An Evaluation of Private Antitrust Enforcement: 29 Case Studies

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Interim Report

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The distinctive system of private enforcement that we have in this country is substantially underappreciated. Congress's venerable "private Attorney General" idea[2] has produced tremendous benefits for the United States economy - for businesses of all sizes and, ultimately, for consumers. It has helped to deter anticompetitive behavior and to compensate victims of illegal activity. It has enabled U.S. businesses and consumers to protect themselves from economic exploitation, both by those who subvert the free market in general and by foreign cartels in particular. It has saved the U.S. taxpayer tremendous sums in enforcement costs by shifting the enormous burdens and risks of litigating against sophisticated, well-financed lawbreakers to private plaintiffs' counsel.

These private attorneys general often work thousands of hours and lay out millions of dollars in the course of prosecuting antitrust litigation - time and costs which are reimbursed only if plaintiffs prevail. Private enforcement has often substituted for federal and state action entirely when government did not act at all or did not achieve meaningful results. Private actions have also complemented governmental enforcement in many situations where the government investigated, prosecuted, and imposed penalties, but was unable to compensate private victims for the harms they suffered as a result of antitrust violations. Private antitrust enforcement has also restructured many industries in ways that have improved efficiency and

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[2] The federal antitrust laws permit a private right of action, as well as awarding attorneys' fees to successful plaintiffs. 15 U.S.C § 15 (Supp. 1992). In doing so, these laws create "private attorneys general," providing incentives to pursue private litigation in the public interest. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

competitiveness, redounding to the benefit of consumers, the affected industries themselves, and the economy as a whole.[3]

Yet, numerous criticisms have been leveled against private antitrust litigation, often without any substantive or empirical basis.[4] Some maintain that private actions all too often result in no real benefits for overcharged purchasers.[5] A few call for the complete abolition of private rights of action.[6] Others call for its curtailment in various ways.[7] Many of those who

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[3] As Irwin Stelzer observed, "An army of private enforcers, enlisting help from attorney-entrepreneurs free to accept cases on a contingency fee basis, freed of 'loser pays' obligations, is an important supplement to those limited resources. In America, the number of private actions brought under the antitrust laws historically had exceeded by ten times the number brought by the government. True, many of these follow successful government-initiated actions, but it is also true, according to the estimate of one scholar, that some 80% of court decisions establishing important principles (not all of which I find agreeable, I might add) in the competition policy area have resulted from private actions." Irwin Stelzer, *Implications for Productivity Growth in the Economy*, notes for talk at *Workshop on Private Enforcement of Competition Law*, sponsored by Office of Fair Trading, at p. 2 (London, England, Oct. 19, 2006).

[4] Ironically, some of the most strenuous critics of private enforcement are avid supporters of having private entities play greater roles in other areas of the economy.

[5] This belief was ably summarized by Professor Cavanagh: "Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing. Coupon settlements, wherein plaintiffs settle for 'cents off' coupons while their attorneys are paid their full fees in cash fall within this category. Coupon settlements may take the form of a discount certificate on future purchases from defendants, or, as in the case of airlines, a right to discounts on future travel. Coupon settlements are of dubious value to the victims of antitrust violations. First, the plaintiffs may never bother to redeem the coupon.... Second, even if they do choose to redeem the coupons, there may be no real financial benefit. For instance, if plaintiffs have a discount certificate to buy equipment from the phone company, they may be able to buy comparable equipment more cheaply from Circuit City or Radio Shack.... Clearly, the types of coupon settlements described here, which are not atypical, confer no real benefits on the plaintiffs. Equally important, defendants are not forced to disgorge their ill-gotten gains when coupons are not redeemed. In such situations, it is difficult to justify paying attorneys their full fees in cash, instead of in kind." Edward Cavanagh, *Antitrust Remedies Revisited*, 84 Or. L. Rev. 147, 163 (2005)(footnote omitted).

However, Professor Cavanagh only provides an isolated anecdote to support these conclusions. He makes no effort to assess whether the type of settlement he describes is in fact "not atypical". He provides no data to show how often antitrust class action cases result in useless coupons. Nor does he substantiate how often private cases result in violators not being forced to give up their illegal gains while plaintiffs' attorneys obtain their "full fees in cash".

[6] For example, Professors Elzinga and Breit would "replace the entire damage induced private actions approach with a system of fines (well in excess of current levels). This proposal would eliminate the perverse incentives and misinformation effects and reparation costs. Public enforcement has the advantage of separating incentive for enforcement from the penalty itself." William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J. L. & Econ. 405, 440 (1985). Professors Elzinga and Breit do not, however, provide data that supports their conclusions by showing, for example, how common "perverse" private suits are.

[7] For example, Professor Hovenkamp writes that treble damages and attorneys' fees for victorious plaintiffs give plaintiffs too great an incentive to sue: "As a result, many marginal and even frivolous antitrust cases are filed every year, and antitrust litigation is often used as a bargaining chip to strengthen the hands of plaintiffs who really have other complaints." Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 59 (Cambridge: Harvard University Press 2005). Professor Hovenkamp does not, however, privide data that supports his conclusions.

point to its perceived flaws rely all too often on questionable anecdotes rather than data to support their arguments.[8] We emphasize that we are not disputing that many of these anecdotes raise real concerns about abuses in particular cases. Private antitrust enforcement certainly is not perfect.[9] Our point, however, is that a valid assessment of the net efficacy of private enforcement, which accounts in most years for more than 90% of filed antitrust cases,[10] can be made only by also considering its benefits to victimized consumers and businesses, and to the economy and the public interest more generally.

