



DEPARTMENT OF JUSTICE

“Special, So Special”*: Specialist Decision-Makers in, and the Efficient Disposition of, Antitrust Cases

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I. Introduction

Good evening. Thank you, Professor Kovacic, for the very kind introduction, and thank you to Nicolas Charbit, Ariel Salvaro, and the rest of the organizers of this “Antitrust Salon” for inviting me to be with you tonight. It’s always great to be back at G.W. Law School, and to see so many friends and colleagues from around the world.

My compliments, Professor Kovacic, for your success in making the Salon series a highly anticipated event among antitrust scholars and practitioners. As many of you know, during the French Enlightenment, salons were hubs of intellectual exchange. Men and women of different social classes would come together to discuss new and innovative ideas, all in the spirit of improving the political and economic system of their time.

In this same spirit, over the past two years, the Antitrust Division has sought to innovate how we deploy the tools of antitrust law to protect competition and American consumers. Last week, for example, the Division made its first use of a novel form of dispute resolution for federal antitrust enforcement in our challenge to Novelis Inc.’s proposed acquisition of Aleris Corporation.¹ As we allege in our complaint, that transaction would combine two of only four North American producers of aluminum auto body sheet, which automakers use to produce aluminum parts for automobiles.

The agreement the Justice Department and the parties entered to resolve this challenge has been called truly groundbreaking. For the first time in its history, the Antitrust Division is using

* The Pretenders, *Brass in Pocket* (Sire Records, 1980).

¹ U.S. Dep’t of Justice Antitrust Division, Justice Department Sues to Block Novelis’s Acquisition of Aleris (Sept. 4, 2019), <https://www.justice.gov/opa/pr/justice-department-sues-block-noveliss-acquisition-aleris-1>; Plaintiff United States’ Explanation of Plan to Refer this Matter to Arbitration, *United States v. Novelis, Inc.*, No. 1:19-cv-02033-CAB (Sept. 9, 2019), <https://www.justice.gov/atr/case-document/file/1200821/download>.

its authority under the Administrative Dispute Resolution Act of 1996 to arbitrate a Clayton Act Section 7 challenge. The parties have agreed to refer the matter to binding arbitration should certain conditions be triggered. The arbitration would resolve the sole issue of product market definition. The proceeding will take place, as I noted before, pursuant to the Administrative Dispute Resolution Act of 1996² and the Antitrust Division's implementing regulations.³ We made a filing today with the court that helps explain the plan and process for arbitration.

This new process could prove to be a model for future enforcement actions, where appropriate, to bring greater certainty for merging parties and to preserve taxpayer resources while staying true to our enforcement mission.

Accordingly, in these remarks this afternoon, I will discuss two possible mechanisms that could improve antitrust enforcement: "specialty" Article III courts and mutually agreed-upon arbitration proceedings. I note these in the spirit of encouraging thinking in the area by academics, practitioners, and policymakers.

II. The Case for Improvement of Antitrust Dispute Resolution Processes

Before explaining the "how," I would like to explain *why* I believe that antitrust legal proceedings could be improved through alternative mechanisms. As the Supreme Court famously proclaimed, the antitrust laws represent a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."⁴ At its core, antitrust protects free markets against anticompetitive mergers or conduct that would harm consumers.

In practice, antitrust jurisprudence has evolved with the recognition that market efficiency that benefits consumers is the ultimate goal of any enforcement effort. We typically consider

² 5 U.S.C. § 571 et seq.

³ 61 Fed. Reg. 36,896 (July 15, 1996).

⁴ *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

“efficiency” through the lens of economic theory and empirical analysis of particular transactions or types of business conduct. If conduct harms the competitive process, resulting in inefficiency and a reduction in consumer welfare, antitrust law condemns it. If conduct is efficient and consumer-welfare enhancing, antitrust law should not condemn it.

While antitrust legal *standards* have embraced efficiency, antitrust legal *processes* still have a long way to go. No one here needs to be reminded of the tremendous costs of antitrust litigation. Indeed, the Supreme Court repeatedly has recognized, including in the relatively recent *Bell Atlantic v. Twombly* case, the expense and burden that lengthy antitrust cases can impose.⁵

I submit that antitrust enforcers should be more attuned to ensuring an efficient process for resolving merger and conduct investigations and, when necessary, litigations. Of course, efficiency should not come at the expense of achieving the right result. Rather, we always should be open to process improvements that can result in economically sound outcomes that are achieved in a more efficient manner.

