Paper Trail: Working Papers and Recent Scholarship

Editors' Note: *In this issue, we note four current papers with little in common other than their interest to antitrust practitioners. Amitai Aviram and Avishalom Tor apply the recent findings of behavioral economics to information arrangements among competitors. Samuel Thompson challenges Oliver Williamson's influential assertion that even modest productive efficiencies can outweigh the likely deadweight welfare loss from a horizontal merger. Chistopher Fairman examines the persistence of particularized pleading requirements under the Federal Rules of Civil Procedure in several categories of cases, including antitrust. Finally, David Scheffman and Richard Higgins reexamine the policy significance of theories of raising rivals' costs as a means of exclusion twenty years after Salop and Scheffman's famous* Yale Law Journal *article on the subject.*

Send suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—William H. Page & John R. Woodbury

Papers and Summaries

Amitai Aviram & Avishalom Tor, Overcoming Impediments to Information Sharing,
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=435600

A rule of reason analysis of an information-sharing arrangement will typically consider the types of information exchanged, the means of exchange, and the likely motivations for both. Aviram and Tor offer a useful analysis, based on recent work in behavioral economics, of both rational and behavioral reasons why firms might hesitate to share information with their competitors, even when it would be socially beneficial to do so. These reasons, in turn, might disabuse policy makers and courts of some of their assumptions about the characteristics of information-sharing agreements.

On the rational side, the authors point out that firms considering participating in an arrangement may legitimately fear sacrificing an informational advantage (for example a new means of reducing production costs) or allowing rivals to free ride on their information-gathering efforts. The authors also note that, in oligopolistic network industries, information sharing may fail if participating firms attempt to gain a competitive advantage in their network by strategically degrading compatibility standards.

On the behavioral side, the authors suggest that a variety of factors may cause firms to misperceive the costs and benefits of information sharing. For example, a social norm of intense rivalry may so predispose firms to challenge each other for market share at every turn, that the firms may sometimes fail to notice opportunities for efficient cooperation. Managers may also be operating under the illusion that they can control business outcomes better in a familiar purely competitive environment and thus undervalue the benefits of partial cooperation because of the apparent loss of control and strategic risks that it entails. Or the well-established human tendencies of "loss aversion" and "ambiguity aversion" might deter firms from embarking on novel, risky, cooperative arrangements, even where the objective evidence suggests that they will be profitable.

The authors conclude by identifying market characteristics that might make the various impediments more or less likely, and by tentatively suggesting some institutional means that might overcome the impediments.

—WHP

Samuel C. Thompson, Critique of Williamson's Economic Case for an Efficiencies Defense in Antitrust Merger Analysis: Are Rectangles Really Larger than Triangles?, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=419600

In this paper, Thompson offers an extended, if somewhat laborious, geometric and algebraic demonstration aimed at refuting Oliver Williamson's famous contention that even a 2 percent cost savings generated by a merger would likely outweigh any deadweight welfare losses. Williamson argued on this basis that enforcement authorities and courts should allow an efficiencies defense to antitrust challenges to mergers. Thompson, however, suggests that Williamson's theoretical demonstration of the tradeoff between productive efficiencies and the deadweight welfare loss is contingent on Williamson's assumptions of a concave demand curve and constant marginal costs. If demand is linear and marginal costs are increasing, the merger would have to create far greater efficiencies to outweigh the deadweight loss. Thompson also discusses how the tradeoff would differ if the merger occurred in markets with more or less elastic demand, and if the merger resulted in a firm with less than a monopoly market share. He concludes that enforcement authorities should not adopt an efficiencies defense because productive efficiencies are too unlikely to outweigh allocative inefficiencies to justify the inquiry.

—WHP

Christopher Fairman, The Myth of Notice Pleading, 45 Arizona Law Review (forthcoming 2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=409140

Fairman argues that federal courts continue to impose heightened pleading standards outside of the specific areas defined in Federal Rule of Civil Procedure 9(b), despite the Supreme Court's admonition in *Leatherman* not to do so. Antitrust is one of the areas in which heightened pleading requirements persist. Courts in some antitrust cases had followed the suggestion in *Associated General Contractors*' footnote 17 to "insist upon some specificity in pleading before allowing a potential massive factual controversy to proceed." After *Leatherman*, this practice waned, but in recent years we have begun seeing courts, like the Fourth Circuit in *Dickson v. Microsoft*, again articulate heightened pleading requirements. Not discussed by Fairman, but consistent with his observations, is the following argument in the government's recent amicus brief in *Trinko*:

> Notice pleading may not require that a complaint "include evidentiary detail. On the other hand, the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome." *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (Boudin, J.). Respondent's two successive failures to allege such a factual predicate show that it cannot pay the price of entry.

David T. Scheffman and Richard S. Higgins, 20 Years of Raising Rivals' Costs: History, Assessment, and Future, http://www.ftc.gov/be/RRCGMU.pdf (forthcoming, George Mason University Law Review)

The recent former director of the FTC's Bureau of Economics, Dave Scheffman, is one of the fathers (along with Georgetown professor Steve Salop) of the modern theory of "raising rivals' costs" (RRC), strategic behavior designed to impair the ability of rivals to compete, thereby allowing the market price to rise to supracompetitive levels. Scheffman was not alone among economists who questioned, during the reign of the "Chicago School," the presumption that all vertical

mergers or restraints were competitively benign. This paper correctly highlights a 1980 FTC conference on strategic behavior, in which a large number of academic luminaries participated, as a key event in the development of this approach. It then provides an extended assessment (in the authors' view) of the strengths and weaknesses of the analysis, the (lack of) empirical support for RRC, and what should be the (very limited) policy role for the application of RRC, including in the analysis of vertical mergers.

The paper can, in places, be a bit difficult to follow. While there are two authors, much of the paper is written in the first person, from Scheffman's perspective. Although it is clearly a paper with a view—i.e., appropriate policy applications of RRC are very limited—the basis for that view is not always clear. For example, one frequent observation is the need for empirical analysis (one of Scheffman's important and often-repeated mantras while Bureau Director) to evaluate whether on balance apparent RRC strategies are pro- or anticompetitive. While the authors seem to believe that the use of RRC strategies has been less factually supported than other antitrust complaints in agency and court opinions, they provide little evidence of this failing, in this writer's view.

Reading the paper will likely provoke vigorous nods of agreement in some, and vigorous head-shaking disagreement in others. For those looking for an adrenaline boost, the read is worthwhile. (Steven Salop, whose work is frequently cited and critiqued in this paper is affiliated with Charles River Associates, the employer of JRW.) ●

—JRW