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# THE STRATEGIC USE OF PUBLIC AND PRIVATE LITIGATION IN ANTITRUST AS BUSINESS STRATEGY

D. DANIEL SOKOL\*

## I. INTRODUCTION

One understudied area of the formative period of antitrust and of Standard Oil's conduct during this period is in the use and nature of antitrust private claims against Standard Oil. In contemporary antitrust, the ratio of private to government brought cases is ten to one.<sup>1</sup> In contrast, one hundred years ago government cases constituted nearly all antitrust cases,<sup>2</sup> and many of such cases were state cases.<sup>3</sup> On the hundredth anniversary of the *Standard Oil* decision,<sup>4</sup> the present Article uses a discussion of the antitrust private actions against Standard Oil prior to the company's court-ordered break up in 1911 as a starting point for a broader discussion about the interaction between public and private rights of action in antitrust in the modern era. Traditionally, government will bring antitrust cases to offset competitive distortions in the market either because private plaintiffs do not bring the right kinds of antitrust cases or because private actors lack the resources of government to bring good cases.<sup>5</sup> This Article suggests

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1. Daniel A. Crane, *Technology and Antitrust*, 86 TEX. L. REV. 1159, 1179 (2008).

2. See Richard A. Posner, *Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON 365, 366 tbl. 1, 371 tbl. 3 (1970).

3. James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 499-501 (1987). In the 1960s and early 1970s, total federal antitrust enforcement peaked. See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 450-51 (2003).

4. *Standard Oil Co. v. United States*, 221 U.S. 1, 1-4 (1911). For an overview of recent *Standard Oil* scholarship, see Barak Y. Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429 (2012).

5. See generally D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON

circumstances in which government not only does not correct but also actually creates the market distortion by bringing a nonmeritorious case that aids the firm's competitors rather than a case that helps consumers. In identifying this behavior, this Article combines two strands of literature—the strategic use of antitrust by private actors on the one hand and a public choice based economic theory of regulation on the other.

This Article claims that there may be a subset of cases in which private rights of action may work with public rights as an effective strategy for a firm to raise costs against rival dominant firms. A competitor firm may bring its own case (which is costly) and/or have government bring a case on its behalf (which is less costly). Alternatively, if the competitor firm has sufficient financial resources, it can pursue an approach that employs both strategies simultaneously. This situation of public and private misuse of antitrust may not happen often. As the Article will explore, it is not only a theoretical argument. This Article will provide examples of where this may have occurred both in antitrust's formative years and in its present.

Part III of this Article suggests that a public choice capture of the antitrust enforcers by the competitor firm, however, may backfire on the competitor firm. A firm that uses government to push the firm's own business agenda faces a potential principal-agent problem.<sup>6</sup> As that part will suggest, a firm cannot control government actions effectively for a number of reasons. This creates agency costs because the principal (the firm) cannot adequately bind its agent (the government). In the next part, Part IV, this Article provides discussion of the private antitrust cases against Standard Oil. It then places these private cases in the context of state government antitrust actions of that period as an example of where the strategic use of the private and public litigation strategy likely happened and where it did not. This historical examination of the public and private antitrust interface provides a window into contemporary antitrust actions in Part V for dominant firms such as Microsoft, Google, and Intel. This Article concludes that it is difficult to set up any sort of workable screens that government enforcers may utilize to reduce the opportunities to undertake such behavior.

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L. REV. 1055, 1080–85 (2010) (providing an overview of private rights).

6. See Kenneth Arrow, *The Economics of Agency*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 37, 37 (John W. Pratt & Richard J. Zeckhauser eds., 1985) (defining the agency relationship as one where "[t]he action [of the agent] affects the welfare of both the agent and another person, the principal").

## II. PUBLIC AND PRIVATE ANTITRUST—SUBSTITUTES OR COMPLEMENTS?

The law and economics literature regarding private rights of action in antitrust conceptualizes private rights of action as a binary decision of one of a complement or substitute to government enforcement. Complement in this context is value neutral and may either positively or negatively add to public enforcement. Behind this dichotomy is a broader theoretical discussion about the optimal mix of antitrust enforcement in the U.S. antitrust system. What is optimal antitrust enforcement is not sufficiently clear.<sup>7</sup> Some theoretical work suggests that private antitrust rights have a neutral effect on total antitrust enforcement.<sup>8</sup> In other theoretical models, private rights may lead to a more optimal antitrust system.<sup>9</sup> In contrast, there are those that argue against any private rights within the antitrust system because they negatively affect total antitrust enforcement.<sup>10</sup>

First, this Article provides a brief overview for the argument that private and public rights of action are substitutes. In a private rights system, an antitrust agency may not need to spend as many resources to remedy certain types of anticompetitive conduct because private litigants may serve as a substitute for any nonenforcement by the antitrust agency.<sup>11</sup> In an early work, Gary Becker and George Stigler took the view that private firms could substitute for public enforcement under conditions of optimal public enforcement.<sup>12</sup> If in fact a lawsuit creates the same interests for government as it does for the private plaintiff, then private rights can be seen as the

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7. There is a baseline problem of determining the optimal level of enforcement from which to assess departures. I presume that overly broad private rights are the departure from optimal enforcement. However, there are not good empirics to suggest what optimal enforcement would look like. I merely note that overly broad rights may lead to more costly prosecution.

8. See Jonathan B. Baker, *Private Information and the Deterrent Effect of Antitrust Damage Remedies*, 4 J.L. ECON. & ORG. 385, 386 (1988) (finding that in some situations regarding private rights, the results are the same as in the absence of antitrust); Stephen W. Salant, *Treble Damage Awards in Private Lawsuits for Price Fixing*, 95 J. POL. ECON. 1326, 1327 (1987) (finding that in certain situations, the treble-damage system yields the same results as laissez-faire capitalism).

9. See David Besanko & Daniel F. Spulber, *Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement*, 80 AM. ECON. REV. 870, 883 (1990) (finding that social welfare can increase when information is asymmetric).

10. See William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 439–42 (1985) (summarizing criticisms of private enforcement); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 596–98 (1991) (making the case against competitor suits).

11. Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 905 (2008).

12. Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 13–16 (1974) (noting, however, that because of the possibility of public malfeasance, private enforcement might still be preferred).

outsourcing of government litigation resulting from budget constraints.<sup>13</sup> In this sense, private rights are a substitute for government enforcement.

As Part III will explain in greater detail, the incentives for public versus private enforcement are in many circumstances different.<sup>14</sup> This suggests that private enforcement may be a complement rather than substitute for government enforcement. A. Mitchell Polinsky notes that what is different about public enforcement is that in a private enforcement regime, firms will litigate only when the fine revenue is greater than the cost of enforcement.<sup>15</sup> Public enforcement allows for punishment when the probability of detection otherwise would be low.<sup>16</sup> Assuming that this insight is true in most cases,<sup>17</sup> a small private firm will lack the resources to be able to effectively bring cases against larger competitors,<sup>18</sup> and so the government may step in as plaintiff to correct for a market distortion by a potential would-be monopolist.

Public enforcement may be different in more fundamental ways. The notion that a private plaintiff is a “private attorney general”<sup>19</sup> does not seem to comport with theory or practice. Financial gain often motivates private enforcement,<sup>20</sup> although in some situations, private plaintiffs may sue for injunctive relief too. Nevertheless, just because a competitor brings the claim to the government enforcer does not necessarily mean that the claim is not valid.<sup>21</sup> Private firms may have better information than the

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13. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 13 (2001) (finding that the United States, in comparison with other democracies, “is especially inclined to authorize and encourage the use of adversarial litigation to implement public policies and resolve dispute.”).

14. The follow-on cases in the Microsoft litigation had different theories of harm than the government case. WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* 78–83 (2007).

15. A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 107 (1980).

16. A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45, 46 (2000).

17. For example, one can imagine cases where the litigation costs may be asymmetric among plaintiff and defendant or where from a game theory perspective a firm may litigate in a situation even when it is costly to do so because of a future deterrent effect against other competitors.

18. See Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 9–10 (2008).

19. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987) (describing how the Clayton Act “bring[s] to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate”).

20. Ilya R. Segal & Michael Winston, *Public vs. Private Enforcement of Antitrust Law: A Survey*, 28 EUR. COMPETITION L. REV. 306, 311 (2007).

21. Harry First & Andrew I. Gavil, *Re-Framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 679, 679–83, 697–98.

government about potential antitrust violations.<sup>22</sup> Indeed, oftentimes these claims may be valid. Private firms (in our case, competitor firms) also may complain to government because they possess better information than the government and downstream consumers, and, therefore, are able to detect anticompetitive practices at an earlier stage.<sup>23</sup> These are all good reasons for private rights and for private involvement in complaints for government cases.

The primarily financially based incentive for private enforcement does not necessarily mean that public enforcement is better from a societal welfare standpoint. Public enforcement may have multiple motives. The most obvious is to remedy the anticompetitive conduct. There are other concerns as well regarding case selection and limited agency resources. Government enforcers care about shaping future antitrust doctrine. For example, private actors are less willing to take into account the potential deterrent effects of a legal action the way government enforcers will.

Most of the private rights theoretical work does not distinguish among different types of antitrust cases. The first basic type refers to a situation where private actions involve collusion, the behavior is per se illegal, and the economic consequences of the illegal behavior are easier to determine. In such cases, the issue of private rights is whether or not in conjunction with government enforcement, such rights lead to optimal deterrence rather than one where the very activity in question is anticompetitive.<sup>24</sup>

Private rights and the calculation of optimal deterrence are more difficult in situations of alleged illegal single-firm conduct. The great difficulty with unilateral conduct cases<sup>25</sup> is that the very conduct that is procompetitive may drive out competitors from business.<sup>26</sup> Antitrust can be abused under the rubric of equality of opportunities for competitor firms

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22. R. Preston McAfee, Hugo M. Mialon & Sue H. Mialon, *Private v. Public Antitrust Enforcement: A Strategic Analysis*, 92 J. PUB. ECON. 1863, 1864 (2008).

23. See Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 33–35 (1989) (stating there is no reason to think antitrust violations will be easier to detect by consumers in later lawsuits).

24. See Salant, *supra* note 8, at 1327–34.

25. This Article uses the shorthand “monopolization” for unilateral conduct although this shorthand also includes single-firm conduct not covered by Sherman Act Section 2, such as Federal Trade Commission Act Section 5, 15 U.S.C. § 45(a)(1) (2006).

26. See Louis Kaplow & Carl Shapiro, *Antitrust*, in 2 HANDBOOK OF LAW AND ECONOMICS 1073, 1210 (A. Mitchell Polinsky & Steven Shavell eds. 2007) (“It has long been believed that exclusive dealing contracts and related arrangement have the potential both to be anticompetitive and to promote efficiency.”). A rule of reason regime makes such deliberations more difficult than a per se regime. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012).

instead of policing against behavior that harms competition.<sup>27</sup> Indeed, it is difficult for agencies or courts to be able to discern the differences among pro- and anticompetitive behavior. As the District of Columbia Circuit stated in its *Microsoft* decision,

Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.<sup>28</sup>

In such cases, antitrust suits, whether public or private, may generally lead to false positives.<sup>29</sup> Private rights merely compound such concerns.<sup>30</sup> Similarly, harm to competitors is not a rationale for antitrust in case law.<sup>31</sup> However, it may be used in practice by firms looking to extract rents.<sup>32</sup> How frequent such strategic use of antitrust takes place remains an open empirical question. Treble damages may allow competitor firms to bring at best weak or at worst meritless claims to settle with dominant firms for profit to raise the costs for the dominant firms. Such cases may lead to over-enforcement of antitrust.<sup>33</sup>

Private unilateral conduct lawsuits are also difficult to win in courts. It may be that firms push government action because it may improve the likelihood of changing the dominant firm's behavior, either from bringing a case or merely from an investigation. Empirics offer some insight into private rights. Private Sherman Section 2 decisions during the 2000–2007 period totaled 539 cases; of these cases, 63.8 percent were cases brought by competitors.<sup>34</sup> In contrast, during that same period, the Department of Justice (“DOJ”) brought no new Section 2 cases but finished litigating two

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27. Donald I. Baker, *Government Enforcement of Section Two*, 61 NOTRE DAME L. REV. 898, 926–27 (1985).

28. *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

29. An aggressive prosecutor may have false positive because he is skeptical of suspects (“all are criminals”). An aggressive prosecutor also may have false positive because of hubris (overconfidence).

30. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984).

31. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

32. Rent seeking can create barriers to competition by government. However, it is also costly because of rent dissipation, where industry expends resources to gain the rent. See Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 226, 232 (1967).

33. RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 35 (1976). See also Easterbrook, *supra* note 30, at 5.

34. William F. Adkinson, Jr., Karen L. Grimm & Christopher N. Bryan, *Enforcement of Section 2 of the Sherman Act: Theory and Practice* tbl.2 (Nov. 3, 2008) (unnumbered working paper), available at <http://www.ftc.gov/os/sectiontwohearings/docs/section2overview.pdf>.

cases that it inherited from the previous antitrust leadership (*United States v. Microsoft Corp.*<sup>35</sup> and *United States v. Dentsply International, Inc.*<sup>36</sup>), while the Federal Trade Commission ("FTC") brought two new cases (*In re Rambus*<sup>37</sup> and *In re Unocal*<sup>38</sup>) and litigated a number of cases that it inherited from the previous antitrust leadership, of which some had a mix of Section 1 and Section 2 claims.<sup>39</sup> Many of the private cases can be discounted because many were non-monopolization commercial disputes onto which the lawyers had tacked a collateral Section 2 claim. However, there were a number of disputes among big companies (for example, contractual fights, licensing fights, Lanham Act advertising fights) in which the plaintiff asserted a Section 2 violation. Few of those resulted in a government review. These private statistics suggest that government enforcers on the whole are able to determine that many competitor claims are not good cases for which to bring government action.<sup>40</sup>

Given the difficulty in distinguishing "good" and "bad" unilateral conduct, what we can say about private claims is that some are good, some are bad, and determining which is which is beyond the scope of this Article. The ability of government to distinguish between good and bad claims and to pursue them for optimal antitrust as opposed to public choice concerns is the narrower set of circumstances that this Article addresses. This Article thus seeks to provide a descriptive analysis of what constitutes strategic behavior, both on the part of firms and of government, and how this may negatively affect consumer welfare. This analysis is not to suggest that such behavior is frequent, but rather is merely to identify that strategic behavior may have particularly important impact under some settings. Strategic behavior by private parties to use government has little impact when the behavior at hand is clearly anticompetitive and has little impact when the behavior is clearly not anticompetitive. Strategic behavior may

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35. *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 149–50 (D.D.C. 2002), *aff'd sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

36. *United States v. Dentsply Int'l, Inc.*, No. 99-005(SLR), 2006 U.S. Dist. LEXIS 94907 (D. Del. Apr. 26, 2006).

37. *In re Rambus, Inc.*, No. 9302, 2006 FTC LEXIS 101, at \*3–5 (FTC Aug. 2, 2006), *vacated sub nom. Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

38. *In re Union Oil Co. of Cal.*, 138 F.T.C. 1 (2004).

39. See, e.g., *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 32 (D.D.C. 1999), *revised and reaff'd in pertinent part*, 99 F. Supp. 2d 1 (D.D.C. 1999); *In re Bristol-Myers Squibb Co.*, 135 F.T.C. 444 (2003); *In re Schering-Plough Corp.*, 136 F.T.C. 956 (2003), *rev'd sub nom. Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005); *In re Biovail Corp.*, 134 F.T.C. 407 (2002); *In re Hoechst Marion Roussel, Inc.*, 131 F.T.C. 924 (2001); *In re Abbott Labs.*, No. C-3945, 2000 FTC LEXIS 65 (FTC May 22, 2000).

40. The alternative explanation that there are not sufficient resources to bring any Section 2 cases does not seem particularly strong.



have a significant impact in grey areas where the cases are not on their face not actionable by government but where they are not necessarily easy cases either.

### III. THE STRATEGIC USE OF ANTITRUST: PRIVATE RIGHTS AND PUBLIC RIGHTS FOR PRIVATE ENDS

#### A. DYNAMICS OF ANTITRUST LITIGATION

Because private plaintiffs may be competitors of dominant firms, they may utilize private litigation in order to behave strategically.<sup>41</sup> By strategic use of law, this Article means behavior that a firm undertakes to influence the legal / regulatory environment to increase its profits at the expense of its rivals.<sup>42</sup> R. Preston McAfee and Nicholas Vakkur identify seven different types of business strategies for firms using antitrust strategically in order to punish competitors: (1) extortion, (2) contractual renegotiation, (3) retribution for non-cooperative behavior, (4) as a response to an existing lawsuit, (5) as a response to prevent a hostile takeover, (6) to create a barrier to entry for competitors, and (7) to make competition from efficient competitors more difficult.<sup>43</sup> The present Article suggests that there is an additional way in which antitrust may be used strategically that should be added to this list. Strategy 8 is where private firms use government litigation to make competition from efficient competitors more difficult.<sup>44</sup>

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41. McAfee, Mialon & Mialon, *supra* note 22, at 1864.

42. DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 332–33 (2000).

43. R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of Antitrust Laws*, 1 J. STRATEGIC MGMT. EDUC. 3–4 (2004).

44. One might add a Strategy 9. In Strategy 9, which is outside of the litigation process, a competitor may lobby various parts of government to create restrictions through legislation and/or regulation as a means of benefitting itself at the expense of its rivals. See generally D. Daniel Sokol, *Limiting Anti-Competitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV. 119 (2009) (discussing the creation of public restraints in antitrust). Because of space limitations in this symposium, I do not discuss Strategy 9 in depth and merely identify it. This strategy was used against Standard Oil. Standard Oil sought permission to build an oil pipeline to transport a larger supply of oil to Texas. Competing less efficient refiners pushed for state action against Standard Oil in Texas to prevent the construction of the pipeline, which would have increase the supply of oil, even though they had supported the pipeline project before Standard Oil was to have built it. Roger M. Olien & Diana Davids Olien, *Oil Men Conspiring and Cats Making Love: The Manipulation of Anti-Monopoly Discourse for Competitive Advantage in the Domestic Petroleum Industry, 1870–1911*, 24 BUS. & ECON. HIST., Fall 1995, at 135, 142–43. In the contemporary period, a number of Wal-Mart competitors have bankrolled zoning and public relations initiatives against Wal-Mart opening stores and increasing competition in cities such as Chicago. Ann Zimmerman, *Rival Chains Secretly Fund Opposition to Wal-Mart*, WALL ST. J. (June 7, 2010), <http://online.wsj.com/article/SB10001424052748704875604575>

Strategy 8 encompasses a number of ways that private firms may use government-brought antitrust action strategically to punish more efficient rivals. This Article will provide examples of how this private extortion strategy (Strategy 1)<sup>45</sup> has been used in conjunction with Strategy 8, both historically in the *Standard Oil* litigation and in contemporary antitrust in Advanced Micro Devices' ("AMD") actions against Intel. That is, extortion as an antitrust strategy allows a firm to use government investigation as a way to get a better payoff for itself and harm its competitors in simultaneous private antitrust litigation.

Antitrust cases tend to be complex. This impacts the economics of litigation. The cost to defend antitrust claims may be significant for the firm defending them.<sup>46</sup> However, it is also expensive to bring such claims as a plaintiff. Having the government bring such claims is much cheaper than doing so as a plaintiff. Essentially, a private plaintiff may press for government action and then free ride off government victories in filing follow-on private actions.<sup>47</sup>

The different resource asymmetries among large and small firms affect the use of private rights. A firm may pursue private litigation because the expected return to the plaintiff outweighs the costs of litigation.<sup>48</sup> However, it is very difficult for small firms to expend significant resources for litigation against large firms because of the costs involved. Therefore, small firms that are not well financed are less likely to use private rights.

These asymmetries are not as one sided as they seem. The costs involved in litigation (once a plaintiff firm reaches the minimum cost threshold) create cost asymmetries that may make litigation more expensive for a defendant than a plaintiff for large-scale, complex antitrust litigation for unilateral conduct cases.<sup>49</sup> Defense-side law firms often have

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45. See Snyder & Kauper, *supra* note 10, at 551. Over time, antitrust legal doctrine has evolved to limit such concerns, such as changes to the antitrust injury doctrine. William H. Page & Roger D. Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 MICH. L. REV. 111, 112–15 (1992); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1445 (1985).

46. McAfee & Vakkur, *supra* note 43, at 3. See also Easterbrook, *supra* note 30, at 1–4.

47. See, e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 484–85 (1968).

48. See William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 250 (1985) (arguing the social costs of the strategic use of antitrust may be high); Segal & Winston, *supra* note 20, at 313 ("Thus, the plaintiff will have a strong incentive to sue even in cases in which it suffered little or no harm from the action as long as the defendant's benefit from the action is high.").

49. See David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 9–10 (1985).

higher billing rates. These firms also have an incentive to staff cases more heavily because they are often paid by the hour rather than via contingency fee. In contrast, plaintiff-side firms are less likely to waste time and more likely to operate leanly and efficiently as a result.<sup>50</sup>

In antitrust cases, the large firm defendant must produce far more documents than the plaintiff since the large firm has a larger and more multifaceted organization that can easily access potentially relevant documents. Though the small plaintiff needs to review these documents when they become available, it is less costly to review documents than to produce them since the production phase entails a much larger review of documents than those that ultimately get produced, as well as higher costs of document production. Moreover, assembling data for quantitative analyses may be more costly for a defendant, since learning the ins and outs of the data may take time, as will properly collecting and maintaining data.

## B. EXTENSIONS ON THE STRATEGIC USE OF ANTITRUST

### 1. Principal-Agent Issues in Antitrust

The strategic use of public antitrust may be conceptualized within an agency cost framework.<sup>51</sup> The basic issue in the principal-agent relationship is that the interests of the principal and agent may not be aligned. This may create problems of shirking or moral hazard on the part of the agent. The principal incurs costs because it must monitor its agents to prevent shirking or moral hazard on the part of the agent. Such problems are commonly understood throughout economic and political relationships.<sup>52</sup> Previous work has identified principal-agent issues within antitrust. One such line of principal-agent antitrust research focuses on principal-agent issues regarding antitrust agencies' relationship with Congress.<sup>53</sup> Scholars have identified a second type of principal-agent relationship within antitrust. If public and private cases are substitutes, then

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50. See Alon Klement & Zvika Neeman, *Incentive Structures for Class Action Lawyers*, 20 J.L. ECON. & ORG. 102, 104 (2004).

51. Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 304 (1983).

52. See generally Arrow, *supra* note 6. (analyzing principal-agent theory in general); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (same).

53. See M. Albert Vachris, *Federal Antitrust Enforcement: A Principal-Agent Perspective*, 88 PUB. CHOICE 223 (1996) (discussing the relationship between the Antitrust Division of the DOJ and its corresponding congressional oversight committee).

the government is the principal and private firms are agents. To get private firms to effectively take on litigation (essentially, the government outsources its litigation to private parties), the combination of treble damages plus attorney's fees provides incentive to align private interests with those of the government.<sup>54</sup>

This Article's primary theoretical contribution is to note a different sort of principal-agent problem in antitrust. It suggests that the principal-agent problem is one where a private party is the principal and the antitrust agency is the agent. That is, competitor firms that make complaints are principals and antitrust enforcers who may take up cases based upon these complaints are agents.<sup>55</sup> One can imagine a world in which a firm complains to the government against one of its competitors to raise the competitor's costs. The problem that the private firm has is that the government might decide to pursue a claim against a firm, perhaps beyond the specific issue at hand, because the case might have good precedential value or because a particular agency staffer or senior enforcer may also believe that the case would allow for his career's advancement. In this sense, one possible outcome of an investigation is that the principal-agent problem may lead to an outcome that may negatively affect business opportunities for the competitor-complainant and potentially for the industry as a whole, including the competitor-complainant.<sup>56</sup>

This scenario is not necessarily optimal for the competitor firm. The principal (competitor-complainant firm) must bear the cost of monitoring the agent's behavior to ensure compliance on the part of the agent (government). Such monitoring might include meetings with enforcers, coordination of evidence gathering, lobbying efforts, briefings for Congressional staffers to create pressure against antitrust agencies from the legislative branch, etc. The government, as the agent of the competitor-complainant, might create situations in which it enforces in a way that diverges from what the competitor firm-principal would like, as this part will discuss.

Some firms may have no choice but to use the government in implementing their antitrust strategy because changes in case law have

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54. Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 17 n.61 (1995).

55. In a number of public choice settings, the principal-agent problem is a result of free-rider problems that exist when a larger group of principals, such as voters, must monitor government agents. See Vachris, *supra* note 53, at 224. In the setting for this Article, there is a single principal but the cost of monitoring is high because the ability to monitor and shape agent behavior is difficult and costly.

56. One might measure this through stock returns or other financial indicia where enforcement transforms an industry.

made opportunities for the strategic use of private antitrust more difficult to achieve. Administrability plays a role in shaping private suits that courts allow.<sup>57</sup> Over time, the scope of private rights has narrowed in antitrust both procedurally, due to cases like *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*<sup>58</sup> and *Bell Atlantic Corp. v. Twombly*,<sup>59</sup> and doctrinally, as antitrust case law development has veered pro-defendant since the late 1970s.<sup>60</sup> The pro-defendant bias in antitrust cases, various pro-defendant legislation,<sup>61</sup> the issuance of non-antitrust decisions that impact plaintiff firms' ability to bring antitrust cases,<sup>62</sup> together with a more interventionist European Commission in abuse of dominance cases,<sup>63</sup> and the FTC's potential expansion of its powers under Section 5 of the FTC Act,<sup>64</sup> may explain how strategic use of antitrust to influence government cases may rise in subsequent years.

A sufficiently well-financed larger plaintiff can employ a strategy that uses both government and private litigation simultaneously. Though cheaper than private litigation, government litigation can still become costly to a firm because of attempts to influence antitrust enforcement (monitoring costs). Thus, public and private rights of action may be complements for well-funded competitors in particular—those that have the resources to bring their own cases, and who additionally can push for government enforcers to bring a case on their behalf against a competitor firm.

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57. See Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 699 (1975) ("Courts in predatory pricing cases have used such empty formulae as 'below cost' pricing, ruinous competition, or predatory intent in adjudicating liability.").

58. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986).

59. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007).

60. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 37 (2005) (describing the transformation of the "Harvard School" position on antitrust).

61. See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, sec. 4, § 1332(d), 119 Stat. 4, 9 (requiring federal district court to decline to exercise jurisdiction if two-thirds of the class action plaintiffs are from the state in which the action was originally filed).

62. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (holding that the Federal Arbitration Act preempts California's judicial rule stating that a class arbitration waiver is unconscionable); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560 (2011) (reversing grant of class certification because evidence presented by members of the putative class failed to present "significant proof" that the company had a general policy of discrimination).

