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Antitrust Class Actions in the Wake of Procedural Reform

CHRISTINE P. BARTHOLOMEW*

What is the current vitality of antitrust enforcement? Antitrust class actions—the primary mode of competition oversight—has weathered two decades of procedural reform. This Article documents the effects of those reforms. Relying on an original dataset of over 1300 antitrust class action settlements, this Article finds such cases alive but far from well. Certain suits do succeed on an impressive scale, returning billions of dollars to victims. But class action reform has made antitrust enforcement narrower, more time-consuming, and costlier than only a decade ago. And, as this Article’s sources reveal, new battle lines are forming. Across the political spectrum, people are trumpeting antitrust as the next great hope to resolve trade issues, equalize wealth inequity, and reform Big Tech. Even amid these rising calls, class action opponents continue to campaign for more reform. This Article describes those efforts and provides the essential data to repel them.

* Professor, SUNY Buffalo Law School. The author would like to thank attendants of the UC Irvine Antitrust Scholars Roundtable, the 2019 Third Annual Chapman Junior Faculty Works-In-Progress Conference, and the 21st Annual Loyola Antitrust Colloquium, as well as Christopher Sagers, Christopher Leslie, John Kirkman, Tom Campbell, Benjamin Edwards, Jim Wooten, Anya Bernstein, Guyora Binder, Michael Boucai, Jon Jagher, Andrew Gavil, and John M. Connor for feedback on early drafts. Special thanks to my research assistants, Ben Holwitt, Andrew Kij, Tyler Gately, Kimberly VanOpdorp, and particularly Patrick Callahan, for their tireless work.

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INTRODUCTION

Critics have long maligned private antitrust enforcement as ineffective, impotent, and even dangerous to competitive markets. Since 2005, these doom merchants have succeeded in pushing through a cascade of legislative and judicial reforms hostile to antitrust class actions.¹ Once a new reform goes into effect, more are swiftly demanded. Antitrust class actions have become harder to plead, certify, and litigate than at the start of the century. But now, a growing populist voice is calling for stronger oversight in Silicon Valley and beyond.² Perhaps not so ironically, antitrust

1. See, e.g., John C. Coffee, Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years, 2002–2007*, in *CLASS ACTION LITIGATION 2008: PROSECUTION AND DEFENSE STRATEGIES* 195, 195–96 (Joel S. Feldman & Keith M. Fleischman, eds., 2007) (“[T]he tide has turned against class certification, and new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic.”); Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 *DEPAUL L. REV.* 305, 307 (2010) (discussing “a broader shift in judicial philosophy” against class actions).

2. See, e.g., Richard B. Baker, Carola Frydman & Eric Hilt, *Politics and Antitrust: Lessons from the Gilded Age*, *HARV. L. SCH. F. ON CORP. GOVERNANCE* (Jan. 2, 2019), <https://corpgov.law.harvard.edu/2019/01/02/politics-and-antitrust-lessons-from-the-gilded-age/> [https://perma.cc/3QZ3-PRLN] (“Recent years have witnessed a resurgence of interest in antitrust.”); Joshua Wright & Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy*, 25 *STAN. J.L., BUS. & FIN.* 131, 134 (2020) (“The global antitrust community has witnessed a

enforcement is declining while market concentration is on the rise.³ This bipartisan groundswell will need the procedural means to make markets more competitive. Antitrust class actions could respond to this call—but only if a decade of sustained reform has not left them too anemic.

As the head of the Federal Trade Commission (FTC) explains, the “[s]tudy of enforcement successes and failures” is needed to guide “the healthy development of the antitrust laws.”⁴ To date, legal scholarship offers conflicting diagnoses of antitrust class actions. While some characterize such litigation as dangerously powerful and demand its immediate curtailment,⁵ others fear it is already too weak to fulfill its vital enforcement function.⁶ Both views rely mostly on conjecture. Existing scholarship, though laudable, offers precious little evidence on the effects of a generation of legislative and judicial tinkering.⁷ Antitrust-specific studies are scant. What exists involves limited sample sizes and descriptive analytics without predictive or prescriptive dimensions.⁸ This Article remedies that shortage.

Gauging antitrust enforcement in the United States means focusing on class actions. Theoretically, private consumer class actions share enforcement oversight with competitors or federal, state, and local governments.⁹ Realistically, private enforcement is the primary regulator: antitrust class actions exceed government

reanimation of populist sentiments that once dominated the field.”).

3. See *infra* Part II.B. and accompanying footnotes.

4. Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 295 n.6 (2019).

5. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991) (contending class actions allow “the entrepreneurial attorney [to] serve her own interest at the expense of the client”); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 79–80 (2003).

6. See, e.g., Donald R. Frederico, *The Arc of Class Actions: A View from the Trenches*, 32 LOY. CONSUMER L. REV. 266, 280 (2020) (“[M]any have fretted that class actions are on life support.”); Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 972 (2017) (“I did not declare the class action device dead, but I did express concern that it had been severely weakened.”).

7. Prior related empirical research is more limited in scope. Two studies focused on class actions generally. See Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248 (2010); Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. REV. 937 (2017) (updating their 1993–2008 study and analyzing solely published opinions); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010) (analyzing all class action opinions but for the limited period of 2006–2007).

8. See, e.g., JOSHUA DAVIS & ROSE KOHLES, 2019 ANTITRUST REPORT: CLASS ACTION FILINGS IN FEDERAL COURT (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696575 [<https://perma.cc/MW2K-Q9J8>]; Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 883–89 (2008).

9. See, e.g., James J. O’Connell, Editor’s Note: Antitrust and the Limits of Globalization, 29 ANTITRUST 4, 6 (2015).

actions by more than twenty-five-to-one.¹⁰ Thus, the foundation of this Article is a dataset of published and unpublished federal antitrust final settlement approval decisions from 2005–2020, the fifteen-year period following enactment of the Class Action Fairness Act (CAFA). The most exhaustive gathering of such decisions to date, this dataset spans 393 final approval opinions—over 1300 settlements involving the rights of hundreds of millions of consumers. To bolster this material, this Article adds carefully culled docket analytics, motion practice statistics, and material from attorney fee and cost award requests. Combined, this data fully refutes some critiques levied against antitrust class actions and drastically qualifies others.

Richly laden with information about what legal claims successfully clear which types of procedural hurdles, judicial settlement approval decisions reveal the heretofore unknown scope and limits of modern antitrust enforcement. They confirm what some long feared: all is not well with antitrust class actions. Quantitatively, class action reforms have hobbled private antitrust enforcement—at a cost to its consumer protection goals. By design, antitrust laws combat a wide range of market misconduct and monopoly power distortion.¹¹ But procedural reforms have limited private enforcement’s reach. Nearly ninety percent of the settlements involved wrongdoing by cartels.¹² Cases challenging other anticompetitive conduct, including abuse of monopoly power, are vanishing.¹³ And even the future of enforcement against cartels is uncertain. The 1328 settlements examined for this Article show how risky an enterprise private antitrust enforcement has become. This litigation is increasingly more costly for plaintiffs’ attorneys in terms of both time and expense. Gone are the days when certification of a class signaled a likely settlement. Today, class certification is but the first of many hurdles. Multiple rounds of procedural

10. See AM. ANTITRUST INST., *THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES* 222 (2008), <https://www.antitrustinstitute.org/work-product/aai-transition-report-on-competition-policy-to-the-44th-president-of-the-united-states/> [<https://perma.cc/9EBN-3VJY>]. Rivals frequently have business reasons to avoid suing a competitor. See Christine P. Bartholomew, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2198 (2014) (explaining how competitors may want to enter joint ventures or merge); see also Clare Deffense, Comment, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions*, 72 CALIF. L. REV. 437, 464 (1984). Government oversight by the Department of Justice (DOJ), the FTC, and state actors depends on political whim and financial backing—which waver by administration. See Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 230 (2003); see, e.g., *Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence Before the H. Comm. on the Judiciary*, 116th Cong. 2–3 (2020) (statement of John W. Elias, Attorney, Department of Justice) (describing 2019 DOJ antitrust investigations triggered by “[p]ersonal dislike of the industry” and presidential tweets rather than “on an antitrust analysis”).

11. See, e.g., John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2469 (2013) (“Congress and the American people want an antitrust system that protects consumers and small suppliers from exploitative behavior—behavior that takes their wealth without providing them with offsetting benefits.”).

12. See *infra* Part II.B.2.

13. See Bartholomew, *supra* note 10.

gatekeeping are the new norm. The average settled case first cleared 10.62 dispositive motions and lasted almost five years.¹⁴

For all that antitrust class action has suffered over the last two decades, the data underlying this Article hints at another approaching wave of reforms. Tort reformers, thinly guised as consumer advocates, have co-opted the settlement approval process, using it to push the judiciary to procedurally limit private enforcement in new ways. They urge courts to redefine what counts as a permissible settlement and reduce the financial incentives for undertaking private enforcement.¹⁵ The settlement data, coupled with docket analytics, belie the ruinous ramifications of such changes.

This Article unfolds as follows. Part I summarizes three key procedural reforms to class actions and explains why the settlement approval process provides a telling lens to assess those reforms' impact. Part II sets out the findings of this Article's original dataset. It details the deleterious effects of statutory and doctrinal procedural reform on the overall health of antitrust class actions, and it identifies where antitrust cases have survived such challenges. Part III, the prophetic portion of the Article, uses information gleaned from settlement objectors to anticipate—and refute—the next round of potential attacks on private enforcement.

I. ANTITRUST REFORMS AND SETTLEMENTS

Antitrust class actions fulfill a critical role in the stability of the economy.¹⁶ Such cases blend the gains of antitrust and class actions, from regulatory oversight to deterrence to judicial access.¹⁷ Consumers function as “champions of semi-public rights”¹⁸—a collective David against corporate Goliaths. Harms, too small to bring individually, are aggregated.¹⁹ The costs of litigation can easily exceed individual recoupment in these cases, which lead to class action suits as we know now.²⁰ As a

14. See *infra* Part II.B (discussing procedural hurdles and case length).

15. See *infra* Part III (discussing objector proposed reforms).

16. See, e.g., *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2019 WL 6888488, at *21 (E.D.N.Y. Dec. 16, 2019) (recognizing “a genuine public interest in bringing private antitrust class actions”).

17. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (discussing how Congress created private enforcement to “deter violators and deprive them of the fruits of their illegal actions, and to provide ample compensation to the victims of antitrust violations”); accord Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 678 n.7 (2010) (“[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice . . .” (quoting *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982))).

18. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

19. *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 259 (3d Cir. 2016) (describing “the typical class action” as aggregating “hundreds or thousands of claims . . . to ensure that the wrongdoer is held accountable and that small claims are vindicated” (citing *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008))); cf. Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 784 (2015) [hereinafter *Redefining Prey*] (“Consumers have the right to sue for corporate wrongdoing; however, that right is illusory given the expense of individual litigation.” (footnote omitted)).

20. See *Redefining Prey*, *supra* note 19, at 755 n.89.

class, consumers challenge restraints of trade²¹ and push back against consolidation of market power that risks “the spirit, verve, and élan of the nation.”²²

Beyond a generalized notion that some enforcement is necessary, little else about antitrust engenders consensus. Private enforcement sits at the intersection of two contentious debates: (1) substantive disagreements regarding what anticompetitive conduct to regulate, and (2) procedural disagreements about how much regulatory power class actions should have. The substantive battles over “the soul of antitrust” date back decades.²³ This Article responds to the procedural skirmishes.

Procedure controls the true reach of law. Or, as Representative John Dingell more colorfully stated, “I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time.”²⁴ Thus, the only way to evaluate the efficacy of modern antitrust efforts is to first fully understand the consequences of procedural changes. Part I spells out how class action critiques influenced a flurry of procedural reforms. It focuses on three exemplars of how, though trans-substantive, these changes complicate antitrust enforcement. It then explains that settlements expose the impact of these reforms and uncover future efforts lying in wait.

A. The “Reformed” Antitrust Class Action

Class actions have faced a wave of procedural reforms spearheaded in part by tort reformers.²⁵ Reform efforts trace their roots to the 1980s, when conservatives began targeting civil rights class actions.²⁶ By the 1990s, the target expanded to class actions more generally.²⁷ Critics feared class actions would spark a “litigation explosion” and undermine efforts to roll back regulatory oversight.²⁸

These critics maintain class actions are little more than legalized blackmail that trigger inadequate “sweetheart” deals.²⁹ Plaintiffs’ attorneys insist on filing suits on

21. Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 *FORDHAM L. REV.* 2543, 2546 (2013).

22. Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 *U. MICH. J.L. REFORM* 1, 2 (2015).

23. See, e.g., Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 *CALIF. L. REV.* 917, 917 (1987). Previous scholarship fully details the changing substantive reach of antitrust. See generally TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018); Jeffrey L. Harrison, *After Forty Years of Antitrust Revision and Apple Inc. v. Pepper, What Now Illinois Brick?*, 11 *WM. & MARY BUS. L. REV.* 695 (2020); William Kolasky, *Antitrust Litigation: What’s Changed in Twenty-Five Years?*, 27 *ANTITRUST* 9, 11 (2012).

24. *Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Admin. L. & Governmental Rels. of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell).

25. See, e.g., sources cited *supra* note 1.

26. See, e.g., David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 *FORDHAM L. REV.* 1785, 1810 (2018).

27. See *id.* at 1804.

28. *Id.* at 1808–09 (reflecting a change of course from the expansion of Federal Rule of Civil Procedure 23 in response to the Electrical Equipment Antitrust Cases).

29. See, e.g., Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 *NOTRE DAME L. REV.* 1377, 1381 (2000) (defining sweetheart settlements). For variants of the sweetheart deal narrative, see John C. Coffee, Jr.,

behalf of uninterested consumers.³⁰ Once certified as a class action, defendants may have no rational choice but to settle even meritless cases.³¹ Class counsel then resolve claims on the cheap in exchange for inflated attorney fee awards.³²

While tales of sweetheart deals and blackmail settlements exist across class actions, antitrust suits generate particular suspicion. Reformers claim antitrust class actions “piggy-back” on existing government investigations, increasing the risk to defendants without any additional deterrent gains.³³ Class litigation is too blunt an instrument that threatens “[m]istaken inferences”³⁴ and chills legitimate procompetitive conduct.³⁵ This speculation festers despite a bipartisan 2007 report by the Antitrust Modernization Commission finding “[n]o actual cases or evidence of systematic overdeterrence.”³⁶

Animus toward class actions has spurred significant reform, starting with the enactment of CAFA. In March 2005, Congress expanded federal diversity jurisdiction, moving most state class actions into federal court.³⁷ Class action critics

Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996).

30. See, e.g., Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1243 (discussing how “[c]orporate defendants, reform-minded legislators, and the business press” characterize class action counsel as “‘greedy,’ ‘extortionist’ ‘bounty hunters’”); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1575 (2007) (discussing how class actions hamper “the right to control one’s own litigation”).

31. See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784–85 (3d Cir. 1995) (“Class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims’ actual worth.” (emphasis in original)). *But see* Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681 (2005) (debunking the blackmail myth).

32. See, e.g., Neil M. Goldstein, *Preserving Fee-Shifting After Evans v. Jeff D.: Joint Attorney/Client Control of Settlements*, 11 INDUS. RELS. L.J. 267, 269 (1989).

33. David Rosenberg & James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159, 161 (2006) (“[M]any antitrust class actions merely ‘piggy-back’ on public enforcement” (citation omitted)); see, e.g., Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001) (“The effect is to lengthen the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation, and increase litigation costs.”).

34. *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (“Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” (citation omitted)).

35. See, e.g., Joseph Scott Miller, *Error Costs & IP Law*, 2014 U. ILL. L. REV. 175, 201 (2014) (maintaining “[t]he costs of false positives, given their likelihood, swamp any gains from adding a layer of antitrust enforcement”).

36. DEBORAH A. GARZA ET AL., ANTITRUST MODERNIZATION COMM’N: REP. AND RECOMMENDATIONS 247 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [<https://perma.cc/8Y3B-CLNT>].

37. 28 U.S.C. § 1332(d)(2) (2005).

insisted state courts were too plaintiff friendly, so federal jurisdiction was necessary to equalize the treatment of defendants.³⁸

Once solidly in federal court, private antitrust enforcement faced an increasingly pro-corporate, anti-class action Supreme Court majority.³⁹ Through a series of judicial opinions, the Court increased the procedural hurdles for antitrust class actions. Lower courts soon followed suit. The next subsections consider just three of the many changes⁴⁰ to procedure: increased pleading standards, forced arbitration, and stricter class certification requirements.

1. *Twiqbal*

First, just two years after CAFA's enactment, the Supreme Court began requiring more aggressive judicial screening of complaints.⁴¹ Previously, for over fifty years, a complaint needed only provide a "short and plain statement" of the relief sought.⁴² *Bell Atlantic Corp. v. Twombly* revised this standard, holding a complaint must state facts "plausibly suggesting (not merely consistent with)" illegal conduct.⁴³ The Court

38. See Class Action Fairness Act, Pub. L. No. 109-2, § 2(a)(4)(B), 119 Stat. 4, 5 (2005) (discussing potential state court biases against defendants). The accuracy of this concern is debatable. See PUB. CITIZEN'S CONG. WATCH, CLASS ACTION "JUDICIAL HELLHOLES": EMPIRICAL EVIDENCE IS LACKING 3 (2005), <http://www.citizen.org/documents/OutlierReport.pdf> [<https://perma.cc/PW82-26KB>] (explaining very few jurisdictions are "unfair" to defendants). However, the pro-defendant benefit of a federal forum is well-settled. See Willy E. Rice, *Allegedly "Biased," "Intimidating," and "Incompetent" State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly "Impartial" and "Competent" Federal Courts—A Historical Perspective and an Empirical Analysis of Class Action Dispositions in Federal and State Courts, 1925–2011*, 3 WM. & MARY BUS. L. REV. 419, 541 (2012) ("Corporate defendants' 'win' ratios in federal courts are 66.7% and 84.6%, respectively." (footnote omitted)). Thus, while CAFA was enacted to promote fairness, in actuality, it has helped corporations evade class action liability.

39. See, e.g., *Redefining Prey*, *supra* note 19, at 766.

40. See generally *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (holding that indirect purchasers do not have sufficient injury to bring an antitrust claim). This is not to say that procedure is the only aspect of antitrust litigation that has changed. The scope of substantive issues has also narrowed over time. See *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); see also Bartholomew, *supra* note 10, at 2164.

41. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

42. FED. R. CIV. P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." (footnote omitted)); see also Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744, 747–51 (2016) (discussing the pre-*Twombly* pleading standard).

43. *Twombly*, 550 U.S. at 557. The decision shows a clear disdain for private enforcement, characterizing class actions as "tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 558 (alteration in original) (emphasis in original) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

added onto the new standard two years later in *Ashcroft v. Iqbal*.⁴⁴ Courts must now screen complaints using a two-step process: (1) distinguish facts from legal conclusions; and (2) based on those facts, use “judicial experience and common sense” to evaluate whether there is a plausible claim for relief.⁴⁵ Combined, “*Twigbal*” allows courts to dismiss implausible claims, as well as claims that—though potentially plausible—are thin on facts at filing, well before a plaintiff can undertake discovery.⁴⁶

The new pleading standard means little for many areas of law.⁴⁷ But for antitrust, it injects subjectivity into motions to dismiss.⁴⁸ Judges can disagree over whether a complaint alleges sufficient circumstantial facts to shift from a possible to a plausible conspiracy. This subjectivity is particularly fatal for section 1 cartel claims.⁴⁹ Few defendants are forthcoming about illegal agreements, and evidence of such deals is difficult, if not impossible, to fully gather pre-discovery.⁵⁰

Twigbal similarly poses a risk to section 2 claims or vertical agreements under section 1. Claims must be plausible in order to survive a motion to dismiss, which requires a complaint allege facts showing that the harm the plaintiff suffered was traceable to impermissible conduct. Only injuries “of the type the antitrust laws were intended to prevent” are actionable.⁵¹ This procedural requirement compounds what is already a heightened standard. Consequently, *Twigbal* allows a judge to sort permissible from impermissible competitive conduct, affording judges “discretion to dismiss claims based on hunches and policy animosity.”⁵² Even if a judge finds the alleged conduct problematic, the complaint must still plausibly allege a causal link between the wrongdoing and the suffered harm. This showing can be insuperable. If the judge suspects any other market force caused the plaintiffs’ harm, he may dismiss the claim. As Judge Martin of the Sixth Circuit explains, “it is difficult to see how any antitrust plaintiff—short of those few omniscient plaintiffs that happen to know

44. 556 U.S. 662 (2009).

45. *Id.* at 678–69.

46. *Cf.* Rebecca Haw Allensworth, *Economic Sense and Sensibility: Matsushita and the Rise of the Battle of the Experts*, 82 ANTITRUST L.J. 47 (2018); Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 626 (2011) (discussing the problems *Twigbal* poses to claims dependent on discovery).

47. Bartholomew, *supra* note 10, at 2187.

48. *See, e.g.*, Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 33 (2010) (“Although judicial discretion—and its potential for inconsistency—is hardly a novel aspect of Rule 12(b)(6) motion practice, the invocation in *Twombly* and *Iqbal* of highly subjective factors may have made it the determinative factor in deciding whether a plaintiff will be allowed to proceed to discovery.”).

