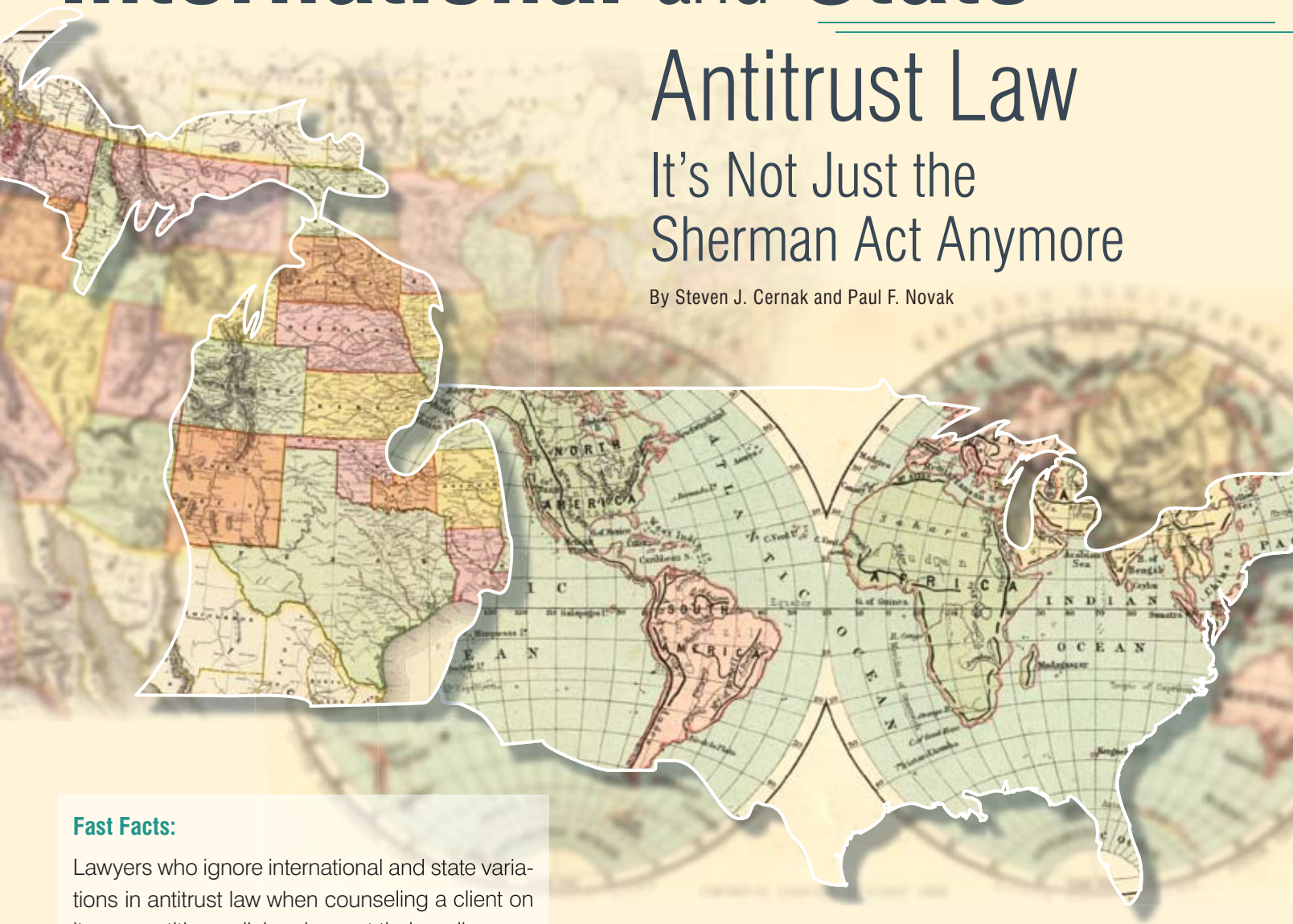
International and State Antitrust Law

It's Not Just the Sherman Act Anymore

By Steven J. Cernak and Paul F. Novak



Fast Facts:

Lawyers who ignore international and state variations in antitrust law when counseling a client on its competition policies do so at their peril.

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Lawyers whose antitrust experience has gone no further than a survey course in law school might be tempted to think that the only law they need to know is the Sherman Act.[1] Such a limited view certainly is no longer appropriate, if it ever was. Dozens of countries have recently passed antitrust legislation, and they join the dozens of others in increasing enforcement of laws that are similar to but often strikingly different from the Sherman Act and other U.S. antitrust laws (including that they are usually called "competition laws"). On another front, individual states within the U.S. continue to enforce state antitrust laws that sometimes differ from federal antitrust law in important respects. As a result of these developments, lawyers who ignore international and state variations in antitrust law when counseling a client on its competition policies do so at their peril. This article briefly surveys some of the geographic and substantive areas in which antitrust law variations are most likely to be of interest to readers. (For a review of two important countries with new competition laws, China and India, see page 34 of this issue.)

