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Of Myths and Evidence: An Analysis of 40 U.S. Cases for Countries Considering a Private Right of Action for Competition Law Violations

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> "[P]rivate rights of action U.S. style are poison. They over-reached dramatically." Bush Administration Federal Trade Commission Chairman William Kovacic.[2]

This quotation reflects the prevailing view towards private rights of action in the competition or antitrust field. Many commentators, especially members of the defense bar, have criticized the existing United States system of private antitrust litigation. Some assert that private actions all too often result in remedies that provide lucrative fees

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[2] William E. Kovacic, speaking at an ABA panel on Exemptions and Immunities, quoted in FTC:WATCH No. 708, Nov. 19, 2007, at 4. Kovacic was summarizing the conventional wisdom in the field but was not necessarily agreeing with it.

for plaintiffs' lawyers but secure no significant benefits for overcharged victims.[3] Others suggest that private litigation merely follows an easy trail blazed by government enforcers and adds little to government sanctions.[4] Yet others contend that, in light of government enforcement, private cases in the United States lead to excessive deterrence.[5] Further, one

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[3] Professor Cavanagh ably summarized this belief: "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 in cash .... are of dubious value to the victims of antitrust violations.... [and] defendants are not forced to disgorge their ill-gotten gains when coupons are not redeemed." Edward Cavanagh, *Antitrust Remedies Revisited*, 84 Or. L. Rev. 147, 163 (2005)(footnote omitted).

However, Professor Cavanagh provides only an anecdote to support these conclusions. He offers no data to show the type of antitrust settlements he describes are typical or to demonstrate how often they result in useless coupons.

[4] John C. Coffee, Jr. at one point subscribed to this view, but later concluded the evidence was to the contrary. 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 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.'").

[5] As the Antitrust Modernization Commission noted: "[S]ome have argued that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery. No actual cases or evidence or systematic overdeterrence were presented to the Commission, however." ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 247

common criticism of private actions in general – and of class actions in particular – is that they are a form of legalized blackmail or extortion, one in which plaintiffs' attorneys coerce defendants into settlements based not on meritorious claims, but rather on the cost of litigation or fear of an erroneous and catastrophic judgment.[6] These actions also are

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(2007) (citation omitted), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (footnotes omitted).

For reasons why "treble damages" do not lead to excessive deterrence but, on the contrary should be increased, see Robert H. Lande, *Five Myths about Antitrust Damages*, 40 U.S.F. L. Rev. 651 (2006),available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263478

[6] See John H. Beisner and Chares E. Borden, Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience, available at www.instituteforlegalreform.com/resources/ExpandingPrivateCausesofActionFinal.doc. However, people like Beisner & Bordon who embrace this view provide no systematic empirical basis for its factual predicates. Similarly unsupported is their claim that the cost of discovery for defendants can run into "the tens of millions of dollars." Id. at 13. Much the same is true for the claim that class counsel receive high fee awards but the class receives little of value. See, e.g., id. at 218.

Also lacking is evidence that defendants regularly settle antitrust class actions simply to avoid the risk of an erroneous, catastrophic loss. This settlement rate is about the same as in general litigation. See, e.g., Allan Kanner and Tibor Nagy, *Explosing the Black Mail Myth: A New Perspective on Class Action Settlements*, 57 Baylor L. Rev. 681, 697 (2005). Moreover, the amounts of these settlements are far greater than the cost of defending litigation -- suggesting that defendants were responding to a real risk of liability in agreeing to pay damages rather than merely seeking to avoid the cost of the litigation itself.

said to discourage legitimate competitive behavior.[7] For these and related reasons many members of the antitrust community call for the curtailment of private enforcement,[8] some even for its abolition.[9]

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[7] AMC Commissioner Cannon wrote: "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.... litigation is expensive and courts and juries may erroneously conclude that procompetitive or competitively neutral conduct violates the antitrust laws... potential defendants... will refrain from engaging in some forms of potentially procompetitive conduct in order to avoid the cost and risk of litigation." W. Stephen Cannon, *A Reassessment of Antitrust Remedies: The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 Antitrust L.J. 103 (1986).

