

Optimizing Private Antitrust Enforcement

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INTRODUCTION

The United States is unique in the world insofar as private enforcement of the antitrust laws vastly outstrips public enforcement. There are roughly ten private federal cases for every case brought by

the Department of Justice or Federal Trade Commission.¹ Almost all of these private cases are oriented exclusively toward damages. While the plaintiff usually asks for an injunction against further misconduct, everyone understands that the case is all about the treble damages or, more likely, the settlements that the defendants inevitably pay if the case survives summary judgment.²

Although most other countries follow a model that relies primarily on governmental antitrust enforcement, in many jurisdictions there is a surge of interest in expanding private rights of action for damages.³ Most prominently, the European Commission released a White Paper in 2008—essentially a blueprint for further action by the Commission—calling for expanded private antitrust enforcement within the European Union.⁴ Notably, while proclaiming the need for expanded private enforcement, the White Paper seems to recoil in horror at the possibility of following a U.S. blueprint. On virtually every major aspect of private litigation—including standing, discovery, claim aggregation, and damages—the White Paper argues for an approach that essentially rejects the U.S. position.⁵

In many other jurisdictions, private enforcement is either well under way or under active discussion.⁶ As with the European Union, however, most movements toward private enforcement reflect deep ambivalence about the U.S. model.

In this Article, I argue that efforts to correct the perceived infirmities of the U.S. private enforcement system by tweaking the mechanics of enforcement—standing rules, discovery principles, claim aggregation mechanisms, damages rules, and the like—are futile. The

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1. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1179 (2008).

2. In the current system, the possibilities for injunctive relief are slim. Only about eighteen private antitrust cases go to trial every year in the federal system, out of about 800 cases that reach a final disposition. See Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 35 n.188 (2008). Even assuming that half of these cases succeed at trial, that is only about nine cases a year which would even be candidates for permanent injunctive relief. Of course, it is possible that the parties would enter into a settlement agreement calling for the entry of a stipulated injunction, but such settlements are exceedingly rare in private cases.

3. See AM. ANTITRUST INST., PRIVATE ENFORCEMENT: ADDING TO THE COMPLEXITY? (2009) [hereinafter “AAI REPORT”].

4. Commission of the European Communities, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (Apr. 2, 2008) [hereinafter “EU White Paper”].

5. See *infra* text accompanying notes 108–122.

6. See AAI REPORT, *supra* note 3.

shortcomings of private enforcement are existential, not technical. They go to foundational assumptions about the goals and purposes of antitrust law and competition policy. Private antitrust in the United States has rarely advanced the two assumed goals of private enforcement: deterrence and compensation. As other jurisdictions around the world consider adopting a private enforcement model, they should begin by reevaluating the goals of private enforcement. Only once the goals are properly specified does it make any sense to discuss the more technical implementation details.

To critique the U.S. system of private litigation is not to call for a governmental monopoly of antitrust enforcement, the *de facto* rule in most countries. Those who distrust private economic monopolies should also distrust public governmental monopolies. A system of private enforcement allows for decentralized decisionmaking and individualized bargaining. It supplies a set of “on the street” enforcers closer to the relevant problems, along with enhanced enforcement resources and continued enforcement during downturns in public enforcement. In the United States, private antitrust enforcement should be retained, but reconceived. In the European Union and the developing antitrust world, private antitrust enforcement should be enhanced, but designed with the failures of the U.S. system in mind.

This Article suggests a framework for reconceiving the role of private enforcement. Part I argues that the goals of private enforcement need to be reconceptualized at a fundamental level. Compensation and deterrence, the two assumed goals of antitrust law, are not viable in most cases. Compensation fails because the true economic victims of most antitrust violations are usually downstream consumers who are too numerous and remote from the violation to locate and compensate. Deterrence is ineffective because the time lag between the planning of the violation and the legal judgment day is usually so long that the corporate managers responsible for the planning have left their corporate employer before the employer internalizes the cost of the violation.

Part II argues that the most compelling reason to allow private antitrust enforcement is to set the stage for individualized bargaining over problems of market power and negotiated, forward-looking solutions. The proposed approach extends beyond the familiar, and often ineffective or superfluous, practice of granting injunctions against continuing violations. Indeed, it seeks to dispense with the need for binary fault-based adjudication, and instead orients the legal decisionmaker toward policing market problems from a problem-solving perspective. Reorienting private antitrust enforcement to serve

this objective will require a comprehensive reconceptualization of the role of the private remedy.

Part III briefly considers the future of private antitrust litigation and proposes some steps that could be taken to enhance private litigation's effectiveness in serving antitrust's ultimate goal—the advancement of consumer welfare. Although it is unlikely that the United States will abandon its compensation- and deterrence-oriented private litigation system any time soon, a number of modest steps have already been taken to experiment with the problem-solving approach. Moreover, it is not unrealistic to expect that emerging antitrust jurisdictions could undertake some experimentation of their own before their private enforcement systems harden into the inertia of custom.

I. THE FAILURE OF THE COMPENSATION AND DETERRENCE GOALS

The U.S. Supreme Court has repeatedly stated that the private right of action for treble damages under the antitrust laws serves two purposes: compensating injured victims of unlawful conduct and attracting enforcement resources to supplement the government's deterrence-oriented efforts.⁷ Unfortunately, modern private antitrust enforcement does not serve either one of these objectives very well.

A. Compensation

From a political perspective, it is important to pay lip service to the notion that private antitrust remedies exist to compensate people injured by wrongdoers.⁸ Recently, the European Commission released

7. See, e.g., *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979))); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 (1981) (referring to deterrence as "one of the important purposes of the treble-damages action under § 4 of the Clayton Act"); *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978) (stating that "§ 4 [of the Clayton Act] has two purposes: to deter violators and deprive them of 'the fruits of their illegality,' " and "to compensate victims of antitrust violations for their injuries." (citations omitted)); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (asserting that compensation and deterrence are the twin goals of § 4 of the Clayton Act); see also Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1127 (1976) (stating that two purposes of private antitrust enforcement are compensation and deterrence).

8. The framers of the Sherman Act justified the treble-damages remedy as necessary to achieve compensation for injured victims of the trusts. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 911–35 (1999).

a White Paper calling for increased private antitrust enforcement in Europe.⁹ The White Paper dutifully reported that “full compensation is . . . the first and foremost guiding principle” of private antitrust litigation and that “[m]ore effective compensation mechanisms mean that the costs of antitrust infringements would be borne by the infringers, and not by the victims and law-abiding businesses.”¹⁰ If one is trying to sell a new private enforcement system to a skeptical public, this is certainly the right tactic.

Alas, private antitrust litigation does a very poor job of compensating injured victims. Antitrust injuries are conventionally classified into two categories, static and dynamic.¹¹ Static injuries concern the effects on consumers from an increase in price attendant to the exercise of monopoly power.¹² Dynamic injuries arise when a dominant firm stifles innovation or new product development.¹³ Private antitrust litigation could, in theory, attempt to compensate injured victims for both types of losses, but it fails at both tasks.

1. Static Injuries

In a static model of competitive injury, the clearest social cost of an antitrust violation falls upon a class of people who will often not be able to sue—those who stopped purchasing from the defendant because the price increased too much. When a firm acquires market power through collusion or by excluding rivals, it typically will raise its price to a monopoly level. Two classes of consumers suffer harm. First, some consumers who would otherwise have purchased the product are no longer willing to purchase it at the higher price. Hence, they purchase a second-best preference as a substitute. These consumers’ loss is a deadweight loss—a class of forgone transactions that should, in a competitive market, have taken place.¹⁴ Economists

9. *EU White Paper*, *supra* note 4, at 3.

10. *Id.* Interestingly, the white paper listed deterrence as a merely secondary goal for private enforcement. *Id.* In the United States, the situation is arguably the opposite. See William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1452 (1985) (arguing that the Supreme Court has elevated deterrence over compensation as a value for private antitrust enforcement).

11. To be more precise, antitrust scholars generally speak about “static efficiency and dynamic efficiency.” See, e.g., J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 600 (2009). The loss of one or other of those forms of efficiency due to anticompetitive injury is what I call static or dynamic injury.

12. See generally HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 19–20 (3d ed. 2005).

13. See generally Herbert Hovenkamp, *Restraints on Innovation*, 29 CARDOZO L. REV. 247 (2007).

14. Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 30 (1989).

identify deadweight loss as the primary *social* cost of anticompetitive behavior.¹⁵ It is a social cost because it results in a misallocation of scarce social resources. Customers must buy their second-best, rather than their most-favored, preferences.

The second class of harm accrues to consumers who continue to purchase the product at the higher price. Their injury is a wealth transfer from consumers to producers.¹⁶ This is not necessarily economically inefficient, since it merely transfers money from one person to another and does not directly affect the deployment of scarce resources.¹⁷ There is nothing that says a priori that the money is better off in the hands of consumers than the producers. For example, if the price-fixed product is a luxury good, then price-fixing may act as a progressive tax on rich consumers for the benefit of poor artisans.

Private parties who sue antitrust defendants typically do not sue to vindicate the interests of the consumers who stopped buying the goods because they were too expensive. Instead, only the purchasers who did buy and actually incurred an overcharge bring antitrust claims.¹⁸ For example, imagine the difficulty of representing a class of purchasers who *stopped* buying vitamins because of a vitamins cartel or, even worse, who never *started* buying vitamins because of excessive prices. How could one prove who the consumers were or quantify their injury? It is much easier to recover damages on behalf of purchasers who made the purchase but paid too much. In this case, the formula is simply to posit a but-for price and use the difference between the actual price and the but-for price as damages.¹⁹

The fact that private damages are automatically trebled under the Clayton Act²⁰ (save for a few exceptional cases) is no reason to believe that deadweight losses are being recovered after all. One could rationalize the treble damages allowance as necessary to capture a set of damages that are difficult to identify or recover in private litigation,

15. KENNETH G. ELZINGA & WILLIAM BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 6–7 (1976); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 653 (1983).

16. Hovenkamp, *supra* note 14, at 9–11.

17. To the extent that would-be monopolists expend resources trying to effectuate wealth transfers, such expenditures may be inefficient. RICHARD A. POSNER, *ANTITRUST LAW* 13 (2d ed. 2001). However, private enforcers do not sue to recover such wasted expenditures.

18. See Hovenkamp, *supra* note 14, at 36; Landes, *supra* note 15, at 675–76.

19. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396, 399 (1906) (holding that damages in overcharge cases are the “difference between the price paid and the market or fair price”).

20. 15 U.S.C. § 15(a) (2006).

including the deadweight loss.²¹ Although this may be an argument for the deterrent purpose of treble damages, it is not a particularly good argument for their compensatory function. A consumer who recovers treble damages may be entirely different from a consumer who forgoes the relevant purchase after the price increase. Private antitrust enforcement tends to focus on a set of purchasers and injuries that are secondary in the hierarchy of antitrust concerns. Private enforcement does not seek compensation for, nor does it meaningfully analyze, the key concern of deadweight loss.²²

Assume, however, that compensating for wealth transfer is a goal of antitrust every bit as important as preventing deadweight losses.²³ How well does private antitrust enforcement do on this score? For consumers, the answer is “not very well.” The widely distributed nature of the overcharge and the difficulty in locating the real economic victim work against this goal.

To see why private enforcement fails at compensating for wealth transfer, consider the chain of loss-causation in a typical antitrust claim. A dominant durable medical equipment manufacturer enters into exclusive dealing contracts with hospitals and the group purchasing organizations (“GPOs”) that bargain on the hospitals’ behalf.²⁴ The exclusive contracts unlawfully lock out potential competitors and allow the manufacturer to charge a monopoly price. In the first instance, the monopoly overcharge is paid by distributors that stock goods for the hospitals. The hospitals have complex billing arrangements with the distributors in which some, but not all, of the overcharge is passed on to the hospital. The hospitals then pass along some, but not necessarily all, of this overcharge to their patients.

The patients are often not directly affected by the overcharge. This is because the patients’ co-pay for using hospital services remains initially unaffected; their insurance companies pay the bulk of the passed-on overcharge. The insurance companies may eventually

21. See generally Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993).

22. On the other hand, public enforcers typically seek penalties, not damages, and do not have to establish standing to sue or make their case on behalf of any particular class of purchasers. Rather, they can focus on the overall social harm of the conduct and pursue remedies designed to deter and prevent such conduct in the future.

23. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 911–35 (1999) (arguing, based on legislative history, that Congress intended the Sherman Act to prevent wealth transfers from consumers to producers).

24. See, e.g., *Del. Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116 (9th Cir. 2008); *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 2009-1 Trade Cas. (CCH) 76, 461 (E.D. Mo. 2008); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int’l*, 247 F.R.D. 253 (D. Mass. 2008).

increase their premiums or co-pays, but these future increases may fall on a different set of insured than those who received monopoly-priced services. For large classes of patients such as the indigent and the elderly, any overcharge borne by the hospitals may be passed onto taxpayers in the form of Medicare, Medicaid, or direct hospital subsidization. This complex scenario has countless analogs in the world of manufacturing, sales, and distribution. Thus, a monopoly overcharge often produces numerous ripples in the economy.²⁵

The law has a practical answer to the above scenario: just as a person can be damaged without legal injury,²⁶ so also can a person be legally injured without actual damage. Under the current U.S. system of standing, a private plaintiff who is a direct purchaser from an overcharging monopolist has a right of action to recover the full extent of the overcharge, even if the plaintiff passes on the entire overcharge downstream and therefore suffers no economic damage.²⁷ Conversely, an indirect purchaser bearing the real economic brunt may recover nothing.²⁸ Proposals for reform would grant some standing to indirect purchasers,²⁹ but even that would not necessarily result in the real economic victims being compensated. The question remains: Who are the proper indirect purchasers? Are they the hospitals, patients, insurance companies, or taxpayers? Figuring out which, if any, of these groups suffered the real economic harm is often difficult or impossible given the complexity and variability of the relevant economic relationships.

