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PROMOTING COMPETITION IN COMPETITION LAW: THE ROLE OF THIRD-PARTY FUNDING IN OVERCOMING COMPETITIVE BARRIERS IN PRIVATE ANTITRUST ENFORCEMENT PRACTICE

By Jiamie Chen[1]

I. INTRODUCTION

Among the most fundamental antitrust concerns are barriers to entry in concentrated markets. Yet antitrust practice itself—specifically big-ticket private enforcement—remains a concentrated market subject to longstanding competitive barriers within the greater legal industry. Private enforcement contingency practice inherently involves high risks and high rewards. Recent developments have driven contingency risks even higher, requiring greater investments at early stages of litigation while creating more ways for plaintiffs to lose. No one can meaningfully compete—or continue competing—in the private enforcement market without effectively managing the financial risks of the practice.

But the private enforcement world is changing. The targeted conduct itself is evolving, from proverbial smoke-filled rooms to computer algorithms[2] and two-sided e-commerce platforms.[3] New thought leaders like Lena Kahn[4] and Dina Srinivasan[5] are shifting the conversation on how traditional antitrust principles apply to today's economic and commercial realities. In addition, key precedents in antitrust collective actions are developing abroad, particularly in the United Kingdom.[6]

These factors create room for new players and new ways to compete in the private enforcement market. One development in particular—the rise of third-party commercial litigation funding in the United States—can help competitors overcome the risk management barriers in this practice market. Commercial funding provides non-recourse capital to law firms and operates like an investment. By contrast, a traditional recourse loan must be repaid with interest regardless of litigation outcome. Moreover, it makes truly institutional-scale capital available to the legal market and can help level the playing field

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2 Ariel Ezrachi and Maurice Stucke, *From Smoke-Filled Rooms to Computer Algorithms—The Evolution of Collusion* (May 14, 2015), *available at* https://clsbluesky.law.columbia.edu/2015/05/14/from-smoke-filled-rooms-to-computer-algorithms-the-evolution-of-collusion/.

3 *See, e.g., Ohio v. American Express Co.*, 585 U.S. ___, 138 S. Ct. 2274 (2018); *see also* Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. Davis L. Rev. 133-2014 (2017).

4 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

5 Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 Berkeley Bus. L.J. 39, 88 (2019).

6 *See, e.g.*, Richard Crump, *US Firms Eye Early Knockout In Rival UK Forex Class Actions* (Feb. 13, 2020), *available at* https://www.law360.com/articles/1243710/us-firms-eye-early-knockout-in-rival-uk-forex-class-actions.

with well-resourced corporate defendants. Of course, there is no substitute for requisite experience.[7] But third-party commercial litigation funding can and should play a key role in promoting competition in competition law.

II. COMPETITIVE BARRIERS IN PRIVATE ENFORCEMENT

A. Appetite for the Practice

Private antitrust enforcement occupies a niche that draws certain practitioners—and the draw is as powerful as it is well-founded. As one Harvard Business School professor quipped, "[t]he phrase 'doing well by doing good' has been used, at my last unscientific count, roughly 38 trillion times."[8] Yet it aptly applies to the (successful) practice of private antitrust enforcement.

The Supreme Court itself has emphasized the critical role of "private attorneys general" in antitrust enforcement.[9] The Court most recently reiterated this view in the seminal *Apple v. Pepper* case, stating that, in the private enforcement action at issue, "[t]he plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law." [10] To put a finer point on it, "unlike public enforcers, private enforcers can obtain significant damages," which "serves as a crucial source of deterrence for illegal anticompetitive conduct and the major avenue for compensating victims for harms suffered at the hands of cartelists and dominant firms."[11] Private enforcement of antitrust law is needed perhaps now more than ever.[12]

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7 Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 75 (2019) ("Repeat players add value in large part by leveraging their experience and access to capital to level the playing field against defendants, who will almost always be repeat players, as will their teams of BigLaw attorneys.").

8 Michael Norton, *Finally, Proof That You Can 'Do Well By Doing Good'* (May 18, 2013), *available at* https://www.huffpost.com/entry/proof-that-you-can-do-well-by-doing-good_b_3298306.

