

AN ENFORCEMENT OFFICIAL'S REFLECTIONS ON ANTITRUST CLASS ACTIONS

Stephen Calkins*

The Federal Trade Commission (FTC) is charged with preventing unfair and deceptive acts and practices. Its two largest bureaus, of competition and consumer protection, enforce antitrust and consumer protection laws. The FTC and the U.S. Department of Justice's Antitrust Division share federal antitrust enforcement responsibility, and were they able to deter all law violations there would be little need for private actions, let alone class actions. Federal enforcers, however, have not always been successful in achieving optimal deterrence (leaving for another day just how much deterrence is optimal). Many observers have seen class actions as having an important role in antitrust enforcement.¹

Some of the most celebrated—and notorious—of class actions have been antitrust cases.² The availability of class actions, along with treble damages and

* General Counsel, Federal Trade Commission. Given that this paper concerns private litigation, it is even more essential than usual to note that my remarks are made in my individual capacity, and do not represent the views of the Federal Trade Commission or any individual Commissioner. Thanks for assistance goes to the many private lawyers who discussed these issues with me and to Laura Berger, Gary M. Greenfield, James D. Hurwitz, Jonathan Luna, Jay C. Shaffer, David C. Shonka, Sandra M. Vidas, and Marianne R. Watts. Responsibility lies solely with the author.

1. See HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 18.01, at 18-3 (3d ed. 1992) ("It may be that a class action lawsuit is the most fair and efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers. Sometimes a class-action lawsuit is the only way in which consumers would know of their rights at all, let alone have a forum for their vindication.") (quoting *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 520 (M.D. Ala. 1992)).

2. See, e.g., *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322 (5th Cir. 1981) (approving settlement valued at \$200-\$800 million), *cert. denied*, 456 U.S. 1012 (1982); *In re Fine Paper Antitrust Litig.*, 1983-1 Trade Cas. (CCH) ¶ 65,475 (E.D. Pa. Mar. 3, 1983) (addressing attorneys fees in case with settlement proceeds of \$50,650,000); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 267 (S.D.N.Y. 1971); *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532 (S.D.N.Y. 1971). For discussion of an early, then-huge settlement of a price-fixing case against seven firms, none of whom had faced government charges, see Frederick P. Furth & Robert E. Burns, *The Anatomy of a Seventy Million*

joint and several liability, in turn has helped shape antitrust law.³ Class action doctrines have been enunciated in antitrust cases, including, most notably, *Eisen v. Carlisle & Jacquelin*.⁴ Antitrust cases claim a prominent place in the class action treatises,⁵ and the more practitioner-friendly antitrust tomes discuss class actions in some detail.⁶

Now, with class action rules being revisited, it is appropriate to reflect on antitrust class actions, and on the relationship between government enforcement and private class actions. While no single paper can cover the expanse of this province, this paper will try to provide at least some useful foundation and observations for that examination. To this end, the paper first looks at some data, and espies some seemingly significant trends, namely a decline in the use of class actions in the 1980s followed by a recent possible renaissance in their use. A review of a few important recent cases also shows the close relationship between governmental and class action antitrust enforcement, with sometimes the former triggering the latter, but at other times, the latter stimulating the former or the class action proceeding without federal support. The paper next explores the marked increase in the deterrence provided by government antitrust enforcement, which inevitably raises questions about the continued importance of antitrust class actions. This leads to an exploration of the role of antitrust class actions in providing supplemental deterrence, compensation, and identification of wrongdoing. Finally, the paper suggests that some antitrust class action abuses can be addressed through active judicial management, and, in fact, antitrust class actions (and especially successful ones) concentrate on the accepted core of antitrust, where the benefits from enforcement are likely to be greatest and the chance of causing mischief is minimized.

I. THE DECLINE AND RISE OF ANTITRUST CLASS ACTIONS

While modern class action practice can be dated to the 1966 amendments to Rule 23, the roots of antitrust class action practice can be traced to the very beginning of the antitrust laws. In enacting those laws, Congress created a dual system of enforcement. The Justice Department's Antitrust Division and the Federal Trade Commission share principal responsibility for enforcing the antitrust laws, but suits by private parties, whether for damages or equitable relief, have always provided an important adjunct to government enforcement.⁷ The

Dollar Sherman Act Settlement, 23 DEPAUL L. REV. 865 (1974).

3. For an earlier discussion of the interrelationship of substance and remedy, see Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).

4. 417 U.S. 156 (1974).

5. NEWBERG & CONTE, *supra* note 1, § 18; 7B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 1781 (2d ed. 1986 & Supp. 1996).

6. 1 ABA ANTITRUST SECTION, *ANTITRUST LAW DEVELOPMENTS* 712-45 (3d ed. 1992). See also 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 356 (1995).

7. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31

congressional policy encouraging private antitrust enforcement is found principally in the very broadly worded recovery provisions of Section 4 of the Clayton Act.⁸ If read literally, this section would allow "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to recover not only treble damages, but also "the cost of the suit, including reasonable attorney's fees," plus, in appropriate cases, prejudgment interest. Add principles of joint and several liability to Rule 23 and Section 4, and by 1966, plaintiffs' lawyers had something tantamount to an engraved invitation to pursue antitrust violators.

There was a time when the leading antitrust lawyers specialized in class actions. In 1971, Professor Handler complained that "class action allegations have become part of the boiler-plate of many, if not most, private antitrust complaints."⁹ Massive rounds of discovery, endless joint meetings, stressful settlement jousting—that was the typical life of an antitrust lawyer. Whole law firms thrived on this practice. As one candid antitrust lawyer admitted, "Rule 23 has to be, for us lawyers, the greatest thing that ever came down the pike."¹⁰ Class actions were a featured part of programming for professional associations.¹¹ In summer 1980, the American Bar Association's Section of Antitrust Law presented a typical offering, entitled "The Nuts and Bolts of Antitrust Class Actions," featuring an overview and then presentations by a plaintiffs' lawyer, a defense lawyer, and a judge.¹² The first speaker declared, "I think it is obvious from the experience over the last fifteen years since the 1966 amendments to Rule 23 were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective."¹³

A. The Decline

Little did the conference participants know that this "devastatingly effective" tool was about to fall into disuse. With the exception of several speakers who addressed class action settlements the following spring,¹⁴ no subsequent meeting of

(1969); *United States v. Borden Co.*, 347 U.S. 514, 518 (1954).

8. Treble damages suits were first allowed by Section 7 of the Sherman Act, which in 1914 was re-enacted without substantial change as Section 4 of the Clayton Act. In 1955, Congress repealed Section 7 as redundant. Section 3, 69 Stat. 283 (1955). See S. REP. NO. 619, 84th Cong., 1st Sess. 2 (1955).

9. Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 6 (1971).

10. Richard Haas, *Professional and Ethical Aspects of Antitrust Class Actions*, 41 ANTITRUST L.J. 280, 280 (1972).

11. See e.g., *Symposium on Class Actions*, 41 ANTITRUST L.J. 229 (1972) (full-day program at the annual Spring Meeting of the ABA Section of Antitrust Law); Earl E. Pollock, *Introductory Remarks*, *id.* at 230 ("Now once upon a time this subject probably would have been of interest only to a few procedure buffs and maybe a small group of technicians. But then came the revolution!").

12. *The Nuts and Bolts of Antitrust Class Actions*, 49 ANTITRUST L.J. 1499 (1982).

13. Dando B. Cellini, *An Overview of Antitrust Class Actions*, 49 ANTITRUST L.J. 1501, 1506 (1982).

14. *Symposium, Settlement of Government and Private Cases*, 50 ANTITRUST L.J. 69 (1982).

the ABA Antitrust Section presented a panel on antitrust class actions. For that matter, none of the scores of subsequent issues of the *Antitrust Law Journal*, which prints Section program proceedings and articles of interest to the antitrust community, has contained an article about class actions.¹⁵ Filings of antitrust class actions plummeted after 1981, according both to anecdote and such data as is available. According to the Administrative Office of the United States Courts, antitrust class actions were filed at the following rate:

1995 FEDERAL COURT ANTITRUST CLASS ACTION STATISTICS¹⁶

Year	Filed	% of all federal class actions
1972	N/A	N/A
1973	157	5.9
1974	114	4.2
1975	190	6.2
1976	191	5.3
1977	235	7.5
1978	183	7.1
1979	100	4.8
1980	112	7.1
1981	118	7.1
1982	42	3.4
1983	49	4.8
1984	23	2.3
1985	33	3.4
1986	16	2.2
1987	10	1.6

15. A Westlaw search of the *Antitrust Law Journal* database, on December 5, 1996, yielded no documents dated after 1980 with the words "class" or "classes" in the title, and only five articles, none focusing on class actions, with the word "actions."

16. Figures from 1972 through 1995 are based on annual data gathered by the Administrative Office of the United States Courts ("AOC"), compiled and reprinted in 18 CLASS ACTION REP. 411 (1996). Averages calculated for all years, 1973 through 1995, show that civil rights represented 43.6% of classes filed, securities 12.2% and torts 7.3%. *Id.* at 407. Recently, after discovering flaws in its statistics in the course of a federal study of class actions, the AOC has cautioned that class actions filed between 1987 and 1994 may be underreported. At the same time, the AOC data continue to overreport by including separately actions that are later consolidated, especially for antitrust, securities and tort cases.

1988	26	3.5
1989	16	2.5
1990	19	2.1
1991	50	5.4

Fiscal Year End Changed from June 30 to Sept. 30

1991	34	3.8
1992	23	1.9
1993	23	2.7
1994	70	7.1

1995 Calendar Year

1995	103	7.7
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Conventional wisdom explains the apparent drop after 1981 as caused by President Reagan's March 30, 1981 appointment of William Baxter as Assistant Attorney General in charge of the Antitrust Division.¹⁷ According to one count, from 1983–1987, the Justice Department initiated 397 actions, of which 292 were bid-rigging indictments; only 26 indictments charged horizontal price fixing.¹⁸ None was near the scale of the forest products actions that resulted in such lucrative antitrust class actions.¹⁹ In contrast, from 1971 to 1976, the same author counted 196 horizontal price-fixing cases (of which thirteen alleged bid-rigging to a government) among the 346 cases brought by the Justice Department.²⁰ An ABA Antitrust Section Task Force complained that "Division [price-fixing] enforcement actions have been directed largely against a narrow group of industries, such as construction, made up primarily of small local business."²¹

Although the drop may be partly explained by the changing nature of Justice Department antitrust cases, the story is likely more complex. Modern antitrust began in 1977, when the Supreme Court undid much vertical restraint law in *Continental T.V. v. GTE Sylvania*. Ever since then, plaintiffs have been finding less

17. See Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 384–85 (1988) ("Diminished resources have been allocated to governmental enforcement of the laws that typically have spurred class action litigation—most notably antitrust, civil rights, and securities.").

18. Milton Handler, *Is Antitrust's Centennial a Time for Obsequies or for Renewed Faith in Its National Policy?*, 10 CARDOZO L. REV. 1933, 1941 (1989).

19. See *supra* note 2.

20. Milton Handler & Michael D. Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 YALE L.J. 626, 636 & n.46 (1976).

21. Report of the American Bar Association Section of Antitrust Law Task Force on the Antitrust Division of the U.S. Department of Justice (July 20, 1989), 57 ANTITRUST & TRADE REG. REP. (BNA) at S-8 (Special Supp.) [hereinafter ABA Report on Antitrust Division].

happy hunting in antitrust fields; the Supreme Court issued important pro-defense opinions in 1979,²² 1981,²³ 1983,²⁴ and 1984.²⁵ Federal classes involving indirect purchasers (consumers suing manufacturers) were eliminated in 1977 by *Illinois Brick*.²⁶ Also in the 1970s, some leading decisions narrowed the circumstances in which antitrust classes could be certified by focusing on the fact of damage, as is discussed below, and it took time before courts were comfortable limiting these opinions.

One should not disregard the antitrust atmosphere. At one point in our history, antitrust defendants were regarded as corporate renegades. That changed during the 1980s. Antitrust began to seem like a part of the problem, not the solution. Academic commentators and even government antitrust enforcers made it clear that overly aggressive antitrust enforcement, including especially self-interested private enforcement, could harm competition rather than help it.²⁷ Private enforcement also came to be seen as less important, because, as is discussed below, government deterrence was increased through enhanced penalties, and Congress commissioned states to protect consumer interests with *parens patriae* authority.

The very successes of antitrust private litigation, including class actions, caused a reaction. Horror stories were told about the deadly combination of treble damages, class actions, joint and several liability, and selective settlements.²⁸ Congress was inundated with complaints about the unfairness and arbitrariness of a system that could leave one tiny participant in an industry liable for three times almost all of the damages allegedly caused.²⁹ Congress invested countless hours

22. *Broadcast Music v. CBS*, 441 U.S. 1 (1979).

23. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981).

24. *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

25. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (holding there must be evidence tending to exclude the possibility that the manufacturers and distributors conspired to fix prices but affirming liability); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

26. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

27. See, e.g., Michael K. Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131 (1980); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985); W. Stephen Cannon, *The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 ANTITRUST L.J. 103 (1986) (Deputy Assistant Attorney General outlines proposals for reducing antitrust damages exposure). See also ABA Report on Antitrust Division, *supra* note 21, at S-8 (noting Division's "mixed message").

