Report of the American Antitrust Institute's Private Enforcement Project

Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases

Robert H. Lande and Joshua P. Davis

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The goal of this Report is to take a first step toward providing an empirical basis for assessing whether private enforcement of the antitrust laws is serving its intended purposes and is in the public interest. To do this the Report assembles, aggregates, and analyzes information about forty of the largest recent successful private antitrust cases. This information includes, inter alia, the amount of money each action recovered, what proportion of the money was recovered from foreign entities, whether the private litigation was preceded by government action, the attorney's fees awarded to plaintiffs' counsel, on whose behalf money was recovered (direct purchasers, indirect purchasers, or a competitor), and the kind of claim the plaintiffs asserted (per se or rule of reason). This information is then used to help formulate policy conclusions about the desirability and efficacy of private enforcement of the antitrust laws.

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[1] The authors are Venable Professor of Law at the University of Baltimore School of Law and a Director of the American Antitrust Institute, and Professor of Law at the University of San Francisco School of Law and a member of the Advisory Board of the American Antitrust Institute, respectively. They are grateful to the American Antitrust Institute ("AAI") for assisting with and supporting this project in numerous ways. However, all conclusions in this Report are solely those of the authors and are not necessarily those of the AAI. (The AAI accepts contributions to its general treasury from a multitude of sources, including various law firms whose interests may be consistent with views expressed herein. A list of contributors is available upon request.)

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The Purposes of Private Enforcement and Private Remedies

The legislative history[2] of and the case law[3] interpreting the federal antitrust laws indicate that one of their important goals is to compensate victims of illegal behavior. Moreover, their primary goal is to prevent wealth transfers from victims to firms with market power,[4] a concept that is consistent with and complementary to the goal of compensating overcharged victims of antitrust violations. To be sure, the decision of Congress to award "treble damages" might suggest that at least two-thirds of the damages remedy was intended only for punitive or deterrence purposes. It is possible,

[2] Senator Coke complained about a bill that would have provided only for double damages: "How would a citizen who has been plundered in his family consumption of sugar by the sugar trust recover his damages under that clause? It is simply an impossible remedy offered him.... [H]ow could the consumers of the articles produced by these trusts, the great mass of our people--the individuals--go about showing the damages they had suffered? How would they establish the damage which they had sustained so as to get a judgment under this bill? I do not believe they could do it. 21 Cong. Rec. 2615 (1890).

Representative Webb stated that the damages provision "opens the door of justice in every man whenever he may be injured by those who violate the antitrust laws and gives the injured party ample damages for the wrong suffered." 51 Cong. Rec. 9073 (1914). He also stated that "we are liberalizing the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere--anywhere you can catch the offender...." 51 Cong. Rec. 16274 (1914).

See also the discussion in Herbert Hovenkamp, Antitrust's Protected Classes, 88 MICH. L. REV. 1, 21-30 (1989).

[3] See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("[The treble damages remedy was passed] as a means of protecting consumers from overcharges resulting from price fixing.") A large number of Supreme Court cases hold that both deterrence and compensation are purposes of the treble damages remedy. See, e.g., Atlantic Richfield Co. v. USA Petroleum, 495 U.S. 328, 330 (1990); California v. ARC Am. Corp., 490 U.S. 93, 102 (1989); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 557 (1982); Pfizer, Inc. v. India, 434 U.S. 308, 314 (1978); Illinois Brick Co. v. Illinois, 431 U.S. 720, 746, 748, 749 (1977); Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 502 (1969).

[4] Many statements by the Sherman Act's sponsors about the overall purpose of the proposed legislation suggests that their primary concern was that firms might use market power to increase prices to consumers. For example, Senator Sherman termed monopolistic overcharges "extortion which makes the people poor," and "extorted wealth." Congressman Coke referred to the overcharges as "robbery." Representative Heard declared that the trusts, "without rendering the slightest equivalent," have "stolen untold millions from the people." Congressman Wilson complained that a particular trust "robs the farmer on the one hand and the consumer on the other." Representative Fithian declared that the trusts were "impoverishing" the people through "robbery." Senator Hoar declared that monopolistic pricing was "a transaction the direct purpose of which is to extort from the community . . . wealth which ought to be generally diffused over the whole community." Senator George complained: They aggregate to themselves great enormous wealth by extortion which makes the people poor." See Robert H. Lande, "The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust," 33 Antitrust Bull. 429, 449-50 (1988) (footnotes omitted).

however, that even this portion is necessary to compensate plaintiffs for the difficulty of bringing suit,[5] for unawarded prejudgment interest,[6] and for difficult to quantify and unawarded damages items such as the allocative inefficiency effects of market power and the value of plaintiff's time expended pursuing litigation.[7] Moreover, antitrust verdicts producing treble damages are rare,[8] and we believe that few, if any, of the many antitrust cases that settle do so for more than single damages.[9] Of course, private enforcement also serves to deter antitrust violations.[10]

[5] Senator Sherman observed that "the measure of damages, whether merely compensatory, putative [sic], or vindictive, is a matter of detail depending upon the judgment of Congress. My own opinion is that the damages should be commensurate with the difficulty of maintaining a private suit against a combination such as is described." 21 Cong. Rec. 2456 (1890). Representative Webb stated, "[u]nder the civil remedies any man throughout the United States, hundreds and thousands, can bring suit in the various jurisdictions and thus the offender will begin to open his eyes because you are threatening to take money out of his pocket." 51 Cong. Rec. 16,275 (1914).

[6] Damages should include victims' lost prejudgment interest, the lack of which often can reduce the value of an antitrust damages award by 50%. See Robert H. Lande, "Are Antitrust "Treble" Damages Really Single Damages?" 54 Ohio State L.J. 115, 130-36, 158-68 (1993).

[7] As the Antitrust Modernization Commission noted: "Indeed, in light of the fact that some damages may no be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover 'speculative' damages) treble damages help ensure that victims will recover at least their actual damages." Antitrust Modernization Commission, Report and Recommendations, at 246 (2007) (footnote omitted).

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

[8] For a list of antitrust verdicts that calculated damages amounts see John M. Connor & Robert H. Lande, *How High do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513, Appendix (2005).

[9] For an analysis of this issue see Robert H. Lande, "Why Antitrust Damage Levels Should Be Raised, 16 Loyola Consumer L. Rev. 329 (2004).

[10] See, e.g., Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977).

Criticisms of Private Enforcement

While government criminal and civil actions are essential to deter future antitrust violations, virtually the only way to secure redress for the victims of antitrust violations is through private litigation.[11] However, many commentators have been criticized the existing system of private antitrust litigation and the private actions that have been undertaken. Some assert that private actions all too often result in remedies that provide lucrative attorney's fees but secure no real benefits for overcharged purchasers.[12] Others suggest that private class actions merely follow an easy trail blazed by government enforcers and that private actions add little to government sanctions.[13] Yet others contend that private antitrust damages lead to excessive deterrence in light of government sanctions.[14] Indeed, one common criticism of private actions in general —

[11] State Attorneys' General can bring parens patria actions on behalf of victims located within their states, and the Federal Trade Commission has succeeded in disgorgement actions, but these actions are rare compared to private actions.

[12] 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.... 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 provides only an anecdote to support these conclusions. He makes no effort to assess whether the type of settlement he describes are in fact "not atypical". He provides no data to show how often antitrust class action cases result in useless coupons. For similar arguments see *infra* note 18.

[13] John C. Coffee, Jr. at one point subscribed to this view, Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working, 42 Md. L. Rev. 215, 223-226 (1983), but later concluded that the evidence was to the contrary in antitrust cases. John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669 n. 36 (1986 ("Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at '[l]ess than 20% of private antitrust actions filed between 1976 and 1983.'").

[14] An example of an argument, without empirical evidence, that criminal fines and prison terms reduce the need for treble damages in antitrust class actions is found in David Rosenberg and James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. Competition L. & Econ. 159, 162 (2006). For an argument that treble damages do not lead to

and of class actions in particular — is that they are a form of blackmail or extortion, one in which plaintiffs' attorneys, with little risk to themselves, force defendants into settlements based not on meritorious claims, but rather on the cost of litigation or fear of an erroneous and catastrophic judgment.[15] For these and related reasons many call for

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excessive deterrence and in fact should be increased further see Robert H. Lande, *Five Myths about Antitrust Damages*, 40 U.S.F. L. Rev. 651 (2006).

As the Antitrust Modernization Commission noted: "[S]ome have argues that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery." No actual cases or evidence or systematic overdeterrence were presented to the Commission, however." AMC Report, supra note 8 at 247 (footnotes omitted).

[15] See, e.g., John H. Beisner and Chares E. Borden, Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience ("Beisner and Borden, Expanding"), available at www.instituteforlegalreform.com/resources/ExpandingPrivateCausesofActionFinal.doc; John H. Beisner and Chares E. Borden, On the Road to Litigation Abuse: The Continuing Exportation of U.S. Class Actions and Antitrust Law ("Beisner and Borden, Exportation"), available at www.instituteforlegalreform.org/pdfs/beisner.pdf. Moreover, the argument runs, the plaintiffs' attorneys—particularly class counsel—settle cases in a way that lines their pockets but provides no meaningful compensation to the injured plaintiffs. Id. However, those who embrace this view provide no systematic empirical basis for its factual predicates.

Consider the claim that the costs of discovery for plaintiffs are trivial but can be exorbitant for defendants. See Beisner and Borden, Expanding at 12. Beisner and Borden make this assertion but offer no evidence that the cost of litigation is low for plaintiffs and that plaintiffs' counsel can spread any costs and risks across their overall portfolio. Id. at 18. They cite to Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 Duke J. Comp. & Int'l L. 125 (2003), but Rowe in turn offers no evidence and, indeed, contends generally that class actions would not be viable without contingency fees and fee shifting.

Similarly unsupported is Beisner and Borden's claim that the cost of discovery for defendants can run into "the tens of millions of dollars." Expanding at 13. To substantiate this assertion, they cite to Eric Van Buskirk, Raging Debate: Who Should Pay for Digital Discovery?, New York Law Journal at T4 (Jan. 30, 2003), who in turn cites to Rowe Entertainment, Inc. v. The William Morris Agency, Inc., 205 F.R.D. 421 (year). In Rowe, the *defendants* estimated the cost of recovering electronic data in response to a discovery request at $10 million, but the plaintiffs estimated the cost at $24,000 to $87,000, and the court ordered the plaintiffs to pay part of the expense of responding to the request. Id. at 424, 427, 433. Even as an anecdote for the high cost of discovery for defendants this example is highly dubious. Yet it has been cited as if it were a fact. See, e.g., Corinne Bergen, *Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat*, 5 J. Int'l Bus. & L. 203, 22 & n. 148 (2006) (citing Beisner and Borden, Expanding).

Much the same is true for the claim that class counsel receive high fee awards but the class receives little of value, see, e.g., id. at 218 (citing Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 Loy. Consumer L. Rev. 431, 437 (2004) (making this assertion unsupported by citation or example)), or that class cases are often brought without a meritorious basis. See, e.g., Gary D. Ansel, *Admonishing a Drunken Man: Class Action Reform*, 48 Antitrust Bulletin 451, 454, 455 (2003) (relying on "war-stories" and "hearsay" and providing no examples of frivolous lawsuits).

Also questionable is evidence for the assertion that defendants regularly settle class actions simply to avoid the risk of an erroneous, catastrophic loss. Along these lines, a version available on

the significant curtailment of private enforcement in significant ways.[16] Some even call for the complete abolition of private rights of action.[17]

While these criticisms have been longstanding and widespread, they have been made without any systematic substantive or empirical basis.[18] Those who point to the perceived flaws of private antitrust enforcement typically offer only anecdotes, some of which are questionable, rather than providing reliable and rigorous data to support their

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the Internet of an *amicus* brief for the Chamber of Commerce includes the following quotation: "A 1995 study of more than 400 class actions brought in four U.S. districts showed that in one of those districts, the Southern District of Florida, *every* class action was settled." Kathryn S. Zecca, Brief of Chamber of Commerce of the United States as Amicus Curiae in Support of Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) at 6 (submitted in Gilchrist v. State Farm, 390 F.3d 1327 (11th Cir. 2004). However, the empirical study that serves as a basis for this claim reveals that the sample in the Southern District of Florida was only six cases and that, on the whole, the settlement rate was slightly over 70%, Thomas E. Wilgang, et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 29-31 (1996), available at www.fjc.gov/public/pdf.nsf/lookup/rule23/pdf/$File/rule23.pdf. As others have pointed out, this settlement rate is about the same as in general litigation. See, e.g., Allan Kanner and Tibor Nagy, *Explosing the Black Mail Myth: A New Perspective on Class Action Settlements*, 57 Baylor L. Rev. 681, 697 (2005). Also without ultimate empirical basis are the judicial assertions that class certification coerces defendants into settling. See, e.g., Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001); In re Rhone-Poulenc, Inc., 51 F.3d 1293 (7th Cir. 1995). Moreover, there is an odd asymmetry in the judicial concern about vulnerable corporations—what about victims who are unable to pursue their legal rights against large corporations simply because their individual claims are not large enough to warrant litigation?

None of this establishes that critics of private litigation and class actions are wrong, and surely some of their anecdotes are correct. But it does suggest that their claims have not been proven.

[16] For example, Professor Hovenkamp writes that treble damages and attorney's 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, give data that supports his conclusions.

[17] 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 to support their conclusions.

[18] 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.

arguments.[19] Indeed, the same point applies to attacks on private litigation generally — critics tend to make factual assertions without an adequate empirical basis.

We emphasize that we are not disputing that the anecdotes the critics use may raise important concerns about abuses in particular cases. Private antitrust enforcement certainly is not perfect.[20] Our point, however, is that a valid assessment of the net efficacy of private antitrust enforcement, which accounts in most years for more than

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[19] 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 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 werecostless 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.

[20] Government enforcement also is not perfect.

90% of filed antitrust cases,[21] can be made only by also systematically considering its benefits to victimized consumers and businesses, and to the economy and the public interest more generally.

The Purpose and Design of This Study

This Report is a first step towards providing the empirical data necessary to assess some of the benefits of private antitrust enforcement. It does this by analyzing a group of 40 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 or in any way definitive. It does not analyze every recent significant private antitrust case, assess a random sample of private cases, or even include all of the largest or "most important" ones.[22] Through paper and electronic searches, website searches, 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.

Of the cases we considered, we did not include some because acquiring the necessary information would have been too difficult or time consuming. Other cases were so

[21] 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.

[22] For example, we were not able to include an analysis of the consumer class action suits against Microsoft, or the private cases against Microsoft by AOL Time Warner, even though a highly respected journalist reported that together these cases recovered more than $2 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.

recent that we have not yet been able to tell the precise value of the relief.[23] We excluded still other cases because they produced benefits that were mostly injunctive in nature and, while they may have yielded tremendous benefits to consumers or to the U.S. economy, these benefits would be difficult to quantify or substantiate. We also did not include any cases that were dismissed or otherwise were unsuccessful, or cases that yielded only "small" recoveries, even though in certain contexts a recovery of, say, $5 million should be considered a tremendous victory for the public interest.[24] Rather, we defined success simply in terms of plaintiffs either winning a favorable decision in court or obtaining a substantial settlement. 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. Finally, we made no attempt to ascertain what proportion of all private cases can be defined as successful, unsuccessful, or somewhere between the two.

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.[25] Our "first cut" was, instead, to look for recent private cases that are

[23] For example, the California Microsoft settlement is difficult to value in large part because the relief is not yet final. In re Microsoft I-V Cases, J.C.C.P. No. 4106, 135 Cal.App.4th 706 (2006). Because the California consumers in that case settled primarily for vouchers available on a "claims made" basis, the actual value of the settlement is yet to be determined. At a maximum, if every voucher is ultimately redeemed, Microsoft will pay out $1.1 billion in cash. However, even if no claims are made by the class, $733 million in vouchers and technology support will go to California public schools as part of a *Cy Pres* distribution.

[24] 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.

[25] 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.)

final, including appeals, and that recovered at least $50 million.[26] 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.

The Results of this Study

Table 1 shows that the forty cases (or groups of cases)[27] analyzed in this report provided a cumulative recovery in the range of at least $18.259 to $19.942 billion in allegedly[28] illegally acquired wealth to U.S. consumers and businesses.[29] All of this was cash -

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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).

[26] Some of the cases included in this 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 Report are referred to by short names (e.g., "Fructose") for brevity. For a full list of the cases analyzed and their formal citations see Appendix II.).

[27] 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."

[28] For simplicity, we are calling the charges "allegations" even though many were proven in Court.

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

Although a verdict would produce treble damages for victims, almost all of our cases involved settlements, and in none of the cases did a court determine the size of the damages. It is possible that some of these settlements were for an amount that exceeded the harm done from an antitrust violation, in which case the amount in excess of that harm could not readily be described as illegally acquired wealth. We know of no way to determine, however, whether any of the settlements exceeded single damages.

products, services, discounts, coupons, and injunctive relief were *not* included in this total.[30] Of this, more than $5.998 to $7.398 billion came from foreign companies that violated U.S. antitrust laws. Table 2 shows that 18 of the 40 cases involved this kind of recovery, which means that without the private enforcement of the antitrust laws this money would have remained with foreign lawbreakers instead of being returned to the U.S. consumers and businesses from which it was taken.[31]

It is especially interesting that of the total amount recovered the clear majority - at least 62% to 64%; $11.306 to $12.706 billion - came from the sixteen cases that did not follow federal, State, or EU government enforcement actions.[32] For each of the cases listed in Table 3, the private plaintiffs completely uncovered the violations, and initiated and pursued the litigation, with the government following the private plaintiffs' lead or playing no role at all. Another $829 million came from cases with a mixed private/public origin (Table 4),[33] and still other private cases followed a government investigation, but provided significantly greater relief than the government action (if, indeed, a government action was brought), expanded the scope of inquiry and claims, or obtained relief against parties not included in the government actions (Table 5).[34] There also were cases whose origin we were not able to ascertain.[35]

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

[31] This project did not select cases on the basis of whether a foreign defendant was likely to be involved. The selection criteria used were whether $50 million or more was paid to victims of the antitrust violation and the date of the completion of the litigation.

[32] 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 investigations or what piece or body of evidence prompted them to file suit, we could not always make definitive classifications.

[33] 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.

[34] 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.

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 it would be extremely difficult to predict.

Of the total $18.259 to $19.942 billion in recoveries we analyzed, $12.045 to $13.445 billion, in 32 cases, was recovered by direct purchasers; $2.111 billion, in 6 cases, was recovered by indirect purchasers; and $4.028 to $4.311 billion, in 6 cases, was recovered by competitors. This means that roughly 2/3 (66% to 67%) of the total recoveries we studied were obtained by direct purchasers. Moreover, 14 of the 40 cases dealt with conduct that was governed solely by the rule of reason, which netted at least a combined $8.182 to $8.465 billion for victims. In addition, 4 other cases[36] 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 40 cases followed directly from hard-core per se offenses. Further, and perhaps not surprisingly, all but 6 of the cases were class actions.[37]

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

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

[36] Insurance, Airline Ticket Commission, Cardizem and Buspirone.

[37] Although we did not intend this 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 often are 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).

(however, to be very conservative we did not count any part of this as a "cash" recovery).[38] Another case resulted in a $125 million rate reduction for consumers (we did not count this reduction in our benefits total).[39] Some cases involved extremely useful *cy pres* grants.[40] 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."[41] 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 consumers many millions, perhaps even billions, of dollars in lower cost drugs.

An analysis of the attorney's 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.[42] In other cases, particularly those

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[38] 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.

[39] See the El Paso summary.

[40] 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.

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

[42] Tables 6A and 6B show that, for the 30 cases where we were able to ascertain the attorney's fee percentage, nine cases involved an award of a third of the recovery, and eight cases involved an

involving recoveries of more than $500 million, counsel requested and the court awarded a much 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.[43] 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 substantial expenditures, often including hundreds of thousands of dollars in expert witness fees and other costs.[44]

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 attorney's 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."[45]

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...

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award of 30-32% of the recovery. By contrast, three of the five actions recovering more than $500 million resulted in attorney's fee awards of only 5-7%.

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

[44] 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.

[45] 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.

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... ."[46] 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."[47] 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."[48]

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;[49] the court in Buspirone stated, "let me say that the lawyers in this case have done a stupendous job. They really have;"[50] 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;"[51] the court in Linerboard made repeated comments to the effect that "the lawyering in the case at every

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

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

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

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

[50] 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).

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

stage was superb;"[52] 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;"[53] and the court in Remeron thanked counsel on behalf of the judiciary "for the kind of lawyering we wish everybody would do"[54] and noted that "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience."[55]

Conclusions

The distinctive system of private enforcement we have in this country is substantially underappreciated. Congress's venerable "private Attorney General" idea[56] has produced tremendous benefits for the United States economy - for consumers and for businesses of all sizes. 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" - lawyers representing businesses, farmers, individuals, or classes of consumers who believe they have been injured by antitrust violations - often

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[52] 2005 WL 1221350, at *6 (E.D. Pa. June 2, 2004).

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

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

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

[56] The federal antitrust laws permit a private right of action, awarding treble damages as well as attorney's fees to successful plaintiffs. 15 U.S.C § 15 (Supp. 1992). By establishing this framework designed to encourage victims to sue violators 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).

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 they 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 competitiveness, redounding to the benefit of consumers, the affected industries themselves, and the economy as a whole.[57]

In fact, there are many reasons to believe that these 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;[58] undue fear of losing cases;[59] lack of

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[57] 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).

[58] 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.

[59] 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

awareness of industry conditions;[60] overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behavior;[61] higher turnover among government attorneys,[62] and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are at times politically motivated.[63] One would expect a vigorous private antitrust regime, then, to confer significant benefits over and above those conferred by a system reliant solely upon government enforcement.

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

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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).

[60] "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.

[61] 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.

[62] 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.

[63] Irwin 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 supposed to respond to proper Congressional oversight, but ensuring that oversight is proper is no easy task.

antitrust laws. However, the frequent and high praise from judges when they approved these settlements, about both the settlements themselves and the lawyers involved in bringing the violators to justice, belies the possibility that these cases and settlements were not in the public interest. It also adds to the certainty that these cases were desirable and that the settlements significantly assisted the victims of antitrust offenses. Moreover, the amount of these settlements is far greater than the cost of defending litigation -- suggesting that defendants were responding to a real risk of liability in agreeing to pay damages rather than merely seeking to avoid the cost of the litigation itself.

In contrast to negative assertions about private antitrust enforcement, its benefits tend to be underreported and underappreciated. They deserve much more public attention and acknowledgement. This Report is a first step toward recognizing those benefits empirically.

Because our cases were not randomly selected, it is difficult to determine the generalizeability of our conclusions. Our sense is that our results would hold up if a larger or more random sample were examined, and it is our hope that our project will encourage future researchers to test our sample's validity against different and larger data bases. However, to the extent one believes these conclusions are likely to be representative, they should be helpful for antitrust policymaking.[64]

[64] Moreover, this Report focused only on successful private actions. One of this Report's major shortcomings is that it ignored meritorious antitrust cases that the private bar did not pursue. It is possible that for every successful antitrust case, there was another case where victims suffered significant losses that never were recovered, whether because damages were too small to warrant a private action, because denial of class certification rendered such a prosecution impractical, or for some other reason. These cases might well have aided victims of illegal behavior if they had been viable. Our study could not, of course, measure the benefits of these never-brought cases, and for this reason might significantly understate the harms to consumers and the economy from antitrust violations.

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)
Airline Ticket Commission Litigation	86
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Augmentin	91
Automotive Refinishing Paint	67
Buspirone	220
Caldera	275
Cardizem (direct class)	110
Citric Acid	175
Commercial Explosives	77
Conwood	1,050
DRAM	326
Drill Bits	53
El Paso	1,427 (plus 125 in uncounted rate reductions)
Flat Glass	122
Fructose	531
Graphite Electrodes	47
IBM	775 (plus $75 in uncounted credit towards Microsoft software
Insurance	36
Lease Oil	193
Linerboard	202
Lysine	65
Microcrystalline Cellulose	50
NASDAQ	1,027
NCAA	74
Netscape	750
Paxil	165
Platinol	50
Polypropylene Carpet	50
RealNetworks	478 to 761
Relafen	250
Remeron	75
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Sun	700
Taxol	66
Terazosin	74
Urethane	73
Visa/MasterCard	3,383
Vitamins	4,200 to 5,600
Total	**18,259 to 19,942**

Table 2: Recoveries from Foreign Cartels & Monopolies

Case	Recovery ($ millions)
Auction Houses	virtually all the $452 recovered by U.S. citizens
Augmentin	91
Automotive Refinishing Paint	31
Cardizem	110
Citric Acid	55 (plus unidentified recoveries by opt outs)
Commercial Explosives	62
DRAM	311
Graphite Electrode	47
Flat Glass	38
Fructose	100
Lysine	24
Microcrystalline Cellulose	25
Remeron	75
Relafen	Unknown amount (much of $250; but not included in totals)
Rubber Chemicals	268
Sorbates	36
Urethane	73
Vitamins	4,200 to 5,600
Total	**5,998 to 7,398**

Table 3: Private Litigation Not Preceded by Government Action

Case	Recovery ($ millions)
Augmentin	91
Buspirone	220
Cardizem	110
Taxol	66
Caldera	275
Commercial Explosives	77
Conwood	1,050
Microcrystalline Cellulose	50
NCAA	74
NASDAQ	1,027
Lease Oil	193
Paxil	165
Relafen	250
Remeron	75
Visa/MasterCard	3,383
Vitamins	4,200 to 5,600
Total	**11,306 to 12,706**

Note: In some cases we have not been able to determine whether private or public action came first, or arose simultaneously or in a mixed fashion. We did not include these cases in this table. Some private cases were uncovered as a result of a government investigation into a different conspiracy, but we did not include these cases in this table.

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
Flat Glass - DOJ investigation but no indictment or civil proceeding ever initiated by government	122
Fructose - uncovered by government action, but no indictments	531
Polypropylene Carpet - conduct uncovered in different private case, to DOJ investigation, to private case	50
Urethane - grew out of a government investigation into a conspiracy involving a different chemical	73
Total	**829**

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
Airline Ticket Commission (86)	33.3
Augmentin (91)	21.6 (weighted average of direct (20%) and indirect (25%))
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
Terazosin (74)	33.3
Microcrystalline Cellulose (50)	33.3
Specialty Steel (50)	30
Lysine (65)	7
Commercial Explosives (77)	30
Graphite Elect rodes (47)	15

Table 6B: Percentage of Recovery Awarded as Attorneys' Fees

For Recoveries between $100 million and $500 million

Case (millions of $ in the recovery)	Attorneys' Fee Percentage
Buspirone (220)	33.3
Cardizem (110)	30
DRAM (326)	25
Flat Glass (122)	32
Linerboard (202)	30
Oil Lease (193)	25
Paxil (165)	20 & 30
Relafen (250)	33

Table 6C: Percentage of Recovery Awarded as Attorneys' Fees

For Recoveries Exceeding $500 million

Case (millions of $ in the recovery)	Attorneys' Fee Percentage
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	
Case	**Result**	**Case**	**Result**	**Case**	**Result**
Augmentin	62	Augmentin	29	Conwood	1,050
Lysine	50	Lysine	15	Sun	700
Auction Houses	452	Vitamins	500	Real- Networks	478 to 761
Automotive Refinishing	67	Paxil	65	Caldera	275
Buspirone	220	Relafen	75	IBM	775
Cardizem	110	El Paso	1,427	Netscape	750
DRAM	326				
Citric Acid	175				
Flat Glass	121				
Fructose	531				
Graphite Electrodes	47				
Insurance	36				
Linerboard	202				
Microcrystalline Cellulose	50				
Oil Lease	193				
Paxil	100				
Platinol	50				
Polypropylene Carpet	50				
Relafen	175				
Specialty Steel	50				
Terazosin	74				
Urethane	73				
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				
Airline Tickets Commission	86				
Total	**12,045 to 13,445**		**2,111**		**4,028 to 4,311**

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. The Airline Tickets Commission case also involved collusion by buyers.

Table 8: Recoveries in Rule of Reason Cases

Case	Recovery ($ millions)
Augmentin	91
Caldera	275
Conwood	1,050
IBM	775
NCAA	74
Netscape	750
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	**8182 to 8,465**

Insurance, Airline Ticket Commission, 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.

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Brian Ratner & Robert Lande

Airline Ticket Commission Litigation

1996 U.S. Dist. LEXIS 20361; 1996-2 Trade Cas. (CCH) P71, 552

This case is notable because: 1) The parties settled for $86.1 million; 2) The Court ordered Defendants to pay 75 percent of Plaintiffs' discovery costs, related to Defendants' "passing on" defense; and 3) The Court awarded plaintiffs' counsel one-third of the settlement due to their skill and effort.

The American Society of Travel Agents (ASTA) sued seven major airlines, including TWA, Continental, USAir, American Airlines, Delta, Northwest, and United Airlines for violations of Sections 1 and 2 of the Sherman Act.[1]

According ASTA, the anticompetitive conduct occurred when the airlines imposed an industry-wide cap on the commissions they paid to travel agents.[2] At the time of the suit, the defendants comprised about 85 percent of domestic flights in the United States.[3]

Prior to the caps, airlines paid travel agents a commission based on the ticket price.[4] Delta was first to announce a cap on the commissions.[5] Following this announcement, the other six major airlines implemented caps in less than a week.[6] The plaintiffs argued that it did not make economic sense for the airlines to all impose commission caps.[7] When the parties settled, the airlines agreed to pay ASTA for the anticompetitive conduct that occurred from February 1995 to September 1995.[8]

This case first made news when Judge Rosenbaum ruled on defendants' request to take discovery pertaining to the "passing on defense" that was denied in *Hanover Shoe*.[9] To support their theory, defendants sought discovery on the issue of damages, or lack thereof, suffered by

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[1] *Price Fixing: Cy Pres Distribution Must Be More Closely Related to Airline Commission Cap Litigation* Antitrust Trade & Regulation Daily (October 22, 2001).

[2] The airlines were charged with "conspiring to reduce commissions on ticket sales by travel agents from 10% to a maximum of $50 for round-trip domestic flights and $25 for a one-way ticket." *Preliminary Okay Is Given to $86 Million Settlement Of Litigation By Travel Agents*, BNA Antitrust & Trade Regulation Daily (September 24, 1996).

[3] *In Re Airline Ticket Commission Antitrust Litigation,* 898 F.Supp. 685, 687 (D.Minn. 1995).

[4] The travel agents claimed that, since 1960, the airlines paid 10 percent of the ticket price. *In Re Travel Agency Commission Antitrust Litigation,* 898 F.Supp. 685, 687 (D.Minn. 1995).

[5] *Id.* at 687.

[6] *Id.* at 687.

[7] Plaintiffs "assert that, in an open and competitive environment, an airline which declined to cut commissions would benefit because travel agents would favor higher paying airlines ." *Id.* at 688.

[8] *Monetary Settlement Of Airline Ticket Commission Gets Final Okay*, BNA Antitrust & Trade Regulation Daily (Feb. 10, 1997).

[9] *Airlines May Engage In Some Discovery To Support Impermissible Pass-On Defense*, BNA Antitrust & Trade Regulation Daily (April 3, 1996).

plaintiffs as a result of the caps.[10] Defendants argued that travel agents were not harmed by the caps because they could still make money booking non-flight travel, including cruises.[11] Although Judge Rosenbaum reluctantly granted the defendants' request, he noted that defendants' contentions were "unusual" and "most conjectural".[12] Due to the questionable nature of defendants' discovery, the court ordered them to pay 75 percent of plaintiffs' costs in producing the requested information.[13] Furthermore, Judge Rosenbaum warned defendants that "if the proffered discovery is rejected both at trial and appeal, the Court may also consider assessing defendants with the remaining 25% of the plaintiffs' survey cost".[14]

The settlement totaled $86.1 million.[15] Only an approximate 0.5 percent of the class objected to the settlement.[16] The Court awarded plaintiffs' counsel the full one-third of the settlement requested,[17] and noted that plaintiffs' counsel "reasonably assessed the value of the case" to reach a settlement that is "cost-effective, simple, and fundamentally fair" to members of the class.[18]

Noting the absence of a "smoking gun," and the existence of an "oligopolistic market" where "rapid price coalescence is the norm," plaintiffs' counsel "personally financed the case, incurring expenses exceeding $3 million with no guarantee of an ultimate recovery".[19]

In addition to the resources invested in the case, the Court also highlighted the fact that plaintiffs' counsel "underwent difficult and protracted settlement negotiations while simultaneously preparing for trial. This work required time, expense, and great skill, all to the class's benefit".[20]

After the settlement funds were distributed to travel agents, about $600,000.00 remained unclaimed.[21] Initially, the court rejected plaintiffs' proposal to distribute the funds to travel

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[10] *Id.*

[11] *In Re Airline Commission Antitrust Litigation,* 918 F.Supp. 283, 287 (D. Minn. 1996).

[12] *Airlines May Engage In Some Discovery To Support Impermissible Pass-On Defense*, BNA Antitrust & Trade Regulation Daily (April 3, 1996).

[13] *Id.*

[14] *Id.*

[15] TWA was the first defendant to settle. Continental settled for $4.25 million, and USAir paid $9.81 million. The remaining four airlines settled with the class on the day trial was to begin. American Airlines paid $21.32 million, Delta paid $20.3 million, Northwest paid $10.87 million, and United Airlines paid $19.51 million. *Monetary Settlement of Airline Ticket Commission Litigation Gets Final Okay,* BNA Antitrust & Trade Regulation Daily (February 10, 1997).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Cy Pres Award of Settlement Must Be Tailored To Goals Of Underlying Suit,* United States Law Week (October 15, 2002), available at http://pub.bna.com/lw/021639.pdf.

agents in Puerto Rico and the Virgin Islands, who were also harmed by the same anticompetitive conduct.[22] Instead, the Court awarded the funds to several law schools and charities in Minnesota where the case was filed.[23] On appeal, the court awarded the funds to the travel agents, as plaintiffs had originally suggested, stating that they were "clearly the next best recipients of the funds".[24]

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[22] *Id.*

[23] *Id.*

[24] *Id.*

Auction Houses Antitrust Litigation

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).

These cases are outstanding examples of the successful outcome of a private antitrust class action for many reasons: 1) The aggregate amount of the combined recoveries includes $412 million in cash and $100 million in discount certificates (in the class action involving domestic auctions), and $40 million in cash (in the class action involving foreign auctions), for a total recovery of $552 million; 2) The vast majority of the settlement was obtained by U.S. businesses and consumers from foreign defendants; 3) The domestic portion of the settlement was found by the court to represent "perhaps 1.8 times to 4.0 times the damages" suffered by the domestic class;[25] 4) Counsel in the domestic case received legal fees that were approximately 80 percent cash and 20 percent discount coupons, the same ratio as the overall cash/coupon ratio of the settlement; 5) The legal fees represented just 5.2 percent of the total settlement; and 6) If the coupons are not used after five years, they are redeemable for their face value in cash.

In the late 1990s, the Department of Justice ("DOJ") initiated an investigation into the possibility that parallel increases in the amounts of commissions charged by Christie's and Sotheby's to both buyers and sellers may have been the result of a conspiracy. That investigation seemed to stall until, in late 1999, counsel for Christie's came into possession of handwritten notes by CEO Christopher Davidge of Christie's, which clearly reflected conspiratorial communications between defendants. In January 2000, Christie's sought and obtained amnesty from the DOJ. In the ensuing weeks, many class actions were commenced on behalf of buyers and sellers at domestic auctions under U.S. antitrust law. Those class actions were consolidated in the Southern District of New York before Judge Lewis A. Kaplan. In view of the clear evidence of conspiracy and Christie's amnesty commitments, Judge Kaplan took the unusual step of holding an auction for the position of lead counsel. The winning bid in that auction was submitted by David Boies, who agreed to undertake representation of the class on the unusual and risky basis that his firm would receive 25 percent of any recovery in the case in excess of $405 million. However, Boies elected not to include claims based on foreign auctions among the class claims, believing that such claims were not viable under U.S. law. In October 2000, after only approximately four months of further litigation, a settlement of the domestic class action for the amount of $412 million in cash and $100 million in discount certificates was first documented and proposed to the District Court.

In the interim, purchasers and sellers at foreign auctions, the Kruman class, filed a separate action for their foreign claims, which had been excluded from the action led by Boies. Initially, the parties in the domestic action proposed that foreign auction claims held by persons who were also domestic class members, be released as part of the domestic settlement. This proposed release would have significantly undercut the Kruman class action, since many if not most auction customers buy or sell at auctions both inside and outside the U.S. However, in a series of rulings in early 2001, the District Court invalidated that aspect of the proposed release

[25] The foreign portion of the settlement represented a much smaller proportion of potential damages, but was substantially discounted for risks stemming from legal weaknesses in the claims, including the basic legal weakness subsequently demonstrated by the Supreme Court's decision two years later, in Empagran, S.A. v. F. Hoffman-LaRoche Ltd., 542 U.S. 155 (2004), under which the foreign class would have had no viable claims under United States law.

finding that Boies had a "structural conflict of interest" in proposing the release of foreign auction claims for no additional consideration.[26] In response to the District Court's invalidation of the releases, the parties modified their settlement to provide that in the event the Second Circuit affirmed, the settlement would continue to be final and effective. Thus, when the Second Circuit affirmed in 2002, this did not derail the domestic settlement.

In 2003, in the wake of the domestic class' success, the class of buyers and sellers at foreign auctions negotiated its separate settlement in the amount of an additional $40 million in cash. By the time of this settlement, testimony and evidence emerging in the criminal trial of Alfred Taubman of Sotheby's had cast substantial doubt on the existence of any conspiracy between the defendants with regard to buyer's premiums charged by defendants, as distinguished from seller's commissions.[27] In addition, looming over the case was the strong possibility that the Supreme Court might grant certiorari and reverse the Second Circuit's decision upholding rights of customers to bring claims arising from foreign auctions under U.S. antitrust law. Those two risks were the primary reason why the class of foreign auction customers obtained less consideration. Indeed, after the court approved the $40 million foreign auction settlement, the Supreme Court took certiorari and reversed in Empagran, a D.C. Circuit case that followed the decision in Kruman. Thus, this settlement may be the only one of its kind to occur, based on U.S. antitrust law claims arising entirely from foreign transactions.

The coupons in the domestic case might have been the best coupons ever issued in an antitrust case. Valued at $100 million by the Court, they had a face value of $125 million when issued.[28] They are fully transferable, and they do trade. All unused coupons can be redeemed for face value after five years (in May 2007). Counsel took approximately 20 percent of their fees in these coupons.

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[26] In re Auction House Antitrust Litigation, 42 Fed. Appx. 511, 516 (2002).

[27] The government's criminal case resulted in a $45 million fine and jail for at least one defendant. Scott D. Hammond, An Overview of Recent Developments In The Antitrust Division's Criminal Enforcement Program, Address Before the American Bar Association, 11 (Jan. 10, 2005), available at http://www.usdoj.gov/atr/public/speeches/207226.pdf.

[28] Id. at 520.

Augmentin: Ryan-House et al v. GlaxoSmithKline plc

C.A. Doc. No. 2:02cv442 (E.D.Va. 2004); SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. v. SmithKline Beecham Corp, Doc. No. 2:04cv23

This case is notable because: 1) It produced substantial recoveries for both direct and indirect purchasers - $62.5 million and $29 million respectively - all from a foreign corporation; 2) This case only involved Section 2 of the Sherman Act; 3) The court awarded Class Counsel's request for 20 percent of the recovery in the direct action, and 25 percent in the indirect action; 4) There was no prior federal prosecution of the antitrust violations at issue;[29] and 5) There were later state actions with participation from the US Department of Justice ("DOJ").

GlaxoSmithKline ("GSK") allegedly used invalid patents to prevent entry of generic products. As stated in GSK's 2004 Annual Report:[30]

> In 2002, the US District Court for the Eastern District of Virginia found various patents covering Augmentin invalid. That holding was subsequently affirmed by the [Court of Appeals for the Federal Circuit]. Following the adverse trial court decision, purported anti-trust class actions were filed on behalf of classes of direct and indirect purchasers that were ultimately consolidated in the US District Court for the Eastern District of Virginia. Plaintiffs alleged that the Group knowingly obtained invalid patents and engaged in other anticompetitive conduct to prevent entry of generic products in violation of the monopolization section of the US anti-trust laws. The court has approved the Group's settlement of those class action claims.

