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Antitrust: Will it Change the Lives of Telecommunications Executives?

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Moderator: Deborah Ellenberg[*]

{1} Good afternoon. This is the last panel of the afternoon. I would like to introduce myself. I'm Deborah Ellenberg, one of the hearing examiners at the State Corporation Commission, and I might add, who has a heightened appreciation for the Virginia Commission's wise decision to handle those arbitrations. I am sure on behalf of Howard, Glenn and myself, we thank you for that decision.

{2} Today, Judge Miller's panel discussed how the Telecommunications Act is being implemented to date, and how other provisions might yet be implemented.

{3} Judge Morrison, Lewis Powell, and Professor Merrill dealt with who is going to pay for the new world and the deregulatory takings, and of course, the RIP (Regulation in Purgatory).

{4} It is my privilege to serve as the moderator of this last panel of the day. This distinguished panel will address the antitrust implications of moving into the competitive arena. Antitrust really has not been part of our everyday vocabulary in the traditional regulatory scheme, that is, in the old days . . . except, I guess, to the extent that it was closely followed by the phrase "State Action Immunity." Increasingly, in this environment it is and should be of concern. By the way, your free gift today for staying for the full afternoon is the free "Get Out/Stay Out of Jail Card." So listen very carefully to these three experts. To help educate and warn us, these three distinct panelists will, in turn, cover their special areas. Their biographies are in your book, so I will not review them in detail.

{5} But, I would like to first introduce you to Professor Glen Robinson on my left, who is the David A. Harrison Professor of Law at the University of Virginia.[1] Professor Robinson is our educator on the panel and he will generally discuss recent developments in antitrust law which may affect the telecommunications industry. Next, we have our prosecutor on the panel, Jim Wade with the Department of Justice.[2] Jim is going to tell you what he is looking for when he goes about investigating anti-trust violations. And, finally, we have our defense attorney, Mike Urbanski, with Woods, Rogers & Hazelgrove.[3] Listen very closely. He is going to tell you how to avoid violations. Please join me in welcoming our panel.

Glen Robinson

Associate Dean and Professor of Law, University of Virginia

Antitrust and Regulation in Telecommunications

{6} Some of the major Department of Justice antitrust cases against AT&T involved some potential conflict between antitrust objectives and the regulatory program.[4] However, the first case involved no important disruption of the Mann-Elkins Act[5] because it had not given the ICC jurisdiction over mergers and acquisitions, which was a central concern of the antitrust suit. In any case, the effects of antitrust were quickly dissipated by the Willis-Graham Act turning over jurisdiction to the ICC. The 1956 decree[6] also involved minimal threat to regulation. After all, the FCC had no direct jurisdiction over Western Electric which was the central target of the suit. In any case, the decree had no important impact on either AT&T or regulatory policy until after 1980, when it threatened to stand in the way of the FCC's new policy of deregulating telephone equipment markets. But the 1982 MFJ was a frontal challenge to regulation in the sense that it called into question the effectiveness of regulation over a large domain &SHY; all interstate telephone service. Although the FCC itself did not oppose the suit, in some ways it even collaborated in it. The core of the Department of Justice's case was that the FCC had been ineffectual in controlling AT&T and that regulation could not be trusted with such a task without radical restructuring of the industry &SHY; the breakup of the Bell System. It would not be much of an exaggeration to say that in the Department of Justice's eyes, and in Judge Greene's as well, the FCC was as much part of the problem as AT&T.

{7} As mentioned, AT&T sought in vain to invoke immunity on the basis of federal and state regulation. Given that a leitmotif running through the Justice Department's entire case was the argument that AT&T had captured the regulatory process, it is unsurprising that the defense got a poor reception from the court. The regulatory process was not to be accommodated; it was on trial.

General Trends in Antitrust

{8} Before jumping into predictions about what the future holds generally, it might be useful to say something about the general trends in antitrust. Richard Hofstadter divided the history of antitrust into three phases. The first, from 1890 to 1914, was characterized by efforts to define the contours of antitrust, to give shape to the formless mandate of the Sherman Act. By the close of the period, antitrust had become firmly established as a public concern, even if not as an effectively-enforced policy. Indeed, it was just such a concern, along with doubts about effective enforcement, that produced, in 1914, the Clayton Act[7] and the Federal Trade Commission Act[8] in order to strengthen the antitrust laws and invigorate their enforcement. Hofstadter's second phase, lasting from the end of World War I to about 1937, was an era of decline, both in enforcement and in public concern. Progressive-era hostility to big business was replaced by public acceptance or, at least, indifference. In the third phase, antitrust enforcement was revived without any noticeable revival of general public interest. Antitrust became the exclusive interest of legal and economic specialists. Antitrust, as a public movement, had become institutionalized into administrative enforcement.

{9} Hofstadter wrote in the mid-1960's, when antitrust enforcement was at its peak, the 1960s were the "go-go" years for antitrust. The government self-consciously set out to push the scope of antitrust as far as possible, and largely succeeded. By the end of the decade, the government antitrust enforcers seemed nearly invincible in court, and antitrust policy became largely a function of prosecutorial discretion.

{10} The "go-go" years of antitrust have gone. Some think this is good, some think it bad, but most observers think it is a fact all the same.

