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Private enforcement of competition law has great potential to augment the necessarily limited government resources devoted to deterring and remedying the effects of anticompetitive conduct. A poorly designed scheme of private enforcement, however, can lead to abuse and can deter pro-competitive conduct. This paper offers a historical overview of private antitrust enforcement in the United States and an explanation of why private case filings have increased and decreased over the years. It addresses: (1) some of the general factors influencing the level of private litigation; (2) the historical trend in private antitrust litigation in the United States; (3) the cause of the significant increase in private antitrust case filings in the 1970s and the subsequent decrease in the 1980s; and (4) what the U.S. experience may suggest for those in the European Community and elsewhere who are considering how to expand the role of private enforcement.

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I. Introduction

On August 31, 2004, the European Commission released a comprehensive study of private competition law enforcement in the European Community.¹ The report concluded that private enforcement of both national and EC competition laws is in a state of “total underdevelopment,” with only sixty decided cases on record.² In the United States, in contrast, private plaintiffs in the year ending March 31, 2004 filed 693 cases, or more than 95 percent of all the antitrust cases filed that year.³

Private enforcement of competition law has great potential to augment the necessarily limited government resources devoted to deterring and remedying the effects of anticompetitive conduct. At the same time, however, a poorly designed scheme of private enforcement can lead to abuse and can deter pro-competitive conduct. This paper offers a historical overview of private antitrust enforcement in the United States and offers an explanation of why private case filings have increased and decreased over the years. Specifically, we address:

- 1) some of the general factors influencing the level of private litigation;
- 2) the historical trend in private antitrust litigation in the United States;
- 3) what we believe caused the significant increase in private antitrust case filings in the 1970s and the subsequent decrease in the 1980s; and
- 4) what the U.S. experience may suggest for those in the European Community and elsewhere who are considering how to expand the role of private enforcement.

II. Factors Affecting Case Filings

The U.S. antitrust laws provide a right of recovery to “any person ... injured in his business or property by reason of anything forbidden in the antitrust laws.”⁴ Whether a private party accepts this seemingly broad invitation to sue, however, depends upon its expectations about the costs and benefits of proceeding. Among the most important of these are the costs of litigating a claim, meaning

1 D. Waelbroeck, D. Slater, & G. Even-Shoshan, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: A Comparative Report*, Aug. 31, 2004, available at http://www.trends.be/attachments/2004/44/economic_clean_en.pdf.

2 *Id.* at 2. See also Speech by M. Monti, *Private Litigation as a Key Complement to Public Enforcement of Competition Rules*, IBA Annual Competition Conference, Fiesole, Sep. 17, 2004, at 2.

3 Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2004*, Table C-2, available at <http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf>.

4 15 U.S.C. § 15(a).

primarily attorneys' fees; the likelihood of prevailing at trial, primarily a function of what the law requires and what the evidence will show; and the level of damages available.

The literature addressing the determinants of private litigation tends to focus largely upon the level of damages. For years commentators have argued that the current U.S. system—which provides for treble damages, costs, and attorneys' fees for prevailing plaintiffs—generates an excessive amount of litigation.⁵ More recently, a number of commentators have argued also that, in fact, damages are much more than treble the injury. The U.S. government may assess fines, direct purchasers may recover treble damages, and, in many states, indirect purchasers may recover treble damages for the same injury.⁶

As for the costs of litigating an antitrust case, scholars have paid particular attention to the role of government antitrust litigation. Under Section 5(a) of the Clayton Act, a private plaintiff may use the civil or criminal judgment entered in a government antitrust action as prima facie evidence against the defendant.⁷ In addition, a government case puts on the public record evidence that a private plaintiff can use in pursuing its own case.

Finally, the likelihood of prevailing at trial is a significant factor influencing a plaintiff's decision to file suit. As we will discuss further below, in the U.S. experience, the decision to classify particular types of conduct as per se unlawful, which significantly increases a plaintiff's chance of prevailing, has had a tremendous impact upon the level of private litigation.

III. Historical Trends

Few private plaintiffs brought antitrust suits in the early years of the Sherman Act. From 1890 to 1894 there were only two reported private antitrust cases.⁸ Four private antitrust cases were reported from 1895 to 1899, eight more from 1899 to 1904, and roughly twenty for each five-year period from then until

5 See generally, W. Breit & K. Elzinga, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* (1976). See also W. Breit & K. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405 (1985); H. Butler, *Restricted Distribution Contracts and the Opportunistic Pursuit of Treble Damages*, 59 WASH. L. REV. 27 (1983); W. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 678 (1983).

