

Reproduced with permission from Antitrust & Trade Regulation Report, 107 ATRR 612, 11/07/2014. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

**REMEDIES****Price Controls****Benching Adam Smith:  
The Increased Use of Price Controls in Antitrust Remedies**

BY MATTHEW L. CANTOR & DANIEL J. VITELLI

**A**ntitrust law is not about picking winners and losers. It is about maintaining a free and open marketplace, so that consumers decide who wins and who loses—not the parties, not the attorneys, and not the judges. In the words of the Supreme Court, the Sherman Act “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”<sup>1</sup>

<sup>1</sup> *N. Pac. R. Co. v. United States*, 356 U.S. 1, 4 (1985).

*Matthew L. Cantor, a partner in the New York City office of Constantine Cannon LLP, specializes in antitrust and health care matters. Daniel J. Vitelli, an associate in the New York City office of Constantine Cannon LLP, also specializes in antitrust and healthcare matters.*

The same principle applies in the context of judges devising injunctions to remedy antitrust violations. Where courts find antitrust violations, they have broad discretion to fashion injunctions so as to “cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.”<sup>2</sup> In exercising this discretion, however, it is not the province of the judiciary to set public policy (in lieu of Congress) or business policy (in lieu of management).<sup>3</sup> Courts, therefore, traditionally favored injunctions that simply prohibited illegal conduct rather than those that prescribed a complex set of metrics, regulations, and dos and don’ts for future conduct. Rid the market of the anticompetitive restraints and let the free market—or Congress—decide the rest, courts have historically argued.

In the last year, however, two high-profile antitrust actions involved injunctions that provide for price restraints to be placed upon defendants in order to constrain their exercise of market power. This quasi-regulatory method of curing antitrust problems may signify a turning point in the history of antitrust enforcement. Traditionally, courts and enforcers have avoided the use of price caps to remedy antitrust concerns on the grounds that such entities are ill-equipped to administer complex, quasi-regulatory schemes set out in injunctions.<sup>4</sup> Now, it seems they may be allowing

<sup>2</sup> *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950).

<sup>3</sup> See IIA Phillip E. Areeda et al., *Antitrust Law* ¶ 325 (3d ed. 2007) (“[T]he purpose of antitrust law is not to substitute for agency regulation but to make markets competitive and thus able to function without the need for ongoing supervision. Decrees that force firms to sell at ‘reasonable’ prices are generally inimical to this goal, for they substitute regulation for market correction and turn the court into a regulatory agency.”).

<sup>4</sup> See United States Department of Justice, Antitrust Division, *Policy Guide to Merger Remedies* 7 n.12 (June 2011) (“In determining appropriate conduct remedies, the Division appreciates that displacing the competitive decision-making pro-

for practices and transactions that may, to an extent, run against antitrust norms, so long as the anticompetitive impact of those practices and transactions can be cured by a behavioral decree. The tides may be turning.

On August 8, 2014, Judge Claudia Wilken of the U.S. District Court for the Northern District of California ruled that the NCAA violated the antitrust laws by agreeing with its member schools to restrain compensation of Division I men's basketball and FBS football players.<sup>5</sup> Judge Wilken engaged in a thorough Rule of Reason analysis, balancing the harm to competition against the procompetitive effects of the restraint. The Judge found that the harm to competition caused by the NCAA's rules outweighed the NCAA's justifications, including the NCAA's perennial argument that restrictions on student-athlete compensation preserved amateurism.

Notwithstanding Judge Wilken's conclusion that "the NCAA's challenged rules unreasonably restrain trade in violation of § 1 of the Sherman Act,"<sup>6</sup> the Judge did not outright eliminate the NCAA restraints challenged in the case. Instead, the Court enjoined the NCAA and its schools from agreeing to prohibit deferred payment through a trust fund of \$5,000 per year per player or less (in 2014 dollars) for Division I men's basketball and FBS football players' names, images, and likenesses. The money is to be paid upon expiration of athletic eligibility or graduation, whichever comes first.<sup>7</sup> Judge Wilken proceeded in this way apparently out of concern that unleashing full-fledged competition would turn the NCAA into nothing more than a professional league of have and have-not institutions. She wanted to ensure that the "playing field" continues to be level, but not at a cost of depriving college athletes of all justified compensation.

