

**Striking a Balance?**  
**Some Reflections on Private Enforcement in Europe and the United States**  
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For much of the twentieth century, antitrust law was largely an American phenomenon. Today antitrust – or competition law as it is known in much of the world – is global, with laws in over 100 countries. However, there are significant differences in application and interpretation of the law from jurisdiction to jurisdiction, particularly when one compares our experience in the United States with that of other countries. Much has been written and said about these differences, and the causes of divergence are manifold. Today I would like to focus on a factor that I believe is particularly important, and that is private enforcement.

The United States is unique in that it statutorily allows – and indeed encourages – private enforcement of antitrust law. With the exceptions of merger and cartel enforcement, one could argue that American antitrust law has been largely shaped by private parties. That stands in contrast with jurisdictions like Europe where the European Commission, and to a lesser extent the Member States, have dominated the development of competition law. That may be changing. Europe is moving towards greater private enforcement of its competition laws, and it will be interesting to see how this development will influence the law in the coming years and decades.<sup>2</sup>

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<sup>1</sup> The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor Kyle Andeer for his invaluable assistance in preparing this paper.

<sup>2</sup> See, e.g., William Kovacic, Chairman Federal Trade Commission, *Competition Policy in the European Union and the United States: Convergence or Divergence?* at p. 9, Bates White 5<sup>th</sup> Annual Antitrust Conference (June 2, 2008) available at: <http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf>.

Commissioner Kroes, like her predecessor Mario Monti, has emphasized the importance of increased private enforcement to the development of a “competition culture” in Europe.<sup>3</sup> A 2004 European Commission study concluded that there was “total underdevelopment” of private enforcement of Articles 81 and 82 – the European counterparts to sections 1 and 2 of the Sherman Act.<sup>4</sup> That led the Commission to embark on a multi-year review of various proposals to encourage greater private enforcement. The fruits of its labor are reflected in a White Paper and Staff Working Paper issued earlier this year that recommends a number of measures designed to facilitate private enforcement.<sup>5</sup>

As someone who spent the bulk of his forty-plus year career defending and litigating private antitrust actions in the United States, I have followed the developments in Europe with interest. I understand that the Europeans did not want to import the American system, and I for one hope that they succeed in that effort. But that is by no means certain. This is not to say that the Europeans are destined to follow in our footsteps. It is simply to say that there are ambiguities in the White Paper that may lead to some unexpected outcomes for the drafters of

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<sup>3</sup> See, e.g., Neelie Kroes, European Commissioner for Competition Policy, *Damages Actions for Breaches of EU Competition Rules: Realities and Potentials*, Cour de Cassation, Paris (Oct. 17, 2005) available at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/613&format=HTML&aged=0&language=EN&guiLanguage=en>>; Mario Monti, *European Commissioner for Competition Policy, Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the new Merger Regulation*, International Bar Association’s 8<sup>th</sup> Annual Competition Conference, Fiesole (Sept. 17, 2004) available at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=HTML&aged=0&language=EN&guiLanguage=en>>.

<sup>4</sup> Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, *STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES*, 1 (Aug. 2004) available at: <[http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative\\_report\\_clean\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf)> (the study identified a total of twelve successful damage awards in Europe since 1962).

<sup>5</sup> Commission of the European Communities, *WHITE PAPER on Damages Actions for breach of the EC Antitrust Rules (“White Paper on Damages”)* (April 2, 2008) available at: <[http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files\\_white\\_paper/whitepaper\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf)>; Commission of the European Communities, *Staff Working Paper on accompanying the White Paper on Damage Actions for breach of the EC Antitrust Rules (“Staff Working Paper on Damages”)* (April 2, 2008) available at: <[http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files\\_white\\_paper/working\\_paper.pdf](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf)>.

that document. Before I turn to these subjects, let me make one thing very clear at the outset. I am not here to tell the Europeans – or any other jurisdiction – what they should do. As I have said in the past, I think that is inappropriate. Rather, I simply want to share some reflections based on my experiences as a litigator.

## **I. Thoughts & Reflections on the European Commission’s Private Enforcement White Paper**

There is a lot to like in the European proposal. For example, I was heartened to see that it eschewed private enforcement of merger regulation. In my experience, private enforcement of Section 7 in the United States has sometimes been manipulated by firms seeking to fend off takeovers, aggrieved suitors, and plaintiff lawyers seeking attorney fees. I believe that public merger enforcement is generally more than sufficient.

The White Paper embraces three basic principles. First, victims have the right to full compensation.<sup>6</sup> Second, private enforcement should be a complement to, not a substitute for, vigorous public enforcement.<sup>7</sup> Third, private enforcement must reflect European norms and values as opposed to those of other jurisdictions.<sup>8</sup> The last principle echoes Commissioner Kroes’ comments that Europe should learn from the American experience and that it would not simply “cut-and-paste an American style system.” For example, she promised that the Commission would not adopt “opt-out” class actions, burdensome and costly discovery, or treble

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<sup>6</sup> White Paper on Damages at pp. 2-3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

damages – features which many, including myself, believe have caused mischief in this country.<sup>9</sup>

I am glad that the White Paper appears to adhere to those promises.