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[8] For example, Michael Denger, former Chair of the ABA Antitrust Section, wrote: "Substantial windfalls go to plaintiffs that are not injured or only minimally injured." Remarks of Michael L. Denger, Chair's program, 50th Anniversary Spring Meting, ABA Antitrust Section, April 24-26, 2002, at 15. But Mr. Denger provides no data at all to prove his assertions, or any citations to scholarly articles containing such data. He does not even provide a single supporting anecdote. He also fails to address any of the well-known deterrence-related benefits of private enforcement, or to show why society would be better off if antitrust violators were permitted to keep their windfalls.

AMC Commissioner Cannon wrote: "[P]rivate plaintiffs act in their own self-interest, which may well diverge from the public interest. Private plaintiffs are very often competitors of the firms they accuse of antitrust violations, and have every incentive to challenge and thus deter hard competition that they cannot or will not meet. If the legal system were costless and errorless, these incentives would pose no problem. However, litigation is expensive and courts and juries may erroneously conclude that procompetitive or competitively neutral conduct violates the antitrust laws. Under the conditions, private plaintiffs will bring suits that should not be brought and that deter competitively beneficial conduct. They know that defendants often will be willing to offer significant settlements rather than incur substantial litigation costs and risks. Since potential defendants know this too, they will refrain from engaging in some forms of potentially procompetitive conduct in order to avoid the cost and risk of litigation." W. Stephen Cannon, *A Reassessment of Antitrust Remedies: The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 Antitrust L.J. 103 (1986).

AMC Commissioner Jacobson co-authored the following observations: "For the weaker firm suing the stronger firm, the suit may be a way of sensitizing the stronger firm so that it will not undertake any aggressive actions while the suit is outstanding. If the stronger firm feels itself under legal scrutiny, its power may be effectively neutralized.

For large firms suing smaller firms, private antitrust suits can be veiled devices to inflict penalties. Suits force the weaker firm to bear extremely high legal costs over a long period of time and also divert its attention from competing in the market. Or, following the argument above, a suit can be a low-risk way of telling the weaker firm that it is attempting to bite off too much of the market. The outstanding suit can be left effectively dormant through legal maneuvering and selectively activated (inflicting costs on the weaker firm) if the weaker firm shows signs of misreading the signal."

Jonathan M. Jacobson & Tracy Greer, *Twenty-one Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 Antitrust L.J. 273 (1998) (quoting, Michael Porter, Competitive Strategy 85-86 (1980)).

However, these authors do not provide systematic data to support their conclusions.

[9] Government enforcement also is not perfect.

[10] See Sourcebook of Criminal Justice Statistics Online, http//wwwalbany/edu/sourcebook/pdf/t5412004.pdf Table 5.41.2004, Antitrust Cases filed in U.S. District Courts, by type of case, 1975-2004. For the most recent reported year 95.7% of all antitrust cases filed were private cases. In only 9 out of 30 years reported did the percentage of private cases fall below 90%: 83.4 was the lowest reported percentage.

In fact, there are many reasons to expect that private antitrust actions complement government enforcement of the antitrust laws in important ways. Indeed, private enforcement may be every bit as essential as public enforcement. As a practical matter the government cannot be expected to do all or even most of the necessary enforcing for various reasons including: budgetary constraints;[11] undue fear of losing cases;[12] lack of awareness of industry conditions;[13] overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behavior;[14] higher turnover among government attorneys,[15] and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are at times politically motivated.[16] One would expect a vigorous

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[11] This is especially true in the current climate of tight federal budgets. Critics of private enforcement never explain where, if private actions were abolished, the substantial amount of money would come from to replace the resources that otherwise would be spent by the private enforcers. Nor do they discuss the deleterious effects on deterrence and victim compensation that curtailing private enforcement would bring.

[12] Professor Calkins notes: "Governmental agencies also hesitate to litigate because of fear of defeat. Courtroom setbacks can demoralize agency staff, raise questions in the eyes of observers, and impose political costs. Few agency annual reports boast about the well-fought loss, and, in an era in which governmental accountability is fashionable, it is challenging to characterize losses as accomplishments.

All too often, agencies worry about their win rates.... the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice boast about the rate at which merger challenges are successfully resolved; and general counsels who are nominated for higher office like to claim that their agency won a high percentage of its cases. Everyone wants a good batting average. Unfortunately, a single loss can ruin a good batting average compiled with few at-bats. It is one thing to lose one of many cases; it is considerably more devastating to lose a third, half, or more of one's cases." Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 St. John's L. Rev. 1 (1998) (citations omitted).

[13] "Private parties operating in the real markets...{will] act on the reality they confront." Stelzer, supra note 3, at 4. "The administrators of our antitrust laws might not feel competent to tell what sort of pricing practice is exclusionary or predatory. But the victims most certainly can." *Id.* at 5.

[14] Of course, many do not believe this. "[W]ho better to argue that ... [certain conduct is anticompetitive] than a competitor, injured by illegal anticompetitive practices, conversant in the technical jargon, on the sharp edge of customer relations, well informed on the details and consequences of the dominant firm's practices." Id. at 5-6

[15] The largest antitrust cases often last for 5-10 years. The government often has trouble retaining a well qualified team for this long a period. Private firms, by contrast, often are able to retain relatively intact teams for longer periods.

