

*Chapter Six****Restoring the Legitimacy of Private Enforcement***

Private antitrust enforcement is under siege. Since 2004, the Supreme Court has decided nine private antitrust cases.¹ In each case, the United States filed an amicus brief favoring the defendant, and in each case the Court reversed the appeals court ruling favoring the plaintiff.² Although historically considered a bulwark in the antitrust enforcement arsenal, the private treble damages remedy has been 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.³ There is little, if any, theoretical or 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 courts’ antitrust jurisprudence and the current administration’s amicus and competition advocacy programs, leading, we believe, to the creation of unnecessary roadblocks for private antitrust actions that undermine the deterrence and compensation objectives of private remedies.⁴

¹ This does not include *U.S. Postal Serv. v. Flamingo Indus.*, 540 U.S. 736 (2004), a case supporting the immunity of the postal service.

² Additionally, the Court recently granted certiorari – at the urging of the Justice Department – to review a Ninth Circuit price-squeeze decision favoring plaintiffs. *See Pac. Bell Tel. Co. v. linkLine Commc’ns*, No. 07-512, *cert. granted*, ___ U.S. ___ (June 23, 2008). Arguably, *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007), is a partial exception to the pattern of defendant-oriented government amicus briefs. In that case, the U.S. filed an amicus brief supporting the Second Circuit’s reversal of the dismissal of the complaint with prejudice, but the Solicitor General would have required the plaintiffs to replead under what would have been, effectively, a heightened pleading standard for antitrust claims related to initial public offerings of securities. The Supreme Court upheld the defendants’ position in its entirety, supporting a broad antitrust immunity based on fears of “inconsistent court results” and “over[] deter[ence].” *Id.* at 2395, 2397. Notably, the FTC did not join in the Justice Department’s brief in *linkLine*, nor its brief in *Twombly*.

³ *See generally* Jeffrey Rosen, *Supreme Court Inc.*, N. Y. TIMES, March 16, 2008 (Magazine) at 38 (detailing probusiness transformation of the Supreme Court).

⁴ The current chairman of the FTC, William Kovacic, has sounded a similar theme. Kovacic has 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>.

In this chapter, we offer a 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 overdeterrence, and that the courts are plagued with widespread frivolous antitrust lawsuits. We also offer a number of specific recommendations for the next administration's "private enforcement policy."

MAJOR RECOMMENDATIONS

We believe that the next administration should make it a priority to:

- Restore balance to the Justice Department (DOJ) and Federal Trade Commission's (FTC) competition advocacy and amicus programs by educating the public and the courts about the virtues of vigorous private antitrust enforcement, dispelling the myths about widespread abusive antitrust litigation, and supporting efforts by courts to strengthen their use of existing case management tools to reduce the expense of litigation.
- Actively support efforts by the European Union and other foreign jurisdictions to develop effective private rights of action.
- Undertake a comprehensive investigation into the effects of *Bell Atlantic Corp. v. Twombly*, the extent to which it has impaired Rule 8's notice pleading standard, and possible remedial measures.
- Support legislation to provide for an automatic award of prejudgment interest to prevailing plaintiffs.
- Study the practical effects of the Class Action Fairness Act on antitrust cases, adhere to certain principles in considering any *Illinois Brick* reform proposal – including the principle that the current level of deterrence should not be undermined – and oppose the specific legislation proposed by the Antitrust Modernization Commission (AMC) for reforming *Illinois Brick*.
- Undertake an investigation into the effects of *Daubert* and Federal Rule of Evidence 702 on private and government antitrust litigation and consider

drafting guidelines for courts to use in evaluating the reliability of economic testimony in antitrust cases.

- Support efforts to make waivers of class actions or class arbitration of antitrust claims unenforceable.
- Oppose legislation proposed by the AMC for settlement claim reduction and contribution.
- Participate as an amicus in appropriate cases to encourage the courts to clarify the limited nature of the doctrine of antitrust injury.

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

A. The Role of Private Enforcement

In its recent report, the AMC emphasized the “critically important role” that private antitrust enforcement plays in implementing the U.S. antitrust laws.⁵ “From the outset,” the AMC explained, “Congress contemplated that private parties would play a central role in enforcement of the Sherman Act. Indeed, Senator Sherman believed that individuals should act as ‘private attorneys general,’ and that the antitrust laws should encourage such enforcement.”⁶

As the AMC noted, the “central feature of private antitrust remedies is the provision for treble damages, which allows plaintiffs in all cases to recover ‘threefold the damages by him sustained.’ ”⁷ The award of mandatory attorneys’ fees and costs to prevailing plaintiffs provides “additional incentives to private parties to bring lawsuits prosecuting anticompetitive conduct.”⁸

⁵ ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 243 (2007) [hereinafter AMC REPORT].

⁶ *Id.*

⁷ *Id.* (quoting 15 U.S.C. § 15(a)).

⁸ *Id.* at 250. 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

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.⁹

Professors Lande and Davis point out that “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; and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.”¹⁰

In the late 70’s, when the Court decided *Reiter*, “nearly 20 times as many private antitrust actions [were] pending in the federal courts as actions filed by the Department of Justice.”¹¹ Today, the number of private antitrust cases brought exceeds the number of U.S. government actions (civil and criminal) by more than 25 to 1. While the number of private actions filed has declined significantly since 1978 (see chart *infra*), the number of government actions has fallen even more sharply (in percentage terms).¹²

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).

