XII. PRIVATE ENFORCEMENT

A. Overview

Despite the prominence and importance of the federal agencies, most federal antitrust cases in the United States are not brought by the Department of Justice, the FTC, or the State Attorneys-General. Rather, most antitrust litigation and adjudication is the result of private enforcement: that is, lawsuits brought by consumers, competitors, and trading partners.[986]

- **Consumer lawsuits** are commonly brought as class actions pursuant to Federal Rule of Civil Procedure 23,[987] represented by class counsel who are typically compensated with a share of the recovery.[988] Among other things, this is because the harm suffered by individual consumers may be too small to justify the considerable costs of antitrust litigation for any individual plaintiff.
- **Competitor lawsuits** are often brought by rivals complaining of exclusion, or of conduct that will increase the defendant's market power. (Competitors generally cannot sue for collusive conduct by rivals, regardless of whether they have been invited to participate in the collusion or not: can you see why?) Courts entertaining such claims—and agencies entertaining competitor complaints—usually take a skeptical look at the allegations to make sure rivals are not just using the antitrust laws as a means of harming a competitor.
- **Trading partner lawsuits** are generally brought by sellers to, or buyers from, the defendant(s). Such claims may involve allegations that the defendant(s) have increased their market power through collusion or exclusion, resulting in (or threatening) the imposition of adverse terms of dealing—such as supracompetitive prices—on the trading partner. Here too, courts and agencies must screen complaints to be sure that a trading partner is not just seeking additional leverage over a bargaining partner in order to secure better terms.

Private antitrust cases tend to be of two kinds: private litigation brought in the wake of, or alongside, government enforcement action, and independent suits brought by market participants on their own initiative.[989] (Studies have shown that private litigation often involves much more than just riding the coat-tails of government enforcers.[990])

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[986] *Compare*, *e.g.*, *Judicial Business of the U.S. Courts*, Table C-2 (555 civil antitrust cases filed in the 12 months ending Sept. 30, 2021; 672 antitrust cases filed in the 12 months ending Sept. 30, 2020) *with* U.S. Dept. of Justice, *Antitrust Division Workload Statistics FY 2010–2019*, 5 (10 civil cases filed in 2018; 19 civil cases filed in 2019) *and* FTC, *Annual Performance Report for Fiscal Year 2020 and Annual Performance Plan for Fiscal Years 2021 and 2022* (FY 2020), 46 ("In FY 2020, the [FTC] concluded 27 matters in which it took action to maintain competition, including 11 consent orders and 11 abandoned transactions, focusing its efforts on markets with the greatest impact on American consumers. This fiscal year saw a continuation of the Commission's ambitious antitrust litigation docket, with 11 active litigations from the current or prior years."). *See also* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L. J. 1001, 1002 (1986) (private and public enforcement numbers for 1941–1984). *But see* Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-o-Mat, 66 Antitrust L.J. 273, 275 (1998) ("Despite the breadth of the statutory language, private antitrust actions in the initial decades of antitrust were very rare. From 1899 to 1939, only 157 treble damage actions were recorded, with only 14 recoveries by plaintiffs, totaling less than $275,000."); *id.* at 276 (dating the "explosion" of private litigation to a string of decisions between 1946 and 1961).

[987] *See generally*, *e.g.*, Christine P. Batholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 Indiana L.J. 1315 (2022); *see also*, *e.g.*, Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 5 (2013) (describing class actions as "the most important type of private [antitrust] cases").

[988] *See* American Antitrust Institute, *The Critical Role of Private Antitrust Enforcement In The United States, Commentary On: 2020 Antitrust Annual Report: Class Action Filings In Federal Court* (Aug. 4, 2021) 10 (empirical data on class action attorney fees).

[989] For some (now somewhat dated) comparative empirical work across the two classes of case, *see* Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 Geo. L. J. 1163 (1986).

[990] Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Sea. U. L. Rev. 1269, 1292-93 (2013) (Study of 20 successful private cases finding that 50% were not preceded by government action, and that $8.36 billion of the $10.7 billion in total victim recovery involved cases that either preceded government enforcement or significantly expanded the scope of recovery the government sought); John C. Coffee, Jr., *Understanding the Plaintiffs Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 681 n.36 (1986) ("Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study

Private Injunctive Relief and Government Damages Actions

We have generally organized this book so that injunctive relief is covered in Chapter XI on government enforcement, while damages are covered in this Chapter XII on private enforcement. That's because injunctive relief is the focus of most government actions, while damages tend to be a central issue in private litigation. (This allocation also helps to keep the lengths of the chapters fairly balanced!) But it obscures two important points: first, private plaintiffs can and do sue for injunctions; and, second, government plaintiffs can and do sue for damages. And although those facts do not raise a host of important complexities, it is worth pointing out a couple of things.

Private injunctions first. Private plaintiffs and states (which are also persons under the antitrust laws[991]) are entitled to sue for injunctions to terminate and remedy antitrust violations.[992] Private plaintiffs are not treated identically to the federal government for all purposes, however, even in an injunction case. First, in order to obtain preliminary injunctive relief, a private plaintiff must not only show a substantial probability of success and a favorable balance of equities: a private litigant must also generally demonstrate a threat of irreparable harm.[993] Second, in order to obtain permanent injunctive relief, a private plaintiff must satisfy the *eBay* standards that apply to permanent injunctive relief generally: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."[994]

As just as private plaintiffs can obtain injunctive relief, the United States (through the Department of Justice) and the states are also empowered by statute to assert certain damages claims for antitrust violations, pursuant to Sections 4a and 4c of the Clayton Act respectively.[995] The United States is limited under Section 4a to recoveries for injuries suffered in its own right to its "business or property": that is, as a buyer, seller, or (conceivably) competitor.[996] The states, by contrast, may sue either for their own damages (as "persons" like any others under Section 4) or for damages suffered by their citizens (in a "parens patriae" litigation under Section 4c).[997] Neither state nor federal governments may sue for broader "damage to the economy" caused by an antitrust violation:

of antitrust litigation by Professors Kauper and Snyder has placed this figure at less than 20% of private antitrust actions filed between 1976 and 1983.").

[991] *See supra* § XI.F; Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261 (1972).

[992] 15 U.S.C. § 26.

[993] *See*, *e.g.*, St. Luke's Hosp. v. ProMedica Health Sys., Inc., 8 F.4th 479, 485 (6th Cir. 2021) ("Four factors guide our review of a district court's preliminary injunction: (1) the likelihood of success on the merits, (2) the threat of irreparable harm absent an injunction, (3) the risk of harm to others, and (4) the broader public interest."); AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 573 (7th Cir. 1999) ("To prevail on a motion for preliminary injunction, the moving party must meet the threshold burden of establishing (1) some likelihood of prevailing on the merits; and (2) that in the absence of the injunction, he will suffer irreparable harm for which there is no adequate remedy at law. If the moving party clears both of these prerequisites, a district court engages in a 'sliding scale' analysis by balancing the harms to the parties and the public interest.").

[994] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

[995] 15 U.S.C. § 15a ("Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by it sustained and the cost of suit."); 15 U.S.C. § 15c ("Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title."); 15 U.S.C. § 15c(a)(2) (providing for trebling and simple interest in parens patriae suits).

[996] Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 265 (1972) ("The legislative history of [Section 4a of the Clayton Act] makes it quite plain that the United States was authorized to recover, not for general injury to the national economy or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services.").

[997] 15 U.S.C. § 15 (injured person may sue for damages); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261 (1972) ("Hawaii plainly qualifies as a person under both sections of the statute [i.e., Section 4 and Section 4c], whether it sues in its proprietary capacity or as parens patriae.").

harm to "business or property" is the only relevant kind of harm in an antitrust case for government, just as for private, plaintiffs.[998]

Private litigants—as well as State AGs—may benefit from antitrust's signature private remedy: treble damages.[999] Although somewhat unusual, treble damages are not unique to antitrust: among other things, they are available under federal law for certain kinds of patent infringement, trademark counterfeiting, and RICO violations.[1000] And they have been available in antitrust (or at least antitrust-like) cases since at least the 1623 Statute of Monopolies, which allowed a plaintiff to recover "three times so much as the damages which he or they sustained by means or occasion of being . . . hindered, grieved, disturbed, or disquieted" by violations of the statute.

Why have treble damages? Trebling serves multiple functions, of which the most obvious are deterrence of wrongdoing and compensation of victims.[1001] It is widely believed that many antitrust violations go undetected,[1002] and that in many cases the costs, complexities, uncertainties, and delays of antitrust litigation may dissuade plaintiffs from attempting to recover for what may be fairly modest individual injuries. Thus, trebling can be understood as an effort to correct the resulting under-deterrence, by increasing both plaintiffs' incentive to litigate and the consequences for defendants of a loss in court.[1003] (The low success rate of rule-of-reason cases may also tend to reduce the deterrence effect of threatened litigation.[1004]) The Supreme Court has expressly recognized the important role that private litigation plays in deterring antitrust wrongdoing.[1005]

Nor is deterrence the only function of the treble-damages rule. By encouraging victims to sue for their loss, trebling may help to promote compensation. Robert Lande has even argued that the apparent "windfall" for victims above compensation from trebling may be illusory because, all things considered, the "treble" damages provision simply balances out other limitations on the right to recover for harms arising from antitrust violations, such that it would be more accurate to think of antitrust damages as amounting to "single" damages only.[1006] Likewise, as DOJ and the FTC monitor private-litigation dockets, such litigation may serve a function of notifying the agencies of matters for investigation and potential enforcement action, including the filing of amicus briefs and/or statements of

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[998] Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262, 92 S. Ct. 885, 891, 31 L. Ed. 2d 184 (1972) ("[Congress] could have . . . required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected."); *id.* at 265 ("[Section] 4, which uses identical language [to Section 4a], does not authorize recovery for economic injuries to the sovereign interests of a State").

[999] 15 U.S.C. § 15, § 15c.

[1000] *See*, *e.g.*, 35 U.S.C. § 284 (in patent infringement cases "the court may increase the damages up to three times the amount found or assessed"); 15 U.S.C. § 1117 (in certain cases involving the intentional counterfeiting of a mark or designation "the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages"); 18 U.S.C. § 1964(c) (plaintiff "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"). *See also*, *e.g.*, Cal. Bus. & Prof. Code § 17082.

[1001] *See*, *e.g.*, Am. Soc. of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575–76 (1982) ("[T]reble damages serve as a means of deterring antitrust violations and of compensating victims[.]").

[1002] *See*, *e.g.*, Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73(3) Rev. Econ. & Stats. 531, 535 (1991) ("The probability of getting caught in a given year is at most between 0.13 and 0.17.").

[1003] For a variety of perspectives on this elusive balance, *see*, *e.g.*, Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 35–37 (2013) (noting: that defendants benefit from an "interest free loan" through the lack of prejudgment interest; costs and burdens of litigation; difficulties of detection; and superior resources of some defendants); Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 673, 677 (2010); Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879 (2008); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 Hastings L.J. 871, 911-35 (1999); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1017–24 (1986); 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); Lawrence Vold, *Are Threefold Damages under the Anti-Trust Act Penal or Compensatory?*, 28 Ky. L. J. 177, 122–25 (1940).

[1004] *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827 (2009).

[1005] *See*, *e.g.*, Pfizer, Inc. v. Government of India, 434 U.S. 308, 314–15 (1978) (acknowledging the effects of damages actions on both compensation and deterrence); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."), *overruled on other grounds,* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

[1006] Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115 (1993). *See also* Robert H. Lande, *Multiple Enforcers and Multiple Remedies: Why Antitrust Damage Levels Should be Raised*, 16 Loy. Consumer L.Rev. 329 (2004).

interest: thus, trebling can be seen as part of an information-gathering system that helps to alert federal enforcers to antitrust violations.[1007]

But trebling has plenty of critics. For one thing, the aptness of trebling to promote optimal deterrence is unclear. Many commentators express concerns that treble damages, combined with the high costs of litigation—particularly the burdens of discovery for large defendants—may allow plaintiffs to "hold up" defendants even on the basis of speculative or weak claims.[1008] Additionally, there may be reasons to doubt the assumption that damages promote deterrence, given the vast separation of time between conduct and penalty, as well as the prospect that individual misfeasant employees may have long since moved on by the time of a remedy.[1009] The Supreme Court has expressed its own concern about the use of antitrust litigation by rivals or trading partners to inflict meritless holdup.[1010] And some have worried that broad private remedies may encourage courts to trim substantive liability rules too narrowly.[1011]

The relationship of trebling to compensation is also hard to define with any precision. On the one hand, purchaser plaintiffs may well have passed on the amount of an overcharge to their own customers, such that they end up overcompensated when they recover damages for harm borne largely by others.[1012] On the other, antitrust litigation leaves some harm uncompensated. Among other things, much of the social harm from an antitrust violation may be found in the "deadweight loss" representing harm to those who would be willing to buy a product or service at the competitive price but do not do so at the supracompetitive price, but this harm is not reflected in antitrust damages claims because such individuals generally do not bring antitrust suits.[1013] At the end of the day, it would be a remarkable thing if a factor of three—the number chosen by the framers of the 1623 Statute of Monopolies—just happened to be the optimal multiplier for an ideal antitrust damages rule.

All this fuels a long-running and lively debate about the desirability of treble damages.[1014] Unfortunately, we do not really know many of the critical facts on which a full assessment of the costs and benefits of existing (and

[1007] United States, *Relationship Between Public and Private Antitrust Enforcement*, OECD Working Paper DAF/COMP/WP3/WD(2015)11 (June 15, 2015), 8 ("The Antitrust Division and FTC monitor the cases closely and participate as amicus curiae where important principles are implicated.").

[1008] Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 33–35 (2013) (collecting concerns of other commentators that private suits may lead to excessive recoveries, prompt "extortionate settlements," and create opportunities for class counsel to "sell out" their clients); Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 673, 680–81 (2010); Stephen Calkins, *Reflections on* Matsushita *and "Equilibrating Tendencies": Lessons for Competition Authorities*, 82 Antitrust L.J.201 (2018).

[1009] Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 673, 697 (2010) ("[I]t is implausible that the threat of future private litigation does much to deter anticompetitive behavior").

[1010] *See*, *e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("The requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with a largely groundless claim from taking up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value. It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. That potential expense is obvious here, where plaintiffs represent a putative class of at least 90 percent of subscribers to local telephone or high-speed Internet service in an action against America's largest telecommunications firms for unspecified instances of antitrust violations that allegedly occurred over a 7–year period. It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest.").

[1011]*See*, *e.g.*, Daniel A. Crane, *Antitrust Antifederalism*, 96 Calif. L. Rev. 1, 41 (2008) ("[C]ourts often establish sharply underinclusive liability norms in private antitrust cases . . . [And] because it is often the same statute that courts must construe in both public and private cases, the courts have tended to apply private litigation liability rules to public litigation as well.").

[1012] *See infra* § XII.C (describing indirect purchaser rule).

[1013] *See*, *e.g.*, David C. Hjelmfelt & Channing D. Strother Jr., *Antitrust Damages for Consumer Welfare Loss*, 39 Clev. St. L. Rev. 505 (1991).

[1014] See, e.g., Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1 (2013); Edward D. Cavanagh, *Detrebling Antitrust Damages in Monopolization Cases*, 76 Antitrust L.J. 97 (2009); Herbert Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005) 66–68; Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1034 (1986); William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J. L. & Econ. 405, 438 (1985) (summarizing proposals); Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. & Econ. 445 (1985).

plausible alternative) antitrust damages rules would depend.[1015] In 2007, the Antitrust Modernization Commission considered, and rejected, arguments for limiting or repealing the treble-damages rule.

Antitrust Modernization Commission, Report and Recommendations (April 2007)

[1] Treble damages serve five related and important goals:

(1) Deterring anticompetitive conduct;

(2) Punishing violators of the antitrust laws;

(3) Forcing disgorgement of the benefits of anticompetitive conduct from those violators;

(4) Providing full compensation to victims of anticompetitive conduct; and

(5) Providing an incentive to victims to act as "private attorneys general."

[2] Although it has been argued that, in certain circumstances, something more or less than treble damages would better advance one or more of these goals, the Commission concludes that an insufficient case has been made for changing the treble damages rule, either universally or in specified instances. The Commission concludes that, on balance, the treble damages rule well serves the defined goals.

[3] *Deterrence.* The first broadly recognized purpose of treble damages is deterrence. To eliminate the incentive to engage in anticompetitive conduct, a violator must be exposed to forfeiture of potential gains from such conduct. Treble damages compensate for the reality that some anticompetitive conduct is likely to evade detection and challenge. If a company realizes that its anticompetitive conduct has only a 50 percent chance of being detected, and if its liability were limited to single damages, it would be more likely to engage in that conduct because the reward exceeds the risk.

[4] *Punishment of violators.* The second recognized purpose of treble damages is to punish offenders, similar to punitive damages under the common law and other statutes. This reason is closely related to the deterrence justification: providing a multiple of damages helps deter such conduct and highlights societal disapproval of such conduct. Furthermore, in addition to raising prices, anticompetitive conduct causes allocative inefficiency (for example, forgone purchases and substitution of less optimal alternatives) that, while reducing consumer welfare, is not reflected in damage calculations. Treble damages help to ensure that the violator pays damages that more fully reflect the harm to society caused by the anticompetitive conduct.