{11} "Most observers" includes me; however, I have to concede that measuring levels of activity in this field is a vexing task. First, it is unclear *whose* activity one should measure. Many of our most important precedents in antitrust are private cases, so it would not be sensible to ignore them. On the other hand, public enforcement actions of federal authorities generally drive common perceptions about antitrust &SHY; including, I think, the perceptions of antitrust lawyers. Second, it is unclear *what* activity to count. Should one count complaints filed? Or, at least in the case of public enforcement, investigations? Or cases actually litigated? Each of these measures contains misleading information. For example, counting claims filed could be misleading both in under and overstating enforcement. What one wants to know is what kinds of complaints were filed and for what kinds of activities. Complaints filed for local bid rigging give you one idea of enforcement; complaints filed to prevent mergers or to challenge major industry monopolization give you quite another. Moreover, the mere filing of a complaint is hardly a good measure of the level of activity. A popular perception of the Reagan Administration was that it was soft on antitrust. Indeed, the number of civil cases filed in the 1980's was below that of the 1970's or the 1990's, but it was the Reagan Administration that successfully concluded the largest, and some might say, the most important antitrust case in history, the one against AT&T.[9]

{12} So, it is hard to know what to make of mere figures. There is, nevertheless, a strong perception that antitrust has become a much less important influence on basic industrial structure. The usual evidence cited is the fact that mergers and acquisitions have increased without significant constraint from antitrust. Thirty-five years ago, in the wake of *United States v. Philadelphia National Bank*,[10] it would have been unthinkable that the recent merger of Chase Manhattan and Chemical Bank would have been consummated without antitrust challenge.

{13} I am not complaining. Most of the current merger activity probably do not present serious antitrust dangers. But, of course, that could have been said as well of mergers in the 1960's. Was the merger of Brown Shoe and Kinney a *real* threat to competition in shoe retailing? Or Von's Grocery's acquisition of Shopping Bag a threat to grocery store competition in Los Angeles? Cases like *Brown Shoe v. United States*[11] and *United States v. Von's Grocery*[12] have been the object of ridicule for more than a generation. Sad to say, however, they are not only still on the books, they are still the last word (almost) from the Supreme Court on the scope of antitrust concerns.[13] No one expects the Justice Department, these days, to bring another *Von's Grocery* case, but that only reinforces the lack of currency between the law on the books and the law on the streets.

{14} *Von's Grocery* is not entirely useless to antitrust. Its continued presence serves to reinforce the Justice Department's threat value in antitrust enforcement. Interestingly, however, the threat value has been actualized in what is essentially a regulatory role. The government does not bring suits to win them, rather it brings them now to ratify a negotiated settlement with the acquiring firm.

Recent Telecommunications Cases

{15} In recent times the pace of transactional activity in the communications industry has increased dramatically. The pace was accelerated by the 1996 Telecommunications Act[14]. In telecommunications the most noteworthy cases are the proposed acquisition of MCI by British Telecom, and the two BOC mergers: SBC-Pacific Telesis and Bell Atlantic-Nynex. The SBC-PacTel merger has been cleared by the Justice Department but awaits state and FCC regulatory approval. While British Telecom-MCI has raised a few eyebrows, it is not clear whether the occasion for such eyebrow lifting is the product of antitrust concerns or international trade strategy.

{16} The Justice Department's clearance in the SBC-PacTel case and its expected clearance in Bell Atlantic-Nynex conforms to its clearance of other mergers within and without the communications industries, so it is not especially surprising. For merger law, it seems to confirm that if the markets are large, and tolerably competitive, there will be no interference from federal antitrust authorities. True, none of the pending transactions involves a straight, horizontal merger that eliminates existing competitors, but the Bell Atlantic-Nynex comes pretty close. It is almost a classic example of a potential competition merger that, in an earlier day, would have been challenged.

{17} So, is antitrust dead, moribund, or hiding? Well, not dead, and maybe not moribund either. Hiding might be literally closer to the mark in the sense that much of the work of official antitrust now appears to be done out of public sight. As I remarked earlier, much of the recent role of the Justice Department in mergers and acquisitions seems to consist of bargaining in the shadow of the antitrust laws. Combining Hart-Scott-Rodino powers[15] of pre-merger investigation with judicial standards set at a time when antitrust intervention was at its zenith, the Justice Department, along with the FTC, has enormous bargaining leverage in merger cases.

{18} In hiding or plain sight, antitrust no longer commands the public attention it once did. The antitrust "movement" is long gone, as Hofstadter observed thirty years ago. It is not simply that the industrial world has changed, though it has, of course. There has been a sea of changes in our intellectual attitude toward the need for antitrust. Increasingly, antitrust has been marginalized, not necessarily in the usual pejorative sense, but in a quite literal sense of being important only at the margins of public policy. This use of antitrust to make minor corrections in markets is not a bad thing. Such a modest use minimizes the cost of errors of over-aggressive interference with market forces. In the present environment, I think these are the errors that most need to be avoided. Beyond that, I doubt that antitrust has any useful purpose in telecommunications. We might look askance at some of what we see in the communications field right now: firms acquiring other firms like there was no tomorrow, entrenched local monopolies in telephony and broadband television, and some evidence of sub-par performance by regulated companies. Realistically, however, there is not much antitrust can do, right now, to promote greater competition in local telephone markets or in broadband video markets. Competition is coming of its own force, aided somewhat by a more enlightened regulatory attitude. It is very unlikely that antitrust intervention will drive the introduction of competition any faster.

{19} In all events, I would not look to antitrust as an *alternative* to regulation. Recall that this was the ambition of the government in the 1974 case, and it backfired. Breaking up the Bell System may have been useful as a spur to a more competitive and more dynamic industry, but once the divestiture was fully implemented, antitrust policy became simply another source of regulatory policy. The result was a confusion of policy and an excess of regulation. Counting the court and the Justice Department as separate policy makers (as they came to be), there were three federal regulators, instead of one. Of course, to these must be added some 50 state regulators.