Nevertheless, the Commission has sought to walk a very narrow line. On the one hand, it seeks not only to make it easier for “victims” to bring private causes of action but also offers some incentive for them to do so. On the other hand, the Commission is wary of the perils of over-enforcement. While the White Paper makes a number of specific recommendations, I want to focus on four: damages, collective redress, fact discovery, and attorney compensation. There is a lot of promise in the recommendations respecting these matters from my perspective but there are also some potentially troubling ambiguities.

**A. Damages: Single Damages only BUT Allows for Recovery of Interest**

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<sup>9</sup> See, e.g., Neelie Kroes, European Commissioner for Competition Policy, *Reinforcing the Fight against Cartels and Developing Private Antitrust Damage Actions: Two Tools for a more Competitive Europe*, Commission/IBA Joint Conference on EC Competition Policy (Mar. 8, 2007) available at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=0&language=EN&guiLanguage=en>>.

A victim's right to compensation for antitrust violations is at the heart of the White Paper.<sup>10</sup> There can be little disagreement with this basic principle. The challenge however, is in its meaning and its application. The White Paper embraces the concept of "full compensation of the real value of the loss suffered" as the minimum standard for damages. "Full compensation" is not merely compensation for actual loss but also loss of profit as a result of any reduction in sales *and* interest.<sup>11</sup> Although the Commission did not provide guidance as to how damages should be calculated, it did announce its intent to issue non-binding guidance later this year.<sup>12</sup> I wish them luck because in my experience the calculation of damages is no easy task. Indeed, American courts have grappled with damages in antitrust cases for decades, and it remains a hotly debated question in both the criminal and civil context.

The White Paper did not retain the Green Paper's proposal for double damages in horizontal cartel cases.<sup>13</sup> Nor did it adopt any other punitive damages proposal. At the same time, however, it did not explicitly rule them out. Instead, the Commission chose to leave the question to the discretion of the individual Member States.<sup>14</sup> It also left the door open to revisit the issue later. The Staff Working Paper suggests that if the current measures fail to result in increased private enforcement then the staff may recommend punitive damages as an incentive to

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<sup>10</sup> White Paper on Damages at p. 2 ("Any citizen of business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) must be able to claim reparation from the party who caused the damage.").

<sup>11</sup> *Id.* at p. 7; see also Staff White Paper on Damages at pp. 55-61.

<sup>12</sup> Staff Working Paper on Damages at p. 60.

<sup>13</sup> Commission of the European Communities, GREEN PAPER Damages actions for breach of the EC Antitrust rules, § 2.3 Damages, p. 7 (Dec. 19, 2005) *available at*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0672:EN:NOT>.

<sup>14</sup> Staff Working Paper on Damages at pp. 57-58.

bring more cases.<sup>15</sup> Nevertheless, the decision to eschew explicit endorsement of a damages multiplier in the White Paper appears at first glance to mark a departure from the American system. And from my perspective a good one. However, on further reflection I am not sure the damage awards in the two jurisdictions will be all that different in practice.

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<sup>15</sup> *Id.* at 59.

More specifically, while the White Paper does not embrace a damages multiplier, it does recommend the recovery of interest from the date of infringement which, depending on interest rates, whether interest is compounded, and the length of the potential process, could result in large awards that may equal or exceed double damages.<sup>16</sup> The right to recover interest does not exist in the United States. Courts do have the discretion to award interest for the period beginning with the initiation of the lawsuit, but I am unaware of a court exercising that discretion in an antitrust case.<sup>17</sup> However, treble damages are available in the United States. Indeed, treble damages have been justified in part on the grounds that they compensate for the general unavailability of prejudgment interest.<sup>18</sup> In the end, I would not be surprised to see damage awards in Europe equal or even exceed those seen in the United States.

**B. Class Actions: What is the impact of opt-in and representative actions?**

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<sup>16</sup> *Id.* at p. 55.

<sup>17</sup> 15 U.S.C. § 15(a) (“The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person’s pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances.”).

<sup>18</sup> See, e.g., ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 249 (2007) available at: <[http://govinfo.library.unt.edu/amc/report\\_recommendation/toc.htm](http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm)> (“Treble damages help ensure that injured parties are indirectly compensated for the loss of the time value of their money and that defendants are not able to profit from their wrongs.”).

The prospect of “collective redress” – or class actions as they are known in the States – for antitrust violations in Europe has attracted a great deal of attention. The European Commission is convinced that some form of “collective redress” is necessary to an effective private enforcement system.<sup>19</sup> That is because individual consumers and small businesses lack the incentives to pursue these cases on their own because the individual injury from an antitrust violation may be small. That means the value of the individual claim is sometimes greatly outweighed by the time and the cost it would take an individual to litigate that claim.

