# Private Antitrust Litigation

New Evidence
New Learning

edited by
**Lawrence J. White**

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MIT Press
Cambridge, Massachusetts
London, England

This book was set in Times New Roman by Asco Trade Typesetting Ltd., Hong Kong, and printed and bound by Halliday Lithograph in the United States of America.

Library of Congress Cataloging-in-Publication Data

Private antitrust litigation.

(MIT Press series on the regulation of economic activity; 16)
1. Antitrust law—United States. 2. Actions and defenses—United States.
I. White, Lawrence J. II. Series.
KF1657.P74P75 1988 343.73'072 87-22557
ISBN 0-262-23131-X 347.30372

# Private Antitrust Litigation

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## Series Foreword

Government regulation of economic activity in the United States has grown dramatically in this century, radically transforming the economic roles of government and business as well as relations between them. Economic regulation of prices and conditions of service was first applied to transportation and public utilities and was later extended to energy, health care, and other sectors. In the early 1970s explosive growth occurred in social regulation, focusing on workplace safety, environmental preservation, consumer protection, and related goals. Regulatory reform has occupied a prominent place on the agendas of recent administrations, and considerable economic deregulation and other reform have occurred, but the aims, methods, and results of many regulatory programs remain controversial.

The purpose of the MIT Press series, Regulation of Economic Activity, is to inform the ongoing debate on regulatory policy by making significant and relevant research available to both scholars and decision makers. Books in this series present new insights into individual agencies, programs, and regulated sectors, as well as the important economic, political, and administrative aspects of the regulatory process that cut across these boundaries.

Most regulatory programs are operated primarily or exclusively by a single government agency. Antitrust policy is an important exception in two respects: the U.S. antitrust laws are enforced by two government agencies (the Department of Justice and the Federal Trade Commission), and private parties can also file antitrust cases. In recent years there have been at least ten times as many private cases as government cases. Critics have argued that because successful plaintiffs are entitled to three times the actual damages they have suffered, there are too many private antitrust cases filed. Yet, although government antitrust enforcement has been frequently studied, almost no empirical work has heretofore been done on private enforcement—in large part because of a lack of data.

The Georgetown project on private antitrust litigation began with the laborious compilation of detailed data on over 2,000 private antitrust cases. This book contains a set of revealing analyses of those data, along with commentary and discussions of implications for antitrust reform. This work should be of interest to students of the judicial system and its operation, as well as to those with particular interest in antitrust policy.

Richard Schmalensee

## Foreword

Private enforcement of the antitrust laws and the payment of mandatory treble damages and lawyers' fees to successful plaintiffs have been important features of U.S. antitrust enforcement ever since the Sherman Act was passed in 1890. In recent years this aspect of antitrust enforcement has become controversial.

During 1975 to 1980 an average of almost 1,500 cases per year were filed, with successful recoveries occasionally in excess $100 million. Increasingly, concern was expressed about the treble damage "bonanza," vocalized by a wide range of the scholarly and political spectrum. It was claimed that many of these lawsuits were of little merit and were instigated in the hopes of generous settlements and generous attorneys' fee awards. Further many critics claimed that the fear of private treble damage actions deterred companies from taking risks in areas near the uncertain line defining legal behavior, for fear of becoming the targets of enormous private actions. As a result innovative manufacturing, organizational, and distributional techniques were not adopted.

Others, however, claimed that private antitrust enforcement had served the country well and that the treble damage remedy was essential to compensate adequately the victims of anticompetitive behavior for the risks and burdens of antitrust suits and to deter wrongdoing in an area where detection of violations and successful enforcement were far from certain.

While there was no lack of debate on policy issues, there was a striking absence of hard empirical data about the costs and benefits of the present system. It was against this background of conflict and uncertainty that the Georgetown private treble damage project was initiated. A few experienced antitrust lawyers in Washington, including Joe Sims, Howard Adler, Thomas Long, and Martin Connor, initiated the project. With the special help of Jeffrey Kessler, financial support was sought and received from a large number of corporations (listed at the end of this volume) that believed that the absence of data hampered any assessment of the private antitrust enforcement system. Finally, an advisory committee of prominent lawyers and academics was established to oversee the project, with Robert Pitofsky serving as chair.

The preliminary design of the project was carried out in the summer and fall of 1983 by Thomas Krattenmaker, Steven Salop, Lawrence White, and

the advisory committee. Lawrence White was selected as the research director of the project, and Cambridge Research Institute was selected to develop the data collection methodology and to carry out the data collection itself. The project designers hoped to collect extensive information about the private antitrust litigation system generally, so as to provide background information about litigation activity, including information on the types of cases brought, the cost and duration of litigation, and the outcomes of the cases. They also hoped to provide data that would allow researchers to infer some of the effects of proposed changes in the rules governing private antitrust litigation.

The data collection effort involved two phases: First, a considerable amount of data was collected from the dockets of all antitrust cases filed between 1973 and 1983 in five selected districts. Second, the parties (or their attorneys) were surveyed in an attempt to collect additional information on settlement terms and legal fees. Unfortunately, this second survey provided only limited additional information.

