



# Federal Trade Commission

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## **Rewriting History: Antitrust Not As We Know It . . . Yet**

**Remarks of J. Thomas Rosch\***  
**Commissioner, Federal Trade Commission**

**before the**

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I'd like to thank the Antitrust Section for this opportunity. Of all of the speaking opportunities that I've had as a Commissioner, this may very well be the most interesting topic that I've encountered yet. I can't tell you how anxious I am to start the debate. To that end, I will focus my remarks on three topics: (1) the ideal institutional architecture for a U.S. antitrust enforcement agency; (2) what lessons we can draw upon in developing the best antitrust regime from overseas; and (3) whether and to what extent there's room in the ideal antitrust regime for federal class actions.

### **I.**

I'll not shy away from stating the obvious: the current system is broken. Any system that subjects different parties to different decision-makers, different procedural

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\* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Amanda Reeves, for her invaluable assistance preparing this paper.

hurdles, and (depending on who you talk to) different substantive standards based on a closed-door clearance process is not only sub-optimal, but is, dare I say it, dysfunctional. The Antitrust Modernization Commission took the politically correct path when it rejected calls to consolidate antitrust enforcement in one agency, even while recognizing that “a single agency generally would be a superior institutional structure.”<sup>1</sup> In making that observation, the AMC was dead on. But were I operating on a blank slate, I’d consolidate all civil antitrust enforcement in the FTC.

If that strikes you as crazy, I’d encourage you to step back and consider the broader context. The two-agency problem is largely a product of an historical accident, resulting from the fact that Congress saw the need for federal antitrust laws in 1890 before the modern administrative agency framework was barely a glimmer in its eye. The FTC was one of the earliest administrative agencies, created in 1914 as part of the enactment of the Clayton Act and FTC Act. Why does any of this matter? It means the antitrust laws were on the books in 1890 – and the DOJ was enforcing them – before the FTC was ever on the scene. In contrast, the FCC, the SEC, their predecessor agencies, and most of the other independent regulatory agencies were created later as part of the same legislation that created the substantive laws that those agencies enforce. In short, one of the main reasons DOJ has civil antitrust enforcement power in the first place is only because, although the FTC was relatively early as far as administrative agencies go, it came after the DOJ. And just like that, when Congress created the FTC, the split of

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<sup>1</sup> Antitrust Modernization Commission Report at 129, *available at* [http://govinfo.library.unt.edu/amc/report\\_recommendation/chapter2.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf). The AMC noted that “the significant costs and disruption of moving to a single-agency system at this point in time would likely exceed the benefits.” *Id.* at 129-30. Moreover, the AMC observed, “there is no consensus as to which agency would preferably retain antitrust enforcement authority.” *Id.*

authority was born. Interestingly, Congress did not repeat this mistake in other areas of law; instead, in lieu of dual enforcers, Congress instead repeatedly decided to place all civil enforcement authority in independent regulatory commissions. Were I rewriting history, I'd do the same when it comes to civil antitrust enforcement. My reasons for reaching this conclusion are three-fold.

First, from an institutional perspective, the FTC is better suited to function as an independent decision-maker. The FTC is headed by five Commissioners that serve staggered 7-year terms, no more than three of which can be from any political party.<sup>2</sup> This framework forces a certain level of bipartisanship. While the fact that a simple majority is required to take affirmative action means that a single party can theoretically dictate outcomes, in my experience, that's rarely the case. The optics of a 3-2 vote, particularly on matters that garner acute public attention, are just plain bad; moreover, a rancorous dissent can undermine the legitimacy of the majority's action. As a result, there is often a behind-the-scenes effort to avoid such division. Moreover, as a practical matter – be it because of recusals, early departures, or delays in nominations and confirmations – the party controlling the White House often does not have a three-vote majority. From March 2008 to March 2010, for example, the FTC functioned without a partisan majority, with one Democrat, one Independent, and two Republicans.

All of this means that Commissioners are not only forced to consider one another's views,<sup>3</sup> but that the FTC as a decision-making body is less vulnerable to the

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<sup>2</sup> 15 U.S.C. § 41.