{20} Although the Justice Department, itself, came to see the MFJ as a barrier to advancing competition and supported its retirement under a new legislative regime, it appears not to have any misgivings about its continued role as a supplementary regulator in this field. Illustrative is the 1994 McCaw Cellular consent decree. The object of the government's antitrust challenge to AT&T's acquisition of McCaw was to ensure that AT&T's competitors would have equal access to the AT&T-McCaw cellular systems. This is unexceptionable, but it is precisely the kind of regulatory purpose that is normally carried out by the FCC. In fact, the effect of incorporating this type of purpose into an antitrust decree is to allocate a continuing regulatory responsibility to the Department (and, of course, the court) for monitoring compliance, interpreting the terms (for instance, what is entailed by the equal access conditions), and possibly entertaining waivers. I predict the time will come when AT&T will seek a waiver of the separate subsidiary requirement. Still, more recently in connection with deliberations over the 1996 Telecommunications Act, the Department sought to replace its lost regulatory role under the MFJ with a major supervisory role in the FCC's certification of local exchange competition. Fortunately, Congress was sufficiently suspicious of adding still another layer of regulation (on top of the states and the FCC) that it limited Justice to an advisory role.

{21} I do not suggest minimizing the antitrust role in order to maximize the regulatory role of the FCC or the states. There is already too much regulation. Sad to say, the 1996 Telecommunications Act did not significantly reduce regulation despite Congress' professed ambition to do so. In the wake of the 1996 Act, there was an outpouring of new regulations from the FCC unequaled in the history of telecommunications regulation. The explanation for most of the regulation is that it is designed to make the world of telecommunications safe for emerging competition, and there is an implied assurance that it will disappear when some markets have shown themselves to be fully competitive and well-behaved. Unfortunately, from the regulatory perspective, the creation of well-behaved markets always seems to be a future prospect rather than a present reality. There always seems to be more things to do to add that extra ounce of regulatory prevention. In light of this regulatory penchant, the highest and best use of antitrust powers is not to focus on the markets or the industry but to focus on the regulators to make sure that, in their zeal to protect competition, they do not stifle it.

Michael Urbanski
Attorney, Woods, Rogers & Hazelgrove

{22} Thanks, Jim. Well, I see I have got four minutes. You all may think that this is something that occurred by happenstance, but actually the timing has been carefully contrived to keep any of you from asking me what ILEC means.

{23} I come from a totally different world from all of you. I am not a professor, a prosecutor or a regulator. I am an antitrust lawyer. I have tried antitrust cases, both criminal and civil, and I worked on one of the few antitrust criminal investigations in the telecommunications industry. I was also involved in a civil case under the Cable Act. My purpose here today, however, is to give all of you, who are new to competition, a glimpse from either the defendant's or, depending on whether it is a criminal or civil case, the target's perspective into the darkness and despair of the antitrust nightmare.

{24} Once you understand the nature of that desperate dream, it is my intention to provide you with some suggestions to avoid encountering the kind of permanent sleep disorder that can come from having the FBI visit you at home or at night, and telling you that what you thought you were doing in your job was really a felony.

{25} Let us start at the end. You are in a court of law sitting next to your lawyer, and there they are--the jury. They are a box full of strangers who hold your company's future or your life in their hands. What are they likely to think about antitrust and corporate America? First, given the background of most jurors, they are going to be overwhelmed by any of the stuff we have heard today because I am too. They are going to be overwhelmed by the economic, industrial, and policy issues presented to them. They are, in short, likely to have the same sort of bewildered glaze over their eyes that each of us had when we first read the Telecommunications Act of 1996.

{26} One juror, interviewed after listening to an antitrust case, put it this way: "I thought I just got off the plane in Tokyo. Everything looked and sounded Japanese. I was totally lost." Again, the analogy to the 1996 Telecommunications Act is wholly appropriate. Jurors in antitrust cases, just like jurors who are sitting today in Denver listening to the Timothy McVeigh case, will focus on what *they* think is important, not what is important to *your* business, or what may be significant, or even relevant, in legal terms.

{27} What we think is important, how we chose to spend our lives as lawyers, or businessmen or government officials, frankly, is not terribly exciting stuff. And it will not evoke the kind of emotional reaction that they are going to have in Denver, or the type that we recently had in Los Angeles at another famous trial. Jurors simply have a hard time identifying with a faceless corporate defendant, and to these cases they bring their perspective as one of your customers. Jurors are going to focus on one issue: "How does this impact my pocket book?" A focus which is completely consumer-oriented.

{28} So issues such as whether the defendant's conduct affected consumer prices, whether the defendant abused its size or market power or market position, and what the jury can do to make sure this never happens again are going to be paramount. Jurors dislike, or are afraid, of monopolists, regulated or unregulated. They feel captive and at the mercy of monopolists. Consequently, in a monopolization or attempted monopolization case, defendants face an uphill battle from the start.

{29} Combined with a skepticism toward monopolies, jurors are going to have a suspicious attitude toward corporate America. Frankly, jurors view large corporations as being unethical by nature. Some jury studies find that up to 75% of antitrust jurors think that the large corporations will regularly use unethical and unfair tactics to bully small customers and squeeze them out of the market. Jury studies seem to indicate that 75% of the jurors think that large companies can and do fix prices. On the other hand, jurors tend to have an idealized view of small businesses. They think that small business is the embodiment of the American dream. If you are a large company, or you are representing a large company, you have to be concerned with these kind of predispositions.

{30} Now, what are the kinds of antitrust practices that concern jurors? Certainly predatory pricing is one of them. In antitrust law, the standard is average variable cost. Jurors are concerned with whether you price your products and services below average variable cost. Now is a juror going to understand that? No, they are not going to understand accounting defenses and those kind of things. They are going to be focused on the content of your files, and what documents seem to indicate, "well, if we do this, we can control the market," or "if we do that, we can smash the competition," or as I had in one case, "run the other guys out of town." Certainly from a juror's perspective, they are going to latch onto that one little document that you have in your file. This raises a good point--you need to be careful about what you write and what you say because these kind of memos may not be important to the Antitrust Division, or to the judge, but they are important to your neighbor who is going to be sitting in judgment of you. Currently, those little documents are more important than a whole courtroom full of cost studies.

{31} Jurors also are concerned about tying arrangements and exclusive contracts. They seem to think that this kind of exclusivity is wrong in and of itself.

