

## ISSUE PAPER: DOES ANTITRUST REGULATION VIOLATE THE RULE OF LAW?

Elbert L. Robertson

Professor Stucke has presented a rich and provocative issue paper detailing the modern Rule of Reason's functional foibles, pitfalls and methodological infirmities. He cites the Rule of Reason's propensity towards inaccuracy, poor administrability, subjectivity, lack of transparency, vagueness, logical circularity and yielding inconsistent results. As you reflect on Prof. Stucke's critique of the Rule, Justice Peckham's literalist interpretive alternative of Trans Missouri fame ( a largely discredited relic of antitrust history) begins to look comparatively refreshing. These formalistic functional and consequential shortcomings of the Rule of Reason make its use highly problematic under the Rule of Law. (See, Carstensen's classic CBOT Hollow Core article) Prof. Stucke states:

Under the rule of law, enforcement authorities apply clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability, so that private actors can reasonably anticipate what actions would be prosecuted or otherwise sanctioned and fashion their behavior accordingly. The law should be sufficiently specific and its enforcement predictable and fair.

Statutory interpretive norms like the Rule of Reason in the context of The Sherman Antitrust Act, serve as foundational secondary rules as in H.L.A. Hart's Concept of Law that provide functional legitimacy for competition policy commands and decisions within our legal system. We can say that a legal system satisfies the rule of law if its commands are generally binding and authoritative, knowable and performable (note Radin Recon. BU LAW Rev). Of particular importance for the development of my thesis, is Professor Stucke's assertion that under the rule of law, antitrust enforcement must be clear and fair. I strongly agree, and have argued elsewhere that the devolution of "bright line" per se doctrine in favor of complex and murky Rule of Reason decisional processes exclusively focusing on Chicago School neoclassical economic efficiency oriented value when evaluating a defendant's alleged anticompetitive conduct, or its effects (vertical and increasingly horizontal) will often result in substantively unfair outcomes to an injured antitrust plaintiff. (See, Robertson Corrective Justice). This substantive unfairness is the denial of compensatory relief to injured market competitors unless some proof is made of economically inefficient "public injury" to the competitive process itself, regardless of the relative economic position of the parties or the form of the injurious restraint. In fact, in terms of the rule of law's precondition of outcome predictability, extensive Rule of Reason processes have a well recognized predictability feature, as Prof. Steve Calkins has noted in his "Not a Quick Look But not the Full Monty" article on the problematic of California Dentists's quick look rule of reason process:

("beneath the surface lies a truth that plaintiffs and prosecutors understand all too well: when the full, formal rule of reason is the governing standard, plaintiffs almost never win" (note Calkins 67 Anti. Law. J. 2000 at 521).

In sum, with the devolution of the per se rule and the ascendancy of the Rule of Reason, a presumed over inclusive secondary rule (Per Se) is replaced by a vague, effectively under inclusive secondary rule (The Rule of Reason). Professor Stuckey is correct when he observes that the Rule of Reason is an undefined rule ex ante, embracing antitrust's most vague and open-ended principles while simultaneously incorporating essentially contested paradigms of neoclassical economic theory for "efficient" competitive end state solutions. Attempts have been made to formalistically restructure the Rule of Reason into a more "workable" and or "flexible" operational test than the onerous, vague, indeterminate balancing of incommensurables offered by Brandeis in CBOT, or the original general announcement of the Rule as the operational measure of promoting competition for purposes of interpreting the Sherman Act since Standard Oil. Variants of the Rule of Reason, like the modern Quick Look methodology has emerged to allow the Federal Courts a means of sidestepping the analytic quagmire of a full blown Rule of Reason inquiry without risking the dangers of per se condemnation (false positives, structural inappropriateness). However the legacy of California Dentists (526 US 756 1999) leaves the subjective touchstone of a Federal judges "intuition" as the threshold condition for the application of this more streamlined alternative. This result hardly advances the Rule of Law Requirement that legal decision making by rendering authority be objectively determinant and predictable.

Despite these difficulties the Rule of Reason remains the primary interpretive paradigm for adjudication for Sherman Act cases involving horizontal and vertical restraints on competition, with even further devolution of the per se rule evidenced by the recent Leegin decision which overturned the 90 year precedent of Dr. Miles which held that vertical minimum RPM was per se illegal price fixing. Citing modern neoclassical economic arguments for the procompetitive benefits of RPM and the greater higher risk of "false positives" associated with per se condemnation, the Court shelved Dr. Miles opting instead for a rule of reason assessment of whether minimum RPM violates the Sherman Act. Can such radical departure from stare decisis and precedent (antitrust common law precedent and Congressional Legislation limiting minimum RPM) be consistent with rule of law if it substitutes a secondary rule norm that itself conflicts with the substantive requirements of the Rule of Law, namely clarity, determinacy and fairness? Will adopting the rule of reason in the Leegin litigation context raise the probability of facilitating false negatives by essentially immunizing dealer based RPM from detection by making plaintiffs discovery too costly or onerous?