Plaintiffs were a class of "All persons or entities in the United States that purchased Augmentin directly from GSK at any time from January 1, 2000 through April 30, 2004 (hereinafter the "Class Period"), except for governmental entities, GSK, its officers, directors, and subsidiaries, which are expressly excluded."[31] The Direct Purchaser Plaintiffs alleged a Section 2 monopolization claim[32] involving IP and patent law as well as the Hatch-Waxman Act.[33]

Class Counsel negotiated a settlement with defendants during the discovery and pre-trial phase of the case. Many of the vital facts of this case were the subject of motions for summary

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[29] *SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. v. SmithKline Beecham Corp*, Doc. No. 2:04cv23, Memorandum in Support of Class Counsel's Motion for Award of Attorney Fees and Reimbursement of Expenses, 4 (E.D. Va., 2004) ("Fee Memo"). ("There was no prior investigation from the Department of Justice or Federal Trade Commission complaint against GSK.")

[30] GSK Form 20-F 03-2004, Annual report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the fiscal year ended December 31, 2004; Commission file number 1-15170, 121 ("20-F, 2004").

[31] Final Order at 2.

[32] Fee Memo at 4.

[33] *Id*. at 22.

judgment in related cases.[34] Class Counsel retained patent and economic experts to analyze liability and damages.[35] Class Counsel obtained a significant recovery for the direct purchaser class despite what the Court described as GSK's "significant defenses which the Class would need to overcome if the case went to trial."[36]

In September 2004, Class Counsel filed a Motion for Award of Attorney Fees describing the risks they encountered in litigating this case, the difficulty of the case, and the extraordinary amount they negotiated for the class. Class Counsel explained that this was a Section 2 monopolization claim, which is more difficult to litigate than a *per se* violation of the Sherman Act.[37] In addition, this case was not a follow-on to any government action, but was initiated and carried to its conclusion by private counsel.[38]

There were other similar private cases filed against GSK.[39] However, because none of the preceding cases resulted in a court finding of fraud, Class Counsel would have been required to prove fraud themselves as an element of their case.[40] Class Counsel may have also had a difficult time proving damages since factors other than anticompetitive behavior could have caused the delay in generic products reaching the market.[41] Moreover, Class Counsel would have risked facing unfavorable law in the Eleventh Circuit, where a similar class had been decertified.[42] In light of these factors Class Counsel asked the Court to award a fee percentage of the settlement fund, rather than use the "lodestar" method of calculating fees.

The Direct Purchaser Class Plaintiffs, SAJ Distributors and Stephen L. LaFrance Holdings, Inc., ("Plaintiffs") as well as approximately 70 class members[43] reached a Settlement Agreement with foreign company GlaxoSmithKline plc and SmithKline Beecham Corp. ("GSK"), and in July 2004, GSK deposited $62.5 million into a Direct Purchaser Settlement Fund Account.[44] The Court found this amount "fair and reasonable and fully justified,"[45] saying that Class Counsel vigorously and effectively pursued class members' claims.[46] There was also an indirect purchaser

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[34] See *Geneva Pharmaceuticals, Inc. v. GlaxoSmithKline PLC*, 349 F.3d 1373 (2003); *Geneva Pharmaceuticals, Inc. v. GlaxoSmithKline PLC*, 213 F. Supp.2d 597 (2002); and *Geneva Pharmaceuticals, Inc. v. GlaxoSmithKline PLC*, 189 F.Supp.2d 377 (2002).

[35] Final Order at 4.

[36] *Id*.

[37] Fee Memo at 3.

[38] *Id*. at 4.

[39] *See* 20F, 2004.

[40] Fee Memo at 4.

[41] *Id*.

[42] *Id*. at 4-5.

[43] Fee Memo at 22.

[44] *SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. v. SmithKline Beecham Corp*, Doc. No. 2:04cv23, Final Settlement Approval Order, 6 (E.D. Va., 2004) (hereinafter "Final Order").

[45] *Id*. at 10.

[46] *Id*. at 9.

class action on behalf of insurers and consumers.[47] There, Counsel was awarded 25 percent of a $29 million recovery.[48]

Following the initiation of this private action, States took action with participation from the U.S. DOJ. In October 2004, West Virginia Attorney General Darrell McGraw filed a lawsuit and consent order to settle the lawsuit against manufacturers GSK and SmithKline Beechham Corporation.[49] The State alleged defendants unlawfully attempted to extend their patent protection for Paxil, Augmentin, and Relafen. After an investigation, with participation from the DOJ,[50] and prior to filing the complaint, the State reached an agreement with defendants to settle the matter. The State received $500,000 under the terms of the settlement.[51]

Following that, in 2005 New York and Ohio initiated a class action on behalf of states nationwide.[52] The class conducted an investigation and, in 2006, a $3.5 million multistate settlement was entered into by participating states and GSK.[53]

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[47] See *In re Remeron End-Payor Antitrust Litigation,* Not Reported in F.Supp.2d, 2005 WL 2230314, 10 (D.N.J. Sept. 13, 2005) ("Mr. Meltzer was appointed Co-Lead Counsel in *Ryan-House v. GlaxoSmithKline plc,* C.A. 2:02cv442 (E.D.Va.), a pharmaceutical antitrust class action brought on behalf of end payors of the prescription medication Augmentin which recently settled for $29 million"); see also, e.g. http://www.amc.gov/commission_hearings/pdf/Gustafson.pdf - however, most citations point to www.augmentinlitigation.com , and that cite is no longer available.

[48] See AAI, The American, Antitrust Institute, AAI Working Paper No. 06-05, *ABSTRACT: Indirect Purchaser Class Action Settlements*, Author: Patrick E. Cafferty, Miller Faucher and Cafferty LLP, 3 (HTML page 5), available at http://www.google.com/search?q=cache:h6GrQtZnFRIJ:www.antitrustinstitute.org/recent2/510.pdf+indirect+purchaser+augmentin+antitrust&hl=en&ct=clnk&cd=4&gl=us .

[49] *West Virigina ex rel. McGraw v. GlaxoSmithKline, PLC et al.*

[50] See http://www.naag.org/antitrust/search/viewCivil Litigation.php?trans_id=111 .

[51] See http://www.wvs.state.wv.us/wvag/annualreports/2004annual report.pdf.

[52] See http://www.naag.org/antitrust/search/viewCivilLitigation. php?trans_id=458. Also see *Washington Medicaid to Receive Share of $3.5 Million Settlement with Augmentin Manufacturer*, US State News, Copyright 2006 US Fed News (HT Syndication), April 12, 2006, 2006 WLNR 6392719; *Attorney General Petro Secures Antitrust Settlement Against Drug Maker*, US State News, Copyright 2006 US Fed News (HT Syndication), July 19, 2006, 2006 WLNR 12481907.

[53] *Id*.

Automotive Refinishing Paint Antitrust Litigation

177 F. Supp. 2d 1378 (E.D. Pa. Nov. 15, 2001).

These cases are noteworthy because: 1) They contain allegations of conspiring to fix, raise, maintain and stabilize prices, *per se* rule violations;[54] 2) A cash settlement of $66.75 million was reached with three defendants;[55] 3) Two of the settling defendants were foreign manufacturers[56] who paid a total of $30.75 million to U.S. purchasers;[57] 4) These cases followed a government investigation, that was closed by the government without any indictments;[58] and 5) The court awarded Class Counsel's full request for a 32 percent attorneys' fee.

In March 2001, the auto body trade publication "Hammer and Dolly" published an article exposing a Department of Justice grand jury investigation of a price fixing conspiracy among several paint manufacturers.[59] This article seems to have spurred the private suits that followed. By November 2001, dozens of cases filed in five states by direct purchasers of Automotive Refinishing Paint were consolidated into one class action suit.[60] Plaintiffs alleged "that defendants combined and conspired with one another to fix, raise, maintain and stabilize the prices that they charged their customers for Automotive Refinishing Paint sold in the United States during the period from January 1, 1993, to December 31, 2000, in violation of Section 1 of the Sherman Act."[61] The defendants consist of three domestic companies: DuPont, PPG and Sherwin-Williams, and two foreign based companies, BASF (Germany) and Akzo Nobel (The Netherlands).[62] Automotive Refinishing Paint refers to paint products that are applied to motor vehicles directly after the initial manufacturing process, including base coat paint, clear coat paint, and primer.[63]

The federal grand jury that initially investigated the allegations of price fixing disbanded in 2003.[64] The government closed its investigation after Class Counsel negotiated a first settlement with one of the two foreign defendants.[65] Moreover, the government's decision not to prosecute

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[54] *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 U.S. Dist. LEXIS 29161 2 (E.D. Pa. Sept. 27, 2004).

[55] The three defendants that settled were Akzo, BASF and duPont. *See In re Auto. Refinishing Paint Antitrust Litig.,* 2004 U.S. Dist. LEXIS 29161, 3. The cases against other defendants are still pending.

[56] *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 291 (E.D. Pa. Feb. 13, 2004).

[57] Akzo agreed to pay $18.75 million and BASF agreed to pay $12 million. *See In re Auto. Refinishing Paint Antitrust Litig.*, 2004 U.S. Dist. LEXIS 29161, 3.

[58] *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 U.S. Dist. LEXIS 29161, 23-24.

[59] Sheila Loftus, *Price Fixing in the Refinishing Industry?*, Hammer and Dolly (Mar. 2001).

[60] *In re Auto. Refinishing Paint Antitrust Litig.*, 177 F.Supp.2d 1378, 1379 (J.P.M.L. Nov. 15, 2001).

[61] *In re Auto. Refinishing Paint Antitrust Litig.*, 2003 U.S. Dist. LEXIS 18123, 1 (E.D. Pa. Sept. 5, 2003).

[62] *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 291.

[63] *In re Auto. Refinishing Paint Antitrust Litig.*, 2003 U.S. Dist. LEXIS 18123, 29.

[64] *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 U.S. Dist. LEXIS 29161, 24.

[65] *Id*.

the case was one factor the court considered in approving the settlement.[66] The court determined that the settlement was reasonable in light of the best possible recovery and the risks inherent in litigation since the government already declined to prosecute.[67]

On September 5, 2003, the Court granted final approval of a partial settlement with the Dutch-based company Akzo Nobel.[68] They agreed to pay $18.75 million in cash and provided certain discovery.[69] Subsequently, on September 27, 2004, the court approved a second settlement with BASF and DuPont.[70] The German-based BASF agreed to pay $12 million and DuPont agreed to pay $36 million.[71] In addition, during the course of discovery, defendants provided plaintiffs with information consisting of documents, sales transactional data and gave permission to interview (former) employees.[72] The settlement negotiations were tough, but for this settlement "[p]laintiffs have had the benefits of initial, first wave document discovery from all defendants – namely, the grand jury documents defendants produced to the Department of Justice."[73]

Moreover, the court granted a fee petition for plaintiffs' counsel in the amount of more than $21.5 million (or 32 percent of the settlements) plus reimbursement of more than $700,000 in expenses.[74] The court awarded attorneys' fees and costs after objections by three of the plaintiffs who argued that a percentage fee was inconsistent with other "mega-fund cases."[75] Specifically, they argued for a lodestar method, by which the fee is calculated based on the number of hours counsel spent on the case.[76] The court overruled the objections, finding that several of the so-called "Gunter" factors had been met, including: the high skill and efficiency of plaintiffs' counsel, the complexity of the litigation, the lengthy time devoted to the case, and the high risk of non-payment as warranting the percentage fee.[77] In its decision, the court spoke highly of the work done on behalf of the class, stating that "Plaintiffs' counsel have repeatedly demonstrated their skill in managing this litigation."[78]

As of today, the litigation against the two remaining defendants, PPG and Sherwin-Williams, is still ongoing.

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[66] *Id*. at 23-24.

[67] *Id*.

[68] *In re Auto. Refinishing Paint Antitrust Litig*., 2003 U.S. Dist. LEXIS 18123, 18.

[69] *In re Auto. Refinishing Paint Antitrust Litig*., 2003 U.S. Dist. LEXIS 4681, 3 (E.D. Pa. Mar. 17, 2003).

[70] *In re Auto. Refinishing Paint Antitrust Litig*., 2004 U.S. Dist. LEXIS 29161, 29.

[71] *Id*. at 3.

[72] *In re Auto. Refinishing Paint Antitrust Litig*., 2004 U.S. Dist. LEXIS 29163, 2 (E.D. Pa. May 10, 2004).

[73] Plaintiffs' Memorandum, at 13.

[74] *In re Auto. Refinishing Paint Antitrust Litig*., 2004 U.S. Dist. LEXIS 29162, 40 (E.D. Pa. Oct. 13 ,2004).

[75] *Id*. at 12.

[76] *Id*. at 13.

[77] *Id*. at 11-32.

[78] *Id*. at 20.

Buspirone Antitrust Litigation

85 F. Supp. 2d 340 (S.D.N.Y. 2002) MDL Doc. No. 1413

and

Buspirone Patent Litigation

85 F. Supp.2d 363 (S.D.N.Y. 2002). Final Settlement approval at (2003 U.S. Dist. Lexis 25638, April 17, 2003). (Buspar)

This case is noteworthy because: 1) Although it was not the first case to allege that a patent infringement settlement was actually a horizontal market allocation and therefore a *per se* violation of the Sherman Act, the $220 million settlement was the largest recovery in the first wave of such cases;[79] 2) The settlement exceeds the total amount of overcharges suffered by the Direct Purchaser Class and constitutes approximately 95 percent of the total overcharges likely to be incurred through 2006, as estimated by Plaintiffs' expert;[80] 3) Private counsel was first to investigate and secured a substantial monetary recovery, amounting to more than double the monetary recovery obtained by the federal government;[81] 4) The outstanding recovery is a result of Class Counsel's efforts during the discovery process, which produced evidence of the Schein Agreement (discussed below), of which Plaintiffs were not previously aware; 5) Judge John G. Koeltl stated, "let me say that the lawyers in this case have done a stupendous job. They really have,"[82] when he approved the settlement and awarded Class Counsel one-third of the recovery in attorneys' fees; 6) This case was the first of several involving BMS's strategies for delaying generic competition with its brand-name drugs (all told, BMS paid out $670 million in settlements of antitrust suits arising from BuSpar, Taxol and Platinol);[83] and 7) The size of the settlement will discourage other brand-name drug manufacturers from using the same tactics to delay or prevent generic competition, helping to keep national healthcare costs down by keeping prescription drugs competitively priced.[84]

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[79] *See In re Cardizem CD,* 105 F.Supp.2d 682 (E.D. Mich. 2000); 332 F.3d 896 (6th Cir. 2003) (Settling for $175 million). *See also In re Terazosin Hydrochloride,* 352 F.Supp.2d 1279, 1286 (S.D. Fla. 2005) (settling for $75 million).

[80] *In re Buspirone Antitrust Litigation*, MDL No. 1413. (S.D.N.Y. 2003), Dr. Jeffrey Leitzinger, Direct Purchaser Class Plaintiff's Motion for Final Approval of Settlement, 3.

[81] Attorneys General for Maryland, New York and Texas lead a class of Plaintiff states, securing a $93 million settlement to reimburse consumers and state and local agencies for overcharges resulting from Buspar purchases between January 1, 1998 and December 31, 2002. *Alabama, et al, v. Bristol-Myers Squibb Co, et al*, No. 01-CV. 11401, MDL 1413, available at http://www.naag.org. The Federal Trade Commission ("FTC") cooperated with the state attorneys general to obtain injunctive relief through a consent order which was finalized on April 14, 2003 and terminates on April 14, 2013. *In the Matter of Bristol-Myers Squibb Co.*, Docket No. C-4076, Decision and Order, available at http://ftc.gov/os/2003/04/bristolmyerssquibbdo.pdf (last updated December 14, 2001). The order prohibits BMS from engaging in specific anticompetitive tactics including those used by the company to obstruct the entry of generic versions of Buspar and Taxol, and requires BMS to abide by certain reporting procedures for five years.

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

[83] John R Wilke, Bristol-Myers Settles Charges of Patent-Law Abuse, The Wall Street Journal, Sec. A pg 5, Col. 1 (Mar. 10, 2003). "Bristol-Myers Squibb Co. settle FTC complaint that it illegally sought to extend patent protection on its drugs BuSpar, Taxol and Platinol; company agreed in January [2003] to pay $670 million to resolve related lawsuits by states, generic-drug makers and pharmacies."

[84] Elyse Tanouye, Prices of Drugs Increase Faster than Inflation, The Wall Street Journal, pg B4 (Feb. 13, 1997).

In 1980 Bristol—Myers Squibb Company ("BMS") obtained a patent ("the '763 Patent") for buspirone, an anti-anxiety drug. The patent was set to expire on November 21, 2000. Since 1986, when the FDA approved buspirone, BMS has sold it under the brand name Buspar. Just before this patent was set to expire, BMS obtained another patent ("the '365 Patent") for one of the metabolites[85] buspirone naturally produces in the body. BMS told the FDA that any manufacture of a generic version of buspirone would violate this second patent.[86]

In anticipation of the expiration of BMS's '763 Patent, several generic drug manufacturers[87] filed Abbreviated New Drug Applications[88] ("ANDAs") with the FDA, seeking approval to begin selling generic versions of buspirone. "Approximately eleven hours before the '763 Patent expired, Bristol-Myers hand-delivered copies of the '365 Patent to the FDA and applied to have it listed in the Orange Book as covering buspirone."[89] Because of this listing in the Orange Book,[90] BMS' subsequent filing of patent infringement suits against the generic manufacturers triggered an automatic stay of FDA approval of their applications for 30 months or until the patent infringement actions reached final resolution.[91] Mylan Laboratories, Inc.[92] ("Mylan") had trucks loaded and ready to ship generic buspirone at midnight on November 22, 2000, when approval of its ANDA was delayed by the patent infringement suit filed by BMS.[93]

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[85] The metabolite covered by the patent -6-hydroxy-buspirone- is a separate chemical compound that the body naturally produces after taking buspirone. *See* Adams, Delayed Reaction; Drug Manufacturers Step Up Legal Attacks That Slow Generics –That's One Reason It Takes Longer to Approve Knock-Off's than Brands --The 'Metabolite Defense,' The Wall Street Journal, pg A1 (July 12, 2001).

[86] "On Dec. 4, [2001], an attorney for Bristol-Myers faxed a letter to the FDA, saying the ['365] patent did cover swallowing BuSpar –even though the company had told the patent office that it covered only swallowing the metabolite." Gardiner Harris and Chris Adams, Delayed Reaction; Drug Manufacturers Step Up Legal Attacks That Slow Generics –That's One Reason It Takes Longer to Approve Knock-Off's than Brands --The 'Metabolite Defense,' The Wall Street Journal, pg A1, (July 12, 2001).

[87] Specifically, the generic manufacturers were Danbury Pharmacal, Inc., Watson Pharmaceuticals, Inc., Mylan Pharmaceuticals, Inc., Mylan Laboratories, Inc., and Mylan Technologies, Inc.

[88] For a detailed explanation of the Hatch-Waxman Act and Orange Book procedures involved in this litigation, *see In re: Buspirone Antitrust Litigation,* 185 F. Supp. 2d 340, 345-346 (S.D.N.Y. 2002).

[89] *In re: Buspirone Antitrust Litigation,* 185 F. Supp. 2d 340, 350 (S.D.N.Y. 2002) citing *Mylan Pharm., Inc. v. Thompson,* 139 F.Supp.2d at 8.

[90] The "Orange Book" is an official FDA publication formally know as "Approved Drug Products with Therapeutic Equivalence Evaluations."

[91] The generic manufacturers whose ANDA's were suspended, immediately filed for injunctive relief in Federal Court. *See Mylan Pharm., Inc. v Thompson*, 139 F.Supp.2d at 8-9 and *Watson Pharm., Inc. v. Henney*, 194 F.Supp.2d 442 (D.Md. 2001) . The patent infringement litigation proceeded and in February 2002 the generics won a motion for summary judgment declaring the second patent did not cover buspirone. *In re: Buspirone Patent Litigation*, 185 F.Supp.2d 340. (S.D.N.Y. 2002).

[92] Mylan Laboratories is based in West Virginia.

[93] Gardiner Harris and Chris Adams, Delayed Reaction; Drug Manufacturers Step Up Legal Attacks That Slow Generics –That's One Reason It Takes Longer to Approve Knock-Off's than Brands --The 'Metabolite Defense,' The Wall Street Journal, pg A1 (July 12, 2001). *See also: In re: Buspirone Antitrust Litigation,* 185 F.Supp.340, 346 (S.D.N.Y. 2002).

BMS also insulated Buspar from competition through an illegal agreement with Schein Pharmaceutical, Inc.[94] ("Schein"), whereby BMS paid Schein $72.5 million over four years not to enter the buspirone market ("the Schein Agreement"). Schein and BMS characterized the 1994 agreement as a settlement of a patent infringement suit involving the original patent. However, plaintiffs alleged that the settlement "was a sham used to cover up an unlawful anticompetitive arrangement under which Schein agreed to stay out of the buspirone market and help maintain a public perception that the '763 Patent was valid … even though both parties knew that the '763 patent was not valid."[95]

Mylan launched its generic busprione product in April, 2001, five months later than scheduled. The delay "yielded some $200 million in additional exclusive sales of BuSpar."[96] By the end of June 2001, generics had captured two-thirds of BuSpar's market share.[97]

On August 12, 2001 four patent disputes[98] and twenty-two antitrust actions[99] were consolidated for pre-trial purposes in the Southern District of New York. The Direct Purchaser Class[100] alleged that the Schein Agreement, the listing of the '365 patent in the Orange book and the sham patent infringement suits filed against competitors were anticompetitive acts designed to preserve BMS's monopoly over the buspirone market.

After two years of intense litigation, the parties agreed to settle for a cash payment of $220 million. Class Counsel was in a position to negotiate such a substantial settlement because in the course of the litigation they discovered the Schein Agreement and amended their complaint. In addition, their motion for partial summary judgment, arguing that the Schein Agreement was *per se* illegal under the Sherman Act, had been fully briefed but not yet decided. During the two years leading up to the settlement, which the court preliminarily approved on January 31, 2003, Class Counsel spent more than 28,000 hours and conducted exhaustive discovery, prepared numerous expert witnesses and engaged in extensive motion practice, including a successful motion for class certification. In a decision filed April 17, 2003, the Honorable John G. Koeltl

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[94] Schein Pharmaceutical Inc. ("Schein") is now a subsidiary of Watson Pharmaceuticals, Inc. ("Watson"), which is one of the generic companies seeking FDA approval for a generic version of buspirone. Watson settled its antitrust claims with BMS for $32 million in 2002. *See* BMS Settles Antitrust Charges Involving BuSpar, *Generic Line, Vol. 19, No. 7* (April 5, 2002).

[95] *In re: Buspirone Antitrust* Litigation, 185 F.Supp. at 366.

[96] Gardiner Harris and Chris Adams, Delayed Reaction; Drug Manufacturers Step Up Legal Attacks That Slow Generics –That's One Reason It Takes Longer to Approve Knock-Off's than Brands --The 'Metabolite Defense,' The Wall Street Journal, pg A1, (Jul. 12, 2001).

[97] Id.

[98] These suits had been consolidated under MDL-1410.

[99] These twenty two suits had been consolidated under MDL-1413.

[100] The Direct Purchaser Class is defined as "All persons who have directly purchased BuSpar(R) from defendant Bristol-Myers Squibb Company any time during the period November 9, 1997 through January 28, 2003 ("Direct Purchaser Class" or the "Class"). Excluded from the Class are the defendants in this lawsuit, and their officers, directors, management and employees, subsidiaries and affiliates, and federal government entities. Also excluded from the Class are the claims brought by and/or assigned to entities which independently sued BMS in the actions styled *CVS Meridian, Inc. and Rite Aid Corp. v. Bristol-Myers Squibb Co., et. al.,* No. 01-CV-10223, and *Walgreen Co., et. al. v. Bristol-Myers Squibb Co., et. al.,* No. 02-CV-2952, as well as claims asserted by certain States in the action styled *State of Alabama et. al. v. Bristol-Myers Squibb Co., et. al.,* No. 01 CV 11401." *In re: Buspirone Antitrust Litigation,* MDL Doc. No. 1413, 2003 U.S. Dist. Lexis 26538, 6.

for the district court awarded Class Counsel one-third of the total recovery plus $811,338.41 in expenses.[101]

The FTC issued its first complaint against BMS on March 7, 2003, as the parties were in the final stages of negotiating this settlement. The complaint accused BMS of a decade-long pattern of alleged anticompetitive acts: "Bristol avoided competition by abusing federal regulations in order to block generic entry; deceived the U.S. Patent and Trademark Office (PTO) to obtain unwarranted patent protection; paid a would-be generic rival over $70 million not to bring any competing products to market; and filed baseless patent infringement lawsuits to deter entry by generics."[102] The complaint resulted in a consent order[103] which will prevent BMS from using similar tactics in the future. Attorneys General for Maryland, New York and Texas, who lead a class of Plaintiff States, worked with the FTC to secure this agreement and also settled their claims against BMS for $93 million in 2003.[104]

The FTC action and the substantial amount that BMS paid to various plaintiffs in settlement of buspirone claims should discourage other brand-name drug manufacturers from using such agreements to delay or prevent generic competition, helping to keep national healthcare costs down by keeping prescription drugs competitively priced.[105]

[101] *In re Buspirone Antitrust Litigation*, Order and Final Judgment, pg 5, ln 14, MDL Docket No. 1413 (April 7, 2003). The court also awarded named plaintiff Louisiana Wholesale Drug. Co., Inc $25,000 as an incentive award. *Id.* at 6.

[102] Press Release: FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition (March 7, 2003) (quoting Joe Simons, Director of the FTC's Bureau of Competition), available at www.ftc.gov.

[103] Decision and Order, Docket No. C-4076 (April 18, 2003) available at www.ftc.gov.

[104] The Plaintiff states initiated formal action against BMS in December, 2001. For a summary of the efforts of Attorneys General in this case go to: www.naag.org. According to Meredyth Smith Andrus, Deputy Attorney General for the Antitrust Division of the Maryland Attorney General's Office, the Attorneys General and the FTC led parallel investigations of BMS and separately negotiated their settlements. Attorneys General will often conduct a non-public investigation, long before a complaint is filed. In this case, the attorneys general first took formal action in 2001 but they may have been looking into the agreement long before that so it is difficult to say with absolute certainty that private counsel initiated the investigation.

[105] *See* Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary, United States Senate, "Competition in the Pharmaceutical Marketplace: Antitrust Implications of Patent Settlements," May 24, 2001, available at www.ftc.gov; *and* Elyse Tanouye, Prices of Drugs Increase Faster Than Inflation, The Wall Street Journal, pg B4 (Feb. 13, 1997).

Caldera, Inc. v. Microsoft Corp.

Case No. 2:96CV645B, 72 F.Supp.2d 1295 (D. Utah 1999).

This case is notable because: 1) Although the amount of the settlement is confidential, the Wall Street Journal estimated that Microsoft paid approximately $275 million to settle with Caldera;[106] 2) This case was filed by a competitor and was not, in its essence, a follow-up to any case brought by the U.S. government, a State, or the European Union against Microsoft; and 3) This case disclosed important information regarding Microsoft's anticompetitive conduct to consumers.

In July 1996, Caldera filed suit against Microsoft, its competitor in the computer operating system market, for illegal tying and monopolization in violation of Sections 1 and 2 of the Sherman Act. Caldera and Microsoft both produced versions of the computer operating system, DOS. Caldera alleged that its DR-DOS offered more features that consumers wanted. [107] However, according to Caldera, Microsoft tied its MS-DOS operating system and its Windows graphical interface, allowing Microsoft to maintain an illegal monopoly in the computer operating system market with MS-DOS.

When Caldera filed suit, Microsoft had already entered into a Consent Decree with the U.S. Department of Justice and a similar agreement with the European Union regarding certain licensing violations.[108] Caldera alleged that Microsoft continued to engage in anticompetitive conduct involving its operating systems, including violations for: (1) unreasonably long licensing agreements with original equipment manufacturers (OEMs); (2) pricing schemes that forced OEMs to buy only MS-DOS; (3) tying MS-DOS with Windows; (4) giving deep discounts to OEMs vulnerable to competition; (5) false public statements regarding Windows' compatibility with DR-DOS; (6) unlawful "beta blacklisting" in order to stop pre-testing the compatibility of Windows and DR-DOS; (7) false public statements made about the timing of the release of MS-DOS to coincide with the release of new versions of DR-DOS; (8) intentionally programming code into Windows with the sole purpose of displaying false error messages when running on DR-DOS; and (9) "peer processor royalties," also referred to as "the Microsoft tax."

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[106] *See* Lee Gomes, *Microsoft To Settle Suit By Caldera*, The Wall Street Journal A3 (Jan. 11, 2000). This estimate was based on Microsoft's reported charge to pay the settlement and its tax rate. "Microsoft Corp. agreed to pay an estimated $275 million to settle an antitrust lawsuit by Caldera Inc., heading off a trial that was likely to air nasty allegations from a decade ago. Microsoft and Caldera, a small Salt Lake City software company that brought the suit in 1996, didn't disclose terms of the settlement. Microsoft, though, said it would take a charge of three cents a share for the agreement in the fiscal third quarter ending March 31. Since the company has roughly 5.5 billion shares outstanding, the cost of the deal would appear to be about $165 million. Michael Kwatinetz, an analyst at Credit Suisse First Boston, estimated Microsoft paid about $275 million, based on its tax rate."

[107] For example, DR-DOS operated at a faster speed and was less expensive than MS-DOS. *See* Caldera, Inc. v. Microsoft Corp., 72 F.Supp.2d 1295, 1298.

[108] The U.S. and European government cases alleged licensing violations, including some involving operating systems. The subsequent Consent Decree barred, among other things, conditioning licensing agreements of Microsoft operating system products on the license of another Microsoft product. *See* Final Judgment, United States v. Microsoft Corp., No. 94-1564 (July 15, 1994).

In early 1998, Caldera filed an amended complaint, expanding its claims to include allegations that Microsoft tied MS-DOS to Windows 95 in an attempt to eliminate DOS competition.[109] This claim was especially unique and has since appeared in the government cases that have followed.[110]

Microsoft subsequently filed nine separate motions for summary judgment seeking to dismiss this and many of Caldera's other claims. In response Caldera filed a Statement of Facts, making public much of its evidence against Microsoft, including emails sent by Bill Gates directing his development staff to identify ways that an application would run only with MS-DOS and not with DR-DOS.[111] Judge Dee Benson denied Microsoft's motions for summary judgment, ruling that Caldera's evidence was sufficient to support its claims and present them to a jury.[112]

The parties entered into a settlement agreement on January 9, 2000, less than one month before the case was scheduled to go to a jury trial. The timing of the settlement was also significant given the additional cases brought by the U.S. and the European Union which had yet to be resolved. In addition, Microsoft had recently prevailed in a jury trial action brought by Bristol, another of its competitors.[113] Some commentators concluded that the settlement represented the first acknowledgment by Microsoft that "Caldera had a solid case," and had not been simply playing the "litigation lottery."[114]

Consumers received important information regarding Microsoft's conduct as a result of the discovery in this case. A consulting expert on the case noted, "Confidential settlements typically allow evidence of corporate wrongdoing to remain hidden. However, the settlement of Caldera v. Microsoft isn't quite like this."[115] Caldera released a series of "smoking gun" emails, which included one email from Bill Gates that threatened "the price of Windows without MS DOS would be twice as much" to companies that sold personal computers to consumers.[116]

[109] Andrew Schulman, *The Caldera v. Microsoft Dossier,* 2/7/2000, available at: www.oreillynet.com/pub/a/network/2000/02/07/schulman.html.

[110] *See* United States v. Microsoft Corp., No. Civ. A. 98-1232, 1998 U.S. Dist. LEXIS 14231, 1998 WL 614485 (D.D.C. Sept. 14 1998). Microsoft had previously asserted that Windows 95, unlike previous versions of Windows, was an integrated operating system rather than an illegal combination of Windows and MS-DOS. *See* Consolidated Statement of Facts in Support of Its Responses to Motions for Summary Judgment by Microsoft Corporation, generally, Caldera, Inc. v. Microsoft Corp., 72 F.Supp.2d 1295.

[111] *See* Consolidated Statement of Facts in Support of Its Responses to Motions for Summary Judgment by Microsoft Corporation, at paragraph 38, Ex. 16.

[112] Memorandum Opinion and Order (June 28, 1999). Judge Benson's rulings were upheld on appeal. *See* Caldera, Inc. v. Microsoft Corp., 87 F.Supp.2d 1244 (D. Utah 1998) (Plaintiff's allegations were sufficient to support its claims of predatory practices and illegal restraint of trade in violation of sections 1 and 2 of the Sherman Act); and *Caldera v. Microsoft Corp.*, 72 F.Supp.2d 1295 (D. Utah 1999) (Denying Defendant's motions for partial summary judgment on Plaintiff's claims of predisclosure, perceived incompatibilities, intentional incompatibilities, and technological tying).

[113] *See* Bristol Technology Inc. v. Microsoft Corporation, Case No. 398-CV-1567 (D. Conn. Dec. 30, 1998).

[114] It had been Microsoft's contention that in purchasing DR-DOS from Novell for $400,000, Caldera bought the lawsuit in the hopes of winning a big payout from the industry giant. *The Caldera v. Microsoft Dossier*.

[115] *Id*.

[116] First Amended Complaint and Jury Demand, at paragraph 55, Caldera, Inc. v. Microsoft Corp., 72 F.Supp.2d 1295.

Cardizem CD Antitrust Litigation

MDL Docket No. 1278; 105 F. Supp 2d 682 (E. Dist. Mich. 2000); 332 F.3d 896 (6th Cir. 2003).

This case is noteworthy because: 1) It was the first of several cases that challenged the validity of settlement agreements between brand-name pharmaceuticals and their generic competitors: as the Judge noted, "[t]his case has helped put prescription drug pricing and marketing tactics at the forefront of media, Congressional scrutiny, and judicial scrutiny;"[117] 2) Private counsel apparently led the initial investigation, which was followed by an FTC investigation;[118] 3) Counsel for the Direct Purchaser Class persuaded the court that the agreement was a *per se* violation of the Sherman Act, the first time such an agreement was declared *per se* illegal; 4) Counsel for the Direct Purchaser Class secured a cash settlement of $110 million[119] which,

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[117] 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 22. *In re Cardizem* CD, MDL no. 1278 (E.D. Mich. 2004).

[118] Private counsel began an investigation in June 1998. *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 511 (E.D. Mich. 2003). "These cases began after an intensive private investigation, conducted by Co-Lead Counsel for the State Law Plaintiffs in June 1998, two months before the first class action case was filed. Lowey Dannenberg Bemporad & Selinger ("LDBS") was informed of the existence of the September 1997 HMRI/Andrx Agreement by a confidential source in June 1998. Thereafter, LDBS engaged in an intensive pre-litigation investigation of factual and legal issues relevant to this litigation. Pls.'s Motion, 9/22/03 Lowey Decl. (describing in detail pre-litigation investigation). In August 1998, Norman Morris, a California pharmacist, and Betty Morris, his wife who was a consumer of Cardizem CD, retained LDBS and Co-Lead Counsel Berman DeValerio Pease Tabacco Burt & Pucillo ("BDPT") to commence the first lawsuit related to the September 1997 HMRI/Andrx Agreement. LDBS and BDPT filed a comprehensive California state law complaint on the Morris's behalf In California state court on August 20, 1998 as a putative class action (the "*Betnor* action"). The following day, *The Wall Street Journal* published a story concerning the *Betnor* complaint. This publicity led to inquiries to Co-Lead Counsel from in-house counsel at Aetna and Cobalt (formerly known as "United Wisconsin Services"), the parent company of Wisconsin Blue Cross, about the possibility of their serving as class representative plaintiffs. Within several months, actions were filed in 11 different states and the District of Columbia. All were filed in state courts, under state antitrust and related laws, by consumers and health insurers. In late 1998 and early 1999, various wholesalers, or retailers who had obtained assignments of claims from wholesalers, filed direct purchaser class actions under the Sherman Antitrust Act, reiterating the allegations of the *Betnor* complaint, but asserting federal antitrust claims not available to the State Law Plaintiffs who were indirect purchasers of Cardizem CD." *Id.* at 511-512 (internal citations omitted).

Although the FTC did not file a complaint until March 16, 2000, it was looking into the agreement as early as March 9, 1999. *See* Ralph T. King Jr., "Drugs: FTC widens Prove Into Generic-Drug Barriers," The Wall Street Journal, B1 (Mar. 9, 1999) (The first private complaints in this case were filed in November 1998 and February 1999). S*ee also* Jerry Guidera and Ralph T. King Jr., "Abbot Labs, Novartis Unit Near Pact With FTC Over Agreement on Hytrin," The Wall Street Journal, B6 (Mar. 14, 2000) (the FTC probe "of the drug industry's alleged efforts to block generic rivals and thus protect sales of brand-name medications" was "launched about a year ago.").

Working with the FTC, class of states led by Attorneys General for Michigan and New York initiated proceedings against HMS/Aventis in 2001 which settled for $80 million dollars in 2003. The FTC secured a consent order preventing HMR from entering into such agreements in the future.

In some cases the Attorneys General, the DOJ, and/or the FTC will conduct a lengthy non-public investigation before filing a complaint, making it difficult to determine whether the government or private counsel began investigating first, or were conducting separate, parallel investigations. In this case, the attorneys general first took formal action in 2001 but they may have been looking into the agreement long before that so it is difficult to say with absolute certainty that private counsel initiated the investigation. However, the fact that private counsel first filed a complaint as early as 1998 supports the inference that this case was initiated by private counsel.

[119] Andrx recorded a $60 million litigation settlements charge in the second quarter of 2002 for all pending litigation relating to Cardizem CD. Andrx 2002 Annual Report, available at http://www.andrx.com. However,

according to plaintiffs' expert economist, represents more than 200 percent of the total amount the Class was overcharged[120] during the period the illegal agreement was in effect;[121] and 5) In her opinion approving the final settlement, Judge Nancy G. Edmunds for the Eastern District of Michigan awarded Class Counsel their requested 30 percent of the total recovery in attorneys' fees, noting that the award was justified by their "excellent performance on behalf of the Class in this hotly contested case."[122]

The litigation stems from a 1997 agreement whereby HMR, manufacturer of the brand-name drug Cardizem CD, agreed to pay $40 million a year to Andrx, a generic drug manufacturer, in return for Andrx's promise not to produce or sell its generic version of Cardizem CD. Plaintiffs alleged that this agreement delayed generic competition and kept prices for Cardizem CD artificially high in violation of the Sherman Act.

Cardizem CD is the brand-name version of diltiazem hydrochloride, which is used for the treatment of angina and hypertension and for the prevention of heart attacks and strokes. While Andrx's generic version was still in development, the company anticipated the possibility that HMR would file a patent infringement suit and, in the hopes of avoiding litigation, Andrx provided samples of its version of the drug to HMR so that its scientists could perform their own tests and be sure that the Andrx version did not infringe on HMR's patent. In September 1995, Andrx filed an abbreviated new drug application ("ANDA") with the FDA requesting approval to begin marketing a generic version of diltiazem hydrochloride. As required by the Hatch-Waxman Act,[123] Andrx filed a certification that its generic product did not infringe on any of the patents listed with the FDA.

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although HMR and Andrx collectively paid into the settlement fund, the proportion contributed by each is confidential as per the settlement agreement. Settlement Agreement, *In re Cardizem CD*, MDL No. 1278 (E.D. Mich. 2004).

[120] Memorandum in Support of Sherman Act Class Plaintiff's Motion for Final Approval of Settlement, filed 11/04/2002, *In re Cardizem CD Antitrust Litigation*, MDL Docket No. 1278, at 2 (E.D. Mich. 2002).

[121] September 24, 1997 through June 9, 1999.

[122] 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 21. *In re Cardizem* CD, MDL No. 1278 (E.D. Mich. 2004).