Taking a fresh look at our enforcement processes requires us to consider the role of the decision-maker: whether judge, jury, arbitrator, or otherwise. Specifically, one can reasonably ask whether antitrust legal outcomes would improve by improving the expertise of our decision-makers and how we could empower decision-makers with the necessary expertise. Complex economics underlie many cutting-edge antitrust cases. Is the generalist judge or lay jury always the optimal decision-maker for these cases?

The importance of ensuring that the decision-maker in antitrust cases fully grasps the evidence and underlying concepts is well-recognized. For instance, the ABA Antitrust Task Force on Economic Evidence agreed that “it is critical that judges and juries understand economic issues

⁵ *E.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

and economic testimony in order to reach sound decisions.”⁶ It also warned that “these problems can seriously affect the adversarial process by skewing judicial outcomes, by leading decision-makers to ignore conflicting economic testimony or come to ‘wrong’ conclusions, and can increase litigation costs.”⁷

To be clear, these concerns are focused on the underlying question of whether the expertise of the decision-maker affects antitrust *error rates*. Judges and juries in antitrust cases face a Herculean task, and very often they do an admirable job under the circumstances. The complexity of antitrust trials has increased over time, however, as our tools for economic analysis continue to evolve and become more complex. Judges and juries—like enforcers—can make mistakes.

For instance, economic analysis in antitrust cases often features uncommon complexity. The depth and scope of economic analysis in an antitrust case poses particular challenges to any decision-maker. In a private suit for damages, a lay jury may have problems sifting through the economic evidence. The uncertainty associated with a jury reviewing a complex antitrust case could cause inefficient settlement outcomes.

Compounding these concerns, in Section 7 cases, the judge is also the fact-finder. He or she may have some anxiety over exercising a forward-looking, predictive analysis that goes against the court’s ordinary function of truth-seeking through a set of facts and actions that have already occurred.

As a result, judges could be tempted to ignore certain economic evidence as indeterminate or simply decide the case based on the rest of the evidence. As one prominent antitrust litigator said, “You have a PhD from Chicago saying ‘tomato’ and a PhD from Stanford saying ‘tomahto’

⁶ Memorandum from Jonathan B. Baker & M. Howard Morse, Co-chairs, Econ. Evidence Task Force, Final Report of Econ. Evidence Task Force to Officers and Council 2 (Aug. 1, 2006).

⁷ *Id.*

and both are equally qualified, and what's a judge supposed to do? The economists tend to cancel each other out.”⁸

The question arises: what can be done to inject greater expertise into the decisionmaking process of antitrust trials?

III. Possible Avenues for Expert Decisionmaking in Antitrust Cases

Some jurisdictions and judges have been creative in adopting procedural changes in order to develop their understanding of the complex economic issues at play in antitrust cases. Courts have appointed economic experts, whether to facilitate settlement, or to assist the court in deciding on the merits. Other courts have experimented with allowing both parties' economic experts to testify concurrently and respond directly to each other's arguments—a practice called “hot tubbing.”⁹ Additionally, educational efforts aimed at teaching judges the fundamentals of antitrust economics seem to have some success.¹⁰

I applaud these efforts. What they share in common, however, is an effort to provide more information to generalist judges and lay juries that already face information overload during a complex antitrust proceeding. In this spirit, we should also consider: what else can we do?

⁸ Jeff Bliss & Curtis Eichelberger, *Comment: In Anthem-Cigna, Aetna-Humana Rulings, Judges Favor Documents Over Economics* (Mar. 3, 2017), <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=870660&siteid=191&rdir=1> (quoting Richard Parker).

