

A SKEPTIC'S TAKE ON PRIVATE ANTITRUST ENFORCEMENT

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Are there no limits???



Roadmap

- Compensation dubious
- Deterrence less than assumed
- Indicia of merit misplaced
- Negative spillover to public enforcement



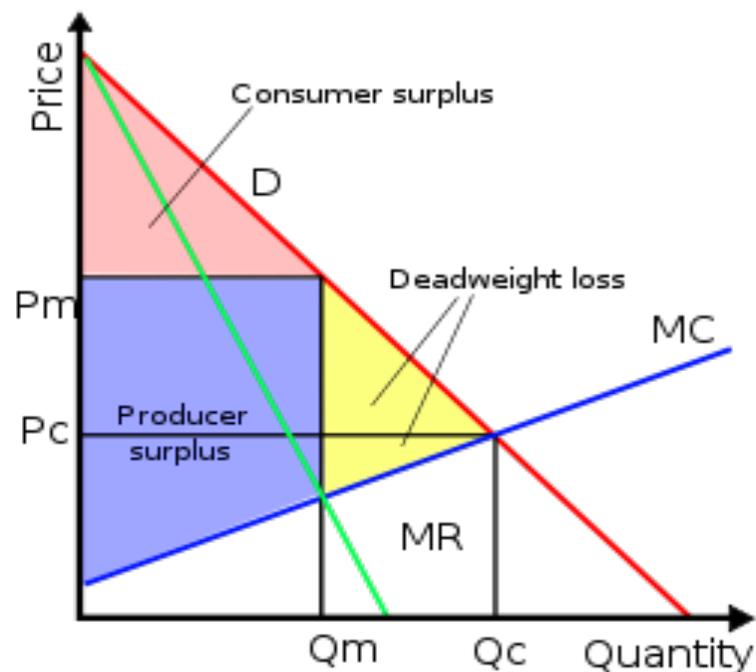
Compensation: Criteria

- (1) Correlation between normative theory of injury and damages awarded
- (2) Injured parties compensated in proportion to injury
- (3) Avoid windfalls to non-injured parties



Normative theory of injury: Consumer injuries from antitrust violations

- ~~Deadweight losses~~
- ~~Dynamic injuries~~
- Wealth transfers



Davis & Lande Study: Compensation in 60 cases

- \$33.8-35.8 billion total
 - Competitors: \$13 billion
 - Direct purchasers: \$15 billion
 - Indirect purchasers: \$2 billion
- Attorney's fees: 9%-27%
- Claims administration: 4% (but 6% in indirect cases)
- Cy pres? (Small, but ongoing)
- "Victims" receive 70%-87% of awards.

Competitor cases

- “The antitrust laws were enacted for ‘the protection of **competition, not competitors.**” *Atlantic Richfield v. USA Petroleum* (Brennan, J.) (quoting *Brown Shoe*).
- “Congress designed the Sherman Act as a “**consumer welfare prescription.**” *Reiter v. Sonotone*
- Bob’s seminal work on legislative history of Sherman Act: avoidance of wealth transfers.
- Competitors may be useful as private attorneys general, but they are not at the normative heart of antitrust policy.

Direct purchaser cases

- Davis and Lande, speaking of my arguments that direct purchasers are not generally real victims: “[Crane] does not know what percentage of the settlements funds in the Lande/Davis sample actual victims received.”

Direct purchasers

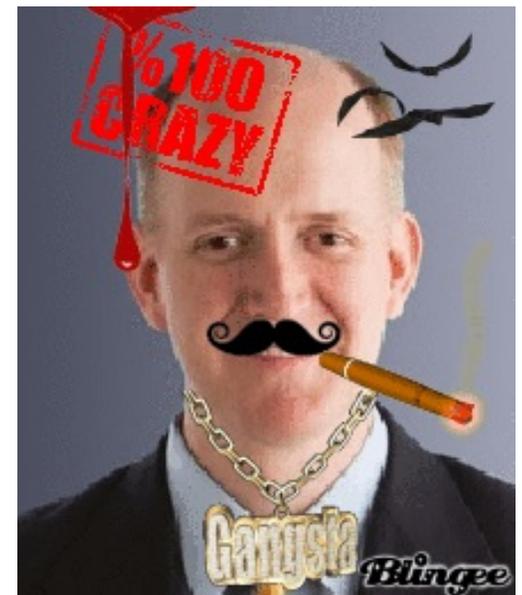
- **“New Options for State Indirect Purchaser Legislation: Protecting the **Real Victims** of Antitrust Violations” (Lande 2010)**
 - “If only direct purchasers are permitted to sue for damages, then the purchasers that ultimately absorbed the over-charges from a violation, who are usually indirect purchasers, will remain uncompensated. The goal of compensating the **actual victims** of antitrust violations surely is the primary reason why many desire to repeal *Illinois Brick*.”
 - Cites several articles referring to direct purchaser compensation as creating “windfalls.”
- **“Are Antitrust ‘Treble’ Damages Really Single Damages?” (Lande 1993)**
 - “[B]usiness plaintiffs will usually be harmed by less than the overcharge, and could remain completely unharmed. Yet they probably will not pass any of their subsequent recovery to consumers, so the “treble damages” recovery can be a **complete windfall. Unharmed business plaintiffs might receive infinite damages**, not treble or single damages.”