The European Commission eschewed American style “opt-out” class actions because of concerns that they could “lead to excesses.”<sup>20</sup> Instead, the Commission recommended consumer “opt-in” class actions and “representative” actions.<sup>21</sup> The “representative” action would be brought by entities such as consumer associations, state bodies or trade associations and they could recover all of the losses.<sup>22</sup> The “opt-in” class action requires “victims” to expressly decide to combine their individual claims into a single action. An “opt-in” class action could only recover the damages suffered by the members of the action. The representative action is largely without precedent in the United States – at least with respect to the right of consumer or trade associations to bring actions – because those associations generally lack standing to bring claims in court.

I agree that opt-out class actions have led to “excesses” and abuses in the United States. However, I am not sure how the European recommendations will play out in practice, and it is

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<sup>19</sup> White Paper on Damages at p.4 (“there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements”); Staff Working Paper on Damages at pp. 15-16.

<sup>20</sup> Staff Working Paper on Damages at pp. 21.

<sup>21</sup> White Paper on Damages at p.4; Staff Working Paper on Damages at pp. 15-22.

<sup>22</sup> *Id.*



not altogether clear to me whether they will avoid the problems that plague American “opt-out” class actions. As I understand it, in Germany and the Netherlands, organizations are already permitted to buy the causes of action that individuals and businesses may have against firms participating in a cartel. If that is right, the result of such behavior may be equivalent to an “opt-out” class action if a purchasing entity acquires all or most the actions.

Furthermore, as I read the White Paper, a representative action could recover all of the damages caused by a violation, making such action similar – if not identical – to opt-out class actions in which there is joint and several liability.<sup>23</sup> These types of entities have already been quite active behind the scenes in Commission actions such as *Microsoft* and *Sony-BMG*, and it will be interesting to see whether these entities will now play a more direct role in enforcement.

Let me make several other observations on the choice between “opt-in” and “opt-out” class actions. First, I was on a panel several years ago that addressed class actions, and one of my fellow panelists was in-house counsel at a large corporation. I was surprised that he strongly favored opt-out class actions. He explained that the *res judicata* effects of those actions were likely beneficial to corporate America. That is probably correct. If potential plaintiffs have to “opt-in”, the *res judicata* effects of class action judgments and settlements will probably be substantially reduced. Second, however, that said, the “opt-out” class action has its unique problems. Among them is the possibility that opt-outs will bring cases to trial even after the class claim has been rejected at trial. That happened to one of my former clients several years ago in the *Brand Name Prescription Drug* cases in Chicago.<sup>24</sup> The American courts have still

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<sup>23</sup> Staff Working Paper on Damages at pp. 18-20.

<sup>24</sup> See generally, *In re Brand Names Drug Antitrust Litigation*, 1999-1 Trade Cas. (CCH) ¶ 72,446 (N.D. Cal. 1999).

not figured out a way to avoid that consequence, consistent with due process.

Third, in noting the “excesses” associated with American style “opt-out” class actions, the Commission specifically cited the concern that the device potentially gave too much to control to the lawyer and too little to the individual claimant.<sup>25</sup> But if the goal is to ensure that individual claimants – *i.e.*, victims – have a greater voice in the direction of the litigation, then it seems to me that a representative action is even farther removed from that goal than an opt-out class action. The representative action may be able to recover the entirety of the damages, but the litigation will be controlled by the entity – not the “victims.”

Finally, it will likely be challenging to coordinate “representative” and “opt-in” actions. The White Paper touts the efficiencies of those actions but it remains to be seen how they will play out in practice. One could imagine a situation in which there are multiple representative and “opt-in” class actions brought simultaneously in different jurisdictions throughout Europe. The time and cost of coordinating multi-jurisdiction litigation cannot be underestimated. I routinely defended the same conduct in federal and multiple state courts at the same time. To be sure, defendants may now remove state indirect purchaser class actions to federal courts under the 2005 Class Action Fairness Act, and when removal occurs, that can make coordination of litigation easier.<sup>26</sup> But the White Paper does not address the issue of multi-jurisdiction litigation and it is unclear – at least to me – how the courts of the Member States will handle this issue.

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<sup>25</sup> *Id.* at 21 (“Combined with other features, such opt-out actions have in other jurisdictions been perceived to lead to excesses. In particular there is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own interests in pursuing the claim (principal/agent problem).”).

<sup>26</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (Its stated purpose was “to amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.”).

To be fair, the Commission acknowledges that a number of details with these proposals have yet to be hammered out.<sup>27</sup> I hope that those details are addressed prior to implementation. One needs to look no further than the American experience to see the problems that can emerge. I will discuss some of those problems, as well as some common sense solutions to those problems, later on.

