Theory and Practice in Antitrust Law: Judge Cudahy's Example

Diane P. Wood†

When Richard D. Cudahy graduated from the Yale Law School, antitrust law in the United States was at its zenith. The U.S. Department of Justice was bringing ambitious lawsuits to break up global cartels in all kinds of product markets, and the Supreme Court had condemned a number of restraints between competitors as illegal per se. *Times have changed, as this Essay demonstrates. More recently, the Court overruled a ninety-six-year-old rule condemning resale price maintenance as* per se *illegal, ruling that such arrangements would henceforth be judged by the more nuanced rule of reason. This decision represents the dénouement of a half-century's evolution in the economic and legal thinking about antitrust laws.*

This half-century's evolution coincides with Judge Cudahy's career. Over the course of this time, academic thinking in some areas of competition policy has circled back around to his initial insights. Judge Cudahy's antitrust decisions reflect the perspective of a jurist who has managed successfully to respect the laws while simultaneously keeping pace with sweeping developments in contemporary thinking about the twin fields of competition policy and economic regulation. Judge Cudahy has been a prolific scholar, authoring nearly thirty articles on these intertwined fields—with special attention paid to energy utilities. Judge Cudahy's contributions to the study of economic regulation will bear study for many years to come. This Essay presents a brief survey of some his most important insights.

† Circuit Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, The University of Chicago Law School.

Introduction

In 1955, when Richard D. Cudahy graduated from the Yale Law School, antitrust law was in its heyday in the United States. The U.S. Department of Justice was bringing ambitious lawsuits to break up global cartels in product markets ranging from dyestuffs, titanium pigments, and roller bearings to petroleum and diamonds.[1] Since its 1940 decision in *United States v. Socony-Vacuum Oil Co.*,[2] the Supreme Court had taken to describing a number of restraints between competitors as *per se* illegal—that is to say, unlawful without regard to the purpose or practical market effect of the arrangement. This idea had reached its zenith by 1958, when Justice Hugo Black wrote the Court's opinion in *Northern Pacific Railway Co. v. United States*,[3] and offered these thoughts on the *per se* rule:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[4]

Strong language indeed, particularly for a statute that merely says that contracts, combinations, and conspiracies in restraint of trade are unlawful.[5]

Contrast the cautious language that the Court used in its 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[6] in which it overruled a ninety-six-year-old rule condemning resale price maintenance as *per se* illegal and decreed that henceforth manufacturers' control over the price (as well as the other terms) under which their goods were distributed would be judged by the more nuanced rule of reason. In *Leegin*, Justice Kennedy began by stating that "[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of [Sherman Act] § 1."[7] Continuing on, Justice Kennedy noted that "[t]he *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, . . . and, it must be acknowledged, the *per se* rule can give clear guidance for certain conduct."[8]

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1. *See* 1 SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 2.13-.23 (3d ed. 1997).
2. 310 U.S. 150 (1940).
3. 356 U.S. 1 (1958).
4. *Id.* at 5 (citations omitted).
5. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006).
6. 551 U.S. 877 (2007).
7. *Id.* at 885.
8. *Id.* at 886.

The opinion's caution—perhaps even reluctance—to endorse the *per se* approach was no accident: The Court ruled that the *per se* rule is appropriate "only after courts have had considerable experience with the type of restraint at issue . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."[9]

The Supreme Court's decision in *Leegin* represents the dénouement of half a century's evolution of both economic and legal thinking about antitrust laws. Not coincidentally, this is the period covered by Judge Cudahy's career, first off the bench and, since 1979, as a member of the U.S. Court of Appeals for the Seventh Circuit. Judge Cudahy's antitrust decisions reflect the perspective of a judge who successfully manages simultaneously to "faithfully and impartially discharge . . . [the] laws of the United States"[10] and to keep pace with the sweeping developments in the twin fields of competition policy and economic regulation. Judge Cudahy has also been a prolific scholar, authoring nearly thirty articles on these related topics. Although he has written more academic articles about regulated industries—particularly energy utilities[11]—than he has about pure antitrust law,[12] he has navigated both fields with integrity and finesse. Moreover, he has managed to do so while scrupulously respecting the different roles played by the courts of appeals and the Supreme Court, leaving it to the latter institution to make or confirm the sea changes in this common-law-like area. It is an example that any newcomer to the bench would do well to follow.

I. Early Antitrust Decisions: Setting the Stage

The five-year period immediately preceding Judge Cudahy's appointment to the court of appeals was one of extraordinary ferment in antitrust law. Before the 1970s, the quip had been that the only consistent theme in the Supreme Court's antitrust merger jurisprudence was that the government always won. That changed for good with the Court's 1974 decision in *United States v. General Dynamics Corp.*,[13] which shifted the evaluation of proposed mergers

9. *Id.* at 886-87.

