

Spinning Wheels of Justice

Antitrust Drive Supported by Ford in 1974 Is Stalled by Many Federal Miscalculations

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WASHINGTON — Government antitrusters are driving harder than usual in their effort to make the U S free enterprise system truly free. But sometimes they are just spinning their wheels.

For example

— Nearly three years after issuing a monopoly complaint against Exxon Corp. and seven other petroleum giants, the Federal Trade Commission is mired in a procedural bog that could delay the case for years more. Some at the FTC believe the commission committed an irremediable blunder when it voted the complaint after only a sketchy staff investigation. FTC lawyers now are pushing a mammoth 1,800-page subpoena to obtain oil-company documents. None of the present commission members "will be here when this case is finally litigated," commissioner Paul Rand Dixon has told a House subcommittee.

— After six years of investigation and two years of trial preparation, the Justice Department's Antitrust Division recently concluded it didn't have a monopoly case after all against Goodyear Tire & Rubber Co. and Firestone Tire & Rubber Co. Instead of the alleged "classic, highly concentrated oligopoly," the division found only legal, non-predatory competition. The backdown—after analysis of 500,000 pages of documents—raises doubt that the government can prove other big "structural" cases that lack the "smoking pistol" of formal conspiracy, some division lawyers believe.

— Last June, the FTC boldly attacked an alleged conspiracy that, according to its complaint, enabled Hertz Rent A Car, Avis Rent A Car and National Car Rental System to dominate the auto rental business at major airports. The FTC's antitrust chief at the time suggested that the ultimate effect could be the replacement of "one or more" of the companies at some airports by more "price-competitive companies." Now, though, the FTC is talking compromise; the outcome is expected to be a not-so-bold consent order that merely bars certain anticompetitive practices. Lawyers familiar with the case say the commission rushed out its complaint without adequate facts. The settlement "is the best we could get with the evidence we had," one FTC man contends.

Campaign Began in 1974

There isn't any clear, all-embracing explanation for these and other slipups by the enforcers. Congressional pressure for hasty action may be one source of the trouble, and shortages of skilled legal talent in government may be another. Whatever the reasons, repeated miscalculations by the prosecutors do threaten the effectiveness of the antitrust drive, endorsed by President Ford in 1974, that has produced legal assaults against some of the nation's biggest companies.

True, ranking antitrust officials, led by

Assistant Attorney General Thomas Kauper, generally insist that their policing is going as well as at any time in recent history. They point to: The Justice Department's now-pending court suits seeking the breakup of International Business Machines Corp. and American Telephone & Telegraph Corp.; a sharp rise in price-fixing charges filed by the department; the FTC's complaint that four top cereal makers—Kellogg Co., General Mills Inc., General Foods Corp. and Quaker Oats Co.—have suppressed competition.

But the eventual results of all this litigation are far from clear, as the wheels of justice continue to turn exceedingly slowly. Eighteen months after the AT&T suit was filed, the court hasn't even decided a basic issue: whether the government has the right to sue. In this and other cases, many things could frustrate the antitrusters apart from outright tactical blunders.

Recently, antitrust issues have grown more complex and the prosecutors have been trying novel legal approaches that may or may not succeed in court showdowns.

Some New Twists

The current FTC complaint against the oil companies implies, for instance, that all the major petroleum companies "share" a monopoly. That is an "extraordinarily far-reaching and rather surprising interpretation" of federal antitrust law, observes Stephen Bryer, a member of the Harvard Law School faculty specializing in antitrust.

The commission's complaint against the cereal makers takes another unusual position, that they have suppressed competition by marketing too many products and by spending too much to advertise them.

Some other obstacles to effective enforcement have been all too evident since the days of Theodore Roosevelt (whose trustbusting deeds, historians agree, never matched his rhetoric). One perennial problem for prosecutors is that corporate defendants can make the most of their due-process-of-law rights to delay government attacks on mergers and price-fixing. A classic case in point: the 17 years and four Supreme Court rulings that the Justice Department needed to force El Paso Natural Gas Co.'s 1974 divestiture of Northwest Pipeline Co.

Critics of the antitrust operation detect yet another obstacle to success. They contend the government hasn't built up the needed staff of lawyers and economists, while private law firms steadily drain its pool of skilled antitrust litigators.