[123] The complicated provisions of the Hatch-Waxman act provide the backdrop for this and similar litigation. Under its provisions, the first generic manufacturer to file an ANDA is entitled to a 180-day exclusivity period. Each ANDA must be accompanied by a certification that the drug for which they seek approval does not infringe on a legitimate patent right because the patent is either invalid, expired, or will not be infringed by the marketing of the generic drug. The patent holder is entitled to notice of this certification and, can immediately file a patent infringement suit against the generic competitor. Filing a patent infringement suit triggers an automatic stay of FDA approval of the generic manufacturer's ANDA for 30 months or until the patent litigation is resolved. 21 U.S.C. 355. Relevant provisions of the Hatch-Waxman Act were amended in *2003 See*: The Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Title XI: Access to Affordable Pharmaceuticals, sections a-b, United States Public Laws, 108th Congress –1st Session, 108 P.L. 173 (2006). The amendments adopt FTC recommendations that brand-name companies be limited to one 30-month stay of approval, that a counterclaim for improper Orange Book listing be authorized for generic companies faced with patent infringement suits, and that limits be put on the 180 day exclusivity period. Statement of the Honorable Timothy J. Muris before the Senate Judiciary committee (Aug. 1, 2003). For a history of the act and a discussion of the recent amendments, *see* Elizabeth Stotland Weiswasser & Scott D. Danzis, The Hatch-Waxman Act: History, Structure and Legacy, 71 Antitrust L.J. 585 (2003). For a discussion of the 2003 amendments and the loop holes that still exist, *see* Brian Porter, Comment: Stopping the Practice of Authorized Generics: Mylan's Effort to Close the Gaping Black Hole in the Hatch Waxman Act, 22 J. Contemp. Health L. & Pol'y 177 (Fall 2005). For an overview of the Act and how it has been manipulated by brand-name pharmaceutical manufacturers as well as differing views as to how such manipulations should be treated, *see* Eric L. Cramer and Daniel Berger, The

In November 1995, HMR obtained patent[124] rights for a new version of diltiazem hydrochloride with a different dissolution profile. The following January, HMR and Carderm Capital L.P. ("Carderm")[125] filed a patent infringement suit against Andrx claiming that the generic drug it intended to market would violate their new patent. The filing of this suit triggered an automatic stay of FDA approval of Andrx's ANDA for 30 months or until the patent infringement litigation reached a final resolution. Andrx filed counterclaims against HMR and Carderm for unfair competition and antitrust violations.

The parties settled the patent infringement suit in 1997. Under the terms of this agreement, HMR agreed to pay Andrx $40 million a year, as long as Andrx did not bring its generic drug to the market. By the time this arrangement was terminated by agreement of both parties in June 1999, HMR had already paid Andrx a total of $89.83 million. After its subsequent release on June 23, 1999, Andrx's generic diltiazem hydrochloride drug, Cartia XT sold for a much lower price than Cardizem CD and captured a substantial portion of the market.[126]

The firm of Lowey Dannenberg Bemporad and Selinger ("LDBS") began investigating the HMR/Andrx agreement in June 1998 after receiving an anonymous tip.[127] After LDBS conducted an investigation, complaints were filed on behalf of several classes of plaintiffs beginning in August 1998. Thanks to the publicity of an article in the Wall Street Journal[128] the issue received national attention.

In 1999, the FTC launched a "probe of the drug industry's alleged efforts to block generic rivals and thus protect sales of brand-name medications."[129] The FTC filed a complaint against HMR and Andrx on March 16, 2000[130] which was resolved with a consent order whereby HMR and Andrx agreed not to enter into similar agreements in the future.[131]

Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Antitrust Cases Involving Delayed Entry of Generic Drugs, 39 U.S.F. L.Rev. 81 (Fall 2004), Herbert Hovenkamp et al., Anticompetitive Settlement of Intellectual Property Disputes, 87 Minn. L. Rev. 1719 (20030), *and* Kristopher L. Reed, A Return to Reason: Antitrust Treatment of Pharmaceutical Settlements Under the Hatch-Waxman Act, 40 Gonz. L. Rev. 457 (2004/2005).

[124] U.S. Patent No. 5,470,584 was issued to Carderm Capital, L.P. and licensed to HMR.

[125] *See* material two notes earlier.

[126] *In re Cardizem CD Antitrust Litigation,* 332 F.3d 896, 903 (6th Cir. 2003).

[127] *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 511 (E.D. Mich. 2003).

[128] Ralph T. King, Drugs: Novel Heart-Drug Deal Protects Sales, Spurs Suit, The Wall Street Journal, B1 (Aug. 21, 1998).

[129] Jerry Guidera and Ralph T. King Jr., Abbot Labs, Novartis Unit Near Pact With FTC Over Agreement on Hytrin, The Wall Street Journal, B6 (Mar. 14, 2000).

[130] In the Matter of Hoechst Marion Roussel, Inc.; Carderm Capital L.P.; and Andrx Corporation, Complaint, March 16, 2000, Docket No. 9293, available at: www.ftc.gov.

[131] *See* "Analysis to Aid Public Comment on Both Consent Orders," April 2, 2001. Docket No. 9293, available at www.ftc.gov.

Class Counsel filed class action suits on behalf of Direct Purchasers on November 18, 1998 and February 22, 1999.[132] The claims were consolidated and Plaintiffs' motion for certification of a class of direct purchasers was granted on March 14, 2001.[133] In addition to the substantial $110 million settlement, Class Counsel's greatest success was winning a motion for partial summary judgment in which the court held that the agreement whereby HMR paid Andrx not to enter the market was a "naked, horizontal restraint of trade and, as such, *per se* illegal."[134] Defendants appealed the class certification and the grant of partial summary judgment to the Sixth Circuit and lost.[135] After nearly four years of litigation the case finally settled for a cash payment of $110 million.[136]

Class Counsel expended more than 37,000 hours litigating this case over the course of four years, preparing successful motions for class certification and partial summary judgment, and coordinating an "efficient discovery effort that included the filing of numerous motions to compel, the review of over a million pages of documents and conducting over 25 depositions of witnesses."[137] In approving the final settlement, the court observed that "[t]he complexity of this case cannot be overstated. Despite its complexity, Class Counsel was able to efficiently and effectively prosecute and settle this matter."[138] The court granted Class Counsel's request for reimbursement of $1,080,231.74 in expenses and 30 percent of the total recovery in the case, noting that, "this Court would be remiss if it failed to acknowledge the experience, hard work, and skill demonstrated by Class Counsel in this matter. Their excellent performance on behalf of the Class in this hotly contested case justifies the award they seek."[139]

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[132] The first complaint filed by purchasers arising from these facts was based on California State Law and was filed on August 20, 1998. Only the direct purchaser actions are under Federal Antitrust laws. There were eventually five groups of plaintiffs: 1) consumers and third party payers, the State Law Plaintiffs 2) Litigating States represented by their attorney generals; 3) direct purchasers 4) individual retailers and chains that opted out of the Direct Purchaser Class and 5) individual blue cross plaintiffs. The Litigating States coordinated their prosecution and settlement with the State Law Class. Together, they settled for $80 million.

[133] The final Direct Purchaser Class consisted of all persons (or assignees of such persons) who directly purchased Cardizem CD from HMR (now Aventis) between September, 1998 and June 23, 1999.

[134] *In re Cardizem CD Antitrust Litigation,* 332 F.3d at 905 (Citing the district court opinion, *In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 682, 705-06 (E.D. Mich. 2000)).

[135] *Id*.

[136] *See:* 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 3. *In re Cardizem* CD, Master File No. 99-md-1278, MDL no. 1278. (E.D. Mich 2004). The Litigating States and State Law Class coordinated their settlement efforts and settled for a combined $80 million dollars. *See: In re Cardizem CD Antitrust Litigation,* 218 F.R.D. 508, MDL No. 1278 (E.D. Mich. 2003).

[137] 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 3. *In re Cardizem* CD, Master File No. 99-md-1278, MDL no. 1278 (E.D. Mich 2004).

[138] *Id*. at 20-21.

[139] *Id*. at 21.

Like other antitrust litigation involving brand-name pharmaceutical companies such as *In re: Terazosin Hydrochloride*,[140] the success of private counsel in securing a substantial settlement and persuading the court that such agreements are a *per se* violation of the Sherman Act will discourage other brand-name drug manufacturers from using such agreements to delay or prevent generic competition, helping to keep national healthcare costs down by keeping prescription drugs competitively priced.[141] The court recognized the particular importance of this litigation stating, "This case has helped put prescription drug pricing and marketing tactics at the forefront of media, Congressional scrutiny, and judicial scrutiny. Encouraging qualified counsel to bring inherently difficult and risky by beneficial class actions like this case benefits society."[142]

[140] *In re Terazosin Hydrochloride*, 352 F.Supp.2d 1279 (S.D. Fla. 2005). In re Terazosin Hydrochloride involved a similar agreement between a brand-name manufacturer and its generic competitor. Plaintiffs in that case won a motion for summary judgment on the same issue and secured a cash settlement.

[141] *See* Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary, United States Senate, "Competition in the Pharmaceutical Marketplace: Antitrust Implications of Patent Settlements," (May 24, 2001), available at www.ftc.gov; *and* Elyse Tanouye, Prices of Drugs Increase Faster Than Inflation, The Wall Street Journal, B4 (Feb. 13, 1997).

[142] 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 22. *In re: Cardizem* CD, MDL no. 1278 (E.D. Mich 2004).

Citric Acid Antitrust Litigation
MDL Docket No. 1092; 996 F. Supp. 951 (N. Dist. Cal. 1998).

The citric acid litigation is noteworthy because: 1) The FBI uncovered the price-fixing conspiracy while investigating the price-fixing conspiracy for lysine; 2) The class action suit settled for $86.2 million, of which $51.2 million came from two foreign defendants; 3) Four of the largest purchasers of citric acid opted out and settled for approximately $89 million from the same defendants, of which at least $4.3 million came from foreign defendants; 4) The private plaintiffs, all of whom were direct purchasers, recovered approximately $175 million; 5) The Department of Justice ("DOJ") obtained $105.4 million in criminal fines, of which $25.4 million came from three foreign defendants; and 6) The DOJ levied nearly $500,000 in fines against individuals involved in the conspiracy.

In the fall of 1992, Archer Daniels Midland ("ADM") executive and whistleblower Mark Whitacre began working with the FBI as a cooperating witness, using hidden tape recorders to reveal price fixing in the lysine market. While doing so, Whitacre captured Michael Andreas, vice chairman of ADM, and Terrance Wilson, head of the corn processing division, participating in price-fixing meetings concerning citric acid.[143] On June 27, 1995, the FBI raided ADM's headquarters in Decatur, Illinois, and within days the FBI also raided several other corn-products companies, including Haarmann & Reimer (Haarmann), Hoffman-La Roche (Roche), and Jungbunzlauer. The FBI seized thousands of incriminating documents implicating all four companies in a conspiracy to fix prices of citric acid.[144] Several years later, in 1998, the U.S. government filed charges against a fifth company, Cerestar Bioproducts BV (Cerestar).[145]

Shortly after the criminal proceedings began, hundreds of food, beverage, and chemical companies filed civil antitrust suits against ADM, Haarmann, Roche, and Jungbunzlauer. These actions were consolidated in the summer of 1996 in the Northern District of California.[146] The direct purchasers alleged that the conspiracy occurred from July 1991 through December 1995, when U.S. sales of citric acid ranged from $1.2 to $1.45 billion.[147] Plaintiffs estimated that overcharges during this period may have been as high as $400 million, and therefore were entitled to treble damages of nearly $1.2 billion.[148] However, in October 1996, the four defendants offered settlements in proportion to their market shares of citric acid for $94 million.

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[143] Citric acid is a flavor additive and preservative produced from various sugars. It is found in soft drinks, processed food, detergents, and pharmaceutical and cosmetic products.

[144] John M. Connor, *What Can We Learn from the ADM Global Price Conspiracies?*, Staff Paper 98-14 (August 1998), http://www.ag.uiuc.edu/famc/program98/connor.htm.

[145] U.S. Dept. of Justice, *Dutch Company Charged with Price-Fixing on Citric Acid*, 98-298 (June 23, 1998), http:// 149.101.1.32/atr/public/press_releases/1998/1805.pdf.

[146] In re Citric Acid Antitrust Litigation, MDL No. 1092. Cargill, Inc. was also named as a defendant, but was dismissed from the class-action suit in January 1998.

[147] John M. Connor, *What Can We Learn from the ADM Global Price Conspiracies?*, Staff Paper 98-14 (August 1998), http://www.ag.uiuc.edu/famc/program98/connor.htm.

[148] *Id.*

Proctor & Gamble, Quaker Oats, Kraft Foods, and Schreiber Cheese, four of the largest buyers of citric acid, opted out of the class, and brought their own private suit against the defendants in June 1997. One month later, on July 11, 1997, the class action suit settled for a reduced amount of $86.2 million: ADM, Haarmann, Roche, and Jungbunzlauer agreed to pay $35 million, $38 million, $5.7 million, and $7.5 million, respectively.[149]

In March 1998, the four opt-out firms, who purchased approximately 19-24 percent of all U.S. citric acid, reached a settlement with defendants for an estimated total of $89 million.[150] This settlement "was from 2 to 3.5 times more generous than what was received by the members of the federal class less than a year before."[151]

In October 1996, ADM plead guilty to charges based on its involvement in the price-fixing conspiracy, which ultimately led to guilty pleas from the other major companies in early 1997. Overall, the DOJ obtained $105.4 million in criminal fines, $25.4 million of which came from foreign companies.[152] According to the DOJ in 1998, the conspiracy was "one of the largest, if not the largest, conspiracies ever prosecuted by the Department of Justice."[153] Canada and Europe also levied fines against the companies for approximately $11.5 million and $120.5 million, respectively.[154]

The government also charged individuals from each company for their participation in the conspiracy. Although none actually went to jail, each pled guilty and paid hefty fines totaling $490,000.[155]

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[149] *Id.* The settlement was reduced because the four large buyers that opted out were seeking at least $1 billion in damages.

[150] ADM paid $36 million. The other three defendants are not public companies under U.S. law and therefore are not required to reveal this information. However, Roche Holding's CEO, Franz Humer, stated that Roche paid $10 million to settle the civil antitrust suit. It paid $5.7 million to members of the federal class, leaving $4.3 million for the opt-out firms. Also, it is believed that Unilever settled separately as well for $25 million, but that has not been verified. John M. Connor, *Archer Daniels Midland: Price Fixer to the World*, Staff Paper 00-11 (Dec. 2000), http://www.agribusinessaccountability.org/pdfs/182_ADM%20Price%20Fixer%20to%20the%20World.pdf. The amount of attorneys' fees and costs awarded in both the class action and the private suit are not known.

[151] "The class settlement of $86.2 million represented an assumed overcharge of $1.7 to $2.4 million per percentage point of the market. However, the opt-out firms received $4.7 to $6.0 million per percentage point." John M. Connor, *What Can We Learn from the ADM Global Price Conspiracies?*, Staff Paper 98-14 (August 1998), http://www.ag.uiuc.edu/famc/program98/connor.htm.

[152] ADM was fined a total of $100 million ($70 million for the lysine case and $30 million for the citric acid case). Haarman, a U.S. subsidiary of Bayer AG, a foreign corporation, paid $50 million in criminal fines, and the two Swiss companies, Roche and Jungbunzlauer, paid fines of $14 million and $11 million, respectively. Cerestar, a Dutch company, was fined $400,000. U.S. Dept. of Justice, *Dutch Company Charged with Price-Fixing on Citric Acid*, 98-298 (June 23, 1998), http:// 149.101.1.32/atr/public/press_releases/1998/ 1805.pdf.

[153] John M. Connor, *What Can We Learn from the ADM Global Price Conspiracies?*, Staff Paper 98-14 (August 1998), http://www.ag.uiuc.edu/famc/program98/connor.htm.

[154] Harry Chandler, *Cartels and Amnesty: The State of Play in Canada*, Competition Bureau (April 5, 2000), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1194&lg=e. CBG, *European Commission Fines Five Companies in Citric Acid Cartel* (December 5, 2001), http://www.cbgnetwork.org/408.html.

[155] ADM's Michael Andreas and Terrance Wilson were both imprisoned and fined solely for their involvement in the lysine conspiracy. Hans Hartmann (Haarman), Udo Haas (Roche), and Rainer Bichlbauer (Jungbunzlauer) each paid $150,000, and Silvio Kluzer (Cerestar) paid $40,000 for their roles in the conspiracy. U.S. Dept. of

Commercial Explosives Litigation

945 F. Supp. 1489 (D. Utah 1996).

These related cases concern an agreement between some of the world's largest manufacturers of commercial explosives to fix prices in the sale of certain commercial explosives. They are noteworthy because: 1) Private counsel apparently led the initial investigation, which was later followed by a Department of Justice ("DOJ") investigation; 2) There were two settlements totaling $113 million; 3) Of this amount $97.75 million came from foreign owned corporations, and; 4) The court awarded Counsel a 30 percent fee in one case; the other was confidential.[156]

This litigation and the government investigation that followed apparently arose out of a 1992 private civil suit initiated by Thermex Energy Corporation ("Thermex"), a Texas manufacturer of commercial explosives, against Atlas Powder Company, owned by Imperial Chemical Industries P.L.C. of Britain ("ICI").[157] Thermex alleged state and federal antitrust violations against Atlas Powder, claiming that it was forced out of business for refusing to participate in a conspiracy to monopolize a part of the commercial explosives market.[158]

In August 1995, a jury awarded $488.5 million to Thermex and found that ICI had engaged in a conspiracy with Defendant Dyno Nobel's predecessor, Ireco Incorporated, "to allocate territories and fix prices."[159] The case settled for a confidential amount, later reported to be $36 million.[160]

In September 1995, the DOJ secured guilty pleas and fines against two of the defendants in the Commercial Explosives litigation, Dyno Nobel Inc., a unit of Dyno Industrier A.S. of Norway,[161] and ICI, a unit of Imperial Chemical Industries P.L.C. of Britain.[163] The DOJ charged Defendants with conspiring to fix the prices of commercial explosives in Kentucky, Illinois and Indiana, and to eliminate competition in the sale of commercial explosives to three limestone

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Justice, *Dutch Company Charged with Price-Fixing on Citric Acid*, 98-298 (June 23, 1998), http://149.101.1.32/atr/public/press_releases/1998/1805.pdf.

[156] Order Awarding Fees and Reimbursement of Expenses for Atty. Fees, Doc. 874 (Dec. 30, 1998).

[157] *Thermex Energy Corporation v. Atlas Powder Co. d/b/a ICI Explosives U.S.A., Inc., et al.*, No. 92-03-141, District Court of Wise County Texas (1992).

[158] *ICI'S Atlas Powder Unit Seeks Bankruptcy Protection*, NEW YORK TIMES (SAT. LATE ED.) Sec. 1, Page 35, Column 1 (Aug. 12, 1995).

[159] Consolid. Amend. Complaint ¶ 8 (June 14, 1996). Richard Forsythe, CEO of Thermex, commented that he's relieved the 11-year order was ending and added that the verdict could trigger a ripple effect in the construction, mining and the oil and gas industries worldwide. "This decision should promote competition and hopefully lower prices for the customer." Internet Bankruptcy Library Archives, Dallas, Texas (July 14, 1995), available at http://bankrupt.com/TCR_Public/950724.MBX.

[160] Business Wire, *ICI Explosives USA Inc. Settles Texas Action* (August 24, 1995).

[161] *Dyno is Fined $15 Million in Price Fixing*, THE NEW YORK TIMES (THURS. LATE ED.), Section B, Page 5, Column 1 (Sept. 7, 1995).

[163] There is corroboration that the DOJ began its investigation in 1992. See www.crowell.com/content/Expertise/Antitrust/Publications22/art_rrm_explosive1098.htm .

quarries in central Texas. Dyno Nobel of Salt Lake City, pleaded guilty and agreed to pay a $15 million fine to settle antitrust charges. This litigation brought about the largest fine, up until that time ,for a single defendant in a criminal antitrust case. ICI, which was involved in the same case agreed to pay a $10 million fine.[164] By May 1997, this investigation resulted in 14 guilty pleas by 12 corporations and two individuals, and the assessment of $37.5 million in criminal fines.[165]

In February, 1996 a class action suit was brought by seventy plaintiffs representing a number of companies that purchase commercial explosives. In their complaint plaintiffs alleged that defendants engaged in an over-arching nationwide conspiracy to fix prices of commercial explosives. Specifically, plaintiffs claimed that from approximately 1985 until 1993 defendants met with competitors to discuss and agree on prices, imposed fabricated surcharges, and thereafter retaliated against Thermex Energy Corporation and other manufacturers of commercial explosives, for refusing to cooperate in the conspiracy.

Another, similar, class action suit was brought in August 1996 and the two were consolidated.[166] The cases settled for approximately $77 million in 1998.[167] The court awarded Class Counsel's request for 30 percent in attorneys' fees in addition to reimbursement of costs.[168]

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[164] *Id.*

[165] Press Release U.S. Dept. of Justice, *Lacroche Industries Inc. Pleads Guilty to Price Fixing, Pays $1.5 million* (May 30, 1997), available at http://www.usdoj.gov/atr/public/press_releases/1997/1139.htm.

[166] Defendants E.I. DuPont de Nemours and Company and Austin Powder attempted to have plaintiffs' Consolidated Amended Complaint dismissed, but their requests were denied.

[167] Out of this settlement, most was paid out by foreign defendants. Dyno Nobel Inc. (a unit of a Norwegian company) paid 43,750,000. Settle. Agreement of Defendant Dyno Nobel Inc., Pg. 3 (Mar. 26, 1998). ICI Explosives USA, Inc. (a unit of a British company) paid $18 million. Settlement Agreement of Defendant ICI Explosives U.S.A. Inc., Pg. 2 (Sept. 12, 1996). DuPont paid $5,750,000. Settlement Agreement of Defendant DuPont, Pg. 3 (Oct. 13, 1998). Austin Powder Company paid $10 million. Settlement Agreement of Defendant Austin Powder Co., Pg. 3 (Sept. 23, 1996). Mine Equipment & Mill Supply Co., Inc. paid $1,150,000. Settlement Agreement of Mine Equip. & Supplies, Pg. 3 (Dec. 31, 1997). The money was distributed to the class and in 2006 the very small amount remaining was subject to a cy pres distribution, some of which was allocated to the American Antitrust Institute.

[168] Order Awarding Fees and Reimburse. Of Expenses for Atty. Fees, Doc. 874 (Dec. 30, 1998).

Conwood Co. v. United States Tobacco Co.

290 F.3d 768 (6th Cir. 2002).

This case is noteworthy because: 1) The $1.05 billion unanimous jury verdict represents the largest antitrust judgment ever affirmed on appeal; 2) Plaintiff's counsel survived motions for summary judgment and for judgment as a matter of law, and secured injunctive relief to prevent the defendant from further anti-competitive conduct; 3) Plaintiff is a competitor; and 4) This case is not a follow-on to any government action, rather private counsel alone initiated and obtained substantial monetary and injunctive relief.

In 1998 Conwood ("Conwood") brought an action against United States Tobacco Co. ("USTC"), its competitor in the moist snuff smokeless tobacco industry, for alleged violations of Section 2 of the Sherman Act, Section 43(a) of the Lanham Act and various state law violations.

The moist snuff smokeless tobacco industry makes more than $1 billion in profits each year. USTC controls 75-80 percent of that market with its popular Copenhagen and Skoal brands and "has the highest profit margin of any public company in the country."[169] Conwood is USTC's largest competitor with its Kodiak brand, holding approximately 13 percent of the market. Swisher International and Swedish Match ("Swedish") are the only two other competitors in the industry with about four percent and six percent of the market share, respectively.

Conwood alleged that beginning in 1990 USTC sought to exclude competition in the market by pursuing anti-competitive strategies, issuing from high-level executives, including unauthorized removal and destruction of Conwood racks, and deceptive practices in category management and discount programs.

Moist snuff products are sold from gravity-fed racks, known as "facings," which dispense cans of the product and provide for point of sale advertising ("POS"). This method of advertising is particularly important in the moist snuff industry since the government restricts other forms of tobacco advertising, and prohibits television and radio advertising altogether. The racks are often the sole means by which a manufacturer can reach consumers and are therefore provided to retail stores by each manufacturer at no cost.

Conwood proved at trial that USTC sales representatives, at the direction of their supervisors, routinely removed Conwood and other competitors' racks, and their accompanying POS, without obtaining consent or by misrepresenting facts to retailers who were often unaware that there were multiple manufacturers of moist snuff products. Conwood presented testimony that USTC sales representatives stated that their bonuses were tied to the destruction of competitors' racks and POS. Once competitors' racks were removed, their products were either put in USTC racks or bagged up and left under a counter. According to Conwood's Chairman, after 1990 the company "spent $100,000 a month on replacement racks"[170] and its sales representatives spent approximately 50% of their time repairing or replacing damaged racks.

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[169] Conwood Co. v. United States Tobacco Co., 290 F.3d 768, 774 (6th Cir. 2002).

[170] Id. at 778.

Conwood asserted that USTC also excluded its competitors through abuse of its role as category captain, which involves store-by-store management of an entire class of products and can control the number of items a store sells. Retailers began utilizing category management in the 1990s to determine which products were more profitable and should therefore be displayed more prominently or given more shelf space. As part of the process, retailers sometimes rely on manufacturers for information on "which items to sock, consumer information, sales, and which stores are stocking what items."[171] In its role as category captain, USTC supplied false information to retailers including inflated or "skewed" sales data, in order to limit the facings and POS of competitors' products, particularly the "price value" brands introduced by Conwood and Swedish in the mid-1990s. According to internal USTC documents, the company found it "imperative" to continue as category captain "to eliminate competitive products," and to "inhibit competitive growth . . . to the best of [their] ability."[172]

USTC was also successful in excluding competition through its Consumer Alliance Program, which granted a discount to retailers who agreed to provide sales data and participate in promotion programs, and/or give USTC racks the best or exclusive placement. According to Conwood, this program was used in an effort to obtain exclusive vending, and according to a USTC internal document, "the elimination of competition products."[173] USTC successfully signed 37,000 retailers, representing 80 percent of its entire volume in moist snuff sales, in the first few months of the program.

Through these and other anticompetitive practices USTC engaged in a widespread campaign to limit the distribution of competing brands at retail outlets. These actions harmed consumers by limiting consumer choice and causing higher prices. In fact, Conwood's expert testified that "there was a direct relationship between the number of facings controlled by UST[C] and higher prices for consumers."[174]

Although Conwood's market share did increase 2.5 percent between 1990 and 1998, the evidence also indicated that its share was lower than its national average in locations where USTC had rack exclusivity and higher for those locations where USTC had not obtained such exclusivity. Moreover, if USTC had not engaged in anticompetitive behavior, Conwood's share would have increased 6.5 to 8.1 percent.[175] According to Conwood's expert USTC's exclusionary practices caused this disparity, resulting in between $313 million and $488 million in damages.[176]

USTC conceded that it had monopoly power, but asserted that this power was the result of a superior product rather than an exercise of monopolistic behavior. The company defended that Conwood's evidence of destroyed and discarded racks supported isolated sporadic torts rather

[171] Id. at 776.

[172] Id. at 777.

[173] Id. at 778.

[174] Conwood Co. v. United States Tobacco Co., 2000 U.S. Dist. LEXIS 12797, 12 (W.D. Kent. August 10, 2000).

[175] Conwood's expert testified that where "Conwood had a market share in 1990 of 20 percent or more, the market share grew on average an addition 8.1 percent . . . [and] where Conwood's market share in 1990 was at least 15 percent, it grew an additional 6.5 percent." Conwood Co. v. United States Tobacco Co., 290 F.3d at 780.

[176] Id. at 780.

than antitrust violations, and that its actions as category captain were merely aggressive competition and common practice.[177]

Before going to trial plaintiff's counsel successfully defended motions to exclude Conwood's expert testimony and separately, the damages study, and also won on USTC's motion for summary judgment. The case then went to trial in February 2000 with both parties agreeing to dismiss their respective Lanham Act claims and Conwood dismissing its state law claims before going to the jury. After just four hours of deliberation the jury returned a $350 million verdict for Conwood and ruled in favor of Conwood on USTC's counterclaims for conversion and Sherman Act violations.

Plaintiff's counsel also prevailed in its subsequent motion for injunctive relief to prevent USTC from removing competitors' racks and POS without obtaining the retailer's prior consent, and successfully defended USTC's motion for judgment as a matter of law. After trebling, the total amount of damages awarded was $1.05 billion, the largest antitrust judgment ever affirmed on appeal. In reviewing the judgment, district court Judge Thomas B. Russell stated that the award was "well within the range that Conwood proved at trial."[178]

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[177] See Final Brief for Appellants at page 5.

[178] Conwood Co. v. United States Tobacco Co., 2000 U.S. Dist. LEXIS at 16.

Dynamic Random Access Memory (DRAM) Antitrust Litigation

Master File No. M-02-1486PJH, MDL No. 1486.

This case is noteworthy because: 1) The $325,997,000 settlement represents more than 85 percent of the alleged pre-trebled damages;[179] 2) Of this total, $310,997,000 was recovered from foreign cartelists; 3) The direct purchaser action[180] was filed shortly after a federal grand jury issued subpoenas to various DRAM manufacturers;[181] 4) Class Counsel cooperated with the Department of Justice ("DOJ") to obtain documents already produced in the grand jury investigation; 5) Class Counsel negotiated a successful settlement despite many of defendants' key employees invoking their Fifth Amendment privilege against self-incrimination as a result of the DOJ investigation; and 6) The court awarded Class Counsel 25 percent in attorneys' fees.

Dynamic random access memory ("DRAM") is an electronic microchip used in everyday electronics, including personal computers, printers, digital cameras and cell phones, and is sold in two forms and a variety of densities, speeds, and frequencies.[182] DRAM manufacturers sell to both large and small-scale customers[183] through a variety of channels and using at least two pricing methods.[184] In the year leading up to the alleged anticompetitive conduct, the $11.2 billion industry sustained significant losses due to waning sales in the personal computer market, causing manufacturers to lose money on "every DRAM they made."[185] However, prices for DRAM components and modules rose from approximately $1 per in December 2001 to between $4 and $5 per by the end of May 2002.[186]

A federal grand jury sitting in the Northern District of California began investigating several DRAM manufacturers in June 2002 for antitrust violations.[187] Shortly thereafter, on June 21, 2002, direct purchasers filed suit against the leading manufacturers[188] for violations of Section 1

[179] This percentage is based on damages as alleged by Plaintiffs. Memorandum of Points and Authorities in Support of Attorneys' Fees, Expenses & Incentive Awards, FN 5, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litigation, Master File No. M-02-1486PJH, MDL No. 1486.

[180] An indirect purchaser action is still pending. *See In re* Dynamic Random Access Memory Antitrust Litigation, 2007 U.S. Dist. LEXIS 44254.

[181] "The three largest chip makers said that they had been subpoenaed or informally contacted in recent days by the Justice Department" as part of an industry-wide antitrust investigation. Barnaby J. Feder, *Chip Makers Report Inquiry on Industry*, The New York Times C1 (June 20, 2002).

[182] *In re* Dynamic Random Access Memory Antitrust Litigation, 2006 U.S. Dist. LEXIS 39841 at 21.

[183] Purchasers include equipment manufacturer customers, franchise distributors, smaller-volume customers, and those who purchased through defendant Micron's online DRAM sales. *In re* Dynamic Random Access Memory Antitrust Litigation, 2006 U.S. Dist. LEXIS 39841 at 22-23.

[184] All defendants use contract and spot pricing, "while defendant Micron additionally engages in direct sales to customers through its [online] division." *Id.* at 23.

[185] Barnaby J. Feder, *Chip Makers Report Inquiry on Industry*, The New York Times C1 (June 20, 2002).

[186] *Id.*

[187] *See* U.S. v. Censullo, No. CR 03 0368 PJH, paragraph 3 (N.D. Cal. Dec. 17, 2003).

[188] Defendants' market share was more than 70% during the class period. *In re* Dynamic Random Access Memory Antitrust Litig., 2006 U.S. Dist. LEXIS 39841, 21 (N.D. Cal. June 5, 2006). Defendants include Elpida

of the Sherman Act. Specifically, the complaint alleged that during the period April 1, 1999 through June 30, 2002, defendants engaged in an international conspiracy to fix, raise and maintain prices for DRAM, causing purchasers to pay artificially inflated prices.[189]

The direct purchaser class faced significant hurdles throughout the course of the litigation. First, on October 16, 2002, the DOJ moved to stay all discovery pending its grand jury investigation. While numerous agreements resulted in production of documents by defendants on a rolling basis, merits discovery did not begin until July 14, 2005.[190] During the course of the litigation Class Counsel ultimately reviewed and analyzed more than 4.5 million pages of documents, participated in 129 depositions around the world, and defended against repeated motions to compel and five separate motions for summary judgment.[191] Perhaps Class Counsel's greatest success was certifying the class on June 5, 2006, despite defendants' vigorous argument that typicality could not be met given the different types of DRAM, different categories of customers, and different channels though which plaintiffs purchased DRAM.[192] Class Counsel also had to contend with the ramifications of 16 of defendants' key employees invoking their Fifth Amendment privilege against self-incrimination due to the continuing DOJ investigation.[193]

The parties began settlement discussions in 2004, with several partial settlements occurring between 2004 and 2007. Seven of the nine defendants settled prior to February 20, 2007, when the Court ruled on four of defendants' summary judgment motions.[194] The remaining two defendants settled only after mediation, and just one month before the case was set to go to trial in April 2007.[195]

Memory, Inc., Hynix Semiconductor, Inc., Infineon Technologies AG, Micron Technology Inc., Mosel Vitelic Corporation, Nanya Technology Corporation, NEC Electronics America, Inc., Samsung Semiconductor, Inc., Samsung Electronics Co., Ltd., Winbond Electronics Corporation, and their U.S. subsidiaries. *See* Third Consolidated Amended Complaint, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litigation, Master File No. M-02-1486PJH, MDL No. 1486.

[189] Third Consolidated Amended Complaint.

[190] *See* Memorandum of Points and Authorities in Support of Attorneys' Fees, Expenses & Incentive Awards. The parties stipulated to production by Defendants, on a rolling basis, of all documents produced to the grand jury, and Plaintiffs agreed to wait to take depositions and make interrogatory requests. The DOJ renewed its request for a stay of deposition and interrogatory discovery in July 2004 and again on January 20, 2005. "On July 14, 2005, Class Counsel worked with Defendants and the DOJ to come up with an agreement whereby merits discovery could finally begin." *Id.*

[191] Memorandum of Points and Authorities in Support of Attorneys' Fees, Expenses & Incentive Awards, page 11-12.

[192] Order Granting Motion for Class Certification, pages 31-32, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litigation, 2006 U.S. Dist. LEXIS 39841.

[193] As of March 7, 2007 the DOJ investigation has resulted in more the $732 million in fines, and criminal charges against four companies and 18 individuals. *See* Statement of Thomas O. Barnett Assistant Attorney General Antitrust Division: Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights Committee on the Judiciary United States Senate, March 7, 2007, available at http://www.usdoj.gov/atr/public/testimony/221777.htm.

[194] Memorandum of Points and Authorities in Support of Attorneys' Fees, Expenses & Incentive Awards, page 11-12. The Court ruled on four of defendants' motions for summary judgment, denying all but one, resulting in the dismissal of defendant Nanya's foreign parent corporation and Taiwan subsidiary, but keeping in Nanya's American subsidiary.

On August 15, 2007, Judge Phyllis Hamilton granted Class Counsel's request for attorneys fees in the amount of 25 percent of the settlement, plus expenses and incentive awards for the ten Class Representatives in the amount of $10,000 each.[196] In granting the $81 million award, Judge Hamilton praised Class Counsel for "an exceptional job" coordinating and litigating the case, and stated, "I have cases a fraction the size of this one that take up more of my time, just because counsel are not acting as cooperatively and professionally as you are."[197]

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[195] The defendants settled with plaintiffs as follows: Infineon $20,750,000; Samsung $67,000,000; Hynix $73,000,000; Elpida $14,750,000; NEC $35,960,000; Micron $90,537,000; Winbond $2,000,000; Mosel $15,000,000; and Nanya $7,000,000. *See* Memorandum of Points and Authorities in Support of Attorneys' Fees, Expenses & Incentive Awards, page 16.

[196] Matthew Hirsch, *DRAM Case Yields $81 Million Fee Award*, The Recorder (August 16, 2007) available at http://www.law.com/jsp/article.jsp?id=1187168529608. Judge Hamilton did take $20,000 off of the $4.2 million in requested expenses, due to some airfare and meals that "gave her some concern."

[197] *Id.*

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)

This settlement positively exemplifies private class action enforcement of antitrust violations because: 1) Approximately thirteen million California consumers and three thousand businesses[198] benefited from the settlement;[199] 2) The settlement consideration consisted of more than $1.552 billion,[200] including $551 million in upfront cash and stock valued at market rates, $876 million in semi-annual cash payments, and $125 million in rate reductions on electricity,[201] a total settlement consideration which at the time resulted in the "largest antitrust class action settlement in California history;"[202] 3) The class recovered significantly more than the profit earned by the illegal overcharge and a substantial proportion of the damages allegedly caused by the conduct at issue;[203] 4) Attorneys' fees composed only six percent of the settlement-date[204] total recovery;[205] 5) Because of private counsel's efforts, the California Attorney General's office chose not to pursue the defendants independently;[206] and 6) The defendants' conduct increased prices significantly for more than six years.[207]

Private plaintiffs first filed natural gas antitrust actions in California Superior Court in September 2000, the same year that California Attorney General Bill Lockyer began investigations under his Energy Task Force.[208] Defendants, including El Paso and its subsidiaries ("El Paso")[209] and

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[198] Ruling Following Oral Argument, 1, (Dec. 5, 2003).

[199] The class consisted almost entirely of indirect purchasers.

[200] After disbursement to city and states and compensation for attorney's fees, the class will receive more than $1.4 billion. Ruling, 2.

[201] The upfront payment included cash totaling over $323.8 million and stock worth over $227.5 million at market rates at the time of the settlement, for a combined value of slightly more than $551 million. El Paso will make semi-annual payments over 15 or 20 years, depending on its credit rating. In regard to the $125 million reduction of the price paid for electricity, El Paso lowered its prices to the California Department of Water Resources and class members received the benefit in the form of reduced natural gas bills. Ruling, 2.

[202] Ruling, 1.

[203] "The [$1.5 billion] settlement is also extraordinary in relationship to the $184 million in profits reportedly earned by [defendant] El Paso Merchant Energy on the pipeline capacity it purchased." Ruling, 4.

[204] Amended Judgment, Final Order, and Decree Granting Final Approval to the Class Action Settlement, 6 (Dec. 10, 2003), (estimated the present value at approximately $1 billion).

[205] $60 million.

[206] "Except as a vehicle to implement the structural relief terms of this settlement." MPA ISO Motion for an Award of Attorney's Fees and Reimbursement of Costs, 11 (Nov. 6, 2003).

[207] 09/01/1996 – 03/20/2003.

[208] Brooks, Nancy Rivera, "Lockyer's Goal Is to Make Them Pay;

Sempra, removed to federal court, though the federal court later remanded to state court. The California Judicial Council coordinated the cases in the San Diego Superior Court under Coordination Trial Judge Richard Haden. In May 2002, Judge Haden ordered that the cases be divided into Northern and Southern California tracks.

Plaintiffs in Northern and Southern California then filed two separate complaints against the defendants. The Northern California Plaintiffs alleged that El Paso and its subsidiaries entered into self-dealing in, or manipulation of, the price of natural gas in California.[210] Northern California Plaintiffs, overcoming challenges to their actions, ultimately proceeded on an intra-corporate conspiracy claim.[211] The Southern California Plaintiffs alleged that El Paso and Sempra "participated in a conspiracy to eliminate competition, preserve and maintain their market power, artificially constrain supplies of natural gas, and exploit the deregulation of the electricity industry for their illicit gain."[212] Plaintiffs proceeded with their actions after the Federal Energy Regulatory Commission ("FERC") finding that El Paso "violated FERC's affiliate rules, substantially injuring California consumers"[213] when it falsely reported its natural gas sales to the trade press to influence published natural gas prices.[214] The claims included

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While U.S. seeks convictions, California has settled with energy suppliers, winning nearly $450 million," *Los Angeles Times*, Business, Part 3, 6, Home Ed. (Dec. 2, 2002).

[209] El Paso consists of El Paso Pipeline and El Paso Merchant. Both have several subsidiaries. MPA ISO Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, 5 (May 8, 2003).

