

Book Review

THE CLOSED ENTERPRISE SYSTEM. By MARK J. GREEN, WITH BEVERLY C. MOORE, JR. AND BRUCE WASSERSTEIN. New York: Grossman Publishers, 1972. Pp. 488. \$8.95.

Stephen A. Saltzburg†

Once again, a Ralph Nader study group has forced us to think about important questions:¹ are our antitrust laws adequately enforced, and if not, why not? Mark Green, the principal author of the new Nader study group report, *The Closed Enterprise System*, identifies a worrisome lack of competition in the United States and attributes to it staggering effects on the lives of American citizens.²

The basic conclusion of the report is simply that our antitrust laws do not work,³ primarily because there presently exists no effective means of enforcing the laws vigorously and not because of major defects in the laws themselves. If the report is to be believed, then those agencies of the federal government entrusted with enforcement power, the Department of Justice and the Federal Trade Commission (FTC), simply are not vigorous antitrust advocates.

It is urged that because major corporations can obtain the services

† Assistant Professor of Law, University of Virginia. A.B. 1967, Dickinson College; J.D. 1970, University of Pennsylvania.

¹ Other well-known study group reports include: R. FELLMEYER, *THE INTERSTATE COMMENCE OMISSION* (1970); *SOWING THE WIND* (H. Wellford ed. 1972).

² Professor Leff has criticized the "eerie, tired sameness of the book." Leff, *Book Review*, *N.Y. Times*, Apr. 30, 1972, § 7, at 20, col. 4. While it is true that much of the material on which the study group bases its conclusions has appeared elsewhere before, the material probably will receive greater public exposure because it is a Nader project. This makes *The Closed Enterprise System* important, even if not entirely original.

A second attack made by Professor Leff is more telling: the workmanship of parts of the book must euphemistically be described as shoddy. This conclusion is probably correct. At some points the report stoops to the level of needless *ad hominem* attacks on former government officials, albeit apologetically in some places. At other points, the report suggests that complex societal problems can be solved with one stroke of the legislative pen or one thrust of the judicial axe. Such oversimplification and overemphasis of anecdotal accounts of particular instances in which the government has failed to prosecute antitrust violations vigorously detract from the worth of the book. In pleading its case, *The Closed Enterprise System* suffers greatly from its author's intense enthusiasm.

Some of the defects of *The Closed Enterprise System* are understandable. Public officials are not quick to admit error, nor even to permit private citizens to examine their conduct. Thus, while the book may sometimes seem onesided with respect to particular actions or decisions not to act by responsible authorities, perhaps this single dimension is better than none at all.

³ While the book often speaks of "the antitrust laws" in general without specifying the laws to which reference is made, emphasis is placed on three sections of the antitrust statutes: § 1 of the Sherman Act, 15 U.S.C. § 1 (1970) (prohibiting combinations or conspiracies in restraint of trade); § 2 of the Sherman Act, 15 U.S.C. § 2 (1970) (prohibiting monopolizing or attempts to monopolize); § 7 of the Celler-Kefauver Anti-Merger Act, 15 U.S.C. § 18 (1970) (prohibiting certain mergers or acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly").

of influential political figures, because they are able to devote tremendous resources to supporting their positions on virtually any issue, and because elected officials are reluctant to shake up the system with major litigation, the Attorney General and his staff at the Department of Justice are pressured into ignoring antitrust enforcement.⁴ The study group illustrates its view by examining suits by the government for injunctive relief "to prevent and restrain" violations of the antitrust laws.⁵ These often end in consent decrees, which, for the most part, are voluntary settlements that do nothing but bind the defendant to a promise not to repeat his illegal actions.⁶ Since the defendant had no legal right to do the acts in the first place, these decrees win little for the government that the antitrust laws do not already provide. Moreover, the defendant who consents to a decree never is forced to admit guilt, and the public is never certain whether there really has been any illegal conduct. Hence, there is no stigma attached to the decree. Consent decrees are pyrrhic victories for the government, at best. Reliance is also placed on the paucity of suits, and the argument is made that the important suits are never brought.⁷

Unsatisfied with the government's attitude toward civil litigation, the study group goes on to chastise its approach to civil sanctions. The group finds that wealthy businessmen are rarely prosecuted for antitrust violations; that, if prosecuted, they plead *nolo contendere*, get suspended sentences, and return immediately to their jobs; and that the maximum fine, raised from \$5,000 to \$50,000,⁸ is rarely imposed,

⁴ The recent ITT-Justice Department debacle offers some insight into the problems that politics provides for antitrust enforcement. For those who found that the underlying facts of the ITT case were obscured by the bizarre personalities involved, these facts can be reviewed in M. GREEN, *THE CLOSED ENTERPRISE SYSTEM* 44-45, 102-03 (1972).