10. 28 U.S.C. § 453 (2006).

11. A comprehensive list of his writings in the field of regulated industries would go beyond the scope of this Essay. For examples, see Richard D. Cudahy, *70th Anniversary of the Federal Power Act*, 26 ENERGY L.J. 389 (2005); Richard D. Cudahy, *Full Circle in the Formerly Regulated Industries?*, 33 LOY. U. CHI. L.J. 767 (2002); Richard D. Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16 ENERGY L.J. 419 (1995); Richard D. Cudahy, *The Airlines: Destined To Fail?*, 71 J. AIR L. & COM. 3 (2006); Richard D. Cudahy, *The Bell Tolls for Hydrocarbons: What's Next?*, 29 ENERGY L.J. 381 (2008); Richard D. Cudahy, *The Coming Demise of Deregulation II*, 61 ADMIN. L. REV. 543 (2009); and Richard D. Cudahy, *The Folklore of Deregulation (with Apologies to Thurman Arnold)*, 15 YALE J. ON REG. 427 (1998).

12. See, for example, Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59 (2010), as well as the articles cited *supra* note 11 that consider the role of competition within the regulated industries.

13. 415 U.S. 486 (1974).

from a strict market-share-based approach to a functional approach under which a single ultimate question—whether there would be a substantial lessening of competition if the merger went forward—took center stage. The Court expressly cautioned that "[e]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete."[14] Three years later, the Court's decision in *Continental T.V., Inc. v. GTE Sylvania Inc.* adopted an explicitly economic approach to the question of whether non-price vertical restraints should be assessed under the *per se* rule or the rule of reason.[15] After a lengthy discussion of the ways in which vertical restrictions imposed by a manufacturer on its distributors might promote inter-brand competition, for example by inducing the provision of desired services or by preventing free riding, the Court overruled a ten-year-old precedent and opted for the rule of reason.[16]

Finally, in 1979—the year of Judge Cudahy's appointment—the Supreme Court ruled in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[17] that even the *per se* rule forbidding horizontal price-fixing could not be applied woodenly. Instead, it held that

> in characterizing . . . conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.[18]

Taken together, *General Dynamics*, *GTE Sylvania*, and *Broadcast Music* set antitrust law on its current path. Economic efficiency and consumer welfare are well-recognized goals of the law; general fairness in business behavior and preservation of small enterprises are concerns left to other fields.

Judge Cudahy's early antitrust decisions reflect the fact that the field was undergoing significant change. In 1981, he wrote for the Seventh Circuit in a case brought by an auto repair shop, Quality Auto Body ("Quality"), against Allstate Insurance and State Farm Insurance.[19] Quality accused Allstate and State Farm of violating section 1 of the Sherman Antitrust Act in two ways: first, Quality argued that the insurance companies were effectively fixing the price at which covered automobile repairs would be handled; and second, Quality claimed that Allstate and State Farm threatened to boycott firms like Quality if it did not adhere to their allegedly stipulated price. The district court granted summary judgment for the insurance companies.

14. *Id.* at 501.
15. 433 U.S. 36 (1977).
16. *Id.* at 58 (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).
17. 441 U.S. 1 (1979).
18. *Id.* at 19-20 (citations and internal quotation marks omitted).
19. *See* Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195 (7th Cir. 1981).

Affirming, Judge Cudahy's opinion for the court described two fatal flaws in Quality's theory. First, each insurance company used a different process for compiling its list of permitted allowances for repairs, and each had its own list. Second, neither company insisted that consumers patronize only stores that it had approved—to the contrary, customers needing repairs could go anywhere, but they had to make up the difference themselves if they chose a shop that wanted to charge more than the insurance payment. Therefore, there was no agreement of any kind, lawful or otherwise; nor was there any boycott. Judge Cudahy's opinion acknowledged the direction in which the Supreme Court had been moving when he observed (citing *Broadcast Music*[20] and *GTE Sylvania*[21]) that "a *per se* analysis is not appropriate in the instant case where anticompetitive effect is far from obvious and may be non-existent."[22] Indeed, reading *Quality Auto* today, the only surprising aspect of the case is that it was brought at all.

Judge Cudahy's other early antitrust opinion illustrates that, despite the importance of the Supreme Court's shift in the 1970s, antitrust law did not change overnight. The case was brought by Phil Tolkan Datsun ("Tolkan"), a Datsun dealer in the Milwaukee area, against The Greater Milwaukee Datsun Dealers' Advertising Association.[23] The Association had been slow to admit Tolkan to membership, apparently because of concern on the part of some existing members that Tolkan would cut into their efforts to serve the North Milwaukee area. Shortly before Tolkan opened its doors, the Association (working with the parent company) planned a major promotion of Datsun's smallest car, the Datsun 210. Tolkan was not one of the dealers listed in the published advertisement. In short order, Tolkan filed an antitrust case in federal court charging that the Association and its members had engaged in a group boycott that was *per se* illegal under the Sherman Antitrust Act; it sought damages in the amount of the profits on sixty Datsun 210s—the number of cars Tolkan believed it would have sold. Neither the district court nor the court of appeals had any trouble rejecting the idea that *per se* liability was warranted on these facts.

