



AMERICAN
ANTITRUST
INSTITUTE



UNIVERSITY OF
SAN FRANCISCO
School of Law

THE VITAL ROLE OF PRIVATE ANTITRUST ENFORCEMENT IN THE U.S.

COMMENTARY ON THE

2018 ANTITRUST ANNUAL REPORT: CLASS ACTION FILINGS IN FEDERAL COURT

MAY 14, 2019

I. INTRODUCTION

Growing concerns over declining competition, higher levels of concentration in markets with only a few firms or a dominant firm, erosion of wages and worker benefits due to the rise of powerful buyers of labor, and slowing rates of market entry dominate the conversation about the role and importance of antitrust enforcement in the U.S.¹ Much of this debate focuses on the real concern that decades of lax public antitrust enforcement are in large part responsible for current competition woes. This conversation has evolved in a highly public and political forum, accompanied by a range of antitrust legislative reform proposals.²

One feature of the ongoing debate over declining competition is that it largely ignores the crucial and complementary role that private antitrust enforcement plays in the U.S. system. Private antitrust enforcement is an essential complement to its public counterpart and is foundational in promoting competition, defending our markets, and protecting consumers and workers.³ Congress fully intended this essential complementarity and the judiciary has recognized it time and time again. In *California v. American Stores Co.*, for example, the Supreme Court noted, “Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.”⁴

¹ See, e.g., American Antitrust Institute, *A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward* (Sept. 28, 2016), <https://www.antitrustinstitute.org/wp->

² See Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong. (2017); Merger Enforcement Improvement Act, S. 1811, 115th Cong. (2017). In the U.S. House of Representatives, a package of four bills was introduced in April 2018. Two of these bills address merger enforcement by tightening standards for merger-related efficiencies to ensure non-consideration of job cuts and prohibiting mergers that would create monopsony power that can harm workers. See Restoring and Improving Merger Enforcement Act of 2018, H.R. 5642, 115th Cong. (2018); Economic Freedom and Financial Security for Working People Act of 2018, H.R. 5630, 115th Cong. (2018).

³ See Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013).

⁴ *Cal. v. Am. Stores Co.*, 495 U.S. 271, 284 (1990).

While private enforcers cannot pick up all the slack from lax public enforcement, they provide needed resources. And unlike public enforcers, private enforcers can obtain significant damages. This serves as a crucial source of deterrence for illegal anticompetitive conduct⁵ and the major avenue for compensating victims for harms suffered at the hands of cartelists and dominant firms.⁶ The importance of the antitrust class action, a major private enforcement device, is clear. The recently released 2018 Antitrust Report: Class Action Filings in Federal Court (“2018 Report”) by Huntington National Bank and the University of San Francisco School of Law (USF Law) indicates that the cumulative total recovered for victims in antitrust class actions from 2013 to 2018 was over \$19 billion or, on average, about \$3 billion per year.⁷

Lex Machina estimates that in 2018 the vast majority, or almost 85%, of total antitrust damages awarded by the courts in antitrust cases were attributable to settlements in antitrust class actions.⁸ The majority of antitrust class actions involve violations of Section 1 of the Sherman Act, i.e., anticompetitive agreements or conspiracies. Antitrust class actions obtain restitution from companies engaged in harmful, illegal conduct, such as price fixing, in markets for important and essential consumer products. The most active defendants in 2016-2018, for example, were companies producing drugs, chemicals, automobile parts, and food.⁹ In light of the vital role played by private antitrust enforcement and the antitrust class action, in particular, the time is ripe for an empirical analysis of trends in activity.

II. OVERVIEW OF THE COMMENTARY

The American Antitrust Institute (AAI)¹⁰ and Professor Joshua Davis at USF Law¹¹ evaluated the 2018 Report with the goal of identifying its major implications for private enforcement in the U.S. — especially the antitrust class action. The Antitrust Report relies on data and artificial-intelligence-based analysis of private U.S. antitrust class actions available through Lex Machina.¹²

The analysis provided in this Commentary highlights the importance of private antitrust enforcement in the U.S. system and the particularly important role played by the antitrust class action. The Commentary proceeds in three parts. The first section highlights major observations on trends and relationships that are apparent in the antitrust class action data from 2013 to 2018. The second section turns to major takeaways that emerge from the statistics provided in the Report and their implications for private enforcement and antitrust class actions. Third, the Commentary provides an overview of major developments in the case law over the period covered by the 2018

⁵ See Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. REV. 315.