63. See generally FRANCESCO RUSSO ET AL., *EUROPEAN COMMISSION DECISIONS ON COMPETITION: ECONOMIC PERSPECTIVES ON LANDMARK ANTITRUST AND MERGER CASES* 113–97 (2010) (analyzing and classifying all European Commission decisions regarding abuse of dominance cases from 1962 through 2009).

64. 15 U.S.C. § 45(a)(1) (2006).

## 2. The Strategic Use of Antitrust and Public Choice in Federal-level Antitrust

Although it does seem that most federal enforcement is primarily motivated by an attempt to reach the “public good” based on efficiency concerns, this does not mean that antitrust enforcers are not subject to public choice concerns about promoting themselves or their agencies.<sup>65</sup> Antitrust enforcers often fixate on bringing “big cases” against well-known firms with market power. This plays into the motivations of competitor firms to use government antitrust enforcement for private ends. These big cases are high-profile cases because they are brought against large firms that will receive maximum exposure—GM, IBM, Microsoft, Intel, breakfast cereal manufacturers, and Google are just some examples of the most high profile cases that DOJ and FTC have investigated. Many of these cases led nowhere.<sup>66</sup>

The publicity involved with high-profile cases is tremendous. Antitrust enforcers may be prone to initiate such cases, even if these do not constitute the best use of agency resources.<sup>67</sup> Competitor firms can play to this bias on the part of enforcers to fixate on the big case. That many of these big cases were ultimately abandoned because they were not good cases (often after a change in administration when the political benefits have already been reaped) suggests that the push for the big case presents opportunities for competitors to exploit antitrust enforcers. In this small set of circumstances, public choice concerns are more likely to be pronounced relative to other antitrust cases.<sup>68</sup> These public choice concerns on the part of antitrust agencies allow for the strategic use of antitrust by competitor firms.

One could argue that this focus on the “big case” has preoccupied antitrust with regard to the oil industry from the time that *Standard Oil* was brought to the present. Whenever the price of oil goes up, congressmen expect to see “action” in terms of antitrust investigations.<sup>69</sup> Under such a

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65. See Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884, 888–89 (1986).

66. William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 912–13 (2009)

67. *Id.*

68. See Malcolm B. Coate, Richard S. Higgins & Fred S. McChesney, *Bureaucracy and Politics in FTC Merger Challenges*, in THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE (Fred S. McChesney & William F. Shughart II, eds. 1995) (assessing various determinants of antitrust enforcement).

69. Timothy J. Muris & Bilal K. Sayyed, *The Long Shadow of Standard Oil: Policy Petroleum, and Politics at the Federal Trade Commission*, 85 S. Cal. L. Rev. 843, 848 (2012).

situation, it should not be ruled out that the FTC, although an independent agency, may not be immune from such political pressure. One way to read the lower level of concentration of merger challenges at the FTC for oil deals<sup>70</sup> might be as a response to political pressures that consolidation in this area may take.<sup>71</sup>

### 3. The Strategic Use of Antitrust and Public Choice in State-Level Antitrust

Public choice concerns in antitrust may occur not only at the federal level, but also at the state level of government enforcement. There is a lack of empirical evidence showing whether state antitrust enforcement is helpful or harmful.<sup>72</sup> Some articles make a case against state antitrust enforcement,<sup>73</sup> while other articles argue the effectiveness of such enforcement.<sup>74</sup> This Article merely makes the point that the type of capture issues present at the federal level are even more pervasive at the state level. Capture is more likely at the state level than at the national level because the cost of capture is lower at the state level.<sup>75</sup> State competitors have more direct and concentrated influence.<sup>76</sup> Based on a public choice model, states may be more likely to diverge from the federal government in terms of antitrust enforcement.

One might make the case that states will be more aggressive to distinguish themselves from federal enforcement. This may be particularly true in cases in which both state and federal enforcers are plaintiffs. Antitrust agency enforcement at the state level is through the state attorney general's ("AG") Office. There is executive and legislative pressure, or sometimes the impact is more direct where the state AG is an elected position, and in some cases, the "AG" seems to stand for "aspiring

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70. Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process: 1996–2003*, 73 ANTITRUST L.J. 531, 543 (2006).

71. Muris, *supra* note 69, at 848.

72. See, e.g., Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99, 99 (2005); Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, in COMPETITION LAWS IN CONFLICT 252, 263 (Richard A. Epstein & Michael S. Greve eds., 2004).

73. See, e.g., Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877, 878 (2003) (arguing that the State's involvement in the *Microsoft* case lengthened the lawsuit, complicated the settlement process, and increased litigation costs and legal uncertainty).

74. See, e.g., Harry First, *Modernizing State Antitrust Enforcement: Making the Best of a Good Situation*, 54 ANTITRUST BULL. 281, 297–301 (2009).

75. See John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV., 713, 727 (1986).

76. Hahn & Layne-Farrar, *supra* note 73, at 880.

governor.”<sup>77</sup>

Where state enforcement tends to add the most value are in cases of local concern, such as local cartel cases or smaller mergers that might be overlooked by antitrust enforcers.<sup>78</sup> However, both at the time of *Standard Oil* and today, states often become involved in complex cases involving national firms (for example, Microsoft and Intel) because the political payoff for aggressive antitrust against such firms is significant. This seems to have been just as true one hundred years ago as it is today for purposes of antitrust.

There is a second reason that state enforcement is different from federal antitrust enforcement—a resource mismatch. State antitrust enforcers have fewer resources than do federal enforcers. Because states have fewer resources than do federal enforcers, they may also like more restrictive per se rules even when such rules have been superseded by the prevailing economic thought.<sup>79</sup> As a result, different enforcement at the state level may not be better enforcement. Given the size and sophistication of federal agencies and their reliance on Ph.D. economists, federal agencies may be better suited for bringing single-firm conduct cases against dominant firms than the states.

#### 4. Impact of Case Selection

The impact of using the government to pursue private ends may have both intended and unintended effects. Based on a government investigation, filed case, and/or litigated case, a dominant firm is likely to be affected in its business strategy. For competitor firms, such an outcome is a “win” if government involvement forces changes that hurt the dominant firm and improve the business situation of the smaller firm, regardless of the overall effect on consumer welfare in an immediate time setting. Such an impact might be to end certain types of conduct by the dominant firm, such as putting an end to tying agreements or bundled discounts. However, the impact may be more far reaching—the case may alter the future business strategy of the dominant firm.<sup>80</sup> The welfare effects of enforcement will, of

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77. Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143, 200 n.278 (2009).

78. Sokol, *supra* note 5, at 1089–90.

79. See, e.g., Douglas J. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. COMPETITION L. & ECON. 427, 430 (2005) (providing the example of divergent state and federal enforcement on vertical restraints).

80. See William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 678 (1983) (arguing that optimal antitrust penalty set at net harm encourages efficient behavior in the long run).



course, depend on whether or not the antitrust case was a good one from the perspective of consumer welfare.

A significant decision also may have industry-wide impact beyond that of the dominant firm. The antitrust decision may negatively impact innovation or business dealings in the entire industry. There also may be a ripple effect going forward on the kinds of cases or conduct that firms may bring as they transition from smaller rivals to dominant firms themselves, or on the type of cases that government may bring against them.

Antitrust cases can impact firms, industries, and overall antitrust case law in at least four ways. A description of the different effects of cases explains why motivations for bringing cases differ among antitrust enforcers and competitor firms, leading to a principal-agent problem. First, an antitrust case may have immediate economic and business strategy effects on the firms involved in litigation. For instance, Intel's 2010 consent decree with the FTC restricted Intel's conduct with regard to exclusivity- and loyalty-based discounts. Though the decree allows for Intel to undertake a number of possible business strategies, it prohibits outright other strategies. For example, the decree prevents Intel from conditioning any benefit on a customer's agreement to use or purchase Intel's products exclusively.<sup>81</sup> Both competitor firms and antitrust enforcers are very concerned about these immediate effects.

A second impact of an antitrust case for firms is the future economic and business strategy effects on these firms. After the District of Columbia Circuit found that Microsoft had illegally monopolized, attempted to monopolize, and tied in violation of Sherman Act Sections 1 and 2 in the operating system market, Microsoft ultimately entered into a consent decree with the DOJ and a number of state attorneys general.<sup>82</sup> As a result of Microsoft's inability to bundle products together, it could not automatically offer antivirus protection to its customers. Moreover, Microsoft could not prevent middleware providers from adding their programs to every new computer. This impacted Microsoft because all of the third-party software subsequently added to computers slowed these computers down.<sup>83</sup> Frustration with slower computers may have caused

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81. *In re Intel Corp.*, No. 9341, 2010 FTC LEXIS 82, at \*19 (FTC Oct. 29, 2010).

82. Modified Final Judgment at 1, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. Sept. 7, 2006), 2006 U.S. Dist. LEXIS 76862, at \*4 (amending the United States's and settling states' final judgment entered on Nov. 12, 2002).

83. Ed Bott, *How a Decade of Antitrust Oversight Has Changed Your PC*, ZDNET (June 8, 2010, 11:54 PM), <http://www.zdnet.com/blog/bott/how-a-decade-of-antitrust-oversight-has-changed-your-pc/2191?tag=content;search-results-rivers>.

some consumers to switch to non-Microsoft operating systems, which benefited these competing firms at the expense of Microsoft. The inability to create such bundles or to exclude competitors because of antitrust concerns meant that Microsoft could not push the boundaries of potential business strategies going forward. Microsoft also seems to have become less innovative as a result of its antitrust legacy. The possibility of repeated, long, and difficult depositions for senior managers and software engineers may make such key employees less likely to propose ideas that might subject them and the company once again to the antitrust microscope. Linked to this idea that antitrust remedies may have chilled Microsoft is the fact that the market no longer sees Microsoft as one of the most innovative firms relative to competitors like Google, Apple, Twitter, and Facebook.<sup>84</sup>

One might argue that while antitrust enforcers think a great deal about future effects on the dominant firm's business strategy, they are less fixated on this than competitor firms. After all, for competitor firms this may well be the difference between the life and death of their firm. Moreover, in most cases, antitrust enforcers will think about future effects on the firm in the context of what is good for competition, rather than as retribution against a dominant firm.<sup>85</sup>

A third impact of an antitrust case is the future economic and business strategy effects on the industry as a whole. In its time, the decision to break up the American Telephone and Telegraph Company ("AT&T")<sup>86</sup> fundamentally transformed the telecommunications sector. The AT&T case

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84. See *The World's 50 Most Innovative Companies 2011*, FAST CO., <http://www.fastcompany.com/most-innovative-companies/2011/> (last visited Mar. 8, 2012). But see *The 50 Most Innovative Companies 2010*, BLOOMBERG BUSINESSWEEK, [http://www.businessweek.com/interactive\\_reports/innovative\\_companies\\_2010.html](http://www.businessweek.com/interactive_reports/innovative_companies_2010.html) (last visited Mar. 8, 2012) (ranking Microsoft behind Apple and Google in innovativeness, but as the third most innovative company overall for 2010).

85. One exception to what motivates enforcers (something that suggests retribution) occurred in the wake of the initial European Court of First Instance decision against Microsoft that affirmed the European Commission's decision against Microsoft. Then-Competition Commissioner Nellie Kroes was quoted by the New York Times:

Kroes highlighted that Microsoft had 95 percent of the world market for desktop operating systems, a figure she said she would like to see fall. She said that, while you could not "draw a line" and say exactly 50 percent was correct, "a significant drop in market share is what we would like to see."

Stephen Castle & Dan Bilefsky, *Microsoft Case Could Make EU "Litigation Capital of the World,"* N.Y. TIMES (Sept. 17, 2007), <http://www.nytimes.com/2007/09/17/business/worldbusiness/17iht-antitrust.5.7539436.html>.

86. *United States v. AT&T Co.*, 552 F. Supp. 131, 226–27 (D.D.C. 1982) (consent decree), *aff'd sub nom.* *Maryland v. United States*, 460 U.S. 1001 (1983); *modified sub nom.* *United States v. W. Elec. Co.*, 900 F.2d 283 (D.C. Cir. 1990) (modifying decree to lift certain restrictions); *modified*, *United States v. W. Elec. Co.*, 890 F. Supp. 1 (D.D.C. 1995) (modifying decree to allow offers of long-distance service to cellular customers).

was brought in the mid-1970s by the DOJ as a response to monopolization by the firm. The breakup of AT&T had a significant effect on the telecommunications sector in terms of the structure and dynamics of the U.S. local and long distance telecommunications markets.<sup>87</sup> Some argue that the decision also speeded up the roll-out of internet and wireless services.<sup>88</sup> This impact-of-industry effects concerns enforcers much more than competitor firms because enforcers are more motivated to think long term about antitrust remedies and competition in the market.<sup>89</sup>

The fourth impact of cases is the future legal / case law effects in terms of what cases are brought to courts going forward. In this sense, from a systemic standpoint, antitrust agencies have a better sense than private plaintiffs of how case selection may impact the broader development of antitrust case law.<sup>90</sup> The effect of a particular case will impact future cases. It creates a path dependence based on the sequence of cases that get decided. Cases specifically on point in certain industries may create greater business certainty because of direct applicability to that industry. There may, however, be broader effects outside of that particular industry. For example, *Aspen Skiing v. Aspen Highlands Skiing Corp.*,<sup>91</sup> a case involving a refusal to deal in the ski industry, created case law effects to regulated industries such as electricity and telecommunications because of the way in which refusals to deal can impact regulated industries and the licensing of intellectual property.<sup>92</sup>

Federal enforcers may care about cases for this reason especially, even

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87. RICHARD A. POSNER, ANTITRUST LAW 111 (2d ed. 2001) (“[I]t is strongly arguable that the divestiture of AT&T was the most successful antitrust structural remedy in history.”). *But see* Robert W. Crandall, Jeffrey A. Eisenach & Robert E. Litan, *Vertical Separation of Telecommunications Networks: Evidence From Five Countries*, 62 FED. COMM. L.J. 493, 530 (2010) (arguing that the breakup of AT&T was a “failure” that “slowed the development of competition while imposing significant efficiency costs”).