[5] *Disgorgement of gains.* Treble damages also serve the purpose of requiring the disgorgement of unlawfully obtained gains (or profits) that result from anticompetitive conduct. Preventing violators from profiting removes incentives to engage in such conduct and thereby enhances deterrence.

[6] *Compensation to victims.* A fourth purpose of treble damages is to ensure full compensation to the victims of anticompetitive conduct. Indeed, in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover "speculative" damages) treble damages help ensure that victims will receive at least their actual damages.

[7] *Creating incentives for "private attorneys general."* Finally, providing treble damages creates incentives for private enforcement of the antitrust laws. This is of particular importance in light of limited government resources to identify and prosecute all anticompetitive conduct. Incentives for private enforcement reinforce the other objectives of treble damages by increasing the likelihood that claims will be brought against violators, thereby enhancing deterrence, appropriate disgorgement and punishment, and compensation to victims.

[1015] Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 15 (2013) ("Having set forth what we would like to know to evaluate private antitrust enforcement, it is striking how little we actually do know. Most of the key questions remain unanswered. The great bulk of the argument about private enforcement of the antitrust laws has been premised on unsubstantiated or insufficiently substantiated claims."). For a recent study, *see* Huntington National Bank & USF School of Law, *2020 Antitrust Annual Report: Class Action Filings in Federal Court* (Aug. 2021).

[8] The Commission was not presented with substantial evidence or empirical support that treble damages do not advance these goals. However, some have argued that treble damages, along with other remedies, can over-deter some conduct that may not be anticompetitive and result in duplicative recovery. No actual cases or evidence of systematic overdeterrence were presented to the Commission, however.

[9] The Commission carefully considered a variety of circumstances in which it was proposed that the damages multiplier might be decreased (or increased). . . . [T]he Commission considered the following (among others): (1) providing treble damages only in cases where the conduct is clearly unlawful and devoid of competitive benefit; (2) limiting damages to single damages when the conduct is overt; and, (3) placing the damages multiplier in the discretion of the trial judge. Ultimately, the Commission declined to recommend these approaches . . . .

[10] There is broad consensus that treble damages are appropriate for hard-core cartel conduct. Even those who advocate eliminating treble damages in some circumstances agree that price-fixing and similar conduct should be subject to treble damages. Moreover, some argue that the multiplier should be higher in these cases to compensate for the low likelihood of detection. Nonetheless, because the Commission recommends retention of a single, uniform multiplier in all antitrust cases, and because hard-core cartel conduct is often subject to criminal prosecution, the Commission does not recommend any increase to the multiplier for hard-core conduct.

[11] The Commission also declines to recommend a change to provide for only single damages in rule of reason cases. Several fundamentally similar proposals were advanced to the Commission to limit treble damages to per se antitrust violations, where the conduct is clearly unlawful and bereft of procompetitive benefits. These advocates argue that in cases other than those—where conduct may be procompetitive or is subject to unclear legal standards—treble damages may deter or "chill" potentially procompetitive behavior. Although such concerns are reasonable, the Commission concluded that statutorily defining whether conduct was a per se violation or subject to the rule of reason would prove difficult.

[12] Furthermore, there is anticompetitive conduct that is not per se unlawful can cause as much damage as per se violations such as price-fixing. Indeed, eliminating treble damages for such cases could greatly hamper incentives to bring actions, and thus reduce deterrence too much.

[14] The Commission also evaluated, but declined to recommend, limiting treble damages to conduct that is covert. For conduct that is publicly open (or "overt")—such as mergers, and most joint ventures, distribution contracts, and single-firm conduct—the probability of detection is close to 100 percent. By comparison, much covert cartel activity likely goes undetected. Given that a principal justification for treble damages is to account for the likelihood of detection, there may be no need for multiple damages where the public is aware of the conduct or it is otherwise overt. The Commission declined to recommend the creation of such a distinction, however, because some overt conduct, such as aspects of a legitimate joint venture, may be a disguised cartel, or otherwise cause severe harm. As with the proposed division between per se and rule of reason conduct, such a distinction might result in increased litigation over whether treble damages are available on the facts of the conduct.

[15] In light of the concerns with these two proposals, as well as several other similar proposals, the Commission also considered, but rejected, a rule that would leave the decision whether to award treble damages to the discretion of a judge. A court may be best positioned to evaluate the severity of the violation, in light of a range of possible factors, and tailor the penalty accordingly. This approach would allow a court to decline to award treble damages if, for example, the questions of fact are close or the legal standards unclear, the conduct was overt, or the conduct had sizable procompetitive benefits. Allowing judges to award only single damages in such cases would therefore potentially reduce overdeterrence and the chilling of procompetitive conduct that may result from mandatory trebling. It would also avoid the need for drafting a statute that defines types of conduct that are and are not subject to treble damages. The Commission concluded, however, that such an approach would increase the length and cost of trials as the parties contest factual issues relevant to the factors to be considered. Moreover, judges would be required potentially to balance multiple, conflicting factors, leading to inconsistency across courts and forum shopping.

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The prospect of competitor antitrust lawsuits, in particular, can raise real challenges for antitrust policy. Courts and commentators often have significant unease about empowering firms to impose high costs—in the form of litigation expenses as well as exposure to treble damages and the risk of business-breaking injunctions—on their rivals, and the fear that antitrust litigation might be, or become, an anticompetitive weapon is widespread.[1016] (As we have already seen, meritless litigation against rivals can be a tool of monopolization: and, perhaps ironically, this tactic may work as well with an antitrust case as any other kind of litigation.[1017]) And yet competitors may be uniquely well placed to spot antitrust violations before they have resulted in enduring market harm.[1018]

Despite the controversies, private litigation remains of tremendous practical importance to the enforcement and development of modern antitrust. Federal agencies and state enforcers suffer from acute resource limitations, and can investigate only a relatively small proportion of the matters brought to their attention.[1019] Private enforcement allows many more alleged antitrust violations to be challenged, investigated, and remedied, and it provides an opportunity for development of the law.[1020] And privately litigated disputes are often just as important and complex as those pursued by the federal agencies. Indeed, some of the most famous and important antitrust precedents—including *Trinko*, *Aspen Skiing*, *Twombly*, *Tampa Electric*, *Jefferson Parish*, *LePage's*, *PeaceHealth*, *Brooke Group*, *Matsushita*, *Monsanto*, and many more—are the result of private litigation rather than government action.

The rest of this Chapter explores ways in which the courts have, for many decades, set important boundaries on who can sue under the antitrust laws, and what they can recover for, in ways that might surprise a reader of the statutory text. Indeed, on the face of it, the statutory rights to damages and injunctive relief are framed broadly. The statutory damages provision is found at 15 U.S.C. § 15a:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances.

And the private plaintiff's right to an injunction is found at 15 U.S.C. § 26, framed in similarly broad terms:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue[.] . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

But in practice these rights to relief have turned out to be narrower than the statutory language would suggest. Specifically, the Supreme Court has imposed some important limitations on the rights of a private person to obtain redress in antitrust litigation, giving rise to some important (and sometimes complicated) lines of authority with

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[1016] *See*, *e.g.*, R.P. McAfee, & N. Vakkur, *The Strategic Abuse of Antitrust Laws*, 1 J. Strate. Mgmt. Educ. 3 (2004); 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).

[1017] *See supra* § VII.G.6, § IX.B (sham litigation as an antitrust violation).

[1018] Herbert Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005) 68–72.

[1019] *See*, *e.g.*, Holly Vedova, *Adjusting merger review to deal with the surge in merger filings*, Competition Matters (Aug. 3, 2021) (emphasizing FTC's limited resources).

[1020] American Antitrust Institute, *The Critical Role of Private Antitrust Enforcement In The United States Commentary On: 2020 Antitrust Annual Report: Class Action Filings In Federal Court* (Aug. 4, 2021); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001 (1986) (noting detection function). Note, however, the concern mentioned above: that private-plaintiff cases might lead to the adoption of narrower substantive liability rules than might be the case in a government-only system. *See supra* note 1011.

which a private plaintiff must contend. One of these lines established what is known today as the "antitrust injury" requirement: in essence it limits the kinds of injuries for which a plaintiff can seek antitrust redress. Another important line is the "indirect purchaser" rule: in essence it provides that only individuals dealing directly with the defendant may sue. As Dan Crane has pointed out, these rules—regardless of whether one might think them wise, fair, or socially desirable—represent something like policy innovation by the Court, rather than a reflection of anything fairly discernible in the text or even legislative history of the antitrust laws.[1021]

This chapter will give a short tour of some of the distinctive issues attending private enforcement of the antitrust laws. In Section B we will encounter the concept of antitrust standing and one of its most important facets: the "antitrust injury" doctrine. In Section C we will examine another critical facet: the controversial "indirect purchaser rule" that limits which participants in the supply chain are entitled to bring an antitrust claim. In Section D we will consider some of the methods (and challenges) of proving antitrust damages in complex real-world markets. In Section E we will consider the question of timing, through the doctrines of limitations and laches. Finally, in Section F we will briefly explore the relationship between private and government enforcement.

B. Antitrust Standing

In order to sue for private relief, a plaintiff must have "antitrust standing." (Not to be confused with Article III standing![1022]) This is a complex and multifaceted concept, but it has two cores: the first core is a test of whether the injury suffered by the plaintiff is the kind of harm that is appropriate for redress through antitrust litigation; the second core is a test of whether the plaintiff is the right kind of entity to be suing for the harm.[1023] In this Section we will meet some leading versions of the standing test, and the critical requirement that an antitrust plaintiff has suffered "antitrust injury."

1. The Elements of Standing

In *Associated General Contractors of California*, the Court gave a lengthy explanation of its decision to deny relief to a union that was suing for antitrust violations—including a group boycott—that had harmed the union's interests by diverting business to nonunionized firms. *AGC* is a slightly odd case: the theory of antitrust violation was unusual, complex, and not well defined. But it prompted the Court to set out its views about antitrust standing in particular detail.

In reading this passage, notice how the Court appeals to a broad array of policy concerns rooted in the nature of the claimed harm *and* the identity of the plaintiff. What rules emerge? And which concerns, if any, do you find persuasive?

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters

459 U.S. 519 (1983)

Justice Stevens.

[1] This case arises out of a dispute between parties to a multiemployer collective bargaining agreement. The plaintiff unions allege that, in violation of the antitrust laws, the multiemployer association and its members coerced certain third parties, as well as some of the association's members, to enter into business relationships with nonunion firms. This coercion, according to the complaint, adversely affected the trade of certain unionized firms

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[1021] Daniel A. Crane, *Antitrust Antitextualism*, 96 Notre Dame L. Rev. 1205, 1226–29 (2021).

[1022] *See*, *e.g.*, Potter v. Cozen & O'Connor, 46 F.4th 148, 156 (3d Cir. 2022) ("Antitrust standing, like shareholder standing, is not an Article III standing doctrine, but rather one that is variously characterized as prudential or a matter of 'statutory standing.'").

[1023] For discussions of various aspects of antitrust standing doctrine, *see*, *e.g.*, Herbert Hovenkamp, Apple v. Pepper, *Rationalizing Antitrust's Indirect Purchaser Rule*, 120 Colum. L. Rev. Forum 14 (2020); Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 Geo. Wash. L. Rev. 1 (1999); Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 Mich. L. Rev. 1 (1995); Robert P. Taylor, *Antitrust Standing: Its Growing-or More Accurately Its Shrinking-Dimensions*, 55 Antitrust L.J. 515 (1986).

and thereby restrained the business activities of the unions. The question presented is whether the complaint sufficiently alleges that the unions have been "injured in [their] business or property by reason of anything forbidden in the antitrust laws" and may therefore recover treble damages under § 4 of the Clayton Act. 15 U.S.C. § 15. Unlike the majority of the Court of Appeals for the Ninth Circuit, we agree with the District Court's conclusion that the complaint is insufficient. [. . .]

[2] . . . [T]he Union's most specific claims of injury involve matters that are not subject to review under the antitrust laws. The amended complaint alleges that the defendants have breached their collective bargaining agreements in various ways, and that they have manipulated their corporate names and corporate status in order to divert business to nonunion divisions or firms that they actually control. Such deceptive diversion of business to the nonunion portion of a so-called "double-breasted" operation might constitute a breach of contract, an unfair labor practice, or perhaps even a common-law fraud or deceit, but in the context of the bargaining relationship between the parties to this litigation, such activities are plainly not subject to review under the federal antitrust laws. Similarly, the charge that the defendants advocated, encouraged, induced, and aided nonmembers to refuse to enter into collective bargaining relationships with the Union does not describe an antitrust violation.

[3] The Union's antitrust claims arise from alleged restraints caused by defendants in the market for construction contracting and subcontracting. The complaint alleges that defendants "coerced" two classes of persons: (1) landowners and others who let construction contracts, i.e., the defendants' customers and potential customers; and (2) general contractors, i.e., defendants' competitors and defendants themselves. Coercion against the members of both classes was designed to induce them to give some of their business—but not necessarily all of it—to nonunion firms. Although the pleading does not allege that the coercive conduct increased the aggregate share of nonunion firms in the market, it does allege that defendants' activities weakened and restrained the trade of certain contractors. Thus, particular victims of coercion may have diverted particular contracts to nonunion firms and thereby caused certain unionized subcontractors to lose some business.

[4] We think the Court of Appeals properly assumed that such coercion might violate the antitrust laws. An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market. Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect. [. . .]

[5] The class of persons who may maintain a private damage action under the antitrust laws is broadly defined in § 4 of the Clayton Act. 15 U.S.C. § 15. That section provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[6] A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation. Some of our prior cases have paraphrased the statute in an equally expansive way. But before we hold that the statute is as broad as its words suggest, we must consider whether Congress intended such an open-ended meaning.

[7] The critical statutory language was originally enacted in 1890 as § 7 of the Sherman Act. The legislative history of the section shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets. That history supports a broad construction of this remedial provision. A proper interpretation of the section cannot, however, ignore the larger context in which the entire statute was debated. [. . .]

[8] In 1890, notwithstanding general language in many state constitutions providing in substance that every wrong shall have a remedy, a number of judge-made rules circumscribed the availability of damages recoveries in both tort and contract litigation—doctrines such as foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract. Although particular common-law limitations were not debated in Congress, the frequent references to common-law principles imply that Congress simply assumed that antitrust damages

litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation. [. . .]

[5] An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

[9] It is plain, therefore, that the question whether the Union may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of § 4. Instead, as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. [. . .]

[10] There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

[11] The factors that favor judicial recognition of the Union's antitrust claim are easily stated. The complaint does allege a causal connection between an antitrust violation and harm to the Union and further alleges that the defendants intended to cause that harm. As we have indicated, however, the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry. [. . .]

[12] A number of other factors may be controlling. In this case it is appropriate to focus on the nature of the plaintiff's alleged injury. As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market. [. . .]

[13] In this case, however, the Union was neither a consumer nor a competitor in the market in which trade was restrained. It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market. As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals. At common law—as well as in the early days of administration of the federal antitrust laws—the collective activities of labor unions were regarded as a form of conspiracy in restraint of trade. Federal policy has since developed not only a broad labor exemption from the antitrust laws, but also a separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions. Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall. [. . .]

[14] An additional factor is the directness or indirectness of the asserted injury. In this case, the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts contains several somewhat vaguely defined links. According to the complaint, defendants applied coercion against certain landowners and other contracting parties in order to cause them to divert business from certain union contractors to nonunion contractors. As a result, the Union's complaint alleges, the Union suffered unspecified injuries in its business activities. It is obvious that any such injuries were only an indirect result of whatever harm may have been suffered by "certain" construction contractors and subcontractors.

[15] If either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and . . . they would have a right to maintain their own treble damages

actions against the defendants. An action on their behalf would encounter none of the conceptual difficulties that encumber the Union's claim. The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

[16] Partly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative. There is, for example, no allegation that any collective bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members has declined, and no allegation that the Union's revenues in the form of dues or initiation fees have decreased. Moreover, although coercion against certain firms is alleged, there is no assertion that any such firm was prevented from doing business with any union firms or that any firm or group of firms was subjected to a complete boycott. Other than the alleged injuries flowing from breaches of the collective bargaining agreements—injuries that would be remediable under other laws—nothing but speculation informs the Union's claim of injury by reason of the alleged unlawful coercion. Yet, as we have recently reiterated, it is appropriate for § 4 purposes to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.

[17] The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits. These cases have stressed the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. [. . .]

[18] The same concerns should guide us in determining whether the Union is a proper plaintiff under § 4 of the Clayton Act. . . . In this case, if the Union's complaint asserts a claim for damages under § 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities. It would be necessary to determine to what extent the coerced firms diverted business away from union subcontractors, and then to what extent those subcontractors absorbed the damage to their businesses or passed it on to employees by reducing the workforce or cutting hours or wages. In turn it would be necessary to ascertain the extent to which the affected employees absorbed their losses and continued to pay union dues.

