

## **Antitrust Modernization Commission Remarks**

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Introduction. I need to expand the standard disclaimer that my remarks are my own to emphasize that they don't reflect the views of *any* Commissioner, *including me*. That's because what I'm going to say here today is not only at odds with the views that I imagine are held by several of my colleagues, but because I'm not speaking as a Commissioner. I'm speaking instead as an antitrust litigator for 40 plus years, and many of the things I'm going to say echo things I said two and a half decades ago at various Antitrust Section and other meetings, including a NAAG meeting. Insofar as my remarks concern the federal and state enforcement agencies, they reflect my experience in dealing with the agencies as an outsider over the years.

This is not to say that I speak for any of the other “gray beard” antitrust litigators either. Far from it. Many of them have as much antitrust expertise and experience as I do. Indeed, John Shenefield and Don Kempf were law school classmates of mine, and John Warden and I were summer law clerks together in L.A. in 1964. And almost all of the other AMC Commissioners are folks with whom I've been co-counsel [like Sandy Litvack] or antitrust colleagues for many years. So even as a gray beard, I'm speaking for myself.

The AMC. First, you have to count me as among the skeptics when the AMC was first formed. At that time, the powers that be in the Antitrust Section asked Jan McDavid, Bob Taylor and me to discuss at the ABA's Annual Meeting in San Francisco what the AMC should

and would do. The list of "shoulds" was a lot longer than the list of "woulds." However, that was before the roster of Commissioners was announced. That roster is very distinguished and I think the Congress should and will take seriously its recommendations.

What Has Happened. More fundamentally, however, I think the three of us neglected the potential impact that the mere existence of the AMC could and would have. Let me be more specific. As someone who represented merger candidates before the DOJ or the FTC, I was one of the legion of critics about the process. Although it was clear that HHI numbers were not dispositive, the criteria that the agencies actually used in issuing second requests and initiating challenges were opaque. Second requests were sometimes enormously (and seemingly inordinately) burdensome and expensive. The lack of settled merger clearance rules meant that it was hard to predict which agency would even review the matter. And there was a difference in the statutory standards for issuance of preliminary injunctions.

The agencies have tried to make the decision-making process more transparent through issuance of the Commentaries this Spring.<sup>1</sup> Chairman Majoras also announced limitations on some of the most burdensome aspects of Second Requests,<sup>2</sup> and I hope and trust that the DOJ will follow suit shortly. I think it would be wrong to say that these things wouldn't have

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<sup>1</sup> Fed. Trade Comm'n and U.S. Dept. Of Justice Commentary on the Horizontal Merger Guidelines (Mar. 2006), <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>

<sup>2</sup> Reforms to the Merger Review Process, Announcement by Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Feb. 16, 2006, <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>.

occurred if the AMC were not in the wings, but there is little doubt in my mind that the AMC's presence hastened them.

Unfinished Business. There is of course unfinished business. The Chairman candidly told the AMC that because of a commitment that she made during her confirmation, she was not in a position to advocate a comprehensive merger clearance agreement between the agencies. But I'm not similarly handicapped. I think the AMC should certainly recommend to Congress that the agencies be mandated (or at least free) to enter into such an agreement. I say "the agencies" instead of Congress both because I would hate to see the division of responsibility become a political football and because I thought the agencies got things pretty right the last time and I think they'll do as well or better this time. (Personally, I think certain core industries should remain with each agency, but for the vast majority of cases, there should be a system for doling them out that can't be gamed – for example, odd numbers to DOJ; even numbers to the FTC.)

Also, although I think the difference in the statutory standards for preliminary injunctions is way overblown – I defy anyone who read the *Arch Coal* decision<sup>3</sup> to identify any daylight between the way the Pipeline Act<sup>4</sup> standard is currently being applied and the way the federal courts are applying the standard in cases brought by DOJ – the AMC appears disposed to recommend that the standards be made uniform. I don't disagree with that. However, in choosing the uniform standard, I think there is at least as good an argument for adopting the

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<sup>3</sup> *FTC v. Arch Coal, Inc.*, 329 F.Supp. 2d 109 (D.D.C. 2004).

