

United States Antitrust Modernization Commission

Comments Regarding Commission Issues for Study

Submitted by Professor Thomas D. Morgan*

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I respectfully suggest that the Commission study the following issue:

Simplification of the Remedial Structure of Antitrust Enforcement

At present, violations of the Sherman Act can be prosecuted criminally by the Justice Department. Violations of both the Sherman and Clayton Acts can be remedied by injunction or treble damages by the Justice Department, state attorneys general and private parties. In effect, the cease and desist authority of the Federal Trade Commission provides a parallel injunctive remedy.

The net effect of these multiple sources of antitrust enforcement is that businesses often cannot know when what they propose to do will get them into trouble. Even if the Department of Justice would not oppose conduct, for example, a private party or state attorney general might. And the latter would be less likely to have published Guidelines of the sort that at least give some transparency and predictability to Justice Department and FTC actions.

None of this would not be a problem if antitrust enforcement were a costless, unmitigated good. However, while much enforcement is clearly in the public interest, there is always a risk that enforcement will introduce what economists call "Type I errors." Those are burdens on conduct that causes no harm or even that is in the public interest. Private action filed by competitors, and actions by state officials who consider primarily the local impact of conduct, seem particularly subject to this risk.

An important benefit of your Commission's work would be to reduce the redundancy. My own recommendation would be that antitrust review of any given industry or type of practice be assigned primarily to one federal agency and that state and private enforcement of the federal antitrust laws be cut back or eliminated.

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