[210] El Paso Natural Gas ("Natural Gas") acquired additional pipeline capacity—enough to meet one-sixth the daily requirement for natural gas in California—for gas traveling to California. The El Paso companies decided to engage in a sham open bidding process in February 2000, and Natural Gas announced it would only accept bids over $37.5 million for the entire capacity. Another El Paso subsidiary, El Paso Merchant ("Merchant"), was the only bidder for the entire capacity, offering $38.5 million. Unknown to other bidders, Mojave Pipeline, another El Paso subsidiary, had agreed to give Natural Gas a secret discounted rate for its downstream transportation costs. Thus, the discounted transportation rate allowed Natural Gas to bid high for the capacity. Once Natural Gas won the capacity, El Paso had firm-wide capacity rights to transport "an enormous amount of the total capacity," allowing El Paso to "manipulate the market and raise prices to class members." MPA ISO Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, 7. Merchant overbooked delivery of natural gas into California on the pipeline and allowed its gas to flow, while denying long-term customers delivery. Merchant forced those shorted customers, still needing to supply their customers, to buy gas in the spot markets. During this time, El Paso sold in the spot market at inflated prices, "unlawfully [tying] the purchase of gas transportation services to the purchase of the natural gas." *Id.* at 8.

[211] Declaration of Bill Lockyer, 3 (November 5, 2003). "Defendants unlawfully tied the purchase of gas transportation services to the purchase of natural gas." MPA ISO Plaintiffs' Motion for Final Approval of Class Action Settlement, 5 (citing Nor. Cal. Compl. ¶¶195-202).

[212] MPA ISO Plaintiffs' Motion for Final Approval of Class Action Settlement, 5. In the early 1990s, changes in the law allowed pipelines outside California to deliver gas to California, eliminating the monopolies of Southern California Gas Company ("SoCal Gas") and San Diego Gas & Electric ("SDG&E"). In 1992, Tenneco finished a pipeline that partially bypassed SoCal Gas and SDG&E and began planning new pipelines that would entirely bypass the SoCal Gas and SDG&E. In 1996, El Paso acquired Tenneco. The plaintiffs alleged that in September 1996, El Paso, SoCal Gas and SDG&E secretly met and agreed not to compete with each other in California and to increase their stranglehold on the Southern California market. El Paso agreed to abandon Tenneco's projects intended to circumvent SoCal Gas and SDG&E. In exchange, SoCal Gas and SDG&E agreed to stop competing with El Paso on pipeline project in Mexico. The agreement left SoCal Gas and SDG&E without competition.

[213] Declaration of Bill Lockyer, 2.

[214] FERC confirmed this conduct. *See* Final Report on Price Manipulation in Western Markets, Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, at III-12-15 (March 2003), *quoted in* MPA ISO Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, 11.

allegations of conduct that would ordinarily be subject to the *per se* rule under the Cartwright Act, the California antitrust statute.[215] The settlement resolved the claims against El Paso.

After three years of substantial investigation, discovery[216] and litigation, the Court approved the parties' settlement in December 2003.[217] The settlement class[218] (the "Class") consisted of California purchasers of natural gas for consumption, but not for resale or generation of electricity for resale, between September 1, 1996 and March 20, 2003.[219] Three subclasses existed within the Class: (1) Core Natural Gas Subclass; (2) Non-Core Natural Gas Subclass; and (3) Electricity Subclass. The Core Natural Gas Subclass consisted of core subscribers of at least one California natural gas utility. The Non-Core Natural Gas Subclass was non-core subscribers of at least one California natural gas utility. The Electricity Subclass included purchasers of electricity from any California public utility. Government entities, including federal and state agencies, cities, counties and other municipalities, were excluded from the class.[220]

The total recovery of $1.55 billion was significantly larger than the profit El Paso earned through its illegal overcharge, and represents a substantial proportion of the alleged damages caused by defendants' conduct.[221] After deducting attorneys' fees, litigation expenses, and payments to various state and city governments, the settlement provided a net of $1.4 billion[222] to the Class including $481 million in upfront cash and cash equivalent,[223] $799 million in semiannual payments[224] and a $125 million reduction of the price paid for electricity.[225] Regarding the price

[215] The court did not rule on whether the conduct at issue was per se illegal, subject to the rule of reason, or some combination of the two.

[216] Plaintiffs' discovery included reviewing more than 1,650,000 pages of documents and 30,000 electronic files. Ruling, 6.

[217] *Id.* Ruling Following Oral Argument, entered Dec. 5, 2003. Amended Judgment, Final Order, and Decree Granting Final Approval to the Class Action Settlement, entered Dec. 10, 2003.

[218] *See* Amended Judgment, Final Order, and Decree Granting Final Approval to the Class Action Settlement, 5 (Dec. 10, 2003) (certifying the class and subclasses for the settlement).

[219] Amended Judgment, Final Order, and Decree Granting Final Approval to the Class Action Settlement, 2-3. The class consisted almost entirely of indirect purchasers.

[220] *Id.* at 3.

[221] "The [total] settlement is also extraordinary in relationship to the $184 million in profits reportedly earned by El Paso Merchant Energy on the pipeline capacity it purchased." Ruling, 4. The exact correlation between the settlement and El Paso's profit is unclear, as $184 million is only the profit El Paso Merchant made by purchasing pipeline capacity and does not include other potential sources of profit, *e.g.*, how much El Paso might have gained by eliminating competing pipeline projects into Southern California. The alleged damages were significantly larger, as the conduct at issue allegedly cause a general increase of prices for gas and electricity in California.

[222] Amounts received by non-Class plaintiffs, attorneys' fees and litigation expenses of the utilities and California governmental parties account for the deductions from the full amount. Ruling, 2. The payments to non-Class plaintiffs provided compensation to the states of Nevada, Oregon, and Washington, and to the cities of Los Angeles and Long Beach.

[223] The upfront cash equivalent consisted of the proceeds of the sale of El Paso common stock. *Id.* Again, the $481 million is the net amount paid to the class, after deducting payments for non-Class plaintiffs, attorneys' fees and the litigation expenses of the utilities and California governmental parties. The $481 million is based on the value of the stock at the time of the settlement, which was slightly over $227 million.

[224] The $799 million is the amount the class will receive over a 15 or 20 year period, after deducting amounts paid to non-class members, including to Nevada, Oregon, Washington, Los Angeles and Long Beach.

reductions, to avoid performing "'any sort of 'true-up' of the allocation in place at the time'" of the overcharge, the California Public Utilities Commission ("CPUC") found that the only efficient manner to distribute the settlement funds was to adjust current gas rates upon receipt of the funds.[226] Class member payout by check was unsatisfactory because of the substantial administrative cost to maintain mailing addresses and print checks.[227]

Counsel received the full fee award they requested—which amounted to 6% of the settlement-date value of the total settlement.[228] The Court approved a 3.32 multiplier of Southern California counsel's $16 million in costs and fees,[229] granting $50 million. The Court noted that the requested fee, "would be one of the lowest fees requested and granted in a common fund settlement of this magnitude,"[230] especially given that the "risks faced by plaintiffs' attorneys were enormous."[231] Northern California counsel requested a 4.58 multiplier for $2 million in costs and fees[232] and received $10 million. In addition, the Court lauded counsel because "[h]ere an exceptional benefit was achieved, even though plaintiffs' counsel had significant contingent risk."[233]

The settlement provided consumers with certain and long-term monetary benefits. For instance, "[the settlement] contains significant structural benefits that will assure more plentiful and affordable gas to Californians for decades."[234] California Public Utilities Commission "not only approved [the settlement] but. . . guaranteed ratepayers will receive 100 percent of the benefit of the [$125 million electricity] rate reductions over 15 to 20 years."[235] The reach of the settlement is also impressive, given that "[e]very California consumer and business that purchases natural gas and/or electricity will benefit from this settlement in the form of rate relief."[236]

Consumers also benefited from the settlement's deterrent effect. The settlement imposed a "significant deterrent benefit and require[d] El Paso to implement an antitrust compliance

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[225] *Id.*

[226] *Id.* at 9.

[227] *Id.*

[228] The Amended Judgment, Final Order, and Decree Granting Final Approval to the Class Action Settlement estimated the present value at approximately $1 billion. *Id.* at 6. This evaluation was based on the value of the stock at the time of the settlement, which was slightly over $227 million.

[229] Costs of $1,380,752.14 and fees of $15,072,831. *Id.*

[230] *Id.* at 11. The Court reiterated that Southern California counsel's "requested five (5) percent fee is low when contrasted with customary contingent agreements in class action cases." *Id.* at 12.

[231] *Id.* at 11.

[232] Costs of $473,568 and fees of $2,079,474. *Id.* at 13.

[233] *Id.*

[234] *Id.* at 1.

[235] *Id.* at 2. These rate reductions provide compensation in addition to the upfront cash and stock proceeds and the semi-annual cash payments.

[236] *Id.* at 4.

program."[237] More broadly, "the settlement amount serves as a strong deterrent to industries who believe they can engage in antitrust activities with impunity."[238] The Court concluded, "the settlement confers a substantial benefit on the class as a whole [and] is an outstanding result in a case that may be challenging to prove at trial...."[239]

These important benefits resulted directly from private enforcement of El Paso's alleged antitrust violations. Though the "California Attorney General's office investigated El Paso for over two years, they never filed a case...."[240] California Attorney General Bill Lockyer noted that while FERC in 2002 found that El Paso had violated FERC's rules, FERC's outcome "did not provide the same opportunities for relief" as the private actions.[241] Lockyer stated Class Counsel "were crucial to bringing [the settlement] to fruition."[243]

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[237] *Id.* at 1.

[238] *Id.* at 12.

[239] *Id.* at 4.

[240] MPA ISO Motion for an Award of Attorney's Fees and Reimbursement of Costs, 11 (Nov. 6, 2003). The California Attorney General's office became aware of the El Paso situation during an on-going investigation into higher gas costs commenced in the summer of 2000. Declaration of Bill Lockyer, 1.

[241] Declaration of Bill Lockyer, 2.

[243] Lockyer also noted that "[c]ounsel for both the Southern California Plaintiffs and the Northern California Plaintiffs were well-financed and expert litigators, bringing particular credibility to the [settlement] negotiations." *Id.* at 4.

Flat Glass Antitrust Litigation

MDL 1200, Master Docket Misc. 97-0550 (W.D. Pa.)

In re Flat Glass Antitrust Litigation is significant for a number of reasons: 1) The Federal Government initiated an investigation into price-fixing in the flat glass industry, but no indictments were ever issued and no civil government proceedings were commenced against any company or individual; 2) One defendant applied for leniency under the Department of Justice ("DOJ") Corporate Leniency Program, but its application was rejected; 3) Plaintiffs successfully appealed the district court's grant of summary judgment in favor of the sole remaining defendant;[244] 4) The direct purchaser settlements ultimately totaled $121.7 million, $37.7 million of which came from foreign corporations or wholly-owned U.S. subsidiaries of foreign corporations;[245] and 5) Attorneys' fees averaged 32 percent (33 1/3 percent from settlements with some defendants and 30 percent from the settlement with another).

Beginning in July 1997, numerous direct purchasers filed in various district courts against six manufacturers of glass products sold in the United States: Libbey-Owens-Ford Co, Inc. ("LOF") (now know as Pilkington North America); its parent, Pilkington plc, ("Pilkington") a United Kingdom corporation; AFG Industries, Inc. ("AFG"), a wholly-owned subsidiary of Asahi Glass Co, a Japanese corporation ; Guardian Industries Corp. ("Guardian"); Ford Motor Company ("Ford"); and PPG Industries, Inc. ("PPG"). The Judicial Panel on Multidistrict Litigation subsequently consolidated all of the lawsuits in the U.S. District Court for the Western District of Pennsylvania before then Chief Judge Donald E. Ziegler. Direct purchasers filed suit after two former senior executives of LOF disclosed (in an unrelated criminal case against them) that there had been a marketwide price-fixing conspiracy in the flat glass industry. During the course of the litigation, plaintiffs learned that LOF had applied for leniency under the DOJ's Corporate Leniency Program, but was turned down. In addition, plaintiffs also discovered that the DOJ had initiated two grand jury investigations into anticompetitive conduct in the flat glass industry, but never indicted or charged any person or entity.

On February 27, 1998, plaintiffs filed an Amended Complaint alleging that defendants had engaged in a classic, *per se*, horizontal conspiracy to fix, raise and maintain the price of flat glass products and automobile replacement glass ("ARG") sold in the United States from August 1991 through December 1995. The complaint further alleged that members of the Class paid higher prices as a result of the conspiracy.

By Orders dated November 5, 1999 and February 16, 2000, the Court certified the Class.[246] Following arm's length settlement negotiations, plaintiffs reached settlement agreements on behalf of the Class with five of the six defendants: LOF/Pilkington ($17.9 million), AFG ($19.8 million), Guardian ($16.9 million), and Ford ($8 million), for a total of $61.7 million. Following Court approval of the settlements, plaintiffs filed an application for fees and reimbursement of expenses and the court awarded attorneys' fees of 33 1/3 percent.

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[244] See 385 F.3d 350 (3d Cir. 2004).

[245] $17.9 million came from Libbey-Owens-Ford Co, Inc. and Pilkington, and $19.8 million came from AFG Industries Inc. a wholly-owned subsidiary of Asahi Glass Co., a Japanese corporation.

[246] *In re Flat Glass Antitrust Litigation,* 191 F.R.D. 472 (W.D. Pa. 1999).

After the conclusion of merits discovery, PPG, the sole non-settling defendant, moved for summary judgment. In May 2003, the District Court granted PPG's motion for summary judgment.[247] The Court held that the record, considered as a whole, "though it undoubtedly evidences that several of the settling defendants conspired to fix prices [of flat glass products], does not tend to exclude the possibility that PPG acted independently and therefore does not support a reasonable inference that PPG was involved in a price fixing conspiracy."[248]

Plaintiffs appealed the District Court's summary judgment ruling and on September 29, 2004, the Third Circuit reversed as to the conspiracy to fix prices of flat glass products.[249] Among other things, the Third Circuit rejected PPG's contention that the Court should look at each piece of evidence separately to see if it was as consistent with the absence of a price fixing conspiracy. The Court remanded, finding that, considered as a whole, there was sufficient evidence that PPG conspired to fix the prices of flat glass products to create a question of fact for the jury.[250] Thereafter, the district court set a trial date and the parties prepared the case for trial. The parties exchanged lists of proposed trial exhibits and deposition designations, proposed jury instructions and *voir dire* questions, and filed 15 *in limine* motions. During this period of intense trial preparation, the parties also undertook settlement negotiations, and in October 2005, virtually on the eve of trial, PPG agreed to pay $60 million, an amount nearly equal to the total of the settlements with all of the other defendants combined. After notice and a hearing, the district court approved this settlement, and granted plaintiffs' application for attorneys fees of 30 percent of this settlement fund.

Both Chief Judge Ziegler and Chief Judge Ambrose (to whom the case was reassigned after Judge Ziegler's retirement) made statements about the quality of plaintiffs' counsels' legal representation at the time of the award of attorneys' fees and expenses. At a hearing on May 28, 2003 Judge Ziegler awarded Class Counsel one-third of the $61.7 million settlements with all defendants except PPG stating: "we have carefully reviewed the counsel fee request of class counsel and find that the requested contingent of 33 1/3 percent and the sums to be distributed to class counsel, including for expenses, are not only fair, reasonable, and appropriate, but the fees are modest when the Court considers the stature of class counsel and the relief obtained for the class in this case and under the circumstances."[251] Similarly, Chief Judge Ambrose approved the requested fee of 30 percent of the $60 million settlement with PPG stating: "Well, I find that the request from plaintiffs for an award of attorneys' fees and reimbursement of expenses is reasonable, considering the skill and efficiency of counsel in obtaining this result, the complexity and duration of the litigation, the risks undertaken by plaintiffs' counsel and the time and effort devoted by them."[252]

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[247] *In re Flat Glass Antitrust Litig.,* Misc. No. 97-550, Opinion (W.D. Pa. May 29, 2003).

[248] Id. at 40.

[249] *In re Flat Glass Antitrust Litig.,* 385 F.3d 350 (3d Cir. 2004). The Third Circuit affirmed the grant of summary judgment as to the ARG conspiracy. Id. at 369-70.

[250] Id. At 368-69. After the Third Circuit's decision, PPG filed petitions for rehearing, for a stay of the mandate, and for *certiorari* to the United States Supreme Court. These petitions were denied. See *In re Flat Glass Antitrust Litigation*, 115 Fed. Appx. 570 (3d Cir. 2004); *PPG Industries Inc. v. Nelson*, 125 S. Ct. 1699 (2005).

[251] Transcript of May 28, 2004 at 9.

[252] Transcript of Feb. 3, 2006 at 10.

Thus, in this case, where there were (a) no governmental criminal or civil proceedings, (b) a grant of summary judgment against plaintiffs and reversal on appeal, and (c) nearly completed trial preparations, total attorneys' fees amounted to slightly less than one-third of the settlements combined. Moreover, purchasers of flat glass received distributions from the settlement funds equal to approximately 2.1 percent of their total purchases of flat glass during the relevant period, which was a significant percentage of the alleged overcharge.

Fructose Antitrust Litigation

M.D.L. File 1087, Master File # 94-1577 (Michael Mihm) (C.D.Ill. 1995)

The Fructose Antitrust Litigation is an important example of private antitrust litigation because: 1) While the government convened a grand jury to investigate price fixing among the major manufacturers of fructose, no indictments were brought, even though indictments were brought against the major manufacturers of two related products, lysine and citric acid; 2) Notwithstanding the absence of an indictment, after 10 years of litigation, including three appeals to the Seventh Circuit Court of Appeals and two petitions to the Supreme Court for *writs of certiorari*, the case settled for $531 million, one of the largest antitrust class action settlements ever achieved; 3) Of this amount, $100 million came from a foreign corporation, A.E. Staley Manufacturing; 4) Due to the relatively small number of fructose purchasers, the payments to individual absent class members were very large - in excess of $10 million per class member in some instances; 5) Each of the three appeals to the Seventh Circuit Court of Appeals[253] resulted in a significant ruling relating to antitrust law in particular, and civil conspiracy in general; and 6) The presiding judge repeatedly praised the skills and conduct of Class Counsel.

In 1995, following a well-publicized FBI raid at the Decatur, Illinois headquarters of Archer Daniels Midland Company ("ADM"), a number of antitrust class action suits were filed against manufacturers of three products: fructose, lysine, and citric acid. The cases were all sent to the Judicial Panel on Multi-District Litigation, which in turn separated the cases by product, transferring them to different judicial districts for consolidated and coordinated pretrial discovery. The Fructose cases were transferred to the United States District Court for the Central District of Illinois.[254]

Although grand jury investigations were conducted with respect to the manufacture and sale of fructose, citric acid, and lysine, indictments were issued only with respect to citric acid and lysine. Guilty pleas were entered by manufacturers and their agents relating to citric acid and lysine.[255] Given that a final judgment in a criminal proceeding involving antitrust violations is prima facie evidence of antitrust violations in a related civil case,[256] as could have been expected, class action settlements were entered into, in relatively short order, in both the Citric Acid Antitrust Litigation[257] and the Lysine Antitrust Litigation.[258]

[253] 216 F. 3d 621 (7th Cir. 2000); 295 F. 3d 651 (7th Cir. 2002); 361 F. 3d 459 (7th Cir. 2004).

[254] The Citric Acid cases were transferred to the United States District Court for the Northern District of California, and the Lysine cases were transferred to the United States District Court for the Northem District of Illinois. *In Re Amino Acid Lysine Antitrust Litigation, et al.,* 910 F.Supp.966 (J.P.M.L. 1995)

[255] In addition, after trial, convictions were obtained against certain officers of Archer Daniels Midland Company relating to lysine and citric acid.

[256] 15 U.S.C. §16.

[257] 1997 WL 446241 (N.D. Cal. 1997); 1997 WL 446240 (N.D. Cal. 1997); 1997 WL 446242 (N.D. Cal. 1997); and 1997 WL 446239 (N.D. Cal. 1997).

In contrast, no guilty pleas were entered into by any manufacturer of fructose.[259] Indeed, ADM, while entering a guilty plea with respect to citric acid and lysine, and agreeing to pay a then-record $100 million fine, did not enter a plea with respect to fructose. As a result, Class Counsel heavily litigated the Fructose case for almost ten years from inception to conclusion.

During the course of the Fructose Antitrust Litigation, there were three separate significant appeals to the Seventh Circuit Court of Appeals.

First, the Court of Appeals was asked to rule on whether plaintiffs could enforce a subpoena to obtain copies of both audio and video recordings made by a Vice-President of ADM during the course of the criminal price fixing investigation.[260] The government did not use these recordings in the criminal proceedings, but they were filed with the Department of Justice ("DOJ"). The district court held that recordings of face-to-face-conversations should be produced but that audio recordings did not have to be produced. On appeal, the Seventh Circuit required production of all the recordings filed with the DOJ.

Second, plaintiffs appealed the grant of summary judgment against plaintiffs and in favor of all non-settling defendants.[261] When the district court entered this ruling, plaintiffs had negotiated only a single $7 million settlement, putting Class Counsel at risk for virtually all of their time and expense. On appeal, the Seventh Circuit reversed. After analyzing the record evidence, the court held that fact questions precluded the entry of summary judgment in favor of the defendants. In a subsidiary ruling, the court held that an adverse inference could be drawn against ADM, but no other defendant, as a result of the refusal of two ADM officers to answer deposition questions on the grounds that their answers might tend to incriminate them. In rendering its' ruling, the Court of Appeals made two significant rulings relating to antitrust enforcement: (1) it declined to accept defendants' extreme interpretation of the application of the *Matsushita* case to the case on appeal, and (2) rejected defendants' argument that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment.

Third, the Seventh Circuit was presented with the novel question of whether the trial court had the authority to effect severance of two defendants for trial by impaneling two separate juries to sit simultaneously in one trial.[262] The trial court ruled that it had such authority and severance into two separate trials was therefore not necessary. On appeal, the Seventh Circuit affirmed this ruling.

As a result of their determined efforts, class plaintiffs and their counsel overcame the absence of a government indictment, ten years of litigation, and the entry of summary judgment for defendants to achieve a settlement of $531 million, resulting in payments of more than $10 million to some absent class members. Without this private class action litigation, the

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[258] 1996 WL 197671 (N.D. Ill. 1996) and 1996 400017 (N.D. Ill. 1996). In addition, there were numerous purchasers of citric acid and lysine in each case which elected to be excluded from the class and commence their own non-class action cases. These opt-out cases settled as well.

[259] The fructose defendants were Archer Daniels Midland Company (ADM), A.E. Staley Manufacturing Company, Cargill, Inc., and American Maize-Products Company.

[260] 216 F. 3d 621 (7th Cir. 2000).

[261] 295 F. 3d 651 (7th Cir. 2002).

[262] 361 F. 3d 439 (7th cir. 2004).

purchasers of fructose would have received nothing since no single fructose purchaser elected to be excluded from the class to pursue its own case.

The Honorable Michael M. Mihm repeatedly praised the effort and conduct of 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...."[263] He accordingly awarded class counsel costs plus 25 percent of the settlement fund.

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[263] See Trial Transcript of Oct. 4, 2004, at 45-46.

Graphite Electrodes Antitrust Litigation
2003 WL 22358491 (E.D. Pa. 2003)

This settlement in the last of three related cases is noteworthy because: 1) The two defendants in this settlement returned more than $47 million to overcharged direct purchasers; 2) This cash recovery came from foreign firms; 3) Legal fees were at most 15 percent of the total recovery; 4) The recovery was estimated at 105 percent of actual damages; and 5) This case was a successful follow-on to a federal criminal prosecution that resulted in more than $300 million in criminal fines against a total of six defendants.

This case is a follow-on to a federal criminal prosecution of an international price-fixing conspiracy. The plaintiffs were direct purchasers of the defendants' products, graphite electrodes, in the U.S. market. (The steel industry uses graphite electrodes to general the intense heat needed to melt scrap metal and refine steel in electric arc furnaces.) The Department of Justice ("DOJ") obtained more than $300 million in criminal fines against the cartel members and many of their executives.[264]

The Graphite Electrodes Antitrust Litigation consisted of three class action lawsuits alleging horizontal price-fixing in the graphite electrodes industry.[265]

During the period from December 1998 through November 2002, the court approved settlements with all defendants, except Mitsubishi and Nippon. Class Counsel obtained class certification in the action against these two defendants in February 2003. Shortly thereafter, the parties reached a settlement with the remaining defendants, and the Court approved a notice of the proposed settlement on May 14, 2003.[266]

Under the terms of the proposed settlement, Mitsubishi agreed to pay the Class $45 million and Nippon agreed to pay $2,875,000. Plaintiff's counsel agreed that their request for attorneys' fees would not exceed 15 percent of the settlement funds, plus reimbursement of litigation costs and

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[264] Kylie Cooper & Adrienne C. Dedjinou, *Twentieth Survey of White Collar Crime: Article: Antitrust Violations,* 42 Am. Crim. L. Rev. 179, 214 (2005). The criminal fines for each company were: Mitsubishi of Japan, $134 million; "SGL Carbon AG of Wiesbaden, Germany, $ 135 million; UCAR international of Danbury, Conn., $ 110 million; Showa Denko of Ridgeville, S.C., $ 32.5 million; Tokai Carbon Co. of Japan, $ 6 million; and Nippon Carbon, also of Japan, $ 2.5 million. A seventh producer, the Carbide Graphite Group of Pittsburgh, cooperated in the investigation and the company and its executives received amnesty." J. Seper, *Mitsubishi Fined for Price Fixing on Key Parts in Steel Industry,* Wash. Times (May 12, 2001).

[265] (1) Kentucky Electric Steel Inc. v. The Carbide/Graphite Group, Inc., SGL Carbon AG, and UCAR International Inc., No. 97-CV-4182 (E.D. Pa.), (2) Kentucky Electric Steel Inc. v. Showa Denko Carbon, Inc., No. 98-CV-1017 (E.D. Pa.), (3) Kentucky Electric Steel Inc., No. 99-CV-482 (E.D. Pa.). The defendants were: Tokai Carbon Company, Ltd., Tokai Carbon U.S.A., Inc. (collectively "Tokai"); SEC Corporation ("SEC"); Nippon; Mitsubishi; VAW Aluminum AG, VAW Carbon GmBH (collectively "VAW"); The Carbide/Graphite Group, Inc. ("CG"); SGL Carbon AG, SGL Carbon Corporation (collectively "SGL"); UCAR International Inc. ("UCAR"); and Showa Denko Carbon, Inc. ("SDC").

One of the defendants, SGL, attempted to evade civil liability by filing for a Chapter 11 bankruptcy petition in 1998. The Third Circuit, however, ordered the dismissal of SGL's bankruptcy petition on grounds that it had been filed in bad faith. In re SGL Carbon Corporation, 200 F.3d 154 (3d Cir. 1999).

[266] *See* Notice of Proposed Settlements with Mitsubishi Corporation and Mitsubishi International Corporation in the Amount of $45,000,000, and With Nippon Carbon Company, Ltd. in the Amount of $2,875,000, Class Action Determination and Other Matters, IN RE: Graphite Electrodes Antitrust Litigation, MDL No. 1244 (E.D. Pa. May 14, 2003).

expenses. According to the notice of the proposed settlement, a pro rata distribution of the proceeds would be determined by using the overcharge percentage from the report prepared by Plaintiffs' expert on damages.[267] The overcharges varied over time and were higher for deliveries in the U.S. than for deliveries outside the U.S.. To account for the variance over time, the proposed settlement divided the relevant period of time into twelve six month periods and called for the assignment of an overcharge percentage for each period.[268] Overall, plaintiffs' expert estimated the amount distributed to the class members at 105% of their actual damages.[269]

Ellwood Quality Steel chose to opt-out of earlier settlements and succeeded in recovering larger amounts from the other defendants. As a result, the allocation plan in the proposed settlement with Mitsubishi and Nippon denied Ellwood any distribution of funds because its settlements outside the class exceeded the amount it would have otherwise received in the settlement with Mitsubishi and Nippon. Nonetheless, Ellwood chose to opt-in to the Mitsubishi/Nippon settlement, and objected to the allocation plan insofar as it took into account Ellwood's prior settlements.

Judge Weiner denied Ellwood's objection. First, the provision ensured that all class members received equal distributions from the Mitsubishi/Nippon settlement. Second, precedent supported offsetting a class settlement share with funds received in private litigation. Finally, Ellwood received an opportunity to opt-out of the Mitsubishi/Nippon settlement and knowingly chose not to do so.

The award of damages had a material effect on the earnings of at least some consumers. Roanoke Steel Corporation reported that $1.4 million of its $1.5 million profit for the first quarter of 2004 was attributable to the settlement.[270]

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[267] The court does not appear to have made any published remarks regarding the quality of the work performed by the plaintiffs' attorneys.

[268] Although the class was limited to consumers who purchased graphite electrodes from July 1, 1992, through June 30, 1997, the proposed settlement provided for damages for purchases from July 1, 1992, to June 30, 1998. *Id.* at 3.

[269] In re Graphite Electrodes Antitrust Litigation, 2003 WL 22358491, 2 (E.D. Pa. 2003)

[270] *Roanoke Electric Steel Corporation Reports First Quarter Results*, P.R. Newswire (March 9, 2004).

IBM v. Microsoft Corp.

Complaint apparently not filed.

This case is noteworthy because: 1) It settled for $775 million cash and a $75 million credit toward Microsoft software; 2) It was a successful follow-on resolving claims between International Business Machines, Inc. ("IBM") and Microsoft arising from the U.S. government's antitrust case against Microsoft; 3) IBM's allegations were broader than those in the government's case; 4) The parties reached a settlement agreement in the absence of a separate lawsuit; and 5) The federal judge in the government case found that Microsoft's anticompetitive practices harmed both competitors and consumers.

In November 2003, on the heels of a settlement with the Department of Justice ("DOJ"), Microsoft entered into a tolling agreement with IBM extending the statute of limitations on antitrust claims to avoid protracted litigation and explore settlement options.[271] The final settlement resolved claims arising from the government's case against Microsoft which was filed in 1998 and alleged violations of Sections 1 and 2 of the Sherman Act, including unlawful maintenance of monopoly power and unreasonable restraint on trade through anticompetitive marketing practices. [272] The U.S. District Court for the District of Colombia issued findings of fact in the government case in November 1999 establishing that Microsoft had used its "prodigious market power and immense profits" [273] to harm competitors, including IBM.[274] Specifically, the judge found that Microsoft had "punished" IBM for failing to halt the promotion of its own products that competed with Windows and Office by withholding technical and marketing assistance, blocking the issuance of a Windows 95 license, and forcing IBM to pay higher prices.[275] According to the findings, these actions also resulted in harm to consumers since, "some innovations that would truly benefit consumers never occur[ed] for the sole reason that they do not coincide with Microsoft's self-interest."[276]

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[271] IBM, *Microsoft and IBM Resolve Antitrust Issues*, http://www-03.ibm.com/press/us/en/pressrelease/7767.wss (July 1, 2005).

[272] *U.S. v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999). Although twenty states joined in the government action, nine ultimately joined in the final judgment while the remainder went on to pursue a full remedies trial. The final judgment which was entered on November 12, 2001, prohibited Microsoft from engaging in a number of anticompetitive practices, including discriminatory pricing and overcharging, and from retaliating against its competitors for supporting or developing certain competing software - the same actions the court identified as having harmed IBM. Final Judgment (Nov. 12, 2001), available at http://www.usdoj.gov/atr/cases/f200400/200457.htm .

[273] *U.S. v. Microsoft Corp.*, 84 F. Supp. 2d at 112.

[274] Microsoft defended its actions in the press and complained that its competitors were using the government action out of jealousy to attack the company. The Microsoft-funded Independent Institute ran a full-page ad in both The Washington Post and The New York Times on June 2, 1999 delivering "An Open Letter to President Clinton from 240 Economists on Antitrust Protectionism." The letter complained that not only did consumers not ask for the antitrust actions, but that consumers benefited from Microsoft's success. An Open Letter to President Clinton from 240 Economists on Antitrust Protectionism, available at http://www.independent.org/pdf/open_letters/antitrust.pdf.

[275] *U.S. v. Microsoft Corp.*, 84 F. Supp. 2d at 39.

[276] *Id.* at 112.

Two months before the tolling agreement was set to expire, Microsoft and IBM entered into settlement discussions to resolve the claims arising out of the factual findings in the government case. The parties reached an agreement on July 1, 2005 whereby Microsoft agreed to pay a $775 million lump sum and extend a $75 million credit toward Microsoft software.[277]

The settlement agreement resolved claims arising out of the government case, including the discriminatory pricing and overcharge claims addressed in the findings.[278] The parties also negotiated to resolve claims related to IBM's OS/2 operating system and SmartSuite products. The OS/2 claims first arose in the early 1980s when the parties publicly agreed to develop the OS/2 operating system together as a replacement for MS-DOS, the original IBM operating system. [279] Microsoft undercut that agreement when it developed its Windows operating system, which also impacted the software that IBM and others initially developed for the OS/2 system.[280]

The agreement does not include daims against Microsoft for harm to IBM's server hardware and software businesses, though IBM did agree not to assert claims for money damages for a period of two years and not to seek recovery for claims involving events prior to June 30, 2002. This exclusion leaves IBM the option to pursue further legal actions, particularly in Europe where antitrust disputes against Microsoft remain unresolved.[281] The parties did not release any further details of the agreement.[282]

[277] IBM, *Microsoft and IBM Resolve Antitrust Issues*, http://www-03.ibm.com/press/us/en/pressrelease/7767.wss (July 1, 2005).

Although it is unclear whether IBM has used the $75 million credit, a principal analyst commented that the company would "most likely procure Microsoft PC software, such as operating systems and office productivity applications, with that credit." Juan Carlos Perez, *Microsoft to Pay IBM $775 Million in Cash, Plus $75 Million in Credit*, InfoWorld (July 1, 2005), available at http://www.infoworld.com/archives/emailPrint.jsp?R=printThis&A=/article/05/07/01/HNmsibmsettle_1.html.

[278] IBM, *Microsoft and IBM Resolve Antitrust Issues*, http://www-03.ibm.com/press/us/en/pressrelease/7767.wss (July 1, 2005).

[279] Markoff, N.Y. Times.

[280] *Id.*

[281] In 2004 the European Commission fined Microsoft $662 million upon its determination that "the software maker had abused its dominance in desktop operating systems to gain an unfair advantage in related markets, including servers." Perez, InfoWorld. If this ruling is upheld on appeal, it could pave the way for a similar action by IBM.

[282] Microsoft has paid more than $4 billion to settle state and federal antitrust suits related to the government case, including those brought by Sun Microsystems, Gateway Computers and Novell, and 13 class actions. Perez, InfoWorld; see also Steve Lohr, *Preaching from the Ballmer Pulpit*, N.Y. Times (Jan. 28, 2007). Microsoft agreed to pay Gateway $150 million over four years to settle its claims arising out of the government case, which were similar to IBM's discriminatory pricing and overcharge claims. Robert A. Guth, *Microsoft Takes $714 Million Charge*, Wall St. J. A.2 (Apr. 12, 2005). In addition, "Novell settled antitrust claims related to its NetWare network operating system in November 2004, with Microsoft paying the company $536 million." Perez, InfoWorld.

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).

This highly publicized and jurisprudentially important case is notable because: 1) It resulted in a settlement with significant prophylactic relief through an injunction that restructured the industry-wide mechanism for providing support and advisory services to Commercial General Liability insurance; 2) It also included a total of $36 million in cash paid by the defendants; 3) Of the cash payout, 27.2 percent consisted of attorneys' fees; 4) The cash component of the settlement was 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; 5) Money was returned to American businesses from foreign ($6 million) and domestic ($30 million) reinsurers; 6) The private action was a follow-up to investigations initiated by State enforcers; and 7) The case went to the Supreme Court and established important legal principles.

In 1989 the plaintiffs - consisting of "nineteen states and numerous private plaintiffs" [283] - sued "a group of insurance companies, reinsurance companies, underwriters, brokers and individuals, and the Insurance Services Office, Inc. ("ISO")" for alleged violations of Section 1 of the Sherman Act and state antitrust laws.[284]

The insurance companies sold Commercial General Liability Insurance ("CGL"), which protects the insured against the risk of liability to third parties for bodily injury or property damage. To share their risks, insurers turn to reinsurers. "Reinsurance is arranged by specialized brokers and underwriters. Much … [of which] is done by syndicates doing business through Lloyd's of London."[285] The terms and availability of reinsurance directly affect those of primary insurance. The insurance association, ISO, had an important role in the furtherance of the business of insurance by the states, and consisted of 1400 domestic property and casualty insurers. ISO's function at that time was to draft the standard CGL forms that were submitted to State regulators for approval, and to provide support services by collecting statistical data and estimating risks relevant to the forms. This information was then used by the insurers in underwriting decision making, including pricing of premiums.

But the defendants' primary insurers didn't like the standard ISO form for CGL insurance, and challenged the accidental pollution and the "long tail"[286] coverage. They "exerted concerted pressure on ISO to get it to withdraw its form for CGL insurance."[287] They also persuaded key

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[283] In Re: Insurance Antitrust Litigation, 723 F. Supp. 464, 468 (N.D. CA 19989).

[284] Id.

[285] In Re: Insurance Antitrust Litigation, 938 F.2d 919, 923 (9th Cir. 1991).

[286] "Long tail" coverage means that a claim can be made after the policy has expired if the event occurred during the life of the policy. The defendants preferred a "claims made" form under which only claims made during the life of the policy would be covered. Id. at 923.

[287] Id.

foreign underwriters and substantial American reinsurers to join their boycott of the ISO form. "As a result of the reinsurers' actions, primary insurers were precluded from selling long tail insurance and also from selling accidental pollution insurance."[288] Therefore the availability of these varieties of insurance was substantially diminished. Eventually, ISO gave into the pressure and eliminated the challenged accidental pollution coverage, and withdrew its support services for the challenged long tail insurance.

Plaintiffs subsequently filed suit, alleging an agreement between the domestic insurers and ISO to limit long-tail risks, and the enlistment of the London reinsurance market to refuse to provide reinsurance for long-tail risks which competitors of the domestic insurers might wish to offer. This allegedly constituted a conspiracy to withhold the inputs required by competitors in order to offer long-tail coverage in competition with the domestic defendants' short-tailed products. Plaintiffs also alleged that defendants' boycott removed their conduct from the insurance exemption to the antitrust laws, pursuant to Section 3(b) of the McCarran-Ferguson Act. The District Court dismissed the complaints on defendants' 12(b)(6) motion. The court of Appeals for the Ninth Circuit reversed, and the Supreme Court granted certiorari. The Supreme Court affirmed the Court of Appeals and remanded for further proceedings. After the document discovery in the District Court had started, the parties settled.

The March 19, 1995 settlement agreement included significant injunctive relief and a cash payment of $36 million.[290] The underwriters from the London Market paid, as alleged co-conspirators, a part of this. The injunctive relief disengaged ISO from industry members and instead put them under the control of an independent board of directors. Furthermore, certain defendants were restricted from participating in contract development activities for five years. The court awarded Class Counsel $9.8 million dollars of the settlement fund in attorneys' fees, costs and expenses. The remaining $26.2 million was placed in an escrow fund, of which $21 million was used to develop the *Public Entity Risk Institute* ("PERI"). PERI provides risk management education and technical services to public entities, small businesses, and non-profit organizations. PERI seems to have become an extremely successful self-sustaining entity which, apparently, public risk managers find quite useful. Another $5.2 million was distributed to the States for development of a risk database for municipalities and local governments.

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[288] Id. at 923-924.

[290] See http://www.abanet.org/antitrust/committees/state-antitrust/insurance.pdf.

Linerboard Antitrust Litigation

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

This case is a good example of the significance of private enforcement because: 1) This class action led to a cash settlement of $202.5 million; 2) The total settlement represented 42-55 percent of alleged damages;[292] 3) The court awarded 30 percent of the total settlement in attorneys' fees; 4) The court stated repeatedly that "the lawyering in the case at every stage was superb;"[293] and 5) Because "there was no prior government action to establish liability,"[294] the plaintiffs "did not benefit from the fruits of a prior government investigation or prosecution."[295]

In 1998, the Federal Trade Commission (FTC) filed a complaint against Stone Container Corporation (Stone) charging them "with a unilateral violation of Section 5 of the Federal Trade Commission Act. According to the FTC, Stone had attempted to reduce linerboard inventories and had 'invite[d]' some of its competitors to join in a 'coordinated price increase.' The FTC did not allege that any other manufacturer had accepted Stone's 'invitation,' nor did it allege the existence of any conspiracy."[297]

Shortly after the FTC filed its complaint, several lawsuits where filed against Stone on behalf of corrugated sheets purchasers and others on behalf of corrugated box purchasers. The latter expanded their allegations in comparison to the FTC's complaint. The corrugated box purchasers not only charged Stone, but also several of its competitors (manufacturers of linerboard), claiming that "the Non-Stone defendants accepted Stone's 'invitation' to restrict the production of linerboard and artificially raise prices, resulting in an antitrust conspiracy in violation of the Sherman Act."[299]

In 2001 the corrugated sheets plaintiffs and the corrugated box plaintiffs joined and requested certification of both classes. "This case is grounded on allegations that defendants conspired to restrict the output of linerboard in order to support increases in the price of linerboard with the objective of increasing the price of corrugated sheets and corrugated boxes. Linerboard is the key component in production cost of corrugated sheets and corrugated boxes, and is the primary

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[292] 321 F.Supp.2d 619, 623 (E.D.Pa. 2004).