88. Christopher S. Yoo, *The Enduring Lessons of the Breakup of AT&T: A Twenty-Five Year Retrospective*, 61 FED. COMM. L.J. 1, 3 (2008) (citing Roger Noll).

89. On the mixed success of antitrust remedies, see RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE (2007). On antitrust remedies and structural break-up, see Peter C. Carstensen, *Remedies for Monopolization from Standard Oil to Microsoft and Intel: The Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of Its Use*, 85 S. CAL. L. REV. 815, 824–40 (2012).

90. Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 714 (2011) (“[P]ublic antitrust enforcement is much more likely than private litigation to avoid claims that will be prone to judicial errors, interfere with regulation, or fail to yield net benefits over regulation.”).

91. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

92. Howard A. Shelanski, *Unilateral Refusals to Deal in Intellectual and Other Property*, 76 ANTITRUST L.J. 369, 369, 372–73 (2009).

though case development is of little consequence to many competitor plaintiffs. One example of the doctrinal significance of a case is that of *Otter Tail Power Co. v. United States* in 1973.<sup>93</sup> *Otter Tail* involved a small public utility company and whether or not the Federal Power Act created antitrust immunity for the company's refusal to supply either interconnection to distribution facilities or energy to competing municipal utilities. The Supreme Court found that an overlap of authority between sector regulation and antitrust did not preclude antitrust liability for anticompetitive conduct.<sup>94</sup> Even though this case involved a relatively small industry player, it was legally significant. As Bill Kovacic argues, *Otter Tail* had tremendous impact in the doctrinal development of antitrust in the area of regulated industries and served as one of the key building blocks in the case against AT&T.<sup>95</sup> That is, without *Otter Tail*, there could have been no AT&T breakup decision. Agencies are therefore more motivated than private firms to pursue a case for its impact upon future case law.

#### IV. STANDARD OIL AND ISSUES OF PUBLIC AND PRIVATE RIGHTS OF ACTION IN THE FORMATIVE PERIOD OF ANTITRUST

##### A. AN OVERVIEW OF THE DYNAMICS OF PRIVATE RIGHTS IN ANTITRUST DURING THE FORMATIVE PERIOD

The drafters of the Sherman Act always intended for there to be private rights, even if they did not foresee such rights being used effectively (at least in consumer cases).<sup>96</sup> During antitrust's early period, the Sherman Act was adaptive in the sense that common law doctrines involving business torts, contracts, and trade restraints became folded within the emerging jurisprudence of antitrust. Pre-antitrust doctrines on restraints of trade played an important part of nineteenth-century jurisprudence.<sup>97</sup> Yet, the Sherman Act was not a direct copy of the previous common law legal regime.<sup>98</sup> The private rights regime in the United States

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93. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

94. *Id.* at 373–74.

95. Kovacic, *supra* note 66, at 908.

96. Hovenkamp, *supra* note 23, at 23–27.

97. See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 77–83 (1965); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 309 (1989). On contracts and antitrust, see generally Alan J. Meese, *Standard Oil as Lochner's Trojan Horse*, 85 S. CAL. L. REV. 783 (2012).

98. William L. Letwin, *The English Common Law Concerning Monopolies*, 21. U. CHI. L. REV. 355, 384–85 (1954).

against restraints of trade had its origin in British and American common law that predated state and federal antitrust acts.<sup>99</sup>

With regard to the private cases against Standard Oil (two cases that had antitrust claims and two that had business tort claims with an antitrust flavor to them), one of the private cases fits into the model of the strategic use of antitrust by competitors through private and public litigation.<sup>100</sup> However, this Article discusses all of the private cases because the legal literature has not explored them. It is difficult from a research standpoint to find private actions during this era. Complicating matters has been poor record collection and maintenance by state courts: case records may not go far back enough, unpublished opinions and trial records of courts of a certain level may no longer exist, or natural disasters (fire, in the case of Ohio records) may have destroyed case records. The published private cases and trial records therefore enrich our understanding of private antitrust and its implementation during antitrust's early years. What is not clear is if these cases are representative of all potential cases.<sup>101</sup> There may well be other private trial court cases that were never reported. Richard Posner's seminal *Statistical Study of Antitrust Enforcement* shows that there were very few reported private antitrust cases at all before 1950—only fourteen total before 1905.<sup>102</sup> In his study, he used the data provided from a 1966 senate hearing<sup>103</sup> that found only one private case against Standard Oil—*Rice v. Standard Oil Co.*<sup>104</sup> However, a search of all reported cases reveals that there was a second private antitrust case against Standard Oil, *Kevil v. Standard Oil Co.*<sup>105</sup>

Two other private cases from this period—*Standard Oil Co. v. Doyle*<sup>106</sup> and *Dunshee v. Standard Oil Co.*<sup>107</sup>—can be framed as antitrust

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99. May, *supra* note 3, at 498–99.

100. See *infra* Part IV.B.

101. See Christopher R. Leslie, *Revisiting the Revisionist History of Standard Oil*, 85 S. Cal. L. Rev. 573 (2012) (detailing the legacy of the decided Supreme Court case only).

102. Posner, *supra* note 2, at 371 tbl.3.

103. *Nolo Contendere and Private Antitrust Enforcement, Hearings on S. 2512 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 89th Cong., 2d Sess., app. I, 180–324 (1966).

104. *Rice v. Standard Oil Co.*, 134 F. 464 (C.C.D.N.J. 1905).

105. *Kevil v. Standard Oil Co.*, 8 Ohio N.P. 311, 311 (Super. Ct. 1900) (overruling a demurrer to a contract enforcement claim “that if plaintiff would abandon his [oil] business, [Standard Oil] would provide him with employment in one of its establishments within a reasonable time thereafter, and would pay him a reasonable salary for his services, and that until the defendant could provide such employment it would pay to plaintiff the sum of nine dollars a week”).

106. *Standard Oil Co. v. Doyle*, 82 S.W. 271 (Ky. Ct. App. 1904).

107. *Dunshee v. Standard Oil Co.*, 126 N.W. 342 (Iowa 1910).

cases but were not pleaded as such.<sup>108</sup> As with the introduction of any new legal regime, there was some uncertainty as to the scope of coverage and the contours of the new antitrust system.<sup>109</sup> Some earlier private contracts and torts cases of that time may be viewed as ones that implicated broader competition concerns. One can imagine that during an early period of a new law, plaintiffs (and judges) might have felt more comfortable framing cases under traditional common law claims instead of as antitrust claims.<sup>110</sup>

A second issue that affected the use of antitrust private rights in the formative period is a function of the development of antitrust procedural rights. The mechanisms of litigation were different in the formative years of antitrust than those available at present. The class action mechanism of antitrust that is so common today<sup>111</sup> was unknown in the early period. Although class actions were formally part of the original 1938 Rules of Federal Civil Procedure,<sup>112</sup> private class action antitrust cases did not occur frequently until the electrode cartels began the plaintiff-side follow-on class action litigation antitrust revolution; the more lenient class action requirements implemented in the late 1960s Federal Rules of Civil Procedure further contributed to the frequency of private class action antitrust cases.<sup>113</sup> Though nobody to date has written a definitive history of the antitrust plaintiff movement, there are a number of factors that explain the rise of this movement. Contingent fee agreements allowed for the funding of present and future cases.<sup>114</sup> Today, antitrust plaintiffs' firms work like venture capitalists—they share in risk, time, and finances.<sup>115</sup> Moreover, the opt-out mechanism of Rule 23 had an important impact

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108. See *infra* Part IV.B.

109. See, e.g., *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910) (limiting the rights of stockholders to sue for competitive injury from corporations).

110. See Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2176 (2002) (noting that judges were reluctant to change their worldview from common law traditions from the 1890s to 1930s).

111. See Roger D. Blair & Christine A. Piette, *Antitrust Injury and Standing in Foreclosure Cases*, 31 J. CORP. L. 401, 405–09 (2006) (describing the antitrust class action against Verizon).

112. Fed. R. Civ. P. 23 (1938).

113. See John M. Connor, *Optimal Deterrence and Private International Cartels* 5 & n.12 (Apr. 9, 2006) (unnumbered working paper), available at <http://ssrn.com/abstract=787927>.

114. On the history of contingency fees generally, see Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261 (1998). On the dynamics of antitrust contingency fees, see K. Craig Wildfang & Stacey P. Slaughter, *Funding Litigation*, in THE INTERNATIONAL HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW 220, 223–26 (Albert A. Foer & Jonathan W. Cuneo eds., 2010).

115. The analogy is not exact. Lawyer financing is an inefficient alternative to outside financing. The business is similar to venture capital, but the financing model is not because of regulation. See Bruce H. Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169, 1210–15 (2011).

because it allowed large companies with deep pockets to act as plaintiffs.<sup>116</sup> This also had the effect of adding a number of plaintiff-side antitrust firms that focused on opt-outs in class actions.

Plaintiff-side antitrust firms were formed by a number of legal entrepreneurs, such as Joe Alioto in San Francisco and Joe Kohn in Philadelphia, who were able to exploit the legal rules and make money from a plaintiff-side practice. They gradually developed firms (and others spun off from their firms); Philadelphia and San Francisco were early hubs of plaintiff-side antitrust, with later expansion to New York, D.C., and Chicago, and to a lesser extent elsewhere.<sup>117</sup> A number of plaintiff-side securities law firms also undertook antitrust work, as the same skill set in class actions for securities translated well to antitrust. If one area of law was less busy, it allowed for another area of law to serve as a fallback for class action work.

In business-versus-business cases, there were cultural limitations based on established social norms to bringing antitrust suits, much the same way that there were not hostile takeovers until much later in U.S. history.<sup>118</sup> However, the 1960s did see the beginning of competitor-based antitrust cases, which were facilitated by cases like *Poller v. CBS*<sup>119</sup> and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*<sup>120</sup>

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116. See ABA SECTION OF ANTITRUST LAW, ANTITRUST CLASS ACTION HANDBOOK 95 (2010). On the economics of opt outs, see generally David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 GEO. WASH. L. REV. 542 (2011) (discussing when opt-out rights should be afforded based on equality, efficiency, and fairness).

117. Many of the plaintiff-side antitrust lawyers were Jewish. Discussions with veteran plaintiff side-lawyers provide at least three explanations for a highly Jewish representation within plaintiff-side antitrust vis-à-vis the overall antitrust bar: (1) Plaintiff-side work provided a sense of social justice ("tikkun olam"), which was valued culturally and also played to the outsider status of Jews within America of the time; (2) Jews were excluded from traditional defense side "white shoe" law practices based on overt religious discrimination; and (3) Jewish lawyers came from a culture that valued entrepreneurship overall. These explanations are not mutually exclusive and the history of the antitrust plaintiff's bar and of a history of Jews in this area of law are worthy of in-depth scholarship.

118. RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 38 (2d ed. 1995) ("Until 1975, no major investment banking firm would participate in a hostile takeover attempt. But once Morgan Stanley, the most conservative of the leading firms, legitimized hostile takeovers by participating in a hostile tender offer for International Nickel in 1975, the conduct of parties to acquisitions moved farther and farther from the image of 'gentlemen' conducting business in a restrained and courteous fashion. Increasingly, the dominant metaphor was war . . .").

119. *Poller v. CBS, Inc.*, 368 U.S. 464 (1962).

120. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

B. *STANDARD OIL* AND PRIVATE RIGHTS

Whether or not the four decided cases involving Standard Oil for which there are published decisions constitute the entire universe of cases filed or are even representative of all private antitrust cases in which Standard Oil was a defendant is not clear. There are additional research limitations to drawing overly broad inferences regarding early private rights in antitrust. The cases themselves are rather short and do not provide sufficient detail about the underlying conduct and the extent of the evidence that was provided to the trial court. Trial records of the court cases do not exist for any of the four decided cases. However, an in-depth examination of two of them (*Dunshee* and *Rice*) allows for examples to emerge of an instance in which the case against Standard Oil did not yield government action where there was no government enforcement (*Dunshee*), and a case in which private action worked together with government enforcement from a strategic antitrust perspective (*Rice*), what this Article earlier termed Strategy 8.

The private cases against Standard Oil give a sense of the types of cases that made it to the decision stage among early private antitrust cases. The first decided private case in which Standard Oil was a defendant was *Standard Oil Co. v. Doyle*.<sup>121</sup> In this case, Doyle successfully alleged that Standard Oil had conspired with two individuals to damage Doyle's business as an oil merchant. The claims were based on a business tort claim to drive Doyle out of business through harassment. There was also a claim of Standard Oil's interference with Doyle's business opportunities in Lexington, Kentucky, such as through offering cheaper oil or through exclusive output contracts. The evidence was conflicting.<sup>122</sup> Maybe Standard Oil was an efficient competitor, or maybe the evidence suggested a predatory strategy akin to the general claims of popular accounts of the time, such as those by Ida Tarbell.<sup>123</sup> The trial record is not available and the decision lacks specific, in-depth analysis of the claim. On appeal, Standard Oil questioned whether the evidence that was submitted to a jury should have been allowed by the court. The court on appeal affirmed the lower court's finding against Standard Oil.<sup>124</sup>

The second case, *Dunshee v. Standard Oil Co.*,<sup>125</sup> had a similar set of circumstances. The allegations were that Standard Oil tried to lure

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121. *Standard Oil Co. v. Doyle*, 82 S.W. 271 (Ky. Ct. App. 1904).

