I. About the American Antitrust Institute

The AAI was born nearly five years ago, when, after a hiatus of some 20 years, I began to tackle a problem that I had become aware of in the late 1970’s while I was a Senior Executive of the Federal Trade Commission. The FTC was then under political attack by Members of Congress both for its effort (ironically, required by Congress itself in the Magnuson-Moss Act) to write industry-wide trade regulation rules, and also for its audacity in bringing large so-called shared monopoly cases against the oil and cereal companies. A galloping FTC horse was being reined in and being taught hard political lessons by its masters, viz., that when you try to regulate a whole industry, you unleash most of that industry’s political opposition, and when you attack the largest companies in

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1 Our website is www.antitrustinstitute.org. For those who are not regular visitors, we urge you to sign up on the homepage as a ‘friend of aai’ in order for us to communicate with you as new activities and information are reported.
America, you stimulate counter-moves by the most powerful leaders of corporate America. I was assigned to help find political cover for the FTC’s antitrust jurisdiction.

When you think about it, there should be ample political support from small business organizations, from larger companies that face dominant firms, from consumer organizations, and from others who are concerned about undue concentration of economic power or who just believe that the marketplace should be something more than a primitive unregulated jungle. In fact, however, I learned that there was precious little political support for antitrust to be found. Despite the potential of a coalition that would speak out for the institutions of antitrust, the effort to bring people of similar mind together had simply not been made. The forces that should have had a natural interest in maintaining a competitive economy had not achieved any degree of organizational identification, not to mention strength. On the other hand, those who opposed particular applications of antitrust were well-organized, well-funded, and ideologically unified by a commitment to laissez faire. They had their think tanks and advocacy groups, which were doing, frankly, a terrific job.

In 1998, my former FTC colleague, Professor Robert Lande of the University of Baltimore Law School, and I began the AAI by putting together an outstanding Advisory Board, the AAI’s prestigious brain trust. Today, the Advisory Board has 58 members, including not only four former heads of the Antitrust Division and many top legal and economic practitioners and academics, but truly household names like Kevin O’Connor, Trish Conners, Ellen Cooper, Harry First, and Lloyd Constantine. The Advisory Board does not vote on AAI positions, but the members provide advice, ideas, and feedback on a wide range of issues.

AAI is a 501(c)(3) education, research, and advocacy institution, incorporated in the District of Columbia. Our funding comes from individuals, private foundations, law firms, corporations, and associations. We make available on request the list of contributors who have given over $1,000, including purchases of tables at our annual
conference. The list includes all such contributors going back to our beginning and contains 55 entities.

II. AAI and the States

The AAI participates in the antitrust system in a variety of ways, as any good Washington think tank should, and it is not unusual for us to be involved in matters alongside the States. In the Microsoft case, for example, we provided a detailed analysis of the proposed remedies in the DOJ settlement and we urged the plaintiff States to hang tough. Later, we issued a press release supporting the remedies proposed by the non-settling States. We filed one of the so-called major comments pointing to what we saw as failings of the DOJ settlement. Finally, we brought our own suit against Microsoft and the DOJ, alleging that they had not complied with the disclosure requirements of the Tunney Act. While we were first and foremost seeking a strong interpretation of the Tunney Act, which has unfortunately never received a great deal of respect from the DOJ, we also wanted to use the litigation as another way of encouraging the District Court to hold off on its public interest determination regarding the DOJ settlement until the non-settling States had had an opportunity to present their evidence on the remedies. It looks as if our effort was unsuccessful insofar as the Tunney Act is concerned, but we were pleased to see the non-settling States receive their day in court unbiased by a prior judicial determination of the public interest.

