Fall 2013

Defying Conventional Wisdom: The Case for Private Antitrust Enforcement

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GEORGIA LAW REVIEW

VOLUME 48 FALL 2013 NUMBER 1

ARTICLES

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I. INTRODUCTION

Recent judicial decisions reflect great skepticism about private antitrust enforcement. Most obviously, the Supreme Court in *Bell Atlantic Corp. v. Twombly*[1] asserted that private antitrust class actions can force defendants to settle even meritless cases,[2] a phenomenon some commentators have labeled legalized "blackmail."[3] Doubts about private antitrust enforcement have contributed to the courts taking extraordinary measures. In *Twombly* itself, the Supreme Court relied on those doubts in making it more difficult for plaintiffs to survive a motion to dismiss, a modification of the legal standard that arguably conflicts with the Federal Rules of Civil Procedure.[4] Similarly, various courts have followed *Twombly*'s lead—and relied on its assertion of the dangers of antitrust class actions—in ratcheting up the showing plaintiffs must make to certify a class.[5] Courts in recent years have also made it easier for defendants to obtain summary judgment in private antitrust cases.[6] These changes have affected not only antitrust claims but private actions in

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[1] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[2] *Id.* at 559.

[3] *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) ("[Judge Friendly called] settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.' ").

[4] *See* Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. 355, 399–400 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542143 (noting the "Court arguably modified the pleading standard without following proper procedure").

[5] *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008) ("Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23."); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) ("Certification is proper only if the trial court is satisfied after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." (internal quotation marks omitted)).

[6] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (summary judgment granted) ("[T]o survive a motion for summary judgment or for directed verdict a plaintiff seeking damages for violations of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." (internal quotation marks omitted)); *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984) (affirming directed verdict in favor of plaintiffs) ("The correct standard [for directed verdict] is that there must be evidence that tends to exclude the possibility of independent action . . . .").

general.[7] Some commentators suggest that judicial hostility to private antitrust claims has caused a shift in substantive antitrust law, one that also hinders public enforcement.[8] Meanwhile, the prevailing view is that private antitrust enforcement causes all kinds of mischief.[9]

It was not always so. For many years, the predominant belief was that private antitrust enforcement plays a crucial—even essential—part in protecting our economy from illegal conduct.[10] Courts lauded plaintiffs' antitrust lawyers as "private attorneys general" and extolled their many virtues.[11] They expressed reluctance to grant motions to dismiss or for summary judgment

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[7] *See generally* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) (discussing the impact of *Twombly* on private actions).

[8] *See, e.g.*, Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 41 (2008) (arguing judicial concerns about private antitrust enforcement have resulted in doctrines that undermine public enforcement).

[9] *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Antitrust Modernization Commission Remarks 9–10 (June 8, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-AMC%20Remarks.June8.final.pdf (arguing that treble damage class action cases "are almost as scandalous as the price-fixing cartels that are generally at issue . . . . The plaintiffs' lawyers . . . stand to win almost regardless of the merits of the case."); *see also* FTC: WATCH No. 708, Nov. 19, 2007 at 4 ("[P]rivate rights of actions U.S. style are poison." (quoting William E. Kovacic speaking at an ABA panel on Exemptions and Immunities where he summarized the conventional wisdom in the field but was not necessarily agreeing with it)).

[10] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130–31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws."); *see also* Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."), *overruled on other grounds by* Copperweld Corp. v. Independence Tribe Corp., 467 U.S. 752 (1984); Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 318 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.").

[11] *See* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972) ("By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as private attorneys general." (internal quotation marks omitted)); *see also* Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) ("[U]ntil there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4 . . . is better served by holding direct purchasers injured . . . ."); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (noting that prerequisites for class certification are "readily met in certain cases alleging . . . violations of the antitrust laws").

and favored class certification in antitrust cases.[12] High government officials at the Department of Justice (DOJ) praised private enforcement.[13] And, of course, Congress itself long ago enacted a private right of action under federal antitrust law,[14] and then expanded that private right of action,[15] one that the courts have now significantly undermined.

The issue, then, is whether this shift in attitude is justified. Putting aside any concerns about the legitimacy of courts resisting a private cause of action created by the legislature, have the critics of private antitrust enforcement made a solid evidentiary case for their views and for the legal reforms they have effected? This Article contends they have not.

In seeking to answer that question, the Article analyzes the effects of private antitrust enforcement as it actually occurs in the United States. It places a special emphasis on class actions, the most important type of private cases. By doing this, it is able to assess whether, overall, private enforcement creates significant benefits for society and, if so, the nature of those benefits. Our

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[12] *See* Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962) (denying summary judgment) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot . . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of even handed justice." (footnote omitted) (internal quotation marks omitted)); *see also* Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 505 (1969) ("Since summary judgment in antitrust cases is disfavored . . . the claims . . . in this case should be read in the light most favorable to petitioner.").

[13] *See Study of Monopoly Power: Hearing Before the H. Comm. on the Judiciary*, 82 Cong. 15 (1951) (Statement of H. Graham Morison, Assistant Attorney General in charge of Antitrust Div., Dep't of Justice) ("I would say within the last 10 years . . . we have for the first time since the history of the enactment of the Clayton Act and the Sherman Antitrust Act, begun to see the development of private litigation under the triple damages statute which is of *substantial help* . . . . We begin to feel that we have some companion element of assistance in this which we have never had before. . . . Now presumably if you did away with the triple damages suit entirely and still wanted substantial enforcement in order to have economic freedom you would have to quadruple the size of the Antitrust Division.").

[14] Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (repealed 1955 having been superseded by § 4 of the Clayton Act in 1914).

[15] Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15 (2012)) (expanding remedy provided by the Sherman Act § 7 to persons injured as a result of violations of any of the antitrust laws); Clayton Act, ch. 323, § 5, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 16 (2012)) (enumerating a final judgment or decree in proceeding by government as prima facie evidence in case brought by a private party); Clayton Act, ch. 323, § 16, 38 Stat. 730, 737 (1914) (current version at 15 U.S.C. § 26 (2012)) (providing injunctive relief for private parties).

examination also should help suggest areas where the private litigation system could be reformed and how those reforms should be structured.

This Article proceeds in three parts. Part II suggests issues it would be useful to address in determining the benefits and costs of private antitrust enforcement. The Article then relies on empirical evidence and analysis either to resolve those issues or, where that is not possible, to identify further appropriate empirical efforts and analysis. In undertaking this effort, Part II relies in large measure on our original empirical research consisting of summaries of sixty recent large and significant private antitrust cases.[16]

Part III then summarizes and assesses the major criticisms that have been leveled against private antitrust enforcement. We pay particular attention to the positions of those who have contested our earlier arguments in favor of private antitrust actions, including Daniel Crane of the University of Michigan and various officials at the Department of Justice. We are grateful for the attention our work has received as it offers hope for a focused debate and the potential for progress in understanding this important issue. A robust exchange serves as a crucible for discovering the truth.

Part III explains that, although critics of private antitrust enforcement make many arguments, they can be placed in two

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[16] Forty of these cases were analyzed in the authors' earlier article. The current Article builds upon and incorporates this work. *See generally* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008) [hereinafter Lande & Davis, *Benefits*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661. For the underlying case studies, see generally Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: Forty Individual Case Studies* (Univ. of S.F. Law Research Paper No. 2011-22, 2008) [hereinafter Lande & Davis, *Forty Case Studies*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1105523, and Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315 (2011) [hereinafter Lande & Davis, *Comparative Deterrence*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693. Twenty additional cases were analyzed in a subsequent article. *See generally* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269 (2013) [hereinafter Davis & Lande, *Empirical Assessment*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132981. For the underlying twenty case studies, see Joshua P. Davis & Robert H. Lande, *Summaries of Twenty Cases of Successful Private Enforcement* (Univ. of S.F. Law Research Paper No. 2013-01, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961669.

broad categories, and there is a strong tension between them. First, critics claim that private enforcement does too little—that it does not adequately compensate victims of antitrust violations, for example, or that it insufficiently deters antitrust violators. The natural conclusion from this criticism would be that private enforcement should be strengthened. But the critics instead tend to suggest that private enforcement is so deeply flawed that it should be restricted further or abandoned in its entirety.[17]

By contrast, the second type of criticism is that private antitrust enforcement does too much—that it overcompensates plaintiffs and overdeters anticompetitive conduct. Proponents of this view also tend to call for the elimination or curtailment of private antitrust litigation.

Critics of private enforcement often support their arguments by noting that certain types of results from private enforcement are possible: private cases *could* result in settlements even if they completely lack merit; the settlements *could* consist largely of dubious coupons, obsolete products, worthless discounts, or cy pres distributions; and so on. We do not dispute that each of these outcomes *could* occur.

But we dispute how often these results *do* occur. Do 95% of private cases lack merit or result in worthless remedies that fail to benefit the victims of the violations? Or are only 5% meritless? The difference is crucial. Yet critics assert that these scenarios are *possible* without ever presenting reliable evidence that they are *common or typical.* Indeed, often critics of private antitrust actions do not even present a single well-supported anecdote to illustrate assertions such as that in class action cases "issuing [class members] a check is often so expensive that administrative costs swallow the entire recovery."[18] And critics never present systematic, reliable evidence that these outcomes occur a high proportion of the time. Yet, after critics note that these scenarios

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[17] These same critics also typically assert that the European Union and other jurisdictions without private rights of action or with only limited rights of action should not expand private enforcement. For information about the current state of private enforcement in Europe and around the world see generally THE INTERNATIONAL HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW (Albert A. Foer & Jonathan W. Cuneo eds., Edward Elgar, 2010) [hereinafter AAI HANDBOOK].

[18] Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 682–83 (2010).

are *possible*, they then declare victory by proclaiming them to be typical or common.

After separating evidence from anecdote, and analyzing our own original empirical research as well as the empirical findings of others, we come to the conclusion that both broad categories of criticisms of private enforcement are so overstated that the resulting policy implications are the opposite of what many critics contend. Private enforcement on the whole likely does significantly undercompensate and underdeter, but not so woefully as to be essentially useless and beyond reform. On the other hand, and as somewhat of a corollary, it is highly unlikely that private enforcement—again, on the whole—overcompensates or overdeters. The call for the curtailment or abolition of private antitrust enforcement, then, is likely not only unwise, but also counterproductive. Much more useful would be consideration of ways to strengthen private enforcement so that it can serve as a more effective means of compensating victims and deterring potential transgressors.

II. ASSESSING PRIVATE ENFORCEMENT

A. WHAT WE WOULD LIKE TO KNOW

Before assessing the virtues and vices of private antitrust enforcement, it is worthwhile to consider what information and analysis would be helpful. Antitrust enforcement can serve two purposes: compensation and deterrence.[19] A complete analysis of private antitrust enforcement would involve assessing how well it fulfills each purpose and, perhaps, comparing it to the contributions of public enforcement.

1. Compensation. As to compensation, in an ideal world, we might identify every antitrust violation (detected and undetected),

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[19] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) ("But § 4 has another purpose in addition to deterring violators . . . ; it is also designed to compensate victims of antitrust violations for their injuries."); *see also* Am. Soc. of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 575–76 (1982) ("[T]reble damages serve as a means of deterring antitrust violations and of compensating victims . . . ."); Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 314 (1978) ("The Court has noted that § 4 has two purposes: to deter violators and deprive them of the fruits of their illegality, and to compensate victims of antitrust violations for their injuries." (internal quotation marks omitted) (quoting *Illinois Brick*, 431 U.S. at 746)).

determine the amount of harm each victim suffered, and assess whether private or public enforcement best compensated victims for that harm. We might also determine every time a private plaintiff obtained compensation in excess of actual damages. Of course, this is not possible. We of course do not know of undetected antitrust violations, we can rarely, if ever, be certain about the merits of those alleged violations that have been detected, and uncertainty plagues any inquiry into how much harm any victim suffered.

A more feasible approach is available. To the extent the inquiry is comparative, we know that public enforcement functions almost purely as a deterrent.[20] It does not generally attempt to provide compensation to injured victims.[21] The issue, then, is whether private enforcement obtains any significant compensation in the right cases and confers it on the right parties.

Various categories of information could be suggestive in these regards. The first category is how much plaintiffs have recovered in private antitrust cases. If the amount is trivial, then private antitrust enforcement does not seem to be very effective.[22] Also, compensation in certain cases may be perceived as particularly valuable, such as when foreign actors prey on Americans.

Second, a systematic analysis would be helpful of whether plaintiffs recovered when they should (or did not recover when they should not).[23] Assuming such a systematic analysis is not

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[20] *See* ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 1022 (2d ed. 2008) ("The importance of each aim [deterrence, compensation, and punishment] varies among legal systems, but deterrence is often a preeminent goal, especially for public enforcement officials.").

[21] *See id.* at 1088 ("[P]rivate suits provide a means for compensation of the victims of antitrust violations, something that public enforcement actions may not be able to do or will only partially do."); *see also* U.S. DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2003–2012, at 11 n.15, http://www.justice.gov/atr/public/workload-statistics.html (last visited Nov. 1, 2013) ("Frequently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damage actions filed by the victims.").

[22] *See* Lande & Davis, *Benefits*, *supra* note 16, at 892–93 (indicating that recoveries in a case study of forty private cases totaled between $18.006 and $19.639 billion).

[23] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.1, at 593 (7th ed. 2007) ("The objective of a procedural system, viewed economically, is to minimize the sum of two types of cost. The first is the cost of erroneous judicial decisions.") (the other is minimizing the cost of the litigation system); *see also* David McGowan, *Between Logic and Experience: Error Costs and* United States v. Microsoft Corp., 20 BERKELEY TECH. L.J. 1185, 1186 n.2 (2005) (defining error costs as "the social cost of mistaken decisions," a false positive error

possible, it could prove useful to know about: (1) cases in which plaintiffs recovered substantial sums and their claims appear to have been meritorious;[24] (2) cases in which plaintiffs recovered substantial sums and their claims appear not to have been meritorious;[25] (3) cases in which plaintiffs failed to recover and their claims appear to have been meritorious;[26] and (4) cases in which plaintiffs failed to recover and their claims appear not to have been meritorious.[27] This analysis might indicate whether private enforcement has resulted in appropriate or inappropriate compensation.

A third category of information pertains to the allocation of funds. Any recoveries in private cases might not reach the actual injured parties for various reasons. The recovered money might go to the attorneys who prosecute the litigation or the claims administrators who oversee the allocation or payment process.[28]

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cost as "when a court wrongly finds liability based on conduct that is actually efficient," and a false negative error cost as "when a court wrongly finds no liability based on conduct that is actually inefficient").

[24] *See generally* Lande & Davis, *Benefits*, *supra* note 16 (analyzing forty cases and plaintiffs' recoveries).

[25] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (implementing a higher pleading standard out of concern that defendants would be forced to settle "even anemic cases" due to fear of excessive costs); *see also* Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 343 (1991) (Scalia, J., dissenting) (cautioning that increasing courts' jurisdiction on antitrust matters may induce frivolous claims and trivialize the federal courts).

[26] *See* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 129 (2003) (defining false positive as "a meritorious suit that is dismissed . . . or not filed because of the fear of dismissal"). Note that undercompensation can occur even if plaintiffs obtain some relief. For example, Professor Connor reported that every DOJ criminal conviction for collusion in his sample resulted in at least one private follow-up case. These cases, however, produced a median recovery of only approximately 30% of the cartels' overcharges, and often considerably less. *See* John M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What Do the Data Show?*, 11–14 (AAI Working Paper No. 12-03, 2012), *available at* http://www.antitrustinstitute.org/~antitrust/sites/default/files/WorkingPaperNo12-03.pdf (discussing private action recoveries). This means it is very common for the current system of private enforcement to significantly undercompensate the victims of illegal collusion. This undercompensation is rarely even noted in analyses of the issues, and even more rarely is it factored into policy analysis. Author Lande is working with Professor Connor to arrive at a more precise estimate of the preliminary figure presented in Professor Connor's cited work.

[27] *See* BONE, *supra* note 26, at 128–30 (explaining that the opposite of a false positive or false negative is a true positive or true negative—in effect when the court's decision was correct).

[28] *See* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1111–12 (1996) [hereinafter Koniak & Cohen, *Cloak*] ("Thus, [defendants] are well-

Further, the plaintiffs may not be the harmed parties.[29] This can occur in part because of the structure of antitrust doctrine. In particular, in federal antitrust cases, only those who pay overcharges directly to antitrust violators (so-called "direct purchasers")—not those who are harmed further down the chain of distribution (so-called "indirect purchasers")—generally may seek to recover damages.[30] Indirect purchasers may recover damages only in state law actions.[31] Information would be helpful about whether recoveries go to those who actually suffer harm and about the portions of recoveries that go to those who did not suffer harm. To the extent such information is not available, theoretical analysis may help. An inquiry into the likely effects of an antitrust violation may cast light on whether the parties who recover damages are apt to be the ones that were injured.

A similar inquiry can help to determine whether private enforcement is likely to result in overcompensation or undercompensation.[32] One issue is whether the outcome of trial

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positioned and well-motivated to propose a deal that gives class counsel a huge slice . . . of a small pie . . . and pretty well-assured that class counsel will accept it, given how expensive and risky it can be to get a class action certified and ready for trial."); *see also* Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 214 (2005) ("Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing."). Similarly, Steve Newborn, co-head of Weil, Gotshal & Manges's Antitrust/Competition practice, was asked which areas of antitrust need reform and replied, "Class actions: they are increasingly beneficial only to plaintiffs' law firms and not to consumers." *Q&A with Weil Gotshal's Steven A. Newborn*, LAW360 (May 26, 2009, 12:00 AM), http://www.law360.com/competition/articles/1033589; Crane, *supra* note 18, at 683 (asserting that in private antitrust class actions "administrative costs swallow the entire recovery").

[29] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 764–65 (1977) (Brennan, J., dissenting) ("For in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers pass on the bulk of their increased costs to consumers farther along the chain of distribution.").

[30] *See id.* at 746 ("It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations.").

[31] *See* California v. ARC Am. Corp., 490 U.S. 93, 105–06 (1989) (holding that state law allowing indirect purchasers' recovery is not preempted by federal antitrust law under the decision in *Illinois Brick*; the Court also indicated that Congress intended the Sherman Act to supplement, not replace, state common law and statutory remedies).

[32] *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 122–24, 130–36, 158–68 (1993), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134822 (demonstrating that so-called "treble" damages are actually only approximately compensatory damages); *see also* Lande & Davis, *Benefits*, *supra* note 16, at

tends to be excessive or insufficient to compensate injured parties.[33] Nominally, plaintiffs pursuing federal—and some state—antitrust claims are entitled to treble damages.[34] That may mean their recovery will be excessive. Other considerations, however, may suggest otherwise, such as limitations on the availability of prejudgment interest and on various categories of damages.[35] The dynamics of settlement negotiations may also prove crucial.[36] In this regard, it is important to keep in mind not only the incentives of the parties but also those of the attorneys who represent them. This point applies with particular force to the plaintiffs' attorneys in class actions, who, as has long been recognized, exercise a great deal of control over litigation. This theoretical discussion—particularly when combined with the empirical evidence discussed above—may illuminate whether plaintiffs are likely to receive too much or too little compensation as a result of private antitrust enforcement.

2. Deterrence. Some of the information relevant to compensation also bears on the issue of deterrence. Again, in an ideal world, we would know of every antitrust violation and the harm it caused. We would also know the odds of the actors being caught and punished. We could then compare that information to determine whether the deterrence effects of private enforcement—and public enforcement—are appropriately calibrated. We would also like information about anticompetitive and procompetitive behavior that never occurred because of the risk of antitrust sanctions.[37] Again, however, reality forces us to work with more limited information.

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883 n.21 (listing the specific categories of damages necessary to compensate antitrust victims).

[33] *See* Lande, *supra* note 32, at 159–68.

[34] 15 U.S.C. § 15(a) (2012); *see, e.g.*, COLO. REV. STAT. § 6-4-114 (2012) ("[S]uch person may recover three times the actual damages."); HAW. REV. STAT. § 480-14 (2012) ("[T]o secure threefold damages for injuries."); MINN. STAT. § 325D.57 (2012) ("[S]hall recover three times the actual damages sustained.").

[35] *See* Lande, *supra* note 32, at 122–24, 130–36 (discussing damages categories not permitted under antitrust laws).

