The International Handbook on Private Enforcement of Competition Law

Edited by Albert A. Foer and Jonathan W. Cuneo

In Association with the American Antitrust Institute

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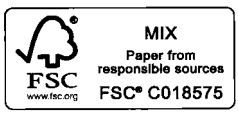

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Preface

A right without a remedy is no right. A famous early statement of this fundamental of the common law came in the English case of *Ashby v. White* in 1703:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. . .[1]

As market economies have displaced various state-dominated regimes, the idea of antitrust has spread remarkably.[2] Temporally, this expansion has been explosive since the fall of the Soviet Union. Its geographic extent is now nearly universal. Today there are well over one hundred jurisdictions in which laws regulate anticompetitive behavior such as collusion or abuse of corporate dominance. Even China, a Communist polity, now has a new and substantial competition law. The principal thrust of the movement toward competition laws has been to create market-based regimes in which most economic decisions are made by private persons and entities complying with (or perhaps manipulating) the laws of supply and demand.

In most of the world's antitrust jurisdictions, ironically, the government itself has maintained a monopoly or virtual monopoly over the implementation of competition law. If there is a violation of competition law, the government decides whether to prosecute. Private parties such as competitors, suppliers, or customers may voice complaints to the government, but they may not initiate their own private actions. And if the government acts, it may fix an identified competition problem, but there will typically be no meaningful way in which private persons who were injured by corporate misbehavior may be made whole. In short, a right to a competitive market is now widely recognized, but private remedies are notoriously difficult to obtain.

This description does not apply equally in all jurisdictions. The US, of course, has evolved an antitrust system in which over 90 per cent of cases are initiated by private

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[1] Ashby v. White (1703), 1 Sm LC (13th Edn 253, 273–74. The quote is from the dissent by Holt CJ, whose opinion was upheld by the House of Lords.

[2] We will be using the terms 'antitrust' and 'competition policy' or 'competition law' interchangeably throughout this book. Although 'antitrust' is an American term (and a rather strange one at that, having its birth in the nineteenth century movement against 'trusts' or large holding companies), the term is nevertheless frequently used in other countries that perhaps more readily use terms that include the word 'competition'. Admittedly, competition policy often has a broader meaning than antitrust. The latter technically refers to specific US statutes, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, whereas the former may refer not only to local statutes or treaties (such as Articles 101 and 102 of the Treaty on the Functioning of the European Union) but may also refer to types of regulation that affect competition (e.g., tax policies, trade policies, intellectual property rights, or sectoral regulations like telecommunications or energy that are often delegated to a specialized government agency) but would not come within what are generally referred to as the US antitrust statutes.

parties. Other nations such as Canada and Australia have substantial private enforcement experience. The European Court of Justice, in the aptly named *Courage* case, recognized the inconsistency between a right to competition and the absence of a remedy, ordering the European Union to ensure that Member States introduce workable private remedies. One justification for this book at this time, then, is that polities around the world are currently in the process of 'taking Courage' by formulating their own approaches to private antitrust enforcement.

Another justification is that surprisingly little empirical literature exists to give guidance to nations contemplating the introduction or expansion of private antitrust enforcement. The US is undoubtedly the leader in private enforcement, but much of the world seems to interpret the US experience as a 'toxic litigation cocktail' to be avoided rather than emulated. One purpose of this book is to set forth a realistic picture of American private antitrust litigation, from the perspective of experienced lawyers who put together and prosecute antitrust cases on behalf of injured parties.

The introductory part of the *Handbook* contains essays by two leading antitrust scholars and a seasoned antitrust practitioner. Robert H. Lande provides an overview of an empirical study of the benefits of private enforcement. John M. Connor, author of *Global Price Fixing*, summarizes the evidence regarding the impact of cartels. Jonathan Cuneo, one of the editors of this *Handbook*, provides an overview of the differing traditions that inform the institutions and practices we will be describing.

The first large section of the *Handbook* consists of eleven chapters that, apparently for the first time, take the development of a US antitrust case from initiation to completion in a systematic way. Each chapter answers a question:

What practices are illegal?
How does a private case get started?
Which claimants may bring a private case?
How does an attorney initiate a private claim?
How may individual claims be aggregated?
What procedural defenses are available, short of a trial?
What devices are available to obtain evidence?
What do you get if you win?
How do you finance private enforcement?
How does private enforcement interact with public enforcement?
What mechanisms make claims distribution workable?

With the US background laid out in depth, the book turns to foreign experiences. We do this through nineteen national chapters written by lawyers and academicians familiar with the local laws and practice. The countries were selected on the basis of their having at least some laws on their books that would appear to provide a private remedy. In many cases these are new laws. In others, the laws have been in effect for varying periods but, for reasons explained in the chapters, they have not proven workable. In a few countries, primarily common law regimes that share much of the same British heritage as the US, there is more of a congruence between law and actual practice.