⁹ *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”).

¹⁰ 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).

¹¹ *Reiter*, 442 U.S. at 344.

¹² *See* Sourcebook of Criminal Justice Statistics Online, Table 5.41.2007,

Treble damages are critical for deterrence because “some anticompetitive conduct is likely to evade detection and challenge,” and therefore antitrust violations would be profitable ex ante if violators were liable only for single damages or the amount of their overcharges.¹³ Moreover, as the AMC noted, “[t]reble damages help to ensure that the violator pays damages that more fully reflect harm to society caused by the anticompetitive conduct” that is otherwise not recoverable,¹⁴ including allocative efficiency losses, the time value of money (prejudgment interest), and “umbrella effects.”¹⁵ In addition to promoting deterrence, treble damages also promote antitrust’s compensation goal.¹⁶ 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.”¹⁷ As the AMC noted, “in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to

<http://www.albany.edu/sourcebook/pdf/t5412007.pdf>.

¹³ AMC REPORT, *supra* note 5, at 246; *see generally* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 – 57 (1983); *see also* *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968) (“[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.”).

¹⁴ AMC REPORT, *supra* note 5, at 246.

¹⁵ *See generally* Robert H. Lande, *Are “Treble” Damages Really Single Damages?* 54 OHIO ST. L.J. 115 (1993). As to allocative efficiency losses, the AMC explained that “in addition to raising prices, anticompetitive conduct causes allocative inefficiency (for example, forgone purchases and substitution of less optimal alternatives) that, while reducing consumer welfare, is not reflected in damage calculations.” AMC REPORT, *supra* note 5, at 246. “Umbrella” effects arise when a price increase by a cartel or monopolist allows other firms supplying the product (or substitute products) to raise their prices. *See* Lande, *supra*, at 147 (noting that courts are split over whether customers of the violator’s competitors have standing to sue, but umbrella effect damages are rarely awarded against an offending cartel or monopoly, largely because of proof problems). Professor Lande argues persuasively that because of these omissions, and others, treble damages under current law is equivalent to no more than single damages, i.e., one times the amount of harm caused. *Id.* at 118. An additional loss not recovered under current law arises from the *Illinois Brick* rule when the damages caused to indirect purchasers exceed the cartel or monopoly overcharge – for example, when wholesalers and retailers operate on fixed percentage gross margins, and thus markup any overcharges. *See* Michael P. Lynch, *Why Economists are Wrong to Neglect Retailing and How Steiner’s Theory Provides an Explanation of Important Regularities*, 49 ANTITRUST BULL. 911, 926 (2004) (describing studies and model showing pass-through rates of more than 100%).

¹⁶ *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)).

¹⁷ *Id.*

judgment, or because of the statute of limitations and the inability to recover “speculative” damages) treble damages help ensure that victims will receive at least their actual damages.”¹⁸

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.”¹⁹ 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.”²⁰ Accordingly, “courts have repeatedly found antitrust claims to be particularly well suited for class actions”²¹ Indeed, without class actions, cartels and other antitrust violators that inflict widespread economic harm would have little to fear from the treble damages remedy.²²

B. *Study of Successful Cases*

A recent study by Professors Lande and Davis documents the benefits of private enforcement by analyzing 40 of the largest recent successful private antitrust cases (defined as those resolved since 1990 that recovered at least \$50 million in cash for the plaintiffs).²³ The study made the following significant findings:

- The 40 cases provided a cumulative recovery to consumers and businesses of at least \$18 – 20 billion; all but six were class actions.²⁴

¹⁸ AMC REPORT, *supra* note 5, at 246.

¹⁹ *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”).

²⁰ *Hawaii v. Standard Oil of Cal.*, 405 U.S. 251, 266 (1972).

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

²² The AMC noted that “[t]he vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys’ fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs.” AMC REPORT, *supra* note 5, at 241.

²³ Lande & Davis, *supra* note 10, at 890 – 91.

²⁴ *Id.* at 892, 902. The study did not include the monetary value of the injunctive relief obtained in these cases, which in some instances dwarfed the compensatory relief. *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*

- Almost half of the total amount recovered came from 15 cases that did not follow federal, state, or EU actions.²⁵
- Roughly two thirds of the total amount recovered was recovered by direct purchasers.²⁶
- Nearly half of the cases (17) did not involve traditional “hard-core” per se violations (such as price fixing or bid rigging), and most of those (14) involved conduct governed solely by the rule of reason.²⁷
- The total private recovery in the 40 cases was at least four times the total criminal fines imposed in all cases brought by the Antitrust Division of the DOJ since 1990.²⁸

These findings tend to suggest that private enforcement is generally doing its job: ferreting out antitrust violations that would not otherwise have been exposed, providing significant deterrence beyond the criminal fines obtained by the government in cartel cases, and compensating the victims of antitrust violations. For these reasons, the AMC

note 10, at 892 n.46. In the 30 cases where the information was available, attorneys’ fees constituted approximately 14.5% (\$1.4 billion) of the recoveries (\$9.7 billion). *See id.* at 904 n.95, 915 – 18, Tables 7A–7C.