{32} Finally, what I want to focus on for the rest of my two minutes is the fact that we live in the "Oliver Stone"generation, and jurors think conspiracies are everywhere. In fact, antitrust prosecutors think that, too. Jurors tend to be skeptical if competitors change prices at the same time. They will think that it is part of some grand conspiracy. They will tend to be even more skeptical if there happens to be phone calls and communications between those competitors at the same time.

{33} The case I had in the telecommunications industry was a criminal price-fixing investigation of three local television stations accused of fixing prices for advertising revenue. The Justice Department was particularly concerned because there was a host of calls that went on between the stations every day. Even though it was ultimately determined that there was no evidence of collusion, the prosecutors were particularly interested in those calls that happened to be made on the speaker phone. The people that were summoned to the grand jury were the people in the room next to the person who was talking on the speaker phone. They spent days testifying to what they overheard in bits and pieces of those conversations. So, if you have a speaker phone, do not use it.

{34} Seriously, communications between competitors is a very sensitive concern and, as Jim pointed out, they can amount to naked price fixing. One of the most fertile areas for government investigation of price fixing will be the kind of thing that we are going to go to at six o'clock, which is a cocktail party where competitors are present. Alcohol will be flowing; people may let their guards down a little bit and talk about a competitively sensitive issue such as pricing. Let me give you an example of that.

{35} A few years ago I was in Washington at the ABA Antitrust Section meeting at the Shorham Hotel. The room was populated with antitrust lawyers, regulators, and people just like Jim, and they were walking around everywhere. One of my colleagues, who happened to represent a co-defendant in another case, actually asked me while we were having drinks, "What do you charge for antitrust cases?" It was great! I embarrassed him totally because I did what I tell people at antitrust compliance programs to do. When someone makes a comment like that to you, that is inappropriate and potentially dangerous, spill the drink. Additionally, say something to him like, "I can't believe you said that, my company will have nothing to do with that kind of behavior." You make a scene, which I did.

{36} The reason for making a scene is this. If it happens that five years later, the Department of Justice knocks on someone's door in the middle of the night (and this happens), and the FBI comes in, flashing their badges and saying, "We know there is price-fixing in this market, and we want to you to tell us about it," the only thing that someone will remember, then, is that Jim Wade spilled a drink, walked out of that meeting, and refused to have anything to do with it. People have been convicted criminally of antitrust violations just by being in the room where people are talking prices, and they did not get out of the way; they did not spill a drink; and they did not let other people know that their company was not the kind of company that tolerates this.

{37} Let me give you an example, which took place not in the telecommunications industry, but in a case involving realtors in Maryland a few years ago. It was during a real estate association meeting at the Congressional Country Club in Bethesda, Maryland, that one of the realtors stood up and said, "I don't know about you all, but I can go broke at 7% just as well as I can at 6%, and tomorrow that's where my rates are going to be."[16] Well, nobody said anything at all, and the realtor got up and left. Well, it just so happened that during the next week or month, everybody's rates went up to 7% for real estate commissions, and the Department of Justice prosecuted them criminally for an agreement to fix prices, which resulted in a conviction. It was upheld by the Fourth Circuit Court of Appeals, and some people will now go to jail for just that kind of behavior.

{38} Antitrust may be marginalized in mergers, and it may be marginalized in joint ventures, but when you are the target of a criminal investigation, believe me, you will not think it is terribly marginalized when your family, congregation, and reputation are on the line.

{39} Let's just talk briefly in the couple of minutes I have left about what jurors think about antitrust cases in corporate America. Let's go back to the beginning and see just exactly what happens when you find yourself facing this group of strangers in whose hands your future rests. Professor Robinson makes a great point in his article about the fact that there is not much currency between the antitrust laws on the books and the antitrust laws that are actually enforced and that are being applied by the courts. That is exactly right and what that does, unlike the Telecommunications Act of 1996,[17] where everything is clear, is cause flux in the antitrust laws that gives prosecutors a little bit of room to wiggle. As Jim told you, and his outline makes clear, under the antitrust laws there are both criminal and civil penalties. There are criminal penalties for violating the antitrust laws; they are felonies. Also, you can be fined civilly, you can to jail for up to three years and your corporation can be fined up to ten million ($10,000,000) for the act of one rogue employee.

{40} I represent a company now, in a case that sprung from an investigation which started in 1989. One person said he went and met with a bunch of his competitors and they did some bid rigging, according to him. Of course, defending the corporation, we don't think it ever happened, but he said he did it. Now what led from that? Well, an investigation ensued; he became the Government's chief witness; a criminal action took place; and individuals were prosecuted. Then, the state filed suit. Then another state filed suit. Eight years later we are facing two totally bogus class actions that have been filed on behalf of ambulance chasing antitrust lawyers from Washington, seeking settlements from defendants by dangling over the corporate head that enormous antitrust scimitar called treble damages and attorney's fees. Just about all the lawyers who bring these kinds of cases solicit them. They find a customer, they solicit them, they bring the action. The lawyer gets all the money, the customers get virtually nothing. But, these guys have houses in the Virgin Islands, and poor defense lawyers do not.

{41} It starts with a grand jury subpoena. You get it served at your desk at work, and you say, "What is this? Oh, it's a document, let's give it to the lawyers. I am sure it is just a merger deal, it is not a problem." Then you show it to the lawyers and your first reaction to them, "Why did this happen?" "Where is it coming from?" Well, we never really know, but it usually comes from a disgruntled employee, somebody you just fired. It could come from a competitor; it could from another agency making a referral. It could come, as it happens, from the Department of Justice's full employment plan. They just travel up the east coast investigating all these industries. It can come from customer complaints; it can come from a lot of different places.

