

2004

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Recommended Citation

Joseph P. Bauer *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 Loy. Consumer L. Rev. 303 (2004).

Available at: <http://lawcommons.luc.edu/lclr/vol16/iss4/3>

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Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?

By Joseph P. Bauer*

Lately, much attention has been given to the scope of the antitrust laws. This discussion has two overlapping components: (1) consideration of the substantive doctrines specifying the behavioral or structural changes that are or are not unlawful and the appropriate methodology; and (2) analysis for making those determinations with attention given to the appropriate vehicles for enforcing the antitrust laws. Some argue that the antitrust laws proscribe activities that are either pro-competitive or at worst benign.¹ Further, they assert that the multiplicity of antitrust enforcers and enforcement devices has resulted in undue burdens, including excessive cost, time delay, and forestalling of legitimate, procompetitive behavior.

The discussion of this second component of antitrust enforcement involves two discrete, but overlapping, inquiries. The first, at what might be described as the “macro-level,” is whether the *aggregate* of enforcement activities is beneficial or deleterious. The second inquiry, which inevitably dovetails with the first, looks rather at the *distribution* of antitrust enforcement. Among the many questions raised here are: (1) whether we have correctly allocated authority to the various governmental and private enforcers; (2) whether we have the correct balance of enforcement through litigation or other compliance mechanisms; (3) whether non-American parties (both private and governmental) play an appropriate role in antitrust enforcement; and (4) whether the range of remedies

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¹ See generally Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

invoked in the event of antitrust violations appropriately maximizes consumer welfare. These questions are the focus of this article.

I. Balancing the Extent of Antitrust Enforcement

While complaints about the expansive nature of antitrust enforcement and the expansive distribution of antitrust enforcers deserve close attention and respect, I believe that, on balance, the extent and characteristics of antitrust enforcement are correct. The antitrust laws have served us well for over a century,² and so the burden must be on critics and challengers to demonstrate, including through a proffer of empirical evidence, that alleged over-enforcement truly is a problem. But, to start the discussion, it will be useful to canvass the range of devices that, in the broadest sense, result in “enforcement” of the antitrust laws.

First, I start with a brief word about what is meant by “antitrust laws.” The Clayton Act defines this term to include the Sherman and Clayton Acts.³ Both practitioners and companies which

² Critics will assert that I have assumed away much of the problem. The precise value of the antitrust laws, in preserving or advancing competition and the social and consumer benefits that flow therefrom, may not be calculable. For an example of recent empirical evidence of the benefits from the antitrust laws, see Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSPECTIVES 27 (Fall, 2003). In his article, Professor Baker identifies a number of specific benefits to consumers from particular enforcement actions involving a variety of forms of anti-competitive activities. He estimates that “the annual welfare benefits from deterring the exercise of market power through the antitrust laws as they are enforced today could readily exceed 1 percent of GDP, or \$100 billion per year.” *Id.* at 45.

Other evidence of their value may be derived from the fact that the core statute, the Sherman Act, has remained essentially unchanged since its enactment at the end of the nineteenth century, and other evidence is the continued funding that the antitrust agencies receive from the Congress. Both of these demonstrate that both our polity and our elected officials believe in the continued important role played by the antitrust laws. Further evidence of the value and importance of antitrust is the global expansion of antitrust, not only in Europe, Canada, Japan, and Australia, but also in many developing countries as well.

Nonetheless, I recognize that this does not answer the essential, secondary questions: What should the antitrust laws look like? Who should enforce them, and how much?

³ Clayton Act § 1, 15 U.S.C. § 12 (2004). That definition also includes a few provisions of the Wilson Tariff Act of 1894, which were later codified as part of the Sherman Act.

The Robinson-Patman Price Discrimination Act, Act of June 19, 1936, ch. 592, § 3, 49 Stat. 1526 (codified at 15 U.S.C. §§ 13-13c), is an amendment to the original

are subject to the potential restraint of these laws would doubtless also include, at a minimum, Section 5 of the Federal Trade Commission Act.⁴ This Act makes unlawful “unfair methods of competition” and encompasses not only Sherman and Clayton Act violations, but also some, admittedly ill-defined, incipient antitrust violations.⁵ Moreover, with the growing importance of the states in enforcing antitrust policy, we should also include not only state antitrust statutes,⁶ but perhaps also state “baby FTC” Acts.⁷ I will discuss the *Illinois Brick* doctrine⁸ in more detail below, but it is noteworthy that notwithstanding the federal prohibition on suits by indirect purchasers, twenty-nine states and the District of Columbia, accounting for more than half of the American population, allow indirect purchasers to bring suit against sellers⁹ under their state antitrust laws.¹⁰ Finally, because the activities of many American

Clayton Act, § 2. Because this statute protects competitors as well as (or perhaps even notwithstanding any injury to) competition, many analysts assert that it is not a true “antitrust” statute. Thus, for these critics, any enforcement of the Robinson-Patman Act is “overenforcement.” Although this article is not an appropriate forum to defend the Act, *see generally* Earl W. Kintner & Joseph P. Bauer, *The Robinson-Patman Act: A Look Backwards, A View Forward*, 31 ANTITRUST BULL. 571 (1986).

⁴ 15 U.S.C. § 45 (2004).

⁵ *See, e.g.*, *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (“the Commission has power under § 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.”).

⁶ *See, e.g.*, CAL. BUS. & PROF. CODE § 16720 (“Cartwright Act”) (2004); N.Y. GEN. BUS. § 340 (“Donnelly Act”) (Consol. 2004).

⁷ *See, e.g.*, FLA. STAT. ANN. § 501.204 (2003) (prohibiting unfair methods of competition and unfair or deceptive acts or practices, and stating the legislative intent that consideration and weight in interpretation of the statute should be given to Section 5 of the FTC Act and judicial construction thereof); MASS. GEN. LAWS ch. 93A, § 2 (2004) (same).

⁸ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *See generally* JOSEPH P. BAUER, 11 FEDERAL ANTITRUST LAW § 78.8 (1998).

⁹ *See California v. ARC Am. Corp.*, 490 U.S. 93, 101-02 (1989) (rejecting argument that Section 4 of the Clayton Act or *Illinois Brick* doctrine preempt action against indirect purchasers under state law).

¹⁰ *See* Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, n.3 (forthcoming 2004) (manuscript in author’s possession) (identifying 26 jurisdictions that have *Illinois Brick* repealer statutes, and 4 states that permit such actions either by judicial decision or under consumer protection statute). *See generally* Joel M. Cohen & Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15 ANTITRUST 29 (Summer 2001); Kevin J. O’Connor, *Is the Illinois Brick Wall*

companies are increasingly subject to scrutiny by non-American antitrust enforcement bodies, the laws of numerous foreign countries and multinational organizations (such as the European Union) are also relevant “antitrust laws.”

In canvassing the wide range of enforcement vehicles, I begin by looking at the identity of the “enforcers.” Although enforcement is both litigative and non-litigative, it is the former that has received the most attention and criticism. Who can bring an action to enforce the “antitrust laws”? The universe of enforcers includes both private and governmental entities, and the latter agencies are not only both state and federal, but also include non-American enforcement agencies.