<sup>3</sup> As former Commissioner Leary observed, “[w]hen we deal with shades of gray” – as we often do – “the process is likely to produce better outcomes. It certainly nudges people toward the center.” Commissioner Thomas B. Leary, “The Bipartisan Legacy”

political swings that the Antitrust Division is inevitably subject to (sometimes called “agency capture”). Indeed, anyone who has ever complained that the government’s antitrust enforcement efforts are too unpredictable should not only point a finger at the divergence between the agencies, but should blame the ying yang that goes on every four or eight years when there is a changing of the guard in the White House and at the DOJ. In this regard, it bears noting that it was the Justice Department that issued the Section 2 Report and then almost immediately withdrew it. You’d be far less likely to ever see anything like that happen in a world with just the FTC simply because our institutional structure forces moderation in the first place.

A second advantage that the Commission’s administrative agency structure provides is a unique and important ability to opine on hard questions of antitrust law in the first instance. Over the last 35 years, the ascendancy of neoclassical economics has meant that antitrust has simultaneously become more dependent on economic analyses and more dependent on rule of reason-type analyses. From the standpoint of a generalist district court judge (to which DOJ must try all of its antitrust challenges) and a lay jury (before which private plaintiffs try their cases), this is not all good: we are expecting judges to do more work with less guidance. The result has been that, particularly in the context of litigation involving private plaintiffs, the Supreme Court has expressed a high level of skepticism as to whether generalist judges are up to the task of making the hard decisions about what conduct constitutes a violation of the antitrust laws.<sup>4</sup>

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(May 8, 2003), *available at* <http://www.ftc.gov/speeches/leary/050803bipartisanlegacy.pdf>.

<sup>4</sup> See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-60 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007).

Although the Commission can't solve all of these problems, the FTC's structure does provide it with the unique and important ability to opine on hard questions of law in the first instance when it issues a decision in Part 3. Our decisions in *Three Tenors* and *North Texas Specialty Physicians* are great illustrations.<sup>5</sup> In both cases, the FTC applied the truncated rule of reason analysis articulated in *Indiana Federation of Dentists*<sup>6</sup> (another FTC case) to deem the practices at issue "inherently suspect." In both cases, the D.C. Circuit and the Fifth Circuit, respectively, agreed and adopted the FTC's analysis.<sup>7</sup> Had these questions been presented to a federal district court in the first instance, it's unlikely that the court would have been open (let alone equipped) to apply a more novel form of analysis in the first instance. Yet because the FTC supplied the courts with a well-crafted roadmap, the FTC was able to introduce a different form of doctrinal analysis – and one, that I might add, provides more predictability – into antitrust law.

Third, I'd be remiss in not echoing my colleague, Commissioner and former Chairman Bill Kovacic's observation that the FTC is a better competition agency because of its consumer protection mission.<sup>8</sup> Although there's a tendency to think about antitrust and consumer protection in discrete silos, the FTC's two missions are symbiotic: consumer protection law ensures that consumers can make well-informed choices in the

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<sup>5</sup> *In re PolyGram Holding, Inc.*, FTC Docket No. 9298 (July 24, 2003) (Commission opinion), available at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>; *In re North Texas Specialty Physicians*, FTC Docket No. 9312 (Dec. 1, 2005) (Commission opinion), available at <http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf>.

<sup>6</sup> *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

<sup>7</sup> *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 370 (5th Cir. 2008).

<sup>8</sup> See, e.g., William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 J. L. & Pol'y 101, 114 (2007) (observing that "consumer protection laws are important complements to competition policy").

marketplace while antitrust law protects consumers by ensuring that there is competition in the marketplace. In my time at the Commission, there have been several competition cases that have raised consumer protection issues either on the margins or front and center. Indeed, the agency's competition and consumer protection missions converge when a firm engages in deception or fraud which has the effect of eliminating competition. The Commission's experience with consumer protection means that it not only has the ability to spot such deception, but to make well-informed decisions about whether and to what extent such deception (or other conduct harmful to consumers) should inform an antitrust enforcement action. The recent insights from the behavioral economics literature – that there are ways in which consumers act predictably irrationally – have only made the consumer protection mission more important.<sup>9</sup>

It may be unlikely that we will start on such a blank canvass anytime soon and, in the meantime, we are stuck with the current system. Short of a massive overhaul, can the major disparities be fixed? That's a tough question. The private antitrust bar is quick to criticize the level of deference accorded to the Commission when it does certain things (such as seeking a PI under 13(b) before heading to administrative litigation or litigating a pure Section 5 claim) on the ground that the standards that govern the Antitrust Division and the FTC should be the same because the Antitrust Division is every bit as expert as the FTC. But that argument misses the point. I don't think anyone at the FTC would ever suggest that our counterparts at the Antitrust Division are somehow less

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<sup>9</sup> See, e.g., Maurice E. Stucke, *New Antitrust Realism*, Global Competition Policy (January 2009); Maurice E. Stucke, *Behavioral Economics at the Gate: Antitrust in the Twenty-First Century*, 38 Loy. U. Chi. L. J. 513 (Spring 2007); DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008); GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* (2009).

expert or less equipped to make decisions on hard questions of antitrust law. That would be silly and baseless. The comparison, however, is between the Commission and generalist federal district courts (before which DOJ tries most of its cases).