### **C. Discovery: Meaningful limitations?**

Another major issue that confronted the European Commission's effort to encourage greater private enforcement was the victim's access to evidence. Most national courts allow for very little party and third-party discovery, and the Commission found that those discovery rules made it very difficult, if not impossible, for a private party to bring a successful competition case. The lack of access to evidence was exacerbated by three factors in competition cases: first, the fact-intensive nature of competition cases; second, the evidence in competition cases is generally held by third parties or the defendant(s) and not the victim or claimant (i.e., the problem of "information asymmetry"); and third, the claimants are held to fairly demanding standards of proof in these cases.<sup>28</sup> At the same time, the Commission was wary of "the negative effects of certain systems of disclosure."<sup>29</sup> Specifically it cited concerns with wide-ranging, time consuming, and expensive discovery that could be easily triggered. Thus, the Commission was confronted with a conundrum that is familiar to those of us in the United States: how to provide the tools necessary to litigate these cases without unnecessarily burdening parties with the

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<sup>27</sup> Staff Working Paper on Damages at p.17.

<sup>28</sup> *Id.* at pp. 28-29.

<sup>29</sup> Staff Working Paper on Damages at p.30 ("In some (non-European) jurisdictions, opponents or third persons are obliged to cooperate in potentially very wide-ranging, time-consuming and expensive disclosure procedures on the basis of rather low thresholds.").

excesses of discovery.

The Green Paper outlined several alternative proposals, such as lowering the standard of proof and shifting the overall burden of proof. In the end it rejected those proposals and settled on a recommendation that provided for a minimum level of disclosure. In an effort to minimize the burdens on parties and third parties, the Commission suggested that claimants should meet several conditions before obtaining a disclosure order from the court. First, the claimant must establish a threshold of plausibility in their initial factual pleading.<sup>30</sup> Second, the claimant must demonstrate that the evidence sought is unavailable through other means.<sup>31</sup> Third, the claimant must specify sufficiently precise categories of information, documents or other means of evidence relevant to the claim.<sup>32</sup> However, at its core, the European Commission's recommendation relies on the "central function of the court" to control discovery: "[d]isclosure measures could only be ordered by judges and would be subject to strict and active judicial control as to their necessity, scope and proportionality."<sup>33</sup>

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<sup>30</sup> *Id.* at pp. 31-32.

<sup>31</sup> *Id.* at pp. 32-33.

<sup>32</sup> *Id.* at p. 33.

<sup>33</sup> *Id.* at p. 30.

The European proposal looks good on paper but, as with the other proposals, it remains to be seen how it will work in practice. Indeed, it struck me as I read the proposal that it was not altogether different from the system we have on paper here in the United States. As for the first condition in the White Paper, litigants in the United States after the Supreme Court’s *Twombly* decision<sup>34</sup> arguably have to meet a similar plausibility threshold prior to conducting discovery. With respect to the second and third conditions set out in the Commission recommendations, Federal Rule of Civil Procedure 26(b)(2)(C)(i) allows a court to limit discovery if “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”<sup>35</sup> Rule 34 of the Federal Rules also requires a party seeking document discovery to “describe with reasonable particularity each item or category of items to be inspected.”<sup>36</sup>

Similarly, in order to be entitled to discovery under the scheme outlined in the Commission’s White Paper, a court would have to first assess whether the factual pleading is “sufficient to make out a plausible claim.”<sup>37</sup> It is unclear when the threshold of plausibility would be crossed under the European proposal. The question appears to be left to the courts to decide on a case by case basis. The White Paper does caution courts to “bear in mind” that the plaintiff will generally lack “detailed facts” at the outset of his case.<sup>38</sup> It suggests that plausibility should not be interpreted too strictly. But this is not a simple matter. Indeed, it is

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<sup>34</sup> *Bell Atlantic Corp. v. William Twombly et. al.*, 127 S.Ct. 1955 (2007).

<sup>35</sup> Federal Rules of Civil Procedure 26(b)(2)(C)(i).

<sup>36</sup> *Id.* at Rule 34(b)(1).

<sup>37</sup> *Id.* at p. 31.

<sup>38</sup> *Id.* at p. 32.

one American courts are grappling with in the wake of the Supreme Court’s decision in *Twombly*.

*Twombly* concerned the sufficiency of the pleading of a conspiracy in a private treble damage action where the complaint simply alleged parallel conduct – conduct that was as consistent with independent action as it was with the existence of a conspiracy.<sup>39</sup> The Court repeatedly emphasized the importance of plausibility in pleading a Section 1 claim – the need to allege enough facts to show that there was an agreement.<sup>40</sup> It found that allegations merely suggesting the existence of a conspiracy were insufficient. The Court concluded that “because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”<sup>41</sup> *Twombly* has led to some confusion in the lower courts as they grapple with its discussion of “plausibility.”<sup>42</sup>

But the real issue is whether European judges will heed the Commission’s call to exercise “strict and active” control over discovery. I don’t know much about European judges and courts, but if they are at all like American judges then this reliance may be misplaced. The Notes and Comments to the Federal Rules of Civil Procedure likewise encourage American judges to

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<sup>39</sup> *Id.* at 1961 (“the question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.”).

