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

COMMENTARY ON THE

2019 ANTITRUST ANNUAL REPORT: CLASS ACTION FILINGS IN FEDERAL COURT

SEPTEMBER 21, 2020

I. INTRODUCTION

In recent years, policymakers, legislators, and the public have signaled greater concern over the ill effects of increasingly consolidated markets and policies that undermine competition. At the same time, the dialogue surrounding antitrust has grown more diverse and political. And as the ensuing debate about the role of antitrust has focused largely on legislative reforms and lax public enforcement, the critical role of private enforcement has received less attention.¹ Congress considered private antitrust enforcement to be 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.”²

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.³ And, unlike public enforcers, private enforcers can obtain significant damages on behalf of the victims of antitrust violations.⁴ 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.⁵ The importance of the antitrust class action, a major private enforcement device, is clear. The recently released 2019 Antitrust Report: Class Action Filings in Federal Court (“2019 Report”)⁶ by Huntington National Bank and the

¹ See American Antitrust Institute, *The State of Antitrust Enforcement and Competition Policy in the U.S.*, available at <https://www.antitrustinstitute.org/work-product/antitrust-enforcement-report/>.

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

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

⁴ 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.

⁵ See Davis & Lande, *supra* n.3.

⁶ Huntington National Bank & Univ. of San Francisco School of Law, 2019 Antitrust Report: Class Action Filings in Federal Court (September 2020) [hereinafter “2019 Report”], available at

University of San Francisco School of Law (“USF Law”) reflects that the cumulative total settlement amount recovered for victims in antitrust class actions from 2009-2019 was over \$24 billion.⁷

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, healthcare, pharmaceuticals, automobile parts, and food.⁸ 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, their impact on private enforcement, the public-private partnership in the U.S., and ultimately on competition and consumers.

II. OVERVIEW OF THE COMMENTARY

The American Antitrust Institute (AAI) and Professor Joshua P. Davis at USF Law⁹ evaluated the 2019 Report with the goal of identifying its major implications for private enforcement in the U.S. The 2019 Report builds and expands on the 2018 Antitrust Report: Class Action Filings in Federal Court (“2018 Report”)¹⁰, which assessed private enforcement activity from 2013-2018. Like the 2018 Report, the 2019 Report relies largely on data for private U.S. antitrust class actions available through Lex Machina, as well as supplemental data analysis.¹¹ The 2019 Report extends the dataset to the ten year period covering 2009-2019, 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. The Commentary proceeds in two parts. The first section highlights major observations that emerge from the statistics provided in the 2019 Report and their implications for private enforcement and antitrust class actions. The second section addresses major developments in the case law over the period covered by the 2019 Report that were not covered by our Commentary on the 2018 Report (“2018 Commentary”).¹²

<https://ssrn.com/abstract=3696575>.

⁷ *Id.* at Figure 8.

⁸ *Id.* at Figure 11.

⁹ Joshua Davis is Professor and Director, Center for Law and Ethics at the University of San Francisco School of Law.

¹⁰ Huntington National Bank & Univ. of San Francisco School of Law, *2018 Antitrust Report: Class Action Filings in Federal Court* (May 2019) [hereinafter 2018 Report], available <http://ssrn.com/abstract=3386424>.

¹¹ 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 2019 Report, *supra* note 7, at 33.

¹² Commentary, American Antitrust Institute & Univ. of San Francisco School of Law, *The Vital Role of Private Antitrust Enforcement in the U.S.*, May 14, 2019, available at https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI_USF-Commentary_2018-Antitrust-Class-Action-Report_Final_5.14.19.pdf.

III. OBSERVATIONS AND IMPLICATIONS FOR PRIVATE ENFORCEMENT

One constant in the data is the significant variability in class action filings and recoveries throughout the period. New case filings from 2009-2019 range from an annual low of 72 to a high of 211.¹³ Recoveries in some years were as low as \$225 million and as high as \$5.3 billion.¹⁴ Given this variability, the expanded range of years (from 5 to 10 years) in the 2019 Report provides additional valuable perspective from which to discern trends. Driving this variability, in part, may be the emerging dichotomy in antitrust class actions. Namely, most settlements are relatively small (less than \$50 million), but a handful of settlements are very large (more than \$1 billion).¹⁵

The 2019 Report also provides valuable insight into comparisons of different types of antitrust class actions. Just under 90% of these antitrust class actions alleged exclusively violations of Section 1 of the Sherman Act involving anticompetitive agreements or conspiracies.¹⁶ Alleged violations of Section 2 of the Sherman Act involving unilateral anticompetitive conduct were included in only about 11% of class actions. However, those cases account for a more than proportionate (25%) amount of the total amount of settlements obtained during the period.¹⁷ Also of interest, direct purchaser class actions are twice as numerous as indirect purchaser actions and result in average settlement recoveries that are 2.5 times higher.¹⁸ Cumulatively that translates to about 85% of class recoveries occurring in direct purchaser actions as opposed to indirect purchaser actions.

