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A Different Approach to Antimonopolization Enforcement for the Obama Admininstration

Andrew J. Pincus May 2009

President Barack Obama promised during the 2008 presidential campaign that he would "reinvigorate antitrust enforcement," criticizing the Bush administration for "what may be the weakest record of antitrust enforcement of any administration in the last half century."[1] He singled out the decline in merger challenges and also observed that "the Bush Justice Department has not brought a single monopolization case."[2]

Once in office, the president nominated Christine Varney to be assistant attorney general for the Justice Department's Antitrust Division. At her confirmation hearing, Varney spoke of the need to "rebalance legal and economic theories in antitrust analysis and enforcement."[3] The Federal Trade Commission, the other federal antitrust enforcement agency, had signaled well before November's election its disagreement with various positions taken by the Antitrust Division during the Bush administration.[4]

As the Obama administration begins implementing these views, however, it will find itself with little room to maneuver in some areas as a result of judicial decisions that have codified to a very significant degree the "Chicago School" approach of using traditional economic analysis to resolve antitrust questions. The Supreme Court, for example, has addressed a variety of antitrust issues over the past 15 years—arising under Sections 1 and 2 of the Sherman Antitrust Act of 1890, the landmark federal law limiting monopolies and cartels, and the Robinson-Patman Act of 1936 (which targets price discrimination). Most of the Court's decisions relied in large part on the economic reasoning championed—both on the bench and in academic writings—by Chicago School legal theorists and judges Robert Bork, Richard Posner, and Frank Easterbrook, as well as by Supreme Court Justice Stephen Breyer. And that approach has resulted in consistent defeats for those arguing in favor of broader rules of antitrust liability—typically plaintiffs seeking to recover treble damages from defendants alleged to have engaged in anticompetitive practices. These plaintiffs have lost every Supreme Court case but one in the past 15 years.[5]

Observers disagree about the significance of this record. Some say that the Supreme Court is correcting erroneous approaches from the pre-Chicago School era in which courts relied on legal tradition and evidence of company officials' subjective intent—for example, an executive's comment that he wanted to drive his competitor out of business—to declare anti-competitive, and therefore illegal under the antitrust laws, business practices that in fact are beneficial to consumers, such as selling related products in a package rather than separately. Others contend that these decisions rely too much on economic theory and ignore the practical realities of the marketplace, permitting businesses to engage in conduct that does injure consumers. What is indisputable is that the Court has taken a more restrictive approach in defining the categories of conduct that are illegal under the federal antitrust laws.

Looking back to President Obama's criticisms, however, the Antitrust Division and FTC appear to have the tools needed to take a more aggressive approach in the merger context. The Hart-Scott-Rodino process requires companies entering into significant business combinations to provide advance notice to the federal antitrust agencies, and allows the agencies to obtain information about the combination in order to decide whether to sue to prevent its consummation. It gives the government considerable leverage in settlement negotiations. Companies typically do not want their deals held up by litigation and often are willing to make concessions so that a transaction can move forward without uncertainty. The recent decision of the federal court of appeals for the District of Columbia in *FTC* v. *Whole Foods Markets Inc.*,", in which the court ruled in favor of the FTC in connection with a merger challenge,[6] may well reinforce that effect and, in addition, counterbalance the impact of the losses the government has suffered in other recent merger challenges.[7] Moreover, none of the Supreme Court decisions involved a merger case. Indeed, the Court has not addressed a merger issue in decades.

The situation is very different with respect to President Obama's second example—his reference to the absence of any government enforcement efforts targeting alleged monopolization. A number of Supreme Court cases have involved claims under Section 2 of the Sherman Act, which targets the illicit acquisition or abuse of monopoly power, and every decision rejected the Section 2 claim. Even the D.C. Circuit's decision in the *United States* v. *Microsoft* case,[8] which upheld part of the government's claim, was far from a ringing endorsement of expansive Section 2 liability.

In light of these judicial limitations, how can the Obama administration deliver on the president's desire for a more robust antitrust enforcement program targeting monopolization?

