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INTRODUCTION

Benefits of Private Enforcement: Empirical Background¹

*Robert H. Lande*²

Many commentators, especially members of the defense bar, have criticized the existing United States system of private antitrust litigation. Some assert that private actions all too often result in remedies that provide lucrative fees for plaintiffs' lawyers but secure no significant benefits for overcharged victims.³ Others suggest that private litigation merely

¹ This chapter is a condensation and revision of two articles by Robert H. Lande & Joshua P. Davis: *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 USF. L. REV. 879 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661 [hereinafter *Benefits: An Analysis*], and *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust laws*, BYU L. Rev. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693 [hereinafter *Comparative Deterrence*]. For summaries of the individual case studies analyzed in this article, see *Benefits from Antitrust Private Antitrust Enforcement: Forty Individual Case Studies*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523 [hereinafter *Benefits: Individual Case Studies*].

² Venable Professor of Law, University of Baltimore Law School; Board of Directors, American Antitrust Institute. The author is grateful to Thomas Weaver for excellent research assistance.

³ Professor Cavanagh ably summarized this belief: "Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing. Coupon settlements, wherein plaintiffs settle for 'cents off' coupons while their attorneys are paid their full fees in cash . . . are of dubious value to the victims of antitrust violations . . . [and] defendants are not forced to disgorge their ill--

follows an easy trail blazed by government enforcers and adds little of public benefit to government sanctions.⁴ Yet others contend that, in light of government enforcement, private cases lead to excessive deterrence.⁵

One common criticism of private actions in general – and of class actions in particular – is that they are a form of legalized blackmail or extortion, one in which

gotten gains when coupons are not redeemed." Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 214 (2005) (footnote omitted). However, Professor Cavanagh provides only an anecdote to support these conclusions. He offers no data to show the type of antitrust settlements he describes as typical or to demonstrate how often they result in useless coupons.

⁴ John C. Coffee, Jr. at one point subscribed to this view, but later concluded the evidence was to the contrary. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.36 (1986) ("Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at '[l]ess than 20 percent of private antitrust actions filed between 1976 and 1983.'" (citation omitted).

⁵ As the Antitrust Modernization Commission noted: "[S]ome have argued that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery. No actual cases or evidence of systematic overdeterrence were presented to the Commission, however." ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 247 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (footnotes omitted). For reasons why "treble damages" do not lead to excessive deterrence but on the contrary should be increased, see Robert H. Lande, *Five Myths about Antitrust Damages*, 40 USF. L. REV. 651 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263478.

plaintiffs' attorneys coerce defendants into settlements based not on meritorious claims, but rather on the cost of litigation or fear of an erroneous and catastrophic judgment.⁶ These actions also are said to discourage legitimate competitive behavior.⁷ For these and related reasons, many members of the antitrust community call for the curtailment of private enforcement;⁸ some even call for its abolition.⁹

Although these criticisms are widespread, they have been made without any systematic empirical evidence.¹⁰ Those who point to the alleged flaws of our system of

⁶ See John H. Beisner & Chares E. Borden, *Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience*, U.S. Chamber Institute for Legal Reform, www.instituteforlegalreform.com/get_ilr_doc.php?id=1034. However, Beisner and Borden and others who embrace this view provide no systematic empirical basis for its factual predicates.

⁷ AMC Commissioner Cannon once wrote:

Private plaintiffs are very often competitors of the firms they accuse of antitrust violations, and have every incentive to challenge and thus deter hard competition that they cannot or will not meet. . . . [L]itigation is expensive and courts and juries may erroneously conclude that procompetitive or competitively neutral conduct violates the antitrust laws. . . . [P]otential defendants . . . will refrain from engaging in some forms of potentially procompetitive conduct in order to avoid the cost and risk of litigation.

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

⁸ HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 59 (Cambridge: Harvard Univ. Press 2005).

⁹ See William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 440 (1985).

¹⁰ One prominent critic, former ABA Antitrust Section Chair Janet McDavid, candidly admitted this:

private antitrust enforcement support their arguments only with anecdotes, many of which are self-serving or questionable. These arguments have never been supported with reliable data.

Some critics' anecdotes surely are true. Private antitrust enforcement, which constitutes in most years more than 90 percent of antitrust cases in the United States,¹¹ certainly is imperfect.¹² However, objective observers should not confuse anecdotes with data. A balanced view would also consider the systematic benefits of private actions in terms of both compensating victimized consumers and businesses, and deterring future anticompetitive conduct.

