

# THE CRITICAL ROLE OF PRIVATE ANTITRUST ENFORCEMENT IN THE UNITED STATES

COMMENTARY ON:

2020 ANTITRUST ANNUAL  
REPORT: CLASS ACTION  
FILINGS IN FEDERAL COURT

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ANTITRUST  
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# I. INTRODUCTION

With all of the attention currently focused on public enforcement and legislative reform of the antitrust laws, less attention is being paid to private enforcement.<sup>1</sup> But Congress considered private antitrust enforcement indispensable for promoting competition. The judiciary has so recognized time and time again. In *California v. American Stores Co.*, for example, the Supreme Court proclaimed, “Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.”<sup>2</sup>

Private enforcement is not a substitute for vigorous public enforcement. Both are necessary to foster competition. But private enforcement plays an important part, one that becomes more significant when public enforcement recedes.<sup>3</sup> And, unlike public enforcers, private enforcers can obtain significant damages on behalf of the victims of antitrust violations.<sup>4</sup> This serves as a crucial source of deterrence for illegal anticompetitive conduct and the primary means of compensating victims for harms suffered at the hands of cartelists and dominant firms.<sup>5</sup> The importance of the antitrust class action, a major private enforcement device, is clear. The recently released 2020 Antitrust Annual Report: Class Action Filings in Federal Court (“2020 Report”)<sup>6</sup> by Huntington National Bank and the University of San Francisco School of Law (“USF Law”) reflects that the cumulative total settlement amount recovered for victims in antitrust class actions from 2009-2020 was over \$27 billion.<sup>7</sup>

Antitrust class actions recover damages from companies engaged in harmful, illegal conduct, such as price fixing and attempted monopolization, in markets for important and essential products and services. The most active defendants during the period, for example, included companies providing financial services, pharmaceuticals, automobile parts, and electronics parts.<sup>8</sup> In light of the vital role played by private antitrust enforcement, and the antitrust class action in particular, continued empirical analysis of trends in activity is essential. This analysis aids in understanding and evaluating proposals for reforming the antitrust laws in the U.S. and such proposals’ impact on private enforcement, the public-private partnership, and ultimately on competition and consumers.

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<sup>1</sup> See American Antitrust Institute, The State of Antitrust Enforcement and Competition Policy in the U.S. (2020) [hereinafter “AAI Report”], <https://www.antitrustinstitute.org/work-product/antitrust-enforcement-report/>.

<sup>2</sup> *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990).

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

<sup>4</sup> 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 (2011).

<sup>5</sup> See Davis & Lande, *supra* note 3.

<sup>6</sup> Huntington National Bank & Univ. of San Francisco School of Law, 2020 Antitrust Annual Report: Class Action Filings in Federal Court (Aug. 2021) [hereinafter “2020 Report”], available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3898782](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3898782).

<sup>7</sup> *Id.* at Figure 8.

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

## II. OVERVIEW OF THE COMMENTARY

The American Antitrust Institute (AAI)<sup>9</sup> and Professor Joshua P. Davis at USF Law<sup>10</sup> evaluated the 2020 Report with the goal of identifying its major implications for private enforcement in the U.S. The 2020 Report builds and expands on the 2019 Antitrust Annual Report: Class Action Filings in Federal Court (“2019 Report”)<sup>11</sup>, which assessed private enforcement activity from 2009-2019. Like the 2019 Report, the 2020 Report relies largely on data for private U.S. antitrust class actions available through Lex Machina, as well as supplemental data analysis.<sup>12</sup> The 2020 Report extends the dataset to the eleven-year period covering 2009-2020, thus allowing for a deeper analysis of private enforcement trends and their implications. 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.

