



The American Antitrust Institute

November 14, 2006

To: The Antitrust Modernization Commission
From: Bert Foer, President, American Antitrust Institute
Subject: An Empirical Study of Private Antitrust Enforcement

The American Antitrust Institute is pleased to provide this Interim Report on our study of 29 private antitrust cases. We hope it will prove useful as your staff drafts the AMC Final Report, particularly with respect to non-governmental antitrust litigation.

We have pressed ahead to make this Interim Report available now because we believe it to contain unique information about the benefits of private enforcement of the antitrust laws. We are studying 40 relatively recent cases or groups of cases in all and plan to expand and “polish” this report as soon as the remaining eleven case studies have been fully edited and their information digested. Meanwhile, we present this to you, emphasizing that it is not yet in law-review-ready condition.

Much has been said and written about the alleged deficiencies of private antitrust cases, usually in the form of generalizations without empirical data. This Commission has tentatively developed recommendations relating to treble damages, contribution, reduction of claims, and indirect purchasers, among other topics dealt with in our Interim Report. We do not, of course, assert that private enforcement is perfect, but there are substantial benefits of private enforcement that may not be receiving their due recognition.

While the Interim Report is not intended to reflect a representative sample of private antitrust cases, it does reveal a good deal about the benefits of private antitrust cases for consumers and businesses. The data suggest that many of the generalizations that are commonly voiced about private antitrust cases may not be accurate.

For example, we call your attention to:

- the documentation of the astonishing amount of compensation obtained for victims (between \$14.237 and \$15.920 **billion** in cash from the 29 cases or groups of cases);
- the variety of ways in which cases arise (more than 70% of the cash came in cases that were **not** “follow-on’s” to government action);
- the surprising number of rule of reason cases; and
- the substantial variations in the size of awarded attorneys’ fees.

The case studies were undertaken by a variety of attorneys, academics, and law students (who are identified in Appendix II) under the supervision of Professor Robert H. Lande of the University of Baltimore School of Law, a director of the AAI. The summary was written by Professor Lande and Professor Joshua P. Davis of the University of San Francisco School of Law. We would appreciate any comments on this Interim Report, as a more complete and carefully edited final version will be prepared in the near future.