We participated as amicus curiae in the recent settlement of the contact lens class action litigation. This was a tremendous and hard-fought victory for consumers made

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2 http://www.antitrustinstitute.org/recent/149.cfm
3 http://www.antitrustinstitute.org/recent/159.cfm
4 http://www.antitrustinstitute.org/recent2/163.cfm
5 http://www.antitrustinstitute.org/recent2/164.cfm
6 http://www.antitrustinstitute.org/recent/136.cfm
possible by the persistence of the States, in the face of the FTC’s reluctance to get involved, and it stands as an example of how the States can play a unique and positive role in our federal antitrust system. AAI’s intervention was limited to a last-minute effort to bolster the District Court against accepting an interpretation of the settlement with Johnson & Johnson that might have made it possible for Johnson & Johnson to win in practice what it was denied in theory, i.e., the ability of the dominant contact manufacturer to stifle competition by mail-order rivals of their long-standing eye doctor customers.

In some other instances, we provided arguments to the States that contributed to their multistate initiatives. I gather that our filing with the Departments of Transportation and Justice concerning the anticompetitive potential of the Orbitz travel industry joint venture helped generate your strong interest in this matter. Our testimony on Capitol Hill in opposition to the proposed acquisition of USAirways by United Airlines reinforced positions being taken by many of the States.

We also filed an amicus brief in Cox v. Microsoft Corp, a case before the New York Court of Appeals that will determine whether New York’s Illinois Brick repealer statute will be gutted. The issue there is whether a separate New York law that disallows class actions under statutes that confer penalties should be taken to mean that there can be no class actions under New York’s antitrust law, because it mandates treble damages. We argued, first, that this is an important case for the development of antitrust law, deserving of review, and, second, that antitrust treble damages, rather than being punitive, are a rough and ready calculation of actual single damages, given the adjustments that should be made for a variety of factors. An Illinois Brick repealer for which class actions are not permitted might as well not exist.

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8 [http://www.antitrustinstitute.org/recent/74.cfm](http://www.antitrustinstitute.org/recent/74.cfm).
10 Our brief was written by Lloyd Constantine and Robert Lande. Lande is the author of “Are Antitrust ‘Treble’ Damages Really Single Damages?” 54 Ohio State L. J. 115 (1993). Another state situation
Although the AAI is committed to strong antitrust policies and is therefore generally the friend of enforcement, we strive for an independent perspective and are not automatically on the same side as the States, any more than we are always on the same side as the Federal agencies. As a follow-on to the general settlement of tobacco litigation, for instance, we urged the Supreme Court to grant certiorari in a case involving an interpretation of the Noerr-Pennington doctrine.11 After the settlement, wholesalers alleged in private antitrust actions that the tobacco companies had created a cartel to raise tobacco prices. The Third Circuit held both that the plaintiffs had stated a claim for an antitrust violation and that the “state action” doctrine did not apply. Nonetheless, they concluded that the Noerr-Pennington doctrine protected not only the petitioning actions of the tobacco companies as they developed the Master Tobacco Settlement, but also their post-petitioning actions pursuant to the settlement. We argued that post-petitioning actions must not be protected by Noerr-Pennington. The Supreme Court did not grant certiorari, but at least we put a marker on the table. The States need to avoid becoming the excuse for antitrust immunities as a result of the role they play in settlements. This is bad law that calls out for correction.

A very important method by which the AAI seeks to improve the environment for antitrust is through our symposia and conferences. Our national conference each year, to which we have made it a habit to provide complimentary invitations to State AAG’s, is not designed to be a “how to” instructional class but rather a forum for raising important policy issues. Each year, the papers that are prepared for the conference become part of an important law review symposium issue.12 In this way, among others, we are systematically building a body of literature that provides underpinnings for an emerging post-Chicago paradigm of antitrust. Some of our symposia have a different purpose,


namely to bring together a community of stakeholders around a particular issue. Twice, we have done this, for example, with regard to competition policy issues raised by electricity deregulation, to which some State representatives were invited, along with representatives of FERC, DOJ, FTC, NARUC, industry, and the public interest community.

Much of what we do involves testimony, public speaking, and the publication of articles and op-eds. As an example of our op-eds, let me point to a particularly relevant one that appeared in the Rutland, Vermont, Daily Herald, on June 20, 2001, intentionally aimed at the NAAG meeting then taking place in nearby Burlington, Vermont. Titled “Antitrust Enforcement in Peril,” it said, in part,

NAAG, an organization of the states' top legal officers, must use its collective power to ensure that mergers and acquisitions benefit consumers as well as corporations.

