

TITLE:

USING THE “CONSUMER CHOICE” APPROACH TO ANTITRUST LAW

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ABSTRACT

This article presents a comprehensive analysis of the “consumer choice” approach to antitrust law, and suggests that it should replace the existing price and efficiency models. The “choice” approach is one that takes full account of the factors of choice, variety, innovation, and other elements of nonprice competition, as well as traditional price factors.

Shifting to a choice approach will bring significant advantages in handling all antitrust matters. In about 5 percent of situations it will alter the substantive analysis and outcome. The choice model will turn the analysis more toward nonprice competition in markets where prices are regulated, or in circumstances where we must assess all the effects of advertising restrictions, including the important nonprice effects on the suitability of the goods purchased. In other circumstances the choice model will make its substantive change by identifying particular products in which variety and innovation are especially important, and which may require organizational independence to achieve. These include the media, hospitals, pharmaceuticals, and aerospace. In the remaining 95 percent of situations, where the outcomes are unchanged, and the relevant choices still center on price and efficiency, the choice model will operate in a more transparent and intuitive way than is achieved under the fiction of working with “quality-adjusted prices.”

In its concluding sections the article addresses the practical importance and the practical feasibility of making this doctrinal change. One section identifies eight significant recent cases that were decided one way under a price or efficiency theory, but probably would have come out differently under a choice theory. A thorough discussion then shows how a consumer choice approach can be made as administrable and predictable as any other. The choice approach will also help to communicate antitrust concepts easily to new audiences in Congress, the media, the business community, and foreign governments. In addition, it will help allocate cases between the FTC and the DOJ. Finally, a historical conclusion explains why the shift to the choice approach, far from disrupting day-to-day administration of antitrust law, is instead the next logical step in its evolution.