[16] Stelzer noted: "A less obvious but equally important reason that private enforcement is so important is that it is free of direct political influence. In America, administrations come and go, some more given to a jaundiced view of the activities of dominant forms than others, witness the soft settlement worked out with Microsoft when the Bush administration took office and control of the Department of Justice, and its current disinclination to file any Section 2 cases." Seltzer, supra note 3, at 6.

See also William F. Shughart II, Antitrust Policy and Interest-Group Politics 36 (Quorum Books 1990):

> Each of the two antitrust agencies are subject to separate influences. The Antitrust Division is part of the executive branch, so the Assistant Attorney General for Antitrust reports to the Attorney General and, indirectly, to the President. The Federal Trade Commission enjoys the independence from direct executive control associated with its special status, but it may be correspondingly more prone to Congressional influence and interference. See, e.g., American Bar Ass'n Comm'n. to Study the Federal Trade Commission, Report 98 (1969) (reporting the separate statement of Richard A. Posner). The agency is

private antitrust regime, then, to confer significant benefits over and above those conferred by a system reliant solely upon government enforcement.

This Interim Report is a first step toward providing empirical data for an analysis of some of these benefits. It does this by analyzing a group of 29 recent, successful, large-scale private antitrust cases. To our knowledge no similar study has ever been undertaken. Nevertheless, we note at the outset that this report does not purport to be comprehensive. It does not analyze every recent significant private antitrust case, purport to assess a random sample of private cases, or even to analyze all or most of the largest or "most important" ones.[17] Through electronic searches, websites and discussions with antitrust attorneys, we have simply tried to assemble and evaluate some of the largest and most beneficial private antitrust cases that have reached resolution since 1990. This is, moreover, an Interim Report. We hope to expand it to at least 40 private cases in the near future.

Of the cases we considered, we have not yet included some because acquiring the necessary information would have been too difficult or time consuming. We excluded still other cases because they produced benefits that were mostly injunctive in nature and, while they may have yielded tremendous benefits to the U.S. economy, these benefits would be difficult to quantify or substantiate. We also did not include any cases that were unsuccessful, or cases that only yielded "small" recoveries, even though in certain contexts a recovery of, say, $5 million should be considered a tremendous victory for the public interest.[18] Moreover, we have surely missed many successful cases and, for purposes of drawing lines and to save time, simply omitted cases that concluded before 1990 or that produced less than approximately $50 million in cash benefits.

The primary focus of this project was not, moreover, to demonstrate that private litigation often has established important legal precedents: other studies have done this convincingly.[19] Our "first cut" was, instead, to look for recent private cases that are final,

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supposed to respond to proper Congressional oversight, but ensuring that oversight is proper is no easy task.

[17] For example, we have not yet been able to include an analysis of the consumer class action suits against Microsoft, or the private cases against Microsoft by AOL Time Warner, IBM, or Novell, even though a highly respected journalist reported that together these cases recovered more than $3 billion for victims of antitrust violations. See Todd Bishop, Todd Bishop's Microsoft Blog, July 7, 2006, available at http://blog.seattlepi.nwsource.com/microsoft/month.asp?blogmonth=7/1/2006&page=4

[18] For example, in Pease v. Jasper Wyman & Son, 845 A.2d 552 (Me. 2004), plaintiffs won a $56 million verdict in a case that involved a conspiracy to suppress the price of wild blueberries. Plaintiffs also won significant non-monetary relief that restructured anticompetitive pricing methods in the industry. To avoid industry-wide bankruptcy, the plaintiffs settled with the buyers' cartel for roughly $5 million. This case was a purely private action. To our knowledge there was never a government enforcement action.

[19] For an excellent analysis see Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement*, European University Institute 11th EU Competition Law and Policy Workshop, (Florence, Italy, June 2-3 2006).

Professor Calkins found that, of leading antitrust cases decided before 1977, 12 were private and 27 were government. Of the leading cases decided 1977 or later, however, he found 30 private cases and only 15 government cases. *Id.* at 17. (Prof. Calkins took as his sample the leading cases printed in the leading antitrust casebook.)

including appeals, and that recovered at least $50 million.[20] We have no reason to believe that the cases studied in this report were more, or less, likely to establish important legal principles than other private cases. It might well be that many cases recovering far less than $50 million, or cases securing only injunctive relief (or, indeed, no relief at all), established more important legal principles.

Table 1 shows that the 29 cases (or groups of cases)[21] analyzed in this report provided a cumulative recovery in the range of $14.237 to $15.920 billion in allegedly[22] illegally acquired wealth to U.S. consumers and businesses.[23] All of this was cash - no products, services, discounts, coupons, or injunctive relief was included in this total.[24] Of this, $5.405 to $7.055 billion came from foreign companies that violated U.S. antitrust laws. Table 2 shows that without the private enforcement of the antitrust laws, in 12 cases this money would have remained with foreign lawbreakers instead of being returned to the U.S. consumers and businesses from which it was taken.