[19] We conclude, therefore, that the Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors—the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the Union's antitrust claim. Accordingly, we hold that, based on the allegations of this complaint, the District Court was correct in concluding that the Union is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act. The judgment of the Court of Appeals is reversed.

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It is now very clear that the elements of standing include *at least* antitrust injury: that is, injury of the kind that the antitrust laws are intended to address. We will focus on antitrust injury in the next Section. But, beyond the antitrust-injury test, the other components of standing can be harder to pin down. The Eleventh Circuit, for example, describes antitrust standing as a matter of two questions: first, whether the plaintiff has shown antitrust injury; second, whether the plaintiff is an "efficient enforcer" of the antitrust laws.[1024] (We will consider the

[1024] *See, e.g.*, Sunbeam Television Corp. v. Nielsen Media Rsch., Inc., 711 F.3d 1264, 1271 (11th Cir. 2013); Ekbatani v. Cmty. Care Health Network, LLC, Case No. 21-12322, 2022 WL 31793, at *1 (11th Cir. Jan. 4, 2022).

efficient-enforcer test in the next section.) The Second Circuit takes the same view.[1025] The Fifth Circuit makes it three questions: (1) whether the plaintiff has suffered injury-in-fact proximately caused by the defendant's conduct; (2) antitrust injury; and (3) "proper plaintiff status, which assures that other parties are not better situated to bring suit."[1026] But a number of other circuits, including the Fourth, apply a five-factor assessment, exemplified by its 2007 *Novell* decision.[1027] Do these factors set out an appealing framework for figuring out who can bring an antitrust claim?

Novell, Inc. v. Microsoft Corp.

505 F.3d 302 (4th Cir. 2007)

Judge Duncan.

[1] Novell seeks treble damages under § 4 of the Clayton Act for injuries allegedly suffered as a result of Microsoft's anticompetitive conduct in violation of §§ 1 and 2 of the Sherman Act. . . . Two of [Novell's] claims allege that Microsoft's conduct injured competition in the market for PC operating systems, a market in which Novell's products did not directly compete. [Microsoft moved to dismiss these claims on the basis that] Novell, as neither a consumer nor a competitor in the relevant market, lacks antitrust standing to bring them. Microsoft appeals the [district court's] denial of this motion to dismiss. [. . .]

[2] Novell is a software company that owned WordPerfect, a word-processing application, and Quattro Pro, a spreadsheet application, from 1994 until 1996. WordPerfect and Quattro Pro are office-productivity applications, which Novell marketed together as an office-productivity package called PerfectOffice. Microsoft is a software company that owns Windows, a personal-computer ("PC") operating system, as well as office-productivity applications of its own. [. . .]

[3] Novell concedes that its products did not directly compete in the market for PC operating systems. Nevertheless, Novell contends that the technological connection between operating systems and applications gives rise to a significant barrier to entry into the operating-systems market and thus protects Microsoft's Windows monopoly. Novell maintains that its office-productivity applications could perform well on a variety of operating systems and that, during the relevant time period, they were the dominant office-productivity applications in the market. The thrust of Novell's argument is that its popular applications, though themselves not competitors or potential competitors to Microsoft's Windows, offered competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly. That is, Novell argues its products could provide a path onto the operating-system playing field for an actual competitor of Windows, because a competing operating system, running the popular Novell software applications, would offer consumers an attractive alternative to Windows. [. . .]

[4] Novell's present claims echo the government's theory in [United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc)]. Just as the middleware threat posed by Java and Navigator came from outside the Microsoft dominated PC operating-system market, Novell now argues that its products, though also outside the relevant market, similarly threatened Microsoft Windows.

[5] Novell alleges three specific unlawful actions on the part of Microsoft that harmed its products and also harmed competition in the PC operating-systems market. First, Novell claims Microsoft withheld from Novell key technical information necessary to make well-functioning office-productivity applications for Windows 95, an updated version of Windows launched by Microsoft during the period that Novell owned WordPerfect and Quattro Pro. [. . .]

[1025] Laydon v. Cooperatieve Rabobank U.A., 51 F.4th 476, 488 (2d Cir. 2022). *See also* Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co., 29 F.4th 337, 347 (7th Cir. 2022) ("In addition to satisfying Article III standing, the Providers must show that they have suffered an antitrust injury and that they are the proper parties to bring suit.").

[1026] Pulse Network, L.L.C. v. Visa, Inc., 30 F.4th 480, 488 (5th Cir. 2022).

[1027] *See also*, *e.g.*, Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323, 341–42 (3d Cir. 2018); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000).

[6] Second, Novell argues that Microsoft impeded Novell's access to distribution channels, including original equipment manufacturers ("OEMs"). OEMs manufacture PCs and typically preinstall an operating system and certain commonly used applications. Because Windows's monopoly in the operating-system market means most consumers want to buy Windows-equipped PCs, OEMs desire Windows licenses that enable them to install Windows on PCs. Novell asserts that OEMs' dependence on Windows licenses furnished Microsoft with leverage that it used to impose restrictive and exclusionary agreements on OEMs. . . .

[7] Finally . . . Novell claims that Microsoft required it, as a condition of being certified as Windows-compatible, to use Windows-specific technologies that degraded the performance of Novell's office-productivity applications on other operating systems. This requirement neutralized Novell's applications' purported advantage of working well on a variety of operating systems. Novell claims that such an advantage, along with Novell's applications' popularity, could have enabled other operating systems to bridge the "moat" that protected Microsoft's Windows monopoly.

[8] In a private antitrust action, a plaintiff must go beyond a showing that it meets the Article III standing requirements of injury, causation, and redressability; it must also demonstrate "antitrust standing." Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[9] Although a literal reading of § 4 is "broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation," the Supreme Court has interpreted the provision more restrictively. *See Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC")*, 459 U.S. 519, 529–30 (1983). Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.

[10] A plaintiff sufficiently connected to the violation propagating these ripples of harm is said to have "antitrust standing." The Supreme Court has held that a multi-factor analysis is required to determine whether a private plaintiff has antitrust standing. These factors circumscribe and guide courts' judgments on whether plaintiffs have antitrust standing. The Courts of Appeals have since relied on the *AGC* factors to determine antitrust standing. This court recently had the occasion to apply the *AGC* factors, distilling them to five:

> (1) the causal connection between an antitrust violation and harm to the plaintiffs, and whether that harm was intended; (2) whether the harm was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws; (3) the directness of the alleged injury; (4) the existence of more direct victims of the alleged antitrust injury; and (5) problems of identifying damages and apportioning them among those directly and indirectly harmed.

[11] The first two of these antitrust-standing factors together encompass the concept of "antitrust injury." Antitrust injury has been defined as injury of the type the antitrust laws were intended to pre-vent and that flows from that which makes the defendants' acts unlawful. The other three *AGC* factors focus on the directness or remoteness of the plaintiff's alleged anti-trust injury.

[12] Before applying the *AGC* factors to the facts of this case, however, we must first consider Microsoft's argument that Novell's claims fail as a threshold matter. Microsoft asks us to adopt a bright-line rule that only consumers or competitors in the relevant market have antitrust standing to bring private treble-damages claims under § 4. Were we to adopt this proffered rule, Microsoft argues, we would be compelled to find, before reaching the five-factor analysis, that Novell does not have standing in this case because its products did not directly compete in the operating-system market.

[13] We must decline to adopt Microsoft's "consumer-or-competitor" rule. We note that the Supreme Court has rejected the utility of the very type of bright-line approach on which Microsoft seeks to rely: "The infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in

every case." *AGC*, 459 U.S. at 536. In fact, a careful examination of the cases on which Microsoft relies for support of its proposed rule reveals that in most instances the claims were defeated by the absence of an antitrust injury, rather than the plaintiff's failure to demonstrate consumer or competitor status. [. . .]

[14] Having rejected Microsoft's argument that a bright-line consumer-or-competitor rule strips Novell of antitrust standing, we now consider whether the five *AGC* factors, as formulated in our decision in [Kloth v. Microsoft, 444 F.3d 312 (4th Cir. 2006)], compel dismissal of Novell's claims on antitrust-standing grounds. The first two factors—"(1) the causal connection between an antitrust violation and harm to the plaintiffs, and whether that harm was intended; and (2) whether the harm was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws"—are closely related. They ensure that the plaintiff claims the proper type of injury to be accorded antitrust standing. The other factors, which involve examination of the directness or remoteness of the plaintiff's injury and the ease or difficulty of apportioning damages, may further constrict the number of private plaintiffs eligible to bring a treble-damages action under the federal antitrust laws.

[15] We begin by reviewing the first two *AGC* factors. For ease of analysis, we reverse their order and examine first whether Novell has alleged an injury that the antitrust laws were intended to prevent, and then the causal connection between Microsoft's conduct and Novell's injuries. It is helpful in this regard to briefly revisit the purposes of antitrust laws. [. . .]

[16] Taking Novell's allegations as true, as we must, the injury that Novell alleges here is plainly an injury to competition that the anti-trust laws were intended to forestall. Microsoft's activities, Novell claims, were intended to and did restrain competition in the PC operating-system market by keeping the barriers to entry into that market high. Thus, we conclude that Novell has alleged harm of the type the antitrust laws were intended to prevent.

[17] We now turn to the second facet of antitrust injury: the causal connection between Novell's injuries and Microsoft's alleged antitrust violations. Novell claims that its market share in the office-productivity-applications market was eroded as a result of Microsoft's activity, which was designed to and effectively did elevate the barriers to entry into the PC operating-systems market. As chronicled earlier in this opinion, Novell complains that Microsoft withheld key technical information from its software designers, disadvantaging Novell in preparing for the launch of the Windows 95 operating system; that Microsoft exploited its monopoly power to require or encourage OEMs to refrain from installing Novell's products on their computers, cutting off Novell's distribution channels; and that Microsoft required Novell to use Windows-specific technologies in order to be certified as Windows-compatible, degrading Novell's products' performance on other operating systems and harming their advantageous compatibility. All of these activities allegedly had the effect of thwarting the ability of Novell's products to lower the applications barrier to entry into the operating-system market, therefore harming competition in that market. [. . .]

[18] In sum, the first two *AGC* factors weigh in favor of granting Novell antitrust standing. The facts alleged by Novell, taken as true for the purposes of this appeal, are sufficient to demonstrate that Novell suffered an antitrust injury and that its injury can be traced to Microsoft's alleged antitrust violations. While the showing of an antitrust injury demonstrates that a case is of the type for which antitrust standing is recognized, such a showing is not necessarily sufficient to demonstrate that the particular plaintiff has antitrust standing. Thus, we now turn to an analysis of the remaining *AGC* factors. [. . .]

[19] The latter three *AGC* factors require us to consider the directness of the alleged injury; the existence of more direct victims of the alleged antitrust injury; and problems of identifying damages and apportioning them among those directly and indirectly harmed. These additional factors are intended to further restrict entry into the federal courts for private enforcement of the antitrust laws. [. . .]

[20] Considerations of the directness of the plaintiff's injury and of the existence of more-directly harmed parties are closely related. Anti-trust law favors granting standing to the most direct victims of defendants' anticompetitive conduct and denying standing to more remote victims on the theory that the direct victims have the greatest motivation to act as private attorney[s] general and to vindicate the public interest in antitrust enforcement. Further, compensating only direct victims avoids duplicative recoveries. Therefore, the existence of an identifiable, more-directly harmed class of victims with the incentive to sue under the antitrust laws weighs against granting

standing to a more remote plaintiff. If, however, there is no more-directly harmed party with motivation to act as a private attorney general than the plaintiff, the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other is mitigated. [. . .]

[21] Here, Novell alleges that its software applications' popularity, quality, and ability to function well on multiple operating systems posed a potential threat to Microsoft's Windows monopoly by offering competing PC operating systems a bridge across the applications barrier to entry (i.e., the "moat" that protects Windows's monopoly) into that market. Novell claims that because of this threat, Microsoft directly targeted its products. As noted above, Microsoft's specific intent with respect to Novell is not the decisive factor, but it is evidence that Microsoft viewed Novell as a threat that could enable competitors to gain a foothold in the operating-systems market. Furthermore, Microsoft's withholding of information from Novell's software developers relating to Windows 95 clearly has no more direct victim than Novell. Finally, Microsoft's exclusive deals with OEMs that ensured that Novell's products would not be preinstalled on new PCs built by those OEMs directly curtailed Novell's distribution channels.

[22] Although Microsoft argues that a long list of better-situated plaintiffs than Novell exists, it mentions none by name or by category. Nevertheless, we surmise that such plaintiffs might include potentially competing operating systems, the OEMs who were restrained from installing Novell's products on computers they manufactured, or even consumers who purchased computers installed with Microsoft products at an inflated price because of a lack of competition. Without addressing whether plaintiffs representing each of these groups would have antitrust standing, we note that none of these parties has sued Microsoft on the theory that Microsoft's alleged destruction of Novell's dominant office-productivity applications harmed competition in the PC operating-system market. It may be that OEMs, for example, are too dependent on relationships with Microsoft for their business livelihood to have the incentive to pursue claims under § 4. This suggests that Novell may be the best-situated plaintiff to assert these claims. Indeed, today Novell may be one of the few private plaintiffs whose claims in this regard are neither time-barred nor too tenuous to support antitrust standing. [. . .]

[23] Finally, we turn to the fifth *AGC* factor which considers whether a finding of antitrust standing would lead to problems of identifying damages and apportioning them among those directly and indirectly harmed. Cases where this factor has been found to bar standing often involve potential plaintiffs indirectly injured by the allegedly anticompetitive behavior, raising the specter of complex apportionment of damages among, or duplicative recoveries by, direct and indirect victims of such conduct. Because we have already determined, on the record before us, that Microsoft's allegedly anticompetitive conduct was directly aimed at Novell, there is little risk that any damages Novell might prove would need to be allocated or apportioned among any more-directly injured parties.

[24] We therefore find that the *AGC* factors favor granting standing to Novell . . . . We thus affirm the district court's denial of Microsoft's motion to dismiss as to these claims on the antitrust-standing issue.

2. Antitrust Injury

A long line of cases have focused on the first core of antitrust standing: the requirement that the plaintiff must demonstrate the "right" kind of injury, including by establishing what the Court calls "antitrust injury."[1028]

The seminal case on antitrust injury is *Brunswick*—a case which pre-dated *AGC* by a few years—in which a plaintiff complained that a competitor had been allowed to consummate an unlawful anticompetitive merger. The plaintiff's claimed injury in that case arose not from an anticompetitive overcharge, but from the fact that it faced competition from the merged firm, and suffered competitive losses as a result. The Third Circuit saw no problem with such a suit: after all, the plaintiff's injuries were fairly traceable to the defendant's unlawful actions.[1029] But

[1028] There is a huge literature on antitrust injury. *See, e.g.*, Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697 (2003); Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-o-Mat, 66 Antitrust L.J. 273 (1998); Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539 (1989); William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. (1979).

[1029] *See* NBO Indus. Treadway Companies, Inc. v. Brunswick Corp., 523 F.2d 262, 265 (3d Cir. 1975), *vacated sub nom.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

the Supreme Court invoked the underlying purposes of the antitrust laws to conclude that this kind of "injury" could not be the basis for antitrust litigation.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

429 U.S. 477 (1977)

Justice Marshall.

[1] Petitioner [Brunswick Corp.] is one of the two largest manufacturers of bowling equipment in the United States. Respondents [including Pueblo Bowl-O-Mat, Inc.] are three of the 10 bowling centers owned by Treadway Companies, Inc. Since 1965, petitioner has acquired and operated a large number of bowling centers, including six in the markets in which respondents operate. [. . .]

[2] Respondents initiated this action in June 1966, alleging . . . that these acquisitions might substantially lessen competition or tend to create a monopoly in violation of s 7 of the Clayton Act. Respondents sought damages . . . for three times "the reasonably expectable profits to be made (by respondents) from the operation of their bowling centers." Respondents also sought a divestiture order, an injunction against future acquisitions, and such "other further and different relief" as might be appropriate . . .

[3] Trial was held in the spring of 1973, following an initial mistrial due to a hung jury. To establish a s 7 violation, respondents sought to prove that because of its size, petitioner had the capacity to lessen competition in the markets it had entered by driving smaller competitors out of business. To establish damages, respondents attempted to show that had petitioner allowed the defaulting centers to close, respondents' profits would have increased. At respondents' request, the jury was instructed in accord with respondents' theory as to the nature of the violation and the basis for damages. The jury returned a verdict in favor of respondents in the amount of $2,358,030, which represented the minimum estimate by respondents of the additional income they would have realized had the acquired centers been closed. As required by law, the District Court trebled the damages. It also awarded respondents costs and attorneys' fees totaling $446,977.32, and, sitting as a court of equity, it ordered petitioner to divest itself of the centers involved here. Petitioner appealed.