[36] Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 FORDHAM L. REV. 51, 77 (1988) ("[A]ttorneys have an economic incentive to effectuate settlements earlier in the litigation and may pressure clients to accept a settlement that is less than what could have been achieved. . . .").

[37] *See* GAVIL, KOVACIC & BAKER, *supra* note 20, at 1111 ("The mere filing and prosecution of an antitrust case sometimes alters the defendant's conduct.").

A first cut at the likely deterrence effects of private enforcement might be possible by assessing the total amount of money paid by defendants. Shy of obtaining that information, some measure of defendants' expenditures would be useful.[38]

Also, much like with compensation, it is important whether defendants are mulcted in the right cases. A sense of the correlation between actual antitrust violations and antitrust penalties would allow for an assessment of what are often called Type I and Type II errors.[39] These types of errors involve, respectively, defendants incurring sanctions when they should not and defendants not incurring sanctions when they should. A systematic account of the incidence of these errors would be ideal. Without that systematic account, representative—or at least illustrative—information would be helpful.

Further, comparing the efficacy of private and public enforcement makes sense. Toward this end, it would be valuable to know the total monetary burden imposed on antitrust defendants by private enforcement as well as the burden of sanctions imposed by government—or, as an imperfect substitute, by important governmental actors such as the Department of Justice.[40] That might be able to tell us which has the greater total deterrence effects.[41] It would also be useful to see the impact of antitrust litigation on stock prices, which provide another way of measuring the incentives litigation creates to abide by the antitrust laws.[42]

Information about the kinds of cases in which private enforcement occurs could also elucidate how much it contributes to deterrence. For example, private plaintiffs might play a

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[38] *See* Lande & Davis, *Benefits*, *supra* note 16, at 892–97 (analyzing private antitrust recoveries and comparing the deterrence effects of private and criminal litigation).

[39] *Compare* Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1670 (1983), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684227 (defining Type I error costs as when courts prevent beneficial behavior and Type II error costs as when courts allow undesirable behavior), *with* BONE, *supra* note 26, at 129 (defining Type I errors as "false positives" that occur when "meritorious" suits are either dismissed or not filed and Type II errors as "false negatives" that occur when a "frivolous suit" is not dismissed).

[40] *See* Lande & Davis, *Benefits*, *supra* note 16, at 892–95 (comparing private recoveries with criminal fines).

[41] *See id.* (arguing that private cases provide more deterrence than criminal cases).

[42] *See* discussion *infra* Part I.B.*4*.

complementary role to public enforcement if they bring cases in which there is no government action or no such action has occurred until the private plaintiffs file suit.[43] Private plaintiffs, for example, may take on rule of reason cases while at least some government enforcers—notably, the Department of Justice—may tend to act only in per se cases.[44] Or there may be evidence that the government is risk averse and will pursue only those actions it is almost certain to win, whereas private plaintiffs may be willing to take somewhat greater chances.[45] On the other hand, if private plaintiffs bring cases attacking only the same behavior that the government has already prosecuted, that would strike against the value of private enforcement.

Further, the analysis of the likely outcomes at trial and in settlement will cast light on deterrence. It matters whether defendants really are subject to treble damages if judgment is entered against them,[46] and also whether that potential liability causes defendants, for example, to pay excessive sums even when

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[43] *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.36 (1986) ("Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at '[l]ess than 20% of private antitrust actions filed between 1976 and 1983.'" (quoting W. John Moore, *Data Galore in Georgetown Damage Study*, LEGAL TIMES, Nov. 4, 1985, at 24)); *see also infra* note 118.

[44] *See* POSNER, *supra* note 23, at 666 ("There is an independent reason why most public agencies have much higher than 50 percent win rates. Agencies unlike private enforcers operate under a budget constraint. An agency with a tight budget constraint may not bring *any close* cases. (This is true of most criminal enforcement today.) Therefore, although most of its cases will be settled its trials will be selected from a population of one sided cases.").

[45] *Id.* at 665–66; *see also* Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 78 (2010) (explaining general rule proposed by a DOJ report that there would be no "no enforcement unless evidence demonstrated 'substantial disproportion[ality]' between anticompetitive harm and the procompetitive benefit caused by the conduct in question" (quoting U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 90, 105 (2008))). *But see* Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the United States Chamber of Commerce: Vigorous Antitrust Enforcement in this Challenging Era 5–7 (May 12, 2009), *available at* http://www.usdoj.gov/atr/public/spee ches/245777.pdf (criticizing the DOJ for offering companies too much leeway in cases involving procompetitive benefits).

[46] *See* Lande & Davis, *Benefits*, *supra* note 16, at 882–83 ("It is possible . . . that even [treble damages are] necessary to compensate plaintiffs for the difficulty of bringing suit, for unawarded prejudgment interest, and for difficult-to-quantify unawarded damages items. . . .").

they are innocent.[47] An understanding of these dynamics can provide insight into whether the deterrence effects of private antitrust enforcement are likely to be insufficient or excessive.

Finally, it would be valuable—even if just for a subset of cases—to know the likely profits from antitrust violations, the sanctions imposed by those violations, and the odds that the violations would be detected and successfully prosecuted. That information would be suggestive of whether overall enforcement results in excessive or insufficient deterrence effects.

B. WHAT WE KNOW

Having set forth what we would like to know to evaluate private antitrust enforcement, it is striking how little we actually do know. Most of the key questions remain unanswered. The great bulk of the argument about private enforcement of the antitrust laws has been premised on unsubstantiated or insufficiently substantiated claims. As far as we know, we have provided the only effort to gather information about how a significant number of private actions actually proceeded and the results they produced. Our original study canvassed forty cases.[48] We now have analyzed an additional twenty cases.[49] We believe that the time and energy invested in that undertaking casts valuable light on how private enforcement actually works in practice.[50]

That said, it is important to note various limitations on our studies. No effort was made to collect a comprehensive or representative sample of cases. To the contrary, we included a disproportionate number of exceptionally large cases, which means

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[47] *See id.* at 885 n.29 (questioning whether "the costs of discovery for plaintiffs are trivial but can be exorbitant for defendants").

[48] *See generally* Lande & Davis, *Benefits*, *supra* note 16 (aggregating and analyzing forty antitrust cases to determine the effects of private antitrust enforcement).

[49] *See generally* Davis & Lande, *Empirical Assessment*, *supra* note 16 (comparing and contrasting twenty new cases to the previous study of forty cases).

[50] Because almost every case settled, they were extremely difficult to research. We looked for cases that returned a significant amount of money damages to the victims, but we did not, for example, look for cases that were per se as opposed to rule of reason, that involved direct instead of indirect purchasers, or that did or did not involve coupons or cy pres grants. For additional information on our screening criteria, see Lande & Davis, *Benefits*, *supra* note 16, at 889–91.

we were disproportionately likely to select class action cases. Moreover, class action settlements must receive court approval and are a matter of public record. In contrast, in non-class action cases parties often insist on confidentiality, impeding research. Further, we deliberately selected cases that appear to have had significant merit. For all of these reasons it would be inappropriate to make any strong empirical claims about whether private antitrust actions on the whole tend to be meritorious based on an analysis of these sixty cases.

Our purpose was to assess some of the benefits from private enforcement, not to conduct a cost-benefit analysis. In assessing these benefits, we sought to avoid subjective assessments of value. As a result, we did not include cases that obtained an injunction as the only or primary form of relief. Nor, in analyzing quantitative recoveries, did we include equitable relief (or coupons, products, rebates, or discounts). Equitable relief may be extraordinarily valuable, but its benefits are difficult to measure.[51] As a result, the information we collected provides only a substantial *under*statement of the benefits of private actions. Our study does not provide a sense of the most that private actions may have achieved, or even any notion of how much they probably have achieved or how often or typically they have achieved those results.

With these qualifications in mind, let us turn to the information we identified as potentially useful in assessing the merits of private antitrust enforcement. In doing so, the sixty cases we have studied play a prominent role.

1. Compensation

i. Recoveries by Private Plaintiffs. Private antitrust enforcement provides virtually the only way to compensate victims of antitrust violations. To be sure, government actors have mechanisms by which they can seek relief for victims, but they are limited and too rarely pursued.[52] So it is a great virtue of private

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[51] "In the Tobacco litigation, for example, the result was an apparent transformation in the tobacco market spanning numerous years and worth an estimated $484 million. . . . None of that sum is included in the analysis below." Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1272 n.16.

[52] For a discussion of parens patriae actions by state attorneys general and disgorgement actions by the federal enforcers see Lande & Davis, *Benefits*, *supra* note 16, at 884 n.25.

enforcement if it can wrest ill-gotten gains from violators of the antitrust laws and return them to those to whom they rightly belong. And that is what private enforcement has done. The forty cases in our first study revealed a total recovery in private antitrust cases of $22.4 to $24.4 billion.[53] The new study reflects $11.4 billion in additional recoveries.[54] The total in the sixty cases we studied is $33.8 to $35.8 billion.[55]

Also significant are the recoveries from foreign entities. The original forty cases involved recoveries from foreign actors of $5.7 to $7 billion out of a total of $18 to $19.6 billion before inflation.[56] In the twenty additional cases, we were able to identify with confidence $394 million recovered from foreign actors, as well as $591 million from corporate families that included both foreign and U.S. entities, although we could not determine whether the foreign entities were the sources of the funds.[57] In total for the sixty cases in our study, between $6.1 and $8 billion was recovered from foreign corporations.[58]

ii. Indicia of Merits Regarding Recoveries. As far as we know, no one has ever documented a significant number of cases in which private plaintiffs obtained substantial recoveries in meritless cases.

In contrast, we have various reasons for concluding that the cases we have studied involve, on the whole, meritorious claims.[59] The first is that most of the cases garnered substantial settlements.[60] The smallest recovery was $30 million; only a few

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[53] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1324–26 tbl.A8.

[54] *Id.* at 1274.

[55] All recoveries were from 1990 onwards and have been expressed in 2011 dollars unless specifically noted.

[56] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1288.

[57] *Id.*

[58] *Id.*

[59] It is difficult to develop an objective measure of merit for purposes of an empirical analysis. If merit means that in an objective sense the plaintiffs in an antitrust case *should* prevail, it would seem that a substantive analysis of claims would be necessary to determine whether they are meritorious. . . .

To avoid this quagmire, we rely for present purposes on a legal positivist understanding of the law—one that relies on prediction, not prescription.

Id. at 1279.

[60] *Id.*

cases recovered less than $50 million.[61] Defendants would be unlikely to pay such large sums merely to avoid the costs of litigation.[62] Only the meaningful prospect of losing litigation—including after exhausting the appellate process—could explain settlements for such large amounts.[63] We are very skeptical about claims that defending these suits often costs innocent firms $10 million or more.[64] We would believe this only for very unusual cases. Fifty million dollars, then, is likely to be well above the nuisance value of a frivolous case.[65] Moreover, plaintiffs in thirty-six of the sixty cases (60%) from our study recovered more than $100 million.[66] Since actions that settle for more than $50 million are not nuisance lawsuits, the recoveries almost surely reflect the defendants' perception that they could well lose on the merits, not only at trial but also on appeal.[67]

Second, most of the cases from our study received validation—whether in whole or in part—through other aspects of the private litigation.[68] This validation took various forms:

1. In 17 of the 60 cases (28%), defendants or their employees were subject to criminal penalties, generally through guilty pleas.[69]
2. In 17 of the 60 cases (28%), government enforcers obtained a civil recovery, usually in the form of a consent order.[70]

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 1280.

[66] *Id.*

> It is difficult for a business to believably claim, in effect: "We are saints who did absolutely nothing wrong. Nevertheless, we paid $50 million or $100 million or more just to make the case go away." While we are not asserting this can never happen, this argument loses credibility as the settlements get higher.

Id. at 1280 n.47.

[67] *Id.* We explain below, see *infra* Part II.C, why defendants are unlikely to settle meritless cases for substantial sums.

[68] Lande & Davis, *Empirical Assessment*, *supra* note 16, at 1280 n.47.

[69] *See id.* at 1280 (describing thirteen of forty cases and five of an additional twenty cases as subjecting defendants or defendants' employees to criminal penalties, generally through guilty pleas).

3. In 15 of the 60 cases (25%), plaintiffs survived or prevailed on a motion for summary judgment (or partial summary judgment or judgment as a matter of law).[71]
4. In 14 of the 60 cases (23%), defendants lost at trial in the private litigation or in a closely related case.[72]
5. In at least 13 out of 60 cases (22%) plaintiffs survived a motion to dismiss.[73]
6. In 11 out of the 20 new cases (55%), the court certified a class for litigation purposes. (We did not record this information for the original 40 cases.)[74]

In sum, fifty-three of the sixty cases (88%) had at least one indicator that the plaintiffs' case was meritorious.[75] TABLE 4, below, summarizes this information.

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[70] *See id.* (describing twelve of forty cases and five of an additional twenty cases as granting government enforcers a civil recovery, often in the form of a consent order).

[71] *See id.* at 1280–81 (describing plaintiffs as prevailing on a motion for summary judgment or partial summary judgment in nine of forty cases and five of an additional twenty cases).

[72] *See id.* (describing defendants as losing at trial in the private litigation or a closely related case in nine of forty cases and four of an additional twenty cases).

[73] *See id.* (describing plaintiffs as surviving a motion to dismiss in three of forty cases and eleven of an additional twenty cases). This does not mean that numerous cases failed to survive a motion to dismiss. In many cases such a motion was not made. Moreover, we did not systematically report motions to dismiss for the original forty cases we studied. Recent legal developments—including a stricter standard on motions to dismiss—suggest a change in approach, so we did not report plaintiff surviving motions to dismiss in the twenty new cases. *Id.* at 1280–81 & n.49.

[74] *See id.* at 1281 (describing courts as certifying a class for purposes of litigation in eleven out of twenty cases). We did not report certification of litigation classes for the original forty cases. Much as with motions to dismiss, however, courts have become more willing to assess the merits in deciding whether to certify a class. *Id.* Certification of a litigation class therefore indicates plaintiffs' claims have a substantial evidentiary basis.

[75] The percentages appear to total more than 100% because many of the cases involved more than one basis for validation. *Id.* at 1280 n.48.

TABLE 4: SUMMARY OF KINDS OF VALIDATION IN CASES

Kind of Validation of Merits	Number of Cases
Criminal Penalty	17 out of 60 (28%)
Government Obtained Civil Relief	17 out of 60 (28%)
Defendants Lost Trial in Same or Related Case	15 out of 60 (25%)
Plaintiffs Survived or Prevailed at Summary Judgment or Judgment as a Matter of Law	14 out of 60 (23%)
Plaintiffs Survived Motion to Dismiss	13 out 60 (22%)
Class Certification for Litigation	12 out of 20 (60%)
At Least One Basis for Validation	53 out of 60 (88%)
At Least One Basis for Validation, Not Including Surviving Motion to Dismiss	47 out of 60 (78%)

Third, many of the opinions contain generous praise for the plaintiffs' counsel handling the case.[76] For example, of the eight judges from whom we were able to discover explicit and generous praise for the conduct of plaintiffs' attorneys (in none of the cases did we discover criticism), five were appointed by a Republican president.[77] This too helps provide assurance that the cases brought by private counsel generally were not reflective of partisan politics.

For various reasons, the party affiliation of the judges who presided over the cases we studied provides reason to believe that those cases were generally meritorious. The judges were

[76] For examples see Lande & Davis, *Benefits*, *supra* note 16, at 903–04.

[77] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1284.

appointed by both Republican and Democratic presidents.[78] If the judges in the cases we studied were all ideologically aligned with plaintiffs' attorneys, their praise for the attorneys' work might not mean as much.[79] One could also suspect—although the suspicion might be implausible—that the cases succeeded only because of overly sympathetic judges.[80] In other words, judicial ideology, rather than the merits, might explain the relief private plaintiffs obtained.[81]

Further, even though almost all of the sixty cases were only settlements, it should be recalled that a federal judge approved all of the class action settlements as fair, reasonable, and adequate. While this certainly is not the same as a final verdict, this approval by a diverse group of federal judges has some significance.[82] We note that of the sixty-five federal judges who presided over part or all of the cases we studied, forty-one were appointed by a Republican president.[83] We also note that this litigation occurred during an era when almost every Supreme Court antitrust decision has been decided in favor of the defendant.[84] Fifteen of the last sixteen antitrust decisions by a Court rated by Judge Posner as the most conservative since 1930,[85] including every case except one[86] decided after 1992, ruled

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[78] *See id.* at 1285 (showing that twenty-seven of the forty-five judges involved in the first forty cases we studied were appointed by Republican presidents); *see also id.* at 1328 tbl.A11 (showing that fourteen of the twenty judges involved in the second group of twenty cases we studied were appointed by Republican presidents).

[79] *Id.* at 1284.

[80] *Id.* at 1284–85.

[81] *Id.* at 1285.

[82] Lande & Davis, *Benefits*, *supra* note 16, at 903–04. We do not mean to put undue weight on this point. Judges are supposed to protect class members—not defendants—in approving class action settlements. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (noting FED. R. CIV. P. 23(e) protects unnamed class members from unfair settlements). So a judge's approval of a class action settlement does not necessarily mean the claim was meritorious. Indeed, just about any settlement should warrant approval if a class action lacks any merit. Still, judges can make settlements difficult if they believe plaintiffs have pursued a class action with no basis in law or evidence.

[83] *See* Lande & Davis, *Comparative Deterrence*, *supra* note 16, at 362–64 tbl.11 (listing all the judges and their appointing presidents in the cases we studied).

[84] *See* Andrew I. Gavil, Comment, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, 22 ANTITRUST 21, 22 (2007) ("The last clear plaintiffs' victories in the Court occurred in 1992 . . . .").

[85] *See* William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 6–7, 46 tbl.3 (John M. Olin Law & Econ. Working Paper No. 404) (ranking Justices from most to least conservative), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstra

against plaintiffs.[87] Given that this tide of pro-defendant instruction effectively told the lower courts how to decide close cases, and given the high percentage of judges presiding in the litigation we studied that were appointed by Republican presidents, one would not expect praise of the work of plaintiffs' attorneys, undue fear by defendants and their counsel of a biased judge, or approval of the class action settlements based on any pre-existing excessive judicial sympathy for plaintiffs' attorneys.[88]

Every one of these indicators is evidence, but not proof, that these private antitrust cases involved anticompetitive behavior. Ultimately there is no obvious way to prove or fully refute assertions that many or most private cases are unmeritorious and are tantamount to extortion. We submit, however, that the above analysis should, at a minimum, give rise to a presumption—likely a strong presumption—that the cases involved legitimate claims. We know of no reason, moreover, to believe the opposite.

iii. Allocation of Recoveries. Another question relevant to the success of private antitrust enforcement involves the proportions of any recoveries that go to plaintiffs as opposed to others, such as attorneys and claims administrators. In a perfect world, plaintiffs would receive the full recovery. To the extent they do not, that may compromise the compensatory function of private antitrust litigation.

To be sure, this issue has a normative dimension. The plaintiffs in an antitrust case receive a valuable service from their attorneys—just as the defendants do. So it is not clear how to treat attorney's fees. One might think of the funds plaintiffs' attorneys receive out of any recovery as not contributing to the compensation of plaintiffs. Alternatively, one might think of the injury to plaintiffs as comprising any monetary and other harms

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[86] Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2217 (2010) (treating NFL teams as separate entities for marketing and antitrust purposes).

[87] Gavil, *supra* note 84, at 22 ("The last clear plaintiffs' victories in the Court occurred in 1992 in two cases, Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992), and FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992)."). The Supreme Court subsequently decided *Am. Needle*, 130 S. Ct. at 2201; Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009) (9–0 in the judgment, 5–4 in the Court's opinion); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998); and Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

[88] *See* Lande & Davis, *Benefits*, *supra* note 16, at 903–04 (providing examples of praise given by judges to plaintiffs' attorneys).

they suffer as a result of an antitrust violation, including their need to retain counsel to vindicate their rights. From the latter perspective, the money plaintiffs recover that allows them to pay their attorneys should be included as part of their compensation; the injury from an antitrust violation should be understood to encompass all of the financial and other costs incurred in litigation.