<sup>40</sup> *Id.* at 1974 (The Court was not requiring “heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”).

<sup>41</sup> *Id.*

<sup>42</sup> Prior to *Twombly*, courts were reluctant to dismiss complaints for failure to state a claim in light of the Court’s decision in *Conley v. Gibson*, 355 U.S. 41 (1957). *Conley* held that that a motion to dismiss should be denied “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 4546. Courts interpreted that language as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings. However, the Court in *Twombly* repudiated *Conley*’s “no set of facts” language “as best forgotten as an incomplete, negative gloss on an accepted pleading standard.” *Twombly*, 127 S. Ct. at 1968.

manage discovery and exercise their discretion to limit needless and/or costly discovery. However, in my experience, that did not always happen. The fact of the matter is that many American judges hated to arbitrate discovery disputes in civil cases. Their dockets were busy enough without the hassle and headaches of playing discovery referee. They simply did not have time to manage discovery in the dozens, even hundreds, of civil cases before them.

The European Commission recognized the time and costs involved with discovery. However, it remains to be seen whether European courts will be more successful in reigning in some of the abuses that have plagued the American system. As I said, much of it will depend on the willingness of the European judges to actively supervise and control discovery. One cannot underestimate the costs of discovery in these cases. Those costs have escalated in today's world of e-mail and electronic documents. In my experience, it was not unusual for the parties to produce millions of documents and use scores of lawyers to compile and review these documents. The costs could run in the millions of dollars in attorney fees and litigation expenses. That leads me to another important question that was addressed by the White Paper – who pays the litigation costs in the end.

#### **D. Allocation of Costs: “Loser Pays” Rules**

The issues of costs inevitably leads to the question of who foots the bill. In the United States, the defendant is not only on the hook for its own costs regardless of outcome in most cases, but it is also potentially on the hook for the plaintiff's costs as well if the plaintiff prevails. However, in many of the national courts throughout Europe, the rule is that it is the unsuccessful litigant who bears the costs of the civil action (“loser pays” principle).<sup>43</sup> That means a potential plaintiff must consider the possibility of a significant bill of costs from the defendant at the

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<sup>43</sup> Staff Working Paper on Damages at p. 76.

conclusion of an unsuccessful challenge.

The Commission voiced some concern that the “loser pays” rule might deter potential claimants from bringing damages actions.<sup>44</sup> On the other hand, the Commission recognized that the rule may deter frivolous actions.<sup>45</sup> Another side benefit of the rule is that it may encourage parties to focus their discovery in an effort to minimize costs. The Commission considered recommendations to modify the “loser pays” rule in its Green Paper. For example, one proposal entailed limiting the “loser pays” rule to those cases where the unsuccessful claimant “acted in a manifestly unreasonable manner by bringing the case.”<sup>46</sup>

In the end, however, the Commission simply recommended that the national courts be given discretion to depart from the “loser pays” rule by the Member States. The Commission encouraged Member States “to reflect on their cost regimes so as to facilitate meritorious antitrust litigation, particularly for cases brought by claimants whose financial situation is significantly weaker than that of the defendant, and/or situations where costs prevent meritorious claims being brought due to the uncertainty of the outcome.”<sup>47</sup> It is unclear whether the recommendation will result in a shift away from the “loser pays” rule.

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In sum, the Commission sought to strike a delicate balance between a consumer’s right to recovery and an abusive litigation system that serves the interests of lawyers. The proposal – at least on paper – may be better than what we have in this country. The true test, however, will be

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<sup>44</sup> Staff Working Paper on Damages at p. 74.

<sup>45</sup> *Id.* at pp. 76-77.

<sup>46</sup> *Id.* at p. 74.

<sup>47</sup> *Id.* at p. 75.



in the application of these measures.

## **II. American Private Enforcement Experience: Lessons & Reforms**

The Europeans may suffer from “total underdevelopment” of private enforcement but I would suggest we are suffering from the effects of “overdevelopment.” While countries around the world have emulated much of our legal system, most, if not all, are wary about many aspects of our system of private enforcement. One need look no further than the European Commission’s White Paper on private enforcement. The Staff Working Paper repeatedly cited the “excesses” of the American system as a cautionary tale.<sup>48</sup> Indeed, if there is one thing that the Commission made abundantly clear throughout this process it is that it does not want to import the American private antitrust enforcement model.