"[The] issue [of class action abuse] was never directly presented in these cases, but many of these issues arise in the context of class actions in which the potential for abusive litigation is really pretty extraordinary." C. Scott Hemphill, Janet L. McDavid, Andrew J. Pincus, & Ronald A. Stern, panelists, *Roundtable Discussion - Mark D. Whitener and Andrew I. Gavil, Moderators*, 22 ANTITRUST 8, 12–13 (Fall 2007). When asked by Professor Andrew Gavil about empirical evidence, McDavid said: "I'm not aware of empirical data on any of those issues. My empirical data are derived from cases in which I am involved." *Id.*

¹¹ See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE Table 5.41, <http://www.albany.edu/sourcebook/pdf/t5412004.pdf> (Antitrust Cases filed in US District Courts, by type of case, 1975–2004).

¹² Government enforcement also is imperfect.

The purpose and design of the study

This chapter discusses a study that serves as a first step towards providing the empirical data necessary to assess the benefits of private antitrust enforcement. With the support of the American Antitrust Institute and a variety of research assistants, the authors of the study analyzed the compensation and deterrence effects from a group of 40 recent, successful, large-scale private antitrust cases. Among other things, the authors examined the amount of money recovered for victims, what proportion of the money was recovered from foreign entities, whether the private litigation was preceded by government action, and on whose behalf money was recovered (direct purchasers, indirect purchasers, or a competitor). To our knowledge, no similar study has ever been undertaken.

It is important to note that this study does not purport to be comprehensive or in any way definitive. It does not analyze every recent significant private antitrust case, assess a random sample of cases, or even include all of the largest or "most important" ones.¹³ The authors simply tried to assemble and evaluate 40 of the largest and most successful cases that concluded between 1990 and 2007.¹⁴

¹³ For example, we were not able to include an analysis of the consumer class action suits against Microsoft, even though a highly respected journalist reported that together these cases recovered more than \$1.5 billion for victims. See Todd Bishop, *Microsoft antitrust payouts, the grand total*, THE MICROSOFT BLOG (July 7, 2006, 6:50 AM), <http://blog.seattlepi.com/microsoft/2006/07/07/microsoft-antitrust-payouts-the-grand-total/>.

¹⁴ In one case, the final settlement was approved within this time frame, but the final award of fees and costs to the attorneys did not occur until January 2008. See *In re Auto. Refinishing Paint Antitrust Litig.*,

The study was not intended to demonstrate that private litigation often has established important legal precedents: other studies have done this convincingly.¹⁵ The "first cut," instead, was to look for recent private cases that were final, including appeals, and that recovered at least \$50 million in cash for victims of anticompetitive behavior. The authors included only the recovery of money in their results; awards of products, services, discounts, coupons, and injunctive relief were not treated as "benefits."¹⁶

Results of the study: compensation

The 40 cases (or groups of cases)¹⁷ analyzed in the study provided U.S. consumers and businesses a cumulative recovery in the range of at least \$18.006 to \$19.639 billion in

2008 U.S. Dist. LEXIS 569 (E.D. Pa. Jan. 3, 2008).

¹⁵ For an excellent analysis, see Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement*, European University Institute 11th EU Competition Law and Policy Workshop (Florence, Italy, June 2–3, 2006), available at <http://www.eui.eu/RSCAS/Research/Competition/2006%28pdf%29/200610-COMPed-Calkins.pdf>. Professor Calkins found that, of leading antitrust cases decided before 1977, 12 were private and 27 were government. Of the leading cases decided in 1977 or later, however, he found that 30 were private cases and only 15 were government cases. *Id.* at 17.

¹⁶ Securities were counted in one case because they had a readily ascertainable market value.

¹⁷ To arrive at this number we counted related cases as being a single "case." For example, there have been many separate legal actions involving vitamins cartels. However, this report analyzes and counts them all together as one "case."

allegedly¹⁸ illegally acquired wealth.¹⁹ (Expressed in 2010 dollars, the corresponding range would be \$21.887 to \$23.862 billion.²⁰) Of this, more than \$5.706 to \$7.056 billion came from 18 cases involving foreign companies that allegedly violated U.S. antitrust laws. In other words, without private enforcement of the antitrust laws, this money would have remained with foreign alleged lawbreakers instead of being returned to U.S. consumers and businesses.²¹

Interestingly, a large proportion of the total amount recovered – at least 42 to 46 percent or \$7.631 to \$8.981 billion – came from the 15 cases that did not follow publicly disclosed U.S. or EU government enforcement actions.²² In all such cases, private

¹⁸ For simplicity we are calling all of the charges "allegations," even the ones proven in court.