The group boasts an impressive track record on antitrust enforcement. When federal regulators have retreated, aggressive state AGs have advanced. During the Reagan Administration, for example, NAAG seized the moment and emerged as the leading defender of the antitrust laws. The states have kept the pressure on Microsoft and have vigorously criticized the airline industry for its lack of competitiveness. State attorneys general are prepared to expand the consumer watchdog if the FTC and the Justice Department's Antitrust Division abandon the field.

And this brings us to the present.

III. Some Challenges and Opportunities for the States to Consider

A. Scoring the Bush Antitrust Record: The States Are Still Needed

If the Reagan years of laissez faire called forth a resurgence of State antitrust activism, the question can be raised as to whether, in light of what was declared a return to moderate policies of enforcement in Washington, the States can now recede.

13 [http://www.antitrustinstitute.org/recent/128.cfm](http://www.antitrustinstitute.org/recent/128.cfm)
When Tim Muris and Charles James took their Federal offices, they both made speeches emphasizing continuity. Chairman Muris, speaking to the AAI’s conference in his first address as Chairman, paid homage to his predecessor Robert Pitofsky and focused attention on their similarities of thought, although certainly not hiding some differences.\(^\text{14}\)

But Bush II has been in office for about a year and a half now and it is increasingly difficult to see the continuity. Let’s start with some numbers. As I run off these numbers, pay attention to fy 2001, which was the Bush transition year, as well as 2002, where my figures go through August and are thus one month shy of a full fiscal year.

How many merger/joint venture cases have the two agencies brought? In fy 1997, DOJ brought 14 and the FTC 23; 1998, DOJ 15 and FTC 18; 1999, DOJ 21, FTC 19; 2000, DOJ again 21, FTC 24. In 2001, DOJ brought only 8 and the FTC 24. In the current fiscal year, as of the beginning of September, DOJ was down to 2 and the FTC was down to 17. Thus, the numbers show a tremendous drop-off in the Antitrust Division and what is at most a slight drop at the FTC.

Keep several things in mind as you reflect on these numbers. First, throughout these years, the Antitrust Division and the FTC have had roughly equivalent financial resources, but only half of the FTC’s budget is devoted to antitrust, meaning that two-thirds of the Federal antitrust resources are at DOJ. Thus, the FTC would appear in both the Clinton and the Bush II administrations to be using its resources far more productively to open merger and joint venture cases. There are two possibly mitigating factors to consider. DOJ often closes investigations which have led to some form of restructuring by the parties, using a press release rather than issuing a complaint and settlement order. Such press releases are not counted in the numbers I’ve used. This so-called secret settlement practice needs to be re-evaluated in light of the general desirability of greater transparency, but it does not change the conclusion that there has been a dramatic fall-off in DOJ merger activities. Unless the current

DOJ administration is using the secret settlement more frequently than its predecessors, the conclusion holds that the DOJ has in the past two years dropped the merger ball. It should also be noted that the number of mergers has fallen off quite substantially in the past year, but this should not have a differential effect on the two federal agencies.

Turning to non-merger activities of the agencies, the DOJ number of cases for Sections 1 and 2 of the Sherman Act go from 4 in 1997 to 7 in 1998 and again in 1999, then fall to 2 in 2000, 0 in 2001, and 2 for this year to date in September. Criminal cases tell a similar story: 32 in 1997, 57 in 1998, 53 in 1999, 52 in 2000, then 37 in 2001 and 30 for the fiscal year to date in 2002. At the FTC, meanwhile, the restraint of trade and monopolization case numbers have held fairly steady: 5 in 1997, 11 in 1998, 6 in 1999, 13 in 2000, only 4 in 2001 but 8 for this year to date in September. For the year to date, DOJ has opened 2 nonmerger cases and the FTC 8.