{42} Well, what does the grand jury subpoena do? It requires you to produce. I will go to your office as your lawyer. I will sit there and catalog everything in your office, every single thing. Every piece of paper. If you get a phone message today, the typical Department of Justice's subpoena says it is a responsive document. So, I must tell you. If you received phone messages that you would normally throw away, put it in a box behind your desk, because we are going to have to produce that to the Department of Justice. It will be every document that has a phone number on it, for example. We had an investigation in the bottling industry a few years ago which we had good relationships with the lawyers on the other side, and there was a Victoria's Secret catalog that one of the secretaries had written a phone number on. It was technically responsive to the subpoena. So among the hundreds and hundreds of thousands of pages of documents that we produced that was document 00001. Of course, it was the most dog-eared of documents as well.

{43} Here is how they will make their investigation. Here is how they will make their case. They will get your phone records. Phone records are very detailed. They will see who is calling who, and from which extension at which time. They will get them from you. They will get them from all your competitors where they think price fixing is going on. They will get your expense accounts. Nobody wants to give their expense accounts. But, they get your expense accounts. They put them in a computer, and they plot them against where your competitors are. Are they at the same restaurants? Are they claiming the same kind of things?

They will get your calendars; they will see where you went. They will get your diaries; they will see where you went. In the television investigation that I handle, we suspected that they actually had wire taps on employees. They actually had a van outside my client's station. They were making movies of where our people went during that process.

{44} Your attorney will take every document from your office that is responsive. It will typically be hundreds, or of thousands of pages. The typical cost is a $1 or $2 per page to produce it to the government, because you have to review it for privilege, you have to number it, you have to look at it, and, in the case of the Victoria Secret catalog, you have to look at it again and again. You have to conduct interviews. It's an amazing disruption to your business that is done at an enormous cost.

{45} Once the documents are produced, what is typically hundreds of thousands of pages, you begin the grand jury process. In addition to a grand jury subpoena, all of your friends, all of your co-workers, all of your former employees are going to be interviewed by the FBI. It won't be fun; it won't be at the office; they will be at your home at night. Employees have called me up and said "the FBI is here, what should I tell them?" Of course, you cannot tell them to not talk to the FBI. That would be wrong.

{46} Often, what happens in these situations is that not only do you have to have lawyers for the company, but a person will have to have separate counsel if that person is a target of the investigation. If there are other people involved in the alleged investigation, they will have separate counsel. So fortunately, this kind of antitrust is not marginalized, and fortunately for us defense lawyers, it's a really good thing. You have to have lots of different lawyers because some of them have conflicts of interest. They will interview your employees, your customers, your competitors, sometimes examine wire taps, video surveillance, and those kinds of things. It is a frightening process.

{47} If you do go to the grand jury, it's the Spanish Inquisition. The lawyers aren't allowed in. The only people there are the grand jurors and the prosecutors. If you think that it is a totally two-sided process in which these people are going to be expected to reach a fair and impartial judgment based on the one-sided evidence that's presented to them, you are wrong. Basically, antitrust cases are handled by very highly skilled lawyers at the Department of Justice, and if they want to get an indictment, they can and will do it.

{48} There are a couple of other concerns, beyond just the antitrust offenses themselves. When you make a stupid comment at a cocktail party tonight, a couple of other things might happen. In our television case, for example, not only were we worried about people going to jail, not only were we worried about antitrust issues, we were worried about the atomic bomb, we were worried about licensure. You've got to be worried about licensure, you have got to be worried about debarment in a lot of different settings. There was no question in these kinds of cases. Again there can be no question about a guilty plea because once you do that, you run down the road of licensure problems and debarment.

{49} The substantive antitrust offenses in section 1 of the Sherman Act,[18] which are prosecuted criminally, are price fixing, bid rigging, and group boycotts. That is where a few of you decide you want to keep this guy out of the market and you get together. That is just as much a crime as price fixing and bid rigging.

{50} In addition, there are some other offenses you have to be worried about in this nice process that I am talking about. Suppose you happen not to like those documents you have in your file after you get a grand jury subpoena and you dispose of some of them, well that's obstruction of justice. That's a crime in and of itself. If you decide you want to tell to the person who works for you that "you might not want to remember all those speaker phone conversations I had with my competitor," well, that's another substantive offense, obstruction of justice. There is also perjury if you happen not to tell the truth. If you make a false statement to any government official, that can be a violation of 18 U.S.C. 1001[19], which is making false statements to the government. There is also a potential for violation of Section 43(a) of the Lanham Act[20] that can give civil problems, but that's for another day.

{51} If these days you are engaged in a criminal conspiracy and you put something in the mail, in addition to the Sherman Act problem, obstruction of justice problem, or perjury problem, you could be involved in mail fraud. If you send something over the Internet, if you send something by fax, if you do something over the phone, every time you do those acts, it's a separate count, a separate felony of wire fraud. Once all this criminal stuff is over with and it's all behind you, you'll get these crazy solicited civil suits.

{52} Once this process is over, this is how you will feel. Well, you will feel incredibly stupid for ever getting yourself involved in this mess in the first place. Second, you will feel like you yourself were a victim of the legal system. You will feel like signing up as the latest member of the New Republic of Texas. Also, believe you me, and I thank you for it, you will feel economically challenged.

{53} Let me conclude by saying that there are some things you can do about this. You can start, and I am sure most of the companies that are here have these kinds of programs, by having an effective antitrust compliance program where you educate your employees into the perils of what I call the "red light theory of antitrust". We are not talking about mergers, we are not talking about joint ventures, we are talking simply about how to stay out of criminal trouble and you do that by avoiding talking about the substance of your business, particularly price with your competitors. That's the red light theory of antitrust. That's my "theory of spill the drink" if they start it. It embarrasses them and may embarrass you now, but it will save you a lot in the end.