²⁵ *See* Lande & Davis, *supra* note 10, at 898. Indeed, the two cases involving the largest recoveries – the *Vitamins* cases (\$3.9 to \$5.3 billion) and *Visa/MasterCard* (\$3.38 billion) – 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 15 cases that were not “follow-on” cases, another 6 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 10, at 912 – 14, Tables 5 & 6.

²⁶ *See* Lande & Davis, *supra* note 10, at 900. About 10% of the total amount was recovered by indirect purchasers, and the remainder (about 22%) by competitors. *See id.*

²⁷ *See id.* at 902.

²⁸ *See id.* at 895 (noting that criminal fines since 1990 (through 2007) totaled \$4.2 billion).

recommended no major overhaul of private enforcement. On the contrary, as to the treble damages remedy – the central feature of private enforcement – the AMC concluded:

[A]n insufficient case has been made for changing the treble damages rule, either universally or in specified instances. The [AMC] concludes that, on balance, the treble damages rule well serves the defined goals.²⁹

We are in full agreement with this conclusion.

C. *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 cartel overcharges and other antitrust violations to supplement their traditions of public enforcement. The leading jurisdiction to do so is the European Union (EU). In response to the European Court of Justice's landmark *Crehan* decision,³⁰ 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, the European Commission (Commission) has been considering how best to develop this meaningful private right of action in the courts of the now 27 Member States. Recently, the Commission issued an important White Paper setting forth proposals to address the obstacles to effective antitrust damage actions.³¹ 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

²⁹ AMC REPORT, *supra* note 5, at 246. The AMC also recommended no change in the provision requiring the award of attorneys' fees to prevailing plaintiffs. *See id.* at 250.

³⁰ Case C-453/99, *Courage v. Crehan*, 2001 E.C.R. I-6297.

³¹ *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (Apr. 2, 2008). The Commission noted, "Despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, to date in practice victims of EC antitrust infringements only rarely obtain reparation of the harm suffered." *Id.* at 2. Most commentators expect progress at both the EU and member-state level coming slowly despite the strong leadership role on this issue being played by the Competition Directorate of the European Commission.

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.³²

In sum, jurisdictions all around the world have begun to recognize the importance of creating a private-public partnership to enforce competition law through both private suits for damages as well as the existing governmental enforcement mechanisms. However, the reality of vigorous private damages outside the United States is yet unrealized in most jurisdictions.

II. The Costs of Private Enforcement Are Not Excessive

Notwithstanding the benefits of vigorous private enforcement and the treble damage remedy, 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. These are myths.³³

A. *The Number of Antitrust Cases is Modest*

As shown in the accompanying chart,³⁴ the number of new private federal antitrust cases has declined significantly in the last 30 years, while the economy has more than doubled

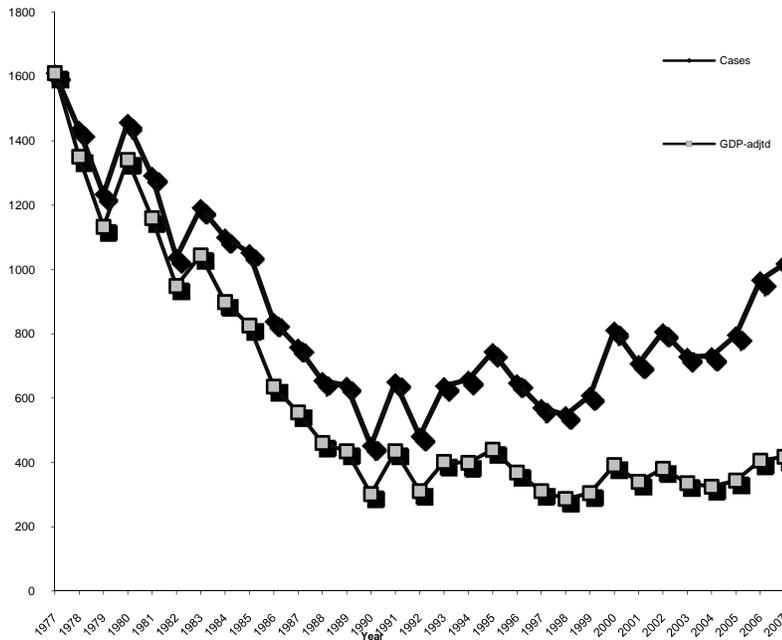
³² It has been more difficult to implement private rights of action in civil law countries. A host of theoretical, substantive, procedural, and practical concerns have prevented most civil law jurisdictions from enacting new private rights of action or effectively enforcing the handful of existing provisions. 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.

³³ The current 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).

³⁴ 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. GDP-adjusted cases are calculated by taking the actual number of cases in a year and dividing by the real GDP growth multiple of that year relative to 1977. GDP data are from the Bureau of Economic Analysis, National Economic Accounts, www.bea.gov/national/xls/gdplev.xls.

in size. 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 821 cases per year in the 2000s. Adjusted for real GDP growth, the number of cases has dropped nearly 75% and has been steady for the last two decades. 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 about two-thirds, from 1.2 % in 1977 to 0.4% in 2007.

Chart: Private Antitrust Cases 1977-2007



Other data also indicate that the volume of private cases remains modest. As shown in the table below, between July 1, 2001 and June 30, 2007, 454 federal antitrust class actions were filed, for an average of about 76 per year. Antitrust class actions accounted for only 2.2% of the approximately 21,000 class actions filed during this period. At the same time, the number of consolidated multidistrict (MDL) antitrust class actions has remained fairly steady at an average of close to 9 per year over the last 10 years (1998 – 2007).