Again harking back to *Broadcast Music*, Judge Cudahy noted that the Supreme Court had cautioned against overzealous use of the *per se* rule. Where the group action at issue, he wrote, did "not involve a direct effort to influence the supply of, or demand for, a competitor's product, *per se* treatment may not be appropriate."[24] In the case before the court, there was no showing that membership in the Greater Milwaukee Datsun Dealers' Advertising

20. 441 U.S. 1 (1979).

21. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

22. *Quality Auto*, 660 F.2d at 1203.

23. Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, 672 F.2d 1280 (7th Cir. 1982).

24. *Id.* at 1286.

Association was either necessary or desirable. Without this showing, Tolkan's suit was also doomed under the rule of reason because it could not demonstrate the requisite competitive harm. With typical care, however, Judge Cudahy mentioned at the end of the opinion that the court was not foreclosing the possibility that Tolkan might have a state claim for unfair competition or some business tort. In the absence of competitive injury, however, it had no antitrust case.[25]

II. Antitrust in a Regulated Industry: Telecommunications

As an expert in the general field of regulated industries, Judge Cudahy was as prepared as anyone could have been for the mammoth dispute that erupted between MCI Communications and AT&T. In March 1974, MCI, at the time a mere upstart trying to break into the long-distance telephone business, had initiated its antitrust suit against AT&T, the telecommunications hegemon at the time.[26] Around the same time, the Department of Justice filed an antitrust action against AT&T that culminated in 1983 with the Modified Final Judgment that ordered the break-up of the old Bell System. In the latter case, the district court had ruled in 1976 that AT&T was not immune from antitrust scrutiny merely because it was a carrier regulated by the Federal Communications Commission (FCC) pursuant to the Communications Act of 1934.[27] Nevertheless, even without blanket immunity, there were still many ways in which AT&T's regulated character had an effect on MCI's suit.

MCI's complaint was based on twenty-two acts by AT&T that allegedly violated the antitrust laws.[28] The district court granted summary judgment for AT&T on seven of those counts. The jury found for AT&T on five of the remaining fifteen charges. It found for MCI on the remaining ten counts, and awarded MCI damages of $600 million; trebled, this turned into a judgment of $1.8 billion, exclusive of costs and attorneys' fees, in MCI's favor.[29] In the inevitable appeal that followed, AT&T raised a host of objections to both the findings of liability and the computation of damages. Judge Cudahy authored the majority's opinion, which upheld liability on eight of the ten counts and remanded for recomputation of damages; Judge Thomas Fairchild joined Judge

25. Much the same approach, with the same degree of care, is reflected in two of Judge Cudahy's separate opinions. *See* U.S. Trotting Ass'n v. Chi. Downs Ass'n, 665 F.2d 781, 791 (7th Cir. 1981) (Cudahy, J., concurring in part and dissenting in part) (refusing to find a *per se* violation on the part of the Trotting Association, which was a private corporation that registered standard-bred horses for racing, issued registration certificates, and kept a record of the horse's races on an eligibility certificate); Thill Sec. Corp. v. N.Y. Stock Exch., 633 F.2d 65, 71 (7th Cir. 1980) (Cudahy, J., concurring) (agreeing with the majority that a recent Supreme Court decision compelled the finding that the Exchange's anti-rebate rule was governed by the securities laws and, thus, was immune from an antitrust challenge).

26. MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1092 (7th Cir. 1983).

27. *See* United States v. Am. Tel. & Tel. Co., 427 F. Supp. 57 (D.D.C. 1976).

28. 708 F.2d at 1163.

29. *Id.* at 1092-93.

Cudahy's opinion, while Judge Harlington Wood, Jr. dissented in part. All together, the report of the decision runs more than 125 pages. Although this is not the place to analyze the decision in depth, it is interesting to study the skillful way in which Judge Cudahy handled the complex interactions between communications policy and antitrust. In order to place those aspects of the opinion in context, it is useful to begin with a brief overview of the telecommunications industry at the time this litigation arose.[30]

Prior to 1969, the telecommunications industry was regulated as a lawful monopoly: the Bell System operating companies, along with some 1600 independent telephone companies, provided local exchange service; long distance service was the province of AT&T's Long Lines Department; and interexchange facilities were handled by both the local companies and Long Lines. AT&T also provided point-to-point private lines, so-called foreign exchange lines, and common control switching arrangements. Sensing an opportunity to compete around the edges of this empire, MCI asked the FCC in 1963 for permission to construct and operate a long-distance, private telephone service between Chicago and St. Louis.[31] In order to do this, as MCI recognized, it would need to be able to interconnect with AT&T's local telephone facilities. In 1969, the FCC finally decided that MCI could pursue its proposal;[32] in 1971, it issued a broader decision in which it approved "the entry of specialized carriers into the long distance" field.[33] To make a long story short, that decision was not as clear as it should have been, and in the years that followed, AT&T engaged in a number of practices that had the effect of slowing the entry of MCI and others into the business. Disputes arose over interconnections, AT&T's pricing structure, and MCI's own plans.

