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The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic

Jason Rathod

Founding Partner, Migliaccio & Rathod LLP, Washington D.C.

Sandeep Veheesan

Regulations Counsel, Consumer Financial Protection Bureau, Washington D.C.

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The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic

JASON RATHOD* AND SANDEEP VAHEESAN**

ABSTRACT

The United States and Europe have traditionally taken very different approaches to the regulation of harmful conduct. Previously, European nations relied almost entirely on the public enforcement of laws, whereas the United States relied on a mix of public and private actors. In the United States, private rights of action have played a central role deterring illegal conduct—and, in fact, provided greater deterrence than public enforcers in some areas of law. They have also allowed injured parties to obtain compensation. Despite their very different histories, the private enforcement systems in the United States and Europe are showing signs of convergence today.

Since the 1970s, industry in the United States has waged a potent public relations campaign against private rights of action. This pro-business crusade has depicted corporations as victims of a litigation explosion and cast plaintiffs and their attorneys as unscrupulous mercenaries. This narrative has little, if any, empirical support. Nonetheless, based on this mythology, the Supreme Court and other federal courts have erected a number of procedural obstacles to effective private enforcement of law.

While private enforcement is in retreat in the United States, the European Union seeks to strengthen private rights of action, with an emphasis on private enforcement of antitrust law. Recent EU initiatives established some of the foundations for private parties to protect their rights in court. European policymakers, however, have as yet declined to establish effective claims' aggregation and litigation funding mechanisms, citing the business victimhood mythology spread by private industry in the United States. Encouragingly, a few EU Member States have rejected this paradigm and established some of the elements of strong private rights of action. In particular, Denmark, the Netherlands, Portugal, and the United Kingdom have passed laws that are likely to foster effective private litigation.

A comparative analysis of enforcement institutions on both sides of the Atlantic reveals a complex picture. American and European consumers, workers, and other large groups will generally face major obstacles to

* Founding Partner, Migliaccio & Rathod LLP, Washington D.C.; Duke University School of Law, J.D. 2010; Grinnell College, B.A. 2006.

** Regulations Counsel, Consumer Financial Protection Bureau, Washington D.C.; Duke University School of Law, J.D. 2010; Duke University, M.A. 2010; University of Maryland, College Park, B.A. 2005. This Article is the result of the authors' independent research and does not necessarily represent the views of Migliaccio & Rathod LLP, the Consumer Financial Protection Bureau, or the United States. We thank Ken Davidson, Ben Douglas, Bert Foer, Geoff Kozen, and Steve McIntyre for thoughtful comments on earlier drafts.

vindicating their rights. In cases generating larger individual claims, American and European plaintiffs' lawyers may still be able to use aggregate settlement procedures to hold corporate defendants to account.

When understanding its contribution to the deterrence of harmful conduct, private enforcement has to be viewed together with public enforcement. Because much of the enhancement of private enforcement in the European Union arises in the context of antitrust, it is an area ripe for cross-continent examination. With antitrust, the overall enforcement landscapes in the United States and European Union will likely be drastically different in the medium term. Due to limited public enforcement, a decrease in private lawsuits will severely compromise overall antitrust enforcement in the United States. In Europe, strong public enforcement will offset generally weak private enforcement and result in far more effective protection of consumer rights.

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INTRODUCTION

The United States and European nations have long taken different approaches to the regulation of socially harmful conduct. Traditionally, Europe has relied almost exclusively on public enforcement of laws through robust regulatory apparatuses. The United States, in contrast, has historically used a mix of public and private enforcement. The vigorous private enforcement regime in the United States allowed civil society to regulate harmful conduct directly through lawsuits.

Today, though, the private enforcement systems in the United States and Europe are showing signs of convergence. In the United States, private industry has waged a relentless—and effective—political and public relations crusade against private enforcement. Beginning in the 1970s, industry cultivated and propagated a business victimhood mythology, depicting corporations as victims of a litigation explosion and casting plaintiffs (and their attorneys) as mercenaries out to make a quick buck. This so-called “tort reform” campaign has played a powerful role in reshaping the attitudes of the public, legislators, and judges. As a result, the federal courts have erected several barriers that severely limit the scope and efficacy of private enforcement in the United States.

While private enforcement has been in retreat in the United States, it has started to gain some traction in Europe. The European Union’s initiatives have sought to strengthen private rights of action, particularly in the area of antitrust law. The private enforcement project, however, has assumed a one step forward, half step back pace so far. In some critical procedural areas, EU policymakers have unquestioningly adopted American business victimhood mythology and declined to establish the procedures necessary for effective private rights of action. Until this mentality is shed, there will only be a halting rise of private enforcement in Europe, whether in the realm of antitrust law or more generally.

A comparative analysis of enforcement institutions on both sides of the Atlantic reveals a complex picture. Private enforcement will likely display signs of functional convergence in the United States and Europe—with consumers and other large, dispersed groups facing major obstacles to vindicating their rights. In the longer term, some European Union Member States appear likely to enact stronger private rights of actions. Importantly, private enforcement has to be examined in the context of overall enforcement—private and public. For example, looking at an area of law that has been the focus of European reform, antitrust, the overall enforcement landscapes will be very different. Given the limitations of public enforcement in the United States, the weakened private enforcement system will severely compromise overall enforcement. In Europe, public enforcement is robust, so despite largely ineffective private enforcement in most Member States, overall enforcement will, in general, remain strong.

This Article proceeds as follows. Part I examines the role of private

enforcement in deterring conduct harmful to the public. Part II charts the rise of the big business-led campaign against private rights of action in the 1970s and 1980s in the United States. Part III reviews how the federal courts, drawing on this “tort reform” rhetoric, have significantly curtailed private rights of action. Moving across the Atlantic, Part IV describes the European Union’s mixed efforts to promote private enforcement and the influence of the corporate anti-civil justice narrative. Part V presents a comparative analysis of private rights of action. Part VI examines the interplay between public and private enforcement in the context of antitrust law in the United States and European Union.

I. DETERRING HARMFUL CONDUCT THROUGH PRIVATE RIGHTS OF ACTION

A. *Theory of Optimal Deterrence*

Economics offers insights on how to structure legal regimes to deter socially harmful conduct. To deter damaging conduct “optimally,” the expected cost of engaging in the conduct should equal its net social harm.¹ The expected cost is the total value of the civil and criminal sanctions multiplied by the probability of detection multiplied by the probability of liability. In mathematical terms, it can be expressed as:

$$\begin{aligned} \text{optimal expected penalty} &= \text{net harm} \\ \text{optimal expected penalties} &= \text{legal penalties} * p(\text{detection}) * p(\text{liability}) \\ \text{optimal expected penalties} &= \text{optimal legal} \\ \text{penalties} * p(\text{detection}) * p(\text{liability}) & \\ \text{optimal legal penalties} &= \text{optimal expected} \\ \text{penalties} / [p(\text{detection}) * p(\text{liability})] & \\ \text{optimal legal penalties} &= \text{net harm} / [p(\text{detection}) * p(\text{liability})] \end{aligned}$$

Even a strong penalty may be ineffective if enforcement mechanisms uncover and prosecute only a small percentage of wrongful behavior. A numerical example illustrates how deterrence can be increased or decreased. Assume that a manufacturer can deprive workers of one million dollars in earned wages and bolster its own bottom-line. The manufacturer has a fifty percent probability of being caught and held liable.

$$\begin{aligned} \text{harm} &= \$1,000,000 \\ \text{probability of being caught and held liable} &= 0.5 \\ \text{optimal penalty} &= \$1,000,000 / 0.5 = \$2,000,000 \end{aligned}$$

¹ See, e.g., Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 (1983). While it can inform policymaking, the optimal deterrence framework has drawn criticism for its narrow and reductionist view of human behavior. See generally LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2010).

In this example, the government would have to impose a penalty of \$2,000,000 to deter the manufacturer from engaging in wage theft. If the penalty were lower and the probability of being caught and held liable remained constant, the manufacturer would have an incentive to steal wages because the gains would exceed the expected costs.

To deter harmful conduct, policymakers can raise the penalties imposed, but can also increase the enforcement resources devoted to detecting and prosecuting the illegal behavior. For example, staffing of enforcement authorities can be increased. More “enforcers on the beat” raise the likelihood that wrongful conduct is detected and remedied through the administrative or judicial process. And, of course, penalties and enforcement resources can be increased simultaneously.

B. Private Enforcement Can Achieve Public Ends

Public and private resources can be used in conjunction to achieve optimal deterrence. Typically, a government agency is entrusted to enforce a particular set of laws across an entire society or a particular segment of the economy. Private parties can also be empowered to file lawsuits and serve as “private attorneys general.”²

The government is conventionally seen as the enforcer of laws and regulations. Legislatures establish dedicated agencies to enforce, for example, environmental protection and securities laws. In the United States, the government established the Environmental Protection Agency³ and Securities and Exchange Commission⁴ to enforce these laws. These agencies employ attorneys, economists, and other experts to uncover and prosecute legal violations. Government enforcers learn of possible violations through a number of means, including their own investigations as well as complaints from private parties. If an investigation finds that legal action is warranted, agencies file complaints in court or a specialized administrative body.

The government is not the only enforcer of laws, however. Private parties, typically injured parties, can bring lawsuits against alleged wrongdoers, seeking monetary and non-monetary remedies. Because every citizen is now a potential legal enforcement official, private enforcement has been described as “state power exercised through society.”⁵

C. Private Enforcement Generates Public Benefits

1. Deterrence: Private Enforcement Complements Public Enforcement

In modern societies, even the most dedicated government agency is

² *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

³ Reorganization Plan No. 3, 35 Fed. Reg. 15,623 (July 9, 1970).

⁴ Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–pp.

⁵ SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* 9 (2010).

unlikely to have the resources to uncover all instances of illegal conduct. With large populations and complex economies, even a team of committed public enforcers cannot be expected to catch, let alone prosecute, every violation. Take the securities laws as an example. In today's leading financial markets, millions of transactions involving millions of participants take place every day.⁶ A non-trivial fraction of securities fraud is bound to remain hidden from the eye of enforcers. And during times of fiscal austerity, government budget cuts further diminish the ability of enforcement agencies to uncover wrongdoing.⁷ Smaller agency staffs mean that even some strong cases may be settled on suboptimal terms or not pursued at all.

The limits of government enforcers extend beyond resource constraints. Government agencies can be subject to improper political influence. The target of an investigation can undertake sustained lobbying to dampen an agency's initiative.⁸ The wrongdoer can even engage in outright bribery of government officials. Those that plead their case before the government are not likely to be representative of society; groups composed of a few large players (such as an oligopolistic industry) are much more likely to lobby than groups composed of a large number of players with small individual stakes (such as American consumers).⁹ The "revolving door" between industry and government can be another source of lax enforcement. Government officials—who have worked in the regulated industry or expect to do so again—may identify strongly with market participants and adopt a permissive approach toward past and future clients and employers.¹⁰

Ideology in the political branches of government can also lead to underenforcement of laws. In presidential systems, both the legislature and the executive have tools at their disposal to dilute enforcement of laws that they dislike. For example, the president can weaken an executive agency by appointing officials who bring fewer enforcement actions¹¹ and write lenient rules for industry.¹² For its part, Congress can starve an executive agency of

⁶ At the New York Stock Exchange alone, anywhere between five hundred million and two billion shares have been traded every day in recent years. See Daily NYSE Group Volume in NYSE Listed, 2015, NYSE MARKET DATA, http://www.nyxdata.com/nysedata/asp/factbook/viewer_edition.asp?mode=table&key=3141&category=3.

⁷ Jim Snyder & Jim Rowley, *Budget Deal Opens "Age of Austerity" for Federal Agencies*, BLOOMBERG (Mar. 23, 2013), <http://www.bloomberg.com/news/articles/2013-03-22/congress-quick-fix-budget-only-dulls-pain-of-85-billion-in-cuts>.

⁸ Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 L. & SOC. INQUIRY 435, 449 (1991).

⁹ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 21–22 (1965).

¹⁰ Edna Earle Vass Johnson, *Agency "Capture": The Revolving Door Between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95, 98 (1983).

¹¹ See, e.g., John Solomon & Juliet Eilperin, *Bush's EPA Is Pursuing Fewer Polluters*, WASH. POST (Sep. 30, 2007).

¹² See, e.g., Ronald P. Jackson, Jr., *Extending the Success of the Acid Rain Provisions of the Clean Air Act: An Analysis of the Clear Skies Initiative and Other Proposed Legislative and Regulatory Schemes to Curb Multi-Pollutant Emissions from Fossil Fueled Electric Generating Plants*, 12 U. BALT. J. ENVTL. L. 91, 107 (2005).

funding for enforcement.¹³

In light of the real limitations on public enforcement, private rights of action can play an important complementary function. Public enforcement, due to resource constraints, political pressure, and ideological considerations, cannot realistically be entrusted to enforce laws and regulations at the optimal level. Private enforcement, which relies on the collective ability and initiative of the population, can compensate for the shortcomings of government enforcement. Because private plaintiffs are neither dependent on government budgets nor constrained by the ideological biases of the political branches of government, they can be expected to enforce laws in a more consistent manner over time.

Public enforcement officials themselves have recognized the value of private rights of actions. A head of the Antitrust Division in the Truman Administration described private actions as being “of substantial help” to the antitrust mission.¹⁴ He added: “[I]f you did away with the triple damages suit entirely and still wanted substantial enforcement . . . you would have to quadruple the size of the Antitrust Division.”¹⁵ In a 2013 amicus brief filed jointly by the Department of Justice and Federal Trade Commission in the Supreme Court, the two agencies wrote that “[p]rivate actions are a vital supplement to government enforcement not only under the antitrust laws, but also under a wide range of other statutes.”¹⁶ Similarly, European public authorities have acknowledged that they realistically cannot carry the entire burden of detecting and punishing illegal behavior.¹⁷

Empirical research has found that private enforcement generates significant deterrence of socially harmful behavior. Joshua Davis and Robert Lande studied sixty antitrust cases between 1990 and 2011 in which plaintiffs either won at trial or reached settlements with defendants.¹⁸ In the cases reviewed, they found that the relief obtained by private plaintiffs produced substantial deterrence value, often in excess of public fines.¹⁹ These sixty cases generated monetary recoveries three times greater than the civil and

¹³ See, e.g., CHRISTOPHER LEONARD, *THE MEAT RACKET: THE SECRET TAKEOVER OF AMERICA’S FOOD BUSINESS* 301 (2014).

¹⁴ *Study of Monopoly Power: Hearing Before the H. Comm. on the Judiciary*, 82 Cong. Rec. 15 (1951) (Statement of H. Graham Morison, Assistant Att’y Gen. in charge of the Dep’t of Justice, Antitrust Div.).

¹⁵ *Id.*

¹⁶ Brief for the United States as Amicus Curiae Supporting Respondents, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, at 55 (2013) (No. 12-133).

¹⁷ See, e.g., OFFICE OF FAIR TRADING, *PRIVATE ACTIONS IN COMPETITION LAW: EFFECTIVE REDRESS FOR CONSUMERS AND BUSINESS* 15–16 (2007) (“Since there are . . . inevitably cases which the competition authorities do not pursue, consumers who do not have the resources or skills to pursue redress on their own are disadvantaged vis-à-vis infringing undertakings.”) [hereinafter OFT, *PRIVATE ACTIONS*].

¹⁸ Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. REV. 315, 318 (2011); Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1271 (2013).

¹⁹ Lande & Davis, *Comparative Deterrence*, *supra* note 18, at 336–37.

criminal penalties obtained by U.S. public enforcers in all cartel cases during the same twenty-one year period, even when prison terms for individuals are monetized.²⁰ Their analysis used assumptions that, if anything, were strongly biased in favor of the relief obtained by the government.²¹

Private rights of action have been shown to produce substantial public benefits in other areas of law, as well.²² In employment discrimination and fair housing law, Michael Selmi has shown that private plaintiffs bring many more cases, advance more aggressive legal theories, and seek more substantial remedies than federal enforcers do.²³ James Cox and Randall Thomas have uncovered similar patterns in the enforcement of securities law. While they credit the Securities and Exchange Commission (“SEC”) for improving its enforcement priorities after the collapse of Enron,²⁴ they also found that between 1997 and 2002 private plaintiffs went after larger defendants, who likely inflicted greater harm on investors, than the SEC did.²⁵ The Consumer Financial Protection Bureau, in a recent study of litigation involving consumer financial products between 2010 and 2012, found that for sixty-eight percent of the examined class actions there was no corresponding public enforcement action.²⁶ Even when there were overlapping public and private actions, the private cases preceded the public ones in most instances.²⁷

Governments do not face a binary choice of either public or private enforcement. Instead, they can use both mechanisms to promote optimal deterrence of harmful conduct. Public and private enforcement each have their strengths. Government agencies are likely better suited to bringing complex, resource-intensive enforcement actions. Because every member of a society is a potential enforcer and not dependent on the public purse, however, private enforcers are less susceptible to changes in the political winds and more likely to exercise constant vigilance. Public and private

²⁰ Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 26 (2013).

²¹ See Davis & Lande, *Toward an Empirical and Theoretical Assessment*, *supra* note 18, at 1296 (“We show that only if one disvalues a year in prison as greater than \$43-48 million would DOJ anti-cartel enforcement deter more anti-competitive conduct than private enforcement.”); *id.* at 1301 (“It also should be noted that the victims in the cases we studied sometimes received products, coupons, or discounts. The methodology of our study was to be conservative by not counting the compensatory effects of products, coupons, discounts or rate reductions.”).

²² See generally J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 54 WM. & MARY L. REV. 1137 (2012).

²³ Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998).

²⁴ James D. Cox & Randall S. Thomas, *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 906–07 (2004).

²⁵ James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 777–78 (2002).

²⁶ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 9.4 (2015) [hereinafter CFPB ARBITRATION STUDY], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

²⁷ *Id.* at § 9.4.1–2.

enforcement should be seen as complements that are both important to deterring harmful behavior.

2. Private Rights of Action Serve an Important Compensatory Function

In addition to their deterrence benefits, private rights of action produce significant public value through their compensatory function. If public enforcement could achieve optimal deterrence, it would, as presently constituted, still fail to provide redress to injured parties. Obviously, prison sentences for guilty individuals fail to provide any (monetary) compensation to victims. Civil and criminal fines typically go to the government treasury, rather than to those harmed by illegal conduct.²⁸ And the social safety net may, at most, provide only partial relief for affected individuals.

Private rights of action play a vital compensatory function. Money obtained through litigation can supplement social insurance programs and provide immediate assistance to injured parties. Damages can cover lost wages, costs of medical care, and emotional distress arising from another party's unlawful conduct. Similarly, victims of wage theft, antitrust, and securities violations can recover the money they would have earned or retained but for illegal market behavior.

The money recovered by injured parties through private lawsuits is substantial. A study of over one thousand class actions from 1990 to 2003 found that settlements generate substantial compensation for victims of illegal behavior. On average, 81.6 cents of every dollar recovered went to class members, meaning that less than twenty percent of the settlement funds went to attorneys' fees and administrative expenses.²⁹ In comparison, an attorney in a personal injury lawsuit typically can obtain a contingent fee of thirty to forty percent of the final award.³⁰ In their case study of sixty successful private antitrust actions, Davis and Lande found that consumers and competitors injured by anticompetitive conduct recovered approximately thirty-five billion dollars,³¹ with twenty percent of the total covering legal and administrative costs.³² And this figure understates the redress obtained; the authors did not attempt to value the discounts, coupons, and other relief that are more difficult to quantify in monetary terms.³³ The Consumer Financial Protection Bureau found that between 2010 and 2012 class actions provided gross monetary and in-kind relief of \$2.7 billion to consumers

²⁸ This is, of course, not universally true. *E.g.*, Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action to Obtain \$120 Million in Redress from Sprint and Verizon for Illegal Mobile Cramming (May 12, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/>.

²⁹ Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 131 (2006).

³⁰ *Id.*

³¹ Davis & Lande, *Toward an Empirical and Theoretical Assessment*, *supra* note 18, at 1273.

³² *Id.* at 1309.

³³ *Id.* at 1310.

injured by illegal conduct in six financial services markets.³⁴ Attorneys' fees and administrative costs accounted for \$489 million, or roughly eighteen percent of the total.³⁵

D. Effective Private Enforcement Requires Proper Incentives for Plaintiffs

To promote effective private enforcement, governments must establish the proper incentives for parties to bring suits. Litigation can be a very costly undertaking so the expected benefits must be correspondingly large. A statutory private right of action is likely to be a dead letter if it imposes costly procedural burdens and provides for only modest recoveries for successful plaintiffs.

Sean Farhang has set out an analytical framework for understanding the incentives for private plaintiffs.³⁶ A successful lawsuit results in a plaintiff obtaining relief, which can be both monetary and non-monetary.³⁷ Common forms of relief include compensatory damages, punitive damages, restitution, and injunctions. Of course, non-monetary relief that does not have an explicit dollar figure attached to it can still be of tremendous value to parties.³⁸ The sum total of the potential relief is a plaintiff's *benefit* from litigation. Because a plaintiff is not guaranteed to win his or her case, the possible benefits from litigation have to be discounted by the *probability of success*. As for *costs*, plaintiffs typically have to incur various expenses including attorneys' fees, filing fees, expert fees, and the costs of taking discovery. In mathematical terms, a plaintiff's benefit-cost analysis can be expressed as follows:

$$\begin{aligned} \text{EV} &= \text{expected value of lawsuit} \\ \text{B} &= \text{value of relief from successful lawsuit} \\ \text{p}(\text{success}) &= \text{probability of successful lawsuit} \\ \text{C} &= \text{costs of lawsuit} \\ \text{EV} &= \text{B} * \text{p}(\text{success}) - \text{C}^{39} \end{aligned}$$

For a plaintiff to file a lawsuit, the expected value (EV) must be a positive value. A party is unlikely to pursue litigation if its expected value is negative. And even if the expected value is positive, the value has to be sufficiently large to make litigation worthwhile. If a potential lawsuit has costs of \$1,000,000 and has expected benefits of \$1,000,100, few plaintiffs are likely to file a claim. If the "rate of return" is too small, parties and their

³⁴ CFPB ARBITRATION STUDY, *supra* note 26, at § 8.3.3.

³⁵ *Id.*

³⁶ FARHANG, *supra* note 5, at 22.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

attorneys are unlikely to “invest” in a case.⁴⁰ In the described hypothetical, the suit has an expected rate of return of 0.01 percent—a return lower than even what savings accounts offer under today’s very low interest rates.⁴¹

State actors can encourage and discourage private enforcement, exerting influence over the level of deterrence that a private enforcement regime provides. First, when adopting a private enforcement mechanism for a particular law, legislators can actively adjust the inputs into the private enforcement equation to engineer the preferred level of private enforcement.⁴²

Consider the inputs associated with bringing suit: the expected benefit, the probability of success, and the expected cost. Legislators can enhance and reduce the expected benefit of a private right of action through assorted means. Who can bring a lawsuit is closely related to expected benefits. If an individual can bring suit only in his or her individual capacity, litigation may frequently be unattractive. The costs of litigation are likely to swamp the value of even the largest possible recovery in many cases. In contrast, if an individual can file a representative or class action—a suit on behalf of herself as well as thousands of other persons who have suffered a similar harm—the benefit-cost analysis may be different. Similarly, organizations, such as those representing consumers, can be authorized to bring a lawsuit on behalf of all their members. In both scenarios, the common costs of litigation can be spread among thousands of parties and turn low, or negative, value individual suits into a single group claim with a large expected positive value.