[293] 2004 WL 1221350, 6 (E.D. Pa. June 2, 2004).

[294] Id. at 5.

[295] Id. at 11.

[297] "Linerboard includes any grade of paperboard suitable for use in the production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes… corrugated sheets are also referred to as containerboard." 203 FRD 197, at 201.

[299] Id. at 202.

determinant of the prices of those items."[300] Plaintiffs accused defendants of a price fixing conspiracy in violation of the Sherman act, based on an agreement between Stone and the other defendants. Plaintiffs claimed defendants agreed to "close their their mills for 'market downtime,' thereby reducing industry inventory at mills and box plants... Stone would than purchase inventory from other manufactures while idling its own mills... A total of 435,000 tons had been withdrawn from the market. Inventory reached 'a twenty-year low in terms of weeks of supply' ... [Defendants] successfully increased their prices for containerboard and boxes for the first time in more than two years."[301]

The court ruled that plaintiffs sufficiently proved that the prices of corrugated sheets and boxes directly related to the price of linerboard.[302] Therefore the court acknowledged that both classes of plaintiffs were direct purchasers of linerboard. On September 4, 2001 the court certified both classes of plaintiffs.

Eventually four settlements were reached between the plaintiffs and the defendant. On April 21, 2004 the Court approved all of the settlements,[303] totaling $202,572,489. The final settlements cover 55 percent of the total damages for the limitations period and approximately 42 percent of the damages for the full period.[304] The court awarded Class Counsel's request for $60,771,747 in attorneys' fees, representing 30 percent of the settlement.[305]

Furthermore the Court awarded $1,391,203 in expenses and $25,000 in incentive awards to each of the five corporate class representatives. The Court reasoned that "[a]s well as being novel, this litigation was highly complex and thus required a great deal of lawyering skill."[306] And "[t]he settlements are remarkable given the fact that there was no prior government action to establish liability and the case covered a relatively short conspiracy period of 26 months. The number of persons benefited is large, and includes all entities that purchased corrugated containers and sheets during the class period... The size of that population is... approximately 80,000 companies."[307] And finally, "[t]hroughout every phase of the litigation petitioners managed a major discovery effort"[308] and the plaintiffs "did not benefit from the fruits of a prior government investigation or prosecution."[309]

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[300] Id. at 203.

[301] 305 F.3d 145, 150 (3d Cir. 2002).

[302] 203 FRD 197, 214.

[303] 321 F.Supp.2d 619 (E.D.Pa. 2004).

[304] 2000 WL 1475559, 4 (E.D.Pa, Oct. 4, 2000).

[305] 2004 U.S. Dist. LEXIS 10533 (E.D. Penn. June 2, 2004).

[306] Id. at 14.

[307] Id. at 5.

[308] Id. at 10.

[309] Id. at 11.

Amino Acid Lysine Antitrust Litigation

MDL No. 1083, 918 F. Supp. 1190.

This is a noteworthy price fixing settlement because: 1) It led to a court approved $45 million cash settlement with the three major defendants, and a $5 million cash settlement with the other two defendants; 2) In addition, an estimated $15 million in cash was recovered by 33 plaintiffs who opted-out of the class settlement; 3) In total about 400 direct buyers recovered; 4) Approximately $24 million of the total recovery to U.S. businesses was contributed by foreign companies; 5) Class Counsel received just seven percent ($3.5 million) of the total class settlement in attorneys' fees; and 6) Class Counsel negotiated the primary settlement when the government investigation of the same businesses appeared to be stalled and four months before the government obtained the first of its guilty pleas.

On June 27, 1995, the FBI raided the world headquarters of Archer-Daniels-Midland Company ("ADM") in Decatur, Illinois, soon followed by raids on the offices of two Japanese companies[310] and two South Korean companies,[311] all of which manufactured or imported lysine. The Department of Justice ("DOJ") suspected these five companies of price fixing agreements, a *per se* violation of the Sherman Act. "In September and November 1995, while the DOJ's investigation was continuing and formal federal charges had not yet been filed, a number of private civil (treble damages) suits were filed by buyers of lysine."[312] The civil suits were consolidated in the Northern District of Illinois under the name *Amino Acid Lysine Antitrust Litigation*.

Lysine is an essential amino acid and a building block of proteins. It speeds the development of muscle tissue and is therefore an important supplement in animal feeds. Lysine is mainly produced by biotechnology. Since the late 1980s there were three major producers of lysine in the world: Ajinomoto and Kyowa Hakko of Japan, and Sewon of South Korea. Then in 1991, ADM opened a new and very large lysine production facility in Decatur. This facility doubled the world's production capacity for lysine and brought ADM among the major producers. Cheaper production costs, as well as the huge increase in supply, caused a steep decline in the prices of lysine of 45 percent in the first 18 months of operation. In 1992, ADM officials (including Mark Whitacre) met with officials of Ajinomoto and Kyowas Hakko and agreed to the formation of the International Amino Acids Manufacturers' Association. The meetings of the association became a forum for discussions of prices, production levels, and sales share allocations. Sewon and another South Korean company also joined the association. This resulted in rising prices of lysine. By the end of 1992, Mark Whitacre of ADM became an inside source of information for the FBI, supplying them with evidence of the illegal meetings. The lysine cartel came to an end in June 1995, when the DOJ convened a grand jury in Chicago to consider the collected evidence of the price fixing conspiracy and the FBI raided the offices of the manufacturers. The DOJ investigation resulted in three major federal antitrust actions and led to more than 40 civil antitrust suits in federal district courts by direct buyers of lysine.

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[310] Ajinomoto and Kyowa Hakko Kogyo.

[311] Sewon and Cheil Jedang.

[312] Lawrence J. White, *Lysine and Price Fixing: How Long? How Severe?*, Review of Industrial Organization, 18(1), 25 (Feb. 2001).

The civil suits were brought together in 1996 under the name of Amino Acid Lysine Antitrust Litigation, in which about 400 plaintiffs were certified as a single class. This led to settlement offers by the three largest defendants in April 1996, totalling $45 million. ADM offered $25 million to the plaintiffs; Ajinomoto and Kyowa both offered $10 million to settle the suit. "This offer came at a time when the DOJ's criminal investigation appeared stalled. Indeed, a rather unusual feature of the civil suit is that the settlement offer was made *four months before* the government obtained the first of its guilty pleas."[313] Therefore the plaintiffs could not benefit from extensive information gathered from a closed grand-jury investigation or from facts admitted in guilty pleas. Subsequently, because it was hard to determine the amount of overcharge, a major dispute about the adequacy of the settlement amount resulted.

"[A] number of plaintiffs objected that the proposed settlement was too low. A report by Connor (1996) supported these claims... [H]e concluded that the combined price-overcharge and deadweight loss came to about $165-$180 million."[314] However, "[c]rucial and controversial in Connor's analysis were his assumptions with regard to the 'but for' price... and the time period during which the conspiracy had an effect on prices."[315] In 2002 Connor adjusted his earlier conclusions on the amount of the overcharge concluding that "[w]ith the benefit of hindsight and a great deal more information, it appears now that the first $150-million estimate by the plaintiffs was too high."[316]

In July 1996 the court determined "that the proposed payments in settlement by three of the defendants in this antitrust action... were within the range of fairness, adequacy and reasonableness."[317] About 33 plaintiffs chose to opt out of the settlement and, according to estimates, managed to settle for $15 million.[318] "Most of the opt outs were larger firms with the legal resources to continue hard negotiations with the defendants. Although settlement terms are confidential, reports in the press suggested that the opt-out firms, with the benefit of criminal guilty pleas by the lysine cartel members, got at least double the amount per dollar of purchases than did the smaller buyers in the class."[319]

The two other lysine defendants settled with the plaintiffs for almost $5 million in 1997.[320] "The federal lysine class and the opt-outs from the class eventually collected approximately $70 million from the cartel members; indirect purchasers of lysine obtained an estimated $15 million in state courts... Thus, U.S. lysine buyers recovered as a group slightly more than single damages; net of legal fees, buyers recovered less than single damages."[321] About $25 million of the total

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[313] John M. Connor (2002), Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation, 17 (1996).

[314] White at 26.

[315] Id. at 27.

[316] Connor (2002) at 28.

[317] In re Amino Acid Lysine Antitrust Litigation, 1996 WL 411665, 1.

[318] Connor, John M. (1997) 'The Global Lysine Price-Fixing Conspiracy of 1992–1995', Review of Agricultural Economics, 19, 158–174, at table 1.

[319] Connor (2002) at 28.

[320] Id. at 2.

[321] Id. at 29.

recovery went from foreign violators of U.S. antitrust law to U.S. businesses. The court awarded the role of lead Class Counsel on the basis of a fixed-fee auction. "The fee was capped at $3.5 million for any settlements above $25 million. The firm hired no economists to analyse the overcharge issue. The legal fees, at 7% of the settlement, were very low by historical standards."[322] But it also led to discussions about whether Class Counsel represented the plaintiffs properly, namely "the suggestion, which has appeared in some of the media coverage, that the class counsel may have sold out too cheaply because of their unwillingness to invest all of the time that is required for the full representation of their clients' interests."[323] But the court ruled that "it is a total red herring to suggest that either the bidding process to obtain the best quality representation at the lowest cost to the plaintiff class members, or the cap on fees that the Kohn firm chose to include in its ultimately successful bid, has in any respect disadvantaged the plaintiff class. Instead precisely the opposite is true."[324]

Apart from the treble-damage settlements, the DOJ obtained convictions for criminal price fixing by the five corporate lysine sellers. By the end of 1996 all the defendants had agreed to plea guilty to criminal price fixing charges. Ajinomoto and Kyowa paid a fine of $10 million, Sewon paid a fine of $1.3 million and ADM paid the largest fine of $70 million. In addition, four of the executives who managed the conspiracy pleaded guilty and paid substantial fines. The DOJ prosecuted four other executives and, in 1999, a Chicago jury found three of them guilty and they were subsequently sentenced to long prison terms. Michael D. Andreas, a top ADM officer, was sentenced to 36 months of imprisonment which is the maximum allowed by the Sherman Act.

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[322] Id. Supra note 22, at 17.

[323] In re Amino Acid Lysine Antitrust Litigation, 1996 WL 197671, 1.

[324] Id. at 3.

Microcrystalline Cellulose Antitrust Litigation

MDL No 1402

These related cases are notable because: 1) Three classes of direct purchasers of Microcrystalline Cellulose ("MCC") recovered from two defendants, the foreign Defendant Asahi and the domestic Defendant FMC Corporation; 2) Class Counsel recovered $25 million from each defendant, for a combined total of $50 million plus accrued interest to the date of payment; 3) This settlement amount represents approximately 40 percent of the damages claimed by the classes; 4) Plaintiffs' Counsel was awarded one-third (33 1/3%) of the combined gross settlement funds; and 5) Although this was a follow-on to an FTC action for violations of the Federal Trade Commission Act, Class Counsel alleged violations of Sections 1 and 2 of the Sherman Act and conducted further discovery to expose the defendants' involvement.

The background of this case was described by the United States District Court for the Eastern District of Pennsylvania, as follows:

> In the early 1960s, FMC purchased the company that had developed MCC and obtained a patent for the product. Shortly thereafter, FMC chose Asahi as the exclusive distributor of Avicel®, its brand name of MCC, in Asia. FMC also licensed Asahi to manufacture some of its MCC products. The two companies continued to cooperate in marketing Avicel as well as some unbranded MCC products during the 1970s and 1980s. [This portion under seal]. From 1984 to 1997, the relevant class period, FMC sold approximately 50 different MCC products and blends for use in the pharmaceutical, vitamin, and food industries. The two major categories of MCC products are colloidal and non-colloidal. Non-colloidal MCC is used mainly in drug and vitamin tablets and some food products, while colloidal MCC is a blended product used in liquid drug suspensions and emulsions and other food products.
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> After FMC's patents expired, approximately ten firms entered the MCC market . . . . At least four of these competitors had exited the market by the early 1990s. By the late 1980s and early 1990s, FMC had lost some of its MCC market share to competitors that had expanded their MCC production... Competition increased in the mid-1990s as competitors improved the quality of their MCC products and production neared market capacity.[325]

In late December 2001, the FTC announced it had filed a complaint[326] and simultaneously entered into consent decrees[327] with FMC and Asahi. The complaint alleged that FMC and Asahi had allocated geographic markets for MCC. The FTC also alleged that FMC solicited

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[325] *In re: Microcrystalline Cellulose Antitrust Litigation*, 218 F.R.D. 79, 82 (2003) (internal citations omitted) (hereinafter "*MCC litigation*").

[326] www.ftc.gov/os/2000/12/fmcasahicomplaint.htm; www.ftc.gov/opa/2000/12/fmc.htm.

[327] www.ftc.gov/os/2000/12/fmcconsent.htm.

other MCC manufacturers to participate in the market allocation conspiracy.[328] The FTC broughts its complaint under Section 5 of the Federal Trade Commission Act.[329]

The FTC Consent Order prohibited Asahi and FMC from conspiring further, and barred FMC from serving as the U.S. distributor for any MCC competitor including Asahi, for a number of years.[330]

As a result of these and a public announcement by the FTC, Class counsel investigated potential claims. Ivax Corporation, a firm that purchased MCC products from FMC, filed the first complaint against FMC and Asahi in January 2001. The plaintiffs alleged that FMC and Asahi conspired to allocate the MCC market in violation of Sections 1 and 2 of the Sherman Act.[331]

In August 2003, the court certified the Pharmaceutical Class, the Vitamins Class, and the Food Purchasers Class.[332] In total, the three classes consisted of approximately 1700 class members.[333]

Though this private action was a follow on to the FTC action, the FTC's case was not sufficiently developed to permit Class Counsel to rely on any record created by the FTC. Class Counsel fought discovery battles to retrieve documents the FTC had not uncovered. In particular, the FTC did not take discovery from the Japanese Asahi entity responsible for manufacturing MCC, but only sought documents from the American affiliate, related to jurisdictional issues. Class Counsel asserted that the documents received from Asahi, along with depositions of Asahi employees, were essential to this case.[334]

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[328] See 65 FR 83038 *Federal Trade Commission Analysis to Aid Public Comment* (Dec. 29, 2000); see also www.ftc.gov/opa/2000/12/fmc.htm.

[329] 15 U.S.C. § 45.

[330] http://www.ftc.gov/os/2000/12/fmcd_o.pdf.

[331] *MCC litigation* at 81. "See Complaint in Civ. A. No. 01-111 . . . . In simple terms, the alleged agreement barred Asahi from selling any MCC products in North America or Europe without FMC's consent and barred FMC from selling MCC products in Asia. Plaintiffs claim that this alleged allocation of the market was an unreasonable restraint of trade in violation of Sections One and Two of the Sherman Act. See 15 U.S.C. §§ 1, 2. The action is brought under Sections 4 and 16 of the Clayton Act, which provide for the private enforcement of the antitrust laws to recover resulting damages. See 15 U.S.C. §§ 15(a), 26."

[332] *MCC litigation* at 94: In August of 2003, the Court determined that this case could proceed as a class action and certified the following three classes:

> 1. The Pharmaceutical Class is defined as: United States All persons or entities in the United States who purchased microcrystalline cellulose directly from defendant FMC Corporation in the United States for use in connection with the manufacture or preparation of prescription and/or over-the-counter pharmaceutical products at any time during the period January 1, 1984 through December 31, 1997. The Class excludes governmental entities, defendants, defendants' parents, subsidiaries, and affiliates.
> 2. The Vitamins Class is defined as: [all direct U.S. purchasers of MCC] for use in connection with the manufacture or preparation of vitamin products [during the relevant time period].
> 3. The Food Purchasers Class is defined as: [all direct U.S. purchasers of MCC] for use as a food additive [during the relevant time period].

[333] *MCC litigation.*

[334] *In re: Microcrystalline Cellulose Antitrust Litigation*, MDL No. 1402, Memorandum of Law in Support of Petition for Award of Attorney's Fees, Reimbursement of Expenses, and Incentive Payments to Class Representative, pages 9 – 11 (hereinafter "Memo in Support of Fees").

In April 2005 Class Counsel negotiated a settlement with Asahi for a $25 million cash payment and Asahi's cooperation in Plaintiffs' litigation against FMC.[335] Class counsel received approval from the court to use up to $2.5 million of the Asahi settlement to pay expenses in the FMC litigation.[336]

Class Counsel submitted merits expert declarations to establish the relevant antitrust market (the sale of MCC to pharmaceutical and vitamins manufacturers in the U.S.), and to discredit the entry of small, lower quality MCC manufacturers into the U.S. market as insufficient to prevent FMC from exercising monopoly power. FMC's merits expert declarations claimed that Asahi's decision not to enter the U.S. market was consistent with independent business decision making. The experts based this on findings that Asahi was not successful in selling MCC outside of Japan, faced capacity and distributor network restraints, and did not have a plant in the U.S.[337]

Class Counsel reached a settlement with FMC while an FMC summary judgment motion was pending.[338] The parties negotiated a $25 million settlement after more than five and a half years of litigation. The gross settlement fund represented approximately 40 percent of the damages claimed by all three classes over the 14-year class period.[339] The court approved this settlement on November 20, 2003.[340]

The Pharmaceutical/Vitamin Classes used expert, Dr. John C. Beyer to calculate class damages. Dr. Beyer estimated that the Pharmaceutical and Vitamin Classes suffered an average overcharge of 22.1 percent in purchases of MCC from FMC, which translates into $78.259 million in class-wide single damages. The Food Purchasers Class Counsel used expert, Dr. Douglas F. Greer to calculate the Food Purchaser Class damages, and estimated an average overcharge of 18.5 percent, or $50.9 million in class-wide single damages.[341]

These percentages served as the basis for a proposal by Plaintiffs' Counsel as to each Class' allocation. Members of the Pharmaceutical/Vitamins Classes' claims were to be calculated at the rate of 22.1 percent of their purchases of MCC from FMC.[342] The court approved these allocations.[343]

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[335] *In re: Microcrystalline Cellulose Antitrust Litigation*, MDL No. 1402, Declaration of H. Laddie Montague, Jr. in Support of Plaintiff's Motion for Final Approval of the Settlement with Defendant FMC Corporation and for an Award of Attorney's Fees and Reimbursement of Expenses, page 2, ¶ 5 (hereinafter "Montague Declaration").

[336] Memo in Support of Fees at 11.

[337] Montague Declaration at 21, 22.

[338] *Id.* at 29.

[339] *Id.* at 30.

[340] *In re: Microcrystalline Cellulose Antitrust Litigation*, MDL No. 1402, Final Judgment Order (Nov. 20, 2003) (hereinafter "Final Judgment Order").

[341] *In re: Microcrystalline Cellulose Antitrust Litigation*, MDL No. 1402, Plaintiffs' Proposed Plan of Distribution (attached to Final Judgment Order as Exhibit C), page 2-3.

[342] *In re: Microcrystalline Cellulose Antitrust Litigation*, MDL No. 1402, Agreement of Settlement and Plaintiffs' Proposed Plan of Distribution (attached to Final Judgment Order as exhibits B and C, respectively).

[343] Final Judgment Order at 2.

NASDAQ Market-Makers Antitrust Litigation

MDL. No, 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1998).

The NASDAQ litigation is an outstanding example of private antitrust litigation because: 1) The case returned a significant amount of cash to victimized consumers ($1.027 billion plus interest); 2) It involved a large nationwide class action; 3) It was not a follow-up to a government action (private attorneys uncovered the wrongdoings, initiated the litigation, and carried it to conclusion); 4) The awarded attorneys' fees were quite modest in percentage terms (only 13 percent of the total recovery); and 5) It achieved important prophylactic relief.

In 1993 private plaintiffs began their investigation of possible collusion involving NASDAQ.[344] It was triggered by a *Forbes* article[345] that criticized the influence of large market-makers trading on NASDAQ, and it was supported by a later study which concluded: "In effect, spreads on the affected NASDAQ securities were rounded-up to the nearest even-eight, and were therefore substantially larger than spreads on comparable securities traded on the NYSE."[346]

The private plaintiffs filed their complaints in May 1994, representing "a class of over 1.0 million individual and institutional investors who purchased or sold shares of class securities on the [NASDAQ Exchange] during the period of May 1, 1989 to May 24, 1994"[347] The defendants consisted of thirty-seven market makers on the NASDAQ Exchange.[348]

One of plaintiffs' earliest actions was to obtain a document preservation order which prevented periodic erasure and recycling of crucial audiotapes. This happened long before any government subpoenas. It was not until after the class actions were filed that the SEC and the DOJ opened formal investigation in the fall of 1994. "Without the early preservation orders crucial evidence would have been lost to private plaintiffs and the government. The preserved audiotape eventually provided important, direct evidence of collusion."[349]

The Defendants planned to file a motion arguing antitrust preemption, and contacted the SEC. But after the plaintiffs met with the SEC, the SEC decided that the complaint was not preempted. The plaintiffs initiated another meeting with the Antitrust Division of the DOJ and convinced them, by presenting factual and economic evidence, to start an investigation. As Professor John C. Coffee, Jr. (member of the Legal Advisory Board of the National Association of Securities Dealers ("NASD") stated in his affidavit: "[private plaintiffs] awake the federal

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344 See Arthur M. Kaplan, "Antitrust As A Public-Private Partnership: A Case Study of the NASDAQ Litigation", 52 Case W. Res. L. Rev. 111, 114 (2001). This summary is based upon Kaplan's article.

345 Gretchen Morgenson, "Fun and Games on NASDAQ", Forbes, 74 (Aug. 16, 1993).

346 Kaplan, supra note 1, at 114. See William Christie & Paul Schultz, "Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?", 49 J. Fin. 1813, 1840 (1994).

347 184 F.R.D. 506 (S.D.N.Y. 1999).

348 A market maker quotes a buy and sell price, trading for its own account. Their profit – or for the party at the other side, the trading costs - derives from the spread between the bid and the offer. That is the difference between the buying and selling price of the same stock.

349 Kaplan, supra note 1, at 117.

government to … price collusion that the government had previously ignored," and pulled "the principal laboring oar in advancing this case."[350]

This early cooperation between the plaintiffs and the SEC resulted in a consent agreement with the NASD on August 8, 1996, reorganizing the NASD and NASDAQ, followed by the implementation of new trading rules for NASDAQ. "The new rules (expressly formulated in response to imperfect competition on Nasdaq) furthered and systematized the narrowing of spreads that already had occurred on many high profile Nasdaq securities, under the glare of publicity and private litigation."[351]

The discovery leading to class certification was a complex process. The plaintiffs also actively helped to keep the government investigation alive by providing them with relevant factual and economic information.[352] In the end the plaintiffs "reviewed and analyzed over 3,000,000 pages of documents, and over 10,000 hours of audiotape, in addition to the numerous depositions taken by plaintiffs, and more than 200 government transcripts."[353]

The plaintiffs achieved the first individual settlement on April 9, 1997. But it was difficult to reach a collective settlement with the defendants, who where resisting an all cash settlement in favor of a coupons settlement. On March 23, 1998 the last settlement was signed. "The settlements in the aggregate totaled approximately $1.027 billion. [All cash!] An affidavit of Professor Michael Barclay showed that this amount approximated plaintiffs' individual damages."[354] On top of this, the private litigation and the new SEC rules greatly reduced NASDAQ spreads. A subsequent study showed a "large decline" in NASDAQ spreads, resulting in newly "competitive pricing."[355]

Because the awarded attorneys' fees were quite modest in percentage terms (only 13 percent of the total recovery), a total of $896,233,301 was paid to class members. Approximately 1,249,500 claimants received payment, with a range from $25 to more than $11 million.[356] The cooperation between the private plaintiffs and the government agencies resulted in the largest antitrust recovery in history at the time of the final settlement. And, as strikingly pointed out by Professor Stephen Calkins: "NASDAQ did not follow a prior governmental investigation. Indeed, the private action appears to have triggered the governmental activity."[357]

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[350] Affidavit of John C. Coffee, Jr. par. 24, In re Nasdaq Market-Makers Antitrust Litigation, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1998).

[351] See Kaplan, supra note 1, at 120.

[352] Id. at 119.

[353] Id. at 125.

[354] Id. at 128.

[355] James P. Weston, "Competition on the Nasdaq and the Impact of Recent Market Reforms", 55 J. Fin. 2565, 2566 (2000). Kaplan at 128.

[356] Re Nasdaq Market-Makers Antitrust Litigation, 2000-1 Trade Cas. (CCH) at 86,648 (S.D.N.Y. 2000).

[357] Stephen Calkins, *An Enforcement Official's Reflections On Antitrust Class Actions*, 39 Ariz. L. Rev. 413, 422 (1997). See also id. at 443 ("NASDAQ's genesis was entirely private.")

Law v. National Collegiate Athletic Association

902 F.Supp. 1394 (D.Kan. 1995); affirmed, 134 F. 3d 1010 (10th Cir. 1998); reversed, 938 F. 2d 919 (9th Cir. 1991).

This case is an interesting example of recent antitrust litigation for six reasons: 1) The National Collegiate Athletic Association holds a unique position in multiple markets, as both a major producer and consumer, based on the distinct relationship between higher education and sports marketing; 2) The trial court examined the case under a "quick look" rule of reason analysis, and made a specific determination that there was an antitrust violation; 3) The anticompetitive action significantly depressed wages in the market for assistant college coaches; 4) The case included a total of $74.5 million in cash paid by defendants; 5) Of this total, the court awarded $20 million (26.8 percent) in attorneys' fees and expenses; and 6) The case was exclusively litigated by private parties, without any Federal or State action taken.

In 1989, the National Collegiate Athletic Ass'n. ("NCAA") formed the Cost Reduction Committee ("Committee") in response to rising costs in athletic programs. "As a result of its deliberations, the [c]ommittee proposed legislation (collectively, the "Restricted Earnings Coach Rule")."[358] In January 1991, Division I NCAA members adopted the rule, which limited the number of coaches on each college team who could make more than a baseline level.

In 1994, several coaches adversely affected by the REC rule brought separate suits against the NCAA, claiming injuries as a result of antitrust violations. Plaintiff's jointly brought a motion for summary judgment asserting that the "NCAA . . . conspired to limit the compensation they will pay to one category of . . . coaches [and] that the restriction on its face is an impermissible restraint of trade."[359]

In response, the NCAA justified the REC rule arguing its necessity to: (1) "to maintain competitive equity and to prevent schools from escalating personnel expenditures,"[360] (2)"establish an "unrestricted" head or assistant coach category that will accommodate any type of volunteer, paid, full-time or part-time coach, and (3) establish a "restricted-earnings" category that will encourage the development of new coaches while more effectively limiting compensation to such coaches."[361]

The trial court began its analysis by explaining that although such an obvious case of horizontal price fixing would normally be subject to a *per se* analysis, such application would be inappropriate here under the Supreme Court's holding in *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984).[362] Based on the unique situation of college sports, some horizontal collusion is necessary to preserve the integrity of the NCAA and its ability to make college

[358] *See* Law v. National Collegiate Athletic Ass'n., 902 F.Supp. 1394, 1400-401 n. 5 (D.Kan. 1995).
[359] Id. at 1398.

[360] Id. at 1399.

[361] Id. at 1401.

[362] Id. (explaining that the NCAA is "an industry in which horizontal restraints on competition are essential if the product is to be available at all").

sports available to the public. As such, the court analyzed the NCAA's actions under a "quick look" rule of reason standard.[363]

The trial court determined that the NCAA, through application of the REC rule, prohibited the operation of the free market by limiting demand for coaches, some of whom made "$60,000 to $70,000" before the implementation of the rule.[364] The court was not persuaded by any of the NCAA's justifications for the REC rule, finding that they offered no evidence to support the conclusion that they were trying to promote competition. Rather, the court found that the NCAA's actions were solely in the interest of its member institutions' financial stability. As such, the trial court granted the plaintiffs' motion for summary judgment on the issue of liability, finding that the NCAA failed to meet the burden of showing "that the Restricted Earnings Coach Rule actually promotes a legitimate, pro-competitive objective."[365]

Subsequent to the court granting plaintiffs' motion, the plaintiffs filed motions for permanent injunction,[366] and a motion for class certification for proceedings on injunctive relief and damages.[367] Although many of the individual plaintiffs were no longer employed by NCAA Division I schools (and were thus not immediately in danger of suffering irreparable harm), the court recognized that plaintiffs who could demonstrate harm were entitled to an injunction prohibiting the NCAA from enacting similar legislation in the future. However, the court declined to certify the plaintiffs as a class with respect to damages, because they failed to show a manageable method of dealing with individual issues of harm.

In awarding plaintiffs' request for interim attorneys' fees pursuant to § 16 of the Clayton Act, the court acknowledged that plaintiffs substantially prevailed in the litigation, but that there were complications as to the reasonable amount to be awarded each attorney.[368] Although the court ordered the NCAA to pay out interim fees by April 29, 1996, the NCAA failed to do so and the court imposed sanctions accordingly.[369] On appeal, the court upheld the order imposing the payment of interim fees, but reversed the order of sanctions based on the trial courts failure to adequately notify the NCAA of the possibility of being held in criminal contempt.

After the Tenth Circuit affirmed the trial court's order granting plaintiffs' motion for summary judgment,[370] the trial court considered damages issues with regards to individual plaintiffs and the class as a whole. In three separate class awards, class representatives Law, Hall and Schreiber were awarded CPI adjusted damages of $12,053,528, $10,194,861, and $1,704,059 for their

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[363] "[U]nder the quick look standard[,] because adverse effects on competition are apparent, the court does not require proof of market power, and instead moves directly to an analysis of the defendant's proffered competitive justifications for the restraint." Law v. NCAA at 1405.

[364] Id.

[365] Id. at 1410; affirmed 134 F.3d 1010 (10th Cir. 1998).

[366] Law v. NCAA, Not Reported in F.Supp., 1996 WL 104328 (D.Kan. 1996).

[367] Schreiber v. NCAA, 167 F.R.D. 169 (D.Kan. 1996).

[368] 15 U.S.C. § 26.

[369] See Law v. NCAA, 134 F.3d at 1025 (10th Cir. 1998).

[370] Law v. NCAA, 134 F.3d at 1010 (10th Cir. 1998).

classes, respectively.[371] After trebling, the total amount of damages awarded to the classes was $71,857,344, although the prior injunction against NCAA was reversed due to availability of appropriate remedies for future harm.[372]

What appeared to be an ending to five years of back and forth rulings and appeals was not quite over.

> "Before the Court awarded attorneys' fees, the NCAA agreed to pay $54,500,000.00 to settle the lawsuits. On August 31, 1999, the Court approved the settlement but did not rule on the allocation of the proceeds among class members. On August 31 and September 3, 1999, the Court awarded attorneys fees in the amount of $18,209,149.50 and costs in the amount of $1,749,302.80 to counsel for plaintiffs."[373]

In 2000, the court set out the terms of a revised settlement allocation based on the trial testimony of plaintiffs' expert. This decision was upheld on appeal as a reasonable method for fair payment allocation. Finally, after paying out the coaches and attorneys, the excess was donated to various charitable organizations.

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[371] Law v. NCAA, 185 F.R.D. 324 (D.Kan. 1999).

[372] Id. at 350.

[373] Law v. NCAA, 108 F.Supp.2d 1193, 1195 (D.Kan. 2000).

North Shore Hematology & Oncology Associates v. Bristol-Myers Squibb Co. (Platinol)

Civil Action No.:04 cv248(EGS) (2004)

This case is notable because: 1) Plaintiffs obtained a $50 million settlement in this Section 2 case; 2) This case settled less than one year after its inception; and 3) Although this case followed a government action, the FTC's case did not return any damages to plaintiffs.[374]

Bristol Myers Squibb ("BMS") developed cisplatin, a drug used to treat certain types of cancer, under the brand names "Platinol" and "Platinol AQ" ("Platinol").[375] Both drugs contain the same active ingredient, cisplatin.[376] The Plaintiffs, direct purchasers of Platinol, sued BMS for maintaining an illegal monopoly in the cisplatin market, by fraudulently obtaining patents and filing a series of "sham" patent infringement lawsuits.[377]

Under the Hatch-Waxman Act, the FDA grants pharmaceutical companies a statutory monopoly when the company develops a new drug. During this exclusivity period, the drug manufacturer is free from generic competition. When the exclusivity period ends, generic manufacturers may apply to the FDA for approval to sell generic bioequivalents.[378] During the generic approval process, if a name brand manufacturer files a patent infringement suit, it triggers an automatic thirty-month stay against generic entry into the market.

Direct purchasers of Platinol sued BMS on February 13, 2004 under Section 2 of the Sherman Act.[379] They argued that BMS unlawfully maintained its monopoly by filing a series of frivolous patent infringement suits against would-be generic competitors. Due to the absence of generic competition, they claimed that they were forced to purchase Platinol from BMS at supracompetitive prices.

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[374] This case was filed on May 22, 2004. The Final Order Approving Settlement was entered on November 30, 2004. Docket entries available at https://courtlink.lexisnexis.com/DocketSearch/Results.aspx. The Federal Trade Commission filed the government case on April 23, 2003. Complaint, *In The Matter of Bristol-Myers Squibb Company, A Corporation*, available at http://www.ftc.gov/os/2003/04/bristolmyerssquibbcmp.pdf. The government case ended in a Consent Order on March 7, 2003. According to FTC Chairman Timothy Muris, the consent order "stands for an important proposition: competition must be on the merits, not through misusing the government to stifle your competition." *FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition,* available at www.ftc.gov/opa/2003/03/bms.htm. However, the government suit did not reimburse direct purchasers for the overcharges they paid BMS as a result of the company's anticompetitive conduct.

[375] *Notice of Settlement* at 1.

[376] *Id.* The only significant difference between the two drugs is that Platinol AQ is the aqueous form of the drug and Platinol is a freeze-dried powder form.

[377] The market was defined as Platinol which was purchased from "Bristol Myers Squibb Company or its wholly-owned subsidiary Oncology Therapeutic Network, Inc., any time from June 19, 1999 through September 8, 2004" in the United States. *Id.*

[378] Generic bioequivalents offer consumers the same therapeutic value and active ingredients as their brand name counterparts, at a significantly lower cost. *Id.*

[379] They accused BMS and its wholly-owned subsidiary, Oncology Therapeutic Network, Inc. of maintaining a monopoly from June 28, 1999 to September 8, 2004. *Notice of Settlement* at 1.

The putative anticompetitive conduct began in 1995, when several generic manufacturers applied for FDA approval of generic cisplatin.[380] Less than two months before BMS' patents were set to expire, BMS applied for a new patent.[381] BMS stated it had recently discovered Platinol had additional properties that were not included in the earlier patents.[382] Specifically, the prior patents did not contain any "protected from light" language.[383] The plaintiffs argued that it was common knowledge that Platinol and other Platinum-based compounds had to be protected from light.[384] According to the plaintiffs, BMS filed a series of "sham" infringement suits in order to prevent generic competition.[385]

This case settled less than one year after its inception, for $50 million in cash.[386] The Court awarded Plaintiffs' Counsel 33 percent of the settlement fund.[387] The attorneys' fee award in this case has been cited as precedent in other complex antitrust cases involving pharmaceutical companies engaged in similar conduct.[388]

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[380] *Complaint* at ¶ 111, *In Re Bristol Myers Squibb Co., Before Federal Trade Commission*, available at http://www.ftc.gov/os/2003/03/bristolmyerscmp.pdf.

[381] *Id.* at ¶ 115.

[382] *Id.* at ¶ 113.

[383] Cisplatin is a platinum-based compound, which is sensitive from light. More importantly to the plaintiffs, the new patent would also prolong BMS' statutory monopoly in the cisplatin market for another thirty months.

[384] According to the plaintiffs, the fact that Platinol had to be protected from light was common knowledge in the medical field for some time. In fact, they argued that it was known as far back as 1967, when this information was published in a widely-read medical journal. *Id.* at ¶ 113.

[385] In the first year generic competitors entered the cisplatin market, Platinol sales decreased by fifty percent. *Notice of Settlement* at 4 (November 30, 2004).

[386] *Id.*

[387] *Id.*

[388] The judge in *Remeron* cited this case as precedent, noting that "the requested fee is consistent with awards in other complex antitrust actions involving the pharmaceutical industry". *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, 27044.

Lease Oil Antitrust Litigation No. II

186 F.R.D. 403 (S .D. Tex. 1999), 142 Oil & Gas Rep. 532 (1999)

This is a noteworthy example of private enforcement because: 1) It involved a nationwide class action; 2) The case returned a sizeable amount of cash to the class: $164.2 million under the Global settlement, plus $29.3 million in the Stand Alone settlements, for a total of $193.5 million;[389] and 3) Attorneys' fees were 25 percent of the total settlement amount.

In 1996 a class action suit was filed against 39 oil companies in federal court on behalf of a putative nationwide class of royalty and working interest owners. The class alleged defendants violated Section 1 of the Sherman Act, by conspiring to artificially depress payments made for oil leases for more than a decade.[390] These claims, asserted by the plaintiffs in the *McMahon* case, depended on proving that defendant oil producers and transporters entered a price-fixing conspiracy to depress posted prices, and thereby, depressed the market price for oil at the lease.

One year later, the lead plaintiffs in the class action suits presented a settlement agreement with 24 defendants. Before any ruling on that settlement, the Judicial Panel on Multidistrict Litigation transferred these suits to the District Court, S.D. Texas, for coordinated and consolidated proceedings as *In re Lease Oil Antitrust Litigation*.[391]

The Court facilitated the division of the parties into four groups: Settling Plaintiffs,[392] Settling Defendants, Non-settling Plaintiffs and Non-settling Defendants.[393] The Settling Defendants and Settling Plaintiffs presented testimony in support of their respective positions and in support of the Global Settlement. In addition to the Global Settlement, counsel for both the Settling Plaintiffs and Non-settling Plaintiffs reached seven distinct settlement agreements with seven remaining Non-settling Defendants, which make up the Stand Alone Settlements.[394] Since these seven defendants represented all of the remaining significant defendants in the oil industry,

[389] None of the recovery came from a foreign corporation.

[390] *McMahon Found. v. Amerada Hess Corp.*, 98 Fed. Appx. 267 (5th Cir. 2004).

[391] 186 F.R.D. 403, 408 (S.D Tex. 1999). Prior to the class action, there was significant litigation and discovery in several actions consolidated in this case. Mr. Godfrey began investigating this litigation in 1993, and entered global settlement negotiations when on the brink of beginning a class certification hearing. Id. Actual notice of the eight settlements was attempted to all class members who had received payments from Defendants since 1986. In *McMahon,* the plaintiffs were forced to amend their initial complaint, and subsequently, they successfully defended their amended complaint from motions to dismiss by various defendants. *McMahon Found.,* 98 Fed. Appx. at 267-70. There were approximately five million documents in the MDL-1206 document depository, and it is estimated that there were several million more documents which counsel have made available for review. *Id.* at 408.

[392] The Settling Plaintiffs included Godfrey and Kipple, the two lead plaintiffs in the class action suits, and other related settling cases .

[393] *Id.* at 408.

[394] The Stand Alone Settlements adopt the basic structure of the Global Settlement with limited exceptions, using the same definitions and releasing the same set of underpayment claims for the same class of royalty and working interest owners. The important difference between the Global and Stand Alone Settlements is the consideration provided and the rate of recovery to certain class members for their royalty and/or working interest barrels.

the court's final approval of these Stand Alone Settlements, along with the Global Settlement, concluded the multidistrict litigation.