In any case, we studied the proportion of attorney's fees courts awarded plaintiffs as part of the resolution of private antitrust cases. We found, on the whole, an inverse relationship between the size of a recovery and the percentage of the recovery awarded as attorney's fees. Although attorney's fees awards varied significantly within each category, counsel tended to recover approximately one third in cases with recoveries below $100 million and a similar or smaller percentage in cases with recoveries between $100 and $500 million.[89] The percentage generally declined as the recovery increased (although the *Tricor* case is a notable exception with a 33.3% award and a recovery of $316 million).[90] It should be stressed, however, that these percentages ignore any injunctive or non-monetary relief obtained by plaintiffs. To the extent that these forms of relief could be valued, the legal fees expressed as a percentage of the recoveries should be lowered accordingly from the reported values.

The mean of the fees in the original study was either 25.6% or 14.3%, using, respectively, an unweighted and weighted average (because larger cases tend to produce attorney's fees that are a lower percentage of the settlement).[91] These results were roughly consistent with the results of an earlier study using a different sample, which found unweighted mean legal fees of 21.02% in antitrust class action cases.[92] While these percentages are not trivial, they are lower than ordinarily occur in individual

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[89] *See* Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1293–95 (showing the percentage of recovery that went to attorney's fees in the cases we studied).

[90] *Id.*

[91] *Id.* at 1322–24 tbls.A6 & A7.

[92] Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 266 tbl.5 (2010) (containing statistics for seventy-one antitrust cases and finding mean fees of 21.02% and median fees of 9.15%).

contingency fee cases and leave the great majority of the recovery to the plaintiffs.

We made no similarly systematic inquiry into the administrative costs in the cases we studied. We were, however, able to assemble some pertinent information from claims administrators. Indirect purchaser actions are most relevant in this regard because they tend to involve a relatively large number of plaintiffs entitled to relatively small recoveries. The concern expressed by various commentators is that administrative costs tend to consume most or all of the money in indirect purchaser cases.[93] The information we obtained undermines this view.

The mean percentage of the recoveries allocated to administration is relatively modest at 4.1%, which is essentially the same as the median at 4.07%/4.14%.[94] The range is from 0.03% to 9.25%.[95] These numbers are not nearly as high as the critics of private enforcement suggest. The mean for indirect purchaser actions is 5.6%, somewhat higher than for direct purchaser actions at 3.2%,[96] and the medians are slightly lower—5.3% for indirect purchasers and 3.06% for direct purchasers.[97]

In sum, administrative expenses do not appear to deprive private antitrust enforcement of the ability to achieve compensation for at least a couple of reasons. First, rather than consuming almost all of the recovery in indirect purchaser actions, they consume on average only about 5%–6%. Second, direct purchaser and competitor cases—which involve even lower

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[93] *See* Crane, *supra* note 18, at 682 (arguing indirect purchasers often receive no recovery).

[94] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1307–08 tbl.11.

[95] *Id.*

[96] *Id.* In a sense, these percentages exaggerate the proportion of recoveries spent on administrative costs. In calculating the means, we gave equal weight to each case rather than weighing cases with larger recoveries more heavily. Given that larger recoveries generally involve lower administrative costs as a percentage, the total percentage of private recoveries used to pay for administration is likely substantially lower than the 4.1% we report, and the same point applies in analyzing the indirect and direct purchaser actions. We took our approach for two reasons. First, we did not have the amount of the recovery for all of the indirect purchaser cases, so a weighted mean would not be possible for them. Second, we wanted our numbers to reflect the most worrying cases, which are the small ones that have relatively high administrative costs as a percentage.

[97] *Id.*

administrative expenses—play the primary role in private antitrust enforcement.[98]

2. Deterrence

i. Total Liability and Indicia of the Merits. In terms of deterrence effects, the total amount private plaintiffs have recovered is again relevant. Thirty billion dollars of liability creates a strong incentive to abide by the antitrust laws.[99] Anticipation of that potential liability should have had a powerful deterrence effect (although, obviously, not enough to deter the conduct at issue in those cases).[100] Moreover, that amount likely *under*states the financial repercussions of private antitrust enforcement for defendants. Litigation costs—including, notably, attorney's fees—and disruption of business activities add to the ultimate sanctions defendants suffer.[101] Moreover, at least for these sixty cases, the indicia of merits discussed above suggest that defendants likely *should* have been liable in these cases.[102] Thus, the $30 billion would on the whole seem to have provided appropriately targeted efforts at deterrence.

To be sure, liability in cases where there is no antitrust violation could compromise the value of private enforcement as a means of deterrence. To the extent antitrust violators are held liable for conduct that is not illegal, private actions may discourage procompetitive conduct.[103] Similarly, if actors in the marketplace may be held liable even when they act legally, they will have less incentive to make sure their behavior conforms to

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[98] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 747 (1977) (allowing only direct purchasers—not indirect purchasers—to recover overcharge damages under federal antitrust law). *But see* California v. ARC Am. Exp., 490 U.S. 93, 105–06 (1989) (permitting indirect purchaser actions at the state level).

[99] Davis & Lande, *Empirical Assessments*, *supra* note 16, at 1272.

[100] *Id.*

[101] On the other hand, as discussed below, the amount is diminished because, *inter alia*, defendants generally do not have to pay prejudgment interest, in effect receiving an interest-free loan.

[102] *See supra* TABLE 4 and accompanying discussion.

[103] We say "may" because it is not necessarily true that legal conduct is procompetitive. For example, horizontal competitors may be able to achieve anticompetitive behavior without the kind of agreement or understanding that would have rendered it illegal—indeed that was the *defendants'* position in *Twombly*—but discouraging that behavior might still be procompetitive. Brief for Petitioners at 23–27, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126). Of course, it is also possible that in some instances behavior that violates the antitrust laws is nevertheless procompetitive on the whole.

the law so as to avoid liability.[104] But, as noted above, we know of no study showing a single case—much less a significant or representative number of cases—involving a substantial recovery in an antitrust case that lacked any merit.

3. Comparing the Deterrence Effects of Private and DOJ Criminal Enforcement. Based on the initial forty cases, we argued that the more than $20 billion of damages likely had a greater deterrence effect than all of the DOJ's criminal enforcement efforts during the same period.[105] The additional $10 billion recovered in the twenty new cases we studied reinforces our earlier analysis.[106] From 1990 through 2011, the total of DOJ corporate antitrust fines, individual fines, and restitution payments totaled $8.18 billion.[107] Disvaluing a year of prison at $6 million and a year of house arrest at $3 million adds another $3.588 billion in total deterrence from the DOJ's anti-cartel cases.[108] This totals approximately $11.7 billion.[109] Although this is an extremely impressive figure, it is significantly less than the $34–$36 billion resulting from the sixty private cases for the same period.[110] Moreover, we ignored the costs to defendants of providing products, discounts, or coupons as part of settlements, paying their own attorney's fees and costs, and suffering a disruption of their business practices.[111] Indeed, given the disparity between our conclusions about private and DOJ criminal enforcement, even a

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[104] *See* Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1279 n.44 (arguing that punishing innocent defendants would be expected to undermine deterrence of anticompetitive behavior).

[105] Lande & Davis, *Comparative Deterrence*, *supra* note 16, at 317.

[106] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1274.

[107] *Id.* at 1277.

[108] *Id.* Note that the $6 million per year value (or disvalue) of prison time includes the offender's lost salary and future income, as well as his or her diminished utility from serving a prison sentence. *See* Lande & Davis, *Comparative Deterrence*, *supra* note 16, at 327–28 (elaborating on the disvaluation of prison time).

[109] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1277.

[110] *Id.* Since some of the private cases were follow-ups to DOJ actions, however, some portion of the deterrence from these private actions should be ascribed to the initial DOJ investigation. See *infra* Part II.B.*5.i* for a discussion of follow-on.

[111] Lande & Davis, *Comparative Deterrence*, *supra* note 16, at 337–38. To be fair, in defending against a DOJ criminal action, corporations also incur costs and suffer disruption, factors we similarly ignored in our analysis. *Id.* We also ignored the value of injunctive relief, whether secured by government or private enforcers. *Id.* at 346.

significantly more conservative approach would yield the same ultimate conclusion.[112]

4. Effects on Stock Prices. There is an alternative way to measure the deterrence effects of antitrust enforcement other than by the amount of money defendants are forced to pay. That method is measuring the change in the value of a defendant's stock when it is sued for violating the antitrust laws.

The evidence suggests that antitrust litigation has a significant effect on stock prices. One study showed, for example, that the filing of a government antitrust case causes the value of shares to drop on average by 6% and the filing of a private case by 0.6%.[113] A drop in share values by 0.6% is significant. As the authors of the article finding a 0.6% drop explain, "The average wealth loss for defendants is approximately 0.6[%] of the firm's equity value, or an average loss of $4 million. It appears that plaintiffs can and do damage defendants by a lawsuit."[114]

Interpreting these data requires some care. It would be easy to jump to the conclusion that the expected penalties from government litigation are more harmful to a corporation than the expected penalties from private litigation. Attention to this issue, however, suggests that the opposite is likely true.

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[112] *See id.* at 340. For example, only if prison time were disvalued at more than $43 to $48 million per year on average would the DOJ cases result in more deterrence than the original forty private cases. *Id.* The additional twenty cases have driven that number even higher. Moreover, the conventional views within the antitrust field concerning the typical conduct of government enforcers and the plaintiffs' bar could help magnify the relative deterrence effects of private enforcement. Government enforcers are often portrayed as reasonable, responsible, and rational public servants whose activity is subject to intense public scrutiny. A conventional view of plaintiffs' attorneys, by contrast, is that they are an unethical and crazed pack of jackals, willing to go to any length—to do anything no matter how unfair—to attack defendants and strip them to the bone. For this reason, government enforcement could engender relatively less fear among corporations and therefore provide less deterrence. To be sure, plaintiffs' attorneys are, at times, described as selling out class members—a stereotype that could cut the other way.

[113] DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 179 (2011) (citing John M. Bizjak & Jeffrey L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm*, 85 J. AM. ECON. REV. 436, 437 (1995); Kenneth D. Garbade et al., *Market Reaction to the Filing of Antitrust Suits: An Aggregate and Cross-Sectional Analysis*, 64 REV. ECON. & STAT. 686, 671 (1982)).

[114] Bizjak & Coles, *supra* note 113, at 437; *see also* Moin A. Yahya, *The Law & Economics of "Sue and Dump": Should Plaintiffs' Attorneys Be Prohibited from Trading the Stock of Companies They Sue?*, 39 SUFFOLK U. L. REV. 425, 432 (2006) (noting impact of this sort is material).

From the perspective of the value of a defendant's stock, the financial consequences of private litigation are likely to be far more important than the financial consequences of government litigation. For example, consider our comparison of the total recoveries in our sixty cases to the total penalties imposed by the DOJ during the same period, 1990 to 2011. We found that in just those sixty cases, defendants ended up being liable for approximately $34 to $36 billion.[115] The DOJ was able to obtain various forms of incarceration of individuals, but it is difficult to see why those *individual* punishments would cause any significant loss in the value of the shares of stock of a *corporation*. The fines that the DOJ imposed totaled slightly over $8 billion, about 22%–24% of the private recoveries.[116] The significantly larger private recoveries strongly suggest that any drop in share value would result from anticipated financial losses in private litigation rather than government litigation.[117] So the great majority of the total 6.6% stock drop is probably attributable to the anticipated loss of money by the corporation as a result of private recoveries.

Why, then, does a company's stock drop far more on average from the filing of a government action than a private action? One likely reason is that when the government files an antitrust case, private litigation almost always follows. A comprehensive database, for example, reflects that private litigation occurred after every single cartel case filed by the DOJ.[118] In a reasonably efficient market, investors would appreciate that government antitrust litigation almost invariably leads to private antitrust litigation. The stock drop caused by the private litigation, then, should largely occur at the time of government filing, even if the private litigation is filed later.

Just as we need to take care to attribute a stock drop at the time of filing of a government action to anticipated financial

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[115] *See supra* Part II.B.*1.ii* (discussing private recoveries from our sixty case sample).

[116] Davis & Lande, *Empirical Assessment*, at 1290, 1309 (totaling $8 billion in government recoveries and calculating this as a percentage of private recoveries).

[117] *See id.* at 1309–10. To be sure, these numbers are approximate. On one hand, our studies no doubt missed a great number of the private cases between 1990 and 2007. On the other hand, the DOJ is but one branch of the federal government, so the penalties it imposes do not reflect, for example, enforcement efforts by the FTC or the state attorneys general.

[118] *See* Connor, *supra* note 26, at 11 ("[O]f the 52 international cartels that were fined by the DOJ during 1990–2005, 100% were followed up with private damages actions.").

penalties from private litigation, we also should take care about allocating credit. In some cases, there might not have been any private action at all without the government action. And the government litigation may well contribute significantly to the success of the private action, such as by offering the benefits of issue preclusion. So the private *penalties* may be primarily responsible for the loss of values in corporate shares, but that does not mean private enforcement deserves the lion's share of the credit for that effect.

Finally, note also that the average 0.6% stock drop from the filing of private litigation is surprisingly high if government litigation is almost always followed by private litigation. We might not expect any stock drop at all on average when the inevitable follow-on litigation is filed. The market should have already adjusted at the time of initiation of the government proceeding. Indeed, the 0.6% average drop may mask very different phenomena. Private cases not preceded by government action may involve a much more significant stock drop and private cases preceded by government action may involve a smaller drop or none at all. This is an area where additional empirical work would be valuable. Meanwhile, it is important to know whether private cases occur before government litigation or when there is no government litigation and, on a somewhat related issue, whether there are certain kinds of cases only private plaintiffs are likely to bring. In this regard, the sixty cases we studied again prove instructive.

5. The Complementary Role of Private Enforcement. An important issue involves the kinds of cases private plaintiffs bring. Some commentators suggest that private actions generally follow and depend on government actions.[119] If that were true, private plaintiffs might not contribute as much to deterrence as if they were to bring independent cases. Similarly, at least one commentator has indicated—commendably, relying on empirical

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[119] *See, e.g.*, Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All The Tools and Sanctions*, 56 ANTITRUST BULL. 207, 227–33 (2011) ("Plaintiffs' lawyers now rely on the work done by the Antitrust division more than ever."). Werden, Hammond, and Barnett criticize our analysis of private antitrust enforcement at some length. For a response, see Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1295–1304.

efforts—that private cases almost always lose unless they involve per se claims as opposed to claims relying on the rule of reason.[120] This, too, might suggest a limited contribution to deterrence by private antitrust actions. Government enforcement tends to focus on per se antitrust violations. If private cases are successful only when they do the same, then they do not add as much to overall enforcement as they might. Finally, and related, it would be helpful to know if private actors might be less averse to risk than government actors, potentially deterring conduct that is anticompetitive but is not sure to result in successful prosecution.

i. Follow-on Cases. The sixty cases we studied show that private litigation is not in fact always preceded by government litigation and, indeed, that sometimes private litigation occurs when there is no government litigation at all. Of the sixty cases, twenty-four were not preceded by government action,[121] and another twelve involved a substantially different action than the government pursued.[122] Those groups of cases involved, respectively, $8.8–$10.1 billion and $10.7 billion.[123] Private

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[120] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009).

[121] This is consistent with John M. Connor's finding that a large share of private cartel cases are not follow-on lawsuits. Connor, *supra* note 26, at 10. Connor's survey of private cartel cases filed in U.S. courts reveal that "41% of the treble-damages cases were *non-follow-on*." *Id.* at 11. This means that "they were not preceded by any known government sanctions in either the United States or elsewhere," although a few may have followed antitrust investigations that were ultimately closed. *Id.* (footnote omitted). Further, Connor adds: "An alternative metric is to use the monetary size of the recoveries. In terms of publicly reported *dollar settlements*, the U.S. follow-on cases garnered only 26%, the non-U.S. follow-ons a shrunken 2%, and the non-follow-ons an impressive 72% of the $39 billion total." *Id.* at 12. However, Connor cautions that "the non-follow-on category is strongly affected by the bankcard cases." *Id.*

[122] *See* Lande & Davis, *Benefits*, *supra* note 16, at 910 (listing nine private actions more inclusive than the corresponding government enforcement actions); Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1293 tbl.7 (listing three private actions more inclusive than the corresponding government enforcement actions).

[123] *See* Lande & Davis, *Benefits*, *supra* note 16, at 892, 898, 910 (including cases with recoveries of $7.631 billion to $8.981 billion where no government action preceded the private case and recoveries of $3.477 billion where the private party sought recovery significantly broader than the government action); Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1292–93 (including cases with recoveries of $1.127 billion where no government action preceded the private case and recoveries of $7.230 billion where the private party sought recovery significantly broader than the government action).

actions in this way play a complementary role to government actions.[124]

Note that we do not mean to overstate the importance of whether private litigation or government litigation comes first. The timing and amount of work spent investigating and prosecuting an antitrust case may not correspond to the timing of filing a case. The order of filing serves as a somewhat useful proxy for allocating credit for success, but it is highly imperfect.

ii. Per Se v. Rule of Reason. A related issue is whether private plaintiffs succeed only when they pursue per se claims.[125] If they do, they contribute to antitrust enforcement less than they might if they succeeded in other claims. An interesting and surprising result from our empirical efforts—one that we have not emphasized in the past—"is that a substantial portion of private recoveries occurred in cases subject to the rule of reason, as well as in cases in which it was unclear whether the rule of reason or a per se rule would apply."[126] In the sixty cases, we found that pure rule of reason cases predominated.[127] "Over $17 billion of the more than $30 billion in total recoveries came in rule of reason cases, and over $2 billion came in mixed cases, leaving only about $10 billion—or a third of the total—in pure per se cases."[128] These findings suggest that private litigation may play an important complementary role to public litigation by challenging conduct that the government—and especially the DOJ—may rarely address.[129]

iii. Risk Aversion: Private v. DOJ. Another interesting conclusion is suggested by private plaintiffs pursuing litigation independently of public litigation and prosecuting claims under

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[124] *See* Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1273 (emphasizing that private actions can supplement the limited mechanisms for relief provided by government actors); Lande & Davis, *Benefits*, *supra* note 16, at 906–07 (explaining that private antitrust actions complement government enforcement by combating under-deterrence).

[125] *See* Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1272–73 (noting that an interesting question surrounding antitrust cases is whether the conventional wisdom is correct that private plaintiffs prevail only in per se cases).

[126] *Id.* at 1289.

[127] *Id.* at 1273.

[128] *Id.* at 1290.

[129] *See* Lande & Davis, *Benefits*, *supra* note 16, at 905–06 (explaining that private enforcement complements government enforcement because the government cannot practically be expected to do all or even most of the necessary enforcement).

the rule of reason rather than just under a per se standard. Private plaintiffs may not be as averse to risk as government litigators.[130] Again, a comparison to the DOJ is illustrative.

In our original comparison of private enforcement and DOJ enforcement, we noted that the DOJ appears to succeed in a very high proportion of its cases.[131] From 2000 to 2009, it won anywhere from thirty-one to sixty-seven antitrust cases and lost four in one year and from zero to two cases in all other years.[132] In its worst year, it prevailed over 90% of the time.[133]

We do not know the rate at which private plaintiffs are successful.[134] But almost certainly they prevail at a much lower rate. This conclusion is suggested by the willingness of private plaintiffs to pursue cases other than following a government filing. It is even more powerfully suggested by their pursuit of rule of reason cases. The rule of reason entails a high degree of uncertainty that can readily result in a successful defense.[135] This proposition is confirmed by Michael Carrier's work, which identifies 221 rule of reason cases between 1999 and 2009 in which a court entered final judgments against plaintiffs (and only one in which a court entered final judgment in favor of a plaintiff).[136] Moreover, any plausible model based on expected value would indicate that plaintiffs would pursue claims with a lower chance of success than the DOJ appears to require. This evidence and analysis suggests that private plaintiffs bring riskier claims than government actors, helping to ensure some deterrence effects when behavior is anticompetitive but will not necessarily result in successful prosecution of a claim.

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[130] *See* Lande & Davis, *Comparative Deterrence*, *supra* note 16, at 349 ("In most cases, if the law is somewhat unclear, or if the evidence of illegal conduct is not absolutely compelling at the outset of a legal action, the DOJ does not seem to be willing to pursue litigation.").

[131] *See id.* at 328 n.42.

[132] *Id.*

[133] *Id.* We do not mean this point as a criticism. The DOJ should be more circumspect in pursuing criminal cases than private enforcers are in pursuing civil cases.

