2004

The Future of Private Rights of Action in Antitrust: A Conference Introduction

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By Spencer Weber Waller*

It is my pleasure to introduce the 2004 conference that the Institute for Consumer Antitrust Studies ("Institute") sponsored with the Loyola Consumer Law Review on The Future of Private Rights of Action in Antitrust.[1] The conference marks the beginning of the celebration of the Institute's tenth anniversary and its mission to promote a consumer-friendly competitive economy. I will discuss briefly the history of the Institute, the key issues in the current debate over the future of private rights of action under the competition laws of the United States and its trading partners, and the conference that took place on February 20, 2004, analyzing these cutting edge issues.

I. The Institute for Consumer Antitrust Studies

Ten years ago, a dream of the late United States District Court Judge Hubert Will became a reality. Over time, Judge Will increasingly believed that the centrist tradition in American antitrust law was threatened by the influence of the so-called Chicago school of antitrust analysis[2] and the associated well-funded group of think tanks, academic literature, and judicial education programs that sought to inculcate what he considered a false belief that a narrow definition of allocative efficiency was the only value at stake in antitrust.

More important, Judge Will decided to do something about it. In supervising the settlement of a major private treble damage

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[1] The conference was also co-sponsored by the law firm of Cohen, Hausfeld, Milstein & Toll PLLC ("Cohen Milstein"). In particular, thanks go to Michael Hausfeld and Paul Gallagher, a member of the Institute Advisory Board, for their support and assistance in connection with the conference.

[2] *See* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

antitrust class action case, Judge Will announced that he would entertain proposals, under the doctrine of *cy pres*, to distribute those funds remaining after all claims, fees, and costs had been paid to promote the interests of consumers in the ongoing antitrust debate.

Judge Will selected the Loyola proposal, championed by Dean Nina S. Appel, to create the Institute for Consumer Antitrust Studies and directed the funds to Loyola.[3] This proved to be the beginning, rather than the end, of the process. On appeal, the United States Court of Appeals for the Seventh Circuit reversed Judge Will's decision with respect to the remaining funds,[4] and all monies were returned to the court. It was only in a subsequent settlement of a different antitrust case that Judge Will followed the road map that the Seventh Circuit laid out for him and ultimately awarded similar funding to the Institute.[5] Over the years, the Institute has received additional funding and support from Loyola University Chicago, subsequent *cy pres* court distributions, foundations, law firms, corporations, and individuals.[6]

For the past ten years, the Institute has been a non-partisan, independent academic center designed to explore the impact of antitrust law enforcement on the individual consumer and to shape public policy.[7] The Institute promotes a comprehensive, inclusive view of the benefits of competition law and policy that includes, but goes beyond, prevailing narrow notions of economic efficiency. The Institute fulfills its mission by sponsoring symposia, academic colloquia, and consumer education classes, publishing working papers, undertaking research projects, and funding a unique student fellowship.

The Institute has carved out for itself a unique niche as the only academic public interest center focusing on both antitrust and consumer protection law. Living up to its mandate from Judge Will, the Institute began examining issues of competition from the perspective of the consumer and insisting that such benefits must be tangible, and not merely theoretical in the sense of wealth

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[3] *In re* Folding Carton Antitrust Litig., 687 F. Supp. 1223 (N.D. Ill. 1988).

[4] *In re* Folding Carton Antitrust Litig., 881 F.2d 494 (7th Cir. 1989).

[5] Superior Beverage Co. v. Owens-Illinois, Inc., 847 F. Supp. 477 (N.D. Ill. 1993).

[6] Recent donations and grants are set forth on the Institute's web site at http://www.luc.edu/antitrust (last visited Apr. 19, 2004) (sponsorship).

[7] Full information on the history and activities of the Institute can be found at http://www.luc.edu/antitrust (last visited Apr. 19, 2004).

maximization for producers. The Institute achieved its goals through consumer education classes, a nation-wide writing competition in health law antitrust, in addition to a series of conferences on antitrust and health care,[8] antitrust policy for the new millennium,[9] and consumer protection issues for the elderly.