122. *Id.* at 272–73.

123. 1 IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* 188 (1904).

124. *Doyle*, 82 S.W. at 275–76.

125. *Dunshee v. Standard Oil Co.*, 126 N.W. 342 (Iowa 1910).



customers of Dunshee and that Dunshee went out of business as a result. The lower court found in favor of Dunshee. On appeal to the Iowa Supreme Court, the court found that there was sufficient evidence to submit the case to the jury and therefore the court affirmed the jury's judgment in favor of Dunshee.<sup>126</sup>

One element that makes reconstructing a full analysis of the events in *Dunshee* difficult is the admission of the clerk of Standard Oil that he had not retained financial evidence involving the facts of the case, claiming that he had been under the belief that any suit by Dunshee had been disposed of, even when there was no such indication of final settlement of the underlying business litigation.<sup>127</sup>

Nevertheless, an examination of the trial record in *Dunshee* provides some insights into the rationale for private action. Crystal Oil (for which Dunshee had bought up the rights as a creditor) was a local retailer that sold oil from tank wagons within the Des Moines market. Standard Oil had been very active in the oil wholesale business, and Crystal Oil was one of its customers. Starting in 1898, however, Standard Oil made the business decision to vertically integrate and become active in both wholesale and retail for oil in the Des Moines market.<sup>128</sup>

Standard Oil entered the market in part because of a commercial dispute with Crystal. Crystal had sought to renegotiate its terms with Standard Oil such that Standard Oil would provide it with more favorable rates than its other retail clients (allowing Crystal to keep its profit margin higher).<sup>129</sup> Crystal switched its wholesale purchases from Standard Oil to Paragon Oil but at no price discount from the Standard rate.<sup>130</sup> Standard Oil wanted Crystal to agree to an all-or-nothing supply contract. Crystal refused and switched suppliers.<sup>131</sup> In the last two years of its business operations, Crystal competed with Standard Oil in the retail market for oil and gasoline in Des Moines. Within two years of beginning retail competition with Standard Oil, Crystal was bankrupt.<sup>132</sup>

The primary claim that Dunshee made was a traditional business tort

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126. *Id.* at 343-44.

127. Appellant's Abstract of Record at 12 (statement of E.E. Thomas), *Dunshee v. Standard Oil Co.*, 126 N.W. 342 (Iowa 1910) (on file with author).

128. *Id.* at 24, 28 (testimony of A.L. Clinite).

129. *Id.* at 82 (testimony of M. Storer).

130. *Id.* at 30 (testimony of A.L. Clinite).

131. *Id.* at 35-36 (testimony of A.L. Clinite).

132. *Id.* at 2-3 (plaintiff's trial court petition).

claim of interference in its business by Standard Oil.<sup>133</sup> Dunshee claimed that Standard Oil's salespeople would try to solicit the business of Crystal's clients. One part of this allegation involved the use of switching a customer's card. If the customer had a green card in its window, the customer signaled that it was a Crystal client to be serviced with oil; if it had a red card, it was to be serviced by Standard Oil. In some instances, Dunshee alleged that the Standard Oil employees switched the cards. In other situations, Standard Oil salespeople aggressively talked to Crystal's clients to have them switch suppliers.<sup>134</sup>

Perhaps one reason that the jury found in favor of Dunshee was how the plaintiff's lawyer put the dispute in populist terms: "It is an individual that is possessed of wealth like the Standard Oil, that is possessed of its power to override the interests of others and take their property away from them whether they will or no."<sup>135</sup>

One of the claims that Dunshee made in its initial petition in the case in 1900 was that as a result of the competition with Standard Oil and Crystal's exit from the market, Standard Oil had been able to raise prices.<sup>136</sup> Essentially, Dunshee had made a claim of predation against Standard Oil in which Standard Oil had been able to recoup its losses through monopolistic pricing after the successful predation. In its demurrer to the petition, Standard Oil argued that the reason that it had been able to price below Crystal was because it was the most efficient competitor and it had certain efficiencies through vertical integration.<sup>137</sup> Testimony by the plaintiff's chief witness, A.L. Clinite, noted that in the early 1890s there was significant competition in the oil retail business, primarily from groceries. The market consolidated by the late 1890s. At no point did Crystal sell below Standard Oil, with the difference in price between one to three cents.<sup>138</sup> Yet, at various points, Crystal tried to meet the competition in terms of price.<sup>139</sup> During the trial, one fact in dispute was the profitability of Crystal.<sup>140</sup>

In question and answer with his own counsel, Clinite made the allegation of predation but then destroyed the basis for his own claim. First,

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133. *See id.*

134. *Id.* at 72–74 (deposition of James Smith).

135. *Id.* at 102 (closing argument of Judge Cole).

136. *Id.* at 3 (plaintiff's trial court petition).

137. *See id.* at 5 (defendant's trial court demurrer) (asserting that defendants could reduce the price of the commodity in which they are engaged in selling at any time).

138. *Id.* at 24, 28–29 (testimony of A.L. Clinite).

139. *Id.* at 29 (testimony of A.L. Clinite).

140. *Id.* at 97–98 (rebuttal testimony of A.L. Clinite).

Clinite noted that prices increased three cents after Crystal exited the market. Then, however, Clinite noted that within a year Standard Oil had exited the retail market altogether.<sup>141</sup> If there were a profit to be made, especially a monopoly profit, it would not be rational for Standard Oil to exit the market within a year.

If the antitrust case against Standard Oil based on Dunshee's allegations were strong, one might suspect that the State of Iowa might have brought a claim against Standard Oil. During this same time period, the state of Iowa did bring a case against Standard Oil. The case, *State v. Standard Oil Co. of Indiana*,<sup>142</sup> made its way to Iowa's Supreme Court on appeal the year after *Dunshee* was decided. The case involved price discrimination of petroleum by Standard Oil across towns located in different counties under Iowa's unfair competition statute. Iowa lost the case both in the lower court and in the Iowa Supreme Court based on the fact that the indictment against Standard Oil did not support the finding of any offense in the county in question (Lyon).<sup>143</sup> The fact that there was no parallel state action against Standard for the conduct against Dunshee suggests that the state, which would have been aware of Dunshee's case through press reports and the Iowa Supreme Court case, did not believe that the case against Standard Oil was strong for a finding of some sort of unfair competition claim.<sup>144</sup>

The first antitrust-specific private case to be decided in which Standard Oil was a party was *Kevil v. Standard Oil Co.*<sup>145</sup> Though decided on antitrust grounds, the case did not implicate an antitrust abuse by Standard Oil in terms of illegal conduct through some sort of monopolization on the part of Standard Oil. The issue for the Superior Court of Cincinnati was an 1898 contract between Kevil and Standard Oil. The contract provided that if Kevil abandoned his competing business, Standard Oil would hire him once a job became available. In the meantime,

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141. *Id.* at 27 (testimony of A.L. Clinite).

142. *State v. Standard Oil Co. of Indiana*, 129 N.W. 336 (Iowa 1911).

143. *Id.* at 338 ("Proof of charging a lower rate in some other community would not support the allegation of an unfair discrimination for purpose of destroying the business of a competitor and creating a monopoly in Doon. It is clear to us that the indictment was drawn under an entire misapprehension of the purpose of the statute, which, as above indicated, was not to prevent injury to the consumer by charging too much, but injury to the public by stifling competition and creating a monopoly, although for the time being the sale at the lower rate might have been to the consumer's advantage.").

144. The Iowa antitrust statute was passed in 1909. *See* Act of Apr. 12, 1909, ch. 225, § 2, 1909 Iowa Acts 204.

145. *Kevil v. Standard Oil Co.*, 8 Ohio N.P. 311 (Super. Ct. 1900).

Standard Oil would pay Kevil nine dollars a week. After Kevil indeed sold off his business, Standard Oil paid him his nine dollars a week. However, after some time Standard Oil refused to pay him any further and the promised job did not materialize.<sup>146</sup> Standard Oil argued that Kevil could not recover under the contract because the agreement in question was nullified by Ohio's antitrust law. The argument was that because the contract led to a combination, it would be prohibited under the state antitrust law. Judge Smith, citing *Addyston Pipe & Steel Co. v. United States*,<sup>147</sup> noted that what was at issue in the contract between Kevil and Standard Oil was merely an ancillary restraint regarding the scope of business and the territory related to the restraint.<sup>148</sup> As such, the contract was not a forbidden combination under Ohio's antitrust law. Judge Smith found in favor of Kevil, noting that the territory covered by the contract was reasonable.<sup>149</sup>

These previous three cases do not support the theory of strategic public and private use of antitrust. The fourth case, however, seems to offer a case study on how private and public litigation may be used strategically. The plaintiff was George Rice, a well-known figure in the national Standard Oil saga. George Rice was a smaller oil producer and refiner. His ability to vertically integrate, and to employ a less ossified management structure than the much larger and more bureaucratic Standard Oil, allowed him to compete and profit in smaller markets.<sup>150</sup> What seems to be the case is that Rice made a bad business decision by refining oil from West Virginia. As the oil field became more mature and production declined, the cost to replace the West Virginia oil with Pennsylvania oil increased his shipping costs.<sup>151</sup> Given that Rice was less efficient than Standard Oil, it seems that he understood that the cost to him for engaging in both public and private antitrust litigation strategies was rational.

Rice spent much of his time shaping public perception to cast Rockefeller and Standard Oil in a negative light, even authoring a pamphlet about Standard Oil called "Black Death."<sup>152</sup> Rice seemed to control the discourse of antitrust in local and national presses. Rice spent a considerable amount of time crafting a story to the press akin to David versus the Goliath of Standard Oil. This discourse, along with filings to

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146. *Id.* at 311.

147. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

148. *Kevil*, 8 Ohio N.P. at 313.

149. *Id.*

150. *Olien & Olien*, *supra* note 44, at 136–37.

151. *Id.* at 140.

152. RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 264 (1998).

government agencies at both the state and federal levels, created political capital, which Rice exploited to raise Standard Oil's costs of doing business.<sup>153</sup>

Rice instigated many cases against Standard Oil, both public and private.<sup>154</sup> He was active lobbying the DOJ to open a case against Standard Oil, in which he made multiple appeals to DOJ enforcers and other more senior government officials.<sup>155</sup> Rice also made numerous complaints to the Interstate Commerce Commission regarding price discrimination or lower rates for Standard Oil based on volume discounts. As one discussion of Rice's tactics notes, "the intent of Rice and of the Commission was clearly to aid small producers who could not afford the 'considerable expense' of competing with Standard for economies in transportation."<sup>156</sup>

A New Jersey federal court ultimately dismissed the private case that Rice brought against Standard Oil. In *Rice v. Standard Oil Co.*,<sup>157</sup> Rice made a number of broad allegations that were consistent with the overall public discourse of the time.<sup>158</sup> He claimed that Standard Oil made below-cost sales. His initial declaration suggested that Standard Oil was able to drive Rice out of business due to a successful predatory strategy and due to rebates and price discrimination by the railroads that favored Standard Oil vis-à-vis other competitors.<sup>159</sup> The only evidence offered regarding railroad rebates was price discrimination that existed prior to the passage of the Sherman Act.<sup>160</sup> The predation claim also alleged recoupment by Standard

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153. Olien & Olien, *supra* note 44, at 140–41.

154. CHERNOW, *supra* note 152, at 264–65.

155. BRUCE BRINGHURST, ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890–1911, at 115–26 (1979); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGIN OF AN AMERICAN TRADITION 408 n.192 (1955).

156. Olien & Olien, *supra* note 44, at 139.

157. *Rice v. Standard Oil Co.*, 134 F. 464 (C.C.D.N.J. 1905).

158. Compare *id.* at 466–68 (describing Rice's various allegations), with THORELLI, *supra* note 155, at 203 (noting that Congressmen repeated claims about the alleged predatory pricing tactics of Standard Oil during the House Debate in 1890 of the Sherman Act.), Leslie, *supra* note 101 (noting the narrative at the time on below-cost pricing), George L. Priest, *Rethinking the Economic Basis of the Standard Oil Refining Monopoly: Dominance Against Competing Cartels*, 85 S. Cal. L. Rev. 499 (2012) (same), Benjamin Klein, *The "Hub-and-Spoke" Conspiracy That Created the Standard Oil Monopoly*, 85 S. Cal. L. Rev. 459 (2012) (noting the narrative at the time on contractual renegotiation), and Daniel A. Crane, *Were Standard Oil's Rebates and Drawbacks Cost Justified?*, 85 S. Cal. L. Rev. 559 (2012) (same).

159. Summons and Declaration at 6–9, *Rice v. Standard Oil Co.*, 134 F. 464 (C.C.D.N.J. 1905) (No. 4951) (on file with author).

160. Amended Declaration at 12v–y, *Rice v. Standard Oil, Co.*, 134 F. 464 (C.C.D.N.J. 1905) (No. 4951) (on file with author).

