ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

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# ANTITRUST DIVISION ROUNDTABLE DISCUSSION

# ANTITRUST EXEMPTIONS AND IMMUNITIES,
# STATE ACTION DOCTRINE

**March 14, 2018**

## Introduction

Thank you for inviting Consumers Union to this important discussion on the appropriate reach of the antitrust laws, and specifically focusing today on antitrust exemptions and implied immunities, and the state action doctrine.

Consumers Union is the advocacy division of Consumer Reports.[1] Our mission is to work for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. And one key to empowering consumers to protect themselves is working to ensure meaningful consumer choice, through effective competition.

By meaningful choice, we mean choice that is easy for consumers to understand and compare, and is responsive to what's important to consumers. When consumers have meaningful choice, businesses are motivated to provide more affordability, better quality, and new thinking, in response to consumers' wants and needs.

That is why, from our founding over 80 years ago, we have been strong supporters of the antitrust laws.

Addressing these issues on today's agenda begins with a recognition of two basic principles:

First, the antitrust laws are an essential protector of competition, a necessary ingredient in making the marketplace work for consumers as well as for all other participants.

[1] Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of antitrust and competition policy, food and product safety, health care, financial services, telecommunications and technology, privacy and data security, transportation, and other consumer issues, in Washington, D.C., in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

Second, the antitrust laws can't solve everything. There are other important protections consumers depend on, that won't be delivered merely by protecting and furthering competition.

Just to take one example, in an area that has always been a top priority for consumers, products and services offered to consumers should be safe, and that requires laws and regulations, for effective oversight, accountability, and deterrence. Competition can *help* promote safer products and services, if there is enough consumer awareness and engagement. But it would be very naïve, and dangerous, to assume we can dispense with government oversight and simply let market forces protect us.

Competition and regulation need to work hand-in-hand.

For that reason, we favor letting both competition and regulation do their appropriate work in the marketplace to the full extent they can.

For our purposes today, that means, first, that specific statutory antitrust exemptions should be *very* few and far between, and that there should be a very high bar to justify one – only where there is a demonstrable compelling overriding public interest that is truly irreconcilable with antitrust.

And even then, the decision still needs to be made, is the best way to further that overriding public interest to simply turn the matter over to joint decision making by competitors in that marketplace? That is essentially privatizing regulation. Are private sector, profit-seeking decision makers the best ones to entrust with furthering this overriding public interest, or does it more appropriately call for government regulatory engagement?

Second, and similarly, it means that implied antitrust immunity based on some separate federal regulatory presence should displace antitrust only if, and only to the extent that, antitrust is fundamentally irreconcilable with the regulatory objective. Those situations are also going to be few and far between, and there needs to be a high bar to substantiate that claim.

And third, it means that if state law or regulation is to ever displace antitrust as to a commercial activity, it should be deemed to have done so only if, and only to the extent that, similarly exacting conditions are met, demonstrating that the state government is committed to protecting the public through other effective means. First, the state government must have clearly stated, in the law, that it intends to restrain competition, as a matter of state policy, with the specified regulatory regime. And second, the state government must be following through on that expressed intention, with active and continuing regulatory supervision of that activity.

These principles are widely accepted among antitrust experts, and they are reaffirmed in the 2007 Report of the Antitrust Modernization Commission (AMC).[2] But they are under frequent assault by those seeking special treatment for their own company or industry, as well as by some who are more broadly opposed to or skeptical of the important role the antitrust laws play in protecting our free market system. So eternal vigilance will be necessary to defend them.

**Regulation and antitrust – implied immunity, state action**

For an industry or practice to have implied immunity from antitrust because it is regulated, it must be a situation in which Congress has determined that the free market is not working to deliver the benefits of competition, that a more active government regulatory regime is required to deliver those benefits, and that regulation under that regime is fundamentally not compatible with enforcing the antitrust laws. The cases refer to this as "clear repugnancy" between the antitrust laws and the regulatory regime. It requires far more than simply an industry preferring to follow only one set of laws, not two.

Importantly, implied immunity is not about resolving any supposed tension between promoting competition and ensuring other important consumer protections. Safety, health, a clean environment, honest advertising, and other important protections can be pursued entirely consistently with protecting competition.