28. See generally Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem"*, 92 HARV. L. REV. 664, 669-70 (1979) (pendulum swinging for class actions in general).

29. See, e.g., Thomas W. Queen, *Recent Developments in Federal Antitrust Legislation*, 54 ANTITRUST L.J. 383 (1985) (discussion of pending legislative proposals, including S. 1300, co-sponsored by a majority of the Judiciary Committee, which proposed to abolish joint and several liability for most antitrust violations). See also Edward D.

trying to craft a solution to the contribution controversy. The legislative effort failed, but the atmospherics were not good for antitrust plaintiffs. Lawyers who were considering investing resources in an antitrust case understandably might have decided to prefer RICO or securities litigation, which could use the same skills but perhaps (at that time) face less hostility.

B. Renaissance of Antitrust Class Actions?

This April the ABA's Antitrust Section will present a class action panel for the first time at a Section meeting since 1980. It will be entitled, "Justice for All: The Nuts and Bolts of Antitrust Class Actions," thus jazzing up only slightly its former title.³⁰ Again the panel will feature an overview and then plaintiffs', defense, and judicial perspectives.

The ABA is following the market: Antitrust class actions are once more in vogue. Such data as is available (see above table) suggests that antitrust class action filings increased in 1994 and 1995 (although whether this reflects an increase in the number of genuine controversies, or merely multiple filings by an increased number of active plaintiffs' law firms, is unknown).³¹

Other participants at this conference are likely better positioned than I to speculate about the reasons for this possible renaissance in antitrust class actions. Part may be happenstance. Some cases follow significant government cases,³² although among the most important cases are some in which federal enforcers played no role in initiating activity. Also noteworthy are the many state-court class actions, pursuant to which indirect purchasers, barred from a federal remedy, are seeking relief. The economic sophistication of experts retained by plaintiffs' lawyers also may have contributed. My guess is that the enhanced respect accorded to antitrust, as an important national economic policy, also may have made a difference.

C. Examples of Important Recent Cases

Some of the most noteworthy recent antitrust cases have been class actions. One case, *Domestic Air Transportation Antitrust Litigation*,³³ appeared to feature

Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 VAND. L. REV. 1277 (1987); *Contribution and Claim Reduction in Antitrust Litigation*, 11 ABA SEC. ANTITRUST L. MONOGRAPH 4-5 (1986).

30. AMERICAN BAR ASSOCIATION, DC97: 45TH ANNUAL ANTITRUST SPRING MEETING PROGRAM 18 (1997).

31. One rough measure of activity is the number of decisions reported in BNA's *Antitrust & Trade Regulation Reporter*. After years with only a handful of entries per six months, indexes for periods starting the second half of 1993 have usually shown more than a dozen entries.

32. See *infra* pt. I.D.

33. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993). See also *In re Amino Acid Lysine Antitrust Litig.*, 910 F. Supp. 696, 701 (M.D.L. 1995).

the classic pattern of a private class action accompanying government enforcement, but three others—*Prescription Drugs*, *NASDAQ*, and *Insurance*—featured private, or at least non-federal, plaintiffs leading the way.

The *Domestic Air Transportation Antitrust Litigation* court described that litigation as “the largest consumer class action considered by this Court, and quite probably, the largest contemplated by the federal judicial system.”³⁴ The court granted certification to a plaintiff class estimated at 12.5 million by the plaintiffs, and at over 50 million by the defendants.³⁵ The plaintiffs alleged that domestic airlines conspired to avoid price competition on routes to or from each defendant’s hub airports, and that airlines effectuated this conspiracy by sharing pricing information through use of the defendant Airline Tariff Publishing Company (ATPC). The settlement ultimately required the defendants to pay only \$50 million in cash, but to issue \$408 million in discount coupons, thus (after allowing of non-redemption of some coupons) providing consumers with what the court estimated to be a total benefit of between \$254 and \$356 million. The court found this an acceptable resolution because the plaintiffs had a “slim chance of success on the merits,” and “the precarious financial condition of the defendants makes the likelihood of collection of any judgment dubious.”³⁶ In its discussion on the manageability of the suit, the court observed that although individual notice must be provided to class members whose names and addresses were known, publication in general circulation newspapers or notices placed in airline magazines might be sufficient.³⁷

34. 148 F.R.D. at 304.

35. *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 694 & n.90 (N.D. Ga. 1992) (determining that the plaintiff class was not too large to be manageable and granting class certification because common issues predominated over individual ones and because injunctive or declaratory relief was appropriate to the class as a whole.)

36. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 306, 315. The *Airlines Litigation* court clearly believed in the value of class actions. “Either the case proceeds as a class action or it is over,” and “[w]hile the number of possible claimants is staggering, defendants should not be permitted to avoid responsibility for the magnitude of their alleged conspiracy.” *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. at 694. Thus, the court quoted Justice Douglas’ dissent in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 (1974):

[A] class action serves not only the convenience of the parties but also prompt, efficient judicial administration.... [Plaintiffs may be] consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief.... The class action is one of the few legal remedies the small claimant has against those who command the status quo.

Id. (quoting *Eisen*, 417 U.S. at 185 (Douglas, J., concurring)).

37. 137 F.R.D. at 695–96 (distinguishing *Eisen*, 417 U.S. at 157). The court was similarly undeterred by the defendants’ contention that *Illinois Brick* foreclosed inclusion of some plaintiffs in the class because they purchased their tickets subject to contracts to be reimbursed by others, explicitly reserving this issue for individual injury determinations so that the litigation could proceed. *Id.* at 696.

As matters turned out, the parties settled and agreed to provide settlement notice concurrently with class notice. For this task, the court rejected as inaccurate the defendants’

Airlines Litigation also is a case where the court may have contemplated the merits before deciding whether to certify a class. As the court expressed it:

The Eleventh Circuit has acknowledged, however, that while it is not proper to reach the merits of a claim when determining class, "this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements."³⁸

*Brand Name Prescription Drug Antitrust Litigation*³⁹ is another of the largest antitrust class actions ever. Tens of thousands of retail pharmacies comprised the plaintiff class, ranging in size from modest community pharmacies to large chain drug outlets. They alleged that the defendants, primarily drug manufacturers, colluded to offer large managed health care organizations discounts that the defendants did not make available to other customers.⁴⁰ One of the proceedings in this case lists, by a rough count, 169 attorneys. Yet the case originated with a private complaint, not with any government action.

The resolution of much of the case is striking both for its size and for the court's insistence on injunctive relief. The parties agreed to settle for \$408 million, which is "five times the largest settlement in any antitrust class action not preceded by a prior governmental investigation."⁴¹ The court rejected the proposed settlement because it felt that stronger injunctive relief was necessary to prevent continuation or recurrence of the challenged conduct.⁴² Subsequently, the defendants agreed to injunctive provisions similar to ones suggested by the court, requiring that the defendants not refuse to grant discounts solely on the basis of the retailer's status, and that the defendants provide to buying groups and other retailers the same types of discounts as offered managed care organizations if those pharmacies and buying groups could demonstrate their ability to affect market share.⁴³

proposed method of individually notifying nine million credit card holders who had purchased tickets and instead adopted the plaintiff's publication plan for reaching class members. *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 537-38 (N.D. Ga. 1992). The court also rejected the defendants' contention that required publication in their airline magazines constituted unlawfully compelled speech in violation of their First Amendment rights. *Id.* at 551-52.

38. *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. at 684 (citations omitted).

39. *In re Brand Name Prescription Drugs Antitrust Litig.*, 7 Trade Reg. Rep. (CCH) ¶ 71,449 (N.D. Ill. June 21, 1996) (approving partial amended settlements).

40. *In re Brand Name Prescription Drugs Antitrust Litig.*, 1996-1 Trade Cas. (CCH) ¶ 71,350 (N.D. Ill. Apr. 4, 1996).

41. *Id.* at 76,735. This amount represented only 75% of the class purchases, because the remaining amount is attributable to non-settling defendants. *Id.*

42. *Id.* at 76,736 through 76,737.

43. *Id.* at 76,733 through 76,735. Thousands of other pharmacies, especially those that wanted to pursue Robinson-Patman Act claims, opted out of the plaintiff class in favor of pursuing their claims individually. *Id.* at 76,733. Their choice is quite consistent with court's tendency to deny class status to plaintiffs alleging price discrimination. *See infra* notes 178-82 and accompanying text.

In the *NASDAQ Market Makers Antitrust Litigation*,⁴⁴ the court certified a class that claimed that the defendants, all of whom are securities market makers on the *NASDAQ* exchange, colluded to create an artificially wide difference in the prices at which securities are bought and sold. Like *Brand Name Prescription Drugs*, *NASDAQ* did not follow a prior governmental investigation. Indeed, the private action appears to have triggered the governmental activity since, within the same month that the private complaints were consolidated into a multidistrict litigation (October 1994), the Department of Justice's Antitrust Division announced that it was initiating an investigation into *NASDAQ*'s market structure, and the following month, the Securities and Exchange Commission announced that it was examining the operation of the *NASDAQ* market, including the "price spreads."⁴⁵

The district court's opinion in *NASDAQ* has several significant features. First, the court granted certification under Rule 23(b)(2) as well as under 23(b)(3).⁴⁶ The court ruled that even though plaintiffs were seeking substantial monetary damages, and there had been no allegation that all class members intended to trade in the future (when they would presumably benefit from injunctive relief), "more recent trends in Rule 23(b)(2) utilization appear to favor a broader application of equitable relief certification' even where damages also are sought."⁴⁷ The court also granted certification under Rule 23(b)(3), finding that issues relating to the existence, extent, contours, secrecy, and effects of the alleged conspiracy were central to the plaintiff's allegations. Of particular note in this regard is that the court endorsed the determination of damages on a classwide, aggregate basis, and distinguished this approach from allowing a "fluid class recovery" under which unclaimed funds would be distributed to uninjured parties whose interests were

44. *In re NASDAQ Market Makers Antitrust Litig.*, 169 F.R.D. 493 (S.D.N.Y. 1996).

45. *Id.* at 498-501. On Nov. 26, 1996, the Department of Justice and defendants submitted to the court a signed proposed stipulation and order in the government's price-fixing case, *United States v. Alex Brown & Sons*, 169 F.R.D. 532 (S.D.N.Y. 1996). *See NASDAQ*, 169 F.R.D. at 500 n.5. The court will decide whether or not to approve this settlement following a 60-day public comment period.

Although government enforcement did not uncover the alleged wrongdoing, government discovery aided plaintiffs. The court reaffirmed the holding in an earlier proceeding, *In re NASDAQ Market Makers Antitrust Litig.*, 929 F. Supp. 723 (S.D.N.Y. 1996) [hereinafter *NASDAQ IV*], allowing plaintiffs to require defendants to produce copies of transcripts of the more than 225 depositions taken by the government in response to civil investigatory demands (CIDs). This order includes material not only in the control of the defendants or its employees, but also material that those defendants or employees have a right to request from the government. *NASDAQ*, 169 F.R.D. at 530-31. The court observed that an expression to the contrary in a prior case, *In re Air Passenger Computer Reservation Sys. Antitrust Litig.*, 116 F.R.D. 390, 393 (C.D. Cal. 1986), was dictum that was superseded by 1991 changes to the Federal Rules of Civil Procedure and rejected by *In re Woolworth Corp. Sec. Class Action Litig.*, 166 F.R.D. 311, 313 (S.D.N.Y. 1996). *NASDAQ*, 169 F.R.D. at 531 n.23.

46. *NASDAQ*, 169 F.R.D. at 517-17.

47. *Id.* at 517 (quoting *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1046 (N.D. Miss. 1993)).

similar to those of the class.⁴⁸

Of all the noteworthy recent antitrust class actions, the most unusual may be *In re Insurance Antitrust Litigation*.⁴⁹ Its origin was a state lawsuit, which led to a coordinated multi-state class action (in part as *parens patriae*), and also to a private class action. The lawsuits, which challenged a series of insurance coordination arrangements, raised a host of jurisdictional, exemption, and substantive antitrust questions, some of which ended up before the Supreme Court before traditional class issues were ever addressed.⁵⁰ The states eventually settled their case for injunctive relief and payment of \$36 million, largely toward their litigation costs.⁵¹

D. The Special Case of Indirect Purchasers

Two years after Rule 23 was amended in 1966, antitrust class action plaintiffs received a further boost when the Supreme Court decided *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*⁵² In that case, a defendant monopolist machine manufacturer argued that a plaintiff shoe manufacturer could not recover under Section 4 because it had "passed on" to its customers, in the form of higher shoe prices, any overcharges that it had paid to the machinery manufacturer. The manufacturer reasoned that its alleged overcharges had been imposed equally on all shoe manufacturers and the demand for shoes was "so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales."⁵³ The Court rejected the "passing-on" defense because of its belief that the defense would unduly complicate antitrust litigation,⁵⁴ and because of its concern that acceptance of the "passing on" defense

48. *Id.* at 524–26. The court relied on the classwide proof used in *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281 (S.D.N.Y. 1971), *amended*, 333 F. Supp. 291 (S.D.N.Y. 1971), *mandamus denied*, 449 F.2d 119 (2d Cir. 1971). *NASDAQ*, 169 F.R.D. at 524.

