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Class Warfare: Why Antitrust Class Actions Are Essential for Compensation and Deterrence

BY ROBERT H. LANDE

OUR RECENT EMPIRICAL STUDIES demonstrate five reasons why antitrust class action cases are essential: (1) class actions are virtually the only way for most victims of antitrust violations to receive compensation; (2) most successful class actions involve collusion that was anticompetitive; (3) class victims' compensation has been modest, generally less than their damages; (4) class actions deter significant amounts of collusion and other anticompetitive behavior; and (5) anticompetitive collusion is underdeterred, a problem that would be exacerbated without class actions.

Recent court decisions undermine class action cases, thus preventing much effective and important antitrust enforcement.¹

Class Actions Are Virtually the Only Way for Most Victims of Federal Antitrust Violations to Receive Compensation

The antitrust statutes provide that violations result in automatic treble damages for the victims.² The legislative history³ and case law indicate that compensation of victims is a goal, perhaps the dominant goal, of antitrust law's damages remedy.⁴ 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."⁵ As the Supreme Court noted, "[C]lass actions . . . may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."⁶ Accordingly, "courts have repeatedly found antitrust claims to be particularly well suited for class actions . . ."⁷

Without class actions, cartels and other antitrust violators that inflict widespread economic harm would have little to

fear from the treble damages remedy. This is because, as a practical matter, class action cases are virtually the only way for most victims of anticompetitive behavior to receive compensation.⁸ A 2013 study that Professor Joshua Davis and I conducted documents the benefits of private enforcement by analyzing 60 of the largest recent successful private U.S. antitrust cases (defined as suits resolved since 1990 that recovered at least \$50 million in cash for the victims⁹). These actions returned a total of \$33.8–\$35.8 billion in cash to victims of anticompetitive behavior.¹⁰ These figures do not include products, discounts, coupons, or the value of injunctive relief or precedent—only cash.¹¹ Consequently, these totals significantly understate the actual benefits of this litigation to the victims involved. And, of course, this study covered only 60 suits (albeit 60 of the largest private recoveries) out of the many hundreds of private cases filed in the United States during this period.

Of these 60 large private cases, 49 were class action suits.¹² These cases recovered a total of \$19.4–\$21.0 billion—the majority of the amount analyzed in our study.¹³ Since these were among the largest private actions ever filed, specific conclusions based upon these results may not generalize perfectly to all class action cases. They do suggest, however, that without class action cases, effective and significant victim compensation would be reduced dramatically.

Most Successful Class Actions Involve Collusion that Was Anticompetitive

Almost every private antitrust case that results in a remedy does so through a settlement,¹⁴ so the underlying merits of the plaintiffs' claims usually have not been definitively assessed by a court or jury. Critics sometimes use this fact to support assertions that class actions usually are meritless, that plaintiffs often receive huge sums from cases not involving anticompetitive conduct, and that private antitrust actions often amount to legalized blackmail or extortion.¹⁵

Antitrust class actions arise in widely varied market and factual settings, and views about the merits of specific cases and the litigation risks involved vary as well. This makes it extremely difficult to draw objective conclusions about the merits of settlements.

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Nevertheless, there are good reasons to believe that the vast majority of class action cases in the Davis/Lande study involved legitimate claims. Forty-one of the 49 class actions involved allegations of collusion,¹⁶ and the same conduct supporting the settlements gave rise to criminal penalties in 20 cases; to civil relief by the FTC or DOJ in 8 cases; to civil relief by a state or other governmental unit in 9 cases; to a trial that the defendants lost and that was not overturned on appeal in 7 cases; to a class being certified in 22 cases; and to plaintiffs surviving or prevailing at summary judgment in 12 cases.¹⁷ Overall, 44 of the 49 class action suits (90 percent) exhibited at least one of these forms of legal validation as to their merits. (The 5 actions that did not have at least one of these indicia settled too early for a substantive evaluation of their merits).¹⁸

These results are broadly consistent with a finding that Professor John Connor derived from an analysis of 130 private recoveries worldwide in international cartel cases for which he could obtain the necessary data.¹⁹ He found that of the 50 largest worldwide settlements, measured by their monetary recoveries in constant dollars, 49 had been filed against international cartels.²⁰ Of these, 51 percent were follow-ups to successful DOJ prosecutions, and another 8 percent were filed after fines by the EC or other non-U.S. antitrust authorities.²¹ Using a different data set, Connor and I found that 36 of 71 (also 51 percent) successful U.S. class action recoveries followed successful DOJ criminal cases.²²

This data does not prove that these or any other specific class action cases involved anticompetitive conduct. But critics who assert that most antitrust class actions are little more than legalized blackmail rely only on anecdotes, hypotheticals, and opinions (often of defendants in the cases), without support from studies, and with no reliable empirical evidence that the actions lack merit or that settlement amounts are excessive compared to the anticompetitive harm.²³ To be fair, one should compare the above indicia of validity to the absence of any systematic evidence underpinning the critics' charges.

