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Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker
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I thank Chairman Nadler, Subcommittee Chairman Cicilline, Ranking Member Buck, and the members of this sub-committee for having me to testify on the important issue of Antitrust Reforms and the American Worker. Ensuring that the antitrust laws protect both workers and consumers from the effects of monopsony should be an important goal of antitrust. The effects of classical monopsony results in harm to both workers and consumers by simultaneously reducing output, decreasing workers' wages, and increasing prices to consumers.[1]

My testimony focuses on proposals to use the federal antitrust laws to ban or significantly curtail the use of Non-Compete Agreements (NCAs) irrespective of the context in which they are used. The first point is that any such action should be based on robust and systematic evidence of the negative and ubiquitous effect of NCAs on both workers and consumers. While there is some evidence that the application of NCAs in some settings harm workers, there is also evidence that NCAs, when accompanied by notice and consideration, result in benefits to both workers and the firms that employ them. In addition, NCAs can simultaneously reduce worker mobility or wages and produce consumer benefits by decreasing prices and increasing output, quality, and innovation. Because NCAs can benefit both consumers and workers, a broad ban on the use of NCAs would potentially harm workers, firms, and consumers. Thus, the conditions that would support use of the federal antitrust laws to ban the use and enforcement of NCAs irrespective of the context in which they are used do not exist.

Second, to the extent that problematic uses of NCAs and other restrictive employment agreements have been identified, the preferred solution is to address these identified problems specifically rather than enact a widespread ban on the use and enforcement of NCAs. Moreover, legislative solutions to specific issues identified by robust and credible research are better addressed through state law rather than through the federal antitrust laws. The existing and well-developed body of law in many states reflects the economic reality that NCAs can have a positive effect on both workers and the firms that employ them in some settings. This approach sensibly allows the use and enforcement of reasonable NCAs, and limits the enforcement of NCAs when their terms are unreasonable. In addition, the information produced by the staggered adoption of varied state approaches over time will continue to be a critical input for shaping rational policies in this area going forward.

To illustrate the first point, consider the results from an article by Gurun, Stoffman and Yonker, published this year in the Journal of Financial Economics.[2] This article examines the effect of financial advisory firm membership in the Broker Protocol. Protocol member firms agreed not to enforce post-employment restrictions, promising not to sue departing brokers for taking client information with them to other member firms. One effect was that the firms would save on litigation expenses associated with such actions. Another effect is that both the earnings and mobility of brokers working for firms in the protocol increased. And consumers also

[1] In a classical monopsony, an employer facing an upward sloping supply curve of labor drives wages below the value of the marginal product of labor by restricting employment below the equilibrium level in a competitive labor market.

[2] Umit G. Gurun, Noah Stoffman, & Scott E. Yonker, *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 Journal of Financial Economics 1218 (2021).

followed departing brokers at a high rate. However, they present evidence that consumers were made worse off. Clients of firms in the Broker Protocol paid higher fees and experienced higher levels of broker misconduct.

Just as it would be wrong for antitrust policies solely to focus on output markets and monopoly and ignore the effects of monopsony, it is also wrong to base antitrust policy on the effect on workers without considering the downstream effects on consumers. Despite the growing and robust empirical literature on the effect of NCAs, there are many outstanding questions that remain unresolved. There are some recent studies of the former that use credible and causal research designs to examine the effects of NCAs in particular settings.[3] However, more research like this is needed, in my opinion, before one can reliability predict the effect of NCAs on worker wages and mobility in the many different settings where they are used. And setting aside the Gurun et al. article discussed above, there is almost no evidence of the downstream effect of restricting the enforcement of post-employment agreements on consumer prices, product quality, and innovation.[4]

Second, it is far from clear that limits on the enforceability of NCAs and other post-employment restrictions are best achieved through the federal antitrust laws. Currently, the legality and enforceability of NCAs are determined by state law. A few states have passed statutes that ban enforcement of NCAs as a matter of public policy, and a few more have challenged the use of NCAs or passed statutes that prohibit the use of NCAs in specific settings, such as when NCAs are applied to low wage workers.[5] However, the majority approach in the states reflects the economic reality that can NCAs have a positive effect on both workers and the firms that employ them in many settings.[6] A national survey by Starr et al. that found a lack of awareness and consideration for low-wage workers found the opposite in high-wage settings.[7] And reported market outcomes also were different. In particular, for surveyed employees who are aware of the NCA prior to accepting the job, Starr et al. report that these workers have 9.7% higher earnings, are 4.3% more likely to have information shared with them, are 5.5% more likely to have received training in the last year, and are 4.5% more likely to report satisfaction with their job when compared to employees that did not have NCAs. If informed high-wage