In fact, as the Justice Department and the FTC recognize, professed safety concerns, for example, can be – and have been – misused, by those working in an

[2] https://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

occupation, as a pretext for imposing unnecessary and excessive licensing qualifications, to keep others out. This unduly restricts entry to that occupation, thereby restricting availability of the service, which means those working in that occupation can inflate the prices they charge consumers and lower the quality of the attention they pay and the service they provide.

Instead, we are talking about market regulation – typically, directly specifying the prices and terms under which goods and services can be sold. These are situations where Congress has determined that leaving it to competition to determine pricing and terms of service results in marketplace dysfunction. Implied immunity is appropriately limited to situations where regulation is supplementing or redirecting market forces in a marketplace that Congress has determined would otherwise not be functional in delivering the kinds of benefits that competition is supposed to provide.

And even in these situations, the displacement of antitrust should be narrowly focused on the irreconcilability with effectuating the regulation, and should only be to the minimum extent necessary to enable the regulation to be effectuated.

Notably, as the courts and the AMC have recognized, there should never be implied repeal of merger enforcement authority under section 7 of the Clayton Act. The competitive effects of a merger can be considered independently of any specialized regulatory regime.

We generally agree with the AMC that an explicit antitrust savings clause can be helpful when Congress wants to make absolutely clear that it intends for the antitrust laws to apply regardless of any arguable inconsistency. But at the same time, Congress should avoid casually including antitrust savings clauses when they aren't needed, when the regulation is not irreconcilable with – not "clearly repugnant" with – antitrust. We don't want to cheapen the coin of the realm, and send courts down the rabbit hole of expecting to see a savings clause every time someone raises this issue – and presuming that if there isn't one, Congress probably intended for the antitrust laws not to apply. The bedrock standard should remain demonstrated "clear repugnancy."

Two Supreme Court decisions, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), and Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264 (2007), caused a stir when they were announced. But neither of them disturbs the "clear repugnancy" standard.

In *Trinko*, leaving aside Justice Scalia's freewheeling musings, in dicta, about possible tensions between the antitrust laws and the Communications Act, the holding was not about what constitutes "clear repugnancy" at all. The holding was simply that enactment of the Telecommunications Act of 1996 did not change the legal standard for monopolization under section 2 of the Sherman Act – and thus, that Mr. Trinko could not prove monopolization under section 2 by the shortcut route of proving failure to comply with the interconnection requirements of the 1996 Act.

One lesson that can be taken from Justice Scalia's dicta is that it can be helpful to have a savings clause when Congress wants to preserve antitrust in the presence of a comprehensive regulatory regime, as there is with the Communications Act.

In *Credit Suisse*, we learned another lesson about antitrust savings clauses – that if you are going to rely on one, better that you make it specific. But the more important point is that *Credit Suisse* exactingly followed the "clear repugnancy" standard, or as the Court also described it there, "clearly incompatible," carefully analyzing all four "critical" factors laid out in earlier cases for finding implied immunity, and finding them all satisfied in this case:

(1) there is regulatory authority under the other law to supervise the activities in question;

(2) the responsible regulatory entities are exercising that authority;

(3) if the regulatory law and the antitrust laws were both applied to those activities, it would create conflicts in guidance, requirements, duties, privileges, or standards of conduct that are essentially impossible for those involved in the activity to reconcile;

(4) those conflicts affect practices that lie squarely within an area of market activity that the regulatory law seeks to regulate.

The "clearly incompatible" standard simply recognizes that there are limits to applying antitrust in the context of an industry subject to complex and exacting regulatory requirements governing the same conduct. It recognizes that in such an extreme case, it can be unfair, and unworkable, to require a company to expend undue resources on trying to figure out how to painstakingly thread the needle through a complex minefield of dual legal structures focused on similar and overlapping purposes.

*Credit Suisse* reaffirmed the holding of Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963) that "[r]epeal of the antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." This holding had also been reaffirmed in Gordon v. New York Stock Exchange, 422 U.S. 659, 6783 (1975).