II. Domestic Watchdogs: Antitrust Enforcement at Home

At the governmental level, the two most important enforcement bodies are the Antitrust Division of the Department of Justice and the Federal Trade Commission (“FTC”).¹¹ As described more fully below, their enforcement responsibilities are overlapping rather than identical. Most significantly, only the U.S. Department of Justice (“DOJ”) can obtain criminal sanctions for antitrust violations, while on the other hand, only the FTC can enforce Section 5 of the FTC Act.¹² Nonetheless, because these two agencies have many shared, and to some extent duplicative¹³ responsibilities, antitrust

Crumbling?, 15 ANTITRUST 34 (Summer 2001); William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1 (1999).

¹¹ See generally Thomas Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 84 (1990) (description by former Assistant Attorney General of evolving role played in enforcement by Antitrust Division); Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998) (noting the increasingly regulatory nature of enforcement efforts undertaken by two federal agencies, and diminished importance of litigation and courts in defining antitrust norms).

¹² Although I included Section 5 of the FTC Act among the “antitrust laws,” see *supra* note 4 and accompanying text, this statutory provision may be enforced only by the Commission, and not by private parties. See, e.g., *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184, 1187 (8th Cir. 1996); *Fulton v. Hecht*, 580 F.2d 1243, 1248 n.2 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973).

¹³ As only one example, the pre-merger filings required by the Hart-Scott-Rodino Act must be submitted to both agencies, and thus staff members in both

appears to be the only body of federal law that is simultaneously enforced both by an agency in the executive branch and by an administrative agency.

While the alternative of criminal prosecution for antitrust violations is infrequent, and is almost exclusively reserved for bid-rigging and other forms of price-fixing, it represents an important part of the arsenal for seeking compliance with the antitrust laws. Persons and corporations who violate the Sherman Act are subject to imprisonment and fines.¹⁴ The sight of A. Alfred Taubman, the extremely wealthy chairman of the board of Sotheby's, the world-famous auction house, convicted and sentenced, at the age of 78, to a one-year term of imprisonment and a substantial fine for participating in a price-fixing conspiracy,¹⁵ doubtless sent a message to other business executives about the risks and penalties for this kind of behavior.

The states are playing an increasingly important role in enforcing the federal antitrust laws as well as their own laws. State attorneys general can push to enforce the antitrust laws in situations where the federal government might be reluctant or unwilling to proceed. Most notably, the nine states that declined to sign off on the settlement negotiated by the DOJ and the other plaintiff states in the *Microsoft* litigation are a good illustration of the important role of state attorneys general.¹⁶ The significance of this enhanced level of

agencies may be allocating resources to perform at least an initial review of the same transactions. 15 U.S.C. § 18a (2004).

¹⁴ The Sherman Act provides that violations constitute felonies, and "shall be punished by fine not exceeding \$10,000,000 if a corporation, or if any other person, \$350,000, by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. §§ 1-2. The Criminal Fines Improvements Act of 1987, Pub. L. No. 100-185, provides in the alternative that "[i]f any person derives pecuniary gains from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. . . ." 18 U.S.C. § 3571 (2004).

The record for fines assessed was set in the vitamins price-fixing conspiracy, in which the defendants agreed to pay nearly \$1 billion in fines. See David Barboza, *Tearing Down the Facade of "Vitamins, Inc."*, N.Y. TIMES, Oct. 10, 1999, § 3, at 1 (describing overall settlement); John Wilke & Susan Warren, *Vitamin Firms to Pay U.S. \$725 Million*, WALL ST. J., May 21, 1999, at A3 (describing settlement by two defendants).

¹⁵ Carol Vogel & Ralph Blumenthal, *Ex-Chairman of Sotheby's Gets Jail Time*, N.Y. TIMES, Apr. 23, 2002, at B1 (imposing fine of \$7.5 million).

¹⁶ See Steve Lohr, *Microsoft's Top Officials May Testify to Help Fight Sanctions*, N.Y. TIMES, Feb. 10, 2002, § 1, at 30.

enforcement is even more dramatically illustrated by the occasional challenge to merger activity by state attorneys general,¹⁷ because non-governmental enforcement of Section 7 of the Clayton Act has been severely constricted by the decisions in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*¹⁸ and *Cargill, Inc. v. Monfort of Colorado, Inc.*¹⁹ Today, companies contemplating mergers must not only take account of guidelines issued by the Antitrust Division and the FTC, but also the guidelines issued by the National Association of Attorneys General.²⁰

With the exception of the merger area, the possibility of private enforcement of the antitrust laws is undoubtedly of more concern for companies contemplating various contractual arrangements with their competitors, customers or suppliers, or undertaking certain unilateral behavior than is government enforcement.²¹ In a typical year, private complaints account for 90-95% of all antitrust actions.²²

Although it is of comparatively little importance, one such form of these private suits are actions that may be brought by

¹⁷ See, e.g., *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990) (holding that divestiture is a form of "injunctive relief" to which state is entitled in action brought under Section 16 of Clayton Act); *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001); *N.Y. v. Kraft Gen. Foods*, 862 F. Supp. 1030 (S.D.N.Y. 1993), *aff'd*, 14 F.3d 590 (2d Cir. 1993). See also *California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147 (1988) (seeking, under state statutes, to enjoin Texaco's acquisition of the California assets of Getty Oil pursuant to merger between two companies).

¹⁸ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

¹⁹ *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986).

²⁰ See, e.g., Horizontal Merger Guidelines of the Nat'l Ass'n of Att'ys Gen'l (1993), available at http://www.naag.org/issues/pdf/at-hmerger_guidelines.pdf (last visited May 4, 2004). See generally Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 CONN. J. INT'L L. 501 (1994).

²¹ See generally John J. Flynn, *Which Past is Prolog? The Future of Private Antitrust Enforcement*, 35 ANTITRUST BULL. 879 (1990).

²² In 2003, there were a total of 762 civil antitrust actions commenced in the federal courts. Private filings accounted for 729 of these cases or 95.6% of all such actions. Judicial Business of the U.S. Courts 2003, Table C-2, available at <http://www.uscourts.gov/judbus2003/appendix/USDistrictCourtCivil.pdf> (last visited May 4, 2004). In that same year, there were 11 criminal cases commenced involving a total of 14 defendants. *Id.* at Table D-2, available at <http://www.uscourts.gov/judbus2003/appendix/USDistrictCourtCriminal.pdf> (last visited May 4, 2004).

governments acting in a private capacity. Both the federal government²³ and state and local governments may sue for injuries they have suffered in their proprietary capacity.²⁴ Since the passage of the Hart-Scott-Rodino (“HSR”) Act²⁵ in 1976, state attorneys general may also sue as *parens patriae* for monetary relief on behalf of natural citizens residing in the state.²⁶

Far more important, of course, as potential private plaintiffs are individuals or corporate entities, who have allegedly been injured as consumers, competitors, customers or suppliers, or perhaps in some other capacity, by a defendant’s antitrust violations. Private parties may seek monetary, injunctive, and declaratory relief. A private plaintiff seeking monetary relief must show that it was “injured in his [sic] business or property by reason of anything forbidden in the antitrust laws. . . .”²⁷ If the plaintiff is successful in making this showing—which carries with it requirements of proving, among other elements, causation, antitrust injury, and standing²⁸—it may recover three times the amount of its damages, plus costs and attorney’s fees.²⁹ Without having to meet quite the same high burdens

²³ 15 U.S.C. § 15a (2004).