Oil after Rice had been driven from the market.<sup>161</sup> There was no evidence of recoupment presented by Rice. Indeed, the evidence that Rice presented merely showed that before Standard Oil's entry, prices were higher than after its entry, with reductions in prices in specific markets from 20 to 70 percent.<sup>162</sup> Instead of proof of anticompetitive harm, Rice claimed a right of producer welfare where customers should pay "a reasonable profit" to him.<sup>163</sup>

Each of these claims was based on behavior that Rice noted took place between 1896 and the beginning of the suit in 1904.<sup>164</sup> Yet, Rice only provided dates of reduced sales from his company to his customers from July 15, 1885 to July 15, 1886, *before* the passage of the Sherman Act.<sup>165</sup> Rice did provide specific customers who had business complaints. These complaints included that Rice was not able to meet the price of Standard Oil, and in one case, an allegation that Standard Oil's subsidiary, Waters-Pierce Oil Company, sent its agents to convince purchasers of Rice's oil to reject it. However, there were no additional details given, and it is not clear if this was intimidation and potentially a business tort or merely competition on the merits.<sup>166</sup>

Another anticompetitive action by Standard Oil, as alleged by Rice, was the threat of boycott. Rice alleged that Standard Oil had threatened to boycott the businesses of customers if they purchased oil from Rice.<sup>167</sup> We might think of this today as some sort of exclusive dealing or foreclosure argument. There was no support in Rice's declaration for such a boycott strategy by any of his former customers. Further, Rice alleged (without any supporting documents and without mentioning any specific names in his complaint) that Standard Oil "bribed and bought out the plaintiff's sales agents."<sup>168</sup> These were common claims in the popular press against Standard Oil at the time.<sup>169</sup> The final claim was that Standard Oil worked

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161. Summons and Declaration, *supra* note 159, at 9.

162. Amended Declaration, *supra* note 160, at 12k-l.

163. *Id.* at 12ff.

164. *Id.* at 12b.

165. *Id.* at 12d-e.

166. *Id.* at 12g.

167. *See id.* at 12h.

168. *Rice v. Standard Oil Co.*, 134 F. 464, 469 (C.C.D.N.J. 1905). The specific allegation in the complaint was at a level so general that no names were mentioned: "And the said defendant and its associates aforesaid also bribed and bought out the plaintiff's sales agents and caused the plaintiff's agents and employees to betray the trust confided to them by the plaintiff in his said business . . . ." Summons and Declaration, *supra* note 159, at 10.

169. *See Crane*, *supra* note 158, at 562; *Klein*, *supra* note 158; *Leslie*, *supra* note 101, at 574; *Priest*, *supra* note 158, at 503.

the political process to ensure that a rival pipeline would not be built. Rice provided no specifics as to this allegation—no names of politicians, no allegations of specific meetings, no written or oral evidence, or anything else that might support his claim.<sup>170</sup>

Given that many of the claims predated the Sherman Act, the court struck the declaration. As such, because the amended declaration had been thrown out, Rice provided no names for any merchants who had been his customers and who had defected to Standard Oil for the “below cost” oil.<sup>171</sup> Nor did Rice provide the names of any businesses that were told to purchase exclusively from Standard Oil or any specific names of his agents who had been bribed by Standard Oil.

Much to Rice’s chagrin, the court issued a *Twombly*<sup>172</sup>-like ruling against Rice.<sup>173</sup> For each of the claims Rice alleged, the court noted that Rice offered no specifics about any individual action against his firm by Standard Oil. Based on facts that were not well pleaded, the court dismissed the case.

This court setback on technical grounds did not stop Rice. Rather, it merely changed his legal strategy. There is no decided case on Rice’s allegations after the January 1905 decision. This may be because Rice chose an alternative path to an antitrust suit to punish Standard Oil, one that did not require the same sort of specific proof of competitive harm. In June of 1905, Rice filed a suit in New Jersey to have Standard Oil declared illegal as a violation of the antitrust laws based on a claim that Standard Oil operated as an illegal trust.<sup>174</sup> Ultimately, these concerns played out against Standard Oil in the federal antitrust lawsuit that the DOJ filed in 1909 and that eventually would lead to Standard Oil’s breakup.<sup>175</sup>

Competitor concerns played into public choice aspects of the federal enforcement against Standard Oil. As Ken Elzinga claims in historical perspective, “President Nixon’s endeavors to manipulate the ITT cases

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170. Summons and Declaration, *supra* note 159, at 11.

171. See *Rice*, 134 F. at 469.

172. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face”).

173. *Rice*, 134 F. 470 (“[T]he averments in the declaration are too vague to give to the defendant the information to which it is entitled before being required to plead.”).

174. *Asks for Dissolution of Standard Oil Co., George Rice Calls New Jersey Corporation Unlawful*, N.Y. TIMES, June 28, 1904.

175. BRINGHURST, *supra* note 155, at 108–203 (discussing the lengthy political and legal considerations that shaped the government’s action against Standard Oil and the company’s later dissolution).

were small change compared with President Theodore Roosevelt's involvement in the *Standard Oil* litigation."<sup>176</sup> Thus, the George Rice example supports the theory that in certain circumstances firms may use both public and private antitrust as a business strategy.

The strategic use of antitrust was not limited merely to competitors complaining to the federal government. There were similar attempts in state court. A brief overview of state-level antitrust provides some context for state action against Standard Oil.

Early antitrust history illustrates a number of successful state antitrust actions. The empirical record of the early period suggests a symbiotic relationship between public action and private cases. As James May has written in his excellent analysis of antitrust during the formative era, "State restraint of trade law also became the foundation for a dramatically increased volume of private litigation during the same years."<sup>177</sup> State antitrust action was more aggressive than that of the federal government during the formative era in terms of total cases. Moreover, state enforcement impacted both local and multistate actions.<sup>178</sup> The Standard Oil case is an example of how states and private plaintiffs used antitrust strategically.

A number of states filed cases against Standard Oil prior to the U.S. Supreme Court decision that broke up the company. This Article only highlights the most prominent state antitrust case to illustrate the point of the potential for capture of antitrust by state officials for their own personal advancement. Frank Monnett, Ohio's AG from 1895, wanted to bring a big case that would enhance his political opportunities. The independent producers in Ohio went to the state AG because they were economically outmatched. This example supports the public use of antitrust by private interests thesis. Monnett had ideological conviction that Standard Oil's conduct had been illegal. However, as historian Bruce Bringham concluded, "[Monnett] meant to use the antitrust issue to advance his political career."<sup>179</sup> As Ohio pushed to adopt its own state antitrust law, some of the provisions were directed against Standard Oil.<sup>180</sup> This bias in legislation directed against Standard Oil is typical of state parochialism that

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176. Kenneth G. Elzinga, Book Review, 88 J. POL. ECON. 1055, 1056 (1980) (reviewing BRINGHURST, *supra* note 155).

177. May, *supra* note 97, at 309.

178. May, *supra* note 3, at 499–501.

179. BRINGHURST, *supra* note 155, at 23. On public choice and the motivation of government officials, see generally D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029 (2011) (book review).

180. BRINGHURST, *supra* note 155, at 24.



protects local firms against national competition.<sup>181</sup> This is not to suggest that Standard Oil did not respond to such politically motivated attacks with its own lobbying efforts.<sup>182</sup> However, these political maneuverings on either side did not focus on the underlying economic merits of the claims against Standard Oil.<sup>183</sup>

## V. STRATEGIC USE OF PUBLIC AND PRIVATE RIGHTS OF ACTION IN CONTEMPORARY ANTITRUST

The dynamics of innovative markets may change the implications of the strategic use of antitrust in the present period as compared to antitrust's formative years. The network industries of Rockefeller's time (oil and railroads) are ones in which industry-wide change happens over longer periods of time than in markets such as software and Internet today. Network industries that are dynamic are different from those of Standard Oil. Most importantly, change occurs in such markets very quickly.<sup>184</sup> Take the *Microsoft* case as an example. None of the actual threats that reduced Microsoft's dominance were ever anticipated by the remedies sought by the DOJ.<sup>185</sup> Mark Zuckerberg was not yet out of high school in 2001 when the DOJ settled with Microsoft. If one examines the market share leaders in Internet search for 2001, at the time of the *Microsoft* settlement, Google was not even in the top ten for page views; instead, market leaders were Yahoo, AOL, MSN, and a number of sites no longer in existence.<sup>186</sup>

### A. MICROSOFT LITIGATION

Microsoft often framed its complainants within a strategic use of antitrust context. Unlike Standard Oil, where there is not consensus about whether or not there was monopolization,<sup>187</sup> in Microsoft most academic

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181. Erin Ann O'Hara & Larry E. Ribstein, *Rules and Institutions in Developing a Law Market: Views from the United States and Europe*, 82 TUL. L. REV. 2147, 2160–61 (2008).

182. BRINGHURST, *supra* note 144, at 27–32, 102–03.

183. Similarly, the Texas case against Standard Oil was highly political based upon the motivations of the state attorney general. *Id.* at 66–67 (“Successful antitrust litigation against the powerful oil trust was extremely difficult under the best of circumstances. [Attorney General] Davidson's unbounded political ambition made it impossible.”).

184. See Richard J. Gilbert, *Competition and Innovation*, in 1 ISSUES IN COMPETITION LAW AND POLICY 577, 595 (Wayne Dale Collins et al. eds., 2008) (summarizing a study which documented the high variance of market leaders in the personal disk drive industry from one year to the next).

185. See William H. Page, *Microsoft and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 33, 49 (2010).

186. Max Freiart, *Internet All Stars '01: Where Are They Now*, COMPETE PULSE (Oct. 1, 2007, 5:44 PM), <http://blog.compete.com/2007/10/01/top-ranked-web-sites-popularity-2001/>.

187. Compare John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. &

commentators would agree that there were at least some anticompetitive behaviors, although which particular behavior was anticompetitive still remains an open question.<sup>188</sup> To be sure, there is much to the public choice and strategic use of antitrust claims that one could make regarding the *Microsoft* case as to the specific conduct of both Microsoft's competitors and the states.<sup>189</sup> However, it seems as if the federal *Microsoft* case itself showed some parallel interests among the private interests of competitors and the larger public interest of DOJ based on efficiency concerns.<sup>190</sup>

The inability of Microsoft's competitors to get the government to take the competitors' position is yet another indication of the principal-agent problem at play when private actors attempt to use the government to bring cases on their behalf. The *Microsoft* case also shows that, even in big cases, public choice does not always have more explanatory power than other potential explanations. It is a descriptive tool, but the tool works well in some settings better than others. The discussion of the *Microsoft* decisions around the world is more narrowly focused in this Article on the use of competitor claims to seek government action and to note that: (1) government interests may become divergent from those of competitor firms, highlighting the principal-agent problem; and (2) the strategic use of antitrust by competitors may backfire on competitors in rapidly changing industries where yesterday's small incumbent firm may become today's market leader.

The *Microsoft* case began in the United States. Thereafter, similar cases emerged in Europe and Asia, often driven by complaints from

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ECON. 137, 168 (1958) (suggesting that there was no predation), and Michael Reksulak & William F. Shughart II, *Of Rebates and Drawbacks: The Standard Oil (N.J.) Company and the Railroads*, 38 REV. INDUST. ORG. 267, 281 (2011) (finding that rebates were not anticompetitive), with James A. Dalton & Louis Esposito, *Predatory Price Cutting and Standard Oil: A Re-Examination of the Trial Record*, 22 RES. L. & ECON. 155, 157–58 (2007) (finding that Standard Oil engaged in unlawful predation), and Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J.L. & ECON. 1, 44–45 (1996) (suggesting a raising rivals' cost strategy by Standard Oil). Of course, Standard Oil was able to grow to its monopoly size because there was not a prohibition against anticompetitive mergers. William H. Page, *Standard Oil and U.S. Steel: Predation and Collusion in the Law of Monopolization and Mergers*, 85 S. CAL. L. REV. 657 (2012). For further exposition on the relationship between mergers and durable monopoly power, see Margaret C. Levenstein, *Antitrust and Business History*, 85 S. CAL. L. REV. 451 (2012).

188. See, e.g., HARRY FIRST & ANDREW I. GAVIL, MICROSOFT AND THE GLOBALIZATION OF COMPETITION POLICY: A STUDY IN ANTITRUST INSTITUTIONS (forthcoming 2013); PAGE & LOPATKA, *supra* note 14, at 115–202; Dennis W. Carlton, *The Lessons from Microsoft*, 36 BUS. ECON. 47, 50 (2001); Andrew Chin, *Decoding Microsoft: A First Principles Approach*, 40 WAKE FOREST L. REV. 1, 147–54 (2005).

189. William H. Page, *Microsoft and the Public Choice Critique of Antitrust*, 44 ANTITRUST BULL. 5, 8–9 (1999).

190. *Id.* at 62–63.

Microsoft competitors. The U.S. *Microsoft* case, Judge Jackson's 2000 order, the 2001 District of Columbia Circuit reversal, and Judge Kollar-Kotelly's consent decree are well known and have been written about in great detail.<sup>191</sup> One item worth noting that has not been the subject of legal scholarship is Google's attempts to use public enforcement against Microsoft as a business strategy during the Microsoft saga. Google was less of a market leader in the mid-2000s than in 2012. As such, it had reason to use complaints against Microsoft as a way to raise Microsoft's costs of doing business. It undertook efforts to interject itself into Microsoft's consent decree in 2007 even though the consent decree did not cover it.<sup>192</sup> Google also filed a complaint in 2009 against Microsoft with regard to Internet Explorer in Europe.<sup>193</sup> The European Commission started an investigation against Microsoft based on a complaint by Opera in 2007, which was a browser with a low market share. The Commission issued a Statement of Objection regarding Microsoft's tying of Internet Explorer to Windows.<sup>194</sup> At the time, Google's own Chrome web browser had a miniscule one-percent market share in the European browser market.<sup>195</sup> The Commission ultimately created a remedy based upon a "choice screen" that would install additional browsers for users of Internet Explorer.<sup>196</sup> As some scholars note, this remedy favored Microsoft's competitors since only users of Internet Explorer had to be provided alternatives.<sup>197</sup>

Certainly, one could make the point that competitors strategically used the Commission to bring a case. However, given weak private rights in

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191. See, e.g., PAGE & LOPATKA, *supra* note 14, 33–83 (providing a detailed analysis of the various Microsoft cases).

