Articles

Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases

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Introduction

THIS STUDY TAKES A first step toward providing an empirical basis for assessing whether private enforcement of the antitrust laws serves its intended purposes and is in the public interest. It does this by assembling, aggregating, and analyzing information about forty of the largest recent successful private antitrust cases.[1] This information includes, inter alia, (1) the amount of money each action recovered for the victims of each alleged antitrust violation, (2) what proportion of the money was recovered from foreign entities, (3) whether govern-

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1. See *infra* Appendix II for a list of the forty cases analyzed. The full versions of the forty case studies can be found at ROBERT H. LANDE & JOSHUA P. DAVIS, BENEFITS FROM ANTITRUST PRIVATE ANTITRUST ENFORCEMENT: FORTY INDIVIDUAL CASE STUDIES (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523.

ment action preceded the private litigation, (4) the attorney's fees awarded to plaintiffs' counsel, (5) on whose behalf money was recovered (direct purchasers, indirect purchasers, or a competitor), and (6) the kind of claim the plaintiffs asserted (rule of reason, per se, or a combination of the two). The Study also draws various comparisons between the deterrence effects of private enforcement and federal criminal enforcement of the antitrust laws. First, it compares the total monetary amounts paid in all forty cases to the total criminal antitrust fines imposed during the same period by the U.S. Department of Justice ("DOJ"). Next, it makes that same comparison for the subset of the forty cases that also resulted in criminal penalties. Finally, the Study takes into account the deterrence effects of the prison sentences that resulted from DOJ prosecutions during this period.

This Study analyzes the collected information to help formulate policy conclusions about the desirability and efficacy of private enforcement of the antitrust laws. The results of the Study show that private antitrust enforcement helps the economy in many ways. It very significantly compensates victims of illegal corporate behavior and is almost always the only way these victims can receive redress. Private enforcement often prevents foreign corporations from keeping the many billions of dollars they illegally obtain from individual and corporate purchasers in the United States. This Study also shows that almost half of the underlying violations were first uncovered by private attorneys, not government enforcers, and that litigation in many other cases had a mixed public/private origin. The results of the Study also show that private litigation probably does more to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the DOJ. This is one of the most surprising results from our Study. We do not know of any past study that has documented that private enforcement has such a significant deterrence effect as compared to DOJ criminal enforcement.

Part I explores the purposes of private enforcement of the antitrust laws, including compensation and deterrence. Part II sets forth some of the typical criticisms of private enforcement, criticisms which generally lack any empirical basis. Part III explains the purpose of this Study—to provide some factual basis for assessing private enforcement of the antitrust laws—and also its design. Part IV presents the results of this Study, which support some surprising conclusions, perhaps most notably that private antitrust enforcement provides a greater deterrence effect than criminal enforcement by the DOJ.

I. The Purposes of Private Enforcement and Private Remedies

The federal antitrust laws prohibit violations of section 1 of the Sherman Act.[2] These violations include price fixing, bid rigging, market and customer divisions, and other collective anticompetitive behavior.[3] Federal antitrust laws also prohibit violations of section 2 of the Sherman Act,[4] which include monopolization, attempts to monopolize, and conspiracies to monopolize any part of the trade or the commerce of the United States,[5] as well as mergers, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."[6] Some offenses, like price fixing and bid rigging, are per se offenses while others, including monopolization, are governed by the rule of reason.[7] If conduct is per se illegal, proof of the conduct itself establishes a violation of the law.[8] Under the rule of reason, in contrast, courts will compare the procompetitive and anticompetitive effects of the conduct to determine its legality.[9] Antitrust laws can be enforced by government prosecutors (the DOJ,[10] the Federal Trade Commission[11] ("FTC"), and state enforcers[12]) and also by aggrieved private parties.[13]

The legislative history[14] and case law[15] interpreting the federal antitrust laws indicate that one important goal of the laws is to com-

2. 15 U.S.C. § 1 (2000).

3. *See* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 165–285 (West Group ed., 2000); *see also* 15 U.S.C. § 1.

4. 15 U.S.C. § 2.

5. *See* SULLIVAN & GRIMES, *supra* note 3, at 71–140; *see also* 15 U.S.C. § 2.

6. 15 U.S.C. § 18; *see also* SULLIVAN & GRIMES, *supra* note 3, at 510–34.

7. For a fuller discussion of the distinction between per se and rule of reason cases, see SULLIVAN & GRIMES, *supra* note 3, at 202–17.

8. *Id.*

9. *Id.*

10. 15 U.S.C. § 15(f).

11. The Federal Trade Commission ("FTC") enforces the Federal Trade Commission Act which prohibits, inter alia, "unfair methods of competition." 15 U.S.C. § 45. This provision is similar to the Sherman Act and Clayton Act. *See generally* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980) (explaining precisely how the FTC Act is similar to but slightly broader than the Sherman Act and the Clayton Act).

12. 15 U.S.C. § 15(c).

13. *Id.* § 15.

14. 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

pensate victims of illegal behavior.[16] Moreover, their primary goal is to prevent wealth transfers from these victims to firms with market power,[17] a concept that is consistent with and complementary to the goal of compensating overcharged victims of antitrust violations. To be sure, Congress's decision to award treble damages[18] might suggest that at least two-thirds of the damages remedy was intended only for punitive or deterrence purposes. It is possible, however, that even this

> 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 to 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." *Id.* at 16,274; *see also* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 21–30 (1989).

15. *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* Atl. Richfield Co. v. USA Petroleum, 495 U.S. 328, 360 n.20 (1990); California v. ARC Am. Corp., 490 U.S. 93, 102 (1989); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 557 (1982); Pfizer, Inc. v. India, 434 U.S. 308, 314 (1978); Ill. Brick Co. v. Illinois, 431 U.S. 720, 746, 748, 749 (1977); Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495, 502 (1969).

16. *See* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1976) ("Treble-damages antitrust actions . . . [were] conceived of primarily as a remedy for [t]he people of the United States as individuals, especially consumers. . . . Treble damages were provided in part for punitive purposes . . . but also to make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit against a combination such as is described in the Act." (internal quotations and citations to legislative history quoting Senators Sherman and George omitted)).

17. Many statements by the Sherman Act's sponsors about the overall purpose of the proposed legislation suggest 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." Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 449 (1988) (citations omitted). Congressman Coke referred to the overcharges as "robbery." *Id.* Representative Heard declared that the trusts, "without rendering the slightest equivalent," have "stolen untold millions from the people." *Id.* Congressman Wilson complained that a particular trust "robs the farmer on the one hand and the consumer on the other." *Id.* Representative Fithian declared that the trusts were "impoverishing" the people through "robbery." *Id.* 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." *Id.* at 449–50. Senator George complained, "They aggregate to themselves great enormous wealth by extortion which makes the people poor." *Id.* at 50.

18. *See* 15 U.S.C. § 15(a).

portion is necessary to compensate plaintiffs for the difficulty of bringing suit,[19] for unawarded prejudgment interest,[20] and for difficult-to-quantify unawarded damages items such as the allocative inefficiency effects of market power and the value of plaintiffs' time expended pursuing litigation.[21] Antitrust verdicts that produce treble damages are rare,[22] and we believe that few, if any, of the many antitrust cases that settle do so for more than single damages.[23] Of course, private enforcement also serves to deter antitrust violations.[24]

II. Criticisms of Private Enforcement

While government criminal and civil actions are essential in deterring future antitrust violations, virtually the only way to secure redress for the victims of antitrust violations is through private

19. Senator Sherman observed, "[t]he 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, "Under 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." *Id.* at 16,275.

