

THE ROLE OF PRIVATE ANTITRUST ENFORCEMENT IN A TIME OF CHANGE

COMMENTARY ON 2021 ANTITRUST
ANNUAL REPORT: CLASS ACTIONS IN
FEDERAL COURT

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I. INTRODUCTION

Private antitrust enforcement is 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.”¹ While public antitrust enforcement gets the lion’s share of attention, less attention is paid to the role of private enforcement. The annual Huntington Report and this commentary seek to change that.

To be sure, 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.² And, unlike public enforcers, private enforcers can obtain significant damages on behalf of the victims of antitrust violations.³ 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.⁴ The importance of the antitrust class action—a major private enforcement device—is clear. The recently released 2021 Antitrust Annual Report: Class Actions in Federal Court (“2021 Report”)⁵ by Huntington National Bank and the University of California Hastings College of the Law (“Hastings Law”) reflects that the cumulative total settlement amount recovered for victims in antitrust class actions from 2009-2021 was over \$29 billion.⁶

II. OVERVIEW OF THE COMMENTARY

The American Antitrust Institute (AAI)⁷ and Professor Joshua P. Davis at Hastings Law⁸ evaluated the 2021 Report with the goal of identifying its major implications for private enforcement in the U.S. The 2021 Report builds and expands on the 2020 Antitrust Annual Report: Class Action Filings in Federal Court (“2020 Report”),⁹ which assessed private enforcement activity from 2009-2020. Like the 2020 Report, the 2021 Report relies largely on data for private U.S. antitrust class actions available through Lex Machina, as well as

¹ 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/>.

² See Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 G. L. REV. 1 (2013).

³ 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).

⁴ See Davis & Lande, *supra* note 2.

⁵ Huntington National Bank & UC Hastings Law, 2021 Antitrust Annual Report: Class Actions in Federal Court (April 2022) [hereinafter “2021 Report”], available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117930.

⁶ 2021 Report, *supra* note 5, at 2.

⁷ 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.

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⁹ 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.

supplemental data analysis.¹⁰ The 2021 Report extends the dataset to the thirteen-year period covering 2009-2021, 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

A. THE PANDEMIC'S TOLL ON PRIVATE ANTITRUST ENFORCEMENT

Among its many other consequences, the COVID-19 pandemic has complicated the timing of antitrust enforcement actions. Early in the pandemic, for example, the FTC and DOJ were compelled to implement expedited business review procedures to address competitor collaborations undertaken to promote public health and stop the spread of the virus.¹¹ At the same time, the DOJ signaled that it would promptly file criminal antitrust charges against businesses seeking to exploit the pandemic.¹² Private enforcers, however, had no comparable institutional capacity to unilaterally speed up the wheels of justice; they remained heavily dependent on the judicial calendar and functioning courts. Accordingly, it is reasonable to ask whether pandemic-related delays affecting the court system may have hampered private enforcement.

Data from the 2021 Report provides ample fodder for contemplation. Consolidated antitrust class action filings were down about 40%, falling from 220 in 2020 to 134 in 2021. Settlements were also down, both quantitatively and qualitatively. Only 20 antitrust class action settlements reached final approval in 2021, down from 36 in 2020. Meanwhile, the total settlement amounts recovered for victims fell from \$3.2 billion in 2020 to \$1.7 billion in 2021. Finally, a key indicator of delay—the time from the initial filing of the complaint to the order granting final settlement approval—trended upward. The median time from filing to approval for the period from 2009-2021 is 5.0 years, but in 2020 the mean was 6.0 years (up from 5.5 in 2019), and in 2021 it was 6.1 years.

The Covid-19 pandemic could explain some of the apparent patterns in the data, although there is insufficient data to draw any firm conclusions. In particular, we might note that the pandemic caused federal courts to suspend and delay trials, especially jury trials. That could explain why

¹⁰ 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 2021 Report, *supra* note 5, at 38.

