "fix" of a merger with the business community. "The fix-it policy turns the Justice Department from a prosecutor into a regulator," Ms. Blumenfeld said. "It is no longer the adversary, but rather the negotiator, and they end up doing it with a very light hand."

Mr. Litvack also questioned whether the Justice Department, the F.T.C. or even Transportation Department officials had sufficient expertise to make the kinds of value judgments about particular industries that are needed to figure out how to "fix" a merger. "Look who is deciding that 12 landing spots do not constitute a competitive shuttle service, but 15 slots are acceptable," he said. "We no longer have the Civil Aeronautics Board because of deregulation, so now the Transportation Department is acting as a regulatory agency, the very thing the Administration says it should not be."

Mr. Litvack added that, despite the concerns, "business loves the fix-it policy of the White House, and I love it as a private lawyer."

October 20, 1986

The Washington Times

THOMAS SOWELL

The monopoly bogeyman

People may argue about Keynesian economics, monetarist economics, or supply-side economics. But the actual decisions made by politicians and judges are dominated by bogeyman economics.

It would be impossible to understand those travesties of logic known as antitrust cases without understanding the bogeyman hovering in the background of the judges' thinking.

The hard evidence in many of these cases would not be enough to sustain a conviction for jay-walking. But a prosecutor who can weave together statistics and theories in such a way as to conjure up the specter of an outside chance of monopoly is well on his way to winning the case.

Courts have broken up mergers in which the two companies put together had less than 10 percent of the sales in the industry. One businessman convicted of an antitrust violation had fewer than 20 employees and more than 70 competitors. When judges believe that such defendants can "substantially lessen competition," you are no longer talking about evidence and logic, but about paranoia and bogeymen.

One of the big alarums of recent years has been over "monopolization" of newspapers in many communities. In this era of nationally distributed newspapers such as *USA Today*, *The New York Times*, and *The Wall Street Journal*, how anyone can monopolize the newspaper business in some local community is beyond me — but not beyond those who believe in bogeyman economics.

Currently, the antitrust division of the Justice Department is solemnly — or at least with a straight face — looking into a business deal among newspapers in Evansville, Ind. The deal can go forward only after Justice Department approval, and they will approve only after they have satisfied themselves that the net result will not be a local newspaper monopoly. During a recent visit to Evansville, I found both *USA Today* and *The Wall Street Journal* available in the hotel lobby at 6 a.m.

In Palo Alto, Calif., (population 50,000), you can get *The New York Times* and *The Wall Street Journal* delivered to your doorstep — or at least thrown in the general direction of the house. San Francisco and San Jose newspapers are also widely available in Palo Alto grocery stores, drugstores, and bookstores. Vending machines on the streets also sell these newspapers — plus Los Angeles and Sacramento papers and *The Christian Science Monitor.*

In reality, there has never been such a diversity of newspapers available all across the country — even in the boondocks — as during the present era of local newspaper "monopoly."

Statistically, however, Palo Alto is included among those blighted comunities where one locally produced daily newspaper has a "monopoly." In reality, there has never been such a diversity of newspapers available all across the country — even in the boondocks — as during the present era of local newspaper "monopoly."

Rapid transportation and electronic communication have vastly increased the area that can be served by a given newspaper, reducing the demand for locally produced papers.

It is only when this simple economic fact is seen through a fog of bogeyman visions that political and legal hysteria is generated.

According to bogeyman economics, monopolies are a constant threat to jack up prices and "exploit" the consumer. The irony is that far more antitrust cases have been prosecuted against companies for lowering prices than for raising them. When a more efficient company cuts prices and its competitors lose business because they cannot afford to follow suit, that is when they turn to the feds.

Some monopolies and cartels do in fact jack up prices beyond what they would be in a competitive market. But this is almost invariably with the help of government.

Government-regulated and subsidized sectors — from agriculture to the maritime industry — charge prices far above what the market would tolerate if politicians did not stifle competition.

One of the few genuine monopolies to arise independently of government was the Aluminum Company of America, which was the only producer of virgin ingot aluminum in the United States from the late 19th century until World War II. However, after half a century of Alcoa monopoly, the price of aluminum had fallen to less than a tenth of what it was originally, and Alcoa's rate of profit was a modest 10 percent.

Why? Because many things that are made of aluminum could also be made of tin, steel, copper, wood, and many other materials. Potential substitutes reduce even a total monopoly's opportunity to act the way bogeyman economics expects. Competition does a much more effective job of protecting consumers than government.

Thomas Sowell, an economist, is a senior fellow at the Hoover Institution.

The Wall Street Journal

December 11, 1986

Predatory Fantasies

By a vote of 6 to 2 Tuesday, with Justice William Brennan Jr. writing the majority opinion, the Supreme Court cleared one more antitrust cobweb out of the national attic. The court said that when a company tries under the antitrust laws to block a merger by a competitor, it must show that it is threatened with injury "that flows from that which makes defendants' acts unlawful." That means the complaining company can't just run to court claiming that the merger will squeeze its profits.

The court could have gone further. But even as it stands, the opinion is not a bad day's work.

The case that produced the opinion started when Excel, the second-largest firm in the very competitive beef-packing industry, agreed to buy company number three. Monfort of Colorado, number five on the totem pole, sued. Monfort claimed that the new, larger Excel would pay more for its cattle and sell its beef for less in order to put competitors into a damaging price-cost squeeze.

On this basis, sad to say, Monfort got an injunction against the merger. An appeals court affirmed the decision, finding Monfort threatened by "a form of predatory pricing."

But the Supreme Court reversed. In its *Brunswick* decision the court had already said that a plaintiff seeking antitrust damages had to show injury from a real antitrust violation. This time Justice Brennan declared that the same was true for a plaintiff seeking injunctive relief.

Moreover, the "price-cost squeeze" threat complained of by Monfort was not the same as the predatory pricing that violated the antitrust laws.

For one thing, Monfort had never really claimed that Excel was going to sell its beef below cost. No "below cost" means no predatory pricing. Even if Monfort had alleged real below-cost predatory pricing, said Justice Brennan, "we doubt" whether the facts supported the claim. Even after the merger, Excel wouldn't have the market power or capacity to wage a successful campaign of predation.

The Justice Department submitted a brief urging the court to go further and rule out suits based on "necessarily speculative claims of post-acquisition predatory pricing." The court declined but said, quoting a prior decision, "Predatory pricing schemes are rarely tried, and even more rarely successful." "Claims of predatory pricing must," warned a footnote, "be evaluated with care."

So if you want to go before the courts claiming a threat of predatory pricing, you'd better take along some documents to prove your case.

Judges have always written about the antitrust laws in two languages—the language of distrust toward people able to exercise economic power and the language of markets, rationality and efficiency. Depending on which language you choose, you will view a competitor squawking over a merger either as a sign that there's wrongdoing afoot or as merely the predictable outcry that accompanies any market-efficient acquisition.

The distrust is probably unavoidable in a democracy. The respect for economic realities is necessary, though, if a country wants to avoid swimming stubbornly toward oblivion on the sea of its own rhetoric.

The justices have taken one more step to adjust the balance, with the decision itself and the type of reasoning they used to get there. It's good to know the courts are capable of this kind of self-correction.