⁶ See Davis & Lande, *supra* note 3.

⁷ Huntington National Bank & Univ. of San Francisco School of Law, *2018 Antitrust Report: Class Action Filings in Federal Court* (May 2019) [hereinafter 2018 Report], available <http://ssrn.com/abstract=3386424>.

⁸ Lex Machina, Antitrust Litigation Report 27 (April 2019), available at <https://lexmachina.com/antitrust-litigation-report/>.

⁹ *Id.* at 15.

¹⁰ The American Antitrust Institute (AAI) is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, see www.antitrustinstitute.org.

¹¹ Joshua Davis is Professor and Director, Center for Law and Ethics at the University of San Francisco School of Law.

¹² See <https://lexmachina.com/legal-analytics/>. Data generated from Lex Machina’s database extends from case filing and settlement analytics to docket entries sourced from PACER. See *supra* note 7, at 29.

Report that may be influential going forward. Finally, summaries of four recent private antitrust cases illustrate the importance of private enforcement. The implications of this analysis provide important context for the continued support for and defense of private antitrust enforcement.

III. MAJOR TRENDS IN ANTITRUST CLASS ACTION FILINGS AND SETTLEMENTS

Private antitrust class action settlements remain under-explored, raising key questions and issues that would foster a better understanding of the importance of the antitrust class action and its critical role. The 2018 Report offers new information and insights. It focuses on private antitrust class actions resulting in settlements that were ultimately approved by a court, including trends for settlements that were finalized during the period 2013-2018.¹³ We note that the 2018 Report finds that the majority of antitrust class action complaints over the period 2013-2018 were filed in a handful of federal district courts. For example, complaints were filed most often in the Northern District of California, followed by the Southern District of New York, the Eastern District of Pennsylvania, and the Eastern District of Michigan.¹⁴

A number of key observations emerge from antitrust class action activity presented in the 2018 Report. One involves variation in antitrust class action cases filed versus cases settled. A total of 4,200 complaints were filed in federal court over the last decade (2009-2018), or an average of 420 complaints per year.¹⁵ There is significant variation in the volume of complaints filed, with outlier years as low as about 220 in 2011, and as high as 660 in 2015.

Because there is a multi-year lag that reflects the time involved in settling cases, the 2018 Report presents settlement data over the shorter period of time 2013 to 2018. Six hundred and thirty (630) settlements were obtained over this period, or about 105 settlements per year. As with the number of cases filed, there is substantial variation in the number of settlements, ranging from a low of around 50 in 2013, to a high of about 170 in 2018.¹⁶ In comparing cases filed and cases settled, the variation in the number of cases filed is far higher than in the number of settlements obtained.

A second major trend apparent in the 2018 Report data pertains to the time span from case filing to case settlement. Antitrust class action cases that reached final approval from 2013 to 2018 settled over a variety of timeframes, ranging from less than two years to over 12 years.¹⁷ Fifty percent of cases settled within a three to five year period. Twenty five percent of cases settled within a six to eight year period, and 16% of cases settled in less than two years. A very small number of cases (about 4%) were settled in over 12 years, but this statistic is driven almost solely by an outlier settlement in 2014. The median (mid-point) amount of time from the date a case was filed to the time it was settled therefore falls within a five-year period.

A third important observation involves the frequency of larger, versus smaller, settlements in antitrust class actions. The average (mean) settlement amount per case varied annually over the five-

¹³ 2018 Report, *supra* note 7.

¹⁴ *Id.* at 7. The Northern District of California is located in the San Francisco Bay area, the Southern District of New York in New York City, the Eastern District of Pennsylvania in the Philadelphia area, and the Eastern District of Michigan in the eastern Lower Peninsula. An unusually high number of filings were made in the District Court for the District of Columbia in 2014.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 8.

year period 2013-2018 from about \$24 million to \$42 million per year.¹⁸ But the median settlement amount ranged from about \$5 million to \$11 million per year -- far lower than the mean over the period. These statistics indicate that there is skew in the distribution of data on settlement amounts per case over the period 2013 to 2018. Namely, there are a larger number of smaller settlements per year and a smaller number of larger settlements over the period.

Finally, the 2018 Report highlights important trends in the growth of settlements across a number of size categories. For example, it reports aggregate annual settlement amounts over the period 2013 to 2018. These aggregate amounts are categorized by size: (1) less than \$10 million, (2) \$10-\$99 million, (3) \$100-\$499 million, and (4) over \$500 million.¹⁹ Over the period 2013-2018, the first two of these categories grew at average annual rates of over 30% and the third category grew at an average annual rate of almost 120%. Aggregate settlements in the range exceeding \$500 million occurred only in 2015 and 2016, so a trend is not discernable.