¹¹ U.S. Dept. of Just. & Fed. Trade Comm'n, Joint Antitrust Statement Regarding COVID-19 (March 24, 2020), *available at* <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

¹² U.S. Dept. of Just., Press Release, Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Produces (March 9, 2020), *available at* <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>.

the time increased to resolve litigation, why the number of settlements decreased, or other apparent patterns.

In exploring the possibility that the pandemic disrupted trials in antitrust class actions, we consider the events in *In re Capacitors Antitrust Litigation* (“*Capacitors*”). A trial was in progress on behalf of a class of direct purchaser plaintiffs when COVID-19 forced the court to declare a mistrial in early 2020. Most of the defendants in the action had settled before trial. Just before the court declared a mistrial, the parties announced multiple new settlements. It is likely the pressure of trial, or trial’s ability to reduce uncertainty, or both, enabled the parties to reach negotiated resolutions.

No more settlements took place while jury trials were suspended in the Northern District of California. For a while, the court was unable to set a stable trial date. And it was unclear when the COVID-19 pandemic would permit jurors to participate safely in litigation. Finally, late in 2021, the Court started the direct purchaser plaintiff class action trial in *Capacitors* once again. The trial proceeded just a little further than it had in 2020—including some additional expert testimony—when the remaining parties announced settlements. The case had been fully resolved.

The *Capacitors* litigation may reveal an important phenomenon. To be sure, a single legal action cannot establish a general pattern. Nor can we be certain about the inferences we draw even about that individual case. But it is plausible that the plaintiffs and the remaining defendants might have settled in 2020 if the trial had continued for a little longer. We cannot know, but we might also reasonably suspect that, at least in this one legal action, the pandemic delayed the final settlements by close to two years.

More generally, we should consider whether a similar dynamic had a widespread effect. Federal trial courts may well have responded to COVID-19 not only by suspending trials but by delaying or refusing to impose trial dates. That would have temporarily removed trials themselves as a means of case resolution. It also would have eliminated impending trial dates that pressure parties to settle. We should not be surprised, then, that the mean number of years to final settlement approval in federal antitrust class actions increased from 5.5 years in 2019 to 6.0 years in 2020 and to 6.1 years in 2021. Nor should we be surprised that there were fewer settlements in 2020 and, especially, 2021 than in some earlier years, including 2015, 2016, and 2018.

The pandemic may explain some other patterns as well. The high number of filings in 2020 might be explained by plaintiffs’ lawyers using time that was freed up by delayed trials—and by disruptions in discovery and motion practice—to file more cases than usual. And perhaps they scaled back on those filings in 2021, which could explain the significant fall-off, as they suffered financially from the lack of settlement recoveries as the pandemic dragged on. They also may have been diverted from new filings by resuming discovery and motion practice as judges and lawyers adapted to virtual litigation.

Of course, not all of the data fit within the above narrative and there are reasons to wonder how much of it may be a creature of a small sample size. Indeed, the data can be made to fit an

alternate narrative, when considered over time. For example, the increase in the time from filing to approval fits a longer-term trend. The mean amount of time has increased every year since 2017, and from 2018 to 2019, it increased by more (0.6 years) than it did in either pandemic year (0.5 and 0.1 years). Moreover, the longest delay from filing to approval, and the greatest year-over-year increase in time (2.0 years), occurred in 2014, long before terms like “pangolin” and “PPE” entered the popular lexicon.

The 40% decline in consolidated antitrust class action filings from 2020 to 2021 also looks less stark over time. The 134 filings in 2021 were slightly above the mean of 127 during the 13-year period from 2009-2021. The 220 filings in 2020 was, in fact, the high-water mark for the period, eclipsing the previous high of 211 set only a year earlier in 2019, before the pandemic began.