6 See, e.g., R. Posner, *Antitrust In The New Economy*, 68 ANTITRUST L.J. 935 (2001); M. Denger & D.J. Arp, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 ANTITRUST 41, 43 (2001).

7 15 U.S.C. § 16(a).

8 R. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 371 (1970).

World War II.⁹ During the war years, however, the number of cases nearly doubled, and it continued to rise rapidly thereafter.¹⁰

In the post-war era, private antitrust cases have consistently and significantly outnumbered government cases. The trends in case filings during this period are depicted in Figure 1 below, which shows two series—government and private antitrust case filings in the U.S. district courts—from 1945 to the present.¹¹

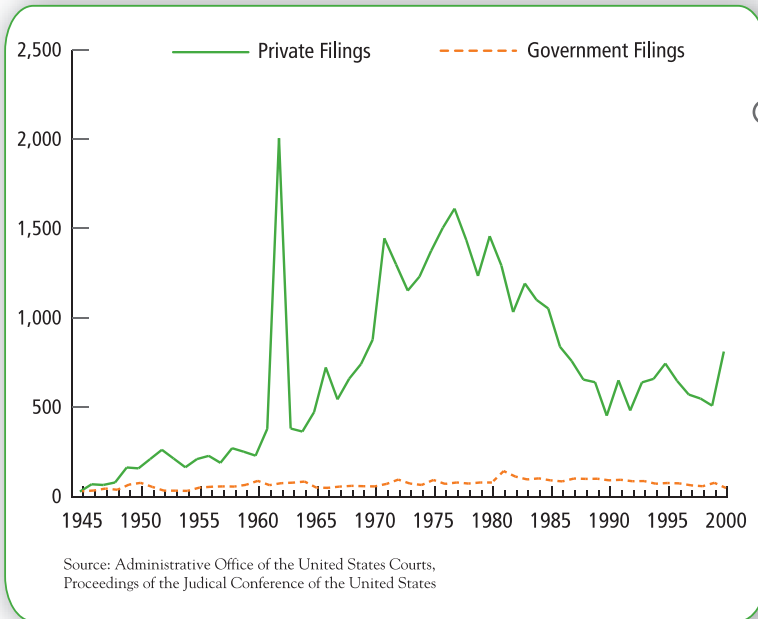


Figure 1

Government and private antitrust case filings in the U.S. district courts, from 1945 to the present

As Figure 1 illustrates, the number of government filings is both low and fairly constant in comparison to the much higher and more volatile number of private cases. Private filings have generally increased from 1945 to the present.

⁹ *Id.*

¹⁰ *Id.*

¹¹ “U.S. government” antitrust case filings include cases brought by the U.S. Department of Justice (DOJ) and by the U.S. Federal Trade Commission (FTC). Because the FTC focuses a large part of its antitrust efforts on merger review, however, and because it operates its own internal tribunal, the FTC files far fewer cases in the regular law courts. The U.S. government antitrust enforcement activity captured in the tables is therefore primarily that of the DOJ. The U.S. government filing statistics also fail to reflect other important enforcement activities, principally merger review, in which the government’s demands more often lead to voluntary compliance than to litigation. See generally, U.S. Federal Trade Commission and U.S. Department of Justice, Annual Report to Congress Pursuant to Subsection (j) of Section 7A of the Clayton Act Hart-Scott-Rodino Antitrust Improvements Act of 1976, Fiscal Year 2000 (Twenty-Third Report).

There are two periods, however, in which private antitrust case filings rose significantly above and then dropped back down to the basic upward trend line.

The first, a sharp spike in the number of private filings in 1962, reflects the wave of private antitrust cases that followed the U.S. government's investigation and prosecution of widespread market allocation agreements in the heavy electrical equipment industry. This spike in private filings peaked at 2,005 cases in 1962, after which filings dropped back immediately to the basic trend line.¹²

The second deviation from the basic upward trend line shows private filings increasing substantially through the 1970s and then decreasing through the 1980s. This increase peaked in 1977 with the filing of 1,611 private antitrust suits. Filings began to decline thereafter, but did not return to the long run trend line until the late 1980s. In the next section, we discuss a possible explanation for this phenomenon.

IV. Private Enforcement in the 1970s and 1980s

The increase in private antitrust case filings in the 1970s and the decrease in the 1980s cannot be explained by a change in the level of damages available to private plaintiffs. Nor can it be explained by a deluge of cases related to a specific conspiracy. As we discuss below, although commentators first attributed the variation to changes in the rules governing standing, and then to changes in government enforcement, we believe that the variation in filings was caused by the increase and decrease in the use of per se rules.