[134] *See* Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1270 (stating that the 2008 study of forty private antitrust cases appears to constitute the only systematic effort to gather information about the results of private actions).

[135] The uncertainty surrounding rule of reasons cases stems in part from the fact that courts will compare the procompetitive and anticompetitive effects of the alleged conduct. Lande & Davis, *Benefits*, *supra* note 16, at 881. In contrast, in per se cases proof of the conduct suffices to establish a violation of law. *Id.*

[136] Carrier, *supra* note 120, at 830.

6. Overall Deterrence Effects: A Study. The evidence discussed above is suggestive, but it does not provide a systematic analysis of the deterrence effects of private enforcement. We know of only one such systematic effort, co-authored by one of us. It analyzes seventy-five cartels, assessing the total sanctions that were imposed on the wrongdoers and the total profits they appeared to reap from their illegal conduct.[137] The article also gathers evidence and theory on the rate at which illegal antitrust conspiracies are discovered and successfully prosecuted.[138] The ultimate conclusion of this analysis is that the total sanctions—public and private—from antitrust enforcement are insufficient for optimal deterrence.[139] In terms of expected value, illegal antitrust conspiracies remain a profitable endeavor—which explains their persistence.[140] Indeed, based on the seventy-five cases, the overall level of sanctions would have to increase at least threefold—and perhaps by as much as ten times—to achieve optimal deterrence.[141] Of course, this analysis applies only to cartel cases and not to other forms of anticompetitive conduct.[142] But as the only effort of its kind, it provides valuable evidence that private enforcement does not result in excessive deterrence effects.

C. ANALYSIS OF POTENTIAL JUDGMENTS AND SETTLEMENTS

The evidence we have, while limited, thus supports some important conclusions, even if it does not establish them with certainty. We can cast additional light on the subject by combining the existing evidence with an analysis of the relevant legal standards and the incentives they create.

Conventional wisdom focuses on three features of private antitrust enforcement. First, the law appears to impose excessive liability.[143] Plaintiffs under federal antitrust law—and under the

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[137] John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 429–30 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917657.

[138] *Id.* at 462–68.

[139] *Id.* at 476–79.

[140] *Id.* at 479.

[141] *See id.* at 428 (calculating that current sanctions are only 9% to 21% of optimality).

[142] *Id.*

[143] *See* William E. Kovacic, *Private Participation in the Enforcement of Public Competition Laws*, *in* 2 CURRENT COMPETITION LAW 167, 173–74 (Mads Andenas et al. eds., 2004)

laws of some states—are entitled to treble damages, an automatic tripling of the amount a judge or jury awards in an antitrust case.[144] Further, in addition to direct purchasers recovering the full overcharges they pay under federal law, the same conduct may give rise to liability to indirect purchasers under state law as well as to sanctions imposed as a result of legal action by federal and state governments.[145] The potential for multiple enforcement actions has led to the claim that the total exposure of antitrust defendants is too great.[146]

Second, some commentators characterize class actions in general, and antitrust class actions in particular, as "extortionate settlements."[147] They speculate that in class actions the potential for great liability based on the outcome of a single trial can cause even innocent defendants to settle meritless claims rather than risk a catastrophic—and errant—adverse decision.[148]

Third, some commentators claim that plaintiffs' class action lawyers have incentive to "sell out" the classes they represent.[149] They note that the lawyers generally do best on an hourly basis by settling relatively quickly, even at a steep discount from the expected value of a case.[150] The attorneys can further sacrifice the

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(asserting courts may fear overdeterrence from plaintiffs seeking treble damages); Stephen Calkins, *Equilibrating Tendencies in the Antitrust System, with Special Attention to Summary Judgment and to Motions to Dismiss*, *in* PRIVATE ANTITRUST LITIGATION 185, 185–200 (Lawrence J. White ed., 1988) (discussing the impact of treble damages on the evolution of antitrust law).

[144] *See generally* Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267202 (analyzing state and federal treble damages provisions).

[145] *See generally id.*; Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) (holding that indirect purchases may not use an offensive pass-on theory to recover damages).

[146] *See* Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651, 657–62 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263478 (discussing courts sorting out damages to prevent defendants from paying excessive damages).

[147] J. Thomas Rosch, Fed. Trade Comm'r, Designing a Private Remedies System for Antitrust Cases—Lessons Learned from the U.S. Experience, Remarks before the 16th Annual EU Competition Law and Policy Workshop 10 (June 17, 2011); *see also* Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 843 (1974) (describing plaintiffs' attorneys as using class actions to "blackmail" businesses).

[148] Rosch, *supra* note 147, at 10.

[149] *See* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 471–72 (2000) (asserting that class action lawyers' self-interest incentivizes them to settle early and often).

[150] *Id.* at 470–73.

interests of the class by seeking money for themselves and a less valuable form of compensation for the class, such as coupons.[151]

Note the strong tension between these views. The first two points suggest that plaintiffs are likely to recover and defendants to pay too much, particularly in class actions, and the third point suggests that plaintiffs are likely to recover and defendants to pay too little, especially in class actions. It is difficult to imagine they are all correct. How, then, can we know which of these points predominates in practice?

A few considerations can help. A key point is that, for various reasons, the claim is weak that defendants may pay three or more times the injuries plaintiffs actually suffered. Defendants do not generally pay prejudgment interest in antitrust cases, so they benefit from what is essentially an interest-free loan.[152] Given the long delay between a violation and resolution through trial or settlement, the real recovery in private litigation is significantly less than three times the actual harm. Similarly, defendants often are not held liable for various kinds of harm their antitrust violations cause, including umbrella effects of market power[153] and allocative inefficiency.[154] As one of us has written elsewhere, in reality antitrust damages are not treble actual harm, but more likely approximately one times actual harm.[155] And settlements are even lower—a median of only 30% of the actual overcharges.[156]

A second consideration is that defendants pay damages only if their antitrust violations are detected, challenged, and ultimately lead to some form of sanction. The best estimates are that no more

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[151] *See infra* note 178 and accompanying text.

[152] *See* Lande, *supra* note 32, at 130 (noting that automatic interest only accrues after a judgment for plaintiff).

[153] Umbrella effects can occur when a non-participant in an antitrust violation raises prices. This can happen, for example, when a cartel with less than 100% of a market raises prices. Yet, umbrella effects are very rarely awarded in antitrust cases. *See id.* at 147–51 (arguing proof problems prevent awards for umbrella effects).

[154] Allocative inefficiency involves buyers shifting the purchases they make because of inefficiencies produced in the market by an antitrust violation. Faced with inflated prices, a buyer, for example, may purchase no item at all or purchase one that does not have the same value to them as would the price-fixed good if it were sold at a competitive price. Although the allocative inefficiency effects of market power are almost universally denounced, we are unaware of even a single United States antitrust case that has even computed it. *Id.* at 152–53.

[155] *Id.* at 171 (noting the mean estimate was only 68% of actual damages, not 300%).

[156] Connor, *supra* note 26, at 14.

than 30% of cartels are detected.[157] Even if discovered, they may not be prosecuted if, for example, a private action does not make economic sense because the damages are too low and the costs of litigation too high. And they may be prosecuted unsuccessfully even if defendants should be held liable. For all we know, this may have occurred in *Twombly*.[158]

A third consideration, related to the first two, is that the incentives in settlement encourage recoveries in private antitrust that are too small rather than too large. Even if in theory defendants after trial could be required to pay more than single damages for violating the antitrust laws, the reality is that the vast majority of cases settle.[159] The primary issue, then, is how settlement dynamics figure in the resolution of litigation.

Antitrust defendants likely have a significant advantage over plaintiffs in settlement negotiations for various reasons. First, as noted above, antitrust defendants are the beneficiaries of interest-free loans.[160] Plaintiffs suffer and defendants benefit from delay, placing defendants at a significant advantage in negotiations.

Second, antitrust defendants tend to be rich and powerful economic actors.[161] That is why they are in a position to exploit market power to the detriment of the plaintiffs, who usually are in a more vulnerable position.[162] This disparity can affect the litigation process. Plaintiffs will often lack the resources to tolerate the expense and disruption that litigation entails. Moreover, while commentators sometimes suggest that litigation costs fall disproportionately on antitrust defendants,[163] the

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[157] *See* Connor & Lande, *supra* note 137, at 465 (noting estimates that no more than 30% of cartels are detected).

[158] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566 (2007) (asserting only that nothing in the complaint made a conspiracy plausible, not that there was no conspiracy).

[159] *See generally* Lande & Davis, *Benefits*, *supra* note 16 (discussing cases that settled).

[160] *See* Lande, *supra* note 32, at 130 (noting automatic interest accrues only after judgment for an antitrust plaintiff).

[161] Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 979 (2010).

[162] *Id.*

[163] *See* Rosch, *supra* note 147, at 11 (suggesting that defendants typically spend more than plaintiffs during discovery).

evidence on this issue is at least mixed.[164] Those costs may well fall as heavily on antitrust plaintiffs.

Shifting the focus from the incentives before the parties to those before the attorneys reveals a third reason to believe settlements in private antitrust actions are likely to be too small. As noted above, plaintiffs' attorneys generally receive a contingency fee as a percentage of the recovery.[165] They also have to wait until a recovery to obtain any compensation for the time they have expended and the costs they have incurred; just like the plaintiffs, they in effect provide an interest-free loan, albeit a voluntary one. As a result, they tend to obtain the best return on their time if they settle cases quickly, even for a relatively small amount.[166] Defense attorneys, in contrast, are paid by the hour.[167] They therefore fare best in protracted litigation. Of course, we do not mean to be cynical. Many ethical lawyers sacrifice their own interests to those of their clients. But to the extent we look at the incentives before attorneys, they reinforce the conclusion that recoveries in private antitrust cases are apt to be too small rather than too large. Defense attorneys will benefit from driving a hard bargain whereas plaintiffs' attorneys do best by settling early, even if for a relatively modest amount.

D. PROVISIONAL CONCLUSIONS

The evidence on the whole, then, weighs in favor of private antitrust enforcement. As to compensation, we know of at least sixty major cases in which private plaintiffs obtained substantial recoveries and their claims appear to have been meritorious. We also know that some of those cases involved recoveries from foreign actors preying on U.S. victims. In contrast, we do not know of any substantiated cases in which plaintiffs recovered

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[164] *See, e.g.*, Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 548 (1998) (providing evidence that plaintiffs may incur costs higher than or equal to those of defendants in high-cost litigation).

[165] *See* Davis & Cramer, *supra* note 4, at 371–72 (explaining plaintiffs' attorneys usually front litigation costs and recover these costs only upon a recovery); Davis & Cramer, *supra* note 161, at 980 (stating that plaintiffs' lawyers typically operate on a contingency fee basis).

[166] Davis & Cramer, *supra* note 4, at 372; Davis & Cramer, *supra* note 161, at 980.

[167] Davis & Cramer, *supra* note 4, at 371; Davis & Cramer, *supra* note 161, at 980.

when they should not have done so. The attorney's fees in private antitrust cases are significant, but they are no larger than in other contingency fee cases and decrease significantly as a percentage of total recovery as the total recoveries increase. Moreover, the administrative costs appear to be relatively modest, even in indirect purchaser actions.

Private enforcement also contributes a great deal to deterrence. It may have greater deterrence effects than criminal enforcement by the DOJ and at least plays an important complementary role to government efforts. Private attorneys at times file suit before the government and at times there is no corresponding government action at all. Notwithstanding the conventional view to the contrary, private attorneys also obtain substantial recoveries in rule of reason cases and, more generally, may be more tolerant of risk than government enforcers.

This evidence, as well as some basic attributes of antitrust enforcement, supports some provisional conclusions. Although defendants appear to be exposed to treble damages or more, in reality, they are likely to be liable for much less for various reasons: antitrust damages are restricted, antitrust violators will not always get caught, and plaintiffs have incentive to settle for much less than the expected value of litigation. What we currently know, then, suggests that private antitrust enforcement plays a valuable role in compensating victims and deterring antitrust violations, but it likely would need to be strengthened to perform either function at an optimal level.

III. CRITICISMS OF PRIVATE ANTITRUST ENFORCEMENT

The conventional wisdom in the antitrust field long has been that private enforcement, and especially class action cases, accomplish little or nothing and might well be counterproductive. This prevailing belief was well summarized by former FTC Commissioner J. Thomas Rosch, who claimed that treble damage class action cases "are almost as scandalous as the price-fixing cartels that are generally at issue . . . . The plaintiffs' lawyers . . . stand to win almost regardless of the merits of the

case."[168] As a result of these widespread beliefs, former FTC Chairman William E. Kovacic summarized the conventional wisdom about private enforcement succinctly and correctly: "private rights of actions U.S. style are poison."[169]

We have surveyed the many criticisms that have been made of private antitrust enforcement. They can be classified into one of five categories if each is defined broadly: (1) private enforcement does not adequately compensate the real victims of antitrust violations; (2) private enforcement does not adequately deter antitrust violations; (3) private enforcement usually does not address anticompetitive conduct; (4) private enforcement overdeters anticompetitive conduct or deters procompetitive conduct; and (5) the attorneys for plaintiffs sell out their clients.

This Part seeks to determine whether there is any systematic evidence to support these criticisms.[170] It puts aside unsubstantiated anecdotes (which often are self-serving). The only fair way to assess the net efficacy of private antitrust enforcement is by carefully analyzing systematic and reliable evidence of whether these criticisms reflect reality, or whether they are hypotheticals, assertions, anecdotes, or exceptions. It is important to ascertain the empirical facts so the United States can select the optimal policy regarding private enforcement. Further, in light of the widespread interest in creating or modifying private antitrust remedies in Europe and elsewhere in the world,[171] where the conventional wisdom about the United States experience seems to

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[168] Rosch, *supra* note 147, at 9–10. Similarly Steve Newborn, co-head of Weil, Gotshal and Manges' Antitrust/Competition practice, was asked which areas of antitrust need reform and replied, "Class actions: they are increasingly beneficial only to plaintiffs' law firm [sic] and not to consumers." *Q&A With Weil Gotshal's Steven A. Newborn*, LAW 360 (June 2, 2009), http://competition.law360.com/articles/103359.

[169] *See* FTC: WATCH, *supra* note 9. For additional criticisms of private antitrust enforcement, see Lande & Davis, *Benefits*, *supra* note 16, at 883–89, and Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1269–70.

[170] We are not disputing that critics' anecdotes may be true or that they raise important concerns about abuses in particular cases. Private antitrust enforcement certainly is not perfect. Neither is government enforcement or decisions by courts or commissions. But there is a huge difference between a critic of private enforcement providing an anecdote—particularly one that neutral observers have a hard time evaluating—and the systematic data that should be used to make policy.

[171] *See generally* AAI HANDBOOK, *supra* note 17 (describing efforts undertaken internationally concerning private antitrust enforcement).

undermine private enforcement, ascertaining the facts becomes even more significant.

Before addressing each of these criticisms separately, however, we again note that they fall into two broad categories. The first category of arguments suggests, roughly speaking, that private antitrust enforcement does not do enough—providing insufficient compensation for antitrust violations or insufficiently deterring those violations. The second category suggests that private enforcement does too much—creating, for example, excessive deterrence effects.

The most straightforward conclusion that should flow from the first set of criticisms—private antitrust enforcement does too little—is that private enforcement should be strengthened. If private enforcement results in inadequate compensation or deterrence, we should increase the amount that plaintiffs may recover or amend procedures permitting defendants to pay insufficient sums. But the critics we will discuss have not reached those conclusions. They argue instead that private enforcement fails so terribly in its aims that it cannot be fixed and should be abandoned or restructured entirely.[172] That position should require critics to carry a heavy burden. As we shall see, they have not succeeded.

Another preliminary point is important: there is a strong tension between the two categories of criticisms. While it is conceivable that private antitrust enforcement both does too much and does too little, that possibility is unlikely, and the more specific arguments made in favor of the two views are often flatly at odds. The result is a view of private antitrust enforcement that is overwhelmingly negative and often, taken together, internally inconsistent.

A. PRIVATE ENFORCEMENT DOES NOT COMPENSATE THE REAL VICTIMS

Critics often argue that private enforcement, and especially class action cases, do a poor job of compensating the real victims of

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[172] *See* William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 440 (1985) (arguing the current system should be replaced with a system of exclusive government enforcement).

illegal behavior.[173] There are many reasons given for this conclusion, including: class action plaintiffs usually recover only worthless coupons, discounts, or products,[174] or distribute cy pres awards to unrelated charities;[175] the cases are horribly inefficient and most of the proceeds are said to be eaten up by legal fees or claims administration expenses;[176] and when the victims do recover money, the sums are so small most victims do not even find it worthwhile to claim them.[177] Noncompensation is said to be a special problem for indirect purchasers who, it is asserted, are the ones that really suffered most of the losses; direct purchasers, by contrast, are portrayed as nonvictims who reap windfalls.[178]

All of the critics who voice these views have one thing in common: they provide only unsupported assertions or, at best, anecdotes to justify their assertions. None has provided or cited reliable empirical data in support of their allegations. We choose to respond in some detail to two of these critics because they are among the best, most scholarly, and respected individuals who

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[173] *See* Cavanagh, *supra* note 28, at 214 ("Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing.").

[174] *See, e.g., id.* (suggesting coupon settlements fail to compensate antitrust victims); John E. Lopatka & William H. Page, *Indirect Purchaser Suits and the Consumer Interest*, 48 ANTITRUST BULL. 531, 554 (2003) (asserting the low value of vouchers distributed in the *Microsoft* state-court litigation).

[175] *See* Lopatka & Page, *supra* note 174, at 554–55 ("[C]ourts often turn to cy pres distributions of part or even all of the funds to worthy causes.").

[176] *See* Crane, *supra* note 18, at 682–83 ("[I]dentifying the actual people who suffered injury and issuing them a check is often so expensive that administrative costs swallow the entire recovery.").

[177] *See* Lopatka & Page, *supra* note 174, at 554 (contending the low value of vouchers from the *Microsoft* state-court litigation discouraged consumers from seeking to redeem them).

[178] *See* Cavanagh, *supra* note 28, at 214 ("Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing. Coupon settlements, wherein plaintiffs settle for 'cents off' coupons while their attorneys are paid their full fees within this category. Coupon settlements may take the form of a discount certificate on future purchases from defendants, or, as in the case of airlines, a right to discounts on future travel. Coupon settlements are of dubious value to the victims of antitrust violations . . . . Clearly, the types of coupon settlements described here, which are not atypical, confer no real benefits on the plaintiffs. Equally important, defendants are not forced to disgorge their ill-gotten gains when coupons are not redeemed. In such situations, it is difficult to justify paying attorneys their full fees in cash, instead of in kind."); William H. Page, Indirect Purchaser Suits After the Class Action Fairness Act 3 (June 10, 2011) (discussing the difficulties of recovering as an indirect purchaser), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=186 2218 [hereinafter Page, *After the Class*]; *see also* Crane, *supra* note 18, at 682 (asserting a direct purchaser may fully recover a monopolist's overcharge even if the cost is passed downstream).

have criticized private enforcement. Yet the flaws in their criticisms are typical.

Professor William Page, one of the nation's leading antitrust scholars, criticizes private enforcement in a number of articles. To be fair, his view is nuanced. He focuses his criticisms on indirect purchaser actions under state law, which he claims serve as a poor means of compensating victims and an inefficient and excessive form of deterrence. He asserts, for example: "[E]ven courts that did certify classes [in indirect purchaser actions] found it impractical to distribute most of the settlement funds to consumers who actually suffered harm, instead relying on dubious coupon and cy pres distributions."[179] Each of his assertions about coupons and cy pres distributions is, of course, sometimes true. The key question for public policy purposes, however, is how often each is true. For example, do 95% of victorious antitrust class action cases "rely" upon "dubious" coupons for victims or cy pres awards? Or is the correct figure only 5%? The policy implications of these alternatives differ sharply. If his assertions are correct 95% of the time, then private litigation is not adequately compensating the true victims of illegal behavior.

Yet in support of his assertion that courts are "relying on dubious coupon and cy pres distributions," Professor Page cites only three cases that he claims involved dubious coupons or vouchers.[180] Without going into the specifics of each case and whether the coupons were in fact worthwhile or dubious, we have no way of knowing whether these cases are typical. What percentage of antitrust settlements involve coupons? Why were these cases chosen? Moreover, some coupons resulting from antitrust cases are worthwhile,[181] and a settlement may include

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[179] Page, *After the Class*, *supra* note 178, at 4; *see also id.* at 24 ("Even if offered amounts are more substantial, most consumers typically do not make claims. In the *Microsoft* litigation, for example, consumers only claimed a small fraction of the settlement amounts in the various state settlements. In Massachusetts, 'only 1 percent of $34 million in vouchers was claimed.' ").