Finally, we observe some surprising findings about how class settlement recoveries are allocated. Conventional wisdom about the relative share of the recovery that goes to class members and how that share changes with the size of the settlement is not borne out by the data. In total, 75% of class settlement recoveries were retained for class members, with only 23% of the recoveries allocated for attorneys' fees and 2% for reimbursement of costs.¹⁹ That is a much higher percentage for the class than is generally recognized. On the other hand, the 2019 Report shows that the typical (median) attorneys' fee award was 30% and that the amount of the fee award did not vary significantly with the size of the recovery, except for very large recoveries (more than \$1 billion).²⁰ Two inferences that one might draw are: (1) that antitrust class actions are on the whole efficient and beneficial to class members and (2) that if deterrence of antitrust violations is nonetheless insufficient—as the empirical literature suggests—courts should continue to award significant attorneys' fees to encourage private antitrust enforcement.

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.

¹³ 2019 Report, *supra* n.6 at Figure 1.

¹⁴ *Id.* at Figure 8.

¹⁵ *Id.* at Figures 9 and 10.

¹⁶ *Id.* at Figure 13.

¹⁷ *Id.*

¹⁸ *Id.* at Figure 12.

¹⁹ *Id.* at Figure 16.

²⁰ *Id.* at Figure 14.

A. Consolidated Private Antitrust Case Filings by Year: Making Sense of Higher Variability

The 2019 Report documents a general, albeit slight, increase in private antitrust case filings from 2009 through 2019.²¹ The data also reflect that year-to-year variations in filings are much greater than the overall trend from 2009-2019. For example, the number of filings increased, on average, by 14% over the 10-year period. This is not a trivial increase over time but it is not nearly as dramatic as some year-to-year variation in the rate of filings. Overall, there is significant variability around the average annual rates of filings.²² For example, total consolidated filings of 211 in 2019 are the highest over the 10-year period covered by the 2019 Report. The next closest year is 2018 with 136 filings. That marks a jump of over 55% between 2018-2019 and 185% from 2017-2019. While the data are insufficient to identify any longer-term upward trend in filings, the issue is worth watching. Additional research is also warranted to determine whether the variations by year are random or whether they are the result of more systemic factors that would support predictive analysis of private enforcement activity.²³

The timing (i.e., 2017-2019) of some of the more pronounced changes in private antitrust case filings prompts us to ask if they are related to the dynamics of public enforcement. One of the most striking features of the antitrust enforcement system in the U.S. in recent years has been the decrease in enforcement of the antitrust laws by the federal government.²⁴ That could have at least two contrary effects. One could be to decrease private antitrust enforcement. After all, in some instances private antitrust litigation follows government antitrust investigations or litigation. Commentators sometimes characterize these private cases as “riding the coattails” of public enforcement. If this phenomenon is dominant, we might expect that the lower enforcement levels under the current administration would lead to fewer antitrust class actions.

On the other hand, lax federal enforcement of the antitrust laws could lead, especially after a bit of a delay, to a proliferation of antitrust violations. Breaking the antitrust laws can be profitable, especially if there is an expectation of limited legal accountability.²⁵ An increase in antitrust violations at the margins—whether communicating more in ways that may be deemed collusive or engaging in conduct that may be found anticompetitive—would be expected in turn to lead to more private antitrust enforcement. The data is more consistent with this second dynamic—private enforcers responding to increasing illegal conduct invited by reduced federal enforcement—dominating the first. However, this observation should be taken as a suggestion for possible lines of inquiry rather than as a claim for what actually occurred. Further, more rigorous statistical analysis of the private enforcement data is warranted. Such analysis might reveal more about the relationship between public and private enforcement of the antitrust laws.

²¹ *Id.* at Figure 1.

²² The standard deviation in average annual rate of filings from 2009-2019 is 45%, indicating significant dispersion around the average annual rate of filings.

²³ It bears noting that the number of filings from one year to the next, much like the number of settlements from one year to the next, is not entirely independent. To the extent a case is filed or settled in one year, it necessarily was not filed or settled in the year before or after. One would expect this effect to result in peaks and valleys surrounding particularly low or high settlement or filing years, regardless of the overall trend.

²⁴ See American Antitrust Institute, *State of Enforcement*, *supra* n.1 at 6.

²⁵ See John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 *Cardozo L. Rev.* 427 (2012).

B. Longer-Term Growth in Private Enforcement Efforts with Stable Fundamentals: Levels of Filings Relative to Total Settlements

The 2019 Report presents data on both consolidated filings and total settlement amounts.²⁶ Despite some annual variation in these two measures, they generally trend upward from 2009 to 2019, as do average settlements.²⁷ Both 2017 and 2019 appear to be outlier years for filings, which were significantly lower (2017) or higher (2019) than average. Filings and total settlement levels for private antitrust cases are influenced by numerous factors that are endogenous to the cases themselves, but also related to other, exogenous variables over which private enforcers have little or no control. As indicated by upward trends in filings, total settlements, and average settlements, a number of features support the notion that private enforcement trends demonstrate stable fundamentals that support longer-term, stable growth in private enforcement cases.