It is especially interesting that more than 70% of the total damages recovered - at least $10.069 to $11.469 billion - came from the twelve cases that did not follow federal, State, or EU government enforcement actions.[25] For the cases listed in Table 3, the private

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Prof. Calkins concludes: Today what is known as U.S. antitrust law no longer is exclusively or even principally the consequence of Justice Department [or FTC or State] enforcement. The leading modern cases on monopolization, attempted monopolization, joint ventures, proof of agreement; boycott; other horizontal restraints of trade, resale price maintenance, territorial restraints, vertical boycott claims, tying, price discrimination, jurisdiction, and exemptions are almost all the result of litigation brought by someone other than the Justice Department [or the FTC of the States]." *Id.* at 18-19. (citations omitted).

[20] Some of the cases included in this Interim Report did, however, establish important legal principles. See, for example, the analyses of the Fructose, Cardizem, and Terazosin cases (Note: The cases analyzed in this Interim Report are referred to by short names ("Fructose") for brevity. For a full list of the cases analyzed and their formal citations see Appendix II.)

[21] To arrive at this number we counted related cases as being a single "case." For example, there have been many separate cases involving vitamins cartels, brought by different plaintiffs and often against different groups of defendants. The vitamins cases could have been reported as 2 cases if, for example, the direct purchaser and indirect purchaser actions were analyzed separately. Alternatively, we could have reported that there were 3 primary categories of vitamins affected, so the vitamins cases could have been counted as 3 cases, or as 6 cases if these were each divided into direct and indirect purchaser cases. Alternatively, each vitamin case could have been reported separately. However, this report analyzes and counts them all together, as one "case."

[22] For simplicity, we are calling the charges "allegations" even though many were proven in court. In at least 14 cases either a court or administrative agency found an antitrust violation in the private case or a similar government case, or there was a guilty plea.

[23] We did not change recoveries to 2006 dollars or otherwise correct for the time-value of money. All figures include the awarded attorneys' fees.

[24] Securities were counted in one case because they had a readily ascertainable market value.

[25] For conduct that gave rise to both government and private litigation, we tried to untangle cause and effect as accurately as possible. For many cases our researchers spent dozens of hours on this issue alone. However, since government investigations can proceed for many months or even for years before the enforcers file suit, and because their records are confidential, and because the enforcers typically do not reveal or discuss their

plaintiffs uncovered and initiated the litigation, with the government following the private plaintiffs' lead or playing no role at all. Another $634 million came from cases with a mixed private/public origin (Table 4),[26] and still other private cases followed a government investigation, but provided significantly greater relief than the government action (if, indeed, one was brought), expanded the scope of inquiry and claims, or obtained relief against parties not included in the government actions (Table 5).[27] There also were cases whose origin we were not able to ascertain.[28]

While the authors certainly were aware that private antitrust cases often do not follow from government investigations, we were somewhat surprised at the high representation of private actions that were filed in the absence of government cases, or that significantly expanded the relief obtained through government enforcement alone. Not only were many cases not follow-ons, but many of these cases arose and proceeded in a wide and unpredictable range of ways, often involving a complex interplay between the federal government, states, and various classes of private plaintiffs. This shows that curtailing private litigation might undermine antitrust enforcement in ways that would be extremely difficult to predict.

Of the total $14.237 to $15.920 billion in recoveries we analyzed, $11.275 to $12.675 billion, in 26 cases, was recovered by direct purchasers; $2.082 million, in 5 cases, was recovered by indirect purchasers; and at least $1.178 billion, in 2 cases, was recovered by competitors. This means that more than 75% of the total damages we studied was recovered by direct purchasers.[29] Moreover, 9 of the 29 cases dealt with conduct that was governed solely by the rule of reason, which netted at least a combined $5.241 to $5.524 billion for victims. In addition, 3 other cases (Insurance, Cardizem and Buspirone) involved per se claims, but were not in the traditional, hard-core per se categories of naked price fixing or bid rigging. We would have predicted that a higher percentage of the 29 cases followed directly from hard-core per se offenses. Further, and perhaps not surprisingly, all but two of the cases were class actions.[30]

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investigations or what piece or body of evidence prompted them to file suit, we cannot always make definitive classifications.

[26] For example *In re* Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348 (N.D. Ga. 2000), started as a result of a different private antitrust suit, which led to a government investigation in the polypropylene carpet market, that in turn led to the private litigation analyzed in this Report. See Table 4 for other examples.

[27] For example, in Linerboard the FTC charged one firm with a unilateral violation of Section 5 of the FTC Act, but the private case involved an entire alleged cartel.

[28] See, for example, the El Paso case summary.

[29] As Professors Areeda and Hovenkamp observed, "[B]buyers have usually been preferred plaintiffs in private antitrust litigation." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 345 (2d ed. 2002).

[30] Although we did not intend this Interim Report to focus particularly upon class action litigation, the requirement of court approval of class action settlements enabled us to obtain information about class action settlements that often is not available in individual settlements, the terms of which can be confidential. Final verdicts are, of course, publicly available for individual cases, but these are rare in the antitrust field. See John M. Connor & Robert H. Lande, How High do Cartels Raise Prices? *Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513, Appendix (2005).