49. 15 U.S.C. § 1 (prohibiting unlawful contracts, combinations, or conspiracies).

50. *See, e.g.*, Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 58 (2010) (discussing the problematic nature of *Twombly* for plaintiffs attempting to plead implicit market division agreements); Malveaux, *supra* note 46, at 624 (“[O]ne judge may dismiss a complaint while another concludes that it survives, solely because of the way each judge applies his or her ‘judicial experience and common sense.’ This is bound to create unpredictability, lack of uniformity, and confusion.”).

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

52. Roger M. Michalski, *Assessing Iqbal*, HARV. L. & POL’Y REV., <https://harvardlpr.com/online-articles/assessing-iqbal/> [<https://perma.cc/4PNQ-SUG3>].

every relevant factual detail before the inception of litigation and without the benefit of discovery—will be able to overcome a motion to dismiss.”⁵³ Despite multiple, unsuccessful attempts to overturn or narrow *Twiqbal*, the plausibility standard still controls.⁵⁴

2. Mandatory Individual Arbitration

An antitrust case only faces *Twiqbal* challenges if the case can be heard by a court. Other procedural changes limit which suits even reach this initial stage. In 2010, in *AT&T Mobility LLC v. Concepcion*, the Court upheld arbitration class action waivers.⁵⁵ In doing so, it invalidated a pro-consumer California law barring such contractual provisions. The Court then doubled down on its pro-arbitration, anti-class action position in 2013. In *American Express Co. v. Italian Colors Restaurant*, a divided Court approved an arbitration class action waiver in a Sherman Act section 1 case.⁵⁶ To the Court’s five-to-three majority, contractual freedom trumps judicial access, not to mention the legislative intent of the Sherman Act in general.⁵⁷ An arbitration clause that waives consumers’ ability to bring a class action is binding, even if the clause effectively “foreclose[s] [them] from vindicating [their] right to redress antitrust harm.”⁵⁸

By coupling arbitration provisions and class action prohibitions, a company can shield itself from the primary form of antitrust oversight.⁵⁹ As Justice Kagan noted in her dissent to *Italian Colors*, “[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”⁶⁰ Unsurprisingly, companies are taking up this shield. As of 2019, seventy-eight of the top hundred largest companies prohibit class actions and require arbitration.⁶¹ Few, if any, reasonable consumers would pursue litigation to enforce their antitrust rights in the face of such provisions. Going at it alone means a consumer foregoes the benefits of scale and negotiating power of a class when facing the resources of a

53. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 461 (6th Cir. 2007) (emphasis in original) (citing *Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC*, 474 F.3d 865, 874 (6th Cir. 2007)).

54. *See, e.g.*, Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

55. 563 U.S. 333 (2011).

56. 570 U.S. 228 (2013).

57. *Id.* at 241 (Kagan, J., dissenting) (“Congress created the Sherman Act’s private cause of action not solely to compensate individuals, but to promote ‘the public interest in vigilant enforcement of the antitrust laws.’” (citation omitted)).

58. *Id.* at 240 (Kagan, J., dissenting).

59. *See* Thomas F. Bush, *Arbitration in Antitrust Cases*, FREEBORN & PETERS LLP, https://www.freeborn.com/sites/default/files/arbitration_in_antitrust_cases_-_freeborn.pdf [<https://perma.cc/34DB-53XF>] (“[W]hen an arbitration clause prohibits class arbitration, the defendant has effectively protected itself from a class action, whether in arbitration or in court. If individual claims are not economically feasible, the defendant may have effectively immunized itself from liability for treble damages for an antitrust violation.”).

60. *Italian Colors*, 570 U.S. at 240 (Kagan, J., dissenting).

61. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019).

corporation. Even then, arbitration makes little sense. A plaintiff in arbitration is less likely to prevail,⁶² must work with less discovery, and has no effective right to appeal.⁶³ The initial cost alone to file an arbitration claim can exceed a plaintiff's potential recovery.⁶⁴ Realistically, this procedural reform limits private antitrust enforcement to those few industries that have yet to adopt these contractual protections.

3. Class Certification

Class actions have had a target on their back for a while, and the courts have been more than willing to take aim.⁶⁵ Due to various legislative and court-made reforms, it is now more difficult than ever to state a class claim.⁶⁶ Class action suits are incredibly unlikely to reach merit-based decisions.⁶⁷

Private antitrust cases that navigate the dangerous waters of arbitration provisions and *Twiqbal* are still far from calm waters. Judges are also erecting higher standards for class certification.⁶⁸ A case does not begin as a class action. Putative class actions must satisfy Federal Rule of Civil Procedure 23(a)'s requirements of numerosity, typicality, commonality, and adequacy, as well as at least one of the subsections under Rule 23(b).⁶⁹ Most often, antitrust cases are brought under Rule 23(b)(3), which sets out two additional requirements: superiority⁷⁰ and predominance.⁷¹ One factor for superiority is manageability, meaning whether foreseeable difficulties make an alternative method of litigation preferable.⁷²

62. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 55 (2019) (“[T]he plaintiff win rate in arbitration is generally lower than its analogue in the judicial system.”).

63. See Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 KAN. J.L. & PUB. POL’Y 578, 582 (1999).

64. See Heidi Shierholz, *Correcting the Record*, ECON. POL’Y INST. (Aug. 1, 2017), <https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/> [<https://perma.cc/8MG5-A3MA>] (noting consumers pay, on average, \$161 to file an arbitration claim).

65. See, e.g., Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711–15; Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. DAVIS BUS. L.J. 1, 46–51 (2006).

66. Lazaroff, *supra* note 65; see also Bartholomew, *supra* note 10, at 2148.

67. *Redefining Prey*, *supra* note 19, at 745–46.

68. See Coffee & Paulovic, *supra* note 1 (“[F]or better or worse, it is today clear that the tide has turned against class certification, and new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic.”).

69. FED. R. CIV. P. 23.

70. *Id.* at 23(b)(3) (“[A] class action [must be] superior to other available methods for fairly and efficiently adjudicating the controversy.”).

71. *Id.* (“[Q]uestions of law or fact common to class members predominate over any questions affecting only individual members . . .”).

72. Superiority has five factors. The first, “alternative methods,” considers “other available methods for the fair and efficient adjudication of the controversy.” See, e.g., *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir. 2004). The remaining four are

Tomes have been devoted to each of these requirements. The focus here, though, is instances where courts import unstated additional constraints into Rule 23, allegedly to cure inefficiency, shelter defendants,⁷³ or even protect class members.⁷⁴ These judicially created reforms provide new grounds for denying class certification for swaths of antitrust cases. Consider manageability and predominance issues by way of example.

Some courts rewrite manageability to add a new requirement: “ascertainability”—a term that appears nowhere in Rule 23.⁷⁵ Despite courts adopting different interpretations,⁷⁶ in application, this new barrier is particularly fatal for small-sum cases.⁷⁷ It allows courts to deny certification if a case might raise logistical challenges “ascertaining” whether putative class members purchased the product at issue.⁷⁸

In addition, some courts reinterpret manageability as a de facto prohibition on multistate class actions because of the thorny horizontal choice of law queries they

the individuals’ interests, pending litigation, forum, and manageability. FED. R. CIV. P. 23(b)(3)(A)–(D).

73. See *In re Thalomid & Revlimid Antitrust Litig.*, No. 14-6997, 2018 WL 6573118, at *19 (D.N.J. Oct. 30, 2018) (ensuring “a defendant’s rights are protected by the class action mechanism” (quoting *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 439 (3d Cir. 2017))); see also *In re Mushroom Direct Purchaser Antitrust Litig.*, 319 F.R.D. 158, 174 (E.D. Pa. 2016); *Blakes v. Ill. Bell Tel. Co.*, No. 11 CV 336, 2013 WL 6662831, at *16 (N.D. Ill. Dec. 17, 2013).

74. See, e.g., *In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 1:04-MD-1628, 2008 WL 5661873, at *10 (S.D.N.Y. Feb. 20, 2008) (applying rigid predominance requirement to “benefit injured Class Members” (citation omitted)).

75. See Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 *FORDHAM L. REV.* 2769, 2778 (2013) (discussing this implicit requirement).

76. Stephanie Haas, *Class is in Session: The Third Circuit Heightens Ascertainability with Rigor in Carrera v. Bayer Corp.*, 59 *VILL. L. REV.* 793, 804–05 (2014) (describing ascertainability’s “malleable” nature). Courts might demand plaintiffs (1) identify class members “using objective criteria,” (2) capture all members necessary to resolve the action in a single proceeding, and/or (3) describe the main claims and defenses that apply to the class. *Id.* at 804.

77. See, e.g., *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 658 (7th Cir. 2015) (requiring ascertainability “bar[s] class actions where class treatment is often most needed: in cases involving relatively low-cost goods or services”); see also Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 *VAND. L. REV.* 1295, 1348 (2016) (explaining ascertainability).

78. See, e.g., *Stewart v. Beam Glob. Spirits & Wine, Inc.*, No. 11-5149, 2014 WL 2920806, at *7 (D.N.J. June 27, 2014); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742, 2010 WL 3119452, at *13 (S.D.N.Y. Aug. 5, 2010).

raise.⁷⁹ Multistate claims are common in antitrust class actions.⁸⁰ Generally, only consumers who purchased directly from an alleged wrongdoer have standing under the Sherman Act.⁸¹ Over thirty states have enacted indirect purchaser statutes, affording indirect purchasers standing to vindicate state antitrust laws.⁸² A single antitrust indirect purchaser case frequently includes claims under many of these state statutes. The more states involved, the greater the potential for redress and deterrence. But depending on which manageability standard a court employs, the more state claims involved, the riskier class certification becomes.⁸³

Class certification reforms are not limited to manageability. Courts are also effectively amending Rule 23's predominance requirement. Rule 23(b)(3) requires courts to ensure that "questions of law or fact common to class members predominate over any questions affecting only individual members."⁸⁴ The prevailing judicial approach had been to infer class-wide impact for price-fixing cases.⁸⁵ Now, many courts require common proof across the class to calculate damages⁸⁶—even if other

79. See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (discussing manageability concerns with a nationwide case); *Lichoff v. CSX Transp., Inc.*, 218 F.R.D. 564, 574 (N.D. Ohio 2003) (noting applying six states' laws "would make it burdensome to instruct a jury on the legal standards for plaintiffs' claims"); see also James E. Pfander, *The Substance and Procedure of Class Action Reform*, 93 ILL. BAR J. 144, 144 (2005) (differing state substantive laws "often persuade[] federal judges to reject nationwide class treatment as unwieldy").

80. CAFA pushed more nationwide classes into federal courts. Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.). While some antitrust class actions still proceed in state court, this Article focuses on federal actions.

81. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 728 (1977) (holding indirect purchasers cannot seek monetary damages because they lack a cognizable antitrust injury).

82. Edward D. Cavanaugh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 19 (2004).

83. Compare, e.g., *In re Skelaxin (Metaxalone) Antitrust Litig.*, 299 F.R.D. 555 (E.D. Tenn. 2014), with *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672 (S.D. Fla. 2004). Both involved overlapping state antitrust law claims for alleged interference with the entry of a generic drug. Both were brought by indirect purchasers with multistate claims. In the Tennessee case, the court denied certification, holding a nationwide case would require application of the law of multiple states, thus "render[ing] this class simply unmanageable." *Metaxalone*, 299 F.R.D. at 588. In the Florida case, though, the court granted certification, noting the variation "does not pose a manageability problem because the applicable substantive laws are virtually identical in their required elements." *Terazosin*, 220 F.R.D. at 700 n.45.

84. FED. R. CIV. P. 23(b)(3).

85. See, e.g., *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014) (citing cases).

86. See, e.g., *Bhasker v. Kemper Cas. Insur. Co.*, 361 F. Supp. 3d 1045, 1099 (D.N.M. 2019) ("[E]ven if the methodology for calculating damages is common to the class, the court must decide whether it will operate in a consistent way for each individual class member."). This approach traces its roots to *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). There, the Court reversed certification of section 1 and 2 claims against Comcast because of a faulty

legal or factual issues predominate.⁸⁷ Any inference of impact is disappearing, replaced instead with an exacting standard poorly suited for the challenges of antitrust economic modeling.⁸⁸

The judicial reforms to manageability and predominance alone have the potential to chill private antitrust enforcement by incorrectly denying class certification. The heightened pleading requirements post-*Twiqbal* coupled with the pro-arbitration shift exacerbate these worries. As the next Section explains, the process for judicial approval of antitrust settlements provides much-needed information to evaluate if such concerns are warranted.

B. Using Settlements to Assess Reforms

The idea that anti-class action sentiment has driven procedural reforms is well known. The impact of these reforms and the legitimacy of their justifications for private antitrust enforcement is not. This Section explains how the settlement approval process is a rich source of data on these questions.

1. Settlement Approval

Despite a “strong judicial policy in favor of settlements, particularly in the class action context,”⁸⁹ Rule 23(e) requires the parties submit detailed information to justify settlement approval.⁹⁰ Courts must assess “the fairness, reasonableness and

damages model. *See id.* at 35. Only in dicta does the court mention common proof for quantifying damages across the class. *See id.* at 33. As the dissent notes, “[T]he decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable ‘on a class-wide basis.’” *Id.* at 41 (Ginsburg, J., dissenting) (citation omitted).

87. *See, e.g.,* *Hughes v. Ester C. Co.*, 320 F.R.D. 337 (E.D.N.Y. 2017); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084 (N.D. Cal. 2018).

88. *See* Bartholomew, *supra* note 10, at 2166 (explaining how such an approach “fails to acknowledge valid disagreement amongst economists”).

89. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (*quoting In re PaineWebber Ltd. P’ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)).

90. FED. R. CIV. P. 23(e). This approval process applies to putative and certified class actions. MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.612 (2004) (defining “settlement class” as “cases certified as class actions solely for settlement”). The primary difference between a settlement class and litigation class is for (b)(3) classes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (noting manageability is irrelevant for a settlement (b)(3) class).

adequacy of the settlement terms⁹¹ and have significant discretion⁹² to accept, reject, and alter settlements.⁹³

Settlement review has two phases: preliminary and final approval.⁹⁴ Between the two stages, the parties provide any requisite notice to class members.⁹⁵ The notice details the settlement terms, the claims process if any, and how to object or opt out of the settlement.⁹⁶ By the final approval, the court has additional information from the claims process, such as the reach of the class notice, the number of claims made to date, any objections, and any opt outs.⁹⁷

At both approval stages,⁹⁸ courts consider substance and process. Substantively, a proposed settlement must provide adequate relief.⁹⁹ This case-specific determination considers:

- (1) the case's complexity, expense, and likely duration;
- (2) class members' reaction to the settlement;
- (3) the stage of the proceedings;

91. *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11, 27 (E.D.N.Y. 2019) (citation omitted); *see also* FED. R. CIV. P. 23(e)(1)(C).

92. Settlement approval is discretionary. *See, e.g.*, *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 377 (3d Cir. 2013); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) ("The trial court, well-positioned to decide which facts and legal arguments are most important to each Rule 23 requirement, possesses broad discretion to control proceedings and frame issues for consideration under Rule 23." (citation omitted)). Courts may consider class counsel's settlement recommendations. *See, e.g.*, *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (affording "great weight" to counsel's recommendation because they "are most closely acquainted with the facts of the underlying litigation" (citation omitted)).

93. *See, e.g.*, *Fralely v. Facebook, Inc.*, No. C 11-1726, 2012 WL 5838198, at *1 (N.D. Cal. Aug. 17, 2012) (denying preliminary approval); *In re* Comcast Corp. Set-Top Cable Television Box Antitrust Litig., No. 09-MD-2034, 2015 WL 6757614, at *1 (E.D. Pa. Nov. 5, 2015) (same); Order Granting Final Approval of Indirect Purchaser Settlements, 4:07-cv-05944, 2016 WL 3648478, at *24 (N.D. Cal. July 7, 2016) (discussing judicially required modifications to a settlement).

94. *See, e.g.*, *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 319 (C.D. Cal. 2016); *In re* Motor Fuel Temperature Sales Pracs. Litig., 258 F.R.D. 671, 675 (D. Kan. 2009).

95. FED. R. CIV. P. 23(e)(2). If the court has certified a (b)(3) class pre-settlement, class members may have already received certification before receiving any settlement notice. *See* FED. R. CIV. P. 23 (e)(2). Also, the defendant must notify certain state and federal officials of a settlement. 28 U.S.C. § 1715(b).

96. *See* DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 21.633 (4th ed.); *see also* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-14 (1985). By opting out, a class member loses standing to object to the settlement. *See, e.g., In re* Ins. Brokerage Antitrust Litig., 282 F.R.D. 92, 110 (D.N.J. 2012).

97. *See* 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 13:41 (5th ed. 2020) (detailing the final approval submissions).

98. If the court preliminarily approved a settlement class, it completes certification during final approval. *See, e.g., In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 527 (3d Cir. 2004); *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1354 (S.D. Fla. 2011).

99. FED. R. CIV. P. 23(e)(1)(A) ("The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.")

- (4) the amount of discovery completed;
- (5) the risks of establishing liability and damages;
- (6) the risks of maintaining the class through the trial;
- (7) defendants' ability to withstand a greater judgment;
- (8) whether the settlement is reasonable compared to the best possible recovery; and
- (9) whether the settlement is reasonable given the future litigation risks.¹⁰⁰

The parties' showings on these factors help evaluate the legitimacy of private antitrust enforcement criticisms. For example, to aid the court's analysis of the case's complexity, settlement approval papers detail the similarities and differences between any existing government investigation. This information exposes whether private enforcement merely duplicates government enforcement.

Procedurally, a court confirms the settlement was the product of arm's-length negotiations. A proposed settlement cannot jeopardize class members' due process rights by benefiting counsel over the class.¹⁰¹ This requirement sheds light on whether sweetheart deals are myth or fact. Courts assess any conflict between class members or with the class representative.¹⁰² If the parties undertook "meaningful discovery" prior to settling and relied on a mediator to reach consensus,¹⁰³ courts generally presume the settlement was at arm's length in the absence of any demonstrative conflict.¹⁰⁴ Nonetheless, courts closely analyze the parties' proposed distribution of settlement funds and any side agreements that may impact the settlement.¹⁰⁵

These substantive and procedural dimensions mean settlement approvals also expose the effect of procedural reforms. Settlement approval papers extensively

100. FED. R. CIV. P. 23(e)(2); *see also, e.g.*, *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 954 F. Supp. 2d 276, 279 (S.D.N.Y. 2013).

101. *See, e.g.*, *Gooch v. Life Invs. Ins. Co.*, 672 F.3d 402, 420 (6th Cir. 2012) (explaining collateral estoppel turns on "whether that settlement complied with the Due Process Clause" (citation omitted)).

102. *Cf. D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure." (citation omitted)); *Fernandez v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 15-22782, 2017 WL 10775413, at *2 (S.D. Fla. Sept. 29, 2017) (same), *report and recommendation adopted*, No. 15-22782, 2017 WL 10775412 (S.D. Fla. Oct. 13, 2017).

103. *E.g.*, *Mba v. World Airways, Inc.*, 369 F. App'x 194, 197 (2d Cir. 2010) (citation omitted); *In re Lorazepam & Clorazepate Antitrust Litig.*, No. 99-079, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003).

104. *See* FED. R. CIV. P. 23(e)(2)(D) (requiring the settlement "treats class members equitably relative to each other").

105. *See id.* at 23(e)(2)(C)(ii)-(iii). Such side deals may be between counsel or with objectors. *See, e.g.*, *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 330 (E.D. Pa. 1994), *vacated on other grounds*, 83 F.3d 610 (3d Cir. 1996), *aff'd* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (class counsel and defendants); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 436 (2003) (objectors).

detail procedural hurdles—both completed and yet to come—for the given case. Coupling this data with information from fee award requests provides a holistic imprint of the modern antitrust class action.

2. Fees and Costs Requests

The attorney fee approval process provides even more data points to assess the need for and the impact of procedural reforms. After issuing final approval, courts resolve any fee¹⁰⁶ and cost award requests.¹⁰⁷ These requests supplement the settlement approval file, providing specifics about the time and expense devoted to the private enforcement effort.

Class counsel usually request a percentage of the settlement fund as attorney fees.¹⁰⁸ Courts frequently cross-check this percentage by referencing class counsel's lodestar, which is the total hours that class counsel devoted to the case multiplied by a reasonable compensation rate.¹⁰⁹ The percentage awarded is based on multiple factors:¹¹⁰

- (1) any benchmark percentage in the circuit;¹¹¹
- (2) the size of the fund and the number of class members;
- (3) class counsel's skill, experience, and efficiency;
- (4) the case's complexity and duration;
- (5) the risks of the litigation;
- (6) the amount of time class counsel devoted to the case;
- (7) awards in similar cases; and
- (8) public policy considerations.¹¹²

106. FED. R. CIV. P. 23(e)(2)(C)(iii).

107. FED. R. CIV. P. 23(h).

108. The common fund doctrine allows attorneys to request fees, usually a percentage of the fund, from the settlement. *See* Tyler W. Hill, Note, *Financing the Class: Strengthening the Class Action Through Third-Party Investment*, 125 YALE L.J. 484, 511 (2015). For settlements that do not create a common fund, courts tend to use the lodestar method to calculate fees. *See, e.g., In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). The Clayton Act also provides fee-shifting for a prevailing party. Clayton Act, 15 U.S.C. § 15(a).