The real problem is not that the lawyers, economists, and senior officials at the Antitrust Division are not first rate in their own right, but is that the FTC is an independent regulatory Commission and the Antitrust Division is not. The DOJ is solely a prosecutor that must prove its cases to a federal district court. To put a finer point on it, there is an entire body of administrative law – and, indeed, a substantial piece of the U.S. federal government – that is based on the fundamental principle that administrative agencies are entitled to deference when they act within the scope of their expertise. For all of its similarities, the Antitrust Division is not bipartisan, is not independent, and does not have the ability to issue administrative decisions on the merits; all of these distinctions, in turn, have real implications for why the agencies are subject to different procedural and substantive standards in the key areas that provide the fodder for most of the public debate.

Nevertheless, with that caveat in mind, there are some changes worth considering that could make the system run more smoothly. First, I would improve the clearance process. That's, of course, easier said than done. The problem with clearance is that we can all agree in the abstract how to divide things up; for most of the cases, that agreement works fine. In the really high profile cases, however, there are inevitably going to be turf wars. Compounding that problem is that both agencies can now legitimately lay claim to special expertise in just about any investigation. We could employ a special arbiter, a possession arrow, or even a coin flip halfway between the buildings in front of the

National Archives to make the ultimate decision in the hard cases, but that assumes that both sides could agree quickly on how to identify the hard cases. I'm not sure that's possible. Ultimately, I think a few more tweaks in the current system is the best that we can hope for.

Second, I would level the playing field when it comes to 13(b). Right now, the Commission has the benefit of the public interest 13(b) standard, which authorizes a district court to grant a preliminary injunction upon finding that “weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”<sup>10</sup> In *Whole Foods* and *Heinz*, the D.C. Circuit recognized that, in adopting this standard, “Congress recognized the traditional four-part equity standard for obtaining an injunction was ‘not appropriate for the implementation of a Federal statute by an independent regulatory agency.’”<sup>11</sup> Thus, the court held, to obtain a preliminary injunction under 13(b), “the FTC need not show any irreparable harm and the ‘private equities’ alone cannot override the FTC’s showing of likelihood of success.”<sup>12</sup> Instead, because the determination of the merits ultimately lies with the Commission, so long as the FTC raises “questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation,” the court held that the FTC is entitled to a presumption in favor of a preliminary injunction.<sup>13</sup> The parties can

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<sup>10</sup> 15 U.S.C. § 53(b).

<sup>11</sup> *FTC v. Whole Foods Market, Inc.*, 533 F.3d 869, 875 (D.C. Cir. 2008) (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001)).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 875 (quoting *Heinz*, 246 F.3d at 714-15).



then rebut that presumption by showing that the equities weigh in favor of the merger.<sup>14</sup>

In contrast, of course, it is argued that the Antitrust Division must meet the traditional common law preliminary injunction standard.<sup>15</sup>

It will not surprise you that I don't believe the way to level the playing field here is to require that both agencies be subject to the traditional common law preliminary injunction standard. That would be two steps backwards in my view. Congress was right to give the FTC the 13(b) standard because, whereas in a typical common law case, a generalist district court decides the merits and therefore can logically make a threshold decision about the plaintiff's likelihood of success, in administrative litigation, Congress delegated decision-making on the merits to the Commission in the first instance and to the administrative (Part 3) process. It undermines the theoretical foundation of that process to say that merits decisions should be left to an expert agency, but that a generalist court can short circuit that review based on a preliminary assessment of the case. So, given that most would agree that the Antitrust Division is similarly expert in some ways, it seems the right way to look at the 13(b) issue is not to assume that the FTC should operate without 13(b), but is instead to ask whether there is a justification for giving the Antitrust Division the benefit of 13(b). I can envision two justifications.

