Looking at Labor from Both Sides Now

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Clayton Act § 6 (15 U.S.C. § 17), enacted in 1914, declares that the "labor of a human being is not a commodity or article of commerce." The statute unquestionably was intended to protect the formation and operation of labor organizations—unions—the purpose of which was to eliminate competition among laborers in connection with seeking better wages, hours and working conditions. Lest there be no mistake, Clayton 6 is entitled "Antitrust laws not applicable to labor organizations," and provides in part that neither labor organizations, nor the members thereof, are combinations or conspiracies in restraint of trade in violation of the antitrust laws. Clayton Act § 6 is part of our labor policy and establishes an exemption from our competition policy.

On the other hand, labor, whether it takes the form of manual labor or brainpower, is an essential input to the production of a good or service for sale to downstream consumers. In that context, it long has been understood that labor is a type of market or activity affecting commerce that could be restrained by anticompetitive conduct. This concept is part of our antitrust jurisprudence, distinct from, but not inconsistent with, labor policy.

Recent investigations, litigation and scholarship have ignited a debate as to whether there can be an antitrust claim for harm to a labor market, absent a showing of a product market effect. Further, if it is sufficient to show an effect on a labor market, how often does this occur and what evidence does a plaintiff need to prove that the conduct is more anticompetitive than procompetitive?

Exempting Labor and Sowing the Seeds of Labor Policy

In enacting Clayton Act § 6, Congress in 2014 sought to make express what the Sherman Act drafters back in 1890 had thought was perfectly clear. The kind of combination that Senator Sherman intended the Sherman Act to prevent was a combination that could "control the market, raise or lower prices as will best promote its selfish interests, . . . dictate terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors."[2] In fact, the congressional debates about what concerted activity the Sherman Act would reach were not unambiguous. Senator Sherman at one point introduced an amendment that would have expressly exempted labor organizations and agriculture cooperatives from the reach of the law.[3] And Senator Aldrich expanded the exclusion further to exempt combinations "with a view, or which tend . . . by means other than a reduction in of

[1] This paper reflects only the views of the author. Nothing in this article should be taken to reflect the views of the Attorney General of the State of New York or anyone else in the Office of the New York Attorney General.

[2] Hoffmann, E., *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOKLYN L.REV.1, 14-15, *citing* 21 CONG. REC. 2457 (1890), *reprinted in* 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUES 9 (1978), at 116-17.

[3] Hoffmann, E., *Labor and Antitrust Policy: Drawing a Line of Demarcation*, *supra*, note 1, at 16-17, *citing* 21 CONG. REC., at 2611, *reprinted in* 1 E. KINTNER, *supra* note 2, at 205-06.

the wages of labor" to lessen the cost of production or reduce prices (*i.e.*, create cognizable efficiencies). [4] Specificity, though, was rejected in favor of a broad proscription on all contracts, combinations or conspiracies that restrained interstate commerce.

However well-intended the drafters of the 1890 Sherman Act had been, during the first two decades of its existence the statute was used to attack labor organizations as restraints on commerce.[5] Congress in 1914 responded with language to make explicit in the Clayton Act what had always been implicit: antitrust law was not meant to be used as a weapon against workers; rather, Congress wanted the seeds of the collective bargaining process to flourish.

Legislators introduced a number of bills to create an explicit exemption for labor unions. Early versions of Clayton § 6 simply exempted labor organizations from the antitrust laws, much along the lines of what Senator Sherman had proposed back in the 1890 debates. [6] Senator Cummins, an Iowa Republican, was concerned about any lingering ambiguity:

> [I]t disturbs me to hear labor termed a commodity--to hear the power of a man or woman to exercise the strength of mind or body in the production of something useful to the human race confused with the product which is the result of its exercise .... [W]hen labor unions ... are declared to be without the antitrust law, we are simply recognizing the essential character of things and are making a legislative declaration or interpretation of the law rather than classifying the people of the country and allowing one class to escape and another class to be bound. [7]

It was his suggestion to add the declaration that "the labor of a human being is not a commodity or article of commerce."[8] The Supreme Court had justified applying the Sherman Act to labor organizations by reasoning that "the act made no distinction between classes."[9]

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[4] *Id*., *citing* 21 CONG. REC .at 2654-55, *reprinted in* 1 E. KINTNER, *supra* note 2, at 245.