9 *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972) ("By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as private attorneys general.") (internal quotation marks omitted); *see also Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 494 (1968) (rejecting the pass-through defense in private antitrust cases because "[t]reble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."); *Cal. v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) ("Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.").

10 *Apple Inc. v. Pepper*, 587 U.S. ___, 139 S. Ct. 1514 (2019).

11 American Antitrust Institute, *The Vital Role of Private Antitrust Enforcement in the U.S.* (May 14, 2019) (citing Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1 (2013) and 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).

12 *See* Joseph E. Stiglitz, *Market Concentration Is Threatening the U.S. Economy* (Mar. 12, 2019), *available at* https://www8.gsb.columbia.edu/articles/chazen-global-insights/market-concentration-threatening-us-economy; *Capitalism is Becoming Less Competitive* (Oct. 10, 2018), The Economist, *available at* https://www.economist.com/open-future/2018/10/10/capitalism-is-becoming-less-competitive.

Of course, fulfilment from such laudable work alone won't keep the lights on (or put the kids through college). Successful practitioners in this sector should have no trouble doing either. For example, a recent empirical study conducted by University of San Francisco School of Law and Huntington National Bank found that, between 2013 and 2018, antitrust class actions resulted in over $19 billion in recoveries, and that the plaintiffs' attorneys obtained fee awards amounting to 20%–40% of the total recovery.[13] Lex Machina found that, between 2009 and 2018, courts awarded over $34 billion in antitrust damages, excluding fees, costs, and prejudgment interest.[14] Antitrust class actions likely make up the vast majority of those damages.[15]

It comes as no surprise that private antitrust enforcement is big business. For example, as multidistrict litigations (MDLs) have rapidly taken over national civil dockets, rising from 16% in 2002 to 39% in 2015 of federal courts' entire civil case load,[16] private antitrust actions constitute a significant portion of all MDLs. In fact, of the 190 currently pending MDLs, 48 are antitrust matters, second only to products liability, which accounts for 66 MDLs.[17]

Yet this billion-dollar market is dominated by a small number of repeat players—firms that show up, and, critically, are appointed to leadership positions again and again in high-stakes nationwide collective actions.[18] Antitrust matters[19] in particular demonstrate the prevalence of this "repeat player" pattern in MDLs, which has drawn empirical study as well as heated commentary from scholars.[20]

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13 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 at* http://ssrn.com/abstract=3386424.

14 Lex Machina, *Antitrust Litigation Report* (April 2019), *available at* https://lexmachina.com/antitrust-litigationreport/.

15 For example, in 2018, class action recoveries accounted for nearly $3.6 billion, or approximately 85%, of the $4.3 billion in total antitrust damages awarded.

16 Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67, 72 (2017) (citing Duke Law Center for Judicial Studies, *MDL Standards and Best Practices* (2014), *available at* https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf). Note that the MDL percentage in 2015 increases to 45% after removing prisoner and social security cases. *Id*.

17 https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-January-15-2020.pdf

18 *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67, 74 (2017); Jaime Dodge, *Facilitative Judging: Organizational Design in Mass- Multidistrict Litigation*, 64 EMORY L.J. 329, 355–73 (2014); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 Cornell L. Rev. 1445, 1458–63 (2017).

19 For example, the Lex Machina Antitrust Litigation Report analyzed over 9,000 antitrust cases and identified the most active plaintiff firms in antitrust litigation nationwide, including and excluding MDL cases. Lex Machina Antitrust Litigation Report at 17-18. Likewise, the 2018 Report empirically analyzed antitrust class actions from 2013 to 2018 and identified the top plaintiffs' lead counsel by complaints filed, number of settlements, and aggregate settlement amount. 2018 Report at 25–27. The significant overlap between these lists leaves no mystery as to who the top antitrust repeat players are.

20 *See* note 18, *supra*; *see also* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 75 (2019), for the opposing view.

The small number of readily-identifiable repeat players shows that appetite for the practice, even when coupled with skill, does not suffice to create robust competition in this market.[21] That is because no one can meaningfully compete—much less thrive—in the private antitrust enforcement market without effectively managing the significant financial risks of the practice.

