

2005

In Search of Economic Justice: Considering Competition and Consumer Protection Law

Spencer Weber Waller

Loyola University Chicago, School of Law, swalle1@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>

 Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Waller, Spencer Weber In Search of Economic Justice: Considering Competition and Consumer Protection Law, 36 Loy. Chi. L. J. 631 (2005).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

In Search of Economic Justice: Considering Competition and Consumer Protection Law

*Spencer Weber Waller**

INTRODUCTION

In November 2003, I was invited to address the first summit conference of European competition and consumer protection officials held by the Directorate-General for Competition of the European Commission at their headquarters in Brussels. At that conference, officials gathered from the twenty-five nations that already were member states of the European Union (“EU”) or that would become member states as of May 1, 2004. These officials spent the better part of a day discussing the interactions and synergies between competition and consumer protection law. The goal was to create and deepen enforcement networks among the member states and between the member states and the EU officials in Brussels and to explore the possibilities for greater convergence between two bodies of law with very different histories and enforcement traditions.¹

I was to be the lunch speaker for this august group—an American professor who cared deeply about both bodies of law—discussing how the two bodies of law related to each other. This task proved to be particularly complicated, both theoretically and in terms of how the laws are actually enforced, and it forced me to reflect long and hard about some items of faith that I had simply taken for granted.

My thesis, then and now, is a simple one. Competition and consumer protection laws are intimately related, two sides of the same coin of consumer sovereignty and hence economic justice. Perhaps surprisingly, this relationship is only beginning to be recognized by academics and policy makers, and the way it all actually works in the

* Professor of Law and Director of the Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. This essay is an expanded version of remarks delivered at the first summit conference of European competition and consumer protection officials, DG Comp, European Commission, Brussels, November 19, 2003.

1. Meeting of Directors General for Competition, Draft Agenda (Nov. 19, 2003) (on file with author).

United States is quite messy. For example, the Institute for Consumer Antitrust Studies is the only one of its kind in the United States, which addresses both bodies of law using the tangible interests of the consumer as the common denominator.² In the United Kingdom, I understand that the Consumers' Association is one of the few organizations that functions in a similar way.³ In fact, most non-governmental organizations in the United States, and elsewhere, unfortunately have become quite suspicious of competition law or simply lack the expertise or resources to pursue it as part of their agenda. For instance, it has been more than thirty years since the Consumers Union in the United States has actively participated in antitrust matters.⁴

Similarly, on the academic side, there exist few sources addressing the fundamental unities between competition and consumer protection law. I have only found articles by one pair of authors who discuss this theme.⁵ In addition, there have been a handful of recent speeches by Professor Timothy Muris, while he served as chairman of the United States Federal Trade Commission.⁶

Within American law schools and the legal profession, the separation

2. See Institute for Consumer Antitrust Studies, at <http://www.luc.edu/antitrust> (last visited Jan. 6, 2005) (providing an overview of the history and activities of the Institute).

3. See Consumers' Association, at <http://www.which.net/corporate/contents.html> (last visited Jan. 6, 2005) (providing links related to the Association, how the Association works, the Association's history, how to become a member, recruitment, and how to contact the Association and explaining that the entire organization now operates under the "Which?" name).

4. See *Consumers Union v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974) (concerning an antitrust claim related to international steel exportation).

5. Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44 (1998); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997) [hereinafter *Consumer Sovereignty*].

6. See, e.g., Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy*, Remarks at the Progress and Freedom Foundation Aspen Summit: Cyberspace and the American Dream (Aug. 19, 2003) (discussing the philosophy underlying a sound consumer protection program and how it, along with a growing knowledge base, informs the Federal Trade Commission's consumer protection initiatives), available at <http://www.ftc.gov/speeches/muris/030819aspen.htm>; Timothy J. Muris, *The Interface of Competition and Consumer Protection*, Remarks at the Fordham Corporate Law Institute's Twenty-Ninth Annual Conference on International Antitrust Law and Policy (Oct. 31, 2002) (discussing the relationship between competition policy and arguing that the interface between the two will become increasingly important in an increasingly global economy), available at <http://www.ftc.gov/speeches/muris/021031fordham.pdf>; Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy*, Remarks at the Annual Lecture of the European Foreign Affairs Review (July 23, 2002) (discussing how competition agencies can overcome some of the challenges facing a move toward a market-based economy and emphasizing the important role consumer protection should play in the shaping of the competitive environment), available at <http://www.ftc.gov/speeches/muris/020723.htm>.

is nearly complete. In law schools, competition and consumer protection law are taught in separate courses, with different books, and frequently by different professors. Within the profession, there are separate bar associations, learned societies, and specialty journals.⁷

Antitrust law, or competition law as it is known outside the United States, deals with the preservation of competitive markets. In all the nearly one hundred countries that have some recognizable form of competition law, there are some common features. Anticompetitive agreements that injure competition are prohibited, with price fixing, bid rigging, and market division by competitors being the prototypical violations. Acts of monopolization, attempted monopolization, or the abuse of the dominant position also are prohibited, with the litigation over Microsoft's behavior in the United States and the European Union being the most prominent recent example. Finally, mergers and acquisitions that pose a serious risk of leading to either anticompetitive collusion or a dominant position typically are prohibited as well.