[5] Some of the earliest cases under the Sherman Act upheld injunctions or awarded treble damages against unions. *See, e.g*., *Loewe v. Lawlor*, 208 U.S. 274 (1908) (reversing lower court judgment upholding demurrer to complaint for treble damages based on boycott of non-unionized manufacturer); *United States v. Debs*, 64 F. 724 (C.C.N.D. Ill. 1894) (upholding injunction against Pullman strike and holding directors and officers of union in contempt), *aff'd,* 158 U.S. 564 (1895); *United States v. Workingmen's Amalgamated Council*, 54 F. 994 (C.C.E.D. La. 1893) (upholding injunction against organizational strike by draymen).

[6] See generally Kovner, J., *The Legislative History of Section 6 of the Clayton Act,* 47 COLUM. L.REV. 749, 753-57 (1947).

[7] Senator Cummins elaborated: "If we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital and their transportations throughout the country we have lost the main distinction which warrants, justifies, and demands that labor organizations coming together for the purpose of bettering the conditions under which they work, of lessening the hours which they work, and of increasing the wages for which they work shall not be reckoned to be within a statute which is intended to prevent restraints of trade and monopoly." Hoffmann, E., *Labor and Antitrust Policy: Drawing a Line of Demarcation, supra* note 2, *citing* 51 CONG. REC. 13,983, 14,456 (1914), reprinted in 2 E. KINTNER, *supra* note 2, at 1919-20, 2366.

[8] *Id.*

[9] *Loewe v. Lawlor*, 208 U.S. 274, 301 (1908). "The act made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us." *Loewe v. Lawlor* (the Danbury Hatters case) was brought by hat manufacturers in Danbury, CT, against the United Hatters of North America, part of the American Federation of Labor. The complaint alleged that defendants were "engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States . . . to unionize . . . ." and that the defendants sought to accomplish their goal through intimidation, threats, coercion and boycotts, interfering with trade and commerce between the plaintiffs and their customers, and causing damage to business and property.

Adding Cummins' language to Clayton § 6 was one way to make clear that this was not about creating a protected class: there was a moral distinction between labor and commodities.

Since its enactment, Clayton § 6 has been labeled the "statutory labor exemption" and a body of law has created a "non-statutory exemption" for employer-labor combinations, or employer combinations acting in furtherance of the collective bargaining program that Congress has established.[10] All of this revolves around the notion that labor is not an article or commodity of commerce, and Congress has created a labor policy that recognizes asymmetry in bargaining power between labor and employers, mandates collective bargaining among groups of workers that are part of certified labor organizations and employers, and is essentially indifferent to the effect on product markets.

Looking at Labor from the Other Side

In recent years, there has been renewed interest in looking at labor from a different perspective—as victims of the trusts that the drafters of the Sherman Act condemned, among other reasons, because "[they] command[] the price of labor without fear of strikes, for in [their] field[s] [they] allow[] no competitors." The legislative history, the text of the Sherman Act, the Clayton Act and the historical backdrop—in particular the approach taken by the Supreme Court in the years between the two statutes---tells us where Congress wanted to go. Congress's principal aim was to outlaw trusts that restrained competition, whether the anticompetitive conduct targeted products or targeted the labor, recognizing that restraining the latter could lead to higher profits from the former. This is not inconsistent with Congress's goal, described above, to protect nascent labor unions from attack under the Sherman Act.