B. Risks of the Practice

In contingency and hybrid-contingency representations, legal risk translates to economic risk. Scholars (especially Professor Herbert M. Kritzer) have studied contingency representations in fields like personal injury and worker's compensation at length.[22] However, "[t]here is relatively little literature on the nature of contingent representation in more complex areas of law such as antitrust."[23]

As discussed below, in addition to readily observable patterns, other, perhaps less obvious, factors also manifest as further risks unique to antitrust contingency practice, especially with certain recent developments in the field.

1. No More Cheap Losses for Antitrust Plaintiffs

Traditionally, plaintiffs must prevail at up to six stages—at pleadings, class certification, *Daubert*, summary judgment, trial, and appeal—to win a case. Defendants need only win once. Savvy plaintiffs' firms have historically succeeded within this construct by apportioning risk such that, if they lose, they do so as inexpensively as possible.

However, recent trends are making it increasingly difficult to "lose cheap," even early in a case. Instead, firms now must make increasingly substantial upfront investments[24] in their contingency antitrust cases, while having to fight (and win) ever more dispositive battles before even reaching the merits.

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21 *See* notes 18-20, *supra*.

22 *See, e.g.*, Herbert M. Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (2004); *see also* Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 Wash. U. L.Q. 739 (2002); Stephen Daniels & Joanne Martin, *"It's Darwinism—Survival of the Fittest:" How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients*, 21 Law & Pol'y 377 (1999); Jerry Van Hoy, *Markets and Contingency: How Client Markets Influence the Work of Plaintiffs' Personal Injury Lawyers*, 6 Int'l J. Legal Prof. 345 (1999); Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 Tex. L. Rev. 1781 (2002); Steven Garber, Michael D. Greenberg, Hillary Rhodes, Xiaohui Zhuo & John L. Adams, *Do Noneconomic Damages Caps and Attorney Fee Limits Reduce Access to Justice for Victims of Medical Negligence?*, 6 J. Empirical Legal Stud. 637 (2009); Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers: Dealing with the Possible but Not Certain*, 60 DePaul L. Rev. 337 (2011).

23 David L. Schwartz, *The Rise of Contingency Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 338 (2013). Notably, many of Professor Schwartz's observations about why "patent cases are more risky to the [contingency] lawyer" than other areas of law also apply to antitrust litigation, such as "unique issues," "the breadth of documentary and electronic discovery," costly expert witness fees, and duration. *See id.*

24 Further, these increased investments, often made through traditional recourse lines of credit, present not only unconditional debts that must be repaid, often with personal guarantees from the firm's owners, but also significant opportunity costs commensurate with the firm's resources and capacity.

To begin with, the costs of filing a viable antitrust complaint have entered a race-to-the-top. To meet the heightened antitrust pleading standards[25] resulting from *Twombly*,[26] *Iqbal*,[27] and, in the Ninth Circuit, *Kendall*,[28] as well as to position themselves for leadership,[29] plaintiffs' attorneys now also routinely retain economics and/or industry experts to produce substantial original content for their complaints.[30] The more case-specific investigation and analyses a firm performs, the more factual allegations it can put forth in its complaint to survive motions to dismiss.[31] In addition, the earlier a firm begins and the more resources it spends on its investigation, the stronger its leadership bid becomes.[32] In a system with these incentives and pressures, a plaintiffs' firm, especially one seeking leadership, is hard-pressed to limit its investment and corresponding risk, even if it loses at the pleading stage.[33]

Several steps, and several years, later, if the plaintiffs prevailed at the pleadings stage and mustered resources to conduct discovery, they now must fight—and win—class certification and *Daubert* battles, before even reaching the merits. And recent

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25 *See generally* Joshua Stokes and Jordan Ludwig, *Pleading An Antitrust Conspiracy in A Post-Twombly World*, 24 Competition 120 (The California Lawyers Ass'n 2015) (providing a circuit-by-circuit survey of how courts evaluate antitrust pleadings in the wake of *Twombly*).

26 *Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007).

27 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

28 *Kendall v. Visa USA, Inc.*, 518 F.3d 1042 (9th Cir. 2008).