Some of the cases we analyzed also involved substantial non-monetary relief. For example, one case generated coupons, fully redeemable in cash if not used for five years (however, to be very conservative we did not count any part of this as a "cash" recovery).[31] Another case resulted in a $125 million rate reduction for consumers (we did not count this reduction in our benefits total).[32] Some cases involved extremely useful *cy pres* grants.[33] Many other cases restructured industries in ways that, according to the judge presiding over the litigation, provided improvements for competition even more beneficial than the monetary relief they conferred on the plaintiffs (even in cases where that monetary relief was quite large). For example, the Visa/MasterCard case was settled in April 2003 for "$3,383,400,000 in compensatory relief, plus additional injunctive relief valued at $25 to $87 billion or more."[34] Similarly, NASDAQ decreased the spreads received by market makers, the Insurance litigation eliminated restrictions on insurance policies, and NCAA eliminated caps on pay to college coaches. Further, together the generic drug cases—Buspirone, Cardizem, Oncology (Taxol), Relafen, Remeron, and Terazosin—discouraged collusion between brand name and generic drug manufacturers, saving purchasers and consumers many millions, perhaps even billions, of dollars in lower cost drugs.

An analysis of the attorneys' fees awarded in these cases provides a more interesting and complex picture than is generally recognized. The amounts awarded varied, of course, based in large part upon the opinion of the presiding judge about the quality of the legal representation, the risks involved, and the success of the case. In a significant number of cases, the courts determined that the exemplary work of counsel and other factors warranted an award of one third of the recovery.[35] In other cases, particularly those involving recoveries of more than $500 million, counsel requested and the court awarded a smaller percentage of the fund. A point rarely appreciated is that plaintiffs' counsel often exercised significant self-restraint in these cases—the amount of the award reflected a request by class counsel of a relatively small percentage of the fund.[36] And, of course, an analysis of the fees awarded in these successful cases does not reflect others in which private counsel lost, recovered nothing for their time and received no compensation or reimbursement for their

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[31] See Auction House case summaries. These coupons traded for a value that reflected their discounted present value. They also comprised 20% of the legal fees paid to the prevailing attorneys, who said that they will redeem them for cash after the expiration of the mandatory five year period.

[32] See the El Paso summary.

[33] See, for example, the Insurance case. This case resulted in a cash settlement with a creative remedy that: (i) funded the development of a public entity that provides risk management education and technical services to small businesses, public entities, and non profits; and (ii) funded the States for development of a risk database for municipalities and local governments.

[34] See Wal-Mart Stores, Inc. v. Visa USA & MasterCard Int'l, 396 F.3d 96, 111 (2d Cir. 2005).

[35] Tables 6A and 6B show that, for the 24 cases where we were able to ascertain the attorney fee percentage, the court awarded a 33.3% fee seven times. Another seven cases resulted in attorneys' fees of 30-32%. By contrast, three of the five cases recovering more than $500 million awarded attorneys fees of only 5-7%.

[36] In El Paso, for example, plaintiffs' counsel received 6% of the common fund as an attorney's fee award - the amount that they requested.

substantial expenditures, often including hundreds of thousands of dollars in expert witness fees and other costs.[37]

In the cases we analyzed, the judges generally expressed great satisfaction with the efforts of the plaintiffs' counsel that appeared before them. To give a few examples, Judge Nancy G. Edmunds (E.D. Mich.), in her opinion approving the final settlement in the direct purchaser Cardizem case, awarded class counsel in attorneys' fees their full request of 30% of the total recovery of $110 million, noting that the award was justified by their "excellent performance on behalf of the Class in this hotly contested case."[38]

Similarly, the judge who oversaw the Fructose litigation, the Honorable Michael M. Mihm, repeatedly praised class counsel. "I've said many times during this litigation that you and the attorneys who represented the defendants here are as good as it gets. Very professional... You've always been cutting to the chase and not wasting my time or each others' time or adding to the cost of the litigation. And this was very difficult litigation... Skill and efficiency of the attorneys. As good as it gets. Complexity and duration of the litigation. It was very complex. We made some new law on more than one occasion."[39] He accordingly awarded class counsel 25% of the settlement fund in fees, in addition to costs, the precise amount that class counsel requested.

Chief Judge Thomas Hogan in one of the vitamins cases (the Choline chloride trial) stated in his opening remarks to the jury pool: "[T]his is a very challenging and interesting case ... involving, I think, some of the finest business litigating lawyers or litigation-type lawyers in the country that are before you that you will have the privilege to listen to."[40] After the jury returned a verdict of $49.5 million in damages for the class plaintiffs, Chief Judge Hogan thanked the jurors for their service and stated: "[T]his is a serious case, and you had the pleasure of having very excellent lawyers on both sides appear before you."[41]

There are numerous other examples of complimentary remarks: The judge in Automotive Refinishing Paint noted that plaintiffs' counsel "repeatedly demonstrated their skill in managing" the litigation;[42] the court in Buspirone stated, "let me say that the lawyers

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[37] In considering what is an appropriate contingent fee award, it is necessary to take into account the high proportion of contingent fee cases that do not result in any award to the attorneys. Unlike defense attorneys, who are normally paid by the hour, a system of contingent fees depends upon a portfolio of cases where the small number of large winners offsets the large number of cases in which there is a small—or no—fee.

[38] Order granting Sherman Act Class Plaintiffs' Motions for Final Approval of Settlement, Plan of Allocation and Sherman Act Class Counsel's Joint Petition for Attorney's Fees, Reimbursement of Expenses, and Incentive Awards for Named Plaintiffs. Order No. 49 at pg 21. *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682.

[39] See Trial Transcript of Oct. 4, 2004, at 45-46. *In re* Fructose Antitrust Litig., MDL No. 1087, Master File No. 94-1577.

[40] May 28, 2003 Trial Tr. at 25:1-6.

[41] June 13, 2003 Trial Tr. at 1520:8-10.