[4] . . . [On appeal, the Third Circuit] found that a properly instructed jury could have concluded that petitioner was a "giant" whose entry into a "market of pygmies" might lessen horizontal retail competition, because such a "giant" "has greater ease of entry into the market, can accomplish cost-savings by investing in new equipment, can resort to low or below cost sales to sustain itself against competition for a longer period, and can obtain more favorable credit terms." [. . .]

[5] The issue for decision is a narrow one. Petitioner does not presently contest the Court of Appeals' conclusion that a properly instructed jury could have found the acquisitions unlawful. Nor does petitioner challenge the Court of Appeals' determination that the evidence would support a finding that had petitioner not acquired these centers, they would have gone out of business and respondents' income would have increased. Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares. [. . .]

[6] Section 4 [of the Clayton Act, 15 U.S.C. § 15]. . . is in essence a remedial provision. It provides treble damages to "(a)ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.

[7] Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents must prove more than that petitioner violated s 7, since such proof establishes only that injury may result. Respondents contend that the only additional element they need demonstrate is that they are in a worse position than they would have been had petitioner not committed those acts. The Court of Appeals agreed, holding compensable

any loss causally linked to the mere presence of the violator in the market. Because this holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so, we cannot agree with it.

[8] Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holding, once a merger is found to violate s 7, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the reason the merger was condemned. This holding would make s 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws.

[9] Both of these consequences are well illustrated by the facts of this case. If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet respondents' injury[—]the loss of income that would have accrued had the acquired centers gone bankrupt[—]bears no relationship to the size of either the acquiring company or its competitors. Respondents would have suffered the identical "loss" but no compensable injury had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents as the Court of Appeals itself acknowledged. Thus, respondents' injury was not of the type that the statute was intended to forestall.

[10] But the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for the protection of competition not competitors. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

[11] Of course, Congress is free, if it desires, to mandate damages awards for all dislocations caused by unlawful mergers despite the peculiar consequences of so doing. But because of these consequences, we should insist upon a clear expression of a congressional purpose, before attributing such an intent to Congress. We can find no such expression in either the language or the legislative history of s 4. To the contrary, it is far from clear that the loss of windfall profits that would have accrued had the acquired centers failed even constitutes "injury" within the meaning of s 4. And it is quite clear that if respondents were injured, it was not "by reason of anything forbidden in the antitrust laws": while respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful.

[12] We therefore hold that the plaintiffs to recover treble damages on account of s 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would be likely to cause.

* * *

Brunswick thus stands for the principle that, in order to bring a private action for an illegal merger or other antitrust violation, a plaintiff must be injured by the *loss of competition* resulting from the challenged transaction or practice, not from the mere fact of the illegal practice, and certainly not from additional competition!

Although *Brunswick* itself involved an action for damages following a merger, it soon became a landmark in the law of private antitrust enforcement more generally. In *McCready* in 1982, for example, the same principle was

applied to a Section 1 damages claim[1030]; in *Cargill* in 1986 the Court confirmed that it applies to actions for an injunction[1031]; and later, in *Atlantic Richfield* in 1990, it was applied even to a *per se* antitrust violation.[1032]

These cases cemented the view of antitrust's purpose that underpinned *Brunswick*. In *Cargill*, just as in *Brunswick* itself, the plaintiff's core complaint was the merged firm would be a successful competitor to whom the plaintiff would lose share and profits. But again—as you may remember from Chapter I—the Court held the door closed:

> Monfort's first claim is that after the merger, Excel would lower its prices to some level at or slightly above its costs in order to compete with other packers for market share. Excel would be in a position to do this because of the multi-plant efficiencies its acquisition of Spencer would provide. To remain competitive, Monfort would have to lower its prices; as a result, Monfort would suffer a loss in profitability, but would not be driven out of business. The question is whether Monfort's loss of profits in such circumstances constitutes antitrust injury. [. . .]
>
> *Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."[1033]

Of course, these limitations are not complete, and, in the years since *Brunswick*, plenty of private plaintiffs have succeeded in showing antitrust injury.

CASENOTE: Steves and Sons, Inc. v. JELD-WEN, Inc.

988 F.3d 690 (4th Cir. 2021)

A high-profile success in showing antitrust injury was managed by Steves and Sons, in a prominent recent private merger challenge. The case took place in markets for doors and for the "doorskin" inputs used to make them. Before the relevant transaction took place, there were three major suppliers of doorskins, each of which was also vertically integrated downstream into doors: Jeld-Wen, CMI, and Masonite. There were also a number of unintegrated downstream door suppliers (or "independents"), of which Steves was one.

In 2012, Jeld-Wen acquired CMI, having given Steves and two other large independents long-term supply contracts to help win their support for the deal. Accordingly, Steves did not oppose the transaction when DOJ initially reviewed it. DO allowed the deal to close without challenge. But problems soon started. The quality of doors that Steves received from Jeld-Wen began to fall, and prices began to rise (even though Jeld-Wen's own costs were falling). In 2014, Masonite announced that it would stop selling doorskins to independents altogether. Later that year, Jeld-Wen gave notice to Steves of termination of supply under the existing contract (triggering a 7-year contractual notice period). In June 2016, Steves filed a private challenge to the merger. Among other things, Jeld-Wen argued that the existence of the supply contract between Steves and Jeld-Wen meant that Steves had not suffered *antitrust* injury, but merely contract damages. Steves prevailed at trial, and Jeld-Wen appealed.

On appeal, the Fourth Circuit directly evaluated whether Steves's complaint was "simply a contract claim masquerading as a candidate for treble damages." It approached this question by asking "whether Steves would have suffered an identical loss if Jeld-Wen had breached the Supply Agreement absent the merger."

The court concluded that Steves had indeed established antitrust injury arising from the merger. That injury took a number of forms. First, the merger eliminated Steves's opportunity to buy doorskins from CMI, the acquisition

[1030] Blue Shield of Virginia v. McCready, 457 U.S. 465, 482–83 (1982).
[1031] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 122 (1986).
[1032] Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341–45 (1990).
[1033] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 114–16 (1986).

target, as an alternative to Jeld-Wen's doorskins: access to CMI would have mitigated the harm from the contract breach. Second, the merger eliminated Steves's opportunity to buy from Masonite: a reasonable jury could have concluded that Masonite's refusal to offer reasonable terms to Steves was a consequence of the duopoly created by the transaction. Had the merger not taken place, the court reasoned, Masonite would likely have agreed to sell doorskins to Steves on more favorable terms. Third, the merger caused Jeld-Wen to degrade its performance of the contract to Steves in ways that did not constitute contract breaches. For example, "the contract didn't require Jeld-Wen to supply high-quality products, maintain a liberal reimbursement policy, or come within 3% of other suppliers' prices. Competition incentivized Jeld-Wen to do those things, and the merger reduced that incentive." Finally, the court noted, it appeared that Jeld-Wen subjectively intended to inflict injury on Steves of exactly the kind the antitrust laws were intended to prevent: "Jeld-Wen sought to leverage its enhanced market power to hurt its customers, including Steves. And that intent is relevant to our antitrust-injury analysis."

In a final effort, Jeld-Wen argued that Steves had failed to quantify the "antitrust impact" of the merger on its business. Specifically, Steves had failed to "construct a hypothetical market in which the merger never happened and show how it would have been better off therein. And Steves failed to do that, Jeld-Wen insists, because it didn't try to quantify the price of doorskins in this hypothetical market". But the court rejected this argument too. There was no requirement under existing law to show "antitrust impact" in a sense different from "antitrust injury." Nor had Jeld-Wen asked for such an jury instruction at trial. Here, ultimately, it was enough that "Steves could prove causation by demonstrating that the merger (1) kept it from buying from other suppliers, thereby exacerbating its contract damages, and (2) disincentivized JELD-WEN from offering quality products and customer service. A reasonable jury could find that Steves succeeded in its proof."

NOTES

1) Why shouldn't a plaintiff who is injured by an antitrust violation be able to sue for that harm? What is the best justification for allowing an injury from illegal conduct to go uncompensated and unpunished? What is the best argument for allowing *anyone* injured by unlawful conduct to sue for it, regardless of the precise means of causation?
2) How would you define "antitrust injury" to someone with no background in antitrust?
3) Do you prefer the Fourth Circuit's five-factor standing test or the Eleventh Circuit's two-part test? In what circumstances would they give different results?
4) When and why is it appropriate for a court to deny recovery to a plaintiff who has in fact brought a claim, and who is in other respects a proper plaintiff, on the ground that other entities, who have not in fact sued, might be "better placed" to do so? Are you aware of other areas of law in which we take this approach?
5) Does the availability of federal and state enforcement counsel in favor of a narrow approach to antitrust standing for private plaintiffs? If so, should a court consider whether a case is likely to attract government enforcers as part of the standing analysis?

3. The Indirect Purchaser Rule

One of the most important and controversial threads of antitrust standing doctrine is the so-called "indirect purchaser rule."[1034] The rule has two main elements. The first, established in *Hanover Shoe* in 1968, is the proposition that a defendant cannot raise the *defensive* argument that an antitrust private plaintiff in fact avoided injury by "passing on" its harm to purchasers further down the supply chain (*e.g.*, in the form of increased downstream prices). The second, established in *Illinois Brick* in 1977, is the proposition that a plaintiff cannot *offensively* bring suit on the ground that it was the recipient of such a passed-on overcharge from an intermediate

[1034] *See*, *e.g.*, William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J. L. & Econ. 405, 420 (1985) ("The limitation *Illinois Brick* placed on private actions, its candid departure from the compensation goal, its obvious concern with ruinous awards, and its concern about litigating complex economic issues of cause and effect are well known and oft debated."); William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602 (1979). The Court appears to regard the indirect-purchaser rule as a component of standing doctrine. *See*, *e.g.*, *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., statement respecting denial of certiorari) (doubting antitrust standing by reason of the indirect-purchaser rule). *See also* Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Standing Analysis*, 68 Geo. Wash. L. Rev. 1 (1999).

agent in the supply chain between the plaintiff and the defendant. Together, these propositions mean that direct purchasers must do the suing and recovering, even when the harms were distributed further down the chain.

Start by reading the Court's reasoning in *Hanover Shoe*. How many reasons does the Court give for denying the passing-on (or, sometimes, just "pass-on") defense? Are they all persuasive?

Hanover Shoe, Inc. v. United Shoe Machinery Corp.

392 U.S. 481 (1968)

Justice White.

[1] Section 4 of the Clayton Act provides that any person "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained." We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of s 4.

[2] If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower. [. . .]

[3] United seeks to limit the general principle that the victim of an overcharge is damaged within the meaning of s 4 to the extent of that overcharge. The rule, United argues, should be subject to the defense that economic circumstances were such that the overcharged buyer could only charge his customers a higher price because the price to him was higher. It is argued that in such circumstances the buyer suffers no loss from the overcharge. This situation might be present, it is said, where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is 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.

[4] 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; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, 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 raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, 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. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

[5] In addition, if buyers are subjected to the passing-on defense, those who buy from them would also 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. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the

fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

[6] Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense. We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer.

* * *

Nine years later, the *Hanover Shoe* was on the other foot: this time it was a plaintiff who was pointing to the fact of some passing-on by a direct trading partner. In that case—*Illinois Brick*—the Court held that the plaintiffs were equally forbidden from pointing to the fact of passing-on in order to recover from a defendant higher up the supply chain.

Illinois Brick Co. v. Illinois

431 U.S. 720 (1977)

Justice White.

[1] Respondent State of Illinois, on behalf of itself and respondent local governmental entities, brought this antitrust treble-damages action under s 4 of the Clayton Act, alleging that petitioners had engaged in a combination and conspiracy to fix the prices of concrete block in violation of s 1 of the Sherman Act. The complaint alleged that the amounts paid by respondents for concrete block were more than $3 million higher by reason of this price-fixing conspiracy. The only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution.

[2] Petitioner manufacturers moved for partial summary judgment against all plaintiffs that were indirect purchasers of concrete block from petitioners, contending that as a matter of law only direct purchasers could sue for the alleged overcharge. The District Court granted petitioners' motion, but the Court of Appeals reversed, holding that indirect purchasers such as respondents in this case can recover treble damages for an illegal overcharge if they can prove that the overcharge was passed on to them through intervening links in the distribution chain.

[3] We granted certiorari to resolve a conflict among the Courts of Appeals on the question whether the offensive use of pass-on authorized by the decision below is consistent with *Hanover Shoe*'s restrictions on the defensive use of pass-on. We hold that it is not, and we reverse. We reach this result in two steps. First, we conclude that whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants. Because *Hanover Shoe* would bar petitioners from using respondents' pass-on theory as a defense to a treble-damages suit by the direct purchasers (the masonry contractors), we are faced with the choice of overruling (or narrowly limiting) *Hanover Shoe* or of applying it to bar respondents' attempt to use this pass-on theory offensively. Second, we decline to abandon the construction given s 4 in *Hanover Shoe* that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" within the meaning of the section in the absence of a convincing demonstration that the Court was wrong in *Hanover Shoe* to think that the effectiveness of the antitrust treble-damages action would be substantially reduced by adopting a rule that any party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it.

[4] [We first] consider the . . . position, adopted by our dissenting Brethren, by the United States as amicus curiae, and by lower courts that have allowed offensive use of pass-on, that the unavailability of a pass-on theory to a

defendant should not necessarily preclude its use by plaintiffs seeking treble damages against that defendant. Under this view, *Hanover Shoe*'s rejection of pass-on would continue to apply to defendants unless direct and indirect purchasers were both suing the defendant in the same action; but it would not bar indirect purchasers from attempting to show that the overcharge had been passed on to them. We reject this position for two reasons.

[5] First, allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. The risk of duplicative recoveries created by unequal application of the Hanover Shoe rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting claims to the same fund. [. . .]

[6] Second, the reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments. The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions "in the real economic world rather than an economist's hypothetical model," and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom. This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants. [. . .]

[7] We are left, then, with two alternatives: either we must overrule *Hanover Shoe* (or at least narrowly confine it to its facts), or we must preclude respondents from seeking to recover on their pass-on theory. We choose the latter course. [. . .]

[8] Permitting the use of pass-on theories under s 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

[9] As we have indicated, potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund the amount of the alleged overcharge by contending that the entire overcharge was absorbed at that particular level in the chain. A treble-damages action brought by one of these potential plaintiffs (or one class of potential plaintiffs) to recover the overcharge implicates all three of the interests that have traditionally been thought to support compulsory joinder of absent and potentially adverse claimants: the interest of the defendant in avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation. [. . .]

[10] [A]llowing indirect purchasers to recover using pass-on theories, even under the optimistic assumption that joinder of potential plaintiffs will deal satisfactorily with problems of multiple litigation and liability, would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant. In treble-damages actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers, and other middlemen, whose representatives presumably should be joined. And in suits by direct purchasers or middlemen, the interests of ultimate consumers are similarly implicated.

[11] There is thus a strong possibility that indirect purchasers remote from the defendant would be parties to virtually every treble-damages action (apart from those brought against defendants at the retail level). The Court's concern in *Hanover Shoe* to avoid weighing down treble-damages actions with the massive evidence and complicated theories, involved in attempting to establish a pass-on defense against a direct purchaser applies a fortiori to the

attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer. We are no more inclined than we were in *Hanover Shoe* to ignore the burdens that such an attempt would impose on the effective enforcement of the antitrust laws. [. . .]

[12] The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.

[13] We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers. But on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of private attorneys general to enforce the antitrust laws under s 4, is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

[14] It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations. Of course, as Mr. Justice BRENNAN points out in dissent, from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation. But s 4 has another purpose in addition to deterring violators and depriving them of the fruits of their illegality; it is also designed to compensate victims of antitrust violations for their injuries. *Hanover Shoe* does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge. In view of the considerations supporting the *Hanover Shoe* rule, we are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all those within the defendant's chain of distribution, especially because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues. Many of the indirect purchasers barred from asserting pass-on claims under the *Hanover Shoe* rule have such a small stake in the lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages. And given the difficulty of ascertaining the amount absorbed by any particular indirect purchaser, there is little basis for believing that the amount of the recovery would reflect the actual injury suffered.

Justice Brennan, dissenting, joined by Justices Marshall and Blackmun.

[15] Today's decision flouts Congress' purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers. [. . .]

[16] *Hanover Shoe* confronted the Court with the choice . . . of interpreting s 4 in a way that might overcompensate the plaintiff, who had certainly suffered some injury, or of defining it in a way that under-deters the violator by allowing him to retain a portion of his ill-gotten overcharges. The Court chose to interpret s 4 so as to allow the plaintiff to recover for the entire overcharge. This choice was consistent with recognition of the importance of the

treble-damages action in deterring antitrust violations. But *Hanover Shoe* certainly did not imply that an indirect purchaser would not also have a cause of action under s 4 when the illegal overcharges were passed on to him.