192. Stephen Labaton, *Microsoft Finds Legal Defender in Justice Dept.*, N.Y. TIMES, June 10, 2007, at 1.

193. Ryan Paul, *Google Joins the EU's Internet Explorer Smackdown*, ARS TECHNICA (Feb. 24, 2009), <http://arstechnica.com/tech-policy/news/2009/02/google-joins-the-eus-internet-explorer-smackdown.ars>.

194. Press Release, Eur. Comm'n, Antitrust: Commission Confirms Sending a Statement of Objections to Microsoft on the Tying of Internet Explorer to Windows (Jan. 17, 2009), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/15>.

195. Clint Boulton, *Is Google Talking Trash to the European Commission over Internet Explorer?*, GOOGLEWATCH (Jan. 18, 2009, 7:43 PM), [http://googlewatch.eweek.com/content/google\\_vs\\_microsoft/is\\_google\\_talking\\_trash\\_to\\_the\\_european\\_commission\\_over\\_internet\\_explorer.html](http://googlewatch.eweek.com/content/google_vs_microsoft/is_google_talking_trash_to_the_european_commission_over_internet_explorer.html).

196. Commission Decision of 16 December 2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/39.530—Microsoft (Tying)), 2010 O.J. (C36) 7, 8.

197. Nicholas Economides & Ioannis Lianos, *A Critical Appraisal of Remedies in the E.U. Microsoft Cases*, 2010 COLUM. BUS. L. REV. 346, 396–97 (2010) (arguing for remedial proportionality).

Europe,<sup>198</sup> more favorable case law against dominant firms than in the United States, and a more active European Commission enforcement in single-firm conduct,<sup>199</sup> there was much more of a parallel between what the Directorate General for Competition (“DG Competition”) believed to be the case regarding Microsoft’s conduct and what the complainant firms wanted DG Competition to do.

One lesson about the strategic use of antitrust is about the importance of remedies. In high technology antitrust cases, the remedies imposed may not be appropriate because the market is changing rapidly. In these situations, the possibility of private and government litigation brought on by competitors may be particularly difficult. For competitors, remedies in high technology industries seem not to be able to restore competition to the pre-antitrust misconduct period.<sup>200</sup> That is, in some cases, small competitors that were excluded will not exist.<sup>201</sup> In other cases, the remedies suggested may hurt that very competitor when the proverbial shoe is on the other foot, as case law will limit future opportunities for firms. One reading of the global *Microsoft* cases suggests that remedies benefited competitors more than competition. As Bill Page concludes,

The protocol licensing program under the final judgments in the American *Microsoft* case has been costly and unrelated to market needs. That program has produced very few licensees of any kind and none that promise to evolve into a platform rival of Microsoft. The Samba license formed under the order in the European *Microsoft* case, in contrast, is both significant and perilous for global antitrust policy. It provides critical protocols and documentation to Microsoft’s most important rival in the server market, a rival, moreover, whose development methods are focused on the analysis of those very protocols.<sup>202</sup>

The lack of effective remedies based on competitor complaints in the present also ties back to remedies under *Standard Oil*.<sup>203</sup> The *Standard Oil* breakup did not seem to remedy the conduct at question in *Standard Oil*.<sup>204</sup>

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198. Wouter P.J. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, 26 *WORLD COMPETITION* 473, 473 (2003).

199. EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 254–56 (2007).

200. Carl Shapiro, *Microsoft: A Remedial Failure*, 75 *ANTITRUST L.J.* 739, 740–41 (2009).

201. This will be true even if antitrust is not used strategically and the competitor firm has a strong economic and legal claim.

202. William H. Page & Seldon J. Childers, *Bargaining in the Shadow of the European Microsoft Decision: The Microsoft-Samba Protocol License*, 102 *NW. U. L. REV. COLLOQUY* 332, 354 (2008) (footnotes omitted).

203. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

204. Crane, *supra* note 158, at 567; Leslie, *supra* note 101, at 573.

Another lesson of the *Microsoft* case developments is that the principal-agent problem between competitor firm and government enforcer can lead to divergence on the part of the agent and increase agency costs. Antitrust agencies may have a leadership change that may change how private firms may be treated by the agency. This political shock implicates the principal-agent problem that competitor firms have with their enforcer agents. As a result of the political shift, an agency may go against the immediate business interests of the very competitor firms that brought the case to the attention of the enforcers in the first place. As the non-U.S. cases developed, U.S. antitrust enforcers seemed to change their position on Microsoft, at least with regard to the development of case law in other jurisdictions. In this sense, DOJ's interest no longer paralleled that of Microsoft's competitors.<sup>205</sup> As Harry First and Andrew Gavil note, DOJ changed its position from prosecuting Microsoft domestically to defending it around the world from attack by non-U.S. antitrust agencies.<sup>206</sup> Moreover, during that same period DOJ began to support Microsoft domestically. DOJ urged state antitrust enforcers to reject a Google antitrust complaint against Microsoft for allegedly making it difficult for the Microsoft Vista operating system to interface with Google's search platform.<sup>207</sup>

In the aftermath of the *Microsoft* cases, the introduction of favorable case law to competitor firms outside of the United States has created strategic opportunities for competitors in the next generation of cases involving high technology firms. This supports the theory that the effects may be industry-wide and also the theory that effects may have unforeseen consequences. The anti-Microsoft playbook of competitor complaints<sup>208</sup> has been followed by a number of companies, including Microsoft. Microsoft filed a complaint with the European Union against Google in 2011.<sup>209</sup> Microsoft, in a blog post by its General Counsel Brad Smith, suggests that it is complaining on the merits.<sup>210</sup> Microsoft argues that the

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205. One might question how much DOJ's interests ever paralleled those of Microsoft's competitors. Public choice seems not to have had primary explanatory power in the case. See Page, *supra* note 189, at 62–63.

206. See First & Gavil, *supra* note 21, at 749–57.

207. Labaton, *supra* note 192.

208. See Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171, 190–91 (2011).

209. Brad Smith, *Adding Our Voice to Concerns About Search in Europe*, MICROSOFT ON THE ISSUES (Mar. 30, 2011, 9:00 PM), [http://blogs.technet.com/b/microsoft\\_on\\_the\\_issues/archive/2011/03/30/adding-our-voice-to-concerns-about-search-in-europe.aspx](http://blogs.technet.com/b/microsoft_on_the_issues/archive/2011/03/30/adding-our-voice-to-concerns-about-search-in-europe.aspx).

210. *Id.*

same rules and style of play that was used against it should apply to Google.<sup>211</sup> One lasting development from the *Microsoft* cases around the world is that competitor firms can use this development of case law for their own purposes, as the liability for an infringement against competition law in Europe (and elsewhere) is lower than in the United States.

### B. INTEL LITIGATION

A second example of the strategic use of coordinated public and private antitrust is the set of litigations around the world among AMD, its dominant competitor Intel, and various domestic and foreign antitrust enforcement agencies. This case is a much stronger example than Microsoft of where there may be the effective strategic use of antitrust by private firms to use government to pursue cases against dominant firms. As with the previous case study of Microsoft, the purpose of this brief case study is not to detail Intel's antitrust-related practices and its case law implications. Rather, it is to note them as part of a broader context of possible strategic use of antitrust against rivals.

AMD sued Intel in U.S. court based upon claims of illegal rebate schemes and other business practices. The next claim that AMD made was one of predation from the loyalty rebates. Finally, AMD claimed that Intel made payments to Original Equipment Manufacturers ("OEMs") to either prevent or delay their use of AMD chips and undertook deceptive practices to discredit AMD's chips.<sup>212</sup> AMD and various competition agencies that it lobbied expressed concern that Intel provided rebates to OEMs upon the condition that such OEMs purchase all or nearly all of their CPU chips from Intel.<sup>213</sup> These exclusivity and loyalty discounts were important because AMD lacked the capacity to provide as many chips to suppliers as Intel. Therefore, Intel was a necessary supplier to these OEMs. The antitrust allegation was that this all-or-nothing business strategy (the OEMs would lose the rebate without the purchase of all or nearly all of their chips from Intel) meant that most OEMs would have strong financial incentives to purchase Intel chips.<sup>214</sup> Because of the total number of chips, Intel would be the cheaper supplier, even if AMD may be the cheaper provider for a

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211. See *id.* ("Having spent more than a decade wearing the shoe on the other foot with the European Commission, the filing of a formal antitrust complaint is not something we take lightly. This is the first time Microsoft Corporation has ever taken this step.").

212. Complaint at 44–46, *Advanced Micro Devices, Inc. v. Intel Corp.*, No. 05-441-JJF (D. Del. Filed Jun. 27, 2005), 2005 U.S. Dist. Ct. Pleadings LEXIS 8782.

213. John Graubert & Jesse Gurman, *The FTC/Intel Settlement: One Step Forward, One Step Back?*, ANTITRUST, Spring 2011, at 8, 8.

214. *Id.*

smaller number of chips.<sup>215</sup>

Overall, there is enough work in terms of economic theory and case law to suggest that AMD's (or the FTC's) case against Intel under Section 2 of the Sherman Act would have been risky on the merits.<sup>216</sup> Initially these claims, on their own, were not enough to create momentum for U.S. federal action against Intel.<sup>217</sup> It was AMD's strategy to create a snowball effect of foreign action in conjunction with private litigation in the United States that created an effective public action on the part of the FTC for private business gains for AMD. AMD also pursued a strategy of lobbying against Intel by complaining to antitrust agencies around the world.

AMD first made its complaints in Asia. Given Microsoft's harsh treatment by competition authorities in Asia, this was a good strategy to begin in jurisdictions with more aggressive enforcement than the United States. The Japanese Fair Trade Commission ruled against Intel in 2005, finding that Intel foreclosed competition.<sup>218</sup> Then, AMD lobbied the Korean Fair Trade Commission to bring a case against Intel. The commission indeed did so, finding that Intel had violated Korean competition law.<sup>219</sup>

Then, building momentum, AMD pushed for the European Commission to pursue a case against Intel. The Commission's case against Intel was successful and resulted in a €1.06 billion fine.<sup>220</sup> Based upon a

215. See Robert H. Lande, *Intel's Alleged Schemes Affected U.S. Customers* 1–2 (U. of Balt. Legal Studies Research Paper No. 2008-10, 2007), available at <http://ssrn.com/abstract=1145327>.

216. See Graubert & Gurman, *supra* note 213, at 11 ("The law of exclusive dealing and discounting under Section 2 of the Sherman Act has become less plaintiff-friendly and more complex in recent years."); Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 884–93 (2010); Keith N. Hylton, *Intel and the Death of U.S. Antitrust Law*, 2 COMPETITION POL'Y INT'L ANTITRUST J. 2, 5 (2010); A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 375–76 (2006). Indeed, one empirical study that tracks pricing and financial data suggests that there was no consumer harm from Intel's pricing, loyalty discounts, and other business practices. Joshua D. Wright, *Does Antitrust Enforcement in High Tech Markets Benefit Consumers? Stock Price Evidence from FTC v. Intel*, 38 REV. INDUS. ORG. 387, 387 (2011).

217. The N.Y. State AG's office also opened an investigation against Intel before the FTC did. Arik Hesseldahl, *NY AG Cuomo Files Antitrust Lawsuit Against Intel*, BLOOMBERG BUSINESSWEEK (Nov. 4, 2009), [http://www.businessweek.com/the\\_thread/techbeat/archives/2009/11/ny\\_ag\\_cuomo\\_fil.html](http://www.businessweek.com/the_thread/techbeat/archives/2009/11/ny_ag_cuomo_fil.html).

218. Press Release, Japanese Fair Trade Comm'n, *The JFTC Rendered a Recommendation to Intel K.K.* (Mar 8, 2005), available at <http://www.jftc.go.jp/en/pressreleases/uploads/2005-Mar-8.pdf>.

219. Young Jin Jung, Hyeong Jun Hwang & Sang Wook Han, YULCHON ATTORNEYS AT LAW, *Corrective Measures Against Intel's Abuse of Market Dominance* (July 31, 2008), <http://yulchon.com/DEU/resource/Publications/view.asp?CD=882&page=5&SearchString=&sltPractice=&keyword=>.

220. Press Release, Eur. Comm'n, *Antitrust: Commission Imposes Fine of €1.06 Bn on Intel for*

less favorable threshold for antitrust liability, the Commission issued a critical decision against Intel.<sup>221</sup> Building upon the public choice model discussed earlier in this Article,<sup>222</sup> it is interesting to note that the European Union's ombudsman issued a report that DG Competition excluded evidence that was potentially exculpatory for Intel.<sup>223</sup>

In addition to its media strategy, AMD also coordinated a highly successful lobbying campaign. Figure 1 below highlights the officially disclosed federal lobbying that AMD undertook from 1998 to 2010. According to lobbying disclosure reports, AMD's registered lobbying efforts rose from around \$40,000 a year between 1998 to 2004, to \$1.02 million in 2005, \$1.49 million in 2006, \$880,000 in 2007, \$650,000 in 2008, \$770,000 in 2009, and \$780,000 in 2010.<sup>224</sup>

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Abuse of Dominant Position; Orders Intel to Cease Illegal Practices (May 13, 2009), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745>.