In addition, lawmakers exercise control over the prospective aggregate effect of a suit under the statute. They could establish opt-out class actions in which similarly situated individuals (the “class members”) are bound by the judgment in a class suit unless the class members opt out in advance. Or legislators could impose an opt-in requirement in which individuals affirmatively have to opt in to join the suit, which would depress the number of class members, decreasing the potential benefit.

Damages are another area in which legislators can change the benefits of bringing suit.⁴³ Legislators could increase the benefit by enhancing the

⁴⁰ See *id.*

⁴¹ See, e.g., *Bank Account Interest Rates*, BANK OF AMERICA, <https://www.bankofamerica.com/deposits/bank-account-interest-rates.go> (last visited Apr. 5, 2016) (0.03% annual percentage yield (APY)); *Rates*, CITIGROUP, <https://online.citi.com/US/JRS/pands/detail.do?ID=CurrentRates> (last visited Apr. 5, 2016) (APY between 0.01% and 0.10%); *Savings Accounts and CD (Time Account) Rates*, WELLS FARGO, <https://www.wellsfargo.com/savings-cds/rates> (last visited Apr. 5, 2016) (0.01% APY); *Chase Savings Interest Rate*, JPMORGAN CHASE, <https://www.chase.com/savings/savings-account-rates> (last visited Apr. 5, 2016) (0.01% APY).

⁴² See generally FARHANG, *supra* note 5, at 21–31 (“[A] key lever legislators use . . . is to determine the expected value of claims (EV) by manipulating expected benefits (EB), probability of prevailing (p), and expected costs (EC).”).

⁴³ *Id.* at 27.

damages available to a prevailing plaintiff through, for instance, the provision of statutory or treble damages. They can also reduce the expected benefit by barring the availability of damages altogether and permitting plaintiffs to only seek declaratory or injunctive relief.

Legislators can increase the probability of success by limiting the elements required to state a claim, broadening the scope of discovery, and extending statutes of limitations. By the same token, legislators can decrease the probability of success by requiring plaintiffs to establish several legal elements and demanding more stringent proof to ultimately prevail.

As to expected cost, legislators can decrease the expected cost by mandating one-way fee-shifting by which prevailing plaintiffs would be entitled to their attorneys' fees from defendants, but defendants would not be entitled to attorneys' fees should they prevail. Legislators can increase expected cost by instituting a "loser pays" rule in which the losing side pays the fees and costs of the prevailing side. "Loser pays" makes plaintiffs, particularly those of modest means, reluctant to pursue all but the most airtight claims and necessitates costly pre-suit investigations. Ultimately, the interplay of all three factors—the expected benefit, the probability of success, and the expected cost of bringing suit—dictate whether a suit is brought.⁴⁴

Second, once a private right of action is in place and its general parameters have been defined, other government institutions can alter its effects, sometimes dramatically. The judiciary is the principal actor that can subsequently change the equation. The legislature could try and craft a statute to have a small or large potential aggregate effect, but judges have appreciable discretion to construe the statute in a manner that amplifies or diminishes the legislative vision. In the United States, civil procedure is trans-substantive, permitting judges to modify procedure and impact substantive rights across many areas of law.⁴⁵ For instance, a judge could apply onerous pleading requirements that force plaintiffs to plead minutiae to survive a motion to dismiss. Such a policy would increase the costs of litigation for plaintiffs and reduce the probability of success. Another element of procedure that could be of large import is the ease—or difficulty—of bringing class actions on behalf of a large number of injured parties.

II. THE UNITED STATES' ONCE STRONG CIVIL JUSTICE SYSTEM HAS BEEN WEAKENED BY INDUSTRY'S "TORT REFORM" CAMPAIGN

A. *The United States' Private Enforcement Tradition and Its Decline*

⁴⁴ See generally *id.* at 28–31.

⁴⁵ Robert G. Bone, *Making Effective Rules: The Need for Procedural Theory*, 61 OKLA. L. REV. 319, 324 (2008).

The United States has a rich legacy of private enforcement. In *Marbury v. Madison*, Chief Justice John Marshall proclaimed: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁴⁶ This understanding was gospel from America’s earliest days.⁴⁷

Private enforcement has long provided not just a remedy for injured individuals, but also deterred harmful conduct. With limited public law enforcement capacity, early American colonies relied on private citizens to enforce law through *qui tam* statutes, which empowered whistleblowers to file suit on behalf of the government (and share in the proceeds) when they had information about statutory violations and frauds on the public treasury.⁴⁸ To this day, *qui tam* remains a vital tool in combating waste, fraud and abuse.⁴⁹ More generally, private enforcement today acts as “an indispensable satellite regulatory system that augments and sometimes serves as a substitute for the work of official governmental agencies.”⁵⁰

The civil justice system is in decline, however, thanks to a campaign led by private industry. Since the 1970s, corporate America has waged a largely successful war to roll back private rights of action that protect all Americans from harmful conduct in the market and society.

B. *The Powell Memo: A Battle Plan for Undermining Business Regulation*

Perhaps no document better captures the mentality and strategic plan of industry than a memorandum written by Lewis F. Powell Jr. in 1971, just two months prior to his nomination as a Supreme Court Justice.⁵¹ At that time, Mr. Powell was a well-regarded corporate attorney who defended the tobacco industry in numerous suits and sat on the board of Philip Morris.⁵²

The confidential memo written for the Chamber of Commerce, entitled “Attack on the American Free Enterprise System,” is a call to arms to American business.⁵³ It alleged that private industry—and, indeed, the free

⁴⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁴⁷ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1486 (1987) (“[T]hat every person should have a judicial remedy for every legal injury done him was a common provision in the bills of rights of state constitutions; [and] was invoked by The Federalist No. 43 in a passage whose very casualness indicated its uncontroversial quality.” (footnote omitted)).

⁴⁸ CHARLES DOYLE, CONG. RESEARCH SERV., QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 3, 3 n.14 (2009), <https://www.fas.org/sgp/crs/misc/R40785.pdf> (listing a number of colonial-era *qui tam* statutes).

⁴⁹ Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 43–44 (2002).

⁵⁰ Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 301 (2013).

⁵¹ KIM M. PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 156–65 (2009) (providing background).

⁵² *Id.* at 15657.

⁵³ Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce, Attack on American Free Enterprise System 1

market system itself—was under relentless attack by “the Communists, New Leftists and other revolutionaries”⁵⁴ who were “far more numerous, better financed, and increasingly . . . more welcomed and encouraged by other elements of society, than ever before in our history.”⁵⁵ The ostensibly radical message had resonated with, and enjoyed amplification from, mainstream institutions—including universities, the media, and legislators.⁵⁶ The troubling results were reflected in “the stampedes by politicians to support almost any legislation related to ‘consumerism’ or to the ‘environment’”⁵⁷ and the litigation successes enjoyed “at business’ expense” by “labor unions, civil rights groups and . . . the public interest law firms . . . extremely active in the judicial arena.”⁵⁸ Yet, in Powell’s view, industry sat idly by as its attackers added to their ranks, including through television, which “play[ed] such a predominant role in shaping the thinking, attitudes and emotions of our people.”⁵⁹

To reshape public opinion,⁶⁰ Powell proposed a multipronged response by industry that would be led by the Chamber of Commerce.⁶¹ The plan of action focused on four fronts: media, education, politics and law.

As to the last of these, the law, Powell stressed that the judiciary had affected American business as much as any branch of government. In fact, the structure of the American system prompted Powell to conclude “the judiciary may be the most important instrument for social, economic and political change.”⁶² Consequently, judicial action represented a “vast area of opportunity” for which businesses should provide generous funding.⁶³

Industry heeded the call to arms, mobilizing its resources from the 1970s onward to mold public opinion and public policy. Between 1968 and 1978, the number of corporations with public affairs offices in Washington D.C. grew fivefold.⁶⁴ Corporate Political Action Committees (“PACs”) grew fourfold in number between 1976 and the mid-1980s.⁶⁵ And the number of firms with registered lobbyists in the city grew by a remarkable multiple of fifteen, from 175 to 2,500.⁶⁶ Alongside greater participation came stronger organization as well. For example, the Chamber of Commerce, which

(Aug. 23, 1971) [hereinafter “Powell, Jr. Memorandum”], <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf>.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2–3.

⁵⁷ *Id.* at 25.

⁵⁸ *Id.* at 26–27.

⁵⁹ Powell, Jr. Memorandum, *supra* note 53, at 3.

⁶⁰ *Id.* at 20 (beginning the section with the apt title: “What Can Be Done About the Public?”).

⁶¹ *Id.* at 11–12.

⁶² *Id.* at 26.

⁶³ *Id.* at 27.

⁶⁴ JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 118 (2010).

⁶⁵ *Id.*

⁶⁶ *Id.*

Powell urged to take the lead on these matters, saw its budget triple and membership double between 1974 and 1980.⁶⁷

C. Waging War: The Propagation of Business Victimhood Mythology to Turn Public Opinion Against Civil Justice and Thwart Private Enforcement

Drawing inspiration from the Powell Memo, corporations and conservative activists adopted a strategy to turn public opinion against the civil justice system by launching a pro-industry crusade in media, politics, education and courts themselves.⁶⁸ This “tort reform” campaign deployed a common rhetorical mythology of business victimhood. Business victimhood was poll-tested and anchored in the ideas that: (1) businesses are victims of a litigation explosion and (2) litigation is an immoral and unjust method of dispute resolution. Businesses are victims, the narrative goes, of trial lawyers who play “jackpot justice” by drumming up frivolous litigation,⁶⁹ of runaway juries who have never seen a damage award too large, and of Americans who file lawsuits for every injury no matter how small. According to the mythology, the result has been an overly litigious society that imposes massive burdens on American business and, by extension, American consumers and workers.

1. Litigation Trends in Recent American History

The 1960s and 1970s witnessed an expansion of rights for groups long denied them, including racial minorities and women, or protected incompletely, such as consumers and workers.⁷⁰ A new generation of attorneys engaged in public interest litigation to ensure that the new laws translated into concrete realities on the ground.⁷¹ The upshot was that litigation increased.⁷²

There was no general “litigation explosion,” however. Empirical evidence suggests that the increase in litigation in the 1970s was modest.⁷³ And, in the decades that followed, litigation rates tapered off.⁷⁴ Perhaps more importantly, there is no evidence of any rise in frivolous litigation. Overall litigation rates are presently comparable to those in other periods of

⁶⁷ *Id.* at 119.

⁶⁸ See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1553 (2014).

⁶⁹ Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform*, 54 DUKE L. J. 447, 450 (2004).

⁷⁰ Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717–18 (1998).

⁷¹ STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 23, 30, 54 (2008).

⁷² Galanter, *supra* note 70, at 717–18.

⁷³ Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 992 n. 42 (2003) (collecting sources).

⁷⁴ *Id.* at 992–93 n. 43 (collecting sources).

American history and consistent, on a per-capita basis, with those of other industrialized countries.⁷⁵

Since the late 1960s, there has, however, been a historically and culturally distinctive rise in one type of litigation: class actions. This is the byproduct of changes to the Federal Rules of Civil Procedure in 1966, which expressly authorized opt-out class actions for damages.⁷⁶ Although class action litigation has increased markedly, there is no evidence to substantiate the view that it is largely frivolous. Two critiques are typically leveled against class actions: (1) class members receive too little;⁷⁷ and (2) the mere threat of a large class damage award blackmails defendants into settling. Neither has an empirical basis. As to the first point, substantial evidence exists to the contrary.⁷⁸ As to the second, the best evidence once again suggests that it is actually plaintiffs who are systematically disadvantaged vis-à-vis corporate defendants in contemporary class action litigation.⁷⁹

2. The Mythology of Business Victimhood

If the record shows that there has not been a discernible uptick in overall litigation and that class action litigation is mostly beneficial, what explains the conventional wisdom to the contrary? In this instance, power is knowledge. That is, powerful sources have fostered the common “knowledge” that litigation is out-of-control. Specifically, with the support of industry, business victimhood mythology has been broadcast in media, politics, education, and courts themselves, just as the Powell Memo advised.

First, private industry has poured tens of millions of dollars into spreading business victimhood mythology through public relations campaigns.⁸⁰ In the 1970s, insurance companies took out advertisements in popular print magazines to condemn the purported litigation explosion.⁸¹ One, for example, read “[w]hen anything goes wrong with me . . . somebody is going to pay! They owe me! Who is this somebody? ‘It’s you!’”⁸² A study conducted contemporaneously with the placement of the ads found that

⁷⁵ *Id.* at 993–94.

⁷⁶ 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1787, at 210–11 (2d ed. 1986).

⁷⁷ Courts must remain vigilant when certifying that settlements are fair, reasonable, and adequate. *See, e.g., Eubank v. Pella Corp.*, 753 F.3d 718, 721 (7th Cir. 2014) (“The case underscores the importance both of objectors (for they are the appellants in this case—without them there would have been no appellate challenge to the settlement) and of intense judicial scrutiny of proposed class action settlements.”).

⁷⁸ *See supra* Part I.C.2.

⁷⁹ Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 773 (2015).

⁸⁰ Stephen Daniels & Joanne Martin, “*The Impact That It Has Had Is Between People’s Ears: Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*,” 50 DEPAUL L. REV. 453, 460 (2000).

⁸¹ *Id.* at 453.

⁸² *Id.* (quoting ad presented in Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A. J. 69 (1979)).

“even a single exposure to one of these ads can dramatically lower the amount of award a juror is willing to give.”⁸³

Starting in the 1980s, industry refined its efforts to shape public attitudes in support of its anti-litigation efforts.⁸⁴ Armed with new sampling data, insurance companies initiated a multi-million dollar campaign across media platforms with the aim of reaching ninety percent of adults in the country.⁸⁵ The campaign was anchored in the concept of a “Lawsuit Crisis” and explained that present-day litigation inflicted harm not just on corporations, but also on pregnant mothers, high school athletes, and church congregations.⁸⁶ It deliberately cast plaintiffs who used the legal system to vindicate their rights as confrontational, immoral, and attacking bedrock American values.

A parallel campaign at the time led by just one insurance company, Aetna, reinforced the notion that corporations are victims of the judicial system. One advertisement reminded viewers of the infamous, though highly misleading,⁸⁷ tale of the McDonald’s coffee lawsuit, stating “[w]hen a woman riding in an automobile spills hot coffee on her lap, then sues the restaurant where she bought the coffee, something is wrong.”⁸⁸ Other industries jumped on the bandwagon and amplified the message throughout the 1990s and 2000s.⁸⁹ Their message has become the conventional wisdom.⁹⁰ As one scholar put it, “[w]e believe America is the most litigious society on earth not because this is true, but because the media have told us so over and over again. We believe . . . our fellow citizens have a shameless propensity to file frivolous lawsuits . . . because our newspapers and television shows inundate our collective consciousness with [unrepresentative] examples of outrageous and ridiculous litigation.”⁹¹

Second, starting in the 1980s, officials at the highest levels of government propagated business victimhood mythology. Myriam Gilles observed that:

⁸³ *Id.* at 456 n. 11.

⁸⁴ *Id.* at 461–64.

⁸⁵ *Id.* at 467.

⁸⁶ Daniels & Martin, *supra* note 80, at 467.

⁸⁷ For a summary of the misleading character of attacks on the McDonald’s lawsuit, see RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 267–72 (1996) (detailing the third degree burns suffered by the elderly plaintiff from 180-degree coffee and the 700 other burn cases from McDonald’s coffee that jurors learned of). The story was also featured in the popular HBO documentary *Hot Coffee*.

⁸⁸ Daniels & Martin, *supra* note 80, at 461–64.

⁸⁹ Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 *DUKE L.J.* 447, 451–52 (2004).

⁹⁰ Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science*, 100 *W. VA. L. REV.* 1097, 1100 (2008); Theodore Eisenberg, *The Empirical Effects of Tort Reform*, *RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS* (Jennifer Arlen ed., forthcoming), <http://ssrn.com/abstract=2032740>.

⁹¹ Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 *STAN. L. REV.* 1393, 1395–96 (1994).

[T]he Reagan Administration provided a nourishing home for all of these anti-lawsuit reformers. . . . Under the new president, the Republican Party “began to recognize the value of assaulting legal liberalism as a strategy” for whipping up their base, and it capitalized on the convenient narrative that lawyers were “destroying America.”⁹²

Some in Congress attempted to advance legislation to address the perceived problem.⁹³ For example, Republican Senator Orrin Hatch pressed for a law to eliminate statutory fee-shifting rules because they had allegedly created “exorbitant windfalls for lawyers” responsible for the “explosion of litigation.”⁹⁴

In 1989, Vice President Dan Quayle took the helm of the Council on Competitiveness, which had been established by President Reagan and focused heavily on the mitigation of litigation’s impact on business.⁹⁵ When accepting the Republican nomination for vice president at the party’s national convention in 1992, Vice President Quayle proclaimed: “[O]ur legal system is spinning out of control. . . . [O]ur legal system is costing consumers \$300 billion dollars a year. The litigation explosion has damaged our competitiveness; it has wiped out jobs.”⁹⁶ Subsequent generations of conservative leaders have echoed this rhetoric. For instance, President George W. Bush frequently denounced “frivolous lawsuits.”⁹⁷

As the business victimhood mythology percolates in political circles, few have risen to offer a corrective. Prominent Democrats have often chosen to either lend their own support or remain silent. The result is that the popular discourse is one-sided and replete with distorted facts shaped by powerful lobbies.

Third, legal academia has supplied an intellectual framework buttressing business victimhood mythology. For instance, the ascendancy of the law and economics movement in legal academia and jurisprudence has provided fertile ground for business victimhood mythology to thrive. The field of law and economics emerged in the 1970s and grew rapidly from the 1980s onward with generous funding from industry-friendly sources such as the

⁹² See Myriam E. Gilles, *The End of Doctrine: Private Arbitration, Public Law and the Anti-Lawsuit Movement* 6 (Cardozo Legal Studies Research Paper No. 436, August 28, 2014), <http://ssrn.com/abstract=2488575>. Before he was President, Reagan described public interest lawyers as “a bunch of ideological ambulance chasers doing their own thing at the expense of the . . . poor who actually need help.” Ronald J. Ostrow, *Legal Services Agency Battles Reagan Attempt to Cut Off Its Funding*, L.A. TIMES, Apr. 12, 1981, at B1.

⁹³ Burbank & Farhang, *supra* note 68, at 1567.

⁹⁴ *Id.*

⁹⁵ Vice President Dan Quayle, *In Their Own Words; Excerpts from Vice President Quayle’s Address*, N.Y. TIMES, Apr. 21, 1992.

⁹⁶ *Id.*

⁹⁷ See, e.g., *Federal Trials Decline for Injury Lawsuits*, WASH. POST, Aug. 18, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/17/AR2005081702002.html>.

Olin Foundation.⁹⁸ Stephen Subrin and Thomas Main observe that “[t]he movement’s emphasis on wealth maximization and efficiency fits easily into, and readily supported, the conservative agenda to reduce regulation and curtail civil litigation.”⁹⁹ For example, professors use the law and economics framework to advocate limitations on class actions, reasoning that class certification creates undue pressure on defendants to settle since they may face immense exposure.¹⁰⁰ While law and economics need not be biased in a pro-corporate direction, the movement in general has tended to support research and commentary skewed toward industry.¹⁰¹

Finally, industry has achieved its greatest successes, and witnessed the most potent amplification of its business victimhood messaging, in the courts themselves. After the growth of public interest litigation in the 1960s, industry and political conservatives made activism in the judiciary their top priority.¹⁰² Jurists and lawyers often reflected industry’s rhetoric. In 1976, Robert Bork wrote that “[w]e are sitting in the center of an explosion of federal litigation,”¹⁰³ while Francis R. Kirkham, then chair of the Antitrust Section of the American Bar Association, “stridently complained about notice pleading, juries, class actions, abusive discovery, and forced settlement of meritless claims due to the high cost of litigating.”¹⁰⁴ Judge Bork laid blame for the litigation explosion on an imprudent expansion of government.¹⁰⁵

Chief Justice Warren Burger, whom some credit with coining the phrase “litigation explosion,”¹⁰⁶ opined that American litigiousness represented a form of “mass neurosis”¹⁰⁷ stemming from communal decay of values with courts “expected to fill the void created by the decline of church, family, and neighborhood unity.”¹⁰⁸ Chief Justice Burger’s sociological analysis, while provocative, was not supported with real world evidence.¹⁰⁹ It did, however, have the effect of providing elite imprimatur to industry attacks on the civil justice system.

⁹⁸ Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1871–72 (2014).

⁹⁹ *Id.* at 1871.

¹⁰⁰ See Gilles & Friedman, *Exploding the Myth*, *supra* note 29, at 121–22.

¹⁰¹ Subrin & Main, *supra* note 98, at 1871–72.

¹⁰² See Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 606–08 (2010).

¹⁰³ Robert H. Bork, *Dedication: Ahmanson Law Center*, 9 CREIGHTON L. REV. 236, 238 (1975).

¹⁰⁴ Subrin & Main, *supra* note 98, at 1864.

¹⁰⁵ Bork, *supra* note 103, at 238–39.

¹⁰⁶ Burbank & Farhang, *supra* note 68, at 1588.

¹⁰⁷ Warren E. Burger, *Remarks to the American Arbitration Association*, in DELIVERY OF JUSTICE 27, 29 (1990).

¹⁰⁸ Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A.J. 274, 275 (1982).

¹⁰⁹ Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 10–11 (1983).

Stephen Burbank and Sean Farhang examined the link between the votes Justices cast on private enforcement issues and the Justices' ideological preferences from 1970 to 2013.¹¹⁰ They found that a Justice's ideology strongly correlated with his or her votes on private enforcement issues: "The conservative-liberal dichotomy . . . perfectly divides our ratio of pro-private enforcement votes in the following sense: every 'conservative' has a lower pro-private enforcement voting rate than every 'liberal.'"¹¹¹ Due to the Supreme Court's rightward shift, pro-private enforcement outcomes have dropped precipitously over time.¹¹² The four most conservative members of the Court during the 2015 term—Justices Thomas, Scalia, Alito and Roberts¹¹³—also had the four most anti-private enforcement scores of *all* Justices in the study.¹¹⁴ Today, outcomes in business cases at the Supreme Court closely align with the positions taken by the Chamber of Commerce's formidable legal lobby.¹¹⁵ Somewhere, Lewis Powell is smiling.