Judge Cudahy's opinion first addressed whether the entire suit should have been dismissed on the ground that the FCC's regulatory control over AT&T's conduct rendered it fully immune from the antitrust laws.[34] AT&T argued both that it was immune across-the-board and that it was entitled to specific immunity for each of the actions that MCI had challenged.[35] The court rejected both of those propositions, just as the district court had done. It began by observing that the Communications Act itself does not expressly grant AT&T immunity from the antitrust laws for the conduct that MCI challenged. Indeed, it noted, "regulated industries 'are not *per se* exempt from the Sherman Act.'"[36] Relying heavily on both *Silver v. New York Stock Exchange*[37] and

30. *See id.* at 1093-1101.
31. *Id.* at 1094.
32. MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1094 (7th Cir. 1983).
33. *Id.* at 1095.
34. *Id.* at 1101.
35. *Id.* at 1102.
36. *Id.* (quoting Georgia v. Pa. R.R. Co., 324 U.S. 439, 456 (1945)).
37. 373 U.S. 341 (1963).

Otter Tail Power Co. v. United States,[38] the court found that "the FCC's regulatory authority under the Communications Act does not preclude application of the Sherman Act. . . . The mere pervasiveness of a regulatory scheme does not immunize an industry from antitrust liability for conduct that is voluntarily initiated."[39] In the case before it, the record showed that the FCC did not control, supervise, or approve AT&T's actions.[40]

The court found that AT&T's assertion of implied immunity with respect to MCI's price challenges presented a closer question. MCI argued that AT&T had engaged in predatory pricing, setting its rates for its own customers at an impossibly low level. On the one hand, from a regulatory standpoint, the Communications Act requires AT&T's tariffs to be "just and reasonable." On the other hand, it was AT&T that initiated tariff filings, not the FCC, and new tariffs automatically took effect after ninety days unless the FCC intervened. In reality, the FCC investigated only a small percentage of the tariffs filed with it. Furthermore, the FCC itself took the position that antitrust enforcement in that area was not precluded. Granting all of that, however, Judge Cudahy held that "an industry's regulated status is an important 'fact of market life,' the impact of which on pricing and other competitive decisions 'is too obvious to be ignored.'"[41] In a manner reminiscent of *General Dynamics*,[42] he cautioned against too heavy a reliance on market share statistics in a regulated setting: "Ultimately, [the analysis of monopoly power] must focus directly on the ability of the regulated company to control prices or exclude competition—an assessment which, in turn, requires close scrutiny of the regulatory scheme in question."[43] AT&T's regulated status also bore on the question of whether it had willfully acquired or maintained its monopoly power.[44] The court regarded it as singularly inappropriate to presume that the company acquired its monopoly illegally if it was operating within a regulatory system. In the end, the court recognized a good-faith defense for AT&T and decided that the instructions the district court had given to the jury adequately covered this point.[45]

At this juncture, the opinion pauses to make some broader observations on "the appropriate purposes and proper scope of antitrust law in the present context—specifically, whether we should focus our examination on economic efficiency and consumer benefit or whether we should more expansively consider the political and social consequences of bigness or concentration of

38. 410 U.S. 366 (1973).

39. MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1102-03 (7th Cir. 1983).

40. *Id.* at 1103.

41. *Id.* at 1105 (quoting Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp., 518 F.2d 913, 935-36 (9th Cir. 1975)).

42. 415 U.S. 486 (1974).

43. 708 F.2d at 1107.

44. *Id.*

45. MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1137 (7th Cir. 1983).

economic power."[46] While recognizing that AT&T had played a pivotal role in the development of telecommunications services in the United States, Judge Cudahy noted that earlier regulatory judgments were being set aside and competition was starting to transform the industry. The following paragraph sheds important light on the judge's own philosophies on antitrust and the role of courts:

> We acknowledge with approval the populist origins of the antitrust laws as well as the preeminent role of the Sherman Act as a charter of economic freedom. But we also believe that, as we have pointed out, larger concerns about broad pro-competitive policy, economic concentration and political power have been, and are being at this very moment, effectively addressed by the regulators, and possibly by the Congress. Hence, we have tended to believe it appropriate to focus at this time and in this case upon the specific issues of economic efficiency and consumer benefit which are directly presented. Thus, our resolution of the allegations of predatory pricing and unlawful failure to interconnect MCI to Bell's local distribution facilities has centered on the questions whether prices cover costs and whether the denied facilities are essential. We are, of course, not insensitive to broader social and political issues, but as indicated, we think that our principal task is to deal in depth with the specific questions presented.[47]