But over the last half century, our antitrust jurisprudence has focused on protecting "consumer welfare"—a term coined in the late 1970's[11] and adopted by the courts,[12] although found nowhere in the text of the antitrust statutes or their legislative history. Consumer welfare generally refers to a distributive concern—that is, maximizing benefits to consumers, as opposed to "total welfare," which would include producer welfare in a calculus of benefits versus harm. Consumer welfare also has come to mean something that is measurable. Most often, and perhaps exclusively, this is price or output effects. The current debate revolves around whether consumer welfare could and should mean something more, and if it doesn't, should we adopt a new standard. Even the more conservative voices in the debate embrace innovation as part of consumer welfare.[13] Consistent with precedent, others consider any harm to trading partners caused by anticompetitive conduct to be part of the consumer welfare calculation, regardless of whether an effect on end consumers can be proven—their argument

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[10] See generally *Brown v. Pro-Football*, 518 US 231, 236-37 (1996) and cases cited therein.

[11] See R. Bork, The Antitrust Paradox: A Policy at War with Itself (Basic Books, Inc. 1978).

[12] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'")

[13] *See, e.g.,* Prepared Statement of Abbott B. Lipsky, Jr. Antonin Scalia Law School George Mason University, Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Consumer Rights Hearing on *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?* (December 13, 2017), at 6.

is that antitrust should protect the competitive process. Wu, for example, argues that it makes more sense to protect the competitive process than an indeterminate value like "consumer welfare." [14] Still others want to abandon the term altogether, suggesting that it invites disregard of harms such as income inequality or destruction of small businesses that might be linked to the aggregation of economic power.[15] That there is a lively debate reflects discontent with a purely quantitative analysis, or at least one that only looks at measurable price effects on the sell side.

So what has this got to do with labor? Apart from the statutory carve-out for labor organizations, and the judicially derived non-statutory employer exemptions that were intended to further the collective bargaining process, there seems to be no real doubt that labor should be looked at as part of commerce—an input market that can be affected by anticompetitive conduct. The question seems to be whether harm to the competitive process directed at labor –high wage or low wage—is enough to sustain an antitrust case. If suppressing the cost of inputs (like labor) will benefit consumers paying for the end product by reducing prices, are we shooting ourselves in the foot?

The answer in one context is easy. The Department of Justice Antitrust Division has stated that if competitors agree on the allocation of labor (i.e., make no poach agreements) or fix the price of labor, that's a horizontal agreement deemed *per se* unlawful, and the parties can even be prosecuted criminally.[16] Like any *per se* unlawful agreement, proof of agreement results in a conclusive presumption of illegality and no proof of anticompetitive effect on a product market or any other kind of market is required.

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[14] Wu, Tim "*After consumer welfare, now what? The "protection of competition" standard in practice,*" Competition Policy International (April 2018) at 2; see also Opening Statement of Carl Shapiro at 2, *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?* Hearing of the Antitrust, Competition and Consumer Rights Subcommittee of the Senate Judiciary Committee (December 13, 2017). Dr. Shapiro would "operationalize" the consumer welfare standard as follows: "a business practice is judged to be anti-competitive if it disrupts the competitive process and harms trading parties on the other side of the market."

[15] *See, e.g.*, Testimony of Barry Lynn at 13, *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?* Hearing of the Antitrust, Competition and Consumer Rights Subcommittee of the Senate Judiciary Committee (December 13, 2017).

