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## Restoring the Legitimacy of Private Antitrust Enforcement

Robert H. Lande

*University of Baltimore School of Law*, rlande@ubalt.edu

Joshua P. Davis

*University of San Francisco*, davisj@usfca.edu

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## ***Restoring the Legitimacy of Private Enforcement***

Private antitrust enforcement is under siege. Although historically considered a bulwark of the antitrust enforcement arsenal, private actions have caught up in the well-orchestrated, ideologically-driven “tort reform” movement that sees class actions as legalized blackmail and class action lawyers as ambulance chasers, rather than private attorneys general.<sup>1</sup> There is no systematic empirical support for the view that frivolous antitrust litigation is a serious problem. Yet the tort reform movement’s corrosive attitude towards class actions seems to have seeped into the antitrust field’s “conventional wisdom,”<sup>2</sup> the courts’ antitrust jurisprudence and past administrations’ amicus and competition advocacy programs. All of this has helped lead to the creation of unnecessary roadblocks for victims of anticompetitive behavior who seek to file private antitrust actions. This movement has undermined both the deterrence and the compensation objectives of private remedies.

This chapter contains a brief but well-deserved defense of the benefits of private antitrust enforcement and a critique of the claims that private enforcement in the United States is excessive, that it leads to

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<sup>1</sup> See Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Georgia L. Rev. 1, 3-8 (2013) (hereafter “Defying”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2217051](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217051). See also

Jeffrey Rosen, *Supreme Court Inc.*, N. Y. TIMES, March 16, 2008 (Magazine) at 38 (detailing probusiness transformation of the Supreme Court). A past chairman of the FTC, William Kovacic, has sounded a similar theme. Kovacic suggested that “judicial fears that the U.S. style of private rights of action – with mandatory treble damages, asymmetric shifting of costs, broad rights of discovery, class actions, and jury trials – excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards,” not just since 2004, but over the last 30 years. William E. Kovacic, Competition Policy in the European Union and the United States: Convergence or Divergence?, Speech at the Bates White Fifth Annual Antitrust Conference 14 (June 2, 2008), available at <http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf>.

<sup>2</sup> Although not saying he agreed with it, former FTC Chair William Kovacic succinctly summarized the conventional wisdom as follows: “private rights of actions U.S. style are poison.” See FTC:WATCH No. 708, FTC WATCH 4 (Nov. 19, 2007), <http://www.ftcwatch.com/series/708/> (quoting William E. Kovacic speaking at an American Bar Association panel on Exemptions and Immunities). For an extensive compilation of additional criticisms of U.S. private cases see Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE UNIV. L. REV 1269, 1269-70, available at [http://papers.ssrn.com/sol3/papers.cfm?Abstract\\_id=2132981&download=yes](http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=2132981&download=yes) [hereafter “Toward Assessment”].

overdeterrence, and that the courts are plagued with widespread frivolous antitrust lawsuits.<sup>3</sup> We also offer a number of specific recommendations for the next administration’s “private enforcement policy.”

## **Major Recommendations to the 45th President of the United States**

The next administration should make it a high priority to:

- Educate the courts, the public, and federal and state legislatures about the virtues of vigorous private antitrust enforcement, including how it compensates victims and deters anticompetitive conduct. The Department of Justice (DOJ) and Federal Trade Commission (FTC) should use amicus briefs, competition advocacy, and speeches to help restore balance by dispelling the myths about widespread abusive private antitrust litigation.
- Actively support efforts by the European Union and other foreign jurisdictions to develop effective private rights of action.
- Encourage states without effective Illinois Brick legislation to adopt strong and comprehensive legislation.
- Support and encourage the formulation of antitrust jury instructions written in language that juries can understand.
- Undertake a comprehensive study into why so few victims of antitrust violations receive full compensation for their losses. A recent study<sup>4</sup> shows that victims of collusion received only a median of 37% and a mean of 66% of the overcharges they paid to illegal cartels in private damages actions. Why weren’t their recoveries closer to the 300% recovery Congress intended? Recommendations should be formulated concerning possible problems involving:
  - The effects of *Bell Atlantic Corp. v. Twombly* and the extent to which it has impaired Rule 8’s notice pleading standard.

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<sup>3</sup> For a more extensive analysis of this issue see See Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Georgia L. Rev. 1 (2013) (hereafter “Defying”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2217051](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217051)

<sup>4</sup> See John M. Connor & Robert H. Lande. Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages, forthcoming in the Iowa Law Review, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2548712](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548712)

- The effects of Daubert and Federal Rule of Evidence 702 on private and government antitrust litigation. Consider drafting guidelines for courts to use in evaluating the reliability of economic testimony in antitrust cases.
- The possibility that overly strict approaches to class action certification have had the practical effect of denying a remedy to many victims of antitrust violations.
- The practical effects of the Class Action Fairness Act on antitrust cases.
- The practical effects of combining the direct purchaser rule from Illinois Brick with class action waivers. Should a new approach be developed for damages under federal antitrust law?

## **I. Private Antitrust Cases are a Critical Component of Effective Antitrust Enforcement**

### **A. *The Central Role of Private Enforcement***

Congress intended that private parties play a central role in enforcement of the Sherman Act, and sought to encourage this by awarding treble damages, mandatory attorneys' fees and costs to prevailing victims.<sup>5</sup> In numerous cases the Supreme Court has underscored the importance of the private treble damages remedy to the enforcement of the antitrust laws. For example, in *Reiter v. Sonotone Corp.*, the Court explained:

Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.<sup>6</sup>

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<sup>5</sup> See 15 U.S.C. § 15(a). The provisions in section 5 of the Clayton Act that suspend the statute of limitations for private actions during the pendency of a government lawsuit, and that allow plaintiffs to use a final judgment in a government action as *prima facie* evidence of liability in a later private action, see 15 U.S.C. §§ 16(a), (l), are further evidence that “[p]rivate enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.” *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990).

<sup>6</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (“The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.”); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (Clayton Act “bring[s] to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate”).

As has been observed, “government cannot be expected to do all or even most of the necessary enforcement” for numerous reasons – in addition to budgetary constraints – including “undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by ‘losers’ that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys;<sup>7</sup> and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.”<sup>7</sup>

Treble damages also are critical for deterrence because a great deal of anticompetitive conduct evades detection and challenge, and for this reason many antitrust violations would be profitable if violators were liable only for the amount of their overcharges.<sup>8</sup> In addition, treble damages also promote antitrust’s compensation goal because so many cases settle for far less than the statutory maximum.<sup>9</sup> Treble damages were thought to “make the [private] remedy meaningful by counterbalancing ‘the difficulty of maintaining a private suit against a combination such as is described’ in the Act.”<sup>10</sup>

As discussed further below, class actions play an essential role in ensuring that the treble damages remedy serves its intended function of “protecting consumers from overcharges resulting from price fixing.”<sup>11</sup> As the Supreme Court has noted, “class actions . . . may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.”<sup>12</sup> Accordingly, “courts have repeatedly found antitrust claims to be particularly

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<sup>7</sup> Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 907 – 08 (2008) (hereafter “Benefits”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1090661](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661)

<sup>8</sup> See John M. Connor & Robert H. Lande, Cartels As Rational Business Strategy: Crime Pays,” 34 Cardozo Law Review 427 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1917657](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917657), at 431-35; see generally William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 – 57 (1983).

<sup>9</sup> See John M. Connor & Robert H. Lande. Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages, forthcoming in the Iowa Law Review, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2548712](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548712)

<sup>10</sup> See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (“[T]hese actions were conceived primarily as ‘open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.’”) (quoting 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb)).

<sup>11</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (noting that “the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. R. Civ. P. 23”).

<sup>12</sup> *Hawaii v. Standard Oil of Cal.*, 405 U.S. 251, 266 (1972).

well suited for class actions . . .”<sup>13</sup> Indeed, as the next section will demonstrate, without class actions, cartels and other antitrust violators that inflict widespread economic harm would have little to fear from the treble damages remedy.

### B. Private Cases Compensate Victims

On the Federal level, private cases are virtually the only way for the victims of anticompetitive behavior to be compensated.<sup>14</sup> A recent AAI study documents the benefits of private enforcement by analyzing 60 of the largest recent successful private antitrust cases (defined as those resolved since 1990 that recovered at least \$50 million in cash<sup>15</sup> for the victims<sup>16</sup> of anticompetitive behavior).<sup>17</sup> The study made the following significant findings:

- The 60 cases provided a cumulative cash recovery to consumers and businesses of at least \$33 billion;
- 47 of these 60 very large recoveries were class actions.<sup>18</sup>
- Roughly one third of the total amount recovered came from 25 cases that did not follow federal, state, or EU actions.<sup>19</sup>

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<sup>13</sup> *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001).

