

Congress Examines Antitrust

Larry Fullerton

Congress devoted an unusual amount of attention to antitrust and consumer protection legislation last year, despite concerns about the war in Iraq, the economy, and threats of terrorism.

In the recent past, proposals for new antitrust legislation have tended to focus on creating or eliminating antitrust exemptions.¹ Proposals such as these have presented issues about when and how departures from general antitrust enforcement policies may be justified, and about the respective roles of Congress and the courts in the development of the law. During 2003, proposals to reduce antitrust exposures for standards development organizations have presented the same kinds of issues. But these proposals and others have also raised broader, more fundamental policy issues in an increasingly complex, global enforcement environment.

Three major bills, including two consumer protection measures, were enacted at the close of the first session of the 108th Congress in December 2003. Other major bills received significant committee or floor consideration, and could be enacted in the next session. Some of the bills considered during 2003 have been industry specific (pharmaceuticals, telemarketing), while others have had more widespread application—proposing to alter criminal and civil penalties provisions, for example, and the process for finalizing Justice Department consent settlements. These legislative proposals have presented fundamental questions about deterrence of cartel behavior, federalism, separation of powers, and international antitrust cooperation.

Practitioners should follow legislative developments such as these. In the current Congress the legislature has become as important to the development of antitrust law and policy as the enforcement agencies and the courts have been historically.

Recently Enacted Legislation

Three major bills of interest to antitrust and consumer protection practitioners were enacted in December 2003, at the close of the last session of Congress:

- **Fair Credit Reporting Act Reauthorization.**² This legislation, which passed by overwhelming margins in both the House and Senate, is intended to combat identity theft by making such conduct more difficult, and by making it easier for consumers to identify, document, and remedy cases of identity theft. Significantly for the regulated credit community, the legisla-

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¹ During the 107th Congress, one new antitrust exemption was enacted into law and another temporary exemption was made permanent. The Aviation and Transportation Security Act (Pub. L. No. 107-71) contained a provision allowing intrastate airlines to coordinate their operations, and the Need-Based Educational Aid Act (Pub. L. No. 107-72) extended favorable antitrust treatment for need-based educational aid. Antitrust exemptions were actively considered, but not enacted, in bills intended to reduce airline flight delays (H.R. 1407/S. 633), facilitate the development of biological terrorism countermeasures (S. 1765), and enhance the quality medical care (H.R. 3897). The House Judiciary Committee also considered, but did not act on legislation (H.R. 3288) intended to make clear that the antitrust laws apply to the elimination or relocation of major league baseball franchises.

² P.L. No. 108-159.

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tion also extends federal preemption of several categories of state credit reporting laws, raising important issues of federalism.

- **CAN-SPAM Act.**³ The Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Act also passed the House and Senate by overwhelming margins. This legislation establishes national standards for sending multiple, unsolicited commercial e-mail messages, subject in some cases to criminal sanctions. The law requires the Federal Trade Commission to develop a plan for a “Do-Not-Spam” registry, but does not mandate its implementation. This legislation is intended to preempt California’s anti-spam law and other state laws, as well.
- **Drug Competition Act.**⁴ This legislation is designed to facilitate federal antitrust reviews of certain kinds of agreements involving pharmaceutical manufacturers by requiring them to be notified to federal law enforcement agencies. With certain exceptions, what must be filed with the agencies are agreements relating to the “manufacture, marketing or sale” of brand name or generic drugs, and agreements relating to the 180-day generic marketing exclusivity period provided by the Hatch Waxman Act. While this legislation was motivated primarily by concerns about the possible anticompetitive effects of settlements of patent litigation between branded and generic drug firms, as enacted, the legislation also covers agreements between generic manufacturers.

Earlier in the year, Congress acted (twice) to provide specific legislative authority for the Federal Trade Commission’s “do-not-call” registry for telemarketers.⁵ Interestingly, in its rulemaking, the FTC decided not to preempt the separate, and potentially conflicting do-not-call registries maintained by twenty-seven states. This approach proved to be controversial. As reflected in the House Commerce Committee Report, some Members of the Committee

remain concerned that consumers and businesses could continue to face conflicting and confusing regulatory approaches. . . . [W]e encourage the FTC to work diligently to persuade states to adopt the FTC’s rule. The Committee cannot [sic] understate the importance of the FTC working aggressively to seek such harmonization, and we will continue to follow the FTC’s progress on this issue.⁶

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Senate Judiciary Committee Proposals

Of the legislative proposals still awaiting final Congressional action, the one likely to be of interest to the broadest segment of the antitrust bar is H.R. 1086, a package of provisions approved by the Senate Judiciary Committee last fall, and now awaiting Senate Floor action. This bill proposes important changes in four areas.

