

Restoring the Legitimacy of Private Enforcement

Transition Report
American Antitrust Institute
December 11, 2008

Major Recommendations

1. Competition Advocacy in the U.S.
2. Private Rights of Action Abroad
3. Twombly Reform
4. Prejudgment Interest*
5. Illinois Brick Reform*
6. Daubert Reform
7. Class Action Waivers
8. Contribution and Claim Reduction*
9. Antitrust Injury

Competition Advocacy

- ◉ Restore balance to amicus program
- ◉ Educate the courts and the public
 - Virtues of vigorous private antitrust enforcement
 - Myths about widespread abusive antitrust litigation
- ◉ Support efforts to reduce litigation expense

Case	S. Ct. Term	Decision Below Favored (Circuit)	SG's Amicus Brief Favored	Supreme Court Decision Favored
Trinko	03-04	Plaintiff (2 nd)	Defendant	Defendant
Empagran	03-04	Plaintiff (D.C.)	Defendant	Defendant
Volvo	05-06	Plaintiff (8 th)	Defendant	Defendant
Dagher	05-06	Plaintiff (9 th)	Defendant	Defendant
Illinois Tool Works	05-06	Plaintiff (Fed)	Defendant	Defendant
Weyerhauser	06-07	Plaintiff (9 th)	Defendant	Defendant
Twombly	06-07	Plaintiff (2 nd)	Defendant*	Defendant
Credit Suisse	06-07	Plaintiff (2 nd)	Defendant**	Defendant
Leegin	06-07	Plaintiff (5 th)	Defendant	Defendant
linkLine	08-09	Plaintiff (9 th)	Defendant*	??

“[J]udicial fears that the U.S. style of private rights of action – with mandatory treble damages, asymmetric shifting of costs, broad rights of discovery, class actions, and jury trials – excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards”

Chairman Kovacic (2008)

European Commission White Paper

“Those opposing [expansion of private rights] evoke the U.S. system in their argumentation, mentioning the excesses this system has led to, and the resulting costs for business and society as a whole.”

Concern about costs of “abusive litigation,” “abusive settlements,” “unmeritorious litigation,” “discovery blackmail,” and “frivolous litigation”

“[T]hat judges perceive the U.S. system of private rights to be excessive does not mean that their perceptions are invariably correct or enjoy convincing empirical support. . . . [A]ssumptions about the asserted dangers of over-deterrence from private enforcement ought not to be accepted as a matter of faith and ought to be tested vigorously in light of modern experience and empirical study.”

Chairman Kovacic (2007)

**The Benefits of Private
Enforcement Are Significant**

**The Costs of Private Enforcement
Are Not Excessive**

- ◎ The number of antitrust cases is modest
- ◎ There is no evidence of overdeterrence or duplicative recoveries
- ◎ Frivolous class actions are not a significant problem

Other Statistics

Number of fed. antitrust cases as % of all civil cases filed: 1977: 1.2% 2007: 0.4%

Number of fed. antitrust class actions as % of total class actions, 2001-07: 2.2%

Ave. number of MDL antitrust actions per year, 1998-2007: 8.6

2008 Update

1042 cases in first 3 quarters of 2008
(Competition Law 360)

16 MDL cases in 2008

Overdeterrence and Duplicative Recoveries

The Frivolous Litigation Myth

1. Frivolous antitrust litigation is common

“[M]any marginal and even frivolous antitrust cases are filed every year.”

Herb Hovenkamp

2. Courts are not able to control discovery abuse

“[T]he success of judicial supervision in checking discovery abuse has been on the modest side.” *Twombly*

Frivolous Litigation Myth

3. Meritless claims are settled because of high cost of litigation or threat of high damages

“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases” *Twombly*

“The potential liability can be so large that a defendant has a powerful incentive to settle even weak claims to avoid the ruinous effect of an adverse judgment.” *Charles Casper*

Critique is overblown

“While frivolous antitrust claims no doubt are sometimes brought ... there is ... no empirical or theoretical support for the critics’ overblown claims about antitrust class actions.”

◎ No empirical studies or anecdotal evidence of nuisance settlements

◎ Theory questionable

- Nuisance settlements – asymmetric costs
- Expected value settlements not frivolous