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ABSTRACT

Title: Antitrust Remedies – Selected Bibliography and Annotations

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This paper was prepared as background for the American Antitrust Institute's Annual Conference in June, 2005, whose topic was Creative Antitrust Remedies. This paper contains a bibliography of general books and annotations of general articles, ABA documents, and governmental statements; followed by annotations of specific topics: monopolization, mergers, cartels, and, finally, OECD materials.

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American Antitrust Institute 6th Annual Conference
Selected Bibliography – Antitrust Remedies

Eleanor Fox and Paul Sirkis

We prepared this selected bibliography for the American Antitrust Institute's Annual Conference in June, 2005, the topic of which was Creative Antitrust Remedies. We have organized the materials as follows: books, articles, bar association reports, fora, and government statements dealing with antitrust remedies generally, then sources specifically dealing with monopolization, mergers, and cartels, and finally, OECD materials. We hope it will be useful for those wishing to conduct further research on the issue of antitrust remedies.

We initially approached the task of surveying the literature on antitrust remedies with a view towards identifying common themes or conclusions. In fact, the body of literature is noteworthy for the extent of general disagreement. For example, on the topic of the *Microsoft* case, some commentators opined that only a severe structural solution would remedy the monopolization violation, while others believed that robust remedial measures would ultimately harm consumers. Indeed, in an introduction to the 2004 ABA Antitrust Remedies Forum, Richard Steuer wrote "[some critics] have complained that the remedies are too severe, or not severe enough. Some have complained that remedies regulating conduct rather than requiring monetary payments are insufficient or too complex. Others have complained that there are too many enforcers and too many proceedings based on the same allegations."[1]

Other aspects of the remedies debate are also contentious. For example, at the ABA Antitrust Remedies Forum, panelists agreed not to discuss *Illinois Brick*, fearing that debate regarding indirect purchaser suits would be so heated as to preempt debate on all other antitrust remedial issues.[2]

This is a work in progress. We welcome suggestions for additional materials that should be included.

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[1] R. Steuer, *Introduction*, ABA Section of Antitrust Law, Antitrust Remedies Forum, at 1, *available at* http://www.abanet.org/antitrust/remedies/remediesintro.doc.

[2] Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1 (2004) at n.6.

Antitrust Remedies Generally

Books

ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (FIFTH), Chaps. VIII D and E (ABA 2002), and supplemental annual reviews.

ABA Section of Antitrust Law, MERGERS AND ACQUISITIONS, UNDERSTANDING THE ANTITRUST ISSUES (SECOND), Chap. 13 (ABA 2004).

ABA Section of Antitrust Law, PROVING ANTITRUST DAMAGES, LEGAL AND ECONOMIC ISSUES (ABA 1996).

Areeda, Philip & Turner, Donald, ANTITRUST LAW, Vol. 2, Chap. 3 (Little, Brown & Co. 1978), and supplements.

Breit, William & Elzinga, Kenneth, ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS (AEI Press, 1986).

Hovenkamp, Herbert, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, Chap. 17 (3d ed., Thomson/West, 2005).

Posner, Richard, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE, Chaps. 5 and 10 (University of Chicago Press, 2d ed. 2001).

Sullivan, Lawrence & Grimes, Warren, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK, Chaps. XVI and XVII (West 2000).

Sullivan, E. Thomas & Harrison, Jeffery L., UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 3.02 (4th ed. 2003).

Wils, Wouter P.J., THE OPTIMAL ENFORCEMENT OF EC ANTITRUST LAW, ESSAYS IN LAW AND ECONOMICS (Kluwer 2003).

Articles

Adams, Walter, *Dissolution, Divorcement, Divestiture: the Pyrrhic Victories of Antitrust*, 27 IND. L. J. 1 (1951) (analyzing past Section 2 antitrust cases and concluding that while the U.S. Department of Justice held an impressive record of legal victories, the remedial action approved by the courts in most of those cases failed to lessen concentration or restore effective competition).

