
Defying Conventional Wisdom: The Case for Private Antitrust Enforcement

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CW on Private Enforcement

Provides Nothing (Coupons)

Adds Nothing

Per Se → Always Tag-Alongs

Rule of Reason → Never Succeeds

Meritless

Sell Out

Compensation: Insufficient; Excessive.

Deterrence: Insufficient; Excessive.



Critics

**Example: Private antitrust actions “are almost as scandalous as the price-fixing cartels that are generally at issue.”
Moderate FTC Cmmr.**

Basis: anecdotes, assumptions, impressions, hypotheticals.



CW Wrong?

Not Necessarily.

But 60 Cases (40 old; 20 new) & other data. . .

1. Unsubstantiated.
2. Implausible.
3. Inconsistent.



Summary

Private Enforcement. . .

1. Does Too Little.
 - a. Probably True.
 - b. Strengthen, Not Eliminate.
2. Does Too Much.
 - a. Unsubstantiated.
 - b. Implausible.
 - c. Inconsistent with 1 above.



Provides Nothing (Coupons)?

60 Cases (20 New Cases)

\$30 Billion in Cash

→ ignores injunctions, coupons, vouchers, etc.



**Adds Nothing?
Per Se → Always Tag-Alongs?**

**Not Preceded by Government Action.
25 of 60 (42%), \$5.1 to \$6.4 billion.**

**Mixed Origins:
7 of 60 (12%), \$5.5 billion**

**Totals:
32 of 60 (53%), \$10.6 to \$11.9 billion**



Adds Nothing? Rule of Reason → Never Succeeds?

Pure Rule of Reason.

22 of 60 (37%), \$17.4 to \$17.7 billion.

Mixture of Rule of Reason and Per Se.

4 of 60 (7%), \$2.2 billion.

Totals.

26 of 60 (43%), \$19.6 to \$19.9 billion.



Meritless?

Indicia of Merit:

1. Size of Recovery:
All \geq \$30 mm; 88% \geq \$50 million.
2. Other Validation:
 40. 82.5%: gov't (crim/civil penalty), SJ, trial.
 - 20: 95% \rightarrow same, MTD, class cert.
 - 60: 87% validated.
3. Generous Praise of Judges (Dem. & Repub.)



Sell Out?

\$30 billion in 60 cases.

Mean: ~\$500 million.

Median: ~\$120 million.

Conclusion: Strengthen, Not Eliminate.



What of. . .

**Compensation?
Deterrence?**