Consumer protection law covers a broader and more diffuse bundle of areas. Unfair and deceptive advertising is prohibited, as are acts of outright fraud. Consumer credit, debt collection, and warranty transactions are regulated in various ways, but primarily through mandatory disclosures of terms and charges. Increasingly, identity theft and the use of the Internet for fraudulent and deceptive purposes have been the focus of consumer protection law as well.

In terms of actual enforcement within the United States, there is no single model that predominates. Sometimes responsibility for competition and consumer protection law is found within the same agency, sometimes it is not. This is a product of the highly decentralized enforcement system for both bodies of law in the United States at both the state and federal levels.

COMPETING FEDERAL MODELS

At the federal level, there are two different models of enforcement: one that combines the enforcement of competition and consumer protection statutes, and one that does not. The Antitrust Division of the United States Department of Justice enforces only competition statutes and is the sole federal criminal enforcer of the United States antitrust laws. In contrast, the United States Federal Trade Commission ("FTC"), an independent federal agency, enforces both competition and consumer protection through Section 5 of the Federal Trade

7. See Consumer Law Review, at <http://www.luc.edu/law/activities/publications/consumer.shtml> (last visited Jan. 6, 2005) (describing the purpose and general content of the journal).

Commission Act which prohibits both unfair methods of competition and unfair or deceptive acts and practices.⁸

Despite this more comprehensive mission, the FTC is organized in a way that tends to emphasize the separation of these fields, rather than the common elements of the agency's mission. The FTC has a Bureau of Competition and a separate Bureau of Consumer Protection, with a Bureau of Economics to support the work of both endeavors. The Bureau of Competition ("BC") primarily engages in the investigation and enforcement of mergers and complex civil antitrust cases with a recent emphasis on intellectual property and health care issues. The Bureau of Consumer Protection ("BCP") primarily investigates and challenges outright fraudulent conduct.⁹ The FTC website details recent BCP activity involving Internet sales, telemarketing, false health and fitness claims, identity theft and similar issues.¹⁰ These are all very different issues from the day-to-day focus of the competition staff. This basic split is further mirrored in the Bureau of Economics ("BE"), where the staff tends to specialize in either competition or consumer protection. Any crossover of staff and cooperation occurs primarily in competition advocacy before legislatures or regulatory agencies, and not in case selection and investigation.

The FTC also has regional field offices which, prior to 1980, routinely handled both competition and consumer protection cases. However, today, all but three regional offices specialize entirely in consumer protection matters, and competition cases are a relatively small part of any regional office's agenda.

The unity between consumer protection and competition, if any, comes at the top of the FTC organization. The President appoints the five FTC Commissioners subject to Senate confirmation. Fortunately, in recent times, we have had at least three current or recent Commissioners who have cared deeply about the relationship between competition and consumer protection law. Former Chairman Muris previously served in high-level staff positions in both the BC and BCP. Commissioner Thomas Leary is an experienced antitrust attorney with

8. 15 U.S.C. § 45 (2000 & West Supp. 2004); see STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION §§ 4:1-8, 5:1-8 (2003) (providing an overview of the meaning of "unfair methods of competition" and "unfair or deceptive acts and practices" under the Act).

9. See Federal Trade Comm'n, The Bureau of Consumer Protection, at <http://www.ftc.gov/ftc/consumer/home.htm> (last visited Jan. 6, 2005) ("The Bureau of Consumer Protection's mandate is to protect against unfair, deceptive or fraudulent practices.").

10. *FTC's Report Chronicles Top 10 Consumer Complaints*, 86 ANTITRUST & TRADE REG. REP. 60 (2004) (reporting the statistical breakdown of fraud and identity theft complaints made by consumers to the FTC).

both law firm and in-house corporate experience. He is increasingly interested in the interface between antitrust and consumer protection.¹¹ One of the newest FTC Commissioners is Pamela Jones Harbour, who is the former Deputy Attorney General of the State of New York who supervised both antitrust and consumer protection enforcement for that state.