## III. OBSERVATIONS AND IMPLICATIONS FOR PRIVATE ENFORCEMENT

The 2020 Report provides further evidence of a divergence between public and private enforcement trends. As public enforcement has waned, private filings have waxed, undermining the notion that class actions simply ride the coattails of public enforcement. On the contrary, the data suggest that as lax public enforcement fosters higher market concentration and invites bad behavior, private filings may compensate for underenforcement in an effort to address the resulting antitrust violations.

Looking beyond the number of enforcement actions filed and focusing on the results of the actions, the rich data reveal more nuance to this narrative. Despite increased private actions in the face of decreased public enforcement, the amount of money recovered from violators by both public and private enforcers has diminished. For public enforcers, this diminution is to be expected, as fewer cases have been brought. For private enforcers, though, the explanation likely lies with other trends, most notably the increasing headwinds faced by private enforcers due to heightened pleading and class certification standards. If these explanations are correct, the clear implication is that for private enforcement to fulfill its increasingly vital role as a complement and a backstop to public enforcement, these trends must be reversed.

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<sup>9</sup> AAI is an independent and non-profit organization devoted to promoting competition that protects consumers, businesses, and society. See <http://www.antitrustinstitute.org>. AAI serves 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. Individual views of AAI’s Board of Directors or Advisory Board may differ from AAI’s positions.

<sup>10</sup> Joshua Davis is Professor and Director, Center for Law and Ethics at the University of San Francisco School of Law.

<sup>11</sup> Huntington National Bank & Univ. of San Francisco School of Law, *2018 Antitrust Annual Report: Class Action Filings in Federal Court* (Aug. 2020) [hereinafter “2019 Report”], available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3696575](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696575).

<sup>12</sup> 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 2020 Report, *supra* note 6, at 37.

A theme we noted in the 2019 Report, and that continues to feature in the 2020 Report, is the tremendous variability in the data on some measures related to settlement size. Aggregate settlement amounts over the period vary widely from year to year. By disaggregating the settlements by size, however, we are able to observe that settlements at different levels trend somewhat independently. Very large settlements, which are few in number, drive most of the variability in the aggregate data. But trends and anomalies in very small settlements cannot be entirely discounted, as they are the force behind one of the highest recovery years in the period, 2018.

Finally, building on analysis from our 2019 commentary, we take a deeper dive on attorneys' fees and how they correspond to settlement amounts. Our findings reinforce the tentative conclusion from last year's analysis that the so-called "megafund doctrine"—a dramatic decrease in attorneys fee percentages on settlements above a threshold of about \$100 million—does not operate in federal antitrust cases in a significant way. Rather, decreases in the fee award percentage in antitrust cases are not discrete and drastic, but rather gradual, much like marginal tax rates in the United States. In what follows, we discuss each of the above observations in more detail and provide analysis of their implications for private enforcement, many of which suggest fertile areas for additional study.

## **A. THE RELATIONSHIP OF PRIVATE TO PUBLIC ENFORCEMENT: RIDING ON COATTAILS OR STEPPING INTO THE BREACH?**

A long-running antitrust policy debate centers on the value that private enforcement adds to the antitrust enterprise as a whole. Critics of private actions maintain that private plaintiffs often follow an easy trail blazed by government enforcers, and that private enforcement therefore does not supplement worthwhile public actions as much as it should. Proponents of private actions have sought to debunk this claim with empirical evidence suggesting that many large and successful private antitrust cases often precede, or else expand the scope of relief sought in, any overlapping government actions.<sup>13</sup>

Data from the 2020 Report, together with future reports, may warrant a reexamination of this debate through a different lens. Apart from the question of the extent to which private enforcement serves as a useful complement to public enforcement, it may also be worth inquiring into the extent to which private enforcement serves as a *substitute* for public enforcement, particularly during periods of government forbearance.