Qualitative and quantitative indicators of declining settlement amounts also might tell a different story. For example, volatility in year-over-year total settlement recoveries is not limited to the pandemic years; it can be seen in each of the last two pre-pandemic periods as well. And in each of those periods, the falloff was even larger than during the pandemic years. Whereas the total settlement recovery fell from \$3.2 billion to \$1.7 billion from 2020 to 2021, it previously fell from \$4.7 to \$2.2 billion from 2016 to 2017. The following year, in 2018, it recovered to a 13-year high of \$5.3 billion, only to fall again in 2019, all the way to a near-low of \$1 billion. If this six-year pattern is the beginning of a trend, perhaps the diminished 2021 total settlement recoveries will bounce back in 2022 or 2023, irrespective of pandemic dynamics.

The explanation for the falloff in consolidated class action filings—from 36 in 2020 to 20 in 2021—also must account for certain nuances and ambiguities. For example, the proportional sizes of the settlements in each year remained consistent across the years, despite the drastic decrease from one year to the next and despite any hypothetical pandemic effect. In 2020, there were 24 settlements in the \$1-100 million range and 10 “large” settlements that exceeded \$100 million—a 60/40 divide. In 2021, there were 15 settlements in the \$1-100 million range and 5 “large” settlements—about a 65/35 divide. However, the data also show that the median and mean settlement amounts both increased substantially from 2020 to 2021—the median from \$6 million to \$16 million and the mean from \$22 million to \$37 million.

The data raise a number of questions. What might the similar breakdown in proportional sizes of settlements tell us about the hypothetical pandemic effect suggested by *Capacitors*, which implies that impending trial outcomes drive settlement outcomes? Does the similar breakdown in settlement size each year suggest that the imminence of trial influences the number of settlements *more* than their dollar amounts? Does the similar breakdown suggest the pandemic did not meaningfully affect the type or size of settlements from one year to the next? How does this data square with the substantial increase in median and mean settlement amounts from 2020 to 2021? Might it suggest the pandemic *did* affect the skew of settlement sizes in a given year after all, with parties showing, in the absence of impending trial, more motivation to settle comparatively high stakes claims than comparatively low stakes claims?

These questions provide reasons to suspect the pandemic may not completely explain the patterns in the data. More plausibly, the pandemic likely provides only a partial explanation.

But at the same time, it is unlikely that the pandemic had no systematic effects at all. A careful statistical analysis would be necessary to inform any shift from speculation to the formation of working hypotheses about the effects of the pandemic on federal antitrust class actions. The importance of large datasets for performing such analysis might prompt consideration of individual cases, as opposed to aggregated yearly data, as a data point. This approach, which creates a “panel” (i.e., both time-series and cross-section) of data, would significantly enlarge the dataset. That analysis might allow us to learn vital lessons from the natural experiment that the COVID-19 pandemic created, such as the importance of establishing credible trial dates for expediting the resolution of federal antitrust class actions.¹³

B. TRENDS WE ARE MONITORING IN THE DATA ON ANTITRUST CLASS ACTIONS

The 2021 Report is the fourth such report to be issued. The first report, issued in 2018, included data from 2013 to 2018. In 2019, the report added a significant amount of data on antitrust class actions extending back to 2009. Since then, the report has maintained 2009 as the first year of the various data series reported, while each subsequent report year has added an additional year of data. As of the 2021 report, therefore, 13 years of data are reported across a variety of antitrust class action metrics.

Given the increased length of the time-series data on antitrust class actions, our commentary this year begins the process of identifying and monitoring trends in key metrics over time. This information gives us valuable information on a number of core questions. For example, how effective has private enforcement been at obtaining restitution for victims of antitrust violations? Another core question is what the number of cases filed and settlements obtained might say about the frequency and severity of antitrust violations over time. This is of particular interest given increasing concerns about the laxity of public antitrust enforcement over many decades, which has contributed to rising concentration in key markets.

The subsections below discuss key findings in our analysis and the questions and implications they raise. These observations could well change as the dataset continues to expand, based on reports issued in the years to come.