<sup>14</sup> Government enforcers can sometimes bring disgorgement actions, but these cases are rare. For an overview of the relevant issues see <https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies>

<sup>15</sup> See *Davis & Lande*, *supra* note 2. The study did not include the value of coupons, discounts, products or injunctions in its analysis. Id at 16. See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 511 – 12 (E.D.N.Y. 2003) (noting “injunctive relief will result in future savings to the Class valued from approximately \$25 to \$87 billion or more,” while compensatory relief was valued at \$3.38 billion). The value of the recoveries did include attorneys’ fees. See *Lande & Davis*, *supra* note 7, at 892 n.46.

<sup>16</sup> Most of the cases settled, so it might be more accurate to describe the plaintiffs as “alleged victims”. However, it should be noted that the majority of these cases were follow-ups to successful government enforcement actions, so in these cases the terms “victims” is likely to be appropriate. Id. at 20

<sup>17</sup> *Lande & Davis*, *supra* note 7, at 890 – 91.

<sup>18</sup> Calculated from *Id.* at 892, 902, and Toward Assessment, *supra* note 1, at 1287.

<sup>19</sup> See *Lande & Davis*, *supra* note 7, at 898, and Toward Assessment, *supra* note 2, at 1292. Indeed, two of the largest recoveries – the *Vitamins* cases (\$3.9 to \$5.3 billion) and *Visa/MasterCard* (\$3.38 billion)

- Nearly half of the cases (27) did not involve traditional “hard-core” per se violations (such as price fixing or bid rigging), and most of those (22) involved conduct governed solely by the rule of reason.<sup>20</sup>

These findings tend to suggest that private enforcement is helping to do its job: ferreting out antitrust violations that would not otherwise have been exposed, and compensating the victims of antitrust violations.

### *C. Private Cases Help Deter Anticompetitive Behavior*

Private enforcement also deters anticompetitive behavior. There is, moreover, evidence that these deterrence effects are likely to be significant.

Another recent AAI study highlights the deterrence benefits of private enforcement by comparing the likely deterrent effects of private enforcement of the U. S. antitrust laws to the deterrence effects of the most esteemed antitrust program in the world, criminal anti-cartel enforcement by the Antitrust Division of the U.S. Department of Justice.<sup>21</sup> The surprising results are that private enforcement probably deters more anticompetitive behavior.

The study does this by noting that from 1990 through 2011, the total of DOJ corporate antitrust fines, individual fines, and restitution payments totaled \$8.18 billion. 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. This totals approximately \$11.7 billion. This is an

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– apparently were important to the success of related government cases. *See* ROBERT H. LANDE & JOSHUA P. DAVIS, REPORT OF THE AMERICAN ANTITRUST INSTITUTE’S PRIVATE ENFORCEMENT PROJECT: BENEFITS FROM PRIVATE ENFORCEMENT: AN ANALYSIS OF FORTY CASES, App. II, Case 40: Vitamins (Dec. 10, 2007), *available at*

<http://www.antitrustinstitute.org/Archives/privateenforce.ashx> (“Although the precise sequence of events is not without controversy, it appears that private counsel discovered much, and perhaps all of the crucial original evidence of illegal behavior[.]”); *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d at 524 n.31 (noting that “the government piggybacked on Class Counsel’s efforts” in bringing subsequent successful case). In addition to the 25 cases that were not “follow-on” cases, another nine cases involved a “mixed” private/public origin, and nine cases involved recoveries that were significantly broader than the government enforcement action. *See* Lande & Davis, *supra* note 7, at 912 – 14, Tables 5 & 6, and Towards Assessment, *supre* noye 2, at 1293.

<sup>20</sup> *See* Lande & Davis, *supra* note 7 at 902, and Towards Assessment, *supra* note 2, at 1989-90.

<sup>21</sup> *See* Davis & Lande, *supra* note 1 at 26-27.

extremely impressive figure, and these sanctions surely have deterred a significant amount of anticompetitive behavior. Nevertheless, this total is significantly less than the more than \$33 billion resulting from just sixty analyzed private cases that occurred during the same period. Moreover, the analysis of 60 private cases 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. Indeed, given the disparity between the likely deterrent effects of private and DOJ criminal enforcement, even a significantly more conservative approach would yield the same ultimate conclusion.<sup>22</sup> The study's conclusions that the amounts of payouts in private cases are actually staggeringly high—so high that they deter anticompetitive conduct more effectively than the criminal fines and prison sentences resulting from Department of Justice cases—is thus the opposite of the consensus within the antitrust community.

#### D. *Foreign Jurisdictions*

The importance of private enforcement is increasingly recognized outside the United States. A number of leading jurisdictions in recent years have adopted, or are considering, private rights of action for antitrust (often called “competition law” outside the United States) violations to supplement their traditions of public enforcement. The leading jurisdiction to do so is the European Union (EU). Following the European Court of Justice’s landmark *Crehan* decision,<sup>23</sup> which held that each member state must provide a meaningful cause of action for persons injured by reason of a violation of EU competition law, in 2014 the European Commission (Commission) enacted a Directive that authorizes private parties to bring damages actions for violations of EU Competition law.<sup>24</sup> Although the Directive’s provisions are not likely to be sufficient to compensate most European victims of anticompetitive behavior fully,<sup>25</sup> it nevertheless is an important and positive step forward.<sup>26</sup> The EU

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<sup>22</sup> Id.

<sup>23</sup> Case C-453/99, *Courage v. Crehan*, 2001 E.C.R. I-6297.

<sup>24</sup> See [http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html) The Directive 2014/104/EU on antitrust damages actions was signed into law on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014. Id.

<sup>25</sup> For an analysis of the Commission’s Proposed Directive, which was in pertinent part identical to the Final Directive, see Robert H. Lande, The Proposed Damages Directive: The Real Lessons from the United States. CPI Antitrust Chronicle, Vol. 2, March 2014, pp. 2-12, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2418257&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418257&download=yes)

<sup>26</sup> Id.

should be commended and encouraged to make changes that are likely to lead to even more optimal compensation of victims, such as permitting opt-out victim class action suits.<sup>27</sup>

In Canada, section 36 of the Competition Act provides a right of recovery of damages for conduct that contravenes certain substantive provisions of the Act, including price-fixing. Prior governmental decisions that the conduct was illegal create a presumption of illegality in any subsequent private suits for damages. There is also a limited right of access to complain to the Competition Tribunal in refusal to supply, exclusive dealing, and tying and territorial restrictions, but no right to seek damages. Class actions have been used a number of times for settlement purposes but none has been litigated to judgment as of the date of this report. Other common law countries such as Australia have also implemented limited private rights of action with most recoveries coming by way of settlement rather than a litigated judgment.<sup>28</sup>

In sum, jurisdictions all around the world are increasingly recognizing the importance of creating a private-public partnership to enforce competition law by creating private suits for damages and other private actions. However, very few jurisdictions outside the United States have vigorous systems of private enforcement. In part this is due to a well-organized campaign by defendants and potential defendants to thwart private actions by misleadingly pointing to alleged flaws with the U.S. system of private enforcement.<sup>29</sup> Despite the lack of a sound underlying empirical foundation, they warn foreign jurisdictions against expanding private rights of action for victims in almost apocalyptic terms.<sup>30</sup> The next administration should forcefully point out the benefits of private enforcement in speeches, testimony, and at international fora, and correct any disinformation about the U.S. system that is promulgated by potential lawbreakers.

## **II. The Current Level of Private Enforcement Is Not Excessive**

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<sup>27</sup> Id. For additional suggestions for strengthening the new EU system see *Id.*

<sup>28</sup> It has been more difficult to implement private rights of action in civil law countries. A host of theoretical, substantive, procedural, and practical concerns have prevented most civil law jurisdictions from enacting new private rights of action or effectively enforcing the handful of existing provisions. For example, in Mexico, Article 38 of the Economic Competition Law provides for a right to sue for up to double damages, but the law is ambiguous as to whether a prior successful governmental enforcement action is required.

<sup>29</sup> See Robert H. Lande, *The Proposed Damages Directive: The Real Lessons from the United States*. CPI Antitrust Chronicle, Vol. 2, March 2014, pp. 2-12, especially at 2-4, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2418257&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418257&download=yes)

<sup>30</sup> *Id.*

Notwithstanding the benefits of vigorous private enforcement, critics maintain that private antitrust enforcement in the United States is excessive, that it leads to overdeterrence, and that it promotes widespread frivolous antitrust litigation.<sup>31</sup> These are myths.

#### A. *The Number of Antitrust Cases is Modest*

The number of new private federal antitrust cases has declined significantly during the last 30 years.<sup>32</sup> The number of cases filed peaked in 1977 at 1611, dropped steadily in the 1980s to a low of 452 in 1990, averaged 600 cases per year in the 1990s, and has increased modestly to an average of 760 cases per year since 2008. The number of private federal antitrust actions filed as a percentage of the total number of civil cases filed in the federal district courts has fallen by approximately 75% from 1.2 % in 1977 to 0.26% in 2014.