20. Damages should include victims' lost prejudgment interest, the lack of which often can reduce the value of an antitrust damages award by fifty percent. *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 130–36, 158–68 (1993).

21. As the Antitrust Modernization Commission noted: "Indeed, in light of the fact that some damages may not 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 receive at least their actual damages." ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 246 (2007) [hereinafter AMC REPORT] (citation omitted), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. 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* Lande, *supra* note 20, at 122–24, 158–68.

22. See John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513 app. at 565 (2005), for a list of antitrust verdicts that calculated damages amounts.

23. See Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004), for an analysis of this issue.

24. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 746–47 (1977).

litigation.[25] And, as we explore below, private enforcement also plays a significant role in deterring antitrust violations. This Study attempts to provide an empirical basis for assessing these benefits. Before doing so, however, it is worthwhile to canvass some of the criticisms of private enforcement of the antitrust laws. Indeed, detractors of private enforcement seem to greatly outnumber its supporters, even if those detractors rarely provide any empirical basis for their position.

Many commentators have criticized the existing system of private antitrust litigation. Some assert that private actions too often result in remedies that provide lucrative attorney's fees but secure no real benefits for overcharged purchasers.[26] Others suggest that private class actions often follow an easy trail blazed by government enforcers and that, as a result, private actions add much less than they should to government enforcement.[27] Still others contend that private antitrust damages lead to excessive deterrence in light of government sanc-

25. State Attorneys General can bring parens patria actions on behalf of victims located within their states. The FTC has succeeded in disgorgement actions, but these actions are rare compared to private actions. *See generally* PHILLIP AREEDA ET AL., ANTITRUST LAW ¶ 302, at 23–26 (2008) (explaining the problems with disgorgement).

26. 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, 214 (2005) (citation omitted). Professor Cavanagh, however, provides only an anecdote to support these conclusions. He makes no effort to assess whether the types of settlements he describes are in fact "not atypical." *Id.* He provides no data to show how often antitrust class action cases result in useless coupons.

27. John C. Coffee, Jr., at one point, subscribed to this view. *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 223–26 (1983). Coffee later concluded, however, that the evidence was to the contrary in antitrust cases. *See* 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, 681 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.'" (citations omitted)).

tions.[28] Indeed, one common criticism of private actions in general—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, coerce defendants into settlements based not on meritorious claims, but rather on the cost of litigation or fear of an erroneous and catastrophic judgment.[29] These actions also serve to discourage legiti-

28. 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 & James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159, 162 (2006). See Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651, 669–73 (2006), for an argument that treble damages do not lead to excessive deterrence and in fact should be increased further.

As the Antitrust Modernization Commission noted: "[S]ome have argued 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 21, at 247 (citation omitted).

29. *See* Donald F. Turner, *The Durability, Relevance and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 811–12 (1987); *see also* JOHN H. BEISNER & CHARLES E. BORDEN, INST. FOR LEGAL REFORM, EXPANDING PRIVATE CAUSES OF ACTION: LESSONS FROM THE U.S. LITIGATION EXPERIENCE (2005) [hereinafter BEISNER & BORDEN, EXPANDING], *available at* http://instituteforlegalreform.com/issues/issue.cfm?doctype=STU&page=8 (follow "Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience (PDF, 116 Kb)" hyperlink); JOHN H. BEISNER & CHARLES E. BORDEN, INST. FOR LEGAL REFORM, ON THE ROAD TO LITIGATION ABUSE: THE CONTINUING EXPORTATION OF U.S. CLASS ACTIONS AND ANTITRUST LAW (2006) [hereinafter BEISNER & BORDEN, EXPORTATION], *available at* http://instituteforlegalreform.com/issues/docload.cfm?docId=1061. 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 & BORDEN, EXPANDING, *supra*, at 16. 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.* Beisner and Borden 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, 127 (2003). Rowe in turn, however, offers no evidence and, indeed, contends generally that class actions would not be viable without contingency fees and fee shifting. *Id.* at 127–33.

Similarly unsupported is Beisner and Borden's claim that the cost of discovery for defendants can run into "the tens of millions of dollars." BEISNER & BORDEN, EXPANDING, *supra*, at 16. To substantiate this assertion, Beisner and Borden cite to Eric Van Buskirk, *Raging Debate: Who Should Pay for Digital Discovery?*, N.Y. L.J., Jan. 30, 2003, *available at* http://www.risk-averse.com/index_files/dd.pdf, who in turn cites to *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (2002). 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. *Id.* at 425, 427. The court ordered the plaintiffs to pay part of the expense of responding to the request. *Id.* at 433. Even as an anecdote for the high cost of discovery for defendants this example is highly dubious. It has been cited, however, as if it was a fact. *See, e.g.*, Corinne Bergen, *Generating Extra Wind in the Sails of the*

mate competitive behavior.[30] For these and related reasons many prominent members of the antitrust community, even those not a part of the Chicago School on antitrust matters,[31] have called for the curtailment of private enforcement in significant ways.[32] Some even call

EU Antitrust Enforcement Boat, 5 J. INT'L BUS. & L. 203, 222 n.145 (2006) (citing BEISNER & BORDEN, EXPANDING, *supra*).

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 BULL. 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 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." 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, Gilchrist v. State Farm, 390 F.3d 1327 (11th Cir. 2004) (No. 02-90047-E). However, the empirical study that serves as a basis for this claim reveals that the sample in the Southern District of Florida consisted of only six cases and that, on the whole, the settlement rate was slightly over seventy percent. *See* THOMAS E. WILLGING 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* http://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 & Tibor Nagy, *Exploding 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 Machs., 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. It does suggest, however, that their claims have not been proven.

30. Turner, *supra* note 29, at 811–12.

31. For example, Harvard Professor Donald Turner called for the replacement of mandatory treble damages by a system that imposed it only when "the law was clear at the time the conduct occurred" and "the factual predicates for liability are clear." *Id.* at 812.

32. For example, Professor Herbert 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 (2005). Professor Hovenkamp does not, however, give data that supports his conclusions.

for the complete abolition of private rights of action.[33] FTC Chair William Kovacic succinctly summarized the prevailing view of the antitrust profession as follows: "[P]rivate rights of action U.S.-style are poison. They over-reached dramatically. And we have to use substantive liability standards to push back on what we think are hard-wired elements of the private rights of action mechanism."[34]

While these criticisms are longstanding and widespread, they have been made without any systematic substantive or empirical basis.[35] Those who point to the perceived flaws of private antitrust enforcement typically offer only anecdotes, some of which are questionable, rather than provide reliable and rigorous data to support their arguments.[36] Indeed, the same point applies to attacks on

33. 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 reparations costs. Public enforcement has the advantage of separating incentives for enforcement from the penalty itself." William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 440 (1985) (citations omitted). Professors Elzinga and Breit do not, however, provide data to support their conclusions.

34. WASH. REGULATORY REPORTING ASSOCS., FTC:WATCH No. 708, at 4 (quoting William E. Kovacic, speaking at an ABA panel on Exemptions and Immunities) (on file with author). Chair Kovacic has also made the point elsewhere that the very existence of the treble damages remedy, which is perceived as punitive, causes "the adjustment by the courts of the malleable features of the U.S. antitrust system to offset perceived excesses in characteristics (e.g., mandatory trebling of damages and availability of jury trials) . . . . [T]he method of equilibration is to alter liability rules." William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 62; *see also* Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1088–98 (1986) (describing the relationship between private treble damages actions and the evolution of substantive antitrust liability standards).

