Meet the expert

Competition

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John Hayes

John Hayes specializes in industrial organization and applied microeconomics. A former economist with the US Department of Justice, Dr. Hayes has been with Charles River Associates for more than ten years. He has provided expert testimony in federal and state court proceedings and submitted testimony to the Federal Communications Commission, the US House of Representatives, the European Commission, and the Korean Fair Trade Commission. Dr. Hayes also regularly appears before the Department of Justice and the Federal Trade Commission on behalf of clients.

Dr. Hayes recently testified on behalf of the FTC in district court in its successful bid to block the proposed merger of two software companies that sell software to estimate automotive collision repairs. Prior to this case, the FTC had not won a preliminary injunction since 2002. The decision in *CCC Information – Mitchell International* suggests a potential shift in how federal courts will evaluate coordinated and unilateral competitive effects.

Tell us about your role in this case.

I was the economic expert for the FTC, which sought to block the $1.4 billion proposed merger of CCC Information Systems and Mitchell International. Both firms sell software used to estimate the cost to repair vehicles damaged in collisions and to value vehicles considered a “total loss.” The FTC asserted that the relevant markets contained only three significant competitors, and the merger would hinder competition and lead to higher prices. The FTC argued that harm was likely under both coordinated and unilateral theories of competitive effects.

What types of economic analysis and evidence did you rely on in your testimony?

My testimony had three main elements. First, I defined relevant software markets, measured shares and concentration, and evaluated the likelihood of entry within those markets. The judge relied upon this and other evidence to conclude that coordination leading to higher prices was possible or even likely following the merger. Second, I simulated the effects of the merger on the prices paid by repair shops and insurers. Last, I explained how reducing the number of suppliers in this stable and mature market could contribute to effective coordination post-merger.

What made this particular case interesting?

The court was skeptical of the evidence for unilateral effects, emphasizing that the FTC’s analysis was based on a small sample of customers, and concluded that it could not “rely upon such a limited amount of data.” However, in some respects, the evidence supporting coordinated effects was more limited, perhaps owing to the difficulty of detecting or measuring the impact of coordination absent “hot documents.” The FTC’s case in this respect relied primarily on the presumption that firms can more easily coordinate in a highly concentrated market where entry is difficult, while CCC and Mitchell argued unsuccessfully that prices and strategies would remain too opaque for price-elevating coordination to take root.

Does this raise the bar on unilateral challenges?

It might, but in my view it shouldn't. It's interesting that key facts that provided the foundation for the judge's decision were just as informative about unilateral effects as coordinated effects. A lot of the economic analysis and evidence that I presented in my report and at trial spoke to both theories of competitive harm. For example, high entry barriers increase the likelihood of both coordinated and unilateral effects. In addition, coordination is easier to sustain in stable, mature markets, but such markets are also more susceptible to unilateral effects because there are fewer opportunities for repositioning. And while it is true that high post-merger shares and concentration increase the danger of successful coordination, these factors are also associated with unilateral price increases.

Do you think the Agencies may become more reluctant to pursue unilateral cases?

There's a case to be made for that view. In *CCC/Mitchell*, some of the FTC staff were reluctant to pursue the unilateral case out of a concern that it would be hard to prove. The FTC pursued both approaches in the end, presumably because a lot of the economic analysis and evidence presented also spoke to unilateral effects.

The *CCC/Mitchell* decision suggests that, when the market is highly concentrated and a strong presumption of harm applies, the FTC may find it easier to prevail under a theory of coordinated effects than unilateral effects. However, economics provides no basis to apply the presumption differently. In my view, the law should follow an equally even-handed treatment.

Are there any lessons to be learned about unilateral effects from this particular case that the antitrust agencies might incorporate in their Merger Guidelines review?

I think it's a promising sign that as part of their consideration of possible revisions to the Merger Guidelines, the agencies plan to address more fully how they use evidence about likely competitive effects that is not based on inferences drawn from increases in market concentration. Direct evidence on competitive effects can come from natural experiments, merger simulations, analysis of win-loss or bid data, and other sources. If the revised Guidelines provide courts with greater clarity about how these types of economic analysis can demonstrate the likelihood of unilateral and/or coordinated effects, I think that would be a very favorable development.

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