PRIVATE ENFORCEMENT OF U.S. ANTITRUST LAW — A COMMENT ON THE U.S. COURTS DATA

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I. INTRODUCTION

With the growing expansion of private antitrust enforcement in Europe and many other parts of the world, the features and effects of the U.S. private antitrust litigation system are due for reexamination. Much of the existing discussion tends to focus on case law developments—such as standing, class action, pleading, or damages rules—that shape the kinds of cases that plaintiffs bring and their disposition. There is also a significant literature on the relationship between private and public enforcement, with the predominance of private litigation in the U.S. an outlier compared to most other antitrust enforcement systems.

Relatively little attention is paid in the academic literature to statistical trends in private litigation filings and disposition. While it is common to hear influential people like Richard Posner assert (or perhaps quip) that "antitrust is dead,"[2] anyone surveying the thousands of well-heeled people mingling at the American Bar Association Antitrust Section's Spring Meeting would have to realize that antitrust law is keeping lots of people busy—and well paid. This is certainly no evidence of antitrust's effectiveness, but it does suggest that, whatever else it may be, the enterprise is far from dead.

In the U.S., at least, much of the action is in private litigation. Every year, the Administrative Offices of the U.S. Courts release workload statistics for the federal courts.[3] While highly imperfect due to reporting quirks (i.e. how case statistics are reported are, in part, a function of how litigants self-describe their matters),[4] the statistics do provide a useful overview of enforcement trends, particularly when viewed longitudinally and comparatively.[5] Also, the continuous reporting of the Administrative Offices' data provides an advantage over periodic empirical studies, which can quickly fall out of date. Though rough, the Administrative Offices' data are the best resource available to track statistical trends in private antitrust enforcement. In this essay, I will review the U.S. Courts statistics on private antitrust litigation and offer a few comments about what they reveal about the enterprise of private antitrust enforcement.

2 See, e.g. David Dayen, *This Budding Movement Wants to Smash Monopolies*, The Nation (April 4, 2017) (reporting Judge Richard Posner's assertion that "Antitrust is dead, isn't it?") https://www.thenation.com/article/this-budding-movement-wants-to-smash-monopolies/.

3 The data can be found at http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

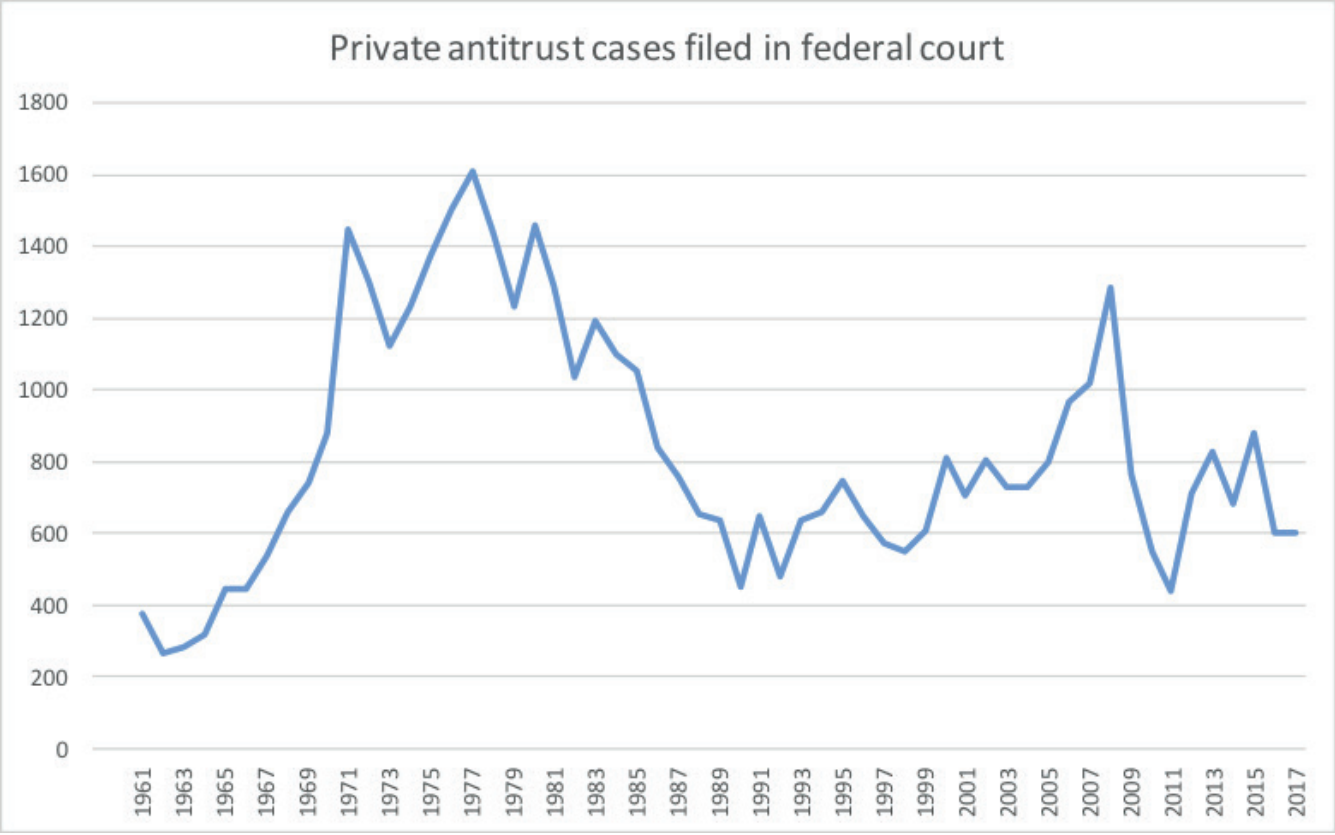
4 For example, class action lawsuits concerning the same claim may be reported either separately or collectively, which can result in significant swings in the data. *See* William H.J. Hubbard, *The Effects of* Twombly *and* Iqbal, 14 J. EMPIRICAL LEGAL STUD. 474, 484 n. 27 (2017) ("Examination of administrative data and hand-coded docket records reveals large numbers of separate but related antitrust case filings, which leads to large numbers of virtually identical cases that are often consolidated in ways that lead to case outcomes (such as transfer or consolidation) that are not informative on the filing or resolution of MTDs.").