International Variations

Canada

Because Canada is such a large trading partner of the U.S. in general and Michigan in particular, knowledge of its competition law is essential. Canada's Competition Act covers mergers, cartels, abuse of dominance (the non-U.S. version of monopolization), many pricing practices, misleading advertising, and deceptive marketing. Unlike in the 50 states, there are no provincial competition laws in Canada. The criminal provisions of the Competition Act cover more matters than in the U.S., including price maintenance, such as minimum vertical price fixing. Unlike in the U.S., only some of the criminal activities are per se or automatically illegal; price maintenance is automatically illegal, while an undue lessening of competition must be proven for conspiracies, for instance. Non-criminal practices, called reviewable practices, generally are legal except in certain circumstances and include mergers, abuse of dominance, and various vertical non-price restrictions. Competition enforcement is conducted by the federal Competition Bureau, and fines and jail sentences tend to be less severe than in the U.S. Private litigation is not common because actions for damages are allowed only for violations of the criminal provisions of the Competition Act, and then only for single damages with the possibility of the loser paying the winner's costs. Private litigants can pursue actions regarding reviewable practices only after obtaining leave from the Competition Bureau, and then only for injunctive relief.

European Community

Not only are the countries of the European Union large U.S. trading partners, the European Community (EC) competition law has served as the model for many of the new laws passed by emerging nations. EC competition law promotes the dual goals of protecting competition and ensuring completion of a single internal European market. The second goal has led to different emphases in enforcement, even though the law looks similar to that of the United States. Article 81 of the Treaty establishing the European Community is roughly equivalent to Sherman Act Section 1 in that it outlaws agreements among economic actors that prevent or distort competition. Unlike the U.S. "rule of reason" analysis, agreements found to meet Article 81's restrictions are automatically void unless they fall into certain enumerated exemptions, including certain "block exemptions" for vertical agreements in particular industries. Article 82 prohibits abuse of dominance similar to Sherman Act Section 2's prohibition of monopolization. While "monopolist" and "monopolization" in U.S. law should seem to mean the same thing as "dominant firm" and "abuse of dominance" in the EC, the EC interpretation has tended to strike down more practices, as evidenced most vividly by the European treatment of Microsoft's practices.[2] EC competition law now is generally enforced by national competition authorities, with the Commission coordinating those activities through the European Competition Network while directly taking on only the matters having a "community dimension."

Merger Control

One great American export of the past three decades is the idea of pre-merger notification to competition law agencies, embodied in the U.S. in the Hart-Scott-Rodino Act.[3] Today, more than 80 jurisdictions around the globe have merger notification laws. Unfortunately, only the idea, not all the particulars, of the U.S. process has been exported, and the variance among the other systems is wide. Some are mandatory, others voluntary. Many require a filing fee (most are lower than in the U.S.), others do not. A variety of tests for determining filing obligations are used, including turnover of the parties, asset holdings in the jurisdiction in question, and market share. The timing for filing and waiting periods varies as well. Regulations implementing the processes often change (in the U.S., filing thresholds are now indexed to a measure of inflation, for instance), so contacting local counsel or the agency itself often is necessary.

Cartel Enforcement

The U.S. approach to cartel enforcement has also strongly influenced the approach of other countries to the most pernicious forms of collusion, such as price fixing and market allocation. Over 100 jurisdictions now have some form of anti-cartel legislation. Again, not all the jurisdictions have a law and enforcement identical to the U.S.'s enforcement of Sherman Act Section 1. Many countries do not make such activities illegal per se, but require something like a rule of reason analysis. Many countries punish such activities civilly, not criminally, and few allow both a private right of action and U.S.-style class actions. Finally, the U.S. treble damage private remedy is unique. Still, there are enough similarities that jurisdictions are coordinating their cartel enforcement activities through joint discovery mechanisms[4] and long-term bilateral or multilateral arrangements like the International Competition Network.[5]

State Variations

Indirect Purchaser Liability

Under the Sherman Act, a violation of antitrust law typically exposes the offender to civil actions for damages from a direct purchaser who was injured by the anticompetitive conduct. Since the United States Supreme Court's decision in *Illinois Brick v Illinois,*[6] purchasers who do not have a direct purchasing relationship with the antitrust violator (such as consumers who do not purchase product directly from a price-fixing wholesaler) do not possess standing to litigate a federal antitrust damages claim for the "overcharge" attributable to the anticompetitive conduct. Although the federal courts do not recognize indirect purchasers as possessing a claim for damages under federal antitrust law, the United States Supreme Court has also ruled that states may enact antitrust laws that differ from the Sherman Act on this subject.[7]

Multiple states have authorized downstream purchasers who can demonstrate injury from anticompetitive conduct to bring such claims against antitrust violators—even if they did not purchase