In other words, though the broader purposes of antitrust law are important, Judge Cudahy conceived of the court's role as one that had to focus tightly on the facts of the case and the "specific issues of economic efficiency and consumer benefit" presented.[48]

Maintaining that perspective, Judge Cudahy gave careful consideration to the proper analysis of MCI's assertions that AT&T had engaged in predatory pricing of its Telpak and Hi-Lo services for long distance communications. The jury had found in MCI's favor with respect to Hi-Lo, and it found for AT&T with respect to Telpak; the court of appeals, over Judge Harlington Wood's dissent, found that AT&T was entitled to prevail on both charges.[49] The critical question that Judge Cudahy tackled was the proper standard for determining predatory pricing. In the end, he held that any price above long-run incremental cost should be deemed non-predatory:[50] such a price will cover all long-run marginal costs, and often there will be money left over to contribute to fixed costs.[51] The discussion displays a sophisticated appreciation of the problems of

46. *Id.* at 1110.

47. *Id.* at 1110-11.

48. *Id.* at 1110.

49. *Id.* at 1111.

50. MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1123 (7th Cir. 1983).

51. Since the Seventh Circuit's *MCI* decision, the Supreme Court has spoken twice on the subject of predatory pricing. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), it declined to adopt a precise rule for predatory pricing, but it did hold that allegations of a two-decade long conspiracy on the part of Japanese electronics manufacturers to charge predatorily low prices in the U.S. market was so implausible that summary judgment in favor of the defendants was proper. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that a plaintiff must show both that the prices are below an appropriate measure of cost (still undefined) and that the predator has a reasonable prospect of recouping its investment in the below-cost prices. Judge Cudahy's approach to this issue in the *MCI* opinion is consistent with both of these later

determining real costs in a multi-product (or multi-service) firm, the problems of assuming too readily that measures of costs used by regulators (such as fully distributed costs) are equally appropriate for the antitrust inquiry, and the conflicting views among academic commentators on this knotty subject.[52] For similar reasons, Judge Cudahy's opinion explains why MCI's theory that AT&T was subsidizing its competitive services with profits from its regulated businesses (so-called cross-subsidization) was not sound.[53]

There is a great deal more in the *MCI* opinion that merits further study, even after almost thirty years. The court's rejection of MCI's predatory pricing theory necessitated a remand for reconsideration of damages, since a significant proportion of the jury's $600 million pre-trebling award rested on that part of the case.[54] What then happened on remand surprised everyone. Back in the district court, MCI revised its lost profits study in an attempt to recover damages based on lost revenue from its Execunet long distance service. This represented a significant shift from the study it had used during the first trial; at that time, MCI was focusing on lost revenue from private line services. The difference was colossal: whereas MCI had claimed losses of $900 million at the first trial (of which the jury was persuaded to award $600 million), its revised study asserted damages of approximately $5 billion *before* trebling.[55] The district court judge was not sure whether this shift in approach was consistent with the Seventh Circuit's mandate, so he authorized an interlocutory appeal under 28 U.S.C. § 1292(b) to obtain some guidance from the court of appeals. A majority of the earlier panel, however, declined to answer the judge's question.[56] It commented only that it was "at least arguable that MCI is seeking to establish an injury much wider in scope than it sought to establish at the first trial."[57] The issue, however, was "close and difficult," and the majority stated that it would be better answered after a full record had been developed on remand.[58] Judge Cudahy dissented. He wrote that this new turn of events was entirely unforeseen and, thus, the district court had wisely turned to the court of appeals for help. By refusing to delve into the case at that point, the court was risking yet more rounds of expensive litigation before the case could be put to rest. He concluded as follows:

> We decided the original appeal here in the context of a trial that had taken place, and we quite naturally envisioned a retrial on issues defined at the first trial. Along the course charted in our mandate an immense change in circumstances has taken place that we did not foresee, and

decisions. *See also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007) (adopting a consistent approach for predatory bidding).

52. MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1119-23 (7th Cir. 1983).
53. *Id.* at 1123-25.
54. *Id.* at 1166-67.
55. Am. Tel. & Tel. Co. v. MCI Commc'ns Corp., 748 F.2d 799, 801 (7th Cir. 1984).
56. *Id.* at 802.
57. *Id.* at 801.
58. *Id.*

which we did not therefore address in any way, shape or manner. That change seems to give rise to the possibility of what was a private-line case claiming (untrebled) something less than $1 billion becoming an Execunet case allegedly worth (untrebled) almost $5 billion. As a practical matter, this is an "unforeseen circumstance" of mind-boggling dimensions, rather like Columbus discovering at the last minute that the world was indeed flat and sailing off the edge.[59]

It is easy to imagine that no one wanted to dive back into the case with the level of depth that AT&T's interlocutory appeal would have necessitated. But if that is what the case required, then Judge Cudahy was willing to take the plunge.