1. TRENDS IN TOTAL FILINGS: ARE WE SEEING A POSSIBLE SLOWDOWN IN ANTITRUST CLASS ACTIONS FILED?

The 2021 Report data on total filings in federal court reveal that filings increased, on average, about 9% per year from 2009-2021. However, as shown in Figure 1 of the 2021 report, filings in 2019 and 2020 were significantly higher than the two years immediately preceding, and one year succeeding, in what might be termed “outlier” years. If these high filing years are indeed

¹³ Testing for pandemic-related structural breaks (including, for example, when each federal district court suspended and renewed jury trials) would be an important part of this analysis.

outliers, which we cannot ascertain at this time, their effect has been to drive up the average annual rate of filings over the period 2009-2021.

We also observe that with the addition of one year of data in each subsequent report, the average annual rate of change in filings shows variability. For example, based on data from 2009-2019, the average annual change in total filings was about 15% per year. But based on data from 2009-2020, this rate dipped slightly to about 14% per year and for the 2009-2021 data, the rate fell even more to about 9% per year.

In addition to a possible slowdown in filings, antitrust class actions may be facing a more arduous journey through the courts as well. For example, the average number of years from filing to final case resolution (with all appeals resolved) increased modestly at about 4% per year from 2009-2021. The relationship between rates of filings and time to resolution warrants monitoring. As discussed above, the degree to which the impact of the pandemic, especially in 2020 and 2021, has affected the time to resolution statistic is, as yet, unclear. In any event, antitrust class action filings continue to trend upward over the 13-year period assessed in the 2021 Report. This contrasts with public enforcement where, as we noted in the 2020 commentary, the number of criminal Section 1 cases won by the DOJ trended downward from 2009-2021.

2. DEFENDANT WINS: WHAT DOES THE DATA ON JUDGMENT ON THE PLEADINGS PORTEND?

The Antitrust Annual Reports break down cases in which defendants prevailed into four categories: judgment on the pleadings, summary judgment, trial, and judgment as a matter of law. The last two categories represent a very small number of defendant “wins,” so we looked more closely at the first two categories, which account for about 90% of defendant wins. Judgments on the pleadings account for about 65% of the cases that defendants won, while orders granting summary judgment account for about 26% of those cases.

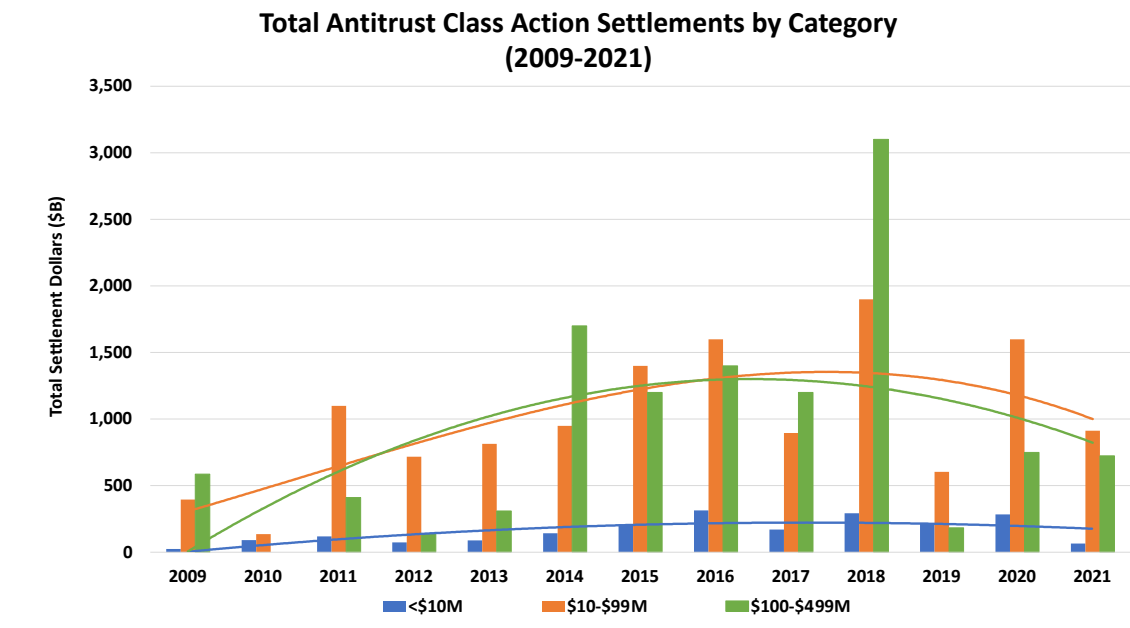
Note that a motion for judgment on the pleadings is made after pleading but before discovery, while a motion for summary judgment is made after discovery and before a trial. This distinction is important because trends in the data may tell us something about how courts are deciding private enforcement cases for defendants over time. For example, we see a 50% increase in filings that were decided on judgments on the pleadings from the 2009-2019 to 2009-2021 data. As a percentage of all defendant wins, this category increased by 14% with the addition of the 2020 and 2021 data. Yet the average time to resolution for those cases remained steady, at about 2.4 years.