²⁴ See, e.g., *Georgia v. Evans*, 316 U.S. 159, 162 (1942) (state is “person” authorized to bring action under Section 4 of Clayton Act); *Chattanooga Foundry v. City of Atlanta*, 203 U.S. 390, 396 (1906) (municipality may bring action for treble damages); *Illinois v. Sangamo Const. Co.*, 657 F.2d 855, 858-60 (7th Cir. 1981) (state is “person” entitled to cost of suit, including reasonable attorney’s fees, as well as to treble damages). See also *Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 1966) (discussing, in actions brought by states in their proprietary capacity following criminal and civil proceedings brought against same defendants by federal government, benefits of tolling provisions of Section 5(b) of Clayton Act). *But see Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972) (denying standing to state to sue for damages for general injury to its economy).

²⁵ Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390.

²⁶ 15 U.S.C. § 15c (2004). See, e.g., *Pennsylvania v. Mid-Atlantic Toyota Distribs. Inc.*, 704 F.2d 125, 127 (4th Cir. 1983) (affirming the district court’s denial of defendants’ motion for summary judgment in *parens patriae* action by five state attorneys general and D.C. corporation counsel); *New York v. Nintendo of Am. Inc.*, 775 F. Supp. 676, 678 (S.D.N.Y. 1991) (approving settlement of *parens patriae* action by attorneys general of all 50 states).

²⁷ 15 U.S.C. § 15a (2004).

²⁸ See generally JOSEPH P. BAUER, 11 KINTNER FEDERAL ANTITRUST LAW ch. 78 (1998).

²⁹ 15 U.S.C. § 15 (2004).

of antitrust injury and the like, a plaintiff may also obtain injunctive relief to protect it from threatened harm from the defendant's antitrust violation.³⁰

The reasons for incorporating private suits as an essential part of the regime for enforcing the antitrust laws are familiar. The potential specter of paying treble damages, plus attorneys fees and costs, in the event of an antitrust violation greatly enhances the deterrence component of the antitrust laws. Payment of those damages compensates the victims of those violations.³¹ Those victims are likely to be among the first to learn of the violations, and they may have better access to evidence thereof. The treble damage component of the potential award serves to recognize the punishment function of the private remedial scheme. And, private lawsuits not only increase the volume of enforcement, but shift the expense of enforcement away from the governmental agencies, thereby conserving public resources.³² Indeed, because private enforcement is

³⁰ 15 U.S.C. § 26 (2004). Under appropriate circumstances, a private plaintiff may be entitled, under the Declaratory Judgment Act, 15 U.S.C. § 2201 (2004), to a judicial declaration that the defendant's conduct is violative of the antitrust laws. Antitrust cases decided by the Supreme Court in which declaratory relief was sought include: *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). See generally JOSEPH P. BAUER, 11 *KINTNER FEDERAL ANTITRUST LAW* § 79.3 (1998).

³¹ It is of course arguable that the treble damage provision both overcompensates victims and misallocates the recovery to the wrong plaintiffs. See *infra* notes 93 and 96 and accompanying text.

³² See *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Reiter v. Sonotone Corp.*, 442 U.S. 329, 344 (1979) ("private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations").

One argument for those asserting that there is over-enforcement of the antitrust laws is that private parties can bring actions for substantive violations which the government is loathe to enforce. Perhaps the leading example of this is the Robinson-Patman Act. Half a century ago, the DOJ ceded enforcement responsibilities for price discrimination to the FTC. However, there has been virtually no enforcement by the Commission of that statute in the past thirty years. Although critics of the Act may decry the "remnant" of private lawsuits, the proper remedy, if the statute no longer advances antitrust values, would be to seek legislative repeal of the statute. The continued failure to obtain that repeal represents a political judgment that the Act continues to play an important role in regulating some aspects of the pricing and distributional decisions by manufacturers and wholesalers—and perhaps that purely Chicago School-based analysis, looking solely to the maximization of efficiency, is not the only basis for determining the content of the antitrust laws.

a vital supplement to governmental actions, plaintiffs are frequently referred to as “private attorneys general.”³³

Two aspects of private litigation deserve special attention. Since the 1966 amendments to Fed R. Civ. P. 23,³⁴ an increasingly important means of private enforcement of the antitrust laws is through the class action device.³⁵ Individuals, corporations, and government entities have brought many class action suits, and have obtained relief by litigated judgments or through settlements, running into the hundreds of millions or billions of dollars.³⁶

Another important phenomenon is the frequency of so-called “follow-on” litigation.³⁷ Whether relying on the *prima facie* evidence

³³ See, e.g., *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 345 (1990) (describing plaintiff which will “vindicate the public interest in antitrust enforcement” as “perform[ing] the office of a private attorney general”) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983)).

³⁴ FED. R. CIV. P. 23.

³⁵ For the three most recent years for which data are available, there were 213 antitrust class actions commenced in the year ending Sept. 30, 2000. Judicial Business of the U.S. Courts 2000, Table X-5, available at <http://www.uscourts.gov/judbus2000/contents.html> (last visited May 4, 2004); 122 such actions in the year ending Sept. 30, 2001, Judicial Business of the U.S. Courts 2001, Table X-5, available at <http://www.uscourts.gov/judbus2001/contents.html> (last visited May 4, 2004); and 126 class actions in the year ending Sept. 30, 2002, Judicial Business of the U.S. Courts 2002, Table X-5, available at <http://www.uscourts.gov/judbus2002/contents.html> (last visited May 4, 2004). At the end of that most recent year, there were a total of 249 antitrust class actions which were pending; more than half of those were in two district courts—80 in the Southern District of New York, and 48 in the Eastern District of Pennsylvania. *Id.* at Table X-4. However, these numbers overstate the actual extent of class action enforcement, since they doubtless include multiple classes which are initially brought against the same defendant(s); many of them will eventually either be consolidated or dismissed.

³⁶ See, e.g., *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (approving settlement obligating defendants to pay more than \$3 billion to class); Elizabeth Becker, *Jury Awards Ranchers \$1.28 Billion From Tyson*, N.Y. TIMES, Feb. 18, 2004, at C1 (award in class action by 35,000 cattle ranchers against country’s largest beef packer); *Judge OKs Microsoft Settlement with Calif.*, L.A. TIMES, July 19, 2003, Part 3, at 3 (approving settlement of state action for \$1.1 billion, for overcharges to consumers of software); *Cigarette Makers Settle Farmers’ Antitrust Suit*, N.Y. TIMES, May 17, 2003, at A18 (settlement under which three major cigarette manufacturers would pay \$188 million to tobacco growers).