Trustbusters' Budget

President Ford's budget for antitrust enforcement in the fiscal year starting Oct. 1 gives the critics ammunition. Although the budget provides an 18% increase in total funds (to \$46 million), most of the extra dollars are allotted just to the FTC's case against the oil companies. The Justice Department, with a far heavier antitrust workload, is due to get only three additional lawyers, an increase of less than 1%.

Thus, to consumer advocate Ralph Nader, antitrust enforcement remains "an ant eyeing an elephant—an underfunded and handicapped federal program unable to contend with the greater corporate power of our dominant firms."

The government's handicap is all too evident in the suit against IBM Corp., says A.G.W. Biddle, president of the Computer Industry Association, an organization of IBM rivals. One sign of the unequal fight, according to Mr. Biddle, was the need of the Justice Department's Antitrust Division to use FBI agents in taking close to 1,100 depositions from IBM executives and others before the start of the trial in a New York federal court a year ago. Lacking knowledge of the computer market, the FBI men failed to ask questions that should have been asked, he maintains.

A senior federal lawyer in the IBM case counters that Justice Department lawyers handled all the "substantive" pretrial testimony, and the FBI auxiliaries dealt only with routine matters.

Strain on Manpower

All the same, Bruce Wilson, a Kauper deputy at the antitrust division, acknowledged to the Senate antitrust subcommittee last year that the IBM and AT&T cases have "severely strained" the division's manpower and money. Mr. Kauper himself has testified that a resurgence of corporate mergers (which hit a peak of more than 4,000 annually in the late 1960s, or more than double the recent rate) would force him to "pull resources off a number of other investigations which are going on."

How to allocate limited resources has actually been a continuing dilemma for federal antitrusters. Now a new squeeze is threatened by the possibility of a legal challenge to Mobil Oil Co.'s controversial \$1.7 billion acquisition of Marcor Inc. Marcor has competed with Mobil through the more than 600 auto service centers operated by its Montgomery Ward & Co. subsidiary.

Although the Justice Department hasn't yet decided whether to challenge the merger, one official involved in the deliberation is troubled by the recent retirement of the senior lawyer who conducted a 20-month investigation of the controlling interest Mobil acquired in Marcor during 1974. "Our juniors just can't match that kind of experience," frets this official, concerned about who could handle any complaint against Mobil.

The Antitrust Division's complement of 445 lawyers is one-third bigger than it was only a couple of years ago. But turnover is averaging a fairly steady 15% a year as fatter salaries and better working conditions lure antitrusters into the corporate ranks. During the next four or five years, the division can expect no growth and perhaps some shrinkage in the cadre of 20 to 30 seasoned litigators needed to handle its more complex cases.

"I'm so sick of training lawyers, I could scream," gripes a senior attorney in the div-

ision who says he himself is thinking of leaving. Although his federal job is paying him the top federal dollar, \$37,800 a year, he fears that won't cover the college bills and auto note payments he sees on the horizon. Definitely leaving soon is the Antitrust Division's chief, Mr. Kauper; he is resigning at the end of next month to return to teaching law.

In at least one instance, involving a 1969 antitrust charge against Fisons Ltd., a British pharmaceutical and fertilizer concern, the division suffered from its inability to keep the prosecution staffed with experienced trial lawyers.

Fisons was accused of conspiring with three U.S. licensees to apportion the market for iron dextran, a drug used to treat iron-deficiency anemia in humans and animals. The case got off to a rather vigorous start with more than a score of pre-trial depositions, over half of them taken from Fisons executives in England. Then, in 1971, things came to a halt when the two principal prosecuting attorneys in the case left the government. They were followed off the case by attorneys No. 3, 4 and 5. New rounds of depositions ensued, along with intervals of up to 18 months when nothing much was happening.

An antitrust official familiar with the case doesn't deny that there was a turnover problem, aggravated by the need to staff more important patent licensing cases. He also describes Fisons' counsel as "masterful" in outwitting the less experienced Justice Department lawyers and thus slowing the case.

Whatever the cause, January 1975 arrived and the patent on which the licenses were based expired. A few weeks later, a federal judge in Chicago, agreeing with counsel for Fisons—and exasperated with counsel for the government—dismissed the case as moot.