[16] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, GUIDANCE FOR HR PROFESSIONALS, at 1-4 (2016). https://www.justice.gov/atr/file/903511/download. Given the novelty of the policy, the Antitrust Division has said that it will prosecute criminally in cases where the agreement postdated, or continued after, the announcement of the 2016 policy. See, e.g., Remarks of Andrew C. Finch, Principal Deputy Assistant Attorney General before the Heritage Foundation (January 23, 2018) https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-c-finch-delivers-remarks-heritage. Civil settlements where the DOJ argued for a per se rule have included *U.S. v. Knorr-Bremse* (1:18-cv-00747-CKK, filed 07/11/18 (D.D.C.) (settlement and final judgement entered July 11, 2018); *U.S. v. eBay*, (5:12-cv-05869-EJD, filed 09/02/2014(D.D.C.)); *U.S. v. LucasFilm* (1:10-cv-02220-RBW, filed 05/09/11 (D.D.C.)); *U.S. v. Adobe Systems, Inc.; Apple Inc.; Google Inc.; Intel Corp.; Intuit, Inc.; and Pixar* (1:10-cv-01629, filed 03/18/11 (D.D.C.)). See also Hassan A. Kanu*, Google Ends 'No Poaching' Requirement for Former Employees*, BLOOMBERG LAW (June 12, 2019, 6:42 AM), https://news.bloomberglaw.com/daily-labor-report/google-ends-no-poaching-requirement-for-former-employees; Legal Entertainment, *Disney Settles Anti-Poaching Lawsuit*, FORBES (Feb. 2, 2017, 6:53 PM), https://www.forbes.com/sites/legalentertainment/2017/02/02/disney-settles-anti-poaching-lawsuit/#7cfccc7f3983.

The answer in other contexts is more problematic. Consider, for example, franchisor-franchisee contracts that include clauses preventing one franchisee from hiring an employee from another franchisee. Putting aside some horizontality when franchisors own company stores, these agreements smell vertical. But one might argue that the effect is the same as an agreement among competitors not to compete for workers.

States have investigated and have entered into a series of settlements with fast food and other chains in which franchisors have agreed not to enforce the no-hire clauses.[17] In one private litigated case involving a McDonald's no-hire clause, the court, denying a motion to dismiss, found that the plaintiff had alleged a horizontal restraint based on the existence of company owned stores that competed with the franchisees, all bound by the same no-hire clause. Rather than apply a *per se* rule, though, the court found that the restraint should be tested under a quick look theory because it was ancillary to the broader franchise arrangement.[18] The Antitrust Division filed two statements of interest in private litigation involving no-poach or no hire clauses to make clear its position on the legal standard to be applied. In one case, involving a franchise agreement, the DOJ advocated for a rule of reason, meaning that the defendants should have the opportunity to demonstrate that the procompetitive effects of a franchise no-hire clause outweighed the anticompetitive harms.[19] In the second case, which followed a DOJ settlement relating to a no-poach agreement among competitors in the rail equipment industry, the DOJ argued for a *per se* rule. [20]

Adverse effects on labor are at the heart of a case involving the Ultimate Fighters' Competition ("UFC"), which focuses on allegations of the UFC's exclusionary conduct. The plaintiff athletes allege that contractual restrictions prevent them from fighting for any competitor or would-be competitor league, with negative effects on their mobility and compensation. The fighters survived a motion to dismiss, and a motion for summary judgment is pending. The parties largely agree on the tests to be applied under Sherman Act section 2: Is there monopoly power? Is there exclusionary conduct? They differ, of course on critical aspects such as market definition, market power, and whether the conduct was in fact exclusionary. But one way to look at this type of case is that proof of monopsony power will

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[17] A number of states have pursued this type of conduct. E.g., Gene Johnson, *7 fast-food chains agree to end 'no-poaching' policies*, SEATTLE TIMES (July 12, 2018, 11:09 AM), https://www.seattletimes.com/seattle-news/apx7-fast-food-chains-agree-to-end-no-poaching-policies/; Diana Bartz & Alana Wise, *U.S. states probe fast-food franchise deals not to poach workers*, REUTERS (July 9, 2018, 4:31 PM), https://www.reuters.com/article/usa-restaurants-probe/u-s-states-probe-fast-food-franchise-deals-not-to-poach-workers-idUSL1N1U5157; Press Release, *Attorney General Letitia James Joins Multistate Settlement To Cease Fast Food Usage Of No-Poach Agreements*, OFFICE OF THE NEW YORK ATTORNEY GENERAL (Mar. 12, 2019) ("Dunkin', Arby's, Five Guys, and Little Caesars will Drop Provisions that Limit Recruitment and Hiring of Fast Food Workers."); Press Release, *AG Ferguson's Initiative to End No-Poach Clauses Nationwide Reaches 100 Corporate Chains*, OFFICE OF THE WASHINGTON ATTORNEY GENERAL (Oct. 7, 2019); Ashley Hiruko, *First AG lawsuit against company no-poach clause ends with $150K payment*, BOTHELL REPORTER (Sept. 3, 2019, 8:30 AM), http://www.bothell-reporter.com/business/first-ag-lawsuit-against-company-no-poach-clause-ends-with-150k-payment/.