First, H.R. 1086 would amend the National Cooperative Research and Production Act⁷ to provide that specified standards-setting activities of a “standards development organization” would be subject to rule of reason treatment in any suit under federal or state antitrust law. Proponents of the bill have argued that it is sometimes unclear whether per se or rule of reason standards

³ Pub. L. No. 108-187.

⁴ Sections 1111–18 of the Medicare Prescription Drug Act, Pub. L. No. 108-173.

⁵ Pub. L. No. 108-10 and Pub. L. No. 108-82.

⁶ H. REP. No. 108-8, at 4 (2003).

⁷ 15 U.S.C. §§ 4301–05.

should apply to such activities. Further, the bill would limit recovery to single damages where the nature and scope of the organization's activities have been disclosed in advance to federal antitrust enforcement agencies.

Second, H.R. 1086 would increase the maximum statutory criminal penalties for violations of Sections 1, 2, and 3 of the Sherman Act.⁸ The maximum statutory fine for corporations would be increased tenfold, from \$10 million to \$100 million; the maximum fine for individuals would be increased from \$350,000 to \$1 million; and the maximum jail sentence would be increased from three to ten years.

Third, the bill would encourage participation in the Justice Department's criminal corporate leniency program by limiting the civil damages liability of corporations that take part in the program in subsequent private damages actions under Sections 1 or 3 of the Sherman Act or "any similar State law." Under H.R. 1086, participants in the leniency program would be liable only for single damages and only with respect to the sales of their own goods or services. De-trebling would be available only to corporations found by a court to have provided a "full account" of relevant facts and otherwise "provided satisfactory cooperation" to private plaintiffs. The de-trebling provisions would cease to have effect after five years.

Finally, H.R. 1086 would amend the Tunney Act to mandate a more substantive and searching judicial review of proposed Justice Department consent decrees.⁹ Specifically, the bill would require reviewing courts to make an "independent" determination that the proposed settlement is in the public interest, following a judicial finding that there is a "reasonable belief, based on substantial evidence and reasoned analysis, to support the United States' conclusion that the consent judgment is in the public interest."¹⁰

H.R. 1086 may be close to enactment by Congress. Having been approved by the Senate Judiciary Committee, it now awaits action by the full Senate. If approved by the Senate, it would go directly to a House-Senate Conference Committee. This is because a slimmer version of the bill (containing only the provisions reducing antitrust exposures for standards development organizations) has already passed the House.

The provisions of H.R. 1086 raise a host of significant questions. First, are the provisions reducing antitrust exposures for standards development organizations really necessary? Could they even be counterproductive? Legitimate standards-setting activities are already governed by the rule of reason, and most such conduct is considered pro-competitive and perfectly lawful. Might Congressional consideration of H.R. 1086 therefore create a new source of uncertainty about the proper standards for analysis of standards-setting activities and chill legitimate behavior?¹¹ In light of questions such as these, the ABA Section of Antitrust Law concluded in a formal Report to Congress that "the legislative record to date does not establish a clear need for the proposed legislation."¹²

⁸ 15 U.S.C. §§ 1–3.

⁹ See Antitrust Procedures and Penalties Act of 1974 (Tunney Act), 15 U.S.C. §§ 16(b)–(h).

¹⁰ See § 221 of H.R. 1086. Currently, courts look only to determine whether the proposed decree is "within the reaches of the public interest." See, e.g., *United States v. Microsoft Corp.*, 56 F.3d 1448, 1457–58 (D.C. Cir. 1995).

¹¹ Note that this uncertainty could still remain even if the legislation were enacted because, by its terms, the legislation only protects the activities of "standards development organizations." The liability of *other* organizations and *other* individuals who participate in the standards-setting process would continue to be governed by current (now less certain) law.