[180] *See* Lopatka & Page, *supra* note 174, at 552–56 (discussing the *Microsoft* and *Domestic Air Transport* litigation and citing the *Motorsports Merchandising* litigation).

[181] *See, e.g.*, *In re Auction Houses Antitrust Litigation*, 164 F. Supp. 2d 345 (S.D.N.Y. 2001), *aff'd*, 42 F. App'x 511 (2d Cir. 2002); Kruman v. Christie's International PLC, 284 F.3d 384 (2d Cir. 2002). These cases are analyzed in Lande & Davis, *Forty Case Studies*, *supra* note 16, at 13–18.

coupons as only a modest percentage of the total recovery.[182] For these reasons, the crucial issue for policy purposes is the percentage of settlements that "rely" on coupons that are "dubious." We lack the needed data and therefore simply have no way of knowing whether Professor Page's anecdotes are representative or anomalous.

Professor Page's cy pres point is similarly unsupported. He cites a large number of cases involving cy pres settlements, but almost none "relied" on a cy pres award; the cases possibly used cy pres awards to dispose of relatively small amounts of residual money that could not, as a practical matter, be distributed to the victims.[183] The only specific dollar amounts he mentioned are one award of $50,000 and nine awards of $250,000 each.[184] But he does not say what the total amounts of the recoveries in these cases were. A $50,000 cy pres grant that is the undistributed residual of a $50 million settlement seems hardly worth complaining about; what would Professor Page prefer the court do with the money?[185] He does provide a small number of cases that appeared to be "relying" upon a cy pres award, discussing at some length the *Toys "R" Us* litigation.[186] But we have no way of knowing whether these cases are typical. We cannot tell whether cy pres awards generally comprise 1% or 100% of settlement funds. We have no idea how representative these cases are; what percent of settlements "rely" on cy pres awards?

More generally, Professor Page writes: "In earlier studies of indirect purchaser litigation, I found that this dispersed and inefficient system provided little benefit to consumers who actually paid an overcharge."[187] Professor Page continues: "Even if classes are certified, the resulting settlements do little to benefit the

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[182] *See* Lande & Davis, *Forty Case Studies*, *supra* note 16, at 13–14 (noting the coupon ratio in the *Auction Houses* settlement was 20%).

[183] *See* Lopatka & Page, *supra* note 174, at 554–56 (discussing cases that utilized cy pres distribution).

[184] *Id.* at 554–56, 555 n.94.

[185] *See* Davis & Lande, *Summaries of Twenty Cases of Successful Private Enforcement*, *supra* note 16, at 24–26 (discussing the *High Pressure Laminates* litigation awarding plaintiffs $46 million and distributing a residual $41,644.79 as cy pres). Allocating slightly less than 0.1% of the recovery to cy pres hardly seems significant.

[186] *See* Lopatka & Page, *supra* note 174, at 554–56.

[187] Page, *After the Class*, *supra* note 178, at 3 (citing his earlier article, Lopatka & Page, *supra* note 174 for support).

consumers who paid the overcharges."[188] For support for these assertions he again cites his earlier article.[189]

Page's earlier article does support his argument with more than assertions or a group of anecdotes of unknown typicality. The article cites as support a study of consumer class action cases.[190] However, the study was published in 1988 and was a general study of class action cases, not one dealing specifically with antitrust cases.[191] The characteristics of antitrust class actions might well be different from those of most other consumer class action cases. Moreover, a study published twenty-five years ago, discussing many cases that even then were not new, provides little insight about current antitrust litigation.

Finally, Page writes: "Even where indirect purchaser classes of consumers have been certified and have generated a settlement fund, they have provided little compensation to consumers, despite incurring significant costs of fund administration."[192] He later continued: "It is very often impractical to distribute tiny individual damage awards to consumers at a reasonable cost."[193] For this proposition, Page cites one of the *Microsoft* cases, the *Relafen* case, and Professor Crane.[194] As support for Page's claims about the burden of claims administration he does cite actual estimates of claims administration expenses in one case, of $7.52 to $292, on a per claimant basis.[195] But he never tells us whether these amounted to 5% or 50% of the settlement fund. In fact, in *Relafen* the administrative costs were 5.3% of the settlement fund.[196] Again, we have no way of knowing whether these figures are typical.

While it surely is true that at times it is not cost-effective to return overcharges to every victim of an antitrust violation, Professor Page provides no statistics showing that the amounts received by the victims in antitrust settlements typically are

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[188] *Id.* at 24.
[189] *Id.* at 24 n.96.
[190] Lopatka & Page, *supra* note 174, at 552.
[191] *Id.*
[192] *Id.*
[193] Page, *After the Class*, *supra* note 178, at 24.
[194] *Id.* at 24 n.99. The Crane paper referenced can be found at *supra* note 18.
[195] Lopatka & Page, *supra* note 174, at 552 n.85.
[196] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1307 tbl.8.

"tiny."[197] We do not dispute that they may be tiny on occasion. We tried to develop statistics on this point but were able to obtain only anecdotal information. We offer as an example the Paxil settlement: 61,064 victims received an average of $196.31 each; 5,784 victims received $500-$1000 each; 1,262 received $1,000–$2,000 each, and 19 received more than $2,000 each.[198] Another interesting example is the Relafen settlement. It produced 978 refunds to consumer victims of between $1,000 and $2,000, and 253 refunds of at least $2,000; two distributions to two different groups of overcharged victims averaged $592 and $59. Some of these refunds were unclaimed, so each victim was subsequently sent an additional 23.9% of the amounts in the earlier distributions.[199] We are not asserting that these amounts are average or typical; we present them merely as illustrations that the amounts returned to victims are not always "tiny," and because they are symbolic of our challenge to critics to present reliable statistics rather than opinions as the basis for their conclusions. We would welcome an analysis of a significant group of cases.

Page relies in part upon Professor Crane, another leading antitrust scholar, who provides even less support for his sweeping claim that "issuing [class members] a check is often so expensive that administrative costs swallow the entire recovery."[200] As a basis for this claim, Crane relies solely on a 1969 Posner article that takes a similar position yet similarly offers no empirical support for it.[201] Crane further argues: "[A]fter lawyers' fees and administrative fees are accounted for, each consumer's share of the recovery is negligible, even though the harm to the class is great."[202] One might think Crane would substantiate this contention, perhaps relying on empirical research revealing cases

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[197] Page, *After the Class*, *supra* note 178, at 24.

[198] E-mail from Patrick E. Cafferty, Partner, Cafferty Clobes Meriwether & Sprengel to Robert H. Lande, Professor, Univ. of Balt. School of Law (Feb. 14, 2011, 3:20:57 PM ET) (on file with author).

[199] *Id.*

[200] Crane, *supra* note 18, at 683.

[201] *Id.* at 683 n.30.

[202] *Id.* at 683. Crane's remark is probably the conventional wisdom in the antitrust field. *See also* Joel Davidow, *International Implications of US Antitrust in the George W. Bush Era*, 25 WORLD COMPETITION 493, 496 (2002) ("It is frequently alleged that class action recoveries for antitrust or other US torts benefit lawyers more than victims.").

in which legal fees and claims administration expenses left little for injured victims, such as only a few dollars for each victim and perhaps only a small portion of the settlement fund for the victims on the whole. However, Crane provides no empirical evidence at all for his assertions.[203]

Crane relies instead on an article by Professor Cavanagh, another highly respected scholar.[204] Cavanagh's article, in turn, adduces only an admixture of anecdotes and hypotheticals involving the use of coupons.[205] He does not specify the size of any actual administrative costs in any cases.[206] Nor does he offer any data on the size of legal fees or the frequency of coupon settlements.[207] Neither scholar provides data showing whether administrative costs average 50% of the settlements or 5%. Neither Crane nor Cavanaugh presents data suggesting the average size of the legal fees as a percentage of the class recovery or the average portion of the recovery left to compensate the victims. Without this information, Crane's assertion that legal fees and administrative fees "often . . . swallow the entire recovery" amounts to no more than speculation.[208] The limited information we have assembled, moreover, suggests that the assertions made by Professors Page and Crane are likely to be incorrect.

As noted above, we were able to ascertain the attorney's fees in forty-five of the sixty large private cases we studied. The fees averaged either 14.3% or 25.6%, using, respectively, a weighted or unweighted average.[209] The weighted number is better for gauging the total amount of compensation that reached the plaintiffs because it gives more weight to the larger settlements, which have a lower percentage allocated to attorney's fees.[210] An earlier study of seventy-one antitrust class action cases computed slightly lower

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[203] *See generally* Crane, *supra* note 18, at 683 (alleging that private antitrust enforcement fails to compensate victims).

[204] *Id.* at 683 n.34 (citing Cavanagh, *supra* note 28, at 214).

[205] *See* Cavanagh, *supra* note 28, at 213–15 (discussing criticisms of class action lawsuits).

[206] *Id.*

[207] *Id.*

[208] Crane, *supra* note 18, at 683.

[209] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1294–95.

[210] *Id.*

figures: median legal fees of 9.15% and mean legal fees of 21.02%.[211]

We did not report the costs of administering the settlement funds when we analyzed the sixty large private cases in our study. In general, we found it difficult to convince attorneys or claims administrators to spend their valuable time searching for the relevant material. We did, however, persuade two claims administration firms, Rust Consulting and Class Action & Claims Solutions, to assemble and supply relevant data from their cases. The resulting information we obtained in these thirty-one cases is instructive. The administrative costs in these cases, all of which had claim filing deadlines between 2003 and 2010, averaged 4.1% of the recoveries and were all less than 10%.[212] "These thirty-one cases, moreover, were mostly moderate in size: twenty-seven involved settlements of $6–$70 million each and the largest was $250 million . . . ."[213] There are fixed costs associated with returning overcharges to victims, so it would be logical for the percentage of administrative costs to be smaller for larger cases and to be larger for very small recoveries.

In regard to this last point, note that we were able to obtain the administrative costs involved in returning overcharges to the victims in one of the largest antitrust cases in history—the *Visa/MasterCard* case.[214] In that case, the administrative fees involved with returning more than $3 billion comprised 2.34% of the settlement fund.[215]

The total of the legal fees (the low estimate in the two samples was 9.15% and the high estimate was 25.6%) plus the administrative costs (of 4.1% for the sample of thirty-two cases) would be approximately 13% to 30% of the settlements, depending

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[211] *See id.* at 1295 n.99.

[212] *See supra* Part II.B.*1.iii* (discussing the allocation of recoveries in our sample). We are grateful to Rust Consulting and to Class Action & Claims Solutions for this information.

[213] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1308. Although in many respects $6–$70 million is a large settlement, the majority of sixty cases in our study involved settlements of more than $100 million, and nine were at least $700 million. *Id.* at 1308 n.153.

[214] *Id.* at 1306.

[215] *Id.* at 1308.

upon which average figures are used.[216] This would result in the victims receiving 70% to 87% of the settlement.[217]

As noted above, we do not claim that these thirty-two cases are typical of antitrust class action settlements[218] (and we readily concede there must have been cases involving substantially higher administrative costs).[219] At the least, however, we know a number of antitrust class action cases returned around 70% to 87% of the recovery to victims after subtracting legal fees and claims administration expenses. And some cases, like the Visa/MasterCard case, returned more than 90% to victims.[220] Of course, it would be ideal to generalize from larger and better samples. But note that the critics who claim legal fees and administrative expenses "often . . . swallow the entire recovery" in

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[216] *Id.* at 1293–95, 1308.

[217] The possibility that Professor Page has made an inaccurate estimate of administrative costs in indirect purchaser actions also tends to undermine his claim that they provide a highly inefficient means of achieving optimal deterrence. Similarly, the Class Action Fairness Act, allowing for greater coordination between indirect purchaser, direct purchaser, and competitor claims through removal of most indirect purchaser class actions to federal court, supports our position. 28 U.S.C. § 1453 (2012).

[218] As we noted elsewhere:

> We asked a large number of potential sources, including both claims administration firms and individual attorneys, for the administrative fees associated with as many antitrust class action cases as they could produce. But the vast [sic] most of the potential sources were too busy or for other reasons declined to supply us with this information. We have no way of knowing whether those who did supply us with information are typical.

Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1306 n.152. Moreover, "[e]leven of these cases involved payments to indirect purchasers, and these cases averaged 5.6% in administrative costs, while the twenty-one direct purchaser cases averaged 3.1%." *Id.* at 1310 n.159. "Since the cases were not randomly selected and are few in number, we hesitate to come to a strong conclusion that indirect purchaser cases involve higher administrative costs . . . ." *Id.* Perhaps it would be fair to infer that these results suggest that indirect purchaser cases typically involve slightly higher, though still modest, administrative costs. That conclusion, however, seems tenuous given the limited sample. More research is needed.

[219] We do not know of a specific example. But surely there have been small class action cases with extremely high administrative costs and 33% attorney's fees.

[220] As noted, the administrative expenses in this case were 2.34%. The attorney's fees were $225.17 million—divided by the total of $3,771.25 million equals 5.97%. Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1309 n.156. "In 2007 we reported legal fees in this case of 6.5%. We believe the difference is due to the fact that the settlement earned interest before it was distributed. Regardless, the total of legal fees and administrative expenses was less than 10%." *Id.* at 1310 n.161.

class actions provide no evidence at all, much less a large data set or a representative sample.[221]

Crane further asserts that compensation "fails" as a goal of antitrust because recoveries do not end up with the real victims of the initial overcharges; his basis for this assertion is his claim that illegal overcharges pass through various layers in the distribution chain rather than remaining with the direct purchasers who are the only ones able to bring claims for damages under federal antitrust law.[222] Crane attempts to substantiate this argument by

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[221] Crane, *supra* note 18, at 682–83.

[222] *Id.* at 681–82. Similarly, Michael Denger, former Chair of the ABA Antitrust Section, stated, "Substantial windfalls go to plaintiffs that are not injured or only minimally injured." Michael L. Denger, Partner, Gibson, Dunn & Crutcher, Chair's Showcase Program at the ABA Section of Antitrust Law 50th Annual Spring Meeting 3 (Apr. 25, 2002), *available at* http://Americanbar.org/content/dam/aba/publishing/antitrust_source/07_ 02.authcheckdam.pdf. But Mr. Denger provides no data to prove his assertions or any citations to scholarly articles containing such data. He does not even provide a single supporting anecdote. Robert H. Lande, *Potential Benefits from Private Competition Law Enforcement*, *in* PRIVATE ENFORCEMENT OF COMPETITION LAW 61, 63 (Luis Antonio Velasco San Pedro et al. eds., 2011) (citations omitted).

Deputy Assistant Attorney General, Antitrust Division, W. Stephen Cannon wrote:

> [P]rivate plaintiffs act in their own self-interest, which may well diverge from the public interest. Private plaintiffs are very often competitors of the firms they accuse of antitrust violations, and have every incentive to challenge and thus deter hard competition that they cannot or will not meet. If the legal system were costless and errorless, these incentives would pose no problem. However, litigation is expensive and courts and juries may erroneously conclude that procompetitive or competitively neutral conduct violates the antitrust laws. Under the conditions, private plaintiffs will bring suits that should not be brought and that deter competitively beneficial conduct. They know that defendants often will be willing to offer significant settlements rather than incur substantial litigation costs and risks. Since potential defendants know this too, they will refrain from engaging in some forms of potentially procompetitive conduct in order to avoid the cost and risk of litigation.

W. Stephen Cannon, *The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 ANTITRUST L.J. 103, 106 (1986).

Antitrust Modernization Commission Commissioner Jacobson co-authored the following observations:

> For the weaker firm suing the stronger firm, the suit may be a way of sensitizing the stronger firm so that it will not undertake any aggressive actions while the suit is outstanding. If the stronger firm feels itself under legal scrutiny, its power may be effectively neutralized.
>
> For large firms suing smaller firms, private antitrust suits can be veiled devices to inflict penalties. Suits force the weaker firm to bear extremely high legal costs over a long period of time and also divert its attention from competing in the market. Or, following the argument above, a suit can be a

relying on a "typical" example: a hypothetical-dominant medical equipment manufacturer entering into exclusive contracts with hospitals that unlawfully lock out competitors and allow the manufacturer to charge a monopoly price.[223] In his hypothetical, the distributors originally pay the overcharge, and some—but not all—of that overcharge is passed onto the hospitals. The hospital also passes along some—but not all—of the overcharge to the patients.[224] The insurance companies pay the bulk of the overcharge because the patients are not often directly affected, as they pay only an insurance co-pay.[225]

> low-risk way of telling the weaker firm that it is attempting to bite off too much of the market. The outstanding suit can be left effectively dormant through legal maneuvering and selectively activated (inflicting costs on the weaker firm) if the weaker firm shows signs of misreading the signal.

Jonathan M. Jacobson & Tracy Greer, *Twenty-one Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273, 277 (1998) (quoting MICHAEL PORTER, COMPETITIVE STRATEGY 85–86 (1980)). However, these authors do not provide systematic data to support their conclusions.

[223] Crane, *supra* note 18, at 681–82.

[224] *Id.*

[225] To see why private enforcement fails at compensating for wealth transfer, consider the chain of loss-causation in a typical antitrust claim. A dominant durable medical equipment manufacturer enters into exclusive dealing contracts with hospitals and the group purchasing organizations ("GPOs") that bargain on the hospitals' behalf. The exclusive contracts unlawfully lock out potential competitors and allow the manufacturer to charge a monopoly price. In the first instance, the monopoly overcharge is paid by distributors that stock goods for the hospitals. The hospitals have complex billing arrangements with the distributors in which some, but not all, of the overcharge is passed on to the hospital. The hospitals then pass along some, but not necessarily all, of this overcharge to their patients.

> The patients are often not directly affected by the overcharge. This is because the patients' co-pay for using hospital services remains initially unaffected; their insurance companies pay the bulk of the passed-on overcharge. The insurance companies may eventually increase their premiums or co-pays, but these future increases may fall on a different set of insured than those who received monopoly-priced services. For large classes of patients such as the indigent and the elderly, any overcharge borne by the hospitals may be passed onto taxpayers in the form of Medicare, Medicaid, or direct hospital subsidization. This complex scenario has countless analogs in the world of manufacturing, sales, and distribution. Thus, a monopoly overcharge often produces numerous ripples in the economy.

Id. (footnotes omitted).

Professor Crane characterizes his lone hypothetical as "typical,"[226] but that seems unlikely. It involves monopoly exclusion, but most significant private recoveries are based on illegal collusion,[227] conduct that is usually far simpler to analyze. Yet relying on this single exclusive-dealing hypothetical, Crane dismisses the more than $12 billion paid to direct purchasers in the cases studied in the earlier Lande/Davis survey.[228] "Since direct purchasers often pass along a substantial portion of any overcharges downstream, over two thirds of the recoveries studied [those involving direct purchasers] likely failed to compensate the parties who ultimately absorbed most of the economic injury."[229]

Crucially, Crane does not analyze the overcharges or the recoveries in any of the direct purchaser cases in the Lande/Davis study. In reality, he does not know what percentage of the settlement funds in the Lande/Davis sample actual victims received.

Crane could have analyzed the direct purchaser cases in the study he cites. Consider the *Auction Houses* cases, for example, where firms were convicted of conspiring to raise auction commission rates.[230] We would be extremely interested in the results if he to assessed how much of the $552 million recovery[231] ultimately went to people who were victimized by the cartel. We expect that, other than 5.2% of the fund allocated to attorney's fees,[232] almost all went to the real victims of the collusion. Crane does not consider the possibility that almost all of the direct purchasers could have been end users. We also would urge him to analyze the $125 million in coupons issued in that case[233] (which we conservatively did *not* count as a cash benefit). He would see that these coupons were fully transferable (and were in fact often transferred) and fully redeemable for cash if not used for five

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[226] *Id.* at 687.

[227] *See* Lande & Davis, *Benefits*, *supra* note 16, at 901 (describing the types of claims made in our first case study).

[228] *Id.* at 899–900 tbl.4.