The increasing proportion of defendants who won on judgment on the pleadings is counterbalanced by a decreasing proportion of defendants who won on summary judgment. For example, we see only about a 7% increase in filings that were decided on summary judgment between the 2009-19 to 2009-21 data. As a percentage of all defendant wins, this category decreased by almost 20% between the 2009-2019 to 2009-2021 data. But in stark contrast to defendant wins on judgment on the pleadings, the average time to case resolution

for wins on summary judgment fell about 42% between 2009-2019 and 2009-2021. Most of this is accounted for by the addition of the 2021 data, where average time to resolution was only about five years, down significantly from about nine years from the 2009-2019 and 2009-20 data. This may reflect the impact of the COVID-19 pandemic, as defendants and courts sought to resolve cases on the merits without trial, but it is impossible say with confidence given the available data.

3. TRENDS IN TOTAL SETTLEMENTS: ARE ANTITRUST CLASS ACTION CASES TRENDING TOWARD LARGER DOLLAR AMOUNTS?

Earlier AAI commentaries on the Antitrust Annual Report noted that settlements in private antitrust cases in any given year are skewed to a larger number of smaller dollar settlements. With this “positive” skew, the median settlement—or the half-way point in the distribution—is, as a general matter, less than the mean. This remains the case based on the 2021 report data. Looking back on 13 years of data reveals that smaller settlements below \$10 million have, as shown in the figure below, displayed less variability and a more consistent upward trend over time than other larger dollar categories of settlements. Although, in a marked departure from earlier years, settlements below \$10 million amounted to only \$66 million in 2021, the lowest amount since 2009.



The trends in settlements between \$10-\$99 million and between \$100-\$499 million peaked around 2018 and have fallen off since. While the 2020 numbers in these categories were higher than the recent low point of 2019, they remained substantially below average 2014-2018 levels. 2021 marks a further increase in recoveries above \$100 million, which may indicate a trend towards a return to 2014-2018 levels. That said, 2021 recoveries over \$100 million were less

than half the level of 2014 recoveries, suggesting any return to the boom years of 2014-2018 is far off.

Given the important insight that is available from comparing mean and median settlement data, we looked more closely at the two over time. The average annual rate of increase in median settlement size is about double that of the mean settlement from 2009 to 2021. Relatedly, we also found that the “gap” between the median and mean settlement has decreased gradually over time. The closing of the gap between the median and mean means that the median is moving to the right, closer to the mean, or higher settlement amounts, tempering the positive skew in the distribution. This may say something about the success of antitrust class actions in obtaining restitution for victims or the increasing frequency and severity of cases.

As discussed above, when we look at total recovery amounts, even excluding very large settlements, 2021 recoveries are among the lowest since 2014. This is so even though 2021—like 2017-2019—did not see any settlements over \$500 million that would have been excluded. Because both the mean and median settlement amounts increased in 2021, the depressed total reflects a reduced volume of settlements overall, not a decrease in the size of what settlements took place.