Antitrust Class Actions

	<i>Class Actions</i> ³⁵	<i>MDL Antitrust Dockets</i> ³⁶
1998		9
1999		9
2000		6
2001	25 (July-Dec.)	9
2002	98	4
2003	62	15
2004	78	8
2005	71	9
2006	84	8
2007	36 (Jan.-June)	9
Total	454	86
Annual Average	76	8.6

B. There is No Evidence of Overdeterrence or Duplicative Recoveries

The AMC considered the claims of some critics “that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery.”³⁷ Yet, despite its request for evidence on this issue,³⁸ “[n]o actual

³⁵ Source: Federal Judicial Center (FJC). These data were gathered (but not reported) by the FJC in its ongoing study of the Class Action Fairness Act. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Advisory Comm. on Civil Rules* (April 2008), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf). The FJC data eliminate overlapping or duplicate class actions (i.e., those consolidated with other actions). Thus, these figures treat class actions in a single MDL proceeding as a single class action. According to Willging, the class action data on prior years previously published by the Administrative Office of U.S. Courts is flawed.

³⁶ Source: Judicial Panel on Multidistrict Litigation (JPMDL). The number of dockets indicates dockets classified by the JPMDL as antitrust matters in which a transfer order was entered in the given year. These figures are a subset of all class actions, but the time period may not coincide with the figures compiled by the FJC study.

³⁷ AMC REPORT, *supra* note 5, at 247.

³⁸ See Antitrust Modernization Commission, Request for Public Comments, Remedies, 70 Fed. Reg. 28902–07 (May 19, 2005).

cases or evidence of systematic overdeterrence were presented to the Commission”³⁹ Indeed, even prosecuted cartels rarely pay *nominal* treble damages, let alone the sixfold damages that some claim could result when direct purchasers sue under the Sherman Act and indirect purchasers sue under state laws.

For example, in the vitamins cartels cases, which resulted in “the largest antitrust settlements in history”⁴⁰ the amounts recovered by direct and indirect purchasers amounted to about 200% of the overcharges in the United States.⁴¹ In real terms, given the absence of prejudgment interest, the recoveries amounted to less than 67% of the overcharges.⁴² 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.⁴³ On a worldwide basis, because of the absence of private damage suits in Europe, the monetary sanctions were less than 30% of the overcharges.⁴⁴ In light of the recidivism and continuing flow of international price fixing prosecutions, and the inability of foreign victims of cartels to sue in the United States under *Empagran*, the current level of damages – even for blatant price fixing – appears to be insufficient for deterrence purposes.⁴⁵

³⁹ AMC REPORT, *supra* note 5, at 247; *see also* Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSPECTIVES 27, 41 (2003) (“[I]t seems unlikely that the current levels of antitrust enforcement activity and penalties are generally so high as to lead to overdeterrence.”).

⁴⁰ JOHN M. CONNOR, *GLOBAL PRICE FIXING* 404 (2d ed. 2007).

⁴¹ *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.

⁴² *See id.* at 139, Table 20A.

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.* at 149, 150 (noting that “the impressive corporate monetary sanctions imposed worldwide were inadequate to deter recidivism” and “cartelization is a crime that pays”). In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Supreme Court held that foreign victims of international cartels that made purchases outside the United States could not sue in U.S. courts, even where U.S. consumers were adversely affected by the cartel, if the adverse foreign effect is “independent” of any adverse domestic effect. The D.C. Circuit subsequently held that foreign victims could not sue unless the harm to U.S. commerce proximately caused the harm to foreign victims. *See Empagran S.A. v. F. Hoffmann-La Roche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005).

C. 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 purposes⁴⁶), there is simply no empirical or theoretical support for the critics' overblown claims about antitrust class actions.

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.”⁴⁷ It is reflected in the work of some leading antitrust scholars.⁴⁸ And it is reflected in the views of the mainstream antitrust bar.⁴⁹

⁴⁶ 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).

⁴⁷ *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.”).

⁴⁸ See, e.g., HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 59 (2005) (“many marginal and even frivolous antitrust cases are filed every year”).

⁴⁹ 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)⁵⁰ 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).⁵¹ Both theories are seriously flawed.

The “nuisance settlements” theory assumes that class action plaintiffs can impose disproportionate litigation costs on defendants,⁵² but the reverse is more likely.⁵³ 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 overcharges In class actions, counsel must bear the substantial cost of class certification.⁵⁴

⁵⁰ 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).

⁵¹ 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.”).

⁵² 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*).

⁵³ 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”).

⁵⁴ 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>.

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.⁵⁵ "Meritless filings are not met with payoff money; they are met with motion practice, and sometimes sanctions."⁵⁶ 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."⁵⁷ 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.⁵⁸

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

⁵⁵ 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").

⁵⁶ 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.").

⁵⁷ Silver, *supra* note 56, 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").

⁵⁸ 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 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.

settles *after* defendants have been denied summary judgment cannot reasonably be characterized as frivolous.⁵⁹ 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.⁶⁰

Beyond the flawed theory, the claim of widespread frivolous antitrust litigation is unsupported in fact.⁶¹ It is not simply that there are *no* empirical studies to support the claim; there are apparently 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.⁶² In sum, there is simply no basis to believe that frivolous antitrust class actions are a significant problem.⁶³

⁵⁹ 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.”).