Balto, David, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 ANTITRUST L.J. 1113 (2005) (arguing that while the FTC's broad remedial capabilities are better suited than a federal court to address difficult issues of remedies, the agency has failed to use its full range of remedial powers, and by emphasising disgorgement and restitution in recent years, the Commission has strayed from its original vision as an administrative agency that focuses on complex antitrust issues and seeks innovative relief, and instead largely duplicates the efforts of private and state enforcers).

Benston, George J., *Indirect Purchasers' Standing to Claim Damages in Price Fixing Antitrust Actions: A Benefit/Cost Analysis of Proposals to Change the Illinois Brick Rule*, 55 ANTITRUST L.J. 213 (1986) (arguing against modification of the *Illinois Brick/Hanover Shoe* rule and concluding that the rule ultimately benefits consumers, innocent producers, and taxpayers).

Cavanagh, Edward D., *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1 (2004) (reviewing the *Illinois Brick* decision and its impact on the evolution of antitrust doctrine and arguing in favor of legislative reform authorizing federal jurisdiction over multi-jurisdictional indirect purchaser suits brought in state court), *available at* http://www.luc.edu/law/academics/special/center/antitrust/illinois_brick.pdf.

Cavanagh, Edward D., *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777 (1987) (advocating detrebling, citing the risk of overdeterrence, unfairness, market distortions, and baseless lawsuits as arguments to abolish or at least limit the applicability of this provision).

Davis, Ronald W., *Indirect Purchaser Litigation: ARC America's Chickens Come Home to Roost on the Illinois Brick Wall*, 65 ANTITRUST L.J. 375 (1997) (noting the growing tendency toward allowing indirect purchasers to sue for price fixing under state antitrust or consumer protection legislation, and pointing out that this raises serious questions about the fair and efficient administration of justice, as state courts sort out the intricate economic analysis of pass-on among varying levels of indirect purchasers.)

Denger, Michael & Arp, D. Jarrett, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 ANTITRUST 41 (2001) (arguing that the analysis of whether the multi-faceted system of remedies adequately deters cartel behavior should inquire whether it (1) provides compensation to those who are actually injured by cartel behavior; (2) avoids creating windfalls to those who are not injured; (3) generates excessive costs by giving rise to unnecessary legal fees and related expenses and imposing unjustified burdens on the judiciary and the parties through protracted, uncoordinated and duplicative litigation; and (4) furthers the fundamental policy of promoting a more competitive industry structure that furthers consumer welfare).

Easterbrook, Frank, *Detrebling Antitrust Damages*, 28 J.L. ECON. 445 (1985) (arguing that the existence of a multiplier should depend on (a) the extent to which the violation is concealable and (b) whether the plaintiff is a business rival of the defendant, and arguing that the amount to be trebled should be limited to the economic injury from monopoly or part of the profit that induces others to violate the law).

Gavil, Andrew, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*. 69 GEO. WASH. L. REV. 860 (2001) (arguing that the case management problems posed by the diffusion of private direct and indirect purchaser litigation among state and federal courts leads to unjustifiable systemic inefficiencies, and proposing a legislative solution that would allow easier removal and consolidation of indirect purchaser suits).

Hovenkamp, Herbert, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717 (1990) (arguing that the indirect-purchaser rule is inconsistent with Section 4 of the Clayton Act in that it potentially awards the direct purchaser with greater than three times the damages "by him sustained," while indirect purchasers receive nothing).

Joskow, Paul L., *Transaction Cost Economics, Antitrust Rules, and Remedies* 18 J. LAW, ECON. & ORG. 95 (2002) (arguing that antitrust rules should be sensitive to the attributes of enforcement institutions, the information and analytical capabilities these institutions possess, the uncertainties they must confront in the diagnosis and mitigation of anticompetitive behavior and market structures, and the associated costs of Type I and Type II errors implied by alternative legal rules and remedies).

Lande, Robert H., *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004) (asserting that current antitrust damage levels do not total treble damages and are not high enough overall to optimally deter antitrust violations), *available at* http://home.ubalt.edu/ntlaland/AntitrustDamageLevelsConsumerLRev2004.pdf.

Lande, Robert H., *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L. J. 115 (1993) (suggesting that treble damages amount to less than actual damages when factors such as lack of prejudgment interest, the time value of money, failure to account for societal welfare losses or umbrella effects, litigation costs, and tax effects are taken into account), *available at* http://home.ubalt.edu/ntlaland/TrebleDamages1993.doc.