{54} Corporate antitrust programs also have the benefit of not only educating your employees about substantive antitrust violations but they have two other benefits. One, the federal sentencing guidelines require the courts take into consideration, as a mitigating factor, an effective antitrust compliance program. Secondly, we have been successful, even in situations where there has been an antitrust violation found, of beating back debarment by having an antitrust compliance program in place. There are some requirements of an effective program. It has to be in writing. There needs to be a compliance officer. There has to be employee training, some oversight, and some follow-up. The requirements are pretty well defined in the literature. The Department of Justice also has a corporate amnesty program if any of you feel like you want to come and lean on their shoulder. They will talk to you about the Department of Justice antitrust amnesty program.

{55} The only other word of wisdom that I will say here is that antitrust stuff is not really that hard. The analysis is only really three-fold. One is to consider whether your discussions are price or non-price related? Price is a big problem. Non-price may or may not be.

{56} Two, is the relationship vertical or horizontal. Are they a competitor, are they a distributor or at another level? It is obviously a more sensitive antitrust concern if they are a competitor as opposed to being at another level in the market.

{57} Three, what level of market power is involved? If you are talking price with your competitor, forget it, you don't even have to worry about market power because you are going to the big house.

{58} Again, the goal is not to make any of you think like antitrust lawyers, to make any of your employees think like antitrust lawyers. The goal to have enough sense about what to stay away from. Your lawyers can help you with these programs and can help you with these audits.

{59} I appreciate the opportunity to have provided you with a non-telecommunications lawyer's view into these proceedings. I hope they were helpful and I will just close with one word to the wise. Be wary of Mr. Wade of the Justice Department, he is watching. Thank you.

James R. Wade

Attorney, Department of Justice, Antitrust Division, Telecommunications Task Force

{60} What I would like to do today is direct my remarks to some issues with a little different emphasis than Professor Robinson. In particular, I would like to talk about some of the Anti-trust Division's non-merger related enforcement activities; that is, enforcement of the prohibitions of Sections 1 and 2 of the Sherman Act.[21] The Division has both criminal and civil enforcement powers. I would like to start by explaining a little bit about the standards we apply in each of these areas.

{61} The first distinction I would like to draw is how we decide to proceed, civilly or criminally, in investigating potential Sherman Act violations. The Antitrust Division Manual explains that the Department of Justice will commence a criminal case where the conduct involved would constitute a per se offense under the antitrust laws. This includes conduct such as naked price fixing, bid-rigging, or territorial allocation schemes. Generally speaking, we may also proceed criminally in those instances where there is evidence that the defendants knew that they were violating the law and, in fact, acted in flagrant disregard of the law.

{62} I want to give you one recent example that you may have read about in the papers. It involves the food additives industry rather than telecommunications. It is the so-called citric acid conspiracy.[22] This example is based on testimony presented in open court in connection with that investigation. In this case, there were a number of high level executives at major firms holding meetings throughout the world where they would agree to the broad terms of a conspiracy to fix prices. This group of senior executives were referred to as "the masters." At the same time, there was a group of lower level officers from each of the firms, referred to as "the sherpas," who were responsible for meeting and working out the details of the terms of the conspiracy and its implementation. Indeed, as you will see, the sherpas worked out a fairly elaborate enforcement scheme for policing the workings of this cartel. What they did was to arrange for all of the conspirators to agree on the prices each firm would charge for citric acid, and on the precise percentage, down to the tenth of a decimal point, of overall sales each firm would be allowed to sell worldwide. Each company would then share its monthly sales figures with the other members of the cartel so that everyone would be able see whether anyone was failing to abide by the agreement. They even devised an elaborate "rebate" mechanism at year-end where each firm would review the annual sales of all the other co-conspirators. Any company that had sold more than its allotment would be required to pay back the appropriate amount to the company or companies that had not reached their agreed upon sales level. I think we can all agree that this is the type of conspiracy the Department of Justice will look at very unfavorably. In fact, to date, there have been criminal charges brought against six different companies, five high-ranking officials at those companies, and over $170 million in fines.

{63} Unfortunately, as many of you may know, this money does not go directly into the Antitrust Division account; a fact, which I personally think, is quite unfortunate. Seriously, the clear result of this conspiracy was to raise the price of citric acid. Because that product is used in a number of mass marketed consumer products, primarily soft drinks and processed food additives, every household in America was being affected by this conspiracy.

{64} Now, contrast this case with another, which I will refer to as the NASDAQ case.[23] This was also a fairly recent case where the Department elected to proceed civilly. Here, twenty-four major securities firms entered into a horizontal agreement to maintain artificially wide spreads. The "spread" in this context is the difference between the bid price and the asking price for securities. The effect of this agreement was to increase the commissions that these dealers were receiving at the expense of the consumer purchasing the stocks. The mechanism used to implement this particular scheme was an "industry convention" that all dealers were informed of when they went to work for one of these firms. In fact, each dealer was told as part of his training that he or she should comply with this convention, which mandated that they should not bid in odd one-eighths ('s) of a point. The effect of this arrangement was to keep the spread artificially higher than it would have been otherwise, to the direct detriment of the stock purchaser. The Department of Justice looked at this practice and elected not to proceed criminally. Why not? First, it was an industry practice which traders followed almost as a matter of custom rather than as an explicit or implicit agreement. Secondly, there was no enforcement mechanism like the type seen in the citric acid conspiracy. In fact, the evidence suggested that sometimes when the convention was violated there might be some "retaliation" in the form of harassing phone calls or the like, but in other instances there was no response whatsoever. Thus, there was no consistent mechanism for enforcing the agreement and the Department concluded that the agreement was too thin to merit criminal prosecution. On the other hand, the Department did vigorously pursue a civil investigation which culminated in a consent decree aimed at ending this practice and ensuring that this type of arrangement would not re-surface in the future.