29 See Manual for Complex Litigation § 10.22 (4th ed. 2004) (hereinafter "MCL 4th") for a general discussion of counsel leadership organization, duties, and considerations in complex litigation; see also David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders* (forthcoming 2020), Lewis & Clark L. Rev., *available at* http://dx.doi.org/doi:10.7282/t3-vz3v-h745, for an empirical study and analysis of leadership orders in MDLs that were pending as of June 18, 2019. The study also found that leadership was contested in less than 38% of the sampled MDLs.

30 For example, MCL 4th advises judges appointing lead counsel in complex litigations to consider, inter alia, "the attorneys' resources, commitment, and qualifications to accomplish the assigned tasks." MCL 4th (2004) § 10.224. Indeed, competing firms at antitrust leadership appointment hearings often cite their access to resources, how early they began their case investigation, how much time and resources they have spent on their investigation, the unique factual allegations in their complaints resulting from their investigations, and the extent of investment they made or plan to make in the case in support of their leadership bids. *See also In re Dairy Farmers of Am. Cheese Antitrust Litig.*, 2013 U.S. Dist. LEXIS 162798, at *16 (N.D. Ill. Nov. 15, 2013) (denying counsel's application for appointment as co-lead counsel where counsel "has fallen far short of demonstrating that she has sufficient resources to carry this complex, antitrust class action forward in the demanding role of co-lead counsel.").

31 Further, some federal courts have raised antitrust pleading standards even higher in class actions by migrating a full Rule 23 analysis to the pleadings stage to strike class allegations from the complaint *See In re: Railway Indus. Employee. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464 (W.D. Pa. 2019).

32 *See* note 30, *supra*.

33 This is especially true in cases with relatively novel or indirect theories of anticompetitive harm or application of traditional principles to modern economy. *See*, *e.g.*, *In Re: Humira (Adalimumab) Antitrust Litigation*, No. 1:19-cv-01873 (N.D. Ill. filed Mar. 18, 2019); *In re: Aluminum Warehousing Antitrust Litigation*, No. 1:13-md-02481 (S.D.N.Y. filed Dec. 16, 2013); *In re Apple iPhone Antitrust Litigation*, No. 4:11-cv-06714 (N.D. Cal. filed Dec. 29, 2011); *Reveal Chat Holdco LLC et al. v. Facebook, Inc.*, No. 3:20-cv-00363 (N.D. Cal. filed Jan. 16, 2020).

developments have made this supposedly preliminary stage increasingly difficult and costly for antitrust plaintiffs.

First, merits inquiries have increasingly seeped into the certification analysis, such that plaintiffs arguably must prove their case at certification.[34] The Supreme Court blessed this trend by providing for merits assessment at the certification stage as to commonality in *Dukes* and extending it to the critical predominance requirement in *Comcast*.[35]

In addition, antitrust plaintiffs now must overcome the additional hurdle of *Daubert* challenges at class certification before reaching merits. Even before *Dukes* and *Comcast*, from 2000–2009 alone, expert challenges increased over 340%,[36]and a plaintiff expert in private antitrust cases is four times more likely to be excluded than a defendant's expert.[37] With *Daubert* challenges at certification becoming even more widespread after *Dukes* and *Comcast*, the majority of appellate courts facing the unsettled issue of whether class certification expert evidence must meet the full *Daubert* standard have answered in the affirmative.[38] This means that the risks and costs of litigating a full *Daubert* challenge, which traditionally occurred if and after plaintiffs won certification, now must be borne

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34 There can be no serious debate that certifying a class has become increasingly difficult. *See, e.g.*, Joseph A. Seiner, *The Issue Class,* 56 B.C. L. Rev. 121, 129 (2015) (discussing how scholars argue that the Supreme Court's decision in *Dukes* undercuts plaintiffs' ability to bring class actions); Libby Jelinek, *The Applicability of the Federal Rules of Evidence at Class Certification,* 65 UCLA L. Rev. 280, 294 (2018) (arguing that *Dukes* marked a departure from previous class certification standards, resulting in a heightened evidentiary burden for plaintiffs at the class certification stage). *See also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008) (allowing certification only if the plaintiffs establish Rule 23's requirements by a preponderance of the evidence); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269 (5th Cir. 2007) (applying the preponderance of the evidence standard); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (holding that a court may certify a class only after it "resolves factual disputes relevant to each Rule 23 requirement"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) ("Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.").