III. Complex Business Markets

Market analysis is not always straightforward in antitrust cases, no matter how many times the Supreme Court defines product and geographic markets or how many times the Department of Justice re-issues its Horizontal Merger Guidelines. Judge Cudahy's exploration in *Sanner v. Board of Trade of the City of Chicago*[60] of the way in which futures markets intersect (or do not) with the markets for physical goods bears study, particularly in light of recent shocks to the financial markets. In *Sanner*, an agricultural organization and a number of named soybean farmers sued the Chicago Board of Trade (CBOT), asserting that a resolution that CBOT had adopted requiring certain people to liquidate a percentage of their positions violated the Sherman Antitrust Act.[61] The district court dismissed the case for lack of standing, finding first that the association lacked standing to pursue these claims on behalf of its members and second that the individual farmers had not suffered an immediate enough injury for purposes of the antitrust laws.[62] The court of appeals agreed with that assessment of the association's case, but it remanded with respect to the farmers.[63]

The CBOT resolution that sparked the case was prompted by the actions of a trader known as Ferruzzi, who had amassed an unusually large long position in July soybean futures. The CBOT determined that this was a threat to orderly trading, and it thus issued a resolution requiring "any person or entity" that owned or controlled a gross long or gross short position in excess of a specified amount to reduce that position by at least twenty percent per trading day over a period of about a week. Ferruzzi complied, but the plaintiff farmers alleged that this eventually led to a price decline in both the July 1989 soybean futures market and in the cash market for actual soybeans. They charged that the individual defendants, acting through the CBOT, intended to cause those

59. *Id.* at 803 (Cudahy, J., concurring in part and dissenting in part).
60. 62 F.3d 918 (7th Cir. 1995).
61. *Id.* at 920.
62. *Id.*
63. *Id.* at 930.

parallel price declines for the benefit of clients in trading houses who held short positions in soybeans and had failed to hedge.

Judge Cudahy's opinion for the court first rejected the association's standing, since it sought nothing but damages on the part of the member farmers. The complaint thus failed to meet one of the criteria for associational standing—namely, that neither the claim nor the relief requested would require the participation of the individual members.[64] Next, the court rejected standing for soybean farmers who refrained from selling their crop because of the depressed price in the cash market.[65] Finally, the court found that the farmers who did sell their soybeans at those depressed prices satisfied not only Article III standing (as the district court had found[66]), but also antitrust standing.[67]

It was the closeness of the relation between the futures market and the cash market for soybeans that persuaded the court to allow the farmers' suit to go forward. The plaintiffs contended that the resolution not only causes the prices of the July 1989 soybean futures contracts to plummet, but also caused the cash crop prices to fall "in direct proportion to the CBOT soybean futures prices."[68] While recognizing that there are differences between futures and cash markets, Judge Cudahy insisted that they were not *unrelated* for purposes of antitrust standing. Because of the lockstep movement of the two markets in this particular case, to manipulate one was to affect the other. In addition, the farmers alleged that one of the CBOT's objectives in adopting the resolution was to prompt a price decline in the cash market. That sufficed for purposes of antitrust standing.[69]

Judge Cudahy had occasion to revisit *Sanner* in *Loeb Industries, Inc. v. Sumitomo Corp.*,[70] a later case dealing with the physical and futures markets for copper. There, the plaintiffs charged that the defendants had conspired to fix the price of copper futures at artificially high levels, and that this market manipulation necessarily inflated the price of the physical copper that plaintiffs bought. Once again, the district court had dismissed on standing grounds. In an opinion that I authored, the court of appeals found that the direct purchasers of

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64. *Id.* at 923; *see also* Hunt v. Wash. Apple Advertising Comm'n., 432 U.S. 333, 343 (1977) (recognizing that an association may have standing to bring a suit on behalf of its members).

65. Sanner v. Board of Trade of the City of Chi., 62 F.3d 918, 923-24 (7th Cir. 1995).

66. *Id.* at 924-26.

67. *Id.* at 926-30. The concept of antitrust standing is described in the Supreme Court's decision in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). Essentially, that case requires the plaintiff to have suffered a direct antitrust injury, in the proximate-cause sense of that term. Thus, for example, shareholders or employees normally cannot sue on behalf of a corporation that has suffered antitrust injury. Looking at such factors as the causal connection between the alleged violation and the harm to the plaintiff, the motive, whether the injury is the type addressed by the antitrust laws, the directness of the injury, the concreteness (or speculativeness) of damages, and the risk of duplicative recovery, the court assesses antitrust standing on a case-by-case basis.