⁶⁰ 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.

⁶¹ 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* 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”).

⁶² 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.”).

⁶³ 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

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.

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. *Twombly* Reform

The Supreme Court's ruling in *Twombly*⁶⁴ – effectively raising the bar for pleading an antitrust conspiracy, while denying that is what it was doing – was wrong and unsupported by any empirical evidence that the courts are plagued with frivolous antitrust litigation or that existing case management tools cannot curb discovery abuse. *Twombly* is particularly unfortunate because it raises the barrier to the private detection of cartel behavior. The predictable result of *Twombly* and the “retirement” of *Conley v. Gibson*'s “no set of facts” standard is to give district courts a green light to dismiss on the pleadings some potentially meritorious antitrust and other claims. While some evidence suggests that has already happened,⁶⁵ we urge the next administration and Congress to

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.”).

⁶⁴ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

⁶⁵ See, e.g., *In re Insurance Brokerage Antitrust Litig.*, 2007 WL 2533989 (D.N.J. 2007) (dismissing bid-rigging and market-allocation complaint under *Twombly* after some defendants had paid hundreds of millions of dollars to settle the case and related cases, and where executives of certain defendants pled guilty or were convicted of criminal antitrust charges), *appeal docketed*, No. 07-4046 (3rd Cir. 2007). One recent study found that the rate at which 12(b)(6) motions were granted by the federal district courts in all types of cases increased somewhat after *Twombly*, from 36.8% to 39.4%. See Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(B)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (forthcoming 2008) (manuscript at 124). The study found that the increase was quite significant

undertake a comprehensive investigation into the effects of *Twombly*, the extent to which it has impaired Rule 8's notice pleading standard, and possible remedial measures.

C. Prejudgment Interest

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.⁶⁶ As Judge Easterbrook has noted, “The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders. We should allow, indeed require, such awards.”⁶⁷ 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.⁶⁸ Moreover, the absence of prejudgment interest gives defendants a strong incentive to delay the resolution of litigation.⁶⁹

for civil rights cases, but the data were too thin to draw any conclusions about antitrust cases. *See id.* manuscript at 125 and n.147.

⁶⁶ 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.

⁶⁷ *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.

⁶⁸ *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).

⁶⁹ 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.

The AMC recommended no change in the current law, primarily because it thought that treble damages “adequately compensate for the general unavailability of prejudgment interest in antitrust cases.”⁷⁰ That is plainly incorrect. As Judge Easterbrook has pointed out, “[t]rebling makes up for the fact that antitrust violations are hard to detect and prove.”⁷¹ Trebling also makes up for the fact that, as noted above, actual damages do not compensate for harms such as allocative efficiency losses and “umbrella” effects, as the AMC itself recognized. If, as Professor Lande persuasively argues, treble damages actually amount to single real damages,⁷² then the absence of prejudgment interest can be defended only on the basis that civil antitrust damages should serve *no* deterrent or punitive function, which is inconsistent with the thrust of the AMC’s endorsement of the treble damages rule. The other reasons offered by the AMC against changing the law are wholly unpersuasive.⁷³

D. *Illinois Brick Reform*

The controversy over indirect purchaser damage suits has raged for 30 years since the Supreme Court’s decision in *Illinois Brick* to bar such suits under section 4 of the Clayton Act,⁷⁴ while allowing direct purchasers to recover the full amount of an overcharge under

⁷⁰ AMC REPORT, *supra* note 5, at 249.

⁷¹ *Fishman*, 807 F.2d at 584.

⁷² *See* Lande, *supra* note 15.

⁷³ The AMC asserted, without support, that antitrust damages are not easily calculated at the time of injury in most cases, and thus the current rule is consistent with the rule in torts that denies prejudgment interest for this reason. AMC REPORT, *supra* note 5, at 249. In fact, however, as the case cited by the AMC points out, the common law rule has long given way to awards of prejudgment interest in tort cases involving injury to property or business. *See* *Wickham Contracting Co. v. Local Union No. 3, Int’l. Bhd. of Elec. Workers*, 955 F.2d 831, 837 – 38 (2d Cir. 1992); *see generally* DAN B. DOBBS, *LAW OF REMEDIES* 248 – 49 (2d ed. 1993). The AMC also suggested that changing the rule “could deter courts from developing sounder rules regarding the treatment of opportunity and capital costs,” noting that “some courts have effectively compensated for the lack of prejudgment interest by including in the determination of damages elements such as inflation and interest paid on borrowed capital.” AMC REPORT, *supra* note 5, at 249. But, as Professor Davis maintains, “The AMC had it backward. Its reasoning seems to suggest that because some courts have found a way to circumvent the general proscription on awarding prejudgment interest—and, apparently, were right to do so—there is no need to eliminate the proscription to achieve this desirable result in a forthright and systematic manner.” JOSHUA P. DAVIS, *AN IMBALANCE OF REPRESENTATION: A CRITIQUE OF THE ANTITRUST MODERNIZATION COMMISSION RECOMMENDATIONS REGARDING CIVIL REMEDIES IN PRIVATE ANTITRUST CASES* 9 (Dec. 2007), available at <http://www.antitrustinstitute.org/Archives/privateenforce.ashx>.