[42] *In re* Auto. Refinishing Paint Antitrust Litig., 2004 U.S. Dist. LEXIS 29162 *20 (E.D. Pa. Oct. 13 2004).

in this case have done a stupendous job. They really have.";[43] California Attorney General Bill Lockyer praised private counsel in El Paso noting they "were well-financed and expert litigators, bringing particular credibility to the [settlement] negotiations" and stating, "Class counsel were crucial to bringing [the settlement] to fruition";[44] the court in Linerboard made repeated comments to the effect that "the lawyering in the case at every stage was superb";[45] the court in Relafen lauded "the exceptional efforts of class counsel" and pointed out that the settlement was "the result of a great deal of fine lawyering on behalf of the parties";[46] and the court in Remeron thanked counsel on behalf of the judiciary "for the kind of lawyering we wish everybody would do"[47] and noted that "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience."[48]

Conclusions

Negative assertions about the efficacy of private litigation have been very well publicized. This might be due in part to the powerful economic interests that stand to benefit from a curtailment of private antitrust enforcement and, ultimately, from lax enforcement of the antitrust laws. The benefits of private antitrust litigation, by contrast, tend to be underappreciated. They deserve much more public attention and acknowledgement. This Interim Report is a first step toward recognizing those benefits.

[43] http://www.milbergweiss.com/whymilberg citing *In re* Buspirone Patent Litig., MDL Docket No. 1413 at 34:2-3 (S.D.N.Y. Nov. 6, 2003) (Final Approval Hearing Transcript).

[44] Declaration of Bill Lockyer 4 (November 5, 2003).

[45] 2005 WL 1221350, at *6 (E.D. Pa. June 2, 2004).

[46] *In re* Relafen Antitrust Litig., 231 F.R.D. 52, 80 (D. Mass. 2005).

[47] *In re* Remeron Antitrust Litig., Civil Action No. 02-2007 (FSH) (D.N.J. 2005) (Transcript of Proceedings at 15:16).

[48] *In re* Remeron Antitrust Litigation, 2005 U.S. Dist. LEXIS 27013 at *37 (D.N.J. 2005) (unpublished opinion).

Appendix I

The following tables provide a summary of key information about the antitrust cases studied by this report. All results were rounded to the nearest million dollars:

Table 1: Recoveries in Private Cases

Case	**Recovery ($ millions)**
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Automotive Refinishing Paint	67
Buspirone	220
Cardizem (direct class)	110
El Paso	1,427 (plus 125 in uncounted rate reductions)
Fructose	531
Graphite Electrodes	47
Insurance	36
Linerboard	202
Lysine	65
Oil Lease	194
NASDAQ	1,027
Paxil	165
Platinol	50
Polypropylene Carpet	50
RealNetworks	478 to 761
Relafen	250
Remeron	75

Sun	700
Vitamins	4,200 to 5,600
Terazosin	74
Visa/MasterCard	3,383
Commercial Explosives	77
Taxol	66
Drill Bits	53
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
NCAA	74
Total	14,237 to 15,920

Table 2: Recoveries from Foreign Cartels & Monopolies

Case	**Recovery ($ millions)**
Auction Houses	almost all the $452 recovered by U.S. citizens
Automotive Refinishing Paint	31
Cardizem	110
Fructose	100
Commercial Explosives	62
Graphite Electrodes	47
Lysine	24
Remeron	75
Relafen	Unknown amount - much of $250
Rubber Chemicals	268
Sorbates	36
Vitamins	4,200 to 5,600
Total	5,405 to 7,055

Table 3: Private Litigation Not Preceded by Government Action

Case	**Recovery ($ millions)**
Buspirone	220
Cardizem	110
Taxol	66
Commercial Explosives	77
NCAA	74
NASDAQ	1,027
Oil Lease	220
Paxil	165
Relafen	250
Remeron	75
Visa/MasterCard	3,383
Vitamins	4,200 to 5,600
Total	10,069 to 11,469

Note: In some cases we have not been able to determine whether private and public action came first, or arose simultaneously or in a mixed fashion.

Table 4: Cases with a Mixed Private/Public Origin

Case	**Recovery ($ millions)**
Drill bits - private suit led to government investigation which prompted this suit	53
Fructose - uncovered by government action, but no indictments	531
Polypropylene Carpet - conduct uncovered in different private case, to DOJ investigation, to private case	50
Total	634

Table 5: Private Recoveries that Were Significantly Broader than the Government Enforcement Action (in addition to all of the compensation to victims noted in Table 1) (Does not include the cases in Table 3 that were not preceded by a government action

Case	**Why private recovery was significantly more than government remedy**
Automotive Refinishing Paint	Government investigation yielded no indictments; private cases got $67 million
El Paso	Private plaintiffs obviated need for separate government action seeking monetary recovery.
Fructose	Government did not indict antitrust violators.
Insurance	Private plaintiffs provided compensation and contributed to restructuring of industry, eliminating restrictions on insurance and reinsurance.
Linerboard	FTC action was against one firm for unilateral conduct; the private case involved a conspiracy
Polypropylene Carpet	Private plaintiffs obtained greater monetary recovery and prosecuted larger number of defendants.
Relafen	No federal case; state governments intervened only after settlement – private plaintiffs provided the compensation to victims.
Sun v. Microsoft	Private plaintiffs made broader allegations than U.S. government action, obtained information that supported later European action, and protected distribution of "pure" Java software.
Specialty Steel	Private action included longer time period.

