Donald Trump's Major Antitrust Encounters

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Donald Trump, in the course of his campaign for President, has not yet provided much if any indication of the likely shape of a Trump Administration's antitrust enforcement program.[1] Nor, prior to his current campaign, did he have occasion to offer public opinions about antitrust issues or antitrust's role in economic affairs. On the other hand, he has had three major antitrust encounters in the course of his business career, and they may provide a clue or two about his general attitude toward antitrust law. These encounters are: the joint Federal Trade Commission and Department of Justice enforcement action against him in 1988 for alleged violations of the Hart-Scott-Rodino Antitrust Improvements Act (HSR); the 1980s litigation between the United States Football League and the National Football League; and the 1990s litigation between and among the Sands Resorts, Penthouse, and Trump interests in Atlantic City hotel casinos.

HSR Act Violations

The HSR Act requires any party with sales or assets exceeding specified minimums to notify the FTC and DOJ of its intent to acquire stock or assets of another party whose sales or assets also exceed specified minimums and to refrain from consummating the contemplated transaction during a specified "waiting period." During that waiting period, one or the other of these enforcement agencies will review the transaction and determine whether it should be challenged because of perceived anticompetitive effects. In 1988, both agencies charged Trump with violations of the HSR Act as a result of his acquiring—both directly and through his investment banker, Bear Stearns & Co.—stock in two gaming companies, Holiday Corp. and Bally Manufacturing Corp., without making the required HSR filing and without regard to applicable waiting periods.[2]

Trump appears to have relied on "put-call option agreements" with Bear Stearns under which he acquired beneficial ownership of the shares purchased in Bear Stearns' name. Bear Stearns apparently relied on either the investment exemption under Section 802.9 or the institutional investor exemption under Section 802.64 of the HSR Rules to treat these purchases as exempt from the reporting and waiting period requirements. The FTC's Bureau of Competition, however, saw this more as a "device entered into or employed for the purpose of avoiding" HSR obligations and thus covered by Section 801.90 of the HSR Rules.[3]

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[1] His website does, however, include an endorsement of a procompetitive step in health insurance markets: "Modify existing law that inhibits the sale of health insurance across state lines. As long as the plan purchased complies with state requirements, any vendor ought to be able to offer insurance in any state. By allowing full competition in this market, insurance costs will go down and consumer satisfaction will go up." https://www.donaldjtrump.com/positions/healthcare-reform.

[2] United States v. Donald J. Trump, 1988-1 Trade Cas. (CCH) ¶ 67,698 (D.D.C. 1988).

[3] *See* ABA Section of Antitrust Law, Premerger Notification Practice Manual 64–65 (4th ed. 2007); James W. Mullenix, *The Premerger Notification Program at the Federal Trade Commission*, 57 Antitrust L.J. 125, 129–31 (1988).

Trump was one of only three parties charged with that kind of improper use of put-call option agreements in 1988.[4] Trump settled the charges in his case by paying a civil penalty in the amount of $750,000.[5]

USFL v. NFL

The USFL was founded in 1982 as a spring football league. Trump was not part of the founding group of team owners but became an owner upon his purchase of the New Jersey Generals in 1983. He quickly became a dominant force in league decision-making and strategy. Most importantly, he prevailed over all of the owners to move the league games to a fall schedule and thus in much more direct competition against the NFL. While many and perhaps most of the owners had serious reservations about this change, Trump had no doubt whatsoever about it. He was quoted as saying that "if God wanted football in the spring, He wouldn't have created baseball."[6]

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Indeed, the schedule change became part of a reported broader Trump plan to effectuate a merger between the NFL and the USFL, a plan that included a USFL lawsuit against the NFL for unlawful monopolization of major league professional football.[7] The USFL complaint alleged a broad array of exclusionary acts contributing to the monopolization, including entering into contracts with all three of the major television networks that prevented the USFL from contracting for effective TV coverage, attempting to "co-opt" USFL owners including Trump, attempting "to preclude the USFL's New Jersey Generals from moving to New York City," an NFL "Supplemental Draft of USFL players," the NFL's move to a 49-man roster, and "NFL's activity directed at specific USFL franchises such as the Oakland Invaders."[8]

The jury found that the NFL had willfully acquired or maintained monopoly power over the relevant market in violation of Section 2 of the Sherman Act. But the jury awarded damages of only one dollar, trebled to three dollars, finding in essence that the USFL's failure was caused by its own mismanagement rather than by the NFL's conduct. (The district judge awarded attorneys' fees of $5.5 million.) The district court upheld the jury verdict and declined to issue any injunction; the Court of Appeals for the Second Circuit affirmed in all respects. The USFL played its last game in 1985, having lost approximately $200 million after three seasons and getting nothing out of its antitrust suit.