This brings us to the second problem with pursuing a compensation goal. Even if the real economic victims of an overcharge as a class could be identified, identifying the actual people who

25. See Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 276 (1979) (“[I]n a multiple-level chain of distribution, passing on monopoly overcharges is not the exception: it is the rule.”).

26. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103 n.5 (1998) (recognizing the principle of *damnum absque injuria*—harm without legal injury).

27. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

28. *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977). It bears noting that the *Illinois Brick* and *Hanover Shoe* rules only apply in federal lawsuits. In *California v. ARC America Corp.*, 490 U.S. 93 (1989), the Supreme Court held that federal antitrust law does not preempt state antitrust laws that allow indirect purchaser suits. A number of states have allowed such indirect purchaser suits.

29. The congressionally appointed Antitrust Modernization Commission recently made a recommendation for legislative reforms that would overrule both *Hanover Shoe* and *Illinois Brick* and allow for removal of state cases to federal court and consolidation of all damages claims as to a particular violation. ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS ch. 2 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf. The court would then make a determination of what the total monopoly overcharge was, treble the overcharge, and allocate the damages pot to the different plaintiffs based on the proportion of their individual injuries to the total.

suffered injury and issuing them a check is often so expensive that administrative costs swallow the entire recovery.³⁰ The U.S. experience is instructive. Realizing that the costs of issuing checks to the members of the injured class were often prohibitive, creative lawyers invented other ways in which the injured consumers could be compensated. For example, the settling lawyers would have the defendants agree to issue coupons to class members. These coupons could be used for future purchases from the defendants. The coupons often go unclaimed and unused, however.³¹ Further, the issuance of coupons may simply encourage the defendants to raise the price of their products, thus wiping away any compensatory benefit, or it may cause inefficient overconsumption by the compensated class.³² In 2005, Congress passed the Class Action Fairness Act,³³ which was designed in part to rein in perceived abuses in coupon settlements. Still, after lawyers' fees and administrative fees are accounted for, each consumer's share of the recovery is negligible, even though the harm to the class is great.³⁴

Despite these obstacles, legal scholars continue to claim that private antitrust enforcement provides meaningful compensation. In a recent study, Professors Robert Lande and Joshua Davis provided an empirical analysis of forty recent private antitrust cases that resulted in substantial damages awards.³⁵ They concluded that private antitrust litigation "very significantly compensates victims of illegal corporate behavior and is almost always the only way these victims can receive redress."³⁶ One may question how much compensation of injured victims actually occurred. The forty cases resulted in the recovery of \$18.006 to \$19.639 billion in cash, depending on how the

30. See Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1590 (1969) (arguing that "[t]he class action, save for large institutional purchasers, is a delusion. There is no feasible method of locating and reimbursing the consumer who several years ago may have paid too much for a toothbrush . . .").

31. See Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1396-97 (2005) (reporting redemption rate of 26.3 percent).

32. See A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Damage-Revelation Model of Coupon Remedies*, 23 J.L. ECON. & ORG. 653, 653 (2007). Polinsky and Rubinfeld summarize the literature critical of coupon settlements, but argue that coupons may be socially efficient if they are designed as an alternative to cash and make the defendant bear costs that better reflect the harms they have caused. This may be a strong deterrence argument, but it does little for the compensation goal.

33. Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (2005).

34. See Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 214 (2005).

35. Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008).

36. *Id.* at 880.

calculations are performed.³⁷ Of the total recovery, “\$12.088 to \$13.438 billion, in thirty-two cases, was recovered by direct purchasers; \$1.815 billion, in six cases, was recovered by indirect purchasers; and \$4.028 to \$4.311 billion, in six cases, was recovered by competitors.”³⁸ Since direct purchasers often pass along a substantial portion of any overcharge downstream,³⁹ over two-thirds of the recoveries studied likely failed to compensate the parties who ultimately absorbed most of the economic injury.

The downstream channeling of costs is primarily a feature of U.S. standing rules, so one should also consider the \$1.815 billion recovered in the six indirect purchaser cases to gauge whether these recoveries help to offset the phenomenon.⁴⁰ While this results in an average recovery of about \$300 million per case, the numbers are skewed by the *El Paso* litigation, which resulted in a \$1.4 billion recovery for the indirect purchasers. Eliminating this outlier results in an average indirect purchaser recovery of \$77.6 million. In each case, the settlement pot was further reduced by an attorney’s fee award, generally in the 20 to 33 percent range.⁴¹

It is unclear how much the disbursement of the remaining settlement amount benefited the downstream consumers. For example, take the *Augmentin* case, which is one of the six indirect purchaser recoveries in the study.⁴² In *Augmentin*, the indirect purchaser settlement value was \$29 million. Class counsel recovered 25 percent as attorneys’ fees, leaving \$21.75 million to be distributed to the indirect purchasers.⁴³ However, the indirect purchaser class consisted of both insurers and state governments in addition to consumers.⁴⁴ The insurers, perhaps not having standing as direct purchasers and hence counting as indirect purchasers, likely passed along most of the overcharge to their insured, many or most of whom were not part of the recovering class. What was the outcome for the injured consumers themselves—those who took the anti-depressant drug Remeron? They were awarded only 32.8 percent of the settlement

37. *Id.* at 891.

38. *Id.* at 899.

39. *See supra* notes 26–38 and accompanying text.

40. Some states permit indirect purchaser suits under their own antitrust laws. *See supra* text accompanying notes 28–29.

41. Lande & Davis, *supra* note 35, at 911–12, tbls.7a-c.

42. *Id.* at 879.

43. Robert H. Lande & Joshua P. Davis, *Benefits from Antitrust Private Antitrust Enforcement: Forty Individual Case Studies* 19 (Am. Antitrust Inst., 2008), available at <http://ssrn.com/abstract=1105523> (providing further detail on the Augmentin case).

44. *In re Remeron End-Payor Antitrust Litig.*, Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, at *1, *6 (D.N.J. Sept. 13, 2005).

fund, or \$7.134 million after attorneys' fees.⁴⁵ The settlement opinion does not reveal their precise number, but it does state that over 800,000 notices were sent to potential class members.⁴⁶ Given these numbers, it is unlikely that the settlement yielded more than a few dollars per injured class member.

There is another way of looking at the compensation in such cases. The *Augmentin* settlement opinion reveals that out of the 800,000 consumers to whom notice was given, only 65,000 filed proofs of claim.⁴⁷ Assuming that all 65,000 claims were allowed, each member received an average of about \$109 from the settlement, which may not be an insignificant sum to many families. Should this modest compensation to about 8 percent of the injured parties count as a success? Perhaps those who filed proofs of claim were the members who felt most aggrieved by the violation, and hence were most in need of compensation. Still, it is more likely that they were the members with the time and education to file proofs of claim. By contrast, the remaining 92 percent simply absorbed their losses.

The outlier *El Paso* case, which resulted in a recovery of \$1.4 billion for indirect purchasers, involved claims that natural gas suppliers artificially inflated the price of natural gas in California.⁴⁸ The indirect purchasers consisted of 13 million California consumers and 3,000 businesses.⁴⁹ Naturally, the possibility of cutting a check to the prevailing plaintiffs was unsatisfactory because of the substantial administrative costs in "maintain[ing] mailing addresses and print[ing] checks."⁵⁰ Instead, the settlement provided for a complex scheme of remittances to the California Public Utilities Commission and for natural gas rate reductions over fifteen to twenty years.⁵¹ Because natural gas is rate regulated in California,⁵² the settlement amounted to an agreement about rate-regulation principles for the next two decades.

One may describe the *El Paso* scheme as compensating consumers as a class, but such a description would be largely inaccurate. This is because consumer injuries occurring in the past correspond only roughly to future consumer gains. Injured consumers

45. *Id.* at *25.

46. *Id.* at *19.

47. *Id.*

48. Lande & Davis, *supra* note 43, at 77.

49. *Id.*

50. *Id.* at 84.

51. *Id.* at 84–86.

52. California Public Utilities Commission, Natural Gas and California, <http://www.cpuc.ca.gov/puc/Energy/gas/natgasandca.htm> (last visited Feb. 11, 2010).

who died, moved away from California, or discontinued natural gas service over the rate-reduction period received no compensation, or they received compensation that bore little relation to the amount of their injury. On the other hand, consumers who moved to California or otherwise began natural gas consumption after the violation received a windfall. In sum, consumers whose consumption patterns or volume changed significantly from the time of the violation to the rate-reduction period were either overcompensated or undercompensated. The *El Paso* settlement did not amount to a serious effort to identify persons who suffered economic harm and compensate them in proportion to their loss.

As the above examples illustrate, identifying, locating, and compensating the real economic victims of an antitrust overcharge is often impossible. Compensation, therefore, is a noble but ultimately unrealistic goal.

There exists one class of interests to which the forgoing observations do not apply with equal force. When competitors are injured by an exclusionary practice, they are not overcharged. Instead, they lose profits. In a small sense, the ripple-effects principle of economic injury still applies to competing firms. For example, a manufacturer plaintiff that loses sales because of an antitrust violation may mitigate its losses by laying off employees, borrowing less money from banks, or demanding fewer raw materials from suppliers. However, the adversely affected employees, banks, and suppliers do not have standing to sue because their injury is too remote from the violation.⁵³ Still, the competitor plaintiff usually will have experienced the majority of the economic injury; in this sense, the competitor is situated like an ordinary tort victim. Further, it is not hard in most cases to identify competitors that have lost profits, even if the precise amount of their injury is difficult to determine.⁵⁴ Because their injury is concentrated, it is generally cost-effective to award them damages.

There are several problems with justifying a compensation-oriented private remedy on the grounds that competitors are good candidates for compensation. First, there is a widespread and probably legitimate concern that competitor plaintiffs frequently use antitrust law for anticompetitive purposes.⁵⁵ If anything, private

53. See generally *Associated Gen. Contractors v. Carpenters*, 459 U.S. 519 (1983).

54. See generally Roger D. Blair & William H. Page, "Speculative" Antitrust Damages, 70 WASH. L. REV. 423 (1995) (suggesting methods of proving non-speculative damages).

55. See William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985); Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 5-32 (2005); Frank H. Easterbook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); R.

competitor lawsuits make it harder for consumers to receive full compensation, since courts often react to competitor lawsuits by crafting liability norms in a way that stymies consumer suits as well.⁵⁶

Second, competitor harm—or at least the kind of harm recognized by antitrust law—does not occur in many antitrust cases. If a cartel raises prices, a firm that does not join the cartel nonetheless benefits from it.⁵⁷ If an anticompetitive merger harms a rival firm because in the but-for world it would have faced less competition, the rival firm has not suffered antitrust injury and may not recover damages.⁵⁸ On the other hand, it is also possible that antitrust violations harm competitors without harming consumers, as is true in cases of attempted monopolization where a dominant firm harms its rival but fails to obtain monopoly power.⁵⁹ But in those cases, the ordinary justification for allowing the competitor suit is a prophylactic one—namely, that it is better to prevent antitrust violations before they occur.⁶⁰ This is not a compensation justification; rather, it is a deterrence argument in which the rival's lawsuit is merely a means to achieve the end of consumer welfare.

Relatedly, any harm suffered by an excluded competitor is incidental to the economic purposes of antitrust law. The Supreme Court has often declared that “[t]he purpose of the antitrust laws . . . is ‘the protection of competition, not *competitors*.’ ”⁶¹ Therefore, individual competitors serve as means to the end of consumer welfare. While antitrust may do a comparatively better job of compensating them than other classes of victims, this is not the major purpose of antitrust law.

Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 2 J. STRATEGIC MGMT. EDUC. 37, 37–38 (2005); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991).

56. See Crane, *supra* note 2, at 40–43.

57. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

58. See *generally* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

59. See *generally* *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

60. *Swift & Co. v. United States*, 196 U.S. 375 (1905).

61. *Leegin Creative Leather Pros., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)). Whether the “competition, not competitors” maxim applies with equal force in the European Union has been the subject of much discussion. See Damien Gerardin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 CHI. J. INT’L L. 189, 207 (2009). Nonetheless, the European Commission seems to have come around to a consumer welfare orientation. DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses 4, Dec. 2005, available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>. It would thus be anomalous even in the European Union to justify the expense, burden, and systemic effects of private antitrust litigation if all it did was compensate aggrieved competitors.

