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TWO MODERN ANTITRUST MOMENTS: A COMMENT ON FENTON AND KWOKA

Jonathan B. Baker*

The thoughtful and convincing articles by Kathryn Fenton1 and John Kwoka2 each bring alive an interesting moment in antitrust history at the Federal Trade Commission. At both times, the scope and durability of antitrust’s Chicago School revolution was in question. My comment highlights the way two Commissions, more than a decade apart, addressed that revolution.

The FTC’s decision concerning the General Motors/Toyota production joint venture was issued early in 1984,3 a time of significant uncertainty for horizontal restraints law. The joint venture was under review early during antitrust law’s transition from the structural to the Chicago School era.4 By 1984, the Supreme Court had decided three cases now considered important Chicago School landmarks: GTE Sylvania,5 Brunswick,6 and BMI.7 At the time, however, it would have been easy to question how far the changes in antitrust doctrine would go and how permanent they would be. BMI had introduced an efficiency screen into the traditional per se prohibition against price fixing, but that decision had been followed by Maricopa,8 which could have been read as restricting that...
limitation on the application of the per se rule to settings like that in *BMI*, in which the horizontal agreement was necessary to create a valuable new product. The breadth of *BMI* arguably was not truly evident until *BMI* was reaffirmed by the Supreme Court in *NCAA*, which did not occur until shortly after the FTC issued its decision on the GM/Toyota joint venture.

The GM/Toyota joint venture was not evaluated under Sherman Act Section 1, the statute at issue in *BMI*, but under the tougher incipiency standard of Clayton Act Section 7. In the review of horizontal mergers under Clayton Section 7, the structural presumption of *Philadelphia National Bank* still controlled, although it too had begun to erode. Horizontal joint venture analysis under that statute was then governed by the Supreme Court's *Penn-Olin* decision of 1964 and the FTC's *Yamaha/Brunswick* decision, upheld on appeal in 1981. These joint venture precedents emphasized a structural era concern with the loss of potential competition between the venturers. But they were coming under pressure from what were potentially fundamental shifts in horizontal restraints and horizontal merger doctrines.

The antitrust doctrine dimension of the fight in *GM/Toyota* was over how much antitrust policy should change in response to criticisms from Chicago-oriented commentators that the existing rules unduly discouraged procompetitive conduct. When *GM/Toyota* was decided, that question was being passionately contested, and its resolution was not yet clear.

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9 *Maricopa* was difficult to distinguish from *BMI* and could even have been viewed as limiting *BMI* to its facts.
11 The Clayton Act's objection to mergers that may substantially lessen competition was treated by the Supreme Court as "authority for arresting mergers at a time when the trend to a lessening of competition was in its incipiency." *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).
15 *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981).
16 This contest of ideas was not simply a matter of partisan politics. Each camp included Commissioners from both parties. Republican Chairman James C. Miller III, Republican Terry Calvani, and Democrat George W. Douglas formed the Commission majority; Republican Patricia P. Bailey and Democrat Michael Pertschuk dissented.
Those who viewed GM/Toyota from the well-established structural perspective saw an easy case for enforcement. The automobile industry was considered a tight oligopoly, with GM as its price leader. Entry was difficult, and import competition from Japan was limited by trade agreement. The proposed venture joined the first and fourth leading firms selling passenger cars in the U.S. market. GM had picked Toyota, the largest Japanese automaker, as its partner, even though GM was already a part owner of Isuzu, a smaller Japanese firm with which it could have partnered. GM and Toyota agreed to make small cars together when they could have competed to make them. And their joint manufacturing venture would put them in a position to exchange competitively sensitive information about costs, product design, and sales, thus, potentially, facilitating continued oligopolistic pricing, even if the firms marketed separately the cars the venture would produce.

Alternatively, those who took the rising Chicago School perspective were unwilling to presume that large firms in concentrated markets necessarily would achieve higher-than-competitive prices. They were also attentive to the many possibilities for achieving cost-savings and other efficiencies from collaboration, even if the collaboration was between rivals. From this perspective, GM/Toyota was also an easy case. GM had been unsuccessful at making inexpensive, high-quality, small cars and wanted to learn how to do so from a successful firm. Toyota had achieved great success as an importer, but could not bring in more small cars because of trade restraints and was reluctant to build assembly plants in the United States without first obtaining domestic manufacturing experience. The joint venture thus promised to help GM become a better producer of small cars and to make Toyota a better domestic competitor, able to expand sales more easily by producing in the United States. Moreover, competitive dangers were limited because the joint venture involved only one plant.