Restricting itself to the area delineated by the Supreme Court's decisions will be difficult. Potential targets of government enforcement efforts are well aware of the Court's restrictive approach in Section 2 cases, and they are likely to invoke its reasoning to challenge the legal basis for any government enforcement action, arguing that the principles announced by the Court in its recent decisions preclude the government's claim.

Alternatively, the Justice Department's Antitrust Division and the FTC could attempt to change the Court's view of the scope of Section 2. The Supreme Court, however, generally has not been closely divided in these cases. For example:

- Six justices joined the opinion in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.,* in which the Court concluded that a claim of "predatory pricing"—alleging that the defendant charged prices that were too low in order to drive a competitor out of business—requires proof that the prices are below the defendant's costs and that the defendant can recoup its losses after the competitor exits the market, standards designed to ensure that the antitrust laws would not prohibit price cuts that result from legitimate competition and benefit consumers.

- The Court was unanimous in *Weyerhaeuser Co.* v. *Ross-Simmons Hardware Lumber*, which applied the *Brooke Group* rule to a claim of "predatory buying" alleging that the defendant bid up the price of an input to a level that made its competitor unprofitable. Again, this was because the challenged conduct, paying increased prices for an input, benefits other marketplace participants and closely resembles behavior associated with legitimate competition.

- In *Pacific Bell Tel. Co.* v. *linkLine Communications Inc*, the most recent decision in this area, all nine justices rejected the plaintiffs' price-squeeze claim, which alleged that the defendant raised prices in the wholesale market and lowered them in the retail market in order to "squeeze" its retail competitors, again because of concern about the possible impact on legitimate competition, although the Court divided on whether to write broadly or narrowly.

- In *Verizon Communications Inc. vs. Law Offices of Curtis V. Trinko*, which took a very limited view of a company's duty under the antitrust laws to deal with its competitors, six justices supported the conclusion that antitrust liability was inappropriate because of the difficulty of distinguishing the challenged conduct from legitimate competition (the other three justices rejected the plaintiffs' claim for other reasons). The Court stated that as a general matter the antitrust laws do not restrict the right of a business to decide with whom it will deal and that the Court had been "very cautious" in recognizing exceptions to this principle "because of the uncertain virtue in forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."[9]

These decisions, each joined by six or more justices, demonstrate the broad support for the Court's current monopolization jurisprudence and, therefore, the difficulty of convincing the Court to change its views on the issue.

What's more, although the Supreme Court traditionally accords less weight to considerations of *stare decisis* (legal precedent) in the antitrust context, Justice Breyer's dissent in *Leegin Creative Leather Products Inc.* v. *PSKS Inc.*—which relies heavily on *stare decisis* considerations, and which was joined by the other justices most likely to be open to arguments for more expansive antitrust liability—would make it difficult for those justices to support a U-turn in Section 2 analysis.

Most importantly, the Court's Section 2 decisions rest on a clearly articulated rationale, which would have to be discredited in order to convince the Court to adopt a different approach. As the Court explained in *Trinko*,

> Under the best of circumstances, applying the requirements of § 2 "can be difficult" because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Mistaken inferences and the resulting false condemnations "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." The cost of false positives counsels against an undue expansion of § 2 liability.*[10]

Brooke Group's adoption of an objective standard for predatory pricing rested on a similar rationale. The Court pointed out that

> … the costs of an erroneous finding of liability are high. "[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition … [;]mistaken inferences . . . are especially costly because they chill the very conduct the antitrust laws are designed to protect.'" *It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.*[11]

And in *linkLine*, the Court stressed "the importance of clear rules in antitrust," refusing to recognize liability for price squeezes in the absence of predatory pricing because "firms that seek to avoid price squeeze liability will have no safe harbor for their pricing practices."[12]

The upshot: The Court's inclination to adopt narrow rules of liability in the monopolization context stems from its fear that a broader approach would deter legitimate competition and would have the ironic effect of transforming the very laws designed to promote and protect competition into devices for curtailing competition.

Convincing the Court to adopt a broader approach to Section 2 liability will therefore require a cogent explanation of why such a change in course will not create the very chilling effects on legitimate competition that the Court cited as the basis for rejecting broad liability standards in these cases. Even for the U.S. government—whose arguments are accorded great respect by the justices—that will be a heavy burden to overcome.