¹⁹ All figures include the awarded attorneys' fees. Although a federal court verdict would produce treble damages for victims, almost all of our cases involved settlements, and in no case did a court determine the percentage overcharge. We know of no way to determine whether any of the settlements exceeded single damages.

²⁰ See *Comparative Deterrence*, *supra* note 1, at Table 14.

²¹ Cases were not selected for this project on the basis of whether a foreign defendant was likely to be involved.

²² When conduct gave rise to both government and private litigation, we tried to ascertain who first uncovered the antitrust violation. However, because government records are confidential and the enforcers usually do not reveal or discuss their investigations, we could not always make definitive classifications. Because we had access only to publicly available information, some of our classifications could be mistaken. For further discussion of the interplay between public and private enforcement, see Chapter 11 of this *Handbook*.

plaintiffs apparently uncovered the alleged violations and initiated and pursued the litigation, with the government following the private plaintiffs' lead or playing no role at all. Another \$4.212 billion came from cases with a mixed private/public origin.²³ Only about a third of the total private recovery – \$6.163 to \$6.446 billion – came from cases that were purely public in origin.

Still other private cases followed a government investigation but provided significantly greater relief than the government action (if, indeed, the government brought an action). Some cases also expanded the scope of inquiry into the challenged conduct and the claims against the defendant, or they helped plaintiffs to obtain relief from parties not included in the government actions. The high proportion of private actions that supplanted, co-originated with, or enhanced government enforcement is perhaps surprising. There were still other instances where the authors of the study were not able to ascertain the origin of a case.²⁴

The authors documented a total of \$18.006 to \$19.639 billion (using nominal dollars) in recoveries by direct purchasers, indirect purchasers, or competitors.²⁵ Direct

²³ For example, *In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348 (N.D. Ga. 2000), started as a result of a different private antitrust suit, which led to a government investigation in the polypropylene carpet market, that in turn led to the private litigation analyzed in this report. *See Benefits: An Analysis*, *supra* note 1, Table 5, for other examples.

²⁴ *See, e.g., Benefits: Individual Case Studies*, *supra* note 1, at 77–87 (*El Paso* case summary).

²⁵ Direct purchasers are customers who bought a good or service directly from a defendant, and indirect purchasers are customers who purchased a good or service further down the chain of distribution. In the US, in general only direct purchasers and competitors can bring claims for damages under federal law, and

purchasers, in 32 cases, recovered \$12.088 to \$13.438 billion (67 to 68 percent of the total). Indirect purchasers, in six cases, recovered \$1.815 billion. Competitors, in six cases, recovered \$4.028 to \$4.311 billion. All but six of the cases were class actions.

Some of the cases analyzed also involved substantial non-monetary relief. For example, one case generated coupons, fully redeemable in cash if not used for five years. Another case resulted in a \$125 million energy rate reduction for consumers. To be very conservative, the authors did not count any part of the coupons²⁶ or the rate reduction²⁷ in the study's "cash" recovery totals. Some cases also yielded extremely useful cy pres grants,²⁸ which likewise were left out of results.

indirect purchasers can bring claims for damages only under state law (most, but not all, U.S. states allow indirect purchaser actions). For further discussion of direct and indirect purchaser claims, see Chapter 3 of this *Handbook*.

²⁶ See *Benefits: Individual Case Studies*, *supra* note 1, at 13–18 (*Auction House* case summaries). These coupons traded for a value that reflected their discounted present value. They also comprised 20 percent of the legal fees paid to prevailing attorneys, who said they will redeem them for cash after the expiration of the mandatory five year waiting period.

²⁷ See *id.* at 77–87 (*El Paso* case summary).

²⁸ See, e.g., *id.* at 110–113 (*Insurance* case summary). This case resulted in a cash settlement with a creative remedy that: (1) funded the development of a public entity that provides risk management education and technical services to small businesses, public entities, and non-profits; and (2) provided funding to states to develop a risk database for municipalities and local governments. *Id.*

Cy pres is a type of remedy that is available in some class actions where there are funds left over after the class members have been compensated, or the funds are insufficient to distribute to the class members in an economically efficient manner. The court has discretion to award these funds to the "next best" usage