49. No. C-88-1688 CAL (N.D. Cal. filed Oct. 6, 1994).

50. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

51. *Insurance Companies Settle Multistate Conspiracy Charges*, Antitrust & Trade Reg. Rep. (BNA), No. 1684, at 434 (Oct. 13, 1994).

52. 392 U.S. 481 (1968).

53. *Id.* at 492.

54. *Id.* at 492–94 (footnote omitted):

We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact.... Equally difficult to determine...is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer [successfully passed on all of an overcharge] there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.... [I]t is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to

would leave the ultimate consumer with too small an incentive to seek even treble damages through a class action.⁵⁵

By 1977, the Court was less concerned about protecting those ultimate consumers' ability to bring class actions, and more concerned about symmetry in antitrust recoveries and avoidance of undue complications to litigation. *Illinois Brick*⁵⁶ held that Section 4 of the Clayton Act does not allow indirect purchasers to recover overcharges even when the purchasers can show that the overcharge was passed on by the direct purchasers.⁵⁷ While recognizing that an indirect purchaser *could* be injured to the extent that a direct purchaser passes the overcharge on to the subsequent purchasers, the Court nonetheless held that Section 4 does not allow recovery in such situations. It gave three reasons for this conclusion. First, because *Hanover Shoe* precludes a defendant from using a pass-on defense, "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants."⁵⁸ Second, establishing the amount of any overcharge would present insurmountable evidentiary obstacles because a "demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff."⁵⁹ Third, the Court concluded that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers" rather than by allowing ultimate consumers "to sue only for the amount [each] could show was absorbed by it."⁶⁰

Although *Illinois Brick* provoked a substantial outcry from some quarters, legislation designed to overturn the decision failed to achieve majority support and the lower federal courts began to clear their dockets of such cases as they came to understand, sometimes after repeated attempts to avoid it, that for many classes of plaintiffs, "*Illinois Brick* makes it impossible to proceed."⁶¹ However, Congress's

establish its applicability. Treble-damage actions would require additional long and complicated proceedings involving massive evidence and complicated theories.

55. *Id.* at 494 ("In addition, if buyers are subjected to the passing-on defense, those who buy from them would have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action.").

56. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

57. See Stephen Calkins, *Illinois Brick and its Legislative Aftermath*, 47 ANTITRUST L.J. 967 (1978). The Court intimated, as it did in *Hanover Shoe*, that there might be an exception in the case of "a pre-existing cost-plus contract," 431 U.S. at 724 n.2, or in situations where "the direct purchases is owned or controlled by its customer," *id.* at 736 n.16 (citations omitted). The Court may have subsequently called into question the viability of at least the cost-plus exception. See *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990).

58. *Illinois Brick*, 431 U.S. at 730.

59. *Id.* at 732-33.

60. *Id.* at 735.

61. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 523 F. Supp. 1116, 1119 (C.D. Cal. 1981). See, e.g., *Zinser v. Continental Grain Co.*, 660 F.2d

failure to effect a legislative change did not end the matter of antitrust suits by indirect purchasers. Within a few years, at least fourteen states had enacted legislation that either expressly or inferentially allowed indirect purchasers to sue for overcharges incurred in violation of state laws.⁶² In 1989, in *ARC America*,⁶³ the Supreme Court was asked to hold that such state laws are preempted by Section 4 of the Clayton Act.

The Court declined to find preemption. Finding neither an express pre-emption nor any congressional intent to occupy the field of antitrust law, the Court addressed the question of any conflict between state and federal law, and found none inasmuch as "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."⁶⁴ Rejecting the appellees' contention "that state laws permitting indirect purchaser recoveries pose an obstacle to accomplishment of the purposes and objectives of Congress,"⁶⁵ the Court declared that state laws allowing recovery by indirect purchasers "are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."⁶⁶ The Court likewise found no basis for the Ninth Circuit's conclusion that state indirect purchaser statutes "interfere with the congressional purpose of avoiding unnecessarily complicated proceedings on federal antitrust claims."⁶⁷ In that regard, the Court simply noted that the state "statutes cannot and do not purport to affect remedies available under federal law," adding that "state indirect purchaser actions will not necessarily be brought in federal court" and that, in any event, "federal courts have the discretion to decline to exercise pendent jurisdiction over state indirect purchaser claims, even if those claims are brought in the first instance in federal court."⁶⁸ The Court thus concluded:

Illinois Brick was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute—§ 4 of the Clayton Act—would result in no one plaintiff having a sufficient incentive to sue under that statute. State indirect purchaser statutes pose no similar risk to the enforcement of the federal law.⁶⁹

Arc America was a green light for plaintiffs' lawyers to pursue consumer antitrust class actions in state courts.⁷⁰ For example, one state trial court has

754, 760 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1156–60 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

62. See *California v. ARC America Corp.*, 490 U.S. 93, 98 n.3 (1989) (collecting citations).

63. *Id.* at 98.

64. *Id.* at 101–02.

65. *Id.*

66. *Id.* at 102.

67. *Id.* at 103.

68. *Id.* at 104–05.

69. *Id.* at 104.

70. This trend is discussed in, and the discussion of these cases benefited from reading a draft of Ronald W. Davis, *Indirect Purchaser Litigation: ARC America's Chickens Come Home to Roost on the Illinois Brick Wall*, 65 ANTITRUST L.J. 375 (1997).

recently certified a "multi state class" consisting of indirect purchasers of compact disc recording in fourteen states and the District of Columbia.⁷¹ Indirect purchasers also have been actively seeking class action damage awards for alleged price-fixing conspiracies involving infant formula,⁷² pharmaceuticals,⁷³ and lysine,⁷⁴ as well as other products. Moreover, perhaps emboldened by the *ARC America* decision, several lower level courts in states that have not enacted indirect purchaser legislation have recently held that state laws allow class actions suits by, and on behalf of, indirect purchasers.⁷⁵ For example, a North Carolina intermediate appellate court has held that that state's 1969 statute allows actions by indirect purchasers despite *Illinois Brick* and despite several North Carolina decisions indicating that "[f]ederal case law interpretations of the federal antitrust laws are persuasive authority in construing our own antitrust statutes."⁷⁶ An intermediate appellate court in Tennessee has tentatively reached a similar conclusion with regard to that state's pre-*Illinois Brick* statute.⁷⁷ And in yet another case, a federal district court has certified to a state supreme court the question whether that state's consumer protection act allows recovery by indirect purchasers even though the state's antitrust laws appear to preclude such suits by virtue of *Illinois Brick*.⁷⁸

71. *Robinson v. EMI Music Distribution, Inc.*, No. CIV.A. L-10462, 1996 WL 495551 (Tenn. Cir. July 8, 1996).

72. *See, e.g., Boos v. Abbott Lab.*, 925 F. Supp. 49 (D. Mass. 1996) (certifying question to state supreme court); *Hyde v. Abbott Lab.*, 473 S.E.2d 680 (N.C. Ct. App. 1996) (certifying issue to state supreme court); *Blake v. Abbott Lab.*, No. CA03A01-9509-CV-0037, 1996 WL 134947 (Tenn. Ct. App. Mar. 27, 1996) (reversing dismissal, for failure to state a claim under state law, a class action by indirect purchases of infant formula).

73. *See Blewett v. Abbott Lab.*, No. 95-2-01775-4, 1995 WL 798948 (Wash. Super. Ct. Oct. 4, 1995), *appeal pending* (dismissing state indirect purchaser case under *Illinois Brick*).

74. *See, e.g., In re Amino Acid Lysine Antitrust Litig.*, 927 F. Supp. 273 (N.D. Ill. 1996) (remanding case to state court where defendant had not shown minimum amount in controversy between it and the named class action plaintiffs needed to establish diversity jurisdiction).

75. Since *ARC America* at least two other states, Maine and North Dakota, have enacted laws allowing actions by indirect purchasers. ME. REV. STAT. ANN. tit. 10, § 1104 (1994); N.D. CENT. CODE § 51-08.1-08 (1994).

76. *Hyde v. Abbott Lab.*, 473 S.E.2d 680, 684 (N.C. Ct. App. 1996). The law clerk who worked on the opinion discussed the court's reasoning in an internet chat-line. Daniel Needleman, (Feb. 20, 1997) *At-members@abanet.org*. The court was concerned "that antitrust violations might slip under the radar screen of the federal and state agencies" and that "North Carolina's interests may not be well protected by a consent decree signed by a federal agency." *Id.* The court was not willing to rely solely on the state's *parens patriae* ability to protect its citizens. *Id.* "The court felt that there are often political factors which prevent the attorney general's office from going after a particular defendant," and that small antitrust violations might go "unnoticed at the attorney general's office." *Id.*

77. *Blake v. Abbott Lab.*, No. CA03A01-9509-CV-0037, 1996 WL 134947 (Tenn. Ct. App. Mar. 27, 1996).

78. *Boos v. Abbott Lab.*, 925 F. Supp. 49 (D. Mass. 1996). *See Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100 (Fla. Dist. Ct. App. 1996) (certifying a similar question

What remains unresolved is how this state court litigation, for the benefit of indirect purchasers, will be reconciled with any federal court litigation for the benefit of direct purchasers.⁷⁹ Regardless of one's views of the virtues of treble damages, it seems unlikely that courts will knowingly countenance the paying of treble damages twice. As before *Illinois Brick*, the issue can be finessed for quite a while, since direct purchasers and indirect purchasers may challenge different wrongs, and settlements will cloud the issue. Defendants are already resorting to self-help by insisting on global settlements, with directs and indirects alike. At least for the present, however, *Illinois Brick*, which had sought to uncomplicate antitrust litigation,⁸⁰ has had the opposite effect, and moved an important part of the antitrust class action litigation to state courts.

It is somewhat ironic that state courts have been supplementing federal court enforcement efforts, because government antitrust deterrence appears to have increased substantially, making supplemental efforts less important for purposes of deterrence.

II. INCREASED GOVERNMENT ANTITRUST DETERRENCE

Antitrust class actions would be unimportant, at least for purposes of deterrence, if government enforcement achieved the correct level of deterrence of each of the various kinds of law violations. While no one knows the precise level at which deterrence is optimal, it is clear that deterrence especially of hard-core antitrust violations has increased significantly.

A. Changes in Federal Governmental Remedies

Any assessment of calls to reform the rules governing private class actions should consider the context in which such litigation occurs. A significant aspect of that context is governmental enforcement. The Federal Trade Commission and the Department of Justice's Antitrust Division can undertake actions that achieve some of the broad-based injunctive and compensatory effects of private class actions. Moreover, governmental enforcement actions may often serve as a stimulus to, or substitute for, private actions, or as a deterrent to the conduct that would make such private actions necessary.

Long ago, Professor Handler suggested that the deterrent effect of large class actions "certainly could be achieved by fairer, more discriminating, and administratively less onerous means" were Congress simply to increase antitrust penalties.⁸¹ In the last quarter-century, although the government's civil antitrust remedies do not appear to have changed markedly, Congress has dramatically

to the Florida Supreme Court).

79. The dilemma posed by possibly conflicting federal and state class actions has been recognized in other contexts, as well. See, e.g., Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514 (1996).

80. See Calkins, *supra* note 3.

81. Handler, *supra* note 9, at 9.

increased criminal antitrust penalties.

1. Criminal Penalties

At one time, criminal penalties for violations of the Sherman Act⁸² were low. Prior to 1974, Sherman Act violations were misdemeanors punishable by fines not exceeding \$50,000 and/or imprisonment up to one year.⁸³ The Justice Department complained vigorously: "Antitrust violations are often considered by the public and the business community as mere technical violations of law and not of a particularly serious nature. They have in the past been characterized as similar in nature to traffic violations, littering the public streets, and petty thefts."⁸⁴

Since 1974, potential criminal fines have increased dramatically. In that year, Congress reclassified Sherman Act violations as felonies, and raised maximum fines for individuals and corporations to \$100,000 and \$1,000,000, respectively.⁸⁵ The Antitrust Improvements Act of 1990⁸⁶ hiked these maximums even further, to \$350,000 and \$10,000,000, respectively.⁸⁷ Other legislation has also raised potential Sherman Act fines. Under the Criminal Fine Improvements Act of 1987, which is applicable to all felonies (including violations of the Sherman Act), fines for federal antitrust felonies can be set at the greater of either: (a) the amount set by the Antitrust Improvements Act; or (b) double the gross amount gained from violation or lost by the victim.⁸⁸

The potential for and likelihood of incarceration also have increased. The

82. 15 U.S.C. §§ 1, 2 (1994). The Federal Trade Commission does not prosecute criminal violations of the Federal Trade Commission Act. When the Commission has reason to believe that any person, partnership, or corporation is liable for criminal penalties under the latter Act, it refers such matters to the Attorney General. See 15 U.S.C. § 56(b) (1994).

83. *Id.* Under Section 6 of the Sherman Act, the Department of Justice may obtain forfeiture of property transported in interstate commerce that was "owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this title." 15 U.S.C. § 6 (1994). The Antitrust Division reports obtaining forfeiture in two years since 1987. In 1992, \$27.8 million was obtained from one corporation, and in 1995 a total of \$25 million was obtained from two corporations. *U.S. Dep't of Justice, Antitrust Division, Workload Statistics, FY 1987-96*, 72 *Antitrust & Trade Reg. Rep. (BNA)* 117, 122 (Jan. 30, 1997).

