

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Donald Trump and Antitrust: Taking Stock of a Litigious Record

Over the course of Donald Trump's presidential campaign, the now presumptive Republican presidential nominee has carved out his political identity by being outspoken on a variety of issues, including border enforcement, foreign policy, trade, and the Second Amendment, but has largely remained silent on the issue of antitrust enforcement.

During his 2008 campaign for president, then Senator Barack Obama made clear that an Obama administration would seek to "reinvigorate antitrust enforcement" by reversing the policies of the Bush administration, and criticized the Bush administration for having the "weakest record of antitrust enforcement of any administration in the last half century."¹ Unfortunately, Trump has not directly spelled out his antitrust agenda, which makes predicting how a Trump administration might influence antitrust enforcement a difficult task.

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States Football League (USFL) and the National Football League and a joint Federal Trade Commission and Department of Justice enforcement action against Trump for alleged violations of the Hart-Scott-Rodi-

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no Antitrust Improvements Act (HSR)—which may inform his perspective. More recently, in his first public comments about antitrust as a presidential candidate, Trump claimed on Fox News that Amazon has "a huge antitrust problem," and stated that Jeff Bezos "is worried about me...[he] thinks I would go after him for antitrust."²

Taken together, what can Trump's public comments as well as his experience in this fairly specialized area tell us about what a Trump

presidency might mean for antitrust enforcement?

Trump and 'USFL v. NFL'

The USFL was founded in 1982 with the explicit goal of avoiding fights with the NFL. In fact, central to the USFL's business plan was the scheduling of the season in the spring, when NFL stadiums were empty and USFL teams could play in them on the cheap. In the spring, the USFL also had a captive TV audience, and attracted football fans who would otherwise be watching springtime baseball.

Trump, who purchased the New Jersey Generals in 1983, quickly turned his team into a USFL contender and became a powerful voice among team owners. According to news reports, Trump soon began advocating among the owners for a change of business strategy; instead of avoiding the NFL, Trump reportedly argued that the USFL should move its season to the fall, a strategy that Trump predicted would eventually lead to a merger of the two leagues.³

The USFL owners eventually agreed with Trump, and voted to move the USFL season to the fall beginning in the 1986 season. After unsuccessfully attempting to secure a fall TV broadcast contract, the USFL, with Trump's

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backing, filed suit in federal court alleging that the NFL had engaged in exclusionary conduct by attempting to co-opt USFL owners, instituting a NFL Supplemental Draft of USFL players, increasing NFL roster sizes, and entering into a contract with all three of the major television networks.⁴ The suit claimed damages of \$1.7 billion. (Co-author Shepard Goldfein was one of the lawyers who represented the NFL in its defense of the USFL's suit.)

Ultimately, while the jury found that the NFL had violated Section 2 of the Sherman Act, it rejected the USFL's primary "claim[] that the NFL had monopolized a relevant television submarket or attempted to do so," and awarded the USFL damages of only \$1 (trebled to \$3).⁵ Instead, the jury found that the USFL's inability to enter the market for major league football was due to the league's own mismanagement.⁶

The USFL appealed the verdict to the Second Circuit, which affirmed the jury's general verdict, and agreed that "The USFL failed because it did not make the...patient efforts that bring credibility, stability and public recognition to a sports league."⁷ As to the allegation that the NFL had prevented the USFL from accessing major television networks, the Second Circuit held that the USFL had, through a series of poor business decisions, "ended by its own hand any chance of a network contract."⁸ Having lost its case both in the media and in the courtroom, the USFL did not resume play for the 1986 season and the league disbanded.

Trump and the HSR Act

The HSR Act requires pre-acquisition notification of significant acquisitions involving U.S. businesses to the U.S. antitrust authorities when any party to a transaction has sales or

assets that exceed minimum thresholds set forth by the FTC and DOJ.⁹ After providing pre-acquisition notification to the government, the parties must wait the statutory period (generally, 30 days) before completing the transaction, unless early termination is granted or a "second request" for additional information is issued.¹⁰ During the statutory waiting period, the antitrust agencies determine whether they will challenge the proposed transaction under the antitrust laws.