For example, the 2019 Report²⁸ shows that annual median settlements are less than average settlements. As noted in our 2018 Commentary, this implies that settlements are skewed to the left—toward smaller settlement amounts (e.g., up to \$50 million). Thus, while there have been some extremely high dollar settlements—such as in 2016 and 2018—it is the more frequent, lower dollar settlements that serve as the “backbone” of private enforcement efforts. However, it is important to note that median settlement amounts have not grown appreciably over the period. This suggests that, while smaller settlements remain most common, growth in total and average settlement amounts is being driven by the increase in very large settlements. This may also provide a partial explanation for the variability in total settlements year-over-year as mentioned above; years with one or more large settlements (more than \$1 billion), such as 2016 and 2018, are well above a relatively steady average in years without such settlements.

The foregoing observations support the idea that private enforcement fundamentals over a longer period of time demonstrate stability as average annual settlements continue to rise. These trends signal that private enforcement over the longer term remains effective and efficient in obtaining restitution for victims of antitrust crimes.

C. Recoveries for Different Types of Purchasers: Insight into Direct Purchaser vs. Indirect Purchaser Cases

The 2019 Report reveals a large discrepancy between the recoveries in direct purchaser actions and indirect purchaser actions.²⁹ In total, the direct purchaser actions recovered far more than the indirect purchaser actions from 2009-2019: \$20.2 billion (84% of total recoveries) in direct purchaser settlements as opposed to \$3.5 billion (15%) in indirect purchaser settlements. This discrepancy results from two, related phenomena. First, there were over twice as many direct purchaser settlements (669) as indirect purchaser settlements (289). Second, the average direct purchaser settlement was 2.5 times the size (\$30 million) as the average indirect purchaser settlement (\$12 million). The combined effect is that direct purchaser settlements produced 5.75 as much in total recoveries as indirect purchaser settlements.

²⁶ See 2019 Report, *supra* n.6, at Figure 1 (filings) and Figure 8 (total settlements).

²⁷ Note that real total settlement values (using CPI-U and PPI-all) do not produce trends that are different than those observed from nominal values.

²⁸ See 2019 Report, *supra* n.6, at Figure 9.

²⁹ *Id.* at Figure 12.

The foregoing information is not particularly surprising. Indirect purchaser actions are more difficult to prosecute than direct purchaser actions and generally recover less. One reason for this is that it is easier to prove that the anticompetitive conduct of antitrust defendants had an impact on the entities to which they made sales to (or purchases from) directly than to trace the effects of that conduct along the chain of distribution, as is necessary in indirect cases. Moreover, federal law does not generally allow indirect claims for damages, and some states have not adopted laws allowing for such claims. As a result, in many cases direct claims are worth bringing when indirect claims are not, direct claims may succeed when indirect claims fail, and when both succeed direct claims are likely to result in greater recoveries than indirect claims.

This discrepancy in types of recoveries has at least one important policy implication. There has been a good deal of discussion recently about repealing the direct purchaser rule and allowing indirect purchasers to recover damages under federal antitrust laws. In considering that possibility, the 2019 Report shows that direct purchaser actions play a far more significant role in private antitrust enforcement than indirect purchaser actions. This amplifies the concern we expressed in our 2018 Commentary that any legal change that undermines direct purchaser actions as part of an effort to strengthen indirect purchaser actions could significantly reduce private antitrust enforcement overall.

As discussed in the 2018 Commentary, there are at least two rules relevant to the indirect purchaser issue. The first derives from *Hanover Shoe*. It holds that direct purchasers can recover the full overcharge they pay as a result of an antitrust violation. The second derives from *Illinois Brick*. It holds that only direct purchasers can recover damages under federal antitrust law (with a few exceptions that have little practical significance). One way to repeal the “direct purchaser rule” would be to preserve *Hanover Shoe* and reverse only *Illinois Brick*. That should maintain direct purchaser actions as they currently exist while allowing indirect purchasers to bring claims for damages under federal antitrust law. In a sense, it would in effect combine federal antitrust law with the laws of those states that allow indirect purchaser antitrust actions, in the process extending indirect purchaser actions across the country and making the applicable law more uniform. A strong case can be made for this sort of legal reform.³⁰

The same is not true for repealing both *Hanover Shoe* and *Illinois Brick*. Doing so would give rise to a pass-on defense in direct purchaser actions and could even deprive direct purchasers of a claim for overcharge damages, forcing them to seek lost profits. That could make it impractical to obtain class certification in all or nearly all direct purchaser actions. Given that the 2019 Report shows that direct purchaser litigation is responsible for 84% of the settlement recoveries in antitrust class actions litigated in federal court, the consequences could be dire both for compensation and deterrence from private enforcement.³¹ It is possible that indirect purchaser actions might expand non-trivially as a result, but even if those recoveries doubled (from 15% to 30% of current levels), the overall