⁵ M. GREEN, *supra* note 4, at 178. These are very important actions for the government. Section 4 of the Sherman Act, 15 U.S.C. § 4 (1970), places an affirmative duty on the Attorney General to institute actions in equity to prevent and restrain antitrust violations. In these suits the United States represents the public interest. The United States may also sue for damages for injuries that it suffers from antitrust violations, but unlike private citizens it cannot obtain treble damages. See 15 U.S.C. § 15a (1970); cf. *United States v. Cooper Corp.*, 312 U.S. 600 (1941) (decided prior to enactment of § 15a).

⁶ See Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 385-88 (1970).

⁷ The most important example is the failure of the Department to seek deconcentration of industry—for example, General Motors. M. GREEN, *supra* note 4, at 250-51. Those members of the Department's staff who advocate deconcentration suits read § 2 of the Sherman Act as prohibiting monopolies per se, rather than the act of monopolizing. In other words, they view the very structure of monopolistic industries as open to attack regardless of how that structure came about. Neither the language of the statute nor the cases interpreting it are crystal clear in stating what Congress intended to prohibit, and the controversy as to what the statute means has been a lively subject of debate. For a general analysis of the problem, see Johnston & Stevens, *Monopoly of Monopolization—A Reply to Professor Rostow*, 44 ILL. L. REV. 269 (1949); Levi, *A Two Level Anti-Monopoly Law*, 47 NW. U.L. REV. 567 (1952); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745 (1949). See also C. KAYSER & D. TURNER, *ANTITRUST POLICY* 44 (1959); Wilson, *The FTC's Deconcentration Case Against the Breakfast-Cereal Industry: A New "Ballgame" in Antitrust?*, 4 ANTITRUST L. & ECON. REV., Summer 1971, at 57.

⁸ 15 U.S.C. §§ 1, 2 (1970).

and in any event, only represents a drop in the bucket compared to the illegal profits earned by defendants.

One thing that the report found especially disturbing about the Department's failure to prosecute antitrust violations vigorously was that private suits for treble damages have been rendered more difficult. In the few cases in which the government prosecutes an action to completion and proves that a violation has occurred, private citizens may rely on the government's victory as prima facie proof of liability in their own private actions against the same defendant.⁹ Seventy-five percent of private antitrust suits follow successful litigation by the government.¹⁰ But when a defendant agrees to a consent decree or pleads *nolo contendere*, there is no prima facie case of liability in private actions.¹¹

Whereas the report concludes that the enforcement efforts of the Department of Justice may accurately be described as disappointing, it finds those of the FTC plainly discouraging. Established in 1914, a creature of compromise between supporters of big business, who advocated creation of an agency to articulate antitrust standards to guide corporate officials, and critics of the Justice Department, who wanted more vigorous enforcement,¹² the FTC has never clearly demarcated its role vis-à-vis antitrust enforcement. The same criticisms made of the Justice Department are directed at the agency, and the study group finds the FTC equally guilty.¹³ The report finds especially disappointing the agency's inability to adjudicate cases faster than the courts.

Having identified what it views as lax enforcement practices, the study group proceeds to examine the costs. When the antitrust laws are not working, competition decreases, industries become more concentrated, and leading firms gradually acquire monopoly power. Monopoly power is likely to lead to artificially high prices and restricted output.¹⁴ It has been estimated that the overall cost of monopoly and

⁹ See 15 U.S.C. § 16 (1970).

¹⁰ Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1060 (1952). A surprising statistic is how few suits are brought and carried to completion by private citizens following a victory by the government. It seems apparent that out-of-court settlement and a negotiated recovery often prove more attractive than the prospect of a full treble damage recovery after a complete trial.