One thing is certain: Trump is not afraid to resort to legal action, at least as a private party, as evidenced by the litigation strategy he pursued in 'USFL.' Similarly, as USA Today reported this month, Trump has been involved in approximately 3,500 lawsuits to date.

In 1988, both the FTC and DOJ charged Trump with violations of the HSR Act in connection with Trump's acquisition of stock in Holiday Corp. and Bally Manufacturing Corp.¹¹ The DOJ and FTC alleged that Trump acquired stock in the two companies without making the filings required under the HSR Act and without following the statutory waiting periods.¹²

Trump, who acquired the stock through Bear Stearns, "used put-call option agreements" that allowed Trump to acquire ownership of the shares both directly and in Bear Stearns' name.¹³ For its part, Bear Stearns claimed that the purchases were exempt from HSR reporting under the institutional investor exemption under Section 802.64, or the investment exemption under 802.9 of the HSR Rules.¹⁴ The FTC, on the other

hand, regarded the moves made by Bear Stearns on behalf of Trump as an intentional strategy deployed to avoid the HSR reporting requirement, and filed a complaint.¹⁵ Trump settled the claim by paying a civil penalty of \$750,000.¹⁶

Challenges to Amazon

The legal basis for Trump's suggestion of antitrust scrutiny of Amazon in a future Trump administration is not quite clear. For example, Trump reportedly criticized Amazon and Bezos in December 2015 after receiving less than glowing coverage from The Washington Post, which Bezos also owns. Trump took to Twitter, where he criticized the Amazon CEO for using the newspaper as a tax shelter for Amazon,¹⁷ but failed to reveal any clues about his antitrust views related to the company.¹⁸

Presumably, Trump is aware that, even if true, his allegation that Amazon uses The Post to reduce its tax obligations has no obvious connection to the antitrust laws. Instead, with respect to antitrust, Trump may have been alluding to claims made last year by Authors United, a group of authors who formally requested that the DOJ investigate Amazon's alleged exercise of market power in the book market.¹⁹ Authors United claimed that Amazon had blocked or limited the sale of books on its website, sold some books below cost, and used its influence to steer readers toward its own books and away from books published by other companies.²⁰

The DOJ stated that it would consider these claims, but to date has not—to the best of our knowledge—launched a formal investigation. While a case against Amazon would certainly garner headlines, it is not clear that Trump has fully considered

the challenges that the government would face in bringing such a suit.

Under Section 2 of the Sherman Act,²¹ the government must show (1) that the defendant has monopoly power, and (2) that the defendant willfully acquired, maintained, or created that monopoly power through exclusionary conduct.²² While no bright-line rule exists, share of the relevant market is an important factor in assessing whether monopoly power exists.²³ Moreover, monopoly power will only give rise to Section 2 liability if that power was willfully acquired or maintained, rather than resulting from “growth or development as a consequence of a superior product.”²⁴

With the foregoing in mind, one could foresee a number of obstacles that may stand between Trump and his envisioned pursuit of Amazon. First, Trump would have to establish that Amazon possesses the extent and type of market power that bring Section 2 into play. And, although Amazon is the nation’s largest bookseller, it certainly would be relevant to consider whether there are several other players in the marketplace seeking to challenge Amazon for sales. Second, a Trump DOJ would have to show that Amazon achieved or maintained its market power not by offering a superior product or lower prices, but rather through “competition on some basis other than the merits.”²⁵ This is always a challenge in Section 2 cases absent well-defined exclusionary conduct.

Finally, the Trump DOJ would have to show that Amazon’s conduct—in this instance the pricing of books on its platform—has had an anticompetitive effect from a consumer perspective. While Amazon’s entry into the book-selling marketplace in the 1990s spelled the end to many brick and mortar bookstores, a key issue would be whether Amazon’s business model

and pricing has enhanced rather than harmed consumers.