³⁷ See generally Thomas E. Kauper & Edward A. Snyder, *Private Antitrust Cases That Follow on Government Cases*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 329 (Lawrence J. White ed., 1988); Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement*:

provision of the Clayton Act³⁸ or simply relying on the expanded availability of offensive collateral estoppel,³⁹ private parties are able to take advantage of favorable judgments in actions by the federal government against antitrust violators to obtain private relief without the need to reprove all of the elements of the antitrust violation.⁴⁰

One component of private enforcement that has grown in importance are actions by non-American plaintiffs. Foreign

Follow-on and Independently Initiated Cases Compared, 74 GEO. L.J. 1163 (1986).

³⁸ 15 U.S.C. § 16(a) (2004); *cf.* *United States v. Grinnell Corp.*, 307 F. Supp. 1097, 1097 (S.D.N.Y. 1969) (federal government, when suing in its proprietary capacity, may obtain *prima facie* benefit from prior enforcement action brought by government).

³⁹ *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (permitting use, under certain circumstances, of collateral estoppel by plaintiffs who were not parties to earlier litigation).

⁴⁰ *See Ohio Valley Elec. Corp. v. Gen. Elec. Co.*, 244 F. Supp. 914, 917 (S.D.N.Y. 1965) (describing “unprecedented number of private antitrust actions” brought against electrical equipment manufacturers upon conclusion of government litigation); ABA SECTION OF ANTITRUST LAW MONOGRAPH 13, TREBLE DAMAGES REMEDY 23 (1986) (indicating that 2,233 private actions were brought against electrical equipment manufacturers).

In the wake of the settlement of the government’s action against Microsoft, a number of its competitors and customers brought follow-on treble damage actions. The most significant of these was by AOL Time-Warner, the parent of Netscape, which the district court and the court of appeals had found was the primary target of Microsoft’s anti-competitive behavior. The terms of the settlement of that action included a payment by Microsoft to AOL Time Warner of \$750 million. *See Steve Lohr & David P. Kirkpatrick, Microsoft to Pay AOL \$750 Million to End ‘Long War,’* N.Y. TIMES, May 30, 2003, at A1. *See also Steve Lohr, Court Lifts Order that Required Windows to Include Java*, N.Y. TIMES, June 27, 2003, at C3 (describing Sun Microsystems’ follow-on litigation against Microsoft, in which Sun seeks various forms of injunctive relief and \$1 billion in damages); Ted Bridis, *Private Suits Against Microsoft Ordered by Judges to be Handled by One Court*, WALL ST. J., Apr. 27, 2000, at B8 (ordering temporary consolidation of over two dozen private actions).

But see In re Microsoft Corp. Antitrust Litig., 355 F.3d 322 (4th Cir. 2004) (finding that the district court’s application of collateral estoppel was too broad, and that Microsoft should be barred from relitigating only those facts which were critical and necessary to judgment in governments’ action).

In rare situations, the order of the “follow-on” litigation may be reversed, i.e., the government may decide to proceed only after the initiation of a private action. *Compare United States v. Visa U.S.A. Inc.*, 2001-2 Trade Cas. (CCH) ¶ 73,440 (S.D. N.Y. 2001) (government action challenging exclusivity rules of two major credit card networks) *with SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) (private challenge to same behavior).

individuals and corporations have long been viewed as “persons” entitled to sue either for monetary or injunctive relief.⁴¹ In *Pfizer v. Inc. v. Government of India*,⁴² the Supreme Court held that foreign governments are also permitted to sue under the American antitrust laws.⁴³ If affirmed, the decision in *Empagran, S.A. v. F. Hoffman-LaRoche, Ltd.*,⁴⁴ which is presently pending before the U.S. Supreme Court, holds open the possibility of even greater enforcement by foreign parties of behavior allegedly violative of the American antitrust laws.

Of course, the path to riches for the antitrust plaintiff is not all downhill and paved with gold. In addition to the obvious need to prove the fact of an antitrust violation, courts have imposed a number of procedural obstacles to success in a treble damage action. The most important of these is the *Illinois Brick* doctrine,⁴⁵ which bars claims other than by the direct purchaser from the defendant. In addition, courts have imposed other increasingly onerous preconditions for satisfying the antitrust injury and standing requirements.⁴⁶ The up-shot of these judicially created hurdles has been substantially to diminish the potential vigor of private enforcement.⁴⁷

⁴¹ See 15 U.S.C. § 12 (2004) (defining “persons” to include “corporations and associations existing under or authorized by . . . the laws of any foreign country”).

⁴² *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313-14 (1978).

⁴³ *But see* Pub. L. No. 97-393, 96 Stat. 1964 (1982) (providing that with certain exceptions, recovery by foreign governments and their instrumentalities should be limited to actual damages and cost of suit) (*codified at* 15 U.S.C. §§ 15(b)-(c) (2004)).

⁴⁴ *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003) (“where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct’s effect on foreign commerce”), *cert. granted*, ___ U.S. ___, 124 S. Ct. 966 (2003).

⁴⁵ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

⁴⁶ See *infra* notes 93-94 and accompanying text.

⁴⁷ On the other hand, because, as noted above, see *supra* note 10, indirect purchasers in a majority of states can bring actions under state *Illinois Brick* repealer laws, some defendants may face the prospect of six-fold (or even more) damages if they are sued both by direct and indirect purchasers.

III. Enforcement Abroad

The most important development in the past decade affecting the competitive behavior of American companies, has been the vastly stepped up enforcement efforts by foreign antitrust agencies under non-American antitrust regimes. If an American company engages in multi-national activities—and that will be true for virtually all large corporations—it is not unlikely that foreign antitrust agencies will be concerned with the local effect of those companies' behavior.⁴⁸ Preeminent of these is the European Union Competition Commission, but American companies are increasingly finding their behavior subject to scrutiny by Canadian, Japanese, Australian, and other antitrust agencies as well.⁴⁹ The inability of General Electric to consummate its proposed acquisition of Honeywell, after that transaction was given clearance by the Antitrust Division, because it fell afoul of European regulators is the most prominent of these situations.⁵⁰ The attention that Microsoft's contractual restrictions and distributional arrangements are continuing to receive in Europe, notwithstanding the settlement of its long-standing dispute with the DOJ and numerous states, is yet another prominent example of this growing internationalization of antitrust norms.⁵¹

⁴⁸ As noted, for example by Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409 (2004); Donncaadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431 (2004); and Charles M. Wright & Matthew D. Baer, *Price-fixing Class Actions: A Canadian Perspective*, 16 LOY. CONSUMER L. REV. 463 (2004), the EU and several countries are considering creating or expanding private remedies under their antitrust regimes. These laws would then give rise to claims against American companies in foreign courts or before non-American antitrust agencies.

⁴⁹ In addition to the competition laws of the European Union, the laws of the individual member states may also apply, to the extent that they are not inconsistent with EU law.

⁵⁰ See Robert J. Reynolds & Janusz A. Ordovery, *Archimedean Leveraging and the GE/Honeywell Transaction*, 70 ANTITRUST L.J. 171 (2002); Laurence Zuckerman & Andrew R. Sorkin, *G.E. Calls its \$45 Billion Bid for Honeywell All But Dead*, N.Y. TIMES, June 17, 2001, § 1, at 31. See also Paul Meller, *Europe Lists its Objections to G.E. Deal*, N.Y. TIMES, July 8, 2003, at W1 (EC identifying its concerns about G.E.'s proposed acquisition of Instrumentarium, a Finnish manufacturer of medical devices).