Table 1. From Tables C-2, Judicial Business of the United State Courts 2008–14

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<sup>31</sup> A former chairman of the FTC has noted that the fact “that judges perceive the U.S. system of private rights to be excessive does not mean that their perceptions are invariably correct or enjoy convincing empirical support,” and agreed that “assumptions about the asserted dangers of overdeterrence from private enforcement in the United States ought not be accepted as a matter of faith and ought to be tested vigorously in light of modern experience and empirical study.” William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 74 – 75 (2007).

<sup>32</sup> The data in the chart are from the Administrative Office of the United States Courts, Annual Reports of the Director: Judicial Business of the United States Courts, Table C-2. The data are reproduced in the Sourcebook of Criminal Justice Statistics Online, *supra* note 12.

<b>Year</b>	<b>1) Private Antitrust Actions Filed</b>	<b>2) Total Civil Cases Filed in Federal District Court</b>	<b>Column 1 / Column 2 (as a percentage)</b>
2008	1,287	267,257	.48%
2009	792	276,397	.29%
2010	523	282,895	.18%
2011	452	289,252	.16%
2012	677	278,442	.24%
2013	801	284,604	.28%
2014	782	295,310	.26%
<b>Average:</b>	760	282,023	.27%

*B. There is No Evidence of Overcompensation or Duplicative Recoveries*

Some claim that private enforcement could result in overcompensation of victims, or duplicative recoveries, when direct purchasers sue under the Sherman Act and indirect purchasers sue under state

laws.<sup>33</sup> Some claim that this combination could result in a total of sixfold or more damages for antitrust violations.<sup>34</sup> Yet, no evidence of even a single example where victims have received more than treble damages has ever been presented.<sup>35</sup>

A recent AAI study analyzed the overcompensation/duplication issue empirically by assembling a sample of every completed private U.S. cartel case since 1990 for which the authors could find the necessary information.<sup>36</sup> For each of these 71 cases, the study collected neutral scholarly estimates of affected commerce and overcharges. It compared these to the damages secured in the private cases filed against these cartels.

The victims of only 14 of the 71 cartels (20%) received back their initial damages (or more) in settlement. Of these only seven (10%) received more than double damages. The rest — the victims in 57 cases — received less than their initial damages. In 4 cases the victims received less than 1% of damages and in 12 they received less than 10%. Overall, the median average settlement was 37% of single damages. However, because the distribution of settlement percentages is so skewed, the weighted mean (a figure that weights settlements according to their sales) is much lower (19%) than the unweighted mean settlement of 66% (which gives equal weights to the cartels that operated in large markets and those that operated in small markets) because plaintiffs tend to be rewarded relatively poorly in the largest cases.

As an example, the vitamins cartels cases resulted in what was described as “the largest antitrust settlements in history”<sup>37</sup> at the time. The amounts recovered by direct and indirect purchasers amounted to about 200% of the overcharges in the United States.<sup>38</sup> In real terms, given the absence

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<sup>33</sup> See Robert H. Lande, “Are Antitrust ‘Treble’ Damages Really Single Damages? 54 Ohio State L. J. 115, 116-17 (1993), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1134822](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134822)

<sup>34</sup> See *id.*

<sup>35</sup> See *id., passim.*

<sup>36</sup> See John M. Connor & Robert H. Lande. “Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages,” forthcoming in the Iowa Law Review, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2548712](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548712)

<sup>37</sup> JOHN M. CONNOR, GLOBAL PRICE FIXING 404 (2d ed. 2007).

<sup>38</sup> See John M. Connor, *The Great Global Vitamins Conspiracies, 1985-1999* at 140 (Apr. 9, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120936](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120936).

of prejudgment interest, the recoveries amounted to less than 67% of the overcharges.<sup>39</sup> Even taking into account the record criminal fines, the total monetary sanctions paid by the members of the vitamins cartels did not exceed 80% of the overcharges in real terms in the United States. On a worldwide basis, because of the absence of private damage suits in Europe, the monetary sanctions were less than 30% of the overcharges.<sup>40</sup>

Indeed, despite the existence of the theoretical treble damages remedy, the current level of damages – even for blatant price fixing – is quite insufficient to fully compensate victims of anticompetitive behavior. The claim that lawbreakers often pay sixfold damages (or even treble damages) or that many victims are overcompensated is without support.

### *C. There is No Evidence of Overdeterrence by The Combination of Private And Public Enforcement*

Some critics assert that “treble damages, along with other remedies, can overdeter conduct that may not be anticompetitive....”<sup>41</sup> Yet, despite the request by the Antitrust Modernization for evidence on this issue,<sup>42</sup> “[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission . . . .”<sup>43</sup>

A recent study, moreover, demonstrates the opposite. This study demonstrates that the combined level of current United States cartel sanctions – the total of private and public remedies - is only 9% to 21% as large as it should be to protect potential victims of cartelization optimally.<sup>44</sup> Consequently, the average level of United States anti- cartel sanctions should be increased: there certainly is no

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<sup>39</sup> See *id.* at 139, Table 20A.

<sup>40</sup> See *id.*

<sup>41</sup> For a summary of these arguments see ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 243 (2007), at 247.

<sup>42</sup> See Antitrust Modernization Commission, Request for Public Comments, Remedies, 70 Fed. Reg. 28902–07 (May 19, 2005).

<sup>43</sup> AMC REPORT, *supra* note 41, at 247.

<sup>44</sup> See John M. Connor & Robert H. Lande, Cartels As Rational Business Strategy: Crime Pays,” 34 Cardozo Law Review 427 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1917657](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917657), at 431-35.

overdeterrence.

The United States imposes a diverse arsenal of sanctions against collusion: criminal fines and restitution payments for the firms involved and prison, house arrest and fines for the corporate officials involved. Both direct and indirect victims can sue for mandatory treble damages and attorney's fees. This multiplicity of sanctions has helped give rise to the strongly held - but until this study never seriously examined - conventional wisdom in the antitrust field that these sanctions are not just adequate to deter collusion, but that they are actually excessive.<sup>45</sup>

The study analyzes this issue using the standard optimal deterrence approach.<sup>46</sup> This is predicated upon the belief that corporations and individuals contemplating illegal collusion will be deterred only if expected rewards are less than expected costs, adjusted by the probability the illegal activity will be detected and sanctioned. To undertake this analysis the study first calculates the expected rewards from cartelization using a unique database containing information 75 cartel cases. The study surveys the literature to ascertain the probability cartels are detected and the probability detected cartels are sanctioned. It calculates the size of the sanctions involved for each case in our sample. These include corporate fines, individual fines, payouts in private damage actions, and the equivalent value (or disvalue) of imprisonment or house arrest for the individuals convicted (at \$6 million per year).<sup>47</sup>

The analysis shows that, overall, United States' cartel sanctions are only 9% to 21% as large as they should be to protect potential victims of cartelization optimally.<sup>48</sup> This means that, despite the existing public and private sanctions, collusion remains a rational business strategy. Cartelization is a crime that on average pays. In fact, it pays very well.<sup>49</sup> Accordingly, the study concludes by proposing a number of ways to strengthen the existing array anti-cartel sanctions and to thereby help deter anticompetitive behavior and save consumers many billions of dollars each year.<sup>50</sup>

As noted, there is a myth in the antitrust world that the current overall level of antitrust sanctions is too high. The next administration should work energetically to help rebut this "conventional wisdom" by the use of speeches, testimony white papers, and appropriate amicus briefs. Private enforcement should be given its due as an important complement to public enforcement.

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<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

#### D. Frivolous Class Action Antitrust Suits are Not a Significant Problem

Fueled by tort reform rhetoric, critics maintain that frivolous antitrust litigation is common, that it often forces businesses to incur expensive and abusive discovery, and that it allows class action lawyers to extort settlements of meritless claims. However, the reality is that while frivolous antitrust claims no doubt are *sometimes* brought (perhaps by inexperienced or incompetent attorneys, or by competitors for anticompetitive purposes<sup>51</sup>), there is simply no empirical or theoretical support for the critics' overblown claims that antitrust class actions are systematically meritless.

The myth of widespread abusive antitrust class actions seems deeply ingrained in the current legal culture. It is reflected, for example, in *Twombly*, where the Supreme Court raised the bar for pleading an antitrust conspiracy because of the problem of "discovery abuse," which the Court said "will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings."<sup>52</sup> It is reflected in the work of some leading antitrust scholars.<sup>53</sup> And it is reflected in the views of the mainstream antitrust bar.<sup>54</sup>

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<sup>51</sup> Traditionally, concerns about abusive antitrust litigation focused on suits by competitors, as noted by Edward A. Snyder & Thomas E. Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991), not cases filed by customers or consumers, which are "likely to be the most meritorious." Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163, 1164 (1986).