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[3] *See, e.g.,* Evan Starr, Are Noncompetes Holding Down Wages? (Dec 20, 2019) (unpublished manuscript), https://ssrn.com/abstract=3223659; Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Non-Compete Agreements (August 22, 2020) (unpublished manuscript), https://ssrn.com/abstract=3452240 (difference in difference evidence based on Oregon's 2008 ban on NCAs for low wage workers); Natarajan Balasubramanian et al., Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers, J. HUM. RES. (forthcoming 2020), https://ssrn. com/abstract=2905782 (Cross Sectional difference in differences study based on 2015 Hawaii Ban on NCAs for technology workers).
[4] John M. McAdams, Non-Compete Agreements: A Review of the Literature (December 31, 2019). Available at SSRN: https://ssrn.com/abstract=3513639.
[5] For an up to date description of state laws, see Russell Beck, Beck Reed Riden LLP, 50 State Noncompete Chart (June 27, 2020) [hereinafter 50 State Chart], https://beckreedriden.com/50-state-noncompete-chart-2/.
[6] Bruce H. Kobayashi, Non-Competes & No Poach Agreements in Technology Markets, GAI Report on the Digital Economy (2021) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733724.
[7] See Evan Starr, J.J. Prescott & Norman D. Bishara, Noncompetes in the U.S. Labor Force 64 J.L. & Econ. 53 (2021), https://ssrn.com/abstract=2625714.

workers benefit from signing NCAs, then allowing enforcement of reasonable NCAs for higher wage workers to protect legitimate business interests is a sensible approach that avoids interfering with efficient and mutually beneficial uses of NCAs.

Consistent with this evidence, the majority of states allow the use and enforcement of reasonable NCAs, but limit enforcement of NCAs when their terms are deemed to be unreasonable. For example, state courts decline to enforce NCAs that lack a legitimate business interest or contain prohibitions that are unreasonably broad or lengthy, and state statutes restrict the scope, duration, and circumstances under which an NCA can be included in an employment contract and enforced post-employment. These approaches are based on labor, contract and consumer protection law principles rather than antitrust law principles. In particular, enforcement of reasonable NCAs in many states is conditioned, either through statute or via court enforcement, on the existence of adequate disclosure, limits on the breadth and duration of any agreement, and a narrow focus tailored to protect legitimate business interests, including the protection of trade secrets, confidential information, or the employer's goodwill. Some states also protect investments in skills training and client lists. In addition to limiting enforcement in specific settings, state approaches to NCAs also include requirements for consideration, for "garden" leave that requires firms asserting enforcement of NCAs to compensate workers post-enforcement, and consumer protection remedies aimed at reducing informational asymmetries can serve to mitigate the wage effects of NCAs.

There are also alternatives to federal law desigeneed to make this area of law more uniform. The uniform law commission recently passed the Uniform Restrictive Employment Agreement Act.[8] The ULC approach adopts many of the approaches taken by the majority of the states, including provisions that require notice and consideration for enforceability. It also adopts a red/purple pencil approach that limits courts' ability to enforce NCAs that contain unenforceable terms and would impose liability and civil penalties or damages on those who attempt to impose and enforce unreasonable and unenforceable NCAs. And it also goes beyond the law of most states to make NCAs applied to low-wage workers unenforceable.

Imposition of a uniform federal approach based on antitrust law principles that made NCAs broadly unenforceable would likely interfere with the balanced and reasonable approaches to the use and enforceability of NCAs currently taken by making unenforceable NCAs that benefit workers, firms, and consumers. Moreover, the existence of variation in state laws, or the fact that adoption of Uniform Acts tend to be slow and incomplete, does not provide a compelling rationale for an immediate federal response.[9] State variation and the staggered adoption of restrictions on NCAs and other restrictive employment agreements are a critical input into the

[8] *See* Uniform Law Commission, Restrictive Employment Agreement Act, available at https://www.uniformlaws.org/committees/community-home?CommunityKey=f870a839-27cd-4150-ad5f-51d8214f1cd2.

[9] *See generally*, Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. Leg. Stud. 131 (1996).

process through which the states serve as "laboratories of democracy".[10] A uniform federal approach will eliminate the generation of critical economic evidence needed to evaluate the causal effects of different policies, evidence necessary to the formation of informed policies for the regulation of NCAs.

Finally, I would like to briefly address the broad argument and supporting evidence that antitrust law, and in particular merger policy, has systematically failed workers. Many cite empirical work that demonstrates an association, but not a causal link, between increased employer concentration and lower wages.[11] Because these studies do not identify the causal effect of employer concentration on wages, it is difficult to translate this association into prescriptions for policy generally, or for antitrust policy in particular. For example, the observation of a negative correlation between employer concentration and wages can be generated in competitive markets, or though underlying causes that increase economic efficiency. Consider a case where falling demand causes a firm to exit a competitive industry with numerous other firms. Decrease in the demand will also cause factor prices, including wages, to fall. Measured over time, concentration will be negatively correlated with wages despite the absence of monopoly or monopsony power.[12] These and other problems with an approach based on correlations between industrial concentration and prices, including factor prices such as worker wages, caused industrial organization economists to abandon this approach as a useful guide to antitrust policy long ago. These failed approaches were replaced by approaches that allow causal inferences about the effects of specific regulatory policies or firm conduct.