As the court of appeals observed, "The USFL failed because it did not make the painstaking investment and patient efforts that bring credibility, stability and public recognition to a sports league"; it "abandoned its original strategy of patiently building up fan loyalty and public recognition by playing in the spring"; faced with rising costs "and some new team owners impatient for immediate parity with the NFL, the idea of spring play itself was abandoned even though network and cable contracts were available"; and these actions "were taken in the hope of forcing a merger with the NFL through the threat of competition and this litigation."[9] As the court of appeals

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[4] *See* United States v. Wickes Cos., 1988-1 Trade Cas. (CCH) ¶ 67,966 (D.D.C. 1988); United States v. First City Fin. Corp., 1988-1 Trade Cas. (CCH) ¶ 67,967 (D.D.C. 1988).

[5] Press Release, Fed. Trade Comm'n, Donald Trump Agrees to Settle Government Charges He Violated Premerger Notification Requirements (Apr. 5, 1988,) https://www.ftc.gov/sites/default/files/documents/cases/1988/04/880405trumppressrelease.pdf.

[6] Drew Jubera, *How Donald Trump Destroyed a Football League: An Oral History of the Rise and Fall of the USFL*, ESQUIRE, Jan. 13, 2016, at 8, http://www.esquire.com/news-politics/a41135/donald-trump-usfl/.

[7] *Id.* at 2, 9.

[8] U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1341–42 (2d Cir. 1988).

[9] *Id.* at 1341.

noted, to grant the requested relief would "reward [the USFL's] impatience and self-destructive conduct with a fall network contract"; the USFL was thus seeking "through court decree the success it failed to achieve among football fans."[10]

The court of appeals came back to that same theme at the end of its opinion:

> The jury . . . obviously found that patient development of a loyal following among fans and an adherence to an original plan that offered long-run gains were lacking in the USFL. Instead, the USFL quickly changed to a strategy of competition with the NFL in the fall, hoping thereby to force a merger of a few USFL teams out of large television markets and a resultant reduction in value of USFL games to television.[11]

The Atlantic City Hotel Casino Case

Trump's third antitrust adventure, beginning in 1989 and ending in 1993, forced him to defend himself against charges of: (1) attempting to monopolize casino gambling in a market defined as the "Central Boardwalk Area" of Atlantic City; and (2) conspiring with Penthouse and its owner, Robert Guccione, to suppress competition within that market in violation of the New Jersey Antitrust Act. It evolved into a classic scorched-earth antitrust war.

The plaintiff, an affiliate of the Sands Resorts, wanted to purchase several parcels of land from Penthouse that it could develop into a hotel casino next to Trump's existing hotel casino on that Atlantic City Central Boardwalk Area. The Sands affiliate had a contract with Penthouse to purchase those properties but a vast multitude of zoning, regulatory, financing, and other contingencies resulted in repeated and prolonged delays in the closing of the transaction. These delays created openings for Trump to persuade Guccione to allow Trump to replace the Sands affiliate as the buyer of the properties in question. This thereby enabled Trump to avoid new competition as well as to build his own third Atlantic City casino hotel. He already owned Trump Plaza within the Central Boardwalk Area and the huge Taj Mahal elsewhere in Atlantic City.

The ensuing antitrust claims were part of a massive array of legal claims asserted between and among the plaintiff, Penthouse, and Trump interests in the Chancery Division of the Atlantic County Superior Court of New Jersey: many varieties of alleged breach of contract, tortious interference, fraud, civil conspiracy, violations of the New Jersey Racketeering Influence and Corrupt Organizations Act, and more. But the antitrust claims enabled the Sands interests to assert entitlement to an award against Trump of $2.1 billion—treble the alleged damages of $700 million.

