Josh Wright and the Limits of Antitrust
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Thomas Lambert

Alden Abbott and I recently co-authored an article, forthcoming in the *Journal of Competition Law and Economics*, in which we examined the degree to which the Supreme Court and the federal enforcement agencies have recognized the inherent limits of antitrust law. We concluded that the Roberts Court has admirably acknowledged those limits and has for the most part crafted liability rules that will maximize antitrust's social value. The enforcement agencies, by contrast, have largely ignored antitrust's intrinsic limits. In a number of areas, they have sought to expand antitrust's reach in ways likely to reduce consumer welfare.

The bright spot in federal antitrust enforcement in the last few years has been Josh Wright. Time and again, he has bucked the antitrust establishment, reminding the mandarins that their goal should not be to stop every instance of anticompetitive behavior but instead to *optimize* antitrust by minimizing the sum of error costs (from both false negatives and false positives) and decision costs. As Judge Easterbrook famously explained, and as Josh Wright has emphasized more than anyone I know, inevitable mistakes (error costs) and heavy information requirements (decision costs) constrain what antitrust can do. Every liability rule, every defense, every immunity doctrine should be crafted with those limits in mind.

Josh will no doubt be remembered, and justifiably so, for spearheading the effort to provide guidance on how the Federal Trade Commission will exercise its amorphous authority to police "unfair methods of competition." Several others have lauded Josh's fine contribution on that matter (as have I), so I won't gild that lily here. Instead, let me briefly highlight two other areas in which Josh has properly pushed for a recognition of antitrust's inherent limits.

Vertical Restraints

Vertical restraints—both intrabrand restraints like resale price maintenance (RPM) and interbrand restraints like exclusive dealing—are a competitive mixed bag. Under certain conditions, such restraints may reduce overall market output, causing anticompetitive harm. Under other, more commonly occurring conditions, vertical restraints may enhance market output. Empirical evidence suggests that most vertical restraints are output-enhancing rather than output-reducing. Enforcers taking an optimizing, limits of antitrust approach will therefore exercise caution in condemning or discouraging vertical restraints.

That's exactly what Josh Wright has done. In an early post-*Leegin* RPM order predating

Josh's tenure, the FTC endorsed a liability rule that placed an inappropriately heavy burden on RPM defendants. Josh later laid the groundwork for correcting that mistake, advocating a much more evidence-based (and defendant-friendly) RPM rule. In the *McWane* case, the Commission condemned an exclusive dealing arrangement that had been in place for long enough to cause anticompetitive harm but hadn't done so. Josh rightly called out the majority for elevating theoretical harm over actual market evidence. (Adopting a highly deferential stance, the Eleventh Circuit affirmed the Commission majority, but Josh was right to criticize the majority's implicit hostility toward exclusive dealing.) In settling the *Graco* case, the Commission again went beyond the evidence, requiring the defendant to cease exclusive dealing and to stop giving loyalty rebates even though there was no evidence that either sort of vertical restraint contributed to the anticompetitive harm giving rise to the action at issue. Josh rightly took the Commission to task for reflexively treating vertical restraints as suspect when they're usually procompetitive and had an obvious procompetitive justification (avoidance of interbrand free-riding) in the case at hand.

Horizontal Mergers

Horizontal mergers, like vertical restraints, are competitive mixed bags. Any particular merger of competitors may impose some consumer harm by reducing the competition facing the merged firm. The same merger, though, may provide some consumer benefit by lowering the merged firm's costs and thereby allowing it to compete more vigorously (most notably, by lowering its prices). A merger policy committed to minimizing the consumer welfare losses from unwarranted condemnations of net beneficial mergers and improper acquittals of net harmful ones would afford equal treatment to claims of anticompetitive harm and procompetitive benefit, requiring each to be established by the same quantum of proof.

The federal enforcement agencies' new Horizontal Merger Guidelines, however, may put a thumb on the scale, tilting the balance toward a finding of anticompetitive harm. The Guidelines make it easier for the agencies to establish likely anticompetitive harm. Enforcers may now avoid defining a market if they point to adverse unilateral effects using the gross upward pricing pressure index (GUPPI). The merging parties, by contrast, bear a heavy burden when they seek to show that their contemplated merger will occasion efficiencies. They must: (1) prove that any claimed efficiencies are "merger-specific" (i.e., incapable of being achieved absent the merger); (2) "substantiate" asserted efficiencies; and (3) show that such efficiencies will result in the very markets in which the agencies have established likely anticompetitive effects.

In an important dissent (*Ardagh*), Josh observed that the agencies' practice has evolved such that there are asymmetric burdens in establishing competitive effects, and he cautioned that this asymmetry will enhance error costs. (Geoff praised that dissent here.) In another dissent (*Family Dollar/Dollar Tree*), Josh acknowledged some potential problems with the promising but empirically unverified GUPPI, and he wisely advocated the creation of safe harbors for mergers generating very low GUPPI scores. (I praised that dissent here.)

I could go on and on, but these examples suffice to illustrate what has been, in my opinion, Josh's most important contribution as an FTC commissioner: his constant effort to *strengthen antitrust's effectiveness* by *acknowledging its inevitable and inexorable limits*. Coming on the heels of the FTC's and DOJ's rejection of the Section 2 Report—a document that was highly attuned to antitrust's limits—Josh was just what antitrust needed.

Filed under: antitrust, Efficiencies, error costs, exclusive dealing, federal trade commission, JDW Symposium, merger guidelines, section 5, vertical restraints Tagged: Federal Trade Commission, ftc, joshua wright, Symposium

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