¹¹ 15 U.S.C. § 16 (1970).

¹² For a brief history of the FTC, see M. GREEN, *supra* note 4, at 323-33.

¹³ Cf. E. COX, R. FELLMETH & J. SCHULTZ, *THE NADER REPORT ON THE FEDERAL TRADE COMMISSION* (1969); POSNER, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969); SIMON, *The Case Against the Federal Trade Commission*, 19 U. CHI. L. REV. 297 (1952); Comment, *The "New" Federal Trade Commission and the Enforcement of the Antitrust Laws*, 65 YALE L.J. 34 (1955).

¹⁴ See J. BLAIR, *ECONOMIC CONCENTRATION: STRUCTURE, BEHAVIOR AND PUBLIC POLICY* (1971); Machlup, *Oligopoly and the Free Society*, 1 ANTITRUST L. & ECON. REV., Fall 1967, at 11, 14-20. See also C. KAYSER & D. TURNER, *supra* note 7, at 11-14.

One of the most startling examples of overpricing as a result of antitrust violations involved the antibiotic tetracycline. As a result of a conspiracy between the nation's leading drug manufacturers, between 1953 and 1961, 100 tablets sold for about \$51. The study group report indicates that 10 years later, after Congress had investigated the con-

shared monopoly power in terms of lost production is between \$48 billion and \$60 billion every year.¹⁵ In addition to the pure loss of GNP, it is also estimated that "in any year at least 3 percent of national income is redistributed mainly toward inequality, because of market power."¹⁶

The report concludes that there may be other less quantifiable costs. For example, they rely on the classic work, *Antitrust Policy*, in which Carl Kaysen and Donald Turner suggest that three goals of the antitrust laws are adversely affected by nonenforcement. First, there is the goal of competition, not as a means of accomplishing other objectives, but as an end in itself, valued because it substitutes the judgment of the market place for the judgment of big business and thus provides for society a more acceptable decisionmaker in economic matters. Second, there is the goal of minimizing the ability of large businesses to coerce smaller businesses. Finally there remains the aim of the antitrust laws to insure that social and political power are distributed somewhat equitably.¹⁷

Still another way in which the evils of concentration may manifest themselves, asserts the report, is in discrimination in hiring, firing, and promotion in noncompetitive industries. The point seems to be this: the more power a business has, and the freer it is from competition, the more likely it is to act arbitrarily.¹⁸ Concluding that the public is virtually powerless to change this in the face of the incestuous marriage of politics and big business,¹⁹ the group warns that reductions in economic freedoms may become associated with restrictions in political freedoms.²⁰

The principal answer to these problems offered by the study group is that the Department of Justice and the FTC should begin to move to break up (or down) oligopolistic enterprises or shared monopolies. The recommended focus would be on the structure of industries and the amount of competition taking place, rather than on individual non-

spiracy and indictments had been handed down, the price for 100 tablets was only \$5. M. GREEN, *supra* note 4, at 3.

¹⁵ The study group extrapolates these figures from studies made by Minnesota Professor D. R. Kamerschen, *An Estimation of the "Welfare Losses" from Monopoly in the American Economy*, 4 WEST. ECON. J. 221 (1966) and Michigan State Professor F. M. Scherer, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (1970). See M. GREEN, *supra* note 4, at 14.

¹⁶ W. SHEPHERD, *MARKET POWER AND ECONOMIC WELFARE* 212 (1970).

¹⁷ C. KAYSAN & D. TURNER, *supra* note 7, at 18-23.

¹⁸ See Shepherd, *Market Power and Racial Discrimination in White-Collar Employment*, 14 ANTITRUST BULL. 141 (1969). See also E. KEFAUVER, *IN A FEW HANDS* 168-78 (1965) (citing study by C. Wright Mills).

¹⁹ Justice Douglas has written recently that "[t]he modern super-corporations . . . wield immense, virtually unchecked power. Some say that they are 'private governments,' whose decisions affect the lives of us all." SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 409-10 (1972) (dissenting opinion) (footnotes omitted).