IV. DATA HIGHLIGHT THE EFFICIENCY AND EFFECTIVENESS OF THE ANTITRUST CLASS ACTION

The foregoing observations can be synthesized into a number of major takeaways on antitrust class actions over the period 2013-2018. These relate to both the efficiency and effectiveness of the antitrust class action device. The efficiency issue involves the volume of antitrust class action activity and the speed with which filed cases are resolved through successful recoveries. The effectiveness issue likewise relates to the speed with which cases are resolved, but also to the growth in, and key characteristics of, settlements over time.

First, the 2018 Report reveals that there is over 60% more variation in the number of cases filed than in the number of cases settled. This likely reflects the fact that in large cases, a large number of complaints may be filed and consolidated in a single multi-district litigation action, or through a similar efficient procedural mechanism. This leads to a single settlement or a small number of settlements. In other words, numerous filed complaints may actually involve only one or a few “cases” at the settlement stage.

Second, the disparity in variation between cases filed versus cases settled may also reflect, to a much smaller degree, the expected process of weeding out non-meritorious cases. This ensures that private enforcement resources are efficiently focused on violations that demonstrably harm competition and consumers. Another observation that reinforces this important point is the average time from filing to settlement. The 2018 Report data show that 50% of antitrust class actions are resolved through settlement within three to five years of filing and over 65% of cases within five years. This also speaks to the efficiency of the litigation process.

Third, the data show the not-surprising result that there are a larger number of smaller settlements per year and a smaller number of larger settlements. Growth in settlements across a wide range of size categories was robust across the period 2013-2018. For example, average annual growth in settlements of less than \$10 million and from \$10-\$99 million was over 30%, and settlements between \$100-\$499 million grew at almost 120%. These trends likely signal the effectiveness of enforcement across antitrust violations and the attendant damage they inflict on consumers.

¹⁸ *Id.* at 13.

¹⁹ 2018 Report, *supra* note 7, at 14.

Fourth, significant growth in settlements in the range of \$100-\$499 million deserves particular attention. This class of settlements signals successful cases against antitrust violations with a large impact. Thus, while there are a small number of sizeable recoveries, they are typically associated with large, often global antitrust conspiracies that significantly disrupt commerce and victimize thousands, or even millions, of U.S. consumers.²⁰ More than half of the total recovery over the period 2013-2018 came from 14 settled cases. Settlements in 2018 alone totaled about \$5 billion, including a portion of the \$2 billion recovered in the Foreign Exchange Benchmark Rates Antitrust Litigation. These data thus show that there has been significant compensation to victims in cases involving large antitrust conspiracies.

V. INFLUENTIAL CASE LAW DURING THE PERIOD COVERED BY THE 2018 REPORT

The common law evolution of antitrust rules through judicial decision-making means developments in private antitrust enforcement are never fixed for all time. In stepping back to assess the state of private enforcement in the United States, it is therefore worthwhile to examine recent decisions in important private cases, and to consider whether they may lead to significant changes in the law. Calendar year 2018 played host to a variety of decisions with important implications for both the substance and procedure governing U.S. antitrust law and enforcement.

A. *Amex* and Two-Sided Markets

The Supreme Court decided a blockbuster and highly controversial antitrust case in the 2017-2018 term, *Ohio v. Am. Express Co.* case.²¹ Holding that American Express's "antisteering" contract provisions, which prohibit merchants from encouraging customers to use less expensive payment cards instead of American Express, were not anticompetitive under a rule-of-reason analysis, the Court in a 5-4 majority opinion by Justice Thomas distinguished Amex's credit card network as a "two-sided transaction platform" with strong "indirect network efforts."²² In the credit card market, the Court noted, a card becomes more valuable to merchants when more consumers use it, and more valuable to consumers when more merchants accept it.²³

The plaintiffs' evidence that Amex had increased merchant fees without losing business failed to persuade the Court because, in its view, the record suggested that "the cause of increased merchant fees is not Amex's antisteering provisions, but rather increased competition for cardholders and a corresponding market wide adjustment in the relative price charged to merchants."²⁴ Meanwhile, "antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance."²⁵

The dissent, penned by Justice Breyer, critiqued the majority's apparent disregard of certain facts found by the District Court, including testimony by merchants, which the District Court credited, that they would have encouraged customers to use cheaper cards if not for the antisteering

²⁰ A single large antitrust case and settlement can involve a large number of filings. A single law firm, or multiple firms, may file many complaints in any given large case.