The Commission is hardly the only critic. Our own courts – and specifically the Supreme Court – appear to be increasingly wary about private antitrust enforcement. I too share concerns about the incentives of our current system. The question is what do about it. While recent legislative and judicial procedural reforms may be a step in the right direction, problems persist. That has led to some frustration in the courts. There has been something of a judicial backlash, at least in the Supreme Court, against private enforcement, and it is arguable that that in turn has led to cutting back the substantive antitrust law. Liability standards have arguably been heightened, at least in part because of an uneasiness over the excesses of private enforcement in the United States. That is a problem. One can share the concerns with the “excesses” of American private enforcement without agreeing that the way to address that problem is through a rewrite of

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<sup>48</sup> See, e.g., Staff Working Paper on Damages at pp. 16, 17 fn. 24, 21, and 30.

the substantive antitrust rules.

### **A. American Private Enforcement “Excesses”**

It is arguable that our current system encourages too much private antitrust enforcement. A number of cases are brought not on the merits but to serve some other purpose. Whether it is a competitor seeking to use the antitrust laws to its competitive advantage or a plaintiff’s lawyer seeking a quick settlement, the antitrust laws can be subject to abuse when enforced by private parties.<sup>49</sup> This is not to say that I believe that all, or even most, of these private cases are meritless. Far from it. However, it is arguable that private enforcement has undermined antitrust enforcement as a whole in this country and that it has also made public enforcers more cautious than they should be in bringing cases.

I have three basic interrelated concerns with private antitrust enforcement in the United States. First, the procedural rules are such that antitrust plaintiffs sometimes have tremendous leverage that can be used to extract large, almost extortionate, settlements from defendants. In my experience, the size of some of these settlements does not necessarily reflect the strength of the case but rather the dimensions of potential liability.

That is to say, a defendant may be unwilling to risk trying even weak cases in light of the

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<sup>49</sup> See, e.g., II P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 332, p. 154 (1st ed. 1978) (“[C]lass action[s] . . . can consume massive judicial resources, result in enormous costs for all parties, and threaten gigantic recoveries. A class action can be the vehicle for strike suits designed to coerce a settlement.”); see also *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (“the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.”); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 528, n.17 (1983) (“Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”); *Franchise Realty Interstate Corp. v. Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir.1976) (“The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case.”).

vagaries of the judicial system, given the potential for hundreds of millions, even billions, of dollars in damages.

The size of the liability in these cases is a function of several contributing factors. The opportunity for treble damages is one obvious factor but it is hardly the only one. Joint and several liability, the rule prohibiting contribution in antitrust cases, and the class certification process (some courts have certified classes with far too little scrutiny) all combine with treble damages to make settlement the most attractive option for potential defendants in some cases. These factors may combine to make a class action a vehicle for extortionate settlements: if a defendant does not settle, it faces the prospect that it may be held liable for treble damages caused to an entire class of plaintiffs not only by itself, but by all of the other defendants against which the lawsuit is brought.

Let me illustrate the point with an example. A decade ago I represented a defendant in a class action that alleged a conspiracy among nearly two dozen pharmaceutical manufacturers and wholesalers. The complaint was filed on behalf of tens of thousands of retail pharmacies across the country, and it sought billions of dollars in damages. The size of the class and the amount of the damages, coupled with the fact that each defendant was potentially on the hook for the entirety of the plaintiffs' claim, placed incredible pressure on each individual defendant to settle the claims. And indeed, shortly before trial, a number of defendants chose to settle rather than litigate the claims – paying over \$700 million to the plaintiffs, of which nearly a quarter went to the lawyers.

Several defendants had the courage to take the case to trial before a jury in Chicago, a city not known for its love of big business. The result? The judge dismissed

the case after the close of the plaintiffs' case.<sup>50</sup> In short, the class action device, coupled with the threat of treble damages and procedural rules like joint and several liability, skewed the incentives of some of the defendants to settle for hundreds of millions of dollars what ultimately proved to be a losing case.

Second, the nuisance value of antitrust litigation is such that it encourages some plaintiff lawyers to bring, to put it charitably, highly speculative lawsuits. Those lawyers are not seeking to litigate meritorious claims. Rather they are looking for a quick payoff. The key for some of the more opportunistic plaintiffs lawyers is to survive a motion to dismiss. Once that threshold is crossed, a plaintiff's lawyer can quickly drive up a defendant's costs through discovery. The breadth of discovery requests has long been a problem but it has been compounded with the proliferation of electronic documents in recent years. And some courts have been unwilling to curb the requests. As a result, some defendants are willing to settle even the very weakest of cases simply to avoid the nuisance of discovery.

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<sup>50</sup> See, e.g., *In re Brand Names Drug Antitrust Litigation*, 1999-1 Trade Cas. (CCH) ¶ 72,446 (N.D. Cal. 1999).

Third, some settlements place the interests of the plaintiffs' lawyers above those of consumers.<sup>51</sup> Settlements are the rule rather than the exception in most antitrust cases today. However, the terms of some settlements sometimes serve the lawyer more than the putative class of victims. Some plaintiffs' lawyers have managed to negotiate settlements that on their face look large but in practice offer the victims very little.