If one looks at ongoing litigation for the current year to the beginning of September, the DOJ has 4 cases and the FTC 10.

On the numbers, then, it appears that both federal agencies have slowed down from the Clinton Administration pace, but that the change is far more noticeable at the Department of Justice than at the FTC. Numbers, of course, can be misleading. Let’s turn from quantity to quality.

What have the Bush antitrust experts in fact accomplished? On the positive side, the Muris and James regimes held firm against a United-USAirways merger, causing it to go away. They appealed the loss in the American Airlines predation case, contrary to speculation that they would refuse to support a predation claim. They stopped one merger that would have created a monopoly in nuclear submarine manufacturing and others that would have created a duopoly in baby food and in institutional glassware. They have continued to pursue criminal cartels, put Taubman in jail, and are making life difficult for those who would keep generic drugs from the market, as well as

15 I have benefited in the following from Robert Skitol’s paper, “What Should We Call the ‘New Antitrust,””http://www.antitrustinstitute.org/recent2/188.cfm.
enlarging the antitrust interest in health care. They have initiated investigations of consummated mergers that escaped the Hart-Scott-Rodino review. They held what appear thus far to be inconclusive but nonetheless important hearings on the relationship between intellectual property and antitrust. They are doing research on underlying issues of methodology and policy, aimed at better identifying the appropriate targets of enforcement. They have begun initiating some reforms to streamline the merger review process; and they have executed some relatively minor internal re-organizations. They have sought, thus far unsuccessfully, to gain increases in their budgets, to assure that personnel resources would not be reduced, despite the fall-off in merger activity. A Reagan team would probably have asked for reductions. The general rhetoric of the Bush II Administration is supportive of the antitrust mission, albeit in a more conservative formulation than that of the Clinton Administration.

An outsider can observe that the FTC on the whole has appeared to be more active than the DOJ. In addition to some of the achievements noted above, the FTC has devoted resources to the narrowing of the Noerr-Pennington and the state action doctrines. The FTC recently initiated a workshop on possible anticompetitive actions at the State level relating to e-commerce. While the purposes are reasonable, it was unfortunate that the announcement seemed to condemn the States as much as focus on the possible problem areas. Both agencies have made the Chicago School point that government action is the likely cause of most market failures, and so they not infrequently seem to be attacking the exercise of State powers.

On the clearly negative side, according to my scorecard, they have taken a surprisingly weak position on remedy after an appellate victory in the Microsoft case. They have upset their colleagues in Brussels by exaggerating the differences over the GE-Honeywell merger and unnecessarily denigrating the EU’s analytical powers, which has required a lot of kissing and making up. They have messed up an opportunity to reform the FTC-DOJ allocation of mergers by unnecessarily outraging the Senator with most power over the two agencies, which has generated tensions with the Senate. (The House is essentially oblivious to antitrust right now.) They have
dawdled over a number of investigations that a moderate law enforcer would likely have already decided to litigate: the Orbitz joint venture and the EchoStar/DirecTV merger being examples. They have challenged few mergers, verbally downgraded the unilateral effects approach in favor of a more-difficult-to-prove “coordinated” interaction approach, and brought relatively few other cases, virtually eliminating civil non-merger enforcement at DOJ, as well as putting monopolization and vertical restraints, including retail price maintenance, almost entirely out of mind.

In general, it can be said that the Federal agencies today are at most modestly active, and that some of their activity is devoted to working on ways to reduce rather than expand the scope of antitrust enforcement. The University of Chicago mentality is clearly supreme, but like its chief exponent, Judge Richard Posner, the mentality has mellowed a bit with experience. There is rhetorical continuity with the recent past, but based on actions rather than words, the continuity is with the first Bush Administration, which had a more moderate record of enforcement than the minimalist Reagan Administration, rather with the Clinton Administration, which was noticeably more activist. On this reading of the scorecard, with which others are welcome to disagree, there is every reason for the States to maintain an active antitrust role, both to keep pressure on the Federal agencies to do their job aggressively and to fill in gaps where the Federal agencies are not active, either because a matter is local or because of policy choices.