³⁰ Although there could be a theoretical concern about excessive liability, federal law accounts for the risk of duplicative recovery as part of the antitrust standing inquiry. *Associated Gen. Contractors v. Carpenters*, 459 U.S. 519 (1983). Moreover, in over four decades of experience with overlapping claims since *Illinois Brick*, the problem has not arisen in practice. *See, e.g.*, Antitrust Modernization Comm’n, Report and Recommendations 274 (2007) (“AMC Report”) (in three years of Commission proceedings, “no one identified an instance of unfair or multiple recovery”); Brief for Texas, Iowa, and 29 Other States as Amici Curiae 19, *Apple, Inc. v. Pepper*, No. 17-204 (filed Oct. 1, 2018) (“Amici States are also unaware of any such instance.”); *see also* Connor & Lande, *Crime Pays*, *supra* n.25 (noting that total sanctions even in price-fixing cartels are sub-optimal).

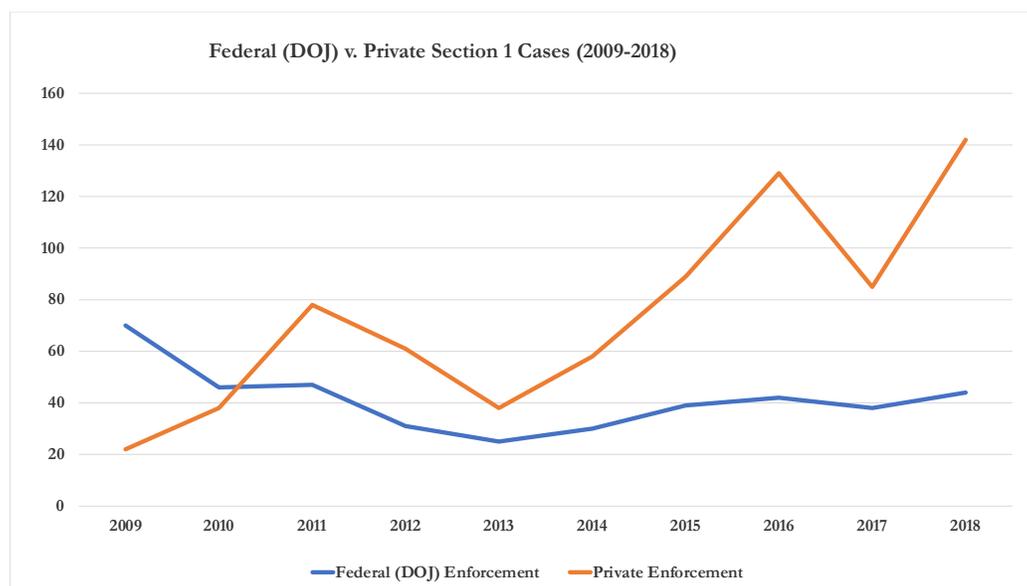
³¹ Reliable data is not readily available on the number and size of any indirect purchaser claims litigated in state courts. However, due to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, & 1711-1715 expanding federal court jurisdiction to most large cases, one would expect this universe to be limited.

effect could be to eliminate more than two-thirds of the recoveries in federal antitrust class action settlements.

D. Unpacking Types of Violations: Section 1 is the “Bread and Butter” but Section 2 Holds Promise

The 2019 Report sheds important light on the relative strengths of Section 1 and Section 2 claims. The 2019 Report shows that the great majority (89%) of antitrust class action settlements in federal litigation under federal law rely only on Section 1 of the Sherman Act.³² That is unsurprising. So is the small minority (2%) of settlements that invoked only Section 2 of the Sherman Act. These figures largely comport with conventional wisdom. The general view is that private antitrust enforcement is dominated by actions involving collusion—in the words of Section 1, a “contract, combination, or conspiracy”—and that very few actions rely on unilateral conduct challenged under Section 2.

Trends in private Section 1 cases from 2009-2019 provide more insight into private enforcement. For example, private Section 1 cases reached a high in 2016, succeeded by another peak in 2018. With the expanded data on cases available in the 2019 Report, it is clear that the number of private Section 1 cases has trended significantly upward over the past decade. As shown in the figure below, however, federal enforcement against Section 1 violations by the U.S. Department of Justice (DOJ) Antitrust Division has trended slightly downward from 2009-2018.³³ As noted above, one explanation for the disparity in trends for public versus private Section 1 cases may be that lax federal enforcement of the antitrust laws has prompted a proliferation of antitrust violations. Private enforcers therefore filled the void, according to this theory, providing an important source of restitution and deterrence.



³² 2019 Report, *supra* n.6, at Figure 12.

