

Comments on AAI Transition Report's Chapter on Private Enforcement

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Area of AAI-AMC Consensus

- Treble damages good
- Single damages too low given
 - Detection odds
 - Deadweight loss
 - Umbrella effects
- Lack of actual cases or evidence treble damages leads to overdeterrence.

AAI Positions on Which AMC Provides Some Indirect Support

- Agencies should help dispel myths of private overenforcement.
 - AMC treble damages analysis suggests it shares some AAI views about what these myths are.
 - Agencies have a direct interest in dispelling any myths because fears of private overenforcement lead to narrow interpretations of statutes that agencies enforce.
- Agencies should encourage foreign nations to develop effective private rights of actions.
 - Given *Empagran* that may be necessary for optimal deterrence of global misconduct.
 - Consistent with view of Dennis Carlton and AAG Garza that should go beyond treble damages when foreign victims cannot recover, but a more direct solution.

AAI Positions on Which AMC Is Totally Silent

- Ban Waivers of Class Arbitrations.
 - Class actions reduce duplication and solve collective action problem in cost sharing and fear of defendant retribution.
 - Nuisance settlement fear wrongly presumes defendants bear more litigation costs.
 - Massive exposure fear wrongly presumes defendants more risk averse.
 - No evidence frivolous antitrust suits getting significant damages.
- Investigate Misuses of *Twombly*, *Daubert*, and Antitrust Injury.

AAI Proposal Rejected by AMC

- AAI says should award pre-judgment interest.
- AMC argues treble damages already compensate and hard to calculate damages at time of injury.
But:
 - Trebling poor fit because does not vary with time lag.
 - Nominal trebling = single damages when one considers lack of prejudgment interest, deadweight loss, and umbrella effects, so fails to deter adequately when one considers odds of detection & successful adjudication.
 - Have to calculate damages at time of injury anyway.
- AAI side favored by Dennis Carlton, AAG Garza, and Judge Easterbrook.

AMC Contribution Proposal Rejected by AAI

- AMC would allow nonsettling defendants to get offset for allocated liability share of settling defendants and contribution from other nonsettling defendants.
- AAI concerns:
 - Would reduce deterrence.
 - Would reduce incentives to settle – private leniency program.
 - Apportioning liability share would be hard.
- Easterbrook, Landes & Posner side with AAI position on burden of proof grounds.

AMC Indirect Purchaser Proposal Rejected by AAI

- AMC would combine overruling *Illinois Brick*, consolidation with state indirect suits & clarifying class certifiability of direct purchasers despite pass-on.
- AAI concern this lessens deterrence. But:
 - Keeping duplication where state indirect purchaser statutes exist to sometimes increase deterrence is second best to fixing other doctrines that systematically undermine deterrence.
 - Current direct/indirect law itself undermines deterrence
 - *Illinois Brick* often reduces deterrence when direct buyers benefit from anticompetitive profits or fear defendant retribution.
 - Procedural complexity and uncertainty worsens deterrence.
 - Specter of sextuple damages part of what drives courts to be hostile to class actions by indirect purchasers.
- Perhaps better to combine this AMC reform with
 - Rule allowing prejudgment interest
 - Rules clarifying class certifiability for both direct and indirect purchasers.