In order to understand the basis of the plaintiff's claims for damages, it is necessary to explain some background information about the oil industry – in particular, about the movement of crude oil from the well or "lease" to the trading centers. There are certain kinds of transactions that take place at the two transfer points: 1) at the lease, where oil is transferred from the well into a transportation system of some type, and 2) at the trading center. At the trading centers oil is sold at a price which unquestionably represents the actual market value of the oil at those trading centers. The market price at the trading center is certainly a reliable measure of market value because hundreds of thousands of barrels are purchased each day at these centers by numerous refiners which compete for these barrels. The common factual issue is that if there was a differential between the market price at the trading center and the posted price greater than the value added by its movement to the market center. The legal issue is, if this differential was greater than the value added, who was entitled to the profit?

The plaintiff's expert witness, Dr. Leitzinger, estimated the damages from 1986 to 1998. Including interest, the estimate of damages due to alleged underpayments by Global Defendants amounted to $358.8 million.[395] Under the Global Settlement, the first tier royalty owners recovered $116.19 million, 32 percent of their estimated damages. The court accepted these calculated figures and later stated, "compared with other complex commercial class action settlements, a recovery of over 32% is substantial."[396]

Each of the settlements in this case had established a common fund for the benefit of the nationwide class of royalty and working interest owners of the crude oil companies and the funds totaled more than $190 million. Each settlement provided that attorneys' fees will not exceed 25 percent of the Settlement Amount.[397] The Court acknowledged that "the plaintiff attorneys have had to work harder to represent this class due to its size and diversity; they have not simply benefited from the fact that, a single tortuous act harmed millions of people rather than thousands."[398] It stated that the case required a large initial investment by the attorneys, and was made more difficult due to the sheer number and variety of members.[399] The Court concluded by stating that the attorneys did extraordinary work, tackled novel issues, and gained a relatively high recovery and substantial benefit for the class. In approving Class Counsel's

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[395] *In re Lease Oil Antitrust Litig.,* 186 F.R.D. at 434.

[396] *See* In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 325 (N.D. Ga. 1993). The court in that case stated that applying the range of value of the combined settlement, the court finds that the settlement in this action amounts to approximately 12.7-15.3 percent of the estimated $2 billion minimum possible untrebled recovery.

[397] *In re Lease Oil Antitrust Litig.,* 186 F.R.D. at 434. The Fifth Circuit in *Johnson* recommended 12 factors for the district courts to use as they reconsidered the award: 1) time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill required to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitation imposed by the client or the circumstances; 8) the amount involved and results obtained; 9)the experience, reputation and ability of the attorneys involved; 10)the "undesirability" of the case; 11) the nature and length of the professional relationship with the client; and 12)awards in similar cases. *See* Johnson v. Georgia Highway Express*,* 488 F.2d 714, 717-19 (5th Cir. 1974).

[398] *In re Lease Oil Antitrust Litig.,* 186 F.R.D. at 447.

[399] *Id.*

requested 25 percent fee, the court noted that the size of the settlement did not warrant a drastic reduction in the percentage of the fee in these circumstances..[400]

With respect to the Second Tier Claimants, the expert witness calculated damages at 32 cents per barrel for early barrels and 49 cents per barrel for late barrels. Based on this valuation claimants would receive three percent of their estimated damages for early barrels and 13 percent of their estimated damages for late barrels. Thus, Plaintiffs could recover $48 million under the Global Settlement. The Court found that the recovery aspects of the Global Settlement were fair, adequate and reasonable.

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[400] *Id.* at 448-49.

Netscape Comm. Corp. v. Microsoft Corp.

Per Local Civil Rule 40.5, Related to Civil Action Nos. 98-1232 and 98-1233 (D.D.C. 2002)(a/k/a AOL v. Microsoft).

The Settlement of the lawsuit brought by Netscape Communications against Microsoft is noteworthy because: 1) It was, in large part, a follow on to the combined federal and state government suit against Microsoft;[401] 2) It resulted in a cash settlement of $750 million;[402] 3) The parties, once fierce competitors, agreed to become collaborators of software and distributors of each other's products;[403] and 4) It leaves outstanding the issue of anticompetitive consequences for consumers of Microsoft's continuing domination in the browser and operating system markets.[404]

In the mid 1990's Netscape Navigator, an internet browser, dominated the browser market with more than a 70 percent share.[405] The Netscape browser was unique as it could be run on different operating systems and could also be used as a platform to write software applications.[406] The emergence of this new browser worried executives at Microsoft who feard that it would threaten their Windows monopoly in the operating systems market.[407]

Windows is the dominant operating system as it is used in more than 90 percent of the PC's in this country.[409] Its dominance is mainly attributed to the fact that it can run a large number of software applications, many of which are written to run exclusively on Windows.[410] Consequently, Microsoft never faced a threat from a competing operating system.[411] However, with the emergence of Netscape, Microsoft faced its first threat from a browser that could run

[401] *United States v. Microsoft*, Nos. 98-1232 & 98-1233 (D.D.C. 1998).

[402] David D. Kilpatrick & Steve Lohr, *Microsoft to Pay AOL $750 Million; End to 'Long War,'* New York Times A6 (May 30, 2003); David E. Vise, *Microsoft, AOL Bridge Digital Divide*, Washington Post E1 (May 30, 2003); Julia Angwin, Robert A. Guth, and John R. Wilke, *Microsoft Settles AOL Browser Suit – Software Maker to Pay $750 million to Its Rival*, Wall Street Journal A3 (May, 20, 2003).

[403] *Id*.

[404] *A Big Deal; Microsoft and AOL Time Warner*, The Economist, 67 (June 7, 2003).

[405] Government's Complaint at 2, *United States v. Microsoft Corp.* (D.D.C. 1998)(Nos. 98-1232 & 98-1233).

[406] *Id*. at 3.

[407] *Id*.

[409] *Id*. at 1.

[410] *Id*.

[411] *Id*.

on any operating system and could also be used as a rival platform for running software programs.[412] Therefore, the multi-billion dollar Windows monopoly was in jeopardy.

What ensued was the so-called "browser wars" in which Microsoft sought to minimize the threat to its Windows monopoly by increasing its share of the browser market.[413] Microsoft launched an extensive campaign to market its competing browser, Internet Explorer.[414]

This campaign garnered the attention of the Department of Justice, which along with Attorney Generals from 19 different states filed suit against Microsoft in 1998.[415] After more than a year of proceedings the District Court for the District of Columbia issued its findings of facts and conclusions of law that Microsoft had engaged in an anticompetitive campaign against Netscape.[416] Following the conclusions found in the government's case, American Online ("AOL"), which had purchased Netscape, privately sued Microsoft.[417] AOL's allegations substantially mirrored those in the government's complaint.[418]

Specifically, AOL made several allegations. First, they accused Microsoft of tying Internet Explorer to the Windows operating system[419]. Second, they alleged exclusionary agreements that prevented other companies from selling, buying, marketing or using Netscape Navigator.[420] Lastly, they claimed Microsoft attempted to and did monopolize the PC operating system and browser markets.[421]

In May 2003, AOL and Microsoft reached a settlement, whereby Microsoft agreed to pay AOL $750 million.[423] Under the agreement, AOL will receive a seven year, royalty free use of Internet Explorer on its online service, as well as long term license to use Microsoft's media software.[424] In addition, Microsoft agreed to distribute AOL CD ROM's to Original Equipment

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[412] *Id*. at 2.

[413] *Id*. at 4.

[414] *Id*.

[415] Plaintiff's Complaint at 8, *Netscape Comm. Corp. v. Microsoft Corp.*, Per Local Civil Rule 40.5, Related to Civil Action Nos. 98-1232 and 98-1233 (D.D.C. 2002).

[416] *Id*.

[417] *Id*. at 1.

[418] *Id*. at 12-19.; *United States v. Microsoft* (D.D.C. 1998)(Nos. 98-1232 & 98-1233).

[419] *Id*.

[420] *Id*. at 5-6.

[421] *Id*. at 15-16.

[423] *Id*.

[424] *Id*.

Manufacturers around the world, and both companies agreed to make each other's instant messaging services interoperable with one another.[426]

Overall, Microsoft and AOL entered into a win-win collaborative effort. Microsoft will be able to further expand the dissemination and use of its software into even more markets, and AOL received a badly needed infusion of cash, as it was $25 billion in debt.[428] Moreover, AOL was able to expand the dissemination of its fledgling internet service as well as expand its appeal with the royalty free use of Microsoft software.[429]

While the settlement might be a good deal for both companies, what about the consumers? Critics have charged that this settlement is only about the two companies' future in digital media and not about past anticompetitive behavior.[430] Furthermore, critics claim the settlement constitutes the "final nail in the Netscape Coffin."[431] This is so because the settlement does nothing to address Internet Explorer's continuing domination in the browser market.[432] Therefore, consumers are still left with little choice in both the browser and operating system markets.[433]

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[426] Julia Angwin, Robert A. Guth & John R. Wilke, *Microsoft Settles AOL Browser Suit --- Software Maker to Pay $750 Million to Its Rival; Wide Collaboration Is Set*, Wall Street Journal A3 (Mar. 30, 2003).

[428] *A Big Deal; Microsoft and AOL Time Warner*, The Economist, 67 (June 7, 2003).

[429] *Id.*

[430] *Id.*

[431] *Id.*

[432] *Id.*

[433] *Id.*

Oncology & Radiation Associates v. Bristol-Meyers Squibb Co. (Taxol)

Case No. 1:04CV00248 (D.D.C.)

This case is notable because: 1) The class obtained a $65,815,000 settlement in a Section 2, rule of reason action; and 2) This private action preceded government actions against the manufacturer.

Bristol Myers Squibb ("BMS") manufactures a chemotherapy drug under the brand name, Taxol.[434] The active ingredient in Taxol is paclitaxel.[435] BMS developed paclitaxel during a research venture with the National Cancer Institute.[436] The National Cancer Institute awarded BMS the right to manufacture paclitaxel exclusively for five years.[437]

When the exclusivity period ended, generic competitors attempted to enter the paclitaxel market.[438] Generic drugs have the same therapeutic value and active ingredients as their brand name counterparts.[439] However, generic drugs cost significantly less than their name brand counterparts.[440]

Direct purchasers of paclitaxel filed suit against BMS in 2001.[441] The suit alleged that BMS engaged in anticompetitive conduct in order to keep generic equivalents of Taxol off the market from January 1999 to March 2003.[442] Specifically, direct purchasers argued that BMS abused the FDA patent process by filing frivolous lawsuits against generic drug manufacturers, and paid off would-be competitors to stay out of the paclitaxel market.[443] Some have estimated during this period, BMS made $3 million each day on Taxol.[444]

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[434] Notice Of Proposed Settlement Of Class Action And Hearing Regarding Settlement, *Oncology & Radiation Associates v. Bristol Myers Squibb Co. and American Bioscience, Inc.*, No. 1:01CV02313 (EGS) at 2 (D.D.C. May 13, 2003), available at http://www.completeclaimsolutions.com/taxol/pdf/notice.pdf.

[435] Patrick Cafferty, Miller Faucher & Cafferty LLP, *Collusion and Other Anticompetitive Practices: A Survey of Class Action Lawsuits Against Drug Manufacturers* 21 (Jan. 2004), http://www.familiesusa.org/assets/pdfs/3rd_edition_lawsuit_surveys_pmd30c3.pdf.

[436] *Id.*

[437] *Id.*

[438] *Id.*

[439] FTC, *FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition*, http://www.ftc.gov/opa/2003/03/bms.htm (March 7, 2003).

[440] Id.

[441] Notice Of Proposed Settlement Of Class Action And Hearing Regarding Settlement, *Oncology & Radiation Associates v. Bristol Myers Squibb Co. and American Bioscience, Inc.*, No. 1:01CV02313 (EGS) at 2 (D.D.C. May 13, 2003), available at http://www.completeclaimsolutions.com/taxol/pdf/notice.pdf.

[442] *Id.*

[443] *Id.*

[444] Common Cause, *Prescription For Power: How Brand Name Drug Companies Prevailed Over Consumers in Washington*, http://www.hatch2006.org/positionpapers/ppPharmaceuticalRepor.html#_4 (June 12, 2001).

Drug manufacturers have to record patents related to brand name drugs in the FDA publication referred to as the "Orange Book".[445] When a generic drug manufacturer seeks FDA approval, the generic manufacturer must certify to the FDA that the drug will not infringe upon any patents in the Orange Book.[446] The generic manufacturer must put the brand name manufacturer on notice of its intentions to introduce a generic equivalent.[447] If, within 45 days, the brand name drug manufacturer files a patent infringement suit against the generic drug manufacturer, the FDA automatically delays entry of the generic drug into the market for thirty months.[448] The purchasers alleged that BMS abused this process, by filing a series of baseless patent infringement suits in order to delay generic competitors from entering the market.[449]

In addition to filing frivolous patent suits in order to delay the entry of generic paclitaxel, the plaintiffs also alleged that BMS colluded with American Bioscience Inc.(ABI), a generic manufacturer, to settle its "sham" patent case. BMS settled this case with ABI for more than $70 million in exchange for ABI's promise that it would refrain from obtaining a patent for generic paclitaxel.[450]

The direct purchasers filed suit against BMS and ABI in November 2001, and the parties settled the suit on August 14, 2003.[451] The class of direct purchasers received $65,815,000.[452] BMS paid $65 million, and ABI paid $815,000.[453]

The Court noted that by the time the parties reached a settlement, private counsel had undertaken an "intensive" investigation, examined thousands of pages of documents, retained and consulted with experts; and had "significant" knowledge of issues such as liability, causation, and damages.[454] The court awarded Class Counsel 30 percent in legal fees.[455]

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[445] FTC, *FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition*, http://www.ftc.gov/opa/2003/03/bms.htm (March 7, 2003).

[446] *Id.*

[447] *Id.*

[448] *Id.*

[449] *Id.*

[450] FTC, *FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition*, http://www.ftc.gov/opa/2003/03/bms.htm (March 7, 2003).

[451] Cohen, Milstein, Hausfeld & Toll, *Antitrust*, http://www.cmht.com/antitrust.php (accessed June 4, 2006).

[452] Notice Of Proposed Settlement Of Class Action And Hearing Regarding Settlement, *Oncology & Radiation Associates v. Bristol Myers Squibb Co. and American Bioscience, Inc.*, No. 1:01CV02313 (EGS) at 2 (D.D.C. May 13, 2003), available at http://www.completeclaimsolutions.com/taxol/pdf/notice.pdf.

[453] Id.

[454] Notice Of Proposed Settlement Of Class Action And Hearing Regarding Settlement, *Oncology & Radiation Associates v. Bristol Myers Squibb Co. and American Bioscience, Inc.*, No. 1:01CV02313 (EGS) at 2 (D.D.C. May 13, 2003), available at http://www.completeclaimsolutions.com/taxol/pdf/notice.pdf.

[455] Email from Steig Olson, Esq. to Tara Shoemaker,
Re: Oncology & Radiation Associates PA Litigation (June 5, 2006).

Following the commencement of this private action in 2001, the government brought several actions against BMS on behalf of indirect purchasers.[456] In 2002, several states and the District of Columbia filed suits against BMS.[457] The Federal Trade Commission filed a complaint against BMS in 2003, based on the same anticompetitive conduct.[458] This case was resolved when the FTC and BMS entered into a consent order in which BMS agreed to cease its anticompetitive practices in order to hamper the entry of generic drugs into the paclitaxel market.[459] When generic paclitaxel finally entered the market, Taxol sales fell by 50 percent.[461]

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[456] Notice Of Proposed Settlement Of Class Action And Hearing Regarding Settlement, *Oncology & Radiation Associates v. Bristol Myers Squibb Co. and American Bioscience, Inc.*, No. 1:01CV02313 (EGS) at 2 (D.D.C. May 13, 2003), available at http://www.completeclaimsolutions.com/taxol/pdf/notice.pdf.

[457] Terry Carter, *A Deluge of Lawsuits* 88 A.B.A.J. 45 (December, 2002).

[458] FTC, *Plaintiff's Complaint In the Matter of Bristol-Myers Squibb* 26, http://www.ftc.gov/os/2003/04/bristolmyerssquibbcmp.pdf (April 14, 2003).

[459] Marcus Meier, *Overview of FTC Antitrust Actions In Health Care Services And Products* 4, http://www.ftc.gov/bc/0604hcupdate.pdf (April 2006).

[461] FTC, *FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition*, http://www.ftc.gov/opa/2003/03/bms.htm (March 7, 2003).

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)

These cases are notable because: 1) The *Stop N Shop* direct purchaser case resulted in a "megafund" settlement of $100 million dollars; 2) The Court awarded Plaintiffs' Counsel in the *Stop N Shop* case 20 percent of the megafund settlement because of the extraordinary quality of their work; 3) Plaintiffs in the *Nichols* case, an indirect purchaser action, received a settlement of $65 million against Defendant Smithkline Beecham for the same anticompetitive conduct; 4) The court awarded counsel a 30 percent fee; 5) Plaintiffs in both cases coordinated discovery during the litigation; and 5) Plaintiffs brought these cases against Smithkline Beecham, in the absence of any formal government investigation or lawsuit.

The plaintiffs in *Stop N Shop Supermarket* were direct purchasers of Paxil. The Plaintiffs in *Nichols* were indirect purchasers of Paxil. Defendant Smithkline Beecham ("SKB") manufactured the antidepressant drug paroxetine hydrochloride under the brand Paxil.

The plaintiffs claimed one count of monopolization under Section 2 of the Sherman Act.[462] Both classes of plaintiffs alleged that SKB abused the FDA patent approval process in order to illegally maintain its Paxil monopoly. Because SKB developed the drug, the company was entitled to a five-year statutory monopoly under FDA policy.[463] After this exclusivity period ended, SKB filed numerous patent infringement lawsuits against generic drug manufacturers that attempted to enter the paclitaxel market.[464]

The plaintiffs argued that SKB filed these "sham" lawsuits to illegally maintain their monopoly in the paroxetine market and fix prices.[465] The *Stop N Shop* direct purchaser plaintiffs estimated that SKB's anticompetitive conduct cost them $880 million in damages.[466] The indirect purchaser plaintiffs in the *Nichols* case estimated the overcharge that SKB passed along to consumers to be 35 percent.[467]

During discovery, SKB faced two lawsuits alleging the same anticompetitive conduct: the *Stop N Shop* case brought by direct purchasers, and the *Nichols* case brought on behalf of indirect purchasers.[468] Plaintiffs' counsel in both cases coordinated discovery, leading to a timely result

[462] *Id* at 8.

[463] J. Padova, Memorandum accompanying Order Granting Attorneys' Fees, *Stop N Shop Supermarket, et. al.*, p.1. (May 19, 2005).

[464] *Id* at 2.

[465] *Id* at 2.

[466] *Id* at 21.

[467] *Smithkline Beecham: News of FTC Probe Triggers Dual Suits Over Paxil,* Class Action Reporter, December 14, 2000 Vol. 2, No. 142.

[468] *Id. at 9.*

in *Stop N Shop*.[469] Both private cases were brought against SKB without of any prior government case or even a formal investigation.[470]

The *Stop N Shop* case settled about one year after its inception. Plaintiffs' counsel filed motions for Class Certification and for Preliminary Approval of Settlement with the District Court on the same day.[471] The $100 million settlement represented about 11 percent of their estimated damages.[472] This was a "megafund" settlement, meaning that the case resulted in a recovery of $100 million or more.

Attorneys' fees are typically awarded on a sliding scale, with the percentage awarded decreasing as the amount of recovery increases.[473] None of the 90 sophisticated corporations, which comprised the direct purchaser class, objected to counsels' request for 30 percent of the settlement fund in attorneys' fees.[475]

Ultimately, however, the Court awarded 20 percent of the settlement fund to Plaintiffs' counsel.[476] The Court observed that "the litigation presented enormously complex legal and factual issues... moreover, this action was riskier than many other antitrust actions because there was no prior government investigation, or prior finding of civil or criminal liability based on antitrust violations".[477]

Although the number of hours plaintiffs' counsel spent on the case was relatively small, Judge Padova commented, "The court recognizes that plaintiffs' counsel should not be penalized for prosecuting this case in an efficient manner, or for keeping down the number of hours which they were required to devote to this case by coordinating merits discovery with plaintiffs' counsel" in the indirect purchaser case.[478]

Judge Padova expressed the idea that although it is typical for courts to decrease the percentage amount awarded for attorneys' fees as the settlement amount increases, there is no hard and fast rule. In a case such as this, a 20 percent award was justified because class counsel's work was so "timely and well done".[479]

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[469] *Id.* at 9.

[470] *Id.* at 29.

[471] J. Padova, Memorandum accompanying Order Granting Attorneys Fees, Stop N Shop Supermarket v. Smithkline Beecham Corp., p. 13 (May 19, 2005).

[472] *Id.* at 21.

[473] *Id.* at 22.

[475] *Id.* at 35.

[476] *Id.* at 44.

[477] *PA Judge Slashes Fees in Paxil Case*, 7 Class Action Reporter 107 (June 1, 2005).

[478] J. Padova, Memorandum accompanying Order Granting Attorneys Fees, p. 30, *Stop N Shop Supermarket v. Smithkline Beecham Corp.* (May 19, 2005).

[479] *Id.*

Judge Padova also granted attorneys fees in the *Nichols* case. From the $65 million settlement, Plaintiffs' Counsel received $19.5 million dollars, or 30 percent.[480] Attorneys in the *Nichols* case spent more than 17,000 hours working on the case to reach the settlement.[481] It is believed that SKB paid millions more to private plaintiffs that opted out of the class actions in confidential settlement agreements.[482]

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480 *PA Judge Slashes Fees in Paxil Case*, 7 Class Action Reporter 107 (June 1, 2005).

481 *Id.*

482 *Id.*

Polypropylene Carpet Antitrust Litigation

93 F. Supp. 2d 1348 (N.D. Ga. 2000).

The polypropylene litigation is important because: 1) It started with a different private antitrust suit, that led to a government conviction, and finally led to this litigation; 2) The government suit resulted in a judicial finding of price fixing and an executive serving prison time; 3) The cases involved a nationwide class action; 4) The settlements totaled $49.7 million; and 4) Legal fees were one-third, plus expenses.

In 1993 Diamond Rug & Carpet Mills, a private carpet and fibermaker sued Shaw Industries,[483] the nation's largest publicly traded carpetmaker, for illegal monopolization.[484] Plaintiffs alleged that, (1) Shaw had illegal monopolies in the manufacture of residential carpet and polypropylene fiber, (2) Shaw tried to lure Diamond into a price-fixing scheme, and (3) Shaw cajoled Dupont into refusing to sell its Stainmaster fiber (a widely popular, treated nylon carpet) to Diamond.[485]

The suit against Shaw attracted the attention of the Justice Department, and it began investigating several carpet makers that used Dupont's Stainmaster nylon carpet fiber, including Beaulieu of America, Mohawk Industries, and Sunrise Carpet Industries.[486] In late 1994, Diamond and Shaw settled their suit and had the results sealed.[487]

On June 7, 1995 the Department of Justice brought charges against Sunrise Carpet Industries and its Chairman, Johnny A. West. The charges stated that Sunrise and Mr. West "engaged in a combination and conspiracy to fix, raise, and maintain prices of twenty-ounce level-loop polypropylene ("poly") carpet in the United States" between October 1992 and, at least, June 1993 in violation of Section 1 of the Sherman Act.[488]

Sunrise and Mr. West plead guilty to one count of price fixing, and a federal judge sentenced Mr. West to a twelve month prison sentence and fined him $150,000; Sunrise was fined $750,000.[489]

A civil complaint was then filed by seventeen plaintiffs, who were direct purchasers, against Sunrise Industries, and in December 1995 six other carpet makers were added as defendants to

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[483] *See* Susan Harte, *Suit Threatens Fiber of Carpet Industry, Shaw Accused of Holding Monopolies*, ATLANTA J. AND CONST., E1 (July 6, 1993).

[484] *Id.*

[485] *Id.*

[486] *See* Susan Harte, *Shaw-Diamond Quarrel Possible Trigger*, ATLANTA J. AND CONST., 6F (December 14, 1995).

[487] *See* Beenea A. Hyatt, *Firms Pile on Carpet Lawsuit; Federal Case To Go To Trial By 1999*, CHATTANOOGA TIMES, B1 (October 8, 1997).

[488] Complaint, U.S. v West (N.D. Ga. 1995) (1:95-CR-240). Sunrise and Mr. West also were accused of agreeing with fellow carpet makers to charge prices above certain levels on polypropylene carpet and of communicating with fellow carpet makers on prices for polypropylene carpets. Id.

[489] The sentencing judge stated that "Mr. West provided complete information about a multi-corporation price-fixing scheme," but there were no more indictments brought forth by the Department of Justice. The Department of Justice closed its investigation of price fixing in the carpet industry in 1997. *See* Susan Harte, *Sunrise Carpet Chief Sentenced in Antitrust Case*, ATLANTA J. AND CONST., 3B (September 16, 1995).

the suit.[490] The new defendants included Shaw Industries, Mohawk Industries, and Beaulieu of America, the three largest carpet makers in the country.[491] In 1997, the U.S. District Court for the Northern District of Georgia granted the plaintiffs' Motion to Certify Class Action, for an estimated 4,000 to 5,000 potential class members.[493]

After class certification, the litigation proceeded and the next major development was in 2000 when the court ruled on the Defendants' Motion to Exclude Expert Testimony.[494] The Plaintiffs intended to introduce the testimony of an economist to "analyze whether the conditions in the polypropylene carpet market during a particular period were consistent with competitive or collusive activity."[495] Plaintiffs also sought to include an econometrician who had developed a model "to forecast competitive prices during the time period at issue, and identify any difference between the actual prices of polypropylene carpet and the forecasted competitive prices during that period."[496] The expert estimated an 8.3 percent overcharge by Defendants, or $222,963,542.[497] The court concluded that Plaintiffs' expert witnesses satisfied the *Daubert* criteria and denied Defendants' Motion to Exclude Testimony.[498]

Shortly after the court's decision regarding the expert witnesses, Shaw Industries and Mohawk Industries announced they had agreed to settle the lawsuit. Shaw agreed to pay $27.5 million and Mohawk agreed to pay $13.5 million.[499] One year later, in March 2001, Beaulieu of America also agreed to settle for $8.7 million.[500] The final aggregate settlement amount was $49.7 million.

After the parties reached a settlement, Judge Murphy granted Plaintiffs' motion for attorneys' fees and reimbursements. The court awarded Class Counsel's request for one-third of the total settlement fund plus accrued interest. The court also awarded the attorneys $3,329,622.52 in out-of-pocket expenses.

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[490] *See* Don Plummer, *Carpet Pricing Challenged; An Expanded Lawsuit Now Targets the Industry's Biggest Manufacturers*, ATLANTA J. AND CONST., 1F (December 14, 1995).

[491] In 1995, Shaw Industries had $2.96 billion in annual sales, Mohawk Industries: $1.64 billion, and Beaulieu of America: $903 million. *Id.*

[493] See *In Re: Polypropylene Carpet Antitrust Litigation*, 996 F.Supp 18 (N.D. Ga. 1997).

[494] See *In Re: Polypropylene Carpet Antitrust Litigation,* 93 F.Supp. 2d 1348 (N.D. Ga. 2000).

[495] *Id.* at 1351.

[496] *Id.*

[497] *Id.* at 1360.

[498] *Id.* at 1370, 1352.

[499] *See* Patti Bond, *Shaw, Mohawk Will Settle in Carpet Price-Fixing Suit*, ATLANTA J. AND CONST., 3F (August 12, 2000).

[500] See *Beaulieu of America Settles Antitrust Class Actions,* THE WEEKLY NEWSPAPER FOR THE HOME FURNISHING NETWORK, 32 (March 5, 2001).

RealNetworks, Inc. v. Microsoft Corp.

Civil Action No. JFM-04-968, MDL Docket No. 1332 (D. Md.) (2005 settlement)

This settlement of the lawsuit brought by RealNetworks, Inc., ("RealNetworks") against Microsoft Corporation ("Microsoft") is noteworthy because: 1) It was the last of the major competitor lawsuits pending against Microsoft; 2) The recovery will be at least $478 million, and possibly as much as $761 million, depending on how many subscribers RealNetworks receives from its collaborative efforts on MSN; 3) The parties agreed to cooperate on the creation and distribution of what had previously been competitive products; and 4) It resulted in the withdrawal of claims against Microsoft before competition authorities in the European Union ("EU") and South Korea ("Korea"), as well as the dismissal of RealNetworks complaint, involving Section 1 and 2 claims, in the U.S.

This was not a "follow on case" to the Department of Justice's ("DOJ") earlier lawsuit against Microsoft, although it alleged similar misconduct by Microsoft. The DOJ case concerned Microsoft's bundling of its web browser with its Windows operating system ("Windows"). RealNetwors' lawsuit, on the other hand, concerned Microsoft's bundling of a different product, namely its media player, with Windows. In this sense, RealNetwork's lawsuit could be called a "follow on case" to the EU's preliminary decision in August 2003 that Microsoft's bundling violated the EU's competition law.[501] RealNetworks had participated in the EU proceedings as a witness,[502] and in October 2004 RealNetworks filed a complaint with the Korea Fair Trade Commission ("KFTC") regarding Microsoft's bundling of the media player.[503]

RealNetworks filed the lawsuit against Microsoft on December 18, 2003.[504] Microsoft and Real competed directly against each other, as well as Apple and Macromedia (now a subsidiary of Adobe), in the media player, server and digital rights management ("DRM") markets.[505]

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[501] C|Net, *EU Closes in on Microsoft Penalty* (Aug. 6, 2003), *available at* http://news.com.com/EU+closes+in+on+Microsoft+penalty/2100-1016_3-5060463.html. In March 2004, a final decision against Microsoft was issued. Commission Decision No. COMP/C-3/37.792 (2004) (Microsoft). Indeed, RealNetworks CEO Ron Glaser told shareholders in a cover letter to the 2003 Annual report that the "recent European Commission ruling against Microsoft regarding its media player bundling practices reinforces" the company's view "that the merits of our case are relatively strong and that the funds spent pursuing this litigation will be money well spent." RealNetworks, Inc., 2003 Annual Report 115 (2004).

[502] Seattle Post-Intelligencer, *RealNetworks sues Microsoft* (Dec. 19, 2003), *avaliable at* http://seattlepi.nwsource.com/business/153239_realsuit19.html.

[503] InfoWorld, *Korea to hear Microsoft Competition case* (July 8, 2005) *available at* http://www.infoworld.com/archives/emailPrint.jsp?R=printThis&A=/article/05/07/08/HNmskorea_1.html. Ultimately, the KFTC fined Microsoft and ordered the firm to remedy its bundling practices. InfoWorld, *Update: Microsoft fined $32M by South Korea* (Dec. 7, 2005) *available at* http://www.infoworld.com/archives/emailPrint.jsp?R=printThis&A=/article/05/12/07/HNmicrosoftfined_1.html.

[504] RealNetworks, Inc., v. Microsoft Corp., Complaint, No. C03-5717 (JW) (EAI) (N.D. Cal. 2003). The case was subsequently transferred to Judge Motz of the United States District Court for the District of Maryland, who was hearing most of the follow on cases to the DoJ's action against Microsoft. See, RealNetworks, Inc., v. Microsoft Corp., No. JFM-04-968, MDL Docket No. 1332 (D. Md.).

[505] Michael J. DeMaria, *Screaming Streaming Media*, Network Computing, 47 (Feb. 2006). Interestingly, RealNetworks' complaint does not list Macromedia as a competitor. Complaint, at 10.

Although not a true follow on to the DOJ litigation, RealNetworks' complaint relied heavily on the findings from the DOJ's case against Microsoft. RealNetworks alleged that Microsoft deliberately pursued the same tactics against its products including: bundling of competitive products with Windows, exclusive dealing contracts with PC manufacturers and content providers for Microsoft products, preventing consumers from removing Microsoft's media player, and denying RealNetworks access to technical information. RealNetworks claimed that this conduct enabled Microsoft to maintain its monopoly in PC operating systems and to create a monopoly in various digital media markets, in violation of the Sherman and Cartwright Acts. More specifically, RealNetworks claimed illegal monopoly maintenance in the operating systems market, attempted monopolization of the digital media markets under Section 2 of the Sherman Act, as well as tying of the media player and the streaming media server to the desktop and server operating systems, and exclusive dealing under Section 1 of the Sherman Act.[506] RealNetworks sought both damages and injunctive relief.

RealNetworks' Annual Report for 2005 revealed that it had spent $1.6 million on legal fees for the case in 2003, $11 million in 2004, and $55 million in 2005.[507] RealNetworks received $478 million from Microsoft in 2005.[508] In the "Shareholder Letter" contained in the 2005 Annual Report, CEO Ron Glaser noted that the settlement had "substantially enlarged" Real's profit for 2005. More precisely, the company would not have "returned to GAAP profitability" without the settlement.[509] But for the $478 million from Microsoft, RealNetworks would have suffered a $166 million net loss for 2005.[510]

In addition to the $478 million paid to RealNetworks in 2005, Microsoft agreed to pay an additional $283 million over the next two years.[511] Microsoft also agreed to "promote and integrate" RealNetworks' music and game services with Microsoft's MSN network.[512] The $283 million may be reduced depending on how many subscribers RealNetworks receives from the collaborative efforts on MSN.[513] Microsoft agreed to provide RealNetworks with technical data and assistance in software development,[514] but Microsoft did not agree to end its bundling practices or to allow users to remove the media player from Windows.[515]

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[506] RealNetworks, Inc., v. Microsoft Corp., Complaint, No. C03-5717 (JW) (EAI) 46-55 (N.D. Cal. 2003).

[507] RealNetworks, Inc., 2005 Annual Report 28 (2006). These were not immaterial costs for RealNetworks. The legal fees equaled one percent of RealNetworks' total net revenue for 2003, four percent for 2004, and 17 percent of the net revenue for 2005. Id. at 31.

[508] RealNetworks, Inc., 2005 Annual Report 30 (2006). The settlement payment exceeded net revenues in 2005 by $153 million. Id. at 28, 30.

[509] "Shareholder Letter," *reprinted in* RealNetworks, Inc., 2005 Annual Report (2006).

[510] RealNetworks, Inc., 2005 Annual Report 28 (2006).

[511] RealNetworks, Inc., 2005 Annual Report 30 (2006).

[512] "Shareholder Letter," *reprinted in* RealNetworks, Inc., 2005 Annual Report (2006).

[513] RealNetworks, Inc., 2005 Annual Report 30 (2006).

[514] See Exhibit D to the Settlement Agreement Between Microsoft Corporation and RealNetworks, Inc.: Windows Technology Commitments in RealNetworks Inc., Form 10-K, Exhibit 10.24, "Amended and Restated Settlement Agreement" (March 16, 2006).

[515] RealNetworks, Inc., 2005 Annual Report 13 (2006).

Other than returning the company to profitability for the first time since 1999, it is not clear that the settlement achieved its objectives. For example, the 2005 Annual Report states that the company "cannot predict whether consumers will adopt or maintain our media player products..., especially in light of the fact that Microsoft bundles its competing Windows Media Player with its Windows operating system."[516] Similarly, the Annual Report noted that notwithstanding the settlement, "Microsoft will continue to be an aggressive competitor"[517] and Microsoft's "dominant position" as well as "its aggressive activities... will likely continue to have... adverse effects on our business and operating results."[518]

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[516] RealNetworks, Inc., 2005 Annual Report 13 (2006).

[517] RealNetworks, Inc., 2005 Annual Report 14 (2006).

[518] RealNetworks, Inc., 2005 Annual Report 16 (2006).

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)

These related cases concern an agreement between four of the major drill bit manufacturers to artificially fix prices of roller cone drill bits used in drilling oil and gas wells. They are noteworthy because: 1) The primary source of the litigation was a private suit. Despite the fact that the Drill Bits Litigation followed a government investigation, the government investigation had been prompted by a private suit; 2) Two of the private settlements preceded guilty pleas and settlements in their criminal counterpart; 3) Counsel achieved a settlement with Dresser Industries, a drill bit manufacturer not included in the government suit; 4) The settlement totaled $53.4 million; and 5) The court awarded Counsel a fee of 30.8 percent.

This case can be traced back to a private suit between two drill bit manufacturers, Rockbit International of Fort Worth and Baker Hughes, one of the defendants in the Drill Bits Antitrust Litigation.[519] Baker Hughes brought suit against Rockbit for violating a patent agreement. While discovery was being conducted, Rockbit came across a memo from Baker Hughes to a sales manager at Reed Tool Co. in Houston, which implicated the parties in a price fixing scheme.[520]

Rockbit then filed suit against Baker Hughes in November 1989 claiming the company violated federal antitrust laws by fixing prices, tying its products, and forcing Rockbit out of business in order to protect its price fixing conspiracy.[521] Rockbit was not successful in this suit. The court granted Baker Hughes' motion to dismiss on June 24, 1991, finding that Rockbit, as a manufacturer lacked proper standing to bring the suit.[522]

This litigation prompted a Justice Department investigation and a private antitrust suit ("Drill Bits"). The DOJ conducted a investigation into the pricing practices of three of the major drill bit manufacturers named in the private action: Baker Hughes, Smith International d/b/a Reed Tool Company and Camco International.[523] The government brought two different suits, one against Baker Hughes and one against Smith International and Camco International. Dresser Industries, a defendant named in the private Drill Bits suit was not indicted.

The DOJ charged that between March and November 1989, Smith and Camco violated the Sherman Act. The two companies allegedly conspired to fix prices for roller cone drill bits by reducing discounts and by publishing new price lists. The government alleged that 500

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[519] David Ivanovich, *Drill Bit Makers Face Charges of Conspiring to Fix Prices*, HOUS. CHRON.(KRT)(Oct. 23, 1993)(Available in 1993 WLNR 3253623).

[520] *Id.*

[521] *Rockbit Indus. U.S.A., Inc., v. Baker Hughes, Inc.,* 802 F.Supp. 1544, 1546-47 (S.D.Tex. 1991).

[522] *Id.*

[523] L.M. Sixe, *Texas Firms Agree to Settle Price-Fixing Dispute,* HOUS. CHRON.(KRT)(Sept. 10, 1993)(Available in 1993 WLNR 3254515).

customers - including independent drilling contractors, major oil companies and oil and gas property owners - were victimized by the price fixing.[524] These cases resulted in criminal fines.[525]

In March 1991, a class action suit was brought on behalf of plaintiffs representing direct purchasers of roller cone drill bits. In their complaint plaintiffs allege that four drill bit manufacturers violated Section 1 of the Sherman Act.[526] Plaintiffs alleged that between 1986 and 1992, defendants agreed to fix, stabilize, and/or inflate or raise the prices of drilling bits in the U.S. market by refraining from discounting their list prices and by refraining from competing among themselves on the basis of price.[527] Several similar cases were consolidated into a class representing approximately 6,000 purchasers of drill bits.[528]

All Defendants settled over a three-year period for a total of $53.4 million.[529] The court awarded an attorneys' fee of 30.8 percent of the settlement, or $16,129,271, plus reimbursement of $1,079,308.09 in expenses.[530]

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[524] David Ivanovich, *Drill Bit Makers Face Charges of Conspiring to Fix Prices*, HOUS. CHRON.(KRT)(Oct. 23, 1993)(Available in 1993 WLNR 3253623).

[525] This investigation resulted in Baker Hughes pleading guilty and paying a one million dollar fine in 1992. In 1993, Smith International paid a fine of $675,000 and Camco International settled charges filed against its Reed Division by promising to pay $575,000.
Ralph Bivins, *Houston Drill-Bit Price-Fixing Cases Settled*, HOUS. CHRON.(KRT)(Nov. 24, 1993)(Available in 1993 WLNR 3254369).

[526] Complaint ¶¶ 28-33, *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).

[527] Id. It was reported that defendants controlled approximately 75 percent of the domestic drill bit roller cone market at that time; Smith International dominated with a 27 percent share of the market, followed by Baker Hughes with 25 percent, Camco International with 15 percent and Dresser Industries with 12 percent. Ralph Bivins, *Houston Drill-Bit Price-Fixing Cases Settled*, HOUS. CHRON.(KRT)(Nov. 24, 1993)(Available in 1993 WLNR 3254369).

[528] Ralph Bivins, *Houston Drill-Bit Price-Fixing Cases Settled*, HOUS. CHRON.(KRT)(Nov. 24, 1993)(Available in 1993 WLNR 3254369).

[529] See Fine, Kaplan & Black's website, at http://www.finekaplan.com/CustomPage.shtml#1. Baker Hughes paid $17.8 million in Jan. 1993, Reed Tool Company paid $16.8 million and Camco paid $10.8 million in September 1993. Dresser Industries was the last party to settle for $8 million in April of 1994.Order of Approval of Settlement and Final Judgment, Doc. 372 (April 26, 1994), *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).

