

Nicolas Charbit
Sonia Ahmad
Editors

Albert A. Foer

A Consumer Voice in the Antitrust Arena *Liber Amicorum*

Richard Brunell, Michael Carrier, Peter Carstensen,
Cecilia (Yixi) Cheng, Harry First, Franklin Foer, Eleanor Fox,
Douglas Ginsburg, Warren Grimes, John Kirkwood, John Kwoka,
Robert Lande, Kexin Li, Robert Litan, Barry Lynn, Julián Peña,
Christopher Sagers, Jonathan Sallet, Steve Shadowen,
Maurice Stucke, Randy Stutz, Sandeep Vaheesan,
Spencer Weber Waller



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ALBERT A. FOER

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Liber Amicorum

Foreword by Diana Moss

Introduction by Robert Lande & Randy Stutz

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Foreword

DIANA L. MOSS*

It is a great privilege to introduce this *liber amicorum* honoring Albert A. Foer. Known to almost all colleagues and friends as Bert, he will without doubt delve into these many diverse and excellent contributions with enthusiasm and curiosity. Indeed, perhaps the greatest value of any tribute to a life's achievements is to put the work of the subject into a deeper and richer perspective. For Bert – who took the unusual and more arduous path of advocating for change, rather than promoting the status quo – the diversity of topics in the chapters in his *liber amicorum* achieves just that.

After a career in the family retail business and in leadership positions at the US Federal Trade Commission, Bert took the bold step in 1998 of founding a new, unusual, and much-needed organization in Washington DC – the American Antitrust Institute (AAI). By all measures, AAI is now the longest-standing and the leading progressive competition research, education, and advocacy organization in the US. The founding of AAI was the culmination of Bert's deep commitment to the importance of the consumer in the design and intent of US antitrust law, a growing concern over the effect of conservative influence on weakening antitrust enforcement, and a bit of an itch to launch a start-up (but without venture capital).

Bert's role in competition advocacy and as a reformer is known best in the US. But it also known abroad. Indeed, as Bert and I worked together to make the AAI a going concern in the early years, one of the most asked questions was whether the AAI model might be appropriate, or at least scalable, in other countries. Back in the US, the AAI was increasingly in the spotlight, making the progressive case for invigorating antitrust. This happened regularly at congressional hearings, in amicus briefs filed in appellate courts, in academic and industry conference venues, and in the media. By this time Bert – who notoriously walked or took the metro to almost all meetings in Washington DC, regardless of the weather – was getting a workout.

* President, American Antitrust Institute.

As Bert carefully added expertise to the AAI staff, the potential for organic growth in competition research, education, and advocacy became clear. It was under his leadership that the notion of the antitrust “enterprise” came into focus. Indeed, one of Bert’s most significant contributions was a crystalline sense of the underlying order in the system of antitrust enforcement that is unique to the US. To this day, the complementary but often fraught nature of the public and private enforcement partnership remains a central theme in AAI’s advocacy. Bert’s early responses to attacks on the antitrust consumer class-action device – which is the major vehicle for obtaining restitution for victims of antitrust crimes – have paved the way for future generations of antitrust lawyers to take up careers as private “attorneys general.”

Many of the milestones that define Bert’s work and achievements come through in the contributions to Bert’s *liber amicorum*. The essays frame out the many contours that collectively define Bert’s mission to found a unique and invaluable organization and to advance consumer-focused competition advocacy. For example, the essays that take up the question of “Why Antitrust? *Raison d’être*” are central to motivating and exploring the underpinnings of Bert’s commitment to advocacy.

The *liber amicorum* branches into the many areas that reveal Bert’s keen eye for spotting future important issues and the impact of AAI’s highly respected legal, economic, and institutional analysis. We thus see essays that cover important ground in the domain of “Enforcement and Remedies,” including the intersection between competition and intellectual property law, the interplay between public and private antitrust remedies, and the uniquely challenging area of criminal section 1 enforcement. These dovetail with essays on labor-market and other buyer power concerns – issues on which Bert focused much of his energy while leading the AAI from 1998 through 2014.

As progressive advocates advance ideas and proposals for reforming (but also creating) competition laws in the US, Europe, and elsewhere, Bert’s contributions come into clear focus. The reform “movement” is still in its infancy as competition authorities grapple with issues posed by the growth of dominant firms and the corrosive effects of cartels. AAI’s impact in advancing the case for constructive reform rests squarely on principles that were established early on. These include, namely, an evidence-based case for the harmful effects of lax enforcement, the vital role of private enforcement, and a holistic approach that gives equal attention to all areas of enforcement and draws on the full complement of available statutory tools.

The essays on “Antitrust Reform and Way Forward” allow the reader of this *liber amicorum* to transition through Bert’s focus on the very difficult calculus underlying not only the need for reform, but what that reform might ultimately look like. This discussion highlights a major failing of antitrust, at least in the US, as some courts have applied a narrowly interpreted consumer welfare standard, and set up almost insurmountable hurdles for plaintiffs, with little to no focus on the consumer.