⁹ Ryan Thompson, *Concurrent Expert Evidence: Hot Tubbing in America? Experts Jump In* (Aug. 31, 2016), <https://www.natlawreview.com/article/concurrent-expert-evidence-hot-tubbing-america-experts-jump>; Hannah Albarazi, *Judge Floats 'Hot Tubbing' For Capacitors Antitrust Litigation* (July 25, 2019), <https://www.law360.com/articles/1182308/judge-floats-hot-tubbing-for-capacitors-antitrust-litigation>.

¹⁰ Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges?: The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011).

A. Specialist Antitrust Courts and Judges

One possible response overseas has been to create or appoint specialist antitrust courts. Many foreign competition authorities operate with specialist courts to one degree or another. For instance, the United Kingdom has the Competition Appeals Tribunal, “a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy which hears and decides cases involving competition or economic regulatory issues.”¹¹ India, for many years, had the Competition Appellate Tribunal, which reviewed decisions of the Competition Commission of India. We can always learn from each other, and this area is no exception.

Specialist courts can provide some benefits. They can help litigants and the public benefit from greater expertise, efficiency, and uniformity in the disposition of antitrust cases.¹² Specialist decision-makers at the trial level could bring a more sophisticated understanding of complex economic arguments, and as such, likely would issue decisions with a lower risk of error. They also could help mold legal precedents, consistent with economic wisdom, which could impact future cases and business conduct. Additionally, they could manage cases more efficiently, whether through filtering out meritless cases or employing procedures that narrow cases to their core disputes, thus creating greater efficiencies or greater speed for enforcement actions.

Of course, specialty courts are not without their drawbacks. Circuit Judge Diane Wood, a former Deputy Assistant Attorney General of the Antitrust Division, acknowledged the difficulty of presenting antitrust cases to inexperienced federal judges, but she also stated the strongest

¹¹ <https://www.catribunal.org.uk/>.

¹² See generally Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 FORDHAM INT’L L.J. 788 (2013).

rationale against specialized courts: that is, “the accountability of the courts to the rest of society.”¹³ As she explained,

Generalist judges cannot become technocrats; they cannot hide behind specialized vocabulary and “insider” concerns. The need to explain even the most complex area to the generalist judge (and often to a jury as well) forces the bar to demystify legal doctrine and to make the law comprehensible. This creates obvious benefits for clients as well as courts, since in today’s skeptical world clients are not likely to warm to the “trust me, I know what is best for you” explanation either.¹⁴

Judge Wood further stated additional reasons against specialization, such as the risk of regulatory capture, the potential for cross-fertilization of ideas, and a number of legal issues, such as due process, that do not vary across types of law.¹⁵

Is there a way, then, to obtain the benefits of specialized courts, while addressing these legitimate concerns? There seems to be a myriad of options suggested to do that.

Indeed, Judge Douglas Ginsburg of the D.C. Circuit Court of Appeals, who previously served as Assistant Attorney General for the Antitrust Division, identified several promising ways to structure specialist antitrust courts to overcome some of the concerns identified by Judge Wood. As Judge Ginsburg explained, “[t]he specialist court should be staffed by judges drawn from generalist courts, temporarily and only to the extent needed.”¹⁶

One idea is to develop a process akin to the multi-district litigation assignment system by relying on Article III judges who have the requisite training and experience handling antitrust cases. The MDL process itself demonstrates that case complexity might warrant a system of specialization. In fact, MDL panels repeatedly have cited the general experience of a judge and a

¹³ Diane P. Wood, *Generalist Judges in A Specialized World*, 50 SMU L. REV. 1755, 1767 (1997).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Ginsburg & Wright, *supra* note 12, at 808.

judge's familiarity with the factual and legal questions at issue in its orders selecting a transferee judge.¹⁷

If an MDL-like process were created, the selection of the judge for antitrust cases could be based on pre-judicial antitrust experience, economics training before or during tenure as a judge, and previous judicial experience handling antitrust cases. Having Article III judges fill this role would address many of the downsides identified with specialty antitrust courts, such as the loss of a broader perspective and trial experience that generalist judges bring to disputes.

