WRITTEN TESTIMONY OF JAY L. HIMES

BEFORE THE

SENATE STANDING COMMITTEE ON CONSUMER PROTECTION

OF

THE LEGISLATURE OF THE STATE OF NEW YORK

ON

THE TWENTY-FIRST CENTURY ANTITRUST ACT (S.8700-A)

SEPTEMBER 14, 2020
ALBANY, NY

Chairperson Thomas and Members of the Committee:

My name is Jay L. Himes. I am a practicing attorney, having been admitted to the Bar of this State more than 40 years ago.

I am pleased to have this opportunity to discuss S.8700, the proposed "Twenty-First Century Antitrust Act." The views that I express here and in my oral testimony are my own, and not those of any association, firm, or other organization. As I explain below, I support each of the changes that S.8700-A proposes to make in New York's state antitrust law, the Donnelly Act. After summarizing my background, I consider the provisions relating to: (1) unilateral (single-firm) conduct; (2) criminal enforcement; and (3) class actions.

1. Background and experience

From the spring of 2001 to the end of 2008, I was the Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. Before joining the Attorney General's Office, a substantial amount of my private practice involved antitrust matters, representing both plaintiffs and defendants, and since leaving the Attorney General's Office, virtually all of my practice has consisted of representing plaintiffs in antitrust class actions.

Shortly after I became the Attorney General's Antitrust Bureau Chief, the Court of Appeals for the District of Columbia handed down its landmark decision in the Microsoft case, brought by the U.S. Antitrust Division, the New York Attorney General, and the Attorneys General of various other States.[1] Ruling en banc, the Court upheld Microsoft's liability for

[1] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

unlawfully monopolizing the market for operating systems in Intel-compatible personal computers.

After the Court of Appeals' decision, I was one of the principal negotiators of the 2001 settlement of the case, which resulted in final judgments not only prohibiting various forms of conduct by Microsoft, but also required affirmative disclosure by Microsoft of both: (1) applications programming interfaces to aid developers to write apps for the Windows operating system, and (2) communications protocols designed to facilitate delivery of services from cloud-based servers using non-Microsoft operating systems to individual work-stations and laptops running Windows.

Beginning with the Microsoft settlement and continuing until I left the Attorney General's office in late 2008, I partnered with the U.S. Antitrust Division to monitor Microsoft's compliance with the settlement. This federal/state compliance work included my collaborating on a near-daily basis with my counterparts in the Antitrust Division, regular in-person review sessions at Microsoft's Redmond, WA campus, and on-going supervision of a group of software engineers working full-time on compliance matters.[2]

Since leaving the Attorney General's Office, I also served a four-year assignment as the court-appointed trustee to monitor compliance with the final judgment in *United States v. Bazaarvoice, Inc.*,[3] in which the U.S. Antitrust Division successfully over-turned a merger between Bazaarvoice and PowerReviews, the number 1 and 2 companies in the online product

[2] *See generally New York v. Microsoft Corp*., 531 F.Supp.2d 141 (D.D.C. 2008) (summarizing the compliance effort and extending parts of the States' final judgment over the opposition of Microsoft and the Antitrust Division).

[3] 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

rating and review industry. That work included assuring that Bazaarvoice met it court-ordered obligations to accept and display on a timely basis product ratings and reviews submitted by internet users to PowerReviews, the successor company that operated independently after the District Court ordered Bazaarvoice to divest the assets of the competitor it had unlawfully acquired.

I participate in antitrust and bar association matters generally. I currently chair the International Section of the New York State Bar Association and am a former chair of the Association's Antitrust Section. In recent years, I have also have participated both nationally and globally in panels on such varied topics as antitrust and competition law, online platform issues, class actions, international litigation, investigation, and arbitration, restrictions on employee mobility, state aid under the Treaty on the Functioning of the European Union, and international trade law. I similarly have published on a wide variety of subjects, including the Donnelly Act.[4]

My background is more fully set forth in my accompanying resume.

2. Unilateral (Single-Firm) Conduct

Unlike the federal Sherman Act, the Donnelly Act does not explicitly prohibit monopolization or other anti-competitive single-firm conduct. The case law on whether New York's statute reaches single-firm conduct is, therefore, mixed. S.8700-A addresses this matter in two sub-sections. One would create an express monopolization violation using substantially the same language as Section 2 of the Sherman Act.[5] The other would create a claim for abuse

[4] Experiments in the Lab: Donnelly Act Diversions from Federal Antitrust Law, 15 N.Y. LITIGATOR 61 (No. 2, Fall 2010).