68. 62 F.3d at 927.

69. *Id.* at 929.

70. 306 F.3d 469 (7th Cir. 2002).

physical copper had standing to sue, but that the indirect purchasers of scrap copper did not.[71] The panel read *Sanner* as holding that "in the context of a market manipulation scheme, damages inflicted on the physical commodity market were not derivative of injuries in the futures market. . . . Instead, they form a separate and compensable injury."[72]

Concurring in the judgment, Judge Cudahy pointed out that the "lockstep" that had existed in *Sanner* was much tighter than the one displayed in the copper cases. As he saw it, the "existence . . . of a negotiable premium (or discount) as part of the price [of physical copper] is enough itself to remove this relationship from the 'lockstep' category."[73] He also raised a concern about the possibility of duplicative recovery, which he thought greater in the copper case than in *Sanner*. In the end, however, he was satisfied that there was "sufficient evidence that the defendants engaged in massive physical cathode transactions and intended to manipulate physical prices as well as futures prices and thus to injure purchasers such as the plaintiffs."[74] As this finding was entirely consistent with *Sanner*, Judge Cudahy concurred in the judgment.

IV. Protection of the Competitive Process

Last, and in some ways most revealing, is Judge Cudahy's opinion in *Fishman v. Estate of Wirtz*,[75] which dealt with the 1972 purchase by a group calling itself the Chicago Professional Sports Corporation (CPSC) of the Chicago Bulls professional basketball team. Prior to CPSC's purchase, the Bulls had been owned by the Chicago Professional Basketball Corporation ("Chicago Basketball"). In 1971, Chicago Basketball decided to sell the franchise. Initially, plaintiff Marvin Fishman organized an investors' group to buy the club, and his group reached a tentative agreement. But before going forward, the Fishman parties decided to obtain a commitment for a lease for a suitable arena. They approached Arthur Wirtz, who controlled the Chicago Stadium, where the Bulls had been playing for several years on short-term leases. Wirtz was not interested in doing business with them, at least at the price they offered, and so that round of bidding fell apart. Fishman then formed a new group, which he incorporated as Illinois Basketball, Inc. (IBI), and tried again. In the meantime, some of his prior investors had created a competing group, CPSC. IBI was willing to pay $3.3 million in cash for the Bulls, while CPSC initially offered the same amount, but not on an all-cash basis. Both groups, in the meantime, were trying to secure an arena. Chicago Basketball signed an agreement with IBI, but that agreement was subject to the approval of

71. *Id.* at 475.
72. *Id.* at 483.
73. *Id.* at 499.
74. *Id.*
75. 807 F.2d 520 (7th Cir. 1987).

the National Basketball Association (NBA). In the end, after a fair amount of backroom dealing, CPSC persuaded Wirtz to refuse to deal with IBI and instead to promise the Chicago Stadium to CPSC. This left IBI stuck with a stadium with significantly less seating capacity. CPSC also lobbied the NBA governors to vote for its bid; on July 28, 1972, Chicago Basketball signed a new contract with CPSC, and on August 10, 1972, the NBA approved the deal.

IBI and Fishman promptly filed two lawsuits (later consolidated into one) in the Northern District of Illinois, in which they contended that Wirtz and the CPSC parties had violated sections 1 and 2 of the Sherman Antitrust Act and various provisions of Illinois law. Wirtz, they charged, owned an essential facility—the Chicago Stadium—and he violated the monopolization provisions of section 2 by refusing to deal with the plaintiffs when they sought a lease. The CPSC parties, they asserted, had conspired with Wirtz and others to withhold a lease at the Chicago Stadium. In addition, they asserted that CPSC and other parties had conspired with the NBA, certain NBA members, and others to institute a group boycott forbidden by section 1 against IBI and thereby to prevent IBI from acquiring the Bulls.

After a bench trial, the district court ruled in the plaintiffs' favor.[76] The case reached Judge Cudahy and his panel on appeal. Over a strong dissent from Judge Frank Easterbrook, Judge Cudahy largely upheld the district court's decision. Judge Easterbrook would have found no violation because the final consumers of basketball were going to be served by only one company; in his view the antitrust laws are indifferent to the process by which that entity is chosen. Judge Cudahy saw things differently. He concluded that the relevant market was the market for live professional basketball in the Chicago metropolitan area. The defendants allegedly worked to preclude the plaintiffs from entering that market, thereby ensuring the monopoly for themselves. The competition that concerned the panel majority was competition *for* the market, rather than head-to-head competition *in* the market. Just as in *Otter Tail*,[77] this was a case in which the relevant market was properly viewed as the market to which access was sought. It thus did not matter to Judge Cudahy that only one company would remain at the end of the day. Rather, the integrity of the competitive process was paramount.[78]