²⁰ Machlup, *supra* note 14, at 12. See also Miller, *Toward the "Techno-Corporate" State?—An Essay in American Constitutionalism*, 14 VILL. L. REV. 1 (1968).

competitive acts.²¹ The goal would be the deconcentration of noncompetitive industries.²² In essence, the legal argument made in support of deconcentration suits is that monopoly power over time, unless resulting from an unexpired patent or efficiencies of scale, violates section 2 of the Sherman Act; that, for purposes of antitrust enforcement, the conduct of all participants in a shared monopoly must be examined with respect to the group as a whole rather than individual members thereof; and finally, that a shared monopoly may itself be a per se violation of section 2.²³ There is some support for such suits in the language of earlier Supreme Court decisions.²⁴ But, many lawyers and economists who share the Nader view that deconcentration is both necessary and required by the Sherman Act believe that, absent further legislation, the Supreme Court will find massive deconcentration too radical an approach to antitrust for the judiciary to initiate. They urge that deconcentration efforts center on legislation, not adjudication.²⁵

While favoring such legislation, and allowing for its possible passage, the study group strongly prefers litigation. In a shared monopoly society, the group finds it unlikely that politically powerful supercor-

²¹ M. GREEN, *supra* note 4, at 144. See Sherman & Tollison, *Public Policy Toward Oligopoly: Dissolution and Sale Economics*, 4 ANTITRUST L. & ECON. REV., Summer 1971, at 77; note 8 *supra*.

²² Mr. Justice Brandeis observed that "no monopoly in private industry in America has yet been attained by efficiency alone." L. BRANDEIS, *THE CURSE OF BIGNESS* 114 (1934). He went on to say:

It will be found that wherever competition has been suppressed it has been due either to resort to ruthless processes, or by improper use of inordinate wealth and power. The attempt to dismember existing illegal trusts is not, therefore, an attempt to interfere in any way with the natural law of business. It is an endeavor to restore health by removing a cancer from the body industrial. It is not an attempt to create competition artificially, but it is the removing of the obstacle to competition.

Id. 115-16. This would appear to be the study group's view also.

²³ M. GREEN, *supra* note 4, at 295-301. When referring to shared monopolies, the Nader report is speaking of the concentration ratios of industries. They define the term as a situation in which four or fewer firms supply 50% or more of a particular market. This is also the manner in which the term is used throughout this review. Senator Philip Hart has introduced S. 3832, 92d Cong., 2d Sess. (1972): "A BILL To supplement the antitrust laws, and to protect trade and commerce against oligopoly power or monopoly power, and for other purposes." It would be illegal under the bill for any corporation or combination of corporations to possess monopoly power in any line of commerce in any section of the country or with foreign nations. There is a rebuttable presumption of monopoly power when a corporation has an excessive rate of return for a period of years, or if there is no substantial price competition in the line of commerce involved, or if four or fewer corporations account for 50% or more of sales in any line of commerce. Senator Hart has indicated that he thinks it will be many years before Congress will accept such a proposal. *Washington Post*, July 23, 1972, § A, at 20, col. 2.

²⁴ *FTC v. Cement Institute*, 333 U.S. 683 (1948) (common course of action); *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) ("power exists . . . to exclude competition when it is desired to do so"); *Interstate Circuit Inc. v. United States*, 306 U.S. 208 (1939) (parallel action without formal agreement sufficient to establish violation); *cf. FTC v. Motion Picture Advertising Services Co.*, 344 U.S. 392, 395 (1953); *Standard Oil Co. v. United States*, 337 U.S. 293, 304 (1949); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

²⁵ See, e.g., C. KAYSER & D. TURNER, *supra* note 7; Harris, *The 'New Populism' and Industrial Reform: The Case for a New Antitrust Law*, 4 ANTITRUST L. & ECON. REV., Summer 1971, at 9. See also L. BRANDEIS, *supra* note 22, at 116.

porations will acquiesce in the speedy passage of meaningful antitrust legislation. Therefore litigation is the most direct means of attack.

Thus, the report exhorts its readers to press the government to litigate bigger and better cases.²⁶ Apparently there is little, if any, realization that if business interests can block antitrust legislation, they also can block lawsuits. Certainly, it is less likely that the executive branch will take full responsibility for massive antitrust suits than that it will shift the burden of action to Congress by calling for appropriate and specific legislation. Having identified a problem of businessmen controlling government, the study group proceeds to ignore it.