⁷⁴ *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Hanover Shoe without allowing for any pass-on defense.⁷⁵ Currently, more than 35 states covering 70% of the U.S. population have some sort of *Illinois Brick* repealer,⁷⁶ but recoveries for consumers under these statutes have been limited,⁷⁷ apparently because of difficulties of proof of harm as well as the high hurdles that some courts have erected to class certification⁷⁸ and standing.⁷⁹ While critics of the current “system” bemoan the prospect that defendants may be held liable for more than treble damages for the same wrong, there is no evidence “of an instance of unfair or multiple recovery,” according to the AMC.⁸⁰ Moreover, the procedural morass of multiple state indirect purchaser actions has been mitigated to some extent by the Class Action Fairness Act of 2005 (CAFA), which allows for removal and consolidation for pretrial purposes of most indirect purchaser actions in a single federal district court.⁸¹ Before any additional legislation is considered, it would be appropriate to study the practical effects of CAFA on antitrust cases, so that remaining problems can be pinpointed and addressed with a clearer understanding of where matters now stand.

We agree that the current situation is not desirable, but working out a fair and practical solution has proven to be extremely complicated. The next administration should adhere to the following principles in considering any *Illinois Brick* reform proposal: (1) the current level of deterrence should not be undermined; (2) consumers should be

⁷⁵ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

⁷⁶ See Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, ANTI-TRUST, Summer, 2001, at 34, 34 – 35.

⁷⁷ See Lande & Davis, *supra* note 10, at 900 (recoveries by direct purchasers in sample of cases exceeded those of indirect purchasers by more than 6 to 1).

⁷⁸ See, e.g., *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008) (holding that district court should not have certified indirect purchaser class without conducting a “searching inquiry” into the factual basis of plaintiffs’ novel and complex theory of class-wide impact).

⁷⁹ See, e.g., *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129 (N.D. Cal. 2008) (holding that indirect purchasers of DRAM, a component in computers, lacked standing under various state *Illinois Brick* repealers because they did not “participate” in the cartelized market).

⁸⁰ AMC REPORT, *supra* note 5, at 274. The AMC also noted however, somewhat implausibly, that the lack of evidence “may simply reflect the difficulty of determining whether actual damage awards and settlements exceed total damages.” *Id.*

⁸¹ See *id.* at 272 (noting predictions that CAFA “could greatly reduce the waste of resources associated with multiple indirect purchaser actions in state courts,” but that AMC was “loath to rely on such predictions” because CAFA only applies to pretrial consolidation, has several express exceptions, and does not apply to individual actions, opt-out actions, and *parens patriae* actions brought by state attorneys general).

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; (6) state attorneys general should retain the option of bringing *parens patriae* actions under state law in state court, without removal.

The AMC's reform proposal – to overturn *Illinois Brick* and *Hanover Shoe* – fails on these principles because it significantly decreases the incentives for direct purchasers to sue while creating a significant risk that the slack in deterrence would not be made up by indirect purchaser actions, particularly given the failure of the proposal to address the roadblocks to existing indirect purchaser class actions.⁸²

E. Daubert Reform

Prior to the Supreme Court's decision in *Daubert v. Merrell Dow Pharm., Inc.*,⁸³ “admissibility challenges to the qualifications and methodologies of economic testimony in antitrust cases were rare.”⁸⁴ Now, 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 case dispositive), “*Daubert* motions are almost exclusively defense tools

⁸² See Comments by the American Antitrust Institute Concerning the Antitrust Modernization Commission's Recommendations Regarding Direct and Indirect Purchaser Actions, April 30, 2007, <http://www.antitrustinstitute.org/Archives/amc072.ashx>. The AMC did recognize that its proposal to overturn *Hanover Shoe* might make class certification more difficult for direct purchasers, and thus recommended that certification of classes of direct purchasers should be allowed without regard to the pass-on issue, but failed to address the existing difficulties for certification of indirect purchaser classes.

⁸³ 509 U.S. 579 (1993).

⁸⁴ 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).

used to attack plaintiff's case."⁸⁵ One review of federal appeals court decisions involving *Daubert* between 2000 and 2006 shows that the admissibility rate of economists and accountants in those cases was .598.⁸⁶ 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.⁸⁷

The asymmetric application of *Daubert* leads to certain adverse consequences. First, it raises plaintiffs' litigation costs, often unnecessarily, because (despite the figures noted above) most *Daubert* motions are denied.⁸⁸ 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 the expert report withstands challenge. And it may be more difficult and expensive for plaintiffs to obtain qualified experts to testify 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.⁸⁹

⁸⁵ *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 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.").

⁸⁶ 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).

⁸⁷ 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>.

⁸⁸ See Hockett, et al., *supra* note 85, at 11.

⁸⁹ 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

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.⁹⁰ 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.⁹¹ 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*.

F. *Enforceability of Class Action Waivers in Arbitration*

Since the Supreme Court held in *Mitsubishi Motors* that international antitrust disputes could be subject to mandatory predispute arbitration agreements, most courts have held that arbitration may be compelled for any Sherman Act claim covered by an arbitration agreement, provided that the “prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”⁹² While a case can be made that mandatory agreements to arbitrate antitrust disputes should never be enforceable, particularly against consumers,⁹³ arbitration agreements are most problematic when used to circumvent class actions.