Courts have already been working to appropriately contain any expansion of these two decisions – declining, for example, to extend *Trinko*'s holding as a basis for regarding the extensive regulation in the health care marketplace as a basis for finding implied antitrust immunity.[3] The courts have done the same for commodity futures,[4] for municipal bonds,[5] and even for securities.[6]

The AMC, in endorsing the "clear repugnancy" standard, recognized the limited, narrow nature of the *Trinko* holding – that failure to comply with the Telecommunications Act does not create a new violation of the Sherman Act that wouldn't have existed before. (*Credit Suisse* was decided after the AMC report was released.)

The state action doctrine applies similar limiting principles in the context of state government involvement. It gives due deference, pursuant to federalism, to a state's authority as a sovereign to decision that competition as enforced under the

[3] Steward Health Care Sys., LLC v. Blue Cross & Blue Shield, 997 F. Supp. 2d 142, 153 n. 6 (D. R.I. 2014).
[4] Texas-Ohio Energy, Inc. v. Centerpoint Energy, Inc., 661 F. Supp. 2d 1172 (D. Nev. 2009).
[5] Hinds County v. Wachovia Bank N.A., 700 F. Supp. 2d 378 (S.D.N.Y. 2010).
[6] Dahl v. Bain Capital Partners LLC, 589 F. Supp. 2d 112 (D. Mass. 2008).

federal antitrust laws is clearly incompatible with some specific overriding state regulatory objective. But it requires that the state be clear, and serious, about this decision. First, the state must have made affirmatively and unmistakably clear – in the law – that it intends to restrain competition, as a matter of state policy. And second, the state must be following through on that expressed intention, with active, ongoing government supervision of the conduct in question, so that those engaging in that conduct, and the state officials, are accountable to the public.

The Supreme Court laid out this standard almost 40 years ago, in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). And the Court has reaffirmed it repeatedly, including most recently in FTC v. Phoebe Putney Health Sys., 568 U.S. 216 (2013) and again in North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015). The AMC also endorsed it. We think it is the right standard, and that both requirements should be firmly enforced.

**Statutory antitrust exemptions**

Creating statutory antitrust exemptions for specific industries or activities runs counter to one of the central objectives of the antitrust laws, which is to base our economy on giving businesses and consumers alike the benefits of an open marketplace, in which all businesses are given full opportunity, and full incentive, to compete. Having a shared set of fundamental principles of fair competition is by far the better, more effective alternative to trying to construct a separate set of statutory requirements, to spell out specially designed rules of competition, for each different sector, with details and complexities that are difficult to grasp and become all-too easy to find ways to evade. Experience has shown that every statutory detail presents an opportunity for a creative lawyer to find a loophole.

It is certainly possible to envision an industry sector in which it might not make sense to have open competition. The railroads were once considered a perfect example, at least in terms of short-line end-to-end tracks – to not have numerous competing railroads each building side-by-side tracks to cover the exact same ground. Though even with the railroads, it was feasible to have competing long-distance

routes from one side of the continent to the other, or for other long distances, such as from New York to Dallas.

And for the vast majority of industries, the duplication of infrastructure, equipment, and human resources is part and parcel of providing choice to consumers, and different pathways to innovation. Competition is not ruinous and wasteful; it is enabling and energizing.

And yet we have witnessed, including in recent decades, how seductively attractive it can be to create an antitrust exemption, and how difficult it can be to remove an exemption once it is created.

It is all-too easy for industry partisans to paint a picture for a lawmaker that their business has a special mission, or special complexities, that antitrust lawyers and economists "just don't get." We know that's not true, but we have seen that thoughtful lawmakers can be persuaded by this kind of sales pitch.

We've seen these kinds of efforts result in statutory exemptions several times in just the past 25 years or so, including:

- for colleges to agree not to compete with each other on the amount of financial aid they will offer students.

- for hospitals to agree not to compete with each other on attracting candidates for medical residency programs.

- for financial firms to fix prices for the rates of return paid to clients who invest in a charitable gift annuity or charitable remainder trust created by one of the firms.

- for businesses in *any* industry to not compete with each other, and to share potentially sensitive business information, in developing solutions for possible digital data problems in converting designated years in automated systems, at the arrival of the Y2K Millennium, from '99 to '00.

- for pharmaceutical manufacturers to not compete in developing countermeasures for pandemic outbreaks.