The picture at the federal level in the United States is clouded by the fact that beyond the Antitrust Division and the FTC, there are numerous sectoral regulators, each with its own unique statutory authority, which can include either competition or consumer protection issues, or both. For example, the Federal Communications Commission and the bank regulatory agencies each have the authority to enforce both sets of laws. On the other hand, the Consumer Product Safety Commission and the Food and Drug Administration are limited to the consumer protection side of things, while the National Surface Transportation Board and the Nuclear Regulatory Commission enjoy power only in the competition area. Moreover, each agency's understanding of its mandate under these bodies of law differs somewhat, as does their willingness to interact with, and defer to, the Antitrust Division and FTC when they appear as competition or consumer advocates at those agencies.

FIFTY STATES, FIFTY MODELS

Under state law the situation is just as complicated. All fifty states have competition and consumer protection attorneys who work under their elected (occasionally appointed) Attorney General. Few states have combined these staff attorneys into a single unit, although in some states, like New York, they may report to a common Deputy Attorney General. In contrast, in Illinois, the antitrust bureau is located on a different floor and reports to a different deputy attorney general than the consumer protection bureau. In some of the smallest states such as Delaware, and even middle-sized states such as Indiana and North Carolina, there may be only a single attorney charged with enforcing both bodies of law.¹² While lawyers from different states cooperate on multi-state task forces in particular cases, such cooperation is invariably among either antitrust lawyers or consumer protection lawyers and not between members of each group.

11. See *Safely Traversing the Association Minefield: Leary Speaks on Conflict Between Consumer Protection and Antitrust*, FTC WATCH, Feb. 9, 2004, at 4 (describing comments made by Commissioner Leary concerning antitrust and consumer protection ethical conflicts).

12. For a complete listing of the staffs of state attorneys general in these areas, see GLOBAL COMPETITION REVIEW, THE 2004 HANDBOOK OF COMPETITION ENFORCEMENT AGENCIES (2004).

PRIVATE RIGHTS OF ACTION

In the United States legal system, private rights of action are equally important to governmental enforcement. This is particularly true in the competition and consumer protection area. Over ninety percent of all competition cases in the United States remain private treble damage actions that can be brought under either state or federal law or combined into a single case in federal court. There are also less frequent cases where private parties seek injunctive relief only for competition violations.

While there is no direct private right of action for violations of the Federal Trade Commission Act (either its competition or consumer protection provisions), many state statutes incorporate the standards of the FTC Act into their own state law and allow suits for actual and punitive damages.¹³ Most of the federal consumer credit statutes have explicit private rights of action allowing specified damages of a set amount plus attorney fees and are frequently aggregated into class actions. Producers harmed by untrue claims by a competitor bring most private unfair advertising cases under the federal Lanham Act.¹⁴

A COMMON VISION?

Despite this messy factual situation, there are essential unities between these two fields that need to be pursued more rigorously in the United States. As Lande and Averitt note in their path-breaking article *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, competition law provides consumers with a choice of competing products and services and consumer protection law allows consumers to exercise that choice free from fraud, coercion, deception, or demonstrably false information.¹⁵ They describe five practical benefits that flow from approaching these fields as a common endeavor: “[t]he Federal Trade Commission should continue to have both competition and consumer protection authority”;¹⁶ “[t]he jurisdictional coverage of competition and consumer protection laws can be clarified”;¹⁷ “[c]lose legal questions can be judged more correctly once

13. See, e.g., Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/2-10a (2002) (providing for a private right of action for damages for violation of the act, which include acts in violation of Section 5 of the FTC Act).

14. 15 U.S.C. § 1125 (2000 & West Supp. 2004).

15. Averitt & Lande, *Consumer Sovereignty*, *supra* note 5, at 718–22.

16. *Id.* at 744.

17. *Id.* at 747.

the policies of the statutes are better defined”,¹⁸ “[n]on-price competition should become a higher priority for both antitrust and consumer protection enforcement”,¹⁹ and “[c]ountries establishing or reorganizing trade regulation programs can do so in a beneficial manner.”²⁰

Former FTC Chairman Muris largely agrees and in his recent speeches has highlighted two areas where he sees a great overlap consistent with the Lande–Averitt position. In particular, Chairman Muris believes that approaching competition and consumer protection matters in a unified way would produce great benefit in cases involving restrictions on price or comparative claims in advertising, and in the regulation of the professions.²¹

Perhaps the best illustration of all of these arguments is *California Dental Ass’n v. F.T.C.*, in which the FTC unsuccessfully challenged on competition grounds a private dental society’s restrictions on various soft non-verifiable advertising claims, such as pain-free dentistry and low prices.²² While the FTC chose to challenge these restrictions on per se and quick-look antitrust theories that were rejected by the United States Supreme Court,²³ one could easily imagine viewing the case as a consumer protection matter either under the Lande–Averitt framework or the Muris view.