B. Ironies of the States’ Rights Reversion

We are living in a time when the Administration and the Supreme Court appear on the surface to be shifting power from Washington to the States. But as the song says, “It ain’t necessarily so,” at least in antitrust and possibly more broadly. Here, as in many areas, the reality that contradicts theory is that there is precious little money for the States to work with. It is apparent in antitrust that the States are in a reduced state financially. This is affecting travel, it is affecting training, it is affecting recruiting and retention, it is affecting the caseload. Moreover, the Justice Department made clear its resentment of the role of the non-settling States in the Microsoft case.
The unofficial DOJ view seems to be that the States should focus on antitrust issues that affect only individual States, leaving interstate commerce to the Feds. The FTC looks for ways to attack anticompetitive State actions and announces workshops that sound like they are intended to find fault with the States. This is not by any means a condition of warfare, but neither is it a highly congenial situation.

On top of all this, the ABA and business elements, facing multiple levels of antitrust enforcement, are arguing that the States should not be allowed to play so active a role. The same opponents of the States also target the private enforcement of antitrust. They would do away with class actions and treble damages, if they could. I believe that the threat along these lines is likely to grow more rather than less serious. It would make sense to bring together representatives of the States and of their friends in the private antitrust bar to recognize a common interest and to develop a counter-strategy. Right now, the story of why both State and private antitrust enforcement are necessary is not being told very well, anywhere.

What do I mean by a counter-strategy? Let’s take Illinois Brick.

C. Illinois Brick

It is now estimated that over half of the nation’s consumers live in states that have repealed the Supreme Court’s Illinois Brick decision. There is much good in this ever-growing expansion of consumer recourse, but the situation also leaves much to be desired. First, the mere existence of a repealer statute does not guarantee protection for the State’s consumers. Statutes vary and their interaction with other statutes such as those controlling the certification of classes also vary. In some of the States with repealer laws on the books, there is still no realistic consumer remedy. Second, half of the consumers of the nation, where there are no repealers, have not even a theoretical recourse if they are damaged by an antitrust violation. Third, the combination of different federal and State laws has created an easy-to-caricature legal hodge podge, the theoretical possibility of a defendant having to pay several times
over for the same antitrust violation, and increasing support for a counter-reformation among the defense bar, their large corporate clients, and assorted politicians.

Let’s address these one at a time in terms of a strategy aimed at providing better recovery to consumers who are injured by antitrust violators.

First, yes, the effectiveness of Illinois Brick repeal varies greatly among the States. Strategy: enough experience now exists to evaluate what has been learned in the laboratories of the States. NAAG (or perhaps the AAI) should bring together those with experience – including, by the way, the private bar and judges— to determine what has worked best and what has not worked as well, and why. From this important exercise should come two things: (a) useful knowledge for those crafting legislation in the States that have not yet enacted a repealer statute or wish to improve what they have, and (b) a body of information that can be drawn upon in the battles that lie ahead to retain consumer recourse.

Second, yes, half the nation’s consumers are still unprotected. My guess is that as politicians in non-repealer States become aware of the money that is being left on the table as the vitamin cartel and other large price fixing class actions are settled, there will be a renewed push for repealer legislation. The AAI offers its resources to assist in the drafting of a model State Illinois Brick repealer statute. The best practices workshop I have described should provide ammunition for this. Building the number of States with repealer laws is important for my third point, as well.

The third point is that the forces of counter-reformation are gathering strength. I offer you the following prediction. Within a few years, national corporations will demand that Congress “fix” the indirect purchaser problem. Recognizing that it will not work to simply repeal the repealers, they will call for a national law that provides indirect purchaser relief and a maximum of one treble damages award, and which eliminates complexity by pre-empting State laws on the subject. The devil will be in the details. For example, one could imagine federal legislation that would apply only to cartels or could have an unworkable class certification provision. The States will
eventually have to enter into negotiations on these details. A bill that does not adequately protect their citizens will have to be opposed. The more States that have repealer laws, the better the odds that the States will be able to negotiate an acceptable national law. Thus, all the more reason to work hard now on increasing the number of repealer States, and beginning the process by the type of workshop and research effort I have described.