2. Dynamic Injuries

Economists and antitrust scholars increasingly view static consumer injuries as far less significant than dynamic injuries.⁶² The major dispute concerning competition policy and innovation is not whether innovation creates more consumer welfare than static efficiency, but whether antitrust enforcement can meaningfully advance dynamic efficiency. For those who follow the tradition of Joseph Schumpeter, all significant competition is dynamic and static efficiency is of dubious importance.⁶³ Because the path of innovation is unpredictable, some economists in the Schumpeterian tradition doubt whether antitrust law does much to advance consumer welfare.⁶⁴ On the other side, those who follow the tradition of Kenneth Arrow contend that antitrust law is critical to fostering consumer welfare, since oligopolistic markets tend to foster lower rates of innovation than more competitive markets.⁶⁵ Still, whether one follows Schumpeter or Arrow, there is general agreement that innovation and technological progress are vital to the advancement of consumer welfare, and that they are probably far more significant than short-term pricing and output effects.⁶⁶

Private antitrust litigation is no better at compensating consumers for dynamic injuries than for static injuries. Indeed, it is probably worse. With respect to static injuries, it is possible for economists to estimate the amount of the overcharge, though the estimate may sometimes be speculative and does not address

62. See Hovenkamp, *supra* note 13, at 253 (stating that “today no one doubts [Robert M. Solow’s] basic conclusion that innovation and technological progress very likely contribute much more to economic growth than policy pressures that drive investment and output toward the competitive level”); Michael E. Porter, *Competition and Antitrust: A Productivity-Based Approach*, in *UNIQUE VALUE: COMPETITION BASED ON INNOVATION: CREATING UNIQUE VALUE FOR ANTITRUST, THE ECONOMY, EDUCATION AND BEYOND* 154, 156–57 (Charles D. Weller ed., 2004).

63. JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 84–85 (1942).

64. See Harold Demsetz, *How Many Cheers for Antitrust’s 100 Years?*, 30 *ECON INQUIRY* 207 (1992); Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 *ANTITRUST L.J.* 1, 3 (2007) (“In the light of the potential tension between competition and innovation, and in the light of the uncertainty that innovation creates for predictions about competitive effects of mergers and future conditions in relevant markets, a growing body of commentary has questioned the relationship of antitrust law to innovation.”).

65. Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 619–22 (Richard Nelson ed., 1962). See generally Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 *ANTITRUST L.J.* 575 (2007).

66. See, e.g., Thomas O. Barnett, *Maximizing Welfare Through Technological Innovation*, 15 *GEO. MASON L. REV.* 1191, 1194 (2008) (arguing that “dynamic efficiency—particularly leapfrog dynamic efficiency—accounts for the lion’s share of efficiency/welfare gains”).

deadweight static losses.⁶⁷ In contrast, measuring the amount of dynamic efficiency loss and quantifying this loss in dollars often amounts to little more than guesswork.⁶⁸ Dynamic efficiency losses suffer from an incommensurability problem, and commensurability is usually considered the very heart of legal compensation models.⁶⁹

For example, suppose that Microsoft undertakes a campaign to quash the development of a multi-platform Java programming system in order to prevent Java from developing a program that could compete with Microsoft's Windows operating system.⁷⁰ As a result, Microsoft retains its operating system dominance and overcharges consumers for Windows. The overcharge portion of the static harm, although not the deadweight loss, can be quantified and reduced to a damages award in litigation. But the much larger harm may be the loss of an unknown amount and variety of technological innovations that would have followed had Microsoft not stymied Java programmers in creating a competitive alternative.⁷¹ Since operating systems function as a platform to other applications, technological innovations in the operating systems field could have led to countless innovations in applications.

Unsurprisingly, very few antitrust plaintiffs seek compensation for dynamic injuries. Even when they do seek such compensation, courts are inhospitable to their claims. Proving the but-for world of competitive innovation is far too speculative an endeavor to meet the evidentiary burden required by civil litigation. Thus, courts have rejected claims against Microsoft for stifled innovation.⁷²

For example, the Fourth Circuit held that “[i]t would be entirely speculative and beyond the competence of a judicial proceeding to create in hindsight a technological universe that never came into existence. . . . It would be even more speculative to determine the relevant benefits and detriments that non-Microsoft products would have brought to the market and the relative monetary value . . . to a diffuse population of end users.”⁷³ As the Fourth Circuit observed, the problems of proof were not limited to the specific facts of

67. See *supra* text accompanying note 54.

68. Hovenkamp, *supra* note 13, at 257.

69. But see Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 57 (1993) (arguing for an alternative view of compensation form of redress based on “affirming public respect for the existence of rights and public recognition of the transgressor’s fault with regard to disrespecting rights”).

70. See Hovenkamp, *supra* note 13, at 257–59.

71. *Id.* at 257.

72. *Id.* at 258–59.

73. *Kloth v. Microsoft*, 444 F.3d 312, 324 (4th Cir. 2006) (quoting *In re Microsoft*, 127 F. Supp. 2d 702, 711 (2001)).

the *Microsoft* case: “At bottom, the harms that the plaintiffs have alleged with respect to the loss of competitive technologies are so diffuse that they could not possibly be adequately measured. The problem is not one of discovery and specific evidence, but of the nature of the injury claimed.”⁷⁴

Damages for these sorts of harms are almost never recovered in private litigation. Again, one might posit that the treble damages remedy is a rough proxy for compensating plaintiffs for some unquantifiable dynamic injury,⁷⁵ but such an argument is weak. The installed base of consumers who continued to purchase the defendant’s products after the monopolistic price increase are often the very consumers who would have continued to purchase from the defendant even if an innovative, competitive product had entered the market. The consumers most likely to have purchased the hypothetical innovative product are the ones who stopped purchasing from the defendant and substituted to less desirable second choices after a price increase, or who never began purchasing from the defendant in the first place.⁷⁶ Awarding treble damages to the consumers who paid the overcharges does not compensate the consumers who likely suffered most of the dynamic injuries.

Just because private antitrust litigation does not compensate consumers for the harms of stifled innovation does not mean that private litigation is not useful in deterring conduct that stifles innovation. In the same way that private litigation may prevent static deadweight losses by deterring antitrust violations, so too may it prevent conduct that stymies innovation. What private antitrust litigation cannot do in most cases is recover damages for forgone technological development or purchases. Since most scholars would agree that these injuries are by far the most troubling ones, antitrust damages thus seem incapable of achieving compensation for the most significant antitrust injuries.

B. Deterrence

Those who believe that antitrust law exists primarily to promote economic efficiency argue that deterrence, and not compensation, should be the primary purpose of private antitrust

74. *Id.*

75. See *supra* text accompanying notes 21–22.

76. For example, in the case of Microsoft the most likely victims of the suppression of innovation are users of Linux or other operating systems who would have seen the development of a more innovative operating system market in the but-for world.

enforcement.⁷⁷ In their view, antitrust damages supplement criminal fines by removing any expected profitability from antitrust violations.⁷⁸ Decisionmakers in dominant firms will perceive that they are better off by not violating antitrust law, given the likelihood of detection multiplied by the penalty. Unlike other fields of law in which the deterrent value of private enforcement has been questioned,⁷⁹ the deterrent success of private antitrust enforcement is largely taken for granted.⁸⁰

In order to evaluate this deterrence claim, one must ascertain who is being deterred. The primary class of relevant decisionmakers is corporate managers, although one must also consider the possibility that vigilant shareholders will rein in managers who fail to respond to antitrust incentives. With respect to these managers, the argument that private antitrust litigation provides effective deterrence is increasingly undermined. Two converging trends—the increasing length of antitrust proceedings and the increasing shortness of managerial tenure—make it likely that corporate managers severely discount the threat of future litigation damages.

First, the time gap between the planning of antitrust violation (which is presumably the moment at which deterrence should take root) and antitrust judgment day is growing longer. While current statistics on the duration of antitrust litigation are not readily available, it is possible to make reasonable assumptions based on the available data. For the last decade, the average disposition time for all civil cases in the federal system has been steady at between eight and nine months. The average time from filing of the case to trial has steadily increased from around 18.5 months in 1996⁸¹ to 24.6 months

77. See, e.g., POSNER, *supra* note 17, at 266 (arguing that compensation should be a “subsidiary” goal to deterrence); Page, *supra* note 10, at 1451 (arguing that “the deterrent function must predominate”).

78. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). As Bill Landes has explained, “[t]he optimal penalty should equal the net harm to persons other than the offender, adjusted upward if the probability of apprehension and conviction is less than one.” William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 678 (1983).

79. See, e.g., John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1535–36 (2006) (“As presently constituted, securities class actions produce wealth transfers among shareholders that neither compensate nor deter.”).

80. Some commentators have questioned whether treble damages are adequate to achieve optimal deterrence. See, e.g., Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651 (2006). However, most commentators seem to assume, without discussion, that the prospect of antitrust damages is successfully conveyed to the firm, even if the exact size of the multiplier should be higher.

81. See FEDERAL COURT MANAGEMENT STATISTICS (2001), available at <http://www.uscourts.gov/cgi-bin/cmsd2001.pl>.

in 2007.⁸² This suggests that early disposition of cases, whether due to motions to dismiss or early settlement practice, has declined somewhat but that cases going all the way to trial take much longer than before because of the increasing complexity of modern litigation and the increasing burden of discovery.⁸³ The Georgetown study of private antitrust litigation conducted in the early 1980s found that antitrust cases take, on average, about three times longer than other federal cases from initiation of the lawsuit to disposition.⁸⁴ While this ratio has likely not remained constant—the average private antitrust lawsuit today takes over six years to disposition—the average antitrust suit almost certainly lasts several years. In 2007, there were 378 federal antitrust cases that had been pending for over three years, an immense number considering that there were only a thousand new antitrust filings and that many cases are quickly disposed of on motions to dismiss.⁸⁵

The time from filing to trial tells only part of the story. The average interval from the filing of a notice of appeal to final disposition is now over a year for all federal cases.⁸⁶ The average interval for antitrust cases is likely even longer due to their monetary significance and complexity. Certiorari petitions to the Supreme Court typically add another year to the delay, during which the appellate court's mandate and the corresponding obligation to pay the judgment are stayed.⁸⁷ Moreover, the misconduct at issue usually begins at least a year or two—and often many years—before the complaint is even filed. Hence, in the average private antitrust case, the time from the

82. See FEDERAL COURT MANAGEMENT STATISTICS (2007), available at <http://www.uscourts.gov/cgi-bin/cmsd2007.pl>.

83. See FED. R. CIV. P. 26(b)(2) 2006 advisory committee's note (describing increased burdens from electronic discovery).

84. The Georgetown study found that the average time for the termination of all cases was 24.9 months, with a median of 16.6 months. See Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1009 (1986). For comparative purposes, the median length of federal civil cases at the time of the Georgetown study was about nine months. *Id.*

85. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbls.S-11 & C-2 (2007), available at <http://www.uscourts.gov/judbus2007/contents.html>. To put the antitrust numbers in perspective, it may be useful to consider the ratio between three-year old cases and new filings for other classes of private lawsuits. The following are some other categories of cases by (1) new filings, (2) three-year old cases, and (3) ratio between (1) and (2): breach of contract: 33,939; 1,358, 25:1; civil rights: 31,756, 2,077, 15:1; environmental: 767, 214, 4:1; labor: 18,674, 532, 35:1; RICO: 653, 122, 5:1. Antitrust, with fewer than three new filings per three-year-old case shows a significantly greater disposition toward lengthy cases than other common categories of business litigation.

86. *Id.* at tbl.B-4.

87. FED. R. APP. P. 41(d)(2).

beginning of an anticompetitive scheme until judgment day is at least five years and may be closer to ten years or more.

The relevant time intervals in two recent private antitrust cases, in which the plaintiffs won substantial damages awards at trial and had them affirmed on appeal, are instructive. In *LePage's Inc. v. 3M*, the allegedly anticompetitive bundled rebates were put in place in 1992; LePage's filed suit in 1997 but did not prevail until 2004, when the Supreme Court denied certiorari.⁸⁸ In *Conwood Co. v. U.S. Tobacco Co.*, the plan to eliminate Conwood was hatched in 1990, Conwood sued in 1998, and the Supreme Court denied certiorari in 2003.⁸⁹ In both cases, the time between the decision to engage in the challenged conduct and the end of the legal process was well over a decade.

This time lag should be paired with the fact that the managers who put into place anticompetitive schemes are increasingly unlikely to be around to internalize their effects at judgment day. During the 1980s, the turnover rate among senior managers in large corporations was just above ten percent.⁹⁰ By all accounts, the turnover rate increased significantly—perhaps even doubling—in the 1990s and 2000s as various capital market factors accentuated shareholder demand for short-term performance.⁹¹ Today, the average CEO holds her job for about six years.⁹² Mid-level executives, such as divisional managers, typically hold their jobs for an even shorter period, perhaps less than four years.⁹³ Thus, most of the executives responsible for an

88. *LePage's Inc. v. 3M*, 324 F.3d 141, 144 (3d Cir. 2003), cert. denied, 542 U.S. 953 (2004).

89. *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 772, 775 (6th Cir. 2002), cert. denied, 537 U.S. 1148 (2003).

90. See Anne T. Coughlan & Ronald M. Schmidt, *Executive Compensation, Management Turnover, and Firm Performance: An Empirical Investigation*, 7 J. ACCT. & ECON. 43, 52 tbl.1 (1985) (documenting an average CEO turnover of 12.7 percent for all firms listed in *Forbes* compensation survey from 1978–1980); Jerold B. Warner, Ross L. Watts & Karen H. Wruck, *Stock Prices and Top Management Changes*, 20 J. FIN. ECON. 461, 461 tbl.1 (1988) (calculating average annualized rate of 11.5 percent for arrivals or departures by top management including CEO, chairman, or president positions based on *Wall Street Journal* reports from 1963–1978).