[8] For example, Professor Hovenkamp writes that treble damages and attorneys' 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 (Cambridge: Harvard University Press 2005). Professor Hovenkamp does not, however, give data that supports his conclusions.

[9] For example, Professors Breit and Elzinga would "replace the entire damage induced private actions approach with a system of fines (well in excess of current levels). This proposal would eliminate the perverse incentives and misinformation effects and reparation costs." William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & Econ. 405, 440 (1985). Professors Elzinga and Breit do not, however, provide data to support their conclusions.

Although these criticisms are widespread, they have been made without any empirical basis.[10] Those who point to the alleged flaws of the United Sates system of private antitrust enforcement support their arguments only with anecdotes, many of which are self-serving or questionable. They never provide reliable data.[11]

We emphasize that we are not disputing all critics' anecdotes. Private antitrust enforcement, which includes in most years more than 90% of antitrust cases in the United States,[12] certainly is imperfect.[13] Our point, however, is

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[10] One prominent critic, former ABA Antitrust Section Chair Jan McDavid, candidly admitted this: "[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 abuse is really pretty extraordinary." When asked by Andrew Gavil about empirical evidence, McDavid said: "I am not aware of empirical data on any of those issues. My empirical data are derived from cases in which I am involved." Antitrust, Volume 21, Fall 2007, No. 4, at 12-13.

[11] For example, Michael Denger, former ABA Antitrust Section Chair, wrote: "Substantial windfalls go to plaintiffs that are not injured or only minimally injured." Remarks of Michael L. Denger, Chair's program, 50th Anniversary Spring Meting, ABA Antitrust Section, April 24-26, 2002, at 15. Mr. Denger, however, 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. He also does not discuss why society would be better off if antitrust violators were permitted to keep their illegal windfalls, the end result of his positions.

[12] See Sourcebook of Criminal Justice Statistics Online, http//wwwalbany/edu/sourcebook/pdf/t5412004.pdf Table 5.41.2004, Antitrust Cases filed in U.S. District Courts, by type of case, 1975-2004.

that nations considering private enforcement should first fairly assess its effects in the United States. They should not confuse anecdotes with data. One factor they should consider carefully is the systematic benefit of private actions to victimized consumers and businesses, and to the economy more generally.

The Purpose and Design of This Study

This article is a first step towards providing the empirical data necessary to assess some of the benefits of private enforcement of the United States antitrust laws. It does this by analyzing a group of 40 recent, successful, large-scale private antitrust cases. We analyze, *inter alia*, the amount of money each action recovered for victims, what proportion of the money was recovered from foreign entities, whether the private litigation was preceded by government action, and on whose behalf money was recovered (direct purchasers, indirect purchasers, or a competitor). To our knowledge no similar study has ever been undertaken.

We note that this report does not purport to be comprehensive or in any way definitive. It does not analyze every recent significant private antitrust case, assess a

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[13] Government enforcement also is imperfect.

random sample of cases, or even include all of the largest or "most important" ones.[14] We simply tried to assemble and evaluate 40 of the largest and most successful cases that concluded between 1990 and 2007.[15]

The primary focus of this project, moreover, was not to demonstrate that private litigation often has established important legal precedents: other studies have done this convincingly.[18] Our "first cut" was, instead, to look for recent private cases that are final, including appeals, and that recovered at least $50 million in cash for victims of anticompetitive behavior. We included only recovered money:

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[14] For example, we were not able to include an analysis of the consumer class action suits against Microsoft, even though a highly respected journalist reported that together these cases recovered more than $2 billion for victims. See Todd Bishop, Todd Bishop's Microsoft Blog, July 7, 2006, available at http://blog.seattlepi.nwsource.com/microsoft/month.asp?blogmonth=7/1/2006&page=4.