<sup>4</sup> Trans-Alaska Pipeline Act, Pub. L. No. 93-153, 87 Stat. 576 (1973), codified as Federal Trade Commission Act, §13(b), 15 U.S.C. § 53(b) (1988).

Pipeline standard as there is for adopting the DOJ standard. The Pipeline standard is the more recent standard; it is merger-specific; and as far as I can tell, it hasn't resulted in the antitrust screen being too fine.

Similarly, I think the perceived difference between DOJ and FTC enforcement posed by the possibility that the FTC will initiate administrative proceedings after a federal court denies a preliminary injunction is mostly theoretical. The FTC hasn't done that for more than 15 years (the *Donnelley* case in 1990 was the last time),<sup>5</sup> and I see no real threat that it will do it in the future, absent extraordinary circumstances – for example, where a court decision is obviously a home town decision (think certain courts in South Texas or Madison County, Illinois). I think it would be a mistake to strip the Commission of the power to send matters to Part 3 if those extraordinary circumstances exist.

You will note that I left off my list of merger process reforms the elimination of the FTC as a merger law enforcement agency. I was frankly surprised that there were *any* votes to do that in the AMC's straw poll – again, not because I'm a Commissioner but because the two-federal agency model was thoroughly debated in the late 80s by the ABA Antitrust Section Task Forces studying the FTC and DOJ. The difference was that at that time the issue was whether *DOJ*, not the FTC, ought to be eliminated as the agency with responsibility for merger enforcement (with DOJ retaining exclusive jurisdiction over criminal cartel enforcement). The arguments for making that change were pretty compelling. The FTC is the closest thing to a specialized

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<sup>5</sup> *In the Matter of R.R. Donnelley & Sons Co.*, 120 F.T.C 36 (Docket No. 9243; Complaint, Oct. 11, 1990; Final Order, July 21, 1995).

antitrust agency that we have (for example, the current five FTC Commissioners collectively have nearly a century of antitrust experience among them). The various antitrust studies that the FTC conducts for the Congress uniquely inform its antitrust enforcement activities. And the Commission's antitrust and consumer protection missions have a symbiotic relationship that unites them. Indeed, I shudder to think of any consumer protection law enforcement agency that is not tethered to free market considerations.

I can't think of any similarly compelling reasons for making DOJ the exclusive merger law enforcement agency. To be sure, some AMC members may feel their clients have been burned by the FTC. But I can guarantee you that the client in the last big merger case that Dan Wall, Greg Lindstrom and I tried felt the same way about DOJ. At all events, as the Chairman said in her AMC testimony, the dual enforcement system at the federal level has stood the test of time. The ABA Task Forces concluded, as I think the AMC should, that that system should be preserved (though improved in the ways I've previously described).

Tripartite Law Enforcement. I don't feel the same way about the current tripartite system of merger law enforcement— or about the current tripartite system of *antitrust* law enforcement more generally – in which the states and private parties, as well as the federal agencies, are the enforcers. There is no doubt there is currently warrant for this system. Since *California v. American Stores Co.*<sup>6</sup> was decided by the Supreme Court in 1990, the states and private parties have had the undisputed right to obtain divestiture remedies in merger cases, notwithstanding decisions by the federal agencies that that relief was unwise or at least unnecessary. And the

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<sup>6</sup> 495 U.S. 271 (1990).

Clayton Act specifically provides states and private parties with the right to recover treble damages (plus attorney's fees) when they win Sherman and Clayton Act cases.