Perhaps the most troubling have been "coupon settlements." Class members in "coupon settlements" receive only coupons on future purchases – and the circumstances in which the coupons can be redeemed may be extremely limited.<sup>52</sup> On the other hand, plaintiff lawyers collect cold, hard cash – and their fees are based on the total value of coupons, regardless of whether those coupons were actually used. Take for example the settlement in a case I was involved in the mid-1990s.<sup>53</sup> The plaintiffs' lawyers settled the lawsuit soon after it was filed for coupons. The defendant issued nearly 3 million coupons but in the end a low percentage of the coupons was actually redeemed. What did the plaintiff lawyers collect? Over \$4 million . . . in cash. Coupon settlements were addressed in the Class Action Fairness Act enacted several years ago. The Act encourages greater judicial scrutiny of settlements, and it also requires attorney fees in coupon settlements to be based on the coupons that were actually redeemed.<sup>54</sup> But the

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<sup>51</sup> HENRY FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 119-20 (Columbia 1976) ("the benefits to the individual class members are usually minimal" while lawyer compensation "seems inordinate."); see also Edward J. Ross, *Rule 23(b) Class Actions--A Matter of "Practice and Procedure" Or "Substantive Right"?* 27 EMORY L J 247, 249 (1978) (commenting that "recovery from the settlement of a class action does not necessarily inure to the allegedly damaged class members; the real reward is often to their lawyers").

<sup>52</sup> Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 102 (1997) ("A coupon settlement is a settlement where the defendant creates a right for class members to obtain a discount on future purchases of the defendant's products or services.").

<sup>53</sup> *Wolf v. Toyota Motor Sales*, 1997 U.S. Dist. LEXIS 16457 (N.D. Cal. 1997).

<sup>54</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

impact of the Act is still being assessed.

Before you dismiss these concerns as merely the gripes of an old defense lawyer, one should read the recent decisions of the Supreme Court. The Court's concerns over the costs, burdens, and incentives of private antitrust enforcement have arguably played an important role in the scaling back of substantive antitrust law in the United States.<sup>55</sup> It is arguable that the Court has toughened substantive standards in order to minimize the risk of erroneous judgments by juries and the pressures to settle even the weakest of cases.

Cases brought under Section 2 of the Sherman Act are especially vulnerable on this score. Section 2 represents a difficult area of the law and reasonable minds can disagree about how it should be enforced – indeed one needs to look no further than our recent dust-up with the Antitrust Division over the Section 2 report.<sup>56</sup> A hard Section 2 case may put a court in a tough position. If the case is allowed to proceed to trial suddenly the firm is facing the threat of treble damages. That threat may lead a court to dismiss the case short of trial in difficult cases. Courts want to ensure that only the clear-cut cases are subject to the harsh penalties.

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<sup>55</sup> *Twombly*, 127 S.Ct. at 1975 (Justice Stevens writing in dissent noted that “[t]wo practical concerns presumably explain the Court’s dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions.”).

<sup>56</sup> FTC Press Release, *FTC Commissioners React to Department of Justice Report, “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act”* (Sept. 8, 2008) available at: <http://www.ftc.gov/opa/2008/09/section2.shtm>.

But judicial hostility towards private enforcement can bleed over to public enforcement in some cases.<sup>57</sup> When the agencies go to court they are treated the same as any other plaintiff. The standards designed to curb excessive private enforcement are used against the government as well. One needs to look no further than the Department of Justice's predatory pricing case against American Airlines where the government's case failed to survive even summary judgment.<sup>58</sup> Predatory pricing standards are a good example of a rule designed to minimize excessive litigation rather than necessarily getting it right.

## **B. Common Sense Procedural Reforms**

As I said earlier, I don't think the answer to these problems is in a rewrite of the substantive antitrust laws. I would encourage the courts to focus more on tightening procedural rules rather than scaling back substantive rules if they are concerned about the costs and burdens of excessive private enforcement. In this sense, I think *Twombly* was a good decision. I would rather see the Court toughen pleading standards than the standards for proving conspiracy. Among the proposals I would urge the courts to consider are the elimination of joint and several liability, allowing contribution among defendants,<sup>59</sup> the preemption of *Illinois Brick* repealers (particularly in cases removed to the federal court

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<sup>57</sup> See, e.g., William E. Kovacic, Chairman Federal Trade Commission, *Competition Policy in the European Union and the United States: Convergence or Divergence?* at p. 9, Bates White 5<sup>th</sup> Annual Antitrust Conference (June 2, 2008) available at: <http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf> ("In roughly the past 30 years, judicial fears that the US 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."); 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, 51-64 (2007).

<sup>58</sup> *United States v. AMR*, 335 F.3d 1109 (10th Cir. 2003).

<sup>59</sup> There is no right of contribution in the United States. A minor cartel participant may be found liable for the entirety of the plaintiffs's damages.

under the Class Action Fairness Act because the rationale for *Illinois Brick* largely applies once a case is in the federal courts), and instructing juries that damages will be trebled.