[18] *Leinani Deslandes v. McDonald's LLC et al,* No. 17 C 4857 (N.D. IL June 25, 2018).

[19] *Myrriah Richmond and Raymond Rogers v. Bergey Pullman Inc*., No. 2:18-cv-00246-SAB (E.D. WA) (Statement of Interest, filed Mar. 7, 2019).

[20] *In re: Railway Industry Employee No-Poach Antitrust Litigation*, No. 2:18-MC-00798-JFC (W.D. PA) (Statement of Interest, filed Fed. 2, 2019).

also prove monopoly power, and the injury to competition would be the same—impeding competition from other leagues. The only difference here is the type of harm that these plaintiffs experienced—reduced wages and mobility, rather than increased prices for games.[21]

The context that has raised the most difficult questions is mergers. Section 7 condemns a merger "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Mergers typically are evaluated to see whether the effect would be "substantially to lessen competition" in the sale of a product or service, although the text of the statute is not limited to downstream effects. As Hovenkamp and Marinescu have observed, however, there are no litigated decisions enjoining a merger solely due to an effect on a labor market.[22]

Evaluating whether a merger may have anticompetitive effects on a labor market involves many of the same elements as determining whether a merger has anticompetitive effects on a product market. For example, a plaintiff would need to define a relevant market and demonstrate that the merger would reduce competition for the purchase of labor in that market. As we have seen from cases like the hi-tech no-poach investigations, labor markets are not necessarily co-extensive with product markets. E-Bay and Intuit may not compete for sales, but they might compete for computer engineers. [23] Assuming that we've defined a relevant market, and there is a problematic increase in concentration, are there any circumstances when reduction of competition in a labor market will be sufficient to show a violation of Clayton Section 7?

There is an economic case for answering yes, as Rose and Hemphill point out. For example, reducing purchases of inputs might reduce the output of a firm, and ultimately raise the price of the downstream product or service.[24] But consider the situation where that is not provable, and the only provable effect is on the labor market. As a legal matter, Hemphill and Rose persuasively argue that the Supreme Court has been concerned with seller harm the same way that it has been concerned by buyer harm.[25] As a factual matter, many, if not most mergers that adversely impact a labor input market would also impact an output product market. Nevertheless, it is possible to imagine cases where this would not be so: if Microsoft and Amazon decided to merge, that might have an adverse impact on computer engineers in

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[21] *Cung Le et al v. Zuffa LLC d/b/a Ultimate Fighting Championship and UFC*, 2:15 cv 01045-RFB. As of Oct. 10, 2019, motions to dismiss had been denied, motions for class certification had been filed, and the court was hearing expert testimony to determine commonality. See Jason Cruz, MMA PAYOUT (Oct. 2019), http://mmapayout.com/category/legal/antitrust-class-action/.

[22] Marinescu, Ioanna and Hovenkamp, Herbert, *Anticompetitive Mergers in Labor Markets* (*U of Penn, Inst for Law & Econ Research Paper No. 18-8*), found at (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124483; see also Naidu, S., Posner, E. and Weyl, E.G., *Antitrust Remedies for Labor Market Power,* 132 HARV. L. REV. 536 (2018-2019).

