

Response to Bert Foer's Review of *The Institutional Structure of Antitrust Enforcement*

Daniel A. Crane
Professor of Law, University of Michigan

Bert Foer begins his review of my book by expressing concern that his criticisms of my work on private antitrust litigation could offend me. They do not. I have tremendous respect for Bert and his point of view, as I do of AAI members Bob Lande and Josh Davis whose work on private antitrust litigation I discuss critically in my book and elsewhere.¹ I welcome vigorous discussion of the institutional structure issues with which my book is concerned. If I am in error, I hope at least to serve the beneficial function of propounding my errors conspicuously, lucidly, and educationally.

Now, to the merits. I will forgo regurgitation of all the arguments made in my book and related articles or tit-for-tat response to Bert's critiques. Instead, I will make four broad points: one about antitrust "populism," two about the ostensible deterrent and compensatory functions of private antitrust litigation, and one about the relationship between private and public antitrust enforcement.

First, I understand Bert to argue early in his review that my overall view of antitrust enforcement is excessively "technocratic." Citing the "too big to fail" issue and "Occupy Wall Street" movements, he asserts that antitrust "populism," or at least the recognition that antitrust law is about "political economy" and not just about "microeconomics," may be back in vogue.

I plead guilty to favoring a "technocratic" ideal in antitrust, at least in the civil context.² I also plead guilty to harboring certain Chicago School impulses. But it would be fundamentally misguided to think of the technocratic perspective in antitrust as a Chicago School product. Writing in the early 1960s, during the high-water mark of the Warren Court and long before the Chicago School had made inroads, the historian Richard Hofstadter described the "antitrust movement"—meaning the political-populist manifestation of antitrust—as "one of the faded passions of American reform."³ Hofstadter argued that "[a]ntitrust has become almost exclusively the concern of small groups of legal and economic specialists, who carry on their work without widespread public interest or support."⁴ He asserted that antitrust had "ceas[ed] to be largely an ideology and [had become] largely a technique" administered by a small group of influential and deeply concerned specialists" in "differentiated, specialized, and bureaucratized" administrative institutions.⁵ If Bert wants to fight the technocratic shift

¹ The treatment on private antitrust litigation in my book is a shorter version of my analysis in Daniel A. Crane, *Optimizing Private Antitrust Litigation*, 63 Vand. L. Rev. 675 (2010).

² See Daniel A. Crane, *Technocracy and Antitrust*, 86 Tex. L. Rev. 1159 (2008).

³ Richard Hofstadter, What Happened to the Antitrust Movement?, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS*, 188 (1966).

⁴ *Id.* at 195.

⁵ *Id.* at 235.

in antitrust law, he has to reverse over fifty years of American history, not just the Chicago School's influence.

But I'm not sure why he should want to. I suspect that Bert is implicitly equating technocratic with non-interventionist, assuming that technical economic reasoning as the grounds for antitrust policy means the vindication of laissez-faire. That conclusion is unjustified. One can think of many examples where a more technical, economically focused analysis would lead to condemnation of a practice that might otherwise be justified on "political economy" or "populist" grounds.

To give one illustration, the recent demise of the AT&T/T-Mobile merger, in which Bert and the AAI played no small part, is an example of a sensible, technocratic anti-merger decision. If anything, AT&T's strategy to get the merger through rested on "populist" assumptions—that it could sell the merger as a job-creator, a consideration that "technical" antitrust generally disregards. AT&T certainly roped in enough politicians and other "populist" voices, like the Communications Workers of America who claimed that the merger would create 100,000 American jobs.⁶ But, in the end, the FCC and DoJ's opposition came down to the "technocratic" assessment that a merger between the fourth and second largest firms in essentially a four-firm industry with high entry barriers—and particularly where T-Mobile had previously exhibited "maverick" characteristics—would be anticompetitive.