The easiest possibility would be to authorize the Antitrust Division to bring its cases in Part 3 administrative litigation over at the Commission. Under that scenario, authorizing the Antitrust Division to obtain preliminary injunctions under the 13(b)

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<sup>14</sup> *Id.*

<sup>15</sup> The traditional common law standard requires a "likelihood of success on the merits," a showing of irreparable harm if the injunction does not issue, that granting the injunction will not cause undo harm to the private parties, and that the public interest favors such relief.

standard would logically follow because an expert agency would be making the merits determination in the first instance. Of course, this would mean that the FTC would be sitting in review of the Antitrust Division's prosecutorial discretion and trial strategy, which not everyone may like. The flipside is that, however, for those of you that have long criticized the fact that the Commission gets to serve as the prosecutor and judge in administrative litigation, this would eliminate that dual function in cases brought by the DOJ.

The other possibility on the 13(b) front would be to encourage the Antitrust Division to go into federal court and seek a preliminary injunction under the 13(b) standard, pending a trial on the merits – a permanent injunction. The problem here is that the argument for applying the deferential 13(b) standard is theoretically tougher when the merits are being decided by a generalist district court. To be sure, there's still a basis for 13(b) insofar as one believes that the Antitrust Division's threshold decision to sue is entitled to some deference, which it is. There is also the more practical problem that judges may not want to conduct two separate hearings – of course, judges issue preliminary injunctions in cases all the time before they resolve the merits, so the idea of requiring that they do the same in the antitrust context might not be so far fetched after all.

Third and finally, although I've not formed a view on this point, I'd at least consider whether it makes sense to augment the DOJ's enforcement authority by giving it power to prosecute free-standing Section 5 violations. Again, the problem here as I see it

(and as I've explained elsewhere)<sup>16</sup> is that the purpose of Section 5 is to allow the FTC as an expert agency to identify in the first instance the out-of-the-ordinary conduct that is anticompetitive, but not clearly prohibited by the other federal antitrust laws. Although I trust that the DOJ as a matter of prosecutorial discretion could identify the proper uses for Section 5, the whole point of Section 5 is lost if a generalist district court is opining on Section 5 claims in the first instance.

Perhaps the compromise here, as I suggested with 13(b) reform, is again to authorize the Antitrust Division to sue for Section 5 violations, but only in Part 3 administrative litigation.<sup>17</sup> Such a reform would mean that an expert agency (in the form of the Antitrust Division) would be identifying Section 5 causes of action as a matter of prosecutorial discretion while the other expert agency (the FTC) would be ruling on the validity of those causes of action, which would all arguably be consistent with Section 5 as Congress originally intended.

## II.

Next I'd like to take a more global focus and discuss whether, if I were starting from scratch, I'd create identical antitrust enforcement systems in the U.S. and the EU and, relatedly, whether there are aspects of the EU system that I'd replicate in the U.S.

Before I get to the specifics, however, there's an important threshold question: how important is it that there be convergence between the U.S. and the European Commission? I believe that convergence is important – if for no other reason than in a

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<sup>16</sup> See, e.g., J. Thomas Rosch, "Promoting Innovation: Just How "Dynamic" Should Antitrust Law Be? (March 23, 2010), *available at* <http://www.ftc.gov/speeches/rosch/100323uscremarks.pdf>.

<sup>17</sup> I would likewise modify the FTC Act to place this same limitation on the Commission.

global economy firms cannot be expected to comply with divergent international standards – but I don't believe a one-size-fits all approach is essential, if even possible. Moreover, I believe that now, more than anytime before, are we in the U.S. are closer to agreement with the EC. Much of that has to do with the fact that, as the EC has gotten more sophisticated and experienced in its competition law – as, for example, Europe's openness to less measurable non-price competition, consideration of quality and innovation, and its conclusion that consumer choice is a value in considering the impact of a practice on consumer welfare – the U.S. has opened itself up to newer forms of economic thinking, we have met in the center. Nonetheless, differences remain. I'd like to comment on three of those differences.

The first difference is that the EC system is purely administrative and not adversarial. To get a sense of how the EC functions, imagine a world in which the DOJ serves as the sole decision-maker. There is no hearing and there is no judge. We don't need to move to block your merger and get a judicial decision because we can just block it. Likewise, we don't have to have a judge decide whether a firm violated the Sherman Act because we can unilaterally decide that it did. That is how the EC works: the Directorate General for Competition (“DG Comp”) plays the role of prosecutor, jury, and judge; it makes a finding of guilt and decides the punishment. There is an appeal process to the General Court (formerly known as the Court of First Instance), but those appeals drag on and the General Court can only review the Competition Commissioner's decisions for “manifest errors of law.” Having spent 40 years as a litigator (and on the defense side, I should add), I find that to be crazy. This may be my American bias, but I just can't imagine a system where there is not so much as a right to cross examine the

opposing sides witnesses, let alone an independent decision-maker. My ideal antitrust system would unquestionably be adversarial.