91. Kathleen A. Farrell & David A. Whidbee, *Impact of Firm Performance Expectations on CEO Turnover and Replacement Decisions*, 36 J. ACCT. & ECON. 165, 173 tbl.1 (2003) (recording a 9 percent turnover rate from 1986–1997); Steven N. Kaplan & Bernadette A. Minton, *How Has CEO Turnover Changed? Increasingly Performance Sensitive Boards and Increasingly Uneasy CEOs 2* (Nat'l Bureau of Econ. Research, Working Paper No. 12465, 2006) (reporting that in the period 1998–2005, CEO turnover increased to 16.5 percent, implying an average CEO tenure of just over six years).

92. Kaplan & Minton, *supra* note 91, at 2.

93. R.M. Bushman, R.J. Indjejikian & A. Smith, *Compensation Contracts in Hierarchical Organizations: Determinants of Incentive Pay for Business Unit Managers* (Univ. of Chi. Working Paper, 1994) (reporting 3.7 year average tenure for division managers).

antitrust violation will no longer be with the firm by the time a damages award is entered against the company.

High managerial turnover rates might not thwart the deterrence objective if managers were to internalize some of the detrimental effects of antitrust judgments rendered after they leave the defendant firm. In particular, managers might incur a reputational cost in lost future employment opportunities or take a prestige hit in the business community by virtue of their past roles in a later-adjudicated antitrust violation.⁹⁴ But there is scant evidence suggesting that individual managers' reputations are much affected by antitrust judgments against their former employers. Individual managers are not often named as co-defendants in private antitrust cases and usually do not appear in any public pronouncement of liability. Liability in complex antitrust cases seldom turns on the culpability of a single manager, but rather on a cluster of managerial decisions over time, making it difficult to pinpoint blame.⁹⁵ Relatedly, judicial opinions in private antitrust cases often omit the names of individual managers, instead referring to the acts of an impersonal corporation or "the defendant." For example, in the much-publicized *LePage's Inc. v. 3M* case, neither the district court nor the Third Circuit opinion referred to a single 3M executive by name.⁹⁶ In most cases, an outsider to the litigation would find it difficult to impose a reputational sanction against any present or former firm manager.

In light of these facts, it is difficult to see how the threat of a future damages judgment disciplines managerial decisionmaking. When managers plan conduct that brings immediate large profits but only potential liability at some future date, the extent to which the future liability deters them from choosing immediate profits is a function of their implicit discount rate for the potential damages award. The longer the perceived time until judgment day, the more likely it is that managers will discount the threat of damages. If managers believe that they are unlikely to be employed by the firm at the distant judgment day, they will tend to disregard the threat of future liability altogether.

Yet the story is not so simple. One must consider the possibility that private antitrust litigation forces managers and shareholders to

94. See Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 459–60 (2006).

95. Things may be different in price-fixing cases, where a single rogue manager may collude with someone outside the firm. For other reasons discussed below, private damages actions have a more plausible deterrent effect when they are follow-ons to criminal prosecutions. See *infra* text accompanying note 106.

96. *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003).

internalize the costs of an antitrust violation long before any judgment day. Efficient capital markets may punish the firm and, by extension, its managers as soon as a lawsuit is threatened or filed. According to one study, the filing of a securities class action lawsuit by investors more than doubled the likelihood of CEO turnover.⁹⁷

It is unlikely, however, that the mere filing of a private antitrust suit brings about severe consequences for a defendant firm's managers. Unlike securities lawsuits, which may impair shareholder confidence in the integrity of insiders, antitrust lawsuits may instead communicate that company managers are acting aggressively to expand market share and increase profitability. This is especially true in the case of private antitrust lawsuits, which many shareholders may rightly regard as signaling that rival firms are merely disaffected by aggressive, but ultimately lawful, competition. While empirical work suggests that the filing of an antitrust action by the Department of Justice or Federal Trade Commission has an immediate and significant negative effect on a defendant firm's share price, the filing of a private antitrust lawsuit has only about a tenth of the effect of a public suit. Empirical studies have found that defendants lost, on average, 6 percent of their share value upon the filing of a government antitrust lawsuit,⁹⁸ but only about 0.6 percent of their share value upon the filing of a private lawsuit.⁹⁹ A half-percent drop in market capitalization is unlikely to engender ruinous consequences to most managers, particularly if the gains from the challenged behavior were large.

There are two other ways that private antitrust lawsuits might mete out negative sanctions on corporate managers prior to judgment day. First, antitrust litigation is extremely expensive and the costs are often borne disproportionately by defendants.¹⁰⁰ CEOs, CFOs, and particularly general counsels care a great deal about legal fees, but the divisional managers who often make the decisions that ensnare a

97. See Philip E. Strahan, *Securities Class Actions, Corporate Governance and Managerial Agency Problems* 22 (June 1998), available at <http://papers.ssrn.com/abstract=104356> (reporting that filing of a securities class action lawsuit by investors increased probability of CEO turnover from 9.8 percent to 23.4 percent).

98. Kenneth D. Garbade et al., *Market Reaction to the Filing of Antitrust Suits: An Aggregate and Cross-Sectional Analysis*, 64 REV. ECON. & STAT. 686, 686-71 (1982).

99. John M. Bizjak & Jeffrey L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm*, 85 J. AM. ECON. REV. 436, 437 (1995). The average share loss upon the filing of a private lawsuit is about \$4 million.

100. See Crane, *supra* note 55, at 13 (defendants may presume that an antitrust lawsuit will be more expensive than a potential entrant); Frank H. Easterbook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 34 (1984) (the asymmetrical structure of incentives in antitrust litigation imposes greater costs on defendants).

firm in an antitrust suit may not care. A divisional manager typically seeks to maximize the reported profitability of her own business unit, not necessarily the value of her firm as a whole.¹⁰¹ For accounting purposes, legal fees are often treated as operating expenses of the firm as a whole. Therefore, legal fees may not come directly out of a divisional manager's budget or count against her revenues for the purposes of divisional financial reporting and incentive compensation. The threat of having to pay legal fees during a protracted and expensive lawsuit may have relatively little deterrent effect on the key decisionmakers who consider whether to engage in anticompetitive tactics.

A second way that private antitrust lawsuits could provide an early deterrent shock is through large settlement payouts, which are a sort of privately negotiated and accelerated judgment day. But with the exception of government case tag-along suits, which are discussed below, large settlement payouts in private cases usually do not occur until the eve of trial. Corporate managers and boards are usually unwilling to open up their coffers for more than nuisance value settlements until the threat of an adverse judgment is imminent. Thus, private settlements may accelerate judgment day by short-circuiting appeals, but the average time from the planning of anticompetitive conduct to the payment of any substantial settlement amount still probably exceeds five years.

If managers cannot be expected to respond reliably to the threat of distant and unpredictable liability judgments against their firms, how about shareholders? Two related factors suggest that shareholders do not have strong incentives or capabilities either. First, the kind of industrial behavior that gives rise to antitrust claims creates the prospect of substantial long-run costs if an antitrust challenge is successful, but offers significant short-run profits in the meantime. From an outsider's perspective, it is very hard to evaluate the risk that firm behavior will produce eventual antitrust liability. Whether conduct of the kind adjudged under antitrust's rule of reason and monopolization law's amorphous standards is likely to result in antitrust liability is difficult for antitrust experts to predict, let alone

101. See Philip G. Berger & Eli Ofek, *Diversification's Effect on Firm Value*, 37 J. FIN. ECON. 39, 40 (1995) (discussing "misalignment between central and divisional managers"); Flora Guidry et al., *Earnings-Based Bonus Plans and Earnings Management by Business Unit Managers*, 26 J. ACCT. & ECON. 113, 139-40 (1999) (divisional managers seek to maximize short-term profitability of business units rather than that of international conglomerate); Hyun-Han Shin & René Stulz, *Are Internal Capital Markets Efficient*, 113 Q.J. ECON. 531, 533 (1998) (divisional managers can create deadweight costs through rent-seeking and internal politics).

the average institutional investor.¹⁰² It is unlikely that many shareholders will try to curb behavior that increases a firm's market share and profits but that might eventually lead to antitrust liability. Even assuming that a large institutional investor with access to corporate insiders were aware that conduct was risky from an antitrust perspective, it still often would be a rational strategy to approve tacitly the risky conduct, hold the stock for a few years while its value increases, and then sell before an antitrust suit commences. The initial filing of the private lawsuit does relatively little damage to the issuer's share price, so savvy shareholders will have plenty of time to reap their profits and then exit.

Given all of the above factors, it is implausible that the threat of future private litigation does much to deter anticompetitive behavior. The author's own experience in a private antitrust case is illustrative. By the time the case settled during an appeal, it had been nine years since the lawsuit was filed and fifteen years since the alleged misconduct began. Only a handful of personnel who were with the company during the relevant events were still employed by the firm at the time of settlement. Since the underlying conduct occurred, the company had witnessed multiple generations of senior management come and go. The company's capital structure had changed multiple times, too. First, it was part of a corporate conglomerate, then it was spun off as an independent, publicly traded company, then it was acquired by another conglomerate, and shortly afterwards it was taken private. The managers and shareholders who had reaped the gains from any unlawful conduct—assuming that there was any—had long since moved on.

Of course, deterrence is not just about deterring the individual managers who undertook the wrongful acts from doing so again. Deterrence also seeks to set an example that others will heed.¹⁰³ But others will learn the lesson that is *actually* taught to the wrongdoers, and not the abstract lesson that antitrust law is *trying* to teach. If a manager at General Electric observes a successful private antitrust lawsuit against 3M and is asked what it means for him, his answer may well be: "It is perfectly rational for me to beat up on my rival if that increases the success of my division, my incentive compensation,

102. See generally Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007) (antitrust is moving away from ex ante rules toward ex post multifactor standards, shifting judgments from judges to fact-finders and administrative agencies).

103. See Michael K. Block & Jonathan S. Feinstein, *The Spillover Effect of Antitrust Enforcement*, 68 REV. ECON. & STAT. 122, 122 (1986) (observing that antitrust deterrence is most effective when targeted at other firms in the same industry as the violator).

and the value of my stock options. By the time judgment day arrives, I will probably be in a job two times removed from this one and have diversified my stock portfolio so that General Electric's stock will account for a relatively small proportion of my wealth."

In theory, there is some cause to be optimistic about the deterrence potential of private lawsuits in cases brought as follow-ons to government criminal prosecutions against cartels.¹⁰⁴ The Justice Department's leniency program, which provides substantial incentives for early defection from cartels, leads many firms to enter guilty pleas as soon as a price-fixing conspiracy is detected.¹⁰⁵ Once a firm has entered a guilty plea, it will often pay out large private settlements quickly because its defenses are very limited.¹⁰⁶ Therefore, follow-on private damages actions in cartel cases provide a much swifter predicted judgment day than do other classes of private antitrust litigation. Although private follow-on suits have the potential to provide substantial deterrence "kickers," a federal statute encourages firms to participate in the leniency program by limiting follow-on suits against defendants granted leniency to single damages.¹⁰⁷ The statute cuts by two-thirds the deterrence-effectiveness of many follow-on private suits and essentially orients such suits toward a compensation goal. In sum, effective private litigation deterrence is rare.

C. Compensation vs. Deterrence in Emerging Jurisdictions

Most foreign jurisdictions that have, or are in the process of implementing, private antitrust litigation justify it based on deterrence, compensation, or both.¹⁰⁸ To the extent they struggle over the proper goals of private enforcement, the question is generally whether compensation or deterrence will take precedence. In the European Union, the tentative answer is that compensation should be the primary objective and deterrence should be secondary.¹⁰⁹

104. The government does not criminally prosecute any antitrust offenses except for hard-core cartel behavior. Kathryn K. Dyer & Garrett M. Liskey, *Antitrust Violations*, 45 AM. CRIM. L. REV. 195, 223–24 (2008) (discussing aggressive prosecution of international cartels).

105. See Donald C. Klawiter, *Corporate Leniency in the Age of International Cartels: The American Experience*, 14 ANTITRUST 13 (2000).

106. The firm is collaterally estopped to deny that it engaged in price-fixing. 15 U.S.C. § 16(a) (2006). It can still contest the standing of the class of purchasers and the amount of their damages.

107. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 666 (2004) (codified in scattered sections of 15 U.S.C. and accompanying notes).