I want to suggest a third way in which the Obama administration could enhance enforcement in the monopolization context: seeking enactment of a new statute providing the Antitrust Division and the FTC with enforcement authority not tied to damages liability in private actions.

The Supreme Court's concern about chilling pro-competitive conduct stems principally from its recognition that fear of claims for treble damages liability—which often are filed by less efficient competitors in order to deter what is in fact legitimate competition by the defendant[13]—will cause businesses to refrain from engaging in conduct that is even close to the line demarcating impermissible acts.

The less clear that line, the larger the class of beneficial, pro-competitive conduct that will be chilled due to a company's concern that it may be subjected to the threat of hundreds of millions of dollars of liability for conduct that is perfectly lawful. For example, if the Court in *Brooke Group* had concluded that a company with monopoly power violated Section 2 by charging an "unfairly" low price—even if the price recovered all of the company's costs and generated a profit—then companies with a large market share would be afraid to lower their prices in response to competition, for fear that conduct could give rise to a treble damages lawsuit. That would deprive consumers of one of the principal benefits of a competitive market-based economy.

Although clear from the decisions quoted above, the Court's focus on the misuse of the antitrust laws by private litigants was even more explicit in the opinion in *Bell Atlantic Corp* v. *Twombly*, holding that a complaint alleging a violation of Section 1 of the Sherman Act—which requires proof of a conspiracy in restraint of trade—must do more than simply assert that the defendants entered into a "conspiracy." It also must contain "enough factual matter (taken as true) to suggest that an agreement was made."[14] Nominally an interpretation of Rule 8 of the Federal Rules of Civil Procedure—which governs the specificity required in the complaints that initiate litigation in federal courts—the *Twombly* decision reflected the Court's concern about the costs that unjustified lawsuits seeking treble damages could inflict upon innocent defendants if allowed to proceed to discovery. The Court said, "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potential enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim."[15]

This quotation comes from the Court's earlier opinion in *Blue Chip Stamps* v. *Manor Drug Stores*, a case involving private damages claims under the securities laws in which the Court adopted a narrow interpretation of the scope of liability in part because of its conclusion that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."[16] The Court's decisions construing Section 2 of the Sherman Act are motivated in significant part by the very same concerns.

Of course, private damages claims can serve useful purposes. They provide a means of compensating parties injured by wrongful conduct. And the threat of a private lawsuit can deter a company from engaging in wrongful conduct. But private claims also can produce harmful overdeterrence, a particular risk in the monopolization context for the reasons just discussed.

Most other federal agencies responsible for supervising compliance with economic regulations possess civil enforcement authority that is not tied to such private causes of actions. Thus, while the Securities and Exchange Commission can bring enforcement cases under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5—provisions that also give rise to private damages claims—the SEC has the option of invoking authority not tied to a private cause of action.[17] The same is true of the Federal Communications Commission, the Comptroller of the Currency, the Food and Drug Administration, the Consumer Product Safety Commission, and numerous other agencies.[18]

In contrast, all of the enforcement authority exercised by the Antitrust Division is tied to private rights of action—and, moreover, private rights of action that carry treble damages liability. Although Section 5 of the FTC Act, which prohibits "unfair methods of competition," in itself does not give rise to private liability, the FTC has tied its authority in antitrust cases to the Sherman Act and the other antitrust statutes that do create such liability.[19] Moreover, a number of states have enacted so-called "little FTC" statutes creating private damages claims for harm caused by acts that violate Section 5, which means that a finding of liability under Section 5 can, and often does, trigger damages claims.[20]

When the Supreme Court or lower courts are construing the Sherman Act, therefore, the analysis necessarily takes into account the potential effects of permitting private treble damages claims to be asserted on the theory being advanced by the plaintiff (indeed, the recent cases before the Supreme Court all have involved damages claims by private plaintiffs). And, as discussed, that factor leads the Court to adopt narrow liability standards for fear that a broader standard will transform the antitrust laws into a device for deterring pro-competitive conduct.