35. One prominent critic, former ABA Antitrust Section Chair Jan McDavid, candidly admits this. She asserted: "[The] issue [of class action abuse] was never directly presented in these cases, but many of these issues arise in the context of class actions in which the potential for abusive litigation is really pretty extraordinary." *Antitrust and the Roberts Court*, 22 ANTITRUST 8, 12–13 (2007).

Professor Andrew Gavil then asked McDavid and other lawyers participating in the discussion, "What empirical bases do you have for any of those assumptions, other than your personal experience largely as defense lawyers?" *Id.*

McDavid replied, "I am not aware of empirical data on any of those issues. My empirical data are derived from cases in which I am involved." *Id.*

A Professor at Columbia Law School, C. Scott Hemphill, added, "The Court's attention to false positives relies upon a somewhat older theoretical literature. I'm not aware of a sizeable empirical literature making the point." *Id.*

36. 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." Michael L. Denger, Chair, Remarks at the 50th Anniversary Spring Meeting of the ABA Antitrust Section 15 (Apr. 24–26, 2002). Mr. Denger, however, provides no data to prove his assertions, or any citations to scholarly articles containing such data. He does not even

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.[37] The contention of this Study is, however, that a valid assessment of the net efficacy of private antitrust enforcement, which accounts in most years for more than ninety percent of filed antitrust cases,[38] is possible only by also systematically consider-

provide a single supporting anecdote. He also fails to address any of the well-known deterrence-related benefits of private enforcement or show why society would be better off if antitrust violators were permitted to keep their windfalls.

Antitrust Modernization Commission ("AMC") Commissioner Stephen Cannon wrote:

> [P]rivate plaintiffs act in their own self-interest, which may well diverge from the public interest. Private plaintiffs are very often competitors of the firms they accuse of antitrust violations, and have every incentive to challenge and thus deter hard competition that they cannot or will not meet. If the legal system were costless and errorless, these incentives would pose no problem. However, litigation is expensive and courts and juries may erroneously conclude that procompetitive or competitively neutral conduct violates the antitrust laws. Under these 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, 106 (1986).

AMC Commissioner Jonathan 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, 277 n.40 (1998) (quoting MICHAEL PORTER, COMPETITIVE STRATEGY 85–86 (1980)). However, Jacobson and Greer do not provide systematic data to support their conclusions.

37. Of course, there is no reason to think government enforcement is perfect. For those who believe in the importance of the antitrust laws, it is therefore important to compare the role that private antitrust enforcement has played with the role that government enforcement has played.

38. *See* Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online: Antitrust Cases filed in United States District Courts by Type of Case, 1975–2006, http://www.albany.edu/sourcebook/pdf/t5412006.pdf (last visited Apr. 7, 2008). For the most

ing its benefits to victimized consumers and businesses, and to the economy and the public interest more generally.

III. The Purpose and Design of This Study

This Study is a first step towards providing the empirical data necessary to assess some of the benefits of private antitrust enforcement. Toward this end, the Study analyzes a group of forty 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 Study 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.[39] 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 recent that we have not yet been able to tell the precise value of the relief.[40] We excluded still other

recent reported year, 96.3% of all antitrust cases filed were private cases. In only nine out of thirty-two years reported did the percentage of private cases fall below ninety percent. The lowest reported percentage was 83.4. *Id.*

39. For example, we were unable 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's Microsoft Blog, http://blog.seattlepi.nwsource.com/microsoft/archives/104794.asp (July 7, 2006, 06:50 PST). All of the damages figures analyzed in this Study were generated by ourselves and our researchers, and their methodology is reported in ROBERT H. LANDE & JOSHUA P. DAVIS, BENEFITS FROM ANTITRUST PRIVATE ANTITRUST ENFORCEMENT: FORTY INDIVIDUAL CASE STUDIES (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523. The only exception is for the *Vitamins* cases, where we used the estimates generated by Professor John M. Connor, for United States private cases only. *See* JOHN M. CONNOR, THE GREAT GLOBAL VITAMINS CONSPIRACY: SANCTIONS AND DETERRENCE 131, at tbl.18 (2008) (on file with authors).

40. For example, the California *Microsoft* settlement is difficult to value in large part because the relief is not yet final. Settlement Agreement, *In re* Microsoft I-V Cases, 37 Cal. Rptr. 3d 660 (Ct. App. 2006) (J.C.C.P. No. 4106). 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. *Id.* at 31. At a maximum, if every voucher is ultimately redeemed, Microsoft will pay out $1.1 billion in cash. *Id.* at 17. 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. *Id.* at 31–42.

cases because they produced benefits that were mostly injunctive in nature and, while they may have yielded tremendous benefits to consumers or to the United States economy, these benefits are difficult to quantify or substantiate. We also did not include any cases that were dismissed or were otherwise 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.[41] 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, moreover, was not to demonstrate that private litigation often has established important legal precedents; other studies have done this convincingly.[42] Our goal was, instead, to look for recent private cases that are final, including ap-

41. 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. Pease v. Jasper Wyman & Son, No. CV-00-015, 2004 WL 4967228, at *1 (Me. Super. Jan. 2, 2004). Plaintiffs also won significant non-monetary relief that restructured anticompetitive pricing methods in the industry. Settlement Agreement at 10, *Pease*, 2004 WL 4967228, at *1. To avoid industry-wide bankruptcy, the plaintiffs settled with the buyers' cartel for roughly $5 million. *Id.* at 11–12. This case was a purely private action. To our knowledge there was never a government enforcement action.

42. For an excellent analysis, see Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement*, *in* EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 343 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2007).

Professor Calkins found that, of leading antitrust cases decided before 1977, twelve were private and twenty-seven were government. *Id.* at 353. Of the leading cases decided 1977 or later, however, he found thirty private cases and only fifteen government cases. *Id.* at 354. Professor Calkins took as his sample the leading cases printed in the leading antitrust casebook.

Professor Calkins concluded:

> Today what is known as U.S. antitrust law no longer is exclusively or even principally the consequence of Justice Department 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.

Id. at 355 (citations omitted).

peals, and that recovered at least $50 million.[43] We have no reason to believe that the cases examined in this Study 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.

IV. The Results of This Study

A. Recovery in the Forty Cases

Table 1 shows that the forty cases (or groups of cases)[44] analyzed in this Study provided a cumulative recovery in the range of at least $18.006 to $19.639 billion in allegedly[45] illegally acquired wealth to United States consumers and businesses.[46] All of this was cash—products, services, discounts, coupons, and injunctive relief were not included in this total.[47] Of this, more than $5.706 to $7.056 billion came from foreign companies that violated United States antitrust laws. Table 2 shows that eighteen of the forty cases involved this kind of recov-

43. Some of the cases included in this Study did, however, establish important legal principles. *See, e.g.*, ROBERT H. LANDE & JOSHUA P. DAVIS, BENEFITS FROM ANTITRUST PRIVATE ANTITRUST ENFORCEMENT: FORTY INDIVIDUAL CASE STUDIES (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523 (*Fructose*, *Cardizem*, and *Terazosin* case summaries). Note: The cases analyzed in this Study are referred to by short names (e.g., "*Fructose*") for brevity. For a full list of the cases analyzed and their formal citations, see *infra* Appendix II.

