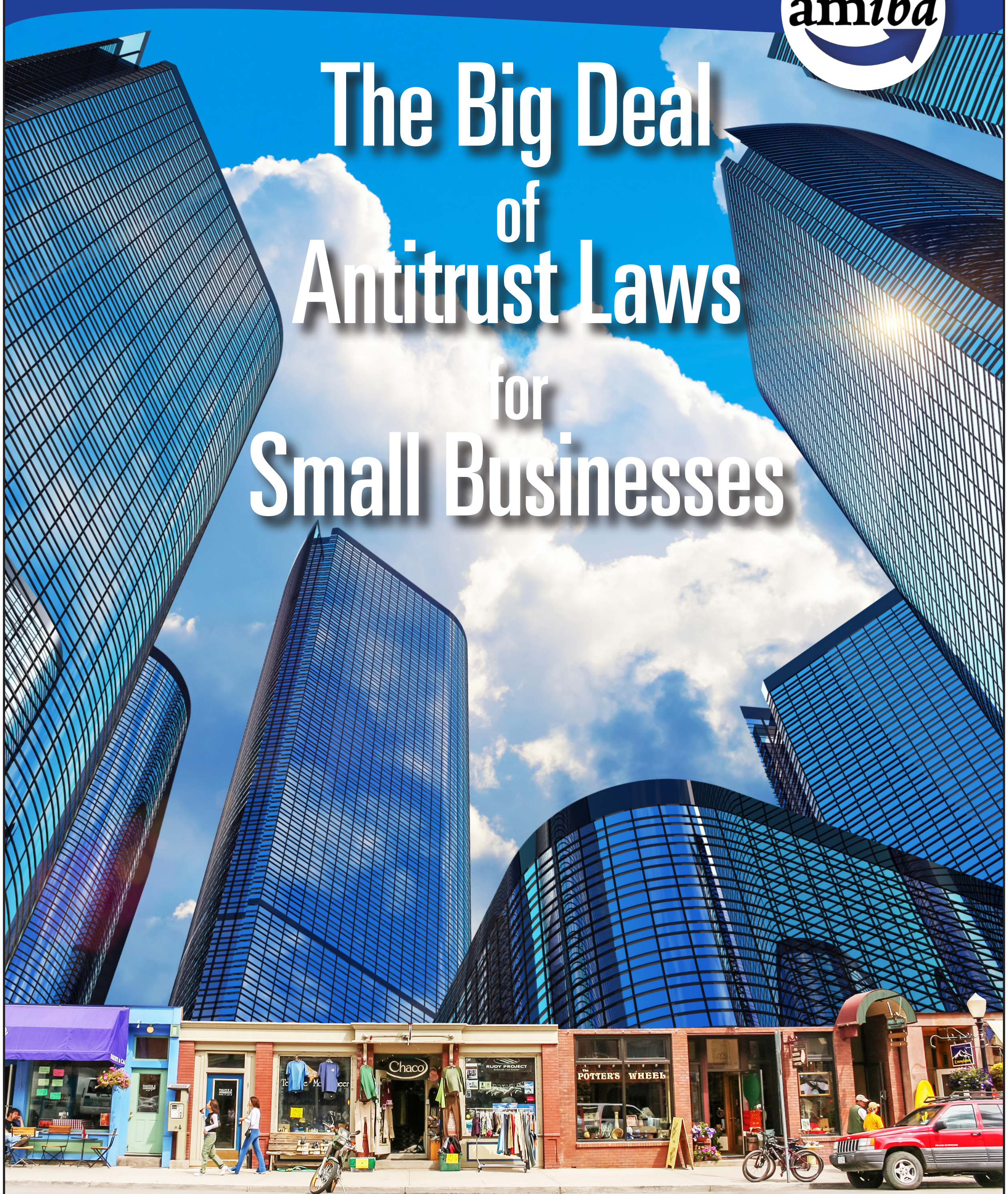
The Big Deal of Antitrust Laws for Small Businesses