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<sup>13</sup> See Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEA. U. L. REV. 1269, 1292-93 (2013) (Study of 20 successful private cases finding that 50% were not preceded by government action, and that \$8.36 billion of the \$10.7 billion in total victim recovery involved cases that either preceded government enforcement or significantly expanded the scope of recovery the government sought); see also Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of 40 Cases*, 42 U.S.F. L. REV. 879 (2008) (discussing 6 cases of mixed public/private origin that led to over \$4.2 billion in victim recovery); John C. Coffee, Jr., *Understanding the Plaintiffs Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.36 (1986) ("Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at '[l]ess than 20% of private antitrust actions filed between 1976 and 1983.'").

As AAI noted in an independent report, “The State of Antitrust and Competition Policy in the U.S.,” several indicators had suggested a decline in government cartel enforcement at the midway point of the Trump Administration.<sup>14</sup> Perhaps most notably, the average number of cartel investigations opened during the period from 2017-2018 was 80% lower than the annual average number of investigations opened over the previous three administrations (1993-2016). In addition, the average number of corporations fined by the Trump agencies in 2017 and 2018 fell by about 45% relative to the Obama Administration.

Notably, the 2020 Report shows that private federal consolidated antitrust filings rose significantly during each year of the Trump Administration. First, they increased from 74 in 2017 to 136 in 2018. But in 2019, they rose dramatically to a ten-year-high of 211. And, in 2020, that number was eclipsed, with 220 filings. In other words, a dramatic increase in private filings appears to have occurred immediately subsequent to a substantial decline in the opening of government cartel investigations and the number of corporations fined.

Neither a causal connection, nor a consistent pattern, can be discerned from two years of diminished government attention to cartels that was immediately succeeded by two years of increased private attention to cartels. But the 2020 Report, coupled with government workload statistics, suggest it may be worth watching for more robust trends in the future. If periods of increased private enforcement reliably correlate with periods of decreased government enforcement, the implications for the long-running policy debate over the utility of private enforcement would be significant, and the debate would take on important new dimensions.

## **B. RISING CONCENTRATION AND DOMESTIC CARTELS: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT RESULTS**

If we expand the timeframe of our analysis and look not just at cases filed and investigations opened but at the results achieved by private and public enforcers, both of which the 2020 Antitrust Annual Report data allow us to do, we can delve further into the interplay between public and private enforcement efforts, yielding additional insights.

Trends in private Section 1 cases from 2009-2020 provide more insight into private enforcement. For example, looking at private Section 1 cases from 2009-2020 as shown in the figure below, the number of settlements reached a high in 2018, preceded by a lower peak in 2016.<sup>15</sup> With the expanded data on cases available in the 2020 Report, it is clear that the number of private Section 1 cases settled has trended upward over the past decade.<sup>16</sup> We compared these cases with federal criminal Section 1 cases won by the U.S. Department of Justice (DOJ) Antitrust Division from 2009 to 2019, the latest fiscal year for which data are

