

## Paper Trail: Working Papers and Recent Scholarship

*This issue of the Paper Trail focuses on the articles and comments published in the recent symposium issue of the George Washington Law Review. As will be evident from the summaries below, the Law Review has gathered the very timely and often provocative thoughts of leading participants in the debate on the topics covered in this symposium on antitrust remedies.*

This month, (albeit with a December 2001 cover date), the *George Washington Law Review* published a lengthy symposium issue entitled *Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct*. The issue includes fourteen principal articles and five comments divided among five broad topics: criminal penalties, the use of paid informants in criminal cases, treble damage actions, merger remedies, state enforcement, and injunctive remedies for monopolization.

**Criminal Enforcement.** Criminal enforcement is the focus of four articles in the first two panels. Donald Baker's piece, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, reviews the history of criminal enforcement in the United States against both corporate and individual defendants, highlighting the enormous increase in fines and jail time imposed in the few years since the adoption of the 1991 Sentencing Guidelines. Baker contrasts the present U.S. regime with that of the EU and Canada, whose only large fines appear to have occurred in cases that followed on successful American prosecutions. He argues that the effectiveness of the U.S. system flows in large part from its unique emphasis on individual, in addition to corporate liability. Donald Klawiter's article, *After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in the Age of International Cartel Enforcement*, goes over much the same ground, arguing that "blockbuster" fines and the DOJ's leniency program have been effective in enhancing deterrence. Gary Spratling's article, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, similarly focuses on the recent upsurge in massive fines and the expansion of the DOJ's amnesty program. Spratling argues that the amnesty program and the threat of huge fines have combined to increase the risk of detection of cartels by provoking cartel members to defect. He also suggests that detection is more likely now because of improved investigative techniques and international cooperation in enforcement.

Two articles take very different approaches to the cartel problem. In *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, Bruce Kobayashi questions the recent enthusiasm for megafines and amnesty. He examines the same history of criminal enforcement as do Baker, Klawiter, and Spratling, but diverges from their approaches by applying the standard of optimal deterrence. He argues that arbitrarily large fines may be less than optimal if firms and individuals make costly expenditures or avoid productive activities because of fear of being held liable. He offers an interesting game-theoretic analysis of the incentives created by the DOJ's leniency program, suggesting that some of the incentives it creates may be perverse. William Kovacic suggests an alternative to criminal

enforcement. In *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, he proposes the use of qui tam actions, modeled on the Civil False Claims Act, to detect and prosecute cartels.

**Private Treble Damage Actions.** Two of the articles in the symposium deal with private treble damage actions. In *Who Suffered Antitrust Injury in the Microsoft Case?*, John Lopatka and William Page discuss a variety of obstacles that consumers, computer manufactures, and competitors will face in proving that Microsoft's offenses caused them antitrust injury. For example, the article examines the difficulties the findings of fact pose for proving that Microsoft's conduct resulted in an overcharge over the price that would have prevailed but for the violations. Competitors also, including Netscape, will face difficulties disentangling the effects of Microsoft's offenses from those of its legitimate competitive activity. Robert Lande and James Langefeld provide an interesting response, *The Perfect Caper? Private Damages and the Microsoft Case*, in which they suggest several possible avenues by which private plaintiffs might prove damages. Andrew Gavil's article, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, addresses the case management problems posed by the diffusion of private direct and indirect purchaser litigation among state and federal courts. He proposes a legislative solution that would allow easier removal and consolidation of indirect purchaser suits.

**Merger Remedies.** Three of the symposium papers address negotiated remedies in merger enforcement, particularly since the FTC's 1996 Divestiture Report. In *Solving Competition Problems in Merger Control: The Requirements for an Effective Divestiture Remedy*, William Baer and Ronald Redcay examine the divestiture policies of the enforcement agencies. They particularly examine the FTC's preference for "up-front" (already-located) acceptable buyers, for "as is" sales of an entire business, and for the inclusion of contingent requirements for divestiture of "crown jewel" assets as an incentive for completion of divestiture programs. Joe Sims and Michael McFalls argue, in their highly provocative piece, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems?*, that the HSR framework for negotiation of remedies to address perceived competitive problems in proposed mergers often does not produce optimal remedial packages. For example, the authors suggest that the agencies threaten to sue in circumstances in which the courts would not provide relief, and thus induce firms to agree to costly remedial measures for speculative competitive risks. Sims and McFalls also criticize some of the features of divestiture practice that Baer and Redcay discuss. A sample sentence: "In recent years, the 'can we help' school of antitrust has been running the agencies, making a series of decisions on intervention that are justified only by speculative fears about what might or could possibly happen in the future, and then generating remedies that seek to protect against those possibilities through bilateral (but highly unequal) negotiations." David Balto's article, *Lessons from the Clinton Administration: The Evolving Approach to Merger Remedies*, discusses many of the same issues, but includes illuminating case studies of specific transactions.

In his comment on the articles on merger remedies, William Blumenthal suggests a burden-shifting approach to "regulatory" merger enforcement that would address some of the criticisms of the process. Molly Boast, in contrast, offers a spirited (not to say angry) and uncompromising defense of the FTC's "sophisticated, refined, and flexible" approach to remedies.

**State Enforcement.** In a free-standing article, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, Harry First responds to Richard Posner's proposal in a recent essay, *Antitrust and the New Economy*, 68 *Antitrust L.J.* 925 (2001), to essentially abolish state antitrust enforcement.

**Microsoft.** Finally, in *Do Easy Cases Make Bad Law? Antitrust Innovations and Missed Opportunities* in *United States v. Microsoft*, Timothy Brennan argues that whether or not Microsoft violated the antitrust laws, the Post-Chicago theories used to support the case reflect a recycling of discredited, non-economic pre-Chicago antitrust. He argues (in a lengthy parsing of the case) that the theories, evidence, and remedies in the case do not correspond with one another. He suggests some alternative strategies that might better have supported the case and the remedies. Richard Pierce offers a comment, arguing that despite the merits of Post-Chicago economics as theory, it does not offer a useful guide to antitrust courts. ●

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