[17] Despite the superficial appeal of the argument that *Hanover Shoe* should be applied "consistently," thus precluding plaintiffs and defendants alike from proving that increased costs were passed along the chain of distribution, there are sound reasons for treating offensive and defensive passing-on cases differently. The interests at stake in "offensive" passing-on cases, where the indirect purchasers sue for damages for their injuries, are simply not the same as the interests at stake in the *Hanover Shoe*, or "defensive" passing-on situation. There is no danger in this case, for example, as there was in *Hanover Shoe*, that the defendant will escape liability and frustrate the objectives of the treble-damages action. Rather, the same policies of insuring the continued effectiveness of the treble-damages action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove that overcharges were passed on to them. *Hanover Shoe* thus can and should be limited to cases of defensive assertion of the passing-on defense to antitrust liability, where direct and indirect purchasers are not parties in the same action. . . . The attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision (in *Hanover Shoe*) and its underlying rationale on its head.

CASENOTE: Apple Inc. v. Pepper

139 S.Ct. 1514 (2019)

Unfortunately, despite the effort in *Illinois Brick* to maintain a bright-line rule, that bright line is harder to see in some cases than others. In *Pepper*, the Supreme Court considered the case of the operator of an app-store platform that deals with both developers and consumers. The complaint in that case was that Apple had engaged in anticompetitive conduct that resulted in overcharging for apps in the iPhone App Store. Can consumers sue Apple on the theory that they purchase the apps from Apple? Or do consumers "really" purchase from app developers, who set the price of the apps in the store?

The Court held that that question had an easy answer. "In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit."

Apple, of course, had offered another view: "Apple's theory is that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. . . . Here, Apple argues that the app developers, not Apple, set the retail price charged to consumers, which according to Apple means that the consumers may not sue Apple."

But there were three things wrong, in the Court's telling, with Apple's position. First, the statutory text and the weight of *Illinois Brick* cut against it, by setting a bright-line rule in the interests of administrability: "When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue." Second, it was economically arbitrary, turning on the intricacies of retailers' contracts with the upstream party. "[U]nder Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service," but not "a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale." Third, if accepted, it would offer an easy way for retailers to structure deals with their upstream suppliers to evade antitrust liability.

Finally, the Court turned to what it took to be the three foundations of the *Illinois Brick* rule: (1) the imperative to facilitate more efficient enforcement of the antitrust laws; (2) the need to avoid complex damages calculations; and (3) the elimination of duplicative damages. Here, the first principle would be violated by "[l]eaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could also sue the retailers." The second principle could not be understood to mean antitrust immunity "any time that a damages calculation might be complicated." And the third was consistent with allowing recovery here: "If the iPhone owners prevail, they will

be entitled to the full amount of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone." *Illinois Brick* did not enact a rule against liability from multiple classes of injured victims, whose harms my not be duplicative of one another. Apple would have to face the claims of the consumer plaintiffs.

However easy or difficult it may be to apply in practice, the rule in *Illinois Brick* is controversial, as it often involves allowing some (*i.e.*, direct purchasers) to recover for harm they have not in fact suffered while prohibiting others (*i.e.*, indirect purchasers) from recovering for harm that they have in fact sustained.

Perhaps unsurprisingly, many states have enacted statutes allowing indirect purchasers to recover for violations of state antitrust law.[1035] The resulting complexity informed the recommendation of the Antitrust Modernization Commission in 2007 to overrule the indirect-purchaser rule, at least in significant part.[1036]

Antitrust Modernization Commission, Report and Recommendations (April 2007)

[1] Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:

- Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.
- Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.
- Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.
- Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.

[. . .]

[2] The conflict between federal and state policies on indirect purchaser damage actions has created a variety of problems. Absent the consolidation of federal and state cases involving direct and indirect purchasers, defendants must respond to complaints about the same conduct in multiple courts. Burdensome and uncoordinated discovery increases costs to defendants and disadvantages plaintiffs as well, because they do not have access to materials produced in other actions. . . . With trials proceeding in at least two, and maybe more, different courts, a defendant may be liable for duplicative damages—the amount of the overcharge to the direct purchaser in the first instance, plus whatever overcharges the direct purchaser was able to pass on to indirect purchasers. Correspondingly, direct purchasers may receive "windfall" awards exceeding their actual damages. Furthermore, when all parties are not before a single court, it can be difficult to negotiate and implement a global settlement. Defendants also may confront costs due to the asymmetric application of collateral estoppel: a finding by one court that the defendant did violate the antitrust law may be used by plaintiffs to establish liability in other suits, but a finding in one suit that the defendant did not violate the antitrust laws may not be used by the defendant to seek dismissal of other suits. [. . .]

[1035] *See*, *e.g.*, Cal. Bus. & Prof. Code § 16750(a). The Supreme Court has sustained these "repealer" statutes against preemption challenge. California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) ("There is no claim that the federal antitrust laws expressly pre-empt state laws permitting indirect purchaser recovery.").

[1036] Some members of the Commission dissented from this recommendation.

[3] To the maximum extent possible, a single federal court should hear all proceedings relevant to actions by direct and indirect purchasers alleging the same antitrust violation. To accomplish this, federal law should permit direct and indirect purchasers to recover the actual damages they suffer as the result of antitrust violations. The first step toward these goals is to overrule *Illinois Brick* and *Hanover Shoe* legislatively to the extent necessary to allow both direct and indirect purchasers to sue under federal law to recover for actual damages they suffer from antitrust violations resulting in an overcharge. Overruling *Illinois Brick* would increase fairness by ensuring that all indirect purchasers, not just those in states permitting such actions, could recover treble their actual damages under federal law for injuries attributable to antitrust violations. Overruling *Hanover Shoe* would limit direct purchasers to recovering treble their actual damages, rather than the full overcharge regardless of pass on, and will thus promote fairness by preventing windfall damage recoveries.

[4] Legislative overruling of *Illinois Brick* may encourage the resolution of direct and indirect purchaser litigation in a single forum, because indirect purchasers may choose to sue under federal antitrust laws rather than to bring state claims. In conjunction with the procedural components of the Commission's recommendation, this also should make resolution of all claims in a single forum easier. Federal recognition of indirect purchaser standing also will promote the development of a body of federal law governing the allocation of damages among direct and indirect purchasers. [. . .]

[5] To be sure, determinations of how to allocate damages among direct and indirect purchasers will often involve complex economic assessments of the extent to which each purchaser in the chain of distribution has suffered harm that can be traced to the overcharge. The federal courts have shown great ability to handle such complex economic issues, however, and they will develop rules and procedures to handle these issues. Consolidating all claims in a single proceeding will facilitate an appropriate allocation of relief among the claimants by the court. In addition, once all parties are before a single court, a global settlement becomes possible. Many of these disputes are likely to be settled; once liability and total damages are established, allocations of damages may often be determined by settlements among the claimants. Furthermore, limiting damages to the amount of the initial overcharge should streamline resolution of the litigation. Indeed, once the amount of overcharge has been determined, it may be possible to resolve the issues of how to allocate those damages among direct and indirect purchasers without the further involvement of the defendants.

NOTES

1) What is the best justification for the rule against indirect purchaser suits?
2) Does *Hanover Shoe* necessarily imply *Illinois Brick*?
3) Is there any point at all in keeping the *Illinois Brick* rule given the widespread availability of state-law causes of action for indirect purchasers?
4) Could *Apple v. Pepper* have plausibly come out any other way: that is, is there a sensible reading of the law on indirect-purchaser claims other than the one given by the Court? [1037]
5) Who is the direct purchaser of auctioneering services: the seller of the goods, the buyer, both, or neither? Do any of the following matter:
    a. which party literally hands over the cash to the auctioneer?
    b. whether the auctioneer styles the fee as a percentage commission on the value of the sale or a flat fee?
    c. whether either party negotiates with the auctioneer to reduce the fee?
    d. the nature of the challenged antitrust wrongdoing by the auctioneer?

4. "Efficient Enforcers"

In many circuits, even a direct purchaser may fail to establish antitrust standing if a court concludes that it would not be an "efficient enforcer" of the antitrust laws. Different circuits approach this analysis in different ways, but courts often consider: the directness and remoteness of the plaintiff's claimed injury; the existence of alternative

[1037] *See* Brief of Petitioner [Apple Inc.], Apple Inc. v. Pepper, Case No. 17-204 (Aug. 10. 2018).

(and better-situated) plaintiffs; and the extent to which damages are or may be speculative, uncertain, complex, or duplicative.[1038]

In *Gelboim*, the Second Circuit provided a detailed explanation of its own approach to this inquiry, in the context of an alleged conspiracy to depress the LIBOR interbank rate (broadly speaking, a price for interbank loans), but left it to the district court on remand to apply the resulting framework to the facts of the conspiracy.

CASENOTE: Gelboim v. Bank of Am. Corp.

823 F.3d 759 (2d Cir. 2016)

That case concerned an alleged conspiracy among 16 banks to depress the London Interbank Offered Rate ("LIBOR"), an indexed rate approximating the average rate of interest at which certain banks may borrow. The banks were sued by purchasers of financial instruments for which the rate of return was indexed to LIBOR: thus, depressing the LIBOR index also reduced their return.

The Second Circuit set out in some detail an analytical framework for determining whether the plaintiffs were "efficient enforcers of the antitrust laws." The court formulated the basic test as follows: "The four efficient enforcer factors are: (1) the directness or indirectness of the asserted injury, which requires evaluation of the chain of causation linking appellants' asserted injury and the Banks' alleged price-fixing; (2) the existence of more direct victims of the alleged conspiracy; (3) the extent to which appellants' damages claim is highly speculative; and (4) the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other."

With respect to the first factor, the court highlighted that some of the plaintiffs had bought their financial instruments from entities that were not alleged to be part of the conspiracy. The court noted that this raised a complex issue in private-damages law: "umbrella" claims. These are suits involving allegations that the defendants' misconduct enabled or incentivized *other* market participants to raise their prices, and they are the subject of a circuit split in modern damages law.[1039] The court raised a concern that allowing umbrella recoveries could produce damages "disproportionate to wrongdoing . . . . Requiring the Banks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap would, if appellants' allegations were proved at trial, not only bankrupt 16 of the world's most important financial institutions, but also vastly extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated."

With respect to the second factor, the court again raised concerns about the fact that plaintiff's theory of damages reached very broadly, including victims who had never dealt with the defendants. The court indicated that "not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced," and emphasized that "one peculiar feature of this case is that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of the Banks. The bondholders, for example, purchased their

[1038] *See, e.g.*, Inform Inc. v. Google LLC, Case No. 21-13289, 2022 WL 3703958, at *5 (11th Cir. Aug. 26, 2022) ("We consider several non-exhaustive factors in determining whether a plaintiff would be an efficient enforcer of the antitrust laws, including the directness of the injury; the remoteness of the injury; whether other plaintiffs are better suited to bring suit; whether the damages are highly speculative; whether the calculation of damages would be highly complex and run the risk of duplicative recoveries; and whether the plaintiff would be able to efficiently and effectively enforce the judgment."); Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 718 (7th Cir. 2006) (listing factors: "(1) the causal connection between the alleged anti-trust violation and the harm to the plaintiff; (2) improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; (6) the risk of duplicate recoveries or complex damages apportionment"); B-S Steel Of Kansas, Inc. v. Texas Indus., Inc., 439 F.3d 653, 667 (10th Cir. 2006) (listing factors: "(1) the causal connection between the antitrust violation and the plaintiff's potential injury; (2) the defendant's intent or motivation; (3) the nature of the plaintiff's potential injury—*i.e.*, whether it is one intended to be redressed by the antitrust laws; (4) the directness or the indirectness of the connection between the plaintiff's potential injury and the market restraint resulting from the alleged antitrust violation") (cleaned up).

[1039] *See, e.g.,* Roger D. Blair & Christine Durrance, *Umbrella Damages: Toward a Coherent Antitrust Policy*, 36 Contemp. Econ. Pol'y 241 (2018); *see also* U.S. Gypsum Co. v. Indiana Gas Co., Inc., 306 F.3d 469 (7th Cir.2002); In Re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation, 691 F. 2d. 1335 (9th Cir. 1982); Mid-West Paper Products Co. v. Continental Group, 596 F. 2d. 573 (3d. Cir. 1979); In re Beef Industry Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979).

bonds from other sources. Crediting the allegations of the complaints, an artificial depression in LIBOR would injure anyone who bought bank debt pegged to LIBOR from any bank anywhere. So in this case directness may have diminished weight."

With respect to the third factor, the court indicated that the key question would be "whether the damages would necessarily be highly speculative. And as to that, this case presents some unusual challenges. The disputed transactions were done at rates that were negotiated, notwithstanding that the negotiated component was the increment above LIBOR. And the market for money is worldwide, with competitors offering various increments above LIBOR, or rates pegged to other benchmarks, or rates set without reference to any benchmark at all."

Finally, with respect to the fourth factor, the court pointed to the vast array of investigations and litigations around the world regarding the alleged conspiracy. "The transactions that are the subject of investigation and suit are countless and the ramified consequences are beyond conception. Related proceedings are ongoing in at least several countries. Some of those government initiatives may seek damages on behalf of victims, and for apportionment among them. Others may seek fines, injunctions, disgorgement, and other remedies known to United States courts and foreign jurisdictions. It is wholly unclear on this record how issues of duplicate recovery and damage apportionment can be assessed."

The court left it to the district court to work out how these factors should be applied to the complex, messy, and unfolding facts of the LIBOR conspiracy.

NOTES

1) Should we have an "efficient enforcer" rule, in addition to our other rules about antitrust injury and standing? If so, what should that rule be and why? If not, what undesirable outcomes are we accepting as the cost of giving up that rule?
2) Do you agree that a damages plaintiff is a "private attorney general" acting to "vindicate the public interest"? Why, or why not?
3) What policy considerations weigh in favor of and against accepting "umbrella" claims? How do you think the Supreme Court will (or should) resolve the circuit split?

C. Remedies II: Proving Antitrust Damages

Although private plaintiffs may obtain injunctive relief, treble damages are often of central importance in private litigation. Earlier in this chapter, we discussed the theory and practice of "trebling": now we consider what goes into the pre-trebled damages measure itself. Section 4 of the Clayton Act, 15 U.S.C. § 15, sets out the basic antitrust damages rule: "Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The "damage" measure is intended to capture the harmful incidence of an unlawful practice or transaction: that is, the damage "by [the plaintiff] sustained."[1040] The starting point in calculating it is the determination of what have happened in a "but-for world" (or a "counterfactual") in which the challenged conduct did not take place. The problem in practice, of course, is that this can be very difficult to prove.[1041]

Modern damages law lives in the shadow of the Court's 1946 decision in *Bigelow*, a suit for damages from an alleged anticompetitive conspiracy that excluded the plaintiffs from access to movie distribution. The plaintiffs alleged loss of profits of more than $120,000 over five years, based on the assumption that, had the defendants not engaged in their unlawful conduct, the plaintiffs would have continued to earn whatever profits they were earning

[1040] 15 U.S.C. § 15a.
[1041] *See generally*, e.g., Roger D. Blair & William H. Page, "*Speculative" Antitrust Damages*, 70 Wash. L. Rev. 423 (1995).

before the conduct began. The matter reached the Supreme Court with respect to damages only: the defendants (respondents in the Supreme Court) argued that it was simply too difficult to quantify the impact of the conduct on plaintiffs' (petitioners') profits, as there was no particular reason to think that the plaintiffs would have continued to make their pre-conduct profits rather than some other amount. The Court was unsympathetic.

Bigelow v. RKO Radio Pictures

327 U.S. 251 (1946)

Chief Justice Stone.

[1] . . . The Circuit Court of Appeals concluded that the jury [had] accepted the comparison of plaintiffs' earnings before and after the adoption of [the relevant conduct] as establishing the measure of petitioners' damage. But it held that this proof did not furnish a proper measure of damage for the reason that, while petitioners' earnings were known and proved for both the four and five year periods in question, it could not be proved what their earnings would have been during the five year period in the absence of the illegal distribution of films. It thought that the mere fact that earnings of the Jackson Park Theatre was greater before the adoption of [the conduct] did not serve to show what petitioners' earnings would have been afterwards, in the absence of [that conduct]. [. . .]

[2] Respondents' argument is, that notwithstanding the force of this evidence, it is impossible to establish any measure of damage, because the unlawful system which respondents have created has precluded petitioners from showing that other conditions affecting profits would have continued without change unfavorable to them during the critical period if that system had not been established, and petitioners had conducted their business in a free competitive market. [. . .]

[3] Respondents [argue] that, without the conspiracy, the conditions of purchase of films might not have been the same after as they were before [the conduct began]; that in any case it is not possible to say what those conditions would have been if the restraints had not been imposed, and that those conditions cannot be ascertained, because respondents have not removed the restraint. Hence, it is said, petitioners' evidence does not establish the fact of damage, and that further, the standard of comparison which the evidence sets up is too speculative and uncertain to afford an accurate measure of the amount of the damage. [. . .]

[4] . . . [E]ven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential as well as upon direct and positive proof. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.

[5] Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

[6] [T]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. That principle is an ancient one, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. In cases of collision where the offending vessel has violated regulations prescribed by statute, and in cases of confusion of goods, the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. And in cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and the defendant have contributed to the profits.