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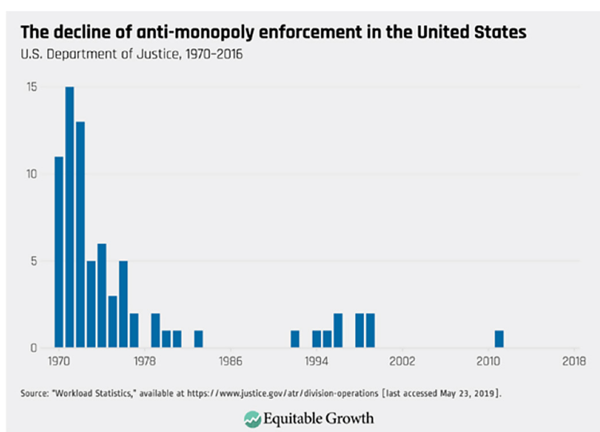
When someone mentions the concept of antitrust, most think about the early twentieth century. Familiar names like Rockefeller, Carnegie and Morgan are remembered along with the industries they controlled like oil, steel and railroads. Others point to the famous political cartoons of the time, illustrating the pervasive nature and consequences of unregulated big business. Though we all have a basic understanding of antitrust, no one seems to visualize Amazon, Google, Facebook or highly concentrated industries like pharmaceuticals, airlines and even caskets. These companies are the biggest threat to our consumers, small businesses and democracy, reverting us back to an age of concentrated business, power and wealth that we thought we corrected with regulations a century ago.

Antitrust today is regulated with three pieces of legislation first created in the late 19th to early 20th century and have not really changed. The first antitrust law is the Sherman Act, passed by Congress in 1890. This act effectively bans any attempt at monopolization or conspiracy with others to collude and monopolize. Both violations and penalties are clearly specified; colluding to fix prices, dividing markets or rigging bids can result in either civil or criminal charges. The Clayton Act, passed in 1914, was meant to build upon the Sherman Act and clearly prohibit some actions that were not specifically addressed in the first law. The Federal Trade Commission (FTC) Act was passed by Congress during the same year which prompted the creation of the FTC. Under this law, the FTC can launch investigations and sue companies that practice unfair methods of competition. However, these are not the only laws; each state has additional antitrust legislation built upon the three federal acts.

Understanding Antitrust Enforcement and Sentiments

Though the laws are specific, potent and long standing, companies today are still able to monopolize because of the anti-intervention sentiment stemming from the 1970s. After the initial wave of antitrust regulations in the 1900s, there has been an inconsistent view about the level of involvement the government should have in regulating the size of businesses. From the 1920s to the 1930s, there was little activity, and from the 1940s to the 1970s antitrust laws became pivotal as politicians viewed the laws as essential to upholding economic and political freedoms. In the 1970s, the Reagan administration adopted the Chicago School economic theory to guide their policies. Presidents after Reagan did not really focus on these regulations, and, thus, there has not been a change in direction. This trend is clear in the chart to the left; there is a huge decrease in the number of Section 2 Sherman Act violations prosecuted by the Department of Justice (DOJ) from 1971 to 1978. In fact, from 1978 to 2016, there were either no cases or less than 5 cases per year. Additionally, more recent data illustrate the same pattern where zero Section 2 cases were tried from 2017 to 2019. However, with President Joe Biden's election in 2020, enforcement sentiment may flip again; the head of the FTC transition team, Bill Baer, has already called for "increase[d] enforcement of antitrust laws as a part of a general attack on social ills."

The last 50 years of lacking enforcement can be explained by the neoclassical economic theory or



Chicago School. The Chicago School economic theory originated from the research and approach of the faculty at the University of Chicago's Department of Economics. The purpose is to reemphasize the importance of laissez-faire and minimize government interference. Scholars argued that the markets correct themselves, consumers and companies are self-interested, and that free market is the best at allocating goods. The many politicians, lawyers and judges who subscribed to this school of thought extrapolated it for antitrust. Under the assumptions of a self-correcting market and rational consumers, there will be effective competition. Because of this assumption, there is no need for antitrust laws since they were created to protect and create conditions for efficient competition.

General Trends From the 1980s to Now

Today, we are realizing the effects of five decades of nonintervention by the DOJ and FTC: overly concentrated markets. From 1985 to 2017, the number of mergers completed annually rose from 2,308 to 15,361; a more than 6.5 times increase. Merges allow a single company to swallow up more of the industry and either absorbs or pushes out younger businesses. In fact, during the 1980s, the share of businesses that were five years old or less made up 50% of the economy but consistently decreased to a little more than 30% in 2013.

