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Antitrust Snoops on the Loose

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Perhaps the most fascinating feature of the continuing Apple litigation—based on the dubious claim that the tech giant conspired to fix e-book prices—is Manhattan district court Judge Denise Cote's imposition in October 2013 of a monitor to watch over the company's compliance with antitrust laws. The monitor, a lawyer named Michael Bromwich, was put in place over Apple's objections and has conducted a wide-ranging investigation, demanding meetings with top executives and board members. He billed Apple for more than $138,000 after two weeks on the job.[2]

Compliance monitors have become a popular item on the wish lists of antitrust plaintiffs and prosecutors. However, the appointment of such a monitor is beyond the statutory authority of judges in antitrust cases, and unsupportable on the basis of other cases in which courts have appointed monitors.

Numerous courts have reflected on the scope of judicial authority under the 1890 Sherman Antitrust Act; this scrutiny is important because antitrust laws are all-encompassing. In a competitive market, everything a business does involves competition. A statute that regulates competition therefore provides a potential basis to regulate every aspect of a business charged with violating it.

But courts have never read their authority under the Sherman Act so broadly. In the 1897 case *U.S. v. Trans-Missouri*,[3] the Supreme Court noted it could not determine "reasonable prices" because such an inquiry would require information that judges do not possess. In 1953 the court ruled in *U.S. v. United Shoe*[4] that the judiciary could not regulate United Shoe's pricing because such an effort, as Justice Charles Wyzanski noted in his opinion, would turn "the Court into a public utility commission."

More recently, in the 2004 case *Verizon v. Trinko*,[5] Justice Antonin Scalia said that he was reluctant to force Verizon to give access to its telecommunications network to rivals because such an order would require "the Court to assume the day-to-day controls characteristic of a regulatory agency." In the same opinion he said that the Sherman Act does not invite "antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited."

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[2] On May 28, 2015, the U.S. Court of Appeals for the Second Circuit in New York rejected Apple's bid to disqualify Michael Bromwich as antitrust compliance monitor.

[3] *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

[4] *United States v. United Shoe Machinery Corp*. 391 U.S. 244 (1968).

[5] *Verizon v. Trinko*, 540 U.S. 398 (2004).

In short, courts have pretty consistently viewed their authority under the Sherman Act as much narrower than that of a regulatory agency. They have generally not interpreted the statute as granting them authority to regulate the details of pricing, output, product design, and similar matters. Apple's compliance monitor is flatly inconsistent with this view of limited statutory authority. Mr. Bromwich has assumed he has the power to inquire into pricing and product design. One of his targets for interrogation was Jonathan Ive, famous as Apple's chief technology designer.

If judges do not have the authority to regulate pricing and product design, how can they have the power to delegate such authority to a compliance monitor? The answer is obvious: They don't.

I should be clear that I am not a fan of constraining judges generally. The overwhelming majority of them are very good at what they do. Moreover, judges have inherent authority to impose orders that enable their decisions to take practical effect. If they did not have such authority, their judgments would be ignored by losing defendants.

But antitrust is special. A consistent line of authority-limiting interpretation has developed around the Sherman Act precisely because thoughtful judges have realized that if their authority is read expansively, the statute would open the door to the most intrusive regulatory system imaginable. This was clearly not envisioned by the framers of the statute.

It is true that compliance monitors have been appointed in other areas of litigation. One important case is *Sheet Metal Workers v. EEOC*,[6] in which the Supreme Court upheld the appointment of an Equal Employment Opportunity Commission monitor to oversee the union's efforts to racially diversify membership.

However, there is an enormous difference between a monitor overlooking racial diversity and a monitor overlooking antitrust compliance. The diversity monitor has a limited scope of interest; either the union is admitting minority members or it is not. The antitrust monitor has an unlimited scope. There is almost nothing a company does that cannot be viewed as affecting his mission. The precedent established by an EEOC monitor isn't sufficient justification for an antitrust monitor like the one at Apple.

It is time for courts to start questioning requests for monitors under the Sherman Act. The statute was not designed to enable the government to impose an invasive scheme of surveillance and control over businesses—like the Communist Party cells embedded in Chinese firms.

Courts have often described the Sherman Act as a charter of free enterprise. The Cote-Bromwich compliance monitor model turns the Sherman Act into a charter of unending encroachment by the state into the private economy.

[6] *Sheet Metal Workers v. EEOC* 478 U.S. 421 (1986).