35 *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast v. Behrend*, 569 U.S. 27 (2013); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 2019 WL 3850581 (D.C. Cir. Aug. 16, 2019) (affirming district court's denial of class certification on remand where appeals court, based on the *Comcast* opinion, previously vacated and remanded district court's prior grant of certification).

36 PricewaterhouseCoopers, Daubert Challenges to Financial Experts: A Ten-Year Study of Trends and Outcomes 2002-2009 (2010).

37 Christine Bartholomew, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 Cardozo L. Rev. 2147, 2150 (2014) (citing James Langenfeld & Christopher Alexander, *Daubert and Other Gatekeeping Challenges of Antitrust Experts*, Antitrust, Summer 2011, at 21, 22; D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99, 108–10 (2000)).

38 The Third, Fifth, Seventh, and arguably Second Circuits require that class certification expert evidence be admissible under *Daubert*. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129 (2d Cir. 2013); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005); *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 812 (7th Cir. 2012). The Eighth and Ninth Circuits employ a less stringent standard. *In re Zurn Pex Plumbing Prods. Liability Litig.*, 644 F.3d 604, 613–14 (8th Cir. 2011) (holding that class certification rulings are "inherently preliminary" and thus admissibility under *Daubert* is not necessary); *Sali v. Corona Regional Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018) (holding that "a district court should evaluate admissibility under the standard set forth in *Daubert* . . . [b] admissibility must not be dispositive [and] the Daubert inquiry should go to the weight that evidence is given at the class certification stage").

during, or before, certification.[39] This also means that, in some cases, plaintiffs now must bear the costs of litigating—and must win—full *Daubert* challenges twice: at certification and again at summary judgment. Litigating certification and *Daubert* has thus become more expensive, more time-consuming, and riskier.

2. Longevity Risk of Antitrust Enforcement Cases

For comparison, antitrust cases take more than twice as long to litigate[40] as patent infringement cases, which themselves are known to take a "relatively long period of time to resolve."[41] In antitrust class actions from 2013-2018 where the court granted final approval of a settlement, the median time between filing of the complaint to the final approval order was 5 years, with some cases taking over 12 years.[42] Indeed, it takes over two years, on average, just to have an antitrust class action dismissed on the pleadings.[43] The silver lining is that the plurality of defendant wins—nearly half—occurred in the pleadings stage, making them (relatively) cheap losses for plaintiffs' attorneys.[44]

Certain longevity is inherent in antitrust cases, especially those involving class actions, as "an antitrust class action is arguably the most complex action to prosecute,"[45] often involving review of millions of documents, taking many dozens of depositions, and extensive law and motion practice.[46] Antitrust cases also involve more unpredictable forces that may cause delay. For example, parallel government enforcement actions, while often significantly bolstering the merits of a follow-on private action, also could lead to delays, as judges are reluctant to deny enforcement agencies' stay requests.[47] In addition, antitrust class actions run the risk of objectors who can delay, or even derail, disbursement of settlement funds to class members and fee awards.[48]

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39 *See generally* Bartholomew, Christine, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 Cardozo L. Rev. 2147 (2014).

40 2018 Report, at 8.

41 David L. Schwartz, *The Rise of Contingency Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 348 (2013) (citing Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 Wash. U. L. Rev. 237, 299 (2006)).

42 2018 Report, at 8.

43 *Id.* at 9.

44 *Id.*

45 *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (quoting *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)).

46 *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 154-55 (D.N.J. 2013) (noting that "Class Counsel have reviewed millions of documents, taken hundreds of depositions, participated in dozens of meetings with defense counsel, briefed several motions, prosecuted appeals, and finally, participated in complex multi-party mediation proceedings.").

