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The Slow Drift Toward More Antitrust Exemptions

By Craig C. Corbitt and Patrick B. Clayton
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For as long as there have been industry-specific regulatory regimes (securities regulations or the old Interstate Commerce Commission, for example), the regulated players have been arguing that they should be exempt from general antitrust liability to private plaintiffs.[1] After all, the argument goes, if Congress has decided to set specific rules for an industry, why should the generally-applicable, "default" antitrust laws also apply? One of the earliest cases regarding an antitrust exemption framed it thusly: "Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act?"[2]

Traditionally, such arguments have been greeted with a cool – if not hostile – reception by the courts, which responded with soaring language recognizing that "the antitrust laws represent a fundamental national economic policy,"[3] and that the Sherman Act stands as the "Magna Carta of free enterprise."[4] The cases evidence a strong reluctance to place regulated conduct beyond the reach of the antitrust laws, owing to the fact that "Congress intended to strike as broadly as it could in section 1 of the Sherman Act,"[5] and that "[l]anguage more comprehensive [than the Sherman Act] is difficult to conceive."[6] Accordingly, the hurdles were set high for those seeking an exemption from antitrust liability: "we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry."[7] These Supreme Court decisions, with full-throated support for the broadest possible application of antitrust, ostensibly remain good law.

But in more recent cases, the sweeping, bright-line language establishing antitrust as the expression of the national economic competition policy, and exemption as the option of last resort, has receded. In its place, a more parsimonious view has

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1 The authors acknowledge that, at a detailed level, distinctions exist among doctrines of immunity, preclusion, and preemption as applied to antitrust. Yet all of these closely-related doctrines achieve the same effect, making it useful to group them together for purposes of this article.

2 *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162 (1922).

3 *Carnation Co. v. Pac. Westbound Conf.*, 383 U.S. 213, 218 (1966).

4 *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 610 (1972).

5 *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975).

6 *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

7 *Carnation*, 383 U.S. at 218.

taken hold, in which new antitrust immunities have been established and existing ones have been enlarged. A recent formulation on the subject by the Supreme Court shows no particular preference for antitrust, dryly reciting that "determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws."[8] The tone is now one of nuance and accommodation, which is unremarkable in terms of general legal analysis, but quite striking when compared to the laudatory approach toward antitrust formerly seen in such cases.

This development cuts across substantive areas of law, though the securities and transportation/communication (*i.e.*, carrier) industries have been particularly affected. At the Supreme Court, *Credit Suisse* and *Trinko*[9] stand as recent examples where the scope of antitrust liability was curbed, in a perceived need to make more room for securities and communications regulatory schemes. *Credit Suisse*, for example, in finding that antitrust claims were precluded against SEC-regulated investment banks, refused to adopt anything less than a categorical antitrust exemption for underwriting syndicate behavior, for fear of "overly" deterring conduct that would be illegal under both securities law and antitrust.[10] (And, the usual left/right idealogical alignments on the high court did not hold, with the majority opinion authored by Justice Breyer and the dissent by Justice Thomas.) The hard rule announced in *Credit Suisse* came despite the urging of the Antitrust Division for the Court to remand the case to determine what inconsistencies, if any, existed between the securities laws and antitrust.[11] This outcome departed from earlier decisions rejecting the notion that comprehensive regulations should oust antitrust claims.[12] The decision belies a certain judicial distrust of antitrust as a means of achieving the benefits of open and competitive markets.

In *Trinko*, which rejected a monopolization claim based on duties imposed by telecommunications regulations, the Court was reluctant to engage in an exemption analysis in the first place: "That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim. . . . [i]n some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity . . . Congress, however, precluded that

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[8] *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 271 (2007).

[9] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004).

[10] *Credit Suisse*, 551 U.S. at 285.

[11] *Id*.

[12] *See, e.g., In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1313 (7th Cir. 1985) ("it was not true that rail carriers' activities were so pervasively regulated that 'the paradigm of competition' had been foresworn by Congress for the rail industry." (internal citation omitted)); *Southern Pac. Communications Co. v. AT&T Corp.*, 740 F.2d 980, 999-1000 (D.C. Cir. 1984) (rejecting the conclusion that challenged practices were subject to "pervasive regulatory control" and finding that application of antitrust was consistent).

interpretation."[13] This hostility towards antitrust claims in regulated industries has been reflected at the circuit and district court levels, in cases touching upon sports,[14] natural gas,[15] and auction rate securities,[16] which have all yielded new refuges from antitrust liability. The Ninth Circuit's *Gallo* decision, for example, found it incompatible to subject natural gas traders – whose prior regulatory regime was replaced by a "barely there" enforcement mechanism that was supposed to increase competition – to antitrust claims. The fact that antitrust stands as the ultimate "market-based" regulatory mechanism to promote open competition garnered scant attention under the court's reasoning.

To be sure, the "legacy" antitrust exemption cases are still cited dutifully by the courts, and indeed the latest blue-ribbon antitrust panel confirmed that application of antitrust in regulated industries should be the national policy.[17] But the vigilance against antitrust exemptions expressed in the older case law seems increasingly at odds with the outcomes in recent decisions, which appear hostile to the idea that the pro-competitive goals of antitrust can be squared with a pro-competitive regulatory regime. The question is whether these developments in antitrust exemptions are a swing of the pendulum that, in time, self-corrects, or instead represent a slow retreat of antitrust as an across-the-board national policy that requires competition to be the ultimate regulator of the marketplace. For the participants in regulated markets, the stakes are high, but for consumer welfare – the promotion of which is the object of the nation's antitrust laws – the stakes are even higher.

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Craig C. Corbitt is a partner in the San Francisco, California office of Zelle Hofmann Voelbel & Mason LLP. Patrick B. Clayton is an associate in the firm's San Francisco office. Zelle Hofmann is a national law firm representing clients in their most challenging insurance-related disputes, antitrust/competition and other complex business litigation. The views and opinions expressed herein are solely those of the authors and do not reflect the views or opinions of Zelle Hofmann or any of its clients. For additional information about Zelle Hofmann, please visit www.zelle.com.

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[13] *Trinko*, 540 U.S. at 406.

[14] *Jes Properties Inc. v. USA Equestrian Inc.*, 458 F.3d 1224, 1226 (11th Cir. 2006).

[15] *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007).

[16] *Mayor & City Council of Baltimore, Md. v. Citigroup Inc.*, No. 08 CV 7746, 2010 WL 430771 (S.D.N.Y. Jan. 26, 2010).

[17] Antitrust Modernization Comm'n, Report and Recommendations 338 (2007) ("When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible . . . [and] should apply wherever regulation relies on the presence of competition . . . to achieve competitive goals.").