

# OHIO STATE LAW JOURNAL

Volume 40, Number 4, 1979

## Current Issues in Antitrust

### Introduction

As the subtitle suggests, the first four articles in this issue of the OHIO STATE LAW JOURNAL deal with issues of critical import to the antitrust practitioner and scholar. The JOURNAL staff hopes, through this effort, to contribute to the disciplined and scholarly debate surrounding these concerns. The authors' experience include extensive practice in the governmental and private arenas, instruction at leading law schools, and publication of numerous antitrust-related writings.

The first Article presents an exhaustive analysis of the Federal Trade Commission's authority, under section 5 of the Federal Trade Commission Act,<sup>1</sup> to award structural relief in cases falling within the Commission's adjudicative jurisdiction. The author is Mr. Neil W. Averitt, a member of the Planning Office of the Commission's Bureau of Competition. In his Article, Mr. Averitt examines the legislative history of the Act and the subsequent judicial interpretations in an attempt to determine whether, in view of then-prevailing theories and practicalities, the drafters and the jurists engaged in the drafting and interpretation of section 5 contemplated the existence of the questioned authority. The Article goes on to evaluate the contexts in which structural relief is peculiarly appropriate and, in examining the efficacy of conduct remedies in these contexts, concludes that at least some authority to award structural relief inheres to the Commission by virtue of the duties imposed by the Act and should be conclusively recognized by the courts.

The next two Articles discuss the merits of S. 600,<sup>2</sup> the anticonglomerate merger legislation currently being studied by the Senate Judiciary Committee. The authors are Mr. Donald I. Baker and Ms. Karen L. Grimm, and Professor Joseph F. Brodley. The Articles are based on testimony given by Mr. Baker and Professor Brodley before the Senate Subcommittee on Antitrust and Monopoly in hearings held on S. 600 in the spring of 1979. The two Articles reflect fundamentally opposing attitudes regarding the role of the antitrust laws in American society. Mr. Baker and Ms. Grimm's Article, opposing enactment of S. 600, is premised on the notion that the primary, if not sole, justification for antitrust regulation in the marketplace is the promotion and preservation of economic efficiency. Professor Brodley, on the other hand, envisions the antitrust laws as legitimate vehicles for the pursuit of social and political

---

1. 15 U.S.C. § 45(b) (Supp. I 1977).

2. S. 600, 96th Cong., 1st Sess. (1979). This bill is reprinted at pp. 893-94 *infra*.

goals—specifically, in this context, limiting undue concentration of economic power in society. In spite of these different perspectives, however, the authors manage to reach some agreement regarding perceived deficiencies in S. 600 as it stands.

The final Article is authored by Mr. Thomas Collin and addresses what the author terms the “fallacy” of Sherman Act liability for refusals to deal unaccompanied by anticompetitive effect.<sup>3</sup> The author, after careful examination of the legislative history of the Sherman Act and the state of the common law at the time of enactment, criticizes the line of cases holding that anticompetitive intent, standing alone, will support a finding of section 1 liability in cases relating to two-firm refusals to deal. The Article traces the origins of this “rule” and finds only lower court opinions and Supreme Court dicta supporting it. In addition to the lack of legal logic supporting the decisions and theory they embrace, Mr. Collin raises several practical objections to the imposition of liability in this context.

*The Editors*

---

3. 15 U.S.C. § 1 (1976).