

CIVIL REMEDIES

Background

The federal antitrust laws are enforced by three types of proceedings: (1) government injunctive cases seeking prospective or preventive relief, conduct or structural; (2) private damage and injunctive actions; (3) criminal prosecutions.¹ The government's policy of seeking to develop the law through injunctive actions and bringing criminal prosecutions only for established hard-core offenses has avoided constitutional vagueness issues that otherwise would exist. This approach has been proven by time, and I suggest nothing here directed to "improve" either type of government action.² This does not mean, however, that antitrust law is grounded in certainty, either as to rules or proof of facts. Both aspects of uncertainty affect private actions.

While enforcement of the antitrust laws, like other basic public policy embodied in statutes, is a very important societal objective, society is also interested in avoiding the chilling of competitive conduct and in avoiding costly and wasteful social overhead. The cost of antitrust litigation — beyond the needs of law enforcement — is wasteful social overhead — overhead that amounts to at least hundreds of millions of dollars a year.

This does not mean that every time the government loses an injunctive or criminal case, the whole cost involved is waste. When a society chooses to enforce a statutory policy through judicial proceedings some enforcement "losses" are inevitable. Rather, the waste I see in the present system is in private actions, which are brought for

¹ I do not address FTC proceedings separately.

² I do think that in government injunctive cases seeking relief beyond future prohibition of "bad" conduct or the enjoining of unconsummated transactions, it may be that a higher standard of proof and/or a greater scope for appellate review of findings should be provided.

private advantage and only incidentally serve as an enforcement tool. The present regime for processing such actions is highly inefficient even in “clear” cases and can be abused for competitive advantage in other cases.

One other consideration is relevant to the present regime governing private actions: treble damages are clearly a form of punishment, but none of the safeguards normally applying to punishment are present — a plaintiff may recover such damages on a mere preponderance of the evidence and regardless of whether the conduct challenged was clearly illegal when engaged in. Moreover, the absence of claim reduction or contribution creates, on top of this punishment, truly draconian consequences for a defendant that has the temerity to go to trial in a “conspiracy” case and loses.

There is also today an element of lawless chaos in damage cases by reason of indirect purchaser actions under the laws of certain States.

I am led by these considerations to propose a number of measures changing the present regime governing private actions.

Proposals

1. In all matters where the government institutes criminal proceedings and obtains a guilty verdict by plea or trial, all unlawful gains made by the defendants and precomplaint and prejudgment interest thereon shall be disgorged in that proceeding, together with such fines and penalties as may be provided by law. The disgorged unlawful gains shall be apportioned among those from whom they were taken directly or indirectly by the criminal court in a summary proceeding to be concluded within 90 days of the entry of a final criminal judgment as to all defendants. Classes of direct and indirect claimants may participate through counsel in that proceeding. Claims of less than \$100 shall be disregarded and the amounts attributable to such claims paid to the Treasury.

Fines and penalties shall accrue solely to the Treasury, but the Court may award compensation from those amounts to any private party found to have been a

material factor in the instigation or successful conduct of the government's investigation and prosecution or to its counsel.

2. In the case of defendants acquitted of criminal charges, private claims may be asserted as outlined below, but only the actual amount of unlawful gain may be recovered.

3. In cases not covered by ¶1, and subject to the limitation of ¶2, private actions for disgorgement and injunctive relief may be maintained only under federal law if the conduct complained does not have its principal effect solely in a single State.³ All similar actions shall be consolidated in a single federal forum for all purposes including trial. Should there be both direct and indirect claimants, the defendants' liability shall be determined first and if established the unlawful gains shall be determined and apportioned among the claimants by the Court.

If the plaintiff(s) prevail by clear and convincing evidence, and the Court finds the conduct established to have been clearly unlawful, the Court may increase the amount to be disgorged by up to 200%. Otherwise only actual unlawful gains shall be recovered.

4. In the case of conduct having its effect principally in a single State, relief may be sought under federal law as in ¶3 or under the law of that State.

5. In private actions under federal law a prevailing plaintiff may recover counsel fees and precomplaint and prejudgment interest in such amount as may be allowed by the Court, unless the Court has increased the amount to be disgorged by an amount greater than that claimed for these items. A prevailing defendant may recover counsel fees in such amount as may be allowed by the Court if the ~~plaintiff~~ ^{competitor} had revenues of greater than [~~\$500 million~~] in its last full fiscal year ^{cases of unless manifest injustice (fair competitor)}

³ "Principal" means more than 50%.

6. In any action claiming concerted conduct, liability shall be joint and several, but:

a. The damages attributable to a concerted actor not made a defendant or to a settling defendant shall not be recoverable from others.

b. Defendants shall have a right of contribution from other parties as to whom there has not been a claim reduction pursuant to ¶a, supra.

In price-fixing, bid rigging, market division or other cartel cases, damages shall be apportioned on the basis of market share. In other cases, the Court shall determine apportionment on the basis of comparative fault or comparative gain as it shall in its discretion deem appropriate.