Critics also sometimes assert that remedies typically secured in class action settlements are at best dubious and often are completely worthless, consisting of useless coupons, meaningless discounts, and obsolete products. They argue with regard to cash payments (without providing even a single anecdote) that "issuing [class members] a check is often so expensive that administrative costs swallow the entire recovery."²⁴ According to many critics the only ones to benefit from private enforcement are the attorneys involved.²⁵

The critics who make these charges, however, never offer evidence beyond opinions, hypotheticals, and occasional anecdotes. Indeed, for the 49 antitrust class action cases that Davis and I studied, the data show that, overall, only a total of approximately 20 percent of the recoveries went for attorney fees (14.3 percent) or claims administration expenses (4.1 percent).²⁶ The rest was returned to the victims. This result is consistent with older estimates of legal fees in

antitrust class action cases in the 6.5 to 21 percent range.²⁷

Critics also sometimes examine what happened in other areas of law and assert that these outcomes occur in contemporary antitrust class action suits as well. But they never offer systematic evidence from antitrust cases to support their opinions.²⁸ Interestingly, only one of the lawsuits in the Davis/Lande study involved a coupon remedy—the Auction Houses cases. However, those coupons were fully redeemable for cash if they were not used for five years.²⁹

The actions Davis and I studied were among the largest antitrust class actions ever brought and therefore might not be representative of class action cases in general. Abuses surely occur from time to time in class action cases, as they do almost everywhere in the legal system. But a majority of the critics' most egregious examples are from other areas of law or are quite old.³⁰ No one has ever presented reliable evidence showing that such examples occur frequently or are typical of contemporary antitrust class action cases.³¹

Class Victims' Compensation Has Been Modest, Generally Less than Their Damages

Even though the \$19.4–\$21.0 billion that Davis and I showed had been returned to victims in 49 class action cases is a significant figure when viewed in absolute terms, it probably was not nearly enough to fully compensate all of the victims involved.

To ascertain "Recovery Ratios" (the percentage of the illegal overcharges that was obtained in the form of monetary payments to victims in private actions), Professor Connor and I assembled a sample consisting of every completed private case against cartels discovered from 1990 to mid-2014 for which we could find the necessary information. For each of these 71 cases we assembled neutral scholarly estimates of affected commerce and overcharges and compared these estimates to the damages secured in the private actions filed against these cartels.³²

The victims of only 14 of the 71 cartels (20 percent) recovered their damages (or more) in settlement. Only seven (10 percent) received more than double damages. The rest—the victims in 57 cases—received less than their damages. In four cases, the victims received less than 1 percent of damages, and in 12 cases they received less than 10 percent of damages. Overall, the median average settlement was 37 percent of single damages. The unweighted mean settlement (a figure that gives equal weights to the cartels that operated in large and small markets) was 66 percent. The mean and median average Recovery Ratios are higher (81 percent and 52 percent, respectively), for the 36 cases that were follow-ups to DOJ prosecutions that imposed criminal sanctions.³³

Because these Recovery Ratios do not include any valuations of products, discounts, coupons, or the value of injunctive relief or precedent, the actual worth of these remedies to the victims is greater than the figures reported above. Nevertheless, it fairly can be concluded that antitrust class action cases often return important recoveries to victims that

are significant in absolute terms, but usually are modest when measured against the sizes of the overcharges involved.

Class Actions Deter Significant Amounts of Collusion and Other Anticompetitive Behavior

Private class action cases serve to deter a substantial amount of anticompetitive activity, perhaps even more than the highly acclaimed anti-cartel program of the U.S. Department of Justice, which often results in prison sentences for cartel participants.³⁴

Virtually every contemporary analysis of antitrust enforcement assumes that deterrence is an important purpose of the private treble damages remedy provision.³⁵ The Supreme Court has underscored this point. 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.³⁶

The government, however, cannot be expected to do all of the necessary enforcement for a number of reasons, including budgetary constraints, “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; and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.”³⁷

A recent study highlights the deterrence benefits of private enforcement by comparing the likely deterrent effects of private antitrust enforcement to that of criminal anti-cartel enforcement by the Antitrust Division.³⁸ The surprising result is that private enforcement—and even just antitrust class action cases considered separately—probably deters more anticompetitive behavior.