These are all worthwhile endeavors. But why can't they be pursued consistent with the basic rules of competition? Why do they need to be exempted from the antitrust laws?

The first three of these, the ones for college student financial aid, for medical residencies, and for charitable gift annuities, were enacted with the specific purpose to derail ongoing antitrust enforcement actions and cases.[7] The medical residency and charitable gift annuity exemptions are permanent. The college financial aid exemption was enacted in 1992 as a temporary exemption, for two years, to give colleges an opportunity to adjust their practices; it is now on its fifth temporary extension, currently set to expire in 2022.

The other two, the Y2K and pandemic exemptions, were conceived by Congressional members and staff as a way of providing reassurance to businesses, against imagined concerns that businesses might otherwise not share expertise to work on these problems, out of fear that they might somehow accidentally violate the antitrust laws and be sued or prosecuted. The Y2K exemption came and went; the pandemic exemption was set to expire in 2012, but was extended, and is now set to expire this December.

We could imagine ways in which unscrupulous businesses might take advantage of concerns about either of these risks, to orchestrate some kind of conspiracy to fix prices or boycott a targeted business. But that kind of conduct is not shielded by either of the exemptions; it is explicitly excluded from both. And as to the broader fears that someone might innocently take some action, entirely in good faith, that turns out to be an antitrust violation, that's hard to imagine.

[7] http://www.nytimes.com/1991/05/23/us/ivy-universities-deny-price-fixing-but-agree-to-avoid-it-in-the-future.html; http://www.nytimes.com/2004/08/14/us/antitrust-lawsuit-over-medical-residency-system-is-dismissed.html; https://www.gpo.gov/fdsys/pkg/CRPT-105hrpt146/html/CRPT-105hrpt146.htm.

A variation on a complete exemption is found in the National Cooperative Research Act (NCRA) of 1984, enacted in response to claims circulating at the time that the antitrust laws were holding back innovation, and that that was why our country was being overtaken in the world economy by Germany and Japan. Claims that we needed to encourage more pooling of American ingenuity in research and development, and that the antitrust laws, or at least that antitrust fears, were getting in the way.

The NCRA approach was to invite joint R&D ventures to register with the antitrust agencies, in exchange for which their R&D activities would be guaranteed not to be treated as per se, outright antitrust violations, but would be subject to the more nuanced rule of reason, under which the effects of those activities would be carefully weighed and given the benefit of the doubt. And then, if any of those activities was nonetheless found to violate the antitrust laws, in any private case they would be subject only to single damages, not the usual treble damages that have been a cornerstone of the antitrust laws since their beginnings.

The NCRA treatment was initially limited to R&D joint ventures, but in 1993 it was extended to joint ventures for production. And then in 2004 the same approach was adopted for joint development of technical standards through a qualifying standards development organization.

The NCRA was initially introduced in Congress as a flat-out antitrust exemption, but in the course of its consideration it was not only revised to rule of reason, but considerable attention was given to carefully defining the scope of conduct that would be covered, and explicitly excluding conduct that might actually create antitrust concerns. Similar attention was given to both the production and standard-setting extensions. And similar care was given to crafting the contours of the pandemic exemption.

In a sense, it's good that the potential risks of creating these exemptions were largely neutralized. On the other hand, we probably could have done just as well without the exemptions. And there's always a risk of overlooking some detail, and inadvertently leaving a loophole for a creative lawyer to find.

During the past 25 years, there have also been a number of other exemptions proposed that *didn't* make it into statute, that were stopped. One of these was a proposal to add an exemption for doctors to the 1994 health care reform legislation, so they could force health plans to negotiate with them as a group on medical fees and other terms, and could refuse as a group to do business with a health plan that wouldn't meet the terms they'd insist on.

Another was a proposal to add an exemption for banks and financial institutions as part of the Emergency Economic Stabilization Act of 2008, so they could agree not to compete in addressing potential challenges to the financial system during the financial meltdown in 2008.

One exemption that was *not* stopped was the exemption, enacted more than 70 years ago, for the entire business of insurance, in the McCarran-Ferguson Act. Like the college financial aid exemption, this one was enacted with the specific intent of derailing an ongoing antitrust enforcement action by the Justice Department. The effort to enact it was aided by threats by numerous insurance companies to stop paying premium taxes, an important source of revenue to the States.