³³ U.S. Department of Justice, Antitrust Division, *Antitrust Workload Statistics: FY2009-2018*, at 1, <https://www.justice.gov/atr/file/788426/download>. Workload statistics are available through 2018. Federal statistics show a declining linear trendline from 2009-2018.

It is somewhat surprising that settlement recoveries under Section 2 amount to 5% (\$1 billion) of total recoveries. Thus, while Section 1 recoveries dominate, Section 2 recoveries are far from trivial. Moreover, settlements achieved under a combination of Section 1 and 2 claims account for 9% of total settlements but 20% of total settlement dollars, or \$4.8 billion. One explanation for this disproportionality between numbers of settlements and total settlement amounts could be that almost all of these cases are predominantly Section 1 cases with Section 2 claims added for strategic reasons. If so, they fit the larger pattern. Alternatively, it is possible that a significant portion of these settlements depended primarily on Section 2 claims with Section 1 claims added for strategic reasons. If so, Section 2 claims play an even more significant role in private antitrust enforcement³⁴ and a much more significant role than has generally been recognized.

More research on the foregoing issue is warranted. However, a closer look at the annual data reveals that there is a high correlation between standalone Section 1 cases and combined Section 1 and 2 cases. There is not the same level of association between standalone Section 2 and combined cases because of the very small number of the former and the lack of a discernible pattern in those cases over the period 2009-2019. What we know therefore is that settlements under Section 2 contribute meaningfully to private antitrust enforcement. They are not unicorns, as has sometimes been suggested, but we do not know how significant their effect is. Such an analysis would require a careful, qualitative review of the 85 cases that involved both Section 1 and Section 2 claims.³⁵

E. The Value of Sector-Specific Enforcement Information: Rankings by Sector

The 2019 Report features new reporting on total settlements by industry sector.³⁶ This provides valuable information on the sectors in which antitrust violations most commonly arise during the period, and also enables the comparison of private enforcement statistics with public civil and criminal enforcement efforts by sector. The financial services sector ranks first on the basis of total settlement amounts by industry. It is followed, in order, by pharmaceuticals, electronics manufacturing, automotive manufacturing, and chemical manufacturing. These industries also rank in the top five on the basis of number of consolidated filings. Airlines, agriculture, and logistics and freight are also in the top 10 on the basis of total settlements and numbers of filings. The top 10-ranked sectors account for about 87% of total settlements and total filings over the period 2009-2019.

Sector rankings are useful for identifying industries that are particularly troubled by antitrust violations, and for which private enforcement is an important tool for obtaining restitution for victims of antitrust violations. Rankings also provide a way to determine similarities or disparities in the focus of public and private enforcement efforts. For example, data on the number of criminal Section 1 violations prosecuted by the DOJ Antitrust Division from 2009-2019 show that, with the exception of chemical manufacturing, the top five ranked private enforcement sectors are also top ranked for public enforcement. Food processing, plastics manufacturing, and construction manufacturing were also a focus of public Section 1 cases, but were lower-ranked sectors in private cases.

³⁴ 2019 Report, *supra* n.6, at Figure 13.

³⁵ *Id.*

³⁶ *Id.* at Figure 11.

This mapping of public and private cases may provide important insights into the public-private antitrust enforcement partnership. Research is warranted into the dynamics of the interplay between government and private enforcement efforts discussed above. The same is true of research into cases where federal criminal indictments are deemed to be the most effective tool for deterring future illegal conduct. The relative consistency with which public and private enforcers focus on competitively-impaired sectors supports the notion that private enforcement is on-target and efficient and that the public-private partnership is important and working. On the other hand, it would be worthwhile to analyze the sectors where enforcement is disproportionately public as opposed to private and the other way around. That may reveal the sorts of market conditions in which public and private enforcement are each most effective.

F. Class Recoveries, Attorneys' Fees, and Expenses: Class Members Receive a Large Share of Total Recoveries but the Typical Attorneys' Fee Award is Higher than Expected

The 2019 Report provides important information about how settlement recoveries in federal antitrust cases are allocated between plaintiff classes, attorneys, and expenses. Although the primary focus of antitrust enforcement is deterring conduct and recovering damages for victims, the award of sufficient fees and costs to plaintiffs' class counsel is important to ensure the U.S. maintains sufficient private enforcement of the antitrust laws. This is analogous to the importance of ensuring that federal antitrust agencies have the appropriate resources to support vigorous enforcement of the antitrust laws. Indeed, scholars have documented the essential role that private class actions play in antitrust enforcement.³⁷ Damages from private antitrust class actions likely have a greater deterrent effect than federal criminal sanctions, including not only monetary fines but also incarceration.³⁸

The 2019 Report data reveal that most of the recovery in antitrust class actions goes to the class members. It shows that the majority of the funds (75%) was reserved for class members.³⁹ A relatively modest amount (23%) went to the attorneys in fees and a small percentage (2%) was allocated to costs. That means that net of payment of fees and costs, the plaintiff classes retained about \$18 billion from total recoveries of slightly over \$24 billion. These results rebut the well-worn criticisms of antitrust class actions. Those criticisms include that the attorneys keep most of the money from class action settlements or that a great deal of the recoveries are consumed by costs. For antitrust class actions in federal court, neither is true.