From 1990 through 2011 the total of DOJ corporate antitrust fines, individual fines, and restitution payments totaled \$8.2 billion. (Dis)valuing a year of prison or house arrest at \$6 million³⁹ adds another \$3.6 billion in total deterrence from the DOJ’s anti-cartel cases, yielding a total of approximately \$11.8 billion.

This is a substantial figure, and the possibility of incurring such sanctions surely has deterred a significant number of would-be antitrust violators.⁴⁰ Nevertheless, these penalties amount to approximately 50 percent of the \$19.4–\$21.0 billion in cash alone (not including products, etc.) secured by just the 49 studied class cases that were completed during the same period.⁴¹ These private cases were only a portion of the hundreds of successful class action cases completed during this period (albeit they were many of the largest).⁴² The total amount of payouts in class action cases is so high that it probably deters more anticompetitive conduct than even the DOJ’s anti-cartel enforcement efforts.

Anticompetitive Collusion Is Underdeterred, A Problem that Would Be Exacerbated Without Class Actions

Some critics assert that “treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive”⁴³ Yet, despite the request by the Antitrust Modernization Commission for evidence on this issue,⁴⁴ “[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission”⁴⁵

By contrast, in a recent study, John Connor and I analyzed whether the current level of antitrust enforcement against cartels (the source of most class action cases) was optimal in achieving deterrence.⁴⁶ The United States imposes a diverse array of sanctions against collusion: criminal fines and restitution payments for firms, and prison terms, house arrest, and fines for corporate officials. Both direct and indirect victims can sue for mandatory treble damages and attorneys’ fees. This multiplicity of sanctions has helped give rise to the strongly held—but until recently never seriously examined—conventional wisdom in the antitrust field that these sanctions are not merely adequate, but are probably excessive.⁴⁷

Our study analyzed this issue using the standard optimal deterrence methodology.⁴⁸ This approach 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.⁴⁹ The study first calculated the expected rewards from cartelization using a unique data base containing information concerning 75 cartel cases. The study surveyed the literature to ascertain the probability that cartels are detected and the probability that detected cartels are sanctioned, and calculated the size of the sanctions involved for each case. These sanctions include corporate fines, individual fines, payouts in private damage actions, and the equivalent value (or disvalue) of imprisonment or house arrest for convicted individuals (using \$6 million per year).⁵⁰

The analysis showed that, overall, combined U.S. cartel sanctions are only 9 to 21 percent as large as they should be to deter anticompetitive collusion optimally. This means that despite the existing sanctions, collusion remains a rational business strategy, and that cartelization is a crime that, on average, pays. In fact, it pays very well. Cartel underdeterrence is a severe problem today, and without class action cases the extent of this underdeterrence would be substantially worse.⁵¹

Conclusion

There is an almost-unanimous consensus in the antitrust world that the DOJ’s anti-cartel enforcement record is exemplary.⁵² In terms of benefits generated, taxpayer dollars are well spent.

Antitrust class action cases, in contrast, get little respect and much criticism, with critics asserting that antitrust class actions are usually not in the public interest.⁵³ This critical

view may help explain the large number of judicial decisions that have made it more difficult for victims of anticompetitive conduct, and especially those victims with limited resources, to recover significant portions of their overcharges and, at times, have prevented any recovery whatsoever.⁵⁴ In light of the crucial role that antitrust class action recoveries play in compensating victims of illegal activity and deterring anticompetitive behavior, these cases should be encouraged rather than hampered through restrictive judicial interpretations of the applicable law. ■

¹ Much of the analysis in this article derives from the cited portions of Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 11–16, 33–38 (2013) [hereinafter Davis & Lande, *Defying Conventional Wisdom*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217051; John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 431 (2012) [hereinafter Connor & Lande, *Crime Pays*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217051; John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 IOWA L. REV. 1997 (2015) [hereinafter Connor & Lande, *Cartel Recoveries*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548712; Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1280 (2013) [hereinafter Davis & Lande, *Empirical Assessment*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132981; Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U. S.F. L. REV. 879 (2008) [hereinafter Lande & Davis, *Benefits*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661.