[5] S.8700, at 2, ll 26-29.

of a dominant position.[6] In my view, the abuse of dominance provision is the more important one. Let me discuss it first.

A. Abuse of Dominance

Abuse of dominance is not a concept familiar to antitrust law in the United States. It's not in the federal laws, nor so far as I know, in any state antitrust law. It's very familiar abroad, however, particularly in Europe where Article 82 of the Treaty establishing the European Economic Community, and now Article 102 of the Treaty on the Functioning of the European Union (TFEU), include this violation. This feature of competition law is, indeed, common in many jurisdictions around the world.[7]

Taking Europe as an example, abuse of dominance reaches firms with a significantly lower market share than that required to establish monopoly power under Section 2 of the Sherman Act.[8] It also subjects the conduct of dominant firms to more rigorous scrutiny, imposing on the firm a "special responsibility" to refrain from impairing the market's competitive structure.[9] An abuse of dominance approach therefore is capable of prohibiting single-firm conduct that is largely beyond the coverage of U.S. antitrust law—such as monopoly leveraging, predatory pricing, margin squeezes, foreclosure of competitors through product pricing strategies, and even excessive pricing.

[6] *Id*., at 2, lines 26, 29-32.

[7] *See generally* Anu Bradford, Adam Chilton, Katerina Linos & Alexander Weaver, The Global Dominance of European Competition Law Over American Antitrust Law (Jan. 2019), https://ssrn.com/abstract=3339626.

[8] Case C-62/86, *AKZO Chemie v. Commission,* [1986] ECR I-3359, ¶ 5 (dominance is presumed where a firm has a 50% market share).

[9] *See, e.g.,* Case C-322/81, *Michelin NV v Commission*, [1983] ECR 3461, ¶ 57.

In sum, European enforcers and private litigants have "a more flexible tool than the Sherman Act to deal with the new problems posed by high tech/big data,"[10] as well as those posed by dominant firms operating in the "brick and mortar" economy. The United States has fallen behind Europe and other parts of the world in responding to single-firm conduct that significantly restricts effective competition. To reiterate, abuse of dominance covers single-firm conduct that U.S. antitrust law, as currently interpreted, is typically powerless to reach.

Accordingly, the abuse of dominance provision is S.8700's single most progressive feature. For New York to adopt this provision as part of its antitrust law would advance the State to the cutting edge of competition law. It would help adapt our State's antitrust principles to new and emerging business practices found in our increasingly technological and digital economy.

Some will argue that adopting abuse of dominance as a Donnelly Act violation would introduce more uncertainty, and thus more risk, for an individual firm seeking to determine whether its intended business conduct is legitimately competitive or unlawful. While I recognize this concern, I do not find it persuasive for several reasons.

- First, the offense applies only to those firms that are "dominant" in an identifiable economic sector—and the overwhelming number of businesses simply do not achieve that threshold level.

[10] Eleanor Fox, Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide, 98 NEB. L. REV. 297, 305-06 (2019).

- Second, those that do become dominant can be expected to have sufficient resources to retain quality legal talent, both to defend their conduct and for guidance in antitrust counseling.
- Third, prohibiting abuse by dominant firms should better preserve the contestability of markets by multiple firms than does U.S. monopolization law as it exists today. Promoting contestability will, in turn, assure that firms—most of which are non-dominant—have incentives to innovate.[11]
- Finally, uncertainty is a fact of business life, whether it arises under such areas as products liability, taxation, international trade, or, indeed, antitrust. Business can, and will, adapt as they have in Europe and the many other global jurisdictions that have enacted abuse of dominance as part of their competition law.

Of course, a court hearing a Donnelly-based abuse of dominance claim would lack U.S. law to inform its decision-making. But there is abundant case law in Europe that can provide guidance. That this law has developed outside the United States should not, in my opinion, be a basis for declining to consider it. As Justice Breyer has written:

> [I]f I have a legal problem similar to a problem that a person like me with a job like mine has already faced and decided, why shouldn't I read what he said? I don't have to agree. It does not bind me. I don't have to follow it.[12]

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[11] *See generally* Ariel Ezrachi & Maurice E. Stucke, Digitalisation and Its Impact on Innovation 4 (July 2020) (empirical economic literature "suggests that an increase in competition (from an initial low position) increases the rate of innovation but that high levels of concentration decrease the rate of innovation") , https://op.europa.eu/en/publication-detail/-/publication/203fa0ec-e742-11ea-ad25-01aa75ed71a1/language-en/format-PDF/source-153655453.