There are a growing number of industries that have few businesses dominate most of the market share. In search engines, Google makes up 63.2% of the entire market, FedEx controls 43% of the delivery market, Apple controls 45.3% of smartphones and Facebook is the largest social media group, controlling 42.1% of its market. These examples are established, so much so, the Senate Commerce Committee called upon the CEOs of Google, Amazon, Apple and Facebook to testify about anti-competition claims. In addition to tech, there are many new industries are consolidating like the coffin industry, where in 2014, two companies controlled 58% of market and just five years later, the same businesses make up 81.7% of the market. Other notable and newly concentrated markets include breakfast cereal, dialysis centers, hospitals and office supplies.

In general, extreme market concentration is not beneficial to anyone in society except the owners and top officials of the large corporations. Squeezing out small businesses increases the cost of products to consumers, depresses the wages for those who work for the big firms, deincentivizes innovation and increases the profits of only the rich who control the dominant part of the market share. In fact, Loecker, Eeckhout, and Unger found that as markup and profits increased in the US, the output and productivity growth decreased. It is key to emphasize that the increase of profits are disproportionate; the big companies saw larger profits while smaller companies saw smaller profits compared to previous years.

This impact is not just a theory but can be seen in declining entrepreneurship statistics for new businesses. Entrepreneurship, specifically in millennials, have been declining since the 1980s. In fact, in those that are 15-34 years old, the rate of new entrepreneurs fell from 3.9% in 1988 to 2.6% in 2014 and has continued over the last 6 years. It was also recorded that millennials have strong interests in entrepreneurship but do not pursue the business. This illustrates that the number of new business owners are less likely to be younger people. To extend this trend to the general population, Americans are less likely to start a business today than they were 30 years ago in the late 1980s and early 1990s.

The Impact and Implication of Market Concentration for Small Business

A consequence of market concentration is a decline in free competition. For example, when Facebook acquired Instagram and WhatsApp, the platforms became integrated. Because so many people used

WhatsApp, Facebook and Instagram separately, it created a strong number of users. If a new social media app launched, it would be difficult to attract users because all of their other accounts are linked together. The convenience of linked accounts is argued to be a benefit for consumers, but also makes it harder for new companies to compete when the existing businesses dominate most of the market. Therefore, Facebook decreases the incentive of other social media startups that could provide a better service than Facebook and its companies. To bolster this point, in a paper analyzing the current state of competition in the US from the Roosevelt Institute, Adil Abdela explain, "higher market concentration makes it difficult for small businesses to compete or for new businesses to enter the market."

Companies that envelop more of the market put up barriers for small businesses to enter. For example, in 2016, Google cut off access to its search data, which was fundamental for third-party airfare and booking engines. Right after, Google released their own competing search and booking engine using their newly private data. This set up barriers for other prospective competitive businesses because if they wanted to compete with Google, they would need to develop similar capabilities as Google. Additionally, it ruins current smaller businesses who relied on Google's search data to run their company. Without it, they too would need to develop the same level of technology as Google, which is improbable and would take decades. This case is not unique, in fact, the firm entry rate has decreased since the 1970's but the exit of firms has stayed relatively consistent from the same time

frame. This illustrates that the companies that were already established are staying open, but there must be a barrier to entry that caused the decrease in the number of firms entering the market.

Mergers, most of the time, benefit the consumer by increasing the efficiency of companies and reaching more geographic regions to provide individuals their product. However, if mergers lead to one company dominating the entire market, it can lead to monopolization, which is what the antitrust laws are inhibiting. To avoid this, the DOJ and FTC can ban the merger of companies if prosecutors believe that it will impede on competition or hurt the consumer. For example, in 1996, the DOJ banned the planned acquisition of Mrs. Smith's Inc, the largest competitor in the frozen pie market, by ConAgra over anticompetitive effects in the market. There are two types of merges that are viewed differently by the courts.