Landes, William, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. LAW REV. 652 (1983) (demonstrating that to determine optimal deterrence, net harm by antitrust violations must first be calculated, then multiplied by the probability of detecting and proving the violation).

O'Connor, Kevin J., *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34 (2001) (noting that thirty-six States and District of Columbia, which contain over seventy per cent of the population of the United States, provide for some sort of right of action on behalf of some or all indirect purchasers).

Page, William H., *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1 (1999) (surveying class certification decisions in cases that indirect purchasers had filed under state *Illinois Brick* repealer statutes and similar state laws and concluding that indirect purchasers suits were not effective in providing real compensation to the vast majority of indirect purchasers of price-fixed products).

Pitofsky, Robert, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L. J. 169 (2002) (asserting that the organizing principle of the 1990s, both during the Bush I and Clinton Administrations, was to administer a moderately aggressive antitrust program, but combine it with a sensitivity to the values of preserving efficiencies and encouraging incentives to innovate and a recognition of economic changes resulting from globalization of competition; and arguing that while few, if any, new substantive antitrust rules were adopted during the Clinton years, remedies during the 1990s were expanded and modified, however they still may not be fully adequate).

Polinsky, A. Mitchell & Rubinfeld, Daniel L., *Remedies for Price Overcharges: The Deadweight Loss of Coupons and Discounts*, John M. Olin Program in Law and Economics Working Paper No. 271 (November 2003) (evaluating coupon and discount remedies, and arguing that deadweight loss can be lower under the discount remedy), *available at* http://www.ftc.gov/be/seminardocs/04polinsky.pdf.

Posner Richard & Landes William, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979) ("Unless they are willing to countenance multiple liability, the courts cannot allow suits by indirect purchasers without also permitting the defendant to assert a 'passing-on defense' against direct purchaser

plaintiffs. As the Court recognized in *Illinois Brick*, there are only two ways of avoiding unacceptable multiple liability: (1) allow indirect purchasers to sue but overrule *Hanover Shoe* or (2) retain *Hanover Shoe* and preclude indirect purchasers from suing.")

Salop, Steven & White, Lawrence J., *Treble Damages Reform: Implications of the Georgetown Project*, 55 ANTITRUST L. J. 73 (1986) (examining the antitrust remedial scheme through the use of a database containing information on over two thousand antitrust cases).

Sullivan, E. Thomas, *Antitrust Remedies in the U.S. and E.U.: Advancing a Standard of Proportionality*, 48 ANTITRUST BULL. 377 (2003) (comparing American and European approaches to antitrust remedies for merger and monopolization cases, and suggesting that American antitrust law should adopt a more focused, market oriented remedial approach).

Waller, Spencer W., *Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207 (2003) (arguing that total punishment in any given antitrust case varies dramatically for offenses with identical or similar status under the law and there is no *a prioi* way to predict punishment levels for a particular case or a particular defendant), *available at* http://www.abanet.org/antitrust/remedies/waller.pdf.

Werden, Gregory J. & Schwartz, Marius, *Illinois Brick and the Deterrence of Antitrust Violations - An Economic Analysis*, 35 HASTINGS L.J. 629 (1984) (reviewing the rationale in *Illinois Brick*, summarizing the basic issues in the controversy caused by that decision, developing an economic model of private antitrust enforcement and concluding that direct purchasers are more efficient than indirect purchasers at enforcing antitrust laws and should therefore be given maximum incentive to bring antitrust suits).

Symposium, *Indirect Purchaser Pot Keeps Boiling*, 15 ANTITRUST 28 (2001) (discussing the increasing incidence of indirect purchaser follow-on litigation).

Symposium, *Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct, The Adequacy of Civil Monetary Sanctions: Treble Damages and Restitution*, 69 GEO. WASH. L. REV. 1 (2001) (individual papers listed herein), *available at* http://www.law.gwu.edu/stdg/gwlr/issues/69-5-6.htm.