Is \$5,000 per annum the appropriate maximum amount for players to receive for the exploitation of their indicia? It is unusual for a judge in an antitrust case to permit a boycotting defendant to institute a price cap on amounts that should have been paid to the victims of the boycott. In this case, Judge Wilken effectively decided that it is "reasonable" to limit payments to athletes for the exploitation of their indicia, even though market demand for certain player indicia (like Heisman Trophy candidates) may be significantly higher than the market demand for others.

But the relative value of a college athlete's name, image, and likeness was not the question before the court. The question before the court was whether or not the NCAA's rules—as they existed—violated the antitrust laws. The court found they did. Historically, most courts

---

cess widely in an industry, or even for a firm, is undesirable. The Division is not a regulatory agency charged with determining how competition should occur in a particular industry.").

<sup>5</sup> *O'Bannon v. NCAA*, No. C 09-3329 CW, 2014 WL 3899815, at \*36 (N.D. Cal. Aug. 8, 2014). To be more precise, Judge Wilken found that the NCAA's rules that prohibit student-athletes from receiving a share of the revenue that the NCAA and its schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses violate the antitrust laws. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> The Court also enjoined the NCAA from agreeing to prohibit the inclusion of compensation in the award of a full grant-in-aid, up to the full cost of attendance.

answering that question affirmatively would have enjoined continued enforcement of the rules that limited student-athlete payment, as they were found to have violated the Sherman Act. That would have, in turn, allowed for the forces of supply and demand to set appropriate payments for athletes. Judge Wilken opted for a different remedy. The case has been appealed to the Ninth Circuit.

On the opposite coast, a Massachusetts state court is considering whether to approve an antitrust settlement that uses price caps to try to rein in potential market abuses following a hospital merger. In *Massachusetts v. Partners Healthcare System, Inc.*, the Massachusetts State Attorney General filed a lawsuit alleging that Partners' acquisition of rivals South Shore Health and Educational Corp. (South Shore Hospital) and Hallmark Health Corp. (Lawrence Memorial Hospital and Melrose-Wakefield Hospital) would reduce competition and increase prices.

The Attorney General's office negotiated a lengthy settlement that (1) restricts how Partners can negotiate with insurers; (2) limits Partners' ability to grow its provider network; and (3) caps the amount that Partners can increase its prices. With respect to the price caps, "[f]or six and one half years, the rate of increase, if any, of prices charged for Partners' health care services shall not exceed the lower of general inflation or medical inflation."<sup>8</sup> In short, the settlement would, among other things, peg prices to inflation for six and one half years to help preserve competition.<sup>9</sup>

To remedy any antitrust harms arising from the proposed merger over the provision of inpatient health services for general acute care, one would have generally expected the Massachusetts Attorney General either to block the merger or to demand adequate divestiture. That is not what has occurred here. Indeed, the U.S. Department of Justice has signaled its support for the price-cap/behavioral remedies favored by the Massachusetts AG in this situation, even though the DOJ historically has preferred "structural" remedies. The judge presiding over the Partners case recently expressed concern about the proposed settlement and scheduled a further hearing for November 10, 2014.

Judge Wilken's injunction in the NCAA case and the Massachusetts Attorney General's proposed settlement in the Partners merger case demonstrate judges' and enforcers' increased appetite for using market regulation to remedy antitrust concerns. This may signal a major shift in how our nation's antitrust laws are ultimately enforced. Even if the NCAA injunction and the Partners settlement are upheld on review, it may take years to determine whether this apparent shift in enforcement is better from an economic or antitrust policy perspective. In the interim, we expect more antitrust defendants and merging parties to propose price-cap/behavioral remedies they find palatable.

---

<sup>8</sup> Mem. of the Commonwealth of Mass. in Supp. of the Entry of Final J. 14.

<sup>9</sup> See *id.* at 1-2 ("[T]he Consent Judgment incorporates a combination of market tools and price and growth restrictions to address comprehensively the competitive harms alleged in the Complaint and, therefore, is consistent with the public interest.").