[15] In one case, the final settlement was approved within this time frame, but the final award of fees and costs to the attorneys did not occur until January, 2008. *See In re Auto. Refinishing Paint Antitrust Litig., 2008 U.S. Dist. LEXIS 569 (E.D. Pa. Jan. 3, 2008).*

[18] For an excellent analysis see Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement*, European University Institute 11th EU Competition Law and Policy Workshop, (Florence, Italy, June 2-3 2006). Professor Calkins found that, of leading antitrust cases decided before 1977, 12 were private and 27 were government. Of the leading cases decided 1977 or later, however, he found that 30 were private cases and only 15 were government cases. *Id.* at 17.

products, services, discounts, coupons, and injunctive relief were not included in our results.[19]

Results of this Study

Table 1 shows that the forty cases (or groups of cases)[20] analyzed in this report provided a cumulative recovery in the range of at least $18,006 to $19,639 million in allegedly[21] illegally acquired wealth to U.S. consumers and businesses.[22] Of this, more than $5,706 to $7,056 million came from foreign companies that violated U.S. antitrust laws. Table 2 shows that 18 of the 40 cases involved this kind of recovery, which means that without the private enforcement of the antitrust laws this money would have remained with foreign lawbreakers

[19] Securities were counted in one case because they had a readily ascertainable market value.

[20] To arrive at this number we counted related cases as being a single "case." For example, there have been many separate legal actions involving vitamins cartels. However, this report analyzes and counts them all together as one "case."

[21] For simplicity we are calling all of the charges "allegations," even the ones proven in court.

[22] We did not change recoveries to 2009 dollars or otherwise correct for the time-value of money. All figures include the awarded attorneys' fees.

Although a United States verdict would produce treble damages for victims, almost all of our cases involved settlements, and in no case did a court determine the percentage overcharge. We know of no way to determine whether any of the settlements exceeded single damages.

instead of being returned to U.S. consumers and businesses.[23] Given the current global market, no doubt the lack of a private remedy means many citizens of nations other than the U.S. remain uncompensated for harms they suffered from illegal and anticompetitive conduct by actors beyond their national borders.

It is interesting that of the total amount recovered a large proportion - at least 42% to 46%; $7,631 to $8,981 million - came from the fifteen cases that did not follow publicly disclosed United States government or EU enforcement actions.[24] For each of the cases listed in Table 3, private plaintiffs appear to have completely uncovered the violations, and initiated and pursued the litigation, with the government following the private plaintiffs' lead or playing no role at all. Another $4,212 million came from cases with a mixed private/public origin (Table 4).[25] Only about a third of the

[23] This project did not select cases on the basis of whether a foreign defendant was likely to be involved.

[24] When conduct gave rise to both government and private litigation we tried to ascertain who first uncovered the antitrust violation. For many of the cases our researchers spent dozens of hours on this issue. However, because government records are confidential and the enforcers usually do not reveal or discuss their investigations, we could not always make definitive classifications. Because we had access only to publicly available information some of our classifications could be mistaken.

[25] For example *In re* Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348 (N.D. Ga. 2000) started as a result of a

total private recovery – $6,163 to $6,446 million – occurred in cases that were purely public in origin.

Still other private cases followed a government investigation, but provided significantly greater relief than the government action (if, indeed, a government action was brought), expanded the scope of inquiry and claims, or obtained relief against parties not included in the government actions (Table 5). There also were cases whose origin we were not able to ascertain.[27] The authors were surprised at the high proportion of private actions that were filed in the absence of government cases, that had mixed public/private origins, or that significantly expanded the relief obtained through government enforcement alone.

Of the total $18,006 to $19,639 million in recoveries we documented, $12,088 to $13,438 million (67%-68% of the total), in 32 cases, was recovered by direct purchasers; $1,815 million, in 6 cases, was recovered by indirect purchasers; and

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different private antitrust suit, which led to a government investigation in the polypropylene carpet market, that in turn led to the private litigation analyzed in this Report. See Table 4 for other examples.

[27] See, for example, the El Paso case summary, Benefits, supra note 1.