84. Letter from W. Vincent Rakestraw, Assistant Attorney General, to the Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary (Nov. 8, 1974), *reprinted in* 9 *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, PT. I THE ANTITRUST LAWS* 6653 (Earl W. Kintner ed., 1984). Even the modest maximum available penalties were rarely sought. See KENNETH G. ELZINGA & WILLIAM BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* (1976); Richard Posner, *A Statistical Study of Antitrust Enforcement*, 13 *J.L. & ECON.* 365 (1970).

85. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974).

86. Pub. L. No. 101-588, 104 Stat. 2879, 2880 (1990).

87. These amounts, like the maximums of prior years, can be increased by convictions on multiple counts.

88. 18 U.S.C. § 3571(d) (1994).

1974 amendments under the Antitrust Procedures and Penalties Act increased potential prison terms to three years. Prison sentences may be imposed for each count of conviction.⁸⁹ As of November 1, 1987, all sentencing must conform to the provisions of the Sentencing Reform Act of 1984.⁹⁰ In the antitrust context, these guidelines apply to bid-rigging, price-fixing, and market allocation agreements.⁹¹ The base level offense corresponds with a recommended sentence of six to twelve months' imprisonment.⁹²

Although for many years criminal penalties were more potential than actual, this has changed. The Antitrust Division has won record fines and significant jail sentences.⁹³ From the beginning of fiscal year 1993 through March 1996, the Division obtained an average jail sentence of nine months per individual.⁹⁴ In fiscal

89. See 18 U.S.C. § 3584 (1994) (imposition of concurrent or consecutive sentences); U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3 cmt. 3 (1995) (similar discussion) [hereinafter SENTENCING GUIDELINES].

90. 18 U.S.C. §§ 3551–3586 (1994). The United States Sentencing Commission, pursuant to the Act, has established Sentencing Guidelines for courts to apply when imposing sentences. The sentencing statute permits a court to depart from the guidelines and sentence outside of the prescribed range if a particular case presents atypical features. 18 U.S.C. § 3553(b) (1994). In that event, the court must specify reasons for departure. *Id.* An appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742 (1994).

91. SENTENCING GUIDELINES, *supra* note 89, §§ 2R1.1, 5A.

92. *Id.* § 2R1.1(a). The base offense level can be adjusted upward or downward to reflect the volume of commerce attributable to the defendant.

The Sentencing Guidelines also require that fines be imposed. *Id.*, § 2R1.1(c) (1996). The minimum recommended fine is \$20,000 for an individual and \$100,000 for a corporation. *Id.* Permissible conditions of probation are set out in 18 U.S.C. § 3563 (1994), as well as the Sentencing Guidelines and include restitution by both natural persons and corporations to victims. SENTENCING GUIDELINES, *supra* note 89, chs. 5, 8 (concerning individuals and corporations and other organizations, respectively).

According to the Antitrust Division, it has employed this restitution authority on 34 occasions since 1984. The bulk of the experience is since 1993 (7 cases in FY 93, 11 in FY 94, 6 in FY 95 and 5 in FY 96). U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, WORKLOAD STATISTICS, FY 1987–96, at 11 (1997). About two-thirds of the cases appear to involve payments to a government entity (or a close surrogate such as a public employee retirement system), that was victimized in a bid-rigging scheme. The other third typically involve payment to a single private entity that operated an auction corrupted by bid-rigging activity.

93. Examples of recent significant jail sentences obtained by the Antitrust Division include two separate criminal actions in 1995. In September 1995, a defendant was sentenced to 1,095 days in jail and five years probation for wire fraud, bid rigging, and bank fraud. *United States v. Giap*, 6 Trade Reg. Rep. (CCH) ¶ 45,095, at 44,170 (E.D. Va. Sept. 27, 1995). In February and March that year all seven individual defendants in a major price-fixing case involving the plastic dinnerware industry were sentenced to jail. The two ringleaders of the conspiracy received prison sentences of 21 months and 15 months, respectively. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, OPENING MARKETS AND PROTECTING COMPETITION FOR AMERICA'S BUSINESSES AND CONSUMERS: GOALS AND ACHIEVEMENTS OF THE ANTITRUST DIVISION (FISCAL YEAR 1993 THROUGH MARCH 1996), 1996 WL 149352 C.D.O.J., at *8 (1996) [hereinafter OPENING MARKETS].

94. OPENING MARKETS, *supra* note 93, at *8.

year 1996, the average jail sentence increased to sixteen months.⁹⁵ In 1992, the average corporate fine imposed was slightly under \$500,000.⁹⁶ Average corporate fines soared to over \$1.2 million during fiscal year 1995, with multi-million dollar fines being "commonplace."⁹⁷ Corporate criminal fines totalled in excess of \$35 million in each of FY 1993-95.⁹⁸

Most recently, of course, Archer Daniels Midland (ADM) pled guilty to participating in two international cartels, for lysine and citric acid, and agreed to pay a \$100 million criminal fine, the largest criminal antitrust fine ever.⁹⁹ Even more recently a grand jury has indicted three current or former ADM executives, including Michael D. Andreas, former ADM executive vice president, plus a Japanese executive.¹⁰⁰ The U.S. subsidiary of Bayer AG, a Germany-based pharmaceutical and chemical manufacturer, recently agreed to pay a \$50 million fine to settle Department of Justice Antitrust Division criminal charges that it fixed prices and allocated sales of citric acid.¹⁰¹ The \$50 million fine represents the second largest antitrust fine in history. The Department also secured a \$14.55 million settlement of a class action for alleged price fixing in the residential door market.¹⁰²

2. Federal Civil Penalties

Injunctive relief in FTC administrative cases derives from section 5(b) of the FTC Act, which gives the Commission the authority to order any "person, partnership or corporation" under its jurisdiction to "cease and desist" prohibited practices.¹⁰³ The Commission may also rely on section 13(b) of its statute to seek a judicially-ordered temporary or permanent injunction prohibiting any conduct made unlawful by any provision of law enforced by the Federal Trade Commission.¹⁰⁴ The Department of Justice also has authority under Section 4 of the

95. Derived from ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, WORKLOAD STATISTICS, FY 1987-96. It should be noted, however, that the number of persons incarcerated has varied from year to year, and declined since FY 1988-89, in part because of increased use of alternative confinement (e.g., house arrest, half-way houses).

96. OPENING MARKETS, *supra* note 93, at *8.

97. *Id.* at *8.

98. *Id.* at *9. The Antitrust Division's record of \$41.5 million was set in FY 1995.

99. *Archer Daniels Midland Co. to Plead Guilty and Pay \$100 Million for Role in Two International Price-Fixing Conspiracies*, U.S. DEP'T OF JUSTICE PRESS RELEASE (Oct. 15, 1996).

100. Scott Kilman & Thomas M. Burton, *Three Ex-ADM Executives Are Indicted: Wilson, Michael Andrews and Informant Whitacre Cited in Antitrust Case*, WALL ST. J., Dec. 4, 1996, at A3.

101. *United States v. Haarmann & Reimer Corp.*, 6 Trade Reg. Rep. (CCH) ¶ 45,097, No. 4267 (N.D. Cal. Jan. 29, 1997).

102. *Court Clears \$14.55 Million Settlement in Doors, Awards Fees of \$4.5 Million*, 72 Antitrust & Trade Reg. Rep. (BNA) No. 1794, at 53-54 (Jan. 15, 1997).

103. 15 U.S.C. § 5(a) (1994).

104. 15 U.S.C. § 53(b) (1994).

Sherman Act¹⁰⁵ and Section 15 of the Clayton Act¹⁰⁶ to seek judicially-ordered injunctions to redress violations of the antitrust laws. Apart from considerations of redress, such relief clearly focuses on the future conduct of the respondent,¹⁰⁷ and, as such, is comparable to the injunctive remedies that may be sought in a private class action. The FTC may issue cease and desist orders against many parties,¹⁰⁸ or merely a single respondent, and the order may prohibit not only the unlawful conduct at issue, but also lawful conduct that might make repetition of the unlawful conduct more likely or more difficult to detect.¹⁰⁹ According to anecdotal evidence—there is no way truly to measure this—firms are at times quite concerned about potential constraints on their future conduct.

With respect to redress, however, government civil cases have not been an effective surrogate for, or even supplement to, private class actions. The Department of Justice has never sought redress in a civil antitrust matter. The FTC may not seek restitution ancillary to an administratively-ordered injunction,¹¹⁰ but it may do so in connection with a petition for a judicially-ordered injunction under section 13(b) of the FTC Act, which authorizes the Commission to seek preliminary and permanent injunctions to remedy “any provision of law enforced by the Federal Trade Commission.” Although the statute makes no distinction between competition and consumer protection cases,¹¹¹ to date the Commission has limited its efforts to gain antitrust redress to three related cases.¹¹²

105. 15 U.S.C. § 4 (1994) (“it shall be the duty of the several United States attorneys...to institute proceedings in equity to prevent and restrain” violations of the Sherman Act).

106. 15 U.S.C. § 25 (1994). This provision gives United States attorneys the duty to institute proceedings in equity in United States district courts “to prevent and restrain violations of this Act.” *Id.*

107. *FTC v. Rubberoid Co.*, 343 U.S. 470, 473 (1952) (emphasizing that Commission cease and desist orders must be prospective and prophylactic in nature rather than punitive or compensatory).

108. *See, e.g., FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967).

109. *See, e.g., FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957); *American Med. Ass’n v. FTC*, 638 F.2d 443, 450–51 (2d Cir. 1980) (affirming order prohibiting discontinued conduct), *aff’d by an equally divided court*, 455 U.S. 676 (1982).

110. *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974).

111. Moreover, the Supreme Court has endorsed court ordered restitution as ancillary to injunctive relief in circumstances involving different, but comparable, agencies or statutes. *See, e.g., Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397–98 (1946).

112. *FTC v. American Home Prods. Corp.*, 5 Trade Reg. Rep. (CCH) ¶ 23,209 (D.D.C. 1992) (approving consent judgment requiring payment of restitution); *FTC v. Mead Johnson & Co.*, 5 Trade Reg. Rep. (CCH) ¶ 23,209 (D.D.C. 1992) (same); *FTC v. Abbott Lab.*, 1992 Trade Cas. ¶ 69,996 (D.D.C. 1992), *injunction denied on other grounds*, 853 F. Supp. 526 (D.D.C. 1994), *settled by consent agreement*, 59 Fed. Reg. 15,733 (Apr. 4, 1994). The infant formula cases also provide a good example of private class actions appearing to have been stimulated by governmental action. However, most of the follow-on infant formula private cases apparently have been remanded to state court or dismissed for lack of standing. *See, e.g., Boos v. Abbott Lab., Inc.*, 925 F. Supp. 49 (D. Mass. 1996); *Moore ex rel. Mississippi v. Abbott Lab., Inc.*, 900 F. Supp. 26 (D. Miss. 1995); *Blake v.*

The FTC's antitrust experience, or lack thereof, with section 13(b) stands in sharp contrast to its use of that authority for consumer protection. When section 13(b) was added to the FTC Act as part of amendments to the Trans-Alaska Pipeline Act of 1973, the provision was expected to be used principally for obtaining preliminary injunctions against corporate acquisitions, pending completion of FTC administrative hearings. During the 1970s, Section 13(b) was used by the Commission mainly in this way, and the Commission continues to make frequent use of the provision in its merger enforcement program.

In the early and mid-1980s the Commission began to make widespread use of the "permanent injunction" proviso of section 13(b) in its consumer protection program to challenge cases of garden variety fraud and deception.¹¹³ Further, the Commission argued that the statutory reference to "permanent injunction" entitled the Commission to obtain an order not only permanently barring deceptive practices, but also imposing various kinds of monetary equitable relief (e.g., restitution and rescission of contracts) to remedy past violations. The Commission also argued that, to preserve the possibility of ultimate monetary equitable relief, it should be able to obtain a freeze of assets and imposition of temporary receivers in appropriate cases. The courts have uniformly accepted the Commission's construction of section 13(b), with the result that most FTC consumer protection enforcement is now conducted directly in court under that section, rather than by means of administrative adjudication.

When a district court issues a temporary restraining order (TRO), and, subsequently, a permanent injunction, it may order an asset freeze, redress to consumers, disgorgement to the Treasury, or other equitable relief against recidivism by individuals such as banning certain types of activity or requiring that a performance bond be posted by the individual before he or she engages in the type of activity that led to the original order (e.g., sale of franchises or telemarketing). In these ways and others, the Commission can thus obtain class action-type relief for consumers.

As illustrated in the chart, below, the Commission has obtained significant amounts of consumer redress over the years. The fluctuations in number of cases and amounts ordered are simply a matter of timing, that is, the number of cases in progress at any one time within the agency tends to fluctuate based upon current enforcement priorities and resource allocation.

Abbott Lab., Inc., 894 F. Supp. 327 (E.D. Tenn. 1995); *DeVincenzi v. Abbott Lab.*, 1994 U.S. Dist. LEXIS 20755 (D. Nev. Nov. 14, 1994).

113. *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 78-82 (1989) (*Kirkpatrick II*).

