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Antitrust: New Economy, New Regime: A Second Annual Symposium of the American Antitrust Institute - Introduction

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ANTITRUST: NEW ECONOMY, NEW REGIME

SECOND ANNUAL SYMPOSIUM OF THE AMERICAN ANTITRUST INSTITUTE

INTRODUCTION

The Editorial Board of the *Case Western Reserve Law Review* is very pleased to present the papers of the American Antitrust Institute's second national symposium, "Antitrust: New Economy, New Regime," held in Washington, D.C. in June, 2001. This Symposium issue features new insights and approaches to the study of antitrust from leading scholars, government policy makers, and practitioners in the field. The focus of this year's Symposium was to examine the antitrust challenges facing the Bush administration, policy makers, and practitioners from a post-Chicago school perspective.

In *Robert Pitofsky: Public Servant and Scholar*, his first speech as Chairman of the Federal Trade Commission, Mr. Timothy J. Muris commemorates the achievements of Robert Pitofsky, the previous FTC Chairman and well-known antitrust scholar. Chairman Muris describes Mr. Pitofsky's role in the formulation, promotion, and implementation of a key FTC organizational goal—the protection of consumer welfare. Additionally, Mr. Muris used the occasion to articulate a theme of moderation and continuity with previous antitrust policy.

Next, several leading academicians and practitioners describe antitrust approaches to our ever-changing economic and technological environment. In *Is Competition Policy Possible in High Tech Markets?: An Inquiry into Antitrust, Intellectual Property, and Broadband Regulation*, Professor Lawrence A. Sullivan argues that current antitrust tools, such as microeconomic theory and empirical analysis, are sufficient to effectively evaluate anti-

competitive behavior in “The New Economy.” However, after examining the recent mergers and litigation in the telecommunications industry, Professor Sullivan concludes that legislative change may be required to the intellectual property (“IP”) and broadband regulation to prevent distortion and unintended anticompetitive results. In *Intellectual Property and Antitrust: Steps Toward Striking a Balance*, Dr. James Langenfeld also considers the nexus between antitrust and IP and their joint impact on innovation, including research and development. He concludes in part that more research is needed to understand the quantifiable impact of intellectual property regulation on innovation, and he recommends greater coordination between the IP and antitrust regulators to prevent the potentially anticompetitive incentives that may result from the existing regulations.

Mr. Arthur M. Kaplan and Professor Stephen F. Ross present two perspectives on current antitrust litigation. Mr. Kaplan, who served as the Co-Lead Counsel for the plaintiffs in the *Nasdaq Market Makers Antitrust Litigation*, presents a case study of that litigation emphasizing the collaborative strategy of the private plaintiffs and the Department of Justice in his article, *Antitrust as a Public-Private Partnership: A Case Study of the Nasdaq Litigation*. In *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, Professor Ross analyzes and proposes a number of theories of antitrust liability for private plaintiffs or governmental entities to pursue against competitive sports leagues, including the National Football League, Major League Baseball, and the National Hockey League. Professor Ross also provides policy justifications for legislative intervention to ensure open competition within the leagues.

Several scholars take up the issue of modern merger policy and evaluation. In his keynote address, *Some Principles for Post-Chicago Antitrust Analysis*, Professor F.M. Scherer questions the Chicago school postulate that conglomerate mergers promote efficiency and describes the implications for current merger evaluation under the *Merger Guidelines*. Prof. Scherer notes the need for greater access to efficiency expertise by the enforcement agencies, the provisional approval of mergers to test their longer-term efficiency, and the development of a set of presumptions where evidence of a merger’s efficiency and anticompetitive effects are inconclusive. In *Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors*, Professor John E. Kwoka proposes a revival of the doctrine of potential competition.

Professor Kwoka identifies two types of non-incumbent competitors, “constraining” and “prospective” competitors, and proposes operational criteria for analyzing mergers involving non-incumbent competitors that pose anticompetitive dangers. In *Toward Guidelines for Merger Remedies*, Mr. Albert Foer proposes *Horizontal Merger Remedy Guidelines* to lend transparency and promote a rational, consistent approach to the deal restructuring conditions imposed on prospective mergers as part of the administrative review of the Department of Justice and Federal Trade Commission.

Next, in *Antitrust and the Systemic Bias Against Small Business: Kodak, Strategic Conduct, and Leverage Theory*, Professor Warren S. Grimes offers a new and different perspective on the *Kodak* tying case, arguing that *Kodak* may be seen as part of a continuing strategy to eliminate what he describes as “the modern marketplace’s systemic bias against small business.” Professor Grimes, drawing from the corollaries of the *Kodak* case, proposes a comprehensive strategy seeking to counteract the bias in antitrust analysis against small business. The Symposium concludes with Professor Spencer Weber Waller’s article, *The Language of Law and the Language of Business*, which examines the evolution of the discourse of antitrust, firmly rooted in the language of economics. Professor Waller describes the parallel evolution of business discourse, demonstrating how the two operate at cross-purposes, and encourages the fuller integration of business discourse into the language of antitrust to bring deeper understanding to the discipline.

The Editors would like to thank Dean Gerald Korngold and Associate Dean Andrew P. Morriss for their assistance in making this Symposium publication a reality, and Mr. Albert A. Foer of the American Antitrust Institute for his support. Finally, we would like to thank Professor Jonathan L. Entin, our Law Review Advisor, for all his help, and Professor Arthur D. Austin II for his initial guidance and expertise.

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