[530] Order of Approval of Attorney's Fees and Expenses, Doc. 379 (April 26, 1994).

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).

This case is noteworthy because: 1) Counsel for the direct purchaser Class secured a cash settlement of $175 million, 69 percent of their estimated class damages;[531] 2) Counsel for the indirect purchaser (end payer) class secured a cash settlement of $75 million, 26 percent of their estimated damages;[532] 3) The Defendant, UK-based GlaxoSmithKline Beecham Corporation ("GSK") took a $405 million charge in the fourth quarter of 2003 to provide for Relafen litigation and these settlements represent a large portion of that amount (much of which will be distributed among businesses based in the U.S);[533] 4) Apparently there was no federal government investigation, although a State enforcer was permitted to intervene;[534] 5) The allegations involved violations under Section 2 of the Sherman Act; and 6) Plaintiffs' success in this litigation will discourage other brand name pharmaceutical manufacturers from manipulating the patent process and the Hatch-Waxman Act in a effort to unlawfully prevent generic competition, and keeping pharmaceutical drugs competitively priced is especially important because the cost of prescription drugs contributes greatly to the rising cost of healthcare.

On November 2, 1982 the United States Patent and Trademark Office ("PTO") denied GSK's sixth application to patent nabumetone, a non-steroidal anti-inflammatory drug. The PTO cited a 1973 article that described the method and synthesis of the drug, thus making any claim to nabumetone void for anticipation. On appeal, GSK persuaded the board of patent appeals that the substance and methods described in the 1973 article were distinguishable from the nabumetone GSK was trying to patent. On December 13, 1983 the PTO issued GSK a patent for nabumetone. The drug, which GSK marketed under the brand name Relafen, received FDA approval in February 1992.

In 1997 several generic drug manufacturers submitted Abbreviated New Drug Applications ("ANDA") to the FDA seeking approval to begin marketing nabumetone. As part of their applications, each of the generic manufacturers[535] certified that GSK's nabumetone patent was,

[531] Memorandum in Support of Direct Purchaser Class Plaintiff's Motion for Final Approval of Settlement, Document 290-01, filed 4/02/2002, *In re Relafen Antitrust Litigation*, Master File No. 01-12239-WGY at page 13, note 3 (D. Mass. 2004)

[532] End Payer Plaintiffs' Memorandum of Law in Support of Final Approval of Proposed Settlement, Document No. 415, filed 4/25/2005, *In re Relafen Antitrust Litigation*, Master File No. 01-12239-WGY at page 3 (D. Mass. 2005).

[533] GSK Settles Lawsuit Over Relafen Patent Tactic, *Generic Line* Copyright 2004 Washington Business Information, Inc., All Rights Reserved Generic Line, Vol. 21, No. 11 (June 2, 2004).

[534] On July 7, 2004, the states of Arkansas, Idaho, Illinois, Maryland, Oregon, and Washington filed motions to intervene in the end payer litigation already pending in the Massachusetts District Court, however, only Illinois was ultimately permitted to intervene. *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 61 (D. Mass. 2005).

[535] The generic competitors included: Teva Pharmaceuticals USA, ("Teva") based in Israel, Copley Pharmaceutical, Inc., which was acquired by Teva in 1999; and Eon Labs, Inc., a division of Sandoz, Inc. ("Eon") which is headquartered in Princeton, New Jersey.

to the best of their knowledge, invalid or unenforceable and gave GSK notice of their applications as is required by statute. GSK filed patent infringement actions against its would-be generic competitors, triggering an automatic stay of FDA approval for 30 months or until the patent litigation is resolved, pursuant to the Hatch-Waxman Act[536]. Generic versions of nabumetone would have otherwise entered the market on September 1, 1998.

In August 2001, after a sixteen day bench trial, District Court Judge Reginald C. Lindsay declared GSK's nabumetone patent invalid due to anticipation.[537] The Court also held that the patent was unenforceable due to inequitable conduct because GSK "engaged in a pattern of misrepresentation in its dealings with the PTO so pervasive as to negate any possibility that [its] misrepresentations to the PTO were inadvertent... Such a pattern bespeaks only deliberate dissembling...." [538] Judge Lindsay's finding of invalidity was upheld on appeal, but the Federal Circuit Court did not reach the issue of unenforceability.[539] Within a week of the District Court's decision, Teva Pharmaceuticals, USA[540] ("Teva") entered the market with a generic nabumetone priced at 60 percent of the Relafen price.[541]

Direct Purchasers of Relafen filed a consolidated class action complaint in December 2002[542] and the District Court certified the Direct Purchaser Class on November 10, 2003.[543] The

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[536] The complicated provisions of the Hatch-Waxman act provide the backdrop for this and similar litigation. Under its provisions, each ANDA must be accompanied by a certification that the drug for which they seek approval does not infringe on a legitimate patent right because the patent is either invalid, expired, or will not be infringed by the marketing of the generic drug. The patent holder is entitled to notice of this certification and, can immediately file a patent infringement suit against the generic competitor. Filing a patent infringement suit triggers an automatic stay of FDA approval of the generic manufacturer's ANDA for 30 months or until the patent litigation is resolved. 21 U.S.C. 355. Relevant provisions of the Hatch-Waxman Act were amended in *2003 See*: The Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Title XI: Access to Affordable Pharmaceuticals, sections a-b, United States Public Laws, 108th Congress –1st Session, 108 P.L. 173 (2006). The amendments adopt several FTC recommendations, including that brand-name companies be limited to one 30-month stay of approval and that a counterclaim for improper Orange Book listing be authorized for generic companies faced with patent infringement suits. Statement of the Honorable Timothy J. Muris before the Senate Judiciary Committee. Aug. 1, 2003. For a history of the act and a discussion of the recent amendments *See:* Elizabeth Stotland Weiswasser & Scott D. Danzis, The Hatch-Waxman Act: History, Structure and Legacy, 71 Antitrust L.J. 585 (2003). For a discussion of the 2003 amendments and the loop holes that still exist *see:* Brian Porter, Comment: Stopping the Practice of Authorized Generics: Mylan's Effort to Close the Gaping Black Hole in the Hatch Waxman Act, 22 J. Contemp. Health L. & Pol'y 177 (Fall 2005).

[537] *In re '639 Patent Litigation*, 154 F.Supp. 2d 157. (D. Mass. 2001).

[538] *Id.* at 194.

[539] *GSK Beecham Cop. V. Copley Pharm.,* 45 Fed. Appx. 915, 917 (Fed. Cir. Aug 15, 2002) (unpublished opinion).

[540] Teva Pharmaceuticals USA ("Teva") is a division of Teva Pharmaceuticals, which is based in Israel.

[541] Affidavit of Co-Lead Counsel Bruce E. Gerstein and Linda P. Nussbaum, Document 295-01, filed 4/02/2002, *In re Relafen Antitrust Litigation*, Master File No. 01-122390WGY at page 7, paragraph 14. (D. Mass. 2004).

[542] In addition to the Direct Purchaser Class, actions were filed by GSK's competitors, Teva Pharmaceuticals USA Inc. ("Teva"), and Eon Labs, Inc. ("Eon") *Eon Labs., Inc. v. SmithKline Beecham Corp.,* Civ. A. No. 03-10506-WGY, Doc. No. 62; and by drugstore Plaintiffs *see note 12, infra.* The website for the National Association of Attorneys General (www.naap.org) reports that in 2004 West Virginia was the lead state in litigation initiated in 2004 against GSK with the help of the U.S. Department of Justice. The litigation was regarding GSK's efforts to block generic competition with Relafen and two other drugs, Paxil and Augmentin. This case settled for $500,000 dollars plus attorney's fees. *West Virigina ex rel. McGraw v. GlaxoSmithKline, PLC et al.* 04-C-254M, Circuit Court of Marshall County 2005). (Summary available at www.naap.org.)

Plaintiffs alleged that the nabumetone patent was fraudulently obtained and wrongfully listed in the FDA's Orange Book,[544] and that the patent infringement suits that GSK filed against its generic competitors were baseless sham litigation used to delay competition with Relafen. Plaintiffs alleged that this conduct violated section 2 of the Sherman Act causing class members to pay substantially higher prices for nabumetone than they would have if generic entry to the market had not been wrongfully delayed.

Class counsel spent an aggregate of more than 33,700 hours litigating this case over the course of two years, taking more than 30 depositions and reviewing hundreds of thousands of internal company documents during the course of discovery. Counsel succeeded in persuading the court that Defendants should be collaterally estopped from relitigating key issues that were decided in the underlying patent litigation, and defeated GSK's motion to dismiss and motion for summary judgment.

The Direct Purchaser Class reached a settlement agreement January 9, 2004, on the eve of trial, for $175 million. Not a single member of the class objected to the terms of the settlement, which is especially significant in light of the fact that this class consisted of large, sophisticated businesses, many of whom were independently represented and could be expected to object.[545] The court subsequently approved the settlement and granted Class Counsel's request for one-third of the fund in attorneys' fees plus $1,799,023.24 in expenses, and a $25,000 incentive award for named plaintiff Louisiana Wholesale Drug Co., Inc. Judge William G. Young for the District of Massachusetts noted that the award was "fair in this case"[546] given "that Class Counsel vigorously and effectively pursued the Class members' claims."[547] The $175 million cash settlement represents a substantial percentage --approximately 69 percent-- of plaintiffs' total damages according to plaintiff's expert's estimate that class-wide damages totaled $252.8 million.

The first indirect purchaser (end payer) action was filed on January 30, 2002 and the District Court certified a nationwide class for purposes of settlement on September 28, 2005.[548] The class represented actual and potential third party payers and consumers of both Relafen and its generic alternatives including individual consumers, health care plans and insurers. Plaintiffs asserted claims under federal and state antitrust laws, state unfair competition and consumer

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[543] *In re Relafen Antitrust Litigation*, 218 F.R.D. 337 (D.Mass. 2003). The Direct Purchaser Class included all entities in the U.S. who purchased Relafen directly from defendants between September 1, 1998 and December 31, 2002. Drugstore Plaintiffs (Albertson's, Eckerd, Hy-Vee, Kroger, Walgreens, CVS, Rite Aid, and Safeway opt-ed out of the class and chose to pursue individual actions) filed complaints against SmithKline on March 29, 2002 and January 7, 2003 asserting claims under sections 15 and 26 of the Sherman Act. *Walgreen co. v. SmithKline Beecham Corp.,* Civ. A No. 02-10588-WGY, Doc. No. 1, *CVS Meridian, Inc. v. SmithKline Beecham Corp.*, Civ. A. No. 03-10040-WGY, Doc. No. 1. These plaintiffs settled with SmithKline and the action was closed on January 20, 2004, *Walgreen*, Civ. A. No. 02-10588-WGY, Doc. No.11, *CVS Meridian*, Civ. A. No. 03-10040-WGY, Doc. No.11.

[544] The "Orange Book: is an official FDA publication formally know as "Approved Drug Products with Therapeutic Equivalence Evaluations."

[545] Memorandum in Support of Direct Purchaser Class Plaintiff's Motion for Final Approval of Settlement, Document 290-01, filed 4/02/2002, *In re Relafen Antitrust Litigation*, Master File No. 01-122390WGY at page 18. (D. M. 2004).

[546] T.R.O. Hrg. Transcr. 4:3-4 (April 9, 2004) *In re Relafen Antitrust Litigation*, 346 F.Supp. 349.

[547] *In re Relafen Antitrust Litigation*, 2004 U.S. Dist. LEXIS 28801,19 (D. Mass. 2004).

[548] *In re Relafen Antitrust Litigation*, 231 F.R.D. at 57.

protection statutes, and the unjust enrichment doctrines of 24 states.[549] Similar to the Direct Purchaser Class, the End Payer's alleged that GSK made misrepresentations in pursuit of a patent for nabumetone which ultimately resulted in substantially higher prices for both Relafen and its generic alternatives.

Class counsel spent four years and more than 29,000 hours litigating this case including analyzing more than one million pages of documents and taking more than 75 depositions during discovery. Counsel successfully opposed a motion to dismiss and succeeded in defeating GSK's motion for summary judgment.

The End Payer Class reached a settlement agreement on November 18, 2004 for $75 million. The settlement also included a Cy Pres award of $500,000 for consumers and third party payers whose claims were limited for procedural reasons.[550] There were no objections to the amount of the settlement, and in fact the court noted that "[t]he overall reaction to the settlement has been positive," which is significant given the 272,229 class members.[551] The court approved the settlement on September 28, 2005 and granted counsel's request for one-third of the fund[552] in attorneys' fees, plus $1,297,301.10 in expenses, and incentive awards.[553] In approving the final settlement Judge Young commented on "the exceptional efforts of class counsel" and had previously noted that the proposed settlement was "the result of a great deal of fine lawyering on behalf of the parties. . . ."[554] According to the End Payer's expert the $75 million settlement represents 26 percent of the estimated $294 million in class damages.[555]

Most significant is the deterrent effect that the large settlements in these cases will have on other brand name drug manufacturers seeking to fraudulently obtain or extend patents in an effort to charge monopoly prices for prescription drugs.

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[549] *Id.* at 60.

[550] *Id.* at 82.

[551] *Id.* at 64, 72. The settlement was divided between consumers and third-party payers, with one third going to reimburse consumers and the remainder to third-party payers.

[552] *Id.* at 77 n. 18. Because a portion of the $75 million settlement fund was paid to settling health plans as part of a separate agreement with GSK, the award of attorney's fees and expenses is based on the $67 million of the fund that remains.

[553] Incentive awards included "$8,000 for each named consumer Plaintiff, $9,000 for each named consumer organization, and $14,000 for each named third party payor." *Id.* at 82.

[554] *Id.* at 80.

[555] End Payor Plaintiffs' Memorandum of Law in Support of Final Approval of Proposed Settlement, Document No. 415, filed 4/25/2005, *In re Relafen Antitrust Litigation*, Master File No. 01-12239-WGY at page 3 (D. Mass. 2005).

Remeron Antitrust Litigation

2005 U.S. Dist. Lexis 27013 (D.N.J. 2005).

This case is noteworthy because: 1) It highlights loopholes in the Hatch-Waxman Act[556] being used to forestall generic competition; 2) Counsel for the Direct Purchaser Class persevered after an early setback and after all other plaintiff classes settled, and secured a $75 million settlement representing 56-69 percent of Plaintiffs' estimate of the overcharges paid as a result of Defendant, Organon Inc.'s[557] ("Organon") anticompetitive scheme; 3) Private counsel was first to investigate the conduct at issue, and obtained most of the relief in this matter because the federal government permanently closed its investigation prior to securing any relief;[558] and 4) Judge Hochberg, who approved the settlement on November 9, 2005, awarded class counsel their request of one-third of the recovery in attorneys' fees and thanked counsel on behalf of the entire federal judiciary "for the kind of lawyering we wish everybody would do."[559]

In 2003, direct purchasers[560] of Remeron filed class action complaints against Organon alleging various illegal and deceptive means to improperly obtain and extend patents for the drug mirtazapine[561] in violation of Section 2 of the Sherman Act. Remeron received FDA approval in

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[556] Relevant provisions of the Hatch-Waxman Act were amended in 2003. *See*: The Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Title XI: Access to Affordable Pharmaceuticals, sections a-b, United States Public Laws, 108th Congress –1st Session, 108 P.L. 173 (2006). The amendments adopt several FTC recommendations, including that brand-name companies be limited to one 30-month stay of approval and that a counterclaim for improper Orange Book listing be authorized for generic companies faced with patent infringement suits. Statement of the Honorable Timothy j. Muris before the Senate Judiciary Committee. Aug. 1, 2003. For a history of the act and a discussion of the recent amendments *See:* Elizabeth Stotland Weiswasser & Scott D. Danzis, The Hatch-Waxman Act: History, Structure and Legacy, 71 Antitrust L.J. 585 (2003). For a discussion of the 2003 amendments and the loop holes that still exist *see:* Brian Porter, Comment: Stopping the Practice of Authorized Generics: Mylan's Effort to Close the Gaping Black Hole in the Hatch Waxman Act, 22 J. Contemp. Health L. & Pol'y 177 (Fall 2005).

[557] Organon Inc., now Organon USA, is a division of Dutch pharmaceutical giant Akzo Nobel, NV.

[558] The Federal Trade Commission (FTC) announced its decision to close its investigation in a press release on Oct. 20, 2004 noting that "significant evidence indicate[s] that Organon may have violated Section 5 of the Federal Trade Commission Act by knowingly making misleading statements to the FDA in order to delay introduction of generic competition to Remeron." *Statement of the Federal Trade Commission Regarding the Decision to Close Its Investigation into the Conduct of Akzo Nobel, NV and Its Organon Subsidiary* (available at Federal Trade Commission, *For the Consumer*, http://www.ftc.gov/opa/2004/10/organon.htm (last updated October 13, 2006)). Before closing its investigation, however, the FTC worked with state attorney general to incorporate injunctive terms into the End-Payer's proposed settlement. *In Re: Remeron End-Payer Antitrust Litigation,* 2005 U.S. Dist. LEXIS 27011 (D.N.J. 2005).

[559] *In Re Remeron Antitrust Litigation*, Civil Action no. 02-2007 (FSH) (D.N.J. 2005) (Transcript of proceedings at 15:16).

[560] Nine large chain stores opted out of the direct purchaser class and settled for a total of $59.8 million in 2004. Technology & Health Brief –Akzo Nobel NV: Remeron Antitrust Suit Settled In the U.S. for $59.8 Million, The Wall Street Journal, Oct. 4, 2004. End-payers, including attorney generals for Texas, Florida and Oregon, filed a Consolidated Class Action Complaint in September 2002 and settled for $36 million in 2004. *In Re: Remeron End-Payer Antitrust Litigation,* 2005 U.S. Dist. LEXIS 27011 (D.N.J. 2005). Organon settled with competitor, Mylan laboratories Inc, for $15 million. Dow Jones Newswires, Business Brief –Mylan Laboratoires Inc.: Akzo Nobel Pays $15 Million in Depression-Drug Settlement, The Wall Street Journal, B2 (Oct. 4, 2004).

[561] Organon holds a patent on mirtazapine, an antidepressant drug, which it manufactures and markets under the brand name Remeron.

1996 and Organon's right to market exclusivity was set to expire in June 2001. In 1999 Organon obtained a patent for a mirtazapine combination drug which it listed in the FDA's Orange Book[562] in January 2001. Because mirtazapine was listed in the Orange Book, generic drug manufacturers intending to market mirtazapine were required under the Hatch-Waxman Act to provide notice to Organon as part of their Abbreviated New Drug Application ("ANDA") filed with the FDA.[563] After receiving notice, Organon filed patent infringement suits[564] against the would-be generic competitors triggering a stay of FDA approval of the generic competitors' ANDA's for 30 months or until a final judgment in the patent infringement suits.

The litigation was complex and hard fought. The district court granted Defendant's motion to dismiss the generic manufacturers' antitrust counter-claims alleging sham litigation, holding that the court could not find that Organon lacked an objectively reasonable basis for its patent infringement claims.[565] The court later held that the Direct Purchaser Class was collaterally estopped from litigating its similar claims. However, the court upheld the independent claims arising from Defendants' late-listing in the Orange Book of the newly-patented combination drug and the Defendant's alleged overarching scheme to forestall generic competition. Although every other plaintiff group involved in the litigation chose to settle their claims after this early set back, the Direct Purchaser Class persevered and sought recovery for the harm wrought by Defendants' attempts to prevent and delay generic competition in the mirtazapine market.

Class Counsel aggressively pursued the surviving claims, filing motions for summary judgment, partial summary judgment and issue preclusion. Class counsel invested an aggregate of more than 35,000 hours on this complex litigation involving research and analysis of a variety of issues including regulatory requirements of the Hatch-Waxman Act and FDA's Orange Book listing, the intricacies of the pharmaceutical industry from scientific and production processes to sales and marketing, as well as patent law and economic issues. The contentious discovery process produced more than one million pages of documents and class counsel conducted more than 45 depositions and spent thousands of hours researching, analyzing and consulting with experts. These efforts led to vital evidence indicating, among other things, that Defendants knew their listing of the combination drug in the FDA's Orange Book was improper and was undertaken with the express intent of delaying generic competition. After more than two years of negotiation and numerous mediation sessions, the parties agreed to settle for $75 million to be distributed pro-rata among the direct purchaser class after the deduction of one-third in

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[562] The "Orange Book" is an official FDA publication formally known as "Approved Drug Products with Therapeutic Equivalence Evaluations."

[563] Each ANDA must be accompanied by a certification that the drug for which approval is sought does not infringe on a legitimate patent right because the patent is either invalid, expired, or will not be infringed by the marketing of the generic drug. The patent holder is entitled to notice of this certification and, can immediately file a patent infringement suit against the generic competitor. Filing a patent infringement suit triggers an automatic stay of FDA approval of the generic manufacturer's ANDA for 30 months or until the patent litigation is resolved. 21 U.S.C. 355. Relevant provisions of the Hatch-Waxman Act were amended in 2003.

[564] The Direct Purchaser Class' complaint came on the heels of a December 2002 grant of summary judgment in favor of certain generic competitors with respect to the patent infringement suits filed by Organon. *In Re Remeron End-Payer Antitrust Litigation,* 2005 U.S. Dist. LEXIS 27011, 4 (D.N.J. 2005).

[565] *Organon, Inc. v. Mylan Pharmaceuticals, Inc.*, 293 F.Supp.2d 453 (D.N.J. 2003).

attorneys' fees plus expenses. The $75 million settlement represents a significant proportion - 56-69% - of the class damages as estimated by the Direct Purchasers' expert.[566]

At the hearing on the motion for final approval of settlement, District of New Jersey Judge Faith S. Hochberg thanked counsel on behalf of the entire federal judiciary "for the kind of lawyering we wish everybody would do"[567] and noted that "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience."[568] On November 9, 2005, Judge Hochberg approved the settlement and plan of allocation, and granted Class Counsel's request for one-third in attorneys' fees plus expenses and an incentive award.

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[566] Memorandum of Law in Support of Direct Purchaser Class Plaintiff's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Award, filed 10/26/2005, *In re Remeron Antitrust Litigation*, Master Docket No. 03-CV-0085 (D.N.J. 2005)

[567] *In Re Remeron Antitrust Litigation*, Civil Action no. 02-2007 (FSH) (D.N.J. 2005) (Transcript of proceedings at 15:16).

[568] *In re Remeron*, 2005 U.S. Dist. LEXIS 27013 (D.N.J. 2005).

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).

These related cases concern an agreement between three of the world's largest manufacturers of rubber chemicals to artificially fix prices and to allocate markets and customers in the U.S. They are noteworthy because: 1) Counsel for the direct purchaser class secured a settlement of more than $268 million, all of which came from foreign corporations and their U.S. affiliates; 2) Counsel in the direct purchaser class was awarded a fee of 25 percent; and 3) Counsel secured an $18 million settlement with Akzo/Flexsys, a defendant that was not indicted in the parallel government investigation.

This case initially started on or about September 26, 2002, with a series of government raids on a number of rubber chemical producers, including Bayer AG and Flexsys NV, in several European cities. These unannounced inspections were in connection with an investigation into the alleged cartel agreement and related illegal practices concerning the price-fixing of rubber chemicals.[569]

As a result of this investigation, a number of companies and their top executives plead guilty, paid criminal fines and served jail time starting in 2004. Crompton and two of its top executives plead guilty to price fixing in the international rubber chemicals market,[570] after admitting to "participating in a combination and conspiracy to suppress and eliminate competition by maintaining and increasing the price of certain rubber chemicals" sold in the United States from 1995-2001.[571] Bayer AG agreed to plead guilty and pay a $66 million fine for participating in the conspiracy.[572] A number of its top executives were sentenced to fines and imprisonment.[573] Flexsys NV was not a target of the DOJ investigation.[574]

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[569] Second Amend. Consol. Compl. for Violations of the Fed. Antitrust Laws ¶ 51 (Mar. 18, 2005).

[570] Crompton was sentenced to pay a $50 million criminal fine and its executives await sentencing. Press release, U.S. Dept. of Justice (Sept. 14, 2004), *First Executive in the International Rubber Chemicals Cartel Agrees to Plead Guilty,* available at http://searchjustice.usdoj.gov/search?q=cache:6MwGZC767v0J:www.usdoj.gov/atr/public/press_releases/2004/205419.wpd; See also Press Release, U.S. Dept. of Justice (Sept. 21, 2004) *Executive in the International Rubber Chemicals Cartel Agrees to Plead Guilty*, available at http://searchjustice.usdoj.gov/search?q=cache:8_VCoA3b1s8J:www.usdoj.gov/atr/public/press_releases/2004/205496.wpd.

[571] *Id.*

[572] Press Release, U.S. Depart. Of Justice (July 14, 2004) *Bayer Agrees to Plead Guilty and Pay $66 Million Fine for Participating in Rubber Chemicals Cartel. Investigation to Date Yields Over $100 Million in Criminal Fines,* available at http://www.usdoj.gov/opa/pr/2004/July/04_at_480.htm .

[573] On November 23, 2004, Martin Petersen, a German national and Head of Marketing and Sales for Bayer's Rubber Business Group agreed to plead guilty. He was sentenced to four months in jail and a $50,000.00 fine. See http://www.usdoj.gov/atr/public/speeches/215514a.htm#a.
On May 16, 2005, Wolfgang Koch, a German national of Bayer plead guilty and was sentenced to four months in jail and a $50,000 fine. Press Release, U.S. Dept. of Justice (May 16, 2005) *Former Bayer AG Executive Agrees to Plead Guilty in International Rubber Chemicals Price-Fixing Conspiracy. Former Executive Faces Jail Time in U.S.*, available at http://usdoj.gov/atr/public/press_releases/2005/209038.wpd.
On August 10, 2005 Jurgen Ick and Gunter Monn, top executives at Bayer, were indicted. Both Ick and Monn are German citizens and remain international fugitives. Press release, U.S. Dept. of Justice (Aug. 10, 2005) *Former Top Bayer Executives Indicted in Price-Fixing Conspiracy*, available at

On April 8, 2003, the first private complaint in this multi-district litigation was filed. Several subsequently-filed cases were consolidated and the class filed a Second Amended Consolidated Complaint for violations of federal antitrust laws on March 18, 2005 in the U.S. District Court for the Northern District of California. Direct purchasers of Rubber chemicals, including the companies and industrial manufacturers, brought this lawsuit alleging that from at least as early as May 1, 1995 through December 31, 2001, Defendants conspired to fix the prices of Rubber Chemicals sold in the United States and/or to allocate markets and/or customers in the United States.[575]

In 2005 Plaintiffs settled with two of the three groups of defendants for approximately $268 million:[576] Bayer, and its affiliates in Germany, Pennsylvania, Ohio and New Jersey[577]; and Akzo/Flexsys and its affiliates in the Netherlands, Illinois, Belgium and Ohio.[578] The case against Crompton appears to be ongoing.

In the course of this litigation class counsel analyzed hundreds of thousands of documents produced by Defendants.[579] They also conducted an independent investigation of the facts and analyzed Defendants' sales and pricing data. Class counsel was awarded an attorney's fee equal to 25 percent of the Flexsys Settlement Fund, or $4,625,000, plus $692,523.57 in costs.[580] Counsel was awarded approximately 20 percent of the Bayer Settlement Fund, or $47,975.19, and $400,000 for costs.[581]

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http://searchjustice.usdoj.gov/search?q=cache:Tkx6stpvMn0J:www.usdoj.gov/atr/public/press_releases/2005/210540.wpd.

[574] *Id.*

[575] Second Amend. Consol. Compl. for Violations of the Fed. Antitrust Laws ¶ 2 (Mar. 18, 2005).

[576] Flexsys paid $18,500,000. Settlement Agreement of Defendants Flexsys N.V. and Flexsys America L.P., and Akzo Nobel Chemicals International B.V. and Akzo Nobel Chemicals, Inc. ("Flexsys Defendants"), Doc. 12 (Feb. 18, 2005), ¶ 7. Bayer settled for $250,375,190. Notice of Settle. in Class Action and Hearing on Settle. Approv., Plan of Allocation and Request for Atty's Fees and Costs, ¶ 17 (June 26, 2006).

[577] *Id.* at ¶¶ 18-21.

[578] *Id.* at ¶¶ 13-17.

[579] *Id.* at ¶ 13.

[580] Order Granting Interim Atty's Fees and Reimburse. Offof Costs to Class Counsel Based on the Settlement with the Flexsys Defendants, Doc. 150, ¶ 1 (June 21, 2005).

[581] Notice of Settle. in Class Action and Hearing on Settle. Approv., Plan of Allocation and Request for Atty's Fees and Costs, ¶ 17 (June 26, 2006).

Sorbates Direct Purchaser Antitrust Litigation

Not Reported in F.Supp.2d, 2002 WL 31655191 (N.D. Cal.)

This case is noteworthy because: 1) The primary defendants/manufacturers, who formed a price fixing cartel between 1979 and 1996, were spread out between three countries (United States, Germany, and four in Japan) and defended their actions globally (United States, Canada, and Europe), making this litigation a complex and extensive process; 2) Civil actions were brought by both direct purchasers of sorbates and on behalf of indirect purchasers of many states within the U.S.; 3) Total recovery for direct purchasers in the U.S. was roughly $96.5 million (at least $36.5 million of which came from foreign defendants);[582] 4) Attorneys fees varied between the direct purchaser and state actions, from 22-33 percent of the total recovery.

In 1998 the Department of Justice ("DOJ") began an investigation into the alleged price fixing of sorbates, a chemical manufactured for use in the food preservatives industry, by several large multinational corporations. The DOJ investigated Eastman Chemical, Co. (U.S. manufacturer), Hoescht AG, Nutrinova Nutrition Specialties & Food Ingredients GmbH, CNA Holdings (German manufacturer), and Daicel Chemicals Industry, Ltd., Nippon Synthetic Chemical Industry Co., Ltd., Ueno Fine Chemicals Industry Ltd., and Chisso Corporation (the four Japanese manufacturers) to determine whether they had formed a cartel for the purpose of fixing the prices of sorbates between 1979 and 1996.[583]

In response to the DOJ investigation, several of the industries "[pled] guilty to participating in the antitrust conspiracy to suppress and eliminate competition by fixing prices and allocating the market shares of sorbates sold in the United States."[584] Following this, the European Commission held similar investigations which resulted in additional criminal fines. [585] The Commission found that by 1995, the cartel had control of 85 percent of the sorbates market in Europe.[586] Additionally, Hoescht AG and Eastman Chemicals both pled guilty to violations of the Competition Act of Canada.[587]

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[582] In addition, several actions, brought by individual States on behalf of indirect purchasers, settled for a total of more than $12 million.

[583] *Williams Food Inc. v. Eastman Chem. Co.,* Not Reported in P.3d, 2001 WL 1298887 (D. Kan. 2001).

[584] *Id*. Between 1998 and 2001, Diacel, Hoescht, Nippon, Eastman and Ueno, agreed to pay fines of $53 million, $36 million, $21 million, $11 million, and $11 million, respectively, as a result of litigation with the Department of Justice. U.S. Department of Justice, Antitrust Division, Sherman Act Violations Yielding a Fine of $10 Million or More (January 23, 2003), at http://www.usdoj.gov/atr/public/criminal.htm .

[585] These fines totaled EUR $172 million; divided between Hoescht ($123 million), Diacel ($20.6 million), Ueno ($15.3 million) and Nippon ($13.1 million). *Chemicals: Monti's Cartel Clampdown: Sorbates Firms Fined EUR 138 M: Hoescht, Chisso, Daicel Chemical Industries, Nippon Synthetic Chemical Idustry and Ueno Fine Chemicals*, Chemical Business NewsBase - Europe Environment, October 9, 2003. "The Commission calculated the fines according to the gravity and duration of the infringement, but took into account the level of cooperation from the companies." Chisso Corp. was granted full immunity for its role as a whistleblower. *Id*.

[586] *Id*.

[587] They were fined a total of $3.28 (Canadian) in a Canadian federal court *Companies Guilty of Price Fixing,* The Toronto Star, Wednesday Edition (October 27, 1999).

In addition to the fines, several civil actions were brought in the U.S. by both direct purchasers represented by private counsel, and by States on behalf of classes of indirect purchasers within those States. The direct purchasers led the way with a consolidated class action in the Northern District of California; followed by a few separate smaller classes of direct purchasers in other states. Finally cases brought by States had varied success in different State courts throughout the country.

A large group of direct purchasers brought suit in the Northern District of California, which resulted in final approval of a settlement for $81,978,000;[588] followed shortly by a second settlement for $14.6 million.[589] At least one-third of direct purchaser recovery, which covered the vast majority of private civil recovery, came from foreign defendants.[590] Defendants were required to make yearly contributions into a net settlement fund, where purchasers could recover damages measured by a mathematical formula approved by the court.

Successful suits by states on behalf of indirect purchasers were brought in Wisconsin, California, Kansas, Ohio and Illinois, totaling over $12 million.[591] Notably, the Wisconsin suit was brought on behalf of purchasers in 12 states and constituted a large bulk of non-direct purchaser recovery with a settlement of $7.8 million.[592]

Attorneys fees and costs awarded have varied between jurisdictions and plaintiff classes. The percentages were between 22-33 percent of the total recovery.[593]

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[588] *In re Sorbates*, Master File C 98-4886 Cal. (N.D. Cal. 2000) (combined settlement of Diacel, Nippon, Hoescht and Eastman). "Japan's Daicel Chemical Industries Ltd. and Nippon Synthetic Chemical Industry Co. revealed in separate statements that they would pay $16 million and $7.2 million, respectively to US food firms." CHEMICAL COMPANIES: Japanese Firms To Settle Antitrust Suit For $23.2M, Wednesday, Dec. 12, 2001, Vol. 3, No. 242, at http://bankrupt.com/CAR_Public/011212.mbx.

[589] *In re Sorbates Direct Purchaser Antitrust Litigation*, Not Reported in F.Supp.2d, WL 31655191 (N.D. Cal. 2002). With $6.5 million being allocated to Euno. EUNO FINE CHEMICALS: Judge Approves $6.5M Settlement Deal, Thursday, November 28, 2002, Vol. 4, No. 235, http://bankrupt.com/CAR_Public/021128.mbx

[590] *See supra* notes 7 & 8. The remaining 2/3, totaling over $60 million was divided b/w Hoescht (a german corporation), Eastman (an American corporation) and one other. FOOD FIRMS: Freeman, Freeman Files Sorbate Price-Fixing Suit, Thursday, July 27, 2000, Vol. 2, No. 145, http://bankrupt.com/CAR_Public/000727.MBX.

[591] *EASTMAN CHEMICAL: Indicates Openness to Settle Remaining Sorbates Cases*, Tuesday, May 15, 2001, Vol. 3, No. 95, http://bankrupt.com/CAR_Public/010515.mbx; *Sorbates Prices Cases*, JCCP NO. 4073 (Sup. Ct. Cal. 2003) http://www.sorbatessettlement.com/not.html; *Williams Food v. Eastman Chemical*, Not Reported in P.3d, 2001 WL 1298887 (Kan.Dist.Ct. 2001); *State v. Diacel Chemical Ind.*, No. 02CH19575 (Illinois 2004); *Children's Hunger Alliance Receives $197,761 from Sorbates Settlement*, 2005 http://www.childrenshungeralliance.org/NEWS/0406/0406-ag.html

[592] Of those state's that have recovered, there is a general trend toward cy pres distribution of the funds. For instance, several states have donated large portions of their settlements to food banks, boys and girls clubs, and other charitable local institutions *PRESERVATIVE MAKERS: Judge Approves Settlement of Wisconsin Suit*, Monday, April 30, 2001, Vol. 3, No. 84 http://bankrupt.com/CAR_Public/010430.mbx.

[593] *See Id.* (direct purchaser settlement of Euno and Chisso at 25 percent); Proposed Final Judgment and Order, *State v. Daicel Chem. Ind., et.al.* (No. 02CH19575) at http://www.illinoisattorneygeneral.gov/consumers/sorbates/proposed_ final_judgment&order.pdf (Illinois settlement at 22.5 percent); *Williams Food Inc. v. Eastman, et. al.*, 2001 WL 1298887 (Kan. Dist. Ct.)(opt out Kansas direct purchaser litigation at 33 1/3 percent).

Sun Microsystems v. Microsoft Corp.

333 F.3d 517 (4th Cir. 2003).

This case is notable because: 1) It involved an exceptionally large payment for the settlement of an antitrust claim, $700 million out of a $2 billion overall payment by Microsoft to Sun; 2) While the action relied in part upon findings of fact and conclusions of law made in the U.S. Government's Microsoft case, its allegations were much broader than those in the government's case; 3) Sun provided much of the evidence that it accumulated for this case to the European Union, and this evidence apparently helped form much of the basis for its action against Microsoft involving the server market; 4) The allegations involved rule of reason violations, not "hard core" cartel violations; and 5) The agreed-upon relief helped protect Java from pollution by Microsoft, and helped ensure that only pure, non-Microsoft Java would in the future be distributed on PCs. This was a significant victory for the PC ecosystem and the consumers who benefit from it.

In March 2002 Sun filed an antitrust suit against Microsoft, charging that Microsoft had engaged in a number of antitrust violations, some of which mirrored the charges in the U.S. government's case against them, and others of which were broader. Sun also charged a number of intellectual property violations. Among the specific antitrust violations were the allegations that Microsoft illegally attempted to monopolize the Intel-compatible PC operating systems market, the browser market, and the Office suite market. Sun also charged Microsoft with attempting to monopolize the workgroup server market. In addition, Sun charged Microsoft with illegally tying Internet Explorer to its PC operating system, its workgroup server to its PC operating systems, and its exchange server software to its Office productivity suites. Sun also charged that Microsoft illegally entered into exclusive dealing arrangements for its browser, and that it entered into exclusionary agreements with Apple and Intel not to develop, distribute or use non- Microsoft compatible implementations of Sun's Java platform, in violation of Section 1 of the Sherman Act.

On January 21, 2003, the United States District Court for the District of Maryland granted Sun's motion for preliminary injunction.[594] Microsoft was, inter alia, enjoined from distributing its Windows PC Operating System or Browser unless they contained unpolluted Java software.

Microsoft appealed this decision, however, and the Fourth Circuit lifted the preliminary injunction. The reasons for this reversal were that: "(1) future and present harm alleged by competitor were insufficient to support mandatory preliminary injunction requiring manufacturer to distribute competitor's middleware software with every copy of manufacturer's operating system and web browser; [and that the] (2) mandatory preliminary injunction was not necessary to prosecute competitor's claim that manufacturer had monopolized operating system market..." The Court of Appeals remanded the case for a trial on the merits.

On April 2, 2004, Sun and Microsoft agreed to settle these antitrust and intellectual property issues, and also agreed on a variety of patent license and other issues. Of the overall $2 billion

[594] Sun v. Microsoft, 240 F.Supp.2d 460 (D. Md. 2003).

settlement, a joint Sun-Microsoft Press Release attributed $700 million to a settlement of Sun's antitrust claims against Microsoft.[595]

[595] See April 2, 2004 Press Release, "Microsoft and Sun Microsystems Enter Broad Cooperation agreement; Settle Outstanding Litigation" available at http:www.sun.com/smi/Press/sunflash/2004-04.

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.

This case is noteworthy because: 1) Although the government was first to investigate, the litigation was primarily initiated and led by private counsel;[596] 2) Private counsel obtained a substantial monetary recovery, whereas the federal government secured only injunctive relief;[597] 3) Counsel for the Plaintiffs' class were successful in persuading the District Court that the agreement between Abbot Laboratories[598] ("Abbott") and its generic competitor, Geneva Pharmaceuticals, now Sandoz, Inc.,[599] ("Geneva") effectively delayed generic competition with the brand name drug Hytrin[600] and was thus anticompetitive and a *per se* violation of the Sherman Act; 4) Counsel for the Plaintiff class secured a total cash settlement of $74.5 million,[601] which, according to plaintiffs' expert,[602] is enough to reimburse a substantial percentage – 40-60 percent – of overcharges suffered by the class members while generic competition was delayed; 5) Plaintiffs' success in this litigation will discourage other brand name pharmaceutical manufacturers from unlawfully preventing or delaying generic competition, and keeping

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[596] The first federal government action in this case was the complaint and consent order proposal issued by the Federal Trade Commission (FTC) on March 16, 2000, more than one year after the first Direct Purchaser complaint was filed in December 1998. Attorney Generals for Colorado, Kansas and Florida filed suit alleging antitrust violations based on the same facts on September 27, 2001 "on the heels of an investigation started [in 1999] by the Federal Trade Commission." Michael Perrault, Suit: Drug Makers Were In Collusion, Rocky Mountain News, Pg. 4B (September 28, 2001).

