

SYMPOSIUM

Some Scholarly Consensus: Modernization of the Antitrust Laws Is Generally Best Left to the Judiciary

By JOSHUA P. DAVIS*

THIS ISSUE of the *University of San Francisco Law Review* follows a symposium held at the University of San Francisco School of Law on the Antitrust Modernization Commission (“AMC”). Formed by an Act of Congress in 2002, the AMC is charged with examining whether there is a need to modernize the antitrust laws, to identify particular issues of study, to solicit the views of those affected by the antitrust laws, and to prepare and submit a report to Congress and the President.¹ The symposium was a wonderful success, benefiting from the participation of renowned scholars, sophisticated practitioners, important government officials, and, notably, one of the members of the AMC, Commissioner W. Stephen Cannon.

The symposium was held because the winds of change seemed to be stirring in the world of federal antitrust law. The AMC augured a possible significant shift in how the federal government regulates markets. But, to extend the metaphor, the weather itself may have changed since its formation. Indeed, whether the AMC will result in any significant reform is becoming increasingly unclear. It may in the end have little effect.

One reason making significant reform unlikely is pragmatic; the federal government is otherwise occupied. When Congress passed the Antitrust Modernization Commission Act, Republican control of the legislative and executive branches held the potential for simultaneous

* Professor of Law, U.S.F. School of Law. I would like to thank David W. Scopp and Christopher M. Wood for their extraordinary work in organizing the symposium that resulted in this issue of the *University of San Francisco Law Review*.

1. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856 (to be codified at 15 U.S.C. § 1 note).

legislation on various matters. With the Bush Administration's recent struggles—in reforming Social Security, in organizing prescription drug benefits as part of Medicare, in contending with the aftermath of Hurricane Katrina, in grappling with the occupation of Iraq, and in addressing nuclear threats in North Korea and Iran, to identify but a few key issues—suddenly political capital seems scarce. Thus, although businesses that support the current Administration may well want to amend the laws that govern competition, inertia may win the day. Whether they are seeking to insulate themselves from the discipline of the free market, or merely attempting to prune back laws that create inefficiencies, the reality is that the federal government has many problems to solve. Modifying the federal antitrust laws is unlikely to be high on any politician's list of priorities.

A second reason the AMC may be unlikely to achieve reform is that it may not be attempting to do so in the best way. In particular, it is not at all clear that the best agent of change in antitrust doctrine is the legislature. The judiciary, instead, may be ideally suited for updating the antitrust laws, which it has been doing for many decades through a common law process. The antitrust laws, by their nature, leave courts room to modify doctrine as appropriate. The relevant statutes are relatively brief—much like our Constitution—and have been interpreted as embodying a relatively simple set of principles, which enable courts to adapt doctrine to changing circumstances. Indeed, despite origins in a populist concern for small businesses, the courts have reached a rare consensus about the primary underlying aim of the antitrust laws: the pursuit of efficiency, as that concept has been defined by economists. According to the courts, free competition in general promotes efficiency, creating incentives to satisfy the desires of consumers as inexpensively as possible. And, as Professor Hovenkamp argued at a previous symposium² at the University of San Francisco School of Law, the courts have proven reasonably good at formulating and modifying doctrine to give content to the general terms of the antitrust laws, and at reading narrowly legislation Congress has passed in response to special interest groups.³ Federal antitrust law is essentially a common law field with statutory authorization. And change—or, if you will, modernization—is integral to common law decision-making.

2. Symposium, *Soaring Prices for Prescription Drugs: Just Rewards for Innovations or Antitrust Violations?*, 39 U.S.F. L. REV. 1 (2004).

3. Herbert Hovenkamp, *Sensible Antitrust Rules for Pharmaceutical Competition*, 39 U.S.F. L. REV. 11, 12–14 (2004).

It is perhaps unsurprising, then, that, as Albert A. Foer discusses in his article in this symposium issue, *Half-Time at the Antitrust Modernization Commission*, numerous blue-ribbon commissions have been formed in the past to address antitrust law, few of them led to immediate change, and the fate of the AMC may well be the same. Foer offers a useful analysis of the AMC's work to date, placing its efforts in a broader historical and political context. One implication of his analysis is that the AMC is unlikely to lead to a sudden, radical departure from traditional antitrust principles.

It is similarly unsurprising that two other authors of articles in the symposium issue of the law review argue *against* significant changes to the relief currently available under the federal statutory antitrust regime. Professor Robert H. Lande's article, *Five Myths About Antitrust Damages*, addresses the statutory provision that provides treble damages in private civil actions. The predicate for his argument is that, in practice, the nominal award of treble damages deters potential violators of antitrust laws as if the remedy were, at most, single damages. This is so in light of various limitations on private antitrust damages, including that they do not allow recovery of prejudgment interest, recovery for allocative inefficiency, or recovery for the "umbrella effects" of market power, as well as the reality that many violators will not get caught. Meanwhile, Professor Lande contends, courts often make informal adjustments to decrease damages because they have doubts that treble damages are appropriate. Professor Lande makes the ultimate conclusion: private civil damages in antitrust cases should remain as they are, and, if any change should occur, it should be that courts stop adjusting other doctrines to make antitrust cases especially difficult for plaintiffs.