Short shrift is made of private antitrust actions, and this is a serious error. If the study group has accurately identified the problems, if its findings of governmental impotence can be believed, and if its view of the law is correct, then private antitrust litigation, despite its cost, can provide much in the way of needed enforcement.

An example might help to illustrate this point. After he had resigned as assistant attorney general in charge of the antitrust division of the Justice Department, Donald Turner proposed a suit to break up the Big Three's auto oligopoly. He proposed that a complaint be filed alleging an individual charge of monopolization against General Motors; a shared monopoly charge against General Motors, Ford, and Chrysler; and a charge that the three companies were using illegal methods of franchising.²⁷ The suit was never filed. Assuming that a private citizen believes that the suit will never be filed by the government, but that it is a suit that has merit and a good chance of winning, it would appear that he might consider several different kinds of private actions.

Assume that *A* purchases a 1972 Chevrolet in Los Angeles from a General Motors dealer. *A* believes that the car is greatly overpriced and attributes the overpricing to the lack of competition in the auto industry. It is possible for *A* to file a class action suit for treble damages against General Motors, alleging that General Motors shares a monopoly in the auto industry, that General Motors (and Ford and Chrysler) performs like a monopolist, and that General Motors has a history of antitrust violations.²⁸ In supporting his action, *A* can use

²⁶ M. GREEN, *supra* note 4, at 30-62, 321-33.

²⁷ *Id.* 252-53. As might be expected, the study group concluded that the reason such a suit was not brought was because the government was in the hip pocket of big business. There may, of course, be other reasons—the suits may be thought to be too disruptive and the remedies almost impossible. Or, it might be argued that their cost outweighs the likely benefits. It is significant, however, that government spokesmen have never put forward these reasons to justify inaction. Still, it could be argued that the government has made a deliberate, conscious and well intentioned decision that deconcentration suits are more disruptive than they are useful. Aside from the condemning silence on this point, the fact that legislation would undoubtedly be almost as dislocating makes the argument that litigation is inadvisable less persuasive. *But see* note 39 *infra*. Moreover, there is no indication that Congress has given tacit approval to the inaction of the Department of Justice.

²⁸ *Id.* 251-53.

any theory or argument that the government might have used had it filed the suit, although it is difficult to know how much more persuasive a court would find the arguments if urged by the United States. While it is difficult to predict the exact class that a court would permit *A* to represent,²⁹ it is very likely that the class would be at least as broad as all purchasers of autos from General Motors in the Los Angeles area.³⁰

Should *A* succeed in winning, therefore, the recovery on behalf of the class would indeed be great. *A*'s principal obstacles to victory are the expense of proving his claim and the enormous delays that he will undoubtedly face. It is possible, however, that proving his case might be somewhat easier than proving other antitrust violations like price fixing.³¹ With the figures presently available concerning the percentage each of the Big Three has in the auto industry, and with their clear history of restrictive practices, this could turn out to be the kind of suit that is won or lost more on the law than the facts. Still, *A* will have to prove the extent of his damages, and this will be no simple task despite some helpful Supreme Court decisions.³² If *A* wins, there still is no deconcentration. *A* will have succeeded only in imposing a substantial penalty on General Motors, and even the substantiality of the penalty pales in comparison with the corporation's sale of autos throughout the United States. Ford and Chrysler would emerge unscathed. The results of victory are not entirely satisfactory if *A*, like the study group, is a true believer in deconcentration. Yet such a suit is profitable and might be valuable in establishing legal doctrine for use in subsequent litigation.

A might add to his complaint in the aforementioned suit the fol-

²⁹ In the recent case of *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), the Supreme Court emphasized the efficacy of class actions in antitrust cases. In *Hawaii*, the Court held that § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), did not authorize a state to sue for treble damages for an injury to its economy. Concerned about the possibility of double recoveries against defendants, the Court suggested that if class actions, which do not require a jurisdictional amount and allow recovery of attorney's fees, were not such a useful remedy, it might be willing to interpret § 4 of the Clayton Act as authorizing *Hawaii's* suit. The Court concluded:

Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries.