Redress Ordered in Federal Trade Commission Cases Fiscal 1990-1996 ¹¹⁴		
Fiscal Year	Number of Cases ¹¹⁵	Amount Ordered ¹¹⁶
1990	37	\$51,458,550
1991	37	\$83,521,385 to \$125,471,385
1992	49	\$73,029,449
1993	27	\$15,912,517
1994	48	\$60,274,142
1995	62	\$63,972,720
1996	48	\$80,993,370
TOTAL ¹¹⁷	308	\$429,162,133 to \$471,112,133

Were the FTC to begin achieving like results in competition cases, government antitrust deterrence would increase yet further. The agency is not currently taking steps in this direction, however.

B. *Parens Patriae*

Parens patriae is a concept rooted in the English constitutional system; its literal translation, "father of the country," refers to the English system which empowered the king to act as guardian for persons legally unable to act for themselves.¹¹⁸ The concept of *parens patriae* evolved in the United States and empowered a state to sue in its quasi-sovereign capacity on behalf of its citizens.¹¹⁹ In *Pennsylvania R.R.*, the Supreme Court held that the State of Georgia could enjoin an alleged conspiracy to set discriminatory railroad freight rates.¹²⁰ The Supreme Court recognized that *parens patriae* lawsuits by the states "have long been recognized [and t]here is no apparent reason why those suits should be excluded from the purview of the anti-trust acts."¹²¹ Thus, for many years *parens patriae* suits by the states to enforce anti-trust laws enjoyed the imprimatur of the

114. Source: Statistics prepared by the author based on internal data provided by the Bureau of Consumer Protection.

115. Case numbers count redress orders with corporate defendants and individuals separately where appropriate.

116. Although the Commission attempts to collect the full amount of each judgment, whether ordered by a court or obtained thorough a settlement, it is not always successful.

117. The total amount of redress reflects the range of redress ordered by the district court in a redress action involving Figgie International, Inc. The court required Figgie to pay a minimum of \$7,590,000 million and up to \$49.95 million, if necessary, into an escrow account to pay refunds to consumers for misrepresentations about its Vanguard heat detectors. See *FTC v. Figgie Int'l*, No. CV88-04335-RMT(TX), 1991 WL 24621 (D.C. Cal. Jan. 14, 1991), *aff'd*, 994 F.2d 595 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994).

118. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).

119. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

120. *Id.* at 445-50.

121. *Id.* at 447.

Supreme Court.

However, a number of developments in the 1970s brought into question the continuing viability of the state *parens patriae* actions.¹²² In 1972, the Supreme Court rejected the State of Hawaii's argument that a state should be allowed to sue as *parens patriae* for injury to its "general economy" from antitrust violations.¹²³ The following year, the Ninth Circuit Court of Appeals held that a state could not maintain an action as *parens patriae* on behalf of citizen consumers to recover monetary damages to injuries from an alleged price-fixing conspiracy among snack-food manufacturers.¹²⁴ While the Ninth Circuit acknowledged that *parens patriae* was probably the appropriate legal approach to remedying consumer injuries from antitrust violations, it declined to apply it to actions under the Clayton Act absent an explicit intention by the Congress to permit such actions.¹²⁵ Congress cited the Ninth Circuit's *Frito-Lay* decision as a main reason for enacting Section 4C "and [as] a recognition that the consuming public currently has no effective means of obtaining compensation for its injuries."¹²⁶

Thus, the issue was placed squarely with Congress on whether to give explicit statutory *parens patriae* authority to the states. As part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress passed Section 4C of the Clayton Act which authorized state attorneys general to bring civil actions in the name of the state in federal district court for antitrust violations. Congress envisioned that individual consumers would be the chief beneficiary of Section 4C by "providing the consumer an advocate in the [antitrust] enforcement process—his State attorney general."¹²⁷ The state attorney general was viewed by Congress as "an effective and

122. Earl W. Kintner et al., *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1, 19 (1977).

123. *Hawaii v. Standard Oil Co.*, 405 U.S. at 251.

124. *California v. Frito-Lay, Inc.* 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

125. *Id.* at 777 ("[I]f the State is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvisation but by legislation and rule making.").

126. H.R. REP. NO. 94-499, 94th Cong., 2d Sess (1975), *reprinted in* 1976 U.S.C.C.A.N. 2574 [hereinafter House Report].

127. *Id.* at 2574-75. Assistant Attorney General for Antitrust Thomas Kauper testified to Congress on the need for making *parens patriae* authority available for consumer redress:

I believe that there is a need for the availability of a method by which damages can be recovered where antitrust violations have caused small individual damages to large numbers of citizen-consumers. Without such a procedure, those antitrust violations which have the broadest scope and, often, the most direct impact on consumers would be most likely to escape the penalty of the loss of illegally-obtained profits. Those whose injuries were too small to bear the burden of complex litigation would have no effective access to the courts. As a result, the goal of deterrence sought by the Clayton Act would be frustrated in those situations where damages fell directly on small consumers or purchasers.

ideal spokesman for the public in antitrust cases, because...[h]e is normally an elected and accountable and responsible public officer whose duty is to promote the public interest.”¹²⁸

Parens patriae actions empower state attorneys general to file civil antitrust actions on behalf of its citizens in federal court and to seek treble damages for injuries to consumers.¹²⁹ The ability to recover treble damages is a remedy unavailable to federal agencies. Such damages may be distributed either in a manner authorized by the court in its discretion or to the state as a civil penalty, “subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.”¹³⁰

Both proponents and detractors of *parens patriae* authority for the states predicted profound changes to result from its enactment. One commentator predicted “potentially mammoth liabilities for businessmen” and “a realistic remedy for consumers injured by antitrust violations.”¹³¹ Members of Congress expressed fears that *parens patriae* authority for state attorneys general would “inflict possibly astronomical awards”; would be administered in a “harsh and arbitrary” fashion; and would be “subject to much abuse.”¹³²

Since the passage of Section 4C, state attorneys general have made significant use of the *parens patriae* law.¹³³ For example, the Attorney General of California

Id.

128. *Id.* at 2575.

129. 15 U.S.C. § 5c (1994).

130. *Id.* § 15c. *Parens patriae* actions under Section 4C are limited in a number of respects: 1) damages are limited to those arising from violations of the Sherman Act, 15 U.S.C. § 15c(a)(1) (1994); 2) damages are limited to those incurred by natural persons, not corporations, partnerships, or proprietorships, *id.*; 3) *parens patriae* authority does not authorize actions by the state on behalf of indirect purchasers, *see, e.g.,* *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); 4) natural persons for whom damages may be recovered must be notified and given an opportunity to opt out of the action, 15 U.S.C. § 15c(b)(1), (2) (1994); 5) a final judgment in such a *parens patriae* action bars any damage claim under Section 4 of the Clayton Act by any natural person on whose behalf the state brought the action and who failed to exercise the right to opt out, *id.* § 15c(b)(3); and 6) damages may not include amounts previously awarded for the same injuries, *id.* § 15c(a)(1)(A). Section 4C also provides for the state's recovery of reasonable attorneys fees following the successful prosecution of the *parens patriae* antitrust lawsuit. 15 U.S.C. § 15(a)(2) (1994). *See Arizona v. Maricopa County Med. Soc'y*, 578 F. Supp. 1262, 1271–79 (D. Ariz. 1984) (recovery of attorneys fees by Attorney General's staff).

131. Kintner et al., *supra* note 122, at 32. *See also* Handler & Blechman, *supra* note 20 (criticizing proposed legislation and proposing an alternative under which the FTC would award damages consistent with a court's earlier finding of liability).

132. House Report, *supra* note 126, at 2593.

133. *See, e.g.,* *Pennsylvania v. Playmobil USA, Inc.*, No. CV-95-0287, 1995 WL 787518 (M.D. Pa. Dec. 15, 1995); *New York v. Reebok Int'l Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996); *Alaska v. Carr-Gottstein Foods Co.*, No. A93-291 CIV (JWS), 1995 WL 441987 (D. Alaska 1995); *New York v. Kraft Gen. Foods*,

relied on the law in challenging a merger of supermarkets in that state.¹³⁴ States have often combined their resources in filing multistate *parens patriae* actions. These multistate enforcement efforts are coordinated through the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG) and have focused on a number of areas including vertical price fixing,¹³⁵ and mergers and joint ventures.¹³⁶ In one case the *parens patriae* procedure was seen as superior to class actions for resolving small consumer claims, and was therefore found to preempt a class action.¹³⁷

Fears that the *parens patriae* power would be "subject to abuse" and produce "astronomical" monetary awards appear to have been exaggerated. Moreover, individual consumers have hardly been the recipient of enormous windfalls. For example, in *In re Minolta Camera Products Antitrust Litigation*,¹³⁸ approximately 70,000 out of a total of 340,000 consumers received refund checks for \$16 and \$9, respectively, out of a settlement fund of \$4,644,940. In fact, despite the recovery by some state attorneys general of substantial monetary damage awards,¹³⁹ individual consumers have received little in the way of monetary awards. For example, in a *parens patriae* prosecution in a milk products pricing fixing case, the court noted the futility of even attempting to award individual claimants monetary damages: "The present reality, however, is that a distribution per person or even per household here would, after administrative expenses, be so small as to be no greater than or perhaps less than the cost to each applicant of the postage and the preparation of sworn claim forms to obtain it."¹⁴⁰ Most of the monetary damage

Inc., 862 F. Supp. 1035 (S.D.N.Y. 1994); *Shepherd Park Citizens Ass'n v. General Cinema Beverages*, 584 A.2d 20 (D.C. 1990); *In re Mid-Atlantic Toyota Antitrust Litig.*, 560 F. Supp. 760 (D. Md. 1983); *Iowa v. Scott & Fetzer Co.*, 1981-2 Trade Cas. (CCH) ¶ 64,873 (S.D. Iowa 1982).

134. See *California v. American Stores Co.*, 872 F.2d 837, 845 (9th Cir. 1989), *reversed on other grounds*, 495 U.S. 271 (1990).

135. *Maryland v. Mitsubishi Elecs. Am., Inc.*, No. Civ.A. S-91-815, 1992 WL 88132 at *1 (D. Md. Jan. 15, 1992).

136. *New York v. VISA U.S.A., Inc.* No. CV-89-5043 PNL, 1990 WL 75047 (S.D.N.Y. May 8, 1990); *Massachusetts v. Campeau Corp.*, CIV.A.No. 88-1018-MA, 1988 WL 106896 (D. Mass. May 5, 1988). See also *New York v. Primestar Partners, L.P.*, Nos. 93 CIV. 3868 (JES)-93 CIV. 3907 and (JES), 93 CIV. 5799 (JES)-93 CIV. 5804 (JES), 1993 WL 527984 (S.D.N.Y. Sept. 14, 1993).

137. *Pennsylvania v. Budget Fuel Co.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988).

138. 668 F. Supp. 456 (D. Md. 1987).

139. *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532, 534 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996) (award of \$9.5 million for price fixing); *New York v. Keds Corp.*, No. 93 CIV. 6708 (CSH), 1994 WL 97201 at *1 (S.D.N.Y. Mar. 21, 1994) (\$7.2 million award for price fixing); *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 679 (S.D.N.Y. 1991) (defendants to pay at least \$5 million and up to \$25 million in \$5 coupons for consumers to redeem, and additionally pay \$3 million to states for anti-trust enforcement).

140. *New York v. Dairyalea Coop., Inc.*, No. 81 CIV. 1981 (RO), 1985 WL 1825, at *2 (S.D.N.Y. June 26, 1985).

awards recovered usually help fund charitable causes.¹⁴¹

Recently, a number of state attorneys general have invoked *parens patriae* authority to prosecute state antitrust violations against the producers of cigarettes for allegedly suppressing and concealing scientific and medical information related to cigarette smoking and resulting diseases.¹⁴²

C. Government Enforcement: Conclusion

Measuring deterrence is exceedingly difficult. Law enforcement agencies are struggling with this challenge as part of their obligation to comply with the Governmental Performance and Results Act of 1993,¹⁴³ and it is too early to tell whether an agency will find the ideal measure. Regardless how antitrust deterrence is measured, however, it seems likely that overall governmental deterrence has increased. Nominal federal criminal penalties soared and are starting to be realized, and the states have become a factor in antitrust.

Any increase in governmental deterrence makes the deterrence role of class actions less vital. This makes appropriate some reflecting on the role of antitrust class actions.

III. THE ROLE OF ANTITRUST CLASS ACTIONS

Commentators have long had a Janus-faced view of antitrust class actions. Antitrust class actions are seen, on the one hand, as a prototypical vehicle for aggregating the efforts of small firms and consumers to win relief against malefactors of great wealth. On the other hand, they are also portrayed as legalized blackmail. As early as 1971, Professor Handler thundered that a fair appraisal "leaves little doubt that massive class actions constitute a net liability for antitrust, for federal courts, and for society generally."¹⁴⁴

Antitrust plaintiffs may recover treble damages, plus attorneys fees. Defendants also face joint and several liability. Observers have debated whether this really results in the recovery of injuries thrice over.¹⁴⁵ Few doubt that the

141. See, e.g., *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532, 534 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996) (\$8 million award to be distributed to participating states which will use funds for refurbishing, renovating, and providing athletic facilities, equipment, and services).