The Institute also sponsors a unique student fellowship to train the next generation of competition and consumer protection advocates. Student Fellows are selected from incoming Loyola law students and after their completion of the first year of study. Fellows must maintain standing in the top third of the class and pursue a structured curriculum that provides them with the proper background to practice in the field which culminates in research and field work in their third year. Students receive a financial stipend, attend all Institute events, local and national antitrust conferences, and enjoy special, informal programs designed to inform them of key topics and introduce them to policymakers in the public and private sector. Student Fellows have also pursued special research projects and commented on legislative proposals dealing with competition matters. There are currently twelve Student Fellows of the Institute with seven graduates from the program.

The Institute further sponsors the annual Loyola Antitrust Colloquium to support the work of professors in law and related disciplines who share the Institute's centrist, pro-consumer orientation. The first colloquium was held in 2001 and featured over thirty attendees for a day of papers, commentary, and discussion. A number of the papers from that and later colloquia have been published.[10] The colloquium has more than doubled since 2001 and now includes professors from law, business, economics, and other disciplines, in addition to enforcement officials, practitioners who teach on a part-time basis, members of the Institute advisory boards,

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[8] *Can Antitrust Law Cure Health Care?*, 8 LOY. CONSUMER L. REV. 76-166 (1995-1996). This conference was co-sponsored by the Institute for Health Law of Loyola University Chicago School of Law. *See* http://www.luc.edu/schools/law/hlthlaw/index.htm (last visited Apr. 19, 2004).

[9] *Antitrust Law for the New Millennium: An Examination of Leading Issues in Antitrust Enforcement Policy for the Approaching Age*, 9 LOY. CONSUMER L. REV. 111-92 (1997).

[10] *See, e.g.*, Elbert L. Robertson, *Antitrust as Anti-Civil Rights? Reflections on Judge Higginbotham's Perspective on the "Strange" Case of* United States v. Brown University, 20 YALE L. & POL'Y REV. 399 (2002); Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283 (2001); Joseph Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437 (2001).

and members of the judiciary.[11]

The Institute's web site features a number of free publications designed both for the public and antitrust professionals.[12] The working paper series includes scholarly and shorter work from faculty members at Loyola University Chicago and other law schools embodying the Institute's philosophy. The working papers range from a chapter from a forthcoming biography of Thurman Arnold, one of the pioneers of modern antitrust, to an executive summary regarding the full-length treatment of behavioral economics. A *Consumer's Guide to Antitrust* outlines the basic tenets of the antitrust laws and the commitment to free markets for the benefit of consumers that has animated U.S. antitrust policy since the passage of the Sherman Act in 1890. Shorter pieces by the Student Fellows analyze current events in the field and are also published in the newsletter of the Illinois State Bar Association's Antitrust Committee. Finally, the newsletters of the Institute itself are available on line as well.

The Institute relies on the support of two advisory boards to better fulfill its mission. The U.S. Advisory Board assists the Institute director and staff as a source of ideas for programs, speakers, research projects, competition advocacy before state and federal agencies and legislatures, job placement, and funding opportunities. The Board also provides valuable direction to the evolving nature of the Institute. The Board reflects the basic philosophy of the Institute as to the importance of the antitrust and consumer protection laws and their vigorous enforcement, but includes representatives from all segments of the bar, corporations, government, and academia.[13] An International Advisory Board provides an international and comparative perspective on the growth of a sound consumer-friendly competition policy and has proved to be a fertile source of opportunities to participate in discussions of issues of common concern.

The Institute now has a decade of activities and programs under its belt since its initial creation and funding. The Institute's goal remains to identify critical issues of competition and consumer protection and to influence their ongoing development. Most

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[11] The programs for the past colloquia can be found at http://www.luc.edu/antitrust (last visited Apr. 19, 2004) (programs).