III. U.S. COURTS HAVE DRAWN ON INDUSTRY RHETORIC TO RESTRICT PRIVATE ENFORCEMENT

In recent decades, federal courts in the United States have lowered the expected value of bringing private lawsuits. The courts have reduced the probability and benefits of success and also raised the costs of litigation. These seemingly technical changes to procedural rules have undermined the efficacy of private enforcement.¹¹⁶ It is particularly troubling that these developments have been justified with rhetoric that echoes industry talking points, including the myth of business victimhood.

¹¹⁰ Burbank & Farhang, *supra* note 68, at 1570–80.

¹¹¹ *Id.* at 1573.

¹¹² *Id.* at 1574.

¹¹³ *Id.* at 1573.

¹¹⁴ *Id.* It is telling that Justices Roberts and Scalia vocally advocated for (ultimately unsuccessful) legislative restrictions on private enforcement during the Reagan era. *Id.* at 1554. In essence, that which could not be accomplished through the political arena was accomplished through a conservative judiciary.

¹¹⁵ Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637, 637 (2012) ("[T]he Supreme Court has been captured by the Chamber of Commerce."); Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1742 n.52 (2014) (collecting sources).

¹¹⁶ The changes elaborated in this Article represent the lion's share of the ways in which private enforcement has been curtailed. There are, however, additional sources, including the Advisory Committee on Rules of Civil Procedure, which private industry successfully lobbied to impose limitations on discovery through incorporation of a "proportionality" requirement and elimination of generous language that relevant discovery need only "appear[] reasonably calculated to lead to the discovery of admissible evidence." See FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; Patricia W. Moore, *Chief Justice's Year-End Report Praises Rules Amendments Sought by Corporate Defendants* LAW PROFESSOR BLOGS NETWORK (Jan. 2, 2016), <http://lawprofessors.typepad.com/civpro/2016/01/chief-justices-year-end-report-praises-rules-amendments-sought-by-corporate-defendants.html>.

A. *Decline in the Probability of Success: Pleading Standards.*

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires plaintiffs to articulate in their complaint “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹¹⁷ The rule’s language reflects the view of the drafters of the original 1938 Federal Rules that liberal notice pleading should be the norm.¹¹⁸ Under “notice pleading,” a pleading need only contain enough factual information for the opposing party to proffer a coherent response.¹¹⁹ In deliberately adopting notice pleading, the drafters eschewed the technicality rife in the prior common law and code pleading regimes,¹²⁰ rebuffing “attempts to identify ‘facts’ as opposed to ‘conclusions’ [in pleadings], and preferring discovery to pleading as the means to ascertain what happened.”¹²¹

Although under pressure from some quarters to return to previous pleading systems, the Advisory Committee on Rules of Civil Procedure long rejected such efforts, as did the Supreme Court, which is reflected in the once-canonical *Conley v. Gibson*.¹²² There, the Court reaffirmed that a complaint merely had to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests”¹²³ and that it “should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”¹²⁴ For the next fifty years, the pleading requirements remained essentially unchanged.¹²⁵

Starting in 2007, however, the Court reversed course, imposing stringent new requirements on pleading. It ushered in a new, heightened “plausibility” pleading standard in *Bell Atlantic Corp v. Twombly*¹²⁶ and *Ashcroft v. Iqbal*.¹²⁷ A principal effect of *Twombly* and *Iqbal* has been to decrease the probability of plaintiff success because many plaintiffs are unable to present sufficiently specific facts at the suit’s inception and before discovery, to survive dismissal.

¹¹⁷ FED. R. CIV. P. 8.

¹¹⁸ See Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 917 (1976).

¹¹⁹ *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

¹²⁰ *Thompson v. Allstate Ins. Co.*, 476 F.2d 746, 749 (5th Cir.1973) (summarizing this shift and stating that “[a]ncestor worship in the form of ritualistic pleadings has no more disciples. The time when the slip of a sergeant’s quill pen could spell death for a plaintiff’s cause of action is past. Under the Federal Rules of Civil Procedure, a complaint is not an anagrammatic exercise in which the pleader must find just exactly the prescribed combination of words and phrases.”).

¹²¹ *Burbank & Farhang*, *supra* note 68, at 1604.

¹²² 355 U.S. 41 (1957).

¹²³ *Id.* at 47.

¹²⁴ *Id.* at 45–46.

¹²⁵ See, e.g., *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002).

¹²⁶ 550 U.S. 544 (2007)

¹²⁷ 556 U.S. 662 (2009).

In *Twombly*, the Court found that, at least in antitrust cases like the one before it, “a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”¹²⁸ Rather, “[f]actual allegations must be enough to raise a right of relief above the speculative level,”¹²⁹ and plaintiffs must plead “enough facts to state a claim for relief that is plausible on its face.”¹³⁰ In *Iqbal*, the Supreme Court made clear that the plausibility pleading standard was not limited to the antitrust context and applied across all civil cases. The decision explicitly affirmed the language of *Twombly*, and added that Federal Rules of Civil Procedure Rule 8 “demands more than an unadorned, the defendant-unlawfully-harmed me accusation,”¹³¹ instructing that a complaint should be dismissed when it contains “naked assertions devoid of further factual enhancement.”¹³²

Troublingly, in reaching the holdings in *Twombly* and *Iqbal*, the Court deployed language that echoed industry rhetoric. The *Twombly* order alluded to the alleged excessive costs of so-called frivolous litigation and blackmail settlements. It stated that district courts must “insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed”¹³³ and prevent plaintiffs from bringing “a largely groundless claim”¹³⁴ intended to coerce an “*in terrorem*” settlement.¹³⁵ Given that the defendant was the federal government, rather than a business, the order in *Iqbal*, signed by a bare majority of conservative justices, does not speak quite in the same register as *Twombly*. Nevertheless, the Court based its reasoning, in part, on comparable logic that “litigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”¹³⁶

As several commentators have observed, the plausibility pleading standard introduced by *Iqbal* and *Twombly* is “nothing less than a ‘revolutionary’ departure from notice pleading and from the original vision of the Federal Rules.”¹³⁷ For many plaintiffs, the immediate practical effect of the new standard is to lower the probability of prevailing. The plaintiffs most likely to lose at the motion-to-dismiss stage are those with claims

¹²⁸ *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted).

¹²⁹ *Id.* at 1965.

¹³⁰ *Id.* at 1974.

¹³¹ *Iqbal*, 556 U.S. at 678.

¹³² *Id.* (internal citations and quotations omitted).

¹³³ *Twombly*, 550 U.S. at 558.

¹³⁴ *Id.* (internal citations and quotations omitted).

¹³⁵ *Id.* (internal citations and quotations omitted).

¹³⁶ *Iqbal*, 556 U.S. at 685.

¹³⁷ Subrin & Main, *supra* note 98, at 1848 n.51 and accompanying text (2014) (collecting sources using similar language).

requiring information held by the defendant in order to be properly pled.¹³⁸ While neat empirical analyses have proven elusive,¹³⁹ *Iqbal* and *Twombly* have likely deterred the filing of a meaningful proportion of meritorious cases and led to the premature dismissal of complaints—claims which likely would have proceeded to discovery under *Conley*.¹⁴⁰

B. Rise in Expected Costs: Summary Judgment

The original Federal Rules of Civil Procedure embraced jury trials as the norm but also established a method to dispose of suits by a judge before trial under Rule 56. Summary judgment was previously considered, however, “an exceptional remedy with a very limited role.”¹⁴¹ Early cases involving summary judgment reflected the strong preference for trials, as illustrated by the Supreme Court’s 1962 pronouncement that summary judgment is permitted only “where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial” since “the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.”¹⁴² This reasoning was powerfully reinforced eight years later in the civil rights case of *Adickes v. S.H. Kress & Co.*¹⁴³ The Supreme Court held that because a restaurant, which had allegedly colluded with police to discriminate on the basis of race, failed to proffer evidence that conclusively “foreclose[d] the possibility” of the plaintiff’s allegations, the dispute was inappropriate for resolution at summary judgment.¹⁴⁴

Adickes reigned supreme for sixteen years, but, as Judge Diane Wood put it, “then came the Revolution.”¹⁴⁵ The Court reversed course and expanded the scope of summary judgment in a “trilogy” of decisions issued in 1986:

¹³⁸ Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1261–62 (2008).

¹³⁹ Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2287–94, 2338 (2012) (surveying the existing literature and eventually concluding, based on author’s own methodology, that the plausibility standard has had “substantial [negative] effects” for plaintiffs).

¹⁴⁰ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 20–22 (2010) (“The Court’s signal was loud and clear. Motions to dismiss based on *Twombly* and *Iqbal* have become routine, and the perception among many practicing attorneys and commentators is that the grant rate has increased, particularly in civil rights cases, employment discrimination, private enforcement matters, class actions, and proceedings brought pro se.”).

¹⁴¹ Subrin & Main, *supra* note 98, at 1851.

¹⁴² *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (quoting *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 624 (1944)).

¹⁴³ 398 U.S. 144, 156–57 (1970).

¹⁴⁴ *Id.* at 157–58.

¹⁴⁵ Hon. Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 239 (2011).

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,¹⁴⁶ *Anderson v. Liberty Lobby*,¹⁴⁷ and *Celotex Corp. v. Catrett*.¹⁴⁸ As summarized by Arthur Miller, “*Celotex* has made it easier to make the [summary judgment] motion, and *Anderson* and *Matsushita* have increased the chances that it will be granted.”¹⁴⁹ The Court declared in *Celotex* that when the moving party does not carry the burden of proof at trial, the moving party could point to the non-moving party’s absence of evidence as evidence of absence, compelling summary judgment.¹⁵⁰ *Matsushita* and *Anderson* give the judge leeway to effectively substitute his or her judgment for that of the jury. Under *Matsushita*, the nonmoving party must come forward with persuasive evidence to support their claim that when the facts are presented by the moving party, they render the claim “implausible” to a “reasonable” jury.¹⁵¹ Per *Anderson*, the nonmoving party must go beyond arguing that the jury may not believe the facts as presented by the moving party; rather, it must affirmatively present meaningful, contrary evidence.¹⁵²

The language and reasoning of the decisions also betrays the Court’s motivation, inspired by the received wisdom of industry, to address a perceived litigation explosion and the attendant financial costs for corporate defendants. In *Celotex*, for example, Justice Rehnquist, in words that would have surely astonished the drafters of the Federal Rules, divined symmetry between a litigant’s constitutional right to present a full and fair case before a jury of her peers and a defendant’s purported “right” to obtain summary judgment.¹⁵³

Due in part to the trilogy, summary judgment has become the focal point of litigation—with jury trials having all but vanished from most civil dockets in federal court. To illustrate, in 1938 about one out of five cases went to trial.¹⁵⁴ By 2003, only about one in fifty cases went to trial.¹⁵⁵ And while the absolute number of dispositions increased by five times from 1962 and 2000, the total number of trials decreased by one-fifth.¹⁵⁶

Contrary to the hopes implied in *Celotex* of reining in litigation costs, the

¹⁴⁶ 475 U.S. 574 (1986).

¹⁴⁷ 477 U.S. 242 (1986).

¹⁴⁸ 477 U.S. 317 (1986).

¹⁴⁹ Miller, *Pretrial Rush*, *supra* note 73, at 1041.

¹⁵⁰ *Celotex*, 477 U.S. at 325.

¹⁵¹ *Matsushita Elec. Indus. Co.*, 475 U.S. at 581, 593. The Supreme Court has recently attempted to rein lower courts in on this front, reversing a lower court that improperly “weigh[ed] the evidence and reach[ed] factual inferences contrary to [the non-moving party’s] competent evidence.” *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014).

¹⁵² *Anderson*, 477 U.S. at 254.

¹⁵³ See *Celotex*, 477 U.S. at 327.

¹⁵⁴ Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469, 469 (2009).

¹⁵⁵ Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1258–59 (2005).

¹⁵⁶ Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1776 (2014) (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461–64, 462–63 tbl.1, 464 fig.1).

termination of disputes by a judge at summary judgment, rather than by a jury at trial, has likely increased the costs of litigation and had a disproportionately adverse impact on cash-strapped plaintiffs.¹⁵⁷ Although “[t]he term ‘summary judgment’ suggests a judicial process that is simple, abbreviated, and inexpensive,” Judge D. Brock Hornby has written that “[it] is none of those.”¹⁵⁸ The convoluted and costly nature of contemporary summary judgment practice emanates principally from the way the trilogy transformed discovery. Previously, the limited purpose of discovery was to understand the nature of the claims and defenses of the opposing party to prepare for an actual trial.¹⁵⁹ After the trilogy, litigants have used the discovery phase to amass as much evidence as possible to make, or surmount, a summary judgment motion and prepare for what amounts to a trial on the papers, with evidence culled from mountains of deposition transcripts, discovery responses, expert reports, and document productions.¹⁶⁰

Some may argue that trial is more expensive and complex than summary judgment, and therefore it is better that a large number of suits get disposed of at summary judgment. There is, however, no factual basis for the underlying cost assumption. Trial briefing is more straightforward, and appeals are less likely in light of appellate standards that accord deference to jury findings and judges’ trial rulings.¹⁶¹

C. Rise in Expected Costs: Class Certification

A class action is a suit maintained by an individual or group of individuals, “the named plaintiff(s),” on behalf of those who have suffered a common harm at the hands of a common culprit, or “the class.”¹⁶² The outcome of a class action binds all parties, which means that a class member cannot later bring a separate suit on the same claims litigated in the class action, regardless of the outcome.¹⁶³ Hence, it is accurate to characterize the

¹⁵⁷ See Wood, *supra* note 145, at 233 (“[M]ore and more people are whispering that the Emperor has no clothes: that summary proceedings in the federal courts, in combination with modern pretrial discovery, have had an effect exactly opposite of that which was intended.”); Subrin & Main, *supra* note 98, at 1851 (“This fundamental shift is enormously significant, arguably unconstitutional, probably inefficient, and especially unfair to certain plaintiffs.”).

¹⁵⁸ D. Brock Hornby, *Summary Judgment without Illusions*, 13 GREEN BAG 2d 273, 273 (2010).

¹⁵⁹ *Id.* at 274 (“Discovery expense regularly serves as poster child for everything wrong with civil litigation. Notably, about 50% of plaintiffs’ lawyers, 47% of defense lawyers, and 44% of mixed practice lawyers believe ‘discovery is used *more to develop evidence for summary judgment* than it is to understand the other party’s claims and defenses for trial.”) (quoting ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 71 (2009)).

¹⁶⁰ Wood, *supra* note 145, at 241–42; see also Hon. Mark W. Bennett, *Essay: From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 716 (2013).

¹⁶¹ Wood, *supra* note 145, at 250.

¹⁶² See FED. R. CIV. P. 23.

¹⁶³ See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

class action as a procedural mechanism that expands the scope of parties bound by a suit's outcome.

The original Rule 23 of the Federal Rules of Civil Procedure provided that lawsuits could be maintained as class actions, but set forth conceptually dense classifications that hampered their use.¹⁶⁴ In 1966, Rule 23 was amended to clarify the nature of the rule and expand its availability.¹⁶⁵ Most important was the new Rule 23(b)(3), which replaced the existing opt-in mechanism with an opt-out mechanism for participation in class suits by absent class members.¹⁶⁶

For a suit to be maintained as a class action, the criteria elaborated in Rule 23(a)—commonality, numerosity, typicality and adequacy—must be met, along with the criteria for one of the categories of suits set forth in Rule 23(b).¹⁶⁷ In recent years, courts have imposed onerous, new requirements for suits to obtain class action status, substantially raising the costs of litigating.¹⁶⁸ A core rationale—openly stated—for the new requirements has been the perception, eagerly cultivated by industry, that class action suits are abusive and blackmail defendants into settling.¹⁶⁹

Arguably the most dramatic shift in class action jurisprudence has been from requiring the elements of class certification to be shown principally through the nature of the pleadings to demanding that each element be supported by a preponderance of the evidence.¹⁷⁰ In 1982, the Supreme Court wrote that class certification is proper only if “the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 are met.”¹⁷¹ In recent years, courts’ constriction of class action practice has largely developed around the subordinate clause “after a rigorous analysis.”¹⁷² This shift, ushered in by some courts of appeals in the 2000s and later blessed by the Supreme Court, was doctrinally justified as part of the court’s duty to conduct a “rigorous analysis.”¹⁷³ As a result, successful class certification motions today generally come only after extensive discovery, well-refined expert testimony, and lengthy evidentiary hearings dedicated solely to class certification, none of which were envisioned by the

¹⁶⁴ Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 170, 176 (1970).

¹⁶⁵ *Id.* at 170.

¹⁶⁶ Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 HARV. L. REV. 664, 670 (1979).

¹⁶⁷ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010); *see also* FED. R. CIV. P. 23.

¹⁶⁸ Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 731 (2013); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 626–27 (2012).

¹⁶⁹ Klonoff, *supra* note 168, at 831.

¹⁷⁰ *Id.* at 750–51 (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008), *as amended* (Jan. 16, 2009)).

¹⁷¹ *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

¹⁷² Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 608–09 (2014).

¹⁷³ *Id.*

original Federal Rules, or the 1966 amendments.¹⁷⁴

In a seminal case that applied rigorous, costly class certification criteria, *In re Hydrogen Peroxide*, the Third Circuit justified the new regime by noting that class certification “create[s] unwarranted pressure to settle non-meritorious claims on the part of defendants” and that this “potential for unwarranted settlement pressure is a factor we weigh in our certification calculus.”¹⁷⁵ The Third Circuit is not alone in reasoning from a premise patterned on unsubstantiated corporate messaging, as almost every circuit has imposed the same criteria based on the same reasoning.¹⁷⁶

In *Wal-Mart Stores, Inc. v. Dukes*¹⁷⁷ and *Comcast Corp. v. Behrend*,¹⁷⁸ the Supreme Court also endorsed this shift. In *Dukes*, the Court found that the commonality requirement demands that the plaintiff present a common contention of such a nature that “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”¹⁷⁹ Mere pleadings, however, cannot satisfy commonality, or other Rule 23(a) requirements, as a plaintiff must “affirmatively demonstrate his compliance” through evidence.¹⁸⁰ In *Comcast*, the Court found that “the same analytical principles govern Rule 23(b),” and that “[i]f anything, Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a).”¹⁸¹ Because the Rule 23(b)(3) predominance requirement also calls for an examination of the elements of the claims that plaintiff seeks to have certified, some lower courts have applied *Comcast* in a manner that compels exhaustive matching of evidence with claims’ elements to demonstrate that common issues, in fact, prevail over individual ones for each claim.¹⁸²

The transition from reliance on pleadings to a preponderance of the evidence for each element of class certification has substantially raised the costs of class litigation for plaintiffs, who carry the burden for proving that the suit should be maintained on a class basis.¹⁸³ The necessary evidence for each element is typically in the possession of the defendant, demanding intensive discovery that defendants resist at every turn.¹⁸⁴ Further, well-heeled defendants are likely to hire experts to construe the available evidence in a manner that suggests that plaintiffs have *not* affirmatively identified

¹⁷⁴ See generally Klonoff, *supra* note 168, at 745–92.

¹⁷⁵ 552 F.3d at 310 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162, 168 n.8 (3d Cir. 2008)).

¹⁷⁶ See Gilles & Friedman, *After Class*, *supra* note 168, at 658–59.

¹⁷⁷ 131 S. Ct. 2541, 2551 (2011).

¹⁷⁸ 133 S. Ct. 1426, 1432 (2013).

¹⁷⁹ *Dukes*, 131 S. Ct. at 2551.

¹⁸⁰ *Id.*

¹⁸¹ *Comcast*, 133 S. Ct. at 1432.

¹⁸² See, e.g., *Brown v. Electrolux Home Prods.*, No. 15-11455, 2016 U.S. App. Lexis 5112, at *14-24 (11th Cir. Mar. 21, 2016) (vacating the district court’s order granting class certification because it failed to comprehensively examine elements of state law claims, and whether they were better-suited for individual or collective treatment).

¹⁸³ See Miller, *Simplified Pleading*, *supra* note 50, at 317–18, 320–22.

¹⁸⁴ Steig D. Olson, “Chipping Away”: *The Misguided Trend Toward Resolving Merits Disputes As Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 976 (2009).

enough parties, shown that resolution of common issues will drive the litigation and predominate over individual issues, and shown that the class action is a superior method for resolving disputes over individual litigation. Accordingly, plaintiffs are compelled to hire their own expert(s) to show that they have, in fact, met these criteria. In an additional, recent requirement, plaintiffs' experts are also subject to motions challenging their qualifications, methodology and conclusions¹⁸⁵ under the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁸⁶ which was intended merely as a method of protecting juries, not judges, from unsound expert evidence.¹⁸⁷

D. Lowered Expected Value: The Ascertainability Prerequisite for Class Certification

Most of the new requirements of class certification have made the process more expensive—sometimes exceedingly so—but have not altogether eliminated the possibility of class actions. Some new procedural requirements, though, could have this effect. For example, the imposition of a strict ascertainability requirement demands that plaintiffs be able to readily ascertain class membership through objective criteria at the class certification stage. While reasonable sounding on its face, ascertainability may be very difficult to satisfy in cases implicating inexpensive non-durable goods for which consumers rarely keep proof of purchase. Strict ascertainability, if widely adopted, threatens to end most consumer class actions involving a low-priced consumer good.¹⁸⁸ Ascertainability is not found in Rule 23 but courts have recently deemed it to be an “implicit” requirement that flows from a perceived need to determine the identities of those who would be bound by judgment.¹⁸⁹

A 2013 Third Circuit decision, *Carrera v. Bayer Corp.*, uses perhaps the most stringent version of ascertainability to raise hurdles, often insurmountable, for plaintiffs.¹⁹⁰ Largely relying on precedent of his own making, Judge Scirica, writing for the panel, observed that a “rigorous analysis” of class action requirements demands that plaintiffs be able to show at the class certification stage that the members of the putative class are

¹⁸⁵ Christine P. Bartholomew, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2148–49 (2014).

¹⁸⁶ 509 U.S. 579 (1993).

¹⁸⁷ See, e.g., *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999).

¹⁸⁸ Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 483 n.43 (2014) (“This ascertainability requirement has sounded a death knell for many (if not most) cases arising from small retail purchases, where consumers are unlikely to retain proof of purchase.”). Fortunately, some courts have refused to adopt the harsh variant of ascertainability imposed in *Carrera*. See, e.g., *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 566 (C.D. Cal. 2014).

¹⁸⁹ See, e.g., *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (characterizing ascertainability as an “implicit threshold requirement”).