²¹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

²² *Id.* at 2281.

²³ *Id.* at 2286.

²⁴ *Id.* at 2288.

²⁵ *Id.* at 2290.

provision, as well as evidence that Amex raised its merchant prices 20 times in a five-year period without losing the business of any large merchant and without increasing benefits for (or cutting prices paid by) cardholders.²⁶ Further, Justice Breyer noted, the District Court found that a 1990s effort by Discover to attract merchants with lower fees and additional discounts had failed precisely because of Amex’s antisteering provision—and that Discover subsequently raised its merchant fees to match those of its competitors.²⁷

Only time will tell whether the *Amex* decision will be largely limited to the facts of the case or whether it will have a larger effect on antitrust doctrine. The decision could make it harder for plaintiffs to prosecute antitrust cases in ‘two-sided transaction’ markets and creates confusion over what that means for the rest of the economy. Two-sided markets in general are increasingly common in the digital era, and include search engines, social networks, ride sharing, e-commerce, and rental exchanges, among other “platform” businesses.

B. Big Tech and *Illinois Brick*

The *Amex* decision has attracted considerable commentary as to what it means for the application of antitrust law in other two-sided markets. A forthcoming Supreme Court decision in *Apple Inc. v. Pepper*²⁸ could address this question, but (even more momentously) could give the justices an opportunity to revisit the 1977 *Illinois Brick* case, which vests the right to recover the full amount of overcharge damages for Sherman Act violations from direct purchasers and denies recovery to indirect purchasers.²⁹

In this monopolization case brought by iPhone users, the plaintiffs challenge the exclusive sale of iPhone apps through Apple’s App Store. Apple argues that app developers, not iPhone users, are the sellers of the relevant products, and Apple is merely the developers’ sales agent. Hence the users are allegedly indirect purchasers. The respondents argue that users are direct purchasers since they buy apps directly from the alleged monopolist—Apple—using the App Store.

The U.S. Department of Justice (DOJ) supports Apple’s position, but 31 states have filed an amicus brief arguing that *Illinois Brick* should be altogether overturned, contending that duplicative-recovery and apportionment concerns raised at the time simply have not panned out, as evidenced in states that permit indirect purchaser claims under state antitrust law. The American Antitrust Institute, in contrast, argued in its amicus brief that overruling *Illinois Brick* is a matter for Congress.

AAI is concerned that, if undertaken without due care, reform to the existing regime threatens to undermine the deterrent value of antitrust treble damages class actions.³⁰ Judicially overturning *Illinois Brick* likely would mean overturning *Hanover Shoe* (often described as *Illinois Brick*’s “corollary”) as well, notwithstanding that the States do not propose doing so. Allowing a pass-on defense could make direct-purchaser class actions difficult to certify under Rule 23 by introducing a host of new challenges involving predominance of common issues, including the ability to prove impact (or injury) on a classwide basis, ascertainability, and damages.

²⁶ *Id.* at 2293 (Breyer, J., dissenting).

²⁷ *Id.* at 2293-94.

²⁸ *In re Apple iPhone Antitrust Litigation*, 846 F.3d 313 (2017).

²⁹ *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

³⁰ See Am. Antitrust Inst., Class Action Issues Update (Fall 2018), <https://www.antitrustinstitute.org/work-product/class-action-issues-update-november-2018/>.

As even the Antitrust Modernization Commission (AMC) recognized in its 2007 Report, “the extent of pass-on affects both direct purchasers’ claims and the indirect purchasers’ claims” and “has the potential to prevent *any* class from being certified.”³¹ The AMC recommended legislation to “specify that courts should certify direct purchaser classes without regard to whether the injury alleged was passed on by direct purchasers.”³²

Although judicially overturning *Illinois Brick* and *Hanover Shoe* would nominally create a new category of federal indirect purchaser class actions not previously available, we know from experience with indirect purchaser class actions in *Illinois Brick*-repealer States that these would be difficult to certify, as the *Asacol* case, discussed below, aptly illustrates. Without a corresponding change to prevent defendants from using pass-on arguments to derail direct-purchaser claims *and* a relaxation of the standards governing class certification in indirect cases, *both* direct and indirect purchaser class actions could become difficult to certify, leading to a significant net reduction in overall deterrence levels. That result would be troubling, given evidence that U.S. antitrust law already produces sub-optimal levels of deterrence.³³

At oral argument, Justices Gorsuch and Kavanaugh suggested their openness to overruling *Illinois Brick*, while Justices Breyer, Alito, Sotomayor, and Kagan sought to distinguish the App Store market, in which consumers purchase apps from the alleged monopolist (Apple). Chief Justice Roberts expressed the concerns that both iPhone users and app developers could sue under the respondents’ theory. A decision is expected by the end of June.