Institutional design does not cause the segregation of competition and consumer protection law as much as history. Our first federal antitrust laws came in 1890, well before the development of consumer protection law.²⁴ It was largely a historical accident that the FTC was created with antitrust jurisdiction in 1914, and with consumer protection jurisdiction added more explicitly in 1938.

FINDING UNITY IN THE TANGIBLE INTERESTS OF THE CONSUMER

If I was writing on a blank slate in the United States, or even anywhere outside the United States, I would recommend combining, or at least closely coordinating, competition and consumer protections in the strongest manner possible. Consumer protection and competition

18. *Id.* at 748.

19. *Id.* at 750.

20. *Id.* at 753.

21. See *supra* note 6 (listing remarks made by Timothy Muris expressing his views on consumer protection).

22. *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 780–81 (1999).

23. *Id.* at 756.

24. Sherman Act, 15 U.S.C. §§ 1, 2 (2000 & West. Supp. 2004).

law share a common purpose, or at a minimum, share an imperative not to work at cross-purposes. There is also an increasing need for international cooperation in both fields. Finally, and most importantly, the opportunity exists to engage the public and articulate the benefits of both bodies of law in common sense terms to rally support for a more competitive and consumer friendly economy. It is ironic that the principal proponents of combining these two fields in the United States come from vastly different traditions. Former Chairman Muris is a devoted fan of the Chicago school of antitrust economics and recently emphatically criticized more centrist and traditional views of the purposes and goals of antitrust.²⁵ Bob Lande is one of the most articulate defenders of the view that the antitrust laws serve a variety of goals beyond the mere promotion of allocative efficiency.²⁶ Why then the common cause in pushing the integration of competition and consumer protection? Is it to further colonize new fields for the Chicago school view of markets and regulation? Is it to reintroduce other views of economics and non-economic values held more dear in consumer protection back into the competition arena? Obviously much depends on one's personal values.

Current antitrust policy in the United States has largely abandoned the real consumer as the true beneficiary of competition law in favor of a goal of efficiency and wealth maximization, regardless of whether consumers ever share in those benefits. The courts have shut out consumers from challenging overcharges from price fixing under the federal antitrust laws by requiring that cases be brought only by so-called direct purchasers.²⁷ State laws allowing such indirect purchaser cases have been heavily criticized and are the subject of attack by the organized bar.²⁸ In addition, the courts have rather aggressively used concepts of antitrust injury and standing in ways that seem at odds with the statute allowing recovery of treble damages and attorney's fees and

25. Timothy J. Muris, *How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy*, Remarks Before the American Bar Association, Antitrust Section Fall Forum (Nov. 19, 2003), available at <http://www.ftc.gov/speeches/muris/murisfallaba.pdf>.

26. See generally Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (discussing evidence that Congress wanted to promote free competition and to prohibit unfair transfers of wealth, among other reasons).

27. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746–47 (1977).

28. The repeal, preemption, or modification of state indirect purchaser statutes is expected to be a key debate before the newly-created federal Antitrust Modernization Commission. See Antitrust Modernization Comm'n, *Welcome*, available at <http://www.amc.gov> (last visited Jan. 6, 2005) (providing updates on the Commission's future actions).

costs for those injured in their business or property because of an antitrust violation.²⁹ For antitrust, the voraciousness of the market must be tamed for the benefit of the consumer.

Ironically, consumer protection law, particularly outside the United States, may need a little more respect for the value of markets to serve the consumer. Too many jurisdictions bar truthful price advertising claims or truthful comparative advertising claims which normally serve consumer interests. Do consumers really benefit from laws in certain countries which prohibit sales at other than narrowly specified times of the year? Do consumers really benefit when the Aldi supermarket chain in Germany, or its superstore equivalents, are attacked for so-called unfair competition amounting to a strategy of aggressive, but above-cost, price competition? At home, consumers can do better than having their name invoked by trade associations and governmental bodies in passing highly restrictive regulations that may benefit a particular favored competitor or group, but produce no price, quality, or innovation benefits for its intended beneficiaries.

Bringing together these two bodies of law can indeed clarify points of law in a market economy. However, the exercise will not be worth it unless the focus remains on real, demonstrable value to individual consumers, and not merely hypothetical consumer welfare in the guise of wealth maximization. Both fields deserve better.

29. See Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437 (2001) (arguing that recent trends of judicial assault on private antitrust claims poses a serious threat to the maintenance of competitive markets and the prevention of anti-competitive practices).

