EDITOR'S NOTE

Trying, Winning, and Losing

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BACK IN 2015, I STOPPED BY MY LOCAL Irish pub, where the big screen happened to be showing the Rugby World Cup. I was fascinated by two things: the amazingly skillful lateral and backward passing, and the fact that successfully moving the ball across the goal line is called a "try." When we "try" a case in American courtrooms, "trying" does not always mean success (although an advocate always hopes to "score points" on any witness examination). Rather, the result can be either winning or losing (or something in between). This issue of Antitrust focuses on trying, winning, and losing in antitrust litigation.

Ian Simmons, Sergei Zaslavsky, and Patrick Jones write about their experience trying the first jury trial of a two-sided market monopolization case after *Ohio v. American Express Co.*[1] That decision required the plaintiff to show injury either to an overall platform market or to both sides of a two-sided market. As with many other antitrust cases, the challenge for plaintiff's counsel is explaining complex economic concepts in way that is compelling and accessible to the lay fact-finder without oversimplifying or sacrificing rigor. But as the authors explain, there is usually an intuitive core underlying the important two-sided concepts. After explaining how a plaintiff can win a two-sided market case, Simmons, Zaslavsky, and Jones also discuss how a defendant can win (such as through demonstrating that the challenged restraints are necessary in order to maximize the platform's output).

Next, Perry Lange, Nana Wilberforce, Lauren Ige, and John O'Toole discuss recent no-poach litigation, both civil and criminal. They describe the law as enunciated both in pretrial rulings and in jury instructions. They observe that both courts and juries have been reluctant to impose criminal liability in non-solicitation cases, perhaps because of skepticism that the purpose of the agreements was to allocate labor markets—because continued hiring, despite the alleged existence of agreements, might suggest that competition in labor markets has not in fact ceased. They also note a divergence between the application of the "ancillarity" doctrine in criminal cases and the Seventh Circuit's recent treatment of ancillarity in a civil class action.

Michael Tubach, Anna Pletcher, and Kelse Moen expand the discussion, writing more broadly about the Antitrust Division's recent track record in criminal antitrust prosecutions. They note that the Division's conviction rate for Section 1 crimes has dropped substantially over the last four years. Drawing on interviews with prosecution and defense counsel in recent cases, as well as their own experience, they offer several potential explanations for the trend, as well as some recommendations for course correction.

Shifting to a less-explored part of the law, Mark Poe provides a plaintiff's perspective on the Robinson-Patman Act. He maintains that the longstanding criticism of the Act is flawed. He reviews the principal substantive arguments made against the Act and provides a plaintiff's response. His argument draws on his own experience trying Robinson-Patman cases. Readers who are defending Robinson-Patman claims, seeking to assert such claims, or counseling clients on compliance will find this article useful.

Two other articles in this issue discuss the 2023 Merger Guidelines.[2] First, Gregory Werden explores the concept of risk as articulated in the guidelines. The guidelines seem to suggest the agencies need only establish that there is some plausible risk that a merger may have anticompetitive effects, but not that there is any substantial probability that this risk will actually materialize. Werden illustrates this with the Antitrust Division's briefing in the JetBlue-Spirit case, which he suggests is an indication of how the agencies will litigate under the guidelines. Werden notes that the district court rightly rejected the Antitrust Division's approach, using instead a predictive approach focused on probability, rather than mere plausibility. Second, James Keyte reviews the guidelines as well, reprising his earlier article on the draft version of the guidelines.[3] He notes some of the changes from the draft, and he identifies several aspects of the final guidelines that depart from current law—and that should be tested in litigation.

Craig Minerva and Conner Dwinel bring our readers up to date on recent litigation challenging the constitutionality of the Federal Trade Commission's structure and litigation practices. They review the basis for challenges to date (such as the limited presidential ability to remove FTC commissioners and administrative law judges), but they also identify an argument that has not yet been advanced in litigation: that the FTC Act's deferential standard for appellate review of Commission fact finding could itself violate parties' due process rights.

Litigation, of course, is not the FTC's only role—it also has rulemaking authority. Yeseul Hyun, Jee-Yeon Lehmann, and Shannon Seitz report on their analysis of the public comments that were submitted in the FTC's pending rulemaking on employee noncompete agreements. Some of their results are unsurprising—employee commenters tended to

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support a ban, and employer commenters tended to oppose it. But the authors also question the representativeness (and therefore the value) of the public comments. For example, using a sampling technique, the authors found that 70% or more of the comments came from the healthcare sector. This may suggest the need for a narrower rulemaking targeted at that sector. More likely, it simply suggests greater organization in the industry.

Finally, Bryan Gant brings us back to basics on Rule of Reason analysis. He argues that there is an overlooked "step zero" under the Rule of Reason: was there the kind of restraint to which Rule of Reason analysis should apply. He uses the *Actavis* case[4] as an example: the threshold question is not whether there was a reverse settlement payment, but whether there was a "large and unexplained" reverse payment.

It is impossible for this wish to come true for all of our readers simultaneously (except perhaps in Lake Wobegon[5]), but may your antitrust "tries" all be winners. And to bring your rugby knowledge current: Ireland won this year's Six Nations Rugby.[6] Congratulations, Ireland! ■

[1] 138 S. Ct. 2274 (2018).

[2] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[3] *The Draft Merger Guidelines: Interpretive Guidance or Ideological Advocacy?* ANTITRUST, Vol. 37, No. 3, (Summer 2023).

[4] 570 U.S. 136 (2013).

[5] https://en.wikipedia.org/wiki/Lake_Wobegon.

[6] Check out the final results at https://www.sixnationsrugby.com/en.