I don’t mean to imply that this will be easy. Efforts to pass federal legislation have not moved very far in the past, often because enough people couldn’t agree on how to fix the problem. But what is new is that the States have to various degrees shown that the problem can be fixed. As they have done this, however, they have demonstrated both that the State-by-State fix is unduly cumbersome and incomplete and that corporate defendants would be better off if their alleged antitrust misconduct could be tried and, if necessary, punished, once and for all.

The danger of a federal fix is that it will be full of loopholes and procedures that will provide something less than what many of the States currently have. It is not going to be easy for the large corporations to agree on a bill that will give consumers enough to make the bill politically salable. There will be the usual compromises and subtle efforts by hardliners to minimize the consequences of an antitrust violation. Once a bill has been introduced, it may also become a Christmas tree on which to hang such anti-antitrust proposals as the elimination of treble damages and the further restriction of class actions. This is why the States need to have a coordinated and well-prepared strategy. In working on this, it will be especially important to attempt to gain support from consumer organizations, of course, and—less obviously-- the plaintiffs’ bar in States like California where private lawyers have earned a niche through their expertise in finding consumer class action relief under the repealer laws. They will likely feel endangered and prefer that the status quo prevail. Though
understandable, this would be an ostrich-like refusal to face up to a scenario whose likelihood is perhaps only moderate, but where the harm potential is great.16

D. Some Opportunities for State Activism

I was asked to identify “gap” areas in which the States might direct some of their antitrust resources. Let me do this by very briefly pinpointing several topics that the AAI is either looking at or wishing it had the resources to look at more closely.

(a) Vertical Relations – Category Captains

Chicago School adherents are generally unconcerned about vertical relationships, leaving a large opening for State initiatives. Here’s one example. Since about 1995, the consumer goods industries have experimented with a new organizational technique known as category captains. In essence, a retailer appoints its leading supplier to be the captain of a category. In the pet food industry, for example, there were four categories: wet and dry dog and cat foods. Each had a category captain. We learned quite a bit about how this works when we opposed the Nestle acquisition of Ralston Purina.17 The retailer typically provides to the designated category captain all of its information about the category, including competitively important details about the captain’s rival suppliers’ sales, prices, profitability for the retailer, and promotions. In turn, the captain prepares a planogram and a strategy plan for the next year, that may include what products to carry, how much and what quality shelf space to give them, a promotional schedule, even suggested pricing. Although the retailer is free in principle to reject the advice, information asymmetries and related factors seem to make this quite rare.

16 I want to take this opportunity to flag an interest of the AAI’s, in the event that anyone has information that would be helpful to us. Frequently, economists and others assume that when there is an antitrust violation by a supplier, the overcharge is passed on dollar for dollar through the retailer to the consumer. In fact, the retailer often, perhaps usually, adds a markup, so that the actual damage to the indirect purchaser is significantly greater than the initial overcharge. We seek evidence to document this generalization. See Robert Steiner, “The 3rd. Relevant Market,” Antitrust Bulletin (fall 2000).

The precise structure of the arrangement varies, but in general category captaincy is anticompetitive trouble waiting to happen. The same leading supplier may well be the category captain for all of the leading retailers, thereby placing itself at the hub of a potential hub-and-spokes conspiracy. Perhaps more likely than that are the exclusionary potentials. The category captain can tell the retailer what products to introduce or not to introduce, which competitors’ products to expand or reduce, etc., working both to its own advantage and to the disadvantage of its competitors and potential competitors. Although the AAI has briefed both the FTC and the DOJ on the potential harms of category captains, and the harm has now been documented in several private cases, real policy work should be premised on a subpoena-based investigation that has not been undertaken at the Federal level. Especially interesting is the recent announcement by Borders that it will institute a category captain system for its different categories of books. Would we really want one leading publisher advising our largest booksellers as to what should appear on their shelves?

