Concurrences
Antitrust Publications & Events

The Global Antitrust Economics Conference 2019
31 May 2019 – NYU Stern School of Business, New York

Conference Materials

1. Interview with Brad Humphreys (West Virginia University) by Roger Noll (Stanford University)
2. Interview with Gail Levine (US Federal Trade Commission) by Greg Rosston (Stanford Institute for Economic Policy Research, Stanford University)

1. Interview with Brad Humphreys (West Virginia University) by Roger Noll (Stanford University)

Brad Humphreys (Professor, West Virginia University) was interviewed by **Roger Noll** (Professor, Stanford University) in view of their panel "Antitrust in Sports".

This spring a new pro football league entered, and two more new pro football leagues will enter the market in the next year. Given the extremely profitable and dominant position of the NFL, what competitive strategies do you expect the entrants and the incumbent to adopt, and what outcome do you expect? Do you anticipate that this entry plausibly could lead to antitrust litigation between the NFL and the entrants?

The new entrant in professional football this year, the Alliance of American Football (AAF), recently folded up before completing its first season of play, an entirely expected outcome. Rival sports leagues enjoy a long history in the US. The first US professional league, the National League, formed in 1876 and fended off many 19th Century rivals, almost from its founding, before merging with the American League to form Major League Baseball at the start of the 20 th Century. Only two outcomes to ever occur after the forming of a rival league: the rival league fails, or the rival league succeeds by getting wholly or partially merged into the existing incumbent league. Most rival leagues, like the AAF, fail.

Incumbent leagues use two strategies to successfully deter rival league formation or increase the likelihood that a rival league will fail: they pay players high salaries, and they expand to place teams in all, or most, cities large enough to support a team. Most successful rival leagues formed before the 1980s, when player salaries were low. Given the high salaries now paid to players, and the expansion that all leagues have undertaken since the last successful rival league was formed (the World Hockey Association), I expect that failure will be the likely outcome of any modern rival league formation.

Any antitrust litigation would depend on the rival appearing to be on a path to succeed. The last two successful rival leagues, the AFL (formed in 1960, merged with the NFL starting in 1966) and the World Hockey Association (formed in 1971, completed a partial merger with the NHL in 1979) operated for many seasons and held drafts that competed with the incumbent league drafts.

The last notable rival league, the United States Football League (USFL), operated for three seasons in the early 1980s. The USFL also sued the NFL for anti-trust violations and won, although the jury famously awarded only $1 in damages, of course trebled to $3, to the USFL. I think that a rival league would have to play several seasons before any anti-trust litigation would occur. No success at that level has occurred since the USFL. Salaries have increased substantially since then, as has the number of teams in all leagues.

Your research on competition in college sports finds that competition among colleges causes them to spend essentially all revenue from sports on expenditures in support of sports. Given these results, what do you anticipate will be the effect on the budgets of college sports programs if the recent antitrust case against the NCAA causes the cap on the compensation of college athletes to be raised substantially (by tens of thousands of dollars)?

The impact will be heterogeneous. Some smaller "big-time" NCAA Division 1 programs will be financially strapped by a court ruling that increases athlete compensation. Wide disparities in revenues exist in Division 1. I would not be shocked to see a mass exodus from Division 1 to non-scholarship sports, primarily in "Group of 5" conferences and smaller schools with Division 1 sports except football. And frankly, those schools will be better off. The evidence that big-time sports generates important academic benefits is weak. Recent causal evidence suggests that big-time sports inflicts academic damage in many cases, including reducing GPAs and increasing time to completion. At schools in the "Power 5" conferences, coaching salaries will decline, along with spending on lavish practice facilities and high-end (chartered jet) travel. The revenues earned by "Poser 5" schools are enormous, and these schools will easily adjust to a more professionalized environment.

Your research on the effects of the 1984 case against the NCAA form monopolization of the market for televising college football concluded that the NCAA's TV policies before the case did increase the profits of colleges from broadcasting, but that the distribution of telecasts among schools differed substantially from the distribution arising in a competitive market. As a result,

you conclude that the NCAA over-regulated the college football television market in a manner that benefited the NCAA but imposed costs on its members. Do you find it plausible that the NCAA also over-regulates the market for college athletes, and if so, what effects might be expected if the recent antitrust case substantially relaxes the NCAA's restrictions on the value of an athletic scholarship?