¹⁹⁰ *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

“currently and readily ascertainable based on objective criteria.”¹⁹¹ The court held that a putative class of purchasers of an allegedly ineffectual weight loss supplement, costing approximately fifteen dollars per package, was not ascertainable.¹⁹² The court reasoned that no objective criteria existed to determine class members because consumers were unlikely to retain proof of purchase, only some retailers retained records of sales to individuals, and the submission of affidavits to show proof of purchase purportedly invited fraudulent claims.¹⁹³

Strict ascertainability requirements have been premised on protecting supposedly vulnerable corporate defendants. In *Carrera*, the Third Circuit justified its rigorous ascertainability requirement on an alleged “due process right” of corporate defendants “to challenge the proof used to demonstrate class membership.”¹⁹⁴ In civil rights litigation, plaintiffs are routinely instructed that a procedural due process violation must be tethered to “the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property,”¹⁹⁵ whereas the corporate defendant in *Carrera* was not. Had the court applied this well-established standard in *Carrera*, it should have found that the total damages are ascertainable through the defendant’s sales records. The defendant’s due process right, if any, should only entitle it to pay out no more than that amount in compensatory damages, not dictate the distribution of this money.¹⁹⁶ Even if the defendant did have such a due process right, however, that right is to be weighed, as it is in the civil rights context, against competing interests, including the values served by class actions and private enforcement more generally.¹⁹⁷

E. Lowered Expected Value: Bilateral Arbitration

Judicial compulsion of lawsuits to arbitration, and enforcement of class action waivers, has also dramatically reduced the expected value of filing suit. Arbitration is a form of extrajudicial dispute resolution in which an ostensibly neutral actor resolves disputes in an informal setting lacking many procedural protections found in courts. This enables a speedier, but arguably less just, resolution. In addition, present-day arbitration clauses contain class action waivers, which courts have enforced, that prevent individuals from participating in class actions and other aggregate suits.¹⁹⁸

¹⁹¹ *Id.* at 306 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)).

¹⁹² *Carrera*, 727 F.3d at 308–09.

¹⁹³ *Id.* at 309–11.

¹⁹⁴ *Id.* at 307.

¹⁹⁵ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972).

¹⁹⁶ Discussion with Deepak Gupta, Founding Principal, Gupta Wessler PLLC (2014). We thank Mr. Gupta for conveying his astute observation.

¹⁹⁷ *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

¹⁹⁸ *See, e.g., Cronin v. CitiFinancial Servs., Inc.*, 352 F. App’x 630, 636 (3d Cir. 2009); *Carter v. Countrywide Credit Indus., Incl.*, 362 F.3d 294, 302 (5th Cir. 2004); *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679, 683 (N.D.W. Va. 2010).

In the early 20th century, arbitration gained favor as an efficient method of resolving business-to-business disputes, with the Federal Arbitration Act of 1925 (“FAA”) abrogating judicial barriers to contractual arbitration. The text of the FAA features two seemingly inconsistent provisions.¹⁹⁹ The FAA declared arbitration clauses presumptively “valid, irrevocable, and enforceable.”²⁰⁰ This apparently broad grant of authority existed alongside an equally broad restriction contained in the FAA’s savings clause, which exempted from the statute’s purview grounds that “exist at law or in equity for the revocation of any contract.”²⁰¹

The FAA had only modest effects early in its lifespan. The statute’s legislative history shows that Congress intended the statute to be procedural in nature²⁰² and to facilitate enforcement of business-to-business arbitration agreements for claims brought in federal court—and only in federal court.²⁰³ The statute was not to apply in state court and was not intended to preempt state law.²⁰⁴ This understanding was so fundamental that even litigants did not bother attempting to unsettle it.²⁰⁵ In addition, the savings clause preserved cases implicating important rights as “judges denied motions to compel arbitration of antitrust, securities, pension, and patent disputes, and refused to grant preclusive effect to arbitrators’ rulings on claims under civil rights statutes.”²⁰⁶

The sea change began in the 1980s and coincided with the growth of industry’s efforts against private enforcement.²⁰⁷ *Southland v. Keating*, an early and significant decision, held that the FAA applies in state court and preempts conflicting state law.²⁰⁸ In the next term, the Court held that the FAA could also bar adjudication of federal statutory rights in a court of law.²⁰⁹ Previously, the Court had drawn a clear distinction between contractual and statutory claims with the latter protected from compulsion to arbitration.²¹⁰ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,

¹⁹⁹ See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 84–91 (1992) (detailing the lobbying efforts of American Bar Association officials and the business community that culminated in passage of the FAA).

²⁰⁰ 9 U.S.C. §2 (2014).

²⁰¹ *Id.*

²⁰² H.R. Rep. No. 68-96, at 1 (1924) (“Whether an agreement for arbitration shall be enforced or not is a question of procedure.”); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 127 (2006).

²⁰³ Moses, *supra* note 202, at 127–31.

²⁰⁴ David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 23–26 (2004)

²⁰⁵ *Id.* at 24.

²⁰⁶ David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1039–40 (2012) (footnotes omitted).

²⁰⁷ See *supra* notes 102–09 and accompanying text.

²⁰⁸ 465 U.S. 1, 16 (1984).

²⁰⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

²¹⁰ *Id.* at 647–49 (Stevens, J., dissenting) (citing as examples of this distinction *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 729 (1981) (“Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that

Inc.,²¹¹ however, the Court, channeling the ascendant industry-driven narrative of a litigation explosion, announced that there is no comparative benefit to a “day in court” over a day in an arbitral conference room.²¹² Accordingly, the Court ruled the antitrust claim before it should be moved to arbitration.²¹³

The Court, however, stressed that its ruling was limited because a showing of “overwhelming economic power” could still provide grounds for the revocation of an arbitration clause²¹⁴ and the propriety of arbitration still rested on the ability of a litigant to effectively vindicate its statutory rights in arbitration.²¹⁵

While these limitations on arbitration provided some solace to plaintiffs, they, too, were eliminated by the Court in the 2000s. The final victories of arbitration were driven by private industry. In the mid-to-late 1990s, a for-profit arbitration outfit instructed its corporate clientele in marketing materials that the best way to fortify its defenses against class action liability was to include arbitration clauses with class action waivers in its form contracts with consumers.²¹⁶ Many corporations ran with this advice.²¹⁷ Courts now routinely enforce arbitration clauses and class action waivers, which are increasingly ubiquitous. In 2010, the Supreme Court went so far as to prevent arbitrators from ordering class-wide arbitration unless an arbitration agreement expressly permits class proceedings, making class action waivers the default.²¹⁸

In the past five years, two decisions have eviscerated the potential limitations on arbitration’s scope as outlined in *Mitsubishi Motors*. First, the notion that “overwhelming economic power” could act as a limit on arbitration was effectively abandoned in *AT&T Mobility v. Concepcion*.²¹⁹ In *Concepcion*, plaintiff consumers initiated a putative class action lawsuit

is inimical to the public policies underlying the [Fair Labor Standards Act], thus depriving an employee of protected statutory rights.”) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56–57 (1974) (“Arbitral procedures, while well suited to the resolution of contract disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. . . . [T]he resolution of statutory or constitutional issues is a primary responsibility of courts.”).

²¹¹ 473 U.S. 614.

²¹² *Id.* at 628; Reinert, *supra* note 156, at 1778 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 628) (“[O]ne key narrative on the Supreme Court’s road to arbitration is that arbitration is no better or worse than judicial resolution of competing claims.”).

²¹³ *Mitsubishi Motors Corp.*, 473 U.S. at 640. In dissent, Justice Stevens chastised the Court for entrusting the well-established public interests served by antitrust laws, and the “private Attorneys General” who execute them, to the “[d]espotic decisionmaking” and “rudimentary procedures” of arbitration. *Id.* at 654, 656–57.

²¹⁴ *Id.* at 627.

²¹⁵ *Id.* at 637.

²¹⁶ See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396–97 (2005) (detailing this history).

²¹⁷ *Id.* at 397.

²¹⁸ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010).

²¹⁹ 563 U.S. 333, 352 (2011).

against a cell phone company, alleging that the company induced them to enter into contracts by offering a free phone, but subsequently charged the consumers \$30.22 to cover sales taxes.²²⁰ The contract contained an arbitration clause with a class-action waiver that required plaintiffs to proceed in arbitration only on a bilateral basis with the company, rather than on behalf of all consumers who had been similarly defrauded.²²¹ Under governing California law, the district court and the Ninth Circuit held that adhesion contracts of this kind were considered unconscionable because they enabled those with overwhelming economic power to “deliberately cheat large numbers of consumers out of individually small sums of money[.]”²²² No rational consumer would bring an individual claim for such paltry damages.²²³

The Supreme Court reversed the Ninth Circuit decision, invoking business victimhood mythology. The Court held that the California law barring class action waivers in adhesion contracts as unconscionable was an impermissible “obstacle to the accomplishment of the FAA’s objectives,” and therefore, was preempted.²²⁴ The Court brushed aside concerns that the absence of a class mechanism would mean that small-value claims would go unprosecuted.²²⁵ It reasoned that this was “unrelated” to the preemption inquiry and that, in any event, class-wide proceedings are unfair to corporate defendants as they result in “*in terrorem*” settlements with the sheer size of class proceedings compelling defendants to settle “questionable claims.”²²⁶ In practice, *Concepcion* gutted the FAA’s savings clause. Lower courts now have little room to find an arbitration clause unconscionable; doing so would have to be squared with the Court’s order that state law must not “stand as an obstacle to the accomplishment of the FAA’s objectives.”²²⁷

In *American Express Co. v. Italian Colors Rest.*,²²⁸ the Court eliminated the one last refuge for prospective plaintiffs—that arbitration must allow a plaintiff to effectively vindicate his or her statutory rights. While *Concepcion* involved preemption of state law claims, *Italian Colors* implicated claims arising under federal antitrust law. The plaintiff restaurant, Italian Colors, alleged that American Express had unlawfully leveraged its monopoly power in charge cards to force merchants to accept its high-cost credit cards.²²⁹ While the parties’ contract contained an arbitration clause, the plaintiff argued that the dispute was not subject to arbitration because compulsion to arbitral forum would prevent the plaintiff from vindicating its

²²⁰ *Id.* at 336–38.

²²¹ *Id.* at 336.

²²² *Id.* at 340 (quoting *Discover Bank v. Super. Ct. of L.A.*, 113 P.3d 1100, 1110 (Cal. 2005)).

²²³ *See Id.*

²²⁴ *Id.* at 343, 352.

²²⁵ *Id.* at 351.

²²⁶ *Id.* at 350–51.

²²⁷ *Id.* at 343.

²²⁸ 133 S. Ct. 2304 (2013).

²²⁹ *Id.* at 2308.

federal statutory rights.²³⁰ In its opposition to the defendant's motion to compel arbitration, the plaintiff submitted a declaration from an economist estimating that the costs of proving plaintiff's claim would be "at least several hundred thousand dollars, and might exceed \$1 million," while the maximum recovery would be only \$38,549.²³¹

The Court held that the purported "effective vindication" exception was mere dictum in *Mitsubishi Motors*, on which the Court subsequently declined to rely on to invalidate arbitration agreements, and the same result was necessary in the case before it as "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."²³² In reaching its conclusion, the Court relied on the broad language extolling the virtues of arbitration in *Concepcion* that purportedly are embodied in the FAA.²³³ Justice Kagan, authoring a dissent for three justices, called the decision a "betrayal of our precedents, and of federal statutes like the antitrust laws,"²³⁴ adding that: "In the hands of today's majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."²³⁵

Today, when a large number of potential plaintiffs have been commonly defrauded by comparatively small amounts, the pursuit of private enforcement is usually futile with the presence of a bilateral arbitration clause. In light of the expected benefits, the costs of individual arbitrations are prohibitive.²³⁶ The Consumer Financial Protection Bureau's study on the effects of arbitration clauses in consumer financial contracts confirms this economic logic. Across six major consumer finance markets in which tens of millions of Americans participate, the CFPB reported that in 2010 and 2011 only fifty-two individual arbitration claims for less than \$1,000 were filed and that just *four* of these claimants obtained relief.²³⁷ It is unsurprising that large civil defense firms specify the "potential elimination" of mass accountability as the principal benefit of arbitration for their corporate clients.²³⁸

²³⁰ *Id.* at 2310.

²³¹ *Id.*

²³² *Id.* at 2309.

²³³ *Id.* at 2312.

²³⁴ *American Express*, 133 S. Ct. at 2313.

²³⁵ *Id.* at 2320.

²³⁶ See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30."). Moreover, even if financing were possible, plaintiffs harbor legitimate fears that arbitrators are biased toward corporate defendants. After all, corporate defendants tend to be repeat players, while plaintiffs typically are not, creating an incentive for arbitrators to rule in favor of the defendants or risk losing future business. See Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 FORDHAM URB. L.J. 273, 279–80 (2010).

²³⁷ CFPB ARBITRATION STUDY, *supra* note 26, at § 5.2.2.

²³⁸ See, e.g., John L. Collins, David S. Baffa & Gerald L. Maatman Jr., *Guidance for Employers Considering Mandatory Arbitration Agreements with Class and Collective Action*

IV. THE EUROPEAN UNION HAS SOUGHT TO DEVELOP PRIVATE ENFORCEMENT, BUT DEFERENCE TO U.S. INDUSTRY RHETORIC HAS IMPEDED REAL CHANGE

While the Supreme Court has subverted private rights of action in the United States, European Union institutions have taken a number of steps over the past fifteen years to develop the private enforcement of public law, with an emphasis on antitrust law.²³⁹ Traditionally, the European Union and its Member States placed public institutions at the center of their law enforcement regimes.²⁴⁰ Private enforcement has been underdeveloped and largely existed as an afterthought. Breaking with this historical norm, the European Court of Justice (“ECJ”), in a series of decisions since 2001, has held that victims of antitrust violations have a right to seek damages and also lowered procedural obstacles to private antitrust suits.²⁴¹ In contrast to its American counterpart’s hostility toward private rights of action across all areas of law, the European Union’s highest court has aimed to encourage private enforcement in antitrust in particular.

The European Union has enacted rules to effectuate private rights of action. Seeking to protect public rights broadly, the European Commission (“EC”) issued a non-binding recommendation in June 2013 on collective actions applicable to areas such as antitrust, consumer protection, and financial services.²⁴² Building on the ECJ’s more narrowly-focused rulings, the European Council enacted a binding directive on private antitrust enforcement in November 2014.²⁴³ This directive establishes a basic procedural framework for facilitating antitrust damages actions. European Union Member States were given two years to establish these enumerated rules as national law.²⁴⁴ While the antitrust-specific directive includes a number of positive elements, the more general recommendation has two critical deficiencies—opt-in collective actions and restrictions on third-party financing—that are almost guaranteed to yield inadequate private

Waivers, SEYFARTH SHAW LLP (July 3, 2013), http://www.seyfarth.com/dir_docs/publications/GuidanceMandatoryArbitration.pdf.

²³⁹ See Laurel Harbour, John Evans, Erwan Poisson & Camille Flechet, *Representative Actions and Proposed Reforms in the European Union*, WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE (2012) [hereinafter WORLD CLASS ACTIONS]. Although “competition law” is the more common term in Europe, “antitrust law” will be used here for the sake of consistency.

²⁴⁰ Angela Wigger & Andres Nölke, *Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement*, 45 J. COMMON MKT. STUD., 487, 495 (2007) (noting “the institutionalization of powerful public enforcement agencies with wide-ranging enforcement competencies that ‘order’ the economy and balance the decision-making according to broader political views” in the civil law nations of Continental Europe).

²⁴¹ Harbour et al., *supra* note 239.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

enforcement.

In developing its recommendation, the EC credited the tort reform narrative in the United States and repeatedly stated the need to prevent “abusive litigation” in Europe.²⁴⁵ Yet, this concern is based on a false portrayal of the civil justice process in the United States. The so-called excesses do not reflect reality and are the product of a distorted historical record.

A. The European Court of Justice Recognizes and Promotes Private Rights of Action, in Particular in Antitrust Law

Although European countries have relied extensively on government action to protect citizens, European Union law has long formally recognized private rights of action as well. The Charter of Fundamental Rights of the European Union states that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy.”²⁴⁶ In a 1963 decision, the ECJ held that an article of the EU’s foundational treaty “must be interpreted as producing direct effects and creating individual rights which national courts must protect.”²⁴⁷ From a policy perspective, the ECJ has stated that private rights of action complement public enforcement and deter illegal conduct.²⁴⁸ In a series of decisions starting in 2001, the ECJ articulated principles governing antitrust private damages actions in the national courts of the Member States. These decisions catalyzed an appreciable shift in the approach of the European Union to private enforcement more generally.

In its 2001 decision in *Courage Ltd. v. Crehan*, the ECJ held that the victims of antitrust violations have a right to pursue actions for damages.²⁴⁹ Crehan was the owner of a pub in the United Kingdom.²⁵⁰ As part of his lease, he was required to serve only beer produced by Courage.²⁵¹ After he was sued for violating this term of the lease, Crehan filed a counterclaim for damages in English court.²⁵² He alleged that the tying arrangement that required him to serve only Courage’s beer as a condition of his lease was a violation of European antitrust law and hurt the profitability of his business.²⁵³ In deciding several questions of European Union law referred to it by the English High Court, the ECJ held that Crehan had a right to obtain damages if he could establish an antitrust violation and show that the violation caused the damages he suffered.²⁵⁴ It stated that EU law created

²⁴⁵ *Id.*

²⁴⁶ Charter of Fundamental Rights of the European Union, art. 47, 2010 O.J. C 364/01 at 20.

²⁴⁷ Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration*, 12.

²⁴⁸ Case C-253/00, *Munoz v. Frumar*, 2002 E.C.R. I-7312, ¶ 31.

²⁴⁹ Case C-453/99, *Courage Ltd. v. Crehan*, 2001 E.C.R. I-6314, ¶ 36.

²⁵⁰ *Id.* at ¶ 3.

²⁵¹ *Id.* at ¶ 5.

²⁵² *Id.*

²⁵³ *Id.* at ¶ 7.

²⁵⁴ *Id.* at ¶ 33.

rights for individuals and that the national courts “must ensure that those rules take full effect and must protect the rights which they confer on individuals.”²⁵⁵ The ECJ also observed that a failure to permit private enforcement would undermine “the full effectiveness” of European antitrust law.²⁵⁶ According to the ECJ, damages actions play an important deterrence role and “can make a significant contribution to the maintenance of effective competition in the [European] Community.”²⁵⁷

The ECJ’s next major pronouncement on private rights of action under antitrust law was in *Manfredi v. Lloyd Adriatico Assicurazioni SpA*.²⁵⁸ The Italian competition authority had found that the defendant insurance companies had engaged in illegal information sharing as a means of fixing rates on domestic auto insurance policies.²⁵⁹ The claimants filed suit seeking to recover damages for the overcharges arising from this conspiracy.²⁶⁰ In affirming the importance of private enforcement, the ECJ recited the compensation and deterrence benefits from *Crehan*.²⁶¹ Importantly, it ruled that private parties could rely on findings of antitrust violations by the national and European competition authorities in pursuing their claims.²⁶² In other words, these decisions would have preclusive effect, and private parties would only have to establish a causal connection between the violation and their injuries. In addition, the court held that parties can seek damages for both overcharges and lost profits.²⁶³ While *Manfredi* did not endorse exemplary or punitive damages, it did not foreclose this option either.²⁶⁴

Although they enshrined private rights of action in EU law, the *Crehan* and *Manfredi* decisions left the implementation of private enforcement to the European Union Member States. *Manfredi* stated that “[i]t is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the Community competition rules and to prescribe the detailed procedural rules governing those actions[.]”²⁶⁵ This discretion is subject to two important limitations. First, the procedures cannot be less favorable for actions under EU law than they are for similar actions under national law—or the principle of equivalence.²⁶⁶ Second, the procedures cannot “render practically impossible or excessively difficult the exercise of

²⁵⁵ *Courage Ltd.*, 2001 E.C.R. I-6314 at ¶ 25.

²⁵⁶ *Id.* at ¶ 26.

²⁵⁷ *Id.* at ¶ 27.

²⁵⁸ Joined Cases C-295/04-C-298/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, 2006 E.C.R. I-6641.

²⁵⁹ *Id.* at ¶ 11.

²⁶⁰ *Id.* at ¶ 13.

²⁶¹ *Id.* at ¶¶ 90–91.

²⁶² *Id.* at ¶ 63.

²⁶³ *Id.* at ¶ 95.

²⁶⁴ *Manfredi*, 2006 E.C.R. I-6641 at ¶ 93.

²⁶⁵ *Id.* at ¶ 72.

²⁶⁶ *Id.* at ¶ 62.

the right to seek compensation”—or the principle of effectiveness.²⁶⁷

In recent years, the ECJ has articulated additional principles that encourage private antitrust enforcement. In *Europese Gemeenschap v. Otis NV*, it affirmed that national courts must treat the EC’s antitrust decisions as binding and cannot issue conflicting decisions.²⁶⁸ And it has also broadened the scope of damages that claimants can recover.²⁶⁹

B. *The European Commission Has Taken an Important Step Toward Developing Effective Private Antitrust Enforcement*

In November 2014, the European Council enacted a directive that establishes a basic framework for the private enforcement of European antitrust law.²⁷⁰ The directive sets out procedural rules that Member States must incorporate into national law within two years.²⁷¹ Through this directive, the EC has laid significant, albeit imperfect, building blocks for an effective system of private antitrust litigation.

1. Procedural Requirements for Private Antitrust Enforcement in the EU Member States

The directive lays out a discovery process. It establishes the right of claimants to obtain evidence from defendants and third parties.²⁷² Courts should order defendants and third parties to disclose relevant evidence provided that a claimant has “a reasoned justification containing reasonably available facts and evidence to support the plausibility of its claim for damages.”²⁷³ The disclosure obligation is subject to a proportionality test.²⁷⁴ If defendants fail to comply or destroy relevant evidence, the directive requires courts to impose penalties, including applying legal presumptions in favor of the claimant and ordering the payment of legal costs.²⁷⁵

The directive confers binding authority on the decisions of national competition authorities and sets out a long statute of limitations period. If a national competition authority finds a violation of antitrust law, courts in that

²⁶⁷ *Id.*

²⁶⁸ Case C-199/11, *Europese Gemeenschap v. Otis NV*, 2012 E.C.R. I-684.

²⁶⁹ *See, e.g.*, Case C-557/12, *Kone AG v. ÖBB-Infrastruktur AG* (finding that EU law overrides national rules that prevent recovery of “umbrella effect” overcharges in cartel cases).

²⁷⁰ Directive 2013/0185 of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [hereinafter “European Council Directive 2013/0185”].

²⁷¹ *Id.*

²⁷² While this right to discovery is not as broad as what litigants are accustomed to in the United States, it represents a significant step in Europe where discovery has been historically weak or non-existent. Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409, 428 (2004).

²⁷³ *Id.* art. 5(1).

²⁷⁴ *Id.* art. 5(3).