[23] The Herfindahl-Hirshman Index may be used to measure post-merger concentration and the increase in concentration as several commentators have suggested. *Id.*

[24] Hemphill, C.S. and Rose, N., *Mergers that Harm Sellers*, 127 Yale L.J. 2078, 2087 (2018).

[25] *Id*. at 2087-92, and cases cited therein.

Seattle, but the products that they sell are not substitutable for one another. On the other hand, if the UFC merged with a nascent competitor, that might have an impact both on the labor market (mixed martial arts athletes) and on the product market (ultimate fighting competitions). [26] One interesting issue might be whether impact on labor markets might be an additional tool for questioning some vertical mergers. Consider, for example, if Amazon and Whole Foods both recruited individuals who were highly specialized food inventory managers, could that have been a problem in an otherwise uneventful merger.

Conclusion

There seems to be no valid reason for concluding that an anticompetitive effect on a labor market is an insufficient basis for antitrust liability, regardless whether the conduct is collusive, unilateral or a merger. The legislative histories of the Sherman Act and the Clayton Act lean heavily in favor of protecting workers, both by condemning aggregations of power that drive down wages and control employment, and by shielding labor organizations from attack under the antitrust laws. The case law does not draw a distinction in principle between anticompetitive conduct that harms product markets and anticompetitive conduct that harms labor markets.[27]

It is unlikely that there will be many instances where labor market harm is present and product market harm is absent or unprovable, but they could occur. Certainly, our basic frameworks and tools should be useful in identifying those instances, but there will be new challenges.[28] Enforcement actions against mergers that appear to harm labor, for one, will involve questions of market definition and whether the merger will enable the exercise of market power. The most difficult task will be to identify cases where harm to a labor market is caused by a decrease in competition resulting from the merger, rather than by, for example, closing an inefficient plant or adopting a cost-saving technology. [29]

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[26] See generally *id.* at 2087.

[27] The DOJ/FTC Horizontal Merger Guidelines contemplate labor market effects as a possible basis for liability under Clayton Act §7. U.S. DEP'T OF JUST. & FED.TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §12, at 32-33 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf

[28] Rose discusses the issues in her paper *Thinking Through Anticompetitive Effects of Mergers on Workers* at 5-7 (submitted as part of the ABA Section of Antitrust Law Spring Meeting 2019 CLE papers).

[29] *See generally, United States v. Anthem, Inc*., 855 F.3d 345 (2017). The government's complaint included a claim that Anthem's proposed merger with Cigna would have an anticompetitive effect on providers, driving down their reimbursement. The claim was not adjudicated; the district court found harm in the product market to be a sufficient basis for an order enjoining the merger, a ruling that was affirmed by the Court of Appeals. Anthem argued on appeal that "medical cost savings", including reduced payments to providers, would be an efficiency that would benefit consumers. The majority observed that "medical cost savings only improve consumer welfare to the extent that they are actually passed through to consumers, rather than simply bolstering Anthem's profit margin." *See also id*., Millet, J., *concurring* at 5 ("securing a product at a lower cost due to increased bargaining power is not a procompetitive efficiency when doing so 'simply transfers income from supplier to purchaser without any resource savings'", quoting 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 970c at 106 (2016). Then-Judge Kavanaugh, while dissenting, would have remanded for a decision on the government's monopsony claim, because if the merger did result in monopsony, "Anthem-Cigna would be able to wield its enhanced negotiating power to unlawfully push healthcare providers to accept rates that are below competitive levels. That may be an antitrust problem in and of itself." *Id.,* Kavanaugh, J., *dissenting* at 12.

Neither the legal justifications nor the appropriate application of law to facts will resolve the debate as to whether the "consumer welfare" standard includes or should include effects that only impact labor, and what limiting principles should apply to ensure that antitrust remains our strongest weapon against anticompetitive conduct in the commercial marketplace.