$4,028 to $4,311 million, in 6 cases, was recovered by competitors.[29] All but 6 of the cases were class actions.[30]

Some of the cases we analyzed also involved substantial non-monetary relief. For example, one case generated coupons, fully redeemable in cash if not used for five years (however, to be very conservative we did not count any part of this in our "cash" recovery totals).[31] Another case resulted in a $125 million energy rate reduction for consumers (we did not count this reduction in our benefits total).[32] Some cases involved

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[29] Direct purchasers are customers who bought a good or service directly from a defendant, and indirect purchasers are customers who purchased a good or service further down the chain of distribution. In the U.S., in general only direct purchasers and competitors can bring claims for damages under federal law, and indirect purchasers can bring claims for damages only under state law (most, but not all, U.S. states allow indirect purchaser actions).

[30] Although we did not intend this Report to focus on class actions, the requirement of public court approval of class action settlements enabled us to obtain information that often is not available in individual settlements, the terms of which often are confidential. Final verdicts are, of course, publicly available for individual cases, but these are rare in the antitrust field. See John M. Connor & Robert H. Lande, *How High do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513, Appendix (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523.

[31] See Auction House case summaries, Benefits, supra note 1. These coupons traded for a value that reflected their discounted present value. They also comprised 20% of the legal fees paid to prevailing attorneys, who said they will redeem them for cash after the expiration of the mandatory five year waiting period.

[32] See the El Paso summary.

extremely useful *cy pres* grants.[33] Many other cases restructured industries in ways that, according to the judge presiding over the litigation, provided improvements for competition even more beneficial than the monetary relief they conferred on the victims. For example, the Visa/MasterCard case was settled in April 2003 for "$3,383,400,000 in compensatory relief, plus additional injunctive relief valued at $25 to $87 billion or more."[34] Similarly, NASDAQ decreased the spreads received by market makers, the Insurance litigation eliminated restrictions on insurance policies, and NCAA eliminated caps on pay to college coaches.[35] Further, together the generic drug cases — Buspirone, Cardizem, Oncology (Taxol), Relafen, Remeron, and Terazosin — discouraged collusion between brand name and generic drug manufacturers, saving consumers many hundreds of millions of dollars in lower cost drugs.[36]

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[33] See, for example, the Insurance case. This case resulted in a cash settlement with a creative remedy that: (i) funded the development of a public entity that provides risk management education and technical services to small businesses, public entities, and non profits; and (ii) provide funds to the States to develop a risk database for municipalities and local governments.

[34] See Wal-Mart Stores, Inc. v. Visa USA & MasterCard Int'l, 396 F.3d 96, 111 (2d Cir. 2005).

[35] See Benefits, supra note 1.

[36] See Benefits, supra note 1.

In the cases we analyzed, the judges generally expressed great satisfaction with the efforts of the plaintiffs' counsel that appeared before them. To give a few examples, Judge Nancy G. Edmunds (E.D. Mich.), in her opinion approving the final settlement in the direct purchaser Cardizem case, noted plaintiffs attorneys' "excellent performance on behalf of the Class in this hotly contested case."[37] Chief Judge Thomas Hogan in one of the vitamins cases (the choline chloride trial) stated in his opening remarks to the jury pool: "[T]his is a very challenging and interesting case ... involving, I think, some of the finest business litigating lawyers or litigation-type lawyers in the country that are before you that you will have the privilege to listen to."[38] There are numerous other

[37] Order granting Sherman Act Class Plaintiffs' Motions for Final Approval of Settlement, Plan of Allocation and Sherman Act Class Counsel's Joint Petition for Attorney's Fees, Reimbursement of Expenses, and Incentive Awards for Named Plaintiffs. Order No. 49 at pg 21. *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682. Similarly, the Honorable Michael M. Mihm, the judge who oversaw the Fructose litigation, repeatedly praised class counsel. "I've said many times during this litigation that you and the attorneys who represented the defendants here are as good as it gets. Very professional... You've always been cutting to the chase and not wasting my time or each others' time or adding to the cost of the And this was very difficult litigation... Skill and efficiency of the attorneys. As good as it gets. Complexity and duration of the litigation. It was very complex. We made some new law on more than one occasion... ." See Trial Transcript of Oct. 4, 2004, at 45-46. *In re* Fructose Antitrust Litig., MDL No. 1087, Master File No. 94-1577.