Turning from the overall numbers to the typical case—i.e., from aggregate percentages and amounts to median recoveries—reveals an interesting pattern. It could help guide judicial decisions, particularly in regard to attorneys' fee awards. The 2019 Report indicates that antitrust class actions may be different from other class actions. Courts have noted, for example, that a typical attorneys' fee award is 25% of the class recovery. That is not true in federal antitrust class actions. The typical (median) attorneys' fee award is 30%.⁴⁰ This likely reflects that antitrust class actions tend to be

³⁷ See, e.g., Joshua P. Davis & Robert H. Lande, *The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden, Hammon, and Barnett*, 58 Antitrust L. Bull. 173 (2013); 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.

³⁸ See *Id.*

³⁹ 2019 Report, *supra* n.6, at Figure 16.

⁴⁰ *Id.* at Figure 15.

particularly complex, expensive, challenging, and lengthy—all factors associated with larger attorneys’ fee awards across all types of class actions.

Also revealing is how the typical (median) attorneys’ fee awards vary with the size of class action settlements in antitrust cases. Courts and commentators often say that there is an inverse relationship between the size of a class recovery and the attorneys’ fees that should be awarded. Whether this is good policy is a matter of debate. As a matter of practice, however, the median percentage reveals relative consistency in fee awards for settlements up to \$1 billion.⁴¹ Median fee awards by size of settlement reported in the 2019 Report are shown in the table below.

Settlement Amount	Attorneys’ Fees
\$1B +	14%
\$500 - \$999M	28%
\$250 - \$499M	25%
\$100 - \$249M	28%
\$50 - \$99M	30%
\$10 - \$49M	31%
< \$10M	30%

For settlements less than \$1 billion, the median fee award tends to hover between 28-30%. Two countervailing considerations may account for this. As noted above, courts at times say, all else equal, larger settlement recoveries should result in a lower percentage in attorneys’ fees. The notion is that it does not take twice the amount of work to obtain twice as much in settlement. But courts also will award a higher percentage fee for a better recovery—a consideration that runs in the opposite direction. This is consistent with the logic that class counsel should be encouraged to obtain better, not worse, results for the classes they represent.⁴² Courts also sometimes say that the fee awarded from a settlement should decrease significantly if a case involves a so-called “megafund.” That position is in a sense an extreme example of the general inverse relationship between settlement size and percentage fee award.

Critics of designating some settlements as “megafunds” often make two arguments. First, they claim that the fee percentage should not decrease at all as recoveries get bigger. That could discourage class counsel from obtaining the best result possible. Second, and relatedly, they note that a discrete decrease in a fee percentage at a particular threshold can create perverse incentives. Class counsel could benefit from a recovery that remains just shy of whatever the threshold is, as that would maximize their fees. Likewise, an increase in the victims’ recovery to just above that threshold could actually lead to a dramatic net decrease in the fee award. Although many class counsel no doubt fulfill their ethical duty to privilege the interests of the class over their own, perverse incentives like these are generally best avoided.

⁴¹ *Id.* at Figure 14.

⁴² Of course, there may be an element of randomness at work. Attorneys’ fee awards vary as a percentage of recovery based on a host of factors. Different judges and jurisdictions may also tend to award different amounts in fees. Chance may have caused the median percentage to be smaller in some categories with larger recoveries and vice-versa.

An alternative approach that would create more appropriate incentives would be to have progressive decreases in fee award percentages that apply only to marginal increases in settlement size, as often occurs with income tax. In the megafund context, that might mean that a recovery of \$999 million would produce an attorneys' fee award of about \$280 million (28%) and a recovery of, say, \$1.1 billion would produce an award of 28% on the first \$999 million and then 14% of any amount in excess of \$999. Here, that would be 14% of the remaining \$100 million for a total of about \$294 million. Such an approach would avoid a situation where a larger class recovery produces a significantly lower fee award measured in dollars.

Indeed, the data are suggestive that courts do not in fact automatically award a lower percentage fee if a case involves a larger recovery. As noted above, any decrease in the typical (median) fee award appears to be quite gradual up to \$1 billion and varies somewhat in whether it moves up or down as category of settlement size increases. There are too few settlements in excess of \$1 billion (5) to draw any inferences about an overall pattern. Nonetheless, to the extent the data in the 2019 Report are consistent with a sharp drop in attorneys' fee percentages at the \$1 billion settlement threshold, courts may be creating undesirable incentives.