²⁷⁵ *Id.* art. 8(2).

jurisdiction are directed to hold that a violation has been “irrefutably established for the purposes for an action for damages.”²⁷⁶ With respect to decisions in other Member States, courts should accord them a high degree of deference and apply them “as at least prima facie evidence that an infringement of antitrust law has occurred.”²⁷⁷ The directive requires Member States to establish a limitations period of no less than five years that does not begin to run until a claimant “knows, or can reasonably be expected to know” that an infringement has occurred and caused him or her harm.²⁷⁸

Defendants are also subject to joint and several liability. A defendant in an antitrust action is liable for the entire harm arising from the alleged violation, including the harm inflicted by other participants in the illegal activity.²⁷⁹ For damages above and beyond those attributed to its conduct, a defendant can seek compensation from its co-conspirators.²⁸⁰ Antitrust violators that have received leniency from a competition authority for reporting cartel conduct are immune from joint and several liability.²⁸¹

On the question of passing-on of overcharges from illegal conduct, the European Union has parted ways with federal law in the United States. All purchasers—regardless of whether they purchased directly from the antitrust violator or an intermediary—are entitled to seek damages.²⁸² This indirect purchaser standing distinguishes European law from federal law in the United States, where the Supreme Court has held that the antitrust laws grant consumer standing only to direct purchasers.²⁸³ At the same time, defendants can invoke the passing-on of illegal overcharges as a defense against direct purchasers;²⁸⁴ this is also contrary to federal precedent in the United States, which prohibits this defense.²⁸⁵ A defendant in Europe is entitled to a commensurate reduction in damages to direct purchasers if it shows that the overcharge was passed through to downstream customers in the form of higher prices.²⁸⁶

The directive provides some guidance on damages.²⁸⁷ It restricts

²⁷⁶ *Id.* art. 9(1).

²⁷⁷ European Council Directive 2013/0185, art. 9(2). The European Court of Justice had earlier held that national courts are bound by European Commission decisions finding an antitrust violation. Case C-344/98, *Masterfoods Ltd. v. HB Ice Cream Ltd.*, 1995 E.C.R. I-11412, ¶ 52.

²⁷⁸ European Council Directive 2013/0185, art. 10(2).

²⁷⁹ *Id.* art. 11(1).

²⁸⁰ *Id.* art. 11(5).

²⁸¹ *Id.* art. 11(4).

²⁸² *Id.* art. 14(1).

²⁸³ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). A number of states, however, confer standing on indirect purchasers under their antitrust laws. *See e.g.*, ALA. CODE § 6-5-50(a); CAL. BUS. & PROF. CODE § 16750(a); WIS. STAT. ANN. § 133.18(1)(a).

²⁸⁴ European Council Directive 2013/0185, art. 13.

²⁸⁵ *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

²⁸⁶ European Council Directive 2013/0185, art. 13.

²⁸⁷ *Commission Staff Working Document: Practical Guide: Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* (June 11, 2013), http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf

Member States from establishing legal standards for damages that makes damages actions “practically impossible or excessively difficult.”²⁸⁸ In the context of cartel conduct, a presumption of harm is automatically established.²⁸⁹ But for other antitrust claims, no such presumption exists.

2. A Positive, But Imperfect, Enactment

The directive is an important step forward and represents real progress toward creating effective private antitrust enforcement. Several provisions raise the expected benefits and reduce the costs of litigation. They increase the likelihood that ordinary citizens will be able to vindicate their economic rights in court. Nonetheless, it has a notable weakness that could hurt private actions and diminish the deterrence of anticompetitive behavior.

Two articles of the directive raise the expected benefits from a private antitrust claim. Article 11 establishes joint and several liability for antitrust violations.²⁹⁰ Per this provision, a claimant “has the right to require full compensation from any [defendant] until he has been fully compensated.”²⁹¹ By allowing a claimant to recover its entire damage from a single defendant, joint and several liability raises the expected benefits from a single lawsuit. Without joint and several liability, a plaintiff is permitted to recover only the damages specifically attributed to each defendant.

Article 12 confers standing on all consumers—those who purchased the affected products directly and indirectly from the antitrust violators.²⁹² By granting standing to indirect purchasers, the directive permits them to recover damages for the overcharges they had to bear because of upstream antitrust law infringements.²⁹³ In the absence of this rule, indirect purchasers would not have standing to recover and would have an expected benefit of zero from antitrust litigation. In the United States, for example, federal antitrust law denies standing to indirect purchasers. The *Illinois Brick* rule holds that only direct purchasers have the right to pursue consumer antitrust claims.²⁹⁴ This narrower standing rule not only reduces the expected benefits for indirect purchasers—it eliminates them entirely.

The directive has multiple provisions that reduce the costs of uncovering antitrust law violations. Article 5 provides for proportionate discovery if a claimant presents “a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages.”²⁹⁵ Provided these conditions are met, national courts must order “the defendant or a third party to disclose relevant evidence which lies in

²⁸⁸ *Id.* art. 16(2).

²⁸⁹ *Id.* art. 16(1).

²⁹⁰ *Id.* art. 11.

²⁹¹ *Id.* art. 11(1).

²⁹² *Id.* art. 12.

²⁹³ European Council Directive 2013/0185, art. 14(1).

²⁹⁴ *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

²⁹⁵ European Council Directive 2013/0185, art. 5(1).

their control.”²⁹⁶ Article 10 establishes a minimum limitation period of five years.²⁹⁷ And the limitation period does not begin until the plaintiff knows or reasonably could know that a violation of antitrust law has occurred, that this violation has caused harm to the plaintiff, and the identity of the violator.²⁹⁸ These two provisions reduce the costs of investigation for claimants. Plaintiffs are not expected to undertake extraordinary pre-trial investigations on their own to uncover violations, nor are they required to uncover violations in an unreasonably short period of time.

Plaintiffs face lower litigation costs under the directive’s rules of issue preclusion. If a national competition authority decision has found an antitrust violation, courts in that country are required to hold that a violation has been “irrefutably established for the purposes for an action for damages.”²⁹⁹ And courts in other EU nations are required to treat this decision “as at least prima facie evidence that a violation of antitrust law has occurred.”³⁰⁰ These two rules relieve plaintiffs of the burden of relitigating and proving allegations that the public authorities have already found to be true. And Article 17 establishes a presumption of harm from collusion.³⁰¹ Consequently, plaintiffs in cartel cases do not have to show that they suffered harm from this illegal conduct.

At the same time, the directive has a notable weakness. While all injured parties (whether they are direct or indirect purchasers) are granted standing, defendants are entitled to invoke the passing-on defense to damages.³⁰² Intermediate buyers when forced to pay overcharges on products due to cartelistic or other anticompetitive behavior can sometimes pass these higher prices, in large measure, on to customers. With the availability of a passing-on defense, defendants can reduce their damages to direct purchasers to the extent that direct purchasers passed the illegal overcharges through to their customers.³⁰³ The passing-on defense can harm the compensation and deterrence function of private enforcement.³⁰⁴ Because it reduces damages to direct purchasers, this defense lowers their anticipated recovery (the expected benefit from legal action), making a lawsuit less attractive and harming overall deterrence. The U.S. experience suggests that indirect purchasers cannot be expected to carry a significant part of the enforcement burden and fully offset reduced enforcement by direct purchasers. In most EU nations, this deficiency is compounded by the procedural obstacles to collective

²⁹⁶ *Id.*

²⁹⁷ *Id.* art. 10(3).

²⁹⁸ *Id.* art. 10(2).

²⁹⁹ *Id.* art. 9(1).

³⁰⁰ *Id.* para. 31.

³⁰¹ European Council Directive 2013/0185, art. 17(2).

³⁰² *Id.* art. 13.

³⁰³ Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Analysis*, 128 U. PENN. L. REV. 269, 269–70 (1979).

³⁰⁴ In 2013, the Supreme Court of Canada granted standing to indirect purchasers but stated that recognizing the passing-on defense could undermine deterrence. *See Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] S.C.R. 57 (Can.).

actions.³⁰⁵

C. Notwithstanding the Progress Embodied in the Directive, the Recommendation on Collective Actions Has Significant, Arguably Fatal, Deficiencies

In June 2013, the European Commission issued a non-binding recommendation on collective actions that Member States should enact into law.³⁰⁶ This statement sets out basic procedures for group litigation. In contrast to the many strengths of the directive, the recommendation imposes significant burdens on class actions and will likely ensure that they are pursued infrequently, if at all.

1. “Best Practices” for Group Litigation of Antitrust and Other Claims

The EC’s recommendation is non-binding and only states that Member States “should” enact them into national law within two years.³⁰⁷ It presents model procedural rules for all the important questions that govern a system of collective private rights of action, including the availability, operation, and funding of group litigation mechanisms. Like the Federal Rules of Civil Procedure in the United States, these rules are trans-substantive and intended to cover a number of areas of law.³⁰⁸

The recommendation confers standing on both natural persons and “qualified entities.”³⁰⁹ Qualified entities should be designated by Member States to bring actions on behalf of individuals.³¹⁰ They should be non-profit in character, work on matters related to the alleged legal violation, and have the capacity to represent multiple injured parties.³¹¹ To facilitate collective litigation against illegal conduct that has effects in multiple Member States, national rules should not discriminate against litigants, including qualified organizations, from other EU nations.³¹²

³⁰⁵ See discussion *infra* Part IV.C.2.

³⁰⁶ The European Commission, *Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Considering Violations of Rights Granted Under Union Law*, 2013/396, OFFICIAL JOURNAL OF THE EUROPEAN UNION (L 201/60) [hereinafter “European Commission Recommendation 2013/396”]. The European Union had earlier enacted a directive on collective actions seeking injunctions. See The European Parliament and the Council of the European Union, *Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers’ Interests*, OFFICIAL JOURNAL OF THE EUROPEAN UNION (L 110/30).

³⁰⁷ European Commission Recommendation 2013/396.

³⁰⁸ *Id.*

³⁰⁹ *Id.* ¶ 4 (“The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility.”).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* ¶¶ 17–18.

In a nod to the class certification process in the United States, the EC calls for an admissibility procedure.³¹³ Courts in the Member States should examine proposed collective actions for their suitability for litigation on a group basis.³¹⁴ Cases in which “conditions for collective actions are not met” or “manifestly unfounded cases” should be terminated.³¹⁵

Opt-in actions are established as the norm for collective litigation. Parties should be required to affirm expressly that they consent to representation by the named litigant.³¹⁶ They should be permitted to join or leave the action at “any time before the judgment is given or the case is otherwise validly settled.”³¹⁷ Because opt-in actions are set out as the presumptive rule, any exception “should be duly justified by reasons or sound administration of justice.”³¹⁸ To facilitate opt-in actions, the recommendation states that Member States should allow for the broad dissemination of information concerning the alleged legal violation and the proposed collective litigation.³¹⁹

The recommendation has several provisions for litigation funding and endorses a number of restrictions in this area. Litigants are obligated to disclose the source of their funding at the beginning of proceedings.³²⁰ Courts should stay the case if a third-party funder has a conflict of interest with the claimant, or cannot meet its financial obligations to the claimant, or if the claimant cannot cover the costs of the opposing party in the event of an adverse outcome.³²¹ The recommendation bars contingency fee arrangements with attorneys under ordinary circumstances.³²² Contingency fee arrangements with third parties are also prohibited unless they are subject to government oversight.³²³ And these parties are not allowed to influence the plaintiff’s litigation strategy.³²⁴ The “loser-pays” rule in litigation is endorsed, which, as the name suggests, means the losing party covers the costs of the winning party.³²⁵

The recommendation prohibits punitive and other non-compensatory damages. Damages should be limited to the actual harm suffered by the group members.³²⁶ This restriction is justified on the basis of avoiding “overcompensation in favor of the claimant party.”³²⁷

The Member States are directed to encourage settlement and alternative

³¹³ European Commission Recommendation 2013/396 ¶ 8.

³¹⁴ *Id.* ¶ 10.

³¹⁵ *Id.* ¶ 8.

³¹⁶ *Id.* ¶ 21.

³¹⁷ *Id.* ¶ 22–23.

³¹⁸ *Id.* ¶ 21.

³¹⁹ European Commission Recommendation 2013/396 ¶¶ 10–11.

³²⁰ *Id.* ¶ 14.

³²¹ *Id.* ¶ 15.

³²² *Id.* ¶ 30.

³²³ *Id.* ¶ 32.

³²⁴ *Id.* ¶ 16.

³²⁵ European Commission Recommendation 2013/396 ¶ 13.

³²⁶ *Id.* ¶ 31.

³²⁷ *Id.*

dispute resolution.³²⁸ Settlement should be promoted before and during the trial.³²⁹ Member States should also encourage collective alternative dispute settlement mechanisms based on the parties' consent.³³⁰

2. The Recommendation Lays Out Model Procedural Rules That Frustrate Collective Litigation

While the directive is an important step forward, the recommendation promotes counterproductive mechanisms for collective litigation in antitrust and other areas of law. It endorses opt-in mechanisms for group actions and restricts the means of funding these litigations. As a result, unless the Member States enact provisions that contradict the principles of the EC's recommendation, private rights of action are likely to remain a dead letter for ordinary Europeans.

a. Strong Presumption in Favor of Opt-In and Against Opt-Out Collective Actions

The recommendation perpetuates the status quo of ineffective private enforcement. Because opt-in actions do not permit the efficient consolidation of a large number of small claims, they reduce the expected benefits from litigation. Accordingly, the opt-in requirement discourages the filing of claims on behalf of a large number of injured parties. Consumers and small businesses typically have small, or even negative, value legal claims. For them, the continued reliance on opt-in mechanisms means that the rights recognized by the European Court of Justice in *Crehan* and *Manfredi* will be difficult to vindicate. Opt-in mechanisms are ineffective in providing redress for injured parties and also deterring illegal behavior.

The choice between opt-in and opt-out actions has proven to be critical around the world. Opt-in actions place the onus on individuals to participate. Individuals must either file their own action before they are consolidated into a group action or take an affirmative decision to join an already initiated collective action.³³¹ In contrast, under opt-out actions, the class of injured parties is broadly defined³³²—for example, all New Yorkers who purchased butter between January 1, 2000 and January 1, 2005. Parties that do not opt out are bound by any final judgment or settlement.³³³

³²⁸ *Id.* ¶ 25–28.

³²⁹ *Id.* ¶ 16.

³³⁰ *Id.*

³³¹ Rachael Mulheron, *Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers*, 50 CAN. BUS. L.J. 376, 380 (2010).

³³² *Id.* at 384.

³³³ At the damages stage, even opt-out actions often become opt-in actions: only parties that file an individual claim are entitled to receive a money award. *Id.* at 396. This is a question of distribution, not deterrence though. Money that is not claimed is disbursed in a number of ways, including cy pres grants to public interest organizations. See Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 131, 155 (2010).

Opt-in actions have had a disappointing record in practice. In most European jurisdictions that presently provide for group litigation, opt-in actions are the principal form of collective redress mechanism.³³⁴ For the most part, opt-in rates have been low,³³⁵ rendering the legal action uneconomical. Individuals have failed to opt-in for a number of reasons. These include unfamiliarity with the case, lack of interest in vindicating a small claim, inertia, distrust of the legal process, and fear of affiliation with litigation perceived as controversial.³³⁶ An analysis of thirty-seven group litigations in England found that thirty-two cases had an opt-in rate below fifty percent, and eight cases had a rate below one percent.³³⁷ Of course, opt-in rates have not been universally low. Some actions involving a large number of potential members have witnessed opt-in rates as high as ninety percent.³³⁸ Higher opt-in records have been seen in employment litigation,³³⁹ in which individual damages are often quite large. Even in this area, however, low opt-in rates are the norm. In the United States, the Fair Labor Standards Act deviates from the opt-out norm and expressly requires opt-in class actions.³⁴⁰ Opt-in rates have typically been low, weakening the enforcement of federal wage-and-hour law.³⁴¹

A representative action brought by the British consumer organization Which? illustrates the shortcomings of opt-in class actions. The Office of Fair Trading (“OFT”) had found that JJB Sports, a leading sports retailer in the UK, had coerced Umbro, a maker of sporting gear, into imposing resale price maintenance on the England national team and Manchester United jerseys in the months leading up to the Euro 2000 soccer tournament.³⁴² Resale price maintenance prohibited retailers from discounting these jerseys and forced consumers to pay higher prices than they would have in a competitive market.³⁴³ English law permits qualified entities to bring follow-on actions in antitrust matters in the Competition Appeal Tribunal.³⁴⁴ Following the OFT’s decision, Which? brought a follow-on action in the

³³⁴ John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 301 (2010).

³³⁵ *See generally id.*

³³⁶ *See, e.g.,* Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* 32–35 (2008), <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Other+papers/reform-of-collective-redress.pdf>.

³³⁷ Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409, 433 (2009).

³³⁸ *Id.*

³³⁹ Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 204 (2009).

³⁴⁰ 29 U.S.C. § 216(b) (2000).

³⁴¹ Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1325–32 (2008).

³⁴² JJB Sports PLC v. OFT, [2004] CAT 17.

³⁴³ *Id.*

³⁴⁴ Enterprise Act 2002 (UK), c. 40, § 19.

Competition Appeal Tribunal, seeking damages on behalf of British consumers who had purchased English national or Manchester United jerseys in 2000.³⁴⁵

The results of the follow-on action were disappointing. Up to a million people may have purchased jerseys subject to the illegal price maintenance scheme.³⁴⁶ Because UK law at the time provided only for opt-in actions, Which? had to solicit consumers to join the litigation.³⁴⁷ Despite an aggressive publicity campaign,³⁴⁸ the action attracted just 130 participants,³⁴⁹ an opt-in rate of below one percent.³⁵⁰ Which? incurred significant legal costs in this unsuccessful effort,³⁵¹ raising serious doubts as to whether it would pursue a follow-on antitrust action again so long as the opt-in rule remained in effect.³⁵²

Low opt-in rates are troubling on multiple grounds. First, if many parties are failing to participate due to a lack of knowledge or interest, private rights of action fail to fulfill their compensatory function. On net, injured parties are uncompensated for the harms that they have suffered. In many cases, the individual damages may be small so the lost compensation could be dismissed as a minor concern. Private enforcement, however, serves an important role in deterring illegal conduct—a role arguably more important than its compensatory one. The European Court of Justice has recognized that private damages actions can protect competitive markets.³⁵³ When opt-in rates are low, lawbreakers are allowed to keep their ill-gotten gains.

In sharp contrast to opt-in collective actions, opt-out collective actions typically see high participation rates. Just as few people choose to opt in to litigation, very few choose to opt out of them. In addition to the United States, other nations with opt-out actions include Australia, Canada, Denmark, and Portugal.³⁵⁴ The Netherlands has an opt-out settlement procedure but no opt-out collective actions.³⁵⁵ An empirical study of opt-out litigation under federal law in the United States and in the Australian state of Victoria has found median opt-out rates of 0.2 percent and 13 percent, respectively.³⁵⁶ Opt-out rates have been comparably low in the Netherlands

³⁴⁵ Consumers Association v. JJB Sports plc, No. 1078/7/9/07, [2009] CAT 2.

³⁴⁶ See, e.g., Joshua Rozenberg, *Compensation Claim for Rip-Off Football Kits*, DAILY TELEGRAPH, Feb. 9, 2007.

³⁴⁷ 2002 (UK), c. 40, § 19.

³⁴⁸ Mulheron, *England's Class Action Dilemma*, *supra* note 331, at 381.

³⁴⁹ Devika Bhat, *JJB Sports Faces Legal Action over Price-Fixing*, TIMES OF LONDON, Feb. 8, 2007.

³⁵⁰ *Id.*

³⁵¹ See Mulheron, *Opt Out for European Member States*, *supra* note 337, at 440.

³⁵² See *id.* at 441; Michael D. Hausfeld & Brian A. Ratner, *Prosecuting Class Actions and Group Litigation*, in WORLD CLASS ACTIONS (Ed. Paul G. Karlsgodt), at 589.

³⁵³ Joined Cases C-295/04-C-298/04, Manfredi v. Lloyd Adriatico Assicurazioni SpA, 2006 E.C.R. I-6641, ¶ 91.

³⁵⁴ Mulheron, *Opt Out for European Member States*, *supra* note 337, at 415, 432.

³⁵⁵ *Id.* at 424.

³⁵⁶ *Id.* at 432.

and Portugal.³⁵⁷ In other words, the overwhelming majority of affected individuals generally take no action and remain passive members of opt-out group litigation.³⁵⁸

Opt-out actions help spread the costs of litigation among a large pool of plaintiffs. On an individual basis, consumer claims often have a small or even negative value—the costs of litigation exceed the expected recovery. As a result, claim consolidation is essential for the vindication of many consumer rights.³⁵⁹ From a benefit-cost perspective, opt-out actions raise the expected benefits of litigation because they combine thousands—sometimes even millions—of small claims into a single action. Since a sizable fraction of litigation costs are fixed or do not increase in lockstep with the number of class members, an opt-out mechanism can convert countless small or negative value claims into a single attractive claim.³⁶⁰ In contrast, opt-in actions ordinarily attract far fewer participants and do not permit the effective consolidation of individual legal claims.

Furthermore, opt-out class actions promote judicial efficiency and legal certainty for defendants. By sweeping a large number of individual claims into a single action, opt-out litigation greatly reduces the number of parallel actions in court.³⁶¹ And this consolidation of numerous individual claims also offers legal comfort to defendants. Once an opt-out action has been resolved, defendants can identify the maximum number of future individual claims based on the number of parties that opted out.³⁶² And, as indicated earlier, opt-out rates tend to be very low.

b. Restrictions on Third-Party Funding and Support for the Loser-Pays Rule

Through its onerous restrictions on litigation funding, the EC's recommendation starves collective actions of the necessary resources. It prohibits contingency fee arrangements between clients and lawyers and also heavily restricts contingency fee agreements with third parties. The lack of a funding provision combined with the backdrop of two-way fee shifting renders group litigation much less feasible.

Given that litigation, especially collective litigation, entails significant upfront expenditures,³⁶³ funding is critical to plaintiffs. In most instances,

³⁵⁷ *Id.*; see also Jocelyn G. Delatre, *Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation*, 8 COMPETITION L. REV. 29, 47–48 (2011).

³⁵⁸ See, e.g., Mulheron, *Opt Out for European Member States*, *supra* note 337, at 432 (“In Canada, opt-out rates have been as low as 0.3%, 0.2%, 4%, or nil—but as high as 40% in one action.”).

³⁵⁹ Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 149 (1999).

³⁶⁰ Russell, *supra* note 333, at 178.

³⁶¹ Mulheron, *Opt Out for European Member States*, *supra* note 337, at 449.

³⁶² Issacharoff & Miller, *supra* note 339, at 206–07.

³⁶³ Charlotte Leskinen, *Collective Actions: Rethinking Funding and National Cost Rules*, 8 COMPETITION L. REV. 87, 91 (2011).

ordinary consumers will be either unable or unwilling to foot the bill of litigation. And qualified entities, barring extraordinary public support, are not likely to have the necessary means either.³⁶⁴ In an opt-in environment, the possibility of having to cover the costs of litigation will only further drive down the already low participation rates. For consumers, a lack of financing will, in practice, mean that few, if any, claims are brought on their behalf.

Modern antitrust cases, for example, are costly for a number of reasons. For one, they often involve analysis of complicated economic questions on whether the defendant's conduct was, on net, harmful to competition and consumers. As private antitrust litigation in the United States has shown, these cases entail extensive discovery and also the retention of business and economic experts.³⁶⁵ And even in follow-on actions in which a national competition authority has already found a violation, claimants are responsible for quantifying damages.