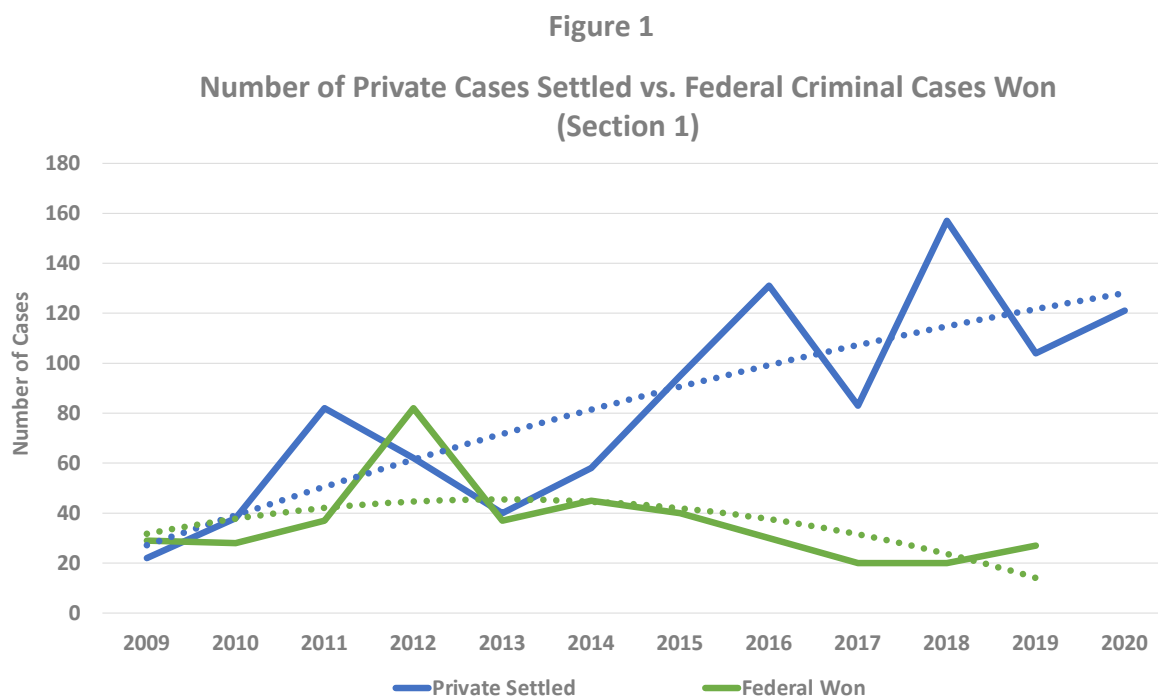
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<sup>14</sup> AAI Report, *supra* note 1.

<sup>15</sup> Analysis in Section III.B is based on the data supporting Section 1 cases reported in the 2020 Report (Figure 13).

<sup>16</sup> Figures 1 and 2 include fitted (polynomial) trend lines for statistics on both private and federal cases.

available.<sup>17</sup> In contrast to private Section 1 cases settled, federal criminal cases have trended downward over the same period.<sup>18</sup>



Turning to monetary remedies obtained in successful private and public Section 1 cases, we compared settlement dollars in successful private cases with total fines levied in federal criminal cases. In the latter case, total fines include both individual and corporate fines.<sup>19</sup> The figure below shows a 2-year moving average for both measures. Private cases recovered just over \$20 billion in restitution for victims of violations such as agreements to fix prices and allocate markets over the period 2009-2020. These recoveries rose sharply between 2013-2014, again between 2017-2018, and have fallen off since then.

Federal criminal fines in Section 1 cases totaled about \$10 billion from fiscal year 2009-2019. Fines trended upward through about 2014, dipped through 2016, peaked in 2017, and fell precipitously under the Trump Administration’s Antitrust Division through fiscal year 2019. The dollar volume of restitution obtained in private cases began to outpace public fines as of about 2014. Since then, private settlement dollars have remained at higher levels than fines in federal cases.