Table 6A: Percentage of Recovery Awarded as Attorneys' Fees
For Recoveries less than $100 million

Case (millions of $ in the recovery)	**Attorneys' Fee Percentage**
Automotive Refinishing Paint (67)	32
NCAA (74)	26.8
Remeron (75)	33.3
Platinol (50)	33.3
Remeron (75)	33.3
Taxol (66)	30
Drill Bits (53)	30.8
Polypropylene Carpet (50)	33.3
Sorbates (96)	22-33.3
Terazosin (74)	33.3
Specialty Steel (50)	30
Lysine (65)	7
Commercial Explosives (77)	30
Graphite Electrodes (47)	15

Table 6B: Percentage of Recovery Awarded as Attorneys' Fees
For Recoveries between $100 million and $500 million

Buspirone (220)	33.3
Cardizem (110)	30
Linerboard (202)	30
Oil Lease (220)	25
Paxil (165)	20 & 30
Relafen (250)	33.3

Table 6C: Percentage of Recovery Awarded as Attorneys' Fees
For Recoveries Exceeding $500 million

Visa/MasterCard (3,383)	**6.5**
Auction Houses - (552)	5.2 (plaintiffs' attorneys got 20% of their fee in coupons - the same % that class members got of their recovery in coupons)
El Paso (1,427)	6
Fructose (531)	25
NASDAQ (1,027)	13

Table 7: Recoveries by Category of Plaintiff

Direct		**Indirect**		**Competitor**		**Unsure**	
Case	**Result**	**Case**	**Result**	**Case**	**Result**	**Case**	**Result**
Lysine	50	Lysine	15	Sun	700		
Auction Houses	452	Vitamins	500	Real-Networks	478-761		
Automotive Refinishing	67	Paxil	65				
Buspirone	220	Relafen	75				
Cardizem	110	El Paso	1,427				
Fructose	531						
Graphite Electrodes	47						
Insurance	36						
Linerboard	202						
Oil Lease	220						
Paxil	100						
Platinol	50						
Polypropylene Carpet	50						
Relafen	175						
Sorbates	96						
Specialty Steel	50						
Terazosin	74						
Visa/MasterCard	3,383						
Vitamins	3,700 to 5,100						
NASDAQ	1,027						

Sorbates	96						
Drill Bits	53						
Commercial Explosives	77						
Remeron	75						
Rubber Chemicals	268						
Taxol	66						
Total	11,275 to 12,675		2,082		1,178-1,461		

Note: The El Paso settlement was recovered mostly, but not entirely, by indirect purchasers. We have not been able to segregate the small amount of recovery by direct purchasers.

In addition, it should be noted that NCAA involved a monopsony by direct purchasers.

Table 8: Recoveries in Rule of Reason Cases

Case	**Recovery ($ millions)**
NCAA	74
Paxil - Section 2	165
Platinol - Section 2	50
RealNetworks	478-761
Relafen - Section 2	250
Remeron - Section 2	75
Sun	700
Taxol - Section 2	66
Visa/MasterCard	3,383
Total	5,241 to 5,524

Insurance, Cardizem and Buspirone charged per se violations, but they were not hard-core price fixing or bid rigging cases. Several cases charged both per se and rule of reason violations. They were not included in this Table.

Appendix II

Following is a list of the cases included in this study and the researchers who analyzed them.

1. In re Auction Houses Antitrust Litig., 164 F. Supp. 2d 345 (S.D.N.Y. 2001), aff'd, 2002 U.S. App. LEXIS 15327(2d Cir. 2002) and Kruman v. Christie's International PLC, 284 F.3d 384 (2d Cir. 2002). Douglas Richards

2. In re Automotive Refinishing Paint Antitrust Litigation, 177 F. Supp. 2d 1378 (E.D. Pa. Nov. 15, 2001). Maarten Burggraaf & Andrew Sullivan

3. In re: Buspirone Antitrust Litigation, 185 F. Supp. 2d 340 (S.D.N.Y. 2002) MDL Doc. No. 1413, *and In re Buspirone Patent Litigation*, 185 F. Supp.2d 363 (S.D.N.Y. 2002). Final Settlement approval at(2003 U.S. Dist. Lexis 25638, April 17, 2003). Morgan Anderson & Erika Dahlstrom

4. In re: Cardizem CD Antitrust Litigation, MDL Docket No. 1278; 105 F. Supp 2d 682 (E. Dist. Mich. 2000); 332 F.3d 896 (6th Cir. 2003). Morgan Anderson

5. In re Commercial Explosives Litigation, 945 F. Supp. 1489 (D. Utah 1996). Ruthie Linzer

6. Natural Gas Antitrust Cases I, II, III & IV. *Sweetie's, v. El Paso Corporation,* No. 319840 (S.F. Super. Ct.); *Continental Forge Company v. Southern California Gas Co.,* No. BC237336 (L.A. Super. Ct.); *Berg v. Southern California Gas Co.*, No. BC241951 (L.A. Super. Ct.); *City of Long Beach v. Southern California Gas Co.,* No. BC247114 (L.A. Super. Ct.); *City of L.A. v. Southern California Gas Col,* No. BC265905 (L.A. Super. Ct.); *Phillip v. El Paso Merchant Energy LP,* No. GIC 759425 (San Diego Super. Ct.); and *Phillip v. El Paso Merchant Energy LP,* No. GIC 759426 (San Diego Super. Ct.). (El Paso) Erin Bennett & Polina Melamed