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).

⁹⁰ 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).

⁹¹ 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.

⁹² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

⁹³ See *id.* at 642 (Stevens, J., dissenting). Legislation is pending in Congress, which AAI supports, that would bar enforcement of predispute arbitration agreements in employment, consumer, or franchise disputes. See Arbitration Fairness Act of 2007, S.1782, 110th Cong. (2007).

In recent years, as the main arbitral forums have adopted provisions comparable to Federal Rule of Civil Procedure 23 allowing class-wide arbitrations, companies with predispute arbitration clauses in form agreements with consumers and merchants have added waivers that bar class or joint arbitrations.⁹⁴ Some courts have upheld such waivers with respect to antitrust claims;⁹⁵ other courts have held such waivers to be either unconscionable under state contract law,⁹⁶ or inconsistent with the Sherman Act because, by preventing class actions, such waivers essentially immunize the potential violator from private actions.⁹⁷ Class action waivers are a particularly acute concern 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.”⁹⁸

The next administration should participate as an amicus in appropriate cases to argue that waivers of class action treatment of antitrust claims should be categorically

⁹⁴ Prior to the Supreme Court’s decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), the prevailing view was that “forcing an antitrust claim to be arbitrated assured the defeat of a claimant’s attempt to institute a class action.” Thomas Campbell, Roxane Busey & Peter Koch, *Arbitrating Antitrust Claims – The Road Less Traveled*, ANTI-TRUST, Fall 2004, at 8, 8; see also Charles E. Buffon & Joshua D. Wolson, *Antitrust Arbitration Counseling*, ANTI-TRUST, Fall 2004, at 31, 32 (“If drafted properly, an agreement to arbitrate could offer an opportunity to avoid a jury trial and class actions and limit proceedings to individual consumers, thereby reducing the risk of an outsized judgment.”). *Bazzle* held that an arbitration agreement that was silent on the issue might be construed to permit class arbitrations; as a result, many companies added express class action waivers. See Elizabeth Avery, *Class Actions and the Future of Arbitrating Antitrust Disputes*, ANTI-TRUST, Fall 2004, at 24, 26 (“[O]ne would expect sophisticated drafters to expressly prohibit class arbitration in all post-*Bazzle* contracts.”).

⁹⁵ See, e.g., *In re American Express Merchs. Litig.*, No. 03cv9592, 2006 WL 662341 (S.D.N.Y. 2006), *oral arg. heard on appeal*, No. 06-1871-cv (2d Cir. Dec. 10, 2007); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274 (4th Cir. 2007). AAI filed an amicus brief in the *American Express Merchants Litigation* urging the Second Circuit to bar enforcement of the collective action waiver in that case. See Brief of Amicus Curiae American Antitrust Institute in Support of Plaintiffs-Appellants’ Brief Seeking Reversal of District Court Decision, *American Express Merchs.*, 2006 WL 662341 (No. 06-1871-cv), available at <http://www.antitrustinstitute.org/archives/files/534.pdf>.

⁹⁶ See, e.g., *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

⁹⁷ 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”).

⁹⁸ Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 418 (2005).

unenforceable, just as predispute waivers of treble damages are unenforceable,⁹⁹ because both are essential to the effective enforcement of the antitrust laws. Indeed, class actions arguably are more important than treble damages because without class actions, private enforcement against cartel behavior and other anticompetitive conduct involving widespread harm would be toothless. The alternative to collective actions (class action or class arbitration) in cases involving consumers or small merchants, where individual damages are slight, is that no actions are brought.¹⁰⁰ But even where individual cases against cartels might be feasible, such cases would still be more costly and less effective than a properly certified class action,¹⁰¹ thus reducing the incentives (and hence the likelihood) that direct purchasers would bring suit. Given the hesitation that many businesses already have in initiating suit against their suppliers,¹⁰² class action waivers threaten seriously to erode deterrence even when the direct purchasers are not consumers or small merchants.

G. *Contribution and Claim Reduction*

The AMC resurrected a 25 year-old legislative proposal for settlement claim reduction and contribution, which the next administration should oppose. Under the current law of joint and several liability, when a plaintiff settles with some but not all of the defendants, the nonsettling defendants' liability is reduced by the amounts paid by

⁹⁹ See *Kristian*, 446 F.3d at 48 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

¹⁰⁰ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”). The fact that a successful plaintiff can recover attorneys’ fees does not make it feasible to bring individual claims because, as the First Circuit noted, “Antitrust cases by their nature are difficult and uncertain. In any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney’s fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court.” *Kristian*, 446 F.3d at 59 n.21. Moreover, as the First Circuit explained, given the risks of complex litigation, lawyers will not bring contingent fee cases on the prospect of merely being made whole. See *id.*

¹⁰¹ Class actions may be maintained under Rule 23(b)(3) only where “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

¹⁰² See AMC REPORT, *supra* note 5, at 273 (noting “circumstances in which direct purchasers choose not to sue . . . to avoid injuring business relationships with suppliers”). A class action solves a collective action problem for purchasers, beyond cost sharing; if all purchasers sue as a class, then they need have no fear of retribution from their suppliers.