109. The compensation rate reflects the average hourly rate in the same geographic area as the pending case for similar work. *See, e.g., In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486, 2013 WL 12387371, at *4 (N.D. Cal. Nov. 5, 2013). Courts then adjust this product using a multiplier. *See, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL 1352859, at *3 (N.D. Cal. Apr. 12, 2017); *cf. Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3–4 range are common in lodestar awards for lengthy and complex class action litigation." (citation omitted)).

110. These factors vary slightly by circuit. *Compare In re UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1104 (D. Minn. 2009) (listing seven factors), *with In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009) (adding three additional factors).

111. *See, e.g., In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 350 (N.D. Ga. 1993) ("The majority of common fund fee awards fall between 20% and 30% of the fund, with an upper limit of 50%." (citation omitted)).

112. *See, e.g., In re Loestrin 24 Fe Antitrust Litig.*, No. 1:13-MD-2472, 2020 WL

In applying these factors, courts have discretion to determine when class counsel deserves a significant award—and when they do not.¹¹³ The results reveal whether class action critiques are creeping into fee and cost awards.

3. Settlement Objections

While settlement and fee approval filings help gauge the impact of prior procedural reforms, settlement objections hint at future ones. Before a final approval or fee request hearing, a class member may voice their views by filing an objection.¹¹⁴

Courts will consider any challenges that “state with specificity the grounds for the objection.”¹¹⁵ Baseless claims are insufficient.¹¹⁶ A large number of challenges may indicate an organized campaign by objectors rather than any legitimate problem with the settlement or fee request.¹¹⁷ Consequently, courts focus more on the content than the number of objections.¹¹⁸

The right to challenge a proposed class settlement has spurred a niche specialty: attorneys representing repeat objectors.¹¹⁹ These professional objectors “file objections, or threaten to file objections, to class action settlements without the aim of improving the settlement at all.”¹²⁰ They include individual attorneys from smaller

4038942, at *6 (D.R.I. July 17, 2020); *Hooker v. Sirius XM Radio, Inc.*, No. 4:13–CV–003, 2017 WL 4484258, at *6 (E.D. Va. May 11, 2017).

113. *See, e.g., In re Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 997 F.3d 1077, 1091 (10th Cir. 2021); *Kamar v. Radio Shack Corp.*, 623 F. App'x 902, 903 (9th Cir. 2015).

114. FED. R. CIV. P. 23(e)(5); *see Shane Grp., Inc. v. Blue Cross Blue Shield*, No. 10-CV-14360, 2016 WL 4475011, at *6 (E.D. Mich. Aug. 25, 2016) (discussing how class members “have a voice as objectors”).

115. FED. R. CIV. P. 23(e)(5)(A).

116. *See, e.g., In re Packaged Ice Antitrust Litig.*, 322 F.R.D. 276, 291 (E.D. Mich. 2017) (“Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.” (citation omitted)); *Int'l Union v. Ford Motor Co.*, No. 05–74730, 2006 WL 1984363, at *26 (E.D. Mich. July 13, 2006) (“Courts presume the absence of fraud or collusion unless there is evidence to the contrary.” (citation omitted)).

117. *See Bruce D. Greenberg, Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN'S L. REV. 949, 952 (2010) (“[P]rofessional objectors simply present the same ‘canned’ objections again and again, often copying them verbatim from case to case regardless of their appropriateness.”).

118. *See Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 300 (5th Cir. 2017) (“At the end of the day, it is not the number of Objectors but the quality of their objections that should guide the court’s review.”).

119. *See John E. Lopatka & D. Brooks Smith, Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U.L. REV. 865, 866 (2012) (discussing the “rise to a cottage industry of so-called professional objectors”).

120. Jonathan Uslaner & Brandon Marsh, *Combating Objectionable Objections*, ABA LITIG. GRP. (Oct. 24, 2016), <https://www.americanbar.org/groups/litigation/committees/class-actions/articles/2016/how-to-combat-objectionable-objections/> [https://perma.cc/R8SQ-CREY]. This Article uses the term “professional objector” to acknowledge “the fact that certain objectors are represented by attorneys who are in the profession of objecting to class action settlements, whether motivated by views of the law, ideology, or otherwise.” *Dewey v.*

shops and attorneys from nonprofit, purported public interest firms with differing motivations. For some, the potential for financial gain spurs objections. These professional objectors threaten to hold a class settlement hostage until they receive compensation from class counsel to withdraw their challenge—a process sometimes called “greenmailing.”¹²¹ Others hope for compensation for altering the settlement. Courts, however, only award objectors whose challenge is a substantial cause of a benefit on the class.¹²² In evaluating an objector fee request, courts consider a variety of factors, including whether the objector was “substantively involved in the litigation.”¹²³ If a challenge is unsuccessful, the objector may opt out of the settlement, file a claim, or appeal. By opting out or making a claim, the objector loses standing to appeal. For other professional objectors, reform is the driving impetus. A close examination of these objections can forecast what future hazards await the already “reformed” antitrust class action.

II. THE MODERN ANTITRUST CLASS ACTION

With this background in place, Part II analyzes modern antitrust class actions. To weigh the consequences of a decade-plus of reforms requires an informed rendering of private enforcement efforts. The skeleton for this depiction is a wholly original dataset comprised of federal antitrust class action settlements from the year of CAFA’s enactment through its fifteenth anniversary (March 2005–2020).¹²⁴ It

Volkswagen, 909 F. Supp. 2d 373, 396 n.24 (D.N.J. 2012).

121. See, e.g., Michael J. Bologna, *Notorious ‘Serial Objector’ May Have Filed his List Objection*, BLOOMBERG L., <https://news.bloomberglaw.com/class-action/notorious-serial-objector-may-have-filed-his-last-objection-1> [<https://perma.cc/K9L3-N3EX>] (Mar. 12, 2019, 11:42 AM).

122. See, e.g., *In re Holocaust Victim Assets Litig.*, 424 F.3d 150, 157 (2d Cir. 2005) (requiring objection be a “a substantial cause of the benefit obtained” (quoting *Savoie v. Merchants Bank*, 84 F.3d 52, 57 (2d Cir. 1996)); *In re Polyurethane Foam Antitrust Litig.*, 169 F. Supp. 3d 719, 720 (N.D. Ohio 2016) (denying fee request because objector “was not meaningfully responsible for any monetary benefit obtained by the class” (emphasis in original)); *Glasser v. Volkswagen, Inc.*, 645 F.3d 1084, 1088 (9th Cir. 2011).

123. E.g., *Dewey*, 909 F. Supp. 2d at 398–99 (“In deciding whether an objector deserves an incentive award, courts have considered whether: (1) the objector’s particular efforts conferred a benefit on the class; (2) the objector incurred personal risk; and/or (3) the objector was substantively involved in the litigation.” (citation omitted)), *aff’d Dewey v. Volkswagen Aktiengesellschaft*, 558 F. App’x 191 (3d Cir. 2014).

124. These opinions were the result of the following Bloomberg search: Sources: All Court Dockets, All U.S. District Court Antitrust & Trade Opinions, Search Term: ((final/3 approval) AND ((class n/3 action))), Content Type: Court Opinions. This docket search generated a more robust compilation than similar Lexis and Westlaw searches. Material from Westlaw and webpages devoted to class settlements, including topclassactions.com, classaction.org, and consumer-action.org, were then added to the Bloomberg results. Once compiled, I grouped related cases to avoid double counting, deleted any non-antitrust, non-class entries, and settlement denials. Except where noted, all charts and tables are based on data from final approval motions, fee and cost award requests, and all related dockets and orders for each settled case. The exhaustive nature of the compilation minimizes the potential influence of missing settlements.

includes evidence extracted from 393 reported and unreported final approval opinions, as well as motion practice for each settled case. Figures from fee and costs award motions flesh out the data.¹²⁵ All told, the dataset spans 171 cases¹²⁶ and 1328 settlements.¹²⁷

The resulting analysis exposes the impact of repeated procedural blows. Section A starts with a macro assessment of private antitrust enforcement. This bird's-eye view initially shows antitrust class actions' perseverance, despite ever-increasing procedural hurdles. But a deeper dive shows a more precarious image—one where decades of reforms have significantly narrowed the primary method of antitrust oversight.

A. Skin-Deep Assessment of Private Antitrust Enforcement

At first glance, antitrust enforcement appears healthy. Isolated data suggests these class actions have successfully navigated the last decade's reforms. These positives, though incomplete on their own, are still worth recognition. Further, the settlement data refutes a core criticism of private antitrust enforcement: class actions do not simply “piggyback” on government oversight, and they can be complementary to such oversight.

Class actions continue to enforce antitrust laws. Both the volume of final approvals and value of settlements increased over the studied period. The number of final approvals grew at an average annual rate of 10.31%. The number of final approvals exceeding \$100 million increased three-fold during the second half of the study.¹²⁸ Consumers reaped the benefits, as settlement amounts also increased over

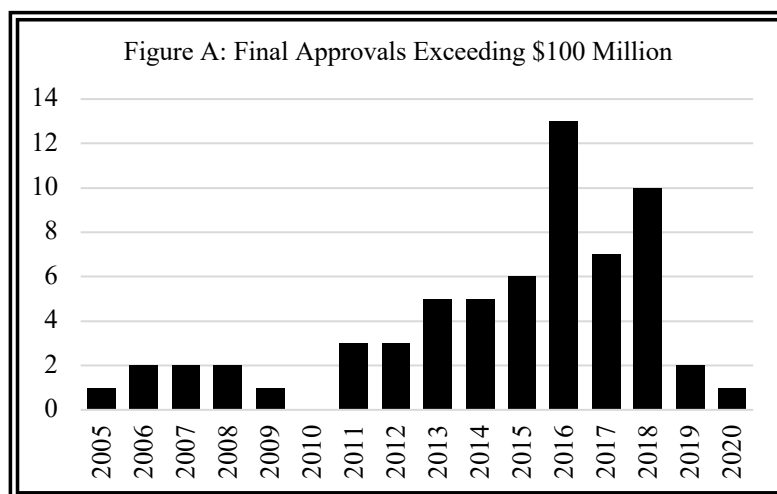
125. Final approval orders exceeded fee and costs awards, as counsel did not always request such an award from each settlement.

126. Because piecemeal settlements were common, final approval decisions far exceeded the number of settled cases. *See, e.g.*, Docket, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 1:06-mc-01775 (E.D.N.Y. June 27, 2006) (six final approvals); Docket, *In re Nexium (Esomeprazole) Antitrust Litig.*, 1:12-cv-02409 (D. Mass. Dec. 7, 2012) (five final approvals).

127. Many final approval orders involved settlements with multiple defendants. Hence, the dataset tracked the total number of defendants per final approval order. The term “settlement” as used herein reflects these individual settlements. The number of settlements is likely unrepresentative because related business entities are combined. If, for example, a parent company and its subsidiary settled, the data reflects that as a single defendant.

128. This figure does not include injunctive, declaratory, or nonmonetary settlements.

time. These settlements afforded consumers over \$32.05 billion in compensatory relief,¹²⁹ in addition to nonmonetary, injunctive, and declaratory relief.¹³⁰



Settlements spanned various industries, evincing private antitrust enforcement's regulatory oversight across diverse segments of the U.S. economy.¹³¹ Most antitrust settlements over the last fifteen years involved pharmaceuticals,¹³² food products,¹³³

129. This figure represents settlement funds available to class members, net attorney fees, and costs. It does not reflect potential adjustments for claims administration or interest accrued post-settlement approval. When adjusted for inflation per the 2019 Consumer Price Index, this amount grows to \$34,214,133,925.71.

130. Not all settlement approvals provided valuations of such relief. *See, e.g.*, Order, *Binz v. Amadeus*, No. 1:15-cv-05457 (S.D.N.Y. Apr. 23, 2018). The limited information available suggests its value is significant. *See, e.g.*, *Talone v. Am. Osteopathic Ass'n*, No. 1:16-cv-04644, 2018 WL 6318371 (D.N.J. Dec. 3, 2018) (valuing injunctive relief settlement at \$84 million); Memorandum Opinion, *In re Ovcin Oral Contraceptive Antitrust Litig.*, No. 06-401 (D.D.C. Nov. 15, 2007) (settlement providing \$6 million in products).

131. The data showed that the majority of the cases studied were price fixing, market manipulation, and bid rigging. Price fixing consisted of 81.9% of total recovery and 70.5% of settlements, while market manipulation consisted of 11.1% of total recovery and 13.7% of settlements, and bid rigging consisted of 7.5% of total recovery and 14.9% of settlements.

132. *See, e.g.*, Order Granting Final Approval, *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, MDL No. 2503, No. 1:14-MD-2503, 2017 WL 5710424 (D. Mass. Nov. 27, 2017); Order Granting Final Approval, *In re Wellbutrin XI Antitrust Litig.*, No. 2:08-cv-02431, 2012 WL 13224382 (E.D. Pa. Nov. 7, 2012); Order Granting Final Approval, *In re K-Dur Antitrust Litig.*, No. 01-cv-1652 MDL No. 1419, 2017 WL 11636125 (D.N.J. Oct. 5, 2017).

133. *See, e.g.*, *In re Processed Egg Prod. Antitrust Litig.*, 302 F.R.D. 339 (E.D. Pa. 2014); Memorandum Opinion & Order, *In re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000, 2013 WL 2155379 (E.D. Tenn. May 17, 2013); Order, *Edwards v. Nat'l Milk Producers Fed'n*, No. 11-cv-04766, 2017 WL 3616638 (N.D. Cal. June 26, 2017).

and electronics,¹³⁴ with the largest settlements coming from financial industries.¹³⁵

<i>Industry (representative examples)</i>	<i>% of Total Recovery</i>	<i>% of Settlements</i>
Finance (derivatives, futures, banking & credit card services)	39.4%	7.8%
Electronics (cable services, flat panels & memory chips)	14.7%	13.0%
Medical/Pharmaceutical (drugs & medical products)	12.6%	17.8%
Chemicals/Gas (plastic additives, rubbers, gasoline & natural gas)	8.1%	9.7%
Cars (manufacturing & parts)	6.6%	15.0%
Transportation (air & freight services)	5.6%	5.2%
Consumer (clothings, services & merchandise)	3.5%	7.5%
Construction Materials (concrete, gypsum, pipe fittings & steel products)	3.0%	6.3%
Food (eggs, fish, mushrooms & bananas)	2.6%	13.4%
Miscellaneous	3.9%	4.4%

134. See, e.g., *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 926 (9th Cir. 2020); Order Granting Final Approval, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. CV-07-44-SC (N.D. Cal. Mar. 22, 2012); Order Granting in Part Motion for Attorney's Fees and Granting Motion for Settlement, *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-02420, 2020 WL 7264559 (N.D. Cal. Dec. 10, 2020).

135. Four of the five largest final approvals, all exceeding \$590 million, involved the financial industry. See Order, *Dahl v. Bain Cap. Partners*, No. 1:07-cv-12388 (D. Mass. Mar. 2, 2015); Corrected Opinion and Order, *In re Credit Default Swaps Antitrust Litig.*, No. 13md2476, 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016); Order Awarding Reimbursement of Litigation Expenses, *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 1:13-cv-07789-LGS (S.D.N.Y. Aug. 16, 2018); Order, *In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, No. 05-MD-1720 (E.D.N.Y. Dec. 13, 2019).

Vigorous private enforcement requires attorneys willing to undertake these complex cases.¹³⁶ Attorney fee awards are intended to incentivize suits.¹³⁷ Class counsel earned over \$6.7 billion. The average fee rate was 27.6%, with percentages varying notably by circuit.

Circuit	Final Approvals	Mean Fee %	Sum of Settlements (millions)	Sum of Fees (millions)	Sum of Costs (millions)
1st Cir.	17	29.1%	\$1,119.54	\$316.53	\$41.56
2d Cir.	69	22.2%	\$15,212.93	\$2,247.43	\$186.90
3d Cir.	94	30.7%	\$2,951.75	\$947.19	\$140.57
4th Cir.	7	29.2%	\$692.81	\$231.42	\$14.47
5th Cir.	4	18.9%	\$18.55	\$0.47	\$5.61
6th Cir.	44	27.5%	\$3,064.22	\$715.73	\$78.45
7th Cir.	27	32.5%	\$1,178.18	\$346.03	\$23.10
8th Cir.	4	30.1%	\$32.25	\$9.60	\$2.65
9th Cir.	105	26.4%	\$6,458.47	\$1,534.74	\$130.33
10th Cir.	6	32.5%	\$967.00	\$320.55	\$8.69
11th Cir.	11	31.3%	\$259.67	\$57.43	\$8.17
D.C. Cir.	5	29.2%	\$103.00	\$15.39	\$4.00
Total	393	27.60%	\$32,058.38	\$6,742.50	\$644.51

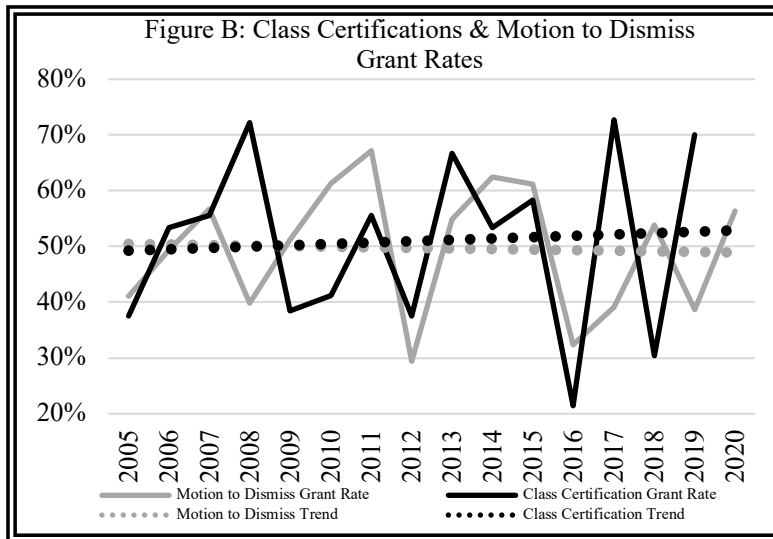
From a perfunctory review of the dockets for each settled case, procedural reforms seem to have had minimal repercussions. Overall, the rates at which courts granted motions to dismiss and class certification held steady across the studied period,¹³⁸

136. *Hunt v. Imperial Merch. Servs.*, No. C-05-04993, 2010 WL 3958726, at *3 (N.D. Cal. Oct. 7, 2010) (“[I]n order to encourage private enforcement of the law . . . Congress has legislated that in certain cases prevailing parties may recover their attorneys’ fees from the opposing side.” (quoting *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008)); *In re Coordinated Pretrial Proc. in Antibiotic Antitrust Actions*, 520 F. Supp. 635, 652 (D. Minn. 1981) (“The policy of Section 4 requires that the antitrust defendants pay the successful plaintiff’s attorneys a reasonable fee in order to encourage attorneys to act as private attorneys-general in enforcing the antitrust laws.”).

137. *Cf. Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973) (“In the absence of adequate attorneys’ fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation.”); *In re Linerboard Antitrust Litig.*, No. MDL 1261, Civ.A. 98-5055, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004) (“[T]he incentive for ‘the private attorney general’ is particularly important in the area of antitrust enforcement because public policy relies so heavily on such private action for enforcement of the antitrust laws.”), *amended by MDL No. 1261, Civ.A.98-5055, Civ.A.99-1341*, 2004 WL 1240775 (E.D. Pa. June 4, 2004).

138. Motion to dismiss analytics are the product of the following WestlawNext search: Case Type: Antitrust, Toggle: Include Multi-District Litigation, Order Date: 1/1/2005 – 3/31/2020, Motion Type: Motions to Dismiss, Court: Federal, Case Type: Class Action. The

despite dramatic annual fluctuations.¹³⁹ For the fifteen-year period post-CAFA, courts granted roughly 50.3% of motions to dismiss in antitrust class actions.¹⁴⁰ This figure is on par with dismissal rates in federal contract cases and lower than civil rights, employment discrimination, and financial instrument cases.¹⁴¹ Similarly, despite stricter certification requirements, class certification rates improved marginally over the study. Class counsel either exercised more successful case selection strategies¹⁴² or circumnavigated more rigid ascertainability and choice of law requirements.¹⁴³



class certification search term is: Case Type: Antitrust, Toggle: Include Multi-District Litigation, Order Date: 1/1/2005–3/31/2020, Motion Type: Motion to Certify Class, Court: Federal, Case Type: Class Action. Motions granted and granted in part are grouped, as are motions denied, denied as moot, and struck.

139. Fluctuations are mostly a product of the small data set for such motions.

140. See, e.g., *In re Pork Antitrust Litig.*, 495 F. Supp. 3d 753 (D. Minn. 2020); *Georgandellis v. Holzer Clinic, Inc.*, No. 2:08-cv-626, 2009 WL 1585772, at *1 (S.D. Ohio June 5, 2009); *Stand Energy Corp. v. Columbia Gas Transmission Corp.*, 380 F. Supp. 2d 748, 750 (S.D. W. Va. 2005), *modified on reconsideration in part*, No. Civ.A. 2:04-0867, 2006 WL 162988 (S.D. W. Va. Jan. 20, 2006).