405 U.S. at 266.

³⁰ It is doubtful that a court would permit the class to grow much larger. See, e.g., *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970) (holding that the class of all egg consumers in the country is too large). See also *Utah v. American Pipe & Constr. Co.*, 49 F.R.D. 17 (C.D. Cal. 1969); *William Goldman Theaters, Inc. v. Paramount Film Dist. Corp.*, 49 F.R.D. 35 (E.D. Pa. 1969).

³¹ See *Wilson*, *supra* note 7, at 57, 71-72.

³² See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), *on remand*, 418 F.2d 21 (7th Cir. 1970), *rev'd*, 401 U.S. 321 (1971); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), *rev'g* 150 F.2d 877 (7th Cir. 1945). See also *Story Parchment Paper Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927). The only way this type of suit would aid deconcentration efforts is if the recovery in damages was so great as to drive General Motors to the brink of financial ruin.

lowing allegations: that he purchases a new car every year; that unless the market structure is changed he will be forced to bring a new suit each year to recover damages for overpricing; and, finally, that injunctive relief against future violations is really his only effective remedy. Such injunctive relief would, of course, require deconcentration of the industry. Since *A*'s remedy at law may be considered adequate,³³ and since *A* will be hard put to demonstrate with much certainty that overpricing will occur in future years, the extraordinary remedy of injunctive relief will be elusive.³⁴

If *A* owns one share of stock in General Motors, he has a third remedy. He can bring an action alleging that the directors of his corporation are acting in concert with those of Ford and Chrysler to share an illegal monopoly, and to pray for an appropriate remedial decree. Case law is far from clear on the point, but there is authority for such a suit.³⁵

Rule 23.1 of the Federal Rules of Civil Procedure establishes the requirements for bringing a derivative action.³⁶ If, before bringing his suit, *A* requests that the directors voluntarily cease their monopolization activities and they refuse, and if *A* requests that the other share-

³³ With respect to an injunction, the Supreme Court has often noted that "[i]t is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear." *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151, 162 (Hughes, J.). It is clear that normal injunctive principles apply in antitrust cases. 15 U.S.C. § 26 (1970). See also Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 *YALE L.J.* 1010, 1021 n.76 (1952).

³⁴ It is by no means certain, however, that *A* cannot obtain an injunction, since it is also well established that "[s]uch relief is granted to prevent . . . a multiplicity of suits, or where the injury . . . is such, as from its continuance or permanent mischief, must occasion constantly recurring grievance . . ." *Insurance Co. v. Bailey*, 80 U.S. (13 Wall.) 616, 621 (1871); cf. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Apparently New York City is seeking such relief in a suit against General Motors that alleges that the corporation monopolizes the sale of buses for local public transportation. *N.Y. Times*, Oct. 5, 1972, at 81, col. 1.

³⁵ In *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731, 734 (2d Cir. 1953), the court said: "Now there does not seem real doubt but that an antitrust derivative suit will lie; indeed, that seems to follow from the nature of such suits." In *Rogers v. American Can Co.*, 305 F.2d 297 (3d Cir. 1962), the Third Circuit agreed with this conclusion holding that the derivative suit is a necessary remedy in those cases where the corporation's directors are themselves implicated in the antitrust violation. *Accord*, *Ramsburg v. American Investment Co.*, 231 F.2d 333 (7th Cir. 1956). The most recent case on point is *Gottesman v. General Motors Corp.*, 436 F.2d 1205 (2d Cir. 1971), where the court held that a derivative action for damages to the corporation could be maintained but found that no damage had been proved.

³⁶ In brief the rule provides that the plaintiff must have been a shareholder of the corporation at the time of the transaction of which he complains and that his complaint must allege with particularity "the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort." *FED. R. CIV. P.* 23.1.

It is important to note that, as the cause of action arises under a federal statute, federal law governs the manner in which the case shall be tried. Therefore, matters like security for costs are resolved by reference to federal statutes and cases in contradistinction to the manner in which diversity cases are handled under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Compare *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), with *McClure v. Borne Chem. Co.*, 292 F.2d 824 (3d Cir.), cert. denied, 368 U.S. 939 (1961).

holders take action to stop the continuing monopoly and they refuse, *A* will have sufficiently exhausted his corporate remedies. Because monopolization is a continuing violation, *A* will be a shareholder at the time of the wrong of which he complains.³⁷ The suit will not be a collusive one to confer jurisdiction since the Clayton Act plainly establishes a jurisdictional basis for suit.³⁸ Startling though it may be, it appears that the weight of authority holds that *A* can bring his action.³⁹