At best, this tripartite system of antitrust enforcement has the potential to produce conflicting case law. At worst, it can produce bad case law and/or bad case outcomes because the incentives of private enforcers – and sometimes State Ags – are not aligned with the incentives of federal enforcers. Private plaintiffs (or their attorneys) are sometimes more investors than anything else. Indeed, the recent indictments in the *Milberg, Weiss* cases raise doubts about whether attorney and client are not *de facto* one and the same in class actions. And, as my friend and predecessor, Tom Leary, has pointed out, because notice and an opportunity to opt out are not given until late in the class action process, class action attorneys are the real decision makers in class action litigation in any event.<sup>7</sup>

Whether or not one agrees with Judge Posner about the shortcomings of state antitrust expertise, human beings (and their ambitions) being what they are, political considerations cannot help but play a bigger role in state merger (and other antitrust cases) than they do in federal agency cases because State AGs are generally more involved in antitrust prosecutorial decision-making than is the Attorney General of the United States. (Indeed, since at least the days of Dita Beard and Earl Butz, the AAG-Antitrust at DOJ and FTC Commissioners have taken special care to make their decisions independently.)

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<sup>7</sup> See Thomas B. Leary, The FTC and Class Actions, Remarks Before The Class Action Litigation Summit, Washington, D.C., June 26, 2003, <<http://www.ftc.gov/speeches/leary/classactionssummit.htm>>.

The unfortunate results of the current tripartite system of antitrust law enforcement are more evident in private cases than they are in state cases (mainly because the states have lost most of the merger cases they've brought independent of the federal agencies).<sup>8</sup> Time and again private treble damage cases have gone off the rails, and the Supreme Court has had to put things right – in *Monsanto*,<sup>9</sup> *Sharp*,<sup>10</sup> *ARCO*<sup>11</sup> and *Kahn*<sup>12</sup> with respect to vertical restraints; in *Spectrum Sports*,<sup>13</sup> *Brooke Group*,<sup>14</sup> and *Trinko*<sup>15</sup> with respect to single-firm conduct; in *Brunswick*<sup>16</sup> and

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<sup>8</sup> Merger cases lost by the states include: *California v. Sutter Health*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001); *New York v. Kraft General Foods*, 862 F. Supp. 1030 (S.D.N.Y. 1993); *Pennsylvania v. Russell Stover Candies, Inc.*, 1993-1 Trade Cas. (CCH) ¶ 70,224 (1993 E.D. Pa); and *State of Cal. ex. rel. Van de Kamp v. Texaco*, 46 Cal. 3d 1147 (1988).

<sup>9</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

<sup>10</sup> *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

<sup>11</sup> *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

<sup>12</sup> *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

<sup>13</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

<sup>14</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

<sup>15</sup> *Verizon Communications Inc. v. Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>16</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

*Monfort*<sup>17</sup> with respect to mergers; and more recently in *Dagher*,<sup>18</sup> *Volvo*<sup>19</sup> and *Independent Ink*<sup>20</sup> with respect to joint ventures, price discrimination and tying.

The most recent example, in my mind, is *Twombly v. Bell Atlantic Corp.*<sup>21</sup> The core conduct alleged in that case is parallel conduct by competitors, which the case law says is benign standing alone. There must be "plus factors" to support a conspiracy claim. Under the Federal Rules – and under Supreme Court cases like *Rex Hospital*<sup>22</sup> and *Leatherman*<sup>23</sup> – those plus factors should be pleaded with sufficient specificity to put the defendant on notice of the issues to be litigated. This is not just legalese. In *Associated General Contractors*,<sup>24</sup> the Supreme Court noted that in an antitrust case “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”<sup>25</sup> The burden and expense involved in litigating such a “massive factual controversy” can be a tax

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<sup>17</sup> *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

<sup>18</sup> *Texaco v. Dagher*, 126 S.Ct. 1276 (2006).

<sup>19</sup> *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006).

<sup>20</sup> *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281 (2006).

<sup>21</sup> 425 F.3d 99 (2d Cir. 2005).

<sup>22</sup> *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976).