[229] Crane, *supra* note 18, at 684. *See also* Lopatka & Page, *supra* note 174, at 544 (suggesting that direct purchasers at times may not be able to pass on overcharges).

[230] *See* Lande & Davis, *Forty Case Studies*, *supra* note 16, at 13–18 (discussing the claims and recoveries in these cases).

[231] *Id.* at 13.

[232] *Id.* at 14.

[233] *Id.* at 17.

years.[234] We would be very interested in whether he (or Professor Page) would characterize these coupons as "dubious" and dismiss them as being unworthy of consideration as compensation for the real victims.[235]

Rather than analyze the forty cases in our study (or a different group of cases) to determine the percentage of the recoveries that went to the actual victims of the antitrust violations, Crane made up an extremely complicated exclusion hypothetical, assumed it to be "typical," and used it to dismiss the more than $12 billion in our study (most of which came from collusion cases) as not having compensated the real victims of illegal behavior.[236] That seems inappropriate.

To be sure, in some cases a portion of the overcharges to direct purchasers is passed on to the next level in the distribution chain. But it is also true that direct purchasers often recover in settlement only a fraction of the overcharges they pay—an amount that does not fully compensate them for their losses.[237] Direct purchasers in a case, for example, may pass on 50% of an overcharge to the next level in the distribution chain, but they may recover only 30%—the average amount found by Professor Connor in his study of the size of settlements in private cartel cases[238]—of the overcharge as damages. If so, the direct purchasers would need the full amount they recovered and then some to be made whole.[239]

Moreover, Crane ignores another type of harm to direct purchasers. It is a basic economic rule that when prices increase, output decreases. If direct purchasers are resellers, the lower volume reduces their profits. Thus, even if some direct purchasers initially appeared to receive excessive compensation as a result of an antitrust case, that appearance may well be misleading given the lost profits they are unable to recover.

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[234] *Id.* at 18. Twenty percent of the legal fees in this case were in the form of these coupons. *Id.*

[235] Page, *supra* note 178, at 3.

[236] Crane, *supra* note 18, at 681–82.

[237] *See* Connor, *supra* note 26, at 14–15 (discussing insufficient settlements in cases involving international cartels).

[238] *Id.*

[239] In this hypothetical, the indirect purchaser also paid overcharges but would receive nothing in the recovery.

For these reasons, Crane's argument at best supports the view that it is *possible* that *some* of the $12 billion in recoveries received by direct purchasers in our case study failed to compensate the actual victims of antitrust violations. But it is also possible that all of the recoveries provided important—but insufficient—compensation to victims of antitrust violations. In any case, his arguments do not justify discounting *all* of the payments made to direct purchasers.

Crane offers a similarly flawed analysis of payments made to indirect purchasers in the Lande/Davis study. He writes:

> [O]ne should also consider the $1.815 billion recovered in the six indirect purchaser cases to gauge whether these recoveries help to offset the [downstream channeling of costs]. [T]he [average recovery per case is] skewed by the *El Paso* litigation, which resulted in a $1.4 billion recovery for the indirect purchasers. . . . In each case, the settlement pot was further reduced by an attorney's fee award, generally in the 20 to 33 percent range.[240]

However, in the case Crane primarily analyzes, the *El Paso* case, only 6% of the settlement was allocated to attorney's fees, a fact Crane omits.[241]

Crane spends some of his analysis on the largest indirect purchaser case in our sample, the *El Paso* case, which yielded $1.4 billion for indirect purchasers:

> [T]the settlement provided for a complex scheme of remittances to the California Public Utilities Commission and for natural gas rate reductions over fifteen to twenty years. . . .

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[240] Crane, *supra* note 18, at 685 (footnotes omitted).

[241] Crane also argues that the $1.815 billion in indirect purchaser recoveries should be reduced for attorney's fees. *Id.* at 684. One certainly could justify doing this, but it also would make sense to express all values in current dollars. The *El Paso* settlement was in 2001, but Crane published his article in 2010. If *El Paso*'s $1.4 billion recovery were reduced by 6% for attorney's fees, down to $1.3 billion, but expressed in 2010 dollars, it would actually be a higher amount: $1.6 billion. But Crane only advocated performing the downward adjustment. *Id.*

> One may describe the *El Paso* scheme as compensating consumers as a class, but such a description would be largely inaccurate. This is because consumer injuries occurring in the past correspond only roughly to future consumer gains. Injured consumers who died, moved away from California, or discontinued natural gas service over the rate-reduction period received no compensation, or they received compensation that bore little relation to the amount of their injury. On the other hand, consumers who moved to California or otherwise began natural gas consumption after the violation received a windfall. In sum, consumers whose consumption patterns or volume changed significantly from the time of the violation to the rate-reduction period were either overcompensated or undercompensated. The *El Paso* settlement did not amount to a serious effort to identify persons who suffered economic harm and compensate them in proportion to their loss.[242]

Crane ignores crucial facts, however, including those set forth in our eleven-page analysis of the case that he cites four times.[243] He fails to acknowledge that the settlement included $551 million in upfront cash and stock valued at market rates.[244] Surely upfront payments to consumers did a wonderful job of compensating the actual victims. Moreover, our analysis of this case noted that we did *not* count the settlement's $125 million in future rate reductions on electricity as a benefit from the case.[245]

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[242] *Id.* at 685–86.

[243] *Compare id.* (discussing *El Paso*), *with* Lande & Davis, *Forty Case Studies*, *supra* note 16, at 77–88 (detailing distinctive aspects of the *El Paso* settlement).

[244] *See* Lande & Davis, *Forth Case Studies*, *supra* note 16, at 77 ("The settlement consideration consisted of more than 1.552 billion, including $551 million in upfront cash and stock valued at market rates. . . ."). *See generally* Crane, *supra* note 18.

[245] Lande & Davis, *Forty Case Studies*, *supra* note 16, at 77. The general policy of the Lande/Davis study was to be (perhaps overly) conservative by *not* counting the compensatory effects of products, coupons (which were part of *In re Auction Houses*), discounts, or rate reductions. Due to our omissions, our study was providing only a lower bound on the compensation effects of these cases. If Crane is fairly going to argue that these cases have not meaningfully compensated victims, as opposed to only calculating a lower bound on the benefits of these cases, he should have included these omissions back

Somewhat more difficult to analyze are the $876 million in cash payments that were to be made to victims in the future.[246] One would not expect a perfect correspondence between the 13 million California consumers and 3,000 businesses overcharged by El Paso and the future beneficiaries of the settlement.[247] But if one assumes an efficient market, as economists are wont to do, a consumer who sells her home soon after the settlement was inked should benefit from an increased sales price, because the purchaser of the house will be receiving a share of the settlement.[248] In other words, an owner selling her house after the settlement should have reaped the capitalized value of the settlement.[249]

Of course, markets are not always efficient. We, therefore, do not know, for example, how many California residents left the state after they collected only five years of cash payments.[250] But neither does Crane.[251] He relies on an imperfect correspondence between the overcharge and the recovery to dismiss the *entire* $1.4 billion settlement, saying that it would be "largely inaccurate" to say that the settlement compensated the victims.[252] Crane has not given us any information on which to take such a strong position.[253]

Another analytic strategy that Crane adopts causes him to underestimate the value of the compensation provided by private antitrust enforcement.[254] He argues that "[e]conomists and antitrust scholars increasingly view static consumer injuries as far

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into the analysis to the extent they were valuable to the victims (as was true in *In re Auction Houses*). He cannot fairly conclude that private litigation provides no meaningful compensation without fairly analyzing the effects of products, coupons, and discounts to the extent they were significant.

246 *Id.*

247 *Id.*

248 *See* Lande & Davis, *Empirical Assessment*, *supra* note 16, at 1314 ("But even if a consumer sells her home soon after the settlement was inked, to the extent the market was efficient—which economists so often assume—the value of the house should have increased accordingly, since the purchaser of the house will be receiving a share of the settlement.").

249 *Id.*

250 *Id.*

251 *Id.*

252 Crane, *supra* note 18, at 685; *see also* Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1314 (discussing this weakness in Crane's argument).

253 Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1314.

254 *Id.* at 1315.

less significant than dynamic injuries."[255] In other words, he claims that scholarly commentators are more concerned "with the tendency of antitrust violations to stifle innovation than they are with its tendency to increase the prices consumers must pay for existing goods."[256] Crane relies on this assertion and criticizes antitrust laws for focusing on static injuries—for example, the paying of overcharges—rather than on dynamic injuries—such as a loss of access to new products.[257]

Of course, this criticism applies to antitrust law generally, not just to private enforcement. Moreover, Crane here mixes apples and oranges. The prevailing view among scholars has long been that antitrust doctrine should focus primarily—if not exclusively—on creating efficient incentives, not compensating victims.[258] Crane cites Hovenkamp's statement that innovation and technological progress contribute more to "economic growth" than does achieving the right level of static efficiency.[259] This view of law as serving to create ideal incentives rather than to redress past wrongs reflects the ascendancy of an economic analysis of law in antitrust.[260] "For these commentators, compensating victims is just a means to an end, not an end in itself."[261] They have not developed a theory—in fact, have not tried to develop a theory—about the hierarchy of injuries that deserve compensation, just a hierarchy among the harms that should be prevented.[262]

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[255] Crane, *supra* note 18, at 688.

[256] Lande & Davis, *Empirical Assessment*, *supra* note 16, at 1315.

[257] *Id.*; *see* Crane, *supra* note 18, at 689 (contending few antitrust plaintiffs seek compensation for dynamic injuries).

[258] *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992) (discussing the purposes of antitrust law). The authors of this Article believe that an important purpose of the antitrust laws is to compensate victims, but we acknowledge that this position does not predominate among antitrust scholars.

[259] Lande & Davis, *Empirical Assessment*, *supra* note 16, at 1315; *see* Crane, *supra* note 18, at 688 n.62 (citing Hovenkamp's assertion that no one doubts Robert M. Solow's "basic conclusion that innovation and technological progress very likely contribute much more to economic growth than policy pressures that drive investment and output toward the competitive level") (citing Herbert Hovenkamp, *Restraints on Innovation*, 29 CARDOZO L. REV. 247, 253 (2007)).

[260] Lande & Davis, *Empirical Assessment*, *supra* note 16, at 1315.

[261] *Id.*

[262] *See* Crane, *supra* note 18, at 703 ("Rather than looking backwards toward remediating or punishing past bad acts, private antitrust enforcement should be oriented toward the future by preventing exercises of market power that harm consumers.").

Thus, Crane's argument about static and dynamic injuries improperly imports views about incentives—and deterrence—into a discussion about compensation.[263] As we said before:

> Crane offers no reason why a consumer suffers any lesser injury from paying an extra $1,000 for a good than from being deprived of an opportunity to buy a superior good that would be worth an additional $1,000 to her. Considered prospectively—viewed in terms of economic growth—innovation is much more important than static efficiency, but this does not mean as a matter of retributive justice $1,000 worth of one sort of harm is any more significant than $1,000 of another sort of harm. To the contrary, economists assume that harms that can properly be measured at $1,000 are of precisely equal value to a victim, whatever that $1,000 represents.[264]

Indeed, that assumption is crucial for an economic analysis to function, and if Professor Crane has a different view he should present it.[265]

As we note above, we have identified sixty private cases that returned more than $30 billion in cash to victims of anticompetitive behavior, plus additional amounts in coupons, discounts, and products.[266] That massive recovery should create a presumption that a significant number of victims have enjoyed substantial compensation as a result of private litigation.[267] Critics of private antitrust enforcement can plausibly argue that *some* of this $30 billion in recoveries *might* not have compensated the *actual* victims of antitrust violations. We agree with that qualification.[268] But no critic has shown that this has happened to a predominant extent.[269] Yet such a showing would be necessary

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[263] Lande & Davis, *Empirical Assessment*, *supra* note 16, at 1315.
[264] *Id.* (citing POSNER, *supra* note 258, at 23).
[265] *Id.* at 1315–16.
[266] *Id.* at 1316.
[267] *Id.*
[268] *Id.*
[269] *Id.*

before he fairly could dismiss the compensation effects of private litigation.[270]

Private litigation is virtually the only way to secure recompense for the victims of antitrust violations.[271] Sadly, we readily acknowledge that this $30 billion almost certainly did not adequately compensate the victims for the harm they suffered. Indeed, we believe that the harm was much larger, but due to issues such as overly strict class action certification standards, victims were often insufficiently compensated or were completely denied compensation.[272] But even though a careful empirical study found that victims were compensated a median of only 30% of their losses[273]—they sometimes were compensated nearly 100% but on many occasions received very little compensation because plaintiffs faced problems such as certifying many of the victims in a class—we contend that 30% of a loaf is better than none at all.

The overwhelming weight of the evidence, then, supports the view that private antitrust cases have provided large amounts of compensation to the victims of antitrust violations. But that does not mean victims receive enough. Instead the antitrust laws severely *under*compensate the victims of antitrust violations.[274] This problem—and not the possibility that some cases result in dubious coupons, that legal fees and administrative costs "swallow" the recovery, or that there is not a precise enough overlap between the real victims and those who recover—should be the focus of our concern.

B. PRIVATE ENFORCEMENT DOES NOT DETER FUTURE VIOLATIONS

As discussed above, we have shown that private antitrust enforcement does a great deal to deter anticompetitive conduct, likely more than the justly lauded DOJ anti-cartel program.[275] Even treating $6 million of corporate liability as equivalent to a year in prison and $3 million as equivalent to a year of house

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[270] *Id.*

[271] For the relatively unusual exceptions, see *supra* note 52 and accompanying text.

[272] *See* Connor, *supra* note 26, at 14 (finding that victims receive a median of only 30% of single damages in settlement).

[273] *Id.*

[274] *Id.*

[275] *See supra* Part II.B.*3* (comparing private enforcement with the DOJ anti-cartel program).

arrest[276]—and ignoring that defendants were required to provide products, discounts, or coupons, pay attorney's fees and other litigation costs (including expert witness fees), suffer the disruptive effects of the litigation on corporate efficiency, and abide by injunctive relief—DOJ anti-cartel cases amount to the equivalent of only $11.7 billion in deterrence compared to the $34–$36 billion in sanctions imposed by private enforcement.[277] Only if a year in prison were equated to more than $40 million would DOJ cartel enforcement do as much to deter as private enforcement.[278]

Professor Crane argues, however, that private enforcement does not deter anticompetitive actions for an interesting reason: "Two converging trends—the increasing length of antitrust proceedings and the increasing shortness of managerial tenure—make it likely that corporate managers severely discount the threat of future litigation damages."[279]

Crane first states that antitrust cases have grown lengthier in recent years,[280] an assertion contradicted by recent data.[281] He then notes that "the average antitrust suit almost certainly lasts several years."[282] He then speculates, without evidence, that "in the average private antitrust case, the time from the beginning of an anticompetitive scheme until judgment day is at least five years and may be closer to ten years or more."[283] Although this range may be accurate due to the lengthy existence of many cartels, it is not very important. Each decision a cartel manager makes to continue his or her participation in a cartel is a new decision. The crucial time lags are the ones from each cartel decision until judgment. Recent data suggests only a three-year length for

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[276] *See* Davis & Lande, *supra* note 16, at 1277 (assigning a dollar value to prison time and house arrest).

[277] *See id.* at 1278 (noting this shortfall in the DOJ's enforcement program).

[278] *Id.*

[279] Crane, *supra* note 18, at 691.

[280] *Id.* at 692 (discussing the burden of discovery on modern litigation).

[281] Professor Connor reports:

> Although time-consuming, settlements in international cartel cases appear to be taking shorter times to resolve in recent years . . . . Prior to 1990, the average treble damages case took 11 years between the filing date and the date the first firm settled. In the 1990s, that lag dropped to a little more than five years, and in the early 2000s it was merely 3 years.

Connor, *supra* note 26, at 8.

[282] Crane, *supra* note 18, at 692.

[283] *Id.* at 692–93.

international cartel litigation and about four years for domestic cartel litigation,[284] so the lag from the last decisions to enter cartels until judgment could be less than four years.[285]

Second, he argues:

> This time lag should be paired with the fact that the managers who put into place anticompetitive schemes are increasingly unlikely to be around to internalize their effects at judgment day. During the 1980s, the turnover rate among senior managers in large corporations was just above ten percent. By all accounts, the turnover rate increased significantly—perhaps even doubling—in the 1990s and 2000s as various capital market factors accentuated shareholder demand for short-term performance. Today, the average CEO holds her job for about six years. Mid-level executives, such as divisional managers, typically hold their jobs for an even shorter period, perhaps less than four years. Thus, most of the executives responsible for an antitrust violation will no longer be with the firm by the time a damages award is entered against the company.[286]

Professor Crane's concluding sentence is, however, unsupported by his evidence. He ignores the fact that executives often change to a different job *at the same firm*. Even if they change jobs on average every four years, they might well remain at the same company for a very long period. He also ignores the possibility that firms that fix prices might be different on average from other corporations.

One of the authors, moreover, recently designed a modest study of managerial turnover among executives who violated the antitrust laws—albeit a very rough study carried out by a student

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[284] Connor, *supra* note 26, at 8, 12.

[285] The time lag would be three years if the international cartel ended the instant it was detected, because private suits are usually filed very shortly after a cartel is detected. The period could be longer if the cartel collapsed on its own and was only detected subsequently, or if detection occurred well after the last decision to participate.

[286] Crane, *supra* note 18, at 693–94 (footnotes omitted).

research assistant and not a private investigator.[287] The study was able to determine the 2011 whereabouts of 35 of 103 managers (34%) known to have received a prison sentence in a cartel case between 1995 and 2010.[288] Of those thirty-five, nine (26%) were employed in 2010 by the company for which they worked during the cartel, and another nine (26%) were working at a different company within the same industry.[289] The remaining seventeen were either still in prison, unemployed, employed in different industries, retired, or deceased.[290] "Because we were unable to discover the whereabouts of 68 of the 103 who received a prison sentence, these results might not be statistically significant."[291] Nevertheless, if the employment results for the convicted price fixers we were unable to track down are similar to those we could find, then half of those who served time in prison for an antitrust offense went back to work for their previous employer or another firm in the same industry.[292]

We also discovered the 2011 whereabouts of four individuals who received only fines and no prison sentences.[293] Two were employed by the same company for which they worked when the cartel operated, one appeared to be working in the same industry, and the fourth had moved to a new industry.[294]

Moreover, for executives who went to prison, our figure of 52% almost certainly significantly underestimates the percentage of price fixers who went back to the same firm or industry. Some

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[287] *See* Connor & Lande, *supra* note 137, at 440–42 (discussing a study of known antitrust law violators' current whereabouts). This study was conducted between July 15, 2010, and March 26, 2011, by W. James Denvil, a student at the University of Baltimore School of Law. For the study methodology, see *id.* at 440 n.48. We stress that Mr. Denvil is not a trained private investigator and was only able to access publically available information.

[288] *Id.* at 441.

> In several cases, individuals were sanctioned but not their very small businesses. Thus, we excluded individuals who were stamp dealers, consultants, sole proprietors, or co-owners during the cartel. Many of the 152 defendants' sentencing details are not posted on the Antitrust Division's Web site. We thank the Division for providing the missing sentencing documents.

Id. at 441 n.57.

[289] *Id.* at 441.

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Id.* at 442.

[294] *Id.*

individuals likely reached retirement age or returned to a firm or industry without notice of this fact being published in a source that is easily web-accessible, or the notice of their re-employment may have been deleted from the Internet before our highly imperfect search. Our survey may have erroneously counted such people as not having returned to their firm or industry.

Thus, Professor Crane's speculation about managerial turnover among antirust violators is probably inaccurate. In any case, it should not be accepted without evidence.

Even if his conclusions were backed with sound data, we would still have to turn to the next step in his chain of inferences. Crane writes:

> High managerial turnover rates might not thwart the deterrence objective if managers were to internalize some of the detrimental effects of antitrust judgments rendered after they leave the defendant firm. In particular, managers might incur a reputational cost in lost future employment opportunities or take a prestige hit in the business community by virtue of their past roles in a later-adjudicated antitrust violation. But there is scant evidence suggesting that individual managers' reputations are much affected by antitrust judgments against their former employers.[295]

One might just as easily come to the opposite conclusion: there is equally scant evidence that individual managers' reputations are *not* affected by antitrust judgments caused by their conduct. Indeed, we know of no sound empirical evidence one way or the other. Nevertheless, we would be surprised if a new employer did not usually surmise that, for example, the head of the marketing department of a firm convicted of price fixing might well have been responsible for the price fixing, even if the executive escaped sentencing. (Whether the new employer would care is a different matter. In light of the unduly low current level of antitrust

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[295] Crane, *supra* note 18, at 694 (footnote omitted).

sanctions,[296] future employers might not care very much whether their executives were likely to fix prices!) Once again, Crane has pointed out that something is possible, then assumed it is common, and finally derived conclusions based upon this bed of quicksand.