44. To arrive at this number we counted related cases as being a single "case." For example, there have been many separate cases involving vitamin cartels, brought by different plaintiffs and often against different groups of defendants.

The vitamins cases could have been reported as two cases if, for example, the direct purchaser and indirect purchaser actions were analyzed separately. Alternatively, we could have reported that there were three primary categories of vitamins affected, so the vitamins cases could have been counted as three cases, or as six cases if these were each divided into direct and indirect purchaser cases. Alternatively, each vitamin case could have been reported separately. However, this Study analyzes and counts them all together as one "case." *See* LANDE & DAVIS, *supra* note 43, at 234 (*Vitamins* case summary).

45. For simplicity, we are calling the charges "allegations" even though many were proven in court.

46. We did not change recoveries to 2008 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.

47. Securities were counted in one case because they had a readily ascertainable market value.

ery. This means that without the private enforcement of the antitrust laws this money would have remained with foreign lawbreakers instead of being returned to the United States consumers and businesses from which it was taken.[48]

Table 1: Recoveries in Private Cases[49]

Case	*Recovery ($ millions)*
Airline Ticket Commission Litigation	86
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Augmentin	91
Automotive Refinishing Paint	106
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

48. 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.

49. The results in every Table in this Article have been rounded to the nearest million dollars.

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	3,908 to 5,258
Total	18,006 to 19,639

B. A Comparison of Deterrence from Private Enforcement and DOJ Criminal Enforcement of the Antitrust Laws

As noted in Part I, in addition to compensating victims of antitrust violations, private enforcement also has the goal of deterring future antitrust violations. While it is extremely difficult to measure the deterrence effects of private actions, by at least one measure they are quite significant. This is because the amount recovered in private cases is substantially higher than the aggregate of the criminal antitrust fines imposed during the same period.

Table 12[50] shows the criminal antitrust fines imposed in DOJ cases since 1990 (the period covered by this Study).[51] The fines total $4.232 billion for all cases combined (not just for the cases analyzed in our Study).[52]

Since one of the goals of the antitrust system is optimal deterrence of anticompetitive behavior,[53] it is fair to compare the $18.006

50. *See infra* Appendix I.

51. A very small mismatch may exist because the DOJ operates on a fiscal calendar.

52. This total includes both corporate and individual fines. See Table 12 *infra* Appendix I for our methodology.

53. *See supra* notes 18–21 and accompanying text.

Table 2: Recoveries from Foreign Cartels and Monopolies

Case	*Recovery ($ millions)*
Auction Houses	Virtually all of the 452 was recovered by United States citizens
Augmentin	91
Automotive Refinishing Paint	31
Cardizem	110
Citric Acid	55 (plus unidentified recoveries by opt outs)
Commercial Explosives	62
DRAM	311
Graphite Electrodes	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	3,908 to 5,258
Total	5,706 to 7,056

billion (at a minimum) paid in private litigation[54] to the $4.232 billion paid in criminal fines.[55] Measured this way, private litigation provides more than four times the deterrence of the criminal fines.[56]

54. *See* Table 1 *supra* Part IV.A.

55. *See* Table 12 *infra* Appendix I.

56. This ratio might need to be adjusted for net present value because government fines occur more quickly than private recoveries, but such an adjustment would be small and would not affect our conclusions. We also note that we are comparing the deterrence effect of United States government criminal efforts to private litigation, and we do not consider the effect of fines imposed by foreign governments. We are grateful to John Connor for raising these issues. Professor Jonathan Baker raises the possibility that potential cartelists could, depending upon the information known to the various parties in a market, take the possibility they will have to pay damages into account when they set their prices. To the extent this occurs often, it would greatly complicate the optimal deterrence analysis. *See* Jonathan B. Baker, *Private Information and the Deterrent Effect of Antitrust Damages Remedies*, 4 J.L. ECON. & ORG. 385 (1988).

It is arguable, however, that it would be more appropriate to compare the actual criminal fine total only to those cases in our Study that did result in a criminal fine or prison sentence. This way we would be certain that the compared cases would be of the same type as the ones that contributed to the DOJ fine total. As Table 11 shows,[57] the same antitrust violations that resulted in some criminal penalties to the affected cartels also gave rise to private cases that caused payouts to victims that totaled between $6.171 and $7.521 billion.

Regardless of which figure we use, we may safely conclude that the private cases provided far more deterrence than the criminal antitrust fines. Even the lowest figure of $6.171 billion in private payouts is significantly greater than the total for criminal fines of $4.232 billion and, as noted, the total private enforcement figure for the forty studied cases[58] was more than four times as large.

Prosecutions by the DOJ also result in prison sentences, and these of course significantly deter illegal activity as well. If we want to fairly compare the deterrence effects of private antitrust enforcement with that by the government, we must take prison time into account. Even when we do, however, the deterrence effect of private enforcement is far greater than the deterrence effect of the DOJ's criminal prosecutions.[59]

Since 1990, criminal antitrust prosecutions by the DOJ have resulted in sentences that aggregate to 428.6 years of prison time.[60] There is, unfortunately, no objective way to compare the deterrence effect of time spent in prison to the deterrence effect of a criminal fine, and different people would trade off jail and fines in different ways. Any "average" figure used to equate the two necessarily is speculative and arbitrary.[61]

57. *See* Table 11 *infra* Appendix I.

58. As noted earlier, this Study's analysis did not include many large and significant private enforcement actions. Nor does our analysis attempt to set a value to the public of important precedents that were established by either private or government cases. Interestingly, Professor Calkins's analysis shows that thirty of the forty-five most important precedents decided since 1977 have come from private litigation. *See* Calkins, *supra* note 42.

59. Our analysis does not take into account injunctive relief, whether obtained by the DOJ or private litigation. It is unclear how this additional consideration might alter the comparison, if it would at all.

60. *See* Table 12 *infra* Appendix I.

61. See Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 128 (2000), for a brief discussion of the literature comparing the deterrence effects of fines and imprisonment. The authors mention ten different analyses that compare or discuss the tradeoffs between fines and imprisonment. *Id.*

We note, however, scholarship by two distinguished teams of economists that attempted to "value" jail incarceration in this context. A 1988 article by Professors Howard P. Marvel, Jeffry M. Netter, and Anthony M. Robinson equated a fine of $25,000 to a month in jail for an antitrust offense.[62] Adjusting their estimate of $300,000 per year for inflation would mean equating a year in jail to slightly less than $600,000 today.[63] Similarly, a 1994 article by Professors Kenneth Glenn Dau-Schmidt, Joseph Gallo, Charles Parker, and Joseph Craycraft equated a year in jail with a fine of $1 million.[64] If this estimate were adjusted for inflation, it would be almost $1.5 million today.[65]

Under the conservative assumption that a sentence (not the actual time served[66]) of a year of incarceration has the same deterrence effect as a $5 million fine,[67] the collective 428.6 years of jail sentences received by antitrust defendants would be the equivalent of $2.143 billion in criminal fines.

Since the total DOJ criminal antitrust fines during this period were approximately $4.232 billion, the total deterrence effect of the DOJ criminal fines and prison sentences together, since 1990, has been approximately $6.4 billion. This is far less than the more than

62. Howard P. Marvel et al., *Price Fixing and Civil Damages: An Economic Analysis*, 40 STAN. L. REV. 561, 573 (1988). The article appeared in the February 1988 issue, so we assume they were using 1987 dollars.