We approach the countries by geographic region, with each region introduced by an

overview that presents generalizations based not only on the chapters that follow but also on information about other countries within the region that are not treated in this volume.

A twelfth question – how can a multi-nation case be settled? – appears in a final section of the *Handbook*, titled 'The Future of Private Enforcement,' followed by a chapter authored by the editors which we call 'Towards An Effective System of Private Enforcement of Competition Law.' Some readers may wish to start with our final chapter, which breaks down the challenge of building an effective private enforcement system into a series of key decision points, indicating the range of solutions that are described in the book and, of course, offering our own policy prescriptions.

The national essays reflect the state of the law as of December 30, 2009. All references to Articles 81 and 82 of the EC Treaty reference Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU') as amended by the Treaty of Lisbon.

* * *

The American Antitrust Institute (AAI) undertook this *Handbook* project in the hope that it will prove useful to governments, NGOs, and others who are trying to develop workable laws and institutions to make private enforcement a reality. The AAI was founded in 1998 as an education, research, and advocacy organization, headquartered in Washington, DC.[3] The AAI is a virtual network of experts representing law, economics, and business acumen, both practitioners and academics, who share a general attitude that antitrust is a good thing and more of it in most situations would be better. This *Handbook*, therefore, reflects all three aspects of the AAI's mission: education, research, and advocacy – in this case advocacy of private enforcement as an essential adjunct to competition laws.

The author of each chapter is identified and relevant personal background is provided in the first footnote of the chapter. The authors were given substantial flexibility to set the tone and outline, although the editorial team asked that most of the same questions mentioned above be addressed to the extent relevant. All chapters were reviewed by a minimum of three editors affiliated with the American Antitrust Institute. We are grateful to the various authors who volunteered their time, energy, and knowledge. Many were drafting in English as a secondary language and no doubt felt that our editorial suggestions put them through an uncomfortable strainer. But even the Anglophones were subjected to a straining process. We appreciate the patience of our authors.

The *Handbook* co-editors-in-chief were Albert A. Foer and Jonathan Cuneo, both of whom have been directors of the American Antitrust Institute since its inception. Foer, the president of AAI, is a former practicing attorney, former senior executive of the Bureau of Competition in the US Federal Trade Commission, and former retail business executive. Cuneo is principal in the Washington law firm of Cuneo, Gilbert and LaDuca, LLP, and a former Counsel to the House of Representatives Subcommittee on Monopolies and Commercial Law.

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[3] The AAI's website is http://www.antitrustinstitute.org. It contains an archive of all AAI's work product as well as links to antitrust resources.

The two Associate Editors played a crucial role in the project. Dr. Bojana Vrcek, a specialist in European comparative competition law with practical experience in Zagreb and Brussels, wrote the overview of Europe and oversaw the editing of all of the countries outside of the US. Randy Stutz, an experienced antitrust attorney on leave from private practice in the District of Columbia, oversaw the preparation of the US chapters.

During the early phase of this project, a large editorial role was played by Byung-Geon (B.K.) Lee of South Korea (then a Hubert Humphrey Scholar on leave from the Korean Federal Trade Commission). Lee, now returned to a policy post with the KFTC, was the co-author of the overview of Asia and Africa and co-author of the chapter on Korea.

The *Handbook* project was fortunate to have the additional editorial assistance of AAI Research Fellows Ke Li of China (a law student at George Washington University), Nikos Valance (a law student at Fordham with a strong journalism background), Aron Schnur (a law student at Georgetown University), Sandeep Vaheesan (a law student at Duke University), Patrick English (on leave from a law firm), Dae Gunn (D.J.) Jei (also on leave from a law firm), and Irit Dolgin (formerly with the Israeli Antitrust Authority). Logistical support of a highly important nature was provided by Sarah Frey, Communications Director of the AAI. The group functioned as an interactive team, meeting frequently to compare notes and discuss themes and recommendations. For all of us, this has been a special learning experience.

Albert A. Foer
Jonathan Cuneo
Editors-in-Chief

Washington, D.C.
December 30, 2009

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PART I

INTRODUCTION

1 Benefits of private enforcement: empirical background[1]

Robert H. Lande[2]

Many commentators, especially members of the defense bar, have criticized the existing United States system of private antitrust litigation. Some assert that private actions all too often result in remedies that provide lucrative fees for plaintiffs' lawyers but secure no significant benefits for overcharged victims.[3] Others suggest that private litigation merely follows an easy trail blazed by government enforcers and adds little of public benefit to government sanctions.[4] Yet others contend that, in light of government enforcement, private cases in the United States lead to excessive deterrence.[5] Further, one common

[1] This article is a condensation and revision of 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases,' 42 USF. L. Rev. 879 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661 (hereafter 'Benefits: An Analysis'). For summaries of the individual case studies analyzed in this article see 'Benefits from Antitrust Private Antitrust Enforcement: Forty Individual Case Studies,' (hereafter 'Benefits: Individual Case Studies'), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523.