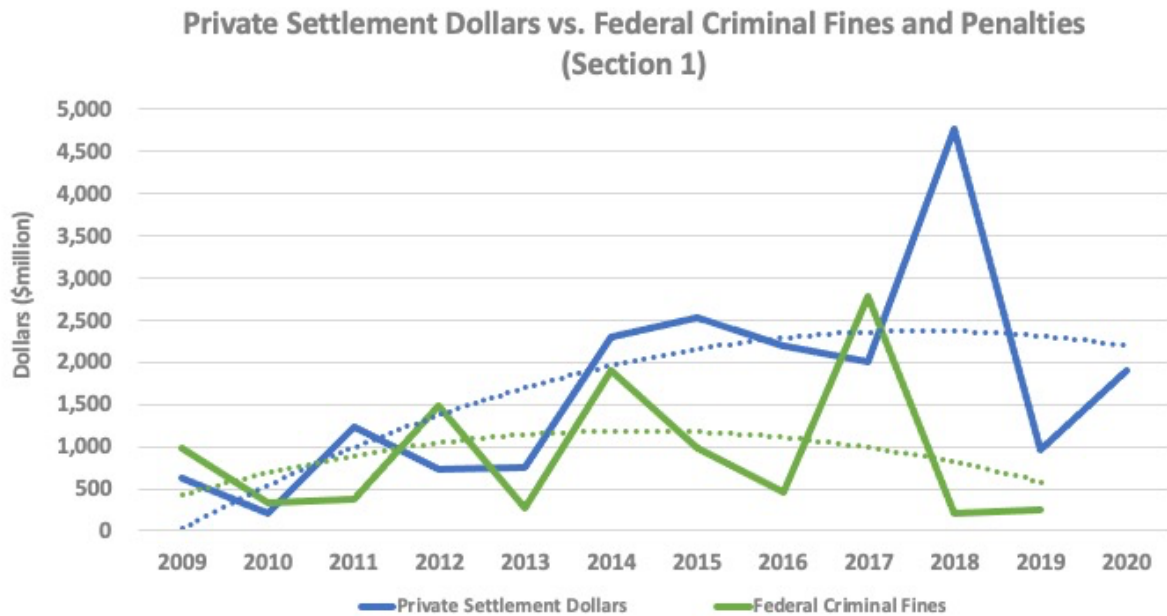
<sup>17</sup> The federal “fiscal year” includes the final three months of the previous year and the first nine months of the current year. Federal data shown in Figures 1 and 2 are assigned to the fiscal year (e.g., 2013 fiscal year data are assigned to 2013, since the majority of months occur in 2013).

<sup>18</sup> U.S. Department of Justice, Antitrust Division, *Antitrust Division Workload Statistics: FY2010-2019*, at 7 [hereinafter “Antitrust Division Workload Statistics: FY2010-2019”], <https://www.justice.gov/atr/file/788426/download>; Department of Justice, Antitrust Division, *Antitrust Division Workload Statistics: FY2000-2009*, at 8 [hereinafter “Antitrust Division Workload Statistics: FY2000-2009”], <https://www.justice.gov/sites/default/files/atr/legacy/2012/04/04/281484.pdf>. The Antitrust Division tracks settlements only in civil cases. In criminal cases, it appears to count both plea agreements and convictions as “wins.” See Antitrust Division Workload Statistics: FY2010-2019, *supra*, at 7, n.14.

<sup>19</sup> *Id.* at 11.



Figure 2



The two figures shown above reveal a number of important observations about private and public Section 1 enforcement. First, as we noted in our 2019 Commentary,<sup>20</sup> the gap between private and public Section 1 enforcement over the last decade is notable. One explanation for the disparity in the two trends, discussed in more detail in the prior section, is that consolidation and rising concentration, coupled with lax merger enforcement over the last several decades, have created fertile ground for collusion in markets dominated by only a few major rivals, prompting a proliferation of antitrust violations. Under this theory, private enforcers have stepped up in providing an important source of restitution and deterrence for the direct and indirect purchasers of goods and services that are the subject of Section 1 violations.

Second, it is not clear to what extent the fall off in cases won and fines levied in federal criminal Section 1 cases since about 2013 is related to an inability to keep up with domestic cartel activity, agency resource constraints, or differences in enforcement under different political administrations. Other developments, such as the vigor of the Antitrust Division's leniency program, may also factor into federal enforcement statistics.