The second difference is that the EC (like Canada) has a unitary appellate system. All appeals originate in the General Court (which is essentially one large federal appellate intermediate court) and can then be appealed to the European Court of Justice.<sup>18</sup> The General Court is comprised of 27 judges (one from each member state), who generally sit in panels of 3 or 5 judges at a time. In contrast, of course, in the U.S., antitrust decisions in public and private cases are reviewed by a panel from one of 12 federal appellate courts and may, on a discretionary basis, also be reviewed by the United States Supreme Court.

In comparing and contrasting these models, I am left to wonder whether the U.S. would be better off with one large intermediate appellate court with rotating panels of judges or whether we are better off with the current system. The answer to this question essentially boils down to whether or not there's value in having the law develop in the various silos that are the 11 regional circuits, the D.C. Circuit, and the Federal Circuit, or whether we'd be better off eliminating the circuit-by-circuit precedent and getting a final answer more quickly (still subject to review by the Supreme Court). I struggle with this one. The defense lawyer in me says that while the business community would prefer the latter EU-type system – particular in the Section 2 context where it seems like the Supreme Court resolves the really hard questions once or twice in a decade – I think we are better off as a legal matter with the current system precisely because it is a common law system. Judges are not perfect. Nor are litigants or attorneys for that matter. In a

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<sup>18</sup> Similarly, in Canada the Competition Tribunal's decisions are appealable only to the Federal Court of Appeal and thereafter to the Supreme Court of Canada.

one-shot appellate system, everything better be working perfectly every time or there is a risk that bad precedent will be made because of bad facts, bad lawyering, bad judging, or all of the above. Some of that could be avoided by trusting judges to issue non-precedential decisions, but that practice has itself largely fallen out of favor.

Moreover, given that our antitrust is made through common law, the intermediate federal appellate courts serve a critical role in that they let district courts and parties test drive rules and see if they work. When statutes are enacted, there are hearings, lobbying, debates in the media, and town hall meetings. When a federal appellate court announces a rule on monopolization (or, far more rarely, merger law), its decision has the same force and effect, but the process is, in many ways, much more limited. The common law system generally works well, but part of that reason is because the federal appellate courts enable issues to percolate. Stripping that out of our system would be risky.

Third, switching to substance, I would like to discuss what the goal of antitrust law should be. Everyone generally agrees that the goal of antitrust law should be to promote consumer welfare. To call that an “agreement,” however, is a red herring: there are many different ideas as to how to achieve that end.<sup>19</sup> In my view, the proper

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<sup>19</sup> See, e.g., Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7-48 (1966) (arguing for a total surplus standard); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 65-151, (1982) (arguing for a standard that judges whether consumer, as opposed to producer, welfare is enhanced); Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959, 963-66 (1999) (same); Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, Statement before the Antitrust Modernization Commission §II.A (Nov. 4, 2005), available at [http://www.amc.gov/public\\_studies\\_fr28902/exclus\\_conduct\\_pdf/051104\\_Salop\\_Merger\\_s.pdf](http://www.amc.gov/public_studies_fr28902/exclus_conduct_pdf/051104_Salop_Merger_s.pdf) (arguing for a consumer surplus standard); Barak Y. Orbach, *The Antitrust and Consumer Welfare Paradox*, Arizona Legal Studies Discussion Paper No. 10-07,

approach is to look at consumer welfare from the buyers' perspective, or what Robert Lande has termed a "consumer choice" perspective, which occurs when a firm's conduct impairs the choices that free competition brings to the marketplace.<sup>20</sup> I see two benefits for looking for such harm.

To start, although there has been some recognition over time that the Sherman Act reaches conduct that weakens product quality or innovation, Sherman Act law is still largely centered on price theory. Nevertheless, consumers also can be harmed when conduct inhibits product development through innovation or limits consumers' options such as by limiting quality or variety. A consumer choice analysis therefore provides a means that is still tethered to a demonstrable standard to analyze anticompetitive conduct in dynamic industries where there is intense non-price competition. Additionally, a consumer choice (or "buyer welfare") approach has the added benefit of bringing the U.S. closer to how the EC conducts its analysis. Article 102 (the EC's monopolization statute), for example, states that an abuse "of a dominant position" may occur where a firm "limit[s] production, markets or technical development *to the prejudice of consumers.*" The EC guidance last year on monopolization includes a similar emphasis.<sup>21</sup>

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available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1553226](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553226) (arguing that antitrust should retire the consumer welfare standard because there is confusion over its meaning and, in any event, there are instances under every interpretation of consumer welfare that are harmful to consumers and reduce total welfare).