The recent report of the Antitrust Modernization Commission confirms that these considerations make Section 2 of the Sherman Act a considerably less-than-ideal instrument for addressing abuses of monopoly power. It points out that "[t]he recognition of potential consumer harm from overdeterrence has led courts to try to avoid 'false positives'—that is, finding Section 2 liability for a firm that has not engaged in unreasonably exclusionary conduct, but instead was simply competing aggressively on the merits," but goes on to warn about the importance of "avoid[ing] underdeterrence that results in 'false negatives'—that is, failing to condemn anticompetitive conduct."[21] The Modernization Commission concludes its analysis by stating:

> In an ideal world, of course, legal rules would avoid both underdeterrence and overdeterrence. In practical reality, however, such precision is often difficult to achieve. Thus, courts may need to make a trade-off between accuracy and the risks of either chilling pro-competitive, or encouraging anticompetitive, conduct.[22]

This Hobson's choice, and the associated unacceptable outcomes, would be tempered substantially if legal rules can be applied in a context in which the risks of overdeterrence and underdeterrence are reduced. Eliminating the threat of retrospective treble damages liability, as well as the possibility that a cause of action could be misused by a competitor for self-interested reasons, would significantly reduce the chilling effect on legitimate conduct. A business then would have not reason to fear huge monetary claims if its actions turned out to have fallen on the wrong side of a legal standard, and it would be more willing to engage in hard competition. That, in turn, opens the door to the adoption of a more precise, yet more difficult to apply standard, which in turn reduces underdeterrence.

What elements should be included in a statute granting new antimonopolization enforcement authority to address the concerns detailed above?

First, of course, there must be a standard for liability. The logical target would be techniques used by firms possessing monopoly power to try to maintain their position. After all, a principal critique of current Section 2 jurisprudence is that it supposedly provides a monopolist with too much leeway to engage in strategic behavior to preserve its monopoly power. Given the myriad of factual situations in which these concerns can arise, the standard inevitably will be general, leaving the courts to flesh out specific principles as they have under the Sherman Act.

One possible approach would be to authorize the issuance of a cease-and-desist order for conduct by a monopolist that "tends unreasonably to maintain monopoly power." By requiring proof that the defendant's actions are "unreasonable" it would exclude liability for legitimate competition, but by imposing liability even for conduct that "tends" to maintain monopoly power—harkening to the merger standard set out in Section 7 of the Clayton Act, which prohibits an acquisition when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"—the provision would reach beyond Section 2.

Second, evidence of the motivations of a defendant's officers and employees—"subjective intent" evidence—should not be sufficient by itself to establish a violation; it should be relevant only to the extent it bolsters evidence that particular conduct is objectively unreasonable. Much of current antitrust practice, especially in private litigation,, is a search for the proverbial "smoking gun" document that can be used—or misused—to convince a jury that the defendant sought to suppress competition. As courts have recognized, however, "a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition. . . . [S]tatements of this sort readily may be misunderstood by lawyers and jurors, whose expertise lies in fields other than economics."[23] Congress should make clear that such evidence will not suffice to establish a violation of the new statute.

Third, the statute should clearly prohibit any form of private cause of action for a violation of its standard, under either federal or state law, as well as the imposition of retrospective liability in government enforcement actions. As discussed, the premise of this grant of additional authority is that it would be forward-looking only, and therefore allow enforcement actions that would range beyond what may be permitted under current law.[24]

Fourth, the authority should be available to both the Antitrust Division and to the FTC so that both federal antitrust enforcement agencies could take action when appropriate. Because the agencies would share enforcement authority, it might be appropriate to require each to institute actions in court, rather than having the division proceed in court and the commission utilize its administrative processes.

The statute would provide a new enforcement option, allowing the agencies to exercise their prosecutorial discretion to select the enforcement weapon most appropriate for the particular situation—the new statute for situations that would not fit under existing case law and their Section 2 authority for more traditional cases that would remain subject to follow-on private treble damage exposure. A statute along these lines would permit more aggressive enforcement action against monopolists with reduced spillover effects on legitimate, pro-competitive conduct.