Yes, I find it extremely plausible that the NCAA over-regulates the market for college athletes. How else can we explain that fact that the NCAA is in the business of certifying the academic credentials of high school students as well as assessing academic outcomes like graduation rates at NCAA member universities? The NCAA's regulatory power over athletes has been virtually unchecked for decades and anything that is not constrained by costs will be over-supplied.

If antitrust litigation relaxes the cap on athlete compensation, the NCAA recruiting regulations will have to be pared back substantially. Something closer to competition for athlete services will likely emerge from such a judgement, and the NCAA is simply not institutionally equipped to deal with that environment. Athlete transfer regulations are already being relaxed, and most of those regulations would likely disappear if the cap on athlete compensation is eliminated.

The interesting question is how much farther the NCAA's regulatory reach would be pared back. For example, the NCAA limits practice time and contact between coaches and potential recruits. Athletes in a pay-for-play environment could claim that lack of contact with coaches limits their ability to improve their performance and earnings. In that case, the player welfare implications are unclear.

2. Interview with Gail Levine (US Federal Trade Commission) by Greg Rosston (Stanford Institute for Economic Policy Research, Stanford University)

Gail Levine (Deputy Director, Bureau of Competition, US Federal Trade Commission) has been interviewed by **Greg Rosston** (Senior Fellow, Stanford Institute for Economic Policy Research, Stanford University) in view of their panel "Telecom Mergers".

With the possibility of 5G services, how should people think about the relevant market for wireless services -- mobile, fixed or a combination?

The antitrust agencies tend to use the same antitrust principles for this space that we use for all markets. Our analysis is deeply fact-specific. The trick is to think like a user. How would a user react if the service became a bit pricier and stayed that way? Would the user switch away, or put up with the price hike? Are there particular attributes that are unique to mobile wireless services, as opposed to fixed wireless services? How does the rollout of 5G affect demand for similar services today? Antitrust analysis is pretty ruthlessly fact-based, asking hard questions about how innovation will affect competition. And location matters, too: users in different locations – with different options before them – might answer that question differently. For example, users in rural areas might see things differently than users in urban settings. The answers to those questions are critical. With the answers to those questions in hand, we can better understand what the "relevant market" is.

What's the mission of the FTC's new Technology Task Force?

The Technology Task Force is a new investigative unit within the FTC's Bureau of Competition. Its goal is to investigate and, where appropriate, challenge anticompetitive conduct in markets in which digital technology plays a critical role. The Task Force may also review consummated mergers in the tech space, and we're looking closely at questions of nascent competition. We've "opened our doors" this month, so to speak, bringing on about 15 staffers.

Our colleagues across the Bureau of Competition will continue to take the lead on reviewing HSR-reportable mergers in the tech space, and the Task Force looks forward to sharing ideas and insights with them. Likewise, the Task Force aims to draw on the expertise of the Bureau of Consumer Protection on privacy, data security, and related tech issues.

After AT&T-TW, is there a role for enforcement of vertical mergers?

Certainly. Vertical mergers aren't challenged as often as horizontal mergers, but they're not so uncommon. As FTC Bureau of Competition Director Bruce Hoffman has noted, since 2000, the FTC and DOJ have challenged over 20 vertical mergers, an average of about a challenge a year. In the end, we have to follow the evidence where it leads us. The intellectual underpinnings for vertical theories of harm have been clear for decades. We know that vertical mergers can harm competition. And nothing in *AT&T/TimeWarner* changes our commitment to investigate all potential theories of harm in vertical mergers.

IP is obviously critical in technology markets. How pervasive is the role of IP in the FTC's antitrust enforcement across the board?

IP issues arise in many of the conduct and merger cases we review. One example of that is our health care cases, and in particular, our reverse-payment cases in the health care space. In fact, we just settled the granddaddy of reverse payment cases – *FTC v. Actavis* – this spring after ten years of litigation, including a trip to the Supreme Court and back. Our settlement placed Teva, the world's largest generic drug maker, under a broad order that protects consumers from reverse payments that drive up drug prices.

In *Actavis*, the Supreme Court took head-on the question of whether patent litigation settlements are

immune from antitrust challenge. The Court's answer: no. Reverse payments are subject to rule of reason review, it said, and it held that although settlements are desirable, a "large and unjustified" reverse payment "can bring with it the risk of significant anticompetitive effects."

And this March, the Commission ruled unanimously in favor of Complaint Counsel in another reverse-payment case: *FTC v. Impax*. This case was the Commission's first chance to apply *Actavis* and to develop the rule of reason analysis that it directs. We're committed to building on our successes in these cases.