Bob is right!

- “This study confirms that a high degree of passing on (sometimes exceeding 100%) is frequent.” Harris & Sullivan (1979)
- Davis & Lande: The direct purchasers are sometimes end users.
 - Give one example: Auction houses
 - Three cheers for the 1%!!!
- Direct purchasers in other cases:
 - Big retailers (Walmart, Meijer, Target)
 - Wholesalers
 - Manufacturers

Indirect purchaser claims filing rate

- Identified claims rates in 7 cases (Air Cargo, Automotive Refinishing Paint, Cardizem, DRAM, Remeron, Tobacco, Warfarin)
- Range of claims filing percentages: <1% - 27%
- Weighted mean claims filing rate: 12%
- Selection bias? Claimant characteristics?
 - Income?
 - Education?
 - Race?
- *Who* is being compensated?



Summary on compensation

- 12% of indirect purchasers receive 6% of 70-87% of damages awarded.
- In plain English: a small fraction of consumers get to share a small piece (about 5%) of the total damages generated by our antitrust system, reflecting only one aspect of their injury.
- Score card:
 - (1) Correlation between normative theory of injury and damages awarded. **C+**
 - (2) Injured parties compensated in proportion to injury. **D-**
 - (3) Avoid large windfalls to non-injured parties. **F**



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Deterrence

- “Anticipation of that potential liability should have a powerful deterrence effect . . .” (Davis & Lande 2013)
- Like Chicago School, treats firm as black box.
- Corporation is a “they,” not an “it.”



Cartel cases vs. monopolization cases

- Large settlements as follow-ons to criminal indictments quickly ratchet up the criminal fine.
- But the lag between violation and judgment day is very long in monopolization or other non-cartel cases.



Duration of litigation/managerial turnover

- Average duration of monopolization lawsuits
 - LePage's: 3M bundles discounts in 1992; SCOTUS denies cert in 2004
 - Conwood: Conduct occurs in 1990; SCOTUS denies cert in 2003
- Managerial tenure:
 - CEO (5.5 yrs)
 - Mid-level manager (4 yrs)
- Davis & Lande: They're working other jobs in same company.
 - The CEO?
- Davis & Lande: In cartel cases, they stay on.
 - So where's the deterrence?

“Indicia of Merit”

- Davis & Lande: “Substantial settlements” show that defendants thought cases had merit.
- “[A]ctions that settle for more than \$50 million are not nuisance lawsuits . . .”
- Really???
 - Case where plaintiff asserts \$500 million in actual damages.
 - 10% probability of success (sanctionable under Rule 11).
 - Expected negative value to defendant = $0.1 \times 3(500 \text{ million}) + \text{atty fees (automatic one-way shifting) + own atty fees. } -\$200+ \text{ million.}$

Indicia of Merit

- 53 out of 60 cases had at least one indicator of merit.
- Lots of problems!
 - Selection bias:
 - Looking only at cases where plaintiffs obtained a settlement or judgment.
 - Corollary: Look at only cases where Rule 11 sanction awarded against plaintiff
 - Administrative Office of U.S. Courts data: 75% of private antitrust cases involuntarily dismissed pretrial.
 - Surviving motion to dismiss or getting class cert indicates merit?
 - On motion to dismiss, court must assume all allegations true.
 - On class cert, court doesn't inquire into merits.
 - Trial judges praise plaintiffs' lawyers.
 - Quality of lawyering inversely related to difficulty of case.
 - Good lawyers win bad cases.