142. See, e.g., *Minnesota v. Philip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996) (upholding state attorney general *parens patriae* action). See also *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 507-08 (S.D.N.Y. 1996). Although the *NASDAQ* opinion is generally hospitable to plaintiffs, the court denied class inclusion to the Attorney General of Louisiana, acting as *parens patriae*, on behalf of five state employees retirement systems. After reviewing Louisiana law, the court concluded that the state did not have a direct pecuniary interest, that state agencies were distinct legal entities, and that, consequently, the retirement systems would have to press their own suits. *Id.*

143. Pub. L. No. 103-62, 107 Stat. 285, 31 U.S.C. §§ 1115 *et seq.* (1994).

144. Handler, *supra* note 9, at 10.

145. For a spirited defense of treble damages, see Robert H. Lande, *Are Antitrust*

rewards have helped attract talented plaintiffs lawyers to sometimes challenging litigation.

Recoveries in antitrust cases have included some impressive amounts.¹⁴⁶ Although antitrust classes have included their share of widows and orphans,¹⁴⁷ those worthies have shared recoveries with Fortune 500 members who were fully capable of going it alone.¹⁴⁸ Antitrust class actions also include some noteworthy examples of firms opting out of classes, sometimes with limited success. On the other hand, the large numbers of small claimants in some antitrust classes has led some antitrust courts to employ "fluid recovery" concepts.¹⁴⁹

The special rewards available to antitrust plaintiffs may have made class

"Treble" Damages Really Single Damages?, 54 OHIO ST. L.J. 115 (1993). For a less sympathetic view, see Frank H. Easterbrook, *Treble What?*, 55 ANTITRUST L.J. 95 (1986) (damages should be based solely on monopoly overcharges). Cf. William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 (1983) (damages should be "the net harm to persons other than the offender"); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985) (optimal penalty would be the overcharge plus deadweight loss).

146. See *supra* note 2. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94C897, MDL No. 997, 1996 WL 351180, at *1 n.2 (N.D. Ill. June 24, 1996) (settlement of roughly \$351 million); *In re Corrugated Container Antitrust Litig.*, 556 F. Supp. 1117, 1126 (S.D. Tex. 1982) (settlement of approximately \$66 million). See also Timothy James Stanley, *An Analysis of the Rules of Contribution and No Contribution for Joint and Several Liability in Conspiracy Cases*, 35 SANTA CLARA L. REV. 1, 88-93 (1994) (appraising settlement in *In re Corrugated Container*).

147. Champions of antitrust classes have not shied away from asserting large numbers of class members. See, e.g., *In re Hotel Tel. Charges*, 500 F.2d 86, 88 (9th Cir. 1974) (40 million telephone users); *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005, 1008 (2d Cir. 1973) (six million stock purchasers), *vacated and class action dismissed on other grounds*, 417 U.S. 156 (1974); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 509 (S.D.N.Y. 1996) (at least a million NASDAQ traders); *Fetig v. Blue Cross*, 68 F.R.D. 53, 58 (N.D. Iowa 1974) (two and one-half million hospital patients); *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 599 (N.D. Ill. 1973) (30 to 40 million automobile purchasers). See, e.g., *Eisen*, 479 F.2d at 1007 n.1 (\$70 injury).

148. That an individual plaintiff *could* have proceeded without benefit of a class does not prove that it *would* have done so. It has not always been thought seemly for major corporations to find themselves on the plaintiffs' side of antitrust cases. Even if such corporate bashfulness is on the decline, whether because of changing mores or greater attention to fiduciary duties, it remains unclear how often individual firms willing to be a quiet class member would step forth and sue by themselves, and it is not clear that they would be as successful as a plaintiffs' class.

149. See, e.g., *Colson v. Hilton Hotel Corp.*, 59 F.R.D. 324 (N.D. Ill. 1972) (hotel chain agrees to lower room rates for defined period because identifying price fixing victims not feasible); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) (approving \$100 million fluid recovery settlement of antibiotics class actions). Cf. *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252 (7th Cir. 1984) (rejecting the use of unclaimed settlement funds to a tax-exempt foundation to research antitrust issues). See generally Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: the Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

certification somewhat more challenging than it otherwise would have been. Judges have occasionally pointed to the possibility of individual antitrust suits as support for a decision to deny certification.¹⁵⁰ More generally, judges periodically ponder the special pressures that an antitrust class action can bring to bear on a defendant and react with horror.¹⁵¹

Rule 23 permits class actions as a means to accomplish a variety of social

150. See, e.g., *Perry v. Amerada Hess Corp.*, 427 F. Supp. 667, 676 (N.D. Ga. 1977). "The treble damage provisions of the antitrust laws are designed to encourage private suits and, where the amount of damage is at all substantial, enable plaintiffs to bear the costs of litigation. Thus the necessity for class action treatment in a suit such as this is lessened." The *Perry* court also expressed reluctance to force class members either to "opt out" or be part of a class that might affect their future business relations with the defendant). *Id.*

151. See, e.g., *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974) (class certification denied under Rule 23(b)(3) as not the superior method of adjudication, where 2000 real estate brokers faced possible liability of \$750 million each), *cert. denied*, 421 U.S. 963 (1975); *In re Carbon Dioxide Antitrust Litig.*, No. 940, 1996 WL 523534 (M.D. Fla. July 15, 1996) (limiting attorneys fees).

[T]he threat of a billion dollar judgment, (a larger risk than it appeared to be after considering the evidence), was not one that defendants were willing to take. The large settlement amount was almost entirely driven by the tremendous exposure the defendants faced in the event a jury found liability....

...

This kind of class action antitrust litigation has proliferated to such an extent that it has become a major primary industry for lawyers who often follow behind a Department of Justice price-fixing inquiry regardless of the outcome of the investigation. This method of lawyering should not be further encouraged by the prospect of a super-windfall.

Id. at *5-6. But see *Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 150 (E.D. Pa. 1976) (potential alleged "staggering liability" did not prevent class action from being superior; "[i]f defendants' liability shocks the conscience, it is the fault of the substantive law which places joint and several liability on co-conspirators, not the class action").

In *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974), plaintiffs sought certification on behalf of a class of over 40 million consumers who, on average, had been overcharged \$2 per person for telephone services as a result of an alleged conspiracy among 46 hotel chains and approximately 600 individual hotels. In holding that a class action was not the superior method of adjudication, the Ninth Circuit observed:

In view of the nonexistent, or minuscule, recoveries that are likely to accrue to the supposedly intended beneficiaries, it is not surprising that most of the named plaintiffs are attorneys acting as counsel for themselves.... [T]his action has been primarily generated and financially supported by the lawyers who possibly stand to realize astronomical fees, and not by the individuals whose potential claims in any event are de minimis....

...

Whenever the principal, if not the only beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method of resolving the dispute.

Id. at 91 (citations and quotations omitted).

objectives. It is important to consider separately purported benefits such as supplemental deterrence, compensation, and identification.

A. Supplemental Deterrence

At one time, supplemental deterrence was the principal justification for antitrust class actions.¹⁵² Government and class action plaintiffs worked like a sort of tag team—the government fingering the wrongdoers and the class action plaintiffs leaping into the ring to pile on.¹⁵³ Indeed, follow-on class actions were seen as the principal deterrent to price fixing.¹⁵⁴ This “tag team” model held great appeal, especially in the early 1970s, because government enforcers had relatively few weapons with which to punish violators.

As noted above, those days may be gone. The Justice Department wields an unusually potent club against criminal price-fixing, as Archer–Daniels–Midland has learned to its dismay. To the extent that antitrust class actions are justified on deterrence grounds, the argument has become harder to make,¹⁵⁵ because antitrust

152. See, e.g., Harold E. Kohn & Arthur M. Kaplan, *The Antitrust Class Suit: A Manageable Instrument for Social Justice*, 41 ANTITRUST L.J. 292, 293 (1972).

But enforcement by the Department of Justice and Federal Trade Commission is severely limited by the maximum penalties that can be imposed. The Sherman Act provides fines of a maximum of \$50,000 per count for each defendant. Fines can be secured under the FTC Act only after violation of a cease and desist order.

Id. Kohn and Kaplan also argue that in some areas government agencies “seemingly will not enforce the law.” *Id.* See also JAMES J. GARRETT, ANTITRUST COMPLIANCE: A LEGAL AND BUSINESS GUIDE 21 (1978) (“Finally, the settlement of treble damages cases can be expensive even for a defendant who thinks that it has done no wrong. The class action device will often materially increase the antitrust defendant’s exposure and costs of defense, as well as the price of settlement.”). Even apart from class actions, deterrence has been seen as the principal, if not exclusive justification for antitrust damages. See WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM 3–28 (1986). See also Lande, *supra* note 147, at 124–29 (reviewing the debate but declining to choose between deterrence and compensation rationales).

153. One well-known study of all certified federal classes closed between 1979 and 1984 in the Northern District of California found that the private antitrust (and securities) cases “depended largely on the investigative activities of governmental agencies.” Garth et al., *supra* note 17, at 376.

154. See, e.g., Michael Kent Block et al., *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429, 444 (1981) (“We noted that government-imposed price-fixing penalties were trivial and found support for the proposition that the effective deterrent to price fixing was the credible threat of large damage awards to private class actions that followed DOJ’s case against the same conspiracy.”).

155. Cf. *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 607 (D.N.J. 1994) (rejecting *cy pres* settlement where beneficiaries were distributors who did not wish to participate in any recovery and the need for deterrence was reduced by criminal indictment and imposition of a \$1 million fee). Although the deterrence rationale is less potent, it has not been altogether eliminated. Although one transgression does not prove underdeterrence, it is noteworthy that ADM and others obviously were not deterred. Deterrence is a function of both penalties assessed and the likelihood of being penalized, so net deterrence can be

class actions (and especially successful antitrust class actions) tend disproportionately to challenge horizontal price fixing, i.e., the kind of conduct most likely subject to criminal enforcement.¹⁵⁶

Currently, however, antitrust class actions play something of a unique role in deterring conduct short of hard-core price fixing that is unlikely to be penalized by either federal agencies or state *parens* enforcers. Examples from the recent class actions discussed above include the *Airlines Litigation*, *NASDAQ*, and *Infant Formula* cases.¹⁵⁷ All three cases involved allegations of fairly subtle pricing coordination by means falling short of classic smoke-filled rooms, and none resulted (or, based on currently available public information, seems likely to result) in criminal antitrust penalties. Attention to this kind of coordination is increasingly central to modern antitrust.¹⁵⁸ It is important, in my view, that antitrust penalties be considered a continuum, from the mildest injunction to serious incarceration, and it is singularly valuable for class actions to provide some deterrence for violations falling short of criminal behavior. Some of these cases, moreover, require the application of fairly sophisticated economic analysis by experts, which class actions can make possible.¹⁵⁹

measured only after ascertaining information about likelihood of being punished. And even if government enforcement is doing more than ever to deter hard-core price fixing, perhaps deterrence is only now (or perhaps not even now) reaching acceptable levels. Finally, one might ask whether the highest level of senior corporate executives actually contemplate the possibility of being subject to criminal enforcement, or whether, instead, they are more likely to fear the prospect of class actions and treble damages. Although criminal antitrust fines have risen dramatically, the pre-ADM record *annual* total in criminal fines (\$41.5 million) is dwarfed by the amounts in some private suits. Only last December, the following e-mail went out over the ABA Antitrust Section's internet chat-line (suggesting greater concern by potential defendants about private civil exposure than about government scrutiny):

Dear Friends in Antitrust Land,

An attorney preparing an antitrust compliance presentation is interested in knowing the following (in order to show the risks of antitrust violations):

What are the largest (i) litigated judgments, (ii) settlements (individual plaintiffs or class actions) in civil antitrust cases?

E-mail from Robert T. Joseph to "at-members@abanet.org" (Dec. 8, 1996). Nonetheless, if government enforcement activity continues to follow its current course, it would seem less likely that additional antitrust deterrence would be an important national priority.

156. See *infra* pt. III.D.2.

157. In *Fine Paper*, plaintiffs obtained their jury verdict in a matter that the government had investigated without taking any action. For discussion of the case, see John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 252-61 (1983).

158. See Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Marketplace*, 65 ANTITRUST L.J. 41 (1996). For a decade-old prediction that horizontal restraints cases would become more complex, see Harvey J. Goldschmid, *Horizontal Restraints in Antitrust: Current Treatment and Future Needs*, 75 CAL. L. REV. 925 (1987).

159. Indeed, Professor Kovacic has suggested that private litigants may be especially well-suited to investing in the sophisticated economic analysis needed to apply some of the

The *Airlines Litigation* case serves as a reminder that the theoretical ability of class actions to provide important supplemental deterrence may not always be realized in fact. One of the low points for antitrust class actions came when Alaska Air, one of the few airlines not a defendant in the case, sought to participate in the coupon program. According to an Alaska Air spokesman, "The airlines using those coupons are going to see substantial additional ticket sales because of them. We asked to be named in the case because, once we saw the settlement, we realized it was to our competitive disadvantage not to do so."¹⁶⁰ The response of one of the class attorneys—"Just because a settlement may benefit a defendant doesn't mean it won't benefit the plaintiff; that's not logical."¹⁶¹—is true as far as it goes. But a settlement that benefits, or even doesn't impose significant costs, on a defendant cannot be justified in terms of deterrence.