Another important observation from the data is that if there is a special threshold above which settlements become megafunds, it is much larger than some courts have thought it to be, at least in antitrust cases. Courts have commented at times that any recovery greater than \$100 million is a megafund for purposes of awarding fees. The data in Figure 14 do not bear that out. It is hard to say with complete confidence precisely what the threshold would be from the data, but Figure 14 indicates it may be around \$1 billion. In categories of recoveries below that amount, the median fee award hovers around 28 to 30%. It is only over \$1 billion that the median drops to 14%. But, again, there were only five settlements above \$1 billion during the period under study. And a median does not tell us about the pattern of fees within a category. So additional data and analysis would be necessary to draw any firm conclusions.

IV. MAJOR DEVELOPMENTS IN THE CASELAW OVER THE PERIOD UNDER STUDY

Antitrust law develops through a common law process over time. Recent important decisions therefore provide a context for analyzing private antitrust enforcement and may help to explain the data and trends revealed in the 2019 Report. Our commentary on the 2018 Report discussed the major developments in caselaw over the period covered by that Report, which, unlike the 2019 Report, did not include 2009-1012 and 2019. The following section supplements the 2018 Commentary to address those periods as well as to update the 2018 commentary.

A. Two-Sided Markets and the Expansion of *Amex*

As discussed in the 2018 Commentary, the Supreme Court decided the controversial antitrust case, *Ohio v. American Express Co.*,⁴³ in the 2017-2018 term. Holding that American Express's "antisteering" contract provisions, which prohibit merchants from encouraging customers to use less expensive payment cards instead of American Express, were not anticompetitive under a rule-of-reason analysis, the Court in a 5-4 majority opinion by Justice Thomas distinguished Amex's credit card network as a "two-sided transaction platform" with strong "indirect network effects."⁴⁴

⁴³ 138 S. Ct. 227 (2018).

⁴⁴ *Id.* at 2286.

The 2018 Commentary stated, “Only time will tell whether the *Amex* decision will be largely limited to the facts of the case or whether it will have a larger effect on antitrust doctrine.”⁴⁵ Less than 18 months later, it seems apparent that the *Amex* decision will have at least some impact on antitrust doctrine beyond the four corners of that case, although the metes and bounds are yet to be determined.

In April of 2020, the DOJ’s attempt to block the merger of Sabre and Farelogix, two companies that provide technology and services for managing and distributing airfare and flight information, was rejected. The opinion, by federal District Judge Leonard Stark, relied heavily on *Amex*, notwithstanding that *Amex* was not a merger case. Despite finding, as a matter of economic fact, that Sabre and Farelogix compete with one another, the court concluded that, as a matter of law, Sabre and Farelogix cannot compete in a relevant market, because Sabre is a two-sided platform and Farelogix is not. In so holding, the judge seized on the following quote from the *Amex* decision: “[o]nly other two-sided platforms can compete with a two-sided platform for transactions.”⁴⁶

The *Sabre-Farelogix* decision was heavily criticized as incoherent and defying economic sense.⁴⁷ Shortly after the district court issued its decision, the EU Competition Authority announced that it would block the merger in the EU on competition grounds. The parties immediately called off the merger, citing the EU decision, leaving the district court decision in a state of appellate limbo.⁴⁸ Invoking a rarely-used procedure, the DOJ sought vacatur of the decision by the Third Circuit, which was granted.⁴⁹ But the Third Circuit’s order vacating the decision included this statement about how courts should view the district court’s order: “this Order should not be construed as detracting from the persuasive force of the District Court’s decision, should courts and litigants find its reasoning persuasive.”⁵⁰

B. Big Tech and *Illinois Brick*

In May of 2018, when we released our 2018 Commentary, the longstanding and foundational direct purchaser rule appeared to hang in the balance in the then-pending case of *Apple Inc. v. Pepper*.⁵¹ The direct purchaser rule—derived from the Supreme Court’s 1968 decision in *Hanover Shoe* and its 1977 decision in *Illinois Brick*—vests the right to recover the full amount of overcharge damages for Sherman Act violations in direct purchasers and denies recovery of damages under federal antitrust laws to indirect purchasers.⁵²

⁴⁵ 2018 Report, *supra* n.10.

⁴⁶ *United States v. Sabre Corp.*, 2020 WL 1855433 at 32 (D. Del. April 7, 2020) (citing *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2287(2018)) (vacated by *United States v. Sabre Corp.*, 2020 WL 4915824 (3d Cir. July 20, 2020))

⁴⁷ See, e.g., Randy M. Stutz, *We’ve Seen Enough: It is Time to Abandon Amex and Start Over on Two-Sided Markets*, American Antitrust Institute, available at <https://www.antitrustinstitute.org/wp-content/uploads/2020/04/Amex-Commentary-4.21.20-Final.pdf>.

⁴⁸ Law360, *UK Opposition Forces Sabre, Farelogix to Drop Merger*, May 1, 2020, available at <https://www.law360.com/articles/1269449/uk-opposition-forces-sabre-farelogix-to-drop-merger>

⁴⁹ *United States v. Sabre Corp.*, 2020 WL 4915824 (3d Cir. July 20, 2020).