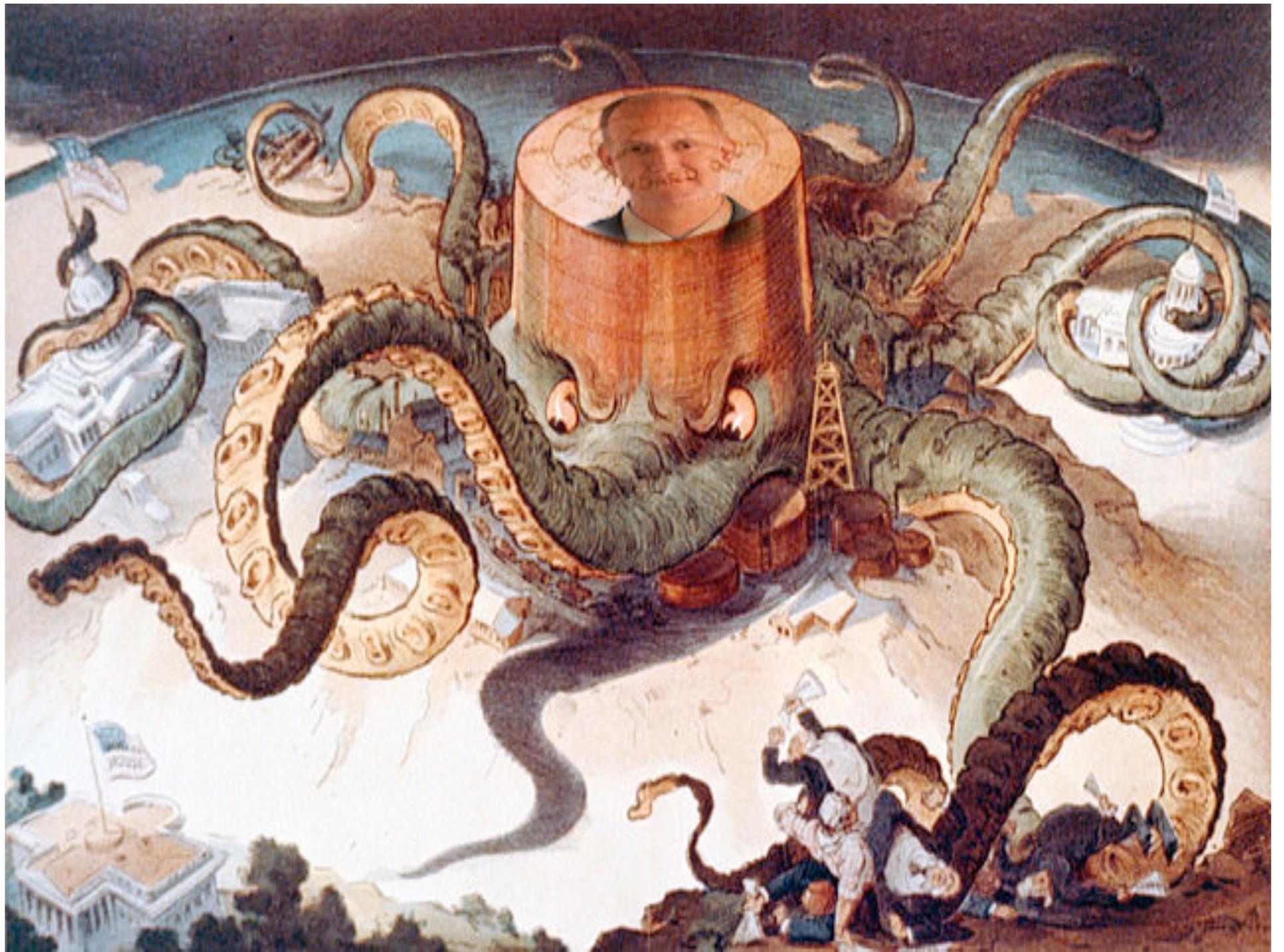
Spillovers to Public Enforcement

- Broad perception (spectrum from Scalia to Breyer—not just Chicago School) that private antitrust litigation creates systematic risks of false positives:
 - Treble damages
 - One-way fee shifting
 - Juries
 - Escalation from class actions
 - Discovery costs
 - Ill-motivated competitor suits
- Courts react by contracting liability norms (i.e., predatory pricing)
- Same rules applied to public enforcement; weak government's hand (i.e., U.S. v. AMR)



Can we agree?

- Without disparaging private enforcement:
 - Differentiate public enforcement—wider latitude in government suits (*i.e.*, FTC § 5)
 - Unshackle public enforcement—minimize collateral effects (*i.e.*, leniency, collateral estoppel)
 - “The private-injunction action, like the treble-damage action under s 4 of the Act, supplements Government enforcement of the antitrust laws; but **it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws.** The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served.” *U.S. v. Borden Co.*, 347 U.S. 514 (1954).





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