(b) Price Discrimination: Yield Management

It is an understatement to suggest that the Chicago School has never had much use for the Robinson-Patman Act, generally believing that price discrimination is efficient and therefore good. AAI does not advocate a return to the good old days of R-P enforcement, but believes there are certain instances of price discrimination that should be of antitrust concern and that increased energy ought to be devoted to identifying instances of price discrimination that hurt consumers. For instance, advances in algorithmic programming have made possible the expansion of yield management practices in such industries as airline travel, hotels, and vacation cruises. In essence, this takes price discrimination to new levels of near-perfection, with different customers paying different prices for what is physically the same product (a seat, a bed, a berth). A recent (Sept. 2, 2002) story in the New York Times reports that Saks, like other retailers, is testing technology that determines which goods to mark down, at specific prices, and at specific stores. Clearly, we are living increasingly in a bazaar-type economy where different consumers pay different prices for what on its face appear to be the same thing. Yield management technology may or may not be in the consumer’s interest. Because it
has growing application, the antitrust community should be thinking about whether it can be problematic under certain conditions.

In a pending merger case that the AAI has been following, the leading cruise line, Carnival, has apparently argued that it should be allowed to acquire the number three cruise line in a concentrated industry, because its practice of yield maintenance amounts to a kind of reverse auction, and prices will be set at the market level, regardless of the presence or absence of rival cruise lines. At this point, we do not know whether the FTC will accept the argument, but it suggests that enforcement officials should be paying more attention to the application of computer technology to the sale of reservations in a variety of industries.

If Carnival’s argument prevails, its logic would seem to justify the creation by merger of one hotel chain, one airline, or one cruise line. Would yield maintenance yield a market price at the same level in a monopoly as in a competitive marketplace? And, supposing only a tight oligopoly, would the complexity of pricing in the presence of yield management make collusion less likely to occur? Interestingly, the Justice Department not long ago found that the two major auction houses engaged in the collusive setting of commissions, even as they conducted auction markets. Would we allow the two auction houses to merge into a monopoly, simply because they sell goods at a market price? Of course not. (The analogy might continue with a cruise ship monopoly, in that the prices

18 See the AAI letters to the FTC urging that both proposed cruise mergers be stopped, http://www.antitrustinstitute.org/recent2/194.cfm and http://www.antitrustinstitute.org/recent2/200.pdf. According to the Daily Deal of August 29, 2002 (http://www.thedeal.com/NASApp/cs/ContentServer?pagename=TheDeal/TDDArticle/TDStandardArticle&c=TDDArticle&cid=1029965999509): Sources said the cruise lines have refined their antitrust presentations in recent weeks, arguing that the economics behind the cruise industry would make it impossible for either company to profitably raise prices after a P&O acquisition. They support this contention with econometric analyses showing that even a small price hike would cause some ships to leave port at less than full capacity, sources said. Under this view, because the marginal cost for each additional passenger is so small compared with the marginal revenue generated by each additional passenger, neither cruise line would risk leaving cabins unfilled by raising prices...The theory is that cruises amount to reverse auctions, where the cruise line starts with a higher price and then repeatedly lowers it until a ship is filled. This suggests that consumers pay a market rate and that the cruise lines are unable to raise prices.
of goods consumed on-board would not be set by auction.) But putting all this aside, where
there is a monopolist whose prices are set in an auction market, the consumer is
nevertheless deprived of a choice of suppliers and the ability to go elsewhere when
service deteriorates.