C. Uninjured Class Members

There has been an ongoing debate among federal courts as to whether and when the presence of uninjured class members bars class certification. In 2018, the First Circuit *In re Asacol Antitrust Litig.*, a product-hopping case, weighed in on the issue.³⁴ Plaintiffs proposed to prove class wide impact through representative statistical evidence provided by experts, and to identify uninjured class members through claim forms reviewed by the claims administrator.³⁵ Approximately ten percent of class members were likely uninjured, according to both plaintiff and defense experts.³⁶

The First Circuit, on interlocutory appeal, reversed the District Court’s decision granting class certification, holding that the plaintiffs’ proposed method of sorting out uninjured class members would violate the defendants’ due process rights and require unmanageable adjudication of individual issues.³⁷ Shortly after *Asacol*, the District of New Jersey granted class certification to plaintiffs in *In re Lamictal Indirect Purchaser & Antitrust Consumer Litig.* (2018), finding the number of

³¹ Antitrust Modernization Commission, Report & Recommendations 278 (2007) (emphasis in original).

³² *Id.*

³³ See John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 Iowa L. Rev. 1997 (2015); John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 437 (2012).

³⁴ *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018).

³⁵ *Id.* at 52, 54.

³⁶ *Id.* at 51.

³⁷ *Id.* at 53, 54.

uninjured class members to be sufficiently small.³⁸ Other federal appellate courts have held that the presence of a manageable number of uninjured class members in a class does not provide an appropriate basis to deny certification.³⁹ The issue may be elevated to the Supreme Court before long.

D. Up-and-Coming: No-Poach Agreements

2018 also brought a flurry of activity involving agreements between companies not to recruit or hire each other's employees, so-called "no-poach agreements." In April 2018, the DOJ filed a civil complaint in *United States v. Knorr-Bremse AG & Westinghouse Air Brake Techs. Corp.*,⁴⁰ alleging an agreement between rail equipment suppliers not to compete for each other's employees in violation of Section 1 of the Sherman Act. The DOJ announced a settlement with the railway companies the same day it filed its complaint. A number of private class-action complaints on behalf of employees affected by similar agreements have been filed both before and since *Knorr-Bremse*.

Legislators have also recognized the potential antitrust risks of no-poach agreements. Several U.S. Senators proposed legislation to outlaw no-poaching clauses in franchise agreements and a number of state attorneys general and private plaintiffs brought antitrust suits against fast-food chains challenging the chains' no-poach clauses.

Notably, the government has focused its efforts on naked, horizontal no-poach agreements—that is, agreements between horizontal competitors that are not part of any legitimate business collaboration. These agreements, argue the government, are subject to a per se analysis. However, it is unclear whether franchise no-poach agreements will also benefit from the per se analysis, or whether they will instead be subject to the rule of reason. The DOJ recently filed a "Statement of Interest" in the Eastern District of Washington encouraging courts to apply the rule of reason to vertical franchise no-poaching agreements. However, the cases settled before the court could rule.

VI. MAJOR CASE HIGHLIGHTS

2018 also saw a number of key victories for private plaintiffs that illustrate the importance of redressing large antitrust conspiracies that harm U.S. businesses and consumers. These conspiracies can result in billions of dollars in overcharges and other market distortions in the U.S. economy, often at the hands of international cartels. While government enforcers can obtain criminal convictions and financial penalties, private enforcement provides the primary mechanism for antitrust victims to be compensated for their losses. Moreover, private damages often dwarf the amounts recovered by the government, providing a critical deterrent to wrongdoers.⁴¹ This section highlights four significant plaintiff victories: the Vitamin C case, the Auto Parts case, the Foreign

³⁸ *In re Lamictal Indirect Purchaser & Antitrust Consumer Litig.*, No. 12-cv-00995, 2018 U.S. Dist. LEXIS 209993 (D.N.J. Dec. 12, 2018).