<sup>52</sup> Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007) (noting the "common lament that the success of judicial supervision in checking discovery abuse has been on the modest side"). The briefs in support of dismissal in *Twombly*, such as the one filed by the Solicitor General, were filled with concerns about "strike suits and *in terrorem* settlement demands." Brief for the United States as Amicus Curiae Supporting Petitioners at 25, *Twombly*, 127 S. Ct. 1955 (No. 05-1126), 2006 WL 2482696; *see also* Brief of the Chamber of Commerce et al. as Amici Curiae in Support of Petitioners at 21 – 22, *Twombly*, 127 S. Ct. 1955 (No. 05-1126), 2006 WL 2474076 ("The impetus for cases like this one is not actual suspicion of wrongdoing, and certainly not the expectation that an actual trial on the merits will yield success, but the hope that the thinnest of allegations, with the greatest of legal consequences, will survive motions to dismiss and begin to put pressure on defendants to settle complex litigation.").

<sup>53</sup> See, e.g., HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 59 (2005) ("many marginal and even frivolous antitrust cases are filed every year").

<sup>54</sup> See, e.g., Roundtable Discussion: *Antitrust and the Roberts Court*, ANTITRUST, Fall 2007, 8, at 12 – 13 (Janet McDavid, former chair of the ABA Antitrust Section, noting that "one other element lurking in a lot of these [recent Supreme Court] cases is concern about class action abuse. That issue 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.").

The frivolous litigation myth is premised on the idea that plaintiffs will bring weak claims in order to obtain settlements and that defendants will settle such claims in order to avoid the costs of discovery (“nuisance settlements” theory)<sup>55</sup> or the small risk of “massive exposure” that may accompany class actions as a result of treble damages, joint and several liability, and fee shifting (“hydraulic pressure” theory).<sup>56</sup> Both theories are seriously flawed.

The “nuisance settlements” theory assumes that class action plaintiffs can impose disproportionate litigation costs on defendants,<sup>57</sup> but the reverse is more likely.<sup>58</sup> Discovery can be expensive for defendants *and* plaintiffs. As the American Antitrust Institute (AAI) noted in its amicus brief in *Twombly*:

For all that defendants must identify and produce voluminous documents, plaintiffs must copy, store, and review them. For all that defendants must produce witnesses for depositions in far-flung locations, plaintiffs must pay court reporters and videographers to record those depositions, and lawyers must travel to and take them. Plaintiffs must also hire expert economists to opine on the existence and amount of

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<sup>55</sup> See, e.g., Brief of the American Bar Ass’n as Amicus Curiae in Support of Neither Petitioners Nor Respondents at 10 – 11, *Twombly*, 127 S. Ct. 1955 (2007) (No. 05-1126), 2006 WL 2503551 (“Because discovery can be so daunting and expensive in antitrust class actions, these cases can assume substantial settlement value as soon as they get past the 12(b)(6) stage. Lawyers experience great pressure to advise their clients to settle even flimsy antitrust cases that proceed past the pleading stage.”) (citations omitted).

<sup>56</sup> See Charles B. Casper, *The Class Action Fairness Act’s Impact on Settlements*, ANTITRUST, Fall 2005, at 26 (“The potential liability can be so large that a defendant has a powerful incentive to settle even weak claims to avoid the ruinous effect of an adverse judgment.”).

<sup>57</sup> See William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887 (2003) (law student note relied on by the Supreme Court in *Twombly*).

<sup>58</sup> See Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: An Introduction and Framework*, in PRIVATE ANTITRUST LITIGATION 28 (Lawrence J. White ed., 1988) (“Both the defendant and the plaintiff can threaten the other side with increased litigation expenses . . . so as to force a more favorable settlement . . . . It is not entirely obvious which side has the overall advantage.”); *id.* at 53 n.68 (noting that a “court can probably detect and penalize frivolous suits more easily than frivolous defenses”).

overcharges . . . . In class actions, counsel must bear the substantial cost of class certification.<sup>59</sup>

Moreover, defendants can and do raise plaintiffs' litigation costs with motion practice, including motions to dismiss, *Daubert* motions, and motions for summary judgment, which judges increasingly are inclined to grant. And frivolous cases subject plaintiffs' attorneys to sanctions under Rule 11, including payment of defendants' attorneys' fees.<sup>60</sup> "Meritless filings are not met with payoff money; they are met with motion practice, and sometimes sanctions."<sup>61</sup> And, of course, class action lawyers operating on a contingency basis personally bear the risk of losing, and even when they obtain a recovery, their fees are capped. In contrast, defense counsel, who are ordinarily compensated by the hour, "can make a credible threat to mount a lavish defense that a plaintiff's attorney cannot credibly counter."<sup>62</sup> In short, rational class action lawyers have little incentive to bring claims they know to be weak, and rational defendants have strong incentives to resist settling frivolous claims, even if it would be cheaper in the short run to settle.<sup>63</sup>

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<sup>59</sup> Brief of the American Antitrust Institute in Support of Respondents at 5, *Twombly*, 127 S. Ct. 1955 (No. 05-1126), available at <http://www.antitrustinstitute.org/archives/files/545.pdf>.

<sup>60</sup> See FED. R. CIV. P. 11 (b) (requiring attorney certification that filing "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and that "factual contentions have evidentiary support, or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

<sup>61</sup> Myriam Gilles & Gary B. Freedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 159 (2006); see id. at 158 ("Class action practice in the real world is characterized by a very high incidence of successful motions to dismiss, successful motions for summary judgment, and unsuccessful motions for class certification."); see also Charles Silver, "*We're Scared to Death*": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1393 (2003) ("Dispositive motions make it hard for plaintiffs to use the threat of endless litigation to obtain payments on unmeritorious claims."); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 70 n.12 (1996) ("In real litigation . . . defendants' counsel are generally quite adept at placing time-consuming and expensive motions and other obstacles in the path of plaintiffs' counsel . . . such that it seems unlikely that a plaintiff can create a sufficient threat, based on disparity of litigation cost alone, to coerce a settlement.").

<sup>62</sup> Silver, *supra* note 61, at 1403; id. at 1402 – 03 (noting that plaintiffs "rationally expect to be outgunned" and that "a defendant can spend as much as it wants").

<sup>63</sup> See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 540 (1997) ("By litigating instead of settling the first few frivolous suits, a repeat-player defendant can build a reputation for fighting. Once established, this reputation will signal other frivolous plaintiffs not to expect a settlement, so they will not sue."). Thus, Professor Bone concludes that "complete information models" (where

The “hydraulic pressure” theory is just as flawed insofar as it is premised on the erroneous notion that a “weak” case that settles based on defendants’ avoiding the risk of an adverse judgment, rather than the cost of litigation, is frivolous. Plainly, a case that settles *after* defendants have been denied summary judgment cannot reasonably be characterized as frivolous.<sup>64</sup> And a case that settles before summary judgment for amounts in excess of litigation costs necessarily reflects defendants’ assessment that there is some appreciable chance that plaintiffs will survive summary judgment and ultimately prevail at trial. To be sure, with large damages, the likelihood of success does not need to be high in order to give a case a significant settlement value. But it is hard to see why an actuarially fair settlement is problematic.<sup>65</sup>

As far as we know, no one has ever documented a significant number of cases in which private plaintiffs obtained substantial recoveries in cases lacking merit, in which private plaintiffs recovered little or nothing even though their claims were meritorious, or, for that matter, in which plaintiffs lost and should have done so. Indeed, commentators generally do not identify specific cases and provide any evidence of why they should fall into any of these categories. Instead, they tend merely to assert that cases of one kind or another exist.

In contrast, there are reasons to believe that the earlier referenced AAI study of 60 large private cases (47 of which were class actions) on the whole involve meritorious claims.<sup>66</sup> The first is that most of the cases resulted in substantial settlements. The recovery in only a few cases was significantly less than \$50 million and the smallest was \$30 million. It seems unlikely that defendants would pay such large sums merely, for example, to avoid the costs of litigation. Only the meaningful prospect of losing litigation—including after exhausting the appellate process—could explain settlements for such large amounts. We are very skeptical about claims that defending these suits often costs innocent firms \$10 million or more. We would believe this only for very unusual cases. Regardless, \$50 million

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plaintiffs and defendants both know that a claim is weak) “do not provide a convincing explanation for why frivolous suits are problematic . . . .” *Id.* at 541.

<sup>64</sup> See, e.g., Notes of the Advisory Committee on 1993 Amendments, FED. R. CIV. P. 11 (“[I]f a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient ‘evidentiary support’ for purposes of Rule 11.”).

<sup>65</sup> Indeed, the hydraulic pressure argument only makes sense insofar as plaintiffs are able to obtain a settlement that *exceeds* the expected value of taking the case to judgment on the theory that, as to high damages cases, defendants are risk averse and plaintiffs are not. But there is no evidence that defendants settle cases for more than expected value, and little reason to believe that defendants are more risk averse than plaintiffs. *See generally* Silver, *supra* note 56, at 1408 – 15.