141. See JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, *MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL* (2011), https://www.uscourts.gov/sites/default/files/motioniqbal_1.pdf [<https://perma.cc/Z3BX-6YR9>] (providing comparative figures).

142. See Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 285 (2011) (connecting procedural standards to attorney litigation strategies).

143. See, e.g., *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 335 F.R.D. 1, 10 (E.D.N.Y. 2020) (granting certification despite ascertainability and predominance challenges); *Cole's Wexford Hotel, Inc. v. UPMC & Highmark, Inc.*, 127 F. Supp. 3d 387, 412 (W.D. Pa. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015) (same).

As the next Section discusses, these preliminary procedural findings are deeply qualified. One unequivocal finding, though, exposes critical fallacies with critiques that antitrust class actions merely “piggyback” on government cases.¹⁴⁴ The actual interplay between private and government enforcement is more nuanced. Private enforcement did overlap with DOJ and FTC investigations, particularly for section 1 claims;¹⁴⁵ however, during the studied period, the reach of antitrust class actions exceeded government enforcement. Class actions often expanded the scope of wrongdoing,¹⁴⁶ the amount of recovery,¹⁴⁷ or the number of defendants involved.¹⁴⁸ Such cases also took the lead on many investigations over the last fifteen years. In

144. See *supra* Part I.A (discussing class action criticisms).

145. See, e.g., Indirect Purchaser Plaintiffs’ Motion for Final Approval of Their Settlement with the Home City Ice Company, *In re* Packaged Ice Antitrust Litig., No. 08-MD-01952 (E.D. Mich. June 6, 2017) (discussing coordination government action); Plaintiffs’ Memorandum of Law in Support of Motion for Final Approval of Proposed Settlement Agreements with (1) Virginia Harbor Services, Inc., Fentek Marine Systems GMBH, Robert B. Taylor, and Donald Murray; (2) Marine Fenders International and Gerald Thermos; (3) Waterman Supply Co., Inc. and Seymour Waterman; and (4) Maritime International, Inc. and John Deats, *Ace Marine Rigging & Supply v. Va. Harbor Servs, Inc.*, No. SACV1100436-GW (FFMx) (C.D. Cal. Dec. 5, 2011).

146. See Order Granting Plaintiffs’ Motion for Attorneys’ Fees, Reimbursement of Expenses, and Incentive Award, *In re* Anadarko Basin Oil & Gas Lease Antitrust Litig., No. CIV-16-209-HE (W.D. Okla. Apr. 25, 2019); Corrected Memorandum in Support of Class Plaintiffs’ Motion for Final Settlement Approval and Award of Attorneys’ Fees, Reimbursement of Expenses, and Incentive Payments, *In re* Schagringas Co. v. BP Prods., No. 1:06-CV-3621 (E.D. Ill. Mar. 10, 2009); Notice of Motion, *In re* Liquid Aluminum Sulfate Antitrust Litig., No. 16-md-2687 (D.N.J. Sept. 17, 2018); Opinion & Order Granting Final Approval of Class Action Settlement, *In re* Auto. Parts Antitrust Litig., No. 12-md-02311 (E.D. Mich. June 20, 2016).

147. See, e.g., Indirect-Purchaser Class Plaintiffs’ Notice of Motion and Motion for Attorneys’ Fees and Incentive Awards, *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 3:07-md-1827 (N.D. Cal. Sept. 7, 2012); Plaintiffs’ Memorandum in Support of Joint Petition for Final Approval of Settlement, Award of Attorneys’ Fees and Expenses, and Incentive Awards, *In re* BP Propane Indirect Purchasers Antitrust Litig., No. 06-C-3541 (N.D. Ill. Jan. 21, 2010) (limited compensation in prior government action).

148. See Plaintiffs’ Motion for Approval of Proposed Plan of Distribution of Settlement Funds, Award of Attorneys’ Fees and Reimbursement of Expenses, and Award of Class Representatives’ Incentive Awards, *In re* Ready Mix Concrete Antitrust Litig., No. 1:05-cv-00979 (S.D. Ind. Mar. 3, 2019); Plaintiffs’ Fourth Motion for Award of Attorneys’ Fees and Reimbursement of Expenses, *In re* Marine Hose Antitrust Litig., No. 08-MDL-1888, at 3–4 (S.D. Fla. Jan. 4, 2011) (“[T]he United States Department of Justice (‘DOJ’) explicitly forewent restitution for the cartel’s victims in light of the pendency of this action.”); Notice of Motion, Motion, and Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Attorneys’ Fees and Costs, *Quantegy Recording Sols., LLC v. Toda Kogyo Corp.*, No. C-02-1611 (N.D. Cal. Dec. 26, 2008); Notice of Motion, Motion and Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses, and Class Representative Incentive Awards, *In re* DRAM Antitrust Litig., No. M-02-1486 (N.D. Cal. July 26, 2007) (fewer defendants in government proceeding).

some instances, the government investigated an industry but took no further action.¹⁴⁹ In others, the class action was the only investigation or litigation.¹⁵⁰

Sometimes, it was the government agency riding class counsel's coattails. Consider *In re TFT-LCD (Flat Panel) Antitrust Litigation*, in which class counsel's significant achievement was despite government action—not due to it. Direct and indirect purchasers alleged a price-fixing conspiracy in the flat panel industry.¹⁵¹ The DOJ did not indict any of the defendants until over a year into the class action.¹⁵² When it did prosecute, the agency relied heavily on the extensive discovery gathered by class counsel, and eventually reached amnesty deals, plea agreements, and findings of guilt against all the defendants. In return, however, the DOJ provided little aid to the pending consumer claims. It did not seek restitution for a single victim. It did not elicit any admissions of indirect purchaser liability. Nor did it require the defendants to concede their wrongdoing harmed purchasers.¹⁵³ Rather, the DOJ made statements to the Court suggesting the indirect purchasers' case theory was flawed.¹⁵⁴ It even prolonged the litigation, agreeing with defendants to successfully push for a stay of merits discovery.¹⁵⁵ For class members, the government action was more of an albatross than an aid.

149. See, e.g., Memorandum of Law in Support of Class Counsels' Motion for an Award of Attorneys' Fees and the Reimbursement of Expenses, *In re Carbon Black Antitrust Litig.*, No. 03-10191, at 15 (D. Mass. Sept. 11, 2007) (discussing how DOJ "had closed their investigations of the defendants"); Plaintiffs' Notice of Motion for Final Approval of Settlement with All Defendants, Approval of Plan of Distribution, and Certification of Settlement Class, *In re Credit Default Swaps Antitrust Litig.*, No. 13 Md. 2476 (S.D.N.Y. Apr. 1, 2016).

150. See, e.g., Class Plaintiff's: (1) Notice of Motion, Motion for, and Memorandum in Support of Approval of Attorneys' Fees as Reasonable and (2) Responses to Objectors on Fee Issues, *Hemphill v. San Diego Ass'n of Realtors, Inc.*, No. 04-CV-1495 (S.D. Cal. Jan. 25, 2005); Plaintiffs' Notice of Motion and Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Class Representative Incentive Awards; Memorandum of Points and Authorities in Support Thereof, *In re Transpacific Passenger Air Antitrust Litig.*, No. 3:07-cv-05634 (N.D. Cal. April 7, 2015); Direct Purchaser Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Award, *In re Resistors Antitrust Litig.*, No. 3:15-cv-03820 (N.D. Cal. June 10, 2019).

151. See Indirect-Purchaser Class Plaintiffs' Notice of Motion and Motion for Attorneys' Fees and Incentive Awards, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 (N.D. Cal. Sept. 7, 2012).

152. *Id.* at 8 n.7 (listing indictment dates).

153. *Id.* at 8.

154. *Id.* at 4. As counsel for the indirect purchasers state:

Despite the guilty pleas and admissions, [defendants] contended (heavily relying on a statement to the Court by the U.S. Department of Justice ("DOJ")) that there were three narrow conspiracies, not one overarching one as the IPPs alleged, and that none of those conspiracies resulted in any measurable higher prices even to direct purchasers, much less to end-user individuals and businesses.

Id.

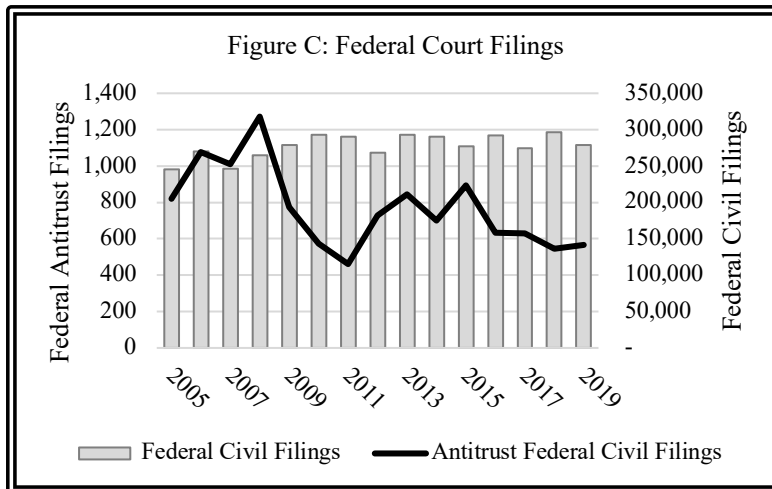
155. Order Granting United States' Motion to Stay Discovery, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-01827 SI (N.D. Cal. Sept. 25, 2007).

These initial findings indicate private antitrust enforcement is persisting and exceeding the scope of government prosecution. Class actions still provide some regulatory oversight, disgorging large amounts of money in many industries. The absolute dollar amounts are staggering, but as the next Section explains, those isolated figures are deceptive.

B. Blight Below the Surface of Private Antitrust Enforcement

It takes a full diagnosis, grounded in empirical data, to see the damage fifteen years of procedural reforms has wrought. The settlement data is like the famous *My Wife and My Mother-In-Law* picture¹⁵⁶—a reversible image where an initial glance distorts the full depiction. Indeed, settlement and fee awards in these cases are significant, and the grant rates for key procedural motions look promising. But focusing on these limited dimensions provides false reassurance.

Enforcement is declining at a time when market concentration is on the rise.¹⁵⁷ Since peaking in 2008, antitrust filings have lagged.¹⁵⁸ Filings dropped 30% from 2005 to 2019.

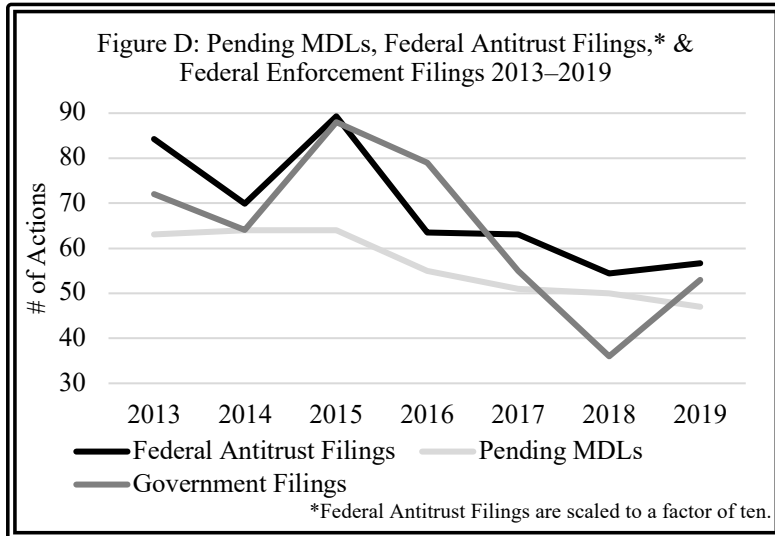


156. W.E. Hill, *My Wife and My Mother-In-Law. They are Both in This Picture-Find Them* (Illustration), LIBRARY OF CONG., (Nov. 6, 1915), <https://www.loc.gov/item/2010652001/> [<https://perma.cc/F9UL-DY3C>].

157. See, e.g., Sean P. Sullivan, *Anticompetitive Entrenchment*, 68 U. KAN. L. REV. 1133, 1137 (2020) (detailing how seller concentration and market power “have been rising in recent decades”); David Wessel, *Is Lack of Competition Strangling the U.S. Economy?*, HARV. BUS. REV. (2018), <https://hbr.org/2018/03/is-lack-of-competition-strangling-the-u-s-economy> [<https://perma.cc/P6R6-URG4>] (“There’s no question that most industries are becoming more concentrated.”).

158. Federal antitrust filing data are included as part of the U.S. District Courts’ Federal Court Management Statistics. See *Caseload Statistics Data Tables*, ADMIN. OFF. U.S. CT., <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> [<https://perma.cc/2C4S-Q2MF>] [hereinafter *Caseload Statistics*] (data culled from Table C-2 for the U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of

Orders consolidating related putative class actions have also declined.¹⁵⁹ Government enforcement is not picking up the difference. DOJ and FTC antitrust suits dropped precipitously in 2015 and have decreased each year since.¹⁶⁰



When compared to global enforcement, this decline suggests gaps in U.S. competition oversight. Many countries, including Brazil, Australia, and even China, have adopted more aggressive competition policies during the studied period.¹⁶¹ EU

Suit, During the 12-Month Periods Ending December 31, from 2005–2019, specifically using the Antitrust field under Nature of Suit).

159. For access to JPML’s annual reports, see *Statistical Information*, U.S. J.P.M.L., <https://www.jpml.uscourts.gov/statistics-info?page=1> [<https://perma.cc/3BND-ZF2F>].

160. For access to the FTC’s annual highlights, see *FTC Annual Reports*, FTC, <https://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports> [<https://perma.cc/P6ZB-6PFN>]. The represented FTC figures include filed merger cases, nonmerger actions, and civil penalty actions. DOJ also produces annual reports. See *Public Documents*, U.S. DEP’T OF JUST., <https://www.justice.gov/atr/division-operations> [<https://perma.cc/UWC9-645T>].

161. See, e.g., Krisztian Katona & Diego Herrera Moraes, *Reforms Achieved, but Challenges Ahead: Brazil’s New Competition Law*, 3 INT’L COMM.: ABA SECTION ANTITRUST L. 11 (2011) (detailing Brazilian antitrust reforms); Press Release, Austl. Competition & Consumer Comm’n, *Guidance for Harper Reforms* (Oct. 25, 2017), <https://www.accc.gov.au/media-release/guidance-for-harper-reforms>

[<https://perma.cc/D5NQ-RJKG>] (detailing new guidelines for regulation of misuse of market power); THE U.S.-CHINA BUS. COUNCIL, *COMPETITION POLICY AND ENFORCEMENT IN CHINA 1* (2014), https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL_0.pdf [<https://perma.cc/M5Q9-QHnk>] (“China’s increased level of competition enforcement activity and the high-profile reporting of its competition investigations have prompted growing

antitrust investigations steadily increased over the last decade,¹⁶² including investigations of U.S. companies.¹⁶³ If the volume of antitrust class actions continues to fall, the gulf between U.S. and international antitrust enforcement will likely widen¹⁶⁴—to the detriment of the average American consumer.

A closer look at the data connects procedural reforms to this decline. Arbitration, class waivers, motions to dismiss, and more rigid class certification requirements are chipping away at private enforcement.

1. Rising Barricades at the Procedural Gates

Docket analytics show how each procedural reform has altered private antitrust enforcement. To see the cumulative destructive effect of such reforms requires both docket and settlement data.

First, more private enforcements end each year before they really begin: the volume of antitrust class action claims that are dismissed is increasing. Combining the steady grant rate, the decrease in overall filings, and the increased volume of Rule 12(b)(6) motions to dismiss reveals the negative impact of *Twiqbal*. Since *Twombly*, courts have granted 50.3% of antitrust motions to dismiss, and the volume of such motions has grown.¹⁶⁵ Coupling the steady dismissal rate with this uptick in motions means an increased annual number of dismissals. While courts frequently grant leave

attention and concern from US companies.”).

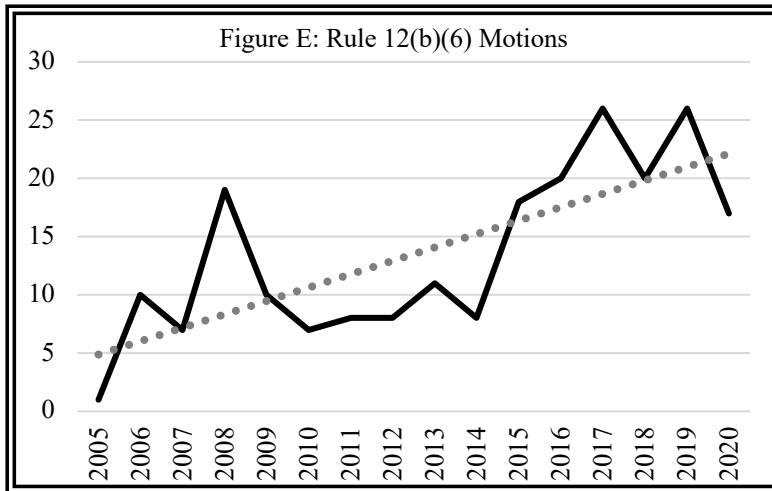
162. See *European Law Enforcement Against Antitrust Conspiracies—Recent Trends*, JONES DAY (Sept. 2016), <https://www.jonesday.com/en/insights/2016/09/european-law-enforcement-against-antitrust-conspiracies-recent-trends> [<https://perma.cc/R2X8-9RVR>]. For a more extensive comparison between E.U. and U.S. antitrust enforcement, see generally DANIEL J. GIFFORD & ROBERT T. KUDRLE, *THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY* (2015).

163. See, e.g., Press Release, Eur. Comm’n, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 20, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770 [<https://perma.cc/P8M8-NZM4>]; Press Release, Eur. Comm’n, Antitrust: Commission Fines US Chipmaker Qualcomm €242 Million for Engaging in Predatory Pricing (July 18, 2019), https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4350 [<https://perma.cc/XEH8-LVK8>].

164. Cf. Clayton Graham, *All Hail the European Union: Implications of Microsoft v. Commission on Global Antitrust Enforcement*, 21 GLOB. BUS. & DEV. L.J. 285, 308 (2008) (“The EU has already taken a more aggressive approach to antitrust regulation than the U.S.”).

165. Analytics for class certification motions are from the following Westlaw search: Case Type: Antitrust, Toggle: Include Multi-District Litigation, Order Date: 1/1/2005–3/31/2020, Motion Type: Motion to Dismiss (further defined by Failure to State a Claim), Court: Federal, Case Type: Class Action. Additionally, motions granted and granted in part were grouped together. Similarly, motions denied and denied as moot were grouped together.

to amend, that leave is not guaranteed.¹⁶⁶ Once dismissed with prejudice, the likelihood of any enforcement for the alleged wrongdoing is all but eliminated.¹⁶⁷



Motions to dismiss are far more common in antitrust class actions than in other areas of law. Of the cases studied for this Article, 82.45% overcame at least one motion to dismiss. Though not an identical benchmark, from 2005 to 2016, 32% of securities filings in the Southern District of New York triggered such motions.¹⁶⁸

Second, dismissal figures only reflect filed antitrust class actions. One cannot confidently quantify how many cases are foregone because of forced arbitration, but the data that is available is concerning. In 2011, *Concepcion*¹⁶⁹ partially closed the court room doors.¹⁷⁰ In 2013, with *Italian Colors*,¹⁷¹ the Court locked them by

166. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). A court may deny such leave where there is “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment.” *Id.*

167. Unfortunately, the study did not uncover any investigation by government enforcers that followed a dismissed private enforcement action.

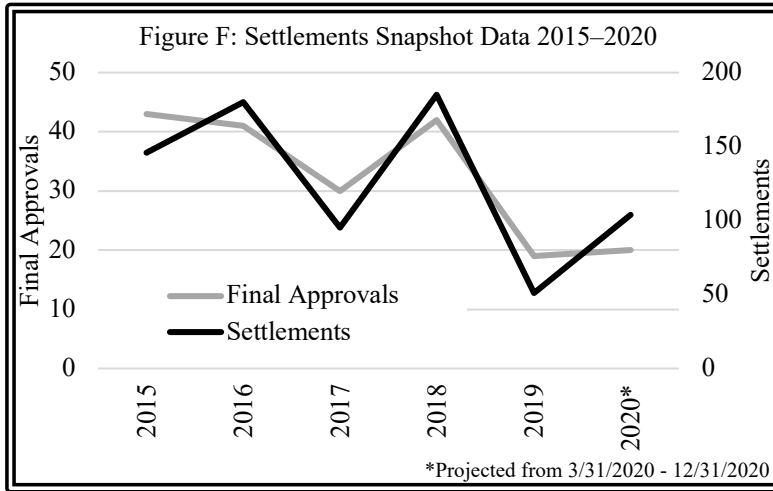
168. See Victor Marrero, *Mission to Dismiss: A Dismissal of Rule 12(b)(6) and the Retirement of Twombly/Iqbal*, 40 CARDOZO L. REV. 1, 18 chart 1 (2018) (setting out number of motions to dismiss and total number of securities cases).

169. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (upholding forced arbitration provisions that preclude class aggregation).

170. See Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENVER U. L. REV. 317, 317 (2012); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 481–82 (2011) (explaining how *Concepcion* “closed the door on the possibility that courts will offer assistance to parties seeking some way to aggregate their claims in class arbitration, unless the parties clearly and unmistakably express their intent to permit such aggregation”).

171. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

approving arbitration provisions that banned class actions.¹⁷² Given the average time from filing to settling,¹⁷³ post-2018 data should reflect the impact of these decisions. In 2019, the volume of antitrust settlements dropped 50%,¹⁷⁴ and 2020 settlements project to be on par.



This precipitous decline suggests arbitration reforms are hindering competition oversight. Individual arbitration is a poor fit for private antitrust enforcement. Arbitration data—let alone for antitrust arbitration—is scarce.¹⁷⁵ Whether putative consumers are turning to arbitration for recourse from anticompetitive wrongdoing is unknown, but highly unlikely.¹⁷⁶ Few consumers would learn they suffered an antitrust injury without the benefit of extensive pre-filing investigations by class action attorneys.¹⁷⁷ The arbitration process does little to remedy this information

172. See James Dawson, *Contract after Concepcion: Some Lessons from the State Courts*, 124 YALE L.J. 233, 234 (2014) (discussing how the decision limited “state courts developed theories under which *Concepcion* could be cabined or read narrowly”).

173. See *infra* Part II.B.1 Figure J (detailing time to settlement).

174. See *supra* Part II.A Figure A (annual antitrust settlements).

175. See Chandrasekher & Horton, *supra* note 62, at 18 (“[P]rior empirical scholarship on arbitration . . . , while valuable, is also limited.”). The arbitration data that is available is woefully thin on specifics. See *id.* at 9 (providing data limited to consumer, employment, and medical malpractice arbitrations). Cf. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/F88D-UD8C>] (study limited to consumer financial disputes). The study findings were akin to those noted in this Obama administration CFPB study.

176. See Chandrasekher & Horton, *supra* note 62, at 53 (“*Concepcion* did not spawn a surge in arbitral filings.”).

177. Cf. Joel I. Klein, *Antitrust Enforcement and the Consumer*, FINDLAW, <https://corporate.findlaw.com/litigation-disputes/antitrust-enforcement-and-the-consumer.html> [<https://perma.cc/ED43-FYR9>] (Mar. 26, 2008) (“Many consumers have never heard of antitrust laws . . .”).

gap.¹⁷⁸ Private arbitrations are often undisclosed: consumers will not learn of wrongful misconduct alleged in arbitration complaints by other consumers.¹⁷⁹ Unlike Rule 23(c)(2), arbitration rules do not require notifying other injured consumers.

Even if potential plaintiffs knew they were harmed, it makes little fiscal sense for consumers to pursue individual arbitration. Of the roughly one billion potential claims resolved during the study,¹⁸⁰ many involved damages too small to justify individual action. Should a plaintiff decide to push forward nonetheless, representation by skilled, experienced antitrust attorneys is unrealistic.¹⁸¹ With no means to aggregate, lawyers are less likely to take on these small sum cases. Without representation, the already lower odds of recovery plummet.¹⁸²

These multiple challenges combined with the post-2018 decline in antitrust settlements and filings leads to two possible conclusions. One, that droves of irrational consumers are secretly filing individual arbitration claims. Or two, arbitration provisions that ban class actions are curtailing private antitrust enforcement. Occam's razor supports the latter conclusion.

178. See Charles Gibbs, *Consumer Class Actions After AT&T v. Concepcion: Why the Federal Arbitration Act Should Not Be Used to Deny Effective Relief to Small-Value Claimants*, 2012 U. ILL. L. REV. 1345, 1353 (2012) (“[T]he ability to alert consumers to their injuries serves a societal goal of addressing this corporate wrong.”).

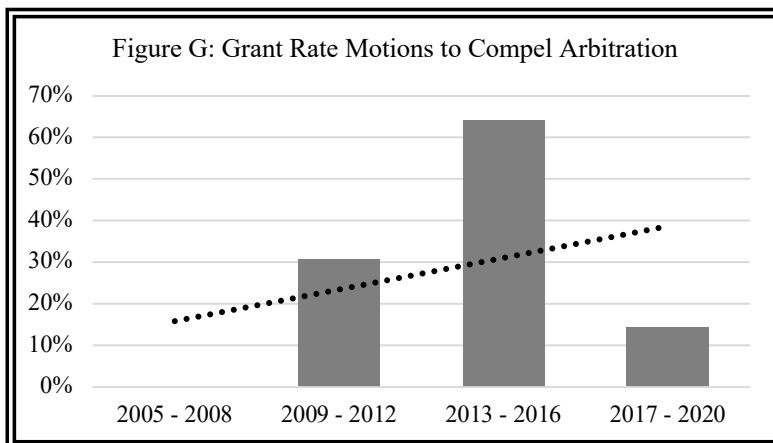
179. See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 3 (2015) <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/5CLZ-36CW>] (“[W]hen there is an arbitration clause, consumers and employees are required to take their complaints to a privatized, invisible, and often inferior forum in which they are less likely to prevail—and if they do, they are less likely to recover their due.”).

180. The total class size for the settlements combined equals 1,047,292,493. This figure is purposefully underreported. Several opinions did not provide a precise class size but instead used figures like “millions” or “thousands.” For any such final approval, this calculation presumes the absolute lowest number within the defined parameters.

181. See STONE & COLVIN, *supra* note 179, at 22 (“[I]n addition to producing worse case outcomes than litigation, mandatory arbitration also reduces the likelihood of obtaining the legal representation that will help employees bring a claim in the first place.”).

182. Cf. Chandrasekher & Horton, *supra* note 62, at 40 (“Pro se consumers were victorious in 6% of [tort] matters, but those with one-shot law firms succeeded in 38% of awards ($p < 0.001$) and those with repeat-playing firms won 31% of decisions ($p < 0.001$).”).

For filed cases, the annual number of motions to compel arbitration is small. Any conclusions drawn from them are provisional. Yet the grant rate for even this small pool is growing. Until 2012, the total grant rate was 29%. From 2013 on, the grant rate nearly doubled at 53%.



Third, even for cases not subject to arbitration, judicial reinterpretation of class certification requirements is limiting enforcement. Across all circuits and over the entire studied period, class certification grant rates held steady. Yet, the image looks very different by circuit. While many courts read new requirements into Rule 23,¹⁸³ two of the highest volume circuits are holding back. The Ninth Circuit rebuffs more arduous interpretations of manageability,¹⁸⁴ while the Second Circuit rejects harsher ascertainability requirements.¹⁸⁵ Additionally, the Third Circuit, where the ascertainability requirement originated, has since loosened the requisite showing.¹⁸⁶ The largest number of class certifications occurred in these three circuits.

Plaintiffs have limited control over the venue of a class action. The Judicial Panel for Multidistrict Litigation consolidates pending putative class actions and assigns

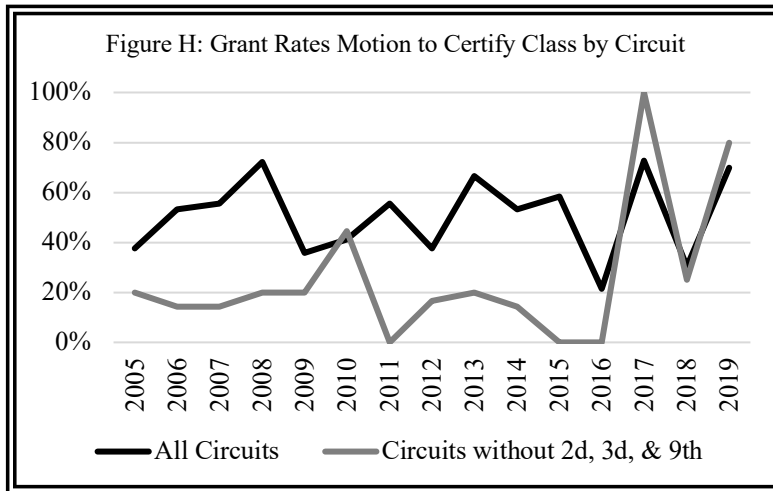
183. See *supra* Part I.A.3 (detailing new predominance and manageability requirements).

184. See, e.g., *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010) (rejecting manageability argument based on proportionality of recovery); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990) (rejecting manageability challenges, given “enforcement, deterrence or disgorgement” functions of the pending class claim).

185. See, e.g., *In re Petrobras Sec.*, 862 F.3d 250, 268 (2d Cir. 2017) (“We conclude that an implied administrative feasibility requirement would be inconsistent with the careful balance struck in Rule 23, which directs courts to weigh the competing interests inherent in any class certification decision.” (citation omitted)).

186. See, e.g., *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017) (making off more rigid ascertainability standards by acknowledging “Rule 23 does not require an objective way of determining class membership at the certification stage”).

them to a transferee court.¹⁸⁷ If a case is not assigned to the Second, Third, or Ninth Circuit, the odds of class certification drop from 49.4% to 37.5%.



Individually, procedural reforms have hobbled private enforcement. Collectively, their damage exceeds the sum of their parts. These reforms have altered the maturation of antitrust class actions. An endless barrage of dispositive motions is the new norm, from motions to dismiss, motions for summary judgment, and motions to exclude expert testimony.

Despite oft-repeated claims to the contrary, the threat of class certification is not pivotal.¹⁸⁸ It is but one motion among many. For example, *In re Polyurethane Foam Antitrust* only settled after twenty-six motions to dismiss, seventeen motions for summary judgment, one motion for class certification, and six motions for reconsideration.¹⁸⁹ For *In re Cathode Ray Tube (CRT) Antitrust*, the numbers were higher: forty motions to dismiss, thirty-three motions for summary judgment, and three motions for class certification.¹⁹⁰ But perhaps the most astounding is an earlier

187. 28 U.S.C. § 1407 (requiring related federal civil cases to be transferred to one judge for consolidated pretrial proceedings); see also Danielle Oakley, *Is Multidistrict Litigation a Just and Efficient Consolidation Technique? Using Diet Drug Litigation as a Model to Answer This Question*, 6 NEV. L.J. 494, 496–501 (2005) (detailing the multidistrict litigation consolidation process).

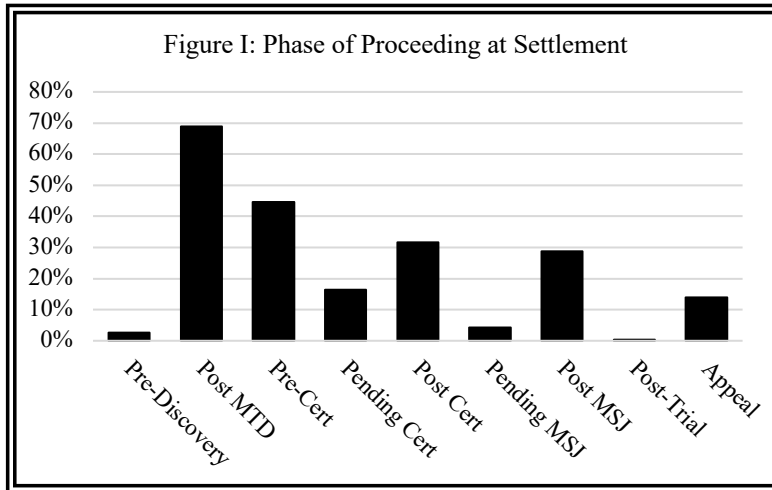
188. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008), amended (Jan. 16, 2009) (describing “the pivotal status of class certification in large-scale litigation”); Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008) (“Arguably, the most critical stage in a class action is the point at which the court decides whether to certify the class.”).

189. See *Docket: In re Polyurethane Form Antitrust Litig.*, JUSTIA, <https://dockets.justia.com/docket/ohio/ohndce/1:2010md02196/170855> [<https://perma.cc/4NMV-8Q6A>] (N.D. Ohio, No 1:10-md-02196).

190. See *Docket: In re Cathode Ray Tube (CRT) Antitrust Litig.*, JUSTIA, <https://dockets.justia.com/docket/california/candce/4:2007cv05944/197984> [<https://perma.cc/J78Z-FASL>] (N.D. Cal., No. 4:07-cv-05944).

example. In *In re TFT-LCD (Flat Panel) Antitrust Litigation*, before settling, plaintiffs first had to overcome ninety-seven motions to dismiss (an average of over four motions per defendant).¹⁹¹ This was in addition to eleven motions for summary judgment, along with multiple motions to certify and decertify the class, challenges to expert testimony, and appeals.¹⁹²

These examples represent the outer limits of extreme motion practice. But the number of key procedural motions filed in each settled case during the studied period increased.¹⁹³ Sixty-nine percent of the settlements occurred after at least one motion to dismiss; 33% faced at least one motion for summary judgment.



More procedural gatekeeping comes at a cost—literally. Comparing antitrust class actions to data from all federal civil cases is telling. After three years of litigation, only 12.57% of federal civil cases are still pending.¹⁹⁴ Of the studied antitrust cases, 77.35% were still going strong at the three-year mark. A conservative measurement of the median time from filing to settlement was 4.41 years or 52.93 months¹⁹⁵—44.16 months longer than the median across all federal civil actions.¹⁹⁶ For antitrust

191. See *Docket, In re TFT-LCD (Flat Panel) Antitrust Litig.*, GOVINFO.GOV, https://www.govinfo.gov/app/details/USCOURTS-cand-3_07-md-01827/USCOURTS-cand-3_07-md-01827-818/context [<https://perma.cc/9XWL-QLAE>] (N.D. Cal., No. 1827).

192. See *id.*

193. This data was gathered from a manual review of each settling cases' docket.

194. See *Caseload Statistics*, *supra* note 158 (Data culled from Table N/A for the U.S. District Courts—Combined Civil and Criminal Federal Court Management Statistics, During the 12-Month Periods Ending September 31, from 2005–2019).

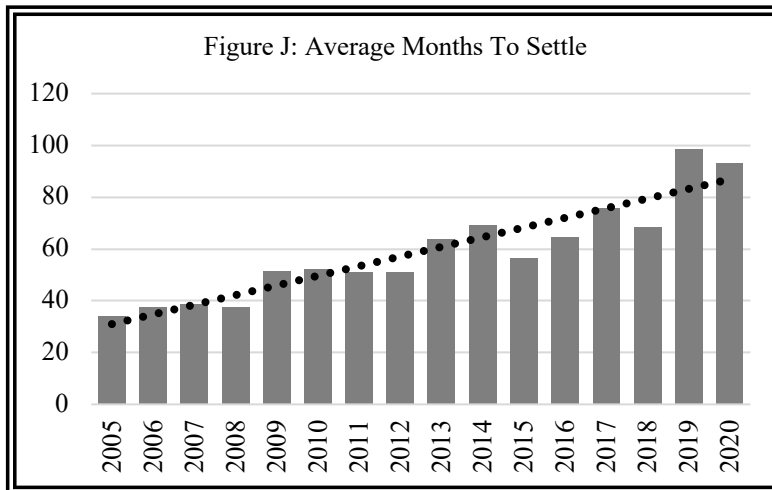
195. This figure does not reflect pre-filing investigations by class counsel. Prefiling investigation periods can be extensive because lengthy complaints are now common. See, e.g., *Abrams v. Chesapeake Energy Corp.*, No. 4:16-CV-1343, 2017 U.S. Dist. LEXIS 209905, at *22 (M.D. Pa. Dec. 21, 2017) (referencing 230, 183, 151, and 131 page complaints).

196. The median time from filing to disposition for federal cases from 2005–2009 was 0.73 years, or 8.77 months. See *Caseload Statistics*, *supra* note 158.

class actions over \$100 million (almost 20% of all the final approval settlements), that figure increased to 5.71 years.

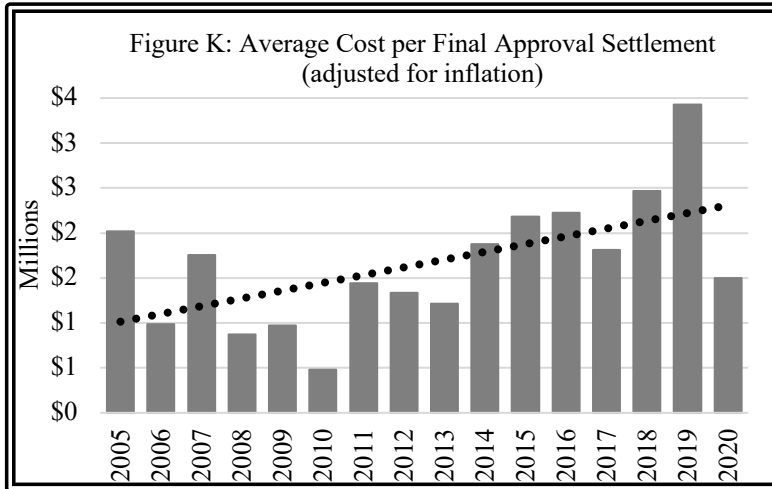
<i>Settlement Size</i>	<i>Final Approvals</i>	<i>Average Months</i>	<i>Median Months</i>
All Settlements	393	59.3	52.9
Less than \$100M	331	57.5	51.3
Over \$100M	62	68.8	60.6

Procedural reforms have failed to reap their intended efficiency gains. Instead, antitrust class actions take longer than ever. The idea of “frivolous” or meritless suits being brought in such circumstances is no more than a myth.¹⁹⁷ If supposed in *terrorem* cases clear such high procedural hurdles, they cannot be fairly considered frivolous. The time from filing to settling is growing at a rate of 8.6% annually. If recent trends continue, such cases should trigger an increase of roughly four months of additional litigation each year.



197. Brief of the Am. Antitrust Inst. as Amicus Curiae in Support of Respondents at 34, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (No. 12-133), 2013 WL 417719, at *34; see also Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 159 (2006) (debunking the myth of meritless claims).

Rather than restraining the growing expense of private enforcement efforts, reforms are contributing to rising costs.¹⁹⁸ Additional motion practice has pushed the average cost per settlement to increase 13% annually.¹⁹⁹



All told, the last decade of reforms has pushed courts away from the guiding principle of the Federal Rules of Civil Procedure. In antitrust class actions, the judiciary is no longer interpreting procedural rules with an eye for “the just, speedy, and inexpensive determination of every action and proceeding.”²⁰⁰ Instead, plaintiffs bring fewer antitrust cases to the judiciary. The judiciary no longer makes a determination in every case—arbitration forecloses litigation. For cases courts do hear, what is “just” depends less on merits than the court to which it is assigned. For those fortunate cases that succeed, that feat is neither speedy nor inexpensive.

2. Chilling Effects

The last fifteen years of reform have done more than impact time and expense; they have limited the reach of antitrust class actions. Congress designed antitrust laws, including the Sherman Act, to remedy a broad range of anticompetitive misconduct.²⁰¹ Comprehensive regulatory oversight requires enforcing both sections

198. This is not to say procedural reforms are the only reason for increased costs. *Cf.* Craig C. Corbitt, Judith A. Zahid & Patrick B. Clayton, *Pre-Complaint Activities*, in *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES: A HANDBOOK* 43, § 2.05 (Albert A. Foer & Randy M. Stutz eds., 2012) (“The global scope of contemporary cartels also increases the cost of litigation.”).

199. This figure reflects the average of the annual percent change.

200. FED. R. CIV. P. 1.

201. *See* Carl Shapiro, Deputy Assistant Att’y Gen. Econ. Antitrust Div., U.S. Dep’t of Just. Competition Policy in Distressed Industries, Remarks at the ABA Antitrust Symposium: Competition as Public Policy (May 13, 2009) (“[A]ntitrust law is sufficiently flexible to permit a wide range of business practices and creative business models”); A.E. Rodriguez & Ashok Menon, *The Causes of Competition Agency Ineffectiveness in Developing Countries*,

1 and 2 of the Sherman Act. In response to the changing procedural landscape, private enforcement has focused on regulating cartels—while foregoing oversight of other wrongdoing. Ninety-three percent of the final approval decisions involved alleged section 1 claims.²⁰² Only slightly over 19% of the decisions included section 2 monopoly allegations. These cases reached a sliver of potential case theories, specifically horizontal price fixing and market manipulations to supply or output.

<i>Case Theory</i>	<i>% of Total Recovery</i>	<i>% of Settlements</i>
Price Fixing	81.9%	70.6%
Market Manipulation	11.1%	13.7%
Bid Rigging	7.5%	14.9%
Market Allocation	7.3%	12.4%
Group Boycott	6.2%	2.8%
Abuse of Monopoly Power	2.5%	5.7%
Bundling/Tying	2.3%	5.0%
Generic Cartel Activity	1.9%	2.6%
Exclusive Dealing	1.1%	2.9%
Merger	0.1%	0.3%

For class counsel with finite litigation resources, price fixing and market manipulation claims are safer investments. Such cases are not easy—not by a long shot—but they are less difficult to prove than their antitrust brethren. Such cases require evidence of a conspiracy.²⁰³ Few defendants are forthcoming about illegal price-fixing agreements, and evidence of such deals is difficult to fully gather in advance of discovery.²⁰⁴ But once a conspiracy is established, defendants are per se

79 LAW & CONTEMP. PROBS. 37, 39 (2016) (describing how antitrust covers a “wide range of business practices of business practices ranging from vertical practices, abuse of dominant positions, commonplace horizontal practices, to full-fledged merger reviews”).