The greatest improvement, however, would be better case management. There have been improvements in case management, but those improvements are far from uniform. For example, some courts have begun to subject motions for class certification to greater scrutiny in an effort to weed out unmeritorious lawsuits early in litigation. Class certification is the turning point in American class action litigation.<sup>60</sup> The drafters of the Federal Rules of Civil Procedure recognized the importance of class certification in 1998 when it amended Rule 23 to facilitate appeals of a class certification decisions.<sup>61</sup> Rule 23(f) allows either party to pursue an immediate interlocutory appeal of a class certification decision. However, appellate courts have not uniformly exercised their discretion to review class certification decisions under Rule 23(f).

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<sup>60</sup> F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION 4<sup>th</sup> Ed. 389 (2008) (“Courts have come to realize that class certification has an impact, and potentially unfair impact, on the dynamics of settlement.”); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (“certification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability... [Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.”).

<sup>61</sup> FED. R. CIV. P. 23 advisory committee’s note (1998 Amendment) (“An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”).



One issue that divides the circuits is the degree of scrutiny to be applied to class certification motions. Part of the problem lies in arguably conflicting guidance from the Supreme Court. Plaintiffs rely on the Court's decision in *Eisen* to argue that courts may not consider the merits of the case at the class certification stage of the case.<sup>62</sup> On the other hand, defendants rely on *Falcon*, another Supreme Court decision, to encourage courts to undertake a "rigorous" analysis of Rule 23's requirements before they certify classes in antitrust cases.<sup>63</sup> For example, Judge Easterbrook has explained that "a judge should make whatever factual and legal inquiries are necessary under Rule 23."<sup>64</sup> I believe that courts should apply greater scrutiny to the plaintiffs' case at the class certification stage, and that includes requiring the plaintiffs' experts to satisfy the requirements of *Daubert*.<sup>65</sup> If universally adopted by the courts, this would be a big improvement.

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<sup>62</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) ("we find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); *Dukes v. Wal-Mart, Inc.* 474 F.3d 1214, 1227 (9th Cir. 2007); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. (D.Colo. 1993).

<sup>63</sup> *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982)("[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."); see, e.g., *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (Easterbrook, J.); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 322-23 (5th Cir. 2005).

<sup>64</sup> *Szabo*, 249 at 676 (7th Cir. 2001) (Judge Easterbrook also stated that "the judge would receive evidence (if only by affidavit) and resolve the disputes before deciding whether to certify the class.").

<sup>65</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

One potential reform is probably off the table. That is the elimination of treble damages. Treble damages have long been a feature of private antitrust enforcement in the United States.<sup>66</sup> A number of observers question the need for treble damages in many, if not all, cases. Robert Bork has said treble damages “attracts bad lawsuits, lawyers interested only in the enormous cash awards, and compels even innocent businesses to settle rather than risk trial with potentially catastrophic damages.”<sup>67</sup> That may overstate matters, but it may be accurate in some cases too. Reflecting that criticism there have been a number proposals over the years to eliminate or reduce the availability of treble damages. For example, the Reagan Administration proposed limits on trebling in 1986.<sup>68</sup> And as recently as two years ago some commentators urged the Antitrust Modernization Commission (“AMC”) to recommend limits on treble damages.<sup>69</sup> While treble damages will likely remain the rule in antitrust cases, I do think that juries should be instructed that the damages they award will be trebled. This seems to me to be a common sense instruction.

### **Conclusion**

In sum, there are several reasons for complementing public enforcement of the

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<sup>66</sup> Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890); 15 U.S.C. § 15(a).

<sup>67</sup> See, e.g., Robert Bork, Comments on the Status of the Antitrust Laws, *available at*: <http://govinfo.library.unt.edu/amc/comments/bork.pdf>.

<sup>68</sup> Antitrust Remedies Improvement Act of 1986, S.2162, H.R. 4250, 99<sup>th</sup> Cong. (1986); *see also* Research Joint Ventures: Hearings before the Subcomm. on Investigations and Oversight of the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology, 98th Cong., 1st Sess. 154, 159 (1983) (testimony of William F. Baxter); Edward D. Cavangh, *Detrebling Antitrust Damages: An Idea Whose Time has Come?*, 61 TUL. L. REV. 777, 830 (1987).

<sup>69</sup> See, e.g., Robert Bork, Comments on the Status of the Antitrust Laws, *available at*: <http://govinfo.library.unt.edu/amc/comments/bork.pdf>; Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission, pp. 3-4 (Nov. 4, 2005) *available at*: [http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/enforcement\\_pdf/051104\\_BRT.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/enforcement_pdf/051104_BRT.pdf).

antitrust laws with a system of private enforcement. But our current system of private enforcement is far from perfect. Unless and until its shortcomings are fixed, those responsible for public enforcement in the EC and elsewhere are right to be wary about importing it, lest their courts, like our Supreme Court, seek to ameliorate its perceived “excesses” by changing the substantive law.