{65} Of course, what I spend most of my time doing are civil investigations. I'd like first to talk about how we analyze horizontal agreements, that is agreements between direct competitors. I would like to draw your attention to a doctrinal development in Sherman Act Section One[24] jurisprudence that my boss, Assistant Attorney General Joel Klein, has been promoting for some time. He refers to it as the "stepwise approach" to the analysis of horizontal agreements.[25] Now traditionally when you examine horizontal agreements, you either apply what is known as a per se analysis where the practice is summarily condemned without the need for demonstrating the actual anti-competitive effects of the agreement, or the so-called "Rule of Reason" analysis, which requires an in-depth analysis of the practice, the market structure in which it operates, and a balancing of its anti-competitive and pro-competitive effects. The rule of reason analysis, I can tell you from experience, requires a considerable amount of time and effort and expenditure of resources. Assistant Attorney General Klein has seen a need for sort of a middle ground approach between these two extremes, namely the step-wise approach. Using the traditional per se versus rule of reason methodology really front loads the review process. Indeed, the front end determination of whether a practice is per se or not is often outcome determinative. And the practical result is that you can't concentrate on a more thoughtful analysis on the merits because you are too busy battling over the per se label.

{66} The stepwise approach is designed to remedy these shortcomings in existing law. The first prong of this analysis is to determine whether the horizontal restraint at issue is of the type that is currently recognized by the courts as being a per se violation; for example, an unadorned agreement to fix prices or divide markets. If not, then we proceed to the second step of the analysis: whether there is a pro-competitive justification for the restraint in question. The focus in this step is on actual effects rather than the so-called "intent" of the parties because of course the parties will always tell you that the restraint has a legitimate, pro-competitive justification. What we look for is for the defendant to come forward with real world evidence, and by that I mean factual evidence or economic expert testimony demonstrating the pro-competitive effects of the horizontal restraint. If the defendant does not meet this burden, the restraint will be judged illegal without further inquiry. On the other hand, if the defendant can make this showing, the third step of our approach would necessitate a balancing of the pro and anti-competitive effects of the practice similar to a traditional rule of reason analysis.

{67} Let me give one example of the stepwise approach in action. This example comes from the radio broadcasting industry, an industry in which we have seen increasing involvement since passage of the 1996 Telecom Act.[26] As many of you may know, that Act lifted the numerical limits on the number of radio stations that a particular entity can own in a single market, resulting in a wave of consolidation which has raised competitive concerns in certain instances. The case I have in mind here actually involved a practice which is fairly common in the radio industry; a joint selling arrangement, or "JSA". Now, how does a JSA work? Two stations operating in a single market, we'll call them Station A and Station B, are direct competitors in the sale of advertising time, the principal source of revenue generated by a radio station. Now Station A enters into a JSA with Station B, the terms of which provide that in return for a monthly fee that Station A pays to Station B, Station A is given the right to price and sell all of the advertising spots on Station B and keep the revenues generated from the sale of this time. So in effect this JSA is an agreement between two horizontal competitors to eliminate any competition on price between those two competitors. You could argue that this agreement should be per se illegal.

{68} But that is not how the stepwise approach would resolve this case. Instead, the Department recognized that this JSA was not the type of practice which would be universally condemned as a per se violation. Indeed, one could imagine circumstances where this type of agreement might be pro-competitive; for example, if you have a single station competing with a large station group owners with numerous stations in a particular market, and that single station enters into a JSA in order to more effectively compete. That is not to say that this will always be the case. The case of *United States of America and State of New York v. American Radio Systems Corporation*, et al.[27] is illustrative. There we found that the JSA did not result in any identifiable efficiencies; there was no elimination of sales staff or integration of operations between the parties to the JSA. Essentially all they did was eliminate price competition between them, and advertisers were left with less competitive choices that they had before. So in this case, applying the stepwise approach, we never needed to reach the third step of the analysis because there was no evidence to satisfy the defendants' burden of demonstrating pro-competitive effects as part of step two. I should point out parenthetically that there was evidence in this particular case, deposition testimony, that the motivation of the parties in entering into the JSA was because they were "fighting needlessly over the advertising dollar." Of course, this is nice evidence to have in a case like this.

{69} Another area where I think we will see a lot of activity, in the telecom field in particular, is the analysis of joint ventures. I'd like to briefly lay out our analysis of joint ventures under the antitrust laws. The first step is to define the relevant market, which involves identifying the products or services provided by the venture, and then determining what are the reasonable available substitutes for those services. Under the Merger Guidelines, product market issues are driven by the consumer's vision of his or her competitive alternatives. In today's telecommunications industry this type of analysis has become increasingly complex. The reason for this confusion stems largely from a phenomenon we call "convergence." By that I mean the process by which previously separate products or services, and the companies that provide them, now seem to be converging. Local telephone providers are getting into long distance. Long distance carriers are entering local telephone markets. Cable companies are providing telephony services. Telcos and utility companies are providing multichannel video programming services in competition with cable. All of these are examples of this convergence. While all of these things are good for competition, it wreaks havoc on traditional product market definitions in the telecommunications field.

{70} Resolution of the product market issue often has a significant impact on the second step of our joint venture analysis, which is to evaluate the competitive effects of the joint venture. Here, the ultimate question is does the joint venture give the venture participants the ability to either impose price increases or reductions of output. In evaluating this question, we would look at factors like the overall market structure, the number of competitors to the joint venture and their relative market shares, ease of entry, and any other characteristics of the industry which might bear on incentives to collude.

{71} The final step of the analysis is to evaluate any pro-competitive efficiencies realized by the joint venture and balance them against its anti-competitive aspects. As was the case with the stepwise approach I discussed previously, our efficiencies analysis looks for evidence that the joint venture provides significant, real-world efficiencies for the operations of the venture, or that, absent the venture, the participants would never have even entered the market. So for example, imagine a hypothetical where two long distance carriers enter into a joint venture to offer local telephone service. On the one hand, if the relevant product market is solely the market for local telephone service, the venture could be competing against what would essentially be a monopolist incumbent local exchange carrier provider, and many people would see that as a good thing. On the other hand, if the relevant market includes a broader bundle of product offerings (local, long distance and cellular, for example), then additional factors come into play. One is what some refer to as the "first mover" advantage. The first mover advantage in this context belongs to the firm which is the first one able to offer a commercially viable bundle of telecommunications services. Any analysis of a joint venture granting a firm this type of first mover advantage would have to carefully account for the implications of the venture, particularly to firms coming into the market later, who may be at a significant competitive disadvantage. This suggests just a few of the very complex issues which are often implicated by an analysis of joint ventures in the telecommunications field.