Many other cases led to the restructuring of industries in ways that, according to the judge presiding over the litigation, provided improvements for competition even more beneficial than the monetary relief conferred on the victims. For example, the *Visa/MasterCard* case was settled in April 2003 for "\$3,383,400,000 in compensatory relief, plus additional injunctive relief valued at \$25 to \$87 billion or more."²⁹ Similarly, the *NASDAQ* case decreased the spreads received by market makers, the *Insurance* litigation eliminated restrictions on insurance policies, and the *NCAA* case eliminated caps on pay to college coaches.³⁰ The generic drug cases – *Buspirone*, *Cardizem*, *Oncology (Taxol)*, *Relafen*, *Remeron*, and *Terazosin* – collectively discouraged collusion between brand name and generic drug manufacturers, saving consumers many hundreds of millions of dollars in drug costs.³¹

consistent with the purposes of the case. See Albert A. Foer, *Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices* (American Antitrust Institute, Working Paper No. 07-11, 2007), available at <http://www.antitrustinstitute.org> (search “Working Paper No. 07-11”). For further discussion of cy pres remedies, see Chapter 14 of this *Handbook*.

²⁹ *Wal-Mart Stores, Inc. v. Visa USA & MasterCard Int’l*, 396 F.3d 96, 111 (2d Cir. 2005). The case is described in detail by the lead attorney for the plaintiffs, Lloyd Constantine, in *PRICELESS* (Kaplan Publishing 2009).

³⁰ See *Benefits: Individual Case Studies*, *supra* note 1, at 135–39; Arthur R. Kaplan, *Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation*, 52 CASE W. RES. L. REV. 111 (2001) (describing the *NASDAQ* case).

³¹ See *Benefits: Individual Case Studies*, *supra* note 1, at 135–39.

Results of the study: deterrence

In addition to its important role in compensating victims of past antitrust violations, private enforcement also helps deter future antitrust violations. The study therefore assesses the deterrence effects of private antitrust enforcement. Although to some degree the deterrence value of private recoveries can be measured by reference to the very same compensation figures discussed earlier in this chapter, the authors sought to contextualize these figures by comparing the deterrence value of private recoveries to the deterrence value of what is widely viewed as the gold standard for antitrust or competition law enforcement worldwide: the DOJ anti-cartel enforcement program. This includes individual fines, corporate fines, and even hard-to-value prison time and house arrest secured by DOJ enforcers.

Although EU cartel enforcement has grown increasingly successful in recent years,³² DOJ enforcement against horizontal collusion is roundly lauded as perhaps the premier enforcement program of its kind in the world. In the United States, even among critics who believe that monopolization and vertical restraints never should be challenged, unkind words for the DOJ's anti-cartel program are rare and relatively minor. This lavish praise, which, it should be noted, is exceptionally well deserved, stands in sharp contrast to the harsh criticism of private enforcement presented at the beginning of

³² For an analysis of EU anti-cartel enforcement generally, see John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies*, 51 ANTITRUST BULLETIN 983, 993-1003 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?a_bstract_id=988722.

this chapter.³³ An objective observer might therefore be surprised to discover that private enforcement probably deters more anticompetitive conduct than the widely praised DOJ anti-cartel program. Indeed, the study suggests that this may well be true despite the DOJ's ability to bring cases that result in prison sentences, house arrest, and individual as well as corporate fines!³⁴

Before concluding that private enforcement almost deserves the same, nearly ubiquitous praise typically reserved for the DOJ anti-cartel program, one might well ask an additional important question. We are confident that federal anti-cartel prosecutions indeed target anticompetitive conduct, but can we be confident that private cases do the same? Defendants often characterize these cases as non-meritorious and against the public interest, and such cases almost always end in settlement rather than a decision by a judge, jury, or the Federal Trade Commission.³⁵ The question of whether private cases actually target anticompetitive conduct will be addressed near the end of this chapter.

³³ See *supra* notes 3-10 and accompanying text.

³⁴ U.S. DEPT OF JUSTICE ANTITRUST DIV., ANTITRUST DIVISION MISSION, *available at* <http://www.justice.gov/atr/about/mission.html> (last visited Sept. 29, 2011). The Antitrust Division also can secure disgorgement of cartel overcharges, but this remedy is rare. See *e.g.*, U.S. v. Keyspan, ___ F. Supp. 2d ___, 2011-1 Trade Cases Par. 77,320 (2011).

³⁵ *Comparative Deterrence*, *supra* note 1, at 3.