63. The Bureau of Labor Statistics Consumer Price Index inflation calculator equates $300,000 in 1987 to $547,570 in 2007. They do not have a figure for 2008. *See* Bureau of Labor Statistics, Consumer Price Index Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Apr. 7, 2008).

64. *See* Kenneth Glenn Dau-Schmidt et al., *Criminal Penalties Under the Sherman Act: A Study of Law and Economics*, 16 RES. L. & ECON. 25, 58 (1994).

65. The Bureau of Labor Statistics Consumer Price Index inflation calculator equates $1,000,000 in 1994 and $1,399,070 in 2007. This calculator does not include figures for 2008. *See* Bureau of Labor Statistics, *supra* note 63. Professors Dau-Schmidt et al. were using 1982 data for much of their paper's analysis. If they meant their valuation of a year in jail to be expressed in 1982 dollars, since $1,000,000 in 1982 dollars is the equivalent of $2,148,620 today, perhaps it would be fair to ascribe this higher figure to them. Dau-Schmidt et al., *supra* note 64.

66. The DOJ reports only the amount of time to which defendants are sentenced. *See* Table 12 *infra* Appendix I. We do not know how much of this time defendants actually served. Because our calculations use incarceration sentences rather than actual incarceration times, our methodology implicitly values incarceration time as being worth much more than the nominal figures used in our calculations. Moreover, we treat various forms of confinement, including house arrest, as equivalent to incarceration. This no doubt overstates the deterrence effect of the DOJ's efforts.

67. We believe that the deterrence effect of being sentenced to a year of confinement is likely significantly less than $5 million, but we make this very high assumption because we do not want to select a figure that reasonably could be criticized as being too low.

$18 billion total defendants paid to victims in the forty cases we studied.[68]

Indeed, even if we used $10 million for the equivalent value of a year's imprisonment (an estimate we believe is much too high), the value of DOJ sanctions would total only $8.5 billion, less than half the amount recovered by private plaintiffs in the cases we studied.

Although the above figures can be analyzed in several different ways, it is safe to conclude that private enforcement is significantly more effective at deterring illegal behavior than DOJ criminal antitrust suits. We did not expect that our project would show this result.

C. Private Antitrust Litigation Does Not Just Follow Criminal Government Enforcement

While we 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. It is especially interesting that of the total amount recovered almost half—at least forty-three to forty-seven percent; $7.631 to $8.981 billion—came from the fifteen cases that did not follow federal, State, or EU government enforcement actions.[69] 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 $4.212 billion came from cases with a mixed private/public origin.[70]

68. We have not adjusted either the DOJ figures or the private recoveries for inflation. In light of the robustness of our comparison, however, doing so should not make a difference in our conclusions.

69. 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, because government investigations can proceed for many months or even for years before the enforcers file suit, their records are confidential, and 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.

70. *See* Table 5 *infra* Appendix I. For example, *In re Polypropylene Carpet Antitrust Litigation*, 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 Study. See Table 5 *infra* Appendix I for other examples.

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
Vitamins	3,908 to 5,258
Total	7,631 to 8,981

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 excluded these cases from this Table as well.

There also were cases whose origin we could not definitively ascertain.[71] In many of these cases, only the private actions achieved a successful result. Still other private cases followed a government investigation, but provided significantly greater relief than the government action (if, indeed, the government brought it), expanded the scope of inquiry and claims, or obtained relief against parties not included in the government actions.[72] Moreover, the fourteen private cases that also involved criminal fines from government prosecutions recovered a total of $6.171 to $7.521 billion for victims.[73]

Thus, not only were many cases not follow-ons, but many of these cases arose and proceeded in a wide and unpredictable range of ways,

71. *See* LANDE & DAVIS, *supra* note 43, at 77–87 (*El Paso* case summary).

72. *See* Table 6 *infra* Appendix I. 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.

73. *See* Table 11 *infra* Appendix I.

often involving a complex interplay between the federal government, States, and various classes of private plaintiffs. Indeed, there might be a very complicated general interaction between public and private antitrust enforcement. It could well be the case that private victories or losses in one type of case (e.g., bundled rebate cases or predatory pricing cases) affect similar or related government cases in different industries, or vice versa. For this reason it is possible that curtailing private litigation might undermine antitrust enforcement in ways that would be extremely difficult to predict.

D. Types of Plaintiffs That Recovered: Direct Purchasers, Indirect Purchasers, and Competitors

Of the total $18.006 to $19.639 billion in recoveries we analyzed, $12.088 to $13.438 billion, in thirty-two cases, was recovered by direct purchasers; $1.815 billion, in six cases, was recovered by indirect purchasers; and $4.028 to $4.311 billion, in six cases, was recovered by competitors.[74] This means that direct purchasers obtained roughly sixty-seven to sixty-eight percent of the total recoveries we studied. This also means that indirect purchasers only recovered nine to ten percent of the total; less than one-sixth as much as direct purchasers.

Table 4: 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	204	Real-Networks	478 to 761
Automotive Refinishing	106	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				

74. *See* Table 4 *infra*.

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	3,704 to 5,054				
NASDAQ	1,027				
Sorbates	96				
Drill Bits	53				
Commercial Explosives	77				
Remeron	75				
Rubber Chemicals	268				
Taxol	66				
Airline Tickets Commission	86				
Total	12,088 to 13,438		1,815		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*[75] involved a monopsony by direct purchasers. The *Airline Tickets Commission*[76] case also involved collusion by buyers.

75. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (1998).

76. *In re* Airline Ticket Comm'n Litig., 1996 U.S. Dist. LEXIS 20361 (D. Minn. Aug. 12, 1996).

E. Types of Cases: Per Se and Rule of Reason

Fourteen of the forty 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.[77] In addition, of the twenty-five per se cases,[78] three (*Insurance*, *Airline Ticket Commission*, and *Cardizem*) did not involve the traditional, hard-core per se categories of naked price fixing or bid rigging. Two other cases involved both per se and rule of reason claims.[79] We would have predicted that a higher percentage of the forty cases followed directly from hard-core per se offenses. Further, and perhaps not surprisingly, all but six of the cases were class actions.[80]

F. Non-Monetary Relief

Some of the cases we analyzed also involved substantial non-monetary relief. For example, one case generated coupons, fully redeemable in cash if not used for five years (however, to be very conservative we did not count any part of this as a "cash" recovery).[81] Another case resulted in a $125 million rate reduction for consumers (we did not count this reduction in our benefits total).[82] Some cases involved extremely useful *cy pres* grants.[83] 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 com-

77. *See* Table 8 *infra* Appendix I.

78. *See* Table 9 *infra* Appendix I.

79. *See* Table 10 *infra* Appendix I.

80. Although we did not intend this Study to focus particularly upon class action litigation, the requirement of court approval of class action settlements enabled us to obtain information 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* Connor & Lande, *supra* note 22, at 513 app. at 565.

81. *See* LANDE & DAVIS, *supra* note 43, at 13–18 (*Auction House* case summaries). These coupons traded for a value that reflected their discounted present value. *Id.* at 18. They also comprised twenty percent 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. *Id.*

82. *See id.* at 77–87 (*El Paso* case summary).