³⁹ See, e.g., *Torres v. Mervin Canyons, Inc.*, 835 F.3d 1125, 1136, 1138 (9th Cir. 2016) (class may contain uninjured members); *Koben v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672, 677 (7th Cir. 2009) (same); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015) (same); *Messner v. Northshore Univ. Health Syst.*, 669 F.3d 802, 818–19 (7th Cir. 2012) (same); see also Joshua P. Davis, Eric L. Cramer & Caitlin May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858 (2014) (arguing classes may be certified that contain uninjured members); Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890 (2014) (same).

⁴⁰ *United States v. Knorr-Bremse AG & Westinghouse Air Brake Techs. Corp.*, No. 1:18-cv-00747 (D.D.C.).

⁴¹ See Lande & Davis, *supra* note 3.

Exchange case, and the Capacitors case.

A. Animal Science Products, Inc. v. HeBei Welcome Pharmaceutical Co. (Vitamin C)

Vitamin C, also known as ascorbic acid, is an ingredient found in products in nearly every American household. Much of the vitamin C in the United States is imported from China, which has been a leading worldwide producer for more than half a century. Beginning in 2005, several classes of U.S. purchasers of vitamin C filed class action complaints alleging that a cartel of four Chinese companies had conspired to create an artificial shortage and fix prices for 80% of the vitamin C in the United States.⁴² Like many of the large and most damaging international cartels, the scheme allegedly caused not only higher prices for purchasers, but large wealth transfers from U.S. businesses and consumers to foreign corporations.

Animal Science Products, a small family-owned business in northeast Texas, alerted counsel that the market had consolidated to just four Chinese manufacturers with over 70% of the worldwide market, and that prices had been rising. Private enforcers uncovered a report in connection with an exhibition in China of an “emergency” meeting of the manufacturers, after which prices doubled. Moreover, the Chamber of Commerce for the manufacturers reported on its website that in November 2001, “domestic manufacturers were able to reach a self-regulated agreement successfully, whereby they would voluntarily control the quantity and pace of exports, to achieve the goal of stabilization.” Earnings of over \$20 million accompanied this agreement.

Prior to the trial, the defendants moved first to have the case dismissed and then for an award of summary judgment. They did not deny allegations of an antitrust violation, instead claiming that their conduct was compelled by the Chinese Ministry of Commerce. They argued they were exempt from antitrust scrutiny under the foreign sovereign compulsion doctrine, the act of state doctrine, and principles of international comity. The Chinese government, for the first time ever, appeared through counsel to file an amicus brief in support of the defendants.

The district court allowed the trial to proceed, and a jury eventually returned a \$147 million verdict for the victims. But on appeal, the Second Circuit reversed the judgment. The court held that the district court was obligated to accept the interpretation of Chinese law offered by the Chinese government, and that it should have granted the defendants’ motion to dismiss under principles of international comity. The decision set the stage for the U.S. Supreme Court to decide the proper standard of deference owed to statements of foreign sovereigns regarding interpretations of foreign law.

On June 14, 2018, the plaintiffs won a landmark victory. In an opinion authored by Justice Ginsburg, a unanimous Supreme Court held that a foreign government’s interpretation of its own law is not binding on U.S. courts. The holding creates important precedent for future cases where U.S. victims’ rights are threatened by interpretations of foreign law or international comity principles. As a result of the Supreme Court’s finding, consolidated class victims were permitted to pursue the \$147 million recovery awarded by the jury. Boies Schiller Flexner LLP, Hausfeld LLP, and Susman Godfrey LLP are co-lead counsel for the direct purchaser damages class and injunctive

⁴² *Animal Science Products, Inc. v. HeBei Welcome Pharmaceutical Co.*, Case No. 13-4791-cv, first consolidated as *In re Vitamin C Antitrust Litigation*, No. 06-mdl-1738-DGT.

class.

B. In re Automotive Parts Antitrust Litigation (Auto Parts)

Beginning in 2011, the Antitrust Division of the DOJ brought criminal cases against 48 automotive parts suppliers and 65 individuals working for automotive parts companies due to their involvement in a wide-ranging conspiracy to fix the prices of bids on automotive parts. The suppliers provided parts, mostly for cars manufactured by Japanese OEMs, such as Toyota, Honda, Nissan, and Mitsubishi. The DOJ obtained numerous guilty pleas from these defendants, and as a result collected fines in excess of \$2.9 billion for illegal activities.