Bar Association Reports and Fora

ABA Section of Antitrust Law, *Antitrust Remedies Forum* (April 2, 2003) (The first roundtable addressed the adequacy of criminal and civil antitrust remedies in deterring cartel behavior; the second addressed non-monetary remedies, including both merger remedies and non-merger remedies; and the third addressed issues of access to courts and procedure), program, roundtable transcripts and papers *available at* http://www.abanet.org/antitrust/remedies/.

ABA Section of Antitrust Law, *Report on Remedies* (2004) (proposing draft legislation as an example of a compromise between the interests of plaintiffs and defendants with respect to indirect purchaser standing), *available at* http://www.abanet.org/antitrust/comments/2004/RemediesReportCouncil.doc.

ABA Section of Antitrust Law, *The State of Federal Antitrust Enforcement – 2005*, Report of the Task Force on the Federal Agencies at 43-45 (proposing remedial harmonization among the antitrust agencies, particularly with respect to the use of buyer up-front remedies by the FTC versus "fix-it first" remedies at the DOJ).

Comments of the American Antitrust Institute Working Group on Remedies, June 17, 2005 (reflecting the consensus of a Working Group chaired by Michael Freed, and consisting of members Joseph Bauer, Patricia Connors, Eugene Crew, Jonathan Cuneo, Albert Foer, Robert Lande, James Langenfeld, Daniel Mogin, Kevin O'Connor and Bernard Persky, on issues including treble damages, prejudgment interest, attorney's fees, joint and several liability, contribution and claim reductions, remedies available to the federal government, private injunctive relief and indirect purchaser litigation), *available at* http://www.antitrustinstitute.org/recent2/423.pdf

Panel Discussion, *Antitrust Remedies in the 21st Century: Too Many Actions? Too Much—or Still Too Little — Recovery?* Chair's Showcase Program, ABA Section of Antitrust Law 50th Annual Spring Meeting, 2002 (Chair Roxane Busey and panelists Michael Denger, Harry First, Robert Pitofsky, Susan Illston and Lewis Kaplan, considered whether the current structure of antitrust remedies strikes the right balance and achieves the goals of deterring antitrust violations, punishing wrongful conduct, and compensating injured parties), *available at* http://www.abanet.org/antitrust/source/07-02/chairprogram.pdf.

Report of the ABA Antitrust Law Section Task Force on Legislative Alternatives Concerning *Illinois Brick*, 46 ANTITRUST L.J. 1137 (1978) (proposing draft legislation based on the principle that to avoid imposing multiple liability on defendants, all claims arising from a given violation, including claims by direct and indirect purchasers or sellers, must be combined into a single forum).

Report of the ABA Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify *Illinois Brick*, 52 ANTITRUST L.J. 841 (1984) (opposing proposed legislation designed to repeal in part *Hanover Shoe* and *Illinois Brick* because such legislation would permit indirect purchaser suits without solving the problems of dilution of the deterrent effect of treble damage recoveries, over-complication of treble damage proceedings, introduction of unwieldy investigations to trace overcharges, and the possibility of double recoveries and inconsistent judgments).

Report of the ABA Section of Antitrust Law Task Force to Review the Supreme Court's Decision in *California v. ARC America Corp.*, 59 ANTITRUST L.J. 273 (1990) (setting forth an analysis of the legal issues and policy implications raised by *ARC America* and listing some alternatives available to federal and state antitrust policymakers in light of *ARC America*).

Report of the Indirect Purchaser Task Force, 63 ANTITRUST L.J. 993 (1995) (proposing a legislative change to the effect that each state attorney general would be authorized to bring indirect purchaser lawsuits as *parens patriae* for its own residents; such indirect purchaser lawsuits would be the *only* indirect purchaser lawsuits that could be brought under federal or comparable state law, i.e., *state* statutes would be pre-empted; in both direct and indirect purchaser cases there would be a presumption that any overcharge was passed on to the *ultimate* indirect purchaser; in both direct and indirect purchaser cases the amount of the overcharge would be calculated as if it occurred at the *direct* purchaser level; and in both direct and indirect purchaser cases duplicative amounts based on the same overcharge could not be awarded).

