Antitrust Modernization Commission Remarks

J. Thomas Rosch
Commissioner, Federal Trade Commission

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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 me

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[3] to identify any daylight between the way the Pipeline Act[4] 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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[3] *FTC v. Arch Coal, Inc.*, 329 F.Supp. 2d 109 (D.D.C. 2004).

[4] 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).

antitrust agency that we have (f

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.[7]

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

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).[8] Time and again private treble damage cases have gone off the rails, and the Supreme Court has had to put things right – in *Monsanto*,[9] *Sharp*,[10] *ARCO*[11] and *Kahn*[12] with respect to vertical restraints; in *Spectrum Sports*,[13] *Brooke Group*,[14] and

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

The most recent example, in my mind, is *Twombly v. Bell Atlantic Corp*.[21] 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*[22] and *Leatherman*[23] – 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*,[24] 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."[25] The burden and expense involved in litigating such a "massive factual controversy" can be a tax

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[17] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

[18] *Texaco v. Dagher*, 126 S.Ct. 1276 (2006).

[19] *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006).

[20] *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281 (2006).

[21] 425 F.3d 99 (2d Cir. 2005).

[22] *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976).

[23] *Charlene Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

[24] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

[25] *Id.* at 528, n.17; *see also id. at* 544.

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*[27] and *Illinois Brick*[28] 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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[27] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

[28] *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 antritrust 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.