¹² See AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, REPORT AND RECOMMENDATION ON H.R. 1086, STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT (Nov. 2003), available at <http://www.abanet.org/antitrust/comments/ncrpa.pdf>.

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The provisions of H.R. 1086 that would alter the penalties for cartel conduct raise other fundamental issues, including issues about the proper deterrence for cartel conduct. Are increases in criminal penalties fair in light of the uncertain scope of criminal liability under the Sherman Act? Is an increase in the maximum statutory corporate fine needed in light of the Justice Department's success in negotiating plea agreements with even greater fines, based on the "twice-the-gain/loss" provisions of 18 U.S.C. § 3571(d)? Would greater jail sentences for individuals contribute materially to deterrence? Could greater jail sentences discourage foreign participants in international cartels from submitting voluntarily to the jurisdiction of U.S. courts?

More fundamentally, how much added deterrence for cartel conduct is really needed, in light of the current, multi-layered system for civil damages remedies in the United States, consisting of private treble damages class actions and opt-out cases in federal courts; indirect purchaser actions in state courts; and damages and penalties actions by state attorneys general and foreign antitrust enforcement agencies? Could proposed increases in criminal penalties affect, or even threaten continued international cooperation in cartel enforcement? And are greater incentives for cooperation with enforcement officials necessary in light of the success of the current amnesty program?

Finally, the proposed Tunney Act amendments create further controversy by presenting separation of powers issues and calling into question the Justice Department's ability to settle civil antitrust cases. The Department's ability to settle cases with consent decrees is an important part of the enforcement process because it allows the Department to avoid costly trials and frees resources for additional investigations and cases. This is particularly important in merger cases where frequently only a small part of the merger raises antitrust concerns, and the parties go into the process knowing certain assets must be divested under court supervision. Indeed, in enacting the Tunney Act, Congress recognized that the consent process is a "legitimate and integral part of antitrust enforcement" and "of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere."¹³

By requiring a more extensive, substantive judicial review of proposed settlements, the proposed Tunney Act amendments may create additional uncertainty about whether a settlement will be finalized, discouraging the parties from entering into a tentative settlement in the first place. Of particular concern is the requirement that the court's public interest determination must be based on "substantial evidence," which could be read to impose a new, and potentially burdensome requirement that the Justice Department develop and present an evidentiary record to support the settlement.

Significantly, while Assistant Attorney General R. Hewitt Pate has supported an increase in the maximum jail sentence for antitrust offenses to ten years, and has encouraged consideration of maximum corporate fines and leniency de-trebling, the Bush Administration has not yet taken a formal position on any of the provisions of H.R. 1086. At the same time, the cartel penalty and Tunney Act provisions of H.R. 1086 have not been the subject of hearings or substantial debate in Congress. For these reasons, and because so many fundamental questions remain open concerning these proposals, many observers, including the U.S. Chamber of Commerce, have called for Congressional hearings before the legislation advances further in the process.

¹³ S. REP. NO. 93-298, at 3, 5 (1973).

Other Pending Measures

A host of other important bills are pending that may be of interest to the antitrust bar. In some cases, these measures are awaiting final floor action and possible enactment.

The operations of the previously authorized Antitrust Modernization Commission may finally be funded, for example, if Congress acts on omnibus appropriations legislation for fiscal year 2004. That legislation also contains a rider that would partially reverse the Federal Communications Commission's relaxation of media ownership restrictions in 2003.

Legislation approved by the House and Senate Commerce Committees (H.R. 3143 and S. 1234) would enhance the FTC's ability to work with its foreign counterparts to investigate and prosecute cross-border fraud. S. 1234 would also reauthorize the FTC for the next three years. And with a recent bipartisan agreement on a significant over-haul of the rules governing antitrust (and other) class actions, this legislation may be considered by the Senate and enacted in this session (H.R. 1115 and S. 1751).

It is difficult to predict whether the pace for Congressional consideration of significant antitrust and consumer protection legislation will continue in 2004, in light of the presidential election and given the many other challenges faced by the United States and its leaders. Nevertheless, the prospects for further legislative activity are clearly sufficient to warrant continued attention by the antitrust bar. Indeed, given the technical nature of many of the issues before Congress in this area, antitrust practitioners and their clients may wish to offer their views about pending proposals. Proactive participation in the process may be well worth the time and effort, given the importance of the issues being considered. ●