² See 15 U.S.C. § 15(a). Victims also receive reasonable attorneys' fees. This section is partly drawn from Connor & Lande, *Cartel Recoveries*, *supra* note 1.

³ In the legislative debates Senator Coke complained about a bill that would have provided only for double damages: "How would a citizen who has been plundered in his family consumption of sugar by the sugar trust . . . recover his damages under that clause? It is simply an impossible remedy offered him [H]ow could the consumers of the articles produced by these trusts, the great mass of our people—the individuals—go about showing the damages they had suffered? How would they establish the damage which they had sustained so as to get a judgment under this bill? I do not believe they could do it." 21 CONG. REC. 2615 (1890). Representative Webb stated that the damages provision "opens the door of justice in every man whenever he may be injured by those who violate the antitrust laws and gives the injured party ample damages for the wrong suffered." 51 CONG. REC. 9073 (1914). He also stated that "we are liberalizing the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere—anywhere you can catch the offender" 51 CONG. REC. 16,274 (1914).

⁴ See generally John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 211–27 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113927 (discussing case law). The decision of Congress to award "treble damages" certainly could be explained by congressional intent that two-thirds of antitrust damages were intended not to compensate victims, but for some other purpose—such as deterrence. It is possible, however, that some or all of the "extra" damages were intended to compensate victims for harms not covered by the statutory damages remedy, such as prejudgment interest, the value of victims' time expended pursuing their litigation, the cost to the victims of the disruptions caused by antitrust violations, and also for broader market effects that are difficult to quantify, such as the allocative inefficiencies and umbrella effects that flow from the exercise of market power.

If the purpose of the damages remedy is compensation, the "damages" caused by an antitrust violation should consist of the sum of all relatively predictable harms caused by that violation affecting anyone other than the defendants. Damages should include the wealth transferred from con-

sumers to the violator(s), as well as the allocative inefficiency effects felt by society, whether caused directly, or indirectly via "umbrella" effects, or to indirect purchasers of the products or services in question. Plaintiffs' attorneys' fees, the value of the plaintiffs' time spent pursuing the case, the costs of disruption to the victims due to the antitrust violation, and the costs to taxpayers of the judicial system also should be included. See Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 161–68 (1993), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134822. Indeed, when these factors are considered, nominal "treble damages"—even on those rare occasions when they are actually awarded⁴—are really only approximately single damages. *Id.*, *passim*.

⁵ See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (explaining in footnote 6 that "the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. R. Civ. P. 23").

⁶ See *Hawaii v. Standard Oil of Cal.*, 405 U.S. 251, 266 (1972).

⁷ *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001).

⁸ Government enforcers can bring disgorgement actions, but these are not common. For an overview of the relevant issues, see Press Release, Fed. Trade Comm'n, *FTC Withdraws Agency's Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law* (July 31, 2012), <https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies>. For an excellent analysis of this area, see Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 501 (2009). See also *In re Mylan*, 205 F.R.D. 369 (D.D.C. 2002). In addition, state attorneys general can bring actions on behalf of their citizens when they are victims of antitrust violations. See, e.g., *Hawaii v. Standard Oil of Cal.*, 405 U.S. at 266; Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267202. For example, in *Tricor Antitrust Litigation, Teva Pharmaceuticals USA, Inc. v. Abbott Laboratories*, 580 F. Supp. 2d 345 (D. Del. 2008), a group of states recovered \$22 million, and private plaintiffs recovered \$316 million. For an analysis of this case, see Joshua P. Davis & Robert H. Lande, *Summaries of Twenty Cases of Successful Private Antitrust Enforcement* (Univ. of San Francisco Law Research Paper No. 2013-01, Nov. 1, 2011) [hereinafter Davis & Lande, *Summaries*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961669, at 75–79.

⁹ Most of the studied cases settled, so it would be more accurate to describe plaintiffs as "alleged victims." However, the majority of these cases were follow-ups to successful government enforcement actions or involved a civil verdict, so in these cases the term "victims" is likely to be especially appropriate. See *infra* text accompanying notes 16–22.

¹⁰ See Lande & Davis, *Benefits*, *supra* note 1, at 890–91. These figures are expressed in 2011 dollars.

¹¹ See Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, 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. *Id.* at 892 n.46.