<sup>66</sup> See Davis & Lande, *supra* note 1. 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 the claims would be necessary to determine whether they are meritorious. To avoid that quagmire, we rely for present purposes on a legal positivist understanding of the law, one based on a reasonable probability of success in litigation.

should be well above the nuisance value of an unmeritorious case. Moreover, the majority of the cases we studied (36 out of 60) settled for more than \$100 million.<sup>67</sup> 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.

Second, most of the cases we studied were validated in whole or in part other than through settlement in private litigation. 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.
2. In 17 of the 60 cases (28%), government enforcers obtained a civil recovery, usually in the form of a consent order.
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).
4. In 14 of the 60 cases (23%), defendants lost at trial in the private litigation or in a closely related case.
5. In at least 13 out of 60 cases (22%) plaintiffs survived a motion to dismiss.<sup>68</sup>
6. In 12 out of the 20 newest cases studied (60%), the court certified a class for litigation purposes. (The study did not record this information for the earliest 40 studied cases.)<sup>69</sup>

In sum, 53 of the 60 cases (88%) had at least one of these indicators that plaintiffs' case was meritorious. (The percentages appear to total more than 100% because many of the cases involved more than one basis for validation.)<sup>70</sup>

Beyond the flawed theory, the claim of widespread frivolous antitrust litigation is unsupported in fact.<sup>71</sup> It is not simply that there are *no* empirical studies to support the claim; there are apparently

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<sup>67</sup> Id. at 18. It is difficult for a firm 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 saying this can never happen, as the settlements get higher, this argument loses credibility.

<sup>68</sup> Id at 18-19. This does not mean that numerous cases failed to survive a motion to dismiss. In many cases such a motion was not made.

<sup>69</sup> Id. We did not report certification of litigation classes for the original 40 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 therefore indicates plaintiffs' claims have a substantial evidentiary basis.

<sup>70</sup> Id. at 19.

<sup>71</sup> See Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 REV. LITIG. 1, 19 – 20 (2002) (noting that in contrast to the evidence of abusive securities class actions that supported enactment of the Private Securities Litigation Reform Act of 1995, there is an "absence of similar claims of widespread abuse in antitrust cases . . . ."). With respect to frivolous litigation in general, legal scholars have concluded that "[r]eliable empirical data is extremely limited . . . ." Bone, *supra*

no good examples of settlements of frivolous antitrust suits. And absent such settlements, class action plaintiffs have nothing to gain by bringing such suits. The evidence suggests that if there is a problem with class action settlements in antitrust cases, it is that plaintiffs sometimes settle strong cases for too little, not weak cases for too much.<sup>72</sup>

Every one of these indicators is evidence, but not proof, that these private antitrust cases involved anticompetitive behavior. But 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. In sum, there is simply no basis to believe that frivolous antitrust class actions are a significant problem.<sup>73</sup>

### III. Specific Recommendations

#### A. Competition Advocacy

The next administration should restore balance to the DOJ and FTC's competition advocacy and amicus programs by educating the public and the courts about the virtues of vigorous private antitrust enforcement and by dispelling the myths about widespread abusive antitrust litigation. The administration should also support efforts by the courts to strengthen their use of case management tools to reduce the expense of litigation.

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note 58, at 520; see Silver, *supra* note 56, at 1395 n.164 (“There is little empirical evidence supporting the theory that frivolous lawsuits are common.”); Arthur Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 996 (2003) (showing that “the supposed litigation crisis is the product of assumption; that reliable empirical data is in short supply; and that data exist that support any proposition”).

<sup>72</sup> See Deborah Platt Majoras, Chairman, Opening Remarks at Workshop on Protecting Consumer Interests in Class Actions (Sept. 13, 2004), available at <http://www.ftc.gov/opa/2004/09/majorasstatement.shtm> (“The FTC’s primary concern has been whether coupon and other non-pecuniary redress provide adequate relief to injured consumers.”).

<sup>73</sup> See William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, ANTITRUST, Spring 2008, 85, 86 (“Recent experience shows that the courts know how to use . . . tools to dispose of nonmeritorious claims either at the pleadings stage or through summary judgment, and that most judges manage discovery more effectively than the Supreme Court seems to acknowledge.”); Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1988 (2007) (Stevens, J., dissenting) (“The Court vastly underestimates a district court’s case-management arsenal.”).

The administration should actively support efforts by the European Union and other foreign jurisdictions to develop effective private rights of action. The United States has a strong interest in ensuring that international cartels are adequately deterred, and private enforcement in the U.S. and abroad is an essential component of that deterrence.

#### B. *Twiqbal* Reform

The Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly*<sup>74</sup> suggested that a heightened standard applied in pleading an antitrust conspiracy, at least in proposed class actions. *Ashcroft v. Iqbal*<sup>75</sup> made clear that the new pleading standard applies to all cases, although it did not make similarly clear what the new standard is. Together these cases have come to be known as "*Twiqbal*." *Twiqbal* has been criticized as destabilizing federal civil litigation without adequate consideration and forethought.<sup>76</sup> It also relies on a questionable assumption that plaintiffs successfully pursue frivolous litigation with some regularity<sup>77</sup>—questionable, in particular, when it comes to private antitrust cases.<sup>78</sup> One unanticipated consequence of *Twiqbal* was the rise of a body of literature attempting empirical analyses of its effects. There is some evidence that *Twiqbal* decreased the rate at which plaintiffs' claims survive motions to dismiss.<sup>79</sup> But it is hard to disentangle that simple conclusion from other dynamics at play, including determining whether the decision changed the cases that plaintiffs bring—perhaps they bring fewer—and whether it altered the behavior of potential defendants—perhaps they violate plaintiffs' legal rights more often.<sup>80</sup> Indeed, the flurry of empirical research on *Twiqbal* may reveal not only the limits on how current scholars conduct empirical analyses but on the limits on what those analyses can tell us about the civil litigation system.<sup>81</sup> Still, at least two conclusions seem plausible: first, *Twiqbal* made it at least somewhat more difficult for plaintiffs to bring cases and, second, it did so without an adequate basis. The next administration should work to prevent this sort of groundless curtailment of antitrust enforcement.

#### C. *Prejudgment Interest*

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<sup>74</sup> 550 U.S. 544 (2007).

<sup>75</sup> 556 U.S. 662 (2009).

<sup>76</sup> Kevin M. Clermont & Stephen C. Yeazell, Inventing Tests, Destabilizing Systems, 95 Iowa L. Rev. 821 (2010).

<sup>77</sup> *Twombly*, 550 U.S. at 559.

<sup>78</sup> Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 66-70 (2013) (explaining why antitrust defendants are more likely to settle for too little—rather than too much—in antitrust cases).

<sup>79</sup> See David F. Engstrom, The *Twiqbal* Puzzle and Empirical Study of Civil Procedure, 65 Stan. L. Rev. 1203, 1234 (2013) (noting *Twiqbal* may increase the rate at which courts grant motions to dismiss, although it may have a greater effect by discouraging plaintiffs from bringing claims).

<sup>80</sup> See *id.* at 1223 (2013) (discussing these confounding considerations among others).

<sup>81</sup> *Id.* at 1234-44 (suggesting possible improvements to empirical analysis of procedure); see also Jonah B. Gelbach, Material Facts in the Debate over *Twombly* and *Iqbal*, 68 Stan. L. Rev. \_\_ (2016) (suggesting limits on empirical inquiry into effects of *Twombly* and *Iqbal*), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2570943](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570943).

The next administration should introduce legislation to amend section 4 of the Clayton Act to provide for an automatic award of prejudgment interest to prevailing plaintiffs, starting from the time the injury first occurs.<sup>82</sup> As Judge Easterbrook has noted, “The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders. We should allow, indeed require, such awards.”<sup>83</sup> Given the typical lag time between the injury inflicted by an antitrust offense and the judgment or settlement, and under conservative assumptions about the time value of money, the failure to award prejudgment interest typically reduces a plaintiff’s recovery by at least one-third.<sup>84</sup> Moreover, the absence of prejudgment interest gives defendants a strong incentive to delay the resolution of litigation.<sup>85</sup> Nor does the award of treble damages under federal antitrust law compensate adequately for the lack of prejudgment interest.

Some argue that no change should be made in the current law because treble damages adequately compensate “for the general unavailability of prejudgment interest in antitrust cases.”<sup>86</sup> This is plainly

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<sup>82</sup> Currently, prejudgment interest is generally not available in antitrust cases. Although the Antitrust Procedural Improvements Act of 1980 amended section 4 to permit prejudgment interest as a penalty for intentional dilatory behavior, see 15 U.S.C. § 15(a), that statute has rarely, if ever, been used. *See* AMC REPORT, *supra* note 5, at 249 (“In the twenty-six years since the amendment, there has been no reported decision awarding prejudgment interest in an antitrust case.”). Interest should be awarded on actual damages from the date of injury.

<sup>83</sup> Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) (Easterbrook, J., dissenting). Judge Easterbrook asked, “Is [the denial of prejudgment interest] small beer? Hardly.” *Id.* at 584.