202. See *infra* Table 5.

203. See, e.g., *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988) (applying per se review to customer allocation agreements regardless of whether the defendant knew the probable anticompetitive effects of its agreement); *United States v. Gillen*, 599 F.2d 541, 545 (3d Cir. 1979) (“Thus in price-fixing conspiracies, where the conduct is illegal per se, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy.”).

204. See, e.g., Hovenkamp, *supra* note 50, at 58. As one scholar explains, “Based on differences among judges, one judge may dismiss a complaint while another concludes that it survives, solely because of the way each judge applies his or her ‘judicial experience and common sense.’ This is bound to create unpredictability, lack of uniformity, and confusion.” Malveaux, *supra* note 50, at 624.

liable.²⁰⁵ Courts usually presume market power, thus the remaining battles focus on quantifying damages.²⁰⁶

Even for price fixing and market manipulation claims, indirect purchaser antitrust class actions are not faring well. This raises red flags for underenforcement. Such cases are filed as a regular counterpart to direct purchaser cases,²⁰⁷ but few survive long enough to settle. While cost-per-settlement ratios for indirect purchasers are on par with direct suits,²⁰⁸ settlement amounts trend lower, as do fee awards. Direct purchaser settlements now outpace indirect purchaser settlements almost four-to-one.

Reforms increase the risk of an indirect purchaser case getting ensnared in procedural hurdles. Indirect purchaser complaints require more detailed allegations of harm, beyond alleging a conspiracy. Indirect purchasers also must allege that the defendants' wrongdoing harmed the direct purchasers. From there, they need plausible allegations that these direct purchasers passed on some of this supracompetitive pricing.²⁰⁹ Post *Twiqbal*, a court can dismiss a complaint that fails to sufficiently and plausibly allege either of these tracing requirements.²¹⁰ Those complaints that survive must then satisfy the more rigorous certification requirements now at play.²¹¹ For multistate cases, these standards can be

205. See, e.g., *In re High Fructose Corn Syrup*, 295 F.3d 651, 654 (7th Cir. 2002) ("Because price fixing is a per se violation of the Sherman Act, an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs.")

206. See *In re Cox Enters., Inc.*, 871 F.3d 1093, 1097 (10th Cir. 2017) ("Under a per se rule, plaintiffs prevail simply by proving that a particular contract or business arrangement . . . exists; no further market analysis is necessary, and defendants may not present any defenses." (citation omitted)); *In re N.C. Bd. of Dental Exam'rs*, 152 F.T.C. 640, 655 (2011) ("A court need not then inquire whether the restraint's authors actually possess the power to inflict public injury . . . , nor will the court accept argument that the restraint in the circumstances is justified by any procompetitive purpose or effect." (alteration in original) (quoting *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980))).

207. See, e.g., *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1015 (N.D. Cal. 2010); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1140 (N.D. Cal. 2009); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1013 (N.D. Cal. 2007).

208. Cost-per-settlement ratio reflects the cost as a percentage of the total settlement. Direct purchaser settlements were 2.02%. Indirect purchasers were 2.6%.

209. See, e.g., *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2014 WL 4955377, at *14 (N.D. Cal. Oct. 2, 2014) ("[Indirect purchasers] allegedly paid the overcharge because it was 'passed on to them by direct purchaser manufacturers, distributors and retailers.'" (citation omitted)); *In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 946 F. Supp. 2d 554, 568 (E.D. La. 2013) (denying motion to dismiss because indirect purchasers sufficiently "alleged a distinct injury in the amount of an overcharge that was passed on to IPPs as a result of defendants' anticompetitive conduct").

210. See, e.g., *In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, No. 1:14-MD-2508, 2015 WL 5166014, at *22 (E.D. Tenn. June 24, 2015); *In re Dairy Farmers of Am., Inc.*, No. 2031, 2014 WL 553332, at *3 (N.D. Ill. Feb. 10, 2014); *In re Photochromic Lens Antitrust Litig.*, No. 8:10-CV-1158-T-27EAJ, 2011 WL 13141933, at *1 (M.D. Fla. Oct. 26, 2011); *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1100 (N.D. Cal. 2007).

211. See *supra* Part I.A (detailing choice of law challenges for indirect purchaser cases).

insurmountable.²¹² On average, direct purchaser claims face 7.7 motions per case. Once an indirect purchaser claim is added, that number jumps to 20.13 motions per case.

As for claims other than price fixing and market manipulation, private enforcement is dwindling. There is little effective antitrust enforcement for bundling or retail price maintenance. Most vertical section 1 claims accompanied horizontal claims. Only 1.4% of settlements involved solely vertical section 1 claims.

<i>Sherman Act Section</i>	<i>Restraint Type</i>	<i>Settlements</i>	<i>Percentage</i>
1		1,127	84.9%
	Horizontal	1,046	78.8%
	Vertical	18	1.4%
	Both H & V	63	4.7%
1 & 2		156	11.7%
	Horizontal	125	9.4%
	Vertical	25	1.9%
	Both H & V	6	0.5%
2		45	3.4%
Total		1,328	100.0%

Vertical restraint cases under sections 1 and 2 are incompatible with the rigorous procedural hurdles now common in class actions. Courts apply the “rule of reason” to such claims.²¹³ To be liable, a defendant must have enough economic power that its alleged misconduct could impact a particular market.²¹⁴ A plaintiff must make an initial showing of the defendant’s market power or show actual detrimental effect caused by the defendant. Then, after this initial showing, the controlling question is whether these anticompetitive effects are sufficiently justified by countervailing procompetitive justifications.²¹⁵

212. See, e.g., *In re Skelaxin (Metaxalone) Antitrust Litig.*, 299 F.R.D. 555, 588 (E.D. Tenn. 2014) (denying class certification to multistate indirect purchaser claim because “[t]he antitrust laws of many states differ markedly”); *In re Processed Egg Prod. Antitrust Litig.*, 312 F.R.D. 124, 165 (E.D. Pa. 2015) (“Because of the significant variability in the state laws Plaintiffs seek to apply, a more detailed plan for managing this proposed ‘all-in-one’ litigation would be necessary to meet the burden of showing this proposed class action is manageable.” (citation omitted)).

213. See, e.g., *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978) (en banc) (vertical section 1 claims); *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977) (vertical section 1 claims); *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911) (section 2 claims).

214. See, e.g., *King Drug Co. v. Smithkline Beecham Corp.*, 791 F.3d 388, 412 (3d Cir. 2015) (“If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective . . .”).

215. See, e.g., *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007).

Historically, courts were reluctant to reject proposed relevant market definitions at the pleading stage.²¹⁶ Post *Twiqbal*, that reluctance is gone. Federal courts across the nation are dismissing complaints for failing to allege a “plausible” market definition.²¹⁷ Gathering nuanced economic information without the benefit of discovery can require herculean, fact specific prefiling investigation.²¹⁸ Complaints now must address why a given market lacks barriers to entry, what substitutes exist for the particular product at issue, and other “pertinent facts relating to cross-elasticity of demand.”²¹⁹

Procedural hurdles disincentivize pursuing rule of reason cases, except for wrongdoing in cases involving relatively straightforward product markets. And the data clearly confirms this: rule of reason cases made up only 10.94% of the studied settlements.²²⁰ Of these, the vast majority related to pharmaceuticals. Over 85% of

216. See *NIBCO Inc. v. Viega LLC*, 354 F. Supp. 3d 566, 576 (M.D. Pa. 2018).

217. See *Madison 92nd St. Assocs., LLC v. Courtyard Mgmt. Corp.*, 624 F. App'x 23, 28–29 (2d Cir. 2015) (dismissing complaint for failing to address interchangeability and cross-elasticity); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. CV 2:03 CV 107, 2009 WL 938561, at *2 (E.D. Tex. Apr. 6, 2009) (“The Fifth Circuit requires plaintiffs to define their market with reference to the rule of reasonable interchangeability.” (citation omitted)), *aff'd*, 615 F.3d 412 (5th Cir. 2010); *Total Renal Care, Inc. v. W. Nephrology & Metabolic Bone Disease, P.C.*, No. 08-cv-00513, 2009 WL 2596493, at *17 (D. Colo. Aug. 21, 2009) (same); see also *Semertzides v. Bethesda N. Hosp.*, No. 1:14-CV-135, 2014 WL 2573073, at *5 (S.D. Ohio June 9, 2014), *aff'd*, 608 F. App'x 378 (6th Cir. 2015); *Int'l Equip. Trading, Ltd. v. Illumina, Inc.*, No. 17 C 5010, 2018 WL 3861575, at *3 (N.D. Ill. Aug. 14, 2018); *Ferguson Med. Grp., L.P. v. Mo. Delta Med. Ctr.*, No. 1:06CV8, 2006 WL 2225454, at *3 (E.D. Mo. Aug. 2, 2006) (“[C]ourts have not hesitated to dismiss antitrust claims where it is clear that the alleged relevant market is too narrow, implausible, . . . or simply not defined anywhere in the pleadings.” (citation omitted)); *Kassner v. Kadlec Reg'l Med. Ctr.*, No. CV-11-5114, 2012 WL 523675, at *6 (E.D. Wash. Feb. 15, 2012) (“Dismissal is proper if an antitrust complaint's market definition is facially unsustainable.” (citation omitted)); *Glynn-Brunswick Hosp. Auth. v. Becton*, 159 F. Supp. 3d 1361, 1379 (S.D. Ga. 2016).

218. In addition to providing specifics about anticompetitive conduct, section 2 complaints must allege the defendant possessed monopoly power in the relevant product and geographic market. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002). The complaint must distinguish substitutes reasonably available to buyers. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 392–93 (1956); *Affinity LLC v. GfK Mediamark Rsch. & Intel., LLC*, No. 12 CIV. 1728, 2013 WL 1189317, at *6 (S.D.N.Y. Mar. 25, 2013), *aff'd*, 547 F. App'x 54 (2d Cir. 2013).

219. *Yellow Page Sols., Inc. v. Bell Atl. Yellow Pages Co.*, No. 00 Civ. 5563, 2001 WL 1468168, at *12 (S.D.N.Y. Nov. 19, 2001).

220. See, e.g., *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1319 n.40 (S.D. Fla. 2005) (deeming a relevant market to be composed of branded and generic terazosin hydrochloride); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 680–81 (E.D. Mich. 2000) (defining relevant market as the branded and generic versions of a heart medication with the chemical compound diltiazem hydrochloride), *aff'd*, 332 F.3d 896 (6th Cir. 2003).

the section 2 cases involved allegations of delaying generic entry for a patented drug. The market in such cases is straightforward and less debated.²²¹

The narrowed scope of modern antitrust class actions warrants concern that decades of procedural reform have chilled private enforcement. Per se direct purchaser cases for market manipulation and price fixing continue, while indirect purchaser or rule of reason claims wane.²²² As the next Part discusses, the future of even this more limited regulatory oversight is at risk. The settlement data identifies additional efforts on the horizon to further restrict class actions.

III. READING OBJECTORS' TEA LEAVES

As Part II detailed, procedural reforms are driving suboptimal antitrust enforcement, from places where reform may not be expected.²²³ To some, reforms still have not gone far enough. As discussed in Part I, class members can object to settlement or fee approval requests.²²⁴ This Part spotlights efforts by professional objectors to further curtail antitrust class actions.

Over the last fifteen years, objectors contested roughly 40% of antitrust settlements.²²⁵ Once one objector filed, others quickly piled on.²²⁶ Courts only granted 2.6% of these objections, overruling the rest mostly for lack of standing or merit.²²⁷ Despite judicial²²⁸ and legislative²²⁹ efforts to limit baseless objections, antitrust objections are on the rise.

221. See, e.g., *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d at 1319 n.40 (deeming a relevant market to be composed of branded and generic terazosin hydrochloride); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d at 680–81 (defining relevant market as the branded and generic versions of a heart medication with the chemical compound diltiazem hydrochloride).

222. Cf. Corbitt et. al, *supra* note 198 at § 2.04 (“Even a seemingly strong case on the merits may be uneconomical to pursue, at least on a contingent fee basis, because the damages are not high enough, the anticipated expenses for discovery and experts are too high, or the case is otherwise too risky to pursue.”).

223. See *infra* Part I.B.

224. See *id.*

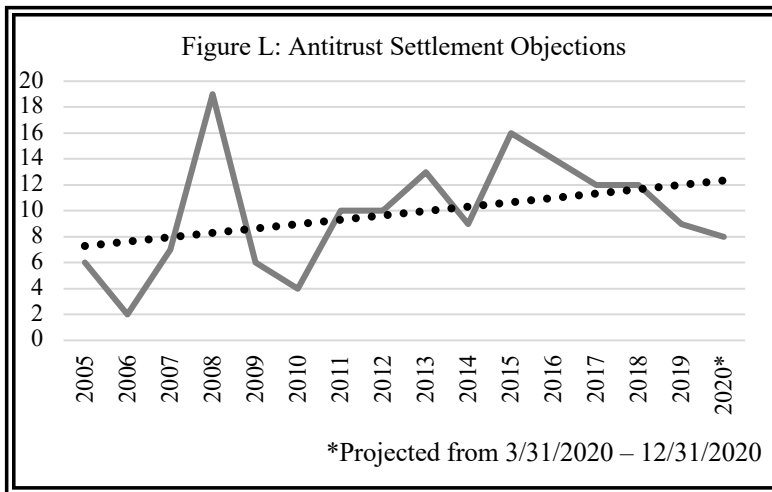
225. Of the 393 final approvals studied, 151 had at least one objection, exactly 38.42%. See *infra* Table 6.

226. See, e.g., *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 350 (S.D. Miss. 2003) (discussing how objections “largely parrot one another”), *aff’d sub nom.* *Smith v. Crystian*, 91 F. App’x 952 (5th Cir. 2004); Defendants’ Joint Memorandum in Opposition to Class Settlement at 8, *In re Nat’l Arb. F. Trade Pracs. Litig.*, No. 01-md-02122 (D. Minn. July 21, 2011) (describing objections as “virtually identical form letter objections”).

227. Of these objections, 74.26% were made by individuals who lacked standing or raised meritless challenges.

228. See Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 *FORDHAM L. REV.* 475, 493–99 (2020) (detailing judicial efforts to curb “bad” objectors, including appeal bonds, disgorgement, and sanctions).

229. Congress amended Rule 23 in 2003 and 2018 to respond to the objector problem. Originally, judicial approval was only required for payments accompanying withdrawn objections. Some objectors, though, would threaten, but not actually file, an objection unless compensated. See RUBENSTEIN, *supra* note 97, § 13:34. These new amendments require more



This de minimis success rate might suggest serial objectors are more a nuisance than a serious threat. But even meritless objections prolong antitrust class actions, drive up costs, and sometimes force counsel to pay off objectors to prevent delay.²³⁰ Quisquous professional objectors also pose a different insidious threat, heretofore underexamined in legal scholarship. These objectors have played a larger role in the development of reform than perhaps thought before. They use settlement challenges to push for procedural reforms, circumventing the legislative process. There is a striking link between failed objections and procedural reforms by the legislature or the judiciary. CAFA enacted proposals that courts previously rejected when raised

specific objections and judicial approval for payments to objectors. FED. R. CIV. P. 23(e)(5)(B).

230. See MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 90, § 21.643; Brunet, *supra* note 105, at 429 (discussing how objections “increas[e] the transaction costs of class action litigation”). As the Honorable Denise Cote of Southern District of New York explains:

Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

In re Gen. Elec. Co. Sec. Litig., 998 F. Supp. 2d 145, 152 (S.D.N.Y. 2014); *cf.* O’Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003) (“Federal courts are increasingly weary of professional objectors: ‘some of the objections were obviously canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests.’” (citations omitted)).

as settlement objections.²³¹ Professional objectors are also driving the spread of the narrower interpretations of Rule 23 detailed in Part I.²³²

Given the relationship between objections and reforms, a tasseography of settlement challenges may foretell the next attacks on private antitrust enforcement.²³³ This Part examines two objector-led reforms. Professional objectors want to limit nonmonetary settlements and reduce fee awards—endangering already weakened private antitrust enforcement efforts.

A. *The Push for Cash Only*

Professional objectors seek to redefine a “reasonable” antitrust settlement. Out of all antitrust settlements studied, 94.7% provided at least some cash component.²³⁴ But for objectors, this is insufficient. Objectors typically insist a settlement is only reasonable if the entire fund is paid out to class members in cash.²³⁵ While injunctive relief often fired up objectors,²³⁶ they reserved considerable ire for antitrust settlement distributions in any mode other than a bank check.

Settlements with nonmonetary components are prevalent, as they respond to the unique challenges of aggregate litigation. The costs of administrating settlement

231. See, e.g., *Henry v. Sears Roebuck & Co.*, No. 98-CV-4110, 1999 WL 33496080, at *5 (N.D. Ill. July 23, 1999) (discussing unsuccessful objections to coupon settlements pre-CAFA); *In re Mex. Money Transfer Litig.* (W. Union & Valuta), 164 F. Supp. 2d 1002, 1027–28 (N.D. Ill. 2000) (same), *aff’d sub nom. In re Mex. Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001).

232. See, e.g., *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2019 WL 6875472, at *30 (E.D.N.Y. Dec. 16, 2019) (rejecting objectors ascertainability challenge); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420, 2020 WL 7264559, at *4 (N.D. Cal. Dec. 10, 2020) (rejecting settlement challenge asserting choice of law issues precluded certification).

233. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 90, § 21.643 (warning “even a weak objection may have more influence than its merits justify”).

234. Objectors seem to concentrate a great deal of energy on injunctive and nonmonetary settlements as opposed to lower dollar amount settlements. Forty-five percent of nonmonetary and injunctive final approvals were objected to. Of monetary settlements less than \$25 million, 24% were objected to. Monetary settlements over \$25 million were objected to in 55% of cases.

235. See, e.g., *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 117 (D.N.J. 2012) (objecting to *cy pres* distribution even though “many of the Settlement Class members who will be receiving the *cy pres* award may have already received payments from these other three settlements” (emphasis in original) (citation omitted)); *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1005 (N.D. Ohio 2016) (rejecting professional objector’s assertion that “no settlement money may be paid to *cy pres* [sic] until every class member who has filed a claim has received 100% of alleged damages, which in this case would include treble and punitive damages” (alteration in original) (emphasis in original) (citation omitted)).

236. See, e.g., *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 291 (3d Cir. 2011) (challenging injunctive relief); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. C 06-4333, 2013 WL 12333442, at *42 (N.D. Cal. Jan. 8, 2013); Objection to Proposed Settlement & Fee Request, *In re Am. Express Anti Steering Rules Antitrust Litig. (II)*, 1:11-md-02221 (E.D.N.Y. Apr. 3, 2014).

distributions can exceed individual settlement amounts.²³⁷ Even when settlements provide cash payouts, funds can remain. Many class members are unable or unwilling to satisfy claim requirements.²³⁸ Some members never learn of the settlement.²³⁹ Mailed settlement checks can be returned or never cashed.²⁴⁰ In such circumstances, nonmonetary settlements provide class members an alternate benefit. Products or gift cards are common direct alternatives.²⁴¹ Indirect alternatives include cy pres—that is, charitable distributions of leftover settlement funds—and charitable settlements,²⁴² where cy pres is in lieu of a distribution to class members.²⁴³

Professional objectors do not see these alternatives as pragmatic solutions. Self-proclaimed protectants, they are saving class members from “abusive” settlements and a legal system ripe with corruption.²⁴⁴ To their jaundice eyes, creative settlement distributions are indicia of the rampant corruption inherent in class actions²⁴⁵—

237. See, e.g., *In re Easysaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 117 (D.N.J. 2012).

238. See, e.g., *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 405 (S.D.N.Y. 2009); *In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091, 1104 (N.D. Ill. 1983); MARCY HOGAN GREER, A PRACTITIONER’S GUIDE TO CLASS ACTIONS 37 (Supp. 2012).

239. See, e.g., *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990) (“[A] substantial number of class members would never be located for distribution of the damage award.”).

240. See, e.g., *All Plaintiffs v. All Defendants*, 645 F.3d 329, 330 (5th Cir. 2011) (noting many settlement checks “were returned as undeliverable or were never cashed”); *Powell v. Ga.-Pac. Corp.*, 119 F.3d 703, 707 (8th Cir. 1997) (“[O]ver 125 checks were returned as undeliverable.” (citation omitted)).

241. See, e.g., Lisa M. Mezzetti & Whitney R. Case, *The Coupon Can Be the Ticket: The Use of “Coupon” and Other Non-Monetary Redress in Class Action Settlements*, 18 GEO. J. LEGAL ETHICS 1431, 1433 n.11 (2005) (listing forms of non-cash settlement relief).

242. See, e.g., *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) (“A cy pres distribution puts settlement funds to their next-best use by providing an indirect benefit to the class.”); Michael J. Slobom, *Recalibrating Cy Pres Settlements to Restore the Equilibrium*, 123 DICK. L. REV. 281, 302 (2018) (“The cy pres doctrine provided a mechanism to dispose of non-distributable settlement funds while preserving an indirect benefit to injured parties and disincentivizing misconduct.” (footnotes omitted)); accord Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 768 (2014) (discussing options for settlement distributions).

243. See Christine P. Bartholomew, *Saving Charitable Settlements*, 83 FORDHAM L. REV. 3241, 3248 (2015) (discussing cy pres and charitable distributions).