[7] The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.

[8] The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action, whose unlawfulness the jury has found, and respondents do not challenge. The comparison of petitioners' receipts before and after respondents' unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damage.

* * *

Bigelow thus stands for two propositions: (1) the plaintiff should have a reasonable margin of benefit-of-doubt in proving up antitrust damages, and (2) comparison of before-and-after profits may be one way in which such proof can be furnished.

In scrutinizing damages claims in modern cases, courts often stress the importance this reasonable margin of doubt, and have often endorsed mechanisms like "yardstick" or "benchmarking" evidence (*i.e.*, the use of a comparable market as a kind of natural experiment for what would have happened absent the conduct), or simple before-and-after comparisons (*i.e.*, use of the *status quo ante* as a rough proxy for a counterfactual).[1042] But, at least in theory, these are not the only paths to proof: "a plaintiff may prove damages by a different measure tailored to the facts of the case, so long as the estimates and assumptions used rest on adequate data."[1043]

In practice, what this means is that damages arguments can depend heavily on expert analysis, and that a district court plays a critical role in limiting through *Daubert* motions practice the set of theories and arguments that make it to a factfinder in an antitrust trial.[1044]

CASENOTE: Conwood Co., L.P. v. U.S. Tobacco Co.

290 F.3d 768 (6th Cir. 2002)

A variety of methods can be seen in action in *Conwood*, a well-known monopolization case that we encountered in Chapter VII. In that case, the defendant, U.S. Tobacco Co. ("USTC"), was found to have maintained its monopoly by abusing a category-captain position, including the removal and destruction of trade display racks displaying rivals' products. *Conwood* also happens to be a terrifically controversial case dealing with the calculation of antitrust damages.

Conwood's expert, Dr. Leftwich, offered what he described as a "regression" analysis to prove the amount of harm inflicted by USTC on Conwood. He analyzed whether, during the relevant period (1990–97), there was a relationship between Conwood's market share at the start of the period and its share at the end. He concluded that in cases where Conwood started out with a "foothold," its share increased by a higher amount: in states where Conwood had at least 15% share in 1990, it grew on average by 6.5%; in states where it had at least 20% in 1990, it grew on average by 8.1%. Conwood argued that it could be inferred from these relationships that Conwood's market share would have increased by the same amounts in states where it did *not* have a foothold, but for USTC's

[1042] *See, e.g.*, Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974) ("There are two generally recognized methods of proving lost profits: (1) the before and after theory; and (2) the yardstick test. The before and after theory compares the plaintiff's profit record prior to the violation with that subsequent to it. The before and after theory is not easily adaptable to a plaintiff who is driven out of business before he is able to compile an earnings record sufficient to allow estimation of lost profits. Therefore, the yardstick test is sometimes employed. It consists of a study of the profits of business operations that are closely comparable to the plaintiff's. Although allowances can be made for differences between the firms, the business used as a standard must be as nearly identical to the plaintiff's as possible.").

[1043] Eleven Line, Inc. v. N. Texas State Soccer Ass'n, Inc., 213 F.3d 198, 207 (5th Cir. 2000).

[1044] *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592–95 (1993) (trial judge must make preliminary assessment of whether reasoning or methodology of expert is "scientifically valid" and "properly can be applied" to relevant facts, including: (1) testability; (2) subjection to peer review and publication; (3) known error rate; and (4) general acceptance by scientific community—amounting to a "flexible" inquiry to assess relevance and reliability).

conduct. The district court denied USTC's *Daubert* motion to exclude this expert evidence, and the jury appears to have accepted it.

On appeal, the Sixth Circuit held that it was not an abuse of the court's discretion to allow Dr. Leftwich to testify. Among other things, Dr. Leftwich indicated that he had evaluated some alternative explanations (*i.e.*, other than USTC's wrongdoing) for Conwood's slower growth in non-foothold states, and could not find such a relationship. He conducted a "before and after" test to see whether there was a relationship between foothold and market share growth in the seven years before 1990, and found no such relationship. Dr. Leftwich also conducted what he described as a "yardstick" analysis of another market in which Conwood was active but USTC was not—the loose-leaf tobacco market—and found no statistically significant relationship between foothold and market share growth. The court noted that regression, before-and-after, and yardstick analysis are all "generally accepted methods for proving antitrust damages."

As many commentators have since pointed out, the difficulty with Dr. Leftwich's testimony was that Conwood's better share growth between 1990 and 1997 in markets where it had a meaningful presence in 1990 tells us nothing useful about the effects of the challenged conduct. In a paper written after the litigation, the defendants' expert pointed out that: (1) the "before and after" analysis presented by Conwood's expert did not show a drop in profits during the relevant period, but rather an *increase* in Conwood's market share during that period; (2) in the "yardstick" market used by Conwood's expert—the loose leaf tobacco market, which was unaffected by the defendants' conduct—Conwood actually *lost* market share during the violation period; (3) the "regression" analysis was entirely disconnected from the alleged acts of monopolization.[1045] Herbert Hovenkamp, too, has offered an extended critique of the analysis, including the following observation:

> Before [regression analysis] can be meaningful there must be some good reason for believing that consistency of growth rates is closely related to the presence of exclusionary practices. For example, the Hubble Telescope was launched on April 25, 1990, the same year the plaintiff's claimed injuries began. The expert could just as plausibly have testified that "the launching of the Hubble Telescope caused Conwood to have slow growth in states where its share was low to begin with."[1046]

The damages award at trial, after trebling, was $1.05 billion.

Conwood aside, the latitude afforded to plaintiffs in proving damages has a limit, and different courts may define that limit in different ways. In *Marshfield Clinic*, for example, the Seventh Circuit—in an opinion written by Judge Posner—clearly felt that the plaintiff's experts had failed to take reasonable steps to isolate the harm attributable to an illegal market-division scheme. At trial, the plaintiff had won a sizeable jury verdict, but on appeal the Seventh Circuit had thrown out all the claims except those relating to the illegal division of markets. And, as the following extract demonstrates, the court of appeals was unsatisfied with the plaintiff's purported quantification of the harm resulting from that market division. As a result, it reversed the district court's damages award in its entirety, leaving the plaintiff with injunctive relief only.

Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic

152 F.3d 588 (7th Cir. 1998)

Judge Posner.

[1] Blue Cross bought services from a seller [the Marshfield Clinic] that had agreed with other sellers to refrain from competing for customers, and it is likely, whether or not provable with the degree of precision required to ground an award of damages, that unless the defendant is enjoined Blue Cross will have to pay Marshfield Clinic more than if the Clinic were not a member of an anticompetitive conspiracy directed in part against the plaintiff, the conspiracy that the suit seeks to destroy.

[1045] D.H. Kaye, *Adversarial Econometrics in* United States Tobacco Co. v. Conwood Co., 43 Jurimetrics 343 (2003).

[1046] Herbert Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005) 88. *See also*, *e.g.*, Joshua D. Wright, *Antitrust Analysis of Category Management:* Conwood v United States Tobacco Co., 17 Sup. Ct. Econ. Rev. 311, 333–35 (2009).

[2] A more difficult question is whether the [district court] judge was right to conclude that Blue Cross could not prove what damages it had sustained as a result of the division of markets. The usual way to measure damages in such a case would be to compare the prices that the Marshfield Clinic charged Blue Cross before and during the conspiracy, or inside and outside the region covered by the conspiracy, or during the conspiracy and after it ended (if it has ended—the injunction issued by the district court before the first appeal was in effect for less than six weeks before we stayed it pending the appeal), correcting by various statistical techniques for any non-conspiratorial factors that might have caused the prices that are being compared to be different from each other. This method or congeries of methods was unavailable to Blue Cross, however, because the division of markets embraced the entire period and region in which the necessary data are obtainable; at least Blue Cross made no effort to show otherwise. Instead it compared the Marshfield Clinic's prices for medical services between 1988 and 1995 with the prices charged by other providers of medical care for the same services during the same period elsewhere in Wisconsin, on the theory that those other prices, properly adjusted, are what Blue Cross would have had to pay the Clinic and the Clinic's competitors had it not been for the conspiracy.

[3] This—the so-called "yardstick" method of computing antitrust damages—was not improper. But the qualification "properly adjusted" is at least as vital as when the plaintiff is trying to prove damages by comparing the defendant's prices at one period or in one area with its prices in another period or another area rather than (as under the yardstick approach) comparing the defendant's prices with the prices of other sellers. Any non-conspiratorial factors likely to have made the prices charged by the Marshfield Clinic higher than the prices charged by other health-care providers had to be taken into account in order to make a responsible estimate of the prices that Blue Cross would have paid had it not been for the conspiracy.

[4] The most important factors were the amount and quality of the Marshfield Clinic's service and its market share. The significance of market share is that even though the Marshfield Clinic was not proved to have monopoly power, it does have a large market share throughout north-central Wisconsin, which might confer enough market power on it to enable it all by itself, without dividing markets with its competitors, to charge a price somewhat above the average for the state. The larger a firm's market share is, the larger is the percentage increase that the other firms in the market must make in their output to offset the effect of the firm's curtailing its output in order to drive the market price above the competitive level. For example, if a firm has 50 percent of the market and as a corollary to jacking its price above the existing, competitive level reduces its output by 20 percent (say from 1,000 to 800 units), the other firms will have to increase their output by an average of 20 percent (from 1,000 to 1,200 units) in order to offset completely the reduction in the output of the dominant firm. This may be difficult for them to do, at least in the near term, and so the dominant firm, though not a monopolist, will be able to get away, at least for a time, with its price hike. That may have been the situation of the Marshfield Clinic.

[5] To make the necessary corrections and thus establish that there was enough evidence to enable a jury to make a responsible estimate of damages, Blue Cross submitted to the district court multiple reports by two economic experts, John Beyer and Thomas McGuire. Beyer's two reports, which compute a range of damages exceeding $7 million from the division of markets, are worthless. They attribute the entire difference between the prices of the Marshfield Clinic and the prices of other Wisconsin providers of medical services to the division of markets, with no correction for any other factor except differences in the treatment mix. Statistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment.

[6] McGuire's reports are more promising, though as his bottom line is a damages figure only $11,000 below the lower of Beyer's highest two estimates, it is a little hard to take seriously. For how is it that after making the subtractions that Beyer failed to make, McGuire came up with essentially the same figure? And is it purely a coincidence that this number, after trebling, would give Blue Cross the same $20 million judgment (actually a little more) that it won in the first trial, even though the division of markets was among the least important of the many antitrust violations charged in this suit? Of course it is possible that the alleged violations were redundant; like the assassins of Rasputin, who drowned him after poisoning and shooting him in order to make sure he was really dead, the Marshfield Clinic may have stacked the division of markets on top of other practices any one of which would have had the same effect on its customers' prices. But this observation cannot help Blue Cross. For only one

of the practices was illegal, the division of markets. If it added nothing to the price effects of the legal practices, it did not cause Blue Cross any harm. [. . .]

[7] McGuire did try to correct for differences in the quality of the services rendered by the Marshfield Clinic compared to the statewide average; but quality and quantity are not the same. If the Clinic because of its reputation . . . for high quality gets referred to it patients who are sicker than average and so require longer treatment, the average price per patient will be higher simply as a function of the more expensive or protracted care required on average by a sicker patient. As far as the record discloses, this is all there is to the higher average price charged by the Marshfield Clinic. McGuire also failed to correct for the effect of market share on the Clinic's prices. In sum, no reasonable jury could estimate the plaintiff's damages from the reports of the plaintiff's experts.

[8] In addition to those reports, there is some nonexpert evidence of damages, consisting of discounts of 15 or 20 percent that the Clinic gave to some of its coconspirators. But this evidence would not enable a reasonable jury to estimate the plaintiff's damages either. The discounts were given in exchange for bulk referrals, and there is no evidence that customers of the Marshfield Clinic, even so large a customer as Blue Cross, would have gotten equivalent discounts had the clinic been competing rather than conspiring. They might have, but no evidence was presented that they probably would have.

[9] We are not saying that Blue Cross did not in fact lose any money as a result of the division of markets. It may well have, as we suggested in discussing the issue of the injunction. (But remember that there is a difference between an actual and a threatened harm. And there is also, and here critically, a difference between an actual and a quantifiable harm and also between a quantifiable and a quantified harm—and only the last supports an award of damages.) The Clinic's own economic experts estimated that the division of markets may have caused the Clinic's prices to be between .4 and .9 percent higher than they would otherwise have been. Blue Cross, however, did not cite that estimate in its briefs to us, and this raises an interesting question of waiver or forfeiture. [. . .]

[10] So the district judge was right to throw out the damages claim on summary judgment but wrong to throw out the injunction as well and therefore premature in pronouncing the defendant the winner of this lawsuit.

NOTES

1) What, if anything, was wrong with the *Conwood* expert evidence? Do you agree that it was effectively worthless and that the judge should have excluded it under *Daubert*?
2) Do you agree with the following statement: "In an antitrust case, damages are generally less important than injunctions to both plaintiffs and defendants." Explain your answer.
3) What kinds of cases are private litigants more likely to bring than government enforcers? What about vice versa?
4) Class action plaintiffs' counsel commonly receive around 30% of any recovery as contingent fees, amounting to many millions of dollars. Recoveries of individual plaintiffs are often small. Does this suggest that something is amiss? Explain.
5) Which is the more important goal for antitrust damages law: compensation or deterrence? Why? In what respects does existing law fail to optimally serve that goal? Do we ever have to choose between the two?
6) Suppose you are asked to advise a jurisdiction that is setting up an antitrust enforcement system for the first time. Would you advise it to adopt private treble damages?

D. Limitations and Laches

Private plaintiffs and states, unlike the federal government, face a four-year statute of limitations for civil antitrust claims.[1047] But the application of a statute of limitations to an antitrust claim can be more complicated than it appears: in particular, it is not always clear when a violation is completed and when it is ongoing.

[1047] 15 U.S.C. § 15b. *See also* 15 U.S.C. § 16(i) (tolling civil limitations during a government antitrust suit); 18 U.S.C. § 3282 (five year limitations period in a federal criminal case).

The following two cases deal respectively with an unlawful price-fixing conspiracy and an unlawful acquisition. Do they indicate the only sensible results? Are they consistent with one another? Should they be?

In the adorably named *Pre-Filled Propane Tank Antitrust Litigation*, the plaintiffs were direct purchasers of—you guessed it—pre-filled propane tanks, alleging a conspiracy among suppliers to charge supracompetitive prices for the tanks. The plaintiffs argued that the four-year statute of limitations should be calculated from the most recent occasion on which a defendant had, pursuant to the conspiracy, either sold a tank at an anticompetitive overcharge or communicated about the conspiracy. The Eighth Circuit, sitting *en banc*, declined to consider the communication theory but agreed that each sale at an anticompetitive overcharge restarted the four-year statute of limitations.[1048]

In re Pre-Filled Propane Tank Antitrust Litigation

860 F.3d 1059 (8th Cir. 2017) (en banc)

Judge Benton.

[1] Actions under Section 1 of the Sherman Act must be filed "within four years after the cause of action accrued." 15 U.S.C. § 15b. Generally, the period commences on the date the cause of action accrues, that being, the date on which the wrongdoer commits an act that injures the business of another.

[2] Plaintiffs allege a continuing violation—an exception to the general rule—which restarts the statute of limitations period each time the defendant commits an overt act. An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff. [. . .]

[3] Plaintiffs allege two types of overt acts within the limitations period: (1) Defendants' sales to Plaintiffs at artificially inflated prices; and (2) conspiratorial communications between Defendants about pricing and fill levels. The first type of act is at issue here—whether sales at artificially inflated prices are overt acts that restart the statute of limitations. Also at issue is whether Plaintiffs allege a continuing violation exception sufficient to restart the statute of limitations. [. . .]

[4] The Supreme Court of the United States addressed the first issue in *Klehr v. A.O. Smith Corporation*, 521 U.S. 179 (1997). The Supreme Court defined a continuing violation under antitrust law:

> Antitrust law provides that, in the case of a continuing violation, say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Klehr, 521 U.S. at 189. [. . .]

[5] Every other circuit to consider this issue applies *Klehr*, holding that each sale in a price-fixing conspiracy is an overt act that restarts the statute of limitations.

[6] The other issue is whether the amended complaint adequately pleads a continuing violation sufficient to restart the statute of limitations. Under *Klehr*, Plaintiffs must allege: (1) a price-fixing conspiracy; (2) that brings about a series of unlawfully high priced sales during the class period; and (3) sales to the plaintiffs during the class period. In paragraph 111 of the amended complaint, Plaintiffs allege all three necessary elements:

> Plaintiffs purchased Filled Propane Exchange Tanks from Blue Rhino or AmeriGas on multiple occasions during the Class Period. On each occasion, Plaintiffs purchased Filled Propane Exchange Tanks containing only 15 pounds of propane, pursuant to the conspiracy, but sold at the price they would have been charged for 17-pound tanks but for the conspiracy. As

[1048] Note that this does not mean that the plaintiff can recover damages for earlier injuries! *See*, *e.g.*, CSX Transportation, Inc. v. Norfolk S. Ry. Co., Case No. 2:18CV530, 2023 WL 25344, at *6 (E.D. Va. Jan. 3, 2023) (discussing this issue in detail).