In the wake of the indictments and guilty pleas obtained by the DOJ, automobile dealers, direct purchasers, and end payors (i.e., consumers) asserted damage claims, on behalf of their respective classes of purchasers, under state and federal antitrust, consumer protection, and unjust enrichment laws. These claims were consolidated in the United States District Court for the Eastern District of Michigan under the caption *In re Automotive Parts Antitrust Litigation* and the leadership of Judge Marianne O. Battani.⁴³ In total, plaintiffs brought cases involving 43 separate automotive parts that performed different functions, ranging from electrical components (e.g., wire harnesses), to mechanical components (e.g., door locks), to rubber components such as anti-vibrational rubber parts.

Auto dealers and other classes have pursued litigation since 2011, overcoming motions to dismiss, as well as reviewing voluminous discovery from the defendants and third parties. Just over seven years later, the automobile dealer settlements that have been executed or agreed upon total over \$385 million—\$298 million of which received final approval by the court in the first three rounds of settlements. The settlement process involved multiple tranches. As of early 2019, the court approved three settlement tranches involving 42 of 72 defendant groups. The fourth remaining tranche is expected to include settlements with at least 28 additional defendant groups.

More than 2,500 auto dealers received payments.⁴⁴ John Isaacson, the CEO of Lee Auto Malls in Maine, one of the automobile dealership class representatives stated, “Our businesses received significant compensation for the damages we suffered as a result of this criminal conspiracy. This litigation and these payments have been important to our businesses’ obtaining the remedies they deserve.”

In total, \$1.7 billion in recoveries have been granted final approval to compensate the Dealership, Direct Purchaser, and End Payor classes for the collusive activity. Cuneo Gilbert & LaDuca, Barrett Law Group, and Larson King represent the automobile dealer class. Direct Purchaser Plaintiffs are represented by Freed Kanner London & Millen LLC, Kohn Swift & Graf PC, Preti Flaherty Beliveau & Pachios LLP, and Spector Roseman Kodroff & Willis PC. End Payor Plaintiffs are represented by Robins Kaplan LLP, Susman Godfrey LLP, and Cotchett Pitre & McCarthy LLP.

C. In re Foreign Exchange Antitrust Litigation (Foreign Exchange)

⁴³ *In re Automotive Parts Antitrust Litigation*, No. 2:12-md-02311 (E.D. Mich.).

⁴⁴ In the first round of settlements, the average dealer payment was \$14,150 and in the second round the average payment was \$22,961.

In *In re Foreign Exchange Antitrust Litigation*, plaintiffs alleged that defendants fixed prices in the Foreign Exchange (FX) market. The FX market is one of the largest in the world, with trading volume of up to \$5.3 trillion per day.⁴⁵ Defendants' alleged collusive trading strategies included agreeing to quote widened spreads, exchanging trading strategies, and revealing confidential client order information, in violation of the Sherman Act and the Commodity Exchange Act.

Defendants include some of the world's largest banks: Bank of America, Barclays, BNP Paribas Group, Citigroup, Goldman Sachs, HSBC, JPMorgan, RBS, UBS, Deutsche Bank, Morgan Stanley, BTMU, RBC, Societe Generale, Standard Chartered, and Credit Suisse. Victims of illegal conduct included individuals and institutional investors such as public pension funds, such as police and fire pension funds, and Taft-Hartley union funds.

Following four years of litigation, private enforcers negotiated settlements with 15 of the 16 defendants totalling \$2.3 billion and obtained agreements to provide on-going cooperation.⁴⁶ The partial settlement is the fourth largest antitrust class action settlement ever achieved. While government regulators and prosecutors have imposed fines and reached settlements with certain banks for FX-related misconduct, only the private settlements will provide restitution for the institutional investors and individual victims of illegal conduct.

Chase Rankin, Executive Director of the Oklahoma Firefighters Pension and Retirement System, stated, "Private enforcement of antitrust law is of vital importance to public pension funds and other investors in the United States who rely on the integrity of the financial markets when investing for the pensions and disability benefits of our members. In the FX litigation, despite the billions of dollars in fines and penalties paid to regulators in the U.S and abroad, only private enforcement actions like the one led by the Oklahoma Firefighters ultimately returned stolen monies to defrauded investors." Scott+Scott Attorneys at Law LLP and Hausfeld LLP served as lead counsel in *In re Foreign Exchange Antitrust Litigation*.