For example, there has been much debate over the proper treatment under Section 2 of the use of bundled discounts—practices in which a company offers to sell a bundle of goods or services at a discount from the price charged if the products or services were purchased separately; indeed, the Antitrust Modernization Commission report contains a six-page discussion of this issue.[25] That commission's proposed test requires a complex analysis of costs and effects on competition that—because it is difficult to apply in practice—could deter legitimate discounting for fear of treble damages liability. Addressing this practice using the new statute would limit such adverse consequences.

There is an additional reason why adoption of such a statute would be timely. There has been much debate in recent years over the application of antitrust rules to the "new economy"—sectors in which innovation and technological change proceed at an extremely rapid rate. The Antitrust Modernization Commission considered this issue and concluded that different legal rules were not necessary: "Antitrust analysis has sufficient grounding in sound economic analysis, openness to new economic learning, and flexibility to enable the courts and the antitrust agencies properly to assess competitive issues in new economy industries."[26]

In other words, the Modernization Commission concluded that current antitrust standards would allow consideration of all of the unique facts and circumstances exhibited by the sectors of the economy that rest on rapidly evolving technology and other unique factors.

But the Modernization Commission also recognized that it is necessary in the context of these industries to "ensure proper attention to particular market dynamics and economic characteristics that may play a role in determining likely competitive effects."[27] That analysis is complex, and the risk that it will be applied incorrectly could produce considerable chilling of pro-competitive conduct for fear that an erroneous judicial decision could lead to billions of dollars in treble damages liability. The availability of an enforcement tool that would not produce that result is likely to enhance the chances of both achieving effective enforcement and preserving strong competition in the industries that may be most important to our country's economic future.

What are the possible objections to conferring this additional authority on the federal antitrust agencies?

Some may argue that this authority is unnecessary, because the FTC simply can interpret Section 5 to include antitrust standards broader than the constraints imposed by the Sherman Act. But there are several difficulties with this approach. The FTC has not pursued such standards in the past, and the courts may be reluctant to uphold them now. A congressionally specified standard is likely to receive a better judicial reception than one devised by the FTC at this late date. And the FTC's authority does not extend to the Antitrust Division, which is at least a coequal enforcer of the antitrust laws. Granting this new authority to both agencies would put them on an equal footing with respect to antitrust enforcement.

Others may worry that the courts would be likely to carry over their interpretation of Section 2—or at least the considerations that underlie it—in construing a new grant of statutory authority. But the Supreme Court's approach to statutory interpretation, which focuses closely on the text of the provision, would preclude such a reflexive application of existing jurisprudence to different statutory language arising in a different statutory context. That especially would be the case because Congress's adoption of the new provision—and its decision to confer authority to sue on the government alone—will so clearly represent a decision to confer different, supplemental enforcement power on the federal antitrust agencies.

The antitrust community loves nothing more than a good debate. I hope this proposal will start one—and that it will lead to a constructive result that maximizes both appropriate antitrust enforcement and good, strong competition in the marketplace.

About the author

Andrew J. Pincus is a partner at Mayer Brown LLP specializing in Supreme Court and appellate litigation. He has argued 19 cases in the Supreme Court, including several antitrust cases, most recently *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*,and *Weyerhaeuser Company* v. *Ross-Simmons Hardwood Lumber Co.* He served as general counsel of the U.S. Department of Commerce from 1997 to 2000 and assistant to the solicitor general at the U.S. Department of Justice from 1984 to 1988. The views expressed in this memo are his own and do not necessarily reflect those of his firm or his clients.

Endnotes

1 Statement to American Antitrust Institute, available at http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

2 Ibid.

3 Christine Varney, Testimony before the Senate Judiciary Committee, March 10, 2009, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3700&wit_id=7670.

4 The commission did not join the solicitor general's amicus briefs in *Twombly* and *linkLine*. And the FTC did not join or endorse the Justice Department's report on Section 2 of the Sherman Act, with three commissioners characterizing the report as "a blueprint for radically weakened enforcement of Section 2 of the Sherman Act." See Federal Trade Commission, "FTC Commissioners React to Department of Justice Report, 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act,'" Press release, available at http://www.ftc.gov/opa/2008/09/section2.shtm. The two agencies also have a longstanding disagreement on some patent antitrust issues, reflected most recently in the solicitor general's recommendation that the Court deny the commission's certiorari petition in *FTC* v. *Schering-Plough Corp*., 548 U.S. 919 (2006). Finally, the commission has declined to join a number of amicus briefs filed by the solicitor general at the certiorari stage. See Darren S. Tucker and Kathleen M. Pessolano, "Supreme Court's Weyerhaeuser Decision Follows Recent Pattern," *The Antitrust Source* 4 (5) (April 2007), available at http://www.abanet.org/antitrust/at-source/07/04/Apr07-TuckPess4=27f.pdf.