[12] *See* http://www.luc.edu/antitrust (last visited Apr. 19, 2004) (publications).

[13] The full membership of the Advisory Boards can be found on the Institute's web site.

recently, the Institute held a symposium on the competition aspects of the developing deregulation of the electrical power industry,[14] a controversial development that still resonates today in the wake of the many scandals that have plagued the industry since that time. The debate over the current structure of the private enforcement of the antitrust laws within the U.S. bar, pending litigation in the Supreme Court over the ability of foreign purchasers to sue in U.S. courts, the growth of private rights of action in competition cases outside the United States, and the history of the Institute all led to the selection of private enforcement issues for this year's symposium.

II. The Future of Private Rights of Action in Antitrust

Private treble damage actions and suits for injunctions have been a fundamental part of antitrust enforcement since the passage of the Sherman Act. Private rights of action both supplement and substitute for government enforcement. Private antitrust cases, including state enforcement of the federal antitrust laws, may be the only means to attack anticompetitive conduct when the federal government is unable or unwilling to bring certain cases. Moreover, vigorous private enforcement has lent the system a certain stability in the United States in comparison to other more centralized systems of competition law.

While the vast majority of the pending antitrust cases in the past forty years have been private treble damage cases, there is great dissatisfaction about the current system of private antitrust enforcement. Many in the antitrust community seek to restrict private rights of action on the grounds that too many enforcers are attacking the same conduct at the same time or merely free riding on earlier federal government enforcement efforts. Much of the criticism, and defense, of the current system is laid out in the report of the ABA Antitrust Section Remedies Forum, which has been extensively considering possible changes to the system.[15] Regardless of what side of this debate one is on, there is substantial agreement that few would have deliberately designed the current system if one were writing on a fresh slate. Ironically, at the same time, foreign competition law systems increasingly are turning to private rights of actions as a means of decentralizing their systems and increasing total

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[14] *See* Spencer Weber Waller, *Competition, Consumer Protection, and Energy Deregulation*, 33 LOY. U. CHI. L.J. 749 (2002).

[15] *See* http://www.abanet.org/antitrust/remedies (last visited Apr. 19, 2004).

enforcement beyond that of a single governmental competition authority.

III. The Conference

The conference began with my introduction and attempt to situate the debate within antitrust over the proper role of private rights of actions to the broader societal debate over tort and class action reform.[16] The first full panel proceeded with the specific debate raging over the continued appropriateness of automatic treble damages in all antitrust cases. Robert Lande challenged the conventional wisdom by asserting that treble damages were never awarded in practice and that damages should, if anything, be increased to adequately deter price fixing.[17] Joseph Bauer suggested that the overall balance appeared "about right," but challenged restrictive interpretations of standing and injury requirements that prevented adequate private enforcement.[18] What followed was a lively debate between Richard Steuer and Paul Slater as commentators about how the antitrust world evolved into its present form and the nature and value of recent proposals by the ABA Antitrust Section Remedies Forum to reform the current system.

The second panel concerned the pending *Empagran* litigation in the Supreme Court and appears to be the only symposium discussion of this issue while the case is under consideration by the Supreme Court.[19] *Empagran* concerns whether foreign purchasers may sue in the U.S. for treble damages for overcharges from price fixing in their home markets or whether such plaintiffs must sue under whatever private rights of action exist in their home jurisdiction. In *Empagran*, the price fixing conspiracy had a significant effect on the United States, but the plaintiffs bought their

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[16] Obviously, the two are linked. The 2004 revisions to Fed. R. Civ. P. 23 and the proposed Class Action Fairness Act will affect antitrust as part of its overall effect on class actions in state and federal court.

[17] Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004).

[18] Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303 (2004).