A. CHANGES IN STANDING

In the early 1980s, when the decline in filings first became apparent, a number of commentators hypothesized that it might be due to the U.S. Supreme Court's 1977 decision in *Illinois Brick v. Illinois*.¹³ As noted above, the U.S. antitrust laws give a right of recovery to any person "injured ... by reason of anything forbidden in the antitrust laws." When price-fixing or some other violation unlawfully increases the price of an intermediate good, however, the immediate purchaser

12 Some of the leading companies in the electrical equipment industry received heavy fines, and 31 individuals were sentenced, in connection with the price-fixing, bid-rigging, and market allocation agreements that have been widespread in the industry. In addition to the slew of private suits that followed the U.S. government's action, however, the electrical equipment cases also had more subtle effects upon the private antitrust bar. Companies in many industries for the first time sought antitrust counseling and instituted internal antitrust compliance programs. See generally, H. Pitt & K. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 Geo. L.J. 1559 (1990). On the supply side, the electrical equipment cases raised awareness of the antitrust laws within the private bar, and likely made many lawyers more alert to opportunities to bring other antitrust law cases.

13 *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) [hereinafter *Illinois Brick*].

may or may not be injured significantly, depending upon its ability to pass on the increase in price to its customers.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the U.S. Supreme Court held that a defendant in a price-fixing case could not reduce its liability by introducing evidence that the plaintiff, its customer, had passed on some of the overcharge to subsequent (or so-called “indirect”) purchasers.¹⁴ Instead, the defendant would be liable to the direct purchaser in full, regardless of the final incidence of the injury. Subsequently, in *Illinois Brick*, the Court concluded that because the defendant was required to reimburse the direct purchaser the full amount of the overcharge, the defendant should not also be liable to the indirect purchaser for the same overcharge.¹⁵ Thus, even if the indirect purchaser could establish that it bore the brunt of the unlawful increase in price, only the direct purchaser would have standing to pursue a claim in court.

Private case filings began to decline noticeably in the years after *Illinois Brick*. Some commentators inferred that the restriction upon standing announced in that case caused the decline by barring indirect purchasers from bringing federal antitrust suits. Empirical attempts to correlate *Illinois Brick* and the decrease in case filings, however, were largely unsuccessful.¹⁶ Upon examination, that is less surprising than it might at first appear. Shortly after *Illinois Brick* was decided, several states enacted statutes granting standing to indirect purchasers under state antitrust laws. Courts in a number of other states interpreted pre-existing state antitrust laws to confer standing upon indirect purchasers.¹⁷ As a result, in those states, both direct and indirect purchasers could seek treble damages for the same antitrust injury.

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

15 *Id.* at 729.

16 See, e.g., *Report of the American Bar Association Antitrust Section Task Force to Review Proposed Legislation to Repeal or Modify Illinois Brick*, 52 ANTITRUST L.J. 841 (1984); T. Kauper & E. Snyder, *Private Antitrust Cases That Follow On Government Cases*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING (L. J. White ed., 1988), at 358.

17 J. Cohen & T. Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15 ANTITRUST 29, 33 (2001) at n. 2 (citing Cal. Bus. & Prof. Code § 16750(a) (enacted in 1978); Wis. Stat. Ann. § 113.18(1)(a) (enacted in 1979); N.M. Stat. Ann. § 57-1-3 (same); 740 Ill. Comp. Stat. Ann. 10/7(2) (same); R.I. Gen. Laws § 6-36-12(g) (same); S.D. Codified Laws § 37-1-33 (enacted in 1980); D.C. Code Ann. § 28-4509 (same); Md. Code Ann., Com. Law §11-209(b)(2)(ii) (enacted in 1982); Mich. Comp. Laws § 445.778(2) (enacted in 1984); Minn. Stat. Ann. § 325D.57 (same); Kan. Stat. Ann. § 50-801(b) (enacted in 1985); Haw. Rev. Stat. §§ 480-3, 480-14 (enacted in 1987), and noting that “[a]ntitrust statutes in Alabama and Mississippi expressly permitted indirect purchaser suits prior to *Illinois Brick*.” See Ala. Code § 6-5-60; Miss. Code Ann. § 75-21-9). Cohen and Lawson cite courts in Arizona, Florida, Massachusetts, North Carolina, Tennessee, and Washington as having interpreted pre-*Illinois Brick* statutes to permit suits by indirect purchasers. *Id.* at 33. The U.S. Supreme Court in *California v. ARC Am. Corp.*, 490 U.S. 93 (1989), held that such statutes were not preempted by federal antitrust law, and, accordingly, suits by indirect purchasers continue today.