[12] Hon. Stephen Breyer, A Story, The Atlantic (Oct. 2018), https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/. *See also* Hon. Stephen Breyer, The Court in the World 11 (2014), https://www.brookings.edu/wp-content/uploads/2017/04/ios_20170411_breyer_lecture_breyer.pdf.

Judges in New York state court, and in the federal courts generally, are well-able to evaluate the case law, whether from Europe or elsewhere, as well as the views of commentators, for its persuasive force when called on to resolve a Donnelly Act abuse of dominance claim.

As currently proposed, the abuse of dominance offense would make it unlawful "for any person or persons with a dominant position in the conduct of any business, trade or commerce or in the furnishing of any service in this state to abuse that dominant position."[13] No further categories of conduct are described. By contrast, Article 102 TFEU provides in pertinent part that:

> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[14]

This list of abusive practices "is not exhaustive."[15]

Including a series of conduct categories in the proposed Donnelly Act provision would respond to the objection that, as currently drafted, the proposed abuse of dominance offense is unduly vague. Modeling the categories on those in Article 102 would facilitate resort to

[13] S.8700, at 2, lines 29-32.

[14] European Union, EU-Lex, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E102.

[15] Case T-201/04, *Microsoft Corp. v. Commission*, [2007] ECR II-3601, ¶860 (2007).

European law and commentary to inform federal and state court consideration of the Donnelly Act claim, as well as assist antitrust practitioners in counselling clients on compliance with the State's new law. Through judicial decisions, a body of Donnelly Act abuse of dominance law would develop, and these rulings would themselves aid the New York Legislature in evaluating whether to enact additional statutory refinement of the claim.

Modeling Donnelly Act categories of abusive conduct on Article 102 seems preferable to developing these categories anew as S.8700-A undergoes further consideration in the Legislature. Independent development could handicap courts looking for guidance on the conduct prohibited unless the legislative history of the provision is sufficiently detailed to illuminate the specific conduct sought to be reached. Or, the Legislature could authorize a government official, such as the Attorney General, to promulgate regulations with the force of law, which identify proscribed conduct. Among the downsides of this approach would be the risk of "mission creep," as the official decided or was persuaded to develop an increasingly intricate "code of conduct."[16] Moreover, stakeholder court challenges to both the procedural and substantive aspects of the regulatory effort would probably delay the new law's taking effect, or even produce its death by a thousand cuts. These concerns might be mitigated by calling for "guidelines," rather than regulations, but with the guidelines lacking binding effect, guidance for courts and antitrust practitioners would decline accordingly.

[16] *Cf*. U.K. Competition & Markets Authority, ONLINE PLATFORMS AND DIGITAL ADVERTISING (Market Study Final Report) 5 (Summary) *et seq*. & 34 (Box 1) (July 1, 2020) (recommending development of a "code of conduct," enforced by a "digital markets unit" applicable to platforms designated as having "strategic market significance").

B. Monopolization

This brings me to S.8700's other provision on single-firm conduct, making monopolization, attempted monopolization, and conspiracy to monopolize a state law violation.[17] Adding this provision—essentially, a Sherman Act §2 clone—is unobjectionable in my view. Better in the Donnelly Act than not.

But I'm skeptical that any great good would come from having this new offense, at least in the foreseeable future. Because the provision mimics federal law, we can predict that courts construing the state counterpart will rely on existing federal case law authority. And there's the rub. Over the last 40+ years, the United States Supreme Court and the lower federal courts have de-fanged monopolization as an antitrust violation in this country.

Ask the witnesses who appear before you to name a leading monopolization decision ***enforcing*** Section 2 that was issued in recent years. You will probably hear the answer "Microsoft" most often—and that's right. While the D.C. Circuit upheld Microsoft's liability under Section 2, that decision is nearly 20 years old. The U.S. Antitrust Division hasn't filed, much less tried, a major Section 2 case in years, although of course we're all waiting to see if the Division is willing to take on one of the tech giants. The FTC went to trial in 2019 in a case against Qualcomm and prevailed in the Northern District of California in a meticulous, fact-based 200+ page ruling by a respected District Court Judge. Earlier this summer, however, the FTC saw its case go up in flames when the Ninth Circuit reversed the district court, relying on

[17] S.8700, at 2, lines 26-29.

non-interventionist Section 2 principles.[18] According to the Court, "[a]nticompetitive behavior is illegal under federal antitrust law. Hypercompetitive behavior"—whatever that is—"is not."[19]

As one academician has put it, the Ninth Circuit's decision is "a victory of theory over facts."[20] That assessment reflects just how out of touch Section 2 theory in the country is with the exercise of exclusionary and exploitive single-firm conduct in fact taking place in real world commerce today.