108. See *EU White Paper*, *supra* note 4, at 3.

109. *Id.*

For all of the reasons identified in this Article, compensation is a poor choice. The case for deterrence is weak, but perhaps more attainable given a speedier adjudicatory system or systemic refinements forcing managers to internalize the costs usually borne only by shareholders. On the other hand, whatever the theoretical desirability of compensating injured victims of antitrust violations, the case that private litigation accomplishes effective compensation is very weak. It is unlikely that procedural adjustments would fix the problem, since it is difficult to imagine any effective way of securing compensation for the downstream purchasers.¹¹⁰

Indeed, compensation is even more likely to fail as a goal in the European Union, its member states, and jurisdictions with similar legal regimes than it is in the United States. The choice of compensation as an objective often interacts with procedural and administrative rules that render private antitrust litigation ineffective at achieving *any* rational goal. Consider the progression of the argument in the European Commission's White Paper. It begins by announcing that compensation should be the primary goal of private antitrust enforcement in the European Union.¹¹¹ This announcement frames the procedural discussions that follow. First, because compensation is the goal, the real economic victim of the violation should always have standing to sue. Accordingly, indirect purchasers all the way down the distribution chain should have standing.¹¹² Indeed, the White Paper proposes a rebuttable presumption that end purchasers absorb the entire overcharge.¹¹³ Conversely, since other parties in the distribution chain who pass the overcharge downstream do not suffer real economic injury, the antitrust violator should be allowed to assert a pass-on defense to the distributors' claims.¹¹⁴

The Commission's proposed standard is already the rule in a number of jurisdictions with emerging private antitrust enforcement. According to a 2007 study of a number of jurisdictions by the International Competition Network ("ICN"), most would probably invoke unjust enrichment principles to deny recovery to a wholesaler or retailer who simply passes on the overcharge, despite the fact that the vast majority of the jurisdictions surveyed had not explicitly considered either the direct purchaser rule or the pass-on defense.¹¹⁵

110. See Posner, *supra* note 30, at 1590.

111. *EU White Paper*, *supra* note 4, at 3.

112. *Id.* at 4.

113. *Id.* at 8.

114. *Id.*

115. International Competition Network Annual Conference, Moscow (May 2007), Report of the Cartels Working Group, *Interaction of Public and Private Enforcement in Cartel Case*, at 12.

Conversely, the ICN study concluded that the vast majority of surveyed jurisdictions would probably allow suits by indirect purchasers.¹¹⁶ To the extent that jurisdictions favor a compensation goal, they will presumably opt for indirect purchaser standing and the availability of a pass-on defense.

The effects of a compensation objective do not end with standing principles. The White Paper calls for “full compensation of the real value of the loss suffered.”¹¹⁷ The White Paper goes on to make clear that this includes not only “actual loss” but also lost profits and interest.¹¹⁸ While this all sounds generous to plaintiffs, there is a highly significant subtext: treble damages or other damages multipliers are inconsistent with a compensatory regime, since they award plaintiffs a windfall far in excess of their actual damages.

Two more procedural aspects of compensation-oriented regimes are significant. First, class action procedures are rare in continental systems.¹¹⁹ The White Paper recognizes that the parties bearing the economic burden of antitrust violations have often “suffered scattered and relatively low-value damages” and that some form of claim aggregation is therefore necessary for private enforcement.¹²⁰ Still, the White Paper shies away from U.S.-style class actions, calling instead for “representative actions” by “qualified entities,” such as state bodies or trade associations, or “opt-in collective actions.”¹²¹ The ICN reports that class actions are available in only five of the jurisdictions it surveyed.¹²²

Another procedural issue raised by the White Paper and commonly discussed in jurisdictions considering private antitrust enforcement is discovery. Here, again, the White Paper rejects the U.S. model. Although the White Paper recognizes the need for some information disclosure in litigation, it seems far more concerned about “the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses.”¹²³ It proposes that any discovery should be court-ordered (rather than party-initiated, as in

116. *Id.*

117. *EU White Paper*, *supra* note 4, at 7.

118. *Id.*

119. See Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 2–3 (2009) (discussing European alternatives to U.S.-style class actions and concluding that “U.S.-style class actions are likely to remain exceptional from a trans-Atlantic perspective”).

120. *EU White Paper*, *supra* note 4, at 4.

121. *Id.*

122. International Competition Network Annual Conference, *supra* note 115, at 4.

123. *EU White Paper*, *supra* note 4, at 5.

the United States) and only available when the plaintiff has pleaded facts plausibly showing the existence of an antitrust violation;¹²⁴ satisfied the court that he cannot reasonably obtain the facts except through discovery; specified the precise categories of information to be disclosed; and demonstrated that the discovery requests are relevant, necessary, and proportionate.¹²⁵

In sum, the proposed EU system, which is also characteristic of other emerging antitrust jurisdictions, promotes compensation as its primary objective and, consequently, provides for indirect purchaser standing, single damages, and restrictive rules on claim aggregation and discovery. By contrast, the U.S. Supreme Court has nominally recognized deterrence and compensation as coequal objectives, but has seemed to favor deterrence over compensation when the two interests diverged.¹²⁶ As previously noted, the United States generally follows a direct purchaser rule, in which the direct purchasers of the overpriced goods have standing to sue even though they may pass on the overcharge by reselling the good at a marked-up price and thereby avoid economic injury;¹²⁷ indirect purchasers lack standing to sue.¹²⁸ The United States also allows automatic treble damages by statute¹²⁹ and liberal, party-initiated discovery by rule.¹³⁰

Consider now how effective the European model is likely to be at achieving compensation, or in encouraging private antitrust litigation at all. If European courts chase the harm downstream to the ultimately injured party, they will find themselves with thousands or even millions of parties to compensate in the ordinary antitrust case. Not only will those parties be widely dispersed with many small

124. On this score, the EU position does not differ from the U.S. position. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (holding that, to survive the pleading stage, a complaint must possess allegations “plausibly suggesting” an antitrust violation).

125. *EU White Paper*, *supra* note 4, at 5.

126. See Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 90 (2007).

127. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 744–47 (1977).

128. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 492–94 (1968). *But see supra* note 28 and accompanying text (noting that state antitrust law is not preempted from allowing indirect purchaser suits and that some states have allowed such suits). Further, the congressionally-appointed Antitrust Modernization Commission recently made a recommendation for legislative reforms that would overrule both *Hannover Shoe* and *Illinois Brick* and allow for removal of state cases to federal court and consolidation of all damages claims as to a particular violation. ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 265–78 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. The court would then make a determination of what the total monopoly overcharge was, treble the overcharge, and allocate the damages pot to the different plaintiffs based on the proportion of their individual injuries to the total. *Id.* at 270–78.

129. 15 U.S.C. § 15 (2006).

130. See FED. R. CIV. P. 26.

injuries, they will also be denied the two features of the U.S. system—generous claim aggregation and treble damages—that provide the best opportunity for a suit to be brought and monies recovered. Further, if the purchasers sue, they will face sharp limitations on discovery. Discovery stinginess is particularly problematic in a system that gives standing to downstream purchasers who are remote from the defendant. Unlike the direct purchasers, who are often sophisticated parties in contract with the defendant, the indirect purchasers may know very little about the defendant's business and need generous amounts of discovery to make their case.

Ironically, a primarily deterrence-oriented system, like that of the United States, has less need of the very features of the U.S. civil litigation system that continental systems often reject. It has less need for claim aggregation since the direct purchasers are relatively fewer in number and have more concentrated injuries. It has less need for treble damages since the direct purchasers often have a sufficient incentive to sue for even single damages. Finally, it has less need for discovery since the direct purchasers often know much more about defendant's business practices and conduct than do the downstream purchasers.

None of this is to say that continental systems are wrong in rejecting direct purchaser rules, class actions, treble damages, liberal discovery, or other features of the U.S. system. Even where those features are present, private antitrust litigation is not very successful at achieving compensation or deterrence. Rather, the point is that if compensation and deterrence have failed as objectives in the United States, they are even more likely to fail in the European Union and in other jurisdictions with similar legal regimes and cultures. Emerging private enforcement jurisdictions have an expanded set of reasons to resist implementation of a private enforcement system centered on either compensation or deterrence. Before locking in a private litigation system that inertia will later make difficult to change, these jurisdictions would be well-advised to consider the failures of the U.S. system at a foundational level and then proceed from a different premise.

II. PROBLEM-SOLVING REMEDIES

Compensation and deterrence largely fail as goals of private antitrust litigation, but that does not mean that the whole enterprise should be abandoned. Instead, private enforcement should be reoriented toward achieving an attainable objective—that is, using the power of private litigation to frame private bargaining over problems

of market power. Rather than looking backwards toward remediating or punishing past bad acts, private antitrust enforcement should be oriented toward the future by preventing exercises of market power that harm consumers.

Importantly, this goal for private antitrust enforcement would be broader than stimulating competition. To be sure, retaining competitive markets should be *an* important goal. However, as discussed next, the institutions of private antitrust enforcement have been limited by a focus on competitive processes that ignores the possibility that some markets simply will *not* be competitive. The optimal system of private antitrust enforcement would create mechanisms whereby competition would be fostered where possible and the results of competitive markets simulated where competition was unavailable in whole or in part.

A. *An Institutional Challenge to Competition Absolutism*

It is a virtually theological proposition that antitrust law creates a national industrial policy founded on competition. The Supreme Court has explained that “[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. ‘The heart of our national economic policy long has been faith in the value of competition.’”¹³¹ Within the antitrust community, it is heretical to question the value of competition in creating lower prices and spurring quality and innovation.

Yet many markets are uncompetitive, either temporarily or semi-permanently. Sometimes, markets are not competitive because dominant firms undertake identifiable bad acts to exclude or suppress competition. More often, the cause is governmental intervention. For example, the grant of a patent right on a pioneer drug without ready substitutes often confers monopoly power on the drug maker for many years. Similarly, complex regulatory schemes may serve as entry barriers that keep out new competition for lengthy periods of time.¹³² Sometimes, markets are not competitive in a conventional sense because they are natural monopolies. Natural monopolies include markets where high fixed costs, network effects, or other features

131. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

132. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 347 (Free Press 1993) (1978) (observing that the “proliferation of regulatory and licensing authorities at every level of government” has allowed governmental officials to “control and qualify the would-be competitor’s access to the marketplace”).

make it unlikely that more than one firm will be in the market at any given time.¹³³ In such cases, there may still be a form of competition in play—Schumpeterian competition or “competition for the market”—but a single dominant firm will still occupy the market for protracted periods of time.¹³⁴ The computer operating system market at issue in the *Microsoft* case may have had such characteristics.¹³⁵

At present, private antitrust litigation is oriented toward locating bad acts that impair the competitiveness of markets.¹³⁶ Often, this means either forcing competition on industrial functions not suited to competition or else abandoning markets altogether, on the theory that the lack of competitiveness is not the result of a bad act. Private antitrust enforcement has thus fallen into the “splitting” dilemma created by the crime-tort model. Under this model, an industrial practice is either a sinner or a saint. Either the practice violates the relevant legal norm (usually decided on a post hoc basis during the course of litigation), in which case it is subjected to the harsh penalty of treble damages, or else it is found to be “competition on the merits,” in which case it escapes any sanction whatsoever. This harsh dualism leaves no middle ground for practical legal solutions to market power problems.

Consider an archetypal problem in antitrust law, the joint venture. Joint ventures between competitors are often efficiency-enhancing devices that bring about tremendous consumer benefits by standardizing interconnections, creating economies of scale or scope, facilitating optimal planning, and spreading risk. On the other hand, the aggregation of economic power in a joint venture can lead to the

133. See generally Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985) (cataloging instances where a product's utility depends on the number of “network” users of the same product and explaining that the “central feature of the market that determines the scope of the relevant network is whether the products of different firms may be used together”); Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 6–15 (2001) (detailing two methods of understanding such continued periods of market dominance—network effects and “Schumpeterian” Rivalry).

134. See Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 57 (1968) (critiquing the natural monopoly theory by noting that rival bidders may still compete in market negotiations, but implying that after contractual negotiations, only the winning bidder will remain—a distinction between “competition for the field” and “competition within the field”).

135. See *United States v. Microsoft*, 253 F.3d 34, 49–50 (D.C. Cir. 2001) (noting Microsoft's argument that the operating system market is the type of dynamic, technological, innovation-based market consuming academic debate over monopoly doctrine, but declining to determine the validity of such a label).

136. See generally Crane, *supra* note 2, at 31–32 (detailing how “[m]ost antitrust litigation remains a search for the elusive ‘bad act’ ” and examining how this practice impacts the monopolization offense from a theoretical standpoint).

creation and exercise of market power.¹³⁷ Suppose, for example, that a joint venture reduces production costs by \$100 and creates new technologies that bring \$100 in new consumer welfare. At the same time, the contractual relationship between the producers also allows them to exercise market power and raise prices \$150 above the competitive level. Under standard antitrust analysis, the joint venture would probably be immunized from liability.¹³⁸ Unless a plaintiff could point to some bylaw or other practice that was (1) the cause of the market power and (2) unnecessary to achieve the efficiencies, the joint venture would almost certainly pass muster under the rule of reason based on its net consumer welfare enhancement.¹³⁹

Suppose now that the total enhancement in consumer welfare based on the production efficiencies and design innovation was \$200, but that the enhanced market power allowed the joint venture to raise prices \$250 above the competitive level. Now, the net effect on consumers would be negative. The joint venture would be condemned and treble damages owed.¹⁴⁰

In neither case would the antitrust solution be optimal. In the first case, the dualistic nature of the legal exercise would require blessing a large amount of market power. In the second case, it would require condemning a large amount of efficiencies. A far better approach would be to allow the joint venture in both cases, but to control the exercise of market power.

For a real-world example, consider the multi-billion dollar antitrust litigation over payment systems that has been waged in many courtrooms over the last decade.¹⁴¹ Payment systems like credit or debit cards are two-sided markets, meaning that payment card systems issue products demanded by two different but interrelated

137. See Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 IOWA L. REV. 1137, 1187–88 (2001) (discussing situations where joint ventures create both efficiencies and market power).