5 *Pacific Bell Tel. Co.* v. *LinkLine Communications, Inc.*, 129 S. Ct. 1109 (2009); *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877 (2007); *Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264 (2007); *Bell Atlantic Corp*. v. *Twombly*, 550 U.S. 544 (2007); *Weyerhaeuser Co.* v. *Ross-Simmons Lumber Co*., 549 U.S. 312 (2007); *Ill. Tool Works Inc.* v. *Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Texaco Inc*. v. *Dagher*, 547 U.S. 1 (2006); *Volvo Trucks N. Am., Inc.* v. *Reeder-Simco GMC, Inc*., 546 U.S. 164 (2006); *F. Hoffman-La Roche Ltd.* v. *Empagran S. A*., 542 U.S. 155 (2004); *U.S. Postal Serv*. v. *Flamingo Indus. (USA) Ltd*., 540 U.S. 736 (2004); *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *California Dental Ass'n* v. *FTC*, 526 U.S. 756 (1999); *NYNEX Corp. et al. v. Discon, Inc.*, 525 U.S. 128 (1998); *State Oil Inc.* v. *Khan*, 522 U.S. 3 (1997); *Brown* v. *Pro Football, Inc.*, 518 U.S. 231 (1996); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) *Professional Real Estate Investors, Inc*. v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993); *Spectrum Sports Inc.* v. *McQuillan*, 506 U.S. 447 (1993). The sole exception is *Hartford Fire Insurance* v. *California*, 509 U.S. 764 (1993), and even that was a mixed decision with the Court ruling for the defendants in part.

6 *FTC* v. *Whole Foods Market, Inc.*, 533 F.3d 869 (D.C. Cir. 2008).

7 For example, the decisions in the Antitrust Division's challenge to the Oracle-Peoplesoft merger and in the FTC's challenge to the Arch Coal acquisition.

8 *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

9 540 U.S., p. 408.

10 540 U.S., p. 414 (citations omitted; emphasis added).

11 509 U.S, p. 226-227 (citations omitted; emphasis added).

12 129 S. Ct., p. 1120-1121.

13 For example, see Edward A. Snyder and Thomas E. Kauper, "Misuse of the Antitrust Laws: The Competitor Plaintiff," 90 *Michigan Law Review* 551 (1991).

14 550 U.S., p. 555.

15 Ibid., p. 559 (quotation marks and citations omitted).

16 *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975).

17 For example, see 15 U.S.C. § 78u-3.

18 See 12 U.S.C. § 1818(b) (banking agencies); 15 U.S.C. § 1194(b) (CPSC); 21 U.S.C. § 332 (FDA); see also 47 U.S.C. § 205(a) (Federal Communications Commission).

19 See *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986).

20 See Federal Trade Commission, *In the Matter of Negotiated Data Solutions LLC*, Docket No. C-4234 (January 23, 2008) (dissenting statement of Commissioner Kovacic), available at http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

21 Antitrust Modernization Commission, *Report and Recommendations* (April 2007), p. 90, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

22 Ibid.

23 *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms. Inc.*. 881 F.2d 1396, 1402 (7th Cir. 1989), cert. denied 494 US 638 (1990).

24 This prohibition should extend to the use as evidence in a private damages action of the court's determination in an action brought by the government under the new statute or of filings or statements made by a party in defending against such a claim. Of course, once a cease-and-desist order is issued in an action under the new statute, the defendant's failure to comply with that order could give rise to monetary sanctions.

25 Antitrust Modernization Commission, *Report and Recommendations,* p. 94-100.

26 Ibid, p. 31.

27 Ibid, p. 32.