47 See *Southeast Ready Mix, LLC et al. v. Argos North America Corp. et al.*, No. 1:17-cv-02792 (N.D. Ga. filed July 24, 2017), for an example of the government requesting and the court granting multiple stays of discovery in the private enforcement action due to the government's ongoing criminal investigation.

48 For examples of settlement and attorney's fees delays and complications involving objectors, *see In Re: Optical Disk Drive Products Antitrust Litig.*, 3:10-md-02143 (N.D. Cal. filed April 7, 2010); *In Re: Lithium Ion Batteries Antitrust Litig.*, 4:13-md-02420 (N.D. Cal filed Feb. 6, 2013); *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, 1:13-cv-07789 (S.D.N.Y. filed Nov. 1, 2013).

III. FINANCING THE RISKS OF ANTITRUST ENFORCEMENT ACTIONS

High-dollar private antitrust enforcement, in short, requires risk capital that is effectively prohibitive for all but the best-resourced firms. Experienced and capable attorneys may hesitate to commit significant (often borrowed) capital upfront with both increasingly challenging obstacles[49] and at least several years[50] standing between them and any potential payout—understandably so. Perhaps no other area of plaintiffs' litigation presents higher risks and higher potential rewards.

Third-party litigation funding is a potent new tool which plaintiffs' attorneys can use to manage the inherent risk in affirmative competition cases. Essentially, third-party funding allows attorneys (or claimants) bearing risk in a case—through advancing some or all fees and/or costs—to share that risk with the funder on a non-recourse basis. The funder effectively becomes a passive investor, either in one particular case or across a portfolio of several cases, with a particular law firm or claimant. Non-recourse funding means that, unlike traditional lines of credit, if the funded case loses, the funder bears the loss of the investment capital. And the terms of each funding arrangement are bespoke—negotiated and tailored to best fit the particular case or portfolio at issue.

While some version of third-party litigation funding has been around for decades, commercial funding picked up momentum[51] around the time that Credit Suisse, the market originator in the U.S.,[52] founded a litigation risk strategies unit in 2006, which it spun off in 2012.[53] In less than ten years, litigation finance has grown in the United States from "approximately 25 to 30 commercial cases a year"[54] to a multi-billion-dollar-per-year investment practice. In the 12-month period ending June 30, 2019, commercial funders deployed approximately $2.3 billion in litigation funding in the U.S.[55] The bulk

49 *See* Section II.B.1, *supra*.

50 *See* Section II.B.2, *supra*.

51 *See* Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. Rev. 571 (2010).

52 For discussions of litigation finance in Australia and the United Kingdom, where it is established and widely accepted, see Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third Party Litigation Funding*, 19 Cardozo J. Int'l & Comp. L. 343 (2011), and *A Brief History of Litigation Finance: The Cases of Australia and the United Kingdom*, *available at* https://thepractice.law.harvard.edu/article/a-brief-history-of-litigation-finance/.

53 Jennifer Smith, *Credit Suisse Parts with Litigation Finance Group* (Jan. 9, 2012), *available at* https://blogs.wsj.com/law/2012/01/09/credit-suisse-parts-with-litigation-finance-group/.

54 *The Rise of Third Party Litigation Funding* (Jan. 21, 2011), *available at* https://www.law360.com/articles/218954/the-rise-of-3rd-party-litigation-funding.

55 *Litigation Finance Buyer's Guide*, *available at* https://advantage.westfleetadvisors.com/litigation-finance-buyers-guide.

of those funds likely landed in litigations featuring "a mismatch of resources between the plaintiff and a more deep-pocketed corporate defendant."[56]

Used prudently, third-party funding can help "clos[e] the existing funding gap"[57] for plaintiffs' attorneys in costly litigations and provide "access to capital to level the playing field against defendants . . . [and] their teams of BigLaw attorneys."[58]

A. Commercial Funding Basics

Attorneys have traditionally self-funded through recourse debt obligations. Using a loan or line of credit, attorneys borrow funds that must be repaid, regardless of litigation outcome. The repayment obligation is often secured by the firm's assets as well as the personal guarantee of the firm's owner(s).[59] Third-party litigation funders, by contrast, provide capital on a non-recourse basis—meaning capital is only repaid from actual case proceeds. The funder bears the risk of deployed capital. Thus, commercial funding operates more like investments than loans.