83. *See, e.g.*, *id.* at 110 (*Insurance* case summary). 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. *Id.*

pensatory relief, plus additional injunctive relief valued at $25 to $87 billion or more."[84] Similarly, *NASDAQ* decreased the spreads received by market makers,[85] the *Insurance* litigation eliminated restrictions on insurance policies,[86] and *NCAA* eliminated caps on pay to college coaches.[87] Further, the generic drug cases—*Buspirone*,[88] *Cardizem*,[89] *Oncology* (*Taxol*),[90] *Relafen*,[91] *Remeron*,[92] and *Terazosin*[93]—discouraged collusion between brand name and generic drug manufacturers, saving consumers many millions, perhaps even billions, of dollars in lower cost drugs.[94]

G. Awards of Attorney's Fees

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.[95] In other cases, particularly those involving recoveries of more than $500 million, counsel requested, and the court awarded, a much smaller percentage of the fund.[96] A point rarely appreciated is that plaintiffs' counsel often exercised significant self-restraint in

84. Wal-Mart Stores, Inc. v. Visa USA & MasterCard Int'l, 396 F.3d 96, 117 (2d Cir. 2005).

85. *See* LANDE & DAVIS, *supra* note 43, at 131–34 (*NASDAQ* case summary).

86. *See id.* at 110–13 (*Insurance* case summary).

87. *See id.* at 135–39 (*NCAA* case summary).

88. *In re* Buspirone Antitrust Litig., 185 F. Supp. 2d 340 (S.D.N.Y. 2002); *In re* Buspirone Patent Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

89. *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (6th Cir. 2003).

90. Vista Healthplan, Inc. v. Bristol-Myers Squibb Co., 266 F. Supp. 2d 44 (D.D.C. 2003).

91. *In re* Relafen Antitrust Litig., 346 F. Supp. 2d 349 (D. Mass. 2004).

92. *In re* Remeron Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005).

93. *In re* Terazosin Hydrochloride, 352 F. Supp. 2d 1279 (S.D. Fla. 2005).

94. *See* LANDE & DAVIS, *supra* note 43, at 31–39 (*Buspirone* case summary), 45–55 (*Cardizem* case summary), 155–60 (*Oncology* (*Taxol*) case summary), 183–92 (*Relafen* case summary), 193–98 (*Remeron* case summary), and 212–20 (*Terazosin* case summary); *see also* Table 7C *infra* Appendix I.

95. Tables 7A and 7B show that, for the thirty 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 award of thirty to thirty-two percent of the recovery. *See* Tables 7A–B *infra* Appendix I. By contrast, three of the five actions recovering more than $500 million resulted in attorney's fee awards of only five to seven percent. *Id.*

96. *Id.*

these cases—the amount of the award reflected a request by class counsel of a relatively small percentage of the fund.[97] 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.[98]

H. Judicial Praise for Plaintiffs' Counsel

In the cases we analyzed, the judges generally expressed great satisfaction with the efforts of the plaintiffs' counsel that appeared before them. For example, in her opinion approving the final settlement in the direct purchaser *Cardizem* case,[99] Judge Nancy G. Edmunds awarded class counsel their full request of attorney's fees—thirty percent 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."[100]

Similarly, the Honorable Michael M. Mihm, the judge who oversaw the *Fructose* litigation,[101] repeatedly praised class counsel.

> I've said many times during this litigation that you and the attorneys who represented the defendants here are as good as it gets. Very professional . . . . You've always been cutting to the chase and not wasting my time or each others' time or adding to the cost of the litigation. And this was very difficult litigation . . . . Skill and efficiency of the attorneys. As good as it gets. Complexity and duration of the litigation. It was very complex. We made some new law on more than one occasion . . . .[102]

97. In *El Paso*, for example, plaintiffs' counsel received six percent of the common fund as an attorney's fee award, but that was the amount that they requested. *See* LANDE & DAVIS, *supra* note 43, at 77 (*El Paso* case summary).

98. In considering 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 fee, or no fee at all.

99. *In re* Cardizem CD Antitrust Litig., 332 F.3d 896 (6th Cir. 2003).

100. 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 at 21, *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (6th Cir. 2003).

101. *In re* High Fructose Corn Syrup Antitrust Litig., 936 F. Supp. 530 (1996).

102. Transcript of Record at 45–46, *In re* High Fructose Corn Syrup Antitrust Litig., *id.* (No. 95-1477). He accordingly awarded class counsel twenty-five percent of the settlement fund in fees, in addition to costs, the precise amount that class counsel requested. *Id.*

Chief Judge Thomas Hogan in one of the vitamins cases 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."[103] 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."[104]

V. Conclusion

The distinctive system of private enforcement we have in this country is substantially underappreciated. Congress's venerable "private attorneys general" idea[105] has produced tremendous benefits for the United States economy—for consumers and for businesses of all sizes. Private antitrust enforcement is virtually the only way that victims of anticompetitive behavior can obtain redress: in the cases we studied, lawbreakers or alleged lawbreakers were forced to return approximately $18–$20 billion to victimized consumer and business pur-

103. Transcript of Record at 25:1-6, *In re* Vitamins Antitrust Litig. v. BASF AG, 2004 U.S. Dist. LEXIS 6869 (D.D.C. Apr. 2, 2004).

104. *Id.* at 1520:8-10. There are numerous other examples of complimentary remarks. The judge in *Automotive Refinishing Paint* noted that "[p]laintiffs' counsel have repeatedly demonstrated their skill in managing" the litigation. *In re* Auto Refinishing Paint Antitrust Litig., 2004 U.S. Dist. LEXIS 29162, at *20 (E.D. Pa. Oct. 13, 2004). The court in *Buspirone* stated, "Let me say that the lawyers in this case have done a stupendous job." Milberg, LLP, Why Milberg?, http://www.milbergweiss.com/whymilberg/whymilberg.aspx?strNav=fir. . . Nav&Page=/firm/firm.aspx (last visited Apr. 7, 2008) (citing Final Approval Hearing Transcript at 34:2-3, *In re* Buspirone Patent Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2003)). 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." LANDE & DAVIS, *supra* note 43, at 87 (*El Paso* case summary). The court in *Linerboard* made repeated comments to the effect that "the lawyering in the case at every stage was superb." *In re* Linerboard Antitrust Litig., 2004 WL 1221350, at *6 (E.D. Pa. June 2, 2004). 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 very fine lawyering on behalf of the parties." *In re* Relafen Antitrust Litig., 231 F.R.D. 52, 80 (D. Mass. 2005). The court in *Remeron* noted that "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience." *In re* Remeron Direct Purchaser Antitrust Litigation, 2005 U.S. Dist. LEXIS 27013, at *37 (D.N.J. Nov. 9, 2005).

105. 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 (2000). By establishing this framework, designed to encourage victims to sue violators, these laws create "private [A]ttorneys [G]eneral," providing incentives to pursue private litigation in the public interest. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

chasers. More than $6 billion of this otherwise would have remained in the hands of foreign lawbreakers.

Private enforcement also deters anticompetitive behavior significantly. Indeed, the forty studied cases helped deter anticompetitive behavior more than all the criminal fines and prison sentences imposed in cases prosecuted by the DOJ during this period. Moreover, almost half of the studied violations or alleged violations were uncovered solely by private counsel, and in many other cases, private counsel played a large role in uncovering and proving the offense.

These private attorneys general—lawyers representing businesses, farmers, individuals, or classes of consumers who believe they have been injured by antitrust violations—often work thousands of hours and lay out millions of dollars in the course of prosecuting antitrust litigation, time and costs which are reimbursed only if they prevail. Their work has saved the United States taxpayer tremendous sums in enforcement costs by shifting the enormous burdens and risks of litigating against sophisticated, well-financed lawbreakers to private plaintiffs' counsel. 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.[106]

In fact, there are many reasons to believe that these private antitrust actions complement government enforcement of the antitrust

106. 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, Notes for Talk at Workshop on Private Enforcement of Competition Law Sponsored by Office of Fair Trading: Implications for Productivity Growth in the Economy 2 (Oct. 19, 2006), *available at* http://stelzerassoc.com/Speeches/Implications%20for%20Productivity%20Growth%20in%20the%20Economy%20OFT%20Oct%2019,%2006.pdf.