⁵¹ See Paul Meller, *European Regulators Back Proposed Microsoft Ruling*, N.Y. TIMES, March 16, 2004, at C9; Paul Meller, *Europeans Reject Offer By Microsoft*, N.Y. TIMES, Feb. 18, 2004, at C3.

IV. Non-litigative Enforcement

Another far less-frequently-discussed component of antitrust enforcement is non-litigative. However, because this method of enforcement also has costs, although usually far less than that of litigation, it also must be noted. These enforcement efforts encompass a multitude of actions by governmental bodies, in advance of, and hopefully in lieu of, administrative or judicial challenges. Probably the most important examples are guidelines issued by government agencies. These include merger guidelines, which have been promulgated both by the federal⁵² and state authorities,⁵³ and federal guidelines on joint ventures,⁵⁴ foreign activities,⁵⁵ intellectual property,⁵⁶ and behavior within the health care industry.⁵⁷ The FTC has also acted quasi-legislatively, engaging in rule-making to explicate its view of Section 5 of the FTC Act⁵⁸ and the issuance of

⁵² The Antitrust Division first issued merger guidelines in 1968. *See* 2 Trade Reg. Rep. (CCH) ¶ 4510. The present version, significantly revised from the earlier version, is jointly issued by the two federal enforcement agencies. *See* 1992 U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992). This version, as further revised in 1997, is available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html (last visited May 4, 2004), and is reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104.

⁵³ *See supra* note 20.

⁵⁴ U.S. Dep't of Justice & FTC, Antitrust Guidelines for Collaboration Among Competitors (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (last visited May 4, 2004).

⁵⁵ U.S. Dep't of Justice & FTC, Antitrust Enforcement Guidelines for International Operations (1995), available at <http://www.usdoj.gov/atr/public/guidelines/internat.htm> (last visited May 4, 2004).

⁵⁶ U.S. Dep't of Justice & FTC, Antitrust Guidelines for the Licensing of Intellectual Property (1995), available at <http://www.usdoj.gov/atr/public/guidelines/ipguide.htm> (last visited May 4, 2004).

⁵⁷ U.S. Dep't of Justice & FTC, Statements of Antitrust Enforcement Policy in Health Care (1996), available at <http://www.usdoj.gov/atr/public/guidelines/1791.htm> (last visited May 4, 2004).

In 1985, the Antitrust Division (in this case it was not joined by the FTC) also issued Guidelines on Vertical Restraints. *See* 4 Trade Reg. Rep. (CCH) ¶ 13,105 (1985). Only eight years later, those guidelines were withdrawn. *See* Anne Bingaman, *Antitrust Enforcement, Some Initial Thoughts and Actions, Address Before the Antitrust Section of the American Bar Ass'n* (Aug. 10, 1993) (speech by Ass't Att'y Gen'l, announcing rescission of guidelines), in 65 ANTITRUST & TRADE REG. REP. (BNA) 250 (Aug. 12, 1993).

⁵⁸ The Commission first announced its view that it had authority to promulgate

industry guides.⁵⁹ However, the bulk of this activity has been in its consumer protection role of defining “unfair or deceptive acts or practices.”⁶⁰

Other forms of non-litigative enforcement include policy statements issued by agencies⁶¹ and advisory opinions—particularly from the Antitrust Division—in response to private inquiries about the legality of proposed behavior. Individual enforcement officials, including FTC Commissioners, Assistant, Associate and Deputy Attorneys General, and lower-ranking officials, all further an understanding about the parameters of the antitrust laws and the range of its enforcement through speeches, newspapers and law review articles, and other devices.

Perhaps the most important, and arguably the most costly, non-litigative enforcement device is the filing required by the HSR Act⁶² of all major mergers and acquisitions of companies, their stock or other assets. Although recent changes and increases in the dollar threshold have sharply reduced the number of required filings,⁶³ there

rules on which it would rely in adjudicative proceedings in 1962. 27 Fed. Reg. 4609, 4611 (1962). Its authority to issue such rules was upheld in *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973) (upholding rule providing that failure to post octane numbers on gasoline pumps at service stations constituted “unfair method of competition”), *cert. denied*, 415 U.S. 951 (1974).

In 1975, Congress amended the FTC Act, authorizing the Commission to “prescribe—(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices. . . .” 15 U.S.C. § 57a (2004).

The FTC has also promulgated rules under the myriad of other statutes it enforces, such as the Wool Products Labeling Act, 15 U.S.C. §§ 68-68j (2004), the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1339 (2004), and the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (2004).

⁵⁹ “Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements.” 16 C.F.R. § 1.5 (2004).

⁶⁰ The Commission’s most significant use of guides to aid in the enforcement of the antitrust laws are the Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240 (2004), which are intended to “provide assistance to businesses seeking to comply with sections 2(d) and 2(e) of the Robinson-Patman Act.” *Id.* § 240.1.

⁶¹ See, e.g., U.S. DEP’T OF JUSTICE, LENIENCY POLICY FOR INDIVIDUALS (1994), available at <http://www.usdoj.gov/atr/public/guidelines/0092.htm> (last visited May 4, 2004); U.S. DEP’T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm> (last visited May 4, 2004).

⁶² See *supra* note 13.

⁶³ The Act has a complicated number of thresholds which trigger the filing

are still more than a thousand transactions for which HSR reports must be filed each year.⁶⁴ After the filing, one of the two agencies may first demand far more detailed information from the parties (the “second request”), which may then be followed by announced objections to the transaction. These objections can in turn result either in negotiations that allow an amended transaction to go ahead (the so-called “fix-it-first” approach),⁶⁵ a judicial challenge to the transaction, or its abandonment. Here, among the costs imposed by this enforcement regime are the mandated filing fees,⁶⁶ the expenses for legal and other services, and arguably the cost of altering, delaying, or prohibiting transactions that were actually pro-competitive.

Non-litigative enforcement also takes place in the private sector. Largely because of the uncertainty and expense of litigation, before undertaking a transaction, parties typically will discuss the proposal with counsel for advice on its legality and on alternatives for enhancing the chances for legal success. Prudent companies also undertake educational programs for key employees, and audits of their records and of their ongoing business practices, to ensure compliance with antitrust requirements.

Finally, because the law is not static, various groups play roles in modifying or preserving antitrust rules. Academics give talks and write articles. Members of the private bar push for rules which benefit their clients. Interest groups, trade associations, and lobbyists

obligation. Some of these thresholds were increased, and then made subject to further increases by being linked to inflationary indexes, by Act of Dec. 21, 2000, Pub. L. No. 106-553, § 1(a)(2) [Title VI, § 630(a)]. *See also* 15 U.S.C. § 18(a) (2004).

⁶⁴ In the last full year prior to the change in thresholds—2000—HSR reports were submitted for 4,926 transactions. That number fell to 2,376 in 2001 (a transition year), and to 1,187 transactions reported for 2002, which is the most recent year for which information is available. *See* FTC & DOJ ANTITRUST DIVISION, ANNUAL REPORT TO CONGRESS FISCAL YEAR 2002, 25TH REPORT, Appendix A (August 2003), available at <http://www.ftc.gov/os/2003/08/hsrannualreport.pdf> (last visited May 4, 2004).

