

With Profits and Consolidation on The Rise, Will Antitrust Litigation Follow?

By Travis Mitchell, J.D. Candidate 2019 | November 4, 2016

During the 2016 election cycle, much has been made of the economy and how it appears to be rigged against the little guy. Both presidential candidates have been trying to position themselves as the solution for bringing profits back to Main Street and cleaning up “big business.” During the Democratic primaries, Bernie Sanders based his campaign on the very idea that the U.S. needed a political and economic revolution, and recent political superstars, such as Elizabeth Warren, have been ringing the bell of economic reform for the past two years. There is evidence that this is not simply politicians attempting to draw policy distinctions among themselves, but a true reflection of what Americans are feeling. According to the [Pew Research Center](#), the economy is the number one concern among likely voters with 84 percent listing it as “highly likely” to influence their vote in the 2016 election. There is no doubt that much of this is rooted in the belief that the economy is rigged against the average American in favor of large corporations. [Recent polling](#) has found that over 70 percent of Americans believe that the economy is rigged in favor of certain groups.

But is this fear well-founded? And, if so, what can we do about it? According to many economists, the answer to the first question is a resounding “yes.” [Over the past decade](#), corporate consolidation has increased in two-thirds of all industries, meaning that there are less companies doing the same or more work. Perhaps even more telling is that the weighted average share of the top four firms in each sector has raised from 26 to 32 percent in that same time frame. Of course, this alone is not evidence of collusion as many other factors could be at play that are affecting the level of competition. Nevertheless, it does lend credence to the belief that the scale has been recently tipped too far in favor of big business. Compounding this is the fact that as consolidation has grown, so have company profits and at a much faster rate than overall economic growth.

Although some, including Federal Trade Commissioner [Maureen Ohlhausen](#), insist that the U.S. does not have a monopoly problem and that current consolidation will lead to social benefits, most experts are leaning towards more regulation. [Chris Sagers](#) notes that he, along with many other prominent economists including Paul Krugman, Jason Furman, Lina Kahn, and the board of *The Economist*, see growing consolidation as a real concern. He points out that many who argue against increased antitrust litigation do so out of ideological concerns without looking at the true measures of monopolization, such as market power, and instead relying on old adages of what competition looks like.

However, if popular sentiment seems to be moving towards more antitrust litigation, so far, courts seem unwilling to fall in line. [Two recent appellate cases](#) reflect that the courts are not yet ready to increase antitrust litigation. The first was interesting in that it rose the rare defense that price fixing was done not for competitive advantage, but because the companies were required to do so by the Chinese government. The second, however, was quite telling on where courts are leaning on antitrust. In *United States v. American Express*, the court rejected an antitrust action

based on the credit card company’s “anti-steering” policies, which bar merchants from telling consumers that they incur an extra charge when customers pay with American Express. The case was noteworthy both for its procedural history and its reasoning. In an odd turn of events, the appellate court chose to disregard facts found in the lower court, namely the definition of “market power” to come to its conclusion. Additionally, the court reasoned that American Express needed to be able to charge the surcharge unrestricted in order to stay competitive in the market with incentives such as cashback deals. If courts continue to be unwilling to use anti-trust litigation to reign in large corporations, the feeling of a “rigged system” may be one that we deal with for a while to come.