The foregoing is not meant to be an exhaustive treatment of all possible actions that *A* might bring; nor is it meant to imply that *A* will prevail on the merits. It is only included to suggest that there may well be new avenues by which staunch supporters of comprehensive antitrust enforcement can bring their ideas before the courts. Class actions offer a rich pot for successful litigants, and attorney's fees are also available to those who prevail on the merits. On the whole, the judiciary has been quite receptive to novel theories of antitrust liability. As one plaintiff's lawyer put it: "It has been my experience that opposing counsel in antitrust cases are harder to convince than courts."⁴⁰

Perhaps the study group correctly anticipates that the present Supreme Court will be less vigilant in enforcing the antitrust laws than the "Warren Court," but this is by no means certain.⁴¹ If the study group correctly interprets section 2 of the Sherman Act as barring shared monopolies, and if the government is really as anti-antitrust as the report would have us believe, perhaps there is some great necessity for increased action by private attorneys general.

³⁷ See, e.g., *Palmer v. Morris*, 316 F.2d 649 (5th Cir. 1963); *Hoff v. Sprayregan*, 52 F.R.D. 243 (S.D.N.Y. 1971); *Lawson v. Baltimore Paint & Chem. Corp.*, 298 F. Supp. 373 (D. Md. 1969); cf. *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

³⁸ See generally 3B J. MOORE, FEDERAL PRACTICE ¶ 23.1.15[1], at 23.1-51 to -55 (2d ed. 1969).

³⁹ *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), offers support for such a suit in its suggestion that the class of persons that can seek injunctive relief under the antitrust laws is broader than the class that can seek damages.

Some undoubtedly will argue that deconcentration should be left to the government and when the government declines to sue, no litigation should be entertained. This argument could well prevail, although it may overlook the concept that private citizens stand as private attorneys general vis-à-vis the antitrust laws to insure that they are enforced. Private citizens are intended to serve as a check on the government. Another argument against such suits is that Congress did not intend them. But, a contrary reading of congressional intent may be found in the approval of the Federal Rules of Civil Procedure without any express or implied reservations regarding derivative antitrust actions.

This is not to say that litigation is equally as effective or useful as legislation. It is to say, however, that private citizens may be able to sue when the government does not.

⁴⁰ *McConnell, Proof of Damages in an Antitrust Case*, 7 ANTITRUST BULL. 39, 57 (1962).

⁴¹ Compare M. GREEN, *supra* note 4, at 253, with *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). *Topco* held that horizontal territorial divisions of markets were per se restraints of trade in violation of § 1 of the Sherman Act. In so holding, the Court cleared up some of the confusion created by the opinion of Justice Fortas in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), as to whether such restraints had to be accompanied by price-fixing to be per se violative of the Sherman Act. It is interesting to note that, contrary to a statement in the dissenting opinion of the Chief Justice, there

In any event, it seems that the theories espoused by the study group can be tested in court if someone is willing to sue. Because of the costs of antitrust litigation, it is probably fair to look to the government in the first instance. But, absent government action, it would seem that some private citizen or citizens would willingly risk the necessary capital to have their day in court, at least if the law is as clear and the problems as great as the report indicates. If no one comes forth, we may have to assume that big business is not only buying off the government, but the concerned, the adventuresome, and the public interest bar as well. Or, we may have to conclude that *The Closed Enterprise System* overstates its case.

was uncontradicted testimony at the trial in the district court that Topco's territorial restraints were designed at least in part to control prices and price competition. See Appendix of Parties, at 184-86. It would seem that in completely ignoring the price-fixing aspect of the *Topco* case, the Court made it clear that it was taking an enthusiastic approach to antitrust enforcement, particularly in view of the fact that the development of per se rules makes it considerably easier for plaintiffs to win antitrust cases. 1 L. SCHWARTZ, *FREE ENTERPRISE AND ECONOMIC ORGANIZATION* 5 (3d ed. 1966). For further evidence of the Court's willingness to uphold divestiture, see *Ford Motor Co. v. United States*, 405 U.S. 582 (1972).