The project commissioned a number of prominent scholars to analyze the prominent issues underlying proposals to reform private antitrust litigation, using the data collected by the project to inform their analysis. Their research was presented at a conference held in November, 1985. This volume contains the papers prepared by those researchers, comments prepared by discussants, and policy commentary by other invited speakers.

The paper by Steven Salop and Lawrence White (chapter 1) presents an analytic framework for studying private antitrust litigation, sets out the policy issues, and provides an overview of the data collected by the project. They argue that the economic incentives of potential defendants to undertake questionable conduct are related in complex ways to potential plaintiffs' incentives to sue and to the parties' mutual incentives to settle rather than to proceed to trial. Paul Teplitz's paper (chapter 2) discusses the data collection effort and the nature of the data collected. He provides the reader with a sense of the docket and survey information underlying the summary data presented.

Kenneth Elizinga and William Wood (chapter 3) analyze the cost of the antitrust litigation system. They compare the cost of litigation to the size of settlements and awards in an attempt to gauge the degree to which the system compensates victims of antitrust violations, as opposed to the effectiveness with which the system deters antitrust violations. They find that jury trials last considerably longer than cases tried by judges and that price-fixing cases last longer than cases involving other antitrust issues. Jeffrey Perloff and Daniel Rubinfeld's paper (chapter 4) focuses on settle-

ments. These authors analyze the incentives of litigants to settle and then use the data generated in the project to make rough predictions of the effect of reducing the damages multiplier on settlement behavior. They conclude that reducing the multiplier likely would reduce the settlement rate and thus increase the overall social cost of litigation. Stephen Calkins' paper (chapter 5) analyzes the reaction of the legal system to the treble damages remedy with regard to motions to dismiss and motions for summary judgment. Calkins concludes that courts have compensated for the apparent harshness of the treble damages remedy by disposing of relatively more cases prior to trial.

Thomas Kauper and Edward Snyder (chapter 7) analyze those cases that followed on government cases. The prototypical follow-on case is a price-fixing case. The authors find that fewer of these cases are dismissed and more settled. Of those that were tried, however, the plaintiff win rate did not exceed the win rate in independently initiated cases. George Benston's paper (chapter 6) focuses on multiparty cases. He analyzes the effects of class actions, joint and several liability, and various claim reduction reform proposals on deterrence and the incentives to settle. This paper is largely theoretical, but it may suggest methods of analyzing the rich data set on multidistrict litigation collected by the project.

The final section of this volume focuses on three policy commentaries prepared by George Garvey, Ira Millstein, and Donald Turner. These authors draw quite varied conclusions from the data and the analysis of the primary researchers.

Where do we go from here?

In the policy session at the conclusion of this conference, several participants expounded the view that the private treble damage system is not out of control. Private antitrust litigation generally does not appear to be excessively expensive, to consume a large amount of judicial resources, or to result in inappropriate recoveries. They argued that any significant reform proposal would damage a system that is fair and useful, particularly during periods when government antitrust enforcement is lax and pro-business. But other participants in the policy session thought that the present system unduly encourages frivolous suits and deters efficient behavior, and they suggested a variety of ways to reform private enforcement. One problem, however, is that few of the critics of the status quo could agree on a single policy of reform.

As this book goes to press, the Reagan administration has proposed restricting the treble damage remedy to lawsuits alleging antitrust overcharges or underpayments (i.e., only for price-fixing cases), with single

damages applying in all other situations. The proposal also would provide automatic prejudgment interest on actual damages. At least for the immediate future, that proposal will be the focal point of serious debate.

The only thing that appears clear at this point is that treble damage reform has moved to center stage and that its supporters and critics are digging in for a period of spirited dispute. All participants, pro and con, should find a substantial amount of useful material in the volume.

Robert Pitofsky and Steven C. Salop

## Preface

On November 8 and November 9, 1985, a group of leading antitrust academics, practitioners, and government officials attended a conference at Airlie House, Virginia. The conference, held under the auspices of the Georgetown University Law Center, was the culmination of a two and a half year effort to plan, collect, and analyze a new data base on the enforcement of the antitrust laws through private litigation. This volume represents the edited papers and comments presented at that conference.

As with any effort of this magnitude, multiple thanks are due to many parties: to the corporate donors (listed at the end of this volume) whose donations funded the project; to the law firms and corporate legal departments (also listed at the end of this volume) who donated paralegal time to permit collection of the data that lay at the heart of the project; to the advisory board members who provided counsel in shaping both the broad scope and many of the details of the project; to the law firm of Jones, Day, Reavis & Pogue, which devoted resources to the project, and to Margaret Stuart Staudinger of that law firm, who provided administrative assistance; to Georgetown University Law Center, which provided resources and a home base for the project, and to Kitty Hackett of the Law Center, who handled many of the day-to-day details of the conference; and to Robert Pitofsky, whose firm leadership and good sense guided the project successfully from its beginnings until the appearance of this volume, marking the project's conclusion.

Lawrence J. White

## Contents

## II
## THE OPERATION OF THE LITIGATION SYSTEM



## III
## SPECIAL ISSUES IN ANTITRUST LITIGATION

# I

# OVERVIEW AND DATA