In general, the commercial litigation funding market[60] focuses on big-ticket business disputes. In the antitrust realm, funders commonly finance direct or opt-out Section 1 claims, Section 1 and Section 2 competitor cases, or portfolios of cartel class actions.[61] Recipients of the funding include law firms who may seek to manage their contingency risk, scale their practice, and/or stabilize or supplement their operating capital. Funding recipients also include claimants, who may seek to finance their legal fees or out-of-pocket costs, and/or to monetize their claims.

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56 Cristina Violante, *What Your Colleagues Think of Litigation Finance* (Dec. 11, 2017), *available at* https://www.law360.com/articles/989204. The survey found that antitrust was one of the top three areas of litigation where third-party funding is used, behind intellectual property and commercial litigation, and that 86% of attorneys who have used third-party litigation funding reported a positive opinion of it.

57 Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. Rev. 1273, 1281 (2012).

58 Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 78 (2019).

59 Attorneys theoretically can fund a contingency portfolio of antitrust cases entirely through law firm equity, but such arrangements are beyond the means of all but a handful of well-resourced firms and are likely not a prudent strategy event for those firms.

60 Commercial funding is distinguishable from consumer litigation funding, which generally is used for claims sounding in personal injury, medical malpractice, wrongful death, mass torts, and so forth.

61 Due to ethical considerations, funding for class actions usually only occurs in a portfolio arrangement rather than on a single-case basis.

Of course, all funding transactions must be structured with an eye toward applicable ethics considerations[62] and potential future discoverability,[63] which all reputable funders routinely address. The most common types of arrangements, or funding products, through which commercial funders provide capital are described below. The particular terms of funding arrangements are bespoke, which allows firms pursuing complex cases to tailor the terms to their needs and the specific risk profile of their practices.[64]

1. Single-Case Financing

A prototypical financing arrangement involves the funder providing capital to cover attorney's fees, out-of-pocket costs, or both, within an agreed litigation budget, for a specific case, on a non-recourse basis. The funder bears the risk of deployed investment capital. If the case results in a recovery, the funder recovers its deployed capital, plus a return, from the actual recovery.

2. Portfolio Financing

Portfolio financing can involve more complex terms but also offers more ways to customize the arrangement to best suit the needs of the parties. Here, the funder provides capital across a specified set of cases. For plaintiffs receiving funding, this can include a portfolio of all direct actions. For law firms, the portfolio may range from an agreed case group up to the firm's entire contingency practice. The funder may also provide funds for the firm's operating capital, rather than for the litigation budget of a specific case, and the returns on that investment can be payable from the recovery in a certain portfolio (or all) of the firm's cases. Because portfolio financing involves more than one case, the per-case transaction costs (time, due diligence, negotiation, and so forth) of portfolio financing tend to be lower than in single-case financing. Portfolio financing also typically offers better economic terms for the law firm because the portfolio nature decreases the risks somewhat for the funder.

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62 For a summary of the debate surrounding the ethics issues relating to third-party litigation finance, see Stephanie Spangler and Dai Wai *Chin Feman, An Overview of the Debate Over Litigation Finance Disclosure* (May 6, 2019), *available at* https://www.law360.com/articles/1155496/an-overview-of-the-debate-over-litigation-finance-disclosure; Danielle Cutrona, *Answers To Key Legal Finance Ethics Questions* (July 16, 2019), *available at* https://www.law360.com/articles/1178103/answers-to-key-legal-finance-ethics-questions.

For further discussion and analysis of the concerns that have been raised in relation to the growth of litigation funding, see generally Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DePaul L. Rev. 499 (2014), and Michele M. DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 Fordham L. Rev. 2791 (2012).

63 Note that Northern District of California Local Rule 3-15 requires the disclosure of "any persons [with] (i) financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding." N.D. Cal. Civ. L. R. 3-15(a)(1). The Northern District has found that identification of a litigation funder as "a person with financial interest" in the case suffices to comply with Local Rule 3-15. *MLC Intellectual Property, LLC v. Micron Technology, Inc.*, No. 14-cv-03657-SI, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).