Prof. Stucke's Issue paper on the Rule of Reason is highly successful in raising these troubling questions. As point of departure from the framework his paper established, I would ask are there any alternatives to these conflicts with the rule of law and precedent raised by predominant interpretive role the rule of reason plays in Sherman Act adjudication? One suggestion is to move antitrust law adjudication more firmly into its regulatory mode. Antitrust law is often characterized as an alternative to economic regulation because it is the law of free and open market competition, merely stating and reinforcing the "rules of the game" and not dictating the results of the competitive process. The fixed determination of price, output quantity and distribution (or redistribution) is the hallmarks of a planned or regulated economy. Antitrust law does not fix, or allow the fixing of prices or quantities nor does it command ex ante distribution of goods produced in a competitive market economy. However this definitional separation is artificial, a historical and overly simplistic in light of antitrust reality. THE TRUTH IS THAT ANTITRUST LAW IS OFTEN, AND IS MOST OFTEN EFFECTIVE ECONOMIC REGULATION. I find shock at this heretical assertion equivalent to shock that there was gambling in Casablanca. Antitrust adjudication in the Federal Courts determines winners

and losers in disputes about market competition under the Sherman, Clayton, Robinson Patman and FTC and to this extent it regulates markets (prices, pricing and production) for goods in interstate commerce indirectly. Antitrust oriented law and policymaking processes directly regulates the marketplace by rulemaking and adjudication of Federal Administrative agencies with economic competition regulatory mandates written into their enabling legislation by Congress.

The paradigmatic example of an independent federal agency with explicit antitrust regulatory responsibility is the US Federal Trade Commission. An important point from American Legal history is that 1914 legislation that became the FTC Act passed largely in response to political demands for institutionalized competition policy expertise designed to help the Federal Courts navigate application of the nebulous Rule of Reason as announced by Justice White in Standard Oil. The FTC has a broad and general mandate to curb “unfair methods of competition”. It has been argued that adjudication and rulemaking processes by the FTC would offer a superior alternative to the Federal Courts inconsistent and unworkable applications of rule of reason. (See, T. Arthur Towards a Flexible Rule of Reason 2000). Its superiority would stem from its primary expertise in antitrust and competition policy issues. Federal judges on the other hand, are legal generalist not possessing such technical expertise or competence to correctly resolve complex trade regulation policy disputes. Under the Chevron doctrine Federal Courts would defer to the Commission’s policy judgments.

A good example of antitrust regulatory rulemaking is presented by the DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors. The purpose of these Guidelines is to give clear guidance to horizontal competitors about the range of collaborative activity permitted by the agency and therefore, not in violation of the antitrust laws, especially competition enhancing activities like R&D. To the extent that published guidelines promote transparency, clarity and predictability they serve a basic Rule of Law enhancing purpose. However close inspection of the Guideline provisions reveals that they are almost totally premised on a rule of reasoning balancing of the perceived efficiency benefits of competitor collaborations regardless of the form those collaborations take. Therefore, a horizontal collaboration involving a naked restraint of trade that generated significant efficiencies would not be prohibited. What implications does this have for enforcement in the Maricopa County or Topco context? Even Palmer would receive rule of reason evaluation under these Guidelines.

While the guidelines include (recognize) per se rules, they also state that the agencies will evaluate all efficiency-enhancing collaborations as mere ancillary restraints under the rule of reason. (See, Sec. 3.2 Guidelines). If the Rule of Reason’s reliance on nebulous efficiency balancing norms conflicts with the rule of laws basic tenets, these Guidelines must also conflict with the rule of law, because despite expressed recognition of per se illegality, any restraint reasonably ancillary to an efficient integration will always be allowed. The possibility of false negatives will be present whenever naked ancillary restraints of trade are a part and parcel of collaborations that have more apparent efficiency benefits on balance. How is it that the danger of permitting false negatives is so less important than the danger of false positives associated with the per se rule? From the perspective of corrective justice the option of allowing the FTC to administratively settle competition disputes between private parties is inadequate because there is no right of private or state enforcement of Sec. 5. Therefore, there is no administrative scheme for compensating private antitrust injury. This is substantively unfair, and as I have argued elsewhere, inconsistent with the dictates of the rule of law.

Finally, from a legal process perspective, what does it mean to utilize the rule of reason as a mode of interpretation given its infirmities? The decision to privilege neoclassical economic cost-benefit approaches in interpreting a statute that doesn't even have the word "competition" in its text is inherently political. (See, Sec. 1 Sherman Act). California Dentists demonstrates how the Court may refuse to defer the FTC's fact finding process as presenting "substantial evidence" under APA Secs. 556 and 557 earning Chevron deference if its application of the rule is intuitively suspect. If antitrust law is to be successful integrated in to the broader body of a legal system that promotes both justice and economy under the rule of law, then the rule of reason must be more than an rubric for neoclassical efficiency balancing. In interpreting the Sherman Act under the rule of law, the rule must be reasonable, fair, efficient and consistent.