Moreover, while indirect purchasers, following *Illinois Brick*, have a right of recovery only under state law, they are not necessarily limited to bringing suit in state court. In practice, many indirect purchasers have opted to join their state claims with federal claims and to bring suit in federal court.¹⁸ For example, because the federal courts have held that *Illinois Brick* does not bar an action for

IN LIGHT OF THE PROLIFERATION OF ILLINOIS BRICK REPEALER LAWS, AND THE EASE WITH WHICH STATE DAMAGE CLAIMS MAY BE JOINED WITH FEDERAL ANTITRUST CLAIMS, IT IS UNSURPRISING THAT ILLINOIS BRICK DOES NOT DO MUCH IF ANYTHING TO EXPLAIN THE DECLINE IN PRIVATE ANTITRUST CASE FILINGS THAT BEGAN IN THE LATE 1970S.

injunctive relief,¹⁹ indirect purchasers may request injunctive relief and, supplemental to that claim, include claims for damages under state law.²⁰ In light of the proliferation of *Illinois Brick* repealer laws, and the ease with which state damage claims may be joined with federal antitrust claims, it is unsurprising that *Illinois Brick* does not do much if anything to explain the decline in private antitrust case filings that began in the late 1970s.

B. CHANGES IN GOVERNMENT FILINGS

A second hypothesis proposed to explain the decline in private filings starting in the late 1970s focuses on changes in government filings.

Figure 2 plots the same data presented in Figure 1, but does so using dual vertical axes (with private case filings plotted on the left vertical axis and government filings on the right) in order to make it easier to compare trends in the two types of filings.

18 In theory, an indirect purchaser might also enter federal court in diversity jurisdiction, but in practice, according to the Administrative Office of the U.S. Courts, all federal antitrust case filings invoke federal question rather than diversity jurisdiction.

19 See, e.g., *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1235 (9th Cir. 1998) ("indirect purchasers are not barred from bringing an antitrust claim for injunctive relief against manufacturers"); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 856 (3rd Cir. 1996) ("in contrast to the treble damage action, a claim for injunctive relief does not present the... risk of duplicative or ruinous recoveries...that the Supreme Court emphasized when limiting the availability of treble damages"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 878 F. Supp. 1078, 1083 (N.D. Ill. 1995) ("Regardless of whether they are deemed indirect purchasers under *Illinois Brick*, however, all of the plaintiffs may still pursue injunctive relief under § 16 of the Clayton Act").

20 In practice, many indirect purchaser cases involve multistate plaintiffs, and filing the claims in a consolidated federal action can tremendously alleviate logistical difficulties that might be presented by multiple actions proceeding in different state courts. In one recent case, for example, thirty-three states and the FTC brought a suit alleging the defendant unlawfully blocked competitors' access to the active ingredients for two anti-anxiety drugs, causing the price of the drugs to rise more than 2000 percent. See *FTC v. Mylan Labs, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999). The states filed one complaint alleging federal claims and, supplemental to them, indirect purchaser claims under state law. See also K. O'Conner, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34 (2001) (discussing the use of federal fora for indirect purchaser actions).

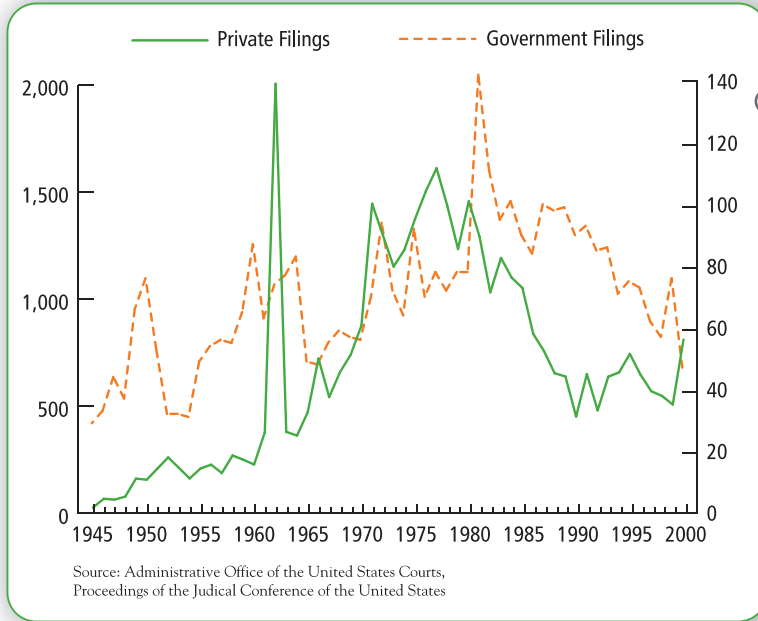


Figure 2

Government
(right vertical axis)
and private
(left vertical axis)
antitrust case
filings in the U.S.
district courts,
from 1945 to
the present