¹² This statistic was calculated from Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: Forty Individual Case Studies* 42 U.S.F. L. REV. 879 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523 [hereinafter Lande & Davis, *Forty Case Studies*], and Davis & Lande, *Summaries*, *supra* note 8, *passim*.

¹³ The rest of the cases were brought by competitors or large victims. Calculated from Lande & Davis, *Benefits*, *supra* note 1, at 892, 902, and Davis & Lande, *Empirical Assessment*, *supra* note 1, at 1287.

¹⁴ This section is partly based on Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, at 15–22 and 33–38.

¹⁵ See Connor & Lande, *Cartel Recoveries*, *supra* note 1, at 1999–2002 (almost every successful antitrust case settles, and 99 percent of antitrust cases settle or are dismissed).

¹⁶ This statistic was calculated from Lande & Davis, *Forty Case Studies*, *supra* note 12, *passim*, and Davis & Lande, *Summaries*, *supra* note 11, *passim*. Most of the studied cases settled, so it would be more accurate to describe the collusion as "alleged." However, the majority of these cases were follow-ups to successful government cartel enforcement actions or involved a civil verdict, so in these cases the term "collusion" is likely to be especially appropriate. See text accompanying notes 19–25 *infra*.

- ¹⁷ In addition, in the 16 class action cases where we thought to look for it, we found six where plaintiffs survived a motion to dismiss. See Davis & Lande, *Summaries*, *supra* note 8, *passim*.
- ¹⁸ These statistics were calculated from Lande & Davis, *Forty Case Studies*, *supra* note 12, and Davis & Lande, *Summaries*, *supra* note 8.
- ¹⁹ See John M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What Do the Data Show?* ANTITRUST CHRON. 2 (Dec. 2012), at 2–24 [hereinafter Connor, *Private Recoveries*].
- ²⁰ *Id.*
- ²¹ See *id.* at 10–11 (footnotes omitted) (“The proportion of private cases following earlier U.S. government sanctions is 51% of the total private actions in the sample. . . . Second, a somewhat unappreciated fact is that 8% of U.S. private actions are filed after fines by the EC or other non-U.S. antitrust authorities. . . . Examples include two of the smaller bulk Vitamins products (B12 and Canthaxanthin), *Methionine*, *Acrylic Glass*, and *Flat Glass*. All but one of these cases is [a] global cartel. In some instances, the DOJ investigated the cartel but chose not to indict, while in other instances there is no public information that the DOJ formally investigated the cartel. Third, 41% of the treble-damages cases were *non-follow-on*.”).
- ²² See Connor & Lande, *Cartel Recoveries*, *supra* note 1, at 1997.
- ²³ See Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, at 38–78 (especially the material presenting and analyzing the criticisms of antitrust class action cases offered by three of the nation’s leading antitrust scholars: Professors Cavanagh, Crane, and Page).
- ²⁴ See Daniel A. Crane, *Optimizing Private Enforcement*, 63 VAND. L. REV. 675, 682–83 (2010).
- ²⁵ See Lande & Davis, *Benefits*, *supra* note 1, at 883–89.
- ²⁶ This is a weighted average. If an unweighted average were used the total would be roughly 30%. See Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, at 46–49.
- ²⁷ See Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 25 (1986) (“Though the data are sparse, the award data from the Georgetown sample indicates that the [legal fee] cost ratio in the range of 10%–20% [of plaintiff recoveries] in cases in which awards were made.”).
- ²⁸ See Lande & Davis, *Benefits*, *supra* note 1, at 883–89.
- ²⁹ See Lande & Davis, *Forty Case Studies*, *supra* note 12, at 14. We did not count these coupons when we assessed the benefits of this litigation; we considered only the cash recovery.
- ³⁰ See e.g., Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, at 43–45 (presenting and analyzing the criticisms of private class action cases offered by Professor Page in 2011 that were based upon a 1988 study that was not antitrust-specific, and the 2010 criticisms offered by Professor Crane that were based solely upon an unsupported 1969 statement by Richard Posner).
- ³¹ See Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, at 17–22.
- ³² See Connor & Lande, *Cartel Recoveries*, *supra* note 1, at 1997. For a number of qualifications and definitions, see *id.*, *passim*, including the caveat that we did not attempt to value coupons, products, discounts, or injunctive relief.
- ³³ *Id.* These recovery amounts include attorneys’ fees.
- ³⁴ 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 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693&download=yes [hereinafter Lande & Davis, *Comparative Deterrence*].