With stakes that high, it is not surprising that both Sands and Trump retained true giants in the antitrust economics field as expert witnesses: Yale University's Paul McAvoy for Sands and Cornell University's George Hay for Trump. As with most complex antitrust claims, relevant market definition became the core issue in the litigation, with McAvoy supporting and Hay contesting the proposition that the relevant market was hotel casinos within the Central Boardwalk Area of Atlantic City, thereby excluding hotel casinos within other parts of Atlantic City.

The trial consumed a full ten months in 1992, and Judge L. Anthony Gibson released a 109-page decision on March 25, 1993. The court flatly rejected Sands' attempt to define the geographic market as limited to the Central Boardwalk Area of Atlantic City. It further ruled that, even if the market were as alleged, and even if Trump's actions "were motivated by an effort to reduce

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[10] *Id.*

[11] *Id.* at 1379.

competition," no antitrust violation would have occurred "because his conduct had no adverse impact on competition." Nor, the court added, would it have made a difference if the court had accepted the concept of a Central Boardwalk Market since it "was not convinced that the actions attributed to Trump had a probability of success."[12]

The court nonetheless emphasized that "the most fundamental flaw" in the antitrust case was the alleged market definition. The conclusion was that the relevant market was "at least the City of Atlantic City" based on "the ease with which casino customers can and do move from casino to casino" and "choices customers make on subsequent trips." The court was also "influenced by the role of the Casino Control Commission," the agency "with the primary responsibility for regulating the conduct of casinos," noting that it "recognizes a city-wide market and evaluates competition within that context."[13] Another consideration was "the absence of physical and economic barriers that might otherwise prevent consumers from turning to other casinos." Thus, "even if Trump had raised 'prices' as part of his alleged anticompetitive conduct, other choices were readily available to casino customers, in and out of the Central Boardwalk Area."[14]

"[T]he claims in this case went too far, cost too much, took too long and proved too little . . ."

According to one close observer of the case, it "dragged on four long years, racked up more than 15,000 pages of court transcripts, and cost, by some estimates, $50 million for all the paperwork and all the lawyers"; the lawyers themselves "were enough to fill out four baseball diamonds."[15] Judge Gibson was quoted as saying he believed "the claims in this case went too far, cost too much, took too long and proved too little"; the "big loser . . . was the Sands Hotel Casino, which was ordered to pay more than $8 million in penalties for what Judge Gibson called breach of contract."[16] According to one report, the lawyers for Trump and Guccione "were openly gleeful"; a Trump lawyer said "Trump's out clean"; close observers said the suit "should have been settled long ago" but "the easily bruised egos of the principals" kept the litigation going by "trading personal insults"; and, "in the end, the case was more about pride than property, more about ego than economics."[17]

Conclusion

So what do Trump's three antitrust encounters tell us to expect from a Trump Administration's antitrust program over the course of the next four years? Alas, not much, but here are a few predictions.

First, the FTC/DOJ action in 1988 for violation of HSR reporting and waiting period requirements has probably left Trump with a bad attitude toward the HSR "regulatory" scheme. He may now be pretty hostile toward HSR limitations on deal-making.

Second, the USFL/NFL litigation ended badly for Trump's side but was, in all likelihood, an adventure from his standpoint. Perhaps the main lesson for a President Trump is that private par-

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[12] Boardwalk Props., Inc. v. BPHC Acquisition, Inc. v. Donald J. Trump, Docket No. ATL-C-000051-89E, Opinion at 64–65 (N.J. Super. Ct. Ch. Div., Atlantic Cty., Mar. 25, 1993).

[13] *Id.*

[14] *Id.* at 65–66.

[15] Pam Belluck, *Tortuous Legal Fight over Boardwalk Site Comes to an End the Sands Lost Big in Its Costly Battle with Donald Trump and Penthouse Publisher Bob Guccione*, PHILLY.COM, Mar. 26, 1993, at 1, http://articles.philly.com/1993-03-26/news/25950418_1_bob-guccione-penthouse-donald-trump.

[16] *Id.*

[17] *Id.* at 2.

ties injured by antitrust violations should not look to the government for redress; they can follow his example by filing their own antitrust suits.

Finally, Trump's scorched-earth defense against claims of attempted monopolization of the hotel casino business in a major part of Atlantic City revealed a determination to spare no expense in defense of his plan to add a third hotel casino to his empire. All indications would seem to be that he strongly supports empire-building, at least on his own terms. From this perspective, it is difficult to imagine that a Trump Administration brings any big Section 2 cases. ●