7. In Re: Fructose Antitrust Litigation, M.D.L. File 1087, Master File # 94-1577 (Michael Mihm) (C.D.Ill. 1995) Michael Freed

8. In Re: Graphite Electrodes Antitrust Litigation, 2003 WL 22358491 (E.D. Pa. 2003) Norman Hawker

9. In Re: Insurance Antitrust Litigation, 723 F. Supp. 464 (N.D. CA 19989); reversed, 938 F. 2d 919 (9th Cir. 1991); affirmed sub nom Hartford Ins. Co. v. California, 509 U.S. 764 (1993). Maarten Burggraaf

10. In re Linerboard Antitrust Litig., MDL No. 1261, 2000 WL 1475559, at *1–3 (E.D.Pa. Oct.4, 2000) ("Linerboard I"); In re Linerboard Antitrust Litig., 203 F.R.D. 197, 201–04 (E.D.Pa.2001) ("Linerboard II"); In re Linerboard Antitrust Litig., 305 F.3d 145, 147–49 (3d Cir.2002) ("Linerboard III"); In re Linerboard Antitrust Litig., 321 F.Supp 2d 619 (E.D. Pa. 2004). Marten Burggraaf

11. In re Amino Acid Lysine Antitrust Litigation, MDL No. 1083, 918 F. Supp. 1190. Maarten Burggraaf

12. In Re: NASDAQ Market-Makers Antitrust Litigation, M.D.L. No, 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1998). Maarten Burggraaf

13. Law v. National Collegiate Athletic Ass'n., 902 F.Supp. 1394 (D. Kan. 1995); affirmed, 134 F. 3d 1010 (10th Cir. 1998); reversed, 938 F. 2d 919 (9th Cir. 1991). Joey Pulver

14. North Shore Hematology & Oncology Associates v. Bristol-Myers Squibb Co., Civil Action No.:04 cv248(EGS) (2004) (Platinol) Tara Shoemaker

15. In re Lease Oil Antitrust Litigation (No. II), 186 F.R.D. 403 (S .D. Tex. 1999), 142 Oil & Gas Rep. 532 (1999) Stratis Camatsos

16. Oncology & Radiation Associates v. Bristol-Meyers Squibb Co., Case No. 1:04CV00248 (D.D.C.) (Taxol). Tara Shoemaker

17. Stop N Shop Supermarket Company, et. al. v. SmithKline Beecham Corp. Civil Action No. 03-CV-4578 (E.D. Pa. 2005), and; Nichols v. SmithKline Beecham Corp., No. 00-CV-6222 (E.D. Pa.2005) (Paxil)

18. In Re: Polypropylene Carpet Antitrust Litigation, 93 F. Supp. 2d 1348 (N.D. Ga. 2000). Drew Stevens

19. RealNetworks, Inc. v. Microsoft Corp., Civil Action No. JFM-04-968, MDL Docket No. 1332 (D. Md.) (2005 settlement) Norman Hawker

20. Red Eagle Resources, et al. v. Baker Hughes Inc., et al., No. 4:91cv00627(Docket)(S. D. Tex. Mar. 11, 1991)(In re Drill Bits Antitrust Litigation) Ruthie Linzer

21. In re Relafen Antitrust Litigation, Civil Action No. 01-12239-WGY; 346 F. Supp. 2d 349 (D. Mass. 2004); 231 F.R.D. 52 (D. Mass. 2005). Morgan Anderson & Erika Dahlstrom

22. In re: Remeron Antitrust Litigation, 2005 U.S. Dist. Lexis 27013 (D.N.J. 2005). Morgan Anderson & Erika Dahlstrom

23. In Re Rubber Chemicals Antitrust Litigation, 350 F.Supp.2d 1366, 2005-1 Trade Cases P 74,804 (Jud. Pan. Mult. Lit. Dec. 21, 2004((No. MDL 1648). Ruthie Linzer

24. *In re Sorbates Direct Purchaser Antitrust Litigation*, Not Reported in F.Supp.2d, 2002 WL 31655191 (N.D. Cal.) Joey Pulver

25. Sun Microsystems v. Microsoft, 333 F.3d 517 (4th Cir. 2003). Robert Lande

26. In Re: Terazosin Hydrochloride Antitrust Litigation Case No. 99-MDL-1317-Seitz/Klein, a/k/a Louisiana Wholesale Drug Co., Inc. v. Abbot Laboratories, et al. S.D. Fla. Case no. 98-3125 and Valley Drug Co. v. Abbot Laboratories, et al. S.D. Fla. Case No. 99-7143.
Morgan Anderson & Erika Dahlstrom

27. Transamerican Refining Corp. v. Dravo Corp., et al., No. 4:88CV00789(Docket)(S.D.Tex. Mar. 10, 1988)(Specialty Steel Piping Antitrust Litigation)(1992 settlement) Ruthie Linzer

28. In Re: Visa Check/MasterMoney Antitrust Litigation, a/k/a Wal-Mart Stores, Inc. et. al v. Visa U.S.A. Inc. and MasterCard International Inc., 396 F. 3d 96, 114 (2d Cir. 2005).
Robert Lande

29. *In re Vitamins Antitrust Litigation* (many related cases)
Brian Ratner & Robert Lande