While we continue to monitor the settlement distribution data over time, smaller dollar settlements remain vitally important in shaping the overall profile of settlements in antitrust class actions.

4. TYPES OF PLAINTIFFS: A TREND TOWARD MORE INDIRECT PURCHASER CASES?

A final takeaway from the 2021 Report concerns trends in antitrust class actions filed on behalf of different classes of plaintiffs. The two major types of plaintiffs are direct and indirect purchasers, which collectively account for almost all cases filed. The 2021 Report provides data on both the number and types of cases filed, and the dollar settlements obtained. We looked at these same statistics—which were also provided in the 2019 and 2020 reports—to discern changes over even a short period of time.

We found that the percentage of the total settlements involving direct purchasers has declined by just over 25% between the 2009-2019 and 2009-2021 data, while indirect purchaser cases have increased by close to 60%. Statistics for total settlement dollars obtained in direct and indirect purchaser cases parallel these trends. For example, the percentage of total settlement dollars obtained in direct purchaser cases decreased by almost 10% from the 2009-2019 to 2009-2021 data, while those for indirect purchaser cases increased by over 45%.

This possible trend may reflect various phenomena. One of them may be an increased preference for, or an increased rate of success under, state versus federal antitrust law. Under the direct-purchaser rule, indirect purchasers lack standing to sue for damages under federal antitrust law. Accordingly, indirect purchaser plaintiffs must sue under state law, where such

suits are allowed. Facing stiff headwinds under federal antitrust law from increased pleading and evidentiary burdens, more plaintiffs may be filing claims under state laws, including indirect purchasers, to tap into more lenient standards. While some states construe their antitrust laws as coextensive with federal law, many (notably including California) do not.

Another possibility is that the increased percentage of indirect purchaser settlements and amounts reflects increasingly sophisticated data and statistical techniques allowing indirect purchasers to better trace the impact of anticompetitive conduct through the various levels of the market. Such techniques might enable indirect purchasers both to bring previously impractical suits and to recover more in existing suits by improving their ability to better capture and describe their damages.

A third possibility is more troubling. Plaintiffs may bring more indirect purchaser claims—and fewer direct purchaser claims—because of judicial enthusiasm for pre-dispute mandatory arbitration clauses. Such clauses may force direct purchasers—who enter contracts with alleged antitrust violators—to pursue individual arbitration rather than collective litigation. Indirect purchasers generally do not have a contractual relationship with alleged antitrust violators and so are not subject to such arbitration clauses. So forced arbitration may explain a shift from direct purchaser antitrust class actions to indirect purchaser class actions or a simple decrease in total class actions.

If so, that could bode poorly for private antitrust enforcement. The 2021 Report shows that almost as many indirect purchaser class actions as direct purchaser class actions settled from 2009-2021—559 and 604, respectively—but the indirect purchaser class actions recovered only slightly more than one quarter as much as the direct purchaser class actions— about \$6 billion as compared to about \$23 billion. One reason for the disparity may be that victims (at least those that are direct purchasers) in all states can recover damages under federal antitrust law but victims in only about 60% of states can recover damages under state antitrust law.¹⁴ In addition, class certification is more difficult in indirect purchaser cases than in direct purchaser cases.¹⁵ Further, historically both direct purchasers and indirect purchasers have pursued class actions based on the same challenged conduct, so that an increase in the number of indirect purchaser class actions cannot compensate for a decrease in direct purchaser class actions.

We should remain open to the possibility that greater use of forced arbitration may decrease the number of direct purchaser class actions—thereby decreasing the number of federal antitrust class action filings, the number of settlements, the average size of the settlements, and the total private recoveries. It is possible—though far from certain—that we may already be seeing indications of this phenomenon. That would be unfortunate—bad for competition, bad for victims of antitrust violations, and bad for our economy and society as a whole.

¹⁴ Joshua P. Davis and Anupama Reddy, *Unintended Consequences: Abolishing the Direct Purchaser Rule as a Threat to Private Antitrust Enforcement*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699110.

¹⁵ *Id.*