1. Deterrence from the DOJ criminal anti-cartel enforcement program

The total amount of criminal corporate fines imposed in DOJ anti-cartel cases from 1990 to 2007 was approximately \$4.2 billion.³⁶ There is no way to measure how many cartels were never formed due to the deterrence effects of these fines. Surely, however, \$4.2 billion in fines was enough to deter a large amount of anticompetitive conduct. During this same period, these same cases also resulted in individual fines that totalled \$67 million,³⁷ and defendants were required to return another \$118 million to overcharged government entities in the form of restitution payments.³⁸

DOJ prosecutions resulting in prison sentences and house arrests also significantly deter illegal activity. Criminal antitrust prosecutions from 1990-2007 resulted in 520 prison sentences totalling roughly 330 years,³⁹ and another 97 years of “house arrest or confinement to a halfway house.”⁴⁰

³⁶ U.S. DEP’T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 1990–1999 12, *available at* <http://www.justice.gov/atr/public/246419.pdf> ; U.S. DEP’T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2000–2009 14, *available at* <http://www.justice.gov/atr/public/256139.pdf>.

³⁷ Workload Statistics FY 1990-1999, *supra* note 36, at 12; Workload Statistics FY 2000-2009, *supra* note 36, at 14.

³⁸ Workload Statistics FY 1990-1999, *supra* note 36, at 12; Workload Statistics FY 2000-2009, *supra* note 36, at 14.

³⁹ WORKLOAD STATISTICS FY 1990-1999, *supra* note 36, at 13; WORKLOAD STATISTICS FY 2000-2009, *supra* note 36, at 15.

⁴⁰ WORKLOAD STATISTICS FY 1990-1999, *supra* note 36, at 13; WORKLOAD STATISTICS FY 2000-2009,

In attempting to compare the deterrence value of private enforcement to the deterrence value of DOJ criminal enforcement, the authors of the study faced the vexing task of setting a value - or a disvalue, cost, or disincentive effect - on prison time and house arrest. To the extent that prison time is incomparable to anything that can be valued monetarily, the task may be impossible. But the authors of the study at least attempted to make a rough approximation.

As a starting point, it is clear that prison time should not be valued - or disvalued - infinitely. Cartelists do not act as if they infinitely fear prison time because they often decide to form cartels and risk that outcome. Rather, potential offenders appear to calculate, at least to some very uncertain degree, their chances of getting caught and the prison sentences and fines they are likely to face.⁴¹ They balance this, in some extremely rough way that only they know, against cartel rewards. Because it is common knowledge that people often go to prison for fixing prices, and yet corporate officials continue attempting to form new cartels, the deterrence effects of prison time must be less than infinite.

The authors of the study identified five possible approaches to valuing prison time. All five approaches were incorporated into the study in the hope that doing so would increase the reliability of results. The approaches include: (1) the valuations for lives and years of life that are used for various regulatory and public policy purposes; (2) tort awards for loss of a life in wrongful death cases; (3) awards made by the September 11th

supra note 36, at 15; *Comparative Deterrence*, *supra* note 1, at app. 1, table 5.

⁴¹ See *supra* notes 38-40.

Victim Compensation Fund to victims' families; (4) the compensation provided to people who have been wrongly imprisoned; and (5) similar estimates by scholars in the field.⁴²

The five approaches yielded estimates that are broadly consistent with one another.⁴³ To be conservative, the authors of the study took the highest of these estimates for the disvalue or deterrence equivalent of a year in prison, \$1,500,000 per year, and increased it to \$2 million.⁴⁴ They used \$1,000,000 for the disvalue or deterrence equivalent of a year of house arrest.

Although it is frequently assumed that corporations always engage in profit maximizing behavior, the authors of the study also allowed that executives might care much more about personal consequences than consequences to their corporations. This is in keeping with other common exceptions to profit maximization assumptions, such as the effects of agent/principal relationships. Although it is not possible to correct for these problems precisely, the authors took the arbitrary step of tripling the deterrence effects of all individual sanctions relative to corporate sanctions. As a result, a year of prison time was valued - or disvalued - at \$6 million⁴⁵ rather than \$2 million, and a year of house arrest at \$3 million rather than \$1 million. The authors also tripled the individual fine

⁴² See Lande & Davis, *Comparative Deterrence*, *supra* note 1.

⁴³ *Id.*

⁴⁴ Two million dollars is probably significantly more than the true cost or deterrence value of a year in prison, but this figure was used in order to take a conservative and relatively non-controversial approach.