[19] Empagran, S.A. v. F. Hoffmann-LaRoche Ltd., 315 F.3d 338 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 966 (Dec. 15, 2003) (No. 03-724). Oral Argument in *Empagran* took place on April 26, 2004, with a decision expected before the end of June 2004.

supplies outside the United States from other foreign-based defendants. The case thus raises complex issues of interpreting the Foreign Trade Antitrust Improvements Act[20] and general policy questions of whether such suits promote or limit detection and deterrence of international cartels in the future. The prospect of foreign claims in U.S. courts is both an important issue in its own right and a logical bridge between the first panel about how private rights play out in the United States and the final panel on the growth of private rights of actions in other jurisdictions.

Michael Hausfeld, the lead lawyer for the plaintiffs in the *Empagran* case, discussed the "five common sense reasons" foreign plaintiffs should be allowed to sue international cartels in the United States even if their injury is deemed to be felt outside of the United States.[21] Professor Salil Mehra offered an economic approach as to why allowing such suits may in fact deter future cartel conduct.[22] Professor Hannah Buxbaum offered a framework based on private international law principles when such suits should be permitted and when they should not.[23] Finally, Douglas Rosenthal as a commentator offered a spirited rebuttal as to why such suits should not be allowed.[24]

The luncheon keynote address was delivered by Don Baker, the former head of the Antitrust Division for the U.S. Department of Justice. Mr. Baker looked at the history of private antitrust enforcement and asked a series of provocative questions about which aspects of our experience we would recommend to others based on our hundred-year history of private rights of action.[25]

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[20] 15 U.S.C. § 6a (2004).

[21] Michael D. Hausfeld, *Five Principles of Common Sense Why Foreign Plaintiffs Should be Allowed to Sue Under U.S. Antitrust Laws*, 16 LOY. CONSUMER L. REV. 361 (2004).

[22] Salil K. Mehra, *Foreign-Injured Antitrust Plaintiffs in U.S. Courts: Ends and Means*, 16 LOY. CONSUMER L. REV. 347 (2004).

[23] Hannah L. Buxbaum, *Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 365 (2004).

[24] While Mr. Rosenthal's comments from the conference are not included in the symposium, many of his points are included in an *amicus curiae* brief he authored on behalf of the Government of Japan in *Empagran* and the briefs filed by the petitioners and the Solicitor General in the litigation. *See, e.g.*, Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, F. Hoffmann-LaRoche Ltd. v. Empagran, S.A. (2004) (No. 03-724), *available at* 2004 WL 226390.

[25] Donald I. Baker, *Revisiting History—What Have We Learned About Private*

The conference concluded with a look at how private rights of action in competition matters have developed outside the United States. Professor Clifford Jones of the University of Florida provided a comparative look at the growth of private rights of actions in the United States, European Union, and Japan, and Donncadh Woods of the European Commission provided a more detailed discussion of the slow growth of private rights of action in the E.U. and the potential for greater use of such remedies following the modernization of E.U. competition law, which took place on May 1, 2004.[26] Charles Wright of the Canadian bar discussed both the growth of private rights of action for price fixing in Canada as well as the growth of a Canadian class action mechanism that differed significantly from its U.S. counterpart, but is quickly proving to be of similar importance.[27] Commentary was also provided by Judge Diane Wood of the Seventh Circuit and Paul Gallagher of Cohen Milstein.

IV. Conclusion

This symposium issue represents a snap shot, as of the spring of 2004, of the future of private rights of action in antitrust law, one of the most critical issues in competition policy. On behalf of Loyola University Chicago School of Law, the Consumer Law Review, and the Institute for Consumer Antitrust Studies, we hope the perspectives offered in these papers and comments help litigants, enforcement agencies, and courts choose wisely so that public and private antitrust enforcement will truly serve the needs and interests of real consumers.

Antitrust Enforcement That We Would Recommend To Others?, 16 LOY. CONSUMER L. REV. 379 (2004).

[26] Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409 (2004). Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431 (2004).

[27] Charles M. Wright & Matthew D. Baer, *Price-fixing Class Actions: A Canadian Perspective*, 16 LOY. CONSUMER L. REV. 463 (2004).