So, given the state of contemporary monopolization law, I wouldn't expect the new Donnelly Act provision to cause many corporate officers to lose sleep. But enacting the provision isn't likely to hurt enforcement, and maybe over time, the cycle will shift, making monopolization claims viable once again. However, the shift, if it occurs at all, is probably a long time out unless Congress acts.

3. Enhanced criminal enforcement

A. Sanctions for Criminal Violations

Currently, violation of the Donnelly Act carries a maximum fine of $1,000,000 for corporations, and $100,000 for individuals. The maximum term of imprisonment is four years.[21] These provisions were enacted in 1975 and have not since changed.

[18] *Federal Trade Commission v. Qualcomm Inc*., No. 19-16122, 2020 WL 4591476 (9th Cir. Aug. 11, 2020), *rev'g*, 411 F.Supp.3d 658 (N.D. Cal. 2019).

[19] 2020 WL 4591476, at *21.

[20] Timothy B. Lee, Appeals court ruling for Qualcomm "a victory of theory over facts", ARSTECHNICA (Aug. 14, 2020) (quoting Tim Wu), https://arstechnica.com/tech-policy/2020/08/appeals-court-ruling-for-qualcomm-a-victory-of-theory-over-facts/.

[21] Gen. Bus. L. § 341.

By comparison, in 1975 the fine levels under federal antitrust law were the same as those in New York, and the imprisonment maximum was three years, a year less. The federal levels have since changed as public recognition of the seriousness of anticompetitive conduct has developed. Now, the federal levels are:

- $100,000,000 for corporations, or twice the price-fixer's gain or the victim's loss—whichever is greater.
- $1,000,000 for individuals.
- 10 years imprisonment.[22]

The Donnelly Act limits are way out-of-step with the times. S.8700-A would remedy this anachronism, once again aligning the Donnelly Act's sanctions more closely with those found in federal law.[23]

Increasing the criminal sanctions also would affect the Donnelly Act's civil penalty provision, which imports the criminal fine levels into Attorney General civil penalty cases.[24] That too is appropriate. While I headed antitrust for the Attorney General, we used the civil penalty option to deal with serious Donnelly Act violations where proving actual damage to the State or to private parties was particularly problematic. The current $1,000,000 maximum penalty clearly limited our negotiating leverage in resolving these matters.

[22] 15 U.S.C. § 2; 18 U.S.C. 3571(d) (authorizing a fine of "not more than the greater of twice the gross gain or twice the gross loss").

[23] S.8700, at 3, lines 31-41.

[24] Gen. Bus. L. § 342-A (authorizing "a penalty in the sum specified in section three hundred forty-one of this article").

B. The Statute of Limitations

Besides up-dating the Donnelly Act's sanction levels, S.8700-A would increase the current statute of limitations period for criminal cases from three years to five years, the limitations period under federal law.[25] Bearing in mind the time often needed to investigate serious antitrust violations, the state statute of limitations is too short. I can recall at least one hard-core cartel matter that we had to take civil because there wasn't enough time to pursue the case criminally. After we filed our civil case, the U.S. Antitrust Division brought criminal charges against the cartel participants—a case that the Donnelly Act's three-year statute of limitations effectively prevented the New York Attorney General from bringing.

The same three-year limitations period also applies to civil penalty actions brought by the Attorney General.[26] It would, I believe, be appropriate to adopt the same five-year period for these penalty cases, which can require investigation comparable to that of a criminal case.

4. Authorization of Class Actions

Under Section 901(b) of New York's Civil Practice Law and Rules, where a statute permits recovery of a "penalty" for its violation, class treatment is prohibited unless the statute imposing the penalty "specifically authorizes the recovery thereof in a class action."[27] In *Sperry v. Crompton Corp.*,[28] the Court of Appeals held that the CPLR provision bars pursuing a Donnelly

[25] S.8700, at 3, lines 41-45. *See* Gen. B. L. § 341 (providing for "three years after [the violation's] commission"); 18 U.S.C. § 3282(a) (providing for "five years next after such offense shall have been committed").

[26] Gen. Bus. L. § 342-A.

[27] NY CPLR § 901(b).