64 Funding arrangement also can be made early in a case, as risks and expenses in antitrust matters become increasingly front-loaded, or at a later stage, when firms (or claims) may reach the limits of their resources.

3. Claim Monetization

When a commercial funder monetizes a claim, it provides a non-recourse advance against the plaintiff's ultimate recovery. Claim monetization has been common in post-settlement, post-judgment, and appeal settings to offset collection risk. It is now increasingly used both generally and at earlier stages in litigation to provide access to inherent value in otherwise illiquid legal claims.

B. How Commercial Funding Helps Mitigate Antitrust Litigation Risks

Leading commercial funders each generally have hundreds of millions of dollars—if not more—of assets under management.[65] Thus litigation funding, for the first time, makes institutional-scale capital available to the legal market on a non-recourse basis. Funders can play a key role in helping to manage the risks and promoting competition in high-stakes private antitrust enforcement practice.

1. Enter and Expand

For firms that have more limited resources, are new to private antitrust enforcement, or otherwise have risk-averse cultures, non-recourse funding can enable them to enter and compete in the private enforcement market.

For firms already in the market, litigation funding can allow them to expand and scale their practice on a non-recourse basis. With funding, a firm can increase the number and quality of their attorneys and staff, dedicate more resources to cases, and ultimately achieve better results—all while the funder bears the risk of the investment capital. By expanding their risk capacity, firms also can pursue more promising enforcement cases—which, in antitrust, still inherently involve significant longevity and legal challenges.[66]

2. Stronger Complaints and Leadership Bids

With litigation funding, a firm can retain investigators, economists, and/or industry specialists to conduct more robust and thorough case investigations and craft stronger complaints. Ample investigation also would allow the firm to form a better preliminary prosecution plan. A firm can demonstrate superior understanding of and commitment to a case through a fulsome investigation and complaint as well as a well-considered plan to prosecute the case. This, coupled with access to ample resources to pursue the prosecution, allows firms to better position themselves for a leadership bid.[67] Stronger complaints also

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65 *Litigation Finance Buyer's Guide*, *available at* https://advantage.westfleetadvisors.com/litigation-finance-buyers-guide.

66 *See* Section II.B, *supra*.

67 It could also give them the freedom to partner with less firms (or perhaps not partner with any other firms) to spread the risk and raise the resources necessary to pursue a given case, and to comply with many judges' preference for "lean" leadership structure, even in complex cases. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, 2018 U.S. Dist. LEXIS 140137, at *76 (N.D. Cal. Aug. 17, 2018) (noting that counsel's fee application "stood in tension with the Court's rejection of an eight-firm leadership team and appointment of a leaner team consisting of four law firms").

better withstand pleadings challenges and can help streamline the increasingly difficult, lengthy, and costly preliminary stages of antitrust litigation.[68]

3. See It Through

Litigation funding further allows both firms and litigants to pursue their cases through the (many) intervening hurdles all the way through resolution. Plaintiffs and firms can access third-party funding generally at any stage of litigation. Likewise, funding arrangements can be re-negotiated and updated throughout a litigation to address relevant developments. Thus, access to the litigation funding resource pool could help antitrust plaintiffs level the playing field with well-funded corporate defendants throughout the duration of a litigation, especially as the barriers to maintaining private enforcement actions keep escalating.[69]

IV. CONCLUSION

For more than a decade, the pendulum swung against antitrust plaintiffs, particularly in class actions. Private antitrust enforcement, inherently a high-risk/high-reward practice, now faces greater challenges at earlier stages of litigation. Private enforcement is needed now, arguably more than ever. Attorneys competing, or seeking to compete, in the private enforcement market must effectively manage the growing risks of the practice. With the risk management potential available through third- party commercial litigation financing, private antitrust enforcement actions may find ways to thrive and prosper in the current legal climate.

68 *See* Section II.B, *supra*.

69 *See* Section II.B, *supra*; Cristina Violante, *What Your Colleagues Think of Litigation Finance* (Dec. 11, 2017), *available at* https://www.law360.com/articles/989204.