{72} Finally, I will mention that we also continue to actively review vertical restraints and vertical mergers under the antitrust laws. Examples of vertical enforcement efforts in the telecommunications industry include the Department's review of British Telecom's initial 20% investment in MCI back in 1994 or 1995. At that time BT had a near monopoly in local telephone services in the United Kingdom, something approaching 97% of all international calls to the U.K. were terminating on BT's network. The competitive concern was whether the proposed transaction increased BT's incentive and ability to discriminate in favor of MCI and against other U.S.-based international carriers in the terms, price, or quality of access to BT's network. So, what was the remedy? Well, primarily the consent decree entered in that case imposed a number of "transparency" requirements. That is, requirements that BT disclose all of the pertinent prices, terms, and conditions of its arrangements with MCI. It includes a provision allowing the Department to make these disclosures available to all industry participants so they could gauge whether they were being discriminated against. Essentially the whole idea of this type of decree is to require transparency in order to facilitate our ability to detect anti-competitive conduct.

{73} Vertical issues are also obviously a big part of current issues pertaining to entry by the Regional Bell Operating Companies ("RBOCs") into long distance. Here again, the basic focus is on the control that the BOCs have over local exchange services, the infamous "local bottleneck", and the potential for the BOC to favor its own long distance affiliate in providing access to that local network. As I think was mentioned this morning, there are a number of regulatory safeguards in place that address this problem to some extent, specifically, the FCC's equal access and non-discrimination regulations. The fact that there are systems in place right now to monitor the quality of access to these local networks, and the requirements imposed on the BOCs by the 1996 Telecom Act regarding unbundling, certainly help ameliorate the potential for discrimination. All of these factors and many, many more must be considered under the so-called §271 proceedings in which the BOCs are seeking permission to enter long distance markets. The FCC has the decision-making role in this process, although, by statute, the FCC must give substantial weight to the Department's evaluation of any particular §271 application in reaching its decision. This area has occupied, and will continue to occupy, a great deal of attention at the Department in the near future.

{74} I hope all of this points out that the Department of Justice has played an important role in the telecommunications industry in the past, and will continue to do so in the future. We remain committed to enforcing the antitrust laws to the best of our ability, and by so doing bringing the benefits of competition to all American consumers of telecommunications products and services. Thank you.

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[**] **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

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[4] *See* U.S. v. American Telephone & Telegraph Co., 552 F.Supp.131 (D.D.C. 1982) *affirm sub nom*. Maryland v. U.S., 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983); U.S. v. Western Electric Co., Inc., 531 F.Supp. 894 (D. N.J. 1981); U.S. v. AT&T, 642 F.2d 1285 (D.C.C. 1980).

[5] Ch. 309, 36 Stat. 539 (1910)codified in scattered sections of 49 U.S.C. (note that some sections of this act have been repealed by subsequent legislation.)

[6] *See* U.S. v. Western Electric Co., Inc., 531 F.Supp. 894 (1981) (this case refers to the 1956 consent decree and reprints some portions of it in Appendix A).

[7] Ch. 3323, 38 Stat. 730 (codified as amended in scattered sections of 15 U.S.C.).

[8] Trade Commission Act, Ch. 311, 38 Stat. 717, codified at 15 U.S.C. §§ 42-58.

[9] *See* U.S. v. American Telephone & Telegraph Co., 552 F.Supp.131 (D.D.C. 1982) *affirm sub nom*. Maryland v. U.S., 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).

[10] 374 U.S. 321 (1963).

[11] 370 U.S. 294 (1962).

[12] 384 U.S. 270 (1966).

[13] Formally, the last word was the *General Dynamics* case; however, the special facts of that case are such that it does not add much to *Von's Grocery* decided eight years earlier. U.S. v. General Dynamics Corp, 415 U.S. 486 (1974).

[14] Pub. L. No. 104-104, 110 Stat. 56 (to be codified at 47 U.S.C.§ 156 *et seq*.).

[15] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified throughout scattered sections of 15 U.S.C., at 18 U.S.C. § 1505 and at 28 U.S.C. § 1407).

[16] In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305 (1979).

[17] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 86 (codified as amended in scattered sections of 47 U.S.C.).

[18] Sherman Anti-Trust Act of 1890 § 1, 15 U.S.C. § 1 (1994).

[19] Violent Crime Control and Law Enforcement Act of 1948, 18 U.S.C. § 1001 (1994).

[20] Lanham Act of 1946 § 43(a), 15 U.S.C. § 1125(a) (1994).

[21] Sherman Anti-Trust Act of 1890 § 1, 15 U.S.C. § 1 (1994).

[22] *See generally* Scott Kilman et al, *A Microphone in the Briefcase,* Wall. St. J., July 10, 1995, at A1 (providing background to the Justice Department's investigation of citric acid producers.)

[23] United States v. Alex. Brown & Sons, Inc., 963 F. Supp. 235 (S.D.N.Y. 1997).

[24] Sherman Anti-Trust Act of 1890 § 1, 15 U.S.C. § 1 (1994).

[25] For further explanation of this approach, see "A Stepwise Approach to Antitrust Review of Horizontal Agreements," Address by Joel I. Klein before the ABA's Antitrust Section Semi-Annual Fall Policy Program, November 7, 1996.

[26] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 86 (codified as amended in scattered sections of 47 U.S.C.).

[27] No. 96-CV-2459 (D.D.C. 1996).

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