<sup>23</sup> *Charlene Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

<sup>24</sup> *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

<sup>25</sup> *Id.* at 528, n.17; *see also id.* at 544.

on defendants that may be passed on to consumers. So it is very important that the pleading standards be high enough to prevent that tax from being levied when it's not warranted. The pleading standard imposed in *Twombly* seems to me to require no real specificity in the factual allegations in a parallel conduct case.

What to do about this? For one thing, I think the DOJ and FTC must speak out more loudly and clearly in private antitrust litigation cases that the agencies consider have gone awry. The agencies filed amicus briefs in *Dagher*, *Volvo* and *Independent Ink*. I hope they are invited by the Court to make a recommendation in *Twombly*. Beyond that, I think the agencies should consider filing such briefs in private litigation in the federal circuit courts, where most antitrust jurisprudence is developed. Sure, it takes resources. But it is critically important that antitrust law not be a patchwork quilt. More fundamentally, I urge the AMC to take a close look at HR 5253, which is the House's price-gouging bill.<sup>26</sup> There is much to be debated in that bill but one of its provisions would give the FTC the right to intervene – not just to speak as amicus – but to *intervene* in federal price-gouging litigation brought by State AGs. If state and private party authority to challenge mergers is not curtailed, I think federal intervention authority in cases brought by the states or private parties is essential in the long run if our tri-partite system is to operate uniformly, as I think it should and indeed must.

Treble Damage Class Actions. Finally, let me say a few words about treble damage class actions. In the real world, they are almost as scandalous as the price-fixing cartels that are generally at issue in the cases. The plaintiffs' lawyers who play in this game are big time

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<sup>26</sup> Federal Energy Price Protection Act of 2006, H.R. 5253, 109<sup>th</sup> Cong. (2006).

investors, and they stand to win almost regardless of the merits of the case. Class certification has become routine – in all but a few cases, the views of economists challenging assurances that there is commonality of impact are dismissed as going to the merits instead of the viability of class certification; commonality of impact is found even when prices are arrived at through negotiations and without regard to list prices; and the federal appellate courts have largely ignored the revisions of Rule 23 that were designed to provide for appellate review of errant district court certifications. Confronted by class certification, it takes a very brave – or foolish – defendant to take a case to trial. For example, in 1999, I had an indemnified client go to trial with four defendants that weren't indemnified. Those four were literally betting billions of dollars that a Chicago jury would do the right thing. There was little doubt about the lack of merit in that case. After 8 weeks of trial, the judge granted judgment as a matter of law. But I know first-hand how good an extortionate settlement looked during trial to those who were not indemnified, and I just thanked my lucky stars I wasn't representing one of them.

Today the multitude of Illinois Brick Repealers magnifies the burdens, expense, and in terrorem effect of this kind of litigation. Fifteen years ago, I said that both *Hanover Shoe*<sup>27</sup> and *Illinois Brick*<sup>28</sup> ought to be repealed so that at least *federal* treble damage actions by direct and indirect purchasers could be consolidated in one federal court, the total damages determined, and then that sum could be apportioned among direct and indirect purchasers. A couple of years later I said I thought that legislative change should pre-empt state Illinois Brick Repealers so that

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<sup>27</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

<sup>28</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

federal reforms would not be gutted by state litigation. I was a voice in the wilderness then, but let me say it again. If the AMC does nothing else, it should recommend this fundamental reform. That will not cure all that ails the treble damage class action. However, it would be a good start. And if the AMC were to recommend further revision of Rule 23 to ensure that federal appellate courts act as meaningful gatekeepers to class certification, I think that might just do the trick.

Conclusion. I want to thank the Antitrust Section for inviting me today and the AMC for listening. I know I'm here because it was thought that I would wear my Commissioner's hat and I regret that misimpression. But I greatly welcome the chance to speak to the AMC no matter what the circumstances. I've had the pleasure of practicing antitrust law my entire working life. I have loved every minute of it, and I want to do everything in my power to see that it is well served.