Third, Figures 1 and 2 reveal a somewhat troubling trend. The number of private cases that settled per year continued to rise in a roughly linear way, but the total amount recovered per year appears to be levelling off, or even beginning to decline. Those two trends together suggest a decrease in the mean recovery per case. Various explanations may be possible for this

<sup>20</sup> See American Antitrust Institute & University of San Francisco School of Law, *The Vital Role of Private Antitrust Enforcement in the U.S.* (Sept. 21, 2020), <https://www.antitrustinstitute.org/wp-content/uploads/2020/09/AAI-Commentary-on-2019-Annual-report.pdf>.

phenomenon. One possibility is that courts have become progressively less receptive to private antitrust cases, making it more difficult for plaintiffs to succeed<sup>21</sup> and hence more likely that they would settle for a modest amount. Another possibility is that the decline of public enforcement has impeded private enforcement. These and other possibilities are not necessarily mutually exclusive. Further study would be necessary to understand why the average recovery per case has gone down. Additional data may also cast light on this issue. The current administration, for example, appears more eager to enforce the antitrust laws than its predecessor. If it is, and if the courts maintain a similar lack of solicitude toward class actions (changes in the composition of the federal judiciary tend to be relatively slow), future patterns in private recoveries may make it possible to tease out the dynamics at work.

Finally, the falloff in private dollar settlements since about 2017-2018, even despite the few large settlements within that period, is potentially troubling. As discussed, private enforcement serves an important function in stepping into the void left by inadequate federal enforcement. But rising standards for showing collusion in private price fixing cases are problematic. For example, federal courts have been steadily increasing the burden on plaintiffs pleading antitrust conspiracies to establish that the defendants' conduct results from collusion and not from un-coordinated, but consciously parallel, conduct among competitors. This has, ironically, meant that it is *more* difficult for plaintiffs to successfully allege collusion where industries are highly concentrated, because where there are only a few competitors, competitors do not need to actually collude in order to achieve supracompetitive prices.

Other factors also increase the burden on private plaintiffs in bringing and litigating Section 1 cases, as explained in AAI's May 7, 2020 commentary, "When COVID-19 is the Symptom and Not the Disease: Consolidation, Competition, and Breakdowns in Food Supply Chains."<sup>22</sup> These include: obtaining class certification, which has become increasingly difficult over the last several decades and presents a considerable barrier to private antitrust litigation, and identifying which consumers were harmed and by what amount. Additional barriers include the primacy of the government's "interest" in overlapping private suits, which can ultimately aid private plaintiffs, but can significantly impair the ability of private plaintiffs to effectively litigate their claims.

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<sup>21</sup> For a general description of the procedural hurdles courts have erected to class actions, see, e.g., Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013). For a discussion that addresses class certification in antitrust cases in particular, see Joshua P. Davis & Anupama Reddy, *Unintended Consequences: Abolishing the Direct Purchaser Rule as a Threat to Private Antitrust Enforcement* (forthcoming 2021/22 in the *Antitrust Law Journal*), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3699110](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699110).

<sup>22</sup> See American Antitrust Institute, *When COVID-19 is the Symptom and Not the Disease: Consolidation, Competition, and Breakdowns in Food Supply Chains* (May 7, 2020), <https://www.antitrustinstitute.org/work-product/when-covid-19-is-the-symptom-and-not-the-disease-consolidation-competition-and-breakdowns-in-food-supply-chains/>.



## C. CASE SIZE AND ANNUAL RECOVERIES

The 2020 Report reveals significant variation in the recovery from federal antitrust class actions by year.<sup>23</sup> One interesting question is whether that variation should be attributed to the happenstance of very large recoveries in individual cases in particular years, to volatility in the number of settlements of more modest size, or both. The following table can help to make sense of the data.

Year	Total <sup>24</sup>	Class Recoveries (\$s in Millions)				
		Total w/o ≥ \$500	< \$10	\$10-\$99	\$100-\$499	≥ \$500
2009	1,006	1,006	25	395	586	0
2010	225	225	90	135	0	0
2011	1,629	1,629	119	1,100	410	0
2012	931	931	73	718	140	0
2013	1,212	1,212	89	814	309	0
2014	2,792	2,792	143	949	1,700	0
2015	3,322	2,810	210	1,400	1,200	512
2016	4,713	3,313	313	1,600	1,400	1,400
2017	2,267	2,267	171	896	1,200	0
2018	5,292	5,292	292	1,900	3,100	0
2019	1,006	1,006	220	603	183	0
2020	3,225	2,475	285	1,600	590	750
<b>Total</b>	<b>27,620</b>	<b>24,958</b>	<b>2,030</b>	<b>12,110</b>	<b>10,818</b>	<b>2,662</b>