[38] May 28, 2003 Trial Tr. at 25:1-6.

examples of complimentary remarks: The judge in Automotive Refinishing Paint noted that plaintiffs' counsel "repeatedly demonstrated their skill in managing" the litigation;[39] the court in Buspirone stated, "let me say that the lawyers in this case have done a stupendous job. They really have."[40] The court in Remeron thanked counsel on behalf of the judiciary "for the kind of lawyering we wish everybody would do"[41] and noted that "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience."[42]

Conclusions

The United States' distinctive system of private antitrust enforcement is substantially underappreciated. It

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[39] *In re* Auto. Refinishing Paint Antitrust Litig., 2004 U.S. Dist. LEXIS 29162, at *20 (E.D. Pa. Oct. 13, 2004).

[40] http://www.milbergweiss.com/whymilberg citing *In re* Buspirone Patent Litig., MDL Docket No. 1413, at 34:2-3 (S.D.N.Y. Nov. 6, 2003) (Final Approval Hearing Transcript). The court in Linerboard made repeated comments to the effect that "the lawyering in the case at every stage was superb;" 2005 WL 1221350, at *6 (E.D. Pa. June 2, 2004). The court in Relafen lauded "the exceptional efforts of class counsel" and pointed out that the settlement was "the result of a great deal of fine lawyering on behalf of the parties." *In re* Relafen Antitrust Litig., 231 F.R.D. 52, 80 (D. Mass. 2005).

[41] *In re* Remeron Antitrust Litig., Civil Action No. 02-2007 (FSH) (D.N.J. 2005) (Transcript of Proceedings at 15:16).

[42] *In re* Remeron Antitrust Litigation, 2005 U.S. Dist. LEXIS 27013 at *37 (D.N.J. 2005) (unpublished opinion).

has produced tremendous benefits for the United States economy - for consumers and for businesses of all sizes.[43] It has helped to deter anticompetitive behavior and to compensate victims of illegal activity. It has enabled U.S. businesses and consumers to protect themselves from economic exploitation, both by those who subvert the free market in general and by foreign cartels in particular. It has saved the U.S. taxpayer tremendous sums in enforcement costs by shifting the enormous burdens and risks of litigating against sophisticated, well-financed lawbreakers to private plaintiffs' counsel. Although negative assertions about the efficacy of private United States antitrust litigation have been very well publicized, this might well be due in large part to the powerful economic interests that stand to benefit from a curtailment of private antitrust enforcement in the United States and from the prevention of private rights of action for competition law violations in other nations.

As to the possibility of overdeterrence, the United States awards what are nominally "treble damages"[44] to victorious victims. But in reality, various constraints on

[43] Of course, because our cases were not randomly selected, it is difficult to generalize from our conclusions.

[44] The Unites States antitrust laws award treble damages as well as attorneys' fees to successful private plaintiffs. 15 U.S.C § 15 (Supp. 1992).

recovery mean that, even after nominal trebling of a judgment at trial, plaintiffs likely recover less than single actual damages.[45] Thus, nominal trebling is justified to compensate victims for unawarded prejudgment interest, and for difficult-to-quantify and unawarded damages items such as the allocative inefficiency effects of market power and for the value of victims' time expended pursuing litigation.[46] Further, antitrust verdicts producing even nominal treble damages are rare,[47] and we believe that few, if any, of the overwhelming

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[45] To the extent the purpose of the remedy is compensation, the "damages" caused by an antitrust violation should consist of the sum of all relatively predictable harms caused by that violation affecting anyone other than the defendants. Damages should include the wealth transferred from consumers to the violator(s), as well as the allocative inefficiency effects felt by society, whether caused directly, or indirectly via "umbrella" effects. Plaintiffs' attorneys' fees, the value of plaintiffs' time spent pursuing the case, and the cost to the American taxpayer of administering the judicial system should also be included. When all these adjustments are made it is likely that the United States “treble” damages remedy actually is less than single damages. See Robert H. Lande, “Are Antitrust “Treble” Damages Really Single Damages?” 54 Ohio State L.J. 115, 122-24, 158-68 (1993), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134822.