Professor Stephen Calkins in *Civil Monetary Remedies Available to Federal Antitrust Enforcers* reaches similar conclusions in addressing the remedies available to the federal government in antitrust cases. In particular, he analyzes (1) whether the Federal Trade Commission should retain the power to seek monetary equitable relief for those harmed by antitrust violations (worried about under-deterrence, he argues against change) and (2) whether the Department of Justice should be authorized to impose civil fines or penalties (for the same reason, he tentatively suggests such authority be granted as an intermediate choice between a mere civil injunction and criminal liability). Note that Professor Calkins's main argument is against reform, that his proposal for change is modest and tentative, and that it is on an issue that the courts cannot address themselves through the common

law process. Only Congress can authorize a new remedy under the federal antitrust statute.

Professor Herbert Hovenkamp in *Federalism and Antitrust Reform* also argues for the most part in favor of only tinkering with, not transforming, the status quo. Specifically, he recommends adjusting, but not changing radically, the background rules for determining when state action immunizes private actors from antitrust liability. He does make one proposal for substantial change, but even there it is not to alter antitrust law as it has developed through a common law process, but rather to undo a *legislative* incursion into the federal antitrust regime. This proposal is to repeal the immunity from the antitrust laws that the McCarran-Ferguson Act⁴ confers on the insurance industry. More generally, Hovenkamp's position is that courts should be somewhat skeptical of state approval of anti-competitive schemes and should not be uncritical in allowing state action to serve as a smokescreen for private collusion. According to Hovenkamp, a special exemption to the federal antitrust laws should arise only if a state clearly authorizes and actively supervises private behavior. In other words, according to Hovenkamp, in the great majority of cases the rules governing competition as developed through a common law process should not be set aside because of a political decision by a state government.

Perhaps the most dramatic proposal in this symposium issue comes from two state attorneys general, J. Thomas Prud'homme and Ellen S. Cooper, *One More Challenge for the AMC: Repairing the Legacy of Illinois Brick*. They argue for a repeal of the "direct purchaser rule" established in *Illinois Brick Co. v. Illinois*,⁵ which allows only purchasers who buy goods or services directly from a violator of the antitrust laws to seek a monetary recovery under federal antitrust law.⁶ Related is the Supreme Court's rejection of any "pass on defense" in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,⁷ which allows direct purchasers to recover the full overcharge they pay on goods or services as a result of an antitrust violation, even if they pass some of the overcharge down the chain of distribution.⁸ Prud'homme and Cooper make in essence two arguments: first, *Illinois Brick* should be over-

4. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000).

5. 431 U.S. 720 (1977).

6. *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 482 (7th Cir. 2002) (describing the "Direct Purchaser Rule"), *cert. denied*, 539 U.S. 903 (2003).

7. 392 U.S. 491 (1968).

8. *See id.* at 494.

ruled, allowing indirect purchasers to bring damages actions under federal antitrust law; and, second, this change should be made through legislation.

There is some basis for believing that the federal courts would not be ideally suited to revisit and revise *Illinois Brick*. If *Illinois Brick* was in fact wrongly decided, one reason may have been that the federal courts were swayed by self-interest. *Illinois Brick*, along with *Hanover Shoe*, simplified federal antitrust cases. Together these decisions spared federal courts from having to calculate the amount of damages, if any, suffered by purchasers at each link in the sometimes lengthy chain of distribution. As Prud'homme and Cooper point out, federal courts will no longer have this luxury, as various states have adopted indirect purchaser statutes, and Congress recently enacted the Class Action Fairness Act,⁹ which creates federal subject matter jurisdiction over many class actions that are based on state law,¹⁰ and that, in the past, would have been litigated in state court. Perhaps this new circumstance will spur the federal courts to reconsider *Illinois Brick* and *Hanover Shoe*.

Even though the judgment of the federal courts in formulating and modifying antitrust doctrine is not beyond reproach, particularly when it comes to *Illinois Brick*, Prud'homme and Cooper's analysis gives rise to concerns about legislative intervention. As their article recognizes, the interaction is complex between the direct purchaser rule and any pass on defense. The ideal way to deal with that complexity will depend on practical issues, many of which will come to light only through litigation. The authors attempt to address some of these issues, but, understandably, their analysis raises far more questions than it provides answers. Congress is not well-suited to anticipate the practical issues that will arise from any change in *Illinois Brick*. Nor is it built to resolve them in a way that serves the underlying purposes of the antitrust laws, as opposed to the interests of powerful lobbying groups that wish to avoid the discipline of free markets. Thus, even assuming that reform of *Illinois Brick* is appropriate, the collective wisdom of the contributors to this symposium issue of the *University of San Francisco Law Review* seems to suggest that that effort should be left, in whole or in part, to the courts.

This symposium issue of the *University of San Francisco Law Review*, then, may be greater than the sum of its parts. Each of the articles

9. 28 U.S.C. § 1332(d).

10. *See id.*

provides insights on an important topic in antitrust law. Taken together, the articles suggest a presumption in favor of leaving the development of antitrust law to courts, even if Congress has the will to act.