D. In re Capacitors Antitrust Litigation (Capacitors)

Following investigations by competition authorities worldwide, plaintiffs brought a class action in 2014 against the principal Japanese capacitor manufacturers, alleging price fixing for aluminum, tantalum and film capacitors from 2002-2013.⁴⁷ Capacitors are passive electric components used to store electric energy.⁴⁸ They vary in size, ranging from smaller than a grain of rice to larger than a garbage can. Virtually every electric device uses multiple capacitors. The typical cell phone, for example, contains hundreds of capacitors.

In recent years, virtually every sector of the modern electronics industry has fallen victim to a price-fixing scheme, likely due in part to the limited number of players. Inflating the price of component parts even by a small amount can cause widespread harm, increasing costs for a wide range of products. In *In re Capacitors Antitrust Litigation*, the plaintiffs alleged that during a 12-year period, the defendants' senior executives met regularly to exchange information about sales revenue and

⁴⁵ *In re Foreign Exchange Antitrust Litigation*, No. 13-cv-07789 Southern District of New York.

⁴⁶ Credit Suisse remains the sole non-settling defendant in the case.

⁴⁷ *In re Capacitors Antitrust Litigation*, Case No. 3:17-md-2801-JD, first consolidated as *In re Capacitors Antitrust Litigation*, Case No. 3:14-cv-03264-JD

⁴⁸ A capacitor consists of two metal plates that hold a charge separated by a non-conductive dielectric. Common forms include aluminum capacitors, tantalum capacitors, plastic film capacitors and ceramic capacitors.

manufacturing output, enabling them to control pricing in the short term, while also agreeing to restrict production to ensure higher long-term prices. Moreover, the defendants coordinated their agreements so that they could achieve supracompetitive profits globally.⁴⁹

Smaller firms such as electronics distributors and contract manufacturers that serve local markets are particularly susceptible to victimization by colluding, globally integrated multinational conglomerates that agree to fix prices. In *Capacitors*, 22 corporate defendants have begun to reach settlement agreements with the plaintiffs. To date, nine defendants have agreed to pay over \$216 million for distribution to the over 1,900 injured direct purchaser class members, and over \$49 million to the many thousands of indirect purchaser class members.⁵⁰ The Joseph Saveri Law Firm is lead class counsel for the direct purchasers and Cotchett, Pitre & McCarthy are lead class counsel for the indirect purchasers.

The Antitrust Division of the DOJ is also investigating the same companies. While DOJ's investigation does not provide any restitution for consumers who overpaid (directly or indirectly), the government has obtained guilty pleas from eight corporate defendants and obtained convictions of two individual corporate executives. The capacitor litigation demonstrates how the current system, allowing for government investigation and private litigation, maximizes deterrence and provides meaningful compensation to victims of illegal conduct. The combination of the potential for criminal conviction, followed directly by the prospect of liability to compensate victims in civil cases, creates an important deterrent to foreign companies seeking to fix prices paid by U.S. companies.

VII. CONCLUSIONS

This Commentary uses the occasion of the 2018 Report to step back and observe the U.S. private enforcement system and the antitrust class action device through a broader lens, both empirically and qualitatively. We observe a variety of notable trends and developments that pertain to both the efficiency and effectiveness of the antitrust class action in obtaining relief for victims of harmful conduct.

It is clear that private enforcement resources are efficiently focused on violations that demonstrably harm competition and consumers. Settlements usually are obtained in a relatively short period of time (i.e., within five years). There has also been robust growth in settlements, signaling the effectiveness of private enforcement in obtaining restitution for the damage they inflict on consumers. And the data show that there has been significant compensation to victims in cases involving large antitrust conspiracies that harm thousands, or even millions, of consumers.

We also observe key decisions in 2018 involving two-sided transaction platforms, the indirect-purchaser rule, classes containing uninjured members, and agreements among employers that restrict employee hiring and wages. The implications of these decisions are only just beginning to unfold. Finally, we see evidence of successful decisions and recoveries, indicating that private enforcement

⁴⁹ At some meetings, the participants were alleged to have discussed specific defined percentage amounts by which their companies would raise prices. At others they were alleged to have coordinated messaging to customers justifying the increases.

⁵⁰ Of the funds agreed upon, \$99.5 million has reached final approval by the court for direct purchasers, and almost \$15 million has reached final approval by the court for indirect purchasers.

remains a critical tool in the U.S. enforcement arsenal and can deliver meaningful compensation to victims while deterring substantial anticompetitive harm caused by massive, global antitrust conspiracies.