[46] Id. As the Antitrust Modernization Commission noted: “Indeed, in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover ‘speculative’ damages) treble damages help ensure that victims will recover at least their actual damages.” Antitrust Modernization Commission, Report and Recommendations, at 246 (2007) (footnote omitted).

[47] For a list of antitrust verdicts that calculated damages amounts see Connor & Lande, supra note 30.

majority of antitrust cases that settle do so for more than single nominal damages.[48]

Moreover, while government criminal and civil actions are essential to deter future antitrust violations, virtually the only way to secure redress for the victims of antitrust violations is through private litigation.[49] Private enforcement at times has substituted for federal and state action entirely when government did not act at all or did not achieve meaningful results. At other times, private actions have complemented governmental enforcement in many situations where the government investigated, prosecuted, and imposed penalties, but was unable to compensate private victims for the harms they suffered as a result of antitrust violations. Private antitrust enforcement also has restructured many industries in ways that have improved efficiency and competitiveness, redounding to the benefit of consumers, the affected industries themselves, and the economy as a whole.[51]

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[48] For an analysis of this issue see Robert H. Lande, "Why Antitrust Damage Levels Should Be Raised, 16 Loyola Consumer L. Rev. 329 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118902.

[49] In the United States, State Attorneys' General can bring *parens patria* actions on behalf of victims located within their states, and the Federal Trade Commission has succeeded in disgorgement actions, but these actions are rare.

[51] As Irwin Stelzer observed, "An army of private enforcers, enlisting help from attorney-entrepreneurs free to accept

In fact, there are many reasons to believe that, as a practical matter the government cannot be expected to do all or even most of the necessary enforcing of antitrust or competition laws for various reasons including: budgetary constraints;[52] undue fear of losing cases;[53] lack of awareness of industry conditions;[54] overly suspicious views about

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cases on a contingency fee basis, freed of 'loser pays' obligations, is an important supplement to those limited [government] resources.... some 80% of court decisions establishing important principles (not all of which I find agreeable, I might add) in the competition policy area have resulted from private actions." Irwin Stelzer, *Implications for Productivity Growth in the Economy*, notes for talk at *Workshop on Private Enforcement of Competition Law*, sponsored by Office of Fair Trading, at p. 2 (London, England, Oct. 19, 2006).

[52] This is especially true in the current climate of tight federal budgets.

[53] Professor Calkins notes: "Governmental agencies also hesitate to litigate because of fear of defeat. Courtroom setbacks can demoralize agency staff, raise questions in the eyes of observers, and impose political costs. Few agency annual reports boast about the well-fought loss, and, in an era in which governmental accountability is fashionable, it is challenging to characterize losses as accomplishments.

All too often, agencies worry about their win rates.... and general counsels who are nominated for higher office like to claim that their agency won a high percentage of its cases. Everyone wants a good batting average. Unfortunately, a single loss can ruin a good batting average compiled with few at-bats." Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 St. John's L. Rev. 1 (1998) (citations omitted).

[54] "Private parties operating in the real markets...[will] act on the reality they confront." Stelzer, supra note 51, at 4. "The administrators of our antitrust laws might not feel

complaints by “losers” that they were in fact victims of anticompetitive behavior;[55] high turnover among government attorneys;[56] and the unfortunate reality that government enforcement (or non-enforcement) decisions are at times politically motivated.[57] Not surprisingly, a vigorous private antitrust or competition regime is likely to confer significant benefits over and above those conferred by a system reliant solely upon government enforcement.