⁶⁵ *See generally* Albert Foer, *Toward Guidelines for Merger Remedies*, 52 CASE W. RES. L. REV. 211 (2001); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 436-37 (2003); R. Hewitt Pate, *Antitrust Enforcement at the United States Department of Justice: Issues in Merger Investigations and Litigation*, 2003 COLUM. BUS. L. REV. 411, 422-23 (2003).

⁶⁶ The fees range from \$45,000 for the smallest reportable transactions, to \$125,000 for medium-size transactions, to \$280,000 for the largest transactions. Act of Dec. 21, 2000, Pub. L. No. 106-553, § 1(a)(2) [Title VI, § 630(b)].

all urge changes in, or continued adherence to, substantive doctrine and enforcement practices. Like everything else already discussed, these too may involve a variety of costs.

V. Too Much, Too Little, or Just Right?⁶⁷

Given this universe, what components of this enforcement regime might be “too much?” First, a few words about the “costs” of assertedly excessive enforcement.⁶⁸ Costs may fall broadly into two categories. Initially there are the measurable costs of the range of enforcement activities just described. The enforcement agencies, both state and federal, have budgets that might be reduced or reallocated.⁶⁹ Companies facing the possibility of antitrust challenge must pay for counseling and compliance expenses,⁷⁰ and then naturally there are the very real costs of litigation, paid to lawyers, experts, and other support vendors. And, if a firm is found to have violated the antitrust laws, it probably will have to pay treble damages and/or fines.⁷¹ Even

⁶⁷ With apologies both to Goldilocks and to Voltaire, who wrote the satire, *Candide*, in which Dr. Pangloss asserted that we live in “the best of all possible worlds.” We don’t!

⁶⁸ See Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSPECTIVES 27, 42-43 (Fall, 2003) (estimating that “the total direct costs for the government and private parties are approximately \$1 billion annually [and] that. . .indirect costs, while possibly substantial, do not exceed the direct costs. If so, the total annual costs of antitrust enforcement in the United States are no more than \$2 billion each year.”).

⁶⁹ The President’s proposed Budget for the 2005 fiscal year seeks allocations of \$206 million for the FTC (including its consumer protection responsibilities) and \$136.4 million for the Antitrust Division. See *White House Unveils FY 2005 Budget Allocations for Antitrust Division, FTC*, 86 Antitrust & Trade Reg. Rep. (BNA) 111 (Feb. 6, 2004).

⁷⁰ Yet another cost incurred by some firms are the changes in their conduct, to avoid detection of violations of the antitrust laws. But, like the purchase of radar detectors, to allow persons to drive their cars with lessened fear of receiving a speeding ticket, these expenditures are not those which society should encourage or which should enter into the cost/benefit calculus.

⁷¹ Strictly speaking, this is not a “cost” of antitrust enforcement, but instead a price to be paid for the antitrust violation. The single damages portion of the monetary award is intended to compensate the victims of the unlawful conduct and to make them whole. The punitive portion of the treble damage award, and the fines, have the multiple functions of increasing deterrence, punishing wrongdoers, and denying them any benefits of their ill-gotten profits. See generally Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207 (2003).

if the behavior in question is finally implemented by the companies, it might be implemented only after incurring greater out-of-pocket costs, and after a substantial delay, denying to consumers and competitors the benefits of that practice in the interim.

Less easily measured, but arguably far more substantial, are the costs of unwise antitrust enforcement, either because the activity was never undertaken for fear of challenge or because it was inappropriately prohibited after an attack by an enforcer. These latter costs would include the merger not consummated, the joint venture not realized, the vertical distributional arrangement not implemented, the single-firm behavior not undertaken, or the innovative practice not attempted.⁷²

If the assertion of critics is that these “costs” are the product of excessive enforcement of the antitrust laws, what specific instances might there be of that excess? Let me touch on five broad possibilities: (1) dual enforcement of the antitrust laws by two federal agencies; (2) enforcement by both federal and state authorities; (3) private as well as governmental enforcement; (4) enforcement by foreign as well as American agencies; and (5) the range of remedies available in the event of an antitrust violation.

VI. The Cost of Dual Enforcement

Perhaps one obvious starting point for the asserted over-enforcement of the antitrust laws are the responsibilities shared by the Antitrust Division and the FTC.⁷³ While anomalous, and perhaps not a system that would be crafted today if we were writing on a clean slate, this dual enforcement has hardly proven dysfunctional or inefficient. Indeed, the agencies have developed, over time, a series of arrangements and agreements, both informal and more formalized, to allocate the industries or types of activities for which they have

⁷² See generally Fred McChesney, *Talking 'Bout My Antitrust Generation: Competition For and Competition in the Field of Competition Law*, 52 EMORY L.J. 1401, 1411-17 (2003) (describing greater market harm that occurs from “false positives”—“mistakenly imposing liability on an innocent defendant”—than from “false negatives”).

⁷³ See generally Ernest Gellhorn, Charles James, Richard Pogue & Joe Sims, *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 ANTITRUST BULL. 694 (1990); William Kovacic, *Downsizing Antitrust: Is it Time to End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505 (1996); David Roll, *Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure*, 31 BUS. LAW. 2075 (1976).

primary responsibility.⁷⁴ While the initial review of certain conduct by both agencies may marginally increase governmental expenditures, and while the less-than-identical treatment that certain conduct may receive from the agencies may marginally increase uncertainty, the significant benefits from dual enforcement outweigh these slight costs.

First, over the years, each agency has developed expertise in analyzing particular industries or practices.⁷⁵ Second, and more important, the agencies are responsive to different constituencies, giving rise to different enforcement priorities. While it is true that both the chief officials of the Antitrust Division and the five FTC Commissioners are appointed by the President and confirmed by the Senate, the latter officials serve overlapping seven-year terms, so that the make-up of any set of Commissioners will frequently include appointees of the present president's predecessors. Moreover, because the FTC is an administrative agency rather than located in the Executive Branch, it will be more sensitive than the Antitrust Division to congressional desires—a matter of particular importance when the executive and legislative branches are not in the hands of the same party. It is undoubtedly not a complete coincidence that the resolution by the DOJ of three of the most important antitrust actions in the past quarter-century—the termination of a nearly thirteen-year long action against IBM,⁷⁶ the settlement of the even longer-lasting attack on AT&T,⁷⁷ and the post-remand settlement of the *Microsoft*

⁷⁴ In 2002, the agencies reached a tentative, formal agreement to divide almost all of their enforcement responsibilities. Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of U.S. Dep't of Justice Concerning Clearance Procedures for Investigations (2002) [hereinafter FTC and DOJ Memorandum of Agreement], available at <http://www.usdoj.gov/atr/public/10170.pdf> (last visited May 4, 2004). Because of significant adverse Congressional reaction, and in particular from Senator Ernest Hollings of South Carolina, these efforts were subsequently abandoned. See Yochi J. Dreazen & John R. Wilke, *Justice Department, FTC Deal Dividing Merger Reviews Collapses*, WALL ST. J., May 21, 2002, at B6.