After hitting a high of 142 cases in 1981, government filings declined through the 1980s and 1990s. The decline in private filings started somewhat earlier than the decline in government filings and, by the 1990s, private filings were on the upswing. Thus, while the trend in private filings mirrors to some extent the trend in government filings, the two series clearly do not move in lockstep.

The Georgetown Project, a comprehensive study of private antitrust litigation, explored in some detail the phenomenon of private suits that follow on a government case. For the period from 1973 to 1983, the Georgetown researchers collected extensive data regarding private antitrust filings in five judicial districts, including the Southern District of New York (New York, NY), the Northern District of Illinois (Chicago, IL), and the Northern District of California (San Francisco, CA), where many private antitrust cases are filed. The final sample included roughly 2,000 cases—approximately one-sixth of all private antitrust cases filed over the decade surveyed.²¹

In a 1988 paper analyzing the Georgetown data, Professors Thomas Kauper and Edward Snyder found that roughly one quarter of all the private antitrust suits in the sample were based upon prior government cases.²² That made clear the degree to which private cases depended upon public ones, and suggested that

21 See S. Salop & L. White, *Private Antitrust Litigation: An Introduction and Framework*, in *PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING* (L. White ed., 1988).

22 Kauper & Snyder, *supra* note 16, at 358.

a change in government antitrust case filings could have a significant impact upon the number of private cases filed. The authors also noticed, however, a seemingly contrary fact: Although private follow-on suits had declined over the decade under study, government filings had not. The authors concluded that the decline in private cases was attributable to a change in the type of cases being filed by the U.S. government—in particular, a shift toward bid-rigging cases which, they observed, do not readily lend themselves to follow-on litigation. Although according to the authors, “the largest number” of the U.S. government’s cases during the latter part of the sample period had involved bid-rigging, only one of the 173 private cases the authors identified as follow-on suits had involved bid-rigging.²³ The authors hypothesized that the U.S. government’s bid-rigging prosecutions generated relatively little private activity because state governments were the usual victims in the bid-rigging cases of that era and the states, rather than bringing follow-on suits, might have used the threat of debarment under state procurement statutes to negotiate settlements with the offending companies.²⁴

This hypothesis is plausible but incomplete. To the extent that a change in the mix of government cases led to a decline in the number of follow-on cases, it probably did contribute to the overall decline in private case filings during the latter part of the period from 1973 to 1983. But even if follow-on suits accounting for one quarter of all private suits had been eliminated entirely, that would not explain most of the decline in private litigation in the early 1980s. Nor does the follow-on litigation theory explain why filings increased substantially in the 1960s and early 1970s to the heights from which the decline in filings occurred.

C. THE RISE AND FALL OF THE PER SE RULE

We believe a third explanation offers a more complete account of the changes in private filings during this period. The substantive law changed—twice. During the 1960s, judicial resolution of private antitrust claims created something of a “plaintiffs’ picnic,” with the courts construing the antitrust laws to protect firms from their competitors without regard to whether the defendant had caused any injury to consumers or to the competitive process.²⁵ Most significant, the U.S. Supreme Court condemned various types of vertical restraints as per se unlawful.

23 *Id.*

24 *Id.*; see also T. Kauper & E. Snyder, *Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared*, 74 *Geo. L.J.* 1163, 1178–79 (1986).

25 Others have cited overuse of *per se* rules as a possible source of over-deterrence. See, e.g., ABA Section of Antitrust Law, *Report of the Task Force on the Federal Agencies*, Jan. 2001, available at <http://www.abanet.org/antitrust/antitrustenforcement.pdf> (“[T]he overly aggressive enforcement of the merger laws in the 1960s, and the relatively indiscriminate application of *per se* rules, may well have discouraged American companies from entering into...potentially efficient business relationships of the kind that have been routinely approved in recent years”).

Although the Court overruled many of these per se cases within a decade, while they were good law they had a profound effect upon the level of private antitrust litigation.