Conclusion

Ultimately, inferring what form a Trump administration’s antitrust enforcement program might take from Trump’s experience with the antitrust laws is itself somewhat speculative. Like Trump’s presidential campaign—during which members of both parties have at times wondered about Trump’s true intentions—it is difficult to discern a pattern among Trump’s varied antitrust experience. Does Trump truly believe that Amazon violated the antitrust laws, or were his comments motivated by other factors or interests? With respect to Amazon, Trump’s comments would seem to undercut the belief of many that Trump would be pro-business and anti-regulation, further broadening the enigmatic persona that Trump appears to embrace or at least reflect.

One thing is certain: Trump is not afraid to resort to legal action, at least as a private party, as evidenced by the litigation strategy he pursued in *USFL*. Similarly, as USA Today reported this month, Trump has been involved in approximately 3,500 lawsuits to date.²⁶ But whether Trump’s litigious streak would imply a more active enforcement policy is unknown. Though not to suggest that Trump lacks an antitrust philosophy: as Bill Tatham, a former owner of the USFL’s Arizona Outlaws commented, “I think Donald Trump looks at the United States like his franchise in the USFL. Don’t ever think he doesn’t know what he’s doing.”²⁷



1. Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007). [http://www.antitrustinstitute.org/files/aai-Presidential campaign - Obama 9-07_092720071759.pdf](http://www.antitrustinstitute.org/files/aai-Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf).

2. Sean Hannity interview with Donald Trump (May 12, 2016). Fox News. <https://www.youtube.com/watch?v=JjCtXR0J7Hk>.

3. Nocera, Joe, “Donald Trump’s Less-Than-Artful Failure in Pro Football,” *New York Times* (Feb. 19, 2016), http://www.nytimes.com/2016/02/20/sports/football/donald-trumps-less-than-artful-failure-in-pro-football.html?_r=0

4. *U.S. Football League v. Nat’l Football League*, 842 F.2d 1335, 1341-42 (2d Cir. 1988).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. 15 U.S.C.A. §18a (West).

10. *Id.*

11. Redburn, Tom, Justice Dept. to Crack Down on Antitrust Rule: To Sue Trump, Belzbergs on Takeover Regulations; Wickes Settles Charges (March 23, 1998). http://articles.latimes.com/1988-03-23/business/fi-1800_1_antitrust-rules.

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

13. Skitol, Robert, “Donald Trump’s Major Antitrust Encounters,” *The Antitrust Source* (April 2016).

14. *Id.*

15. *Id.*

16. *Id.*

17. Borchers, Callum, “Donald Trump’s anti-trust attack on Jeff Bezos doesn’t make much sense,” *The Washington Post* (May 13, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/05/13/donald-trumps-antitrust-attack-on-jeff-bezos-doesnt-make-much-sense/>.

18. Incidentally, as reported by *The Washington Post*, Bezos owns *The Post* through Nash Holdings, his private investment company, which does not have an accounting or tax relationship with Amazon. *Id.*

19. *Id.*

20. *Id.*

21. 15 U.S.C. §2 (2004). Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and conspiracies to monopolize. Section 2 provides that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.”

22. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

23. *United States v. Dentsply Int’l*, 399 F.3d 181, 187 (3d. Cir. 2005).

24. *Grinnell Corp.*, 384 U.S. at 570-71; see *Rambus Inc. v. Fed. Trade Comm’n*, 522 F.3d 456, 463 (D.C. Cir. 2008) (“It is settled law that the mere existence of a monopoly does not violate the Sherman Act.”).

25. *Id.* at 308 (citing *Verizon Comm’n v. Law Offices of Curtis v. Trinko*, 540 U.S. 398, 407 (2004)).

26. Penzenstadler, Nick, and Page, Susan. “Trump’s 3,500 lawsuits unprecedented for a presidential nominee” (June 2, 2016), <http://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/>.

27. <http://www.businessinsider.com/donald-trump-sued-nfl-as-usfl-team-owner-2016-2>