Crane further argues:

> A second way that private antitrust lawsuits could provide an early deterrent shock is through large settlement payouts. . . . [L]arge settlement payouts in private cases usually do not occur until the eve of trial. . . . [T]he average time from the planning of anticompetitive conduct to the payment of any substantial settlement amount still probably exceeds five years.[297]

The filing of a private case can be an extremely important event, however, even if everyone involved knows the case will last for many years. When a private case is filed, and especially if the private suit follows the filing of a government suit, knowledgeable observers should have a rough idea a reasonable percentage of the time as to whether the firm is likely to be found liable if the market is working efficiently. The market certainly could not determine the precise discounted present value of a suit that might settle for $1–$2 billion in five years. But firms in the field observing the events transpiring certainly can decide there is a good chance that certain managers probably were responsible for a violation likely to cost their company a significant amount of money.[298]

Crane recognizes that the date of the resolution of litigation may not matter for deterrence effects if the filing of a lawsuit itself imposes a sufficiently large penalty. His response is that private enforcement actions have a much smaller impact on share price

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[296] Connor & Lande, *supra* note 137, at 428 (noting antitrust sanctions are so low they should be quintupled).

[297] Crane, *supra* note 18, at 696.

[298] This assumes that the current sanctions are large enough to matter significantly. *But see* Connor & Lande, *supra* note 137, at 428 (noting that the current level of cartel sanctions is only 9%–21% of optimality). Firms, then, sometimes might not care that certain managers caused their employer to violate the antitrust laws.

than government actions. Concerning suits by the government, Crane argues:

> While empirical work suggests that the filing of an antitrust action by the Department of Justice or Federal Trade Commission has an immediate and significant negative effect on a defendant firm's share price, the filing of a private antitrust lawsuit has only about a tenth of the effect of a public suit. Empirical studies have found that defendants lost, on average, 6 percent of their share value upon the filing of a government antitrust lawsuit, but only about 0.6 percent of their share value upon the filing of a private lawsuit. A half-percent drop in market capitalization is unlikely to engender ruinous consequences to most managers, particularly if the gains from the challenged behavior were large.[299]

Crane's dismissal of the effect of private antitrust enforcement on stock prices is unpersuasive for the two reasons discussed above: first, a decrease in share prices of 0.6 % is quite significant; second, the drop in price when the government files a case is likely largely the result of the market anticipating a later *private* action and the large costs it may impose on a corporate defendant rather than the much smaller sanctions, if any, the government is likely to impose on the corporation (as opposed to its officers and directors).[300]

Further, Crane's comparison of the drop in share value from public and private enforcement may reflect selection bias. Government prosecutors appear to be risk averse, pursuing only the strongest cases.[301] Our study of DOJ criminal enforcement, for example, showed a rate of success of over 90%.[302] Plaintiffs' attorneys, on the other hand, are willing to take greater chances. This difference in attitude partially explains why the ratio of

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[299] Crane, *supra* note 18, at 695.

[300] *See supra* Part II.B.*4* (discussing the drop in stock price after antitrust actions are filed).

[301] *See supra* note 45 and accompanying text (discussing the heightened criteria required for a government lawsuit).

[302] Lande & Davis, *Comparative Deterrence*, *supra* note 16, at 337.

private cases to public cases was six to one for most of the twentieth century and by the 1980s had climbed to ten to one.[303] Thus, private plaintiffs file lawsuits in almost every action that the government files a case, but the opposite is not true.[304] As a result, the larger decrease in share value from government filings than private filings may reflect the relative strength of the cases at issue, and not just the relative impact of a government action as compared to a private action.[305]

Like Professor Crane's compensation argument, his deterrence argument consists only of theoretical chains of inferences built upon inferences, each a possibility as to what *could* happen to *some extent* and many of them implausible upon reflection. We have shown that defendants paid more than $33 billion in cash as a result of just sixty private antitrust cases.[306] These same defendants also spent additional sums on discounts, products, coupons, rate reductions, and litigation costs.[307] Their business operations were to some extent disrupted by antitrust lawsuits, and the efficiency of many of their officials presumably impaired during their pendency. The filing of a private lawsuit also causes an immediate and significant drop in share value, and the prospect of such a filing likely explains in substantial part why the filing of a government action causes such a large drop in share value. We cannot show an objective measure of the strength of the deterrence effects of private enforcement, but our conclusion that it is

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[303] Bizjak & Coles, *supra* note 113, at 436.

[304] *See supra* Parts II.B.*4–5* (discussing when private suits are filed).

[305] Investors may respond differently to government and private lawsuits for various reasons. Government lawsuits may, for example, tend to involve the kind of conduct that is most obviously anticompetitive and therefore illegal, such as horizontal agreements that allegedly violate the Sherman Act. *See* Bizjak & Coles, *supra* note 113, at 437, 442–46 (arguing that antitrust cases that allege horizontal violations or are brought under the Clayton Act result in a greater decrease in share value than cases that, respectively, allege vertical violations or are brought under the Sherman Act). In addition, the market may respond differently to government filing than private filings in recognition that government will file cases only where there is a very high probability of success. *See supra* note 302 and accompanying text. Whether this is a reason to prefer government enforcement to the exclusion of private enforcement depends on whether it is desirable to deter only the most blatant violations of the antitrust laws. But the different market reactions do not establish the relative deterrence effects of public and private enforcement given the same underlying conduct.

[306] *See* discussion *supra* Part II.B.*1.i.*

[307] *See, e.g.*, *supra* note 181 (providing an example of a meaningful coupon distribution); *supra* note 185 (providing an example of a cy pres distribution).

extremely significant is not undermined by Professor Crane's criticisms.

C. PRIVATE CASES USUALLY DO NOT INVOLVE ANTICOMPETITIVE CONDUCT[308]

Another widespread criticism of private enforcement is that the underlying cases lack merit. If Commissioner Rosch were correct that "[t]he plaintiffs' lawyers . . . stand to win almost regardless of the merits of the case,"[309] then not only would private antitrust actions fail to deter anticompetitive behavior, but they also would unfairly over-reward alleged victims while costing innocent defendants billions of dollars. Another consequence would be discouraging legal—and beneficial—conduct.[310] Defendants and analysts friendly to defendants often make these assertions and provide anecdotes—but no data[311]—to establish that recoveries in meritless cases occur.[312] Just as predictably, plaintiffs dispute

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[308] This section is in part based upon and updates material found in Lande & Davis, *Comparative Deterrence*, *supra* note 16, pt. IV.

[309] Rosch, *supra* note 147, at 9–10; *see also Q&A With Weil Gotshal's Steven A. Newborn*, *supra* note 168 ("Class actions . . . are increasingly beneficial only to plaintiffs' law firms."). Similarly, Professor Herbert Hovenkamp writes that treble damages and attorney's fees for victorious plaintiffs give plaintiffs too great an incentive to sue: "As a result many marginal and even frivolous antitrust cases are filed every year, and antitrust litigation is often used as a bargaining chip to strengthen the hands of plaintiffs who really have other complaints." HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 59 (2005). Professor Hovenkamp does not, however, give data that supports his conclusions. *Id.*

[310] *See* Jacobson & Greer, *supra* note 222, at 277 (suggesting that one business strategy is to commence antitrust litigation to halt a competitor's growth). However, Jacobson and Greer do not provide systematic data to establish the prevalence of this business strategy. *Id.*

[311] One prominent critic, former ABA Antitrust Section Chair Jan McDavid, candidly admitted this lack of data. She conceded, "[The] issue [of class action abuse] was never directly presented in these cases, but many of these issues arise in the context of class actions in which the potential for abusive litigation is really pretty extraordinary." Janet McDavid, Partner, Hogan & Hartson L.L.P., *Roundtable Discussion: Antitrust and the Roberts Court*, 22 ANTITRUST 8, 12–13 (2007) [hereinafter *Roundtable Discussion*]. Professor Andrew Gavil then asked McDavid and other lawyers participating in the discussion, "What empirical bases do you have for any of those assumptions, other than your personal experiences largely as defense lawyers?" Andrew I. Gavil, Professor, Howard Univ. Sch. of Law, *Roundtable Discussion*, at 13. McDavid replied, "I'm not aware of empirical data on any of those issues. My empirical data are derived from cases in which I'm involved." McDavid, *Roundtable Discussion*, at 13. A professor at Columbia Law School, C. Scott Hemphill, added, "The Court's attention to false positives relies upon a somewhat older theoretical literature. I'm not aware of a sizeable empirical literature making the point." C. Scott Hemphill, Columbia Law Sch., *Roundtable Discussion*, at 13.

[312] *See, e.g.*, Gary D. Ansel, *Admonishing a Drunken Man: Class Action Reform*, 48

that they do. Is there any way to ascertain whether there is any truth to these assertions other than through lengthy and controversial analyses of a random sample of cases? We believe there are several reasons to infer that these concerns are at least unproven and in fact likely lack support.

We know of no study providing evidence that any significant number of cases lacked merit and yet recovered substantial settlement recoveries. In contrast, as noted above, we have now identified sixty cases that appear on the whole to have had significant merit. Critics of private antitrust enforcement should be required to provide some similarly credible evidence to substantiate their position. But they have not done so. No less august a political body than the U.S. Supreme Court in *Twombly* has declared that defendants in antitrust cases sometimes settle meritless cases.[313] Yet the Court relied not on evidence, not on a survey or study, but rather on the unsupported opinion of another appellate court judge.[314] Based on little more than conjecture, then, the Court made it more difficult for complaints to survive a motion to dismiss.[315]

Two assumptions tend to underlie the claim that antitrust defendants at times settle cases for more than the merits make appropriate. First, there is the claim that defendants in class actions in general—and in antitrust class actions in particular—are risk averse and are willing to pay a premium to avoid the possibility of losing at trial.[316] Second, there is the suggestion that

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ANTITRUST BULL. 451, 454–56 (2003) (relying on war stories and hearsay yet providing no examples of frivolous lawsuits). *See generally* R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 2 J. STRATEGIC MGMT. EDUC. 37 (2005) (alleging strategic uses of antitrust laws, *inter alia*, to extort funds from a rival, to prevent a successful firm from competing, and to respond to existing lawsuits).

[313] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

[314] *Id.* (citing Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)). The Supreme Court ignored a trial court judge offering a conflicting opinion as part of the same symposium. *See generally* Jack B. Weinstein, Comment, *What Discovery Abuse? A Comment on John Setear's* The Barrister and the Bomb, 69 B.U. L. REV. 649 (1989) (arguing federal judges have several methods at their disposal to corral discovery abuse).

[315] *Twombly*, 550 U.S. 569–70 (requiring facts enough to state a claim that relief is plausible).

[316] RICHARD A. POSNER, ANTITRUST LAW 275 (2d ed. 2001) (discussing the possibility of risk averse defendants settling weak lawsuits); *see also supra* note 148 and accompanying text.

antitrust defendants pay significantly higher litigation costs than antitrust plaintiffs, placing the defendants at a disadvantage in settlement negotiations.[317] Relying on these assumptions, in theory defendants in antitrust class actions should feel compelled to settle even meritless cases.

Attention to the realities of antitrust litigation belies this view. Indeed, for various reasons, the opposite is likely true—plaintiffs in private antitrust cases probably settle for too little rather than for too much.[318] To support this claim, a baseline is useful. Relying on a legal positivist perspective, one might treat the expected value of litigation as a settlement that reflects the merits of a claim.[319] The issue, then, is whether one would expect defendants in antitrust class actions to settle for less or more than the expected value of litigation.

Defendants in antitrust cases tend to be very wealthy and powerful.[320] After all, violators of the antitrust laws must have market power for their illegal conduct to harm others.[321] Their wealth allows them to retain effective counsel, pay the costs of litigation, and tolerate risk. Moreover, plaintiffs are not entitled to prejudgment interest.[322] As a result, antitrust defendants usually enjoy an involuntary, interest-free loan during the pendency of litigation. This makes them less eager to settle than plaintiffs. In addition, there is evidence that plaintiffs in large cases actually incur *higher* litigation costs than defendants.[323] This may well be true in antitrust class actions, where plaintiffs must pay economic experts to gather data and analyze an industry

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[317] *See Twombly*, 550 U.S. at 559 (discussing the possibility of cost-conscious defendants settling lawsuits but ignoring the possibility that cost-conscious plaintiffs may refrain from filing a lawsuit in the face of high discovery costs).

[318] *See supra* Part II.C.

[319] Joshua Davis, *Expected Value Arbitration*, 57 OKLA. L. REV. 47, 48 (2004).

[320] *See supra* note 161.

[321] Although market power is not an element of a per se claim, plaintiffs must prove causation and the fact of damage to recover. Davis & Cramer, *supra* note 161, at 983. Defendants, by definition, must have market power to cause antitrust injuries. Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (noting point of inquiry into market power is to determine whether defendant can cause antitrust harm).

[322] The statute provides for an exception if the defendant causes undue delays or otherwise violates the rules. 15 U.S.C. § 15(a) (2012). We are not aware of this ever being done in an antitrust case. Certainly, it is not common.

[323] Willging et al., *supra* note 164, at 548 (finding that at the 95th percentile, based on the cost of litigation, plaintiffs pay more in litigation costs than defendants).

without the internal expertise, knowledge, and information that defendants enjoy.

The plaintiffs in antitrust litigation, in contrast, tend to have limited means.[324] By their nature, they generally lack market power and are vulnerable to the market manipulations of others. Of course, at least in class actions, the right focus may not be on the plaintiffs themselves but on their attorneys. But that shift in focus reinforces the likelihood that antitrust settlements are likely to be too low rather than too high.

Consider the distinctive incentives before the attorneys for defendants and plaintiffs in class actions. Defense attorneys tend to be paid by the hour.[325] The longer litigation persists, the better they are apt to do financially. The Supreme Court and lower courts in recent years have also greatly strengthened the hand of defense counsel, making it easier for them to prevail in moving to dismiss and for summary judgment, and in opposing class certification.[326] Moreover, defense counsel themselves may not be overly averse to risk. They have no direct stake in the outcome of trial and, given the extraordinarily high rate of settlement in class action cases, likely feel comfortable they can settle eventually if their pre-trial efforts prove unsuccessful.

Plaintiffs' counsel in antitrust cases, on the other hand, generally proceed on a contingent basis, spending their time without immediate payment and incurring litigation costs on behalf of their clients.[327] They receive no compensation or reimbursement if they lose. They also tend to fare best financially if they settle quickly, even for a relatively modest amount.[328]

None of this is meant to impugn the ethics or integrity of attorneys representing either defendants or plaintiffs in antitrust cases. No doubt many attorneys abide by their ethical obligation to place their clients' interests above their own. The point is only that to the extent that the incentives before the attorneys influence the settlement process—even if only at the margins—they will magnify the negotiation advantages of antitrust

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[324] *See supra* note 162.

[325] *See supra* note 167.

[326] *See supra* notes 4–8 and accompanying text.

[327] Davis & Cramer, *supra* note 4, at 371–72.

[328] *Id.*

defendants over antitrust plaintiffs. Plaintiffs in antitrust class actions therefore are likely to settle for too little rather than too much.[329] As a result, the substantial settlements we have identified almost certainly reflect claims against behavior that is likely anticompetitive, and the same is true for other private cases that settle for nontrivial amounts.

D. PRIVATE ENFORCEMENT OVERDETERS ANTICOMPETITIVE CONDUCT AND THEREBY DETERS BENEFICIAL CONDUCT

Even if most of the claims in private cases are meritorious, many believe that treble damages, especially in light of the other existing antitrust sanctions, lead to overdeterrence. The conventional wisdom in the field was eloquently articulated by Professors Lopatka and Page even before the criminal fine levels were significantly increased in 2004:[330]

> [W]e are skeptical that the sum of all federal penalties for illegal antitrust overcharges is suboptimal. Civil liability in the form of treble damages is not the only penalty for price fixing. Criminal antitrust penalties are available and, as we noted earlier, actually precede a high percentage of indirect purchaser actions. Even setting imprisonment aside, the federal criminal penalties are substantial. . . . The fines to which antitrust defendants have agreed in order to settle

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[329] Others may also say that defendants worry that they will lose when they should not. This raises a jurisprudential issue. If the courts say conduct violates the antitrust laws, and if an appellate court, or even the Supreme Court, confirms liability, is it meaningful to say that the outcome is wrong? For present purposes, at least as a first approximation, we adopt the simplistic version of the positivist's view and suggest that the law is whatever the ultimate court declares it to be. *See* Jules L. Coleman, *Negative and Positive Positivism*, *in* PHILOSOPHY OF LAW AND LEGAL THEORY 117, 117 (Dennis Patterson ed., 2003) ("[T]he naive version of legal realism maintains that the law of a community is constituted by the official pronouncements of judges."). Any other perspective would make an objective assessment of merit difficult, if not impossible.

[330] In 2004, the Bush Administration proposed and helped enact significant increases in the criminal fines against cartels. Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 661, 668 (2004) (substituting a $100,000,000 maximum corporate fine for the existing $10,000,000 maximum; a maximum $1,000,000 individual fine for the existing $350,000 maximum; and a maximum ten year prison sentence for the existing maximum three year sentence).

> criminal price-fixing indictments have skyrocketed in recent years. . . .
>
> It seems likely that the combination of federal penalties is adequate.[331]

Others believe there was overdeterrence even before the 2004 increases,[332] and certainly afterwards.[333] Those who believe in overdeterrence frequently single out the private treble damages remedy for special criticism, believing it contributes significantly to a current overdeterrence problem.[334]

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[331] *See* Lopatka & Page, *supra* note 174, at 567–68 ("In light of a more expansive corporate amnesty policy that increases the probability of uncovering concealable antitrust violations, and hence reduces the magnitude of the appropriate fine, the ceilings today may well be high enough that the optimal penalty can be imposed through criminal sanctions alone.").

[332] *See* Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 716 (2001) ("[T]he recent increase in fines may have resulted in higher-than-optimal fines."). The sanction most often believed to be excessive is the private treble damages remedy. For a discussion, see *infra* notes 358–59.

[333] The ABA Antitrust Section, for example, opposed increasing the Sherman Act's criminal penalties unless Congress first conducted a series of hearings and concluded as a result of information collected in these hearings that the answers to a number of difficult questions indicated higher penalties were appropriate. As the Section argued:

> The deterrence issue has no easy answer but simply exemplifies the importance of the need for hearings or public briefings on these issues. . . . Some also believe that combined criminal and civil provide too much deterrence that will chill the businessperson in his decision-making. . . . Whether increased criminal penalties will provide an appropriate level of deterrence . . . should be the subject of hearings and public briefings to reach the proper deterrence balance.

Comments of the ABA Section of Antitrust Law on H.R. 1086: Increased Criminal Penalties, Leniency, Detrebling and the Tunney Act Amendment, at 11–12.

[334] Abbott B. Lipsky, Jr., Partner, Lantham & Watkins, LLP, Statement Before the Antitrust Modernization Comm'n, Private Damages Remedies: Treble Damages, Fee Shifting, Pre-Judgment Interest Before the Antitrust Modernization Commission, Washington, D.C., at 4–5 (July 28, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Lipsky.pdf (citation omitted) ("One can also speculate about why a treble damage remedy is needed for deterrence purposes at all, so long as Section 1 and Section 2 violations can be—and in the case of cartel violations, typically are—prosecuted criminally and punished with actual incarceration for individuals and criminal fines. . . . Perhaps the availability of treble damages overcompensates . . . . It is possible that treble-damage claims unintentionally assume some of the characteristics of a wealth-transfer program that can be gamed to benefit the undeserving . . . [similar to criticism that can be] levied at other bounty payment mechanisms, including the tributive and unwise legal methods that produced or at least inflamed the Salem Witch Trials . . . ." (footnote omitted)). For an example of an argument, without empirical evidence, that criminal fines and prison terms reduce the need for treble damages in antitrust class actions, see David

A difficulty with evaluating the overdeterrence argument is that the United States imposes a diverse array of sanctions against those who collude, including fines and restitution payments for the firms involved and prison, house arrest, and fines for the corporate officials involved.[335] Victims of cartels (both direct and, often, indirect as well under state law) can sue for mandatory treble damages and costs, including attorney's fees.[336] Perhaps because of data constraints, complexity, and the number of factors involved, until recently no one has even tried a serious empirical analysis of the overdeterrence issue.