Perhaps the largest category of cases brought to the plaintiffs' picnic involved non-price vertical restraints. In 1963, the U.S. Supreme Court had declined to condemn non-price vertical restraints as per se unlawful because, as the Court later explained, "[T]oo little was known about the competitive impact of such vertical limitations to warrant treating them as per se unlawful."²⁶ In 1967, however, in *United States v. Schwinn*, the Court held that non-price vertical restraints were per se unlawful after all, because restrictions upon a distributor's right to sell to certain customers or in certain areas "are so obviously destructive of competition that their mere existence is enough" to establish liability.²⁷

Similarly, in 1967, the U.S. Supreme Court held in *Utah Pie Co. v. Continental Baking Co.* that a manufacturer trying to enter a new market by offering low prices had violated the antitrust laws by contributing to a "deteriorating price structure" and by "erod[ing] competition."²⁸ The "deteriorating price structure" argument was typical of the theories of harm urged upon the Court by companies suing their competitors during this period. By accepting the theory in *Utah Pie*, the Court signaled to firms facing vigorous competition that litigation was a viable alternative to meeting the competition. The following year, as private antitrust filings continued to rise, the Court decided *Albrecht v. The Herald*, in which it held that a daily newspaper had committed a per se violation of the Sherman Act when it set the maximum price at which vendors could resell the paper.²⁹

Not surprisingly, the lower federal courts followed the U.S. Supreme Court's lead by turning increasingly toward per se condemnation of various business practices. To take a particularly important example, the U.S. Court of Appeals for the Ninth Circuit, in *Siegel v. Chicken Delight*, held that a franchise agreement requiring that the franchisee purchase its supplies from the franchisor was a per se unlawful tying arrangement.³⁰ Although the court in *Chicken Delight* was ostensibly just applying the U.S. Supreme Court's prohibition of tying first

26 *State Oil Co. v. Kahn*, 522 U.S. 3 (1997) (describing *White Motor Co. v. United States*, 372 U.S. 253 (1963)).

27 *United States v. Schwinn*, 388 U.S. 365 [hereinafter *Schwinn*], at 379 (internal citations omitted).

28 *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967) [hereinafter *Utah Pie*].

29 *Albrecht v. The Herald*, 390 U.S. 145 (1968) [hereinafter *Albrecht*].

30 *Siegel v. Chicken Delight*, 448 F.2d 43, 48–9 (9th Cir. 1971) [hereinafter *Chicken Delight*].

announced almost 25 years earlier in *International Salt Co. v. United States*,³¹ its counterintuitive application of that approach in the field of franchising actually marked a significant extension. For years, the franchising industry had used the condemned arrangement as part of a relational contract in which the franchisee

BY CONDEMNING SUCH ARRANGEMENTS, THE COURT BOTH DETERRED PRO-COMPETITIVE BUSINESS BEHAVIOR AND ENCOURAGED LITIGATION BY AGGRIEVED FRANCHISEES WITH SIMILAR AGREEMENTS.

was charged a modest initial franchise fee and required to purchase all its branded supplies from the franchisor. This two-part pricing scheme had the advantages both of simplifying quality control and of permitting potential franchisees with modest resources to enter the market. By condemning such arrangements, the court both deterred pro-competitive business behavior and encouraged litigation by aggrieved franchisees with similar agreements.

Chicken Delight and the other major decisions served up at the plaintiffs' picnic were heavily criticized by academics, especially in and around Chicago, and are now almost universally regarded as having been misguided.³² As such criticism of the antitrust courts' new solicitude for competitors mounted, the courts became less receptive to their claims. In 1977, the U.S. Supreme Court decided *Continental T.V., Inc. v. GTE Sylvania Inc.*, in which it discarded the per se rule against non-price vertical restraints that it had announced only ten years before in *Schwinn*.³³ That was the beginning of the end of the plaintiffs' picnic.

In 1984, in *Jefferson Parish Hospital Dist. 2 v. Hyde*, the U.S. Supreme Court tempered its earlier statements about tying, noting that only "certain tying arrangements...are unreasonable 'per se,'" and emphasizing the requirement that the defendant have power in the market for the tying good.³⁴ Four justices, in a concurring opinion by Justice O'Connor, advocated abandoning altogether the per se rule against tying.³⁵ And two of the five justices in the majority noted that

31 *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947) (confirmed in *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953) and *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958)).