The bar on contingency fee arrangements between clients and lawyers deprives collective actions of an obvious source of funding. Unlike ordinary consumers, enterprising lawyers are willing to cover the upfront costs of litigation.³⁶⁶ In exchange for a percentage of any final award or settlement, lawyers can pay filing fees, conduct discovery, and retain experts. If the claim is unsuccessful, the lawyer receives nothing. This fee arrangement shifts the risk of litigation to lawyers. In the United States, “[e]ssentially all . . . class actions are funded with contingent fees.”³⁶⁷ In addition, contingency fee arrangements encourage lawyers to screen potential claims carefully—it is in their interest to spend time and money only on matters that are likely to result in a significant recovery and thereby significant fees.³⁶⁸

The recommendation also restricts contingency fee arrangements with non-attorneys. In jurisdictions where contingency fees with lawyers are restricted, third-party litigation funders have been the lifeblood of private rights of action. In Australia and the United Kingdom, in particular, specialized litigation financing firms have emerged in recent decades.³⁶⁹ These firms agree to cover the costs of litigation in return for a percentage of any damage awards.³⁷⁰ This system is similar to contingent fee arrangements, except that a third-party firm performs the financing function in place of the plaintiffs' attorney. While the recommendation does not proscribe such fee arrangements, its restrictions on funders' ability to

³⁶⁴ *Id.* at 90.

³⁶⁵ Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS. L. REV. 1375, 1462–63 (2009).

³⁶⁶ Leskinen, *supra* note 363, at 107.

³⁶⁷ Issacharoff & Miller, *supra* note 339, at 199.

³⁶⁸ Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J. L. ECON. & ORG. 517, 519, 540 (2003).

³⁶⁹ See generally George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 J. L. ECON. & POL. 451 (2012).

³⁷⁰ Cento Veljanovski, *Third-Party Litigation Funding in Europe*, 8 J. L. ECON. & POL. 405, 405 (2012).

influence plaintiffs' litigation strategy are likely to deter prospective litigation financiers. This insistence on funder passivity may not preclude third-party financing, but it could limit funding to only the strongest legal claims.³⁷¹ Funders, much like plaintiffs' lawyers in the United States who finance cases, would likely want to have some control over decisions that could affect whether the suit they support succeeds in court and whether they recover their upfront costs.

Portugal's experience shows how the absence of a funding mechanism can render even a liberal opt-out system impotent. Portugal is one of the few European nations that has an opt-out rule for group actions.³⁷² Individuals and organizations certified by the government have the right to bring opt-out consumer and other collective claims, which Portuguese law calls a "popular action."³⁷³ DECO, Portugal's leading consumer organization, is most closely identified with popular actions.³⁷⁴ Since the opt-out rule was established in 1995, however, DECO has brought only a few popular actions on behalf of Portuguese consumers.³⁷⁵ Although DECO appears interested in using the legal process more aggressively,³⁷⁶ the group is unable to do so due to the high costs of litigation.³⁷⁷ In the absence of a funding mechanism, the opt-out popular actions are unlikely to be feasible on a large-scale.

In addition, the recommendation endorses the loser-pay rules and thereby compounds the difficulties associated with litigation financing.³⁷⁸ Per this rule, the party that loses a case is required to cover the other party's legal costs. A plaintiff that is unsuccessful in a legal action will typically be ordered to pay the defendant's legal expenses, which in some instances could amount to hundreds of thousands of euros. The loser pays rule is intended to deter "frivolous" lawsuits, but it could go too far in the other direction. Few lawsuits are guaranteed to produce victories so the threat of covering a defendant's fees could discourage even meritorious claims.³⁷⁹ When parties have to fund their own legal actions and also face the risk of paying their adversary's legal expenses, the "chilling effect" on private suits can be significant and perhaps fatal.³⁸⁰

³⁷¹ *Id.* at 442.

³⁷² Article 467, Portuguese Civil Code.

³⁷³ *Id.*

³⁷⁴ LISA TORTELL, EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS IN THE EUROPEAN UNION : COUNTRY REPORT: PORTUGAL 4 (2008).

³⁷⁵ *Id.* at 2.

³⁷⁶ *Id.* at 3.

³⁷⁷ *Id.* at 21–22.

³⁷⁸ *Gullone v. Bayer Corp.*, 484 F.3d 951, 958 (7th Cir. 2007).

³⁷⁹ Isacharoff & Miller, *supra* note 339, at 203.

³⁸⁰ Marc A. Sittenreich, *The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions*, 78 *FORDHAM L. REV.* 2701, 2731 (2010). *But see* Veljanovski, *supra* note 370, at 444 ("Surprisingly, the [third-party litigation finance] investors interviewed did not see the prospect of indemnifying defendants for the full adverse costs as a major inhibition to their activities. This is partly because their business plans focuses on high value damage claims.").

c. The Restriction on Non-Compensatory Damages: A Secondary Flaw

The EC's recommendation has another provision that further diminishes the attractiveness of private lawsuits: it seeks to restrict damages to no greater than compensatory damages, signaling that the EC views treble and punitive damages with hostility.

The recommendation's strict requirement that claimants obtain only compensatory damages could hurt private enforcement. Capping damages at a compensatory level decreases the expected benefits from litigation and diminishes the incentive for parties to file claims. It also risks underdeterrence of harmful behavior. In many areas of law, in which illegal conduct is likely to go undetected at times, optimal deterrence requires more than just compensatory damages.³⁸¹ It is telling that even the mandatory treble damages under federal U.S. antitrust law appear to be inadequate for deterrence.³⁸²

To be sure, this ceiling on damages is not nearly as problematic as the EC's insistence on opt-in actions and hostility to third-party financing mechanisms. In many cases, compensatory damages can provide strong incentive to bring class actions. And importantly for deterrence purposes, private damages actions should not be examined in a vacuum. Public and private sanctions need to be viewed together because stronger public penalties can offset more limited private relief.³⁸³

D. The Influence of the American "Tort Reform" Narrative and Business Victimhood Mythology on the European Commission Is Apparent—and Unfortunate

Any neutral observer ought to wonder why the European Union was so timid in its recommendation. Unfortunately, the European Union has a history of developing policy by shadow boxing with the United States and its allegedly out-of-control litigation culture³⁸⁴—a mentality that U.S. industry has cultivated and promoted.³⁸⁵ Examples abound of EU policymakers and official bodies accepting and propagating American industry's business

³⁸¹ See Discussion *supra* Sec. I.

³⁸² See, e.g., John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 426, 430 (2008); Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OH. ST. L.J. 115, 119 (1993).

³⁸³ See Monique Hazelhorst, *Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far*, 3 EUR. REV. PRIVATE L. 757, 769 (2010).

³⁸⁴ See Hausfeld & Ratner, *supra* note 352, at 572–74.

³⁸⁵ Wigger & Nölke, *supra* note 240, at 501 (2007). Some U.S. government officials have also echoed these sentiments of industry and warned European policymakers to be wary of private enforcement. See, e.g., J. Thomas Rosch, Commissioner, FED TRADE COMM'N, *Does the EU Need a System of Private Competition Remedies to Supplement Public Law Enforcement?*, Remarks Before 2011 LIDC Congress (Sep. 23, 2011), https://www.ftc.gov/sites/default/files/documents/public_statements/does-eu-need-system-private-competition-remedies-supplement-public-law-enforcement/110923privatecomp.pdf.

victimhood mythology. European Union regulators have cautioned about “U.S.-style excesses,”³⁸⁶ while Member State departments have warned of “exposing business to spurious or vexatious claims or unwittingly creat[ing] a compensation culture.”³⁸⁷ Even modest proposals are couched in a defensive posture. For instance, the former EU competition commissioner reassured a skeptical audience that she had “left [her] cowboy hat at home” and that reforms would not bring about a U.S.-style system.³⁸⁸ As Hannah Buxbaum has written, “a specific antagonism toward the U.S. class action system—not merely a desire to craft an indigenous version of collective actions—has become a backdrop to European law reform.”³⁸⁹

A review of the EC documents published before the directive confirms that the business victimhood narrative in the United States has influenced—and ultimately hurt—the European private enforcement project. Together with the 2013 recommendation, the EC published a communication to other EU bodies that lays out the rationale for its policy choices.³⁹⁰ The communication notes the need to prevent “abusive litigation”³⁹¹ and states that defendants may feel pressure to settle cases “only in order to prevent or minimize possible damage.”³⁹² Citing a resolution of the European Parliament, this document stresses the need to “fight[] abusive litigation”³⁹³ through the exclusion of “punitive damages, third-party financing of collective redress, and contingency fees for lawyers.”³⁹⁴ It also states that opt-out procedures enhance the abusive potential of class actions.³⁹⁵ Private enforcement in the United States is described as “an illustration of the vulnerability of a system to abusive litigation.”³⁹⁶ Indicative of the deep influence of the United States industry narrative on European lawmakers, the communication credits recent Supreme Court decisions for restricting class actions “in view of the detrimental economic and legal effects of a system that is open to abuse by frivolous litigation.”³⁹⁷

The EC’s 2008 white paper on Damages Actions for Antitrust Violations

³⁸⁶ Hannah L. Buxbaum, *Class Actions, Conflict and the Global Economy*, 21 IND. J. GLOBAL LEGAL STUD. 585, 587 (2014) (quoting Neelie Kroes, Member of the European Commission in charge of Competition Policy).

³⁸⁷ Rachael Mulheron, *Recent Milestones in Class Actions Reform in England: A Critique and a Proposal*, 127 L.Q. REV. 288, 303 (2011) (quoting the English Department of Trade and Industry).

³⁸⁸ Buxbaum, *supra* note 386, at 588 (quoting Neelie Kroes, Member of the European Commission in charge of Competition Policy).

³⁸⁹ *Id.*

³⁹⁰ European Commission, Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a European Horizontal Framework for Collective Redress* (2013) [hereinafter European Commission, *Horizontal Framework for Collective Redress*].

³⁹¹ *Id.* at 3.

³⁹² *Id.* at 8.

³⁹³ *Id.* at 9.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ European Commission, *Horizontal Framework for Collective Redress*, *supra* note 390, at 8.

³⁹⁷ *Id.*

sounds many of the same themes.³⁹⁸ This document proposed rules for creating an effective private enforcement mechanism, and the recent directive and recommendation, described above, incorporated many of the outlined proposals. The white paper rejected a number of procedural options that an earlier green paper had put forth for consideration.³⁹⁹ For example, the white paper stated that compensation, not deterrence, should be the principal aim of damages actions.⁴⁰⁰ On this basis, EC rejected the possibility of double damages for injured parties and touted the superiority of opt-in actions over opt-out actions.⁴⁰¹

Along with the white paper, the EC published two documents that offer insights on its approach to private antitrust enforcement: a staff working paper and impact assessment report.⁴⁰² These publications refer to the risk of “excesses” from a private enforcement system.⁴⁰³ They reflect a tension between providing for effective private rights of action and also protecting against litigation “abuse.” For example, the working paper states that collective redress is important “for access to justice.”⁴⁰⁴ Yet, in the next clause, it observes that “excesses . . . have been reported from other jurisdictions.”⁴⁰⁵ In evaluating the particular procedural options in the green paper, the impact assessment report rejects the most aggressive set of rules—for example, opt-out actions and double damages—for similar reasons. It worries about the risk of “excesses” and the growth of a “litigation culture” in Europe.⁴⁰⁶ Moreover, the document states that a strong private enforcement regime could discourage pro-consumer conduct by dominant firms.⁴⁰⁷

Remarkably, the Commission elevated the supposed American experience over homegrown practice. In 2008, the Commission acknowledged that excesses had not been reported in the two European jurisdictions that then had opt-out systems: the Netherlands and Portugal.⁴⁰⁸ Even as it distinguished U.S. legal culture and rules from its European counterparts, the working paper underscored the need to establish rules that

³⁹⁸ Commission of the European Communities, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* 3 (2008).

³⁹⁹ See generally *id.*

⁴⁰⁰ *Id.* at 3.

⁴⁰¹ *Id.* at 4, 7.

⁴⁰² Commission of the European Communities, *Commission Staff Working Paper Accompanying the White Paper on Damages for Actions for Breach of the EC Antitrust Rules* 16 (2008) [hereinafter Commission European Communities, *Staff Working Paper*]; Commission of the European Communities, *Commission Staff Working Paper Accompanying the White Paper on Damages for Actions for Breach of the EC Antitrust Rules, Impact Assessment* 52 (2008) [hereinafter Commission European Communities, *Impact Assessment*].

⁴⁰³ See generally Commission European Communities, *Staff Working Paper*, *supra* note 402; Commission European Communities, *Impact Assessment*, *supra* note 402.

⁴⁰⁴ Commission European Communities, *Staff Working Paper*, *supra* note 402, at 16.

⁴⁰⁵ *Id.* at 16–17.

⁴⁰⁶ Commission European Communities, *Impact Assessment*, *supra* note 402, at 52.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 17 n.24.

“serve as effective safeguards against misuse of the system.”⁴⁰⁹ It notes that in combination with other procedural rules, “opt-out actions have in other jurisdictions been perceived to lead to excesses,”⁴¹⁰ including plaintiffs’ attorneys assuming control of a case and profiting at the expense of claimants.⁴¹¹ Notably, the Office of Fair Trading, while crediting these tropes in the American context, discounted the threat of a “U.S. style litigation culture” arising from opt-out actions in the United Kingdom.⁴¹²

The European Commission has embraced a narrative on the American tort system that is fundamentally false. This story of excess is not based on empirical fact.⁴¹³ Rather, it relies almost exclusively on distorted anecdotes and misrepresentations of recent history.⁴¹⁴ In reality, the tort system has been an important means of compensating victims and deterring socially harmful behavior. In a number of areas, Americans suffer from a deficit of private enforcement, not the publicized—and false—surfeit, because businesses still find it profitable to break the law.⁴¹⁵

The “exporting” of the U.S. tort reform story to the European Union is unfortunate for European consumers and small businesses. With its reflexive acceptance of themes propagated by American opponents of private rights of action, the EC has stunted private enforcement mechanisms. The European framework embodied in the recent directive and, in particular, the recommendation does not have the features necessary for small claims to be vindicated. Fortunately, Member States still have the discretion to go beyond what the recommendation and directive require. Some EU nations have already established superior aggregate litigation mechanisms, and others have expressed an interest in doing so. But of course, other Member States will enact only the minimum procedures necessary to comply with EU dictates. When he wrote his famous memo in 1971, Lewis Powell probably did not foresee his work shaping policy on both sides of the Atlantic.

V. TRANSATLANTIC COMPARISON OF ENFORCEMENT INSTITUTIONS: SOME CONVERGENT TENDENCIES BUT CRITICAL DIFFERENCES WILL PERSIST OR EMERGE

From a distant view, private enforcement systems in the United States and European Union are on a trajectory of convergence. For the United States, the once-strong private enforcement regime is weakening at a troubling pace. While private enforcement in some areas remains resilient, courts are whittling away at the regime’s overall vigor. In particular, expansive application of the Federal Arbitration Act and imposition of

⁴⁰⁹ *Id.* at 17.

⁴¹⁰ *Id.* at 21.

⁴¹¹ *Id.* at 39–40.

⁴¹² OFT, PRIVATE ACTIONS, *supra* note 17, at 25.

⁴¹³ See discussion *supra* Part II.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

heightened class certification standards have presented grave problems.⁴¹⁶ Meanwhile, the largely ineffectual private enforcement systems of EU Member States are gradually improving as they enact procedural requirements of the EU recommendation and directive into national law, which will bolster private enforcement in antitrust law.⁴¹⁷ The main obstacles will be the absence of mechanisms for financing litigation and the presence of opt-in, rather than opt-out, group actions. Yet, uniformity is unlikely to be the result because the EU recommendation establishes only general principles to be enacted into law at the national level. Some European nations, including Denmark, the Netherlands, Portugal, and the United Kingdom, have already taken steps to meet the challenges.⁴¹⁸

In the medium term, the trajectories of the private enforcement systems in the United States and European Union also point to functional convergence. The nature of the challenges that both are likely to face also suggests that the systems will come to share certain features and flaws. Two likely developments warrant discussion. First, private enforcement systems in both the United States and European Union will have difficulty accommodating the adjudication of low-value individual claims. Second, the incentive structure in both systems will encourage plaintiffs' attorneys to attempt to amass and litigate claims of medium and high value in hopes of entering a global, opt-out settlement. A company's willingness to enter into a global, opt-out settlement will hinge on whether it faces sufficient exposure from individual lawsuits.

A. Convergence in the Medium Term: A Struggle to Accommodate Low-Value Claims

The U.S.'s opt-out class action system was once designed for regulating bad practices that cause a small amount of loss at the individual level, but result in significant damages on an aggregate scale.⁴¹⁹ The new rigors of class certification⁴²⁰ and proliferation of arbitration clauses,⁴²¹ however, have undermined this function. Similarly, in European countries, the lack of opt-out class action systems⁴²² and viable methods of litigation finance⁴²³ will mean that few, if any, attorneys will bear the risk of filing suit on low-value claims.

In the United States, the Supreme Court and lower federal courts have erected two major procedural barriers to class actions in recent years. First, the Court's expansive interpretation of the Federal Arbitration Act has

⁴¹⁶ See discussion *supra* Parts III.C and E.

⁴¹⁷ See discussion *supra* Part IV.B.

⁴¹⁸ See discussion *infra* Part V.C.

⁴¹⁹ See *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980).

⁴²⁰ See discussion *supra* Parts III.C and III.D.

⁴²¹ See discussion *supra* Part III.E.

⁴²² See discussion *supra* Part IV.C.2.a.

⁴²³ See discussion *supra* Part IV.C.2.b.

empowered corporations to impose class action waivers on consumers. In other words, businesses have virtual *carte blanche* to deprive consumers of their right to bring class actions in court and insist that they pursue individual arbitration to recover damages. In practice, mandatory individual arbitration means few, if any, low-value legal claims will be pursued.⁴²⁴ Leaving aside the possibility of government action, “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”⁴²⁵

But even when they can escape mandatory bilateral arbitration, consumer class actions will confront significant difficulties in seeking certification. First, many federal courts are now requiring that plaintiffs, prior to certification, present a method to ascertain the identities of class members through objective criteria—a seemingly reasonable requirement but one that is very difficult to satisfy in many consumers goods contexts.⁴²⁶ This ascertainability requirement, particularly in its harsher iterations, eliminates the possibility of almost all class actions involving inexpensive goods because there is no method to individually identify the legions of consumers who do not retain documentation (such as receipts) of low-value purchases. Second, other class certification prerequisites imposed by the Supreme Court require plaintiffs to present more evidence in an early stage of litigation, which translates to higher costs and greater uncertainty.⁴²⁷ Plaintiffs have to engage in factual discovery and retain experts to certify a class today. Unduly high class certification standards can deter the filing of meritorious claims.⁴²⁸

Despite these myriad vexing challenges, there will remain a thin band of low-value suits that the U.S. system will be able to accommodate, even if it is a struggle. These cases will involve interactions between consumers and remote actors (such as product manufacturers) in which the parties are not in privity and, therefore, cannot be bound by arbitration clauses. The cases will also involve purchases for which there is ready documentation. A good example, which satisfies both conditions, is a consumer who files a class action suit concerning an automobile with a safety defect. The consumer likely sustained substantial damages and is in contractual privity with the car dealership, not the manufacturer.

Much like in the United States, consumer class actions will face serious obstacles in Europe. Today, most European jurisdictions with collective redress procedures have opt-in class action mechanisms,⁴²⁹ which the EU recommendation reinforces. Because opt-in rates are generally very low,

⁴²⁴ CFPB ARBITRATION STUDY, *supra* note 26, at § 5.2.2.

⁴²⁵ *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

⁴²⁶ See discussion *supra* Part III.D.

⁴²⁷ See discussion *supra* Part III.C.

⁴²⁸ Sherry E. Clegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases after the Supreme Court’s Interpretation of Federal Rule of Civil Procedure 23(a)(2) in Wal-Mart v. Dukes*, 44 TEX. TECH. L. REV. 1087, 1109 (2012).

⁴²⁹ Bojana Vrcek, *Overview of Europe*, in THE INTERNATIONAL HANDBOOK OF ANTITRUST ENFORCEMENT 277, 290 (Albert A. Foer & Jonathan W. Cuneo, eds. 2010).

opt-in suits, whether brought by an individual or a qualified organization, are not attractive from an economic perspective. And opt-in actions are only a part of the problem. Even if opt-out mechanisms were enacted across the EU, the general unavailability of contingent fee and third-party financing arrangements, combined with a “loser pays” cost-shifting rule, would deter group actions.⁴³⁰ External funding is essential for undertaking group litigation, especially in cost-intensive areas such as antitrust.⁴³¹

B. *Convergence in the Medium Term: Inefficient Manual Aggregation of Higher Value Claims to Strive for Global Settlements*

When a common practice or policy causes mass harm, it is optimal that mechanisms exist for mass accountability. As set forth above, however, while both the United States and Europe will have class actions available on the books, they will have limited real-world impact.

All hope for mass accountability will not be lost, however. Both the United States and European Union have viable mechanisms to *settle* disputes on a class-wide, opt-out basis, even if they cannot reliably be *litigated* in this manner. In the United States, a settlement complaint that provides for a national opt-out class action settlement can be prepared and judicially approved. Although the traditional requirements for class certification apply to the certification of classes for settlement, it is widely understood that the requirements are far more lax than class certification for litigation purposes.⁴³² Similarly, the Dutch Act on Collective Settlement of Mass Damages (“WCAM”)⁴³³ enables an opt-out class settlement across the European Union, and even the world.⁴³⁴ Under the WCAM, plaintiffs can establish a special purpose foundation and enter into a settlement with a defendant, which is binding on all parties who do not opt out.⁴³⁵

The challenge is that corporate defendants will not settle claims on an aggregate basis out of the goodness of their hearts. Rather, they will need to face sufficient exposure from meritorious litigation that they must “resort to” the provision of *en masse* redress. This option can be attractive to a wrongdoer confronted with the specter of death by a thousand separate lawsuits. A classwide settlement gives the defendant total peace and certainty: the corporation can pay a set amount to the universe of aggrieved

⁴³⁰ Russell, *supra* note 333, at 179–80.

⁴³¹ *Id.* at 179.

⁴³² See, e.g., *In re Oil Spill by Oil Rig Deepwater Horizon*, 910 F. Supp. 2d 891, 930–31 (E.D. La. 2012) (“Because the public interest strongly favors the voluntary settlement of class actions, there is a strong presumption in favor of finding the settlement fair, reasonable, and adequate.”).

⁴³³ See *supra* note 355 and accompanying text; Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 310–13 (2011).

⁴³⁴ Hensler, *supra* note 433, at 313–14.

⁴³⁵ *Id.* at 315–318.

at one time and terminate future legal claims.⁴³⁶ In contrast, a defendant with the potential for large liability but with only a few small lawsuits on its hands is unlikely to settle claims globally.