<sup>20</sup> See, e.g., Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis*, Antitrust Source (February 2009); Robert H. Lande, *FTC v. Intel: Applying the "Consumer Choice" Framework to "Pure" Section 5 Allegations*, CPI Antitrust Journal (February 2010 (2)).

<sup>21</sup> European Commission Communication – Guidance on The Commission's Enforcement Priorities In Applying Article 82 EC Treaty to Abusive Exclusionary Conduct By Dominant Undertakings The Guidance ("Guidance"), along with a press release, a list of questions and answers, the Commission staff working paper, and other

In my view, if there is one thing we could do to better emulate the EC, moving towards a consumer choice framework would be it.

Fourth, while I am talking about substance, my final view vis-à-vis other systems is that, while other foreign states (Canada in particular) have included more specificity in their antitrust laws, I think our system which marries a common law Section 1, Section 2, and Section 7, with a catch-all Section 5 is just right.<sup>22</sup> A common law system, as I have already suggested, makes particular sense in the antitrust context. There is very little that is static about modern firm behavior and it would be a mistake to try and enumerate specific types of anticompetitive conduct or to codify the economic principles that should govern that behavior. All of it is evolving and the law needs to be able to as well. Nevertheless, I think it would also be a mistake to give the private plaintiffs' bar and generalist district judges and juries a blank check to go after any conduct that could conceivably anticompetitive. Congress gave the Commission Section 5 for that reason: to identify the types of conduct that are not easily categorized as violations of any existing statute, but which nonetheless have anticompetitive effects. This combination of the Sherman Act, the Clayton Act, and the FTC Act, in my view, strikes the right doctrinal balance.

### III.

The final topic that I'd like to discuss is the separation between public and private litigation and, more specifically, whether there is an effective role for private class

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useful citations, are *available at* <http://ec.europa.eu/comm/competition/antitrust/art82/index.html>.

<sup>22</sup> For a brief discussion of the differences between the U.S. and Canadian antitrust regimes, see J. Thomas Rosch, *The Path You Need Not Travel: Observations on Why Canada Can Do Without Section 5*, *available at* <http://www.ftc.gov/speeches/rosch/100204roschcanadaspeech.pdf> (Feb. 4, 2010).



actions to play in federal antitrust law or whether we would simply be better without them.

In recent years, more so than ever, the courts have explicitly attacked this issue head on. In *Twombly*, of course, the Court imposed its plausibility gloss on the Rule 8 pleading standard in part because of the high costs of antitrust discovery.<sup>23</sup> To be sure, there's nothing cheap about complying with a Second Request or litigating against the government, but there can be little doubt that the Court's decision was predominantly animated by concerns that the private class action bar needed to be reigned in.<sup>24</sup> To that end, the Court observed that Rule 8 prohibits plaintiffs from using "a largely groundless" claim to go on fishing expeditions to up the ante on settlement negotiations.<sup>25</sup> Likewise, in *Billing v. Credit Suisse*, the Supreme Court held that the securities laws should preempt the antitrust laws, stating in part that preemption was needed to remedy the fact that "antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries" who were apt to err in the hard line drawing needed to separate the legal from the illegal and reach

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<sup>23</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-60 (2007).

<sup>24</sup> See, e.g., Lee Goldman, *Trouble For Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem*, 2008 B.Y.U. L. REV. 1057, 1100-01 (2008) ("Eliminating private suits alleging price fixing in oligopoly markets may have been the *Twombly* Court's intent. The Court has been restricting enforcement of the antitrust laws generally and may have reasoned that government suits remedy the majority of price fixing cases.").

<sup>25</sup> *Id.* at 557-58. ("We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.' *Id.*").

inconsistent results.<sup>26</sup> Arguably the appellate courts' recent trend towards heightened standards for class certification is likewise similarly motivated.