32 See, e.g., W. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 *YALE L.J.* 70 (1967–68); P. Areeda & D. Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 *HARV. L. REV.* 697 (1975) (reprinted in 1 *COMPETITION POL'Y INT'L* 177–212 (2005)); L. Popofsky, D. Goodwin, and A.M. Mazour, *Horizontal Restraints Under Section 1 of the Sherman Act*, Practising Law Institute PLI Order No. B4–7021, 15 (1993); S. Calkins, *In Praise of Antitrust Litigation*, 72 *ST. JOHN'S L. REV.* 1, 14 (1998).

33 *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

34 *Jefferson Parish Hosp. Dist. 2 v. Hyde*, 466 U.S. 2 (1984) [hereinafter *Jefferson Parish*].

35 466 U.S. at 32 (Justice O'Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist, concurring in the judgment).

they adhered to the per se condemnation of tying only because the Congress had not amended the Act to disapprove the Court's prior interpretation.³⁶

Also in 1984, in *Copperweld Corp. v. Independence Tube Corp.*, the U.S. Supreme Court rejected the notion of an intra-enterprise conspiracy—a concept it had long applied without expressly approving, and which it now dismissed out of hand.³⁷ Two years later, in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, the Court dropped the approach it had adopted in *Utah Pie*, and held that a predatory pricing case could not proceed unless the plaintiff alleged a sound theory of harm to competition.³⁸ And, in *Business Electronics Corp. v. Sharp*, the Court narrowly cabined future per se condemnations of business practices, saying that any “departure from [the rule of reason] standard must be justified by demonstrable economic effect.”³⁹

COPPERWELD REFLECTS THE SEA CHANGE IN JUDICIAL RULINGS OCCURRING AT THE TIME AND, AS PART OF THE OVERALL JURISPRUDENTIAL TIDE, NO DOUBT CONTRIBUTED SOME TO THE DEMORALIZATION OF WOULD-BE PRIVATE PLAINTIFFS.

The cases just discussed are indicated in Figure 3 alongside the trend in private filings. The black dots in the figure represent the plaintiffs' picnic cases discussed above, while the squares represent the later cases that reduced the scope of liability.

Of course, not all of the landmark cases of the era fit both trends. *Albrecht*, for example, was not overruled until 1997,⁴⁰ long after private antitrust case filings had returned to the basic trend line. Other changes in substantive doctrine fit the timeline but probably contributed only modestly to the changes in the number of private cases. *Copperweld*, for example, likely precluded a relatively small number of private cases that otherwise would have alleged antitrust violations under the intra-enterprise conspiracy doctrine.⁴¹ Nonetheless, *Copperweld*

36 466 U.S. at 32 (Justice Brennan, joined by Justice Marshall, concurring).

37 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) [hereinafter *Copperweld*], at 760.

38 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

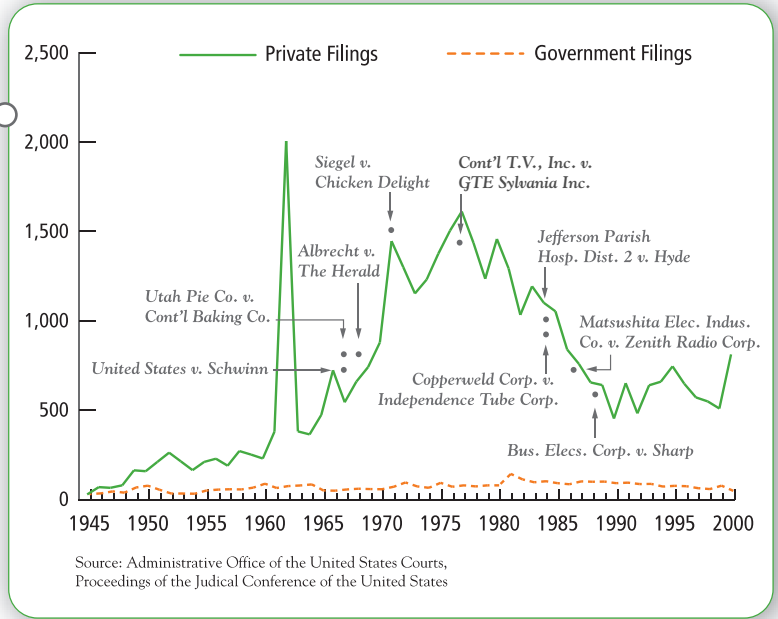
39 *Bus. Elecs. Corp. v. Sharp*, 485 U.S. 717 (1988). The U.S. Supreme Court also cut back on its liberal use of per se rules in *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19, n. 33 (1979) and in *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986).

40 *State Oil Co. v. Khan*, 522 U.S. at 3.