<sup>84</sup> *See* Robert H. Lande, *Multiple Enforcers and Multiple Remedies, Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329, 337 (2004) (data suggest that the average cartel probably lasts 7 – 8 years, with an additional 4 plus year lag before judgment; this factor alone “probably means that so-called ‘treble’ damages are really only approximately double damages”). In other words, actual damages in real terms are roughly twice the nominal damages (before trebling). In the case of the vitamins cartels, for example, the worldwide nominal overcharges during the period of the conspiracy (between 1990 and 1999) were approximately \$8 billion, but the *real* value of the damages in 2003 – when the bulk of the settlements were reached – was estimated at \$18 billion. *See* Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents at 10, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

<sup>85</sup> To be sure, as noted above, current law permits an award of prejudgment interest for certain dilatory conduct, but its restrictive provisions – interest is simple, not compound; it is awarded from the date of the complaint rather than the date of the injury; and it requires plaintiffs to prove that the defendant acted “intentionally for delay,” or “primarily for the purpose of delaying the litigation” – no doubt explain its lack of use.

<sup>86</sup> AMC REPORT, *supra* note 41, at 249.

incorrect. As Judge Easterbrook has pointed out, “[Trebling makes up for the fact that antitrust violations are hard to detect and prove.”<sup>87</sup> A diverse group of scholars believe, for example, that no more than 25% of cartels are detected and proven.<sup>88</sup> This factor alone suggests that treble damages might not be adequate to deter violations optimally – even if the damages included prejudgment interest and even if treble damages usually were awarded. Trebling also makes up for the fact that actual damages do not compensate for harms from market power as allocative efficiency losses and “umbrella” effects.<sup>89</sup> If due to these factors, as some scholars persuasively argue, treble damages actually approximate single real damages,<sup>90</sup> and in light of the fact that even cartels seldom pay even nominal single damages,<sup>91</sup> then prejudgment interest becomes an important way for the antitrust system to deter anticompetitive conduct.

#### D. Daubert Reform

Before the Supreme Court’s decision in *Daubert v. Merrell Dow Pharm., Inc.*,<sup>92</sup> “admissibility challenges to the qualifications and methodologies of economic testimony in antitrust cases were rare.”<sup>93</sup> In recent years motions to exclude expert economic testimony in antitrust cases under *Daubert* and Federal Rule of Evidence 702 are the rule rather than the exception. Because expert testimony typically is essential for plaintiffs to establish the elements of their case (e.g., market definition), and a successful *Daubert* motion will usually lead to summary judgment for the defendants (while exclusion of defendants’ expert will not be dispositive), “*Daubert* motions are almost exclusively defense tools used to attack plaintiff’s case.”<sup>94</sup> One review of federal appeals court decisions involving *Daubert*

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<sup>87</sup> *Fishman*, 807 F.2d at 584.

<sup>88</sup> For citations see Connor & Lande, *supra* note 8, at 462-68.

<sup>89</sup> See Lande, *supra* note 33, at 152-53.

<sup>90</sup> See Lande, *supra* note 33, *passim*.

<sup>91</sup> See Connor & Lande, *supra* note 4, *passim*.

<sup>92</sup> 509 U.S. 579 (1993).

<sup>93</sup> Andrew I. Gavil, *Competition Policy, Economics, and Economists: Are We Expecting Too Much?*, in 2005 FORDHAM CORP. L. INST. 575, 586 (B. Hawk ed., 2006).

<sup>94</sup> *Id.*; see also Christopher B. Hockett, et al., *Revisiting the Admissibility of Expert Testimony in Antitrust Cases*, ANTITRUST, Summer 2001, at 7, 8 (“*Daubert* challenges are a potentially powerful defensive tool.”); *id.* at 11 n.12 (“*Daubert* is rarely used against defendants’ experts.”). But *cf.* Andrew I. Gavil & Katherine I. Funk, *Daubert Comes to Washington: Managing Expert Economic Testimony in Part III Proceedings at the FTC*, ANTITRUST, Spring 2006, at 21, 25 (“[I]n contrast to federal court where *Daubert* motions tend

between 2000 and 2006 shows that the admissibility rate of economists and accountants in those cases was .598.<sup>95</sup> However, for the antitrust cases in the sample (11 of 87 cases), the admissibility rate was only .272, and all of the antitrust cases involved challenges to the plaintiffs' experts.<sup>96</sup>

Another study found that out of 412 Daubert challenges the authors were able to identify between 2000 and 2008 through the *Daubert Tracker Website*,<sup>97</sup> 73 occurred in antitrust cases—in other words, 18% of the challenges arose in antitrust cases, even though antitrust accounted for only 0.8% of cases filed during that period.<sup>98</sup> Using a larger dataset, the authors analyzed a total of 113 challenges in antitrust cases from 2000 through 2011.<sup>99</sup> 21 of those challenges were against defense experts and 92 against plaintiffs' experts. The challenges of defense experts succeeded at a rate of 29% and the challenges of plaintiffs' experts succeeded at a rate of 41%. Moreover, the courts exclude *none* of the testimony of the defense experts in its entirety whereas they excluded 23% of the plaintiffs' experts' testimony in its entirety.

The asymmetric application of *Daubert* leads to adverse consequences. First, it raises plaintiffs' litigation costs, often unnecessarily, because most *Daubert* motions are denied.<sup>100</sup> Not only do plaintiffs have to incur additional lawyers' time to defend against the inevitable *Daubert* motion, they have to spend more on experts, perhaps at an early stage, to ensure that expert reports withstand challenge. And it may be more difficult and expensive for plaintiffs to obtain qualified experts to testify than for

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overwhelmingly to be a defense tool, complaint counsel has been very aggressive at the FTC in filing and pursuing its own motions directed at respondents' experts.”).

<sup>95</sup> See Daubertontheweb.com, <http://www.daubertontheweb.com/accountants.htm> (last visited April 16, 2008). The rate of admissibility is the sum of the number of experts whose testimony was admitted by district courts and upheld on appeal plus the number of experts whose testimony was excluded by district courts and reversed on appeal, divided by the total number of admission/exclusion determinations that reached the appeals courts. See Daubertontheweb.com, <http://www.daubertontheweb.com/statistics1.htm> (last visited June 8, 2008).

<sup>96</sup> In 3 out of the 11 cases the expert testimony was admitted and the ruling affirmed on appeal; in no case was a ruling to exclude the testimony reversed on appeal. The review does not purport to be comprehensive, particularly since it does not include all district court *Daubert* determinations, only those that gave rise to appellate decision. Other caveats are noted at Daubertontheweb.com, <http://www.daubertontheweb.com/statistics1.htm>.

<sup>97</sup> See James Langenfeld & Christopher Alexander, Daubert and Other Gatekeeping Challenges of Antitrust Experts: Appendix, 1 (2011).

<sup>98</sup> See id. at Table 1 (2011).

<sup>99</sup> Id. at Table 2.

<sup>100</sup> See Hockett, et al., *supra* note 85, at 11; Langenfeld & Alexander, *supra* note 97, at Table 2.

defendants to do so because economists fear that they will “Dauberted” if they take on a case for plaintiffs, and their future employment prospects as an expert will be diminished. Indeed, rather than being used merely to exclude “junk economics,” there is evidence that *Daubert* has sometimes been used to dismiss cases where the court has essentially disagreed with the expert’s analysis, thus stigmatizing the economist and usurping the role of the jury.<sup>101</sup>

Particularly troubling is the recent trend of courts to apply *Daubert* at class certification. The Supreme Court has noted this issue in dicta without resolving it.<sup>102</sup> Lower courts have conflicting views.<sup>103</sup> *Daubert* would seem to be an awkward fit at class certification. First, the primary concern animating *Daubert* appears to have been the capability of a *jury* to assess scientific testimony.<sup>104</sup> But the judge, not the jury, decides class certification. There is no need to worry that “befuddled juries will be confounded by absurd and irrational pseudoscientific assertions.”<sup>105</sup> Second, the Supreme Court has made clear that a court must assess expert testimony at class certification, to the extent it is relevant to the class certification standard.<sup>106</sup> Any concerns about the reliability of the expert testimony would naturally be a part of that assessment. Defendants can raise those concerns in opposing class certification. There is no need for an additional round of briefing on the admissibility of expert testimony. Separate *Daubert* briefing adds unnecessarily to the cost of class litigation and to the burden on the courts. It also gives a strategic opportunity to defendants, who generally get two additional briefs (an opening brief and a reply on *Daubert*) to plaintiffs’ one (an opposition) and often get the last

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<sup>101</sup> See Gavil & Funk, *supra* note 85, at 588 (“There is . . . some evidence of some aggressive use by judges of their gatekeeper function, sometimes without the safeguards that *Daubert* itself mandated.”). Some very well known economists have had their testimony for plaintiffs excluded on *Daubert* grounds, including Nobel Laureate Robert Lucas in *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781 (7th Cir. 1999), Professor Robert Hall of Stanford University in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000), and Professor Franklin Fisher of MIT in *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003).