> Defendants kept prices constant despite the fill level reduction, this amounted to an effective price increase of 13%. [. . .]

[7] [T]he allegations of a price-fixing conspiracy are sufficient. Plaintiffs plead that Defendants "conspired and acted in concert to eliminate competition by reducing the amount of propane they would put in their tanks, thereby raising the per-pound price of propane across the country as well as by dividing the market for Filled Propane Exchange Tanks in violation of federal antitrust law." Even more specifically, they plead that "Blue Rhino's President, Tod Brown, and AmeriGas's Director of National Accounts, Ken Janish, exchanged seven phone calls on June 18 and 19, 2008, during which AmeriGas agreed that if Blue Rhino reduced its fill levels to 15 pounds per tank, AmeriGas would follow suit." Defendants later "engaged in dozens of calls, emails, and in-person meetings to coordinate a unified front that would leave the largest retailers and then the entire industry with no choice but to accept their demands." "[N]o later than spring 2008," Defendants "reduced their fill levels from 17 pounds per tank to 15 pounds per tank while maintaining the same price per 'full' tank, for the purpose of increasing their margins on the sale of propane exchange tanks." "This collusion effectively raised the prices charged to Plaintiffs by more than 13% per pound." [. . .]

[8] According to Defendants, Plaintiffs' allegation that the propane conspiracy succeeded made the maintenance of fill levels and prices mere "unabated inertial consequences" and not overt acts continuing the conspiracy. But the question here is not whether the amended complaint alleges other overt acts in addition to sales to the Plaintiffs; the issue is whether the amended complaint alleges that the conspiracy continued when the sales took place. If so, under *Klehr*, each sale to the plaintiff, is an overt act that restarts the statute of limitations.

[9] In any event, this court has never applied the "unabated inertial consequences" test to a horizontal price-fixing conspiracy, let alone one where Plaintiffs allege that "sales pursuant to the conspiracy continued throughout the Class Period," and "Defendants continued to have regular communications regarding pricing, fill levels, and market allocation until at least late 2010." In context, Defendants' conspiracy "succeeded" in "forc[ing] Walmart and other large retailers to accept the fill reduction" and raising the "wholesale prices at which [they] sold propane in Filled Propane Exchange Tanks to retailers throughout the United States." This success did not end the conspiracy, but rather was a precondition to the price-fixing scheme Plaintiffs allege continued into the class period. [. . .]

[10] The amended complaint alleges sufficient factual matter, accepted as true, to show a continuing violation to restart the statute of limitations, and, therefore, to state a claim to relief that is plausible on its face. Because it is not clear from the face of the complaint that the action is barred by the applicable limitations period, the district court erred in granting the motion to dismiss.

CASENOTE: Reveal Chat Holdco, LLC v. Facebook, Inc.

471 F. Supp. 3d 981 (N.D. Cal. 2020)

In *Reveal Chat*, a private plaintiff challenged, among other things, the acquisition by Facebook of Instagram and WhatsApp. The district court held that the continuing violation doctrine was not triggered by Facebook's subsequent holding and integration of the assets, with the result that the statute of limitations was not suspended.

The court began its analysis by noting that, in the Ninth Circuit, a continuing violation requires "an overt act [by the defendant] during the limitations period that meets two criteria: 1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff." Here, the plaintiffs had argued that Facebook had engaged in a continuing violation, after the acquisitions of Instagram and WhatsApp, by announcing in March 2019 the continued technical integration of those apps. This announcement of further integration, according to the plaintiff, inflicted "a new and accumulating injury."

But the court took a different view. "The continuing violation doctrine does not make sense in the context of anticompetitive mergers, and therefore it should not apply to Section 7 claims under the Clayton Act. Section 7 of the Clayton Act is the mechanism for challenging a potentially anticompetitive merger, and it has a statute of limitations within which mergers must be challenged. If the continuing violation doctrine applied, every business decision could qualify as a continuing violation to restart the statute of limitations as long as the firm continued to

desire to be merged. This would write the statute of limitations out of the law by allowing a merger to be challenged indefinitely. This cannot be the case because unlike a conspiracy or the maintaining of a monopoly, a merger is a discrete act, not an ongoing scheme, and once the merger is completed, the plan to merge is completed, and no overt acts can be undertaken to further that plan. Thus, the Court agrees with the Eighth Circuit and the Central District of California that the continuing violation doctrine does not apply in the context of Section 7 claims under the Clayton Act." To the extent that the plaintiff alleged that the acquisition constituted a violation of the Sherman Act as well, the same conclusion would apply under that statute also.

Limitations is not the only time-bar on private suits. The doctrine of laches also limits the period within which a complaint may be filed: this equitable doctrine generally precludes suit by reason of an inequitable delay in filing a complaint.[1049] Laches was front-and-center in the States' challenge to Facebook's 2012 and 2014 acquisitions of Instagram and WhatsApp, filed in 2020.

New York v. Facebook, Inc.

549 F. Supp. 3d 6 (D.D.C. 2021)

Judge Boasberg.

[1] Although what constitutes an "unreasonable delay" in filing suit is generally a fact-intensive question, in the context of injunctive actions under Section 16 [of the Clayton Act], many courts have held that the Clayton Act's four-year statute of limitation on damages actions should be used as a guideline for computing the laches period. As . . . courts explain, [t]he doctrine of laches is premised upon the same principles that underlie statutes of limitation: the desire to avoid unfairness that can result from the prosecution of stale claims.

[2] The starting presumption, then, is that regardless of whether a Section 16 plaintiff seeks damages or an injunction, it must file its lawsuit within four years from the accrual of the claim. Generally, a Section 7 action challenging the initial acquisition of another company's stocks or assets accrues at the time of the merger or acquisition, giving the plaintiff four years from that time to sue. . . . Following the lead of the parties and the cases, [the court] uses the terms "acquisition" and "merger" interchangeably for purposes of this analysis.

[3] This presumptive four-year laches period is particularly appropriate for challenges to acquisitions. The traditional remedy in such cases, which Plaintiffs seek here, is divestiture of the acquired assets and/or stock. Such a remedy, if ordered well after the merger has closed, will usually prejudice the defendant by inflicting substantial hardship and competitive disadvantage, especially where its business operations have been combined with those of the acquired company. For that reason, where the equity relief sought in a merger challenge is retroactive in character, such as divestiture of illegally acquired assets, Areeda and Hovenkamp argue that the four-year time limit should be absolute. Indeed, as they note, courts frequently find a divestiture remedy clearly unfair and unwarranted after delays in filing much shorter than four years—sometimes only months or even days after the merger's announcement. [. . .]

[4] Given these precedents, the Court concludes that Plaintiffs' challenges to Facebook's 2012 and 2014 acquisitions are barred by laches. Going by the four-year "guideline" alone, which is generous compared to the decisions set out above, and which prominent authorities argue "should be absolute," the States missed their window to sue by years. In the case of the Instagram acquisition, the comparable statute of limitations time period had run twice over by the time they filed. The Court is aware of no case, and the States provide none, in which a plaintiff other than the United States (against which laches does not apply), whether a state or a private party, was awarded equitable relief after such long post-acquisition delays in filing suit. Having thus slumbered on their rights, Plaintiffs' equitable claims are now barred.

[1049] *See, e.g.*, Russell v. Todd, 309 U.S. 280, 287 (1940) (defining laches as "the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant").

[5] That result is confirmed by applying the standard laches elements. In brief, Plaintiffs' years-long delay in bringing this action was inexcusable as each challenged act was highly publicized, and Facebook would be prejudiced by the unreasonable delay.

[6] First, the States' long delays were unreasonable and unjustified as a matter of law. Both acquisitions were, per Plaintiffs' allegations, publicly announced, and the States were thus aware or certainly should have been aware of them from those points onward. The Complaint itself makes clear that concerns as to the effects of both on competition were apparent at the time. Plaintiffs allege that Facebook was the dominant player in Personal Social Networking Services at least as early as 2011, before either acquisition. Their position in this case, furthermore, is that when the acquiring firm is a dominant firm or monopolist, competitive harm from the acquisition of even a potential competitor can be predicted with considerably more confidence, indicating a harsh rule against such mergers.

[7] As to each acquisition, moreover, either judicially noticeable facts or the Complaint's allegations provide objective confirmation of contemporaneous antitrust concerns. After Facebook announced its plans to purchase Instagram in April 2012, the FTC conducted a highly publicized, four-month-long investigation to determine whether the proposed acquisition would violate Section 7 of the Clayton Act. Although the agency ultimately allowed the merger to proceed with no action, the States' choice not to assert their own concerns at that time, let alone at any time in the next eight years, "bear[s] upon the issue of laches. . . . .

[8] Second, prejudice to Facebook, were equitable relief to be awarded now, is also apparent. As an initial matter, the bare fact of delay beyond the analogous four-year statute of limitations creates a rebuttable presumption of prejudice. The facts alleged in the Complaint, moreover, confirm the existence of economic prejudice here. According to the States, for the last five-plus years Facebook has made business decisions and allocated firm resources based on holding Instagram and WhatsApp, and it has also integrated their offerings to some extent into its core business. Although short of full business integration, Defendant's expanded use of and investment in the acquired assets establishes economic prejudice resulting from Plaintiffs' delay.

[9] Equitable relief would similarly prejudice Facebook's shareholders, especially those who invested within the last several years, by which point the WhatsApp and Instagram acquisitions had become old news. [. . .]

[10] The States, unsurprisingly, object to the foregoing analysis on a number of grounds. The Court marches through each, but ultimately sticks to its guns.

a. Applicability of Laches

[11] Plaintiffs first maintain that the usual laches framework does not properly govern in cases brought by states suing *parens patriae* and in the public interest. They cite no authority for that contention . . . . The dearth of cases . . . applying laches to bar merger challenges by states, however, does not somehow establish that states are immune from the doctrine. It instead seems to reflect the fact that there are very few cases like the present one, in which state plaintiffs delayed years and years in seeking equitable relief from an allegedly unlawful acquisition.

[12] At any rate, to the extent that the question of laches' applicability to Section 16 suits by state plaintiffs is open, [*Gov't of Puerto Rico v. Carpenter Co.*, 442 F. Supp. 3d 464, 474 (D.P.R. 2020) (granting motion to dismiss on laches grounds)] had the correct answer. The only other case that is close to being on point, *California v. American Stores Co.*, [495 U.S. 271, (1990)], also supports the applicability of laches to state merger challenges. There, California sued in its capacity as parens patriae under Section 16 to unwind the merger of two supermarket chains, claiming that it violated Section 7. . . . Throughout its opinion, the Court repeatedly referred to the suit as a "private action under § 16 of the Clayton Act," and emphasized that despite its holding, equitable defenses such as laches may protect consummated transactions from belated attacks by private parties under Section 16. [. . .]

[13] In expanding the universe of antitrust enforcers beyond the United States itself, Congress thus drew no distinction between states and private litigants: both simply came within the statute's authorization of any person to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws. As such, the Congressional judgment was that states, like private parties, are entitled to relief under Section 16 under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is

granted by courts of equity—"conditions and principles" that have always included the bar of laches against plaintiffs whose unreasonable delay prejudices the defendant. [. . .]

[14] Although the doctrine of laches therefore applies to parens patriae suits such as this one, the Court does not mean to suggest that the presence of state plaintiffs has zero effect on the analysis. Laches is an equitable doctrine, and in the balancing of the equities, it is of course relevant that this suit is brought not by a competitor hoping to seriously interfere with a rival's business operations, but rather by many of the states of the Union. Even giving the States' interests significantly more weight than a private actor's would receive, however, does not lead to a different result. Plaintiffs waited six and eight years, compared to the four-year guideline statute of limitations, to challenge two highly publicized acquisitions—one of an existing nascent competitor, one of a potential future competitor—by a firm that they allege was already a "dominant" monopolist. To hold that laches did not apply in those circumstances would essentially declare the States immune from the doctrine for all practical purposes. While many might welcome such a regime as a matter of policy, it is not the system we have.

b. Ongoing Violation

[15] The States next posit that even if laches applies, their "Complaint is timely," despite the long delays between the mergers at issue and their filing, "because the[y] allege ongoing conduct" by Facebook. They appear to contend, albeit not with perfect clarity . . . that . . . the Instagram and WhatsApp acquisitions themselves are "ongoing" because Facebook still holds the purchased assets. {*Eds: for brevity and clarity we are omitting reference to a second theory here.*}

[16] As noted above, the general rule is that courts measure the reasonableness of a private plaintiff's delay in suing for divestiture relative to the announcement of the transaction and its subsequent consummation. . . .

[17] . . . The States contend that they may . . . seek equitable relief now, no matter what has come before, because time has made clear the more recent continuing anticompetitive effects of the Instagram and WhatsApp acquisitions. [. . .]

[18] [None of the Supreme Court cases cited by the States], however, [either] hold nor imply that the limitations or laches period for challenging a merger is forever tolled. The cases merely clarify that a violation of Section 7 . . . can arise (and persist) not only at the time of the merger, but also at any time afterward so long as the acquired assets are still held. That is a principle of substantive liability; it says nothing about when a plaintiff's cause of action accrues, or, by the same token, when it becomes time barred (or when delay becomes unreasonable). Areeda & Hovenkamp helpfully analogize to the doctrine of adverse possession: The fact that each day of a trespasser's occupancy constitutes a trespass, and thus a violation, does not operate so as to toll the statute of limitations, which accrues when the injury is first actionable. At some point, a trespasser's violation of the law, despite being ongoing, is immunized from suit. By the same token, even if Facebook's continued holding of Instagram and WhatsApp violates Section 7 in some sense at this very moment, that does not make a present challenge timely. Such a result would write the statute of limitations for Section 7 damages actions out of the Clayton Act and similarly eliminate the laches defense that Congress expected to govern Section 16's cause of action for injunctive relief. [. . .]

c. Prospective Relief

[19] The States next argue that because they have alleged ongoing harm flowing from the damage to competition caused by the WhatsApp and Instagram acquisitions, that renders the relief they seek prospective, and laches generally does not apply to bar claims for prospective injunctive relief. As to the remedy of divestiture, that argument makes little sense; indeed, it would mean that all of the cases applying laches in merger challenges were wrongly decided. Although divestiture is a form of equitable relief, it is not generally thought of as prospective but rather retroactive in character, as it is aimed at unwinding a transaction. The fact that the challenged acquisitions allegedly continue to cause ongoing harm does not affect that characterization; on the contrary, where a plaintiff's complaint is that it is experiencing continuing, present adverse effects of past action, a reparative or backward-looking decree such as a divestiture order is the appropriate remedy. [. . .]

[20] Down to their last card, Plaintiffs maintain that dismissing a claim based on laches at the Rule 12(b)(6) stage is generally improper because laches is an affirmative defense, as to which the defendant, here Facebook, bears the burden of proof. . . .

[21] The Court is aware that the D.C. Circuit has echoed the warning that a complaint seldom will disclose undisputed facts clearly establishing the laches defense. "Seldom," though, does not mean "never." Just as a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed, so too must it retain the power to avoid sending the parties into discovery when there is no reasonable likelihood, based on the events related in the complaint, that Plaintiffs will ultimately be entitled to the injunctive relief they seek. . . .

[22] Ultimately, this antitrust action is premised on public, high-profile conduct nearly all of which occurred over six years ago—before the launch of the Apple Watch or Alexa or Periscope, when Kevin Durant still played for the Oklahoma City Thunder, and when Ebola was the virus dominating headlines. The Complaint's allegations themselves make clear that the States could easily have brought suit then, just as they make clear that any equitable relief this Court could or would order now would greatly prejudice both Facebook and third parties. The system of antitrust enforcement that Congress has established does not exempt Plaintiffs here from the consequences of their choice to do nothing over the last half decade. The Court accordingly finds that, as a matter of law, their challenges to Facebook's acquisitions . . . are barred by the doctrine of laches or otherwise furnish no basis for the injunctive relief sought.

* * *

Laches is not always such a good friend to merging parties. In the *Steves* private merger challenge discussed earlier in this chapter, the defendant raised a laches defense on the ground that the deal was announced in 2012 but Steves had not sued until 2016. The Fourth Circuit was unmoved.

Steves and Sons, Inc. v. JELD-WEN, Inc.

988 F.3d 690 (4th Cir. 2021)

Judge Diaz.

[1] Laches is a defense to a divestiture request. For the defense to succeed, JELD-WEN must prove both (1) that Steves unreasonably delayed in bringing suit and (2) that Steves's unreasonable delay prejudiced JELD-WEN. The district court found that JELD-WEN satisfied neither element, and we review that finding for abuse of discretion.

[2] As to unreasonable delay, JELD-WEN makes three points. None is persuasive. [. . .]