Accordingly, for the growing number of disputes that cannot be litigated as opt-out class actions, but that nevertheless involve shared factual and legal issues, plaintiffs' attorneys in both the United States and Europe are likely to execute similar litigation strategies. When possible, they will seek to amass and litigate individual, or smaller group, claims in the hopes of compelling a defendant to enter into a global opt-out settlement. In other words, attorneys will build an inventory of clients with the same claims to litigate.

This strategy likely will not be viable for low-value individual claims. First, those with small value claims will typically not care enough to litigate. Second, even assuming that an attorney could assemble a very large number of identical low-value (say, \$20) claims, the overhead costs of managing the inventory would often exceed the expected value of successful litigation or arbitration. The defendant would also be unlikely to ever face sufficient exposure to want to enter into a global settlement.⁴³⁷ For the plaintiffs, the costs are simply too great and the likelihood of success too low.

The aggregation strategy could work when the individual claims are of greater value, though. This is true even when the claims are subject to bilateral arbitration. For example, in the United States in 2013, an opt-out class action settlement was reached between Pennsylvania landowners and a fracking company for claims arising from the alleged improper calculation of royalty payments by the fracking company.⁴³⁸ Each agreement between the fracking company and the purportedly thousand-plus landowners had a bilateral arbitration agreement.⁴³⁹ However, because there were fourteen named plaintiffs with high value claims, and because plaintiffs' counsel appeared capable of assembling a far greater number, the fracking company felt sufficiently exposed to liability that it opted to enter into a multi-million dollar class action settlement, rather than risk its chances with an unforeseeable number of bilateral arbitrations.⁴⁴⁰ The plaintiffs' lawyers successfully assembled enough individual claims to compel the defendant to settle on an aggregate basis.

Some plaintiffs' lawyers in the United States have deployed the same

⁴³⁶ See Hausfeld & Ratner, *supra* note 352, at 545.

⁴³⁷ One possible exception will be in discrete instances in which individuals are so angered by a bad corporate practice that they organize themselves and develop litigation workarounds. For example, in 2014, an Austrian attorney received an outpouring of support for his efforts in bringing suit against Facebook for privacy violations. See Loek Essers, *As Facebook Privacy Suit Reaches 25,000 Participant Target, Court is Still Unsure It Will Allow It*, PC WORLD (Aug. 6, 2014) <http://www.pcworld.com/article/2462040/as-facebook-privacy-suit-reaches-25000-participant-target-court-is-still-unsure-if-it-will-allow-it.html>.

⁴³⁸ See Dan Packel, *Chesapeake to Pay \$7.5M to Settle Pa. Fracking Fees Action*, LAW360 (Sep. 3, 2013), <http://www.law360.com/articles/469430/chesapeake-to-pay-7-5m-to-settle-pa-fracking-fees-action>.

⁴³⁹ See *id.*

⁴⁴⁰ *Id.*

strategy in the employment context as well. After *Concepcion*, many employers required their employees to sign bilateral arbitration agreements, requiring the submission of employer-employee disputes to arbitration and prohibiting class actions. When a dispute common to many employees has arisen under those circumstances, plaintiffs' attorneys have had success signing up several individuals to prosecute separate arbitrations.⁴⁴¹ In wage-and-hour cases, for example, in which the value of individual claims can amount to tens of thousands of dollars, defendants confront serious risks (and costs in the form of arbitration and attorneys' fees) if they were to fight these cases individually, rather than settle globally.

The creative assembly of claims approach mirrors that employed in mass tort cases in the U.S. In the 1990s, the Supreme Court effectively closed the door on class actions with a strong personal injury component.⁴⁴² For example, class actions concerning exposure to asbestos or use of an unsafe prescription drug can no longer be certified.⁴⁴³ Despite the inability to proceed on a class-wide basis, the underlying facts in cases of this kind are often common to large groups of people, each of whom may have suffered debilitating losses. Consequently, attorneys litigating these cases assemble large inventories, usually with the assistance of a cottage industry of lead generation and referral firms. The law does not allow the settlement of these claims on an opt-out basis, but the parties often reach a mass settlement for the group of victims who have filed suit.⁴⁴⁴

In Europe, litigation barriers will compel plaintiffs' lawyers to deploy a similar strategy as in the United States. The absence of an opt-in class action mechanism and the lack of viable litigation finance will prevent the effective adjudication of low-value claims in Europe.

It will likely be a different story with medium and high value claims, though. For example, imagine that there is a popular refrigerator throughout Europe, which costs \$1,500. The refrigerators have a design defect, rendering them unusable after a few months of use. Assume that all EU Member States incorporate opt-in class actions for consumer cases in the near future, as encouraged by the EC's 2013 recommendation on collective redress. Because the individual claims are of high value and the product is popular, an enterprising plaintiffs' attorney would probably seek to sign up plaintiffs and seed collective cases throughout the European Union. Once the collective cases are off the ground and notice is disseminated to potential owners of the refrigerators, the high value (\$1,500) of the individual damages would mean that a non-trivial number of individuals would likely opt in. The

⁴⁴¹ See Scott Flaherty, *Plaintiffs Atty's Turn Arbitration Pacts Into Weapons*, LAW360 (July 9, 2014), <http://www.law360.com/articles/544270/plaintiffs-attys-turn-employee-arbitration-pacts-into-weapons>.

⁴⁴² See e.g., *AmChem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

⁴⁴³ Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1063 (2012).

⁴⁴⁴ See Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 401 (2014).

goal of the plaintiffs' attorney would be to litigate the collective cases successfully in different European countries until the defendant refrigerator manufacturer sought complete peace by settling the case on an opt-out basis throughout Europe, using WCAM in the Netherlands, for its fair value.⁴⁴⁵

In the coming years, in both the United States and Europe, there will likely be a category of cases in which global, opt-out class resolution will be possible. The scope of these cases will likely be narrow, however, as the claims will have to be comparatively high in value to attract sufficient individual participation, which will be rare. If a sufficient number of claims are not aggregated, a defendant would not face adequate legal risk to enter into such a settlement. This litigation process is also inefficient. The elegant efficiency of the class action lies in its ability to resolve a large number of common claims in one stroke. The manual aggregation model described here is a far cry from that. Plaintiffs' firms, who in the United States already routinely experience cash-flow challenges, will have to dedicate significant resources to procedural planning, which will be diverted from other enforcement efforts.

C. Divergence of Private Enforcement Regimes in the Long Term: An Ascendant EU?

Private enforcement in the United States is likely to remain fettered over a longer time horizon. The Supreme Court has played the lead role in weakening private enforcement. It has erected a series of procedural obstacles against parties that seek to vindicate their rights.⁴⁴⁶ Unless the Court's composition moves significantly to the left in the coming years, it is hard to imagine how or why it would overturn its anti-private enforcement decisions over the past few decades.

The vacancy on the Court created by the death of Justice Antonin Scalia during a Democratic presidency has fueled speculation that dramatic change could be on the horizon. There are reasons to be circumspect, however. While over the past thirty years the conservative majority on the Court has been consistent and assertive in its opposition to private enforcement, the liberal minority has been inconsistent and modest in its support of private enforcement. For example, Justice David Souter, who was considered to be among the liberal bloc despite his appointment by a Republican president, authored the majority opinion in the *Twombly* decision that ushered in the era of heightened pleading requirements.⁴⁴⁷ And although Justice Kagan is considered among the more vocal and eloquent advocates of private enforcement on the Court, even she did not question the thirty-plus years of arbitration precedent in her dissent in *American Express Co. v. Italian Colors Restaurant* against the majority's evisceration of the effective vindication

⁴⁴⁵ Hensler, *supra* note 433, at 313.

⁴⁴⁶ See discussion *infra* Part V.B.

⁴⁴⁷ See discussion *supra* Part III.A.

doctrine.⁴⁴⁸

President Obama's nomination of Court of Appeals Judge Merrick Garland does not suggest that meaningful change is afoot, either. Judge Garland signed on to an opinion with a particularly harsh reading of recent class certification precedent that would require plaintiffs—at the class certification stage—to prove that all putative class members were likely injured by the defendant's conduct.⁴⁴⁹ Fortunately, this interpretation has been almost uniformly rejected by other judges at the district and appellate levels.⁴⁵⁰ Unfortunately, if Judge Garland is confirmed, his endorsement of stringent class certification standards does not inspire confidence that future Supreme Court decisions will reinvigorate the American private enforcement system. At best, some of the most far-reaching decisions concerning arbitration may be modestly pared back, while other elements—heightened pleading standards, termination of disputes at summary judgment and onerous evidentiary burdens at class certification—will become entrenched.

The shift in Court composition does bring some good news. Barring a Republican victory in the 2016 presidential election that results in a conservative successor to Justice Scalia, it is now unlikely that the system will continue to wither through, for example, Supreme Court adoption of a strict ascertainability requirement for class actions⁴⁵¹ or adoption of a requirement for standing that a plaintiff plead an injury beyond violation of a statute,⁴⁵² which many previously feared to be around the corner.

While Congress can override the Supreme Court, the prospects of positive legislative action are slim. Republicans, who in 2016 control both houses of Congress, have been consistently hostile to private rights of action in all areas of law.⁴⁵³ And even when the Democrats controlled Congress and the White House in 2009 and 2010, they did little to reverse the pro-defendant decisions of the Supreme Court.⁴⁵⁴ For example, despite high hopes for undoing the Supreme Court's broad interpretation of the Federal

⁴⁴⁸ 133 S. Ct. 2304, 2313 (2013).

⁴⁴⁹ See *In re Rail Freight Fuel Surcharge Antitrust Litig.* - Mdl No. 1869, 725 F.3d 244, 252 (D.C. Cir. 2013).

⁴⁵⁰ See *In re Elec. Books Antitrust Litig.*, No. 11 MD 2293, 2014 U.S. Dist. LEXIS 42537, at *66 (S.D.N.Y. Mar. 28, 2014).

⁴⁵¹ See discussion *supra* III.D.

⁴⁵² See Oral Argument, at 55:13–16, *Spokeo, Inc. v. Thomas Robins* (2015) (No. 13-133), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1339_d1pf.pdf (signaling the late Justice Scalia's inclination to impose such a requirement and quoting him as stating that, for standing, there “has to be something more than just the violation of what the—what Congress says is a legal right. That—that is not enough.”).

⁴⁵³ John T. Nockleby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind Tort Reform*, 86 OR. L. REV. 533, 533 (2007).

⁴⁵⁴ A prominent exception to this was the Lilly Ledbetter Fair Pay Act of 2009, which overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, and extended the time that victims of employment discrimination had to file claims for damages. 550 U.S. 618 (2007); see Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009).

Arbitration Act,⁴⁵⁵ the Democratic Congress did not act.

In contrast to the bleak outlook in the United States, select European states could implement more robust private enforcement procedures. The implementation of the EC recommendation and EU directive is very likely to produce disappointing results. This framework fails to provide the incentives necessary for strong private enforcement by consumers and other diffuse groups.⁴⁵⁶ Even with the directive and recommendation, however, EU Member States still retain significant discretion over procedure, meaning the current diversity of systems is likely to persist and even grow. Some Member States already provide for opt-out class actions or settlements and third-party funding of litigation. Given the scope for experimentation within the European Union, other Member States may also go beyond the baseline requirements of EU policy and establish opt-out class actions, third-party funding procedures, and perhaps even punitive damages.

Based on current practice and debated procedural reforms, Denmark, the Netherlands, Portugal, and the United Kingdom appear most likely to implement strong private enforcement systems. Portuguese law already provides for opt-out class actions for all plaintiffs, although so far only “qualified” consumer organizations have taken advantage of this procedure.⁴⁵⁷ Denmark allows the government-appointed consumer ombudsman to bring opt-out actions on behalf of consumers when each individual claim has a value of less than DKK 2,000—about \$300 in 2016.⁴⁵⁸ And the Netherlands has an opt-out settlement process.⁴⁵⁹

The United Kingdom has recognized the need for more effective private rights of action and taken concrete steps to advance this objective. In March 2015, the UK Parliament enacted the Consumer Rights Act that allows qualified organizations or injured parties to bring opt-out class actions for violations of antitrust law.⁴⁶⁰ Importantly, the United Kingdom already has a third-party litigation system that, though still in its infancy,⁴⁶¹ could become an important means of financing collective litigation.⁴⁶² Taking a cue from the United States rather than the European Union, one UK administrative body has even eschewed a compensation-only approach to monetary remedies. In 2012, the Competition Appeal Tribunal awarded exemplary

⁴⁵⁵ Stephanie Mencimer, *Suckers Wanted: How Car Dealers and Other Businesses Are Taking Away Your Right to Sue*, MOTHER JONES (Nov. 26, 2007), <http://www.motherjones.com/politics/2007/11/suckers-wanted-how-car-dealers-and-other-businesses-are-taking-away-your-right-sue>.

⁴⁵⁶ See discussion *supra* Sec. III.

⁴⁵⁷ Portugal, Lei n. 83/95 of 31 August.

⁴⁵⁸ Denmark, Marketing Practices Act, No. 428 of 1 June 1994.

⁴⁵⁹ Netherlands, Dutch Act on Collective Settlement of Mass Damages (“WCAM 2005”).

⁴⁶⁰ Jonathan Cary et al., *United Kingdom: Private Antitrust Litigation*, GLOBAL COMPETITION REV. (2015), <http://globalcompetitionreview.com/reviews/62/sections/210/chapters/2530/united-kingdom-private-antitrust-litigation/>.

⁴⁶¹ Barker, *supra* note 369, at 524.

⁴⁶² Veljanovski, *supra* note 370, at 405.

damages to a firm victimized by predatory conduct, which brought a follow-on antitrust action.⁴⁶³

The prospect of expanding private rights of action in Europe is real. The countries previously listed already have in place some of the elements of a strong system of private enforcement. Provided they implement strong opt-out and funding mechanisms, they can facilitate a greater number of private actions. In this event, these nations will have private enforcement regimes that are stronger than those of EU Member States that enact only the minimum requirements of the directive and recommendations, and possibly also stronger than the private enforcement system in the United States.

VI. DIVERGENCE IN OVERALL ENFORCEMENT PATTERNS: A CASE STUDY ON ANTITRUST IN THE UNITED STATES AND EUROPE

To understand the overall effectiveness of a legal regime, private and public enforcement have to be analyzed together. Public and private enforcement are both complements and substitutes for each other.⁴⁶⁴ Given that much of the enhancement of private enforcement in the European Union has arisen in the context of antitrust, it is an area ripe for comparative examination. Overall antitrust enforcement will look quite different in the United States and Europe. Private antitrust actions that follow government enforcement exemplify complementary aspects; whereas stand-alone actions illustrate how private enforcement can fill in for public actions. Where public enforcement is weak, private enforcement will need to play a more central role.⁴⁶⁵ But if public enforcement is more vigorous, private enforcement will not be quite as essential.

Multiple indicia suggest that public antitrust enforcement is weaker in the United States vis-à-vis Europe. The antitrust agencies in the United States enjoy greater public discretion and have been reluctant to pursue non-cartel cases. In contrast, in Europe, the European Commission and twenty-eight national competition authorities generally face judicial checks on their discretion and aggressively challenge both cartel and non-cartel activity.⁴⁶⁶ In light of these important differences in public enforcement, the private enforcement deficit will be felt more acutely in the United States than in Europe.

⁴⁶³ 2 Travel Grp. PLC (in Liquidation) v Cardiff City Transp. Servs. Ltd [2012] CAT 19 (England).

⁴⁶⁴ See generally Samuel Issacharaoff, *Class Actions and State Authority*, 44 *LOY. U. CHI. L.J.* 370 (2012).

⁴⁶⁵ See generally ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

⁴⁶⁶ European Commission, European Competition Network, Statistics, <http://ec.europa.eu/competition/ecn/statistics.html> (last visited Apr. 28, 2016).

A. Private Antitrust Enforcement Will Be Functionally Similar in the United States and Europe

In the near term, private enforcement will have large gaps in both the United States and Europe. Although the doctrinal barriers to effective private enforcement are very different in the United States and European Union, the private enforcement landscapes bear many similarities. Consumer class actions face serious obstacles in both jurisdictions—due to the FAA and rigorous class certification requirements in the United States and the opt-in mechanism and restrictions on litigation financing in Europe. In practice, consumers, small businesses, and other large, dispersed groups will have to overcome high hurdles in enforcing their legal rights under the antitrust laws, whereas medium-sized and large corporations will face fewer difficulties.

One Transatlantic difference in consumer suits is worth noting. Indirect purchasers are ordinarily not in contractual privity with defendants. As a result in U.S. states that permit indirect purchaser lawsuits, mandatory arbitration clauses cannot bar these actions.⁴⁶⁷ At the same time, they do face significant challenges at the class certification stage, including in showing the ascertainability of class members. Nonetheless, some commentators are cautiously optimistic about the future of indirect purchaser class actions in the United States.⁴⁶⁸ In Europe, in contrast, the opt-in requirement, which makes it very difficult to aggregate low value claims, likely dooms most indirect purchaser suits.

In the United States, medium-sized and large businesses will face an easier time protecting their legal rights than consumers will. Unlike consumers and small businesses, who must ordinarily accept standard-form contracts with arbitration provisions, larger businesses, in their capacity as customers, can negotiate contracts with suppliers and insist on the exclusion of mandatory arbitration clauses.⁴⁶⁹ And when businesses sue rivals in their competitor capacity, contractual impediments such as arbitration do not arise. Also, because their individual stakes in a case can be large, corporate plaintiffs do not necessarily need to aggregate their claims with others through the class action mechanism. As a result, the FAA and the higher class certification standards do not restrict antitrust suits by business to the same degree that they restrict consumer actions.

Despite these procedural advantages, businesses will continue to face obstacles in standalone antitrust litigation in the United States. The more permissive standards for granting defendants' motions-to-dismiss and

⁴⁶⁷ See Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 448 (2010) (finding that a majority of states confer standing on indirect purchasers).

⁴⁶⁸ See, e.g., Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, (Stanford Pub. Law Working Paper No. 2532684, 2014), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2532684.

⁴⁶⁹ Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–83 (2008).

motions for summary judgment will hamper business plaintiffs. In general, standalone cases, whether alleging collusion or exclusion, will be difficult to prosecute because courts insist on detailed factual allegations before much discovery has been taken.⁴⁷⁰ On the other hand, businesses are more likely to succeed in follow-on suits brought after government enforcement action produces a favorable decision or settlement.

In Europe, business plaintiffs may face fewer obstacles than their American counterparts. Given the wide diversity of national laws, it is not possible to generalize judicial attitudes toward business plaintiffs across EU Member States. In the United Kingdom, businesses have brought successful follow-on suits in the Competition Appeal Tribunal,⁴⁷¹ which could be a harbinger of more follow-on suits by injured competitors and other businesses.⁴⁷² The prospects of success of standalone suits, though less clear, also seem promising. Encouragingly, some national courts, unlike courts in the United States, have been reluctant to grant summary judgment or otherwise terminate cases early in favor of defendants.⁴⁷³

B. Public Enforcement Is Not Likely to Compensate for the Private Enforcement Deficit in the United States

At present, the U.S. antitrust agencies have great discretion over the matters they bring—and do not bring. When the Department of Justice and the Federal Trade Commission decide to close an investigation without taking action, they face few, if any, transparency conditions. They are not required to publish a statement or analysis and, in fact, are not even obligated to disclose when they have closed an investigation.⁴⁷⁴ To their credit, the agencies have occasionally issued closing statements when they opted not to litigate high-profile matters.⁴⁷⁵ But the statements generally are brief and often not especially informative to the public.⁴⁷⁶

⁴⁷⁰ See discussion *supra* Part III.E.

⁴⁷¹ See, e.g., *2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19 (England).

⁴⁷² Barry J. Rodger, *Why Not Court? A Study of Follow-on Actions in the UK*, 1 J. ANTITRUST ENFORCEMENT, 104, 128 (2013).

⁴⁷³ See, Barry J. Rodger, *Competition law litigation in the UK courts: a study of all cases 2005-2008- Part I*, GLOBAL COMPETITION LITIG. REV. 93, 139 (2009) (citing *Adidas-Solomon AG v. Draper*, [2006] EWHC 1318 (Ch) (England); *Intel Corp v. Via Technologies* [2002] A.E.R. (D) 346 at [32]).

⁴⁷⁴ Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937, 960 (2003).

⁴⁷⁵ See, e.g., Press Release, Dep't of Justice, Statement of the Department Antitrust Division on Its Decision to Close Its Investigation of Delta Air Lines' Acquisition of an Equity Interest in Virgin Atlantic Airways (June 20, 2013), http://www.justice.gov/atr/public/press_releases/2013/298788.htm.

⁴⁷⁶ *Id.*; Grimes, *supra* note 474, at 972. The agencies have also not consistently published closing statements on investigations of wide public interest. See, e.g., Press Release, Am. Antitrust Institute, Lack of Transparency in the Closing of DOJ's Investigation into Monsanto's Transgenic Seed Practices Disappoints Antitrust Advocates (Nov. 21, 2012),

While private parties can file complaints and lobby the DOJ or FTC to bring enforcement actions, the agencies are under no duty to respond and a failure to act on a complaint is not subject to judicial review.⁴⁷⁷ In addition, the nebulous legal standards of modern antitrust law confer broad discretion on the antitrust agencies and allow for greater subjectivity in enforcement.⁴⁷⁸

When the antitrust agencies settle cases rather than proceed to trial, their freedom of action is constrained to some extent. Under the Tunney Act, the DOJ must publish the complaint, a competitive analysis, and the terms of the settlement.⁴⁷⁹ The public then has a sixty-day window in which to submit comments responding to the proposed settlement.⁴⁸⁰ At the end of this period, the DOJ must respond to the public comments and submit the settlement to a judge for approval.⁴⁸¹ The FTC follows a similar notice and comment process for its settlements but does not have to obtain judicial consent.⁴⁸²

Although the Tunney Act was intended to strengthen public accountability,⁴⁸³ the law in practice has merely added a procedural formality to the settlement system.⁴⁸⁴ Appeals courts have directed district judges to apply a highly deferential standard of review.⁴⁸⁵ They are prohibited from looking beyond the DOJ complaint and inquiring into related but undisclosed allegations of competitive harms.⁴⁸⁶ Courts review the settlement for whether its terms address the competitive harms alleged in the government's complaint.⁴⁸⁷ Because the DOJ typically files the complaint and settlement in court simultaneously, it can craft the complaint to fit with the settlement's provisions.⁴⁸⁸ Even in cases in which the DOJ has settled a case after it filed a complaint in court (and in a fashion that appeared not to mitigate the alleged harms to competition), judges have refused to second-guess the DOJ's judgment and reject the settlement.⁴⁸⁹ In practice, the Tunney Act

<http://www.antitrustinstitute.org/content/lack-transparency-closing-doj%E2%80%99s-investigation-monsanto%E2%80%99s-transgenic-seed-practices-disappoint>.

⁴⁷⁷ Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 *FORDHAM L. REV.* 2543, 2567 (2013).