244. See, e.g., Casey, *supra* note 30; see also 141 CONG. REC. S9173 (daily ed. June 27, 1995) (statement of Sen. Barbara Mikulski); Mike France, *Don’t Kill All the Trial Lawyers*, BLOOMBERG BUSINESSWEEK (Aug. 25, 2002, 12:00 AM), <http://www.bloomberg.com/bw/stories/2002-08-25/23-dont-kill-all-the-trial-lawyers> [<https://perma.cc/HM57-CL9X>] (arguing against negative perceptions of plaintiffs’ attorneys).

245. See, e.g., *Objection of Amy Yang, In re Transpacific Air Transp. Antitrust Litig.*, 3:07-cv-05634 (N.D. Cal. Apr. 17, 2015) (presuming “the danger of conflicts of interest [is] endemic to class actions”); *Objections of Conner Erwin, In re Optical Disk Drive Prods. Antitrust Litig.*, 3:10-md-2143 (N.D. Cal. Oct. 19, 2016) (contending, with no evidence, that “[t]here is also a very real concern that Class Counsel will double-dip [in seeking fees] as new settlements are achieved”).

despite no evidence of collusion or self-dealing in the 1328 antitrust settlements studied. Professional objectors view class counsel, defense counsel, and the district court judge as pushing settlements,²⁴⁶ so much so that they believe class counsel sell out the class by agreeing to noncash terms,²⁴⁷ and then the overseeing judge either lacks the knowledge or incentive to interfere.²⁴⁸

This cynicism drives settlement challenges²⁴⁹: one in five objections related to cy pres provisions.

246. See, e.g., Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J.L. & PUB. POL'Y 769, 774 (2016) (noting that the parties lack the “incentive to achieve—and courts have no institutional competence to evaluate—the public deterrence benefits that purportedly justify the absence of compensation”).

247. See *Objections of Class Members Ira Conner Erwin, Luis Mario Santana, and Stefan Rest to Settlement & Attorney-Fee Request, In re TFT-LCD (Flat Panel) Antitrust Litig.*, 3:07-md-1827 (N.D. Cal. Oct. 9, 2012) (contending class counsel intentionally filed a losing case or “a lawsuit they believe[d] they are more likely to win than lose, but chose to cash out for a fraction of the recovery”); Objector Leslie Yagar’s Brief in Support of Objection at 6, *In re Reformulated Gasoline (RFG) Antitrust & Pat. Litig.*, 2:05-ml-0167-CAS-VBK (C.D. Cal. Nov. 24, 2008) (arguing that because the settlement provides “no distribution to Class Members and there is no injunctive relief . . . [, the requested fee award is a] significant windfall for Class Counsel”).

248. *Statement before the H. Judiciary Comm. Subcomm. on the Const. & Civ. Just. Examination of Litig. Abuse*, 113th Cong. (2013) (Statement of Theodore H. Frank, Adjunct Fellow, Manhattan Institute Center for Legal Policy, President, Center for Class Action Fairness) (“[T]o the extent class attorneys exploit that conflict of interest, judges lack the necessary information or incentive to rectify self-dealing in most cases.”) [hereinafter “Frank House Statement”]; cf. John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714 n.121 (1986) (“[I]t is doubtful that courts have much incentive to be very demanding [in reviewing settlements.]”). Judges are taking their oversight responsibility seriously, subjecting nondirect payment settlements to exacting scrutiny and playing an active part in modifying the settlement terms. See, e.g., *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 118 (S.D.N.Y. 2009) (anticipating notice issues and requiring amended notice before final approval hearing), *aff’d sub nom. Priceline.com, Inc. v. Silberman*, 405 F. App’x 532 (2d Cir. 2010); Order & Final Judgement at 2, *In re Publ’n Paper Antitrust Litig.*, 3:04-md-01631 (D. Conn. Apr. 28, 2008). Judges rarely relied on objectors to flag issues. See, e.g., Order & Final Judgement as to Remax Int’l at 2, *Hyland v. Homeservices, Inc.*, 3:05-cv-00612 (W.D. Ky. May 3, 2012), ECF No. 645 (denying preliminary approval without an objector raising concerns).

249. Challenges are laden with this contempt. Objectors characterize cy pres as a means “to permit judges to play Santa Claus with settlement money.” Brief of Objector-Appellant Darren McKinney at *17, *Nachshin v. AOL, LLC*, No. 10-55129, 2010 WL 5779667 (9th Cir. July 20, 2010). Meanwhile, defendants enjoy “a negotiated windfall” while affording class counsel the opportunity to seek “grossly excessive” fee requests. Response to Indirect Purchaser Plaintiffs’ and Attorneys General’s Joint Motions for Final Approval of Settlements, Plans of Distribution, and for Attorneys Fees at 18–19, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. 4:02-md-01486 (N.D. Cal. June 23, 2014).

Table 6: Recovery & Settlements by Objection Type				
<i>Objection Type</i>	<i>Final Approvals</i>	<i>% of Total Recovery</i>	<i>% of Total Costs</i>	<i>% of Final Approvals</i>
Fees, Costs & Incentive Awards	68.9%	57.6%	39.0%	26.5%
Amount & Scope of Release	49.0%	50.7%	32.8%	18.8%
Notice	44.4%	39.5%	25.5%	17.0%
Certification & Class Definition	32.5%	37.8%	24.2%	12.5%
Claims Process	28.5%	35.3%	21.0%	10.9%
Allocation	26.5%	31.3%	19.3%	10.2%
Cy Pres	19.2%	11.5%	9.6%	7.4%
Discovery, Insufficient Investigation & Unsealing	16.6%	13.4%	8.1%	6.4%
No Wrongdoing & No Admission of Wrongdoing	9.9%	4.4%	2.6%	3.8%
Other & Unknown	51.7%	23.4%	23.8%	19.8%
All Objections	100.0%	72.5%	51.6%	38.4%

Tort reform groups, particularly the Center for Class Action Fairness (CCAF) and affiliated entities,²⁵⁰ actively challenge noncash settlements.²⁵¹ They malign cy pres settlements as “gimmicks” that allow “class counsel . . . [to] sacrifice millions of dollars [otherwise available] . . . in more straightforward settlements.”²⁵² Thirty-three percent of their challenges centered on cy pres.

250. CCAF strives to distance itself from other professional objectors, claiming it does not seek payment for its objections. *But see* Memorandum Opinion and Order Re: CCAF Motion for Fees at 2–3, *In re Polyurethane Foam Antitrust Litig.*, 1:10-md-2196 (N.D. Ohio Mar. 14, 2016) (rejecting CCAF’s contention that it was “entitled to least \$435,600” or an average hourly rate of \$2,755); Alison Frankel, *Exposing Class Action Objectors: Lieff Cabaraser, Ted Frank in ‘Lurid’ Dispute*, REUTERS (June 22, 2015, 4:16 PM) <https://www.reuters.com/article/idUS14021648020150622> [<https://perma.cc/66FY-2XM5>] (detailing Frank’s financial relationships with other professional objectors); EMILY GOTTLIEB & JOANNE DOROSHOW, TOP 30 TORT REFORM HYPOCRITES OF 2018! (2018), <http://centerjd.org/system/files/Hypocrites2018F2.pdf>.

251. In 2013, the founder of CCAF, Theodore Frank, acted on his own to urge the House Judiciary Committee to preclude cy pres settlements. *See* Frank House Statement, *supra* note 248. CCAF has mirrored this push via the judiciary. *See, e.g., In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621, 622 (N.D. Ohio 2016); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1037 (9th Cir. 2011); *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 842 F. Supp. 2d 346, 351 (D. Me. 2012); *In re Classmates.com Consol. Litig.*, No. C09-45RAJ, 2012 WL 3854501, at *3 (W.D. Wash. June 15, 2012).

252. Brief for Petitioners, *Frank v. Gaos*, 139 S.Ct. 1041 (2019) (No. 17-961), 2018 WL 3374998, at *16–17.

In seeking to limit settlement options, professional objectors myopically focus on compensation, ignoring all other benefits of antitrust class actions.²⁵³ Private antitrust suits have more deterrent potential than government enforcement.²⁵⁴ Such suits are also fundamental to ensuring judicial access to victims, who lack the incentives or ability to otherwise vindicate their rights.²⁵⁵ But to professional objectors, deterrence and judicial access—gains not dependent on cash outs²⁵⁶—be damned.

Nor does it matter that a broad definition of adequate settlements preserves flexibility, consumer choice, and effectiveness in class actions. In fact, professional objectors would rather risk foregoing any settlement than agree to a noncash benefit. Consider *In re Online DVD-Rental Antitrust Litigation*,²⁵⁷ which involved an alleged anticompetitive market division between Walmart and Netflix regarding DVD rentals.²⁵⁸ Walmart agreed to settle for \$27,250,000.²⁵⁹ Class members could select a gift card or check.²⁶⁰ A fully cash payout settlement was improbable because postage costs “threatened to materially erode the amount of *per capita* payments to Claimants.”²⁶¹ A larger settlement was unrealistic since the case was heading south, fast.²⁶² The district court approved the settlement, overruling professional objectors’ challenges to the gift card option, a choice 63% of the class eventually selected.²⁶³ Objectors, nonetheless, appealed to the Ninth Circuit, insisting they represented the

253. Cf. Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 816 (1997) (“More critical than the limited compensatory relief now offered in these low-value class actions is the prospect that the law would be unable to deter future misconduct absent an effective policing mechanism.”).

254. John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 476–79 (2012).

255. *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1047 (7th Cir. 2007) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 216 (2003) (“One of the objectives of class actions is to afford judicial access to plaintiffs . . .”).

256. Cf. Brian T. Fitzpatrick, *Deregulation and Private Enforcement*, 24 LEWIS & CLARK L. REV. 685, 695 (2020) (“Even when class actions do not do well at compensating, they can still do well at deterring.”); see also Bartholomew, *supra* note 243, at 3261–62 (“Enhancing fairness by guaranteeing judicial access is a gain separate from (and potentially more important than) monetary compensation—particularly to class members.” (footnote omitted)).

257. 779 F.3d 934, 940 (9th Cir. 2015).

258. *Id.*

259. *See id.* at 941.

260. *See id.*

261. *See id.*; Plaintiffs’ Reply Memorandum in Support of Motion for Final Approval of Settlement at 12, *In re Online DVD-Rental Antitrust Litig.*, No. 4:09-md-2029 (N.D. Cal. Feb. 28, 2012).

262. Roughly three months before the Walmart settlement, the district court granted Netflix’s motion for summary judgment, finding plaintiffs lacked antitrust standing. *See Online DVD-Rental*, 779 F.3d at 947.

263. *See id.*

class's best interests.²⁶⁴ Luckily for class members, the Ninth Circuit affirmed.²⁶⁵ Had the objectors succeeded, they would have derailed the settlement, depriving consumers of even an indirect benefit.

Professional objectors' push to redefine a "reasonable" settlement threatens already endangered indirect purchaser cases.²⁶⁶ Perseverating on monetary payouts would hasten their demise. Limiting options for resolution diminishes incentives for class counsel to pursue such claims. Indirect purchaser suits involve larger class sizes, with small individual recovery for each class member.²⁶⁷ Cash disbursements are impracticable, if not impossible in a given case. In addition, seeking final approval of any settlement is riskier and potentially more costly than for direct purchasers. Objections occurred in half of indirect purchaser cases, as opposed to one-third of direct purchaser cases.

	<i>Objections</i>	<i>No Objections</i>	<i>Grand Total</i>
Direct/Indirect	75.0%	25.0%	12
Direct	33.8%	66.2%	299
Indirect	50.0%	50.0%	82
Grand Total	38.4%	61.6%	393

Congress expressly enacted Rule 23 to ensure recourse for small-sum harms suffered by a large number of individuals.²⁶⁸ In pushing for cash only, professional objectors undermine that goal, making it less likely class counsel will pursue this critical means of enforcement.²⁶⁹

264. See *id.* at 949–50 (discussing settlement objectors).

265. See *id.* at 955.

266. See *supra* Part II.B.2 (discussing reforms' chilling effect).

267. See William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1, 3 (1999) (“[I]ndirect purchasers (especially consumers) tend to be numerous and their individual harms small”); see, e.g., *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1150 (N.D. Cal. 2009) (asserting indirect purchaser claims on behalf of consumers in “repealer” states); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096–97 (N.D. Cal. 2007) (same).

268. See STATEMENT ON BEHALF OF THE ADVISORY COMMITTEE ON CIVIL RULES 7 (1965); see also *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“[T]he Advisory Committee had dominantly in mind vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’” (citation omitted)).

269. See, e.g., Crane, *supra* note 17, at 677 (explaining how private enforcement “supplies a set of ‘on the street’ enforcers closer to the relevant problems, along with enhanced enforcement resources and continued enforcement during downturns in public enforcement”).

B. The Push to Reduce Attorney Fee Awards

Objectors also push a second reform effort, targeting attorney fee awards for large antitrust settlements.²⁷⁰ They urge courts to apply a “megafund rule.”²⁷¹ The proposal effectively replaces Rule 23(h)’s multifactor standard with a bright line mandate: the higher the settlement amount, the lower the percentage awarded in fees.²⁷² In doing so, the eight factors courts usually consider when evaluating a fee award drop away; the settlement amount alone dictates. In circuits that have embraced this reform, courts slash fee percentages to as low as 4%.²⁷³ This section uses antitrust settlement data to show that a megafund rule is the product of faux casuistry; its specious foundation precludes any reasoned application. More troubling, this reform would intensify the chilling effects detailed in Part II.B.²⁷⁴

1. The Megafund Rule Fallacy

Megafund challenges typically start when settlements exceed \$50 million. By \$100 million, objections are 86.34% more likely.²⁷⁵ Seventy-four percent of these objections were to fee awards. Once again, the objections are not the true danger. Megafund objections rarely succeed: courts overruled 98% of the fee award challenges. Rather, the true risk is objectors’ use of the settlement approvals to push

270. See *supra* Part II (detailing types of objections); see also, e.g., Order on Duke Construction’s Objection to Class Counsel’s Request for Attorneys’ Fees and Reimbursed Expenses at 1, *In re Ready Mixed Concrete Antitrust Litig.*, 1:05-cv-00979 (S.D. Ind. Mar 30, 2010) (same); Order Granting: (1) Final Approval of Settlement, (2) Award of Attorneys’ Fees and (3) Application for Incentive Awards; and Entry of Final Judgment Dismissing Action with Prejudice at 2, *White v. NCAA*, 2:06-cv-00999 (C.D. Cal. Aug. 5, 2008) (referencing fee objection); Memorandum Op. & Ord. at 5, *Spartanburg Reg’l Health Servs. Dist., Inc. v. Hillenbrand Ind.*, 7:03-cv-02141 (D.S.C. Aug. 15, 2006) (same).

271. See, e.g., *In re Optical Disk Drive Prod. Antitrust Litig.*, 959 F.3d 922, 932 (9th Cir. 2020); Objection to Request for Attorney’s Fees and Notice of Intention to Appear, *In re Foreign Exch. Benchmark Rates*, 1:13-cv-07789 (S.D.N.Y. Feb. 6, 2018).

272. See, e.g., *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 768 F. App’x 651, 654 (9th Cir. 2019) (challenging a 20% fee award as “because this is a ‘mega-fund’ case with a settlement of more than \$200 million”); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *6 (N.D. Cal. Aug. 3, 2016), *dismissed sub nom. In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 16-16368, 2017 WL 3468376 (9th Cir. Mar. 2, 2017); *In re Dynamic Random Access Memory Antitrust Litig.*, No. C 06-4333, 2014 WL 12879521, at *1 (N.D. Cal. June 27, 2014) (objecting that “this is a ‘mega-fund’ case where, as a matter of law, the fee award should be less than the Ninth Circuit benchmark fee of 25%”).

273. See *In re Prudential Ins. Co. Sales Pracs. Litig.*, 962 F. Supp. 450, 458 (D.N.J. 1997) (noting that percentage awards in megafund cases range from 4.1% to 17.92% of fund); see also Order at 1, *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, 2:09-md-02034 (E.D. Pa. Sep. 24, 2019) (6.6% fee award after deducting costs); Final Judgment Awarding Attorneys’ Fees at 2, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 1:05-md-1720 (E.D.N.Y. Jan. 14, 2014) (9% fee award after deducting costs).

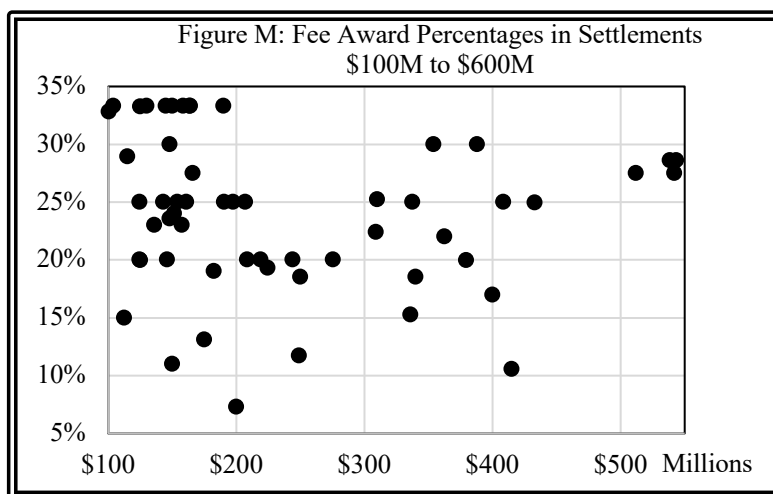
274. See *supra* Part II.B.

275. Settlements of \$50M and above are 46.15% more likely to receive an objection. Settlements valued at \$100M and above are 59.76% more likely to receive an objection.

procedural reform. Even an unsuccessful megafund challenge impacts fees. In settlements over \$100 million, courts notably deviate 30% from the median for antitrust class actions once an objection is filed—regardless of the objection’s success.

Table 8: Relation of Fee Award Mean, Median for Final Approvals to Objections			
<i>Final Approval Size</i>	<i>Objections</i>	<i>Average</i>	<i>Median</i>
All Final Approvals		27.6%	30.0%
Less than \$100M		28.4%	30.0%
	No Objections	28.9%	30.0%
	Objections	27.3%	25.0%
Over \$100M		23.7%	25.0%
	No Objections	25.9%	30.0%
	Objections	22.3%	23.5%

A megafund rule is a sorites paradox with too many unknowns.²⁷⁶ Is a \$50 million settlement actually “mega” for antitrust class actions? Does the cause of action matter? Should it? If fee percentages should decrease, by what amount and why? Given these unknowns, antitrust fee awards are erratic. Some courts start scaling at \$50 million; others, at \$1 billion.²⁷⁷ The rate of discounting is similarly arbitrary, as evidenced by fee awards for settlements over \$100 million.



276. See RUBENSTEIN, *supra* note 97, § 15:81 (detailing the problems with a megafund approach and how it is but “a crude proxy for windfall as it may prove both under- and over-inclusive”).

277. Compare, e.g., *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775,

The fallacy with the megafund rule lies in its precept: an economies of scale rationale.²⁷⁸ Private antitrust enforcement is intended to benefit from economies of scale.²⁷⁹ As the District Court of Alabama explains, “the normal 20% to 30% range of fee percentages awarded” already reflects such economies.²⁸⁰ Class actions afford plaintiffs “a position of parity with the defendant, who will exploit scale economies whether or not the case is brought as a class action.”²⁸¹

Advocates for a megafund rule flip the argument. Economies of scale are no longer a benefit to the class but a weapon to cut fees. A megafund rule presumes that at some point, classes become too efficient. At that critical point, class counsel unfairly profit from economies of scale, thus justifying a lower fee award to obviate a windfall.²⁸² If a class settled for \$100 million, class counsel might earn \$25 million,

2009 WL 3077396, at *16 (E.D.N.Y. Sept. 25, 2009) (awarding 15% of \$85 million fund under sliding scale approach), with *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. 3:07-CV-5944, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (defining a megafund as “a recovery of \$100 million to over \$1 billion”).

278. Judge Easterbrook elaborates on this reasoning by providing a clear example explaining why fee awards in large sum cases should not deviate from the median award:

Under the court’s ruling, a \$40 million settlement would have led to the same aggregate fees as the actual \$132 million settlement. Private parties would never contract for such an arrangement, because it would eliminate counsel’s incentive to press for more than \$74 million from the defendants. Under the district court’s approach, no sane lawyer would negotiate a settlement of more than \$74 million and less than \$225 million; even the higher figure would make sense only if it were no more costly to obtain \$225 million for the class than to garner \$74 million.

In re Synthroid Mktg. Litig., 264 F.3d 712, 718 (7th Cir. 2001).

279. See *The Paths of Civil Litigation: Class Actions: Market Models for Attorneys’ Fees in Class Action Litigation*, 113 HARV. L. REV. 1827, 1831–32 (2000) (“[T]he aggregation of individual claims creates substantial economies of scale.”); William H.J. Hubbard, *Optimal Class Size, Dukes, and the Funny Thing About Shady Grove*, 62 DEPAUL L. REV. 693, 700 (2013) (“A fundamental rationale for class actions is that they take advantage of economies of scale in the litigation of related claims.”).