The above table shows some interesting possibilities, although, of course, we cannot draw any reliable inferences without further analysis. One point relates to 2019. The total recoveries in that year add to just over a billion dollars, the smallest total since the total recoveries of \$931 million in 2012. In 2019, however, the total recoveries from settlements of less than \$10 million (\$220 million) were reasonably in line with other years, as was true to only a somewhat lesser extent of the total recoveries from settlements of \$10 to \$90 million (\$603 million). But 2019 saw unusually modest recoveries of \$100 million or more. So, an explanation of why the total recoveries in 2019 were so much less than in other recent years might do best to focus on relatively large cases, not on relatively small ones.<sup>25</sup>

More generally, we see more consistency in the total annual recoveries when we eliminate

<sup>23</sup> 2020 Report, *supra* note 6, at 14 (figure 10).

<sup>24</sup> These annual totals are based on adding up the total recoveries in each category for each year as set forth in Figure 10 on page 14 of the 2020 Report. They do not perfectly match the totals in the 2020 Report because of rounding errors. See 2020 Report, *supra* note 6, at 12, Fig. 8.

<sup>25</sup> We are cautious about this suggestion in part because there is the possibility that the same dynamic that reduced the number of large settlements increased the number of small settlements—a plausible possibility—so that the two are related.

settlements of \$500 billion or more, particularly for 2014 through 2020. That is not surprising. A single settlement of \$500 billion has a large impact on an annual total. Without those large settlements, 2015, 2016 and 2020 stand out much less from other years. That suggests variations in total recoveries by year can be attributable in no small part to the luck of when very large cases resolve.

That said, this analysis makes 2018 appear all the more anomalous. Not only were the total recoveries well over \$500 million more than any other year in the data—approximately \$5.3 billion—but in 2018 there were no settlements greater than \$500 million. Instead, 2018 stands out because of settlements from \$10 to \$99 million and, especially, from \$100 to \$499 million. So, the mystery of 2018 only becomes deeper by separating out recoveries by size. That said, it is possible that in 2019 a disproportionately large number of cases settled for amounts close to \$500 million, so eliminating the highest category recoveries is actually in a sense misleading. Only a deeper dive into the data—and perhaps the underlying cases—would cast light on this issue.

Overall, then, the above table suggests caution in drawing inferences from annual totals. Litigation dynamics, and the underlying economic behavior they reflect, can play out differently in large settlements than small settlements—and can turn large settlements into small settlements. A careful analysis should disaggregate settlements of different sizes to assess patterns and trends and to test hypotheses.

## **D. Percentage Attorneys’ Fee Awards in Federal Antitrust Class Actions**

Another area where the 2020 Report provides valuable empirical evidence in its own right and also an evidentiary basis for further research is the pattern of attorneys’ fee awards in antitrust class actions. The commentary to the 2019 Report identified some patterns in fee awards that had the potential to upset conventional wisdom. Some courts have said, for example, that the standard fee award in federal class actions in general is 25% of the class recovery (plus reimbursement of costs). In contrast, we discussed in our Commentary on the 2019 Report that the median fee award in federal *antitrust* class actions is 30% of the class recovery (plus costs).<sup>26</sup> The 2020 Report confirms this finding.

We also noted in our commentary on the 2019 Report that the median fee award did not decrease as much as the size of federal antitrust settlements increased as inherited wisdom would suggest. The new data in the 2020 Report reveals a slightly different relationship between fee award percentage and settlement size than the 2019 Report.<sup>27</sup> That can be seen by comparing the following tables.

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<sup>26</sup> 2019 Report, *supra* note 11, at 9.