A recent example of a credible and causal study showing that anticompetitive mergers have generated negative outcomes for workers is an article by Prager and Schmitt, published this year in the American Economic Review. They present causal evidence that anticompetitive hospital mergers caused wage stagnation for skilled health care workers.[13] And it is clear that during the time period of their study, there was a failure of antitrust law to prevent these harms to workers as well as harms to consumers. Immediately prior to the period covered by

[10] The phrase "laboratories of democracy" was popularized by U.S. Supreme Court Justice Louis Brandeis in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) to describe how a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country".

[11] *See, e.g.*, José Azar, Ioana Marinescu, & Marshall I. Steinbaum, *Labor Market Concentration*, National Bureau of Economic Research Working Paper 24147 (2017). Their measured effects are small. According to their estimates, a 10% change in Herfindahl Hirshmann Index (HHI) of a employer geographic based on commuting zones (e.g., a change in the HHI from 2000 to 2200) would result in a .3% to 1.4% decrease in wages depending on which empirical specification was used.

[12] These types of analyses also suffer from the fact that the measure of market concentration is endogenous and from the potential for omitted variable bias. Solution to these problems, such as the use of instrumental variables to deal with the endogeneity of the concentration measure, are often imperfect solutions, and thus do not allow one to make a causal inference about the effect of deconcentration policies on wages. See generally, Joshua D. Angrist & Jörn-Steffen Pischke, *The Credibility Revolution in Empirical Economics: How Better Research Design is Taking the Con out of Econometric*s, 24 J. Econ. Persp. 3 (2010).

[13] Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. Rev. 397 (2021).

Prager and Schmitt's study, the FTC, DOJ, and the state of California lost eight consecutive hospital merger challenges.[14] The underlying failures of antitrust law that caused these effects, a flawed approach to market definition and the differential treatment of non-for-profit hospitals, were identified by the federal agencies. Economists at the FTC also documented the negative effects these mergers in retrospective studies of these mergers. These studies produced credible and causal evidence of the negative effects these mergers had on consumers, including higher prices and negative health outcomes. As a result of these efforts, the agencies altered their approach to hospital mergers to focus on an effects-based analysis, and the courts accepted them and abandoned their harmful approach. The result has been a long stretch of successful merger challenges by the FTC since the mid 2000's.

To close, I would like to amplify three points illustrated by this episode and by the Prager and Schmitt study. First, this episode is an example of a successful evidence-based change to antitrust enforcement based on credible causal research and should serve as a model for rational and informed evidence-based policymaking. Second, the insurer/consumer focused analyses used by the agencies to determine whether to challenge mergers often identify mergers that would simultaneously harm sellers. The type of mergers that harmed workers in Prager and Schmitt's study also harmed consumers, were challenged by the federal agencies, and today would not be cleared by the agencies nor approved by the courts. Moreover, such mergers are unlikely to be considered by firms today. The fact that these cases may not explicitly contain monopsony counts is not proof that merger policy failed to protect workers in addition to consumers. Of course, there are cases where it is possible that firms may have monopsony power in the absence of monopoly power, and the agencies should ensure that their screening processes adequately protect sellers, including labor, in such cases. The agencies should continue to developed tools that identify cases where these monopsony issues arise.[15] Finally, while there is causal evidence of wage stagnation caused by mergers in highly concentrated markets, Prager and Schmitt do not find that these mergers produced corresponding reductions in employment, suggesting that the observed wage stagnation was not caused by the forces of classical monopsony.[16] While ample causal evidence was produced showing antitrust harm from higher prices to payers and consumers in the output market, the evidence that these mergers resulted in the exercise of antitrust relevant monopsony power is much less compelling.

[14] Prager and Schmitt examine hospital mergers taking place between 2000 and 2010. For a list of the hospital mergers in the 1990s that were unsuccessfully challenged by the federal antitrust agencies, *see* Orley Ashenfelter, Daniel Hosken, Michael Vita & Matthew Weinberg, *Retrospective Analysis of Hospital Mergers*, 18 International Journal of the Economics of Business, 5 (2011).

[15] *See, e.g.*, Keith Brand & Ted Rosenbaum, *A Review of the Economic Literature on Cross-Market Health Care Mergers*, 82 Antitrust Law Journal 533 (2019).

[16] Id. at 423: Prager and Schmitt find that employment of skilled workers actually increased faster than in control markets, and conclude that "nothing in the estimates suggests reductions in employment growth following mergers, which would be expected to arise if classical monopsony were the sole mechanism."