[3] First, JELD-WEN contends that a nearly four-year delay after a merger's consummation is presumptively unreasonable. We disagree. Laches turns on the particular circumstances of the case, militating against a singular focus on a merger's closing date. And we measure delay not from the date of the challenged action, but from when the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action, and was able to pursue a claim.

[4] Some courts have relied on laches to dismiss post-consummation challenges to mergers. None of the plaintiffs in those cases, however, offered a good excuse for their delay. So, those cases don't support a singular focus on the date that a merger is consummated.

[5] Nor is such a focus warranted by the hardships of unwinding a completed merger. While those hardships factor into the prejudice stage of the laches analysis, they don't obviate our need to consider whether the plaintiff's delay was unreasonable. And even if a defendant's laches defense fails, it can still prevent divestiture by showing that the balance of hardships (one of the four equitable factors) tips in its favor. Thus, there's no need for the hardships of unwinding a merger to bleed into our review of whether Steves's delay was reasonable. [. . .]

[6] JELD-WEN's second argument is that Steves had notice of its injury right after the merger was announced and thus shouldn't have waited until fall 2014 to pursue relief. Specifically, Steves knew that the merger, by

removing a competitor from the market, would hinder it from buying doorskins from other suppliers and weaken JELD-WEN's incentive to provide good service. Further, Masonite stopped selling Steves any doorskins in 2012, so for those next two years, Steves knew that its only option was to buy from JELD-WEN—yet Steves didn't seek relief.

[7] Again, we disagree with JELD-WEN. It's true that Steves knew about the two injuries that support its past-damages claim in 2012. But Steves lacked notice of the threatened injury on which its divestiture claim is based—its potential loss of access to doorskins in 2021—until 2014, when JELD-WEN indicated that it was terminating the Supply Agreement and Masonite announced that it would stop selling to the Independents entirely. Before then, Steves's access to doorskins was contractually protected for the foreseeable future. The Supply Agreement was set to renew perpetually, and JELD-WEN's CEO had referred to it as a "life time [sic]" deal.

[8] Moreover, Masonite had previously sought a long-term agreement with Steves, so Steves had reason to believe that it had a fallback if its relationship with JELD-WEN soured. That fallback vanished in 2014, when Masonite announced its strategy to kill off the Independents. JELD-WEN's notice of termination and Masonite's announcement are key facts giving rise to Steves's cause of action, which Steves couldn't have discovered before 2014.

[9] The injuries that Steves suffered prior to 2014 wouldn't have supported a divestiture claim. Absent the threat to its survival that emerged only then, Steves couldn't have shown any of the first three *eBay* factors—a threatened irreparable injury, inadequacy of legal remedies, and that the balance of hardships tipped in its favor—because its earlier injuries were compensable by money damages (as evidenced by the award that Steves received in this case).

[10] Logic dictates that unreasonable delay does not include any period of time before Steves was able to pursue a claim. And, as the Supreme Court has explained, laches doesn't require a plaintiff to sue soon, or forever hold [their] peace. In other words, a plaintiff need not challenge an illegal act immediately after it happens; it may wait until it can estimate whether the act threatens it with irreparable harm. Thus, it was reasonable for Steves to wait to pursue relief until 2014, when it learned that the merger threatened its access to doorskins (and thus its survival) after September 2021. [. . .]

[11] JELD-WEN's last argument about delay is that Steves lacks a good excuse for not seeking divestiture between 2014 and 2016. But evidence supports the district court's finding that Steves spent that time diligently exhausting its alternative remedies. Specifically, Steves reached out to Masonite and foreign suppliers, explored building its own doorskin plant, engaged in settlement talks and mediation with JELD-WEN, and asked for (and cooperated with) a Justice Department investigation. Moreover, between September 2015 and June 2016, JELD-WEN signed a series of agreements with Steves reciting their mutual desire to settle their dispute. It would disserve the strong policy in favor of nonjudicial dispute resolution if a defendant successfully could assert that a period of settlement attempts—i.e., efforts to find nonjudicial remedies—contributes to the establishment of laches, particularly when the defendant has expressed a desire to settle.

[12] In short, the district court didn't abuse its discretion in finding that Steves's delay was reasonable, and thus properly denied JELD-WEN's laches defense. As JELD-WEN didn't prove unreasonable delay, we need not address whether the delay prejudiced JELD-WEN.

Fraudulent Concealment

In antitrust cases, as in other settings, courts are often willing to recognize that the statute of limitations should not begin to run if the defendant is fraudulently concealing its wrongdoing. Courts customarily require for this purpose: (1) that the concealment be intentional; (2) that it successfully prevented the plaintiff from learning of the existence of the illegality; and (3) that the plaintiff's ignorance was not traceable to a lack of due diligence.[1050] Courts formulate the concealment test differently: for example, the Second Circuit recognizes that conduct may be "self-concealing" by its nature, while the Ninth Circuit requires that the defendant "affirmatively misled" the

[1050] *See, e.g.*, Chandler v. Phoenix Servs., L.L.C., 45 F.4th 807, 815 (5th Cir. 2022); Edmonson v. Eagle Nat'l Bank, 922 F.3d 535, 557 (4th Cir. 2019); Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012); State of N.Y. v. Hendrickson Bros., 840 F.2d 1065, 1083 (2d Cir. 1988).

plaintiff. Do you think the test for concealment of (alleged) price-fixing and bid-rigging conspiracies should be the same as the test for concealment of, say, (alleged) exclusionary vertical contracts and mergers?

NOTES

1) When is an antitrust case untimely?
2) Which of the considerations identified by the Eighth Circuit in *Ginsburg* do you find most compelling?
3) When is the "best" time for a State AG to challenge a merger that may turn out to be harmful to competition: and does the *Facebook* decision on this point seem likely to result in better or worse enforcement practices? What positive and negative effects can you foresee?
4) Is there a good reason to apply the doctrine of laches against state government enforcers but not against federal government enforcers?
5) Suppose that an acquisition of a target company violates Section 7. Should the continued holding of the target constitute an ongoing violation for the purposes of applicable time bars? Should it constitute an ongoing violation for the purposes of Section 13(b) of the FTC Act (which limits the FTC's district-court litigation authority to ongoing and imminent violations of law)?
6) Consumers generally do not know the terms of the nonpublic dealings between upstream companies in the supply chain, so would often not be well placed to learn about anticompetitive agreements and other practices. What ideal rule would optimally balance fairness and efficiency here?

E. Interaction of Private and Government Enforcement

An important character is often found lurking, one way or another, in and around private antitrust litigation: the federal government. Sometimes the federal government will involve itself directly, by filing amicus briefs or statements of interest in order to make its position known on matters of significance.[1051]

But the federal government can be an important figure even when it is not present. Plaintiffs and defendants alike sometimes try to make some hay out of the fact that the antitrust agencies either have, or have not, taken particular action. For example, a plaintiff might argue that its allegations are more plausible because a government investigation or litigation is pending. Conversely, a defendant might argue that the court should be reluctant to draw inferences in favor of a private plaintiff when the federal agencies have chosen not to investigate—or have investigated but chose not to take further action.

The following three extracts give a flavor of some different perspectives on the interaction between decisions of various actual or potential antitrust enforcers. In *Steves*, the district court had excluded any evidence relating to a DOJ investigation; on appeal, the Fourth Circuit found no abuse of discretion in so doing. In *Deutsche Telekom*—the challenge to the Sprint/T-Mobile merger—the district court accorded "some deference" to the fact that DOJ had accepted a consent decree rather than suing to block the transaction (note that the plaintiffs in that case were states, not private plaintiffs), ultimately rejecting the states' challenge to the deal. Finally, in *In re Graphics Processors*, the district court explicitly declined to treat the fact of an ongoing federal antitrust investigation as a basis to infer plausibility of a private suit. Some other courts have taken a different view.[1052]

You may remember from Chapter XI that the Justice Department said in its own brief in the *Steves* case that the court should place no weight of any kind on the Justice Department's inaction in that case, stating:

> [N]o inference should be drawn from the Division's closure of its investigations into JELD-WEN's proposed and consummated acquisition of CMI. As the United States has stated twice

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[1051] *See, e.g.*, Statement of Interest of the United States, Nostalgic Partners LLC v. Office of the Commissioner of Baseball, Case No. 1:21-cv-10876 (S.D.N.Y. filed June 15, 2022); *Amicus Curiae* Brief of the Federal Trade Commission, Staley v. Gilead Sciences, Inc., Case 3:19-cv-2573 (N.D. Cal. Oct. 25, 2019).

[1052] *See, e.g.*, Hinds Cty., Miss. v. Wachovia Bank N.A., 700 F. Supp. 2d 378, 394 (S.D.N.Y. 2010) ("Although pending government investigations may not, standing alone, satisfy an antitrust plaintiff's pleading burden, government investigations may be used to bolster the plausibility of § 1 claims."); Starr v. Sony BMG Music Ent., 592 F.3d 314, 324 (2d Cir. 2010) (noting in support of a plausibility finding that "defendants' price-fixing is the subject of a pending investigation by the New York State Attorney General and two separate investigations by the Department of Justice.").

> previously in this case in response to JELD-WEN's assertions, there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive.[1053]

However, you may also remember statements by the Justice Department indicating that when it decides to *accept* a remedy, that decision should receive some deference in the event of a state-AG challenge to the same transaction.[1054]

As you read these passages, consider whether you think there are, or should be, clear or consistent rules about the inferences that a court should take from agency action or inaction. In light of what you know about agency powers, priorities, incentives, and resources, how should courts react to the knowledge that an agency is, or is not, investigating or litigating? Should juries be told? Are there any dangers with sharing this information? Conversely, how should agencies respond to the pendency or possibility of ongoing private litigation? How might the incentives of private litigants differ from those of the agencies, or the public interest?

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Judge Diaz.

[1] JELD-WEN criticizes the exclusion of evidence related to the Justice Department's investigations of the merger. Specifically, the district court forbade evidence that the Department had twice investigated the merger without challenging it. The court also permitted evidence that Steves had stated (in 2012) that it didn't object to the merger and (in 2015) that the prices that it was paying JELD-WEN had been flat, while barring evidence that these statements were made to the Justice Department. The court limited JELD-WEN to asking Steves's witnesses whether Steves had made official statements to that effect.

[2] We conclude that the district court acted within its discretion. The Department's decision not to pursue the matter isn't probative as to the merger's legality because many factors may motivate such a decision, including the Department's limited resources.

[3] And in general, a defendant may not use an enforcement authority's decision not to take action as a sword because inaction on the part of the government cannot be used to prove innocence. In short, evidence of the Department's decision could have misled the jury into thinking that the Department deemed the merger to be legal when no such determination had been made.

[4] Similarly, the jury didn't need to know to whom Steves made its statements. Indeed, admitting that evidence might have misled the jury by calling attention to the Department's decision not to challenge the merger.

* * *

New York v. Deutsche Telekom AG

439 F. Supp. 3d 179 (S.D.N.Y. 2020)

Judge Marrero.

[1] Prior to and during the pendency of this action, the FCC and DOJ each heavily scrutinized the Proposed Merger and considered its likely effect on competition. Those agencies' conditional approval of the Proposed Merger does not immunize it from Plaintiff States' antitrust challenge or this Court's judicial scrutiny. Nevertheless, the reality remains that the Court must now assess the Proposed Merger as conditioned by both regulators after lengthy review.

[1053] Brief for the United States of America as Amicus Curiae in Support of Appellee Steves and Sons, Inc., Steves and Sons, Inc. v. JELD-WEN, Inc., Case No. 19-1397, at *15 (4th Cir. filed Aug. 23, 2019).

[1054] Michael Murray, Deputy Assistant Attorney General, U.S. Department of Justice, *Antitrust Federalism* (remarks of Aug. 31, 2020).

[2] Not only have the FCC and DOJ conditioned [*i.e.*, imposed negotiated remedies on] the transaction before the Court, the Court will accord their views some deference. Where federal regulators have carefully scrutinized the challenged merger, imposed various restrictions on it, and stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. Indeed, the Supreme Court has looked to the views of federal regulators on multiple occasions for assistance in conducting its Section 7 analysis. As Plaintiff States note, however, the views of the FCC and DOJ cannot simply be adopted entirely at face value, as their assessment of a merger's legality may be guided by considerations that are outside the scope of Section 7. Ultimately, the Court will treat the views of the FCC and DOJ as informative but not conclusive.

[3] As set forth above in the Court's Findings of Fact, although the FCC recognized the potential for the Proposed Merger to increase mobile wireless speeds, accelerate the provision of 5G service, and expand mobile wireless telecommunications services to underserved rural areas, the FCC nevertheless acknowledged that an unconditioned Proposed Merger could have potentially harmful effects in densely populated areas with price-conscious consumers. To mitigate these concerns, the FCC required that T-Mobile commit to providing its promised speed, 5G, and coverage benefits by setting clear targets with associated penalties. And the FCC sought to address the potential harm to price-conscious consumers by requiring the divestiture of the most successful part of Sprint's business, its prepaid subsidiary Boost, to an independent buyer on terms that would enable that buyer to compete aggressively for the benefit of such price-conscious customers. After extensive review, the DOJ concluded that the Proposed Merger, if unconditioned, could substantially lessen competition in the RMWTS Market. In order to achieve the benefits that the Proposed Merger could provide, the DOJ supplemented the FCC commitments by proposing that Sprint divest Boost to the well-resourced potential entrant DISH, that an independent monitor appointed by DOJ ensure DISH would take advantage of the low wholesale rates provided by an MVNO agreement, and that DISH build out its own 5G network within three years to become a nationwide MNO capable of replacing Sprint.

[4] Plaintiff States point out that some of the conditions contemplated by the FCC and DOJ, such as the MVNO agreement and transfer of spectrum licenses, have yet to receive formal approval. The Court declines to assume at present that the FCC and DOJ will, either through their regulatory review processes or lax enforcement, frustrate the conditions that they negotiated themselves over a period of 15 months.

[5] Having been tasked with independently reviewing the legality of the Proposed Merger, the Court is not bound by the conclusions of these regulatory agencies. Similarly, the Court does not simply adopt their conclusions wholesale. Nonetheless, mindful that the agencies are intimately familiar with this technical subject matter, as well as the competitive realities involved, the Court treats their views and actions as persuasive and helpful evidence in analyzing the competitive effect of this merger as conditioned by the factors described below.

* * *

In re Graphics Processing Units Antitrust Litig.

527 F. Supp. 2d 1011 (N.D. Cal. 2007)

Judge Alsup.

[1] The *Twombly* decision reiterated that allegations of antitrust conspiracy are governed by Rule 8, and not the heightened standard of Rule 9(b). The Supreme Court's concern in that instance was that the allegations were insufficiently particularized to render plaintiffs' entitlement to relief plausible.

[2] Plaintiffs allege in conclusory fashion that defendants fixed prices pursuant to an agreement, but that allegation is simply too conclusory to show a plausible entitlement to relief. As the Supreme Court noted in *Twombly*, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Plaintiffs have not pleaded that defendants ever met and agreed to fix prices; they plead at most that defendants had the opportunity to do so because they attended many of the same

meetings. They then attempt to correlate the release of products with those meetings. Given the sheer number of meetings attended by both defendants, every product release will follow on the heels of a meeting. [. . .]

[3] In support of their allegations, plaintiffs point out that the Antitrust Division of the Department of Justice has served defendants with subpoenas and is conducting a grand jury investigation. The investigation, however, carries no weight in pleading an antitrust conspiracy claim. It is unknown whether the investigation will result in indictments or nothing at all. Because of the grand jury's secrecy requirement, the scope of the investigation is pure speculation. It may be broader or narrower than the allegations at issue. Moreover, if the Department of Justice made a decision not to prosecute, that decision would not be binding on plaintiffs. The grand jury investigation is a non-factor.

* * *

NOTES

1) When and why should an agency refrain from action because private litigation is ongoing or likely?
2) In what ways, if any, should the law offer protection from private litigation as part of a cartel leniency program? Explain.
3) If an agency negotiates a settlement agreement to resolve antitrust concerns, when and to what extent should the court defer to that settlement in a subsequent challenge by private plaintiffs? How about state-government plaintiffs?
4) "The agencies can do more good, more efficiently, by filing thoughtful amicus briefs in ten private cases than by bringing one of their own." Do you agree? Why?
5) If you were a judge, would you be more likely to find a complaint plausible if you knew the same allegations were the subject of a federal government investigation? What if you knew that the investigation had resulted in the filing of a complaint? What if it was a state investigation rather than a federal one?

F. Some Further Reading

Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 673 (2010)

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

Herbert Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005) Ch. 3

Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-o-Mat, 66 Antitrust L.J. 273 (1998)

William Kolasky, *Antitrust Litigation: What's Changed in Twenty Five Years?* 27 ANTITRUST (2012)

Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 Hastings L.J. 871 (1999)

UC Hastings Law Center for Litigation and Courts & Huntington National Bank, *2021 Antitrust Annual Report: Class Action Filings in Federal Court* (April 2022)

United States, *Relationship Between Public and Private Antitrust Enforcement*, OECD Working Paper DAF/COMP/WP3/WD(2015)11 (June 15, 2015)