⁴⁵ Valuing a year's worth of life at \$6 million would mean that a twenty-year prison sentence would be valued at \$120 million, a figure far in excess of the amount that society places on an individual's life.

figures.⁴⁶

Using these estimates and simple arithmetic, the deterrence value of the 330 years of prison time, \$4.2 billion in corporate fines, \$67 million in individual fines (artificially trebled), and \$118 million in restitution imposed for cartel offences, for the entirety of the DOJ anti-cartel program from 1990-2007, is approximately \$6.8 billion. Although it is impossible to know how many cartels were deterred by the equivalent of \$6.8 billion in sanctions, surely the number must be substantial.

2. Deterrence from private antitrust litigation

As discussed earlier in this chapter, empirical research into the deterrence value of private antitrust litigation, during any period, is virtually nonexistent. However, the 40 cases that concluded between 1990 and 2007, which formed the basis for the study, can provide an extremely low floor on this amount. The study documented between \$18.006 billion and \$19.639 billion in cash paid by defendants in these 40 private U.S. antitrust cases alone

⁴⁶ This assumes that the individuals actually pay their own fines. It is, however, difficult to determine whether the antitrust fines imposed on corporate employees are ultimately paid by the employees, or are often or usually directly or indirectly paid by their employers. This area of law is exceedingly complex, and, of course, even if indemnification is illegal, this does not mean that it does not occur regularly. See 1 ROGER MAGNUSON, *SHAREHOLDER LITIGATION* § 9:37 (West 2009); Pamela H. Bucey, *Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 *IND. L. REV.* 279 (1991); Note, *Indemnification of Directors: The Problems Posed By Federal Securities and Antitrust Legislation*, 76 *HARV. L. REV.* 1403 (1963).

(in nominal dollars).⁴⁷

In other words, the deterrence effects from just the cash awards from these 40 private cases nearly tripled the estimated total deterrence value of the DOJ anti-cartel program, a figure that includes the deterrence effects of corporate fines, individual fines (artificially trebled), restitution, prison time valued at \$6 million per year, and house arrest valued at \$3 million per year. Note that this is not a comparison of the full deterrence effects from these 40 private cases to the full deterrence effects secured by the DOJ in the same 40 cases. This is a comparison of only the cash-based deterrence effects from just 40 private cases to the full estimated deterrence effects from every DOJ cartel case filed during the same seventeen-year period.

It is true that not all of these 40 cases were against cartels; some were against monopolies and other arrangements. The 25 collusion cases in the study secured a total of \$9.200 to \$10.600 billion.⁴⁸ Comparing this amount to the DOJ total of \$6.800 billion shows that even these 25 private collusion cases alone probably deterred more anticompetitive behavior than the entire DOJ anti-cartel enforcement program. Moreover, because this study surveyed only 40 private cases, it significantly underestimates the deterrence effects of all private enforcement during the same period. Also recall that the study conservatively valued coupons, discounts, products and injunctive relief as being worth nothing.

One important complication with these results is worth noting, however: Many of

⁴⁷ See *supra* notes 19-21 and accompanying text.

⁴⁸ See Lande & Davis, *Comparative Deterrence*, *supra* note 1, at 23.

these private cases were follow-ups to government prosecutions.⁴⁹ As a result, some of the credit for the deterrence caused by these private recoveries should go to the government enforcers for uncovering and prosecuting the violations. But even where the government discovered the cartels, private cases ultimately secured the damages. Private plaintiffs therefore should get much of the credit for the resulting deterrence in these cases, though the credit should be shared with the government enforcers.

Were the private actions good cases?

It is very difficult for critics of private enforcement to make a credible case that the combination of public and private enforcement in the United States has caused over-deterrence. The area of antitrust most affected by private enforcement is horizontal collusion, and responsible analysts believe that only approximately 25 percent of cartels are even detected.⁵⁰ Critics argue that despite this general under-deterrence of cartels, most private actions are not good cases because, for example, private plaintiffs miss cartels and instead sue firms that have done nothing wrong. If this were true, not only would private enforcement fail to discourage illegal behavior, it would even discourage

⁴⁹ *Id.* at 29.

⁵⁰ Judge Ginsburg & Professor Wright recently analyzed the empirical literature on cartel detection and concluded that only 25 percent of cartels currently are detected, in both the EU and the United States. See Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3, 8 (2010).

beneficial conduct. However, there are many reasons to believe that most, if not all, of the 40 private cases in the study were meritorious cases. And there are no valid reasons to conclude the reverse.

