Remarks by Prof. Joseph P Bauer
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I very much regret that the weather gods and the airplane gods conspired to make it impossible for me to get from South Bend to Washington yesterday afternoon. Bob Lande and Josh Davis have produced a very impressive and valuable report on the multiple benefits to consumers of private enforcement of the antitrust laws. I am pleased to be able to offer a few comments on their Study.

My own study of private enforcement has taken a different path than this Report. I have written several of the volumes in the KINTNER FEDERAL ANTITRUST LAW treatise which deal with enforcement issues and have written two law journal articles in the area.[1] But, my work, which has focused principally on reported decisions, has not been nearly as rigorous as Bob and Josh's study. Thus, this Report serves the highly valuable function of providing enormous amounts of empirical evidence to support the conclusions that many of us have reached only inferentially or anecdotally.

All the people in this room are well aware of both the attacks on, and the justifications for, private enforcement of the antitrust laws. As to the latter: These actions by so-called "private attorneys general" serve multiple functions, including recompense to the victims of unlawful behavior, punishment of those who have violated the antitrust laws, deterrence of such future conduct, and conservation of scarce governmental resources.

This Study naturally focuses on the first two of these goals, by identifying the truly significant sums of money that individual consumers and other victims of antitrust violations have obtained from wrongdoers. It is particularly helpful that the Report quantifies the extent to which billions of dollars of those recoveries have come from foreign defendants. The Study also importantly notes the additional benefits to consumers from

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[1] Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOYOLA CONSUMER L. REV. 303 (2004); Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barrier for Antitrust Injury and Standing*, 62 U. PITTSBURGH L. REV. 437 (2001).

injunctive and structural relief, while recognizing the difficulty in quantifying these benefits.

The Study's discussion of the many substantial obstacles to recovery – both substantive and procedural, as well as the comparatively modest amount of attorneys fees recovered in many of these actions -- reinforces the conclusion not only that the successful actions have indeed benefited consumers, but also the inference that improvident lawsuits are increasingly unlikely. Indeed, the Report suggests that the opposite may well be true – that these obstacles actually deter many potentially meritorious actions. And, these conclusions also support the claim that Bob Lande has eloquently made in several other pieces – which it the importance of maintaining automatic trebling of damages as a vital part of the statutory arrangement.

Let me make a few observations. Despite the many domestic critics of private enforcement, the benefits of permitting private claims as a vital element in the arsenal for enforcement of the antitrust laws are getting increasing attention from European and other foreign legislative and administrative bodies as useful ways of enforcing their own antitrust laws. This Report should provide support for advocates of that approach.

Two of the decisions from the Supreme Court's last Term also have important implications for private enforcement. In *Twombly*, as will doubtlessly be addressed this afternoon, the Court's majority identified the perceived harm that would flow from asserted over-enforcement of the antitrust laws as a basis for ratcheting up pleading standards. These alleged harms include litigation costs for the parties and the courts and the *in terrorem* effect of lawsuits as the motivation to settle even supposedly meritless claims. By imposing this higher pleading hurdle, the Court has made lawsuits, and the recovery for consumers that will flow from those suits, even less likely than they have become with the change in substantive rules in the past two decades.

The *Leegin* case – one of those decisions which have changed the substance of antitrust, here by overturning a nearly century-old precedent – will make it far more difficult to prosecute vertical price restraints. Bob and Josh's Study includes an examination of claims brought under a Rule of Reason rather than under a per se standard, and of claims brought without the benefit of prior government action. They can point to some plaintiff success even when each of these factors is present. But, after *Leegin*, there

will be the double whammy. The enforcement agencies have shown virtually no interest of late in challenging vertical restraints. Thus, to the extent that they are going to be policed at all, it will only be by the private bar. But, the added burdens of showing a Rule of Reason violation will make success more expensive, more time-consuming and more problematic, and thus it will be less likely that these claims will be brought. The benefits of private enforcement pointed out by this Study demonstrate why any further erosion of the ability to assert claims for treble damages would come at significant expense to consumer welfare.

Bob and Josh, once again, my congratulations on an excellent contribution to our understanding of this most important topic.