5 On the statistical reliability of the U.S. Courts' data, see generally Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Offices of the U.S. Courts Database: An Initial Empirical Analysis*, 78 Notre D. L. Rev. 1455, 1496 (2003) (concluding, based on empirical analysis, that the Administrative Office's "data can provide reasonably accurate estimates of the proportion of cases in which plaintiffs win damages judgments").

II. OVERVIEW — TOTAL CASE FILINGS OVER TIME

Table 1 below shows the reported number of private antitrust case filings from the earliest data that the U.S. Courts' data are available — 1961 — to the present. In broad brush terms, the data reflect the following narrative: From the 1960s to the mid-1970s, private antitrust litigation quadrupled, as part of the post-War private litigation explosion.[6] From the late 1970s to the early 1980s, the numbers reversed course and eventually reached an equilibrium at around half of their mid-seventies peak. The explanation for the decline can be largely found in a number of currents of judicial hostility to private antitrust enforcement. The creation of the antitrust injury requirement,[7] tightening of standing requirements,[8] and Chicago School era contraction of liability norms in such areas as vertical restraints and exclusionary conduct[9] created a less hospitable environment for new federal claims.

Still, the "new normal" of the eighties forward represented a level of private enforcement considerably higher than the baseline in the early 1960s. Of course, since the country's population grew over this period it wouldn't be fair simply to look at raw numbers, but the growth was significant even when adjusted for population. Take, as representative, the years 1964, in which 317 cases were filed (1.65 cases per million people), and 1987, in which 758 cases were filed (2.97 per million people). Despite the judicial backlash of the 1970s and 80s, private antitrust litigation had become a significant feature of U.S. antitrust enforcement.



The 2000s brought a new run-up in private antitrust litigation, with a peak reminiscent of the mid-70s occurring right on the brink of the financial crisis. The numbers then plummeted back down to approximately 1990s levels, before taking a run back up and then falling off again in the last two years.