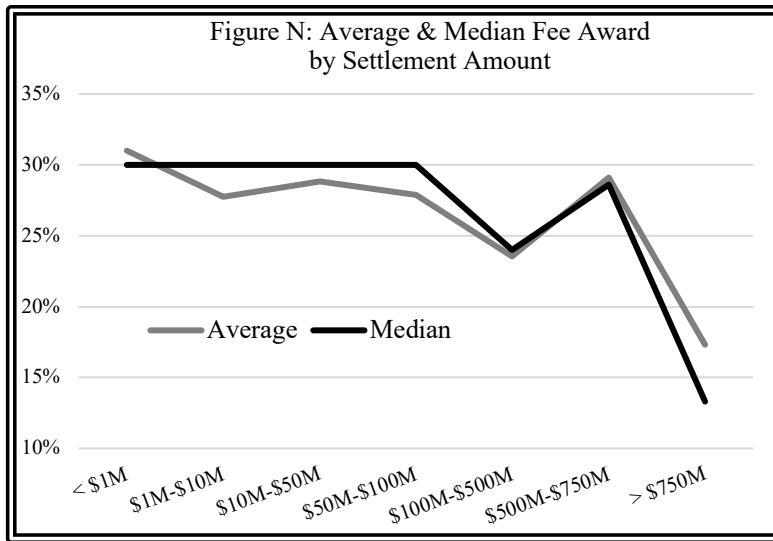
280. Cf. *Mashburn v. Nat’l Healthcare, Inc.*, 684 F. Supp. 679, 695 (M.D. Ala. 1988) (rejecting argument to reduce fees because of alleged economies of scale).

281. Hay & Rosenberg, *supra* note 29, at 1381.

282. See, e.g., *In re* NASDAQ Mkt.-Makers Antitrust Litig., 187 F.R.D. 465, 486 (S.D.N.Y. 1998) (“[W]here a class recovers more than \$75–\$200 million . . . fees in the range of 6–10 percent and even lower are common”); *In re* Platinum & Palladium Commodities Litig., No. 10-CV-3617, 2015 WL 4560206, at *4 (S.D.N.Y. July 7, 2015) (“To avoid a windfall where the recovered funds run into the tens of millions, courts typically decrease the percentage of the fee as the size of the fund increases.” (citation omitted)); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 404 (D. Conn. 2009) (“[L]ower percentages of the fund” should be awarded “as the size of the fund increase[s]”). Objectors frequently cite two class action studies to support a mandatory megafund. See, e.g., *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. 3:07-cv-5944, 2016 U.S. Dist. LEXIS 24951 (N.D. Cal. Jan. 28, 2016). One study focused on published and unpublished settlements from 2006–2007. Fitzpatrick, *supra* note 7, at 814. The other focused on only published opinions but covered a significantly

or 25% in fees. If a case settled for \$1 billion, class counsel could earn \$250 million, even though the case was not necessarily 100 times harder to litigate.²⁸³ Objectors use this logic to argue for reducing fees proportionately as settlement amounts increase.²⁸⁴

Despite the facial appeal of objectors' argument, fee awards in antitrust class actions are not reflecting any principled application of economies of scale. A standard representation of economies of scale is "U." Unit costs gradually fall as output increases. Then, at some point, when output increases enough, costs begin to climb. Fee awards in antitrust class actions, where many courts already embrace objectors' push for a megafund rule, look nothing like a theoretical economies of scale model. Fees do not gradually diminish to reflect scaling—they simply plummet once a settlement crosses the \$100 million threshold without fully rebounding.²⁸⁵



longer time frame (1993–2018). Eisenberg & Miller, *supra* note 7, at 249. Both studies identify an inverse relationship between the size of the recovery and the fee award percentages. These findings are primarily descriptive; the authors of these studies do not urge a megafund rule. In fact, Professor Fitzpatrick has affirmatively pushed against scaling fees. *See, e.g.*, Declaration of Brian T. Fitzpatrick, *In re Loestrin 24 FE Antitrust Litig. (Direct Purchaser Actions)*, No. 1:13-md-02472 (D.R.I. Apr. 20, 2020).

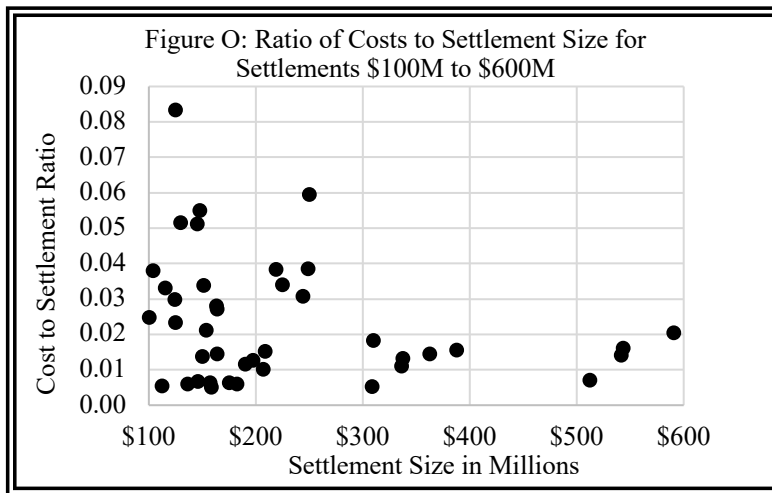
283. *See, e.g.*, *Court Awarded Att’y Fees*, 108 F.R.D. 237, 256 (1986) (“[A]bsent unusual circumstances, the percentage will decrease as the size of the fund increases.”); *In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407, 1413 (D. Wyo. 1998).

284. *See, e.g.*, *Objections to Co-Lead Counsel for Direct Purchaser Plaintiffs’ Notice of Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses & Service Awards and Notice of Intent to Appear at the May 8, 2018 Fairness Hearing, In re Lithium Ion Batteries, Antitrust Litig.*, 4:13-md-02420 (N.D. Cal. Mar. 1, 2018); *Objection to Request for Attorney’s Fees and Notice of Intention to Appear, In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 1:13-cv-07789 (S.D.N.Y. Feb. 6, 2018); *Objection to Proposed Class Action Settlement and Award of Attorneys’ Fees, In re Cathode Ray Tube (CRT) Antitrust Litig.*, 3:07-cv-05944 (N.D. Cal. Oct. 6, 2015).

285. *See* RUBENSTEIN, *supra* note 97, § 15:81 (“[T]he mega-fund approach is an odd idea

Critics may say this disparity between a theoretical economies of scale representation and the actual distribution of fee awards is because not all courts apply a megafund rule. This would be incorrect. The disconnect is because a megafund rule improperly presumes the size of the settlement correlates with economies of scale.

Essentially, objectors are urging courts to use ungrounded abstract legal reduction. The settlement amount says little about the “results obtained” in the case.²⁸⁶ The key inquiry in deciding a fee award is the results achieved for the class.²⁸⁷ A \$15 million settlement may be a tremendous victory or deeply unimpressive. Inversely correlating settlement amount and fee rates does not clarify when economies of scale are desirable from when they are a windfall. Economies of scale could increase alongside class size²⁸⁸ or the number of defendants, yet a megafund rule does not reflect these variables.²⁸⁹ For a given settlement range, even litigation costs alone greatly vary.



in that it implies that everything is rational until \$100 million, but irrational thereafter, creating a cliff-like effect rather than a gradually-reducing percentage along the lines of a hill.”).

286. See *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204–05 (S.D. Fla. 2006).

287. See *Hensely v. Eckerhart*, 461 U.S. 424, 436 (1983) (“[T]he most critical factor is the degree of success obtained.”); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547–48 (S.D. Fla. 1988) (“The quality of work performed in a case that settles before trial is best measured by the benefit obtained.” (citation omitted)).

288. See, e.g., David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 GEO. WASH. L. REV. 542, 552–53 (2011) (discussing relationship between economies of scale and class size).

289. The dataset review shows no noticeable relationship between class size and fee awards. Cases with less than ten defendants averaged a fee award of 28%, whereas cases with more than ten defendants averaged a fee award of 25%.

Settlement amounts also do not reflect how additional factors—such as case theory, purchaser type, or defendants’ resources—could impact economies of scale. Even if economies scale up as settlements increase, how much scaling is unknowable.²⁹⁰ Thus, fee scaling is not addressing economies of scales. Instead, as the next Section explains, its purpose lies elsewhere.

2. The Danger of a Megafund Rule

An arbitrary megafund rule risks undermining regulatory oversight at a time when that oversight is already threatened.²⁹¹ Once untethered from its faulty premise, a megafund rule’s real purpose becomes clear: regulatory reform. Drastically reducing fee awards removes a core incentive to undertake private antitrust enforcement. Fewer skilled attorneys means fewer successful class actions—and an overall reduction of competition oversight.²⁹² Congress intended antitrust treble damages and fee awards to “encourage private enforcement of the antitrust laws.”²⁹³ Such cases “call for the very best the federal courts can provide”²⁹⁴—even more so now given the gauntlet of increased procedural gatekeeping set out in Part I.

Even a reform that reduces fees starting at a modest \$100 million amount would significantly reduce the primary incentive for pursuing private enforcement. Sixty-nine percent of the fee awards during the studied period (\$4.65 billion) came from antitrust settlements exceeding \$100 million. The current median award was 25%,

290. To avoid undefined parameters, some objectors urge courts to rely heavily on class counsel’s lodestar in megafund cases. *See, e.g.*, Notice of Intention to Appear and Objection to Proposed Settlement and Request for Attorney’s Fees at 9, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 1:06-md-01775 (E.D.N.Y. Nov. 20, 2008) (advancing megafund challenge then urging court to use class counsel’s lodestar as “a decisive factor”). Such a result would resurrect the very randomness that courts sought to cure by using Rule 23(h)’s multifactor approach. *See, e.g.*, *In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 724 F. Supp. 160, 170 (S.D.N.Y. 1989) (explaining how lodestar “computations, no matter how conscientious, often seem to take on the character of so much Mumbo Jumbo”); Reagan W. Silber & Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel’s Response*, 17 REV. LITIG. 525, 529 (1998) (“[C]ourts and commentators found that the lodestar formula caused more problems than it solved.”).

291. *See supra* Part II.B.2 (discussing how existing reforms chill private enforcement).

292. Megafund challenges are not the only strategy objectors adopt to reduce fees. Courts generally award costs in addition to fees. Rather than take aim at the percent, some objectors urge courts to award a gross fee and cost award. *See, e.g.*, Objection of Melissa Holyoak & John Tabin at 11–12, *In re Polyurethane Foam Antitrust Litig.*, 1:10-md-02196 (N.D. Ohio Nov. 12, 2015); Objection to Proposed Class Action Settlement & Award of Attorneys’ Fees, *supra* note 284 (challenging fee request, raising megafund and net vs. gross objections). But a gross award of 30% is not the same as a 30% fee award. *See, e.g.*, *In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, No. MDL 2328, 2015 WL 4528880, at *23 (E.D. La. July 27, 2015) (awarding gross award of 33.33% that drops to 17.3% when computed net costs). Using gross amounts will only mean even lower fee awards, as the cost of antitrust class actions continues to rise. *See supra* Part II.B.

293. *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1357 (9th Cir. 1998); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 661 (7th Cir. 1985); *Perkins v. Standard Oil Co.*, 474 F.2d 549, 554 (9th Cir. 1973).

294. *Mullinax v. Willett Lincoln-Mercury, Inc.*, 381 F. Supp. 422, 423 (N.D. Ga. 1974).

with an average rate of 23.87%. A modest mandatory fee cap of 15% would reduce fee awards by 19%, a loss of just under \$1 billion for the coffers of antitrust class action attorneys. If the more radical 4% cap were applied, attorney fees would shrink 78.6%, or \$3.65 billion.

In pushing a megafund rule, objectors overlook how a trans-substantive change to calculating fees would disproportionately impact antitrust class actions. Objectors frequently cite fee awards in securities or consumer class action cases to challenge antitrust requests,²⁹⁵ ignoring that antitrust settlements trend higher. Compare antitrust to securities class actions, for example. Only roughly the top 10% of securities class action settlements exceeded \$50 million, in contrast to 27.2% of antitrust settlements.²⁹⁶ This disparity is likely to increase given the growth rate of antitrust settlement amounts.²⁹⁷

Not only would a one-size-fits-all megafund rule impact antitrust more than other types of class actions, the percent reduction at stake is also greater. Antitrust cases “are notoriously complex, protracted, and bitterly fought.”²⁹⁸ The “wisdom and deliberation”²⁹⁹ needed to litigate such cases exceed other areas of private enforcement. But as it stands, fee awards for the top decile of antitrust cases are roughly 2% lower than the average across all class actions.³⁰⁰

295. See, e.g., *Objection to Request for Attorney’s Fees and Notice of Intention to Appear at 9–10, In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 1:13-cv-07789 (S.D.N.Y. Feb. 6, 2018); Christopher Andrews, Pro Se Objector, Non Attorney Supplement to Objection Received by the Court on September 14, 2016, *In re Optical Disk Drive Prods. Antitrust Litig.*, 3:10-md-2143 (N.D. Cal. Oct. 21, 2016).

296. CORNERSTONE RSCH., SECURITIES CLASS ACTION SETTLEMENTS: 2020 REVIEW AND ANALYSIS, 19 app.3 (2020), <https://www.cornerstone.com/wp-content/uploads/2021/12/Securities-Class-Action-Settlements-2020-Review-and-Analysis.pdf> [<https://perma.cc/J4WA-2EFU>].

297. See *supra* Part II.A.

298. *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (citations omitted); *In re Urethane Antitrust Litig.*, No. 04-1616, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016) (rejecting megafund objection after noting “a one-third fee is customary in contingent-fee cases, and indeed that figure is often higher for complex cases”); see also *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2015 WL 5918273, at *3 (E.D.N.Y. Oct. 9, 2015) (“[T]he complexity of federal antitrust cases is well known.” (citation omitted)); *Seatrains Lines, Inc. v. Fed. Mar. Comm’n.*, 460 F.2d 932, 945–46 (D.C. Cir. 1972).

299. See, e.g., *Mullinax*, 381 F. Supp. at 423 (comparing the “wisdom and deliberation” necessary for the complexity of an antitrust class action with the “basically simple” truth in lending cases); Kimberly L. King, *An Antitrust Primer for Trade Association Counsel*, 75 FLA. BAR J. 26, 29 (2001) (“No litigation is more complex, drawn out, or expensive than antitrust litigation.”).

300. The mean fee award for the largest class recoveries (those in the 10% decline) was 21.5%. In contrast, the median fee award for all class action settlements was 22.3%. See Eisenberg et al., *supra* note 7, at 948.

Settlement Size (in Millions)	Mean	Median	SD
[\$0 to \$2.75] (n=35)	29.0%	30.0%	6.4%
[\$2.75 to \$5] (n=34)	27.3%	30.0%	6.8%
[\$5 to \$10] (n=35)	28.5%	30.0%	6.6%
[\$10 to \$16.9] (n = 34)	27.3%	30.0%	7.4%
[\$16.9 to \$24.5] (n = 34)	30.7%	33.3%	3.5%
[\$24.5 to \$32.5] (n = 34)	28.7%	30.0%	5.3%
[\$32.5 to \$49.9] (n = 35)	28.7%	30.0%	6.2%
[\$49.9 to \$78] (n = 34)	28.0%	30.0%	5.8%
[\$78 to \$175] (n = 35)	26.2%	25.0%	7.2%
[\$175 to \$5,620] (n = 35)	21.8%	22.0%	6.8%
Total (n = 345)	27.60%	30.0%	6.7%

Such a marked impact on private antitrust enforcement weakens the incentives for counsel to pursue such claims.³⁰¹ Class action counsel are risk adverse.³⁰² Even before 2005 and the slew of procedural reforms that followed CAFA, class counsel bemoaned the pro-defendant shift in the field.³⁰³ As noted in Part II, as settlement

301. *See id.* at 937–38 (“If fees are set too low, counsel will not receive fair compensation for their services to the class. Worse yet, if fees are too low, then qualified counsel will not bring these cases in the first place. Injured parties will receive no redress, and potential wrongdoers will no longer be deterred out of fear of potential class action liability.”).

302. Critics use class counsels’ risk-averse nature as ammunition. *See, e.g.*, John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 230 (1983) (“Because the lawyer as bounty hunter has reason to be more risk averse than the clients he represents, his relative independence from his client implies also a greater danger of inadequate settlements, which in turn undercuts the deterrent threat of the law.”).

303. *See* Stephen D. Susman & John B. McArthur, *If It Ain’t Broke, Don’t Fix It!*, 55 ANTITRUST L.J. 59, 60 (1986) (“The antitrust laws have never restrained business as little as they do today. In the twenty years that I have practiced antitrust law, this is the worst time, the hardest time, the least likely time, for a plaintiff to bring or win an antitrust case. Things have never been worse. In my twenty years of practice, there has never been a time when antitrust

sizes increase, so do expenses.³⁰⁴ Such costs are only recoverable if the case is successful; otherwise, counsel must absorb them.³⁰⁵ The existing procedural reforms already reduce the likelihood of that recovery.³⁰⁶

Rather than roll the dice, pursuing other types of class litigation—while foregoing antitrust—is a smarter gamble.³⁰⁷ Decisions regarding which cases to pursue must be made.³⁰⁸ Firms employing private antitrust attorneys tend to specialize in class actions generally³⁰⁹—not just antitrust. This reduces switching costs for diversifying firm case portfolios. With a megafund rule, a class action firm might strategically invest in the occasional high-stake, high-potential-return antitrust case. If the result is large enough, even a deeply reduced fee percentage could be worthwhile. But the largest ration of their war chests would be preserved for litigation that provides a more consistent return on counsel's time and cost investments. For example, securities class actions provide quicker resolution, and only high-volume courts scale securities fee awards.³¹⁰

While other, less risk adverse counsel may still proceed with a large antitrust case in hopes of a big pay day, a megafund rule chances a smaller pool of skilled, willing attorneys. Reducing oversight risks the stability of competitive markets at a time when prior reforms have already left antitrust class actions facing higher gatekeeping and expenses.

law was more favorable to defendants, or when defendants engaged in so many activities, including mergers and vertical restraints, without liability and without much fear of liability.”).

304. See *supra* Part II.

305. See *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (“Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.” (citation omitted)); Morris Ratner, *A New Model of Plaintiffs’ Class Action Attorneys*, 31 REV. LITIG. 757, 767 (2012) (defining the relationship between class action settlement amount and costs noting a “point . . . where further efforts produce little or no return” (quoting John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 688 (1987))).

306. See, e.g., *Kesey, LLC v. Francis*, No. 06-CV-540, 2010 WL 4235857, at *5 (D. Or. July 27, 2010) (“[A]n award of attorneys’ fees would ‘compensate them for serving as a private attorney general [and] encourage future private enforcement’” (citation omitted)). These awards also fund continued litigation against non-settling defendants. *In re Asbestos Sch. Litig.*, No. 83–0268, 1988 WL 82853, at *2 (E.D. Pa. Aug. 5, 1988) (authorizing \$1 million litigation escrow fund from class settlements for use in action against non-settling defendants).

307. See Charles Silver, *Due Process and the Lodestar Method: You Can’t Get There from Here*, 74 TUL. L. REV. 1809, 1839 (2000) (“The risk of a below-average fee will . . . do more to dampen a lawyer’s enthusiasm in a large case than a small one.”).

308. See *supra* Part II.B.1.

309. Three of the firms that most frequently represented settled antitrust class actions during the studied period all have a range of practice areas. See, e.g., *Practice Areas*, COHEN MILSTEIN, <https://www.cohenmilstein.com/practice-areas> [<https://perma.cc/3BB3-5XQA>]; *Class Action Litigation Practice*, HAGENS BERMAN, <https://www.hbsslaw.com/practices/class-action> [<https://perma.cc/3BB3-5XQA>]; *What We Do*, SUSMAN GODFREY L.L.P., <https://www.susmangodfrey.com/practicess-industries/> [<https://perma.cc/W492-B6M9>].

310. See Lynn A. Baker, Michael A. Perino & Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1398 (2015) (“[I]n high-volume districts, the downward slope of the fitted values line is steeper.”).

CONCLUSION

It would be naïve to say all is well with antitrust class actions. Over fifteen years of reforms have flooded this primary form of regulatory oversight. More proposals await just on the horizon, bolstered by unsubstantiated claims that class actions need curtailing. Rather than continuing to trade on supposition, the original dataset underlying this Article allows scholars, courts, and attorneys to assess the vitality of private antitrust enforcement in the wake of the procedural reforms to date.

The overwhelming conclusion from this empirical analysis warrants alarm. Waves of procedural changes have reduced judicial access, compensation, and deterrence. Class actions continue to regulate the American economy. But the rise of arbitration and class action waivers, coupled with harsher dismissal and certification standards, have weakened private enforcement. The modern antitrust class action can right fewer wrongs than a decade ago. The number of antitrust class actions is on the decline. Expenses are on the rise. Cases are taking longer. The number of procedural hurdles is growing. All of this imposes a considerable cost to private antitrust enforcement efforts.

Procedural changes rarely trigger the excitement or media attention that changes to substantive law do. However, class action reformists, cloaked as objectors, have already shown their ability to manipulate procedure to their will. For those pinning their hopes on private antitrust suits, future work must incorporate a clear focus on anticipating and responding to objectors' procedural attacks. Otherwise, the modest resurgence of antitrust enthusiasm will be short lived.