Although I applaud the courts' efforts to impose procedural rules that limit private plaintiffs from using meritless class actions to extract large settlements, I worry that the Supreme Court is not only modifying procedural rules to cabin the private plaintiff's bar, but that it is curbing the substantive rules as well. The combination of our common law antitrust regime and the extent to which the sheer volume of private antitrust litigation outweighs public antitrust litigation has perhaps made this inevitable. Since 2004, the Supreme Court has decided ten antitrust cases – not one of those cases was brought by the government.<sup>27</sup> This means that the vast majority of substantive antitrust law is being made in cases involving private plaintiffs.

As Dan Crane has observed, this feature of our common law process has negative spillover effects for public enforcement because “the content of these liability rules is shaped by concerns peculiar to private litigation, such as abusive competitor suits, the risk that treble damage awards will chill vigorous competition, and the fear that setting the bar too low will encourage litigiousness.”<sup>28</sup> Thus, he goes on to observe “at least in recent years, courts have often established sharply underinclusive liability norms in

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<sup>26</sup> *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007).

<sup>27</sup> *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S.Ct. 1109 (2009); *Weyerhaeuser Co. v. Ross Simmons Hardwood Lumber Co.*, 127 S.Ct. 1069 (2007); *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007); *Leegin Creative Leather Services v. PSKS*, 127 S.Ct. 2705 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S.Ct. 2383 (2007); *Volvo Trucks N. Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Texaco Inc. v. Dagher*, 126 S. Ct. 1276 (2006); *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281 (2006); *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

<sup>28</sup> Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 40-43 (2008)

private antitrust cases” even though “[l]ogically, the liability rules might very well be less stringent in public litigation where those limiting concerns are absent.”<sup>29</sup> Hence, Crane concludes, in the predatory pricing context and even in the Section 5 context, “the predominance of private antitrust litigation has stymied public antitrust enforcement by precipitating the creation of restrictive liability norms that are then applied to public lawsuits as well.”<sup>30</sup> Going forward, the Court would do those of us in the government a favor to bear this consideration in mind and, wherever possible, provide dicta or guidance in the form of admonitions rather than creating hard and fast antitrust rules that are a product of policy concerns that are not present in every antitrust case.

The bigger and tougher question, however, is whether we’d be better off in the antitrust realm without antitrust class actions at all. I don’t have a clear answer here. On the one hand, I’ve no doubt that, particularly with the explosion of electronic discovery, the costs of class action litigation are a real drain on the system, resulting in the production of millions of documents and emails.<sup>31</sup> Those costs do, as the Court observed in *Twombly*, create enormous pressure on defendants to settle – even in cases where a finding of liability is slim to none – simply because, from a pure dollars and cents standpoint, the cost of getting to a favorable summary judgment decision (to say nothing

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., Antitrust Modernization Commission Report, *infra* note 1 at 241 (“With respect to private civil actions, for example, the availability of treble damages has been both lauded as the key to an effective enforcement system and blamed for burdening business with litigation of questionable merit.”); Peter Lattman, “Club Suit Dogs Buyout Firms,” WALL STREET J. (Mar. 9, 2010), *available at* <http://online.wsj.com/article/SB10001424052748703954904575110132751542498.html> (describing volume of electronic document production in litigation against nation’s biggest private equity firms).

of trial) are simply too much in comparison to a settlement offer. To make matters worse, substantial portions of settlement payments never even trickle down to the alleged injured consumer, but instead line the pockets of the plaintiffs' attorneys. To the extent private class actions have come to serve more as the plaintiff bar's full employment act than as a way to remedy real harm, one has to wonder if that tradeoff is worth it.

On the other hand, however, it's not apparent that abolishing private class actions is the right answer. A treble damages system must incentivize plaintiffs' lawyers to invest and that means opt out and the potential for treble damages awards. Moreover, abolishing private class actions might make things worse. Firms would still have to contend with the laws of 50 different states, which would make things even more – not less – complex. And if the litigation landscape after *Illinois Brick*<sup>32</sup> is any indication, we can expect a substantial number of states to pick up any slack created by federal reforms. To that end, I suspect a lot of general counsels if they had their pick would happily choose to keep federal class actions if the alternative is to defend against a patchwork of state class actions. So, in the absence of reforms at the state level as well, I would keep federal civil class actions.