138. I am assuming that at least \$50 of the lower production costs are passed onto consumers, which together with the \$100 increase in consumer welfare from the technological innovation makes consumers at least break even.

139. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 148–49 (2005) (explaining steps in rule of reason analysis, including a final stage where procompetitive effects may be balanced against anticompetitive effects).

140. See, e.g., *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003) (affirming trial court determination that anticompetitive effects of credit card system's exclusionary rule outweighed its procompetitive effect).

141. See Steven Semeraro, *Credit Card Interchange Fees: Three Decades of Antitrust Uncertainty*, 14 GEO. MASON L. REV. 941, 941–42 (2007) (explaining that in 2005 numerous private antitrust cases “were consolidated before the Judicial Panel on Multi-District Litigation” where “potential damages [have been] said to exceed the annual pre-tax profit of the entire U.S. banking industry”).

sets of clients, buyers and merchants.¹⁴² The payment systems are ultimately indifferent as to whether the buyers or merchants pay for the payment service, just as a newspaper is ultimately indifferent as to whether its revenues come from subscriptions or advertising. An antitrust intervention on one side of the market—for example, a prohibition on “honor all cards” policies¹⁴³—may simply cause the payment systems to exact their tolls from the other side of the market by increasing fees to card carriers. Thus, the search for a bad act on either side of the market may have unintended and harmful effects on the other side of the market.

The situation is still more complicated because competition within payment systems occurs along multiple vectors. Until their recent initial public offerings, the Visa and MasterCard systems were joint ventures owned by banks that also issued individually branded credit and debit cards.¹⁴⁴ When a consumer swipes her credit card at a retailer, two different banks within a payment system are implicated.¹⁴⁵ The merchant’s bank (the “acquiring bank”) must pay an interchange fee to the consumer’s bank (the “issuing bank”). Interchange fees are ultimately passed down to merchants; merchants are unhappy because the fees are determined by bargaining between competitor banks who, given their dual status as acquirers and issuers, may not have very strong incentives to keep the rates low.¹⁴⁶

Private antitrust litigants may weigh in and condemn the setting of interchange fees as an unreasonable horizontal restraint. Consider again what happens to the entire system if a particular practice is categorically condemned. Costs are likely to reemerge at some other juncture in the system, with potentially unfortunate results. For example, to the extent that the payment system was previously allocating fees to the less demand-elastic side of the market, a shift to the other side of the market could lead to a reduction in output.¹⁴⁷

Private antitrust litigation for damages between different classes of interests and different judges and juries is not the way to

142. Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 571 (2006).

143. Visa’s and MasterCard’s “honor all cards” policy required merchants that accepted Visa and MasterCard credit cards to honor their debit cards as well. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 101 (2d Cir. 2005).

144. Klein et al., *supra* note 142, at 572.

145. *Id.*

146. *Id.* at 572–74.

147. Dennis W. Carlton & Alan S. Frankel, *Transaction Costs, Externalities, and “Two-Sided” Payment Markets*, 2005 COLUM. BUS. L. REV. 617, 629, 637.

address problems of market power in payment systems. The analytical tools provided by the crime-tort model of private litigation do not lend themselves to regulation of such a vast and complex enterprise. The dualistic bottom line of private litigation—sinner or saint—does not allow for the incremental fixes and accommodations necessary to control the market power in the system without harming interests on another side of the market.

One possible solution is comprehensive regulation by the Federal Reserve. However, the centralized regulation of systems capable of behaving competitively raises its own set of objections. Alfred Kahn, the father of airline deregulation, admonished:

Regulated monopoly is a very imperfect instrument for doing the world's work. It suffers from the evils of monopoly itself—the danger of exploitation, aggressively or by inertia, the absence of pervasive external restraints and stimuli to aggressive, efficient and innovative performance. Regulation itself tends inherently to be protective of monopoly, passive, negative, and unimaginative Regulation is ill-equipped to treat the more important aspects of performance—efficiency, service innovation, risk taking, and probing the elasticity of demand. Herein lies the great attraction of competition: it supplies the direct spur and the market test of performance.¹⁴⁸

The dualism of antitrust's crime-tort orientation is often considered the lesser evil in the juxtaposition of antitrust and regulation. Antitrust law is the default rule imposing competitive behavioral norms when the state does not intervene to regulate an industry.¹⁴⁹ Since regulation is often viewed with disfavor in market economies, antitrust—the search for the bad act—is considered the necessary path, even if that path sometimes results in an imperfect fit between antitrust assumptions and market realities.

One need not quibble with the general preference for antitrust-controlled competition over regulation to see the possibility of an improvement in the status quo. The weaknesses of the current system of private enforcement do not call for a transition to centralized regulation. Rather, they are a reason to reconceptualize the role of private enforcement altogether. A better-designed system of private enforcement would seek to control market power where reasonable by stimulating competition, and where full competition is impossible, by controlling the exercise of market power. Unlike a governmental

148. 2 ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 325–26 (Mass. Inst. of Tech. 1988) (1971). Justice Breyer articulated a similar point of view, explaining the various justifications and subsequent critiques for regulating the marketplace, including the “existence of a ‘natural monopoly.’” STEPHEN BREYER, *REGULATION AND ITS REFORM* 15–35 (1982).

149. In Herbert Hovenkamp's words, antitrust is a “residual regulator” whose only “purpose is to promote competition to the extent that market choices have not been preempted by some alternative regulatory enterprise.” HOVENKAMP, *supra* note 139, at 13.

regulatory system supplying command-and-control rules, the system would seek to incentivize and empower private actors to negotiate individually tailored solutions. Antitrust law would provide the backdrop for these negotiations by threatening judicial intervention in the event that the parties cannot come to terms. Unlike the current system, where judicial interventions are mostly backward-looking determinations of whether damages are owed and, if so, how much, the judicial interventions at issue would be forward-looking and injunctive. In broad-brush terms, the threatened interventions could include setting rates and prices, rewriting contracts, mandating access to infrastructure, disbaring company managers, appointing outside monitors, and requiring public disclosures.

The intuitive reaction to this suggestion may be alarm at the prospect of delegating such broad, intrusive, and burdensome power to judges. Of the three branches of government, the judiciary may be the least well-suited to act as a rate regulator and an industrial captain.¹⁵⁰ There is some appeal in the simplicity of judges or juries awarding damages for past conduct and then washing their hands of the future. Yet two important caveats should be heeded. First, interventions should occur only in cases where the market itself has failed and there is a reasonable prospect that judicial intervention would improve matters. In economies characterized by efficient capital markets, high rates of innovation, technological change, labor mobility, and perpetual demographic change, the need for intervention should be infrequent. Second, the more draconian interventions should be merely threatened initially and then executed only in the event that private bargaining in the court's shadow fails to produce a negotiated outcome. The goal of private antitrust enforcement should not be to have courts directly control market power. Instead, it should be to have courts act as foils to market power.

So conceived, private litigation would not be preoccupied with identifying past bad acts. Rather, it would be preoccupied with making early and speedy interventions into market power problems and, where necessary, laying down rules about how markets should behave in the future. In some cases, this would entail tinkering with the processes of competition to lower entry barriers and make markets behave competitively. In other cases, it would focus not on the

150. See, e.g., *Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 1991) (referring to rate-setting as "a task [courts] are inherently unsuited to perform competently"); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445 (9th Cir. 1990) ("The federal courts generally are unsuited to act as rate-setting commissions."); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979) (rejecting "judicial oversight of pricing policies [that] would place the courts in a role akin to that of a public regulatory commission").

processes of competition but directly on market outputs, on the terms and conditions of trade. In the next section, one example of each of these approaches is considered.

B. Examples of Effective Private Enforcement Mechanisms

1. Contractual Foreclosure

Many antitrust cases concern claims that certain contractual terms foreclose competition. There are many different species of potentially foreclosing contractual terms. A partial list includes tie-ins,¹⁵¹ exclusive dealing,¹⁵² market share rebates,¹⁵³ bundled discounts,¹⁵⁴ loyalty clauses,¹⁵⁵ and volume discounts.¹⁵⁶ These kinds of contractual provisions have the potential to harm the competitiveness of a market by requiring entry on a large scale or preventing smaller rivals from reaching economies of scale that would permit them to act as a meaningful constraint on the dominant incumbent.¹⁵⁷ At the same time, there are many procompetitive or competitively neutral reasons for these kinds of contractual terms.¹⁵⁸ The upshot of foreclosure is lengthy, fact-intensive, and cumbersome litigation.

The usual course in such cases is something like the following: The plaintiff, usually a new entrant, sues, claiming that it is in dire risk of having to exit the market because of the defendant's contractual practices. The defendant counters that the contractual provisions in question bring benefits to customers; indeed, they may

151. Tying involves the seller of a monopoly product requiring the buyer to purchase a second product as well.

152. Exclusive dealing involves contractual commitment to exclusivity in either buying or selling.

153. Market share rebates are earned when a buyer makes specified percentages of its purchases from the seller.

154. Bundled discounts are given in return for the buyer's agreement to make minimum amounts of purchases in separate product categories.

155. There are various forms of loyalty clauses, all of which provide for one contractual party to do business with the other to the exclusion of other potential parties. For example, the buyer may commit to give its business to the seller so long as the seller matches the best price offered by other sellers.

156. Volume discounts are given when a buyer reaches a certain level of purchases, either units or dollars.

157. See Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits,"* 12 GEO. MASON L. REV. 119, 122 (2003) (explaining how exclusive dealing "will force existing [non-exclusive] competitors and potential new entrants to operate at a cost disadvantage" and may prevent their entry "until sufficient distribution becomes available").

158. See generally *id.* at 137–60 (detailing the efficiencies of exclusive dealing, such as counteracting distributor "free-riding" and assisting manufacturers in contracting for distributor promotion).

have been requested by customers. The defendant also contends that the reason the plaintiff failed is not because of the defendant's contracts, but instead because of the poor quality of the plaintiff's product. A threshold motion to dismiss may be granted, in which case the entire case goes away. Otherwise, the parties hunker down into years of discovery and expert disclosures, at the end of which the defendant gets a last chance to avoid trial by moving for summary judgment. If the motion is denied, the defendant pays out a large monetary settlement but does not agree to modify its contractual practices. Often, the contractual practices at issue have been mooted by the expiration of the original contracts and subsequent market developments.¹⁵⁹

If the plaintiff's case is successful, or if it appears to have a chance of succeeding, entrepreneurial class action lawyers will quickly cobble together a class of purchasers in order to make a claim for overcharges. If the class is not certified, the case vanishes. If the class is certified, the defendant settles again without changing its practices. Money changes hands, and the market moves on.¹⁶⁰

As noted earlier, there is little reason to believe that any of this either results in meaningful compensation to antitrust law's intended beneficiaries or deters other firm managers from engaging in similar practices. Instead of looking backward to see if any such contract violated antitrust law, it would be preferable for judges or administrative agencies to entertain private claims with a view toward prospectively restructuring contracts so as to allow the market to behave competitively.¹⁶¹

For example, suppose that a defendant had contracts requiring major customers to make 80 percent of their purchases from the defendant in order to receive a particular level of discount.¹⁶² Suppose also that a hearing were held, limited to the questions of (1) the procompetitive justifications for such market share discounts, (2) the

159. See, e.g., *Masimo Corp. v. Tyco Health Care Group, L.P.*, No. CV 02-4770 MRP, 2006 WL 1236666, at *15 (C.D. Cal. Mar. 22, 2006) (upholding jury verdict against defendant based on foreclosure effects of various contractual practices but declining to grant a permanent injunction because the market had changed considerably in the interim).

160. These observations are not new. In 1966, Everette MacIntyre, an FTC Commissioner, wrote an article bemoaning the duration, expense, and damages orientation of private antitrust litigation and calling for a much greater focus on the possibility of injunctive remedies. Everette MacIntyre, *Antitrust Injunctions: A Flexible Private Remedy*, 1966 DUKE L.J. 22. As noted earlier, the duration of private damages litigation has substantially increased over the intervening years. See *supra* notes 80–89 and accompanying text.

161. This is assuming that there is an antitrust problem at all.

162. These are essentially the facts of *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000).

foreclosure effect on the plaintiff, and (3) the feasibility of contractual modifications that would permit the plaintiff some breathing room in the market without impairing the defendant's legitimate interests. A judge might decide that some level of market share commitment was justified, but that lowering the commitment to 70 percent would achieve most of the same efficiencies without denying the plaintiff the opportunity to reach minimum viable scale. In this event, the judge might enjoin the defendant from denying any customer its contractual discounts so long as it reached at least a 70 percent share, thus effectively lowering the market share commitment by 10 percent.

Such a prospective-looking system would require some statutory innovation. Under the present antitrust statutes, a judge would not be justified in restructuring a contract unless she found a violation of some section of the antitrust law. This all-or-nothing nature of the search for a violation adds nothing but confusion, burden, and time to antitrust proceedings. If the proposed system has any chance of succeeding, it must be nimble and quick. It must strip away the need for lengthy discovery and trials on questions of intent, damages, history, and perhaps even the sinkhole of technical market definition. The trial itself must focus on objective economic facts, specifically the need for and feasibility of adjusting contractual terms in order to remove entry barriers.