settling defendants, and a defendant that pays more than its “share” has no right to seek contribution from another defendant. Under the AMC’s proposal: (1) nonsettling defendants would obtain a reduction of the plaintiffs’ claims by the amount of any settlement *or* the “allocated share” of liability of the settling defendants, *whichever is greater*; and (2) nonsettling defendants could sue each other for contribution. Liability among defendants would be allocated, presumptively, based on defendants’ market shares.¹⁰³

The AMC’s principal argument is that the current rules “are fundamentally unfair” because “less culpable defendants may pay an unfairly large share of the total damages, while more culpable defendants escape significant (or any) liability.”¹⁰⁴ However, as Easterbrook, Landes, and Posner have written, “[a] fairness argument from the mouth of the intentional wrongdoer is unappealing because the wrongdoer can avoid his ‘predicament’ by conforming his conduct to the law’s demands.”¹⁰⁵ Indeed, while the common law rule against contribution among joint tortfeasors has generally been abrogated, it remains firmly in effect for intentional tortfeasors,¹⁰⁶ which is one reason that the Supreme Court concluded that Congress did not intend to allow contribution under the Sherman Act.¹⁰⁷

The AMC acknowledged that its proposal would “likely reduce the incentives for settlement,” because plaintiffs would bear the risk of settling too cheaply with a particular defendant (i.e., for less than the defendant’s ultimate allocated share),¹⁰⁸ and defendants

¹⁰³ See AMC REPORT, *supra* note 5, at 252 – 55.

¹⁰⁴ *Id.* at 252.

¹⁰⁵ Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 340 (1980). Judge Easterbrook testified before the AMC in opposition to any change in current law. See Testimony of Judge Frank Easterbrook, Public Hearing Before the Antitrust Modernization Commission 132 (July 28, 2005) (“I don’t think reshuffling the deck chairs after there’s been a calamity is an example of fairness [Y]ou want to take an ex ante view in thinking about the expected liabilities . . .”).

¹⁰⁶ See DAN B. DOBBS, *THE LAW OF TORTS* 1078 (2000).

¹⁰⁷ See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (“The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.”).

¹⁰⁸ The AMC’s proposal places the risk of “cheap” settlements on the plaintiffs, but gives the benefit of “rich” settlements (i.e., those that exceed the settling defendant’s allocated share of liability) to the

no longer would risk being saddled with other defendants' share of liability if they fail to settle early. Moreover, as Professor Davis points out, a defendant that settles would not really be able to buy peace because its allocated share of liability would be at issue in subsequent proceedings.¹⁰⁹ The AMC thought the pressure on defendants to settle early that results from the existing rule was illegitimate, but this runs counter to the prevailing wisdom reflected in the criminal leniency program that it is desirable to encourage conspirators to break ranks, and that the risk of joint and several liability without contribution serves to increase deterrence.¹¹⁰

Finally, the cost and difficulty of any apportionment scheme has always been thought to militate strongly against a rule of contribution.¹¹¹ While the AMC thought that its allocation method based presumptively on market shares would be simple to administer, it offered no support for this contention, which was disputed by Judge Easterbrook.¹¹² Indeed, even if market share information is available, the AMC proposal recognizes that it may not be fair to allocate responsibility based on market shares, and thus allows courts to use any "method that would be equitable" when using market shares would be "unjust."¹¹³ In sum, as Easterbrook, Landes and Posner concluded about the proposals advanced 25 years ago, "If proponents of antitrust contribution have the burden

nonsettling defendants, by permitting them an offset of the greater of the actual amounts paid *or* the allocated share of liability. The AMC offered no justification for this "heads I win, tails you lose" approach.

¹⁰⁹ See DAVIS, *supra* note 73, at 14.

¹¹⁰ See *id.*; Easterbrook Testimony, *supra* note 105, at 91 (upshot of current rule is that "total collections in antitrust suits increase, and thus, there's better deterrence").

¹¹¹ See *Texas Indus.*, 451 U.S. at 638 ("Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what is already complex litigation.").

¹¹² See Easterbrook Testimony, *supra* note 105, at 92 ("Claim reduction and contribution schemes don't work unless you can get good estimates of the defendants' market shares and other good estimators of their contribution to the cartel. That isn't cheap."); Easterbrook, Landes & Posner, *supra* note 105, at 366 ("determining market shares is a difficult business").

¹¹³ AMC REPORT, *supra* note 5, at 256; see *Texas Indus.*, 451 U.S. at 637 ("Dividing or apportioning damages among a cluster of co-conspirators presents difficult issues, for the participation of each in the conspiracy may have varied. Some may have profited more than others; some may have caused more damage to the injured plaintiff. Some may have been 'leaders' and others 'followers'; one may be a 'giant,' others 'pygmies.'").

of making a convincing case for changing the status quo, they have not carried that burden”¹¹⁴

H. *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.”¹¹⁵ As a doctrine akin to proximate or “legal” cause in torts,¹¹⁶ 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.”¹¹⁷ 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.¹¹⁸

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.

¹¹⁴ Easterbrook, Landes & Posner, *supra* note 105, at 368.

¹¹⁵ Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 – 89 (1977).

¹¹⁶ 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”).

¹¹⁷ 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. PITT. L. REV. 437 (2001) (noting harsh approach to private enforcement reflected in antitrust injury decisions).

¹¹⁸ See Davis, *supra* note 117, at 737 – 44.