As noted above, one of the authors of this piece recently co-authored an article with Dr. John Connor that determined whether the United States' anti-cartel sanctions are optimal overall by analyzing the total, combined impact of every existing anti-cartel sanction using the standard optimal-deterrence model.[337] The analysis assumes corporations and individuals contemplating illegal collusion will be deterred only if expected rewards are less than total costs[338] multiplied by the probability the illegal activity will be detected and sanctioned.[339]

The authors calculated the expected rewards from cartelization. They ascertained the average and median amounts of cartel

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Rosenberg & James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159, 162 (2006).

[335] Connor & Lande, *supra* note 137, at 447. There also are such relatively unusual or minor sanctions as disgorgement actions by the FTC or the DOJ. *See* Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 79–80 (2009).

[336] 15 U.S.C. § 15(a) (2012).

[337] *See generally* Connor & Lande, *supra* note 137 (finding sanctions at current levels are insufficient for optimal deterrence).

[338] Optimal deterrence depends upon the beliefs of potential cartelists as to a number of factors. We would like to know how much potential cartelists expect to gain from their collusion, how likely it is they think they will be apprehended, and how large a fine and how long a prison term they believe they will receive should they be caught. Unfortunately, we have no way of knowing what goes on in the minds of potential cartelists. We only can estimate how much actual cartels have gained in the past, what the historical rate of apprehension has been, and how heavily they and their employees have been sanctioned. We will assume then that the historical outcomes match the cartelists' expectations—an admittedly rough approximation. See Connor & Lande, *supra* note 137, at 431–35 for a more detailed discussion.

[339] *Id.* at 425. In other words, a sanction slightly larger than $300 would be necessary if a cartel expects to overcharge by $100 and believes there is a one-third chance its activities will be detected and condemned. In operational terms, the optimal penalty will be assumed to be equal to the cartel's overcharges divided by the probability the cartel will be detected and sanctioned.

profits, the probability cartels are detected, and the probability detected cartels are sanctioned. They also ascertained the sizes of the sanctions involved. These include corporate fines, restitution payments, individual fines, and the payouts in private damage actions. Finally, they determined the roughly equivalent value (or disvalue) for the imprisonment or house arrest for the individuals involved.[340]

The resulting analysis showed that the combined level of United States cartel sanctions has been far too low. If mean figures are used, the imposed sanctions are only 16% to 21% as large as they should have been for optimal protection of potential victims of cartelization.[341] If median figures are used, the imposed sanctions averaged only 9% to 12% of optimality.[342] In sum, the overall level of the United States' anti-cartel sanctions should be at least five times as high as they are. At least for collusion cases, then, two conclusions seem safe: private deterrence does not overdeter, and without private enforcement the underdeterrence problem would be even worse.

There is no way to be certain whether these conclusions apply to other types of antitrust offenses. The analysis considered only hard-core cartels.[343] For several reasons, however, a presumption of overall underdeterrence is likely appropriate. First, collusion is by far the largest category of private cases.[344] Second, in some ways underdeterrence is more likely in ordinary civil cases. Only hard-core cartels result in corporate and individual criminal fines,

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[340] *Id.* at 430.

> It is of course impossible to equate incarceration and monetary sanctions in an objective manner since this would mean computing the "value" or "cost" of time spent in prison or under house arrest. Nevertheless, [the study] explaine[d] several social science approximations of the disutility of prison time and house arrest, ascertaining and combining many different estimates in a conservative manner.

Id. at 430 n.12. In this way, the study's overall assessment of the aggregate of all the anticartel sanctions was both as complete and noncontroversial as possible. The authors decided to use $500,000 per month as the cost of both imprisonment and house arrest. *Id.* at 454.

[341] *Id.* at 476 n.45.

[342] *Id.*

[343] *See id.* at 469 n.25 (discussing the elimination of some cartels from the sample for various reasons).

[344] *See* Lande & Davis, *Benefits*, *supra* note 16, at 909 (finding twenty-five of forty study cases involved per se cases).

and imprisonment and house arrest for the executives involved. These factors, of course, figured very heavily in the Connor and Lande analysis. Because they would be absent from private cases involving monopolization, exclusive dealing, tying, or vertical restraints, *ceteris paribus*, a higher recovery from private litigation would be necessary for these offenses to be deterred optimally.

Further, for most other antitrust violations (including monopolization, exclusive dealing, tying, and vertical restraints) plaintiffs have to prove that a defendant has monopoly power (often by defining a relevant market) and prove the conduct in question is anticompetitive.[345] These are all extremely formidable challenges. By contrast, in a cartel case plaintiffs do not have to define the relevant market or prove monopoly power and, if there was an agreement to fix prices, there would be no difficulty balancing the efficiencies and anticompetitive outcomes involved in the case.[346] Although the market definition and market power issues might well arise at the damages phase of private cartel litigation, if plaintiffs make it that far, courts impose a more forgiving burden on plaintiffs.[347] As a result, their hand in settlement negotiations has been strengthened considerably. Thus, the imposition of market definition and monopoly power screens in private rule of reason cases is significant.

On the other hand, detection may not be an issue in some noncartel cases. For that and other reasons, we do not know the extent to which the Connor and Lande results can be generalized to other areas of antitrust. But given the evidence of extreme underdeterrence in cartel cases, and the lack of any evidence of overdeterrence there or elsewhere, the case for overdeterrence seems quite weak.

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[345] *See supra* note 44 and accompanying text.

[346] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (holding price-fixing agreements are illegal per se and do not require a showing of anticompetitive effects).

[347] Courts have long recognized than an estimate of damages suffices in antitrust cases. Bigelow v. RKO Pictures, Inc. 327 U.S. 251, 264–66 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). Justice Scalia writing for the Court this past Term confirmed that in antitrust damages "[c]alculations need not be exact." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013) (citing *Story Parchment*, 282 U.S. at 563).

E. PLAINTIFFS' CLASS ACTION LAWYERS OFTEN SELL OUT THEIR CLIENTS

The above analysis does suggest another possibility: plaintiffs in private antitrust cases generally recover too little. Put more tendentiously, one might suggest that private plaintiffs' attorneys—or perhaps just *class action* attorneys—routinely sell out class members.[348] For the reasons discussed above, this assertion is more plausible than its opposite, even if it is an overstatement. Plaintiffs' attorneys do have an incentive to settle relatively quickly and for a relatively small amount.[349]

In response to this possibility, a few observations are important. First, the most straightforward policy reform based on the risk that private cases settle for too little is to make it easier for private plaintiffs to prevail—to ease, for example, the standard for surviving a motion to dismiss or for summary judgment or to get a class certified, or to make substantive antitrust doctrine friendlier to plaintiffs, such as by relying more heavily on per se and quick look analysis rather than applying the full-blown rule of reason. The courts, however, have moved doctrine in just the opposite direction.[350]

A second, and related, observation is that there is a strong tension—if not inconsistency—between the "sell out" theory and the "blackmail" theory. If plaintiffs in private antitrust cases receive far too little, it is unlikely that private enforcement results in excessive compensation and deterrence effects.[351] And yet the

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[348] *See* Wasserman, *supra* note 149, at 470–71 ("The class members, with so little at stake in the first place, have insufficient incentive to closely monitor class counsel and her strategic choices. Thus, in a single class action, class counsel's own self-interest may cause her to prefer early settlement to trial."); *see also* Coffee, *supra* note 43, at 686 ("[F]ee awards have not been a constant percentage of recoveries, but rather have tended to decline as recovery size increases, thereby inclining plaintiff's attorneys to settle more 'cheaply' as the damages involved increase.").

[349] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354–55 (1995) ("Even in the absence of bad faith, suspect settlements result in large measure because of the defendants' ability to shop for favorable settlement terms, either by contacting multiple plaintiffs' attorneys or by inducing them to compete against each other. At its worst, this process can develop into a reverse auction, with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant.").

[350] *See supra* notes 4–8 and accompanying text.

[351] Of course, both *could* be true. If the wrong plaintiffs recover—direct purchasers, for instance, when indirect purchasers are the real victims—then private antitrust enforcement could result in both excessive and insufficient compensation. In this example, direct

tension between these points has not always been recognized. Consider criticism of private antitrust enforcement through class actions by Judge Richard Posner:

> The class action is the law's standard answer to the problem of aggregating a multitude of small claims, but it has serious drawbacks. First, class members typically lack an incentive (if their claim is small) or the ability (because there are many of them, and so there is a free-rider problem as well as the usual costs of coordinating the actions of a large group) to monitor their lawyers, who may negotiate for weak settlements involving large attorneys' fees. Second, the aggregation of claims that is central to the class action permits class-action lawyers to make plausible though not necessarily valid arguments for damages so immense that even though the probability that a court would award anywhere near the amount sought is very slight, the expected cost of the suit, which is the range of possible judgments multiplied by their probabilities and then summed, may be sufficient to induce a settlement, especially if the defendant's management is risk averse.[352]

One could question much in this analysis—for example, the leap from incentives to an implication of unethical conduct, the apparent unexplained distinction between the expected cost of a suit and its legitimate value in settlement, and the suggestion that large antitrust defendants are likely to be more averse to risk than contingency fee attorneys. But focus instead on the unexamined interplay between the two dynamics at issue: the tendency for the plaintiffs' attorneys to accept too little in settlement and their ability to obtain too much.[353] For all Posner suggests, his

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purchasers could receive excessive compensation and indirect purchasers could receive insufficient compensation. But this scenario is unlikely. As discussed above, direct purchasers likely suffer some damages from antitrust violations. So if plaintiffs' lawyers sell them out, they are likely to recover too little on the whole.

[352] POSNER, *supra* note 316, at 275.

[353] *See* Koniak & Cohen, *Cloak*, *supra* note 28, at 1111–12 ("[D]efendants care only about the total amount they must pay out in settlement, not how the payoff is distributed between

reasoning could lead to the conclusion that private enforcement is calibrated properly. Instead, he expresses skepticism about private enforcement, even though, to be fair, he acknowledges that he does "not have enough information" to suggest that the government should have a monopoly on antitrust enforcement, an idea he nonetheless floats.[354]

A third observation is that overall trends matter, not individual anecdotes. No doubt plaintiffs' attorneys on some occasions recover less than they should (and, on other occasions, more than they should). Settlement for just the right amount in every case seems extraordinarily unlikely. On average, which way do the results tend to fall?

Gauging the relevant overall trends would be no mean feat. Part of the problem lies in developing an objective measure for the appropriate outcome in a case. That task is formidable. Assessing whether antitrust cases settled for an appropriate amount would inevitably give rise to disputes. Once again, we are left with inferences.

The sixty cases we studied can help somewhat in this regard. While we cannot know whether those cases settled for the right amount, it appears that the plaintiffs' attorneys demanded a higher recovery than they might have. Plaintiffs recovered approximately $500 million per case on average.[355] Defendants are unlikely to settle for such a large amount without putting up a fight, and plaintiffs are unlikely to obtain such large sums without doing the same. So the sixty cases suggest that at least some plaintiffs' attorneys in a nontrivial number of cases do not sell out their class members entirely. No similar study has been done suggesting that plaintiffs' lawyers have often settled for far too little in a significant number of meritorious antitrust cases.

But the empirical evidence is quite thin, which causes us to turn to incentives and theory. As noted above, the incentives before antitrust plaintiffs' attorneys could lead us to predict they

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class members and the class lawyer. Thus, they are well-positioned and well-motivated to propose a deal that gives class counsel a huge slice (high attorney's fees) of a small pie (a low overall settlement for the class) and pretty well-assured that class counsel will accept it, given how expensive and risky it can be to get a class action certified and ready for trial.").

354 POSNER, *supra* note 316, at 276.

355 Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1274 (noting that plaintiffs in the sixty cases recovered between $33.8 billion and $35.8 billion).

are likely to settle for too little. We should not, however, be too quick to jump from predictions to conclusions. The incentive for defense attorneys paid by the hour is to drag out litigation and undertake unnecessary tasks (not to mention charging for hours they never spent on cases so as to maximize the payments they receive).[356] No doubt these unethical practices sometimes occur. But we should develop more than theory—we should have evidence—before we attribute improper conduct to defense attorneys in general, and we should do the same regarding plaintiffs' attorneys. True, defendants may be better situated to oversee their attorneys than the clients of plaintiffs' attorneys, particularly in class actions. Then again, such oversight is generally imperfect, and the requirement of judicial approval of class action settlements should ameliorate to some extent potential abuses by plaintiffs' attorneys.

Where does all of this leave us? We cannot support firm conclusions. However, to the extent we wish to rely on evidence and theory to make antitrust policy—to the extent we have to make practical decisions with imperfect knowledge—the most plausible position is that private antitrust enforcement does not involve the kind of wild "selling out" that warrants its abandonment. To the contrary, private enforcement has produced tens of billions of dollars worth of compensation and deterrence effects—probably greater deterrence effects than criminal enforcement by the DOJ. On the other hand, attention to the dynamics of the settlement process suggests that private enforcement should be strengthened if it is to achieve optimal levels of compensation and deterrence.

IV. CONCLUSIONS

As this Article has shown, there is insufficient evidence to support the conventional wisdom in the antitrust field that private antitrust enforcement is unproductive and even counterproductive.

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[356] *See* Koniak & Cohen, *Cloak*, *supra* note 28, at 1112 ("If the court uses the 'lodestar' method, which involves multiplying the number of hours worked by some hourly rate and then adjusting further based on a risk factor, then class counsel can collude with defendants and their lawyers by exaggerating or unnecessarily ruuning [sic] up the class lawyer's hours.").

Its flaws have been exaggerated beyond recognition and its benefits have been seriously underestimated.

We have examined all of the principal criticisms of private enforcement and found that they are unsupported by systematic, reliable evidence. Although critics can—and quite often are eager to—marshal anecdotes or at least hypotheticals illustrating virtually any point they wish to make, they have never presented systematic evidence for their conclusions. By contrast, the benefits of private enforcement have been enormous. Private enforcement is virtually the only way for victims of antitrust violations to be compensated for their losses, and this compensation has totaled tens of billions of dollars.[357] Moreover, the deterrence effects of private litigation are underappreciated and also immense. Indeed, the evidence suggests that private enforcement probably does more to deter anticompetitive conduct than the universally acclaimed DOJ anti-cartel program.[358]

Nevertheless, highly respected scholars, including Professors Calkins and Kovacic, believe that because many judges accept the field's conventional wisdom, they systematically bias virtually every aspect of antitrust litigation in defendants' favor.[359] These

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[357] Davis & Lande, *Empirical Assessment*, *supra* note 16, at 1272 (finding $33.8 billion to $35.8 billion in compensation to plaintiffs in the sixty cases studied).

[358] *See* Lande & Davis, *Comparative Deterrence*, *supra* note 16, at 317 ("[A] quantitative analysis of the facts demonstrates that private antitrust enforcement probably deters more anticompetitive conduct than the DOJ's anti-cartel program."). We reiterate that we, too, applaud the DOJ's anti-cartel program. We would rank it as being among the very best of all government programs, especially considering its relatively low cost to taxpayers.

[359] Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1140 (1986) ("One of the ways in which courts have adjusted to the treble damages remedy is by being relatively more willing to keep cases from going to trial.").

> As Professor (former FTC general council) William E. Kovacic observed,
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> [A] court might fear that the US statutory requirement that successful private plaintiffs receive treble damages runs a risk of over-deterrence. A court might seek to correct such perceived infirmities in the anti-trust system by recourse to means directly within its control—namely by modifying doctrine governing liability standards or by devising special doctrinal tests to evaluate the worthiness of private claims.
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> *See* William E. Kovacic, *Private Participation in the Enforcement of Public Competition Laws*, *in* 2 CURRENT COMPETITION LAW 167, 173–74 (Mads Andenas et al. eds., 2004).
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> [E]ven though the courts, by and large, deny this, there is undoubtedly a different standard in antitrust cases in a number of respects. There is a tougher summary judgment rule for plaintiffs. There's much tougher

scholars believe that many judges' disdain for private enforcement causes them to favor defendants in close cases when they formulate substantive antitrust rules, when they develop standing and class action certification rules, or when they measure ambiguous factual situations against these rules.[360] Many courts might find in defendants' favor in close cases and "trebly penalize" defendants and "over-reward" plaintiffs only when the activity at issue was overwhelmingly outrageous and far from the line separating legality from illegality.

The irony, of course, is that to the extent these scholars are correct, judges have been acting upon a belief that is without basis.

> judgment notwithstanding the verdict, from a plaintiff's perspective, much tougher Rule 12 standards for plaintiffs. There is a very rigorous set of standards in antitrust injury doctrine that in the Sixth Circuit probably means that no plaintiff should be allowed to sue at all. . . .
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> [D]o we have these sort of out-of-sorts doctrines in antitrust, these pro-defendant doctrines, as a reaction to treble damages?

Jonathan M. Jacobson, Comm'r, Antitrust Modernization Comm'n, Public Hearing at 57–58 (July 28, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/050728_Civil_Remedies_Transcript_reform.pdf.

[360] *See* Stephen Calkins, *Equilibrating Tendencies in the Antitrust System, with Special Attention to Summary Judgment and to Motions to Dismiss*, *in* PRIVATE ANTITRUST LITIGATION 185, 197–98 (Lawrence J. White ed., 1988) (discussing the effect treble damages have had on the evolution of antitrust law). Professor Calkins discusses how the law of monopolization, horizontal restraints, and vertical restraints might have developed more narrowly because of the effects of damages awards that the courts believed to be treble. *Id.* at 191–95. He concludes that "class actions probably would be more easily certified were there no trebling." *Id.* at 197. Professor Calkins also marshals support by demonstrating why "it seems probable that trebling is a factor" in causing courts to "scrutiniz[e] damage claims more rigorously than they once did." *Id.* at 198. "Plaintiffs would find standing rules more hospitable in a single-damage world." *Id.* *See also* John F. Hart, *Standing Doctrine in Antitrust Damage Suits, 1890–1975: Statutory Exegesis, Innovation, and the Influence of Doctrinal History*, 59 TENN. L. REV. 191, 241–42 (1992) ("The lower courts' rulings on other matters were commonly attributed to antipathy toward antitrust litigation. It would be curious if standing decisions failed to reflect that antipathy . . . ." (footnote omitted)). Kovacic, *supra* note 359, at 175, explained that where courts

> fear that the remedial scheme (eg mandatory treble damages for all offenses) deters legitimate business conduct excessively, the courts will use measures within their control to correct the perceived imbalance. The courts will "equilibrate" the antitrust system in one of three ways:
>
> . . . [C]onstruct doctrinal tests under the rubric of "standing" or "injury" that make it harder for the private party to pursue its case; or
>
> . . . [A]djust evidentiary requirements that must be satisfied to prove violations; or
>
> . . . [A]lter substantive liability rules in ways that make it more difficult for the plaintiff to establish the defendant's liability.

Their decisions to bias the course of antitrust litigation—perhaps unconsciously and implicitly rather than knowingly and explicitly—have been inappropriate. Moreover, to the extent judicial distaste for private enforcement has shaped substantive antitrust rules, this also has inappropriately undermined public enforcement because public enforcement uses these same substantive rules.

By assembling the evidence contained in this Article, we hope to help the truth emerge and prevail.[361] We also urge judges to demand hard evidence of private enforcement's faults. If they find such hard evidence lacking, they should formulate neutral substantive and procedural rules, and measure facts against these rules in an even-handed manner. Substantive antitrust rules, standing and class certification rules, and the methodology by which damages are calculated should all be revisited in light of this Article's findings.

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[361] Pessimists might accept the antitrust field's view of private enforcement as a given, even though it is without basis. Pessimists therefore might desire to decimate or even abolish private enforcement simply to preserve what little still exists of public enforcement. However, because private enforcement probably deters more anticompetitive conduct than public enforcement, and achieves almost all of the compensation for victims, we believe this course of action would be unwise.