As a practical matter, the FTC’s decision was a victory for the Chicago School. The FTC technically found a violation of Clayton Section 7, but it allowed the joint venture to proceed, subject to restrictions on the size of the venture and the information the firms could share. By framing the venture as a violation that needed fixing, the FTC found a way to harmonize a wide-ranging analysis of competitive effects and attention to efficiencies within the pre-existing emphasis of the case law on presumptions of harm from concentrated market structure. As Kathryn

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18 See generally id. at 386 (Statement of Chairman Miller).
Fenton notes, this decision seemed to come from a different era than the FTC’s *Yamaha/Brunswick* joint venture decision three years earlier.\(^{19}\) With Terry Calvani’s appointment as Commissioner the year before and this decision, the FTC firmly embraced the economic approach to antitrust advocated by Chicago School commentateurs.

Fenton also emphasizes that the harm to automobile market competition feared by the structuralists in 1984 has not come to pass. Evaluating the case with the benefit of hindsight, I agree with John Kwoka’s view in a book chapter he wrote on the *GM/Toyota* case: the risks to automobile industry competition in retrospect appear to have been overstated but so were the efficiency gains.\(^{20}\) I suspect that GM picked the wrong joint venture partner to learn most efficiently how to make small cars cheaply.\(^{21}\) GM would likely have learned more from partnering with Nissan, a large Japanese automaker nearly as productive as Toyota. Learning from Nissan would have been easier because Nissan achieved productivity gains while organizing its production process the same way as GM, planning long production runs to achieve scale economies. By contrast, Toyota organized its production process in a way fundamentally different from GM, using small production lots to achieve flexibility and facilitate continuous improvement.

The primary legacy of the FTC’s *GM/Toyota* decision is the agency’s embrace of the economic approach championed by the Chicago School. This approach to antitrust enforcement and policy has captured the antitrust playing field to the point where Kathryn Fenton can reasonably suggest that antitrust lawyers and economists now entering the field likely find this once-controversial decision entirely unremarkable.\(^{22}\)

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\text{Over the decade that followed the } \textit{GM/Toyota} \text{ decision, the Supreme Court completed its reconstruction of antitrust doctrine along Chicago School lines. The shift in perspective often had bipartisan support, although that was least true during the second term of the Reagan administration, when the antitrust enforcement agencies flirted with less mainstream non-interventionism.} \textsuperscript{23} \text{The arrival of the Clinton administration marked the return of Democrats to the Executive Branch for the} \\
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\text{\textsuperscript{19}} \text{Fenton, supra note 1, at 1014.} \\
\text{\textsuperscript{20}} \text{John E. Kwoka, Jr., \textit{International Joint Venture: General Motors and Toyota}, in THE ANTI-TRUST REVOLUTION 46, 76 (John E. Kwoka, Jr. & Lawrence J. White eds., 1989).} \\
\text{\textsuperscript{21}} \text{See generally Jonathan B. Baker, \textit{Fringe Firms and Incentives to Innovate}, 63 Antitrust L.J. 621 (1995).} \\
\text{\textsuperscript{22}} \text{Fenton, supra note 1, at 1013, 1027.} \\
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first time since 1981. This moment in antitrust history promised to begin to reveal what was partisan and what was permanent in antitrust policy’s Chicago School revolution. At the FTC the question was: where would Chairman Robert Pitofsky accept the changes in antitrust and where would he push back? This issue arose, among other places, in the FTC’s decision in California Dental,24 a primary subject of John Kwoka’s article.

The California Dental case addressed advertising restrictions imposed by a state dental association. Members agreed to abide by a Code of Ethics prohibiting false and misleading advertising, and the association issued a number of advisory opinions interpreting the Code provision. The FTC concluded that the resulting advertising restrictions had the practical effect of discouraging competition on the basis of price (by preventing discounters from advertising that fact) and service quality (by preventing dentists from advertising “gentle care” or a one-year guarantee).

From an economic perspective, the theory pursued by the FTC could be viewed as attacking a method the dentists used to police a cartel. The FTC’s legal theory was that the advertising restrictions constituted a horizontal agreement in restraint of trade. Ultimately, the Supreme Court found that the facts found by the FTC were not sufficient to reject the alternative hypothesis: these advertising restrictions promoted competition by discouraging unscrupulous dentists from exploiting uninformed consumers through deceptive advertising claims.