41 The case most clearly setting forth the intra-enterprise conspiracy doctrine, *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 141 (1968), received favorable treatment in forty-four reported federal decisions prior to its overruling in *Copperweld*, though the approbations in about one-half of those cases were dicta.

Figure 3

The plaintiffs' picnic and later cases charted against the trend in private filings, from 1945 to the present



reflects the sea change in judicial rulings occurring at the time and, as part of the overall jurisprudential tide, no doubt contributed some to the demoralization of would-be private plaintiffs. Apart from these few exceptions, the landmark cases of the era fit well with the rise and fall in private filings.

The data generated by the Georgetown Project also lend some support to the hypothesis that the rise and fall of per se condemnation of various vertical restraints fueled the rise and fall in private antitrust case filings. In their paper based upon the project data, Kauper and Snyder grouped case filings into vertical and horizontal categories. Their sample shows the mix of cases shifting more or less steadily from 54 (32 percent) horizontal and 92 (54 percent) vertical cases in 1973, to 38 (41 percent) horizontal and only 36 (39 percent) vertical cases in 1983.⁴² Although both horizontal and vertical cases declined in absolute terms over the sample period, the decline in vertical cases is much more dramatic. In relative terms, the percentage of horizontal cases increases over the sample period, while the percentage of vertical cases decreases. This shift in the mix of private litigation makes sense in light of the doctrinal shift away from per se condemnation of vertical arrangements that occurred during the sample period.

Additional support comes from examining the individual causes of action accorded per se treatment during the short-lived plaintiffs' picnic. If plaintiffs uniformly lost cases once per se condemnation ended and they were forced to

⁴² Kauper & Snyder, *supra* note 16, at 340.

show injury to competition, then presumably plaintiffs would cease to bring such claims. And, in fact, of 45 reported decisions involving non-price vertical restraints in the fourteen years following *Sylvania*, plaintiffs won four and lost 41.⁴³ This poor rate of success no doubt deterred many potential plaintiffs from filing vertical restraint cases.

Similarly, *Chicken Delight* appears to have inspired a large number of tying claims against franchisers, but only until *Jefferson Parish* came along. In the 13 years between *Chicken Delight* and *Jefferson Parish*, 65 reported district court decisions involved allegations that a franchise agreement was an unlawful tie. By contrast, in the 25 years following *Jefferson Parish*, there have been only six such cases. These numbers, too, tend to support the hypothesis that the landmark cases, variously casting doubt upon and abandoning the per se rules of the plaintiffs' picnic, substantially reduced the scope and number of private antitrust case filings.⁴⁴

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V. Conclusion: Lessons for Europe

Private antitrust enforcement in the United States has generally increased over time, more or less consistent with the long-term growth of the economy. The most significant departure from this basic trend came with a sharp increase in filings in the 1970s followed by a decrease in filings in the 1980s. This rise and fall in filings appears to be attributable not to changes in standing rules, available damages, or government enforcement levels. Rather, the change appears to be the result of the contemporaneous rise and fall of the per se rule.

For the European Community and any other jurisdiction considering modifying its competition policy in order to facilitate private enforcement, the U.S. experience is instructive. On the one hand, it demonstrates that private litigation is indeed a powerful tool for enforcement of competition laws, both in helping plaintiffs recover for their injuries and in deterring future anticompetitive behavior. On the other hand, the U.S. experience shows that, as would be expected, private complainants can be trusted to press the courts to condemn

43 D.H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 71 (1991).

44 It is also likely that case filings dropped to some extent simply because businesses abandoned practices as they became per se unlawful. That does not seem, however, to be a powerful explanation because the timing of the decline in case filings is more closely associated with cases cutting back on the per se rule than with cases extending it.

business behavior that does not actually harm competition when doing so is in their interest. For this reason, lawmakers should take care in developing *per se* rules, which relieve the courts of the need to inquire into actual competitive effects.⁴⁵

More generally, the U.S. experience suggests the key to a successful public and private partnership in enforcing competition law lies in developing sound substantive doctrine. With sound doctrine in place, competition authorities can profitably take advantage of the energies and resources of private plaintiffs to help police anticompetitive conduct without repeating the mistakes made in the United States. ▼

45 Even when conduct is clearly anticompetitive, lawmakers must still take care in developing remedies. See *supra* note 6 and accompanying text. As the U.S. Supreme Court recently noted, although there is substantial international agreement upon the anticompetitive nature of price-fixing, “nations ... disagree dramatically about appropriate remedies” (*Hoffman-La Roche v. Empagran*, 124 S.Ct. 2359, 2368 (2004)).