Further, if Bert wants to revive not just antitrust law in general, but private antitrust enforcement, as a populist institution, he had better come to the defense of the jury as a sound institution for adjudicating complicated antitrust disputes.⁷ Chapter Six of my book, which Bert mentions only in passing, raises many of the obvious and conventional criticisms of asking laypeople to decide complex economic questions far outside their common experience. There is little empirical evidence of how juries actually perform, but the little there is sounds alarm bells. I would welcome further study of the performance of juries in private antitrust cases. Until persuaded otherwise, I will proceed with a healthy degree of skepticism.

My next two rejoinders relate to the core of Bert's critique concerning the ostensible purposes of private antitrust litigation. In my book, I argue that private treble damages claims do not do a good job of advancing either the compensation or deterrence objectives. To be clear, I do not argue that private antitrust litigation serves *no* compensatory or deterrent functions. Rather, I argue that the case for deterrence and compensation from private antitrust enforcement is generally weak.

On compensation, my argument is hardly novel. Antitrust damages do little, if anything to compensate for deadweight losses or losses in innovation, two of the core harms of antitrust violations. As to wealth transfers, the overcharges are often passed many layers

⁶ See http://news.cnet.com/8301-1035_3-57320451-94/union-at-ts-t-mobile-buy-would-create-100000-jobs/.

⁷ Let me again make clear that my critique is limited to private treble damages enforcement, not to criminal juries.

downstream and the administrative costs of locating and compensating the truly harmed parties are often insurmountable.

Bert accuses me of making the best the enemy of the good. I'm far from sure that we're even talking about the good. Bert cites to the interesting work on private enforcement by Bob Lande and Josh Davis, which he takes to demonstrate that private litigation produces substantial recoveries to injured parties. Bert asserts that Bob and Josh's work shows that the "victims" receive a large percentage of the settlements. But how do we know who the "victims" are?

In earlier work, I critically assessed some of Bob and Josh's analysis supposedly showing large "victim" awards.⁸ Based on the cases Bob and Josh had studied at that time (and Bob and Josh are continuing their work, so my earlier observations may be somewhat out of date), I concluded that two-thirds of the recoveries seemed to be going to direct purchasers who probably passed on a good bit of the overcharges. Further, it seemed that only a small percentage of alleged "victims" were submitting proofs of claim and thereby partaking of the settlement, leading to the strong possibility that the "compensation" at issue was a highly selective bonus for a small set of well-informed and perhaps comparatively privileged "victims."

Moreover, even in the indirect purchaser cases, the settlement structure seemed designed to throw money at "customers" without regard to their real victimhood. For example, the *El Paso* case, which resulted in a recovery of \$1.4 billion for indirect purchasers, involved claims that natural gas suppliers artificially inflated the price of natural gas in California. The indirect purchasers consisted of 13 million California consumers and 3,000 businesses. Naturally, the possibility of cutting a check to the prevailing plaintiffs was unsatisfactory because of the substantial administrative costs in maintaining mailing addresses and printing checks." Instead, the settlement provided for a complex scheme of remittances to the California Public Utilities Commission and for natural gas rate reductions over fifteen to twenty years. Because natural gas is rate-regulated in California, the settlement amounted to an agreement about rate regulation principles for the next two decades.

One may describe the *El Paso* scheme as compensating consumers as a class, but such a description would be largely inaccurate. This is because consumer injuries occurring in the past correspond only roughly to future consumer gains. Injured consumers who died, moved away from California, or discontinued natural gas service over the rate-reduction period received no compensation, or they received compensation that bore little relation to the amount of their injury. On the other hand, consumers who moved to California or otherwise began natural gas consumption after the violation received a windfall. In sum, consumers whose consumption patterns or volume changed significantly from the time of the violation to the rate-reduction period were either overcompensated or undercompensated. The *El Paso* settlement did not amount to a serious effort to identify persons who suffered economic harm and compensate them in proportion to their loss—but, of course, doing that for 13 million people is not realistic.

⁸ Crane, *Optimizing Private Antitrust*, *supra* n. 1 at 683-86.

Maybe Bert's right that I'm overstating the degree of mismatch between the large sums of money being pumped through the private antitrust system and fair and meaningful compensation to injured parties. If I'm even half right, then compensation as a goal of antitrust policy is in serious doubt.