- ³⁵ Indeed, some believe that deterrence is the sole purpose of the remedy provisions. For citations, see William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 (1983); Connor & Lande, *Crime Pays*, *supra* note 1, at 431; and Lande, *Treble Damages*, *supra* note 4, at 124–29. In the Sherman Act debates, Representative Webb stated, “Under the civil remedies any man throughout the United States, hundreds and thousands, can bring suit in the various jurisdictions and thus the offender will begin to open his eyes because you are threatening to take money out of his pocket.” 51 CONG. REC. 16,275 (1914). See the discussion of these debates in Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 21–30 (1989). See also *Building Blocks for Effective Anti-Cartel Regimes*, <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>, at 52–53 (2005) (multilateral survey of antitrust authorities noting that deterrence is the primary or exclusive objective of cartel sanctions).
- ³⁶ *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.*, 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”).
- ³⁷ Lande & Davis, *Benefits*, *supra* note 1, at 906.
- ³⁸ See Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, at 26–27. For a large number of methodological considerations and qualifications to the conclusions in this section, see Lande & Davis, *supra* note 1. For example, many of the private cases followed DOJ prosecutions. Credit for the deterrence effects of these cases should be shared.
- ³⁹ For an analysis of the factors that went into our decision to (dis)value a year of prison or house arrest at \$6 million, see Connor & Lande, *Crime Pays*, *supra* note 1, at 451–54.
- ⁴⁰ *Id.* For a discussion of the optimal deterrence approach, see sources cited *infra* text accompanying notes 48–50 and the sources cited.
- ⁴¹ *Id.* Moreover, this analysis of these 49 private cases ignored the costs to defendants of providing products, discounts, or coupons as part of the settlements.
- ⁴² For roughly the same period, Connor, *Private Recoveries*, *supra* note 19, at 7, reported a total of \$38.7 billion in private recoveries against cartels.
- ⁴³ For a summary of these criticisms and related issues, see ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 243, 247 (2007). For more recent similar criticisms, including the 2010 criticisms offered by Professor Crane and the 2011 criticisms offered by Professor Page, see Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, at 43–45.
- ⁴⁴ See Antitrust Modernization Commission, Request for Public Comments, Remedies, 70 Fed. Reg. 28,902–07 (May 19, 2005).
- ⁴⁵ ANTITRUST MODERNIZATION COMMISSION REPORT, *supra* note 43, at 247.
- ⁴⁶ See Connor & Lande, *Crime Pays*, *supra* note 1.
- ⁴⁷ See *id.* at 447–54.
- ⁴⁸ See *id.* at 431–47.
- ⁴⁹ For a large number of methodological issues and qualifications, see *id.* See generally John M. Connor, *Cartel Detection and Duration Worldwide*, 2 CPI ANTITRUST CHRON. (Sept. 28, 2011), at 2–10. Empirical studies of cartels by economists and expert practitioners’ surveys show a consensus that only 10% to 30% of all effective cartels during 1990–2010 were detected by antitrust authorities or by private counsel pursuing damages suits.
- ⁵⁰ See Connor & Lande, *Crime Pays*, *supra* note 1, at 447–54.
- ⁵¹ See *id.* at 430, 476–79.
- ⁵² See Lande & Davis, *Comparative Deterrence*, *supra* note 34, at 315–16. This does not mean that enforcement cannot be improved.
- ⁵³ See, e.g., J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Antitrust Modernization Commission Remarks 9–10 (June 8, 2006), <https://www.ftc.gov/public-statements/2006/06/antitrust-modernization-commission-remarks> (arguing that treble damage class action cases “are almost as scandalous as the price-fixing cartels that are generally at issue The plaintiffs’ lawyers . . . stand to win almost regardless of the merits of the case.”); see also FTC: WATCH No. 708, Nov. 19, 2007, at 4 (“[P]rivate rights of actions U.S. style are poison.” (quoting former FTC Chair William E. Kovacic speaking at an ABA panel on exemptions and immunities where he summarized the conventional wisdom in the field without necessarily agreeing with it)). For a large number of additional examples of criticisms of antitrust class action cases, see Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, at 38–78.
- ⁵⁴ See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (finding that potential defendants may, by contract, prevent class arbitration of disputes); see generally Eric L. Cramer & Joshua P. Davis, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 968 (2010); Joshua P. Davis, Eric L. Cramer & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858 (2014); Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890 (2014); Davis & Lande, *Defying Conventional Wisdom*, *supra* note 1, at 67–68.