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 enforcement for various reasons including: budgetary constraints;[107] undue fear of losing cases;[108] lack of awareness of industry conditions;[109] overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behavior;[110] higher turnover among government attorneys;[111] and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.[112] One would expect a

107. 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.

108. 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. . . . [T]he Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice boast about the rate at which merger challenges are successfully resolved; and general counsels who are nominated for higher office like to claim that their agency won a high percentage of its cases. Everyone wants a good batting average. Unfortunately, a single loss can ruin a good batting average compiled with few at-bats. It is one thing to lose one of many cases; it is considerably more devastating to lose a third, half, or more of one's cases.

Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 5–6 (1998) (citations omitted).

109. "Private parties operating in the real markets . . . [will] act on the reality they confront." Stelzer, *supra* note 106, 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.

110. 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 of the details and consequences of the dominant firm's practices." *Id.* at 5–6.

111. The largest antitrust cases often last for five to ten 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.

112. 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 firms 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.

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

Moreover, under the current legal system it is striking that not only is the conduct that results in criminal antitrust violations greatly under-deterred, but there is simply no good way for the government, by itself, to optimally deter most conduct that is illegal but does not give rise to criminal penalties.

The anticompetitive conduct that does give rise to criminal antitrust violations currently occurs far too frequently and is almost certainly significantly underdeterred[113]—even factoring in the effects of the present system of private litigation. A fortiori this conduct would be even more underdeterred if private litigation were eliminated or substantially curtailed.

The effects of any significant curtailment or repeal of private rights of action on conduct that does not result in criminal violations might, however, be even more inimical to the public interest. As a remedy for this conduct divestiture, as a practical matter, almost never occurs, and while an injunction can stop future anticompetitive behavior, it puts violators in a no-lose situation (unless there also is the prospect of private litigation). Even if defendants lose their case and have to stop the practices in question, an injunction alone would permit them to keep the fruits of their past anticompetitive behavior. Optimal deterrence under the current regime is not possible without the prospects of private litigation.

Indeed, private litigation actually does a better job than the government in advancing the primary goal of the government's enforcement program: deterring illegal corporate behavior. The forty cases analyzed in this study, by themselves, provide greater deterrence against anticompetitive behavior than all the DOJ imposed criminal fines and prison sentences since 1990.[114] This is remarkable consider-

Stelzer, *supra* note 106, at 2*; see also* WILLIAM F. SHUGHART II, ANTITRUST POLICY AND INTEREST-GROUP POLITICS 36 (1990). Each of the two antitrust agencies is subject to separate influences. *See id.* at 83, 93. 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. *See id.* at 83. The FTC 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 id.* at 93. The agency is supposed to respond to proper congressional oversight, but ensuring that oversight is proper is no easy task.

113. *See* Lande, *supra* note 23; Connor & Lande, *supra* note 22.

114. *See supra* Part IV.B.

ing that these forty cases were only a portion of all private cases initiated during this period.

Notwithstanding the substantial benefits of private antitrust 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 antitrust laws.

However, the frequent and high praise from judges when they approved these settlements, concerning 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, the benefits of private enforcement tend to be underreported and underappreciated. They deserve much more public attention and acknowledgement. This Study is a first step toward recognizing those benefits empirically.

Because our cases were not randomly selected, it is difficult to generalize from our conclusions. Our sense is that our results would hold up if a larger or 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 these conclusions are likely to be representative, they should be helpful for antitrust policymaking.[115]

115. Moreover, this Study focused only on successful private actions. One of this Study'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 included in this Study. All results were rounded to the nearest million dollars:

Table 5: 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
Visa/MasterCard – unclear which investigation began first, although private action was filed well before government action and addressed different conduct.	3,383
Total	4,212

Table 6: 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	*Reasons Why Private Remedy Was Significantly Broader than Government Remedy*
Automotive Refinishing Paint	Government investigation yielded no indictments; private cases got $106 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 United States 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 7A: Percentage of Recovery Awarded as Attorney's Fees for Recoveries Less than $100 Million

Case ($ millions in the recovery)	*Attorney's Fee Percentage*
Airline Ticket Commission (86)	33.3
Augmentin (91)	21.6 (weighted average of direct (20%) and indirect (25%))
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 Electrodes (47)	15

Table 7B: Percentage of Recovery Awarded as Attorney's Fees for Recoveries Between $100 Million and $500 Million

Case ($ millions in the recovery)	*Attorney's Fee Percentage*
Automative Refinishing Paint (106)	32–33.3
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 7C: Percentage of Recovery Awarded as Attorney's Fees for Recoveries Exceeding $500 Million

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

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 to 761
Relafen – Section 2	250
Remeron – Section 2	75
Sun	700
Taxol – Section 2	66
Visa/MasterCard	3,383
Total	8,182 to 8,465

Note: *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.

Table 9: Recoveries in Per se Cases

Case	*Recovery ($ millions)*
Airline Ticket Commission Litigation	86
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Automotive Refinishing Paint	106
Cardizem (direct class)	110
Citric Acid	175
Commercial Explosives	77
Conwood	1,050
DRAM	326
Drill Bits	53
Flat Glass	122
Fructose	531
Graphite Electrodes	47
Insurance	36
Lease Oil	193
Linerboard	202
Lysine	65
Microcrystalline Cellulose	50
NASDAQ	1,027
Polypropylene Carpet	50
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Terazosin	74
Urethane	73
Vitamins	3,908 to 5,258
Total	9,227 to 10,577

Note: The *Polypropylene Carpet* settlement was preceded by another private suit that alleged both rule of reason and per se violations.

Table 10: Recoveries in Mixed Cases

Case	*Recovery ($ millions)*
Buspirone	220
El Paso	1,427 (plus 125 in uncounted rate reductions)
Total	1,647

Note: While the plaintiffs in *Buspirone* alleged that the defendants' patent infringement settlement was actually a horizontal market allocation and therefore per se illegal, the case was settled before the court decided this issue. However, the *Cardizem* court declared a similar agreement a per se violation.

Table 11: Recoveries for Cases with a Criminal Penalty as Well

Case	*Recovery ($ millions)*
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Citric Acid	175
Commercial Explosives	77
DRAM	326
Drill Bits	53
Fructose	531
Graphite Electrodes	47
Lysine	65
Polypropylene Carpet	50
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Urethane	73
Vitamins	3,908 to 5,258
Total	6,171 to 7,521

Table 12: Total United States Criminal Antitrust Fines from 1990–2007

The following figures are, as noted, from a variety of different sources published at different times. We found results for some years from some sources that contradicted results given by different sources, for reasons we could not determine. The figures in the following table are our best attempt to reconcile these sometimes conflicting data sources. The totals include both corporate and individual fines.

Year (Fiscal)	*Criminal Fines Recovered ($ millions)*[116]
1990	24
1991	20
1992	24
1993	42
1994	40
1995	41
1996	27
1997	205
1998	244
1999	972
2000	308
2001	273
2002	103
2003	64
2004	141
2005	600
2006	473
2007	631
Total	4,232

116. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1990–1996, at 11 (on file with author); U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1998–2007, at 12, http://www.usdoj.gov/atr/public/workstats.pdf.