⁴⁷⁸ Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 *U.C. DAVIS L. REV.* 1375, 1421 (2009).

⁴⁷⁹ 15 U.S.C. § 16(b)–(h) (2006).

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² 16 C.F.R. § 2.34(c).

⁴⁸³ John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies"*, 4 *LOYOLA U. CHI. L.J.* 749, 756–57 (2003).

⁴⁸⁴ James Rob Savin, *Tunney Act '96: Two Decades of Judicial Misapplication*, 46 *EMORY L.J.* 363, 380 (1996).

⁴⁸⁵ *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995) (per curiam).

⁴⁸⁶ *Id.*

⁴⁸⁷ *See, e.g., United States v. Keyspan Corp.* 763 F. Supp. 2d 633, 637–38 (S.D.N.Y. 2011).

⁴⁸⁸ Lloyd C. Anderson, *Mocking the Public Interest: Congress Restores Meaningful Judicial Review of Government Antitrust Consent Decrees*, 31 *VT. L. REV.* 593, 598 (2007).

⁴⁸⁹ *See, e.g., United States v. US Airways Group*, 38 F. Supp. 3d 69, 82 (D.D.C. 2014).

process has generally operated as a judicial “rubber stamp.”⁴⁹⁰

With their broad prosecutorial discretion, the agencies have chosen to emphasize cartel enforcement. An overwhelming fraction of case filings in recent years have been against businesses and individuals accused of collusive behavior.⁴⁹¹ When challenging hard-core cartel activity such as price-fixing and bid rigging, the Department of Justice pursues criminal sanctions against corporations and individuals.⁴⁹² These sanctions include large fines for businesses and prison sentences for implicated individuals.⁴⁹³ These anti-cartel penalties are arguably more punitive than those sought by other antitrust authorities. In particular, the United States is the only nation that has consistently sentenced individual cartelists to terms in prison.⁴⁹⁴

In sharp contrast to its vigorous anti-cartel program, the DOJ filed only one monopolization complaint and settled three such cases between 2005 and 2014.⁴⁹⁵ While the FTC’s enforcement focus has been somewhat more balanced,⁴⁹⁶ its record is still modest. The agency has brought fewer than ten conduct cases, which encompass actions challenging *either* collusive or monopolistic conduct, in each year since 2007.⁴⁹⁷

Outside of price-fixing and bid rigging cases, the agencies have also been significantly more restrained in the remedies that they pursue.⁴⁹⁸ When prosecuting other forms of collusive behavior, the agencies have typically sought injunctions that order the defendants to “go forth and sin no more.”⁴⁹⁹ Aside from a few rare exceptions,⁵⁰⁰ the agencies have not pursued disgorgement as a remedy. In fact, from 2003 to 2012, the FTC followed self-imposed limits on when it would seek monetary remedies in antitrust

⁴⁹⁰ Anderson, *supra* note 488, at 603. A notable exception to this judicial “rubber stamping” of settlements was Judge Greene’s probing review of the AT&T consent decree in the early 1980s. See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

⁴⁹¹ DEP’T OF JUSTICE, Antitrust Div., Workload Statistics FY 2005-2014, <http://www.justice.gov/atr/public/workload-statistics.html> (last visited Apr. 28, 2016).

⁴⁹² Bill Baer, Assistant Atty. Gen., Antitrust Div., Prosecuting Antitrust Crimes, Remarks for the Georgetown University Law Center Global Antitrust Enforcement Symposium at 2 (Sep. 10, 2014).

⁴⁹³ *Id.*

⁴⁹⁴ Alison Jones & Rebecca Williams, *The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?*, 2 J. ANTITRUST ENFORCEMENT 100, 107 (2014).

⁴⁹⁵ DEP’T OF JUSTICE, Antitrust Div., Workload Statistics FY 2005-2014, <http://www.justice.gov/atr/public/workload-statistics.html> (last visited Apr. 28, 2016).

⁴⁹⁶ See, e.g., *In re McWane, Inc.*, 2014 FTC LEXIS 28 (2014); *In re Motorola Mobility, LLC*, 2013 FTC LEXIS 96 (2013).

⁴⁹⁷ FED. TRADE COMM’N, Competition Enforcement Database, <http://www.ftc.gov/competition-enforcement-database> (last visited Apr. 28, 2016).

⁴⁹⁸ Stephen Calkins, *Civil Monetary Remedies Available to Federal Antitrust Enforcers*, 40 U.S.F. L. REV. 567, 569-70 (2006); see also Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI. KENT L. REV. 207, 208 (2003).

⁴⁹⁹ Calkins, *supra* note 498, at 569-70.

⁵⁰⁰ Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 81 (2009).

cases.⁵⁰¹ Although the Sherman Act's anti-monopolization section provides for criminal enforcement, the U.S. government has not obtained a criminal indictment in a pure monopolization case since the early 1970s.⁵⁰²

In monopolization matters, structural remedies have also fallen out of favor. In the government's last major monopolization case, *Microsoft*, the DOJ settled the case in exchange for an assortment of conduct remedies.⁵⁰³ The days of ambitious government monopolization suits that resulted in the restructuring of non-competitive markets appear to have ended with the breakup of AT&T in 1982.⁵⁰⁴

The characteristics of public antitrust enforcement in the United States underscore the need for vigorous private enforcement. The DOJ and FTC enjoy broad prosecutorial discretion and have been unwilling to use their full legal arsenal outside of the cartel context. Because public enforcement is subject to regulatory capture and alone cannot provide adequate deterrence, private rights of action are essential. And while private treble damages actions provide vital deterrence against cartels, their role is even more essential in areas such as monopolization and vertical restraints, which have been largely neglected by government enforcers.

Given these realities, the decades-long attack on private enforcement by the courts has seriously compromised the effectiveness of the American antitrust enterprise. Public enforcement, as it presently operates, is not capable of compensating for the private enforcement deficit. To be sure, the agencies could opt to be more aggressive in the coming years. They could, for instance, seek criminal penalties against monopolists that illegally maintain their power.⁵⁰⁵ And state antitrust enforcers, who face tight resource constraints,⁵⁰⁶ could enlist outside counsel and bring more *parens patriae* actions on behalf of residents harmed by anticompetitive behavior.⁵⁰⁷ But until the antitrust authorities decide, and are provided the means, to

⁵⁰¹ FED. TRADE COMM'N, Policy Statement On Monetary Equitable Remedies—Including in Particular Disgorgement and Restitution—In Federal Trade Commission Competition Cases Addressing Violations of the FTC Act, the Clayton Act, or the Hart-Scott-Rodino Act (July 31, 2003), <https://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular>; Press Release, Fed. Trade Comm'n, FTC Withdraws Agency's Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law (July 31, 2012), <https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies>.

⁵⁰² *United States v. Empire Gas Corp.*, Crim. No. 23917-1 (W.D. Mo. 1972). See Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 14 (2009).

⁵⁰³ *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 150 (D.D.C. 2002).

⁵⁰⁴ Waller, *supra* note 502, at 15–16.

⁵⁰⁵ See, e.g., Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 587–88 (2013).

⁵⁰⁶ Robert M. Feinberg & Kara M. Reynolds, *The Determinants of State-Level Antitrust Enforcement* 5 (American U., Department of Economics, Working Paper Series No. 2009-17, Sep. 2009); Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 COMP. J. L. & ECON. 427, 432 (2005).

⁵⁰⁷ Donald G. Gifford & William L. Reynolds, *The Supreme Court, CAFA, and Parens Patriae Actions: Will It Be Principles or Biases?*, 92 N.C. L. REV. ADDENDUM 1, 4 (2013).

increase their enforcement efforts, the U.S. antitrust system will have serious gaps.

C. In Europe, Strong Public Enforcement Will Substantially Compensate for Weak Private Rights of Action

In contrast to its American counterparts, the European Commission enjoys much less prosecutorial discretion. European Union law imposes broad transparency duties on EU institutions.⁵⁰⁸ For example, in the merger area, the EC “systematically lists all notified transactions, disclosing the lines of business in which participating firms are active, and reports [its] dispositions of each of the notified transactions.”⁵⁰⁹ In select high-profile merger clearances, the EC has published detailed analyses explaining its decision.⁵¹⁰

The EC also has an obligation to provide a written notification to complaints from private parties.⁵¹¹ If it declines to act on a complaint, the EC has to provide a factual and legal basis for its decision.⁵¹² And this non-action decision is subject to judicial review,⁵¹³ which, though deferential,⁵¹⁴ still has substantive teeth. The European General Court has, in fact, vacated decisions of the EC to close investigations because the Commission failed to investigate sufficiently and respond adequately to a complainant.⁵¹⁵ Of course, the complaint system is not perfect: concentrated and organized interests, such as competitors, are more likely to file complaints than diffuse groups such as consumers.⁵¹⁶

While national enforcers in France and Germany are considered more aggressive and effective than those in other Member States,⁵¹⁷ the national competition authorities generally also face real constraints on their freedom of action. National procedural rules are required to conform to the “principle of effectiveness” in enforcing EU antitrust law.⁵¹⁸ The European Competition Network, a group comprising all EU competition authorities, has both formal and informal means of policing underperforming agencies.⁵¹⁹

⁵⁰⁸ EC Treaty art. 253.

⁵⁰⁹ Grimes, *supra* note 474, at 957–58.

⁵¹⁰ *Id.* at 958–59.

⁵¹¹ Case C-119/97, *Ufex v. Commission*, 1999 I-01341.

⁵¹² *Id.*

⁵¹³ Case C-282/95, *Guerin Automobiles v. Commission*, 1997-I-1531.

⁵¹⁴ *E.g.*, Case T-442/07, *Ryanair Ltd. v. Commission*, 2011 II-00333.

⁵¹⁵ *See, e.g.*, Case T-427/08, *CEAHR v. Commission*, 2010 II-05865; Case C-413/06 P, *Bertelsmann AG v. Indep. Music Publishers & Labels Ass’n* (July 10, 2008).

⁵¹⁶ OLSON, *supra* note 9, at 21–22.

⁵¹⁷ Rating Enforcement 2013, GLOBAL COMPETITION REV. (2013) http://www.autoritedelaconurrence.fr/doc/gcr_rating13.pdf.

⁵¹⁸ Wouter P.J. Wils, *Discretion and Prioritisation in Public Antitrust Enforcement*, 34 WORLD COMPETITION 355 (2011).

⁵¹⁹ Stephen Wilks, *The European Competition Network: What Has Changed?* 3 (2007); David J. Gerber & Paolo Cassinis, *The “Modernisation” of European Community Competition Law, Achieving Consistency in Enforcement—Part II*, 2006 EUR. COMPETITION L. REV. 51 (2006).

In addition, many Member States constrain the discretion of their competition agencies. The French national competition authority has very little discretion. It has to take action—positive or negative—on every complaint it receives.⁵²⁰ On the other end of the spectrum, the German competition agency has unfettered discretion.⁵²¹ The norm across the twenty-eight Member States appears to be close to the constraints imposed on the EC.⁵²² As an example, in the United Kingdom, the Competition Appeal Tribunal has overturned OFT decisions to close investigations without taking action.⁵²³

The EC and national competition authorities also face judicial scrutiny of their settlements. EC settlements are subject to “market testing” whereby interested third parties can submit comments responding to the terms of settlement.⁵²⁴ While this process is akin to the Tunney Act’s notice and comment requirements, the procedure in Europe appears more responsive than the U.S. procedure. As an example, consider the drawn-out investigation of Google in Europe: the EC abandoned three settlement proposals in response to criticism from injured competitors and the public and ultimately charged the company in April 2015 with abuse of dominance in internet search.⁵²⁵ In addition to market testing, settlements are also subject to judicial review.⁵²⁶ The standard of review appears deferential, although it has not been fully clarified.⁵²⁷ At the Member State level, settlements are also subject to review. For example, the UK’s Competition Appellate Tribunal can reject OFT settlements on procedural and substantive grounds.⁵²⁸

European competition enforcers have targeted all forms of anticompetitive behavior. While the EC has emphasized uncovering and punishing cartels, it has also been aggressive in challenging abuses of dominance (the European equivalent of monopolization), including predatory pricing, price squeezing, and refusals-to-deal.⁵²⁹ The national competition authorities have attacked a comparably broad, perhaps even broader, range of anticompetitive conduct. For example, national competition authorities in 2014 brought cases against cartels, predatory pricing, resale price

⁵²⁰ Wils, *supra* note 518, at 355.

⁵²¹ *Id.* at 359.

⁵²² *Id.*

⁵²³ *See, e.g.*, J.J. Burgess & Sons v. OFT, [2005] CAT 25.

⁵²⁴ *E.g.*, Press Release, Comm’n, Antitrust: Commission Market Tests Visa Europe’s Commitments – Frequently Asked Questions (June 13, 2013), http://europa.eu/rapid/press-release_MEMO-13-554_en.htm; Council Reg. (EC) 1/2003, Art. 27(4).

⁵²⁵ EUR. COMM’N, Statement by Commissioner Vestager on Antitrust Decisions Concerning Google (Apr. 15, 2015), http://europa.eu/rapid/press-release_STATEMENT-15-4785_en.htm.

⁵²⁶ Case C-441/07, *Commission v. Alrosa Co.*, 2010 I-05949.

⁵²⁷ *Id.* In the *Alrosa* decision, the European Court of Justice rejected the applicant’s claim that the proposed settlement went *beyond* the competitive harms identified by the Commission.

⁵²⁸ *See, e.g.*, *Skyscanner Ltd. v. Competition and Markets Authority*, [2014] CAT 16, Case No. 1226/2/12/14.

⁵²⁹ Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127, 135 (2009).

maintenance, and tying.⁵³⁰

Just as they challenge many types of anticompetitive behavior, European competition authorities seek aggressive remedies for all types of antitrust violations. The European Commission has the power to impose fines of up to ten percent of a company's worldwide revenue.⁵³¹ It today levies large, albeit still inadequate,⁵³² fines against cartels. The EC imposed fines of more than €8.7 billion on just cartels between 2010 and 2014.⁵³³ These cartel penalties are larger than what the United States levied on corporate antitrust defendants during that four-year period.⁵³⁴ To be sure, the larger fines in the European Union may reflect an important remedial difference: unlike in the United States, criminal cartel enforcement against businesses and individuals has yet to take root in Europe.⁵³⁵

Leaving aside the question of whether Europe or the United States is more aggressive against cartels, the European authorities pursue more aggressive remedies against antitrust violations *in general*. While their fining power has frequently been directed at cartels, European competition authorities have fined companies for a variety of non-cartel conduct. For instance, in 2009, the European Commission imposed a €1.06 billion fine against Intel for monopolizing the market for personal computer chipsets.⁵³⁶ And the EC has fined Microsoft nearly €2 billion for monopolizing the personal computer operating system market and for failing to comply with its legal commitments.⁵³⁷

National competition authorities have also levied large fines on companies for cartel and non-cartel conduct. The French competition authority in late 2014 fined thirteen consumer goods companies, including Colgate-Palmolive and Procter & Gamble, nearly €1 billion collectively for fixing the price of products such as deodorant, dishwashing soap, and

⁵³⁰ See European Competition Network, ECN Brief 04/2014; European Competition Network, ECN Brief 03/2014.

⁵³¹ Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No. 1/2003.

⁵³² Emmanuel Combe & Constance Monnier, *Fines Against Hard Core Cartels in Europe: The Myth of Overenforcement*, 56 ANTITRUST BULL. 235, 269 (2011).

⁵³³ EUR. COMM'N, Cartel Statistics, <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (last visited Apr. 28, 2016).

⁵³⁴ DEP'T OF JUSTICE, Criminal Enforcement: Trends Charts through Fiscal Year 2015, <http://www.justice.gov/atr/public/criminal/264101.html> (last visited Apr. 28, 2016).

⁵³⁵ Peter Whelan, *Cartel Criminalization and the Challenge of 'Moral Wrongfulness'*, 33 OXFORD J. LEG. STUD., 535, 536 (2013).

⁵³⁶ Case T-286/09, Intel Corp. v. Commission (June 12, 2014).

⁵³⁷ Press Release, Eur. Comm'n, Commission Fines Microsoft for Non-Compliance with Browser Choice Commitments (March 6, 2013), http://europa.eu/rapid/press-release_IP-13-196_en.htm; Press Release, Eur. Comm'n, Commission Imposes €899 Million Penalty on Microsoft for Non-Compliance with March 2004 Decision (Feb. 27, 2008), http://europa.eu/rapid/press-release_IP-08-318_en.htm; Press Release, Eur. Comm'n Interim Measures Hearing of 30 September – 1 October in Case T-201/04R (Sep. 16, 2004), http://europa.eu/rapid/press-release_CJE-04-66_en.htm.

toothpaste.⁵³⁸ In the UK, the Office of Fair Trading (absorbed by the Competition and Markets Authority in April 2014⁵³⁹) over the past decade fined companies for price-fixing⁵⁴⁰ and resale price maintenance.⁵⁴¹ In the soccer jersey case, which gave rise to the unsatisfactory private action by Which?, the OFT fined the parties involved a total of nearly £15 million.⁵⁴²

The EC and national competition authorities will continue to play the lead role in enforcing antitrust law in the EU. These entities operate in a legal environment that stresses the primacy of public law enforcers,⁵⁴³ and carry the burden of antitrust enforcement.⁵⁴⁴ Competition authorities in Europe are subject to strong legal constraints that enhance public accountability. Importantly, they have used their remedial powers across the board—targeting collusion, monopolization, and other forms of anticompetitive behavior.

Due to these features of public antitrust enforcement, the private enforcement deficit will not be as damaging in Europe as it is in the United States. Undoubtedly, EU Member States should go beyond the minimum requirements of the directive and establish opt-out class actions and effective litigation funding. Private enforcement has an important complementary role, and its absence is likely to produce suboptimal enforcement.⁵⁴⁵ This is particularly true for newer members of the European Union with less

⁵³⁸ Press Release, Autorité de la Concurrence, Home and Personal Care Products Sold in Supermarkets (Dec. 16, 2014), http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=592&id_article=2473.

⁵³⁹ Press Release, Gov. UK, New Competition Authority Comes into Existence (Oct. 1, 2013), <https://www.gov.uk/government/news/new-competition-authority-comes-into-existence/>.

⁵⁴⁰ See, e.g., Szu Ping Chen, *British Airways Fined £58.5m for Fuel Price-Fixing*, TELEGRAPH, Apr. 19, 2012, <http://www.telegraph.co.uk/finance/newsbysector/transport/9213267/British-Airways-fined-58.5m-for-fuel-price-fixing.html>.

⁵⁴¹ See, e.g., Megan Murphy, *U.K. Court Upholds Price-Fixing Fines on JJB, Argos*, BLOOMBERG NEWS, Oct. 19, 2006.

⁵⁴² Eamonn J. Doran, *A Game of Two Halves, Appellant Loses Out in Replica Kit Case*, INTERNATIONAL LAW OFFICE (June 23, 2005), <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=46ec0925-169e-4513-ade2-736b2c8bf3e1>.

⁵⁴³ Wigger & Nölke, *supra* note 240, at 495 (noting “the institutionalization of powerful public enforcement agencies with wide-ranging enforcement competencies that ‘order’ the economy and balance the decision-making according to broader political views” in the civil law nations of Continental Europe).

⁵⁴⁴ See *id.* (“Compared to the 9:1 private–public enforcement ratio of the US, the image is reversed in Europe: public authorities enforced 95 per cent of the competition cases.”); Simon Vande Walle, *What Keeps Plaintiffs Away from the Court? An Analysis of Antitrust Litigation in Japan, Europe and the US*, THE CHANGING ROLE OF LAW IN JAPAN—EMPIRICAL STUDIES IN CULTURE, SOCIETY AND POLICY MAKING 209, 210–13 (Dimitri Vanoverbeke et al. eds., 2014) (observing that private actions are generally relative few in number and settle small amounts in European nations, vis-à-vis the United States).

⁵⁴⁵ See Clifford A. Jones, *Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check*, 27 WORLD COMPETITION 13, 21 (2004) (“[I]f the Commission’s DG-Competition truly has the resources to bring all enforcement cases which ought to be brought, it would likely be the first such public agency to be so endowed in the history of the world!”).

developed public enforcement systems.⁵⁴⁶ Nevertheless, given the stronger public enforcement institutions in Europe as a whole, the overall enforcement shortfall from weak private rights of action is not likely to be as great as it is in the United States.⁵⁴⁷

VII. CONCLUSION

For as long as most can remember, the view across the Atlantic has been markedly different when it comes to regulatory architecture. In the United States, a comparatively weak public enforcement structure was buttressed by a sturdy private enforcement regime through which members of the public could directly regulate harmful conduct through litigation. By contrast, in Europe, the structure was dominated by a strong state regulatory system with private enforcement having only a negligible presence.

As time passes, the view across the Atlantic with respect to private enforcement is beginning to look quite similar. In the United States, private industry has waged a powerful, decades-long campaign against the civil justice system. This message has been particularly effective in undermining private enforcement. Beginning in the 1970s, industry cultivated and propagated a business victimhood mythology, depicting corporations as victims of a litigation explosion and casting plaintiffs (and their attorneys) as mercenaries out to make easy money. This mythology has played a powerful role in reshaping the attitudes of the public, legislators, and judges. As a result, the federal courts have erected procedural barriers that subvert the efficacy of private enforcement.

While private enforcement has been receding in the United States, it has started to move to the fore in Europe. The developments have largely emerged as the European Union and its Member States have sought to bolster the enforcement of their antitrust laws. Progress thus far, however, has assumed a one step forward, half step back pace. By “importing” the anti-private enforcement messaging and narrative of business victimhood from the United States, European Union lawmakers have declined to take the steps necessary to establish strong private rights of action. Further progress in Europe requires rejecting this empirically unsupported narrative of “litigation excess” in the United States. Promisingly, some EU Member States have enacted some of the procedural elements of a strong private enforcement system and may be poised to go further.

Private enforcement has to be understood in a larger context—in relation to its public counterpart. Despite the trend toward convergence of private enforcement between the United States and Europe, the overall enforcement picture is markedly different. Looking at one area of law, antitrust, a

⁵⁴⁶ For this reason, these countries may prove to be the most likely to implement effective private enforcement systems. *See* Harbour et al., *supra* note 239, at 155 (opining that Eastern European countries may push for adoption of certain private enforcement measures for budgetary reasons).

⁵⁴⁷ Hazelhorst, *supra* note 383, at 769–70.

divergence in overall enforcement will emerge between the United States and European Union. Given the broad discretion and restricted focus of public enforcers in the United States, the hobbled private enforcement system will severely compromise overall antitrust enforcement. For Europe, public enforcement remains strong and dedicated to rooting out both anticompetitive cartel and non-cartel behavior. So while Europe's private enforcement system is presently anemic for the most part, overall enforcement will remain relatively robust. Notwithstanding weak private rights of action on both sides of the Atlantic, Europe's public-oriented antitrust enforcement regime will possess greater vitality than its American counterpart.