221. See Summary of Commission Decision of 13 May 2009 Relating to a Proceeding Under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990—Intel) 2009 O.J. (C 227) 13.

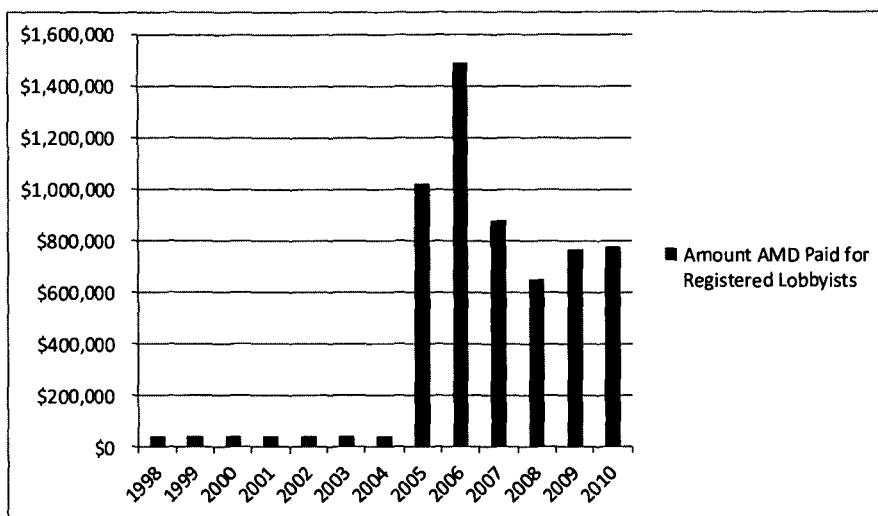
222. See *supra* Part III.B.3.

223. *Decision of the European Ombudsman Closing His Inquiry Into Complaint 1935/2008/FOR Against the European Commission*, EUR. OMBUDSMAN (Jul. 14, 2009), <http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark>.

224. *Lobbying: Advanced Micro Devices*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/clientsum.php?id=D000023765&year=2010> (last visited Mar. 16, 2012).



FIGURE 1. Amount AMD Paid for Registered Lobbyists in the United States for Federal Lobbying.



Not surprisingly, AMD's lobbying expenditures seem to track AMD's successful efforts around the world to build momentum for a U.S. government case against Intel. Lobbying expenditures began in earnest the year that AMD filed its private antitrust lawsuit against Intel. Though there is some variance from year to year, overall the lobbying expenditures are quite high relative to the pre-lawsuit period. Note that there was not a spike in lobbying expenditures given the change between Republican and Democratic administrations, nor as a consequence of a greater push to lobby after *Citizens United v. Federal Election Commission*.<sup>225</sup>

Direct lobbying of antitrust agencies was not the only way that AMD sought to shape the public debate and put pressure on agencies to bring cases against Intel. AMD created a website to highlight its cases against Intel<sup>226</sup> and participated in a media blitz coordinated with analyst calls. AMD sponsored the American Antitrust Institute, which wrote a negative treatment of Intel.<sup>227</sup>

225. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

226. *Fair and Open Competition*, AMD, <http://www.amd.com/us/aboutamd/corporate-information/fair-and-open-competition/Pages/fair-and-open-competition.aspx> (last visited Mar. 16, 2012).

227. Norman W. Hawker, *Wintel Under the Antitrust Microscope: A Comparison of the European Intel Case with the U.S. Microsoft Cases* 12 (AAI Working Paper No. 09-02, 2009), available at <http://ssrn.com/abstract=1412464>.

Let us assume AMD paid legal bills of \$10 million a year for “indirect lobbying” of bringing the private case in the United States and in organizing meetings and materials for antitrust enforcers around the world. The global settlement that Intel paid to AMD was \$1.25 billion. If we assume that the legal case against Intel based upon the underlying economics was not strong, then AMD paid roughly \$66 million in costs for a \$1.25 billion direct benefit plus the European (€1.06 billion) and Korean (26 billion Won) fines as additional costs to Intel as indirect benefits. It is not known how much Intel spent on its antitrust defenses around the world. However, Intel exceeded its \$66 million for antitrust coverage from its insurance carrier by January 2009 and had begun litigation over a \$50 million insurance policy with another one.<sup>228</sup>

An investment like this in litigation and in public relations is well worth the result in terms of costs to its competitor. After pressure from other antitrust decisions, lobbying by AMD, and the need to be seen to do “something” on Intel, the FTC finally filed a case against Intel under Section 2 of the Sherman Act and Section 5 of the FTC Act in December 2009, and settled with Intel<sup>229</sup> in a consent order in October 2010.<sup>230</sup> The FTC settlement also occurred within a short time after Intel settled with AMD,<sup>231</sup> thereby ending a very costly and time consuming worldwide litigation.

In addition to what AMD gained from the global settlement and antitrust decisions around the world, there is also what may have motivated the FTC to file against Intel (beyond believing that the conduct was anticompetitive). Because the FTC made claims under both Section 2 of the Sherman Act and Section 5 of the FTC Act, it is the latter claim that is interesting. The FTC has been attempting to increase the scope of its Section 5 power for some years.<sup>232</sup> Its motivation for pushing Section 5 has to do in part with an institutional play for more power, as the potential limits of Section 5 are unclear.<sup>233</sup> This impact can be quite significant. As Herbert Hovenkamp noted in a 2010 article about the FTC complaint against Intel, “One reading the Intel complaint fears that the FTC is on a

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228. Don Clark, *Intel's Suit Against Insurer Points to Increasing Legal Costs*, WALL ST. J. (Jan. 30, 2009, 5:02 PM), <http://online.wsj.com/article/SB123334937141534517.html>.

229. Press Release, FTC, *FTC Challenges Intel's Dominance of Worldwide Microprocessor Markets* (Dec. 16, 2009), available at <http://www.ftc.gov/opa/2009/12/intel.shtm>.

230. *In re Intel Corp.*, No. 9341, 2010 FTC LEXIS 82, at \*11–36 (FTC Oct. 29, 2010).

231. See Steve Lohr & James Kanter, *A.M.D.-Intel Settlement Won't End Their Woes*, N.Y. TIMES (Nov. 12, 2009), <http://www.nytimes.com/2009/11/13/technology/companies/13chip.html>.

232. See Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 384–86 (2000).

233. See Sokol, *supra* note 5, at 1079.

course toward the same set of mistakes that it made in the 1960s, when it used § 5 to protect rival businesses at consumers' expense."<sup>234</sup> Indeed, a larger role for Section 5 could allow firms to use government strategically more than before as strategic use of private antitrust rights becomes more difficult through case law development. What may benefit AMD and other firms in the near term, as noted in the public choice/principal-agent model described in Part II of this Article, may in fact hurt these firms in the future as the competitive environment changes and they begin to possess monopoly power. Such a development may already be in the works as Chairman Jon Leibowitz of the FTC has hinted about bringing a Section 5 case against Google for unfair competition in the web market.<sup>235</sup> No doubt, some rivals have encouraged this FTC action as a way to use government to create costs for Google.<sup>236</sup>

### C. ARE THERE LIMITS TO THE STRATEGIC USE OF ANTITRUST?

The historical and contemporary case studies of the strategic use of antitrust focus on its use against dominant firms. Yet, at some point these dominant firms become aware that their rivals have embarked on a strategy of strategic antitrust. Both the historical and contemporary case studies beg a question—why do dominant firms not respond to the strategic use of antitrust? They are, after all, better resourced. If they were able to employ the same set of strategies, dominant firms could use it against their rivals. One explanation focuses on organizational design of dominant firms. Firms that are larger and more bureaucratic are slower to respond to trends and strategies than their competitors. That is, complex firms are prone to inertia.<sup>237</sup> Large firms are also more path dependent and therefore less adaptive in strategies. As one seminal organizational theory work

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234. Hovenkamp, *supra* note 216, at 893. Accord William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 940 (2010) ("FTC experience with Section 5 is generally a bleak record.").

235. Rachel Bull, *An Interview with Jon Leibowitz*, GLOBAL COMPETITION REV., May 2011, at 9, 10 ("What I can say is that one of the commission's priorities is to find a pure section five case under unfair methods of competition. Everyone acknowledges that Congress gave us much more jurisdiction than just antitrust. And I go back to this because at some point if and when, say, a large technology company acknowledges an investigation by the FTC, we can use both our unfair or deceptive acts or practice authority and our unfair methods of competition authority to investigate the same or similar unfair competitive behavior . . .").

236. Thomas Claburn, *Google Confirms FTC Antitrust Investigation*, INFORMATIONWEEK (June 24, 2011 03:28 PM), <http://www.informationweek.com/news/internet/google/231000382>.

237. See Jacques Cremer, *Arm's Length Relationships*, 110 Q. J. ECON. 275, 294 (1995), Michael T. Hannan & John Freeman, *Structural Inertia and Organizational Change*, 49 AM. SOC. REV. 149, 151–52 (1984).

concludes, “[o]vercoming this inertia is much more difficult than the literature on management implies, especially for core features of an organization.”<sup>238</sup> Thus, these firms are more defensive in their strategies rather than offense oriented. Dominant firms are thus less readily able to change their business strategies in the face of the strategic use of antitrust.

A second explanation of why dominant firms are not able to use superior resources is that they are too busy running their business, whereas for smaller competitors, this is a primary strategy to save their business. As such, a public and private antitrust strategy is a more central concern for them. This explanation takes the interest group theory of Mancur Olson<sup>239</sup> and applies it to the business context. A third reason why dominant firms are slow to respond is because of the arrogance of dominant firms.<sup>240</sup> Dominant firms may underestimate significant threats to them.<sup>241</sup> Business history is replete with firms that underestimate business risk by competitors and disruptive technologies.<sup>242</sup> Finally, it is also the case that the lobbying of government may be less effective because antitrust enforcers are less likely to sympathize with larger firms, even when larger firms may be the victims of less efficient competitors because of various assumptions on the power asymmetries among large and small competitors. This may also explain why U.S. firms do better with U.S. antitrust enforcers supporting them abroad; abroad the U.S. firms are up against the real monopoly—the coercive power of the state in other jurisdictions rather than other market participants.

## VI. CONCLUSION

This Article identified that government-brought antitrust cases can be used strategically by private firms to raise costs of their dominant rivals. It offered both historical and modern-day examples of how antitrust may be used strategically and how firms may use a combination of private rights with government action to punish dominant firms. Having identified such a model of the strategic use of antitrust, this Article notes that there is no

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238. GLENN R. CARROLL & MICHAEL T. HANNAN, *THE DEMOGRAPHY OF CORPORATIONS AND INDUSTRIES* 6 (2000).

239. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 44 (1971) (describing how concentrated interest groups can be effective).

240. Barak Y. Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. Cal. L. Rev. 605, 619 (2012) (noting arrogance of Rockefeller).

241. See William P. Barnett & David G. McKendrick, *Why Are Some Organizations More Competitive than Others? Evidence from a Changing Global Market*, 49 ADMIN. SCI. Q. 535, 542 (2004).

242. CLAYTON M. CHRISTENSEN & MICHAEL E. RAYNOR, *THE INNOVATOR'S SOLUTION: CREATING AND SUSTAINING SUCCESSFUL GROWTH* 34–35, 56–65 (2003).

general solution for government to distinguish meritorious antitrust claims from the strategic use of antitrust other than to be suspicious of direct competitors and their lobbying. However, the more lobbying is successful as a strategy, the more others will undertake lobbying, even defensively. One lesson from AMD's approach is that every large firm should have an antitrust government affairs person in its organization. Indeed, this may already be happening as firms imitate successful firms and strategies.<sup>243</sup> Because firms see the value of the strategic use of antitrust to use government for private ends, both dominant firms and competitors will imitate it. For example, Google has increased its antitrust lobbying significantly as its antitrust exposure has grown.<sup>244</sup>

Another complicating factor is that government cannot always be trusted to bring a good case because it may have its own agenda to bring a "big case" for various public choice-related reasons. In the area of single firm conduct, there is no easy way to distinguish either good government or private cases in antitrust. That is, it is not clear that the answer to the strategic use of antitrust is more restrictive private rights since government enforcement could be used strategically as well.

Overall, the conclusion of this Article is modest; it identifies that the strategic use of antitrust by firms to push government enforcement and as a strategy of both private and public strategic antitrust behavior does happen—both in the past and currently—and therefore to be aware that it might be lurking behind cases generally and big cases particularly. This suggests, from an antitrust policy perspective, a more intense focus on the economics of the particular case and to figure out business strategy of the firms and the economic consequences as they relate to antitrust.

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243. See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 152 (1983); David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AM. ECON. REV. 465, 465 (1990).

244. Tom Foremski, *Antitrust Heat—Google Spends Millions to Influence Washington*, SILICON VALLEY WATCHER (Jan. 31, 2010), [http://www.siliconvalleywatcher.com/mt/archives/2010/01/antitrust\\_heat.php](http://www.siliconvalleywatcher.com/mt/archives/2010/01/antitrust_heat.php); Gautham Nagesh, *Google Hiring 12 Lobbying Firms as FTC Readies Antitrust Probe*, THE HILL (July 1, 2011, 04:55 PM), <http://thehill.com/blogs/hilicon-valley/technology/169425-google-hiring-12-lobbying-firms-in-response-to-investigations>.