[2] Venable Professor of Law, University of Baltimore Law School; Board of Directors, American Antitrust Institute. The author is grateful to Thomas Weaver for excellent research assistance.

[3] Professor Cavanagh ably summarized this belief: 'Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing. Coupon settlements, wherein plaintiffs settle for "cents off" coupons while their attorneys are paid their full fees in cash . . . are of dubious value to the victims of antitrust violations . . . [and] defendants are not forced to disgorge their ill-gotten gains when coupons are not redeemed.' Edward Cavanagh, 'Antitrust Remedies Revisited,' 84 Or. L. Rev. 147, 214 (2005) (footnote omitted). However, Professor Cavanagh provides only an anecdote to support these conclusions. He offers no data to show the type of antitrust settlements he describes as typical or to demonstrate how often they result in useless coupons.

[4] John C. Coffee, Jr. at one point subscribed to this view, but later concluded the evidence was to the contrary. John C. Coffee, Jr., 'Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,' 86 Colum. L. Rev. 669 n. 36 (1986) ('Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at "[l]ess than 20 per cent of private antitrust actions filed between 1976 and 1983."') (citation omitted).

[5] As the Antitrust Modernization Commission noted: '[S]ome have argued that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery. No actual cases or evidence of systematic overdeterrence were presented to the Commission, however.' Antitrust Modernization Comm'n, Report and Recommendations, at 247 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (footnotes omitted). For reasons why 'treble damages' do not lead to excessive deterrence but, on the contrary should be increased, see Robert H. Lande, 'Five Myths about Antitrust Damages,' 40 USF. L. Rev. 651 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263478.

criticism of private actions in general – and of class actions in particular – is that they are a form of legalized blackmail or extortion, one in which plaintiffs' attorneys coerce defendants into settlements based not on meritorious claims, but rather on the cost of litigation or fear of an erroneous and catastrophic judgment.[6] These actions also are said to discourage legitimate competitive behavior.[7] For these and related reasons many members of the antitrust community call for the curtailment of private enforcement,[8] some even for its abolition.[9]

Although these criticisms are widespread, they have been made without any systematic empirical basis.[10] Those who point to the alleged flaws of the United Sates system of private antitrust enforcement support their arguments only with anecdotes, many of which are self-serving or questionable. I have never seen these arguments supported with reliable data.

We emphasize that we are not disputing all critics' anecdotes. Private antitrust enforcement, which constitutes in most years more than 90 per cent of antitrust cases in the United States,[11] certainly is imperfect.[12] The point, however, is that nations considering private enforcement should first fairly assess its effects in the United States. They should not confuse anecdotes with data. One factor they should consider carefully is the systematic benefit of private actions to victimized consumers and businesses, and to the economy more generally.

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[6] See John H. Beisner and Chares E. Borden, 'Expanding Private Causes of Action: Lessons from the US Litigation Experience,' available at www.instituteforlegalreform.com/get_ilr_doc.php?id=1034. However, Beisner and Bordon and others who embrace this view provide no systematic empirical basis for its factual predicates.

[7] AMC Commissioner Cannon wrote: 'Private plaintiffs are very often competitors of the firms they accuse of antitrust violations, and have every incentive to challenge and thus deter hard competition that they cannot or will not meet. . . . [L]itigation is expensive and courts and juries may erroneously conclude that procompetitive or competitively neutral conduct violates the antitrust laws. . . . [P]otential defendants . . . will refrain from engaging in some forms of potentially procompetitive conduct in order to avoid the cost and risk of litigation.' W. Stephen Cannon, 'A Reassessment of Antitrust Remedies: The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications,' 55 Antitrust L.J. 103, 106 (1986).

[8] Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 59 (Cambridge: Harvard University Press 2005).

[9] See William Breit and Kenneth G. Elzinga, 'Private Antitrust Enforcement: The New Learning,' 28 J.L. & Econ. 405, 440 (1985).

[10] One prominent critic, former ABA Antitrust Section Chair Janet McDavid, candidly admitted this: '[The] issue [of class action abuse] was never directly presented in these cases, but many of these issues arise in the context of class actions in which the potential for abusive ligitation is really pretty extraordinary.' When asked by Professor Andrew Gavil about empirical evidence, McDavid said: 'I'm not aware of empirical data on any of those issues. My empirical data are derived from cases in which I am involved.' Antitrust, Volume 22, Fall 2007, 8, 12–13.

[11] See Sourcebook of Criminal Justice Statistics Online, www.albany.edu/sourcebook/pdf/t5412004.pdf Table 5.41.2004, Antitrust Cases filed in US District Courts, by type of case, 1975–2004.

[12] Government enforcement also is imperfect.