6 On the post-war litigation boom, see generally Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the U.S. 12 (2010).

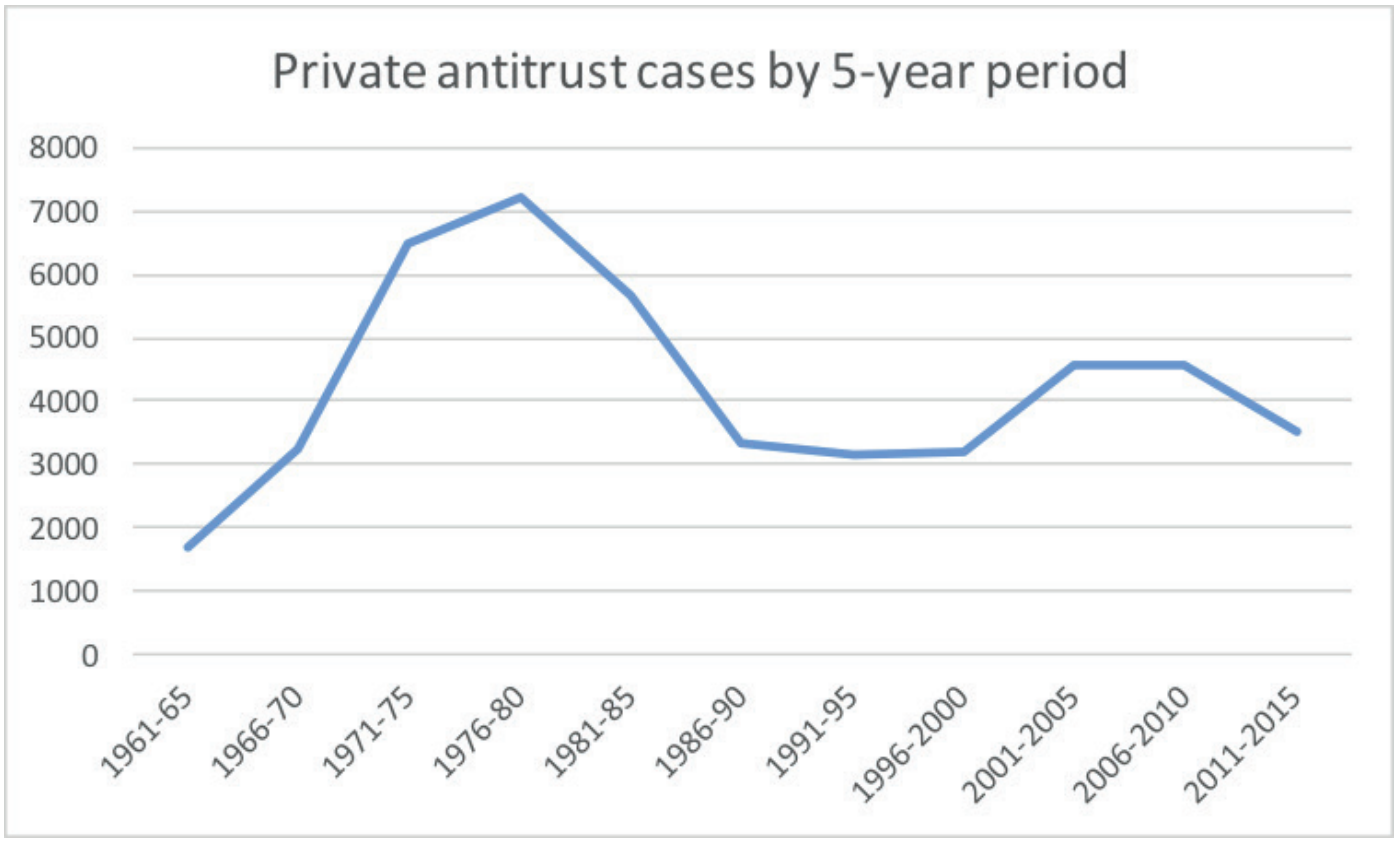
7 E.g. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477. 489 (1977) (creating antitrust injury requirement—that plaintiff demonstrate "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful").

8 E.g. *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977) (prohibiting suit by "indirect purchasers," i.e., those who did not purchase directly from the defendant).

9 E.g. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 26 (1977) (abolishing per se illegality for non-price vertical restraints); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (announcing skepticism toward predatory pricing theories and requiring plaintiffs to present economically plausible theories of collusion and exclusion).

One interpretive question concerning the data concerns the effects, if any, of the U.S. Supreme Court's Twombly[10] decision on new case filings. Since *Twombly* came right on the eve of the financial crisis, it is difficult to disentangle the effects of *Twombly's* heightened pleading standard from the effects of the financial crisis. However, the rebound to roughly pre-*Twombly* levels in the mid-2010s suggests that, whatever else it may have done, the *Twombly* decision had little significant long-run impact on the sheer number of new antitrust case filings.