Government Statements, Government Officials

Delrahim, Makan**,** *Forcing Firms to Share the Sandbox: Compulsory Licensing of Intellectual Property Rights and Antitrust*, Speech delivered at the British Institute of International and Comparative Law London, England (May 10, 2004) (arguing that compulsory licensing is appropriate as an antitrust remedy so long as antitrust authorities carefully consider the potential harm to innovation, and draft the license as narrowly as reasonably possible), *available at* http://www.usdoj.gov/atr/public/speeches/203627.htm.

FTC Policy Statement on Use of Monetary Remedies in Competition Cases (July 25, 2003) (while disgorgement and restitution can complement more familiar remedies such as divestiture, conduct remedies, private damages, and civil or criminal penalties, the FTC will generally seek disgorgement and restitution only in exceptional cases: where the underlying violation is clear, where there is a reasonable basis for calculating the amount of a remedial payment and there is value in seeking monetary relief in light of any other remedies available, including private actions and criminal proceedings), *available at* www.ftc.gov/os/2003/07/disgorgementfrn.htm.

Majoras, Deborah P., *Antitrust Remedies in the United States: Adhering to Sound Principles in a Multi-Faceted Scheme*, Speech delivered at Canadian Bar Association Annual Fall Conference on Competition Law, 3-4 October 2002 (analyzing the effectiveness and efficiency of a multi-tiered antitrust remedial system and warning against the dangers of over-enforcement), *available at* http://www.usdoj.gov/atr/public/speeches/200354.pdf.

Muris, Timothy, *Merger Enforcement in a World of Multiple Arbiters*, Dec. 21, 2001, Prepared remarks before the Brookings Institution Roundtable on Trade & Investment, Washington, D.C. (discussing the divergent antitrust enforcement approaches in the U.S. and Europe and their implications, and advocating for greater transatlantic cooperation and coordination), *available at* http://www.ftc.gov/speeches/muris/brookings.pdf.

Pitofsky, Robert, *The Nature and Limits of Restructuring in Merger Review*, Cutting Edge Antitrust Conference Law Seminars International (2000) (describing the various factors that influence the FTC's decisions to restructure and emphasizing the FTC's willingness to consider restructuring proposals, as long as the restructuring proposals are likely to preserve competition), *available at* http://www.ftc.gov/speeches/pitofsky/restruct.htm.

U. S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, *Antitrust Division Policy Guide to Merger Remedies*, October 2004 (providing a policy framework for fashioning and implementing appropriate relief short of a full-stop injunction in merger cases), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.htm.

U. S. FEDERAL TRADE COMMISSION, *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies*, April 2, 2003 (addressing issues arising in the following areas: (1) the assets to be divested, (2) an acceptable buyer, (3) the divestiture agreement, (4) additional order provisions, (5) orders to hold separate and/or maintain assets, (6) divestiture applications, and (7) timing), *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.pdf.

U.S. FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION, *A Study of the Commission's Divestiture Process* (1999) (systematically reviewing orders requiring divestiture to determine how well buyers of divested assets have fared operating the assets they acquired, and recommending that the Commission include a variety of order provisions and divestiture procedures to correct informational and bargaining imbalances between respondents on the one hand and the staff and the buyers of divested assets on the other hand, particularly where the buyers have never operated in the industry and never operated the to-be divested business), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf.

U. S. FEDERAL TRADE COMMISSION, *A Workshop to Discuss the Federal Trade Commission's Remedies Process* (June 18, 2002), *transcript available at* http://www.ftc.gov/bc/bestpractices/020618trans.pdf.

U. S. FEDERAL TRADE COMMISSION, *Merger Remedies Best Practices Workshop* (October 23, 2002), *transcript available at* http://www.ftc.gov/bc/bestpractices/021023transcipt.pdf.

Monopolization

Ayres, Ian & Nalebuff, Barry, *Going Soft on Microsoft? The EU's Antitrust Case and Remedy*, 2 THE ECONOMIST'S VOICE, art. 4 (2005) (arguing that the Commission's unbundling remedy was desirable, but a preferable remedy would have required, in addition to unbundling, a separate version of Windows with three competing media players as well as Windows Media Player built in), *available at* http://www.bepress.com/cgi/viewcontent.cgi?article=1045&context=ev.