One strategy is a horizontal merger which is when a company acquires other similar companies within their own industry. An example of this merger is the 2013 acquisition of Compaq by Hewlett-Packard; both companies were information technology companies that developed and sold computers. Often, these mergers are allowed because they increase efficiency and cut costs of products that are in the interest of consumers. However, because most of the markets in the U.S. are highly concentrated, when competing businesses become one, even more power is centralized and the negative consequences outweigh the consumer benefits. The power of being a monopoly or oligopoly creates less accountablity and disincentivizes innovation, actually harming rather than aiding consumers' interests. Thus, it is quite easy to transition into a monopoly or attempt to monopolize a market by fostering a horizontal merger, a process that is at first "harmless" until it squashes all competition. This is often a red flag to the DOJ and the FTC and is usually prohibited or allowed with certain caveats designed to prevent monopolization.

The second method is a vertical merger which is when a company buys other companies related to the production process. An example of a vertical merger is when Staples, an office-supply store, bought one of only two office-supply wholesalers in the U.S., Essendant. Proponents argue that lower operating costs and less time spent on logistics benefits consumers because the company lower prices. In many cases, this is true; however, like horizontal mergers, this becomes a monopolization tool if the manufacturers are in a concentrated market. Because one company controls the manufacturer that many of their competitor relies on, it creates unfair advantages. In the this case, Staples now had access to crucial information on all the other businesses that are Essendant clients, including the independent businesses that make up 20%-25% of the office-supply market. Additionally, Essendant can increase their prices to independent businesses, which makes local prices to consumers higher, prompting customers to switch to the lower prices of Staples.

Not only is monopolization or attempted monopolization illegal; anti-competition practices can arise when one or a few companies control most of the market. When a company possesses a large portion of the industry, it has the power, leverage and money to commit these practices, including price fixing, bid rigging, and boycotts. The most famous example is when oligopolies collude to fix their prices. The intent is to set the prices at a certain level agreed upon between competing companies. In 1963, GE and Westinghouse, both producers of turbine engines, participated in price-fixing. The typical representation of this illegal activity are two executives whispering about prices, however, these companies were not as explicit. GE publicly published materials that revealed how they calculated the prices of their turbine generators. Then, in 1964, Westinghouse released basically the same materials as GE, establishing an almost identical pattern of prices, effectively setting the same price without being caught. This strategy lasted for nearly 10 years and allowed these two businesses to gain larger profits by colluding.

What Your IBA Can Do if You Notice Violations

To combat monopolization, antitrust cases can either be prosecuted by the government, via the DOJ or the FTC. However, if the company is charged, all money required in the civil penalties goes to the government. The alternative is a private lawsuit where someone or organization sues a company for antitrust violations rather than the government.

Most of the private antitrust cases are class actions, which is when one or several plaintiffs file a lawsuit on behalf of a large group. The United States Code (U.S.C.) § 15(a) and U.S.C. § 15(c) allows individuals to litigate before federal court or for the Attorney General of the state argue on the individuals' behalf. This is a popular path because there are no immediate costs to joining a class action; lawyers only get paid if the case is won and there is no cost to being a plaintiff. In fact, if the case is won, a small businesses can gain a substantial amount of money in retribution. In Re Dynamic Random Access Memory (DRAM) Antitrust, the Defendants were companies that produced DRAMs, which are integral devices used for smartphones, laptops and other electronic devices. The Plaintiffs or class was comprised of over 19,000 claimants- companies that are impacted by the collusion among the Defendants. The Plaintiffs claimed the Defendants, which made up 96% of DRAM sales, were using public statements to signal the planned collusion. This case ended up settling for $242 million which was distributed among all the claimants.

To compound these benefits, small businesses should contact their IBA because they have greater connections. IBAs can contact other small businesses to join the class and bolster the argument. Additionally, the organizations can work with civil groups based in Washington D.C. that advocate stronger antitrust enforcement like Public Citizen or American Antitrust Institute. Working with these groups is often valuable because the lawyers typically represent many clients and have litigated numerous cases; they can better shape the argument for success. Lastly, if the case is successful, some IBAs can collect a portion of the attorney's fees. This depends on the state; 30 states have allowed lawyers to share fees with nonprofits if the organization recommends the lawyers services.

Therefore, it is crucial that small businesses are aware of antitrust laws and their ability to confront violations. Especially under the lens of COVID-19, big businesses are able to remain open including some like Amazon which are actually accruing higher profits during the pandemic, while many owners of local shops cannot afford to stay open. Knowing the history, trends and laws surrounding antitrust allow small business owners to regain some control and protect their livelihood.