<sup>102</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2554-55 (2011) (“The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so.”).

<sup>103</sup> See, e.g., *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011) (applying limited *Daubert* analysis at class certification); *Behrand v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011) (same), reversed on other grounds, \_\_\_ S.Ct. \_\_\_ ()�.

<sup>104</sup> *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 595 (1993) (noting concern about “a ‘free-for-all’ in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions”). The Court notably expressed its confidence in juries, rejecting the requirement of “general acceptance” to admit expert testimony. *Id.* at 596 (“respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system”).

<sup>105</sup> *Id.* at 595.

<sup>106</sup> *Dukes*, 131 S. Ct. at 2553-57 (carefully analyzing expert testimony in applying Rule 23).

word on class certification even though the burden lies with plaintiffs to satisfy Rule 23. Plaintiffs can of course counter by filing their own *Daubert* motions, but that just further increases the cost and burden of litigation. It would be better to require defendants to include any concerns they have about plaintiffs' expert testimony in their briefs opposing class certification.

Preventing the misuse of *Daubert* should be of concern to the government, not only as a guardian of effective private enforcement, but also as a litigant in the federal courts and administrative proceedings.<sup>107</sup> The DOJ and FTC should hold a joint workshop and issue a report detailing the effects of *Daubert* on private and public litigation. As part of that effort, the agencies should consider drafting guidelines for use by the federal courts in evaluating the reliability of economic testimony with respect to certain recurring issues, including market definition, market power, and conspiracy.<sup>108</sup> The agencies should consider methods of discouraging wholesale *Daubert* challenges, including encouraging the use of Rule 11 sanctions for frivolous *Daubert* motions. Finally, the agencies should consider intervening as an amicus in appropriate cases to establish standards that would limit the misuse of *Daubert*.

#### E. *Class Action Waivers in Arbitration and Illinois Brick Reform*

In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court made it very difficult to challenge predispute arbitration provisions that bar class actions.<sup>109</sup> Few court will be able to set aside such provisions in the future. As a result, class action waivers in effect immunize many potential violators from private purchaser actions.<sup>110</sup> Allowing waiver of class treatment is a particularly concerning in antitrust because of the *Illinois Brick* rule; as Professor Gilles notes, “The only people who can bring an antitrust class action in federal court [direct purchasers] are those on whom collective action waivers may most easily and directly be imposed.”<sup>111</sup>

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<sup>107</sup> See Gavil & Funk, *supra* note 85, at 21 (noting that the government has been subject to *Daubert* motions in the federal courts and in Part III proceedings at the FTC).

<sup>108</sup> Such a guide might be adopted by the Federal Judicial Center for inclusion in its Reference Manual on Scientific Evidence, which contains, for example, a chapter on estimating economic losses in damages awards, including antitrust damages.

<sup>109</sup> American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2310 (2013).

<sup>110</sup> See, e.g., Kristian v. Comcast Corp., 446 F.3d 25, 61 (1st Cir. 2006) (declining to enforce class action waiver on the ground that “the social goals of federal and state antitrust laws will be frustrated because of the ‘enforcement gap’ created by the de facto liability shield”).

<sup>111</sup> Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 418 (2005). The Supreme Court will take up yet another class-action waiver case

Meanwhile, the controversy over indirect purchaser damage suits under federal law has raged for almost 40 years. Since the Supreme Court's decision in *Illinois Brick*,<sup>112</sup> indirect purchasers have been unable to recover damages under section 4 of the Clayton Act,<sup>113</sup> while direct purchasers can recover the full amount of an overcharge under *Hanover Shoe* without allowing for any pass-on defense.<sup>114</sup> *Italian Colors* creates new urgency to reconsider *Illinois Brick* so that private lawsuits can help deter antitrust violations. Private antitrust suits arguably have done more to discourage law-breaking than criminal enforcement by the DOJ.<sup>115</sup> Given the essential role that class actions play in private antitrust enforcement,<sup>116</sup> the combined effect of *Italian Colors* and *Illinois Brick* may be to decrease significantly the efficacy of U.S. antitrust laws.<sup>117</sup>

The next administration should work to overrule *Italian Colors*. But given the current political situation, that may not prove feasible. Instead, or in addition, the next best solution may be to reform *Illinois Brick*. If so, here are some principles to guide that challenging effort: (1) historical levels of antitrust deterrence should not be undermined; (2) consumers should be compensated for their harm to the extent practicable; (3) the calculation of potential damages to any class of purchasers should be reasonably predictable so as to provide clear incentives for private lawyers to take on cases; (4) administrative costs should be minimized to the extent this would not interfere with any of the other goals in this area; (5) procedural hurdles, particularly in the class certification process, should not undermine the effectiveness of direct or indirect purchaser actions; and (6) state attorneys general should retain the option of bringing *parens patriae* actions under state law in state court, without removal.<sup>118</sup>

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next Term, *DirecTV v. Imburgia*, 135 S. Ct. 1547 (March 23, 2015) (No. 14-462) (granting certiorari petition) (whether a class-action waiver is enforceable in an arbitration agreement that incorporates state law where the state law would bar enforcement but is preempted).

<sup>112</sup> Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

<sup>113</sup> Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

<sup>114</sup> See Robert H. Lande & Joshua P. Davis, Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust laws, 2011 B.Y.U. L. Rev. 315, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1565693](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693).

<sup>115</sup> See, e.g., Davis & Lande, Toward Assessment, supra note 2, (documenting direct and indirect purchasers recovered about half of \$34 to \$36 billion obtained by plaintiffs in sixty successful private antitrust cases).

<sup>116</sup> See Mark A. Lemley & Christopher R. Leslie, Antitrust Arbitration and *Illinois Brick* (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2532684](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532684).

<sup>117</sup> For an analysis of a diverse array of possible options, together with their costs and benefits, see Robert H. Lande, New Options for State Indirect Purchaser Legislation: Protecting the Real Victims

#### F. Class Certification Standard

The Supreme Court has issued several recent opinions pertaining to the standard at class certification. Some of them threatened to undermine class actions and, with them, the efficacy of private antitrust enforcement.<sup>118</sup> The upshot, however, is that the class certification standard has been clarified but not for the most part made more exacting. *Wal-Mart Stores, Inc. v. Dukes*<sup>119</sup> held that courts may consider the merits of a class action to the extent they are relevant to determining whether plaintiffs have carried their burden to certify a class under Rule 23. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*<sup>120</sup> clarified that the inquiry into the merits is permissible “only to the extent” it bears on the Rule 23 standard<sup>121</sup> and confirmed that the Rule 23 “grants no license to engage in free-ranging merits inquiries at the class certification stage.”<sup>122</sup> *Comcast Corp. v. Behrend*<sup>123</sup> held that plaintiffs’ theory of liability must match their theory regarding damages.<sup>124</sup> Each of these decisions could have dealt a serious blow to antitrust class actions. In the end, none did. Yet, as in the past, the class action standard remains under siege.

One ominous case on the horizon is *Bonaphakeo v. Tyson Foods*. The Supreme Court has taken up the question of whether a class may be certified under Rule 23(b)(3) if it includes “members who were not injured and have no legal right to any damages.”<sup>125</sup> AAI successfully briefed this issue in *In re Nexium Antitrust Litigation*, in which the First Circuit recognized that “objections to certifying a class including uninjured members run counter to fundamental class action policies.”<sup>126</sup> Including uninjured members in a class need not increase a defendant’s damages and does not raise due process issues, particularly not ones a defendant should have standing to raise.<sup>127</sup> Indeed, awarding classwide damages

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of Antitrust Violations, 61 [Alabama L. Rev. 447 \(2010\)](#), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1267202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267202).

<sup>118</sup> See Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013) (describing the crucial role played by class actions in private antitrust enforcement); ANTITRUST MODERNIZATION COMMISSION, REPORT & RECOMMENDATIONS 241 (2007) (same).

<sup>119</sup> 131 S.Ct. 2541, 2551-52 (2011).

<sup>120</sup> 133 S. Ct. 1184 (2013).

<sup>121</sup> Id. at 1195 (emphasis added).

<sup>122</sup> Id. at 1194-95.

<sup>123</sup> 133 S. Ct. 1426 (2013).

<sup>124</sup> See, e.g., *Leyva v. Medline Industries, Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (interpreting *Comcast* in this manner).

<sup>125</sup> Petition for Writ of Certiorari at i, *Bonaphakeo v. Tyson Foods*, 765 F.3d 791 (8th Cir. 2014), cert. granted, 2015 WL 1278593 (U.S. June 8, 2015) (No. 14-1146). *Tyson Foods* is a wage and hour case. Also pending before the Court (and presumably being held pending *Tyson*), is a *cetiorari* petition challenging class certification in a price-fixing case, which raises the related question of whether classwide harm can be demonstrated when prices are negotiated. *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014), petition for cert. filed, 2015 WL 1043612 (U.S. Mar. 9, 2015) (No. 14-1091).