Although Table 1 suggests somewhat of a see-saw trend line, if presented by a five-year period rather than annually (thus smoothing out reporting anomalies to some extent), the data suggest a story of relative stability in private filings from the mid-1980s to the present. Changes in political administration, in the economy, and in procedural or substantive antitrust law over this period have not significantly affected the volume of private antitrust filings. While the numbers of new private filings have dipped below "normal" levels in the first two years of the Trump administration, it remains to be seen whether this represents a long-term trend or merely statistical "noise."



III. DISMISSAL RATE, SETTLEMENTS, AND TRIALS

The U.S. courts reports do not provide the sort of detailed information about antitrust cases that would be necessary to replicate the empirical work done 35 years ago in the informative Georgetown Study of Private Antitrust Litigation.[11] (Incidentally, if anyone interested in private antitrust enforcement is looking for a worthwhile empirical project, updating the influential Georgetown study would be a great service to the antitrust community). For example, it is not possible to discern basic facts like whether the case raised cases of collusion under Section 1 of the Sherman Act or exclusion under Section 2, whether the case followed government litigation, whether it was a class action, or the identity of the plaintiff (i.e. customer, competitor, other). Even beyond the previously acknowledged reporting issues, the data reported are quite limited, and hence so are the inferences one can draw.

10 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (rejecting conclusory pleading of conspiracy and requiring plaintiff to assert economically plausible claims of conspiracy in order to withstand motion to dismiss the complaint).

11 See Lawrence J. White, *The Georgetown Study of Private Antitrust Litigation*, 54 Antitrust L. J. 59 (1985).

Nonetheless, the limited data reported do enable some inferences to be drawn. In each reporting year, we learn (1) how many private antitrust cases were terminated in the federal courts; (2) how many were terminated through no action of the court; (3) how many were terminated by court action before the pretrial conference; (4) how many were terminated by court action after the pretrial conference; (5) the percentage reaching trial; and (6) within the cases reaching trial, the break-down between jury and bench trials.[12] We can further specify category (2) — termination with no action of the court — as consisting mostly of settlements. (Some plaintiffs may voluntarily dismiss without a settlement, but those instances are relatively rare). Ideally, one would like to capture the defendant success rate on motions to dismiss and for summary judgment, but the data do not permit inferences as to those gradations. Category (3) — termination by court order before the pretrial conference, includes all involuntary dismissals under Federal Rule of Civil Procedure 12, but it also includes any summary judgment motions granted prior to the pretrial conference. Category (4) — termination between the pretrial conference and trial, probably consists mostly of late-granted summary judgment motions (*in limine* motions typically would not result in the total dismissal of a case, but rather the settlement negotiation dynamics).

For this essay, I compiled the data from 2002-2017, in part in order to capture the five-year period prior to *Twombly*. Some results of interest: Over the relevant period, the percentage of cases resolved through settlement, involuntarily dismissed by the court, and trial remained pretty constant: roughly 25 percent of all cases are settled, 74 percent involuntarily dismissed, and (on average) about 1 percent tried. Given the vanishingly small number of trials, the jury/bench trial mix varies somewhat by year, but skews 105-49 in favor of jury trials in total.

One would have wanted to test the effects of *Twombly* on involuntary case dismissals, but the data allow only glimpses through glass darkly. Comparing the five years preceding *Twombly* to the five years following *Twombly*, the data show the total involuntary dismissal percentage rising from 73 percent to 78 percent. However, contrary to popular wisdom, the data also show that that, post-*Twombly* a greater share of cases dismissed were being dismissed after the pre-trial conference than during the earlier period. In the five years preceding *Twombly*, 88 percent of involuntarily dismissed cases were dismissed pre-trial, whereas in the five years following *Twombly*, only 82 percent of all involuntarily dismissed cases were dismissed pre-trial. Could *Twombly* really have made courts more willing to grant summary judgment compared to motions to dismiss? That result would seem counterintuitive, since the ostensible effect of *Twombly* was to grant district courts license to dismiss more cases at the pleading stage, prior to discovery. But perhaps *Twombly* forced plaintiffs to submit higher quality complaints on average, which in turn increased the attractiveness of summary judgment as a case