<sup>27</sup> See 2020 Report, *supra* note 6, at Figure 14.

2019 Report		2020 Report	
Settlement Amount	Fee Award	Settlement Amount	Fee Award
\$1B +	14%	\$1B +	14%
\$500-999M	28%	\$500-999M	26%
\$250-499M	25%	\$250-499M	25%
\$100-249M	28%	\$100-249M	30%
\$50-99M	30%	\$50-99M	30%
\$10-49M	31%	\$10-49M	31%
< \$10M	30%	< \$10M	30%
Overall	30%	Overall	30%

Based on the 2019 Report, our 2019 commentary acknowledged that it was unclear whether there is an inverse relationship between the size of a class recovery and the percentage fee award, particularly for class recoveries below \$1 billion. Our commentary also questioned whether courts in federal antitrust cases apply the so-called “megafund” doctrine—which supports a significant, discrete drop in the percentage fee awarded beyond a particular threshold, at times noted to be \$100 million.<sup>28</sup>

One of the authors of this commentary has since worked with others to analyze the underlying data.<sup>29</sup> That analysis proved productive. We learned that there is a statistically significant inverse relationship between the size of a class recovery and the percentage fee awarded to class counsel. Still, the size of a class recovery explains only about 10% of the variation in fee awards. In other words, case-specific factors—within the broad discretion of trial courts—appear to explain variations in the percentage fees awarded far more than any simple formula based on the size of the class recovery.

We also found that the effect of an increase in the size of a class recovery is small. Only for very large class recoveries—well beyond \$100 million—does the typical fee award fall substantially below 30%. For a recovery of \$100 million, for example, our analysis predicts a fee award of 28.9% and for a recovery of \$1 billion, a fee award of 22.1%. Again, however, the data predict very significant deviations from these predictions—upward or downward—in any given case. Also of interest, the decrease in fee percentage appears to be *incremental* for all class recovery sizes. In other words, the data do not support the existence of a threshold beyond which the fee award percentage drops by a discrete and significant amount. So, the megafund doctrine—to the extent it involves such a drop—does not seem to operate in antitrust cases in federal court.

The way we tested for potential effects of the megafund doctrine was by analyzing the data for statistically significant structural breaks at class recovery amounts that we identified ex ante—

<sup>28</sup> See, e.g., Rubenstein et al., *Newberg on Class Actions* § 15.80, § 15.81, n.11 (5th ed. 2011-21).

<sup>29</sup> Joshua P. Davis, Kevin Caves, & Walt Cook, *Law in the Books versus Law in Action: How Courts Really Award Attorney’s Fees in Federal Antitrust Class Actions* (draft on file with Joshua P. Davis).

most relevantly at \$100 million but also at \$250 million or \$500 million. We did not find any such break in the data. Instead, the data support the conclusion that decreases in the fee award percentage are not discrete and drastic, but rather gradual, much like marginal tax rates in the United States.

In this regard, it is important to note the paucity of settlements involving very large recoveries. It is possible, as a result, that as large settlements accumulate in number over time—particularly settlements around and above \$1 billion—a different pattern will emerge. We may find, for example, that the megafund doctrine explains fee award percentages in cases recovering just under and just over \$1 billion. But courts have not identified \$1 billion as a threshold and the evidence we have gathered to date does not suggest such a discontinuity.

For reasons we noted in our commentary on the 2019 Report, the above empirical conclusions regarding the megafund doctrine are reassuring. That doctrine can create undesirable incentives. It would be unwise for the law to award a greater amount in attorneys' fees measured in dollars for a smaller class recovery than a larger class recovery, as the megafund doctrine can do. That would create a tension between the interests of class members and the interests of class counsel. The data suggest that no such tension in fact exists in federal antitrust class actions. Thus, a seemingly unwise doctrine that the courts have at times endorsed in theory does not appear to exist in practice, at least not in federal antitrust class actions.