The bill passed both the House and the Senate as a temporary 3-year moratorium on further antitrust enforcement against insurance companies, to give them time to adjust their practices. In the conference committee, however, a few words were added that created a permanent exemption "to the extent that such business is not regulated by state law." Many who voted on the final bill were apparently not aware of the change; those who were aware, and concerned, could not get the attention of their colleagues and convince them not to accept it.

And as a result, the business of insurance ended up with an exemption resembling one conferred by the state action doctrine, but without having to satisfy the conditions that justify the state action doctrine, clearly articulated state policy and active state supervision.

Efforts to remove or scale back this exemption have been underway for at least 40 years, and are still underway today. None of the reasons put forward by the insurance industry for maintaining it hold water. At bottom, they essentially fall into

the category of avoiding the uncertainty that removing the exemption would create. An uncertainty that is not only overblown, but that would not even exist if the insurance industry had just stayed under the antitrust laws originally. Getting that outlying industry to join the rest of the economy is a reform that is three quarters of a century overdue.

We can expect to keep seeing various industry factions making similar efforts to convince a receptive ear in Congress that their business is different, is misunderstood, needs an exemption so that it can operate without the specter of legal uncertainty. We must depend on a critical mass of Members and staff, particularly on the committees with jurisdiction over antitrust, to be vigilant in spotting those efforts, and to be resolute in fending them off.

One statutory exemption that I think *does* belong in our laws is the one that has been enshrined in section 6 of the Clayton Act from its very beginning:

"That the labor of a human being is not a commodity or article of commerce."

This provision is what keeps the Sherman Act from being turned on and used against workers seeking to organize in their workplaces – used against those who work for a paycheck, not for profits. Some of the earliest Sherman Act prosecutions, before the Clayton Act, were actually criminal prosecutions against union organizing.

At the same time, we have to be careful that we do not allow groups of independent business entities to try to liken themselves to a union, and seek the same antitrust benefit but without the effort and accountability of actually creating the union. We have seen a number of instances where that has been attempted. One prominent example was the doctors seeking an exemption, so they could bargain collectively with health plans – and could refuse to provide medical services to any health plan that would not accept their demands.

It can be tempting to look at a business negotiation – with a behemoth on one side seeming to have the upper hand, the power to call the shots, and a smaller business on the other side, seeming to have no power, and to be at the mercy of the behemoth – to see that and want to help level the playing field. But granting the

small business an antitrust exemption, so it can lock arms with its competitors, and make joint demands, does not cure the market power problem; it just creates more market power. This has been referred to as the "sumo wrestler" approach – that the only way to go up against a giant is to create another giant. But the two giants will end up shaking hands, discovering a way to mutually accommodate their interests. Consumers are not part of that handshake, and now they suffer not just the effects of one giant throwing its weight around, but the combined effects of two giants.

The right way to deal with the market power on one side, if possible, is to protect and promote competition through *enforcing* the antitrust laws against the giant's abuse of that market power, not by excusing the other side from those laws. Or if that giant's market power is beyond the reach of the antitrust laws, and yet is creating a dysfunctional marketplace, it may be time to consider a regulatory solution. The last thing we want to do is turn over to the private actors the power to act as government and regulate the marketplace on their own, outside accountability to the public.

Keeping this distinction between employees and businesses in a gig economy, where more and more of us are working as independent contractors rather than employees, is going to be a challenge. But we should try to address protecting the rights of workers in the changing economy through labor laws, safety laws, and other laws directed at the workplace, rather than through creating new antitrust exemptions that end up restricting choices for consumers in the marketplace.

## **Conclusion**

As the AMC put it, the antitrust laws "stand as a bulwark to protect free-market competition." But a bulwark loses its strength to protect as it becomes riddled with holes and gaps.

We think the AMC was correct when it concluded that "[s]tatutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy." That the benefits of an exemption flow to the narrow interests of a select group, with "the costs [borne by] consumers through higher prices, reduced output, lower quality, and reduced innovation." That

exemption cannot be justified unless there is "compelling evidence of the unworkability of competition or a clearly paramount social purpose," and the exemption is the "least anticompetitive method of achieving the regulatory objective."