Bresnahan, Timothy F., *A Remedy that Falls Short of Restoring Competition*, 16 ANTITRUST 67 (Fall 2001) (arguing that on the government's theory of the Microsoft case, the settlement fell far short of providing a remedy proportionate to the problem - it did not lower the entry barriers that protected the Windows monopoly, as was required to vindicate the problem that the government successfully demonstrated in court), *available at* http://www.stanford.edu/~tbres/Microsoft/anti-bre.pdf.

Cartensen, Peter C., *Remedying the Microsoft Monopoly: Monopoly Law, the Rights of Buyers and the Enclosure Movement in Intellectual Property*, 44 ANTITRUST BULL. 577 (1999) (arguing that Microsoft intellectual property laws that tend to over-reward innovation have contributed to Microsoft's obtaining and retaining its monopoly status, and arguing that creative antitrust remedies may provide a suitable solution to such IP protection).

Comanor, William S., *The Problem of Remedy in Monopolization Cases: The Microsoft Case as an Example*, 46 ANTITRUST BULL. 115 (2001) (arguing that an effective remedy in the Microsoft case required the "formation of competitive structure at the operating system level, where Microsoft's monopoly position was grounded," however, misplaced concerns about consumer welfare prevented the court from adopting remedies comprehensive enough to achieve this goal).

Crandall, Robert W., *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, AEI-Brookings, Working Paper No. 01-05, 2001 (examining the frequency and effectiveness of divestiture relief in over a century of monopolization cases, and concluding that, with the exception of the break-up of AT&T in 1984, such relief has not been successful at increasing competition, raising industry output or reducing prices to consumers), *available at* http://www.criterioneconomics.com/docs/crandal_2.pdf.

Elzinga, Kenneth, et al., *United States v. Microsoft: Remedy or Malady?*, 9 GEO. MASON L. REV. 633 (2001) (chronicling the Microsoft investigation and lawsuit, and concluding that the break-up remedy adopted by the district court is out of proportion to the court's findings of minimal consumer harm, will result in higher prices for consumers and may deter innovation, and is a remedy long sought by Microsoft's competitors and the one that benefits them most).

First, Harry, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001) (emphasizing the importance of state antitrust enforcement and arguing that state enforcers have some important advantages, including greater local knowledge and different policy perspectives).

Forrester, Ian S., *Article 82: Remedies in Search of Theories?*, *in* INTERNATIONAL ANTITRUST LAW & POLICY, 2004 FORDHAM CORP. L. INST. 167 (B. Hawk, Ed. 2005) (arguing that over the last several years, remedies in Article 82 cases appear to be "looking forward at the desired conduct rather than looking backward and ensuring the discontinuation of the abuse," and that such remedies do more to further industrial policy and political goals rather than address pure competition concerns).

Goldman, Calvin et al., *A Canadian Perspective on Intellectual Property Rights and Competition Policy: Striving for Balance and Related Comity Considerations*, *in* INTERNATIONAL ANTITRUST LAW & POLICY, 2004 FORDHAM CORP. L. INST. 195 (B. Hawk, Ed. 2005) (arguing that in cases where competition policy issues arise from intellectual property rights, competition policy norms should require the least interventionist remedies that: (i) facilitate the realization of dynamic efficiencies, (ii) promote the process of competition rather than individual competitors, (iii) respect fundamental intellectual property rights, and (iv) minimize the potential to chill innovation while ensuring that intellectual property rights are not being used to leverage monopoly power beyond the scope of the particular property right; and underscoring the importance of comity principles in trans-border cases involving markets characterized by innovation and rapid technological advances).

Himes, Jay, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 GEO. MASON L. REV. 37 (2002) (examining the role of state antitrust enforcement generally and defending state involvement in the *Microsoft* case).

James, Charles A., *The Real Microsoft Case and Settlement*, 16 ANTITRUST 58 (Fall 2001) (examining the legal allegations charged in the complaint and how those allegations were resolved in the courts, and defending the effectiveness of the remedies in the proposed Final Judgment).