B. Compensation

Compensation remains, at least potentially, an important goal for class actions. In theory, *parens patriae* actions could serve as a sufficiently effective vehicle for compensation to limit the need for class suits. In practice, however—and the sample of such cases is small—few *parens patriae* recoveries have resulted in the payment of cash or equivalent value directly to injured consumers. While antitrust class action settlements have also seen their share of controversial "coupon-based" settlements,¹⁶² there are some genuinely substantial hard-dollar recoveries.

In any event, the compensation-based rationale for class actions is uneasy for other reasons. *Hanover Shoe* artificially simplified antitrust litigation by assuming that no overcharges are passed on. Consumers who paid the greatest part of an overcharge are thus denied recovery, as are consumers who refrained from

evolving antitrust principles. William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294, 298 (1992). The more that antitrust class plaintiffs bring economic expertise to bear, the less troubling are the expressed worries that only government lawyers can engage in the necessary research. See, e.g., Garth et al., *supra* note 17, at 393 n.147.

In contrast to antitrust cases, where class actions have been seen as an important penalty-imposing adjunct to federal enforcement, consumer class actions have not typically been so regarded. With respect to deceptive advertising, for instance, the FTC can prevent ongoing deception, but it does not punish past, even longstanding, deception. As a consequence, firms tempted to engage in profitable deceptive advertising campaigns may consider reputational effects, the risk of an injunction, and perhaps a Lanham Act action, but not the prospect of paying damages in an FTC case. This may result in suboptimal deterrence.

160. Anthony Faiola, *In Settling with Airlines, There's No Free Ride; Coupons for Travelers, \$16 Million for Lawyers*, WASH. POST, Mar. 20, 1995, at A1 (quoting Louis Cancellmi, spokesperson for Alaska Air).

161. *Id.* (quoting Diane Nast, co-chair of the plaintiff's committee).

162. See, e.g., Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810 (1996) (good review of the controversy); Coffee, *supra* note 157, at 246 ("The future of nonpecuniary settlements seems depressingly bright."); Faiola, *supra* note 160 (controversy over airline litigation's low-value coupon settlement).

purchasing because of the overcharge. While *Hanover Shoe* may make sense in terms of simplicity and deterrence, it impairs the compensation-based rationale for recovery. Further, as discussed above, *Hanover Shoe*'s aspiration for simplicity has itself been undermined by the states' willingness to allow suits by indirect purchasers, thus creating a potential for inconsistent outcomes that will cry out for resolution.¹⁶³ Were the FTC to begin winning consumer redress for competition violations the way it wins redress for consumer protection transgressions, a compensation justification would be harder still.

C. Identification

A third role played by class actions is the identification of wrongdoing. (A related concept would be "detection," but that has overtones of undercover work, whereas often what is involved is not the disclosure of a defendant's conduct, but the construction of an argument that the conduct is illegal). This role continues to be important.

An "identification of wrongdoing" role is somewhat in tension with the familiar story of class action lawyers as followers of government lawsuits or investigations. Supporters of class actions have acknowledged with apparent regret that the image of the private attorney general, riding the range looking for wrongdoers, does not accord with reality.¹⁶⁴ If class actions only follow wrongs identified by federal enforcers, the justification for class actions inevitably turns on incremental effects.

In this respect, some of the recent antitrust class actions are quite striking examples of private initiative.¹⁶⁵ The massive *Brand Name Prescription Drug* litigation (or litigations) originated with a private complaint and, as of this writing, has not led to government action. So also, *NASDAQ*'s genesis was entirely private. The origins of *Insurance Antitrust Litigation* are with the states, which brought a class action, and not with federal enforcers. Thus, some of the most important

163. My understanding is that another controversial factor, joint and several liability/contribution, has been resolved in the *Brand Name Pharmaceutical* cases by agreements that non-settling defendants will not be responsible for damages attributable to defendants settling earlier. See *supra* notes 39–43 and accompanying text.

164. See, e.g., Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 *FORDHAM L. REV.* 51, 73 (1988) ("Private enforcement, although in theory independent from government enforcement, is in practice strongly dependent on government prosecutions."); Coffee, *supra* note 159, at 220–22 ("the available empirical evidence does not provide much support for the thesis that the private attorney general significantly supplements public law enforcement by increasing the probability of detection.... [A] recurring pattern is evident under which the private attorney general simply piggybacks on the efforts of public agencies.") (citing cases, Benjamin S. DuVal, Jr., *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 1976 *AM. B. FOUND. RES. J.* 1273, and Charles W. Wolfram, *The Antibiotics Class Actions*, 1976 *AM. B. FOUND. RES. J.* 253).

165. There have always been some exceptions to the perceived general pattern. See Coffee, *supra* note 157, at 227 n.27 (gypsum wall board matter started with private suit, and private litigation led the way against IBM).

recent antitrust class actions are entirely independent of the federal government.

Class actions proceeding in the absence of government actions offer the greatest hope of aiding antitrust enforcement, but also the greatest risk of doing harm.¹⁶⁶ It is well recognized that unfounded antitrust suits can themselves lessen competition. Unjustified payment of damages can transfer wealth to presumptively suboptimal users, and the prospect or reality of paying such damages can deter pro-competitive conduct.

Ironically, courts that go beyond the awarding of damages, to enjoin what is seen as unlawful behavior, are most at risk of causing harm. Thus, the court in *In re Airline Ticket Commission Antitrust Litigation*¹⁶⁷ was considering ordering airlines to pay a 10% commission until the Justice Department objected that such a remedy would itself violate the antitrust laws. Price discrimination orders can enhance competition or, if poorly drafted, harm it.¹⁶⁸ On the other hand, the court in *Brand Names Pharmaceuticals* achieved popular acclaim when it rejected a settlement that would not have effected a change in challenged pricing practices.¹⁶⁹ Again, whether or not the change is for the better may be the subject of debate.

D. Reflections on Costs and Benefits

With government penalties increased so substantially, antitrust class actions

166. Concern that class actions can lead to overdeterrence is well recognized. See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 680 (1986).

167. 953 F. Supp. 280, 286 (D. Minn. 1997) (approving settlement).

168. A noteworthy "follow-on" private case was the associational lawsuit by the American Booksellers Association (ABA), which represents 4500 independent book stores, and six individual, independent book retailers, against Houghton Mifflin and several other publishers, for giving pricing and promotional benefits to large retail chains that the publishers did not also offer sufficiently to smaller independent book retailers. *American Booksellers Ass'n v. Houghton Mifflin Co.*, No. 94 CIV. 8566 (JFK), 1995 WL 92270 (S.D.N.Y. Mar. 3, 1995); *American Booksellers Ass'n, Inc. v. Random House, Inc.*, No. 96 CIV. 0030 (JFK), 1996 WL 499520 (S.D.N.Y. Sept. 4, 1996). Although these cases were not Rule 23 class actions, the ABA was accorded standing to represent its 4500 individual members in this action for declaratory and injunctive relief. The Federal Trade Commission had earlier challenged six of the country's largest book publishers' use of similar practices. Cases consolidated for decision and reported at 5 Trade Reg. Rep. (CCH) ¶ 24,109 (FTC Sept. 10, 1996). Ultimately, the FTC declined to accept proposed consent agreements and dismissed the complaints. The Commission explained that the industry had changed markedly since the consent agreements were offered and that further expenditure of agency resources to reinvestigate and then renegotiate or litigate the cases was unjustified, especially since private litigation apparently was leading to mutually satisfactory resolutions regarding the disputed practices. *Harper & Row Publishers, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 24,109 (FTC Sept. 10, 1996). The private suits emphasize injunctive relief, and thus may be an example of particularly good or particularly troubling private enforcement, depending on the societal desirability of the remedies achieved (about which I take no position).

169. Cf. Henry J. Reske, *Two Wins for Class Action Objectors: Hired Guns, Consumer Groups Replace Gadflies as Settlement Opponents*, 82 A.B.A. J. 36 (1996).

can no longer be justified reflexively as essential for deterrence. When a firm has paid hundreds of millions of dollars in fines and seen its executives dragged off to prison, it is not self-evident that additional punishment is needed to achieve the correct level of deterrence.

That antitrust class actions are less essential for deterrence does not make them unimportant. As noted, they seem to be playing an increasingly prominent role in identifying antitrust violations and in supplying the punishment to accompany federal civil enforcement. Antitrust class actions also may serve to compensate injured victims.

In light of the reduced importance of class actions for deterrence of certain violations, however, it is important for courts appraising class action settlements to consider separately the various purposes to be served by a settlement. If the purpose is deterrence, it makes little sense to approve a coupon program so commercially attractive that non-defendant firms ask to participate. So also, deterrence may not be achieved by requiring the provision of a product or service that the defendant can provide at little real or opportunity cost. On the other hand, where the principal purpose of a remedy is compensation, the provision of that same product or service may be justified, at least where it can be provided without introducing market distortions that themselves harm competition.

Any lessening of the benefits of an institution such as antitrust class actions inevitably increases concern about costs. Costs that might have been acceptable when class actions were the only effective antitrust deterrents may be too burdensome today. Concerns about the possible costs of antitrust class actions are eased by two factors, however. First, many courts have managed to take an early "peek at the merits" of class action cases. This enables those courts to act to terminate class actions that appear unfounded. Second, antitrust class actions, and especially successful ones, appear to concentrate on the kinds of causes of actions about which there is the widest consensus that harm is substantial.

1. Early Consideration of the Merits of Antitrust Class Actions

It is routinely stated that courts confronting a class action may not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."¹⁷⁰ However, the underlying merits of an antitrust case can arise in a wide variety of contexts, and some antitrust courts appear reluctant to blind themselves completely to the apparent merits of a case until after resolving the issue of class certification.¹⁷¹ Antitrust courts have ample opportunity, if they

170. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

171. *Cf. In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493 (S.D.N.Y. 1996); *supra* notes 38 (*Airlines Litigation*), 50 (*Insurance Litigation*). For cases in which antitrust courts made some form of ruling dealing with the merits at a time when the issue of class certification was still pending, see, e.g., *McClain v. South Carolina Nat'l Bank*, 105 F.3d 898, 903 (4th Cir. 1997) (affirming summary judgment and denial of class certification where individual plaintiff suffered no damages) ("Even if we assume that the district court should have ruled on the class certification motion before it considered the merits of the

wish to exercise it, to dispose of antitrust class actions at an early stage.¹⁷²

For a time it seemed as if courts would use antitrust plaintiffs' obligation to prove the "fact of damage" as an insuperable bar to most class actions. In two important cases—one in 1977, one in 1981—the Supreme Court emphasized that private antitrust plaintiffs must show more than just a violation and damages: they also must prove the fact of damage, and that their damage constituted "antitrust injury."¹⁷³ In class action certification battles, perceived difficulties in class-wide proof of the "fact of damage" became a major impediment to class certification.¹⁷⁴

case at summary judgment, its ultimate conclusions were correct."); *Law v. National Collegiate Athletic Ass'n*, 902 F. Supp. 1394, 1404 (D. Kan. 1995) (applying a rule of reason to analyze salary cap rule for entry level coaches and granting plaintiffs' motion for summary judgment on the issue of liability under the Sherman Act); *Centennial Sch. Dist. v. Independence Blue Cross*, No. CIV. A. 93-3456, 1994 WL 62016 (E.D. Pa. Feb. 28, 1994) (granting in part and denying in part the defendants' motion to dismiss by rejecting argument that plaintiff had failed to properly allege claims of monopoly leveraging and intraenterprise conspiracy, but agreeing that the plaintiff had failed to state a claim for unlawful tying under the Sherman Act); *Lee v. Life Ins. Co. of N. Am.*, 829 F. Supp. 529 (D.R.I. 1993), *aff'd*, 23 F.3d 14 (1st Cir. 1994) (granting defendants' motion to dismiss with prejudice the plaintiffs' claims that mandatory participation in university student health program violated the Sherman Act and the federal equal protection and due process clauses, while declining to exercise jurisdiction over related state claims, which were dismissed without prejudice); *Davis v. Southern Bell Tel. & Tel. Co.*, 755 F. Supp. 1532 (S.D. Fla. 1991) (determining that a group of phone customers had antitrust standing to allege a violation under the Sherman Act, but, with respect to certain activities before 1987, claims should be dismissed under the "state action" doctrine, pursuant to the defendants' motion for summary judgment); *Grant v. Erie Ins. Exchange*, 542 F. Supp. 457 (M.D. Pa. 1982), *aff'd*, 716 F.2d 890 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983) (granting defendants' motions and dismissing plaintiffs' antitrust complaint alleging violations of the Sherman, Clayton, and Robinson-Patman Acts for failure to state a claim under 15 U.S.C. §§ 2, 3, 6, or 13, and, as to remaining claims, pursuant to the insurance exemption of the McCarran-Ferguson Act); *Selman v. Harvard Med. Sch.*, 494 F. Supp. 603 (S.D.N.Y.), *aff'd*, 636 F.2d 1204 (2d Cir. 1980) (granting defendants' motion to dismiss the plaintiff's complaint, which included an allegation that the defendants' refusal to accept him as a transfer student from a foreign medical school violated the Sherman Act).