My deterrence argument is more subtle and novel, and I'm less convinced of it. But the reasons I'm less convinced of it would make me predict that Bert would be *more* convinced of it given his prior beliefs. We have a juicy irony.

In short, my argument is that firms aren't black boxes, that deterrence has to work on the incentives of particular persons associated with the firm (generally managers, but maybe also shareholders), that private antitrust litigation is highly unpredictable and takes a long time, that managerial turn-over rates are high, and that many managers severely discount the prospects of uncertain damages awards far in the future. I develop this argument theoretically in the book, but it tracks my own experiences working with clients.

I would have thought that a believer in market failure like Bert would have been more sympathetic to this line of argument. Amusingly, prior to Bert's review, I received the strongest reactions to this claim about the low deterrence benefits of private antitrust litigation when I presented my work at *The University of Chicago*. There, I was attacked for failing to understand that rational shareholders would find ways to make managers internalize the costs of their anticompetitive decisions. My "behavioralist" assumptions were inherently suspect.

That makes sense coming from folks who think that markets solve agency cost problems efficiently and lead to effective alignment of shareholder and managerial incentives. But folks like Bert who advocate vigorous antitrust intervention because of systemic market failures may find it difficult to explain how corporate governance seamlessly solves these types of coordination problems and leads to strong deterrence from private antitrust litigation that often takes a decade from violation to judgment day.

Bert rightly notes that the prospect of imprisonment does achieve significant deterrence. But, of course, my critique is only of the claim that private treble damages litigation achieves significant deterrence effects. Public enforcement is a whole different issue.

Which brings me to my last point—about the relationship between public and private enforcement. One overall theme of my book—and this is where I most often find common ground with my colleagues at AAI—is that public enforcement needs to be strengthened. A large part of the reason that public enforcement is relatively weak today is that that private litigation outstrips public enforcement ten-to-one, and, as a consequence, antitrust norms are being created far more often in private cases than in public cases. Rightly or wrongly, judges often react with suspicion to private antitrust litigation and its real or perceived baggage—class actions, rent-seeking competitor-plaintiffs, the distorting effects of the treble damages remedy, one-way fee-shifting, discovery abuses, the aforementioned civil jury, etc. Their reaction leads them to limit

liability norms in private cases and, thus, when those norms are transplanted to public cases, the government often faces an uphill battle. Just to give one illustration, consider the impossible task the DoJ faced in proving a predatory price case against American Airlines late in the Clinton Administration after predatory pricing norms had been radically altered in the private litigation incubator over the preceding two decades.⁹

I suspect that Bert thinks that the road to better antitrust enforcement is convincing judges that they're wrong to be so hostile to private antitrust enforcement. The problem is that it's not just the Chicago School judges who are hostile to private antitrust litigation. *It's most judges*. One illustration: Justice Breyer, who is hardly a Chicagoan. Check out his opinion for a unanimous Court in *NYNEX*, explaining why ordinary business torts shouldn't be transformed into antitrust treble damages suits.¹⁰ Look at his cryptic statement in *linkLine* that price squeeze cases have a "natural home" in Government, but not private, cases.¹¹ If you want to understand why so many Supreme Court antitrust decisions unpopular with AAI have been unanimous or near-unanimous in the last two decades, it won't do to ignore the fact that a vast majority of the Justices are channeling an unalterable prejudice against private treble damages litigation—a prejudice that did not start, and will not end, with the Chicago School.

Of course, it's not strictly an either/or proposition. One can continue to advocate for more vigorous private enforcement even while recognizing that public enforcement should be unshackled from the real or perceived baggage of private litigation. My pitch to Bert and AAI is less that they abandon their claims on private enforcement (where we may respectfully agree to disagree) but that they support institutional reforms to relieve public litigation of some private litigation spillover effects. And, on that note, I hope that we are back to common ground.

⁹ See *U.S. v. AMR Corp.*, 335 F.3d 1109 (2003).

¹⁰ *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-37 (1998).

¹¹ *Pacific Bell Tel. Co. v. linkLine Communcs., Inc.*, 555 U.S. 438, 458 (2009) (Breyer, J., concurring in the judgment).