⁷⁵ For example, the FTC has had a long-standing interest in the automotive industry and in various sectors of the health care industry, while the Antitrust Division staff has particular expertise in the computer software, telecommunications, and media/entertainment areas. See FTC and DOJ Memorandum of Agreement, *supra* note 74.

⁷⁶ See *In re Int'l Bus. Machs. Corp.*, 687 F.2d 591, 594 (2d Cir. 1982) (describing stipulation of dismissal of "what had been one of the nation's longest antitrust suits").

⁷⁷ See *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982)

litigation⁷⁸—all occurred after the election of a new president of a different political party than the one under whom the action was originally brought. While it is largely true that antitrust enforcement has historically been bipartisan,⁷⁹ part of that consistency may be the product of the fact that enforcement is not solely the responsibility of the executive branch.⁸⁰

Assertions of over-enforcement of the antitrust laws because of shared responsibility by the federal government and the states present two different potential concerns: officials at both levels may be able to bring actions under the same body of law (the federal antitrust laws), and the same conduct may subject defendants to attack under two different, and perhaps inconsistent, legal regimes.

Expressed concern about the first overlap is a variation on the objections to the dual enforcement by two federal agencies, or of the ability of private parties to bring challenges to many of the same activities as may be brought by government officials. In all of these situations, the statutory allowance for multiple enforcers enhances the likelihood that anticompetitive behavior will be deterred, or if undertaken, that it will receive judicial scrutiny.⁸¹ It also minimizes concerns that harmful conduct will go unchallenged because certain

(approving, with modifications, consent decree terminating litigation and dividing AT&T into numerous smaller units).

⁷⁸ *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002) (after remand, conditionally approving proposed consent decree as final judgment, dependent upon parties' agreement to modifications proposed by court).

⁷⁹ See generally Joel Klein, *Antitrust Enforcement in the Twenty-First Century*, 32 CONN. L. REV. 1065, 1072 (2000) ("the amazing thing is throughout government. . . , there is wide support [for strong antitrust enforcement] from both parties").

⁸⁰ See generally William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003) (criticizing "pendulum narrative" to describe history of governmental antitrust enforcement, and arguing that enforcement has been cumulative, progressive, and characterized by continuity and adjustments based on experience).

⁸¹ Concerns about possible multiple and inconsistent enforcement of the merger laws are diminished by coordination between the state and federal enforcers. See PROTOCOL FOR COORDINATION IN MERGER INVESTIGATIONS BETWEEN THE FEDERAL ENFORCEMENT AGENCIES AND STATE ATTORNEYS GENERAL (1998), available at <http://www.ftc.gov/os/1998/03/mergerco.op.htm> (last visited May 4, 2004). See generally William Baer & David Balto, *New Myths and Old Realities: Recent Developments in Antitrust Enforcement*, 1999 COLUM. L. REV. 207 (assertion by two FTC officials that recent Commission merger enforcement efforts are merely result of applying antitrust doctrines to changed economic and industry conditions, rather than departure from established doctrines).

potential enforcers have desisted from suing because of political concerns, conflicts of interest, or the expenses of litigation. Individual states will often have different competitive interests that they seek to vindicate, as illustrated by the refusal of some states to join the federal government and their sister states in the *Microsoft* settlement. State interests would not be adequately protected by reposing enforcement powers solely at the federal level.⁸²

The possibility of suit under both federal and state antitrust laws is the logical product of our federal system.⁸³ Because congressional power to enact the Sherman and Clayton Acts is found in the Commerce Clause, federal law can only reach activities which are "in or affecting commerce."⁸⁴ Were it not for state antitrust laws, intrastate activities which harmed local competition would go unremediated.⁸⁵ State legislatures have properly permitted state officials and private parties who are injured by anticompetitive conduct, which if it had occurred in interstate commerce would have given rise to a federal claim, to bring parallel actions under state law.⁸⁶ In addition, as noted above in connection with the *Microsoft* litigation or certain mergers,⁸⁷ state attorneys general may choose to challenge certain conduct or seek certain remedies where the federal government is unwilling to proceed.⁸⁸

⁸² See generally Joel Brinkley, *U.S. and State Officials Weigh Microsoft Remedies*, N.Y. TIMES, Nov. 17, 1999, at C1 (noting that, even before district court ruling, state attorneys general disagreed among each other and with Antitrust Division about appropriate remedy in event of finding of antitrust violation).

⁸³ Indeed, state statutory or common law was the exclusive vehicle for enforcement of "antitrust," or trade regulation, norms prior to the enactment of the Sherman Act in 1890. Compare *State ex rel. Att'y Gen'l v. Standard Oil Co.*, 49 Ohio St. 137 (1892) (state quo warranto proceedings, challenging defendant's abuse of its monopoly) with *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911) (action two decades later under Sherman Act).

⁸⁴ See, e.g., *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

⁸⁵ See generally Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001).

⁸⁶ As discussed above, see *supra* note 26 and accompanying text, the state may also enforce the private remedy component of the Clayton Act, by suing, as *parens patriae*, for monetary relief in behalf of natural citizens residing in the state.

⁸⁷ See *supra* notes 16-20 and accompanying text.

⁸⁸ In support of his argument that "having multiple enforcers of antitrust can produce undesirable results," Professor Fred McChesney complains that state

Complaints about private enforcement take various forms. At one extreme, the lawsuit may be of marginal foundation and may be brought in hopes of wearing down an opponent or extracting a settlement. While these concerns are not unfounded, they are increasingly being addressed through the willingness of judges to grant summary judgment in antitrust cases,⁸⁹ and indeed, truly frivolous cases may be subject to Fed. R. Civ. P. 11 sanctions. A more substantial concern is that while a government official—whether federal or state—weighing whether to bring an action must take some account of the public interest in that suit,⁹⁰ a private party arguably is concerned solely with its own enrichment. Instead of seeking to advance the public's interest in increased competition, the private party may be seeking to protect itself from competitors.⁹¹ The safeguard for this, however, is the federal judiciary. The courts have shown no reluctance to dismiss actions before trial or to set aside verdicts for plaintiffs on a whole host of grounds, including not only

attorneys general occasionally bring cases “in which the federal antitrust authorities would have no interest.” McChesney, *supra* note 72, at 1424, 1428. As an example, he describes the multi-state actions against the manufacturers of George Foreman grills for resale price maintenance; Professor McChesney dismisses those suits as meritless because “[r]esale price maintenance simply has no place in the modern, economics-based enforcement agenda.” *Id.* at 1428. However, until the Supreme Court overrules the *Dr. Miles* decision, *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911),—and the Court has recently expressly declined that opportunity, *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 n.7 (1984)—resale price maintenance remains unlawful *per se*. While Professor McChesney may assert that this rule is bad law, it hardly seems inappropriate for the states to enforce that doctrine, notwithstanding the fact that both Professor McChesney and the federal antitrust agencies may think that enforcement of that rule is bad economic policy.

⁸⁹ See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (upholding grant of defendants' motion for summary judgment; “if the factual context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more plausible evidence to support their claim than would otherwise be necessary”). See generally Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986); Rudolph Peritz, *Theory and Fact in Antitrust Doctrine: Summary Judgment Standards, Single-Brand Aftermarkets and the Clash of Microeconomic Models*, 45 ANTITRUST BULL. 887 (2000).