172. *Cf. In re Potash Antitrust Litig.*, Civil No. 3-93-197/RHK/RLE, MDL Docket No. 981, 1997 WL 11223 (D. Minn. Jan. 2, 1997) (granting summary judgment for defendant two years after certifying class in major price-fixing case). *See generally* Calkins, *supra* note 3, at 1137-38 (antitrust courts do not hesitate to grant motions to dismiss and motions for summary judgment). For an argument that the merits should assume center stage more overtly as part of class certification, see Douglas M. Towns, Note, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001 (1992).

173. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 n.3 (1981) (plaintiffs who prove price discrimination are not entitled to minimum "automatic damages"); *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (in order to recover treble damages on the amount of § 7 violations, plaintiffs must prove injury of the type the antitrust laws were intended to prevent).

174. *See, e.g., Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 327 (5th Cir. 1978) ("this Circuit places great importance on the 'impact' element of an antitrust cause of action"). *See also Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 675-76 (5th Cir.

Although one could have imagined this issue serving as the death knell of antitrust class actions, it did not. Some courts, apparently concerned about the broader implications of proceeding too far down that path, continued to certify classes. Plaintiffs' lawyers became more sophisticated, hiring economists who could testify that the fact of damage was subject to classwide proof—and leaving courts to despair of a battle of experts and certify the class. Current practice may be typified by the *Potash* case, where the court explicitly stated that impact could be presumed from price-fixing, and, although mere allegation of price-fixing was insufficient to achieve certification, an economist's expert evaluation of the industry was sufficient.¹⁷⁵ The close controversies about impact tend to be found less in price-fixing cases than in cases alleging offenses such as monopolization or exclusionary practices.¹⁷⁶

2. The Nature of the Claim

Indeed, success with a class action depends very significantly on the nature of the antitrust claim being asserted. Class plaintiffs in horizontal price-fixing cases enjoy disproportionate success in achieving certification. In contrast, purported classes asserting tying or price discrimination violations, for example, face far higher hurdles.

a. Particular alleged violations

Antitrust tying law has long stood accused of misbranding. Tying is a *per se* violation of the antitrust laws, but one can't prove tying without jumping through so many hoops that one might as well have applied the rule of reason. Indeed, tying is probably best understood as a kind of structured rule of reason.

To this day, the various elements comprising a tying violation are in dispute.

Unit B 1982); *In re Beef Industry Antitrust Litig.*, No. M.D.L. No. 248, 1986 WL 8890 at *1 (S.D. Tex. June 3, 1986).

175. See *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 694-97 (D. Minn. 1995). See also *In re NASDAQ Market-Makers Antitrust Litig.*, 159 F.R.D. 493, 522 (S.D.N.Y. 1996); *In re Disposable Contact Lens Antitrust Litig.*, MDL No. 1030, 1996 WL 776967, at *3, *6 (M.D. Fla. Sept. 5, 1996) (certifying class of between 15 and 18 million members; the court said that the disagreement between experts over methodology for proving damages should not prevent certification; "[w]hether or not plaintiffs will be successful in persuading the jury that there has been a common impact remains to be seen."); *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996) (following more recent cases, court ruled that fact of common questions predominated for the fact of impact for products with list prices); *In re Domestic Air Transp. Litig.*, 137 F.R.D. 677, 692 (N.D. Ga. 1991); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 268, 272 (D. Minn. 1989) (common impact even though some prices individually negotiated). But cf. *Alaska v. Suburban Propane Gas Corp.*, No. A93-291 CIV (JWS), 1995 WL 441987, at *8 (D. Alaska Jan. 15, 1995) ("typicality" requirement not satisfied where the competitive price would have varied from customer to customer).

176. See, e.g., *Gerber v. Delta Airlines, Inc.*, No. 1:96-CV-1037-GET, 1996 WL 557853 (N.D. Ga. Aug. 6, 1996); *Fifth Moorings Condominium, Inc. v. Shere*, 81 F.R.D. 712, 716-17 (S.D. Fla. 1979).

In particular, courts have disagreed about whether proof of coercion is a necessary element. The question turns on an interpretation of rather opaque language in the leading Supreme Court tying opinion, *Jefferson Parish Hospital District No. 2 v. Hyde*.¹⁷⁷ Courts have read this language both in favor of and as opposed to a requirement of proof of coercion. In one sense, this disagreement is more symbolic than real, since all of the various tests of tying illegality contain sufficient elements that a good judge can apply them to achieve a sensible result.

With respect to class actions, however, proof of coercion may matter. Courts regularly regard proof of coercion as requiring so much individualized proof as to prevent class certification.¹⁷⁸ Some older cases suggest that certification may be appropriate where a tie appears on the face of a contract,¹⁷⁹ but to the extent that coercion is an element of the violation, it could be an issue regardless of the contract terms. Because coercion is the safest route for avoiding certification of a class, the issue of whether it is an element of a violation assumes greater (and perhaps underappreciated) importance.

Whatever trouble class action plaintiffs have had asserting tying violations pale in comparison to the challenge of asserting a violation of the Robinson-Patman Act, perhaps the least uniformly applauded of all substantive antitrust laws. The Justice Department has ceded enforcement to the FTC, and during the 1980s and 1990s the FTC, although committed to the Act's enforcement, has brought

177. 466 U.S. 2, 12 (1984):

Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Id.

178. See, e.g., *Little Caesar Enters., Inc. v. Smith*, 895 F. Supp. 884, 906 (E.D. Mich. 1995) (denying motion for class certification). See also *Ungar v. Dunkin Donuts of Am., Inc.*, 531 F.2d 1211 (3d Cir.), cert. denied, 429 U.S. 823 (1976); *Telecommunication Tech. Servs., Inc. v. Siemens Rolm Communications*, 72 Antitrust & Trade Reg. Rep. (BNA) 155 (N.D. Ga. Feb. 4, 1997) (class certification denied because individual issue predominate on the issue of coercion). But cf. *Collins v. International Dairy Queen, Inc.*, 168 F.R.D. 668 (M.D. Ga. 1996) (in franchise tying case, "[p]laintiffs may be able to prove coercion by classwide evidence that defendants' approval process for products is futile and that it resulted in the exclusion of alternative suppliers from the market"). The application of antitrust to franchise tying cases is criticized in Alan J. Meese, *Antitrust Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts*, 95 MICH. L. REV. 111, 113 (1996). For a suggestion that certification should depend on the economic function of particular tying arrangements, see Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 VAND. L. REV. 213, 213-14 (1983).

179. See *Bogosity v. Gulf Oil Corp.*, 561 F.2d 434, 452 (3d Cir. 1977) (rejecting requirement of coercion), cert. denied, 434 U.S. 1086 (1978).

relatively few actions.¹⁸⁰ The Act, long regarded as a model of how *not* to draft a statute,¹⁸¹ requires proof of a series of elements and then offers defendants a series of defenses.

Under the circumstances it is not surprising that courts have not been receptive to Robinson-Patman Act class certification. For a brief period, potential class plaintiffs were offered hope by the Tenth Circuit, in *Gold Strike Stamp Co. v. Christensen*.¹⁸² Then the reaction set in. In 1974, the Supreme Court held that the Robinson-Patman Act included a unique requirement that the violation not just affect commerce, but that one of the challenged sales actually crossed state lines.¹⁸³ Some courts seized on this requirement to conclude that class treatment was inappropriate.¹⁸⁴ It is now generally recognized that Robinson-Patman Act cases are usually inappropriate for class treatment.

b. Statistical Data

To glean a statistical impression of antitrust class actions, lawyers in my office reviewed a database consisting of federal antitrust class action decisions that were reported in the Class Action Reports since 1974.¹⁸⁵ The sample contains approximately 350 federal class actions.

By far the largest number of federal antitrust class actions are horizontal price-fixing cases. The Class Action Reports database contains 184 "horizontal price fixing" cases,¹⁸⁶ compared to approximately 75 "monopolization" cases and 75 "distribution restraints" cases. There is no separate category for Robinson-Patman Act (price discrimination) cases.

Horizontal price-fixing cases are far more successful at gaining certification than are monopolization and distribution restraints cases. More than half of horizontal price-fixing cases—52.7%—were certified, and at least 81% of cases so certified (or 39.6% percent of horizontal price-fixing cases overall) ended with a

180. See *Kirkpatrick II*, *supra* note 113, at 61 (1989) ("To overgeneralize only slightly, the FTC's non-merger antitrust plate was once filled with Robinson-Patman enforcement. That era ended around the time of the 1969 Report, and few commentators have lamented its passing.").

181. *Cf. Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 65 (1953) (Justice Frankfurter, noting that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act").

182. 436 F.2d 791 (10th Cir. 1970).

183. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199 (1974).

184. See, e.g., *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, No. 73-CV-614-W-4, 1976 WL 1360, at *7 (W.D. Mo. Dec. 29, 1976).

185. Class Action Reports contains summaries of decisions that are obtained from West Reporters, CCH Trade Cases, *Wall Street Journal* Summary notices, or directly from practitioners. Though the Reports contain the largest available collection of antitrust class actions decisions, it does not purport to contain every antitrust class action decision.

186. This number includes all horizontal price-fixing cases, as well as those cases that contain both horizontal and vertical claims, but does not include the 16 vertical price-fixing cases contained in our sample.

settlement or litigated judgment. Another 23.9% of horizontal price-fixing cases were settled without contested certification, bringing the overall certification rate to 76.6%. Certification was denied in 18.4% of the cases.¹⁸⁷ The remaining 4.9% were decided prior to certification on grounds not relevant to the class.

In comparison to horizontal price-fixing cases, certification of cases in the "monopolization/boycott" category was rare.¹⁸⁸ Of seventy-three cases filed, certification was granted in 28.7%. Among certified cases, at least 50% ended in a settlement or litigated judgment. Another 8.2% settled without contested certification, bringing the total certification rate to 36.9%. Certification was denied 38.3% of the time, and a rather high percentage of these cases, 24.3%, were decided prior to certification on grounds not relevant to certification.¹⁸⁹

"Distribution restraints" cases also are certified much less regularly than horizontal price-fixing cases. Of the seventy-six cases in our sample, 39.4% were certified; at least 60% of these, or 23.6% overall, ended in settlement or litigated judgment. Settlement was granted without contested certification in only 5.2% of cases, while certification was denied in 48.7% of cases.

It follows, in short, that class actions, and especially class actions that meet with some success, concentrate on the widely accepted heart of antitrust. Thoughtful critiques of over-aggressive private antitrust enforcement have concentrated on excesses caused by competitor plaintiffs.¹⁹⁰ Class actions have been concentrated elsewhere.

3. Conclusion

Antitrust class actions, and especially successful ones, tend to emphasize the

187. The Class Action Reporter reports cases according to most recent disposition. For cases where the most recent entry is either a grant or a denial of class certification, we do not know the outcome of the case. In addition, we have omitted from these percentages any cases for which the only entry is a procedural ruling that does not reveal whether a class was certified.

188. *R&D Business Sys. v. Xerox Corp.*, No. 2: 92-CV-042 (E.D. Tex. Apr. 25, 1994) ("[T]here are few reported decision certifying Sherman Act monopolization claims as class actions.").

189. When they are certified, monopolization cases may be more likely than price-fixing cases to be certified as b(2) classes. *See, e.g., Image Tech. Serv., Inc. v. Eastman Kodak Co.*, No. C 87-1686 AWT, 1996 WL 101173 (N.D. Cal. Feb. 28, 1996) (permanent injunction entered against defendant); *R&D Business Sys. v. Xerox Corp.*, No. 2: 92-CV-042 (certifying a b(2) class of "actual or potential" competitors, and a b(3) class of competitors); *Woolen v. Surtran Taxicabs, Inc.*, No. 78-0610 (N.D. Tex. Dec. 31, 1981) (certifying a b(2) class in action alleging airport taxi monopoly over objections of b(3) damage claimants); *Weiss v. York County Hosp.*, No. 80-0134 (M.D. Pa. May 28, 1981) (certifying class under b(2) where class also meets requirements for b(3) certification because damages do not predominate over the "injunctive and declaratory relief sought which will place [p]laintiffs in the positions to which they aspire"); *Sharon Steel Corp. v. Chase Manhattan Bank*, 88 F.R.D. 38, 44 (S.D.N.Y. 1980) (certifying b(2) class of 87 debenture holders).

190. *See Snyder & Kauper, supra* note 27.

core of antitrust. Although no one would suggest that all horizontal price-fixing claims are well-founded, the conduct at issue is widely condemned. Class actions asserting other violations face something of an uphill battle, especially because antitrust courts have shown great willingness to terminate cases at an early stage. Although inevitably there are some abusive cases, it is likely that many antitrust class actions still play a useful role, especially through deterring conduct that stops short of being criminal and through identification of antitrust violations that might otherwise go unchallenged. The potential benefits of antitrust class actions would be enhanced and the potential harms minimized were courts to disaggregate the various purposes of class actions—which I have characterized as supplemental deterrence, compensation, and identification—and make sure that relief achieves a specific purpose without itself harming competition. With the marked increase in federal antitrust penalties, antitrust class actions can no longer be regarded as essential to achieve minimal deterrence of hardcore antitrust violations. However, if one acknowledges that there can be value in providing an outlet in court for expression of serious complaints,¹⁹¹ then there remains an important positive role for antitrust class actions.

191. For the suggestion that powerful entities or small interest groups may disproportionately influence the development of the law, and that class actions may serve to ameliorate this phenomenon, see Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 726 n.280 (1991).