In the United States anticompetitive conduct occurs far too frequently and is almost certainly significantly

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competent to tell what sort of pricing practice is exclusionary or predatory. But the victims most certainly can.” *Id.* at 5.

[55] Of course, many do not believe this. “[W]ho better to argue that ... [certain conduct is anticompetitive] than a competitor, injured by illegal anticompetitive practices, conversant in the technical jargon, on the sharp edge of customer relations, well informed on the details and consequences of the dominant firm’s practices.” Id. at 5-6.

[56] The largest antitrust cases often last for 5-10 years. The government often has trouble retaining a well qualified team throughout this period. Private firms, by contrast, often are able to retain relatively intact teams for longer periods.

[57] Irwin Stelzer noted: “A less obvious but equally important reason that private enforcement is so important is that it is free of direct political influence. In America, administrations come and go, some more given to a jaundiced view of the activities of dominant firms than others, witness the soft settlement worked out with Microsoft when the Bush administration took office and control of the Department of Justice, and its current disinclination to file any Section 2 cases.“ Seltzer, supra note 51, at 6.

underdeterred[58] - even factoring in the effects of the present system of private litigation. *A fortiori* this conduct would be even more undeterred if the United States eliminated or substantially curtailed private enforcement. We would be surprised if firms in other nations were significantly more law abiding than those in the United States, and suspect that the United States record of underdeterrence of anticompetitive conduct (and undercompensation of victims) exists in many other nations as well.

Having said that, we recognize each nation has unique needs, history, institutions, capabilities and circumstances, and we would never advocate "one size fits all" competition legislation. But we do urge every nation without private enforcement of its competition laws to seriously consider that possibility. In doing so, policymakers should consider private enforcement as it actually works in the United States, not a mere caricature, one too often presented by self-interested parties who oppose antitrust enforcement in general.

[58] See Lande, supra note 48, and Connor & Lande, supra note 30.

Appendix I

The following tables provide a summary of key information about the antitrust cases studied by this report. For the individual analyses of the 40 cases studied in our report see "Benefits from Antitrust Private Antitrust Enforcement: Forty Individual Case Studies," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523. All results were rounded to the nearest million dollars:

Table 1: Recoveries in Private Cases

Case	Recovery ($ millions)
Airline Ticket Commission Litigation	86
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Augmentin	91
Automotive Refinishing Paint	106
Buspirone	220
Caldera	275
Cardizem (direct class)	110
Citric Acid	175
Commercial Explosives	77
Conwood	1,050
DRAM	326
Drill Bits	53
El Paso	1,427 (plus 125 in uncounted rate reductions)
Flat Glass	122
Fructose	531
Graphite Electrodes	47

IBM	775 (plus $75 in uncounted credit towards Microsoft software)
Insurance	36
Lease Oil	193
Linerboard	202
Lysine	65
Microcrystalline Cellulose	50
NASDAQ	1,027
NCAA	74
Netscape	750
Paxil	165
Platinol	50
Polypropylene Carpet	50
RealNetworks	478 to 761
Relafen	250
Remeron	75
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Sun	700
Taxol	66
Terazosin	74
Urethane	73

Visa/MasterCard	3,383
Vitamins	3,908 to 5,258
Total	18,006 to 19,639

Table 2: Recoveries from Foreign Cartels & Monopolies

Case	Recovery ($ millions)
Auction Houses	virtually all the $452 was recovered by U.S. citizens
Augmentin	91
Automotive Refinishing Paint	31
Cardizem	110
Citric Acid	55 plus unidentified recoveries by opt outs
Commercial Explosives	62
DRAM	311
Graphite Electrodes	47
Flat Glass	38
Fructose	100
Lysine	24
Microcrystalline Cellulose	25
Remeron	75
Relafen	Unknown amount - much of $250; but not included in totals
Rubber Chemicals	268
Sorbates	36
Urethane	73
Vitamins	3,908 to 5,258
Total	5,706 to 7,056