To be sure, more abbreviated proceedings than a full trial after extensive discovery would entail some risk of error. However, the incremental value of the information produced in traditional antitrust discovery rarely exceeds the cost of the delay that damages actions necessarily incur. Discovery often suffers from a severe case of diminishing marginal returns. Most of the information produced in discovery—beyond the relevant contracts, cost and revenue data, and some basic business documents—is not very useful in determining the ultimate *economic* questions necessary to correct market failures. Thus, the comparative advantages of speedier determinations are apparent.

An overriding objection to such a system might be that coercively rewriting contracts is a regulatory, and not a judicial, function. Nevertheless, judges do routinely rewrite contracts in order to promote competition. One area where this occurs is in litigation over the enforceability of covenants not to compete. Under common law principles, covenants not to compete are only enforceable to the extent reasonably necessary to promote the employer's legitimate interests.¹⁶³ While some courts follow an all-or-nothing approach,

163. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

under which a covenant not to compete is either entirely enforceable or entirely unenforceable, a majority of courts follow some version of the “blue pencil” doctrine, which allows a judge to rewrite an overbroad covenant so as to be reasonable.¹⁶⁴ Judges, as lawyers by training, are familiar with the structure and meaning of contracts and may be better able to modify contracts than other business relationships.

Suppose, however, that judges should not be in the business of rewriting contracts in order to achieve competition objectives, because the necessary technical understanding to do so escapes the average judge. This is actually a broader argument against generalist judges assuming jurisdiction over complex antitrust cases and would mean that judges should not award damages for antitrust violations either.¹⁶⁵ Assuming this argument is correct, it merely suggests shifting the contract-policing function to the Federal Trade Commission or another expert body. Since the remedy would be an injunction rather than monetary damages, there is nothing to prevent the FTC from acting as an administrative body to scrutinize contractual terms.¹⁶⁶ During the political wrangling leading up to the creation of the FTC, there were proposals to give the FTC power to approve or disapprove large corporate contracts.¹⁶⁷ A less ambitious role for the FTC could include some sort of exhaustion of administrative remedies system, whereby any competitor unhappy with an exclusionary contract would have to go through an administrative process before bringing an action in court. This administrative proceeding could result in an administrative law judge recommending contractual modifications that, if adopted by the defendant, would bar the plaintiff from bringing a damages action in court.

Further, even assuming that both judges and administrative agencies are far inferior to contractual parties in drafting contracts, the adoption of a forward-looking private remedy system need not entail extensive contract rewriting by judges or administrative

164. Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 682–89 (2008).

165. See Crane, *supra* note 1, at 1216–20 (explaining that “generalist judges struggle to keep up with antitrust’s economic density”).

166. Proposals to give the FTC power to award damages have been unsuccessful. See Stephen Calkins, *Civil Monetary Remedies Available to Federal Antitrust Enforcers*, 40 U.S.F. L. REV. 567, 580 n.59 (2006) (describing a failed bill “expressly authoriz[ing] the Commission to seek consumer redress after entry of a Commission cease and desist order”). Given the general view that civil antitrust claims entail a Seventh Amendment right to a civil jury, allowing the FTC to award compensatory damages for antitrust violations might be unconstitutional.

167. Crane, *supra* note 2, at 16–18.

agencies in most cases. Just as most private damages actions are either dismissed by the courts or settled,¹⁶⁸ most private injunctive actions would be dismissed on the grounds that the plaintiff was not really foreclosed from competing or else resolved through a negotiated settlement between the parties. The difference from damages litigation would be the speed with which the matter could be brought to resolution—months rather than years—and the nature of the agreed-upon remedy—contractual modification enhancing the competitiveness of the market rather than payments shifting money between pockets.

The solutions to contractual foreclosure are often relatively simple. Consider one recent example. Beginning in the 1990s, Johnson & Johnson (“J&J”) entered into contracts with Group Purchasing Organizations (“GPOs”) that offered hospitals substantial discounts on endo products and sutures if the hospitals bought minimum amounts of their requirements in different product categories from J&J.¹⁶⁹ A medical products company that did not offer a full line of comparable products sued, claiming that the bundled discounts foreclosed its ability to compete because it could not match the discount on J&J’s full product line.¹⁷⁰ As soon as the competitor sued, J&J modified its contractual formula to make the market share formula inapplicable to competitors that did not offer a full product line.¹⁷¹ After this simple contractual modification, J&J’s bundled discount system remained functional as a competitive device against J&J’s full-line competitor Tyco, but had no further exclusionary effect on small rivals since purchases from smaller rivals would no longer count in determining whether hospitals had met their market share requirements.¹⁷² The court granted summary judgment in favor of J&J on the claims related to these contracts, noting that the contractual modification had solved the foreclosure problem.¹⁷³

It is tempting to view the J&J story as evidence that the threat of treble damages has a salutary deterrent effect on exclusionary conduct, but that would be the wrong conclusion. J&J did not modify its contracts until its competitor sued and did so then only to score

168. About three quarters of private antitrust cases are involuntarily dismissed, almost a quarter settle, and just two percent are resolved through a trial. *Id.* at 35 n.188.

169. *See Applied Med. Res. Corp. v. Ethicon, Inc.*, No. SACV031329JVSMLGX, 2006 WL 1381697, at *1 (C.D. Cal. Apr. 27, 2006) (explaining Johnson & Johnson’s purchase agreements with the Group Purchasing Organizations).

170. *Id.*

171. *Id.* at *3–4.

172. *Id.*

173. *Id.* at *4.

litigation points. J&J's switch in time did not stop the litigation from continuing for at least three more years; the court denied summary judgment on a number of other allegedly exclusionary contractual practices. The lesson to draw is that the fixes for contractual exclusion are often simple and could be administered prospectively without excessive complexity or delay.

2. Liability Rules for Dominant Intellectual Property

Contractual foreclosure situations call for antitrust intervention to restructure contractual commitments and open the market to vigorous competition. Occasionally, antitrust intervention cannot create competitive market conditions without impairing the optimal functioning of an industry. A case in point is the increasing clash between intellectual property and antitrust. At their core, both antitrust and intellectual property law share a commitment to enhancing consumer welfare by spurring innovation, efficiency, and low prices.¹⁷⁴ Yet the processes by which intellectual property and antitrust seek to achieve these goals sometimes appear to be in conflict.¹⁷⁵ Intellectual property law tends to grant inventors and creators exclusive rights, which often appear monopolistic, in order to provide incentives to engage in inventive or creative activity.¹⁷⁶ Antitrust law seeks to break down exclusivity and monopoly in order to foster competition.

A standard antitrust approach to problems of market power in intellectual property is something like the following: A judge or an agency first determines whether the defendant has market power. If so, the next question is whether that power derives from the grant of intellectual property rights or from violations of antitrust law. If it arises from the former, antitrust intervention is at an end since intellectual property rights are creatures of statute that judges and antitrust enforcers may not second-guess. Of course, sometimes judges

174. U.S. DEPT OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 1 (2007), available at www.usdoj.gov/atr/public/hearings/ip/222655.pdf ("Over the past several decades, antitrust enforcers and the courts have come to recognize that intellectual property laws and antitrust laws share the same fundamental goals of enhancing consumer welfare and promoting innovation.").

175. *Id.* (noting apparent conflict between antitrust and intellectual property because of "intellectual property law's grant of exclusivity," which was seen as conflicting with "antitrust law's attack on monopoly power").

176. In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, the Supreme Court finally brought to an end a long-standing presumption that patents and copyrights used in contractual tie-ins entailed market power. 547 U.S. 28 (2006).

and antitrust enforcers mistakenly attribute the defendant's market power to antitrust violations, even though that power is inherent in the grant of the patent, copyright, or trademark. Fearing such inadvertent interference with creative and inventive incentives, judges often act with extra caution in applying antitrust law to intellectual property-laden industries.¹⁷⁷

The reason for this sometimes excessive caution has a lot to do with the fact that antitrust law, and in particular *private* antitrust law, is heavy artillery. For example, granting an award of treble damages based on the claim that a patentee had redesigned a patented product in a predatory manner entails a very serious risk of chilling design innovation, one of the very things that both antitrust and patent law seek to stimulate.¹⁷⁸ Therefore, judges are reluctant to find antitrust liability on this basis.¹⁷⁹ Similarly, most U.S. judges refuse to assign antitrust liability for the refusal to share intellectual property, on the theory that refusing to share is inherently part of the bundle of intellectual property rights and compelling firms to license could chill innovative activity.¹⁸⁰

Consider now an alternative approach to private antitrust enforcement that looks not to the past, but instead to the future. The goal with respect to intellectual property would be to decide whether the intellectual property rights ("IPR") holder should be obliged to change any of its commercial practices going forward. Note that the goal cannot be to strip all of the market power from the IPR holder. This is because market power sometimes serves as the reward necessary for the invention to have been created. The proper goal of antitrust enforcement should be to strip away *excessive* market power, which was not inherent in the grant of the IPR because it was unnecessary *ex ante* for the stimulation of the inventive activity.¹⁸¹

177. See, e.g., *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1308 (11th Cir. 2003) (justifying permissive rule on patent settlements on ground that, given the threat of treble damages, more aggressive antitrust intervention would "impair the incentives for disclosure and innovation").

178. 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 705b (rev. ed. 1996) (asserting "no administrable rule [governing predatory product design] could be fashioned that would not exact an unreasonably heavy toll").

179. For a court deeply divided on this issue, see *C.R. Bard, Inc. v. M3 Systems, Inc.*, 157 F.3d 1340, 1370–72 (Fed. Cir. 1998).

180. E.g., *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1329 (10th Cir. 2000) ("Xerox's refusal to sell or license its copyrighted works was squarely within the rights granted by Congress to the copyright holder and did not constitute a violation of the antitrust laws.").

181. See Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1817 (1984) (examining the implications of the patent-antitrust conflict).

The trouble is that stripping away excessive market power is not the same as creating a competitive market. This is where antitrust law often falls into serious conceptual difficulty. Because the current structure of antitrust thinking is binary (violation / no violation), it takes some imagination to contemplate a world in which a judge intervenes to correct an IPR holder's excessive market power without hoping to create a competitive market. Tinkering with degrees of market power seems a job for a legislator or a regulator, not a judge.

Yet such judicial tinkering already occurs within the discipline of intellectual property law and occasionally within antitrust law. Cases in point are the consent decrees that govern the American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). ASCAP and BMI are performance rights organizations ("PROs") which serve as clearing houses that aggregate and license millions of individual artists' performance rights.¹⁸² In the 1940s and 1960s, the Justice Department brought suit against the PROs on antitrust grounds and resolved both actions by consent decree.¹⁸³ Under the consent decrees, BMI and ASCAP must make through-to-the-listener licenses available for public performances of their music repertoires and provide applicants with proposed license fees upon request. If the PROs and the applicant cannot agree on a fee, either party may apply to the rate court for the determination of a reasonable fee.¹⁸⁴ The consent decrees with the PROs thus establish a system of private antitrust enforcement that is focused on the future.

When an antitrust court intervenes to set a rate for music licensed by ASCAP or BMI, it does not create a competitive market. ASCAP and BMI continue to have immense market power. Rather, the court effectively acts as a rate regulator, allowing BMI, ASCAP, and the artists they represent to set a price that reflects the exclusivity rights granted by Congress but not any incremental market power from the aggregation of multiple copyrights. Deterrence and compensation, the two ostensible goals of private antitrust enforcement, are nowhere to be found.

182. The economic justifications for the *BMI* and *ASCAP* system are discussed in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 6 (1979).

183. See Amended Final Judgment, *United States v. ASCAP*, 1950 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (explaining that the Justice Department filed its complaint on February 26, 1941); Amended Final Judgment, *United States v. Broadcast Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), *modified by* 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. 1994) (explaining that the United States filed its complaint in 1964).

184. *United States v. Broadcast Music*, 426 F.3d 91, 95 (2d Cir. 2005).

This sort of regulatory policing of market power in intellectual property does not have to occur within the ambit of an antitrust consent decree. Indeed, tools are available within intellectual property law itself for such private policing to happen routinely. An issue currently being debated is whether courts should grant injunctions against infringement of IPRs or whether they should instead award the IPR holders royalties for the infringement.¹⁸⁵ In their seminal work, Guido Calabresi and Doug Melamed showed that economic interests can be protected under either property rules or liability rules.¹⁸⁶ A court concerned that an IPR's commercial practices were creating excessive market power might decide to treat the IPR as a liability right rather than a property right, deny the IPR holder an injunction, and then require "trespassers" to pay the IPR holder a royalty reflecting the value of the IPR stripped of the excessive market power.¹⁸⁷

If this seems like an overly regulatory regime, consider the fact that many IPR holders are voluntarily opting into such regimes in order to escape the heavy hand of conventional antitrust liability. Many standard setting organizations ("SSOs") have bylaws requiring participants to license their patents on reasonable and nondiscriminatory terms.¹⁸⁸ A primary motivation for such abandonment of property protections in favor of a liability regime is

185. See Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Cosean Trade*, 104 YALE L.J. 1027, 1032 (1995) ("[S]how[ing] that liability rules possess an 'information-forcing' quality that property rules do not."); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 785 (2007) (examining whether a property rule or a liability rule is more appropriate); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655 (1994) ("In my view, property rules can do work effectively in many situations involving IPRs."); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1818–20 (2007) (examining when injunctions are appropriate in intellectual property cases); Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1319–33 (2008) (discussing the merits of injunctive relief).

186. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972). Property rules entail the right to bar the trespasser and liability rules entail the right to make the trespasser pay a fee for its use. *Id.*

187. In *eBay, Inc. v. MercExchange, LLC*, the Supreme Court rejected the Federal Circuit's presumption in favor of a permanent injunction when patent infringement has been proven. 547 U.S. 388, 391 (2006). However, in separate concurring opinions, the Justices displayed very different attitudes toward the frequency with which permanent injunctions should be granted. *Id.* at 394–95. I explore these issues at greater length in Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253 (2009).

188. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1893 (2002).

the avoidance of antitrust liability.¹⁸⁹ Similarly, participants in patent pools often agree to liability rules not simply to promote efficient exchange of rights, but because of antitrust pressures.¹⁹⁰ Patent pooling has faced a long history of antitrust challenges,¹⁹¹ and patentees often hope to avoid antitrust suits by agreeing to license on reasonable and nondiscriminatory terms. SSOs and patent pools create private systems that have the potential to be far more effective at policing market power than the current crime-tort system.

A common objection to liability-rule treatment for intellectual property is that it forces judges into an uncomfortable rate-setting role.¹⁹² To be sure, judges would occasionally have to intervene. But the goal of such a system would be to set the stage for private bargaining over royalty rates for intellectual property in a context where the licensees held a credible threat to counter the licensor's implicit hold-out threat. Since a judge would theoretically assign a royalty rate that stripped the excessive market power out of the IPRs and neither party could predict exactly what the judge would view as excessive, both parties would have an incentive to bargain toward a reasonable royalty rate. The mere threat of a rate-setting proceeding would curtail the IPR's ability to charge an excessive rate.¹⁹³

This is not idle speculation. In a recent study, I examined fifty-two antitrust consent decrees that contained liability-rule provisions for patents or copyrights.¹⁹⁴ In essence, these provisions required the defendants to license their patents or copyrights on reasonable and nondiscriminatory terms and reserved jurisdiction for the court to set

189. Justin Hurwitz, *The Value of Patents in Industry Standards: Avoiding License Arbitrage with Voluntary Rules*, 36 AIPLA Q.J. 1, 4 (2008) (noting that the "root of the [RAND commitment] problem lies in antitrust law").

190. See Daniel A. Crane, *Patent Pools, RAND Commitments, and the Problematics of Price Discrimination*, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY LAW 5–6 (Harry First et al. eds., forthcoming 2010).

191. See 2 HERBERT HOVENKAMP ET AL., *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES AS APPLIED TO INTELLECTUAL PROPERTY LAW* § 34.3 (2d ed. 2010) (examining the evolution of Supreme Court jurisprudence on patent pools); Robert P. Merges, *Institutions for Intellectual Property Transactions: The Case of Patent Pools*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 123, 123–65 (Rochelle Dreyfuss et al. eds., 2001) (explaining the history and importance of patent pools).

192. See, e.g., Brief for the United States at 64–69, *United States v. Nat'l Lead Co.*, 332 U.S. 319 (1947) (No. 89), 1947 WL 44396 (explaining that a liability-rule treatment would impose on the courts "an onerous and absorbing administrative burden").

193. See Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L.J. 207, 208 (2009) (describing "jurisdiction retention" judgments, which do not necessarily involve a court in ever setting a rate" but create a "threat of rate setting").

194. *Id.* at 311–12.

the rate in the event that the parties could not agree.¹⁹⁵ In only three out of fifty-two cases was the district court ever called on to set a rate.¹⁹⁶ In only one case, *ASCAP*, did a substantial amount of activity appear.¹⁹⁷ Between 1950 and 2009, the Southern District of New York has set rates for ASCAP about eight times, which is a significant amount of activity compared to other cases, but still a relatively small number compared to the magnitude of ASCAP's licensing activities, the length of time at issue, and the pervasiveness of the consent decree in regulating ASCAP's activities.¹⁹⁸ In most cases, the private bargaining over copyright or patent royalty rates happened quietly in the shadow of the rate-setting courts.¹⁹⁹

A private enforcement system focused on limiting future exercises of market power in intellectual property would be much more effective than the current damages-oriented system. This is particularly true given that many intellectual property-intensive industries are subject to rapid change and innovation. The current system of private litigation is too slow and cumbersome to keep up.

III. THE FUTURE OF PRIVATE ENFORCEMENT

It is perhaps overly optimistic to hope that private antitrust enforcement will ever look much beyond deterrence and compensation. Jurisdictions around the world are beginning to move cautiously in the direction of private enforcement, usually justifying their

195. The following consent decree language—from a rare case in which the district court actually did set a rate—is typical:

Upon application for a license under the provisions of this Section, the defendant to whom application is made shall state the royalty which it deems reasonable for the patents to which the application pertains. If the parties are unable to agree upon a reasonable royalty, the defendant may apply to this Court for the determination of a reasonable royalty, giving notice thereof to the applicant and the Attorney General, and he shall make such application forthwith upon request of the applicant. In any such proceeding, the burden of proof shall be upon the defendant to whom application is made to establish by a fair preponderance of evidence, a reasonable royalty, and the Attorney General shall have the right to be heard thereon.

United States v. Am. Optical Co., 95 F. Supp. 771, 772 (S.D.N.Y. 1950).

196. Crane, *supra* note 193, at 312.

197. *Id.* at 311.

198. *Id.* at 310.

199. A similar result occurs with respect to statutory copyright licenses. Copyright Royalty Judges, who have statutory jurisdiction to set copyright rates for compulsory licenses, have to exercise their powers relatively infrequently. More often, the parties bargain to a mutually agreeable solution in the shadow of the copyright judges. See Crane, *supra* note 187, at 295 (“[C]opyright judges (in various incarnations) have only had to set rates relatively infrequently.”).

movements on the grounds of compensation and deterrence and providing for damages as the essence of the private remedy.²⁰⁰ The current system of private antitrust litigation is a big business for lawyers on both sides and many other stakeholders in the United States. Most importantly, the current system is not so obviously broken that there is great demand for reform. Billions of dollars flow from defendants to “victims,” so compensation seems to be working; the payments also appear to send a message to potential offenders.²⁰¹ Still, hope remains for modest, incremental reforms in the United States and for more robust experimentation in the developing antitrust world.

A. U.S. Reforms

The best hope for reform in the United States lies in testing and proving forward-looking remedies on a small scale. Take, for example, the possibility of liability-rule treatment for dominant intellectual property. As noted above, in settings like patent pools and SSOs members of intellectual property-intensive industries are already creating private liability-rule systems where IPR holders commit to licensing on reasonable and nondiscriminatory (“RAND”) terms. There is some question, however, about the effectiveness of such remedies. From the perspective of the potential licensee, such commitments may be of limited value because some doubt exists that the administrative processes chosen by the venturers will be impartial.²⁰² There is also uncertainty about the value of the RAND commitment to the venturers since merely committing to RAND licensing will not necessarily prevent an antitrust lawsuit if the customer is disgruntled by the outcome of the private rate-setting process.²⁰³

One way to build a more robust and valuable RAND system would be to create a statutory “gold standard” for RAND adjudications which could include measures for ensuring independence and transparency in expert determinations on licensing terms or terms of sale. Licensors and sellers that committed to following the statutory protocols could be granted immunity from antitrust suit for any

200. See *supra* notes 108–109 and accompanying text.

201. See Lande & Davis, *supra* note 35, at 893–98 (finding that “private enforcement is significantly more effective at deterring illegal behavior than DOJ criminal antitrust suits”).

202. Crane, *supra* note 190, at 25.

203. *Id.*

matters within the scope of the RAND commitment, thus substituting an administrative process for binary antitrust adjudication.²⁰⁴

RAND “gold standard” legislation of this nature could eventually displace much private antitrust litigation in intellectual property-intensive industries by making the terms and conditions of access to intellectual property the subject of private, forward-looking arbitration and bargaining. Initially, however, it would merely offer an optional bypass to conventional antitrust litigation. If it proved successful at mediating questions of market power in intellectual property, it could serve as a valuable precedent in considering other forward-looking remedies.

Similarly, other small-scale and initially optional reforms could validate the concept of forward-looking private remedies and stimulate interest in broader statutory innovations. The challenge for those interested in reforming private antitrust litigation is to create simple, workable models of future-oriented remedies that provide incentives to the relevant stakeholders to bargain toward mutually beneficial solutions to market power problems. As such models are tried and proved on a small scale, they will provide hope for broader reforms.

B. Experimentation in the Developing Antitrust World

The principal obstacle to the development of optimal private litigation systems in the developing antitrust world is the conceptualization of antitrust as an ordinary civil wrong, essentially as a species of glorified tort. With this conceptualization in mind, antitrust reformers often set out to graft competition policy onto the existing civil litigation structures with a cautionary principle in mind: Avoid replicating the out-of-control U.S. antitrust system.²⁰⁵ Since the

204. Under the Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004), participants in standards development activities enjoyed limited antitrust immunities. Their activities within the scope of the standardization processes are subject to the rule of reason and not per se illegal and they may not be sued for treble damages, but only single damages. However, the statute does not expressly reach—and its legislative history suggests that it was not intended to reach—negotiations over patent licensing. See 150 CONG. REC. H3657 (daily ed. June 2, 2004) (Congress “further encourages discussion among intellectual property rights owners and other interested standards participants regarding the terms under which relevant intellectual property rights would be made available for use in conjunction with the standard or proposed standard.”).

205. The disdain that many foreign governments hold for private U.S. antitrust litigation was barely concealed in a series of amicus curiae briefs filed in the U.S. Supreme Court on behalf of a number of foreign governments arguing that foreign purchasers from international cartels should not be permitted to sue in U.S. courts, an issue decided as the foreign governments desired in *F. Hoffmann-La Roche Ltd. v. Empagran SA*, 542 U.S. 155 (2004). See, e.g., Brief for

U.S. system is the only fully developed private antitrust system and addresses, successfully or unsuccessfully, all of the essential friction points—standing, claim aggregation, damages, discovery, fee-shifting, etc.—the process of implementing a private antitrust system often resembles a simultaneous copying and erasing exercise. As evidenced by the European Commission's White Paper,²⁰⁶ the resulting private enforcement systems often have little chance of meeting their ostensible goals.

The key to avoiding the pitfalls of the U.S. system is to start with a different set of premises about what private enforcement is and why it should exist. Instead of imagining antitrust as creating a sociolegal norm susceptible to violation and redress by private parties, emerging jurisdictions should instead imagine antitrust as an administrative process designed to limit inefficient exercises of market power.²⁰⁷ Within this framework, the goal of private enforcement would be to empower firms and individuals to negotiate problems of market power either directly in, or in the shadow of, legal or administrative proceedings.

In many ways, this problem-solving approach should be easier to implement in jurisdictions that do not generally regulate commercial behavior through an adversarial, rights-based system as the United States does. Also, since much of the resistance to the U.S. model concerns the magnitude of damages awards,²⁰⁸ it should be easier to sell private enforcement models that avoid damages windfalls and coercive monetary settlements. In short, an enhanced private enforcement system that breaks the governmental monopoly over enforcement, without entailing the perceived or real pitfalls of the U.S. litigation system, has considerable appeal in many emerging antitrust jurisdictions.

the United Kingdom of Great Britain and Northern Ireland, Ireland, and the Kingdom of The Netherlands as Amici Curiae Supporting Petitioners at 13 (No. 03-724) (quoting *Smith Kline & French Labs Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982) (“As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”)); Brief of the Federal Republic of Germany and Belgium as Amici Curiae Supporting Petitioners at 11, 542 U.S. 155 (2004) (No. 03-724) (asserting that “controversial features of the U.S. legal system include extensive discovery, jury trials, class actions, contingent fees, and punitive damages.”).

206. See *supra* notes 9–10, 111–112 and accompanying text.

207. See *Crane*, *supra* note 1, at 1159 (“The technocratic shift begun by the political elite could be furthered by a variety of reforms, including separating cartel enforcement from other antitrust enforcement, moving from adjudication to administration, and granting FTC norm-creation powers.”).

208. See *supra* notes 126–130 and accompanying text.

CONCLUSION

This Article has argued that private antitrust enforcement generally fails to achieve compensation for victims of antitrust violations and provides a significantly lesser degree of deterrence than most commentators assume. The failure of the compensation and deterrence goals in private antitrust is caused in part by specific features of antitrust law and the harms it aims to cure, including the widely dispersed nature of the economic harm, the indeterminacy of technological innovation, and the complexity of the legal questions adjudicated. These features and harms create cumbersome and ponderous adjudicatory proceedings. However, antitrust law's failure to achieve its compensation and deterrence goals may also have relevance for other areas of economic and commercial regulation that share similar features—perhaps including mass torts, RICO violations, and securities fraud. Similarly, the problem-solving approach to private antitrust enforcement proposed in this Article may have analogues in other regulatory domains.

Within the antitrust domain, it is time for a hard look at the reasons justifying private antitrust enforcement. In particular, it is important to distinguish between aspirations and realities. It would be wonderful if private antitrust enforcers achieved compensation for injured victims and deterred future violations. Alas, they usually do not, nor are there realistic fixes that could enable them to do so. In the United States, this means going back to the drawing board to reconceive the purposes of private antitrust. In the developing antitrust world, this means answering the existential questions before drafting legislation on technical implementation.