Chairman Robert Pitofsky’s approach to analyzing the dental association’s conduct was shaped by his extensive engagement with antitrust enforcement, policy, and theory. Pitofsky is an accomplished antitrust academic and practitioner, with an unparalleled knowledge of antitrust and its history. He understands the long line of antitrust precedents as a continuous evolution, and synthesizes recent decisions with older ones by identifying their common core. Pitofsky accepts the modern emphasis on efficiencies as a healthy corrective and championed the clarification of the role of efficiencies in horizontal merger analysis while Chairman of the FTC.25 Nevertheless, he also emphasizes the impor-

24 Cal. Dental Ass’n v. FTC, 121 F.T.C. 190 (1996), aff’d, 128 F.3d 720 (9th Cir. 1997), rev’d, 526 U.S. 756 (1999). Although I worked for Chairman Pitofsky at the FTC as Director of the Bureau of Economics, I did not work on this matter. Pitofsky and I arrived at the FTC only two months before the Administrative Law Judge issued his initial decision in the case. There was no role for the Bureau of Economics in the review of that decision by the Commission or the subsequent review in the courts. Accordingly, my interpretation of the FTC’s California Dental case is that of an academic observer, not that of a participant.

tance of making sure that efficiencies are demonstrated, rather than merely assumed, and ensuring that in the contemporary enthusiasm for efficiencies core antitrust principles are not discarded.

From this perspective, one key feature of the FTC’s *California Dental* decision, which Chairman Pitofsky authored, was its insistence on making a clear distinction between per se rules and rule of reason analysis. This is also a theme of the Competitor Collaboration Guidelines, issued by both federal enforcement agencies later during Chairman Pitofsky's term.** His likely goal was to protect the per se prohibition against naked price fixing from erosion in the hands of those who presume efficiencies everywhere. Pitofsky worried that the FTC's earlier decision in *Mass. Bd.*—to which the Commission arguably returned in *Polygram (Three Tenors)*—came closer to viewing all truncated analyses under Sherman Act Section 1 as on a continuum and, consequently, that the *Mass. Bd.* precedent would provide less protection against doctrinal erosion than would a clear demarcation between per se rules and the rule of reason.

The Supreme Court's later decision in *California Dental* was a missed opportunity to clarify the doctrinal status of truncated (quick look) rules. The resulting uncertainty, which we must live with today, recalls Chairman Pitofsky's concern that per se rules should be preserved against erosion. The Court seems clear that at least some quick look approaches are acceptable in theory, but the majority provides little guidance as to when they may be employed in practice. The Court merely calls for "an enquiry meet for the case."** In the wake of this decision, it is difficult to know when the government can risk resting on a facial analysis of the restraint or evidence of its actual effects (one quick look approach to condemnation), or on a showing that a plausible efficiency proffered by defendants is not valid after more searching inquiry (another type of quick look to condemn), without contesting market definition (as would be required for a more extensive reasonableness analysis).** Nor do defendants know when they can rest on proof that they lack market power

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30 Id. at 781. See id. at 779 ("Had the Court of Appeals engaged in a painstaking discussion in a league with Justice Breyer's (compare his 14 pages with the Ninth Circuit's 8), and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion.").

31 On types of quick looks to condemn or exonerate, see generally Guidelines for Collaborations, supra note 26, § 3.3; ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B.
COMMENT ON FENTON AND KWOKA (a quick look approach to exoneration), without proving efficiencies or the absence of actual harmful effects (as would be required for a more extensive reasonableness analysis). To the extent that the applicability of these truncated approaches to horizontal restraints analysis under the rule of reason is unclear, both parties may be led to insist on developing a full factual record in all horizontal agreement cases outside the most naked restraints. The government will then investigate such cases, and the parties will litigate them, as if they will be decided under an unstructured rule of reason.

Like per se rules, quick look rules are closer to bright line rules than to unstructured standards. Accordingly, Pitofsky's concern about protecting per se rules has an analogue when quick look rules are at stake: if the quick look rules are viewed as on a continuum, without clearly demarcated categories—as the Supreme Court's "enquiry meet for the case" formulation seems to suggest—how can courts preserve the benefits of truncated analyses in providing guidance as to the legal rules and in reducing the transaction costs of litigation? This problem is more difficult in the quick look context than in the per se rule setting addressed by Pitofsky. For the most part, courts, counselors, enforcers, and commentators have a common understanding of what falls in the category of "naked" horizontal restraints—agreements tantamount to price fixing or market division among rivals with no plausible efficiency justification. By contrast, there is less consensus as to when conduct outside traditional per se categories should be condemned or exonerated without detailed analysis. One unresolved question involves the probative value of actual effect evidence, whether direct evidence of harm to competition or immediate (facial) inference from the nature of the restraint. How convincing must such evidence of actual effect be before it makes sense to proceed without defining markets and, consequently, also without evaluating whether shares are high enough to make harm to competition likely (as would be required in a more complete reasonableness review)? The Supreme Court has some experience in making such judgments, but it is far from clear why a limited factual showing of actual effect was sufficient to support a quick look condemnation in NCAA and Indiana Federation of Dentists but not in California Dental.

BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 196-201 (2002).

These are the general benefits of bright line rules. Unstructured standards, by contrast, can be attractive notwithstanding loss of these benefits, to the extent they reduce error costs in doctrinal application.


Another unresolved problem involves the hierarchy of quick look approaches. A plaintiff might argue that a particular practice would have been treated as a naked restraint, and held illegal per se, were it not for the plausibility of the defendants' efficiency justification. Consequently, the plaintiff might argue, this justification should be the only issue requiring detailed evaluation, as a demonstration of its invalidity would lead to a quick condemnation of the conduct. Defendants in the same case might argue simultaneously that they collectively account for so small a share of the market as to make anticompetitive effects implausible and, thus, that their conduct should be quickly exonerated. Under such circumstances, which of the two proposed quick look approaches, if either, should a court employ?

The FTC's *California Dental* opinion thus provided the springboard for a Supreme Court opinion that raised more questions about quick look rules than it answered. The subsequent history of the FTC's case confirms Chairman Pitofsky's concern about the difficulty of protecting doctrinal understandings absent clear and simple "bright line" rules.

More broadly, Chairman Pitofsky's *California Dental* opinion for the FTC illustrates his ability to tack when the winds shifted to blow from a Chicago direction, without allowing the antitrust vessel to be diverted from the course determined by longstanding core principles of competition policy. Pitofsky was willing to accept movement in horizontal restraints doctrine to incorporate greater sympathy for efficiencies but only if he could be confident that the fundamental bar against naked price fixing was not compromised.35 When Pitofsky addressed antitrust's Chicago School revolution, in short, he saw the value in reforming prior doctrines, so long as reform did not threaten fundamental antitrust prohibitions.36

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Both of these antitrust moments were distinguished by the FTC's incorporation of developments in economic thinking. In reviewing the GM/Toyota joint venture, Chairman Miller assimilated the lesson taught in Chicago by insisting on the importance of weighing procompetitive

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36 Pitofsky's program alternatively could be described in positive terms as restoring the antitrust agenda, for example by investigating potential violations in areas such as anticompetitive exclusion, where governmental enforcement of core prohibitions had become less frequent during the fifteen years before he became FTC Chairman.
benefits against threats to competition and on evaluating those benefits with sympathy for the ability of firms to achieve efficiencies through collaboration. In evaluating advertising restrictions among providers of professional services a decade later, Chairman Pitofsky took for granted then-recent economic learning about the role of reputation and advertising in addressing potential market failures arising from asymmetries in information between sellers and buyers. These developments in economics arose when modern microeconomic theory was transformed by applying game-theoretic arguments to settings with imperfect information. These same developments in economics have also led to contemporary post-Chicago economic critiques of the Supreme Court's reconstruction of antitrust law along Chicago School lines. Accordingly, it is no surprise that around the same time the Pitofsky FTC handed down California Dental, the Commission was also taking seriously theories of anticompetitive harm—notably the threat of anticompetitive exclusion and the potential for mergers to generate unilateral effects—about which Chicago School partisans have been skeptical.

The FTC was not the only institutional actor participating in the development of antitrust policy during the two antitrust moments highlighted by Kathryn Fenton and John Kwoka. It is well-known that the FTC's movement in a Chicago-oriented direction in 1984 paralleled steps taken by the DOJ and the courts. By contrast, it is too early to gauge the influence of Robert Pitofsky's program to accept efficiency-oriented reforms while simultaneously protecting the core of antitrust doctrine. Still, the FTC has established itself as an influential antitrust actor, in part, through its significant participation in the development of antitrust doctrine and policy during these modern antitrust moments.

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57 See Cal. Dental Ass'n, 121 F.T.C. 190, 296 (1996) (citing to economic and policy literature on the marketplace role of advertising, both generally and in the context of occupational regulation). These references are limited; the Commission's opinion does not incorporate a detailed economic analysis comparable to what John Kwoka provides in his article, apparently because the case was tried under a per se theory, without economic testimony as to the marketplace effects of the restrictions on professional advertising. See Kwoka, supra note 2, at 1008 & 1009 n.30.

58 See generally Baker, supra note 4, at 60-75.

59 For example, the appropriate scope of concern with exclusion has been the subject of three decades of debate prompted by Chicago School criticisms. The outcome in one prominent federal court case is nevertheless consistent with Pitofsky's program of protecting the core of antitrust doctrine in this area against erosion. In high-profile litigation seemingly involving every important institutional actor in antitrust enforcement other than the FTC, longstanding prohibitions on anticompetitive exclusion have been reaffirmed by the D.C. Circuit. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001). The unanimous en banc panel included conservative antitrust expert Douglas Ginsburg.