First, every one of the settlements among the 40 cases was approved as being in the public interest by a federal judge.⁵¹ Of the 45 judges who presided over part or all these settlements, 27 were appointed by Republican presidents.⁵² Second, most were at least partially validated through various means other than settlement. For example, in 13 of the 40 cases, defendants also received a criminal penalty for the same conduct.⁵³ Where a criminal penalty was imposed, it is hard to believe that defendants did nothing wrong. In 12 cases, government enforcers obtained a civil victory.⁵⁴ In nine cases, defendants lost at trial in the private litigation or in a very closely related private case.⁵⁵ In nine cases, plaintiffs survived or prevailed on a motion for summary judgment, most of which were argued almost as rigorously as a trial on the merits.⁵⁶ In at least three cases, plaintiffs survived a motion to dismiss.⁵⁷

In sum, 34 of the 40 cases – 31 if you do not include the motions to dismiss – had at least one indicator that plaintiffs' case was probably meritorious. (The number of cases

⁵¹ See Lande & Davis, *Comparative Deterrence*, *supra* note 1, at 25.

⁵² *Id.*

⁵³ *Id.* at 23.

⁵⁴ *Id.* at 27.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

with indicators does not add up to 34 (or 31) because eight cases had more than one indicator.) All told, it is much more likely that most if not all of the recoveries reflect defendants' perceptions that they could well lose on the merits, not only at trial but also on appeal. How likely is a firm that did nothing wrong to nevertheless pay \$50 million or even \$500 million in settlement? While this could happen on occasion, the argument loses credibility as settlements get higher.

At the same time, objective observers should ask to see evidence that most private cases lack merit, as critics suggest. Scant such evidence exists. Defendants' self-serving anecdotes, assertions, and protestations should carry no more weight than those of their plaintiff counterparts.

Conclusions

This chapter has not attempted to perform an overall cost/benefit analysis of U.S. private antitrust enforcement. To be sure, private enforcement has many flaws and problems, and many private actions have not been in the public interest. However, the debate over private enforcement should have balance, and it should be grounded in empiricism. The study discussed in this chapter suggests that the flaws of U.S. private antitrust enforcement have been greatly exaggerated, on the basis of no evidence except the self-serving anecdotes of parties who frequently have an interest in restricting it.

Private enforcement is virtually the only way to compensate the victims of conduct that violates the antitrust laws. It is responsible for the recovery of billions of dollars that

otherwise would have remained with companies that violated the antitrust laws. Many of these lawbreakers were foreign companies. Government enforcement is wonderful, but it rarely helps victims recover the amount taken from them by practices that violate the antitrust laws. The billions of dollars defendants pay in private cases also help to deter future anticompetitive conduct. In fact, in the United States, private enforcement might well deter even more anticompetitive conduct than the DOJ criminal antitrust enforcement program.

As to the possibility that U.S. private enforcement could lead to over-deterrence, it is important to remember that, for practical purposes, victims have only a nominal right to recover "treble damages." In reality, various constraints on recovery mean that, even after trebling of a judgment at trial, plaintiffs likely recover less than single actual damages.⁵⁸ To get closer to a full recovery, for example, these settlements would have to compensate victims for unawarded prejudgment interest.⁵⁹ They also should compensate

⁵⁸ To the extent the purpose of the remedy is compensation, the "damages" caused by an antitrust violation should consist of the sum of all relatively predictable harms caused by that violation affecting anyone other than the defendants. Damages should include the wealth transferred from consumers to the violator(s), as well as the allocative inefficiency effects felt by society, whether caused directly, or indirectly via "umbrella" effects. Plaintiffs' attorneys' fees, the value of plaintiffs' time spent pursuing the case, and the cost to the American taxpayer of administering the judicial system should also be included. When all these adjustments are made it is likely that the United States "treble" damages remedy actually is less than single damages. See Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 122-24, 158-68 (1993), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134822.

⁵⁹ In the United States, interest is only awarded from the time of a judicial decision and the rate is usually quite low. *Id.* at 130.

victims for difficult-to-quantify and unawarded damages items such as the allocative inefficiency effects of market power,⁶⁰ and the value of victims' time expended pursuing litigation.⁶¹ Over-deterrence seems implausible when you consider that victims are

⁶⁰ For an explanation of the allocative inefficiency effects of market power, see *id.* at 119-21, 152-54. Allocative inefficiency is another name for the suboptimal use of societal resources that results from anticompetitive pricing:

To raise prices a monopoly reduces output from the competitive level. The goods no longer sold are worth more to would-be purchasers than they would cost society to produce. This foregone production of goods worth more than their cost is pure social loss and constitutes the “allocative inefficiency” of monopoly. For example, suppose that widgets cost \$1.00 in a competitive market (their cost of production plus a competitive profit). Suppose a monopolist would sell them for \$2.00. A potential purchaser who would have been willing to pay up to \$1.50 will not purchase at the \$2.00 level. Since a competitive market would have sold those widgets for less than they were worth to him, the monopolist’s reduced production has decreased the consumer’s satisfaction without producing any countervailing benefits for anyone. This pure loss is termed “allocative inefficiency.”

Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 433–34 n.17 (1988); see also EDWIN MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 277–92 (W.W. Norton & Co., Inc., 4th ed. 1982) (1970).

⁶¹ See Lande, *supra* note 58, at 130-36. As the Antitrust Modernization Commission noted: “Indeed, in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover ‘speculative’ damages) treble damages help ensure that victims will recover at least their actual damages.” ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS, *supra* note 5, at 246 (footnote omitted).

unlikely even to be made fully whole. So called treble damages awards not only fail to cross any theoretical over-deterrence threshold that exists beyond victim compensation, they almost never even reach the starting point.

Further, antitrust verdicts producing even nominal treble damages are rare,⁶² and it is likely that few of the overwhelming majority of antitrust cases that settle do so for more than single actual damages.⁶³ Especially in light of estimates that only 25 percent of cartels are even detected,⁶⁴ over-deterrence remains, as the Antitrust Modernization Commission noted, only an unproven assertion.⁶⁵ On the contrary, in the United States, anticompetitive conduct occurs far too frequently, despite the deterrence effects of our present system of private litigation.

Another benefit from private cases is that they have saved taxpayers a significant amount of money in foregone enforcement costs. Although government enforcers often will be best suited to uncover and win particular cases, sometimes government enforcers

⁶² For a list of antitrust verdicts that calculated damages amounts, see John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, app. at 565 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787907.

⁶³ This is especially true when inflation is considered. For an analysis of this issue, see Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118902.

⁶⁴ See Ginsburg & Wright, *supra* note 50.

⁶⁵ Recall the Conclusion of the U.S. Antitrust Modernization Commission: “No actual cases or evidence of systematic over deterrence were presented to the Commission” ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS, *supra* note 5, at 247 (2007) (citation omitted).

will lack the necessary resources. Sometimes, due to their relatively low salaries, high turnover involving the very best government lawyers may harm the government's chances of victory. Sometimes government enforcers lack the industry expertise of private attorneys and their clients. Sometimes government enforcers may have a political agenda that leads them not to bring or settle a case on easy terms. Sometimes government enforcement efforts will be unduly affected by budgetary constraints⁶⁶ and undue fear of losing cases.⁶⁷

Not surprisingly, a vigorous private antitrust regime is likely to confer significant benefits over and above those conferred by a system reliant solely upon government enforcement. The United States' distinctive system of private antitrust enforcement is substantially underappreciated. It has produced tremendous benefits for the U.S. economy – for consumers and for businesses of all sizes. It has enabled U.S. businesses and consumers to protect themselves from economic exploitation, both by those who

⁶⁶ This is especially true in the current climate of tight federal budgets.

⁶⁷ Professor Calkins notes: "Governmental agencies also hesitate to litigate because of fear of defeat. Courtroom setbacks can demoralize agency staff, raise questions in the eyes of observers, and impose political costs. Few agency annual reports boast about the well-fought loss, and, in an era in which governmental accountability is fashionable, it is challenging to characterize losses as accomplishments. All too often, agencies worry about their win rates. . . . [A]nd general counsels who are nominated for higher office like to claim that their agency won a high percentage of its cases. Everyone wants a good batting average. Unfortunately, a single loss can ruin a good batting average compiled with few at-bats." Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1 (1998) (citations omitted).

subvert the free market in general and by foreign cartels in particular.⁶⁸ Although negative assertions about the efficacy of private U.S. antitrust litigation have been very well publicized, this might well be due less to the merits of these allegations than to the power of the economic interests that stand to benefit from a curtailment of private enforcement.

⁶⁸ See John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies*, 51 ANTITRUST BULL. 983 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=988722. Historically, depending upon the data set used and the methodology employed, cartels in the United States have overcharged an average of 18 percent to 37 percent. By contrast, the overcharges of European cartels averaged in the 28 percent to 54 percent range, and cartel overcharges within a single European country averaged 16 percent to 48 percent. *Id.*