⁵⁰ *Id.* at 1.

⁵¹ *Apple, Inc. v. Pepper*, 139 S.Ct. 1514 (2019).

⁵² See *id.* at 1525-26, Gorsuch, J. (dissenting).

The Supreme Court decided *Pepper* without altering, or even addressing, the direct purchaser rule.⁵³ As a result, any immediate threat from the judiciary has abated for now. Nevertheless, legislative proposals to undo the direct purchaser rule remain. As explained in our 2018 Commentary, if undertaken without due care, reform could detract from what is already insufficient deterrence effects.⁵⁴ As discussed above, data in the 2019 Report showing the disproportionate large effect of direct purchaser class actions demonstrates the importance of their enduring viability.

C. Uninjured Class Members

As we highlighted in last year’s Commentary, there is an ongoing debate among federal courts as to how, if at all, the presence of uninjured class members affects class certification. The intervening 18 months have seen an emerging consensus on some aspects of this issue. For example, courts appear to be coalescing on the view that the requirement of Article III standing does not prohibit classes from including uninjured absent members.

On November 15, 2019, *Cordoba v. DirecTV, LLC*,⁵⁵ held that Article III does not prohibit certification of classes containing uninjured members. But the court further reasoned that individualized questions regarding Article III standing can be relevant to the predominance inquiry. Before the court were claims under Telephone Consumer Protection Act (TCPA), not antitrust law. In that context, the Eleventh Circuit found that the standing of allegedly uninjured class members presented an individualized issue.

A few months later, in February 2020, in another TCPA case, the Seventh Circuit addressed a defendant’s due process interest in limiting post-trial compensation to those class members entitled to recover. *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*,⁵⁶ held that the defendant’s due process rights were indeed implicated, but only in the unique context of a TCPA claim. Because “unclaimed money can revert to the defendant in TCPA cases,” a defendant who has already been found to have violated the TCPA retains the right to demand evidence that each class member has standing to recover. The court clarified that it was not disturbing the rule, recently articulated in *Mullins v. Direct Digital, LLC*,⁵⁷ that “where damages do not depend on the specific identity of a class member, there is no implication of a defendant’s due process rights.”

Also in February, in *Ramirez v. TransUnion LLC*,⁵⁸ the Ninth Circuit addressed, as a matter of first impression, the similar question of “who must have standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages.” The court recognized that “only the representative plaintiff need allege standing at the motion to dismiss and class certification stages . . . and even at the final judgment stage in class actions involving only injunctive relief.” But it held that “each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover monetary damages in federal court.” However, the court accepted implicitly that Article III standing can be proven using common evidence because, there, it was.

⁵³ *Id.* at 1521 n.2 (“In light of our ruling in favor of the plaintiffs in this case, we have no occasion to consider that argument for overruling *Illinois Brick*.”).

⁵⁴ 2018 Commentary, *supra* n.12, at 6.

⁵⁵ 942 F.3d 1259 (11th Cir. 2019).

⁵⁶ 950 F.3d 959 (7th Cir. 2020).

⁵⁷ 795 F.3d 654 (7th Cir. 2015).

⁵⁸ 951 F.3d 1008 (9th Cir. 2020).

D. No-Poach Agreements

Identified in our 2018 Commentary as an “up-and-coming” issue, antitrust claims based on so-called “no poach” agreements remain a rapidly evolving area of antitrust enforcement.⁵⁹ As we detailed in the 2018 Commentary, 2018 and early 2019 brought a flurry of activity on this front. That flurry continued into the remainder of 2019 and early 2020. In May of 2019, the DOJ moved to intervene in a private antitrust class action settlement between Duke University and the University of North Carolina (UNC), which resolved claims that the universities had entered into no-poaching agreements related to medical faculty. The DOJ sought permissive intervention for the limited purpose of joining the settlement and obtaining the right to enforce the injunctive provisions.⁶⁰

In September of 2019, the DOJ hosted a public workshop on competition in labor markets that discussed labor-market harms in complex business settings involving collaboration among competitors, including franchise agreements. And, in the aftermath of a study identifying the pervasive use of no-poaching agreements in franchise contracts, the Attorney General of Washington and numerous private plaintiffs have challenged these agreements as violations of Section 1 of the Sherman Act. Although the vast majority of franchises have voluntarily agreed to eliminate their no-poaching agreements, those that have litigated have often attempted to justify the agreements as “ancillary restraints” that promote the procompetitive goals of franchising. Only time will tell how successful this argument will be.

⁵⁹ 2018 Commentary, *supra* n.45, at 8.

⁶⁰ United States of America’s Pleading in Intervention, *Seaman v. Duke University*, Case No. 1:15-cv-462-CCE-JLW (filed May 20, 2019).