In concluding with “Views from Abroad,” the *liber amicorum* comes full circle in highlighting Bert’s deep appreciation for and dialogue with international competition enforcers. Bert was a regular presence at the International Competition Network and at competition conferences and gatherings worldwide. In his travels, Bert took the unique “bilateral” approach of educating enforcers and lawmakers about the US experience and bringing home the experiences, questions, cultural influences, and challenges faced in other jurisdictions. In a world where the US approach to competition enforcement has until recently been assumed to be the working “model,” Bert’s approach was refreshing, humble, and open-minded.

I hope all who read this *liber amicorum* do so with Bert Foer’s unique and unusual contributions to antitrust enforcement and competition policy in mind. Individuals like Bert, that devote their talents, energy, and careers in service of the public interest, play a special role in our societies and our political systems. As the diversity and scope of the contributions to Bert’s *liber amicorum* illustrates, such work is necessary and its value immeasurable.

Introduction

Bert Foer: The Optimistic Visionary

ROBERT H. LANDE* AND RANDY M. STUTZ†

When Bert Foer got the idea for the American Antitrust Institute (AAI) a generation ago, there was no other public interest organization in the United States – and to our knowledge in the world – dedicated to promoting robust antitrust enforcement. Bert convinced others that the organization would make an incredibly valuable contribution to our nation, and to its economy and consumers. But in the beginning, there were questions.

Many said, “It’s a great idea, but I’m skeptical.” They asked, “How will you raise enough money? How will you fund it?” Bert responded to this with his usual optimism. No matter how many rejections and setbacks he encountered, he persisted and he innovated. And he kept alive his hope that he could launch, sustain, and enhance AAI. Although AAI never had all the resources Bert wanted, AAI always had enough to get a great deal accomplished.

The second most common question was: “Could this AAI ever become a serious player in the antitrust world?” That was a fair question. After all, any individual can testify before an agency or before Congress, file an amicus brief, write a white paper or article, talk with the media, you name it. What would the existence of an organization like AAI add?

If we had to sum up what we believe Bert’s answer to this question would be in one sentence, it would be Bert’s belief that, “With ideas, hard work, vision, organization, and leadership, the whole will be so much more than the sum of its parts.”

* A founding and current member of the board of directors of the American Antitrust Institute, and Venable Professor of Law, University of Baltimore School of Law.

† Vice president of legal advocacy, American Antitrust Institute. Hired by Bert Foer in 2009.

It was certainly fair to wonder whether AAI could ever become more than the sum of its parts, and whether this advocacy organization could make any real difference in the antitrust world. Bert recognized early that, because AAI would not uncritically accept the status quo, powerful forces would always be working to marginalize or even to destroy it. To succeed, to become a serious voice in the trade regulation community, AAI would have to rely on the power of its ideas, and it would have to produce work of a caliber and quality that rivaled the government agencies and white shoe defense firms.

Affirmation came, appropriately, from the reactions of the market AAI had chosen for itself: the world of antitrust. Although the success of any consumer non-profit organization often defies easy measurement, evidence of AAI's impact on the antitrust community soon became impossible to miss.

Why else, for example, were large international companies routinely coming to AAI asking for its support, or at least that AAI not oppose its deals or programs? Why did they try their best to explain to AAI why their actions were procompetitive, and why their critics were wrong? Why did these sophisticated firms care what AAI thought or did?

Why did AAI quickly become inundated with requests for amicus briefs and white papers, to the point that it had to hire full-time employees who spent most of their time writing them?

Why was AAI fielding so many hundreds of media calls, and why were dozens of reporters, including from the *Wall Street Journal*, the *Washington Post*, and the *New York Times*, attending AAI's press conferences? Why were they calling and quoting AAI?

Why were government officials routinely asking AAI to comment on programs or items they were working on, and to provide a counterweight to the pressure they were receiving from various segments of the business community? Why did government officials become so upset when AAI disagreed with their enforcement decisions?

Why did congressional committees frequently ask AAI officials to testify, and why did they so often consult with AAI informally for ideas and suggestions? Why did the ABA Antitrust Section and an incredibly diverse array of other organizations routinely invite AAI employees and advisors to participate in their conferences and share their views?

Why was Brussels calling AAI and asking it to neutralize the views of conservative US antitrust enforcers who were coming to patronizingly explain to the Europeans that "everyone" in the US believed a certain issue should be decided a certain way, and even offering to pay to fly someone over on short notice?

There is an old saying that the plural of anecdote is data. These developments and many more like them together constitute the data that show that the antitrust

world believes AAI has made and continues to make an important difference. The market has spoken!