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product directly from them. Michigan, for example, was one of the first states to enact an "Illinois Brick repealer" that authorizes a person who was damaged "directly *or indirectly*"[8] to bring a treble damages claim. Even states that have not enacted such "repealers" have frequently applied either state antitrust statutes or unfair competition laws to bring actions for "indirect purchaser" injury. The result has been a patchwork of state competition laws that offer varying degrees of redress to indirect purchasers who can demonstrate cognizable damage from an antitrust violation.[9]

Application of the Per Se Rule and the Rule of Reason

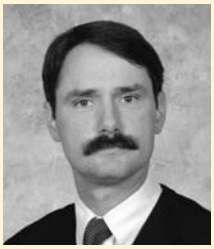
Restraints of trade are categorized under the Sherman Act as two types: (1) conduct that is considered so pernicious that it is deemed illegal per se—with no attendant evaluation of the merits of the underlying conduct, and (2) restraints that are evaluated under a "rule of reason," where a balancing test that weighs both the anticompetitive consequences and any offsetting pro-competitive efficiencies is applied to determine whether antitrust liability exists. Under the Michigan Antitrust Reform Act (MARA), courts are given specific guidance to follow federal antitrust precedent so that Michigan law is consistent with its federal counterpart in the application of per se and rule of reason treatment.[10]

Other states, however, do not necessarily follow federal law on this issue. With a United States Supreme Court that is increasingly apt to place restraints of trade in the more forgiving "rule of reason" category, some states are demonstrating a greater tendency to go their own way. The United States Supreme Court's recent holding in *Leegin Creative Leather Products*[11] underscores the trend. Before *Leegin,* minimum resale price maintenance programs, where a distributor enforced minimum resale prices at which their products could be sold by retailers, were deemed to be illegal per se. The *Leegin* Court reversed that treatment and provided that resale price maintenance agreements should be evaluated under the rule of reason.

Although courts applying MARA will likely adhere to the Supreme Court's decision in *Leegin,* many state attorneys general have taken the position that resale price maintenance programs remain illegal per se under the antitrust laws of their respective states. In New York, for example, Section 369-A of New York General Business Law provides: "Any contract provision that purports to restrain a vendee of a commodity from reselling such a commodity at less than the price stipulated by the vendor or the producer shall not be enforceable or actionable at law." Similarly, California's Cartwright Act contains provisions prohibiting persons from agreeing "in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure."[12] Although post-*Leegin* courts have yet to interpret the application of these state statutory provisions to vertical resale price maintenance agreements, it is certainly envisionable that such agreements could continue to be deemed illegal per se under these and other state statutes.

Conclusion

A more complex globalized economy presents a vast array of new initiatives to attack anticompetitive conduct—with widely divergent legal schemes and results. At the same time, significant divergences between national antitrust policy and those of the states show no signs of narrowing. These national and international trends merit serious attention from the counseling lawyer who, in years past, may have focused more intently on the Sherman Act and less so on other antitrust regulatory schemes. A client that finds its activity blessed under the Sherman Act, but illegal under the antitrust laws of some other nation or state, may be in for a rude awakening if legal counsel has not informed it of the potentially disparate results under alternative regulatory schemes. ■



Steven J. Cernak is the lead competition law attorney with the General Motors Corporation Legal Staff. He is a committee chair in the American Bar Association Antitrust Section, a council member of the U.S. Chamber of Commerce Antitrust Council, and former council member of the State Bar Antitrust, Franchising and Trade Regulation Section. He has one law and two economics degrees from the University of Michigan.

Paul F. Novak practices as senior counsel at Clark Hill PLC and is chairperson of the State Bar Antitrust, Franchising and Trade Regulation Section. He concentrates his practice in antitrust, utility regulation, administrative, and municipal law and formerly led the antitrust enforcement efforts for the State of Michigan Attorney General's office.

FOOTNOTES

1. 15 USC 1.
2. See recent affirmance by European Court of First Instance of the Commission's large fine of Microsoft, available at <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79929082T19040201&doc=T&ouvert=T&seance=ARRET> (accessed August 3, 2008).
3. 15 USC 18a.
4. For a summary of global competition law enforcement, especially of cartels, see the summary in a speech by the head of the Antitrust Division of the Department of Justice, available at <http://www.usdoj.gov/atr/public/speeches/226334.htm> (accessed August 3, 2008).
5. International Competition Network <http://www.internationalcompetitionnetwork.org/> (accessed August 3, 2008).
6. *Illinois Brick Co v Illinois,* 431 US 720; 97 S Ct 2061; 52 L Ed 2d 707 (1977).
7. *California v ARC America Corp,* 490 US 93; 109 S Ct 1661; 104 L Ed 2d 86 (1989).
8. MCL 445.778(1) (emphasis added).
9. See, e.g., *FTC v Mylan Laboratories, Inc,* 99 F Supp 2d 1 (D DC, 1999).
10. MCL 445.784(2).
11. *Leegin Creative Leather Products, Inc v PSKS, Inc,* 127 S Ct 2713; 168 L Ed 2d 623 (2007).
12. California Business and Professions Code § 16720(e)(2).