But that doesn't mean that there are not changes that I'd make. There are three such changes. First, I would strongly consider eliminating (or at least modifying) the treble damages provision in the class action context. Robert Bork has said treble damages “attracts bad lawsuits, lawyers interested only in the enormous cash awards, and compels even innocent businesses to settle rather than risk trial with potentially

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<sup>32</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728–29 (1977) (holding that only direct purchasers may sue under federal antitrust law to recover for damages from anticompetitive overcharges).

catastrophic damages.”<sup>33</sup> That may overstate matters, but it may be accurate in some cases too. Indeed, there have been a number of proposals over the years to eliminate or reduce the availability of treble damages.<sup>34</sup> Compensatory damages, if coupled with pre-judgment interest, can, arguably, achieve these goals. Moreover, perhaps we would all be better off to address the treble damages issue head on (rather than backdoor reforms through case law) which, in turn, might decrease the volume of settlements that have nothing to do with the merits of the case.

Second, following the Antitrust Modernization Commission’s recommendation, I’d eliminate joint and several liability<sup>35</sup> and, relatedly, would allow contribution among defendants. As the AMC correctly recognized, the current system, whereby all defendants are fully liable for damages caused by unlawful joint conduct such that any plaintiff can recover the full amount of their damages from any defendant is inequitable

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<sup>33</sup> See, e.g., Robert Bork, Comments on the Status of the Antitrust Laws, *available at* <http://govinfo.library.unt.edu/amc/comments/bork.pdf>.

<sup>34</sup> Antitrust Remedies Improvement Act of 1986, S.2162, H.R. 4250, 99th Cong. (1986); see also Research Joint Ventures: Hearings before the Subcomm. on Investigations and Oversight of the Subcomm. on Science, Research and Technology of the House Comm. On Science and Technology, 98th Cong., 1st Sess. 154, 159 (1983) (testimony of William F. Baxter); Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time has Come?*, 61 TUL. L. REV. 777, 830 (1987); Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission, pp. 3-4 (Nov. 4, 2005) *available at* [http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/enforcement\\_pdf/051104\\_BR\\_T.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/enforcement_pdf/051104_BR_T.pdf).

<sup>35</sup> See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (noting the “judicial determination that defendants should be jointly and severally liable” in antitrust cases, while holding that there is no right of contribution); see also *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397 (9th Cir. 1957) (joint and several liability is both “firmly rooted” and a “well settled principle”); Antitrust Criminal Penalty Enhancement and Reform Act of 2004 § 214 (providing that nothing in the Act “shall be construed to . . . affect, in any way, the joint and several liability of any party to a civil action . . . other than that of the antitrust leniency applicant and cooperating individuals . . .”).

and unfair: it causes a race amongst defendants to settle quickly for small amounts, such that the last party standing (who potentially played a minimal role in the anticompetitive conduct) can be held liable for an undue share of damages.<sup>36</sup> Fixing these damages rules might minimize if not eliminate settlements that have nothing to do with the merits.

Third, I'd preempt *Illinois Brick* repealers and only allow direct purchasers to recover for antitrust claims.<sup>37</sup> Although the AMC ultimately took a more pragmatic approach, half of the AMC was of the view that, if they were starting from scratch, they would eliminate indirect purchaser recovery.<sup>38</sup> In my view, so long as indirect purchasers can obtain recovery at the state level, litigation will remain unnecessarily complex and costly and all so that parties that are not contemplated by federal antitrust law can obtain minimal relief. I don't see any reasonable justification for that outcome.

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So there you have it. Let the debate begin.

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<sup>36</sup> *Id.* at 243-44 (noting the unfairness of existing rules which “permit plaintiffs to settle with some defendants at an early stage for a relatively small amount of damages, leaving remaining, non-settling defendants potentially liable for nearly the entire damages caused by the joint conduct, trebled”); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Contribution and Claim Reduction, at 4 (Dec. 5, 2005) [hereinafter ABA Comments re Contribution and Claim Reduction] (“This inequity has been condemned by most commentators.”).

<sup>37</sup> This would essentially have the effect of overturning through legislation the Supreme Court's decision in *California v. ARC Am. Corp.*, 490 U.S. 93, 102–06 (1989), which held that federal antitrust law did not impliedly preempt state indirect purchaser claims.

<sup>38</sup> Antitrust Modernization Commission Report, *infra* note 1 at 266 (“Commissioners Carlton, Garza, Jacobson, Litvack, Valentine, and Warden would favor allowing only direct purchaser claims, if writing on a clean slate. They believe that allowing only direct purchasers to sue would provide the most effective deterrence mechanism, and would avoid duplicative recoveries, speculative inquiries about how damages may have been passed on through the chain of distribution, and complex litigation.”).