⁹⁰ See, e.g., 15 U.S.C. § 45(b) (2004) (authorizing FTC to bring action “if it shall appear to the Commission that a proceeding by it . . . would be in the interest of the public”).

⁹¹ See generally Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991).

the plaintiff's failure to prove that the defendant violated the antitrust laws, but also such enforcement-related deficiencies as the failure to prove antitrust injury, which is defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."⁹²

While critics might point to the unusual case where treble damages arguably have been inappropriately allowed, I have already argued elsewhere⁹³ that the federal courts have actually erred far more often in the other direction, finding an absence of standing by or antitrust injury to persons who have been genuinely injured by undoubted antitrust violations. While this article is not an adequate vehicle to explore the issue adequately, I reiterate my contention that one of the more egregious obstacles to an appropriate level and distribution of private enforcement of the antitrust laws is the *Illinois Brick* rule, which denies recovery to downstream, indirect purchasers who would otherwise be able to show real harm, while often permitting windfall recovery—trebled—to direct purchasers who may have been able to pass on any overcharge resulting from the defendant's antitrust violation.⁹⁴

The fourth broad category of arguable over-enforcement is the increasing, and potentially duplicative, attention to conduct or transactions from both American and foreign enforcers. There is some irony in these complaints. Americans are proud of their culture and their laws, and are all too happy to export not only Microsoft software and Boeing airplanes outfitted with General Electric engines and Honeywell avionics, but also our ideals of democracy and competition. Indeed, we have long decried the protectionism and absence of competition that has far too long prevailed both in developed and developing countries. Therefore, the adoption by other countries of vigorous antitrust regimes is, in the long run, clearly in the best interests of American companies and the American economy.

However, we could not have expected that those regimes would have either merely adopted our antitrust laws wholesale, or would always reach the same conclusions of legality or illegality for any particular arrangement or transaction. Encouragement of multiple competition regimes must countenance two consequences. First,

⁹² *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)).

⁹³ Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437 (2001).

⁹⁴ *See id.* at 443, 452.

firms operating multi-nationally will frequently incur the additional costs of avoiding potential antitrust exposure and of confronting potential challenges in multiple jurisdictions. Second, it is unsurprising that in certain circumstances, one regime will find unlawful the same conduct which was upheld by another. While General Electric may decry the fact that European competition law has forced the abandonment of an acquisition which was given the green light by its home country authorities,⁹⁵ such occasional results are the inevitable result of the application of different standards by different enforcement authorities. While cooperation among the enforcement authorities may make such incidents less frequent,⁹⁶ and while experience may lead to greater convergence of American and other antitrust regimes, some “competition” in the development and enforcement of antitrust law is, on balance, healthy for the maintenance of competition in world markets.

Finally, are the remedies available in the event of a violation of the antitrust laws appropriate? This, of course, raises issues both of the aggregate amount and the distribution of modes of enforcement. Does the award of treble damages result in under- or over-compensation of victims and under- or over-deterrence of borderline activity?⁹⁷ Should treble damages be reserved only for certain kinds of violations—perhaps only that conduct which is subject to *per se* liability—with other violations only entitling the plaintiff to single or doubled damages?⁹⁸ Does the potential liability of each defendant for

⁹⁵ See *supra* note 50 and accompanying text.

⁹⁶ See generally Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 IND. J. GLOBAL LEG. STUDIES 433 (2002) (urging consideration of multilateral antitrust enforcement agreement within WTO).

⁹⁷ See generally Roger D. Blair & William H. Page, “Speculative” Antitrust Damages, 70 WASH. L. REV. 423 (1995); Herbert Hovenkamp, *Treble Damages Reform*, 33 ANTITRUST BULL. 233 (1988); Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983); William H. Page, *Optimal Antitrust Penalties and Competitors’ Injury*, 88 MICH. L. REV. 2151 (1990); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985).

⁹⁸ There are already several situations under present law in which recovery is limited to single damages. As noted above, see *supra* note 43, with certain exceptions, recovery in actions by foreign governments and their instrumentalities is limited to actual damages and the cost of suit. The National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815, amended by the National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, 107 Stat. 117, confers limited immunity on certain research, development, and production joint ventures, including

all of the harm suffered by the plaintiffs, with limits on the ability to obtain contribution,⁹⁹ unduly pressure parties to settle and constrain the ability of parties to defend marginal or exaggerated claims?

By contrast, should there be greater use of the criminal side of antitrust—with more frequent prosecutions, and with the government asking for longer prison terms and larger fines—in order to increase deterrence of truly harmful behavior? Does the Supreme Court's approval of arbitration as a means of resolving antitrust claims¹⁰⁰—with the possible denial of the full panoply of procedural rights and of treble damage remedies—undermine the strength of private enforcement? Finally, my favorite hobby-horse: Does the *Illinois Brick* rule, by frequently allowing windfall compensation to some plaintiffs and denying compensation to other, truly harmed would-be plaintiffs, best achieve the dual goals of deterrence and compensation?

This fifth area, perhaps as much as any of the others, has elicited strong reactions, and may be the one most in need of attention and change.¹⁰¹ Here, as with the first four categories, further study and empirical evidence is called for to determine the appropriate nature of enforcement.

provisions allowing them to limit their liability to actual damages and costs after notification to the DOJ and the FTC of their intent to cooperate. 15 U.S.C. §§ 4303, 4305 (2004). The Export Trading Companies Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233, similarly limits claims against qualified companies that receive a certificate of review from the Office of Export Trade in the Department of Commerce to actual damages and costs. 15 U.S.C. § 4016(b) (2004).

⁹⁹ See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (holding that antitrust laws do not permit a right of contribution).

¹⁰⁰ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 (1985) (upholding arbitration as means of resolving antitrust claims arising in international context, but declining to decide whether arbitration is appropriate for antitrust disputes arising from domestic transactions). See also *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi* in non-antitrust case for general proposition that antitrust cases can be arbitrated); *Kotam Electronics, Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724, 728 (11th Cir. 1996) (enforcing agreement to arbitrate antitrust claim arising in domestic setting) (en banc), *cert. denied*, 519 U.S. 1110 (1997); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1441 (9th Cir.) (same), *cert. denied*, 513 U.S. 1044 (1994).

¹⁰¹ See generally Waller, *supra* note 71 (noting that inconsistency and unpredictability of cumulative public and private remedies for antitrust violations result in under-enforcement in certain cases and over-enforcement in others).

VII. Conclusion

This article has admittedly only scratched the surface of the multitude of antitrust enforcement modalities. In some situations, it is arguable that inappropriate costs have been incurred and that competition has suffered because of over-enforcement. On the other hand, I believe that, at a minimum, there is less than an appropriate level of private enforcement because of judicially imposed limitations and conditions. However, on balance, the system that has evolved after more than a century of the antitrust laws probably yields about the right amount and distribution of antitrust enforcement. Persons seeking to disturb that balance—and with respect to private enforcement I am one of those—bear the burden of demonstrating that less (or more) enforcement would benefit competition and the consumers for whose protection the antitrust laws are principally designed.