BOOKS RECEIVED

- AGENCY-PARTNERSHIP AND OTHER UNINCORPORATED BUSINESS ENTERPRISES. By Harry G. Henn. St. Paul: West Publishing Co., 1972. Pp. xxiv, 396.
- ALIENATION AND ECONOMICS. By Walter A. Weisskopf. New York: E.P. Dutton & Co., 1971. Pp. 202. \$7.95.
- BASIC CIVIL PROCEDURE. By Milton D. Green. Mineola, N.Y.: Foundation Press, 1972. Pp. x, 291.
- CONSTITUTIONAL LAW. By Bernard Schwartz. New York: The Macmillan Co., 1972. Pp. xvii, 424. \$11.95.
- CORPORATE FINANCE: *Cases and Materials*. By Victor Brudney & Marvin A. Chirelstein. Mineola, N.Y.: Foundation Press, 1972. Pp. xxxix, 1196.
- ENTERPRISE ORGANIZATION: *Cases, Statutes and Analysis on Licensing, Employment, Agency, Partnerships, Associations, and Corporations*. By Alfred F. Conard, Robert L. Knauss & Stanley Siegel. Mineola, N.Y.: Foundation Press, 1972. Pp. xlii, 1190.
- ESSAYS ON CONSTITUTIONAL LAW AND EQUITY. By Henry Schofield. New York: Da Capo Press reprint, 1972. Two volumes, pp. 1006.
- EVIDENCE: *Cases and Materials*. By David W. Louisell, John Kaplan and Jon R. Waltz. Mineola, N.Y.: Foundation Press, 1972. Pp. xliii, 1370.
- EXPERIMENTATION WITH HUMAN BEINGS: *The Authority of the Investigator, Subject, Professions and State in the Human Experimentation Process*. By Jay Katz with Alexander Morgan Capron & Eleanor Swift Glass. New York: Russell Sage Foundation, 1972. Pp. xlix, 1159. \$20.00.
- FAMILY LAW: *Cases and Materials*. Second Edition. By Morris Ploscowe, Henry H. Foster, Jr. & Doris Jonas Freed. Boston: Little, Brown & Co., 1972. Pp. lvi, 1124.
- HOUSING CRISIS U.S.A. By Joseph P. Fried. Baltimore: Penguin Books reprint, 1972. Pp. x, 250.
- HUGO BLACK: *The Alabama Years*. By Virginia Van der Veer Hamilton. Baton Rouge: Louisiana State University Press, 1972. Pp. 330. \$10.95.
- LAW, LANGUAGE, AND ETHICS: *An Introduction to Law and Legal Method*. By William R. Bishin & Christopher D. Stone. Mineola, N.Y.: Foundation Press, 1972. Pp. xxix, 1315.
- THE LAWYER. By Albert Gerber. New York: World Publishing Co., 1972. Pp. 338. \$8.95.
- LEGAL REGULATION OF THE COMPETITIVE PROCESS: *Cases, Materials, and Notes on Unfair Business Practices, Trademarks, Copyrights and Patents*. By Edmund W. Kitch & Harvey S. Perlman. Mineola, N.Y.: Foundation Press, 1972. Pp. xxiv, 1208.
- PLANNED UNIT DEVELOPMENT: *New Communities American Style*. By Robert W. Burchell with James W. Hughes. New Brunswick: Center for Urban Policy Research, Rutgers University, 1972. Pp. xvi, 254. \$12.95.
- PRISONERS' RIGHTS. Edited by Marilyn G. Haft & Michele Hermann. New York: Practising Law Institute, Criminal Law and Urban Problems Course Handbook Series No. 45, 1972. Two volumes, pp. 512, 600.

- PRIVATE INTEREST AND PUBLIC GAIN: *The Dartmouth College Case, 1819*. By Francis N. Stites. Amherst: University of Massachusetts Press, 1972. Pp. viii, 176. \$9.50.
- PRODUCTS AND THE CONSUMER: *Deceptive Practices*. By Page Keeton & Marshall S. Shapo. Mineola, N.Y.: Foundation Press, 1972. Pp. xl, 828.
- THE SUPREME COURT AND SOCIAL SCIENCE. By Paul L. Rosen. Urbana: University of Illinois Press, 1972. Pp. xii, 260. \$9.50.