As Judge Cudahy recently explained more fully in an article,[79] one of his concerns in *Fishman* was the idea that "consumer" welfare—in the limited sense of final consumers of products—is the sole relevant criterion for antitrust liability. Buyers and sellers exist throughout the chain of economic activity. Even if consumer welfare is the paramount policy informing the antitrust

76. *Id.* at 525.
77. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).
78. 807 F.2d at 537-38.
79. *See* Cudahy & Devlin, *supra* note 12, at 86-87.

laws,[80] he "found no case . . . in which the Supreme Court has put the burden on a plaintiff to isolate and demonstrate the consumer impact of a particular purported antitrust violation not directed at the consumer level."[81] As the Supreme Court has repeatedly emphasized, the antitrust laws are designed to protect "competition, not competitors."[82] However, in Judge Cudahy's view, this means the competitive *process* must be protected just as much as final prices and output levels in the market.[83] He succinctly expressed his theory of liability in the case as follows:

> Here the defendants, through the economic leverage provided by their stadium monopoly, succeeded in driving out all competition for ownership of the Bulls. They used a monopoly in one market to foreclose competition in another—a classic violation of the antitrust laws. The *actual* competition confronting the defendants consisted of Peter Graham, who dropped out early (before CPSC was involved), and later IBI. The potential competition . . . was much broader and consisted of all those who might have bid for the Bulls had they not faced the insuperable obstacle of the defendants' stadium monopoly.
>
> A rule that made the legality of arguably predatory conduct at the level of entry into the consumer market depend on whether *post hoc* analysis could clearly identify adverse impacts on ultimate consumers would be capricious, as well as unjust.[84]

The majority was also satisfied that the Chicago Stadium qualified as an essential facility, despite the fact that, with enough money, someone would have been able to build a new stadium (and, as the court acknowledged, that happened only a few years later when the Rosemont Horizon was built). Time and cost matter, and in Judge Cudahy's view, "[t]he point of the essential facilities doctrine is that a potential market entrant should not be forced simultaneously to enter a second market, with its own large capital requirements."[85]

Competition for the market is just as valuable as competition for a product, but each form of competition, in Judge Cudahy's vision of the antitrust laws, must take place according to the rules. His strong position in *Fishman* was never put to further judicial testing because the parties settled the case before the petition for rehearing could be resolved. But the debate about the purposes of the antitrust laws and the extent to which the competitive process itself is deserving of protection continues to this day.

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80. Fishman v. Estate of Wirtz, 807 F.2d 520, 535 (7th Cir. 1987).

81. *Id.* at 536.

82. *E.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis omitted)).

83. *See Fishman*, 807 F.2d at 536.

84. *Id.* at 536-37.

85. *Id.* at 540. Since *Fishman*, the Supreme Court has thrown a certain amount of cold water on the notion of an essential facilities doctrine. *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410-11 (2004) (stating that the Supreme Court has "never recognized [an essential facilities] doctrine").

Conclusion

Judge Cudahy himself has summarized not only the lessons from *Fishman*, but also the broader message for antitrust:

> *Fishman* thus illustrates why a total-welfare standard may provide a superior vehicle in which to construe the legality of competition-eliminating practices that have a tenuous negative impact on consumers. A strict consumer-welfare approach would ignore blatant distortions, the impact of which cannot reliably be traced downstream, though they bear self-evident harm to entities upstream. By construing business practices through the lens of aggregate welfare, it becomes apparent that harm to an excluded competitor may indeed evidence competitive injury, at least when that harm is not matched or exceeded by a concomitant gain elsewhere. . . .
>
> Competition generally produces efficiency at all economic levels in which it may take place. Therefore, it seems reasonable to reward competition—and sanction its obstruction wherever it may be involved, whether at the consumer level or elsewhere.[86]

Over the course of Judge Cudahy's career, academic thinking in some areas of competition policy has circled back around to his initial insights. Thus, for example, while there may have been a time when people argued that predatory pricing was both impossible and illogical,[87] the more recent application of game theory and other theories of strategic behavior have indicated that predation can occur after all.[88] Throughout these ebbs and flows of economic theory,[89] Judge Cudahy has remained faithful to the law as handed down by the Supreme Court and Congress, while simultaneously being scrupulously careful with the facts of every case. As this glimpse of his work has illustrated, Judge Cudahy's contributions to the field of competition policy—and the branch of that field that we call antitrust—will bear study for many years to come.

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86. Cudahy & Devlin, *supra* note 12, at 86-87.

87. *See* Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 708-09 (1982).

88. *E.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209 (1986).

89. *See, e.g.*, Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, COMPETITION POL'Y INT'L, Autumn 2007, at 59; William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1.