There are several ways such a process could be tested or put in place—all of which are currently in use in other areas of the law. First, individual judicial districts could direct assignments of antitrust cases to particular judges. Cases would remain in the jurisdiction where the plaintiff originally filed suit, but the assignment process would consider the eligible judges' antitrust expertise. Alternatively, one could envision MDL-type cross-jurisdictional assignments. Under this scenario, parties could appeal to a panel of judges across jurisdictions who would then transfer the case to a judge that has the requisite expertise. Finally, as Judge Ginsburg has proposed, there could be a specialty court of current Article III judges across jurisdictions selected by the Chief Justice to sit on assignment, similar to the current FISA (Foreign Intelligence Surveillance Act) courts.¹⁸

B. Arbitration of Antitrust Disputes and Enforcement Actions

Specialty courts are not the only way that parties can have specialty decision-makers rule on their cases. Antitrust litigants, including the Division, could agree to enter arbitration with an

¹⁷ See, e.g., *In re Ocean Fin. Corp. Prescreening Litig.*, 435 F. Supp. 2d 1350, 1352 (J.P.M.L. 2006) (noting that then-District Judge Amy J. St. Eve was “an experienced transferee judge”). See generally, Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 *FORDHAM L. REV.* 311 (2009).

¹⁸ Ginsburg & Wright, *supra* note 12, at 808-09.

experienced antitrust decision-maker. As I noted earlier, we have taken the first step in this direction in our enforcement action against the proposed Novelis/Aleris transaction.

The benefits of arbitration are well-established. Arbitration allows a neutral third party to decide important or dispositive issues without the expense of trial and often leads to a more speedy resolution of cases. Granted, the parties must first consent to such a procedure and agree on an arbitrator, but in many antitrust cases both parties recognize the efficiency benefits of having an expert resolve their claims.

In particular, an arbitrator could be an antitrust specialist or former judge, either with economics training or with extensive experience handling complex antitrust cases. Such an arbitrator could bring an understanding of economic issues and testimony, which should provide for greater accuracy and efficiency.

In the right circumstances, the antitrust agencies can harness the strengths of arbitration and help ensure that the American public benefits from a speedy and sound resolution of Sherman Act and Clayton Act claims.

Some in this room may be aware that pursuant to the Department of Justice's 1996 guidance,¹⁹ alternative dispute resolution procedures should be used "in those civil cases where time permits and there is a reasonable likelihood that ADR would shorten the time necessary to resolve a dispute or otherwise improve the outcome for the United States."²⁰

Both merger and conduct cases may be ripe for arbitration, though the efficiency analysis could differ between the types of cases. Arbitration may be more appropriate for important or

¹⁹ Fed. Reg. Vol. 61, No. 136 at 36896 et seq.

²⁰ *Id.*

dispositive issues rather than entire cases, or for specific issues that can lend themselves to resolution by a specialist.

At the Division, we would have to evaluate several factors before agreeing to arbitrate, but I would like to highlight three key questions.

First, what are the efficiency gains relative to the alternatives? The Division would be more likely to arbitrate if doing so could save significant time or taxpayer money while ensuring that competition and consumers are protected.

Second, is the question the arbitrator will be asked to resolve clear and easily can be agreed upon? If not, then arbitration may not be the best use of our or the parties' resources.

Third, would arbitration result in a lost opportunity to create valuable legal precedent? This will depend on the facts of the particular case, but the effect could be mitigated depending on the transparency of the process and the arbitrator's decision.

There are other procedural concerns as well, although they may be secondary if all three of these factors favor arbitration. The arbitration process itself would need to be agreed upon by the Division and the parties, likely before filing suit. Among the issues we would need to resolve are the effect of the arbitration, the identity of the arbitrator, and how the costs of the arbitrator are allocated.

IV. Conclusion

To conclude, the Antitrust Division welcomes innovation in legal and economic thinking—not only in how we understand the contours of substantive antitrust law, but also in processes for resolving antitrust claims themselves. This is precisely why I created the quarterly Jackson-Nash Address series to provide our staff new learning from recent Nobel laureates to help us advance our approaches to antitrust law enforcement.

I encourage others to consider new and creative ways to ensure that antitrust decision-makers, whether judges, arbitrators, or others, are well-equipped to understand the complex economic arguments presented in antitrust cases. Doing so is a matter of significant importance for us to fulfill our mission to protect competition and American consumers.

Thank you for having me here this evening.