Appendix II

The following is a list of the cases included in this Study and the researchers who analyzed them.[117]

1. *In Re* Airline Ticket Comm'n Litig., 1996 U.S. Dist. LEXIS 20361 (D. Minn. Aug. 12, 1996). Tara Shoemaker

2. *In re* Auction Houses Antitrust Litig., 164 F. Supp. 2d 345 (S.D.N.Y. 2001), *aff'd*, 2002 U.S. App. LEXIS 15327 (2d Cir. July 30, 2002); Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002). Douglas Richards

3. Ryan-House v. GlaxoSmithKline PLC, 2005 U.S. Dist. LEXIS 33711 (E.D. Va. Jan. 10, 2005); SAJ Distribs., Inc., v. SmithKline Beecham Corp., No. 2:04cv23 (E.D. Pa. filed Nov. 30, 2004) (Augmentin). Michael Einhorn

4. *In re* Auto. Refinishing Paint Antitrust Litig., 177 F. Supp. 2d 1378 (E.D. Pa. 2001). Maarten Burggraaf & Andrew Sullivan

5. *In re* Buspirone Antitrust Litig., 185 F. Supp. 2d 340 (S.D.N.Y. 2002); *In re* Buspirone Patent Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002), *final settlement approval*, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 17, 2003). Morgan Anderson & Erika Dahlstrom

6. Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295 (D. Utah 1999). Tara Shoemaker & Erica Dahlstrom

7. *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (6th Cir. 2003). Morgan Anderson

8. *In re* Citric Acid Antitrust Litig., 996 F. Supp. 951 (N.D. Cal. 1998). Bobby Gordon

9. *In re* Commercial Explosives Litig., 945 F. Supp. 1489 (D. Utah 1996). Ruthie Linzer

10. Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002). Erika Dahlstrom

11. *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 2006 U.S. Dist. LEXIS 39841 (N.D. Cal. June 5, 2006). Erika Dahlstrom

12. Natural Gas Antitrust Cases I, II, III & IV: Sweetie's v. El Paso Corp., No. 319840 (S.F. Super. Ct. filed Mar. 20, 2001); Continental Forge Co. v. S. Cal. Gas Co., No. BC237336 (L.A. Super. Ct. filed Sept. 25, 2000); Berg v. S. Cal. Gas Co., No. BC241951 (L.A. Super. Ct. filed Dec. 18, 2000); City of Long Beach v. S. Cal. Gas Co., No. BC247114 (L.A. Super. Ct. filed Mar. 20, 2001); City of L.A. v. S.

117. See LANDE & DAVIS, *supra* note 43, for complete case analyses.

Cal. Gas Co., No. BC265905 (L.A. Super. Ct. filed Mar. 20, 2001); Phillip v. El Paso Merchant Energy LP, No. GIC 759425 (San Diego Super. Ct. filed Dec. 13, 2000); Phillip v. El Paso Merchant Energy LP, No. GIC 759426 (San Diego Super. Ct. filed Dec. 13, 2000) (El Paso). Erin Bennett & Polina Melamed

13. *In re* Flat Glass Antitrust Litig., 191 F.R.D. 472 (W.D. Pa. 1999). Richard Kilsheimer

14. *In re* High Fructose Corn Syrup Antitrust Litig., 936 F. Supp. 530 (C.D. Ill. 1996). Michael Freed

15. *In re* Graphite Electrodes Antitrust Litig., 2003 WL 22358491 (E.D. Pa. Sept. 9, 2003). Norman Hawker

16. Scott Brooks, *Microsoft and IBM Resolve Antitrust Issues*, IBM, July 1, 2005 http://www-03.ibm.com/press/us/en/pressrelease/7767.wss. Erika Dahlstrom

17. *In re* Insurance Antitrust Litig., 723 F. Supp. 464 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd sub nom*, Hartford Ins. Co. v. California, 509 U.S. 764 (1993). Maarten Burggraaf

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

19. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996). Maarten Burggraaf

20. *In re* Microcrystalline Cellulose Antitrust Litig., 221 F.R.D. 428 (E.D. Pa. 2004) Michael Einhorn

21. *In re* NASDAQ Market-Makers Antitrust Litig., 894 F. Supp. 703 (S.D.N.Y. 1995). Maarten Burggraaf

22. Law v. Nat'l Collegiate Athletic Ass'n, 902 F. Supp. 1394 (D. Kan. 1995), *aff'd*, 134 F.3d 1010 (10th Cir. 1998). Joey Pulver

23. Netscape Comm. Corp. v. Microsoft Corp., Civil Action Nos. 98-1232, 98-1233 (D.D.C. filed Jan. 22, 2002). Andrew Smullian

24. N. Shore Hematology & Oncology Assocs. v. Bristol-Myers Squibb Co., Civil Action No.:04 cv248(EGS) (D.D.C. filed Feb. 13, 2004). Tara Shoemaker

25. *In re* Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999). Stratis Camatsos

26. Vista Healthplan, Inc. v. Bristol-Myers Squibb Co., 266 F. Supp. 2d 44 (D.D.C. 2003). Tara Shoemaker

27. Stop & Shop Supermarket Corp. v. SmithKline Beecham Corp., Civil Action No. 03-CV-4578 (E.D. Pa. filed Aug. 6, 2003); Nichols v. SmithKline Beecham Corp., 2003 WL 302352 (E.D. Pa. Jan. 23, 2003). Tara Shoemaker

28. *In re* Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348 (N.D. Ga. 2000). Drew Stevens

29. Settlement Agreement, RealNetworks, Inc. v. Microsoft Corp., No. JFM-04-968, M.D.L. Docket No. 1332 (D. Md. Oct. 11, 2005). Norman Hawker

30. Red Eagle Res. v. Baker Hughes Inc. (*In re* Drill Bits Antitrust Litig.), No. 4:91cv00627 (S.D. Tex. filed Mar. 11, 1991). Ruthie Linzer

31. *In re* Relafen Antitrust Litig., 346 F. Supp. 2d 349 (D. Mass. 2004). Morgan Anderson & Erika Dahlstrom

32. *In re* Remeron Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005). Morgan Anderson & Erika Dahlstrom

33. *In re* Rubber Chemicals Antitrust Litig., 350 F. Supp. 2d 1366 (Judicial Panel on Multidistrict Litigation 2004). Ruthie Linzer

34. *In re* Sorbates Direct Purchaser Antitrust Litig., 2002 WL 31655191 (N.D. Cal. Nov. 15, 2002). Joey Pulver

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

36. *In re* Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005). Morgan Anderson & Erika Dahlstrom

37. Settlement Agreement, Transam. Refining Corp. v. Dravo Corp., No. 4:88CV00789 (S.D. Tex. filed Mar. 10, 1988) (Specialty Steel Piping Antitrust Litigation). Ruthie Linzer

38. *In re* Urethane Antitrust Litig., 232 F.R.D. 681 (D. Kan. 2005). Bobby Gordon

39. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. & MasterCard Int'l Inc., 396 F.3d 96, 114 (2d Cir. 2005). Robert Lande

40. *In re* Vitamins Antitrust Litig. (many related cases), *see* JOHN M. CONNOR, THE GREAT GLOBAL VITAMINS CONSPIRACY: SANCTIONS AND DETERRENCE (2008) (on file with the authors). Brian Ratner & Robert Lande