(c) Monopsony

Another area that has not received sufficient antitrust attention is monopsony.
This is not so much a deficiency of the Chicago School, which recognizes monopsony as
the mirror image of monopoly, capable of causing deadweight economic loss, as of the
simple fact that throughout most of our history, buyers have been less concentrated and
less powerful than suppliers. But this has been changing. Increasingly, buyers have
market power, as seen for example in the supermarket industry. While merger
enforcement has focused on whether prices to consumers will go up as a result of an
overlap between merging supermarkets within a given locale, national and regional
concentration have been allowed to grow enormously. One result is that retailers have
been able to exercise market power over suppliers, manifested, for example, in slotting
allowances that suppliers are forced to pay to get their product on, or keep it on, retail
shelves. Another example is the buying power of meatpackers and others who buy farm
products, who have become capable of pushing the price for farm products below the
competitive level. The Internet has made it possible for group buying to occur in ways
that also raise antitrust questions. While the federal agencies have recognized and
occasionally dealt with monopsony problems, it is apparent that far more work is needed,
both empirical and theoretical, to identify the existence of monopsony and oligopsony
and the circumstances under which it should be attacked. It may be, as suggested by the
FTC’s Toys R Us case, that buyer power can be present with a much lower market
share than is necessary to prove seller market power. The effects of buyer power will be
felt most directly at the local level where a supplier is located, hence should be of
particular interest to the States.

19 Cite Toys
(c) The Role of Efficiency in Merger Enforcement

The Chicago School has succeeded in graduating the significance of efficiency in antitrust analysis, especially for mergers. Nonetheless, there is always a problem of how to identify what should count as an efficiency and to document that it is sufficiently likely to occur and of sufficient magnitude that it should outweigh anticompetitive effects. Both the predicted efficiency and the predicted anticompetitive effect (which may be incommensurate apples and oranges) are generally located in the future, hence a matter of great uncertainty, such that predilections of the enforcers may play a huge role. State enforcers may have a healthier degree of skepticism about the efficiency predictions and perhaps a greater willingness to accept predictions about consumer harm than today’s Federal enforcers. One could speculate on why this might be. I would simply note that the benefits of efficiency tend to be dispersed across the entire society, whereas the harms caused by anticompetitive behavior often tend to be more localized, hence would seem more immediate and serious to an enforcer with a more localized sensitivity.

The next landmark battleground for efficiency will likely involve the question of how much, if any, of a purported efficiency gain must be passed on to consumers in order for the efficiency argument to outweigh the anticompetitive argument. The current standard, that consumers rather than business owners should be the principal beneficiaries, has been questioned by the Chicago School but has not yet been pronounced as official policy in this country.20 Again, State enforcement may be more responsive to the direct interest of consumers in their State, so if the Federal policy evolves toward the standard of overall social welfare (which Chicago calls consumer welfare, but amounts to stockholder welfare plus trickle down theory), the States may well be needed to play an even more active role in merger enforcement.

(d) Cy Pres and Antitrust

As States and private plaintiffs succeed in their antitrust class actions, undistributed funds will increasingly become available for discretionary distribution,

20 Canadian case
worked out with the courts and in some cases the plaintiffs’ bar, to accomplish the goals of the class action. Organizations like AAI should be considered for a portion of such funding, where they can do work that will foster better enforcement of the antitrust laws under which the class action was brought. For example, we have a proposal pending with regard to *cy pres* money generated by a private class action case in California, by which (if the money is eventually granted) we would conduct empirical studies of a variety of California industries in which buyer power plays a role. The objective would be to develop generalizations of the type I suggested are needed for a better understanding of monopsony, oligopsony, and the conditions under which they should be challenged by antitrust actions. It doesn’t take much imagination to think of other projects that could be undertaken with *cy pres* funding, for example jointly by a State, NAAG, and AAI or some other NGO, to develop a Illinois Brick model repealer statute, train the judiciary for antitrust cases, train State antitrust enforcers, or undertake in-depth studies of competition in industries that have significant local effects. As but one example, in the field of sports, efforts could focus on National Football League revenue sharing rules that are arguably designed to channel competition among owners away from an exciting product on the field and toward exploitation of local taxpayers through lucrative stadium deals.  

CONCLUSION

The AAI supports the institutions of antitrust, including Federal, State, international, and private enforcement. Many challenges exist for those who believe in an activist agenda and we stand ready, within the confines of our humble budget, to work with the States on the variety of matters of mutual concern that have been addressed in this paper or which will surely arise in the future.

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