<sup>126</sup> 777 F.3d 9, 22 (1st Cir. 2015).

<sup>127</sup> See Joshua P. Davis, Eric L. Cramer & Caitlin May, *The Puzzle of Class Actions With Uninjured Members*, 82 GEO. WASH. L. REV. 858, 868-81 (2014).

in an antitrust case—including for a class that includes uninjured members—can minimize error costs, providing a more accurate measure of damages than would individual litigation.<sup>128</sup>

In the upcoming Term, the Court will also consider whether defendants can defeat class actions by “picking off” the proposed class representatives with an offer of complete relief for the representative’s individual claim, even when the offer to settle is rejected. *Campbell-Ewald Co. v. Gomez*.<sup>129</sup> Specifically, the Court will consider whether a class representative’s claim is mooted by an offer of complete individual relief before the class is certified, an issue left open in *Genesis Healthcare Corp. v. Symczyk*.<sup>130</sup> For the reasons stated in Justice Kagan’s dissent for four justices in *Genesis Healthcare*, an unaccepted offer is a legal nullity that should not moot a class representative’s claim, let alone the claims of the class.

The Supreme Court does not pose the only threat to class actions. Some lower courts have created a demanding “ascertainability” requirement not found in Rule 23. They have held not only that plaintiffs must offer a class definition based on objective criteria, but that an “administratively feasible” method must exist for identifying individual class members and ascertaining their class membership. The heightened ascertainability requirement poses a particular threat to consumer class actions,<sup>131</sup> but it could place some antitrust class actions at risk as well. Indeed, it may be just another way to impose a requirement that all members of a proposed class suffer injury.

Further, some anti-class action groups are on a campaign to eliminate or curtail *cy pres*.<sup>132</sup> The groups apparently recognize that eliminating or restricting *cy pres* can undermine consumer class actions seeking to recover small amounts of money. And some courts have been overly restrictive about the

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<sup>128</sup> See Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890 (2014).

<sup>129</sup> 135 S. Ct. 2311 (May 18, 2015) (No. 14-857) (granting certiorari petition).

<sup>130</sup> 133 S. Ct. 1523 (2013).

<sup>131</sup> See, e.g., *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) (vacating certification of consumer class that would have relied on affidavits of class members in the absence of receipts); *In re Wellbutrin XL Antitrust Litigation*, No. 08-2433, 2015 WL 3970858 (E.D. Pa. June 30, 2015) (decertifying indirect-purchaser class based on lack of ascertainability in pay-for-delay case; court not convinced that sufficient records existed or were obtainable to ascertain whether individual consumers were members of the class); *Jones v. ConAgra Foods, Inc.*, No. C 12-01633, 2014 WL 2702726 (N.D. Cal. June 13, 2014) (finding ascertainability not met in consumer class that relied on affidavits). But see *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 171 (3d Cir. 2015) (reversing denial of class certification; “*Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken.”).

<sup>132</sup> See U.S. Chamber Institute for Legal Reform, *Cy Pres: A Not So Charitable Contribution to Class Action Practice* (Oct. 2010), [http://www.instituteforlegalreform.com/uploads/sites/1/cypres\\_0.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/cypres_0.pdf); Lawyers for Civil Justice, Comment to the Advisory Committee on Civil Rules and its Rule 23 Subcommittee, April 7, 2015, [http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_on\\_rule\\_23\\_conceptual\\_sketches\\_april\\_2015.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_conceptual_sketches_april_2015.pdf) (“LCJ Comment”) (urging Rules Committee not to enshrine *cy pres* in the civil rules).

use of *cy pres* as part of class settlements.<sup>133</sup> The Chief Justice has expressed skepticism of *cy pres* as part of class settlements, noting “fundamental concerns surrounding the use of such remedies in class action litigation,” and that in a “suitable case, this Court may need to clarify the limits on the use of such remedies.”<sup>134</sup>

Not only the courts threaten the viability of class actions. The House is considering H.R. 1927, the “Fairness in Class Action Litigation Act,” which would effectively eviscerate consumer, antitrust, employment, and civil rights class claims. The bill bars class certification unless proponents demonstrate, based on a “rigorous analysis,” that each person in a class has suffered “the same type and scope of injury.” This standard would be inconsistent with the letter and spirit of Rule 23. It would go beyond requiring harm to all class members, imposing an extreme and arbitrary standard that would prevent certification of many classes that would meet the requirements of the current Rule 23 and case law interpreting it.

At first, a recent interest in revising Rule 23 on the part of the Advisory Committee on Civil Rules also appeared to be a threat. However, the “conceptual sketches” provided by the Rule 23 subcommittee of the Advisory Committee on Civil Rules in April—a prelude to presenting draft amendments to the full committee at its Fall 2015 meeting—appear on the whole to be even-handed and reasonable, more likely to improve the functioning of Rule 23 than to damage it. The sketches address settlement approval criteria, settlement class certification, *cy pres*, objectors, Rule 68 offers and mootness, issue classes, and notice. Indeed, it is a sign of the reasonableness of the sketches that critics of class actions have sharply criticized them.<sup>135</sup>

The next administration should work to preserve class actions and, with them, private enforcement of the antitrust laws. It should submit amicus briefs in support of reasonable interpretations of Rule 23, particularly before the Supreme Court. And it should oppose legislation designed to prevent access to justice and to use procedural ploys to deprive consumers of their substantive legal rights.

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<sup>133</sup> See, e.g., *In re BankAmerica Corp. Securities Litig.*, 775 F.3d 1060 (8th Cir. 2015) (holding that district court erred by not requiring that funds unclaimed after two distributions be redistributed to original claimants, because it was feasible to do so even though original claims process was riddled with problems and delays).

<sup>134</sup> *Marek v. Lane*, 134 S. Ct. 8 (2013) (Roberts, C.J., concurring in the denial of certiorari).

<sup>135</sup> See U.S. Chamber Institute for Legal Reform, *Cy Pres: A Not So Charitable Contribution to Class Action Practice* (Oct. 2010), [http://www.instituteforlegalreform.com/uploads/sites/1/cypres\\_0.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/cypres_0.pdf); Lawyers for Civil Justice, Comment to the Advisory Committee on Civil Rules and its Rule 23 Subcommittee, April 7, 2015, [http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_on\\_rule\\_23\\_conceptual\\_sketches\\_april\\_2015.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_conceptual_sketches_april_2015.pdf) (“LCJ Comment”) (urging Rules Committee not to enshrine *cy pres* in the civil rules) at 1 (sketches “seem aimed at enshrining into the Federal Rules of Civil Procedure (FRCP) several inventions that have enabled the metamorphosis of class actions into the form they have taken today”).

#### G. Antitrust Injury

The “antitrust injury” doctrine requires a private plaintiff to prove that its alleged “injury is of the type the antitrust laws were intended to prevent, and that flows from that which makes defendants’ acts unlawful.”<sup>136</sup> As a doctrine akin to proximate or “legal” cause in torts,<sup>137</sup> it makes sense; injuries caused by an antitrust violation, but which are essentially fortuitous and not within the intended scope of the antitrust statute or rule, should not be compensable under section 4 of the Clayton Act. However, as one commentator has noted, the “term ‘antitrust injury’ is egregiously overused in a variety of contexts where it does not belong, to the confusion of the litigants and the court, not to mention future courts and litigants attempting to wrestle with erroneous precedent.”<sup>138</sup> In particular, the doctrine has been misused by lower courts to dismiss cases at the pleading stage that should not have been dismissed or to avoid addressing the merits of claims.<sup>139</sup>

We urge the next administration to examine critically the expansive use of the antitrust injury doctrine by the lower courts and to participate as an amicus in appropriate cases to clarify the limited nature of the doctrine.

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<sup>136</sup> Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 – 89 (1977).

<sup>137</sup> See Blue Shield of Va. v. McCready, 457 U.S. 465, 477 & n.13 (1982) (analogizing antitrust injury to proximate cause); DOBBS, *supra* note 106, at 446 – 47 (judgments about proximate cause “attempt to limit liability to the reasons for imposing liability in the first place”).

<sup>138</sup> Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 775 (2003). This commentator “reviewed many cases in which the court claimed to see antitrust injury as key to the decision, when the doctrine had no application at all—either there was no violation, or there was no injury, or there was violation and injury but the violation did not cause the injury, or the court employed an unreliable, if not clearly erroneous, generalization about antitrust injury to dispose of a case that should have been dealt with on other grounds. The cases we have specifically examined are the tip of an iceberg of error.” *Id.* at 765; see also Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITTS. L. REV. 437 (2001) (noting harsh approach to private enforcement reflected in antitrust injury decisions).

<sup>139</sup> See Davis, *supra* note 138, at 737 – 44.