Kovacic, William E., *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285 (1999) (emphasizing the importance of remedies in antitrust cases, asserting that examining the effectiveness of past enforcement is essential to shed light on appropriate future solutions, and questioning the adequacy of traditional antitrust institutions to intervene in sectors defined by rapid technological or organizational change).

Lande, Robert H. & Langenfeld, James A., *The Perfect Caper? Private Damages and the Microsoft Case*, 69 GEO. WASH. L. REV. 902 (2001) (arguing that despite the difficulty of calculating damages in cases involving harm to innovation, various methods do exist, and that it is therefore possible for private plaintiffs to recover damages based on innovation harm).

Lande, Robert H., *Why Are We So Reluctant to 'Execute' Microsoft?*, 1 ANTITRUST SOURCE 1 (November 2001) (arguing that although courts are reluctant to impose structural remedies, divestiture should not be a remedy of last resort, rather, it should be a viable option that is considered logically on its legal, administrative and economic merits), *available at* http://www.abanet.org/antitrust/source/11-01/microsoft.pdf.

Lenard, Thomas M., *Creating Competition in the Market for Operating Systems: Alternative Structural Remedies in the Microsoft Case*, 9 GEO. MASON L. REV. 803 (2001) (arguing in favor of a "hybrid" structural remedy (i.e., one that would separate Microsoft into an Applications company and three equally subdivided Operating System companies) on the basis that such a remedy would immediately introduce competition into the personal computer Operating Systems market, and it would minimize ongoing government scrutiny of Microsoft's business and technical activities).

Lévêque, François, *The Controversial Choice of Remedies to Cope with the Anticompetitive Behavior of Microsoft*, Paper presented to the Law and Economics Workshop, Boalt School of Law, University of California at Berkeley, 6 November 2000 (arguing that, with respect to the question of remedies in the Microsoft case, the key economic distinction is between economic remedies based on incentives and command-and-control remedies rather than between behavioral and structural remedies), *available at* http://www.cerna.ensmp.fr/Documents/FL-MSBerkeley.pdf.

Levinson, Robert J. et al., *The Flawed Fragmentation Critique of Structural Remedies in the Microsoft Case*, 46 ANTITRUST BULL. 135 (2001) (arguing that fears of fragmentation and high porting costs resulting from structural remedies are unwarranted).

Lopatka, John E. & Page, William H., *Who Suffered Antitrust Injury in the Microsoft Case?*, 69 GEO. WASH. L. REV. 829 (2001) (arguing that consumers, computer manufacturers, and competitors will face obstacles in proving that Microsoft's offenses caused them antitrust injury, because damages resulting from harms to innovation are difficult to quantify, and even if one could find some price effects from Microsoft's actions, these would be too difficult to disentangle from Microsoft's legitimate business practices).

Lopatka, John E., *Devising a Microsoft Remedy that Serves Consumers*, 9 GEO. MASON L. REV. 691 (2001) (asserting that a structural remedy in Microsoft would destroy

efficiencies and harm consumer welfare, and that conduct remedies may be a preferable solution).

Shelanski, Howard & Sidak, J. Gregory, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1 (2001) (proposing a framework for assessing the costs and benefits of different remedies, particularly divestiture, in monopolization cases involving network industries).

Sullivan, E. Thomas, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565 (2002) (arguing that courts should exercise caution when considering divestiture remedies in technologically dynamic markets, and instead "should consider alternative, conduct-based remedies that will both remedy the antitrust harm and will promote the competitive process" because "the cost of correcting the market failure [should] not exceed the anticompetitive injury visited on consumers.")

Tom, Willard K. & Wells, Gregory F., *Raising Rivals' Costs: The Problem of Remedies*, 12 GEO. MASON L. REV. 389 (2003) (describing the difficulty of crafting remedies in raising-rivals'-costs cases and describing approaches used by courts in past cases).

Zittrain, Jonathan, *The Un-Microsoft Un-Remedy: Law Can Prevent the Problem That it Can't Patch Later*, 31 CONN. L. REV. 1361 (1999) (identifying government action in granting excessive copyright protection as the problem and suggesting slashing the term of copyright for computer software from 95 years to five or ten years).

Mergers

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