[28] 8 N.Y.3d 204, 831 N.Y.S.2d 760 (2007).

Act claim for treble damages as a class action. S.8700-A would confer the authorization needed to render Section 901(b) inapplicable.[29]

While I was in the Attorney General's Office, we wrote several amicus briefs arguing that Section 901(b) did not apply to Donnelly Act treble damages claims, including a Court of Appeals brief in *Sperry* itself. The legislative history of the CPLR provision, I believe, demonstrates that the concern sought to be addressed was liquidated damages available for a statutory violation: prove a violation and damages of $50, $100, or whatever, were automatically available, untethered to any actual loss sustained.[30] The class action prohibition was designed to preclude large recoveries, produced simply by multiplication of a liquidated damage amount.

By contrast, there's nothing "automatic" about antitrust damages. A Donnelly Act plaintiff has to prove the monetary loss that the antitrust violation in fact caused, and, if proven, that amount of actual loss is tripled by the court. Establishing damages in an antitrust case generally requires expert evidence, and the challenges are that much greater in the class setting, where common proof is typically required to demonstrate classwide danages.[31]

Therefore, I support this change.

There is, however, another noteworthy consideration here. Under a Supreme Court decision known as "*Shady Grove*," a plaintiff asserting a Donnelly Act claim in federal court is

[29] S.8700, at 3, lines 24-26.

[30] *See* Brief of The Attorney General of The State of New York as Amicus Curiae in Support of Plaintiff-Appellant Paul Sperry 21-23 (Nov. 20, 2006), filed in *Sperry v. Crompton Corp*. (N.Y. Ct. App.), https://ag.ny.gov/sites/default/files/pdfs/bureaus/antitrust/sperry_amicus_final_corrected.pdf.

[31] *See, e.g., Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).

able to pursue a class action under federal civil procedure.[32] This sort of case is common because the federal Class Action Fairness Act creates expansive federal jurisdiction.[33] The effect of *Shady Grove* is that federal courts around the country regularly address issues arising under the Donnelly Act. In consequence, development under New York's antitrust law frequently is left to federal, rather than state, courts hearing significant class actions.

That is undesirable. We should want the courts of our state to have an active, if not the primary, role in construing New York's antitrust law. S.8700's provision would help in this regard as well.

Equally important, *Shady Grove* was decided by a fractured Supreme Court. Justice Stevens, effectively the deciding vote in authorizing resort to federal class action procedure, is no longer on the Court. Accordingly, if the issue were to percolate up to the Supreme Court again, the Court could eliminate or limit pursuit of Donnelly Act class actions in federal court.

Finally, I should make clear that this part of S.8700-A would not ***create*** a private right of action for persons injured by conduct that violates the Donnelly Act. The statute already provides for private claims and authorizes recovery of treble damages.[34] S.8700-A would simply allow an injured individual or business to bring a private damages case as a proposed class action, which then would be tested against the certification provisions of Article 9 of the CPLR. Thus, unlike the circumstances today, New York's own class action mechanism, available in

[32] *Shady Grove Orthopedic Associates, P.A., v. Allstate Insurance Co.*, 559 U.S. 393 (2010); Rule 23, Fed. R. Civ. Pro.

[33] Pub.L.No. 109–2 (2005) (codified as 28 U.S.C. §§ 1332(d), 1453, and 1711–1715).

[34] Gen. Bus. L. § 340(5).

state court cases, would offer an alternative to federal class action procedure, currently available under *Shady Grove*.

5. Conclusion

A complement to federal antitrust enforcement, public and private enforcement of state antitrust laws has a solid foundation in U.S. Supreme Court decisions.[35] The Legislature has the opportunity to enable New York's Donnelly Act to lead in responding to the increasingly concentrated economic power that we confront today, and to the challenges that we face preserving effective competition in our economy generally.

S.8700-A is a big step in the right direction. The Donnelly Act can—and should—be strengthened. Consumers, workers, and the business community itself will benefit.

[35] For a historical overview, *see generally* Jay L. Himes, Federal "Unemption" of State Antitrust Enforcement (May 14, 2004) (remarks presented to Antitrust, Competition and Trade Committee of LEX MUNDI), https://www.academia.edu/5921253/Federal_Unemption_of_State_Antitrust_Enforcement. For a more recent discussion, *see* Note, Antitrust Federalism, Preemption, and Judge-Made Law, 133 HARV.L.REV. 2557 (2020), https://harvardlawreview.org/2020/06/antitrust-federalism-preemption-and-judge-made-law/.