Table 3: Private Litigation Not Preceded by Government Action

Case	Recovery ($ millions)
Augmentin	91
Buspirone	220
Cardizem	110
Taxol	66
Caldera	275
Commercial Explosives	77
Conwood	1,050
Microcrystalline Cellulose	50
NCAA	74
NASDAQ	1,027
Lease Oil	193
Paxil	165
Relafen	250
Remeron	75
Vitamins	3,908 to 5,258
Total	7,631 to 8,981

Note: We did not include cases in which we were unable to determine whether private or public action came first, in which the two arose simultaneously or in a mixed fashion, or which resulted from government investigation into a different conspiracy.

Table 4: Cases with a Mixed Private/Public Origin

Case	Recovery ($ millions)
Drill bits - private suit led to government investigation which prompted this suit	53
Flat Glass - DOJ investigation but no indictment or civil proceeding ever initiated by government	122
Fructose - uncovered by government action, but no indictments	531
Polypropylene Carpet - conduct uncovered in different private case, to DOJ investigation, to private case	50
Urethane - grew out of a government investigation into a conspiracy involving a different chemical	73
Visa/MasterCard – unclear which investigation began first, although private action was filed well before government action and addressed different conduct.	3,383
Total	4,212

Table 5: Private Recoveries that Were Significantly Broader than the Government Enforcement Action (in addition to all of the compensation to victims noted in Table 1) (Does not include the cases in Table 3 that were not preceded by a government action

Case	Why private recovery was significantly more than government remedy
Automotive Refinishing Paint	Government investigation yielded no indictments; private cases got $106 million.
El Paso	Private plaintiffs obviated need for separate government action seeking monetary recovery.
Fructose	Government did not indict antitrust violators.
Insurance	Private plaintiffs provided compensation and contributed to restructuring of industry, eliminating restrictions on insurance and reinsurance.
Linerboard	FTC action was against one firm for unilateral conduct; the private case involved a conspiracy.
Polypropylene Carpet	Private plaintiffs obtained greater monetary recovery and prosecuted larger number of defendants.
Relafen	No federal case; state governments intervened only after settlement – private plaintiffs provided the compensation to victims.
Sun v. Microsoft	Private plaintiffs made broader allegations than U.S. government action, obtained information that supported later European action, and protected distribution of “pure” Java software.
Specialty Steel	Private action included longer time period.

Table 6: Recoveries by Category of Plaintiff

Direct		Indirect		Competitor		Unsure	
Case	Result	Case	Result	Case	Result	Case	Resul
Augmentin	62	Augmentin	29	Conwood	1,050		
Lysine	50	Lysine	15	Sun	700		
Auction Houses	452	Vitamins	204	Real-Networks	478 to 761		
Automotive Refinishing	106	Paxil	65	Caldera	275		
Buspirone	220	Relafen	75	IBM	775		
Cardizem	110	El Paso	1,427	Netscape	750		
DRAM	326						
Citric Acid	175						
Flat Glass	121						
Fructose	531						
Graphite Electrodes	47						
Insurance	36						
Linerboard	202						
Microcrystalline Cellulose	50						
Oil Lease	193						
Paxil	100						
Platinol	50						
Polypropylene Carpet	50						
Relafen	175						

Specialty Steel	50						
Terazosin	74						
Urethane	73						
Visa/MasterCard	3,383						
Vitamins	3,704 to 5,054						
NASDAQ	1,027						
Sorbates	96						
Drill Bits	53						
Commercial Explosives	77						
Remeron	75						
Rubber Chemicals	268						
Taxol	66						
Airline Tickets Commission	86						
Total	12,088 to 13,438		1,815		4,028 to 4,311		

Note: The El Paso settlement was recovered mostly, but not entirely, by indirect purchasers. We have not been able to segregate the small amount of recovery by direct purchasers.

In addition, it should be noted that NCAA involved a monopsony by direct purchasers. The Airline Tickets Commission case also involved collusion by buyers.