In many cases the Attorneys General or the FTC will conduct a non-public investigation before filing a complaint, making it difficult to determine whether the government or private counsel began investigating first, or were conducting separate, parallel investigations.

[597] The FTC finalized a consent order against Abbott and Geneva on May 22, 2000. *In the Matter of Geneva Pharmaceuticals, Inc.*, Docket No. C-3946, Decision and Order, available at http://ftc.gov/os/2000/05/c3946.do.htm (last updated December 14, 2001). The order, which terminates on May 22, 2010, prohibits both companies from entering into any further similar agreements and requires that Geneva report to the FTC annually for five years on the manner and form of its compliance. Despite the range of remedies available to the government, "including possibly seeking disgorgement of illegally obtained profits," the order was the only relief obtained directly by the government in this case, although state attorney general joined in the Direct Purchaser private action. *In the Matter of Geneva Pharmaceuticals, Inc.*, Docket Nos. C-3945 and C-3946, Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony, et. al, available at http://ftc.gov/os/2000/05/abbottgenevastatement.htm (last updated December 14, 2001).

[598] Abbot Laboratories is based north of Chicago in Abbot Park, Illinois.

[599] Sandoz, Inc. is owned by Novartis, which is based in Switzerland.

[600] Hytrin is the brand name for terazosin hydrochloride, a drug used for the treatment of high blood pressure and enlargement of the prostate gland.

[601] The $74.5 million figure includes the $72.5 million settlement between Direct Purchaser Class and Abbot and Geneva as well as a settlement with Zenith Goldline Pharmaceuticals, Inc., now known as Ivax pharmaceuticals, Inc. ("Zenith"), also named by Valley Drug it its original complaint alleging substantially similar Sherman Act violations. Zenith settled for $2,072,327 plus interest. This settlement was finally approved by the Court on June 13, 2002.

[602] Sherman Act Class Counsel's Joint Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Named Plaintiffs and Memorandum of Points and Authorities in Support Thereof, *In re Terazosin Hydrochloride Antitrust Litigation*, MDL 1317 at page 15, submitted April 6, 2005 (S.D. Fla. 2005).

pharmaceutical drugs competitively priced is especially important because the cost of prescription drugs contributes greatly to the rising cost of healthcare; and 6) In awarding Counsel for the Direct Purchaser Class one-third of the total recovery plus more than $3 million in expenses, Judge Patricia A. Seitz for the Southern District of Florida said that the relationship counsel had with the class members combined with the fact that there were no objections to the settlement was "a testament to the great clientmanship that [Class Counsel] provided."[603]

The $72.5 million settlement agreement entered into on February 24, 2005 concluded more than five years of litigation stemming from Abbot Laboratories' "attempts to protect its patents' exclusivity with respect to the brand name drug Hytrin, and the competing efforts of generic manufacturers to develop and launch bioequivalent drugs for entry in the terazosin hydrochloride market."[604] Plaintiffs alleged that Abbot made multi-million dollar payments to generic manufacturers of the drug to delay the entry of generic versions of Hytrin to the market.

On March 30, 1998, Geneva obtained final approval from the FDA to market and sell its generic, capsule version of the drug terazosin hydrochloride, brand-name Hytrin. Two days later, on April 1, 1998, Abbot entered into an agreement with Geneva. In exchange for $4.5 million a month from Abbot, Geneva agreed not to put its generic version of Hytrin on the market, an arrangement that would continue until Abbot's patent expired or until a final judgment in the patent infringement suit that Abbot filed against Geneva regarding Geneva's tablet formulation of Hytrin. Abbot and Geneva voluntarily terminated the agreement in August 1999 after the FTC began an investigation.[605] Geneva launched its generic product on August 13, 1999. During the last five months of 1999 Geneva's generic terazosin hydrochloride had sales of $71.8 million, an 8.8 percent share of the market.[606]

Named Plaintiffs of the Direct Purchaser Class,[607] Louisiana Wholesale Drug Co., Inc. ("LWD") and Valley Drug Co. ("Valley Drug") filed complaints against Geneva and Abbot in December 1998 and August 1999. They alleged that the agreement between Geneva and Abbot was an illegal market allocation agreement in violation of Section 1 of the Sherman Act.[608] Plaintiffs argued that this agreement blocked the introduction of generic versions of Hytrin, which "resulted in reduced output, artificially inflated prices, and eliminated competition in the market

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[603] *In re: Terazosin Hydrochloride Antitrust Litigation*, Case No. 99-1317 MDL, Transcript of Fairness Hearing Before Hon. Patricia A . Seitz at pg. 15, ln. 17-18 (April 15, 2005).

[604] *In re Terazosin Hydrochloride Antitrust Litigation*, 352 F.Supp.2d 1279, 1286 (S.D. Fla. 2005).

[605] In the early months of 1999, the FTC launched a "probe of the drug industry's alleged efforts to block generic rivals and thus protect sales of brand-name medications." Jerry Guidera and Ralph T. King, *Abbott Labs, Novartis Unit Near Pact With FTC Over Agreement on Hytrin*, The Wall Street Journal, B1 (Aug. 21, 1998).

[606] Ralph T. King Jr., *FTC Panel Backs Suit Against Abbot, Novartis on Deal for Hypertension Drug*, The Wall Street Journal, B20 (Feb. 7, 2000).

[607] In addition to the Direct Purchaser Class litigation summarized here, similar claims were pursued by individual Direct Purchasers such as Walgreens and Shop-Rite and an Indirect Purchaser classes including seventeen certified state classes of end payer**s** for Hytrin consisting of Third Party Payers (e.g., insurance companies) and individual consumers. *In re Terazosin Hydrochloride*, 335 F.Supp. 2d 1336, 1342, fn. 5 (S.D. Fla. 2004).

[608] Valley Drug also named Zenith Goldline Pharmaceuticals, Inc., now known as Ivax pharmaceuticals, Inc. ("Zenith") in its complaint alleging substantially similar Sherman Act violations. That case settled for $2,072,327 plus interest. This settlement was finally approved by the Court on June 13, 2002.

for terazosin hydrochloride."[609] Plaintiffs sought damages for the financial loss incurred by direct purchasers of Hytrin who paid inflated prices while entry of the generic versions of the drug was delayed by the agreement between Geneva and Abbot.

On December 13, 2000, the United States District Court for the Southern District of Florida granted Plaintiffs' motion for summary judgment, holding that the agreement between defendants Geneva and Abbot was a *per se* violation of Section 1 of the Sherman Act. The court concluded that the agreement essentially allocated the entire United States market for terazosin drugs to Abbot.[610] This ruling was reversed by the Eleventh Circuit as "premature" and remanded to the district court to consider the exclusionary scope of the patent before making any determination.[611] On January 5, 2005, the district court ruled on multiple motions for summary judgment filed by parties on both sides of the litigation. The district court again granted Plaintiffs' motion for summary judgment on this issue holding that the agreement exceeded the exclusionary rights Abbot enjoyed as a result of the patent it held on terazosin hydrochloride not due to expire until 2014 and that in light of this, the agreement was indeed a *per se* violation of Section 1 of the Sherman Act. The Direct Purchaser Class settled with Geneva and Abbot for $72.5 million the following month.

Class Counsel spent more than 51,000 hours over the course of six years litigating this case, not including the pre-complaint investigation. The litigation involved obtaining admissible testimony from witnesses, working with experts, conducting market research and analysis, several rounds of motions for summary judgment and class certification, and a complex and protracted discovery process. Class Counsel's significant investment of time and resources resulted in a substantial settlement on February 24, 2005, totaling between 40-60 percent of the direct purchasers' damages.[612] The court granted Class Counsel their requested fees in the amount of one-third of the settlement proceeds, plus interest and $3,133,070.86 in expenses.[613] The

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[609] *In re Terazosin Hydrochloride Antitrust Litigation*, 352 F.Supp. 2d at 1287.

[610] *Id*. at 1292.

[611] *Valley Drug Co. v. Geneva Pharms., Inc.,* 344 F.3d 1294, 1304 (11th Cir. 2003). In reversing the District Court's Ruling, the Eleventh Circuit explicitly rejected the reasoning of the Sixth Circuit in *In re Cardizem CD,* 332 F.3d 896 (6th Cir. 2003). In *Cardizem*, the court held that a similar agreement was a *per* se violation of the Sherman Act, adding that "[i]t is one thing to take advantage of a monopoly that naturally arises from a patent, but another thing altogether to bolster the patent's effectiveness in inhibiting competition by paying the only potential competitor $40 million per year to stay out of the market.") *Id.* at 908. In *Valley Drug,* the Eleventh Circuit responded that "[w]hen the exclusionary power of a patent is implicated, however, the antitrust analysis cannot ignore the scope of the patent exclusion." *Valley Drug*, 344 F.3d at 1311. However, not withstanding the *Valley Drug* opinion, on remand the District Court did find the agreement to be a *per se* violation. *In re Terazosin Hydrochloride*, 352 F.Supp 2d. 1279 (S.D. Fla. 2005).

[612] Sherman Act Class Counsel's Joint Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Named Plaintiffs and Memorandum of Points and Authorities in Support Thereof, *In re Terazosin Hydrochloride Antitrust Litigation*, MDL 1317 at page 15, submitted April 6, 2005 (S.D..Fla. 2005).

[613] Including the Zenith settlement, for $2,072,327 the total recovery in this litigation was $74,572,327. The proceeds of the Zenith settlement are being applied to the reimbursement of out-of-pocket expenses only. Class Counsel are not seeking attorney's fees from the Zenith settlement. The Judge also approved incentive awards for the named plaintiffs "[i]n light of their six years of service on behalf of the class." *In re Terazosin Hydrochloride Antitrust Litigation*, Case No. 99-1317 MDL, Order and Final Judgment, pg 11, ln 27, Apr. 19, 2005. Louisiana Wholesale Drug Co., Inc. was awarded $45,000 and Valley Drug Co. was awarded $30,000. *Id*.

remaining settlement funds will be distributed pro-rata, reimbursing class members[614] for the difference between the price they actually paid for terazosin during the period that generic competition was illegally delayed and the price they would have paid if a generic version of the drug was available. District Court Judge Patricia A. Seitz approved the final settlement on April 15, 2005 noting the quality of the advocacy and that "this is a case in which I think justice was accomplished by a settlement."[615] Judge Seitz also commented that the relationship that counsel had with the class members combined with the fact that there were no objections to the settlement was "a testament to the great clientmanship that [Class Counsel] provided."[616]

In addition to obtaining a substantial monetary award for direct purchasers who overpaid for terazosin hydrochloride, Plaintiffs' success in this litigation will benefit consumers in the future. In particular, the district court's determination, on remand, that the agreement between Abbot and Geneva was a *per se* violation of the Sherman Act will discourage other brand name drug manufacturers from using such agreements to delay or prevent generic competition, helping to reduce national healthcare costs by keeping prescription drugs competitively priced.

[614] Ultimately the class was defined as all purchasers of both brand name and generic drugs who also purchased terazosin hydrochloride directly from Abbot at any time during the period commencing March 31, 1998 when Geneva obtained FDA approval to sell its generic version of terazosin hydrochloride until the illegal agreements were terminated on August 13,1999.

[615] *In re Terazosin Hydrochloride Antitrust Litigation*, Case No. 99-1317 MDL, Transcript of Fairness Hearing Before Hon. Patricia A . Seitz at pg. 15, ln. 6-7 (April 15, 2005).

[616] *In re Terazosin Hydrochloride Antitrust Litigation*, Case No. 99-1317 MDL, Transcript of Fairness Hearing Before Hon. Patricia A . Seitz at pg. 15, ln. 17-18 (April 15, 2005).

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)

This case is noteworthy because: 1) It resulted in a $50 million settlement in 1992; 2) The Court awarded 30 percent in attorneys' fees; 3) All of the overcharged victims were American businesses; and 4) The private action was a follow-up to a federal enforcement action that involved a large nationwide class action slightly broader in its scope than the federal suits.[617]

This litigation began as a result of a task force that the federal government appointed to investigate the sale of pipe to the Washington Public Power Supply System ("WPPSS") in Seattle.[618] Apparently this investigation was sparked by the closing of several public power projects. Numerous suits involving securities fraud and contract matters were filed against the WPPSS due to the failure of these nuclear power projects. There was much public interest in their completion because it was hoped that they would provide an economical energy supply to Washington residents.[619]

As a result, a price-fixing scheme was uncovered by the Department of Justice's WPPSS Task Force, the Internal Revenue Service and the Federal Bureau of Investigation.[620] From 1986-1988, numerous corporations and their officers were criminally charged with price fixing schemes. The alleged mastermind, Gerald Profita, president and CEO of Shaw Corporation, Inc., plead guilty and received a jail sentence of eight years plus a $25,000 fine.[621]

This suit, filed on March 10, 1988, arose out of an alleged conspiracy to illegally fix the price of specialty steel piping materials sold under cost-plus arrangements throughout the United States between 1966 and 1985.[622] The class of Plaintiffs, numbering approximately 6,000, consisted of

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[617] The private action spanned a time frame of 1966-1985. The federal cases alleged activity no earlier than 1974 and no later than 1987, with many cases spanning only a few years Aff. Of Lynn Lincoln Sarko in Support of Pls' Mot. For Class Cert. Re: Summary of Crim. Procs. Ex. 2. Parallel Crim. Procs. In Re Spec. Steel Antitrust Litig. Pgs. 1-5. *Transamerican Refining Corp., et. al. v. Dravo Corp., et. al*., No. 4:88CV00789(Docket)(S.D.Tex. Mar. 10, 1988)(Specialty Steel Piping Antitrust Litigation).

[618] *Dravo and others Settle Pipe Price-Fixing Suit*, 228 ENGR. NEWS-RECORD 14 (Apr. 6, 1992)(Available in 1992 WLNR 1682774).

[619] Per telephone conversation with Mark Griffin, Esq, Partner at Keller Rohrback in Seattle, Washtington. He was a co-lead in the Specialty Steel Piping Antitrust Litigation.

[620] *Dravo and others Settle Pipe Price-Fixing Suit*, 228 ENGR. NEWS-RECORD 14 (Apr. 6, 1992)(Available in 1992 WLNR 1682774).

[621] Aff. Of Lynn Lincoln Sarko in Support of Pls' Mot. For Class Cert. Re: Summary of Crim. Procs. Ex. 2. Parallel Crim. Procs. In Re Spec. Steel Antitrust Litig. Pgs. 1-5. *Transamerican,* No. 4:88CV00789 (Docket)(S.D.Tex. Mar. 10, 1988)(Specialty Steel Piping Antitrust Litigation). The government's "star" witness, Shaw Co.'s manager of purchasing from 1976-1985, W. Robert Short, was found guilty of violating the Sherman Act and received a jail sentence of three years plus a fine of $11,000. *Id*. at Pg 21,22. Two other main participants included the president and vice president of Standard Pipe & Supply Company Inc., Daniel Petrone and Allan Miller. Both plead guilty and received a jail sentence of two years each. Id. Many others received lesser prison sentences and fines. Id.

[622] "The manufacturers or distributors, as suppliers of specialty steel piping, allegedly made arrangements with pipe fabricators to quote an inflated price on steel which was to be resold by the pipe fabricators on a cost-plus

refineries, and other buyers who purchased the specialty steel piping material on a cost-plus basis. There were thirty-one defendants representing the sellers of the specialty steel piping material.[623] Plaintiffs' counsel successfully defeated several motions to dismiss based on plaintiffs' failure to state a claim upon which relief can be granted and lack of proper pendent jurisdiction.[624]

The case settled in 1992 for about $50 million.[625] Attorneys' fees of 30 percent were awarded Plaintiffs' counsel in addition to reimbursement of costs.[626]

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basis. It is alleged that the supplier and fabricator later divided the price differential through payments or credits." *Transamerican Refining Corp., et al. v. Dravo Corp., et al.* Available in 1990 WL 122228, 1990-2 Trade Cases P 69, 127,1 (S.D.Tex. June 22, 1990)(No.CIV. A. H-88-789). "Some defendants allegedly marked up the cost of the pipe by about 25% and kicked back a portion to the fabricators", said Lynn L. Sarko, an attorney for the plaintiffs. *Dravo and others Settle Pipe Price-Fixing Suit*, 228 ENGR. NEWS-RECORD 14 (Apr. 6, 1992)(Available in 1992 WLNR 1682774).

[623] *Id.*

[624] *Transamerican,* Available in 1990 WL 122228, 1990-2 Trade Cases P 69, 127 (S.D.Tex. June 22, 1990) and *Transamerican Refining Corp., et al. v. Dravo Corp., et al.* Available in 1991 WL 261765, (S.D.Tex. Oct. 29, 1991)(No.CIV.A.H-88-789).

[625] Of the thirty one defendants, Allied Signal, Inc.
paid the largest single settlement of $14,000,000.00Adam Goodman, *LaBarge Settles Antitrust Case*, ST. LOUIS POST-DISPATCH (SAT. FIVE-STAR ED.) 9C (Aug. 8, 1992)(Available in 1992 WLNR 509337). [625] See attached in its entirety as Exhibit 1 the Notice of Class Notice and Proposed Partial Settles., Attachment A. *Transamerican*, No. 4:88CV00789(Docket)(S.D.Tex. Mar.10,1988)(Specialty Steel Piping Antitrust Litigation). Pullman Power Products and Resco Holdings Inc., paid 7,300,000.00. See attached in its entirety as Exhibit 2 the Notice of Hearing on Proposed Partial Settles. of Class Actions and Application for Interim Award of Counsel Fees and Expenses, Attachment A. *Transamerican*, No. 4:88CV00789(Docket)(S.D.Tex. Mar.10, 1988)(Specialty Steel Piping Antitrust Litigation) as Exhibit 2. Dravo settled the suit for $6,000,000.00. Id. Crane Company was one of the last defendants to settle for $5,300,000.00. See attached in its entirety as Exhibit 3 the Notice of Hearing on Proposed Partial Settle. of Class Actions; Application for Award of Counsel Fees and Expenses; Proposed Plan of Distrib; Verified Proof of Claim Form; and Claim Proc. at 2.

[626] *Id.* at 3. . *Transamerican*, No. 4:88CV00789(Docket) (S.D.Tex. Mar.10,1988)(Specialty Steel Piping Antitrust Litigation).

Urethane Antitrust Litigation

MDL No. 1616, 232 F.R.D. 681 (D. Kan. 2005).

The urethane litigation is noteworthy because: 1) It started when the DOJ discovered a conspiracy involving polyester polyols (Chemical 1), for which defendants paid a criminal fine; 2) Counsel for the direct purchaser class filed a follow-on suit, involving a longer conspiracy period, which secured an $18 million settlement from one defendant, Bayer. The case against the other defendant is still pending; 3) While pursuing the case against Chemical 1, plaintiffs' counsel brought suit alleging another conspiracy involving a related chemical, polyether polyols (Chemical 2); 4) Plaintiffs in the Chemical 2 class action, again the direct purchasers, secured a $55.3 million settlement from one defendant, Bayer, and the cases against the other defendants are still pending; and 5) Both settlements received so far, $73.3 million, were from the wholly owned subsidiary of a foreign corporation.

Polyurethane (urethane) is an elastic type of rubber produced by either a polyester polyol (Chemical 1) or a polyether polyol (Chemical 2).[627] The Chemical 1 case began after a U.S. government investigation revealed an unlawful price-fixing conspiracy between Bayer Corp., a U.S. subsidiary of Bayer AG, and Crompton Corp., now known as Chemtura Corp.[628] In March 2004, Crompton issued a press release stating that it was being granted amnesty for participating in the investigation.[629] Nearly a month later, a private follow-on case ensued, as the first Chemical 1 case was brought by direct purchasers.[630] In August 2004, the U.S. District Court for the District of Kansas consolidated the Chemical 1 cases into the In re Urethane Antitrust Litigation. Plaintiffs alleged that Bayer and Crompton fixed prices between January 1, 1998 and December 31, 2004.

The Chemical 2 case arose out of an investigation by a private law firm in fall 2003, before any of the Chemical 1 cases were filed. Apparently, the private plaintiffs wanted to see if either the investigation or lawsuit involving Chemical 1 would include Chemical 2. When they saw that it did not, then they chose to pursue the Chemical 2 case.[631] The named defendants in this suit are Bayer, BASF, The Dow Chemical Company, Lyondell Chemical Company, and Huntsman International LLC. These defendants control 75 percent of the Chemical 2 market and 100 percent of two other markets closely related to Chemical 2.[632]

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[627] Polyester polyols "are used to manufacture a variety of foam-based products such as packaging, automobile air filters, sound-deadening materials, and furniture as well as non-foam products such as certain coatings and adhesives." *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 443 (D. Kan. Aug. 16, 2006). Polyether polyols are softer and more elastic, and are usually used to make spandex and soft rubber parts.

[628] *Bayer Unit to Pay $33 Mln Fine, Plead to Price Fixing*; see http://www.cbgnetwork.org/296.html (Sept. 30, 2004).

[629] Crompton Corp., *Crompton Announces Agreements in U.S. and Canadian Rubber Chemicals Investigations*, BusinessWire (2004); see http://phx.corporate-ir.net/phoenix.zhtml?c= 68079&p=irol-newsArticle_Print&ID=547653&highlight=.

[630] Per telephone conversation with Christopher J. Cormier, Esq., of Cohen, Milstein, Hausfeld & Toll, P.L.L.C. in Washington, D.C (Jan. 12, 2007). This law firm is co-lead counsel in the Chemical 2 cases.

[631] Pl. Coordination Req. at 4-5, *In re Urethane Antitrust Litig.,* 237 F.R.D. 440 (D. Kan. August 22, 2005).

[632] These markets are the methylene dyphenyldiisocyanate (MDI) and toluene diisocyanate (TDI) markets.

The suit alleges that these defendants consistently announced and implemented price increases at the same or similar times between January 1, 1999 and December 31, 2004, and the complaint offered four specific periods describing in detail each defendant's involvement.[633] Plaintiffs allege that these price increases cannot be explained by changes in the price of raw materials or by changes in demand, and that the defendants participated in secret meetings and conversations during which they agreed to fix prices and allocate customers.[634] In June 2005, these cases were coordinated with the Chemical 1 cases.[635]

On September 30, 2004, Bayer agreed to plead guilty to charges of participating in a criminal conspiracy to fix Chemical 1 prices between 1998 and 2002, and to pay a criminal fine of $33 million. Note that the private suit alleged overcharges between 1998 and 2004, which encompassed two years more than the government suit.[636]

The government began an investigation on Chemical 2 price-fixing in February 2006. Defendants of the private suit were issued subpoenas from the DOJ seeking information relating to the manufacture and sale of Chemical 2, MDI and TDI. Because of the timing of the investigation, we believe that it stemmed from the private suit.

In August and October 2006, the court approved settlements with Bayer releasing the company from liability in the two private suits. Bayer agreed to pay $55.3 million to Chemical 2 plaintiffs, and $18 million to Chemical 1 plaintiffs. These have been the only settlements thus far, and the cases against the other defendants are still ongoing.[637]

In granting preliminary approval of the Bayer settlement for Chemical 2, the Honorable John W. Lungstrom praised the private plaintiffs' attorneys, stating that "these law firms have performed extensive work identifying and investigating the potential claims in this action, have ample experience handling cases similar to this one, have demonstrated adequate knowledge of the applicable law, will devote adequate resources to representing the class, and have done a commendable job thus far prosecuting the polyether polyol plaintiffs' claims."[638] Attorneys' fees have not been awarded yet for either case.[639]

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[633] *In re Urethane Antitrust Litig.*, 409 F. Supp. 2d 1275, 1280 (D. Kan. Jan. 18, 2006).

[634] *Id.* at 1279.

[635] Because of the arguably differing nature between the Chemical 1 and Chemical 2, the court elected not to consolidate the two groups of cases, but rather consolidate each individually, and the two sets of cases would proceed on separate tracks for scheduling purposes.

[636] Notice of Class Action Settle. with Bayer and Fairness Hrg. at 1, *In re Urethane Antitrust Litig.*, 237 F.R.D. 440 (D. Kan. June 13, 2006).

[637] The Chemical 1 cases have finished class discovery and are currently in merits discovery. The Chemical 2 cases are still in class discovery. Per e-mail conversation with Christopher J. Cormier, Esq., of Cohen, Milstein, Hausfeld & Toll, P.L.L.C. in Washington, D.C (Dec. 28, 2006).

[638] T.R.O. Hrg. Transcr. at 18, *In re Urethane Antitrust Litigation*, 237 F.R.D. 440 (D. Kan. March 27, 2006).

[639] Per e-mail conversation with Christopher J. Cormier, Esq., of Cohen, Milstein, Hausfeld & Toll, P.L.L.C. in Washington, D.C (Dec. 28, 2006).

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).

This case is unusually noteworthy because: 1) It resulted in payments to victims that had a present value of $3.383 billion in cash, the largest settlement in antitrust history (in fact, it was "the largest settlement ever approved by a federal court");[640] 2) It also resulted in significant injunctive relief that the court valued at "$25 to $87 billion or more;"[641] 3) It was initiated and pursued solely by private parties: it was not a follow-up to a government case; 4) It did not involve a classic "hard core" conspiracy, but rather involved a number of complex Section 1 and Section 2 allegations; and 5) The awarded attorneys fees were only 6.5 percent of the monetary recovery, and were far less than one percent of the total value that the Court ascribed to the combination of the monetary recovery and injunctive relief.[642]

On October 25, 1996, a class of approximately five million merchants, including Wal-Mart, Sears, and Safeway, sued Visa and MasterCard for alleged violations of Sections 1 and 2 of the Sherman Act. "First, plaintiffs claimed that the defendants' 'Honor All Cards' policy, which forced merchants who accepted Visa and MasterCard credit cards to accept Visa and MasterCard debit cards, was an illegal 'tying arrangement' that violated Section One of the Sherman Act. Second, plaintiffs alleged that defendants used their Honor All Cards policy in conjunction with other anti-competitive conduct to monopolize the debit card market, in violation of Section Two of the Sherman Act. As a consequence, plaintiffs claimed that they incurred supra-competitive 'interchange fees' ... during every debit and credit transaction made between October 1992 and June 2003."[643]

The litigation was complex and lasted for years. During proceedings spanning almost a decade, more than 400 lawyers and paralegals, led by Constantine, Cannon, P.C., litigated on behalf of plaintiffs, obtaining class certification, winning a motion for summary judgment and defeating defendants' motion for summary judgment. The parties settled on the eve of trial. "Counsel for the class took and defended approximately 400 depositions, including 21 expert depositions, and reviewed more than 5 million pages of documents...."[644] The quantity and quality of this effort, the difficulty of the legal issues involved, and the spectacular results obtained, underlay the Court's decision to award $220 million in legal fees (the above-mentioned 6.5% of the monetary recovery alone).[645]

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[640] See In re Visa Check/Mastermoney Antitrust Litigation, 297 F.Supp.2d 503, 511 (E.D.N.Y. 2003).

[641] Id.

[642] See Wal-Mart Stores, Inc. et. al., v Visa USA & MasterCard International, 396 F.3d 96, 114 (2d Cir. 2005).

[643] Id. at 100.

[644] Id. at 111.

[645] Id. at 114.

The case settled in April 2003 for "$3,383,400,000 in compensatory relief, plus additional injunctive relief valued at $25 to $87 billion or more."[646] Under the terms of the settlement, Visa will pay slightly more than $2 billion to the merchants and MasterCard will pay slightly more than $1 billion. Both firms also agreed to implement a wide variety of injunctive relief. For example, they agreed to significantly lower their charges for debit transactions on August 1, 2003. This saved merchants more than $1 billion from August 2003 to April 2004 alone. On January 1, 2004, merchants in the United States gained the freedom to choose to accept Visa and MasterCard debit products based upon their quality, speed, safety and price. Merchants are no longer forced by the associations' rules to accept debit cards if they take credit cards. Not surprisingly, the District Court judge in the case characterized the injunctive relief as of "substantial" value.[647]

Judge John Gleeson granted final approval of the settlements and the plan of allocation on December 19, 2003. The United States Court of Appeals affirmed this decision on January 4, 2005. Distributions to class member merchants from the settlement fund will be made soon.

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[646] Id. at 111.

[647] See In re Visa Check/Mastermoney Antitrust Litigation, 297 F.Supp.2d 503, 525 (E.D.N.Y. 2003).

Vitamins Antitrust Litigation

Many related cases.

This series of more than 100 related cases is historic because: 1) Settlements in total resulted in approximately $4.2 to $5.6 billion being returned to overcharged U.S. purchasers of vitamins and related products,[648] the largest total for any related series of antitrust cases in history; 2) Of this, between $3.7 billion and $5.1 billion was returned to direct purchasers; 3) Of this total, an additional $500 million was returned to indirect purchasers; 4) Almost all of the private vitamins cases settled. A jury in the only vitamins case that went to verdict, a separate conspiracy involving choline chloride, decided that the cartel had overcharged purchasers by approximately $49.5 million, e.g. a 61 percent price rise; 5) Estimates set the average price increase at approximately 15-80 percent for the 16 different cartelized vitamins, with an average overcharge of 43.7 percent; 6) Of the amounts paid to U.S. purchasers, more than 99 percent, or $4.2 to $5.6 billion, was paid by foreign cartel members; 7) 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; 8) These cases also resulted in criminal fines of approximately $915 million by the U.S. enforcers, and approximately $946 million by the European Union and other foreign enforcers; 9) A number of defendants went to jail; and 10) Because of the huge number of separate vitamins cases, we are not able to estimate precisely the average percentage of the refunds that went to class counsel in the form of legal fees. However, one source estimates that on average the legal fees were no more than 10 percent of the settlements, while another source lists the percentage for the indirect purchaser cases at 14 percent.

It is difficult to determine the exact origin of these cases: who discovered the first evidence of, or enough hard evidence to prove the existence of, the vitamins cartels[649]. Cause-and effect is especially difficult to determine because the "vitamins cartels" actually consisted of 16 different cartels with partially overlapping memberships that, generally speaking, fell into two major groups. Some of the earliest indications that one or more vitamins markets might have been cartelized, moreover, did not seem fruitful and were not pursued vigorously by the government enforcers, but were later re-opened and pursued and led to strong evidence of collusion.

David Boies relates that one of his partners uncovered evidence that Roche was discussing prices with its competitors.[650] Boies and his colleagues investigated, and by May 1997 had found evidence consistent with collusion. They then found more evidence, and by December 1997 decided they had enough to file suit. But first they gave their information to the Antitrust Division. Boies says that his firm uncovered and ultimately proved the collusion "without the benefit of government involvement."[651] Professor John Connor presents a more complicated

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[648] Unless noted, all of the empirical estimates in this Section are from John M. Connor, "The Great Global Vitamins Conspiracy: Sanctions and Deterrence," Draft of 2/14/06, available at www.antitrustinstitute.org.

[649] We attempted to find a public account of the origin of the vitamins cases that written by the Department of Justice Antitrust Division but could not. When we sent them the version contained in this document they would not comment on its accuracy or completeness.

[650] David Boies, Courting Justice (2004) at 226-30. Another source said this evidence was uncovered while he was in the course of preparing a patent-infringement suit. John M Connor, "The Great Global Vitamins Conspiracy: Sanctions and Deterrence," Draft of 2/14/06, at 26, available at www.antitrustinstitute.org.

[651] David Boies, Courting Justice, 230 (2004).

analysis of the events, but ultimately also gives these private counsel credit for uncovering the first solid evidence of collusion.[652] As will be seen infra, this perspective is confirmed by the defendants themselves. However, many of the details of the Department of Justice investigation are non-public, and it is clear that both private counsel and the U.S. Department of Justice were on parallel tracks and discovered much of the critical evidence at around the same time, and that the investigation of each helped that of the other.

Class counsel filed the first Vitamins Complaint in March 1998, on behalf of a class of direct purchasers. They alleged that as early as 1990 and continuing into 1998, Defendants[653] conspired to fix prices, allocate markets, and engage in other collusive conduct with respect to certain vitamins, vitamin premixes and other bulk vitamin products.[654]

Following this complaint, the full dimensions of Defendants' conspiratorial conduct began to become known. In March 1999, the Antitrust Division of the United States Department of Justice announced that Defendant Lonza AG had pleaded guilty to violating Section 1 of the Sherman Act for fixing the price of vitamin B3 (niacin), and that Defendant Chinook Group Ltd., certain of its executives and certain executives of non-settling Defendant DuCoa, LP, had pleaded guilty to violating Section 1 for fixing the price of vitamin B4 (choline chloride).[655]

It is clear that Class Counsel significantly contributed to the discovery of this illegal activity. At the May 21, 1999 press conference in Basel, Switzerland announcing the Roche guilty pleas, Hoffman-La Roche's CEO, Franz Humer, explained how it was the early 1998 class action lawsuit (and not a government investigation) that prompted a new internal investigation that caused Roche to terminate its conspiratorial conduct and begin to cooperate with the government:

> In 1997, responding to the settlement in the citric acid case and to the news of an investigation of the bulk vitamins industry, Roche initiated an internal inquiry of its own, which at the time did not turn any evidence of wrongdoing. *A second internal inquiry prompted by class action lawsuits filed against Roche and other companies in early 1998 for alleged price-fixing in the bulk vitamins market revealed that further action was needed.* The inquiry was carried out in collaboration with US experts. Internal measures were implemented without delay to ensure an immediate halt to any antitrust violations. The

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[652] "U.S. investigators first got wind of the vitamins cartel and Roche's role in it in late 1996 from sources at ADM cooperating with the DOJ in its investigation of the citric acid cartel ..." As a result the FBI interviewed Dr. Kumo Sommer, the head of Roche's Vitamins division, in March 1997. "Sommer denied the existence of any vitamins cartel and the DOJ apparently decided to wind down its investigation for the meanwhile...[However, in] "late 1997 a partner of the law firm of Boies & Schiller...." presented the DOJ with evidence that a conspiracy was occurring. John M Connor, "The Great Global Vitamins Conspiracy: Sanctions and Deterrence," Draft of 2/14/06, at 25-26, available at www.antitrustinstitute.org.

[653] The defendants were F. Hoffman-La Roche, Ltd., Hoffman-La Roche, Inc., Rhone-Poulenc S.A., Rhodia, Inc., BASF AG, and BASF Corporation.

[654] Class Counsel uncovered Defendants' illegal conspiratorial conduct before any grand jury investigation became public, before guilty pleas began to be entered in 1999, before federal cooperation agreements became public, and before any Defendant confessed to any wrongdoing.

[655] Two months later, Defendant F. Hoffman-La Roche Ltd. pled guilty and BASF AG agreed to plead guilty to fixing the prices of various vitamins products.

> findings from this second inquiry formed the basis for Roche's decision to offer, on 1 March this year, its full cooperation in the US Justice Department investigation.[656]

As part of the cooperation prompted by lawsuits filed by Class Counsel, Roche employees interviewed by the Department of Justice implicated other conspiracy participants – including several of the Settling Vitamin Products Defendants – and provided substantial information about the duration and scope of the price-fixing conspiracy. The facts detailed in these interviews regarding conspiratorial conduct in the vitamins industry were subsequently relied on by Roche in preparing its written Fed. R. Civ. P. 30(b)(6) statement, which described Roche's view of the scope of the conspiracy.[657] The statement implicated other conspirators, and placed substantial settlement pressure on the Settling Vitamin Products Defendants.

During this period, as a result of additional investigation and discovery, Class Counsel added several Defendants to the all-vitamins Complaint,[658] and also filed a separate Complaint that alleged a conspiracy relating only to choline chloride.[659] These and subsequent complaints have resulted in a large number of settlements.[660] Plaintiffs also pursued their investigation of price-fixing[661] in the choline chloride industry, settled with some defendants, and reached cooperation agreements with most individual Defendants. Two defendant groups did not settle, however, and this case went to verdict. The jury found that the Mitsui Defendants and the DuCoa/DCV Defendants conspired to fix the price of choline chloride (vitamin B4). The jury also found that

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[656] See Exh. 9 to Class Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Niacin and Biotin Defendants, at 3.

[657] As described by the Special Master, the Roche Rule 30(b)(6) statement "at 101 pages, the longest of the statements, contains charts listing the date and location of events or meetings for particular vitamins, participants and the companies they represented, the vitamins products discussed, and additional details about the meetings." Special Master's Report & Recommendation, dated August 8, 2002, at 11. [Verilaw No. 11362.)

[658] These defendants included Hoechst Marion Roussel; Takeda Industries, Ltd., Takeda Vitamin & Food USA, Inc., and Takeda U.S.A., Inc.; Eisai Co., Ltd., Eisai U.S.A., Inc., and Eisai Inc.; Daiichi Pharmaceuticals Co., Ltd., Daiichi Fine Chemicals, Inc., and Daiichi Pharmaceuticals Corporation; Merck KGaA and EM Industries, Inc.; Sumitomo Chemical Co., Ltd. and Sumitomo Chemical America, Inc.; Tanabe Seiyaku Co., Ltd. and Tanabe USA, Inc. (Sumitomo and Tanabe are referred to collectively as the "Biotin Defendants"); Reilly Industries, Inc. and Reilly Chemicals, S.A.; Lonza Group Ltd., Lonza Inc. and Lonza AG; Degussa AG and Degussa Corp.; and Nepera, Inc. (Lonza, Degussa, Nepera and Reilly are referred to collectively as the "Niacin Defendants").

[659] They named as Defendants Akzo; UCB Chemicals; Chinook Group, Ltd., Chinook Group, Inc., and Cope Investments, Ltd.; Bioproducts, Inc. (United States company), Mitsui & Co. U.S.A., Inc., and Mitsui & Co. Ltd.; and various individual Defendants.

[660] For example, on November 3, 1999, Class Plaintiffs reached a settlement with the Hoffman-La Roche, BASF, Rhone-Poulenc, Hoechst, Takeda, Eisai and Daiichi Defendants regarding those Defendants' sales of bulk vitamin products, and with the BASF Defendants regarding their sales of Choline Chloride (the "Initial Settlement"). See In re Vitamins Antitrust Litig., Misc. No. 99-197, 2000 U.S. Dist. LEXIS 8931, 16 (D.D.C. Mar. 31, 2000).

[661] These settlements and agreements followed and preceded several guilty pleas with government authorities. For example, on March 1, 1999, DuCoa/DCV employees Lindell Hilling, John "Pete" Fischer, and Antonio Felix, and Chinook employees John Kennedy (formerly of Bioproducts) and Robert Samuelson pled guilty to price fixing and market allocation of choline chloride. On May 20, 1999, BASF AG pled guilty in the United States to price fixing and market allocation of certain vitamins, and on September 17, 1999, BASF AG pled guilty in Canada to price fixing and market allocation of choline chloride.

Class Plaintiffs had been damaged in the amount of $49,539,234 (before trebling).[662] After the trial, Class Plaintiffs settled with the Mitsui Defendants for an amount greater than the verdict and presently are engaged in post-judgment discovery with the DuCoa and DCV Defendants.

Professor Connor estimates that on average the attorneys received no more than 10 percent of the settlements in the form of attorneys' fees.[663] A survey of 24 indirect purchaser class action cases found that in all 24 cases the attorneys were awarded a 14 percent fee, in addition to the total of $267 million that was returned to overcharged purchasers.[664] We have heard anecdotes of fees in particular vitamins cases as high as 33 percent, however, but are aware of no other average figures.

[662] On the first day of the choline chloride trial (In re Vitamins Antitrust Litigation -- Animal Science Products, Inc., et al. v. Chinook Group, Ltd., et al.) between Class Plaintiffs and the Mitsui and DuCoa/DCV Defendants, Chief Judge Thomas Hogan stated in his opening remarks to the jury pool that: "[T]his is a very challenging and interesting case involving what we call antitrust issues between the parties. That's anticompetitive-type business issues 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." May 28, 2003 Trial Tr. at 25:1-6. 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." June 13, 2003 Trial Tr. at 1520:8-10.

[663] John M. Connor, "The Great Global Vitamins Conspiracy: Sanctions and Deterrence," Draft of 2/14/06, available at www.antitrustinstitute.org.

[664] See Settlements of Indirect Purchaser Class Actions Under State Law - September 30, 2005, submitted by Patrick E. Cafferty to the Antitrust Modernization Commission.