

To: the Antitrust Modernization Commission

From: Robert H. Bork

Re: Comments on the Status of the Antitrust Laws

The antitrust laws, in my opinion, are performing well, in fact better than at any time in the past seventy-five years. It follows that I think there is very little need for “modernization”.

This is not to say that all cases are being decided correctly, but such mistakes as are being made are due more to the human element, which can never be eradicated, than to any systemic flaws in antitrust doctrine.

There are, however, a few areas of antitrust that could usefully be reformed. The Robinson-Patman Act remains a basically anti-competitive statute and should be repealed. That may be politically impossible, but it is certainly highly desirable.

It is also important to reduce the role of private enforcement. The Antitrust Division of the Department of Justice and the Federal Trade Commission have become increasingly skilled in economic analysis and use consumer welfare as their criteria for bringing or not bringing cases. Private plaintiffs often have no such constraint. They frequently bring unworthy cases and rely upon populist rhetoric to sway juries that are hopelessly at sea in the complexities of law and economics. Most bad decisions today occur in private suits. A major step in reform would be to abolish the trebling of damages. Trebling attracts bad lawsuits, lawyers interested only in the enormous cash rewards, and compels even innocent businesses to settle rather than risk trial with potentially catastrophic damages. Compensatory damages, without tripling, are entirely adequate to the enforcement of the antitrust laws.

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