These stories, however, do not really reveal another effect that AAI has had on the antitrust world. A psychological effect on many of its participants that is probably impossible to quantify yet might be every bit as significant as those more tangible markers of its success. AAI has become a beacon and a home for progressive antitrust thinkers, whose voices may have otherwise been lost, for decades, in a conservative wilderness.

Bert's idea of the AAI and its existence quickly became an organizing focus for consumer-oriented members of the antitrust community. One that has helped give those who believe in competition the confidence that they can continue to fight the good fight, even during dismal times. Inspiration, hope, and a platform and gathering-place for leading progressive thinkers is perhaps Bert's greatest gift to the antitrust field and to everyone who believes in helping consumers and the economy through robust antitrust enforcement.

So many in the antitrust world – including almost all of the authors of the articles that follow – will candidly tell anyone who asks how much it means to them to have the AAI exist as an organization. And how much they are heartened by the knowledge that they are not alone in their fight to save antitrust. Bert and his idea for the AAI have inspired everyone who cares about progressive antitrust to keep fighting, no matter how strenuously the vast resources that promote a hands-off approach are working against them.

Over the last generation there have been countless setbacks for antitrust, and many reasons for despair on the part of those who care about competition and consumers. But despite these many challenges, AAI has evolved into what the chief judge of a federal court recently described as “a titan in the antitrust arena.”¹ Bert's achievement in creating this organization – his ideas, leadership, judgment, inspiration, and charisma, and his amazing personal optimism and rare abilities to work with, inspire, organize, and lead the diverse collection of skeptics and naysayers who have been unwilling to accede to the wishes of powerful monopolies and cartels – has been nothing short of astonishing.

We cannot imagine anyone else who could have threaded this needle. Bert, you are a hero to us all. We join with the authors in this *Liber Amicorum* to honor you, thank you, and to offer you our utmost respect and admiration.

1 *Conrad v. Jimmy John's Franchise, LLC*, No. 318-CV-00133NJRJD, 2019 WL 2754864, at *3 (S.D. Ill. May 21, 2019).

Contributors

Richard M. Brunell
Hilliard Shadowen

Michael A. Carrier
Rutgers Law School

Peter C. Carstensen
*University of Wisconsin
Law School*

Cecilia (Yixi) Cheng
*US Department
of Justice, Antitrust
Division*

Harry First
New York University

Franklin Foer
The Atlantic

Eleanor M. Fox
New York University

Douglas H. Ginsburg
*US Court of Appeals
for the District
of Columbia Circuit
George Mason University*

Warren Grimes
Southwestern Law School

John B. Kirkwood
*Seattle University School
of Law*

John Kwoka
Northeastern University

Robert H. Lande
University of Baltimore

Kexin Li
*Skadden, Arps, Slate,
Meagher & Flom*

Robert Litan
Korein Tillery

Barry C. Lynn
Open Markets Institute

Julián Peña
Allende & Brea

Christopher Sagers
*Cleveland State
University*

Jonathan Sallet
*Benton Institute for
Broadband & Society*

Steve D. Shadowen
Hilliard Shadowen

Maurice Stucke
University of Tennessee

Randy M. Stutz
*American Antitrust
Institute*

Sandeep Vaheesan
Open Markets Institute

Spencer Weber Waller
*Loyola University
of Chicago*

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At a time of reckoning for the future of antitrust, this *Liber Amicorum* brings together a diverse collection of today’s leading thinkers to pay tribute to Albert Allen (Bert) Foer, founder of the American Antitrust Institute (AAI). In doing so, it illustrates the intellectual landscape of the antitrust debate, with articles that go to the heart of its goals, and others that light a path forward towards reform. Others yet delve into the pressing issues of enforcement and remedies. The variety of voices included characterize the breadth of perspectives that Bert cultivated at the AAI, from lawyers and academics to enforcers and journalists. In providing a platform for multidisciplinary discourse through the AAI, Bert helped create the foundation on which today’s movement rests, a public citizen’s voice spotlighting competition as the basis of diversity and dynamism.

Foreword by Diana Moss - Introduction by Robert Lande & Randy Stutz

” Bert Foer is a pioneer of progressive antitrust enforcement who never wavered in his devotion to protecting the little guy. This wonderful volume of essays from the thought leaders Bert inspired is a fitting tribute to his towering achievements and should be required reading for the next generation of advocates fighting for better, stronger antitrust laws that protect our citizenry and our democratic society. “

Amy Klobuchar, United States Senator

” Bert Foer has been an effective advocate for a renewed examination of the U.S. competition laws, particularly with his views on antitrust enforcement. We at the Antitrust Division are fortunate there is someone as brilliant as Bert out there to pressure test and improve our approach, and to do so in a civil manner. His work indeed has sharpened my thinking and has forced me to continuously re-examine my own views. The intellectually diverse contributions to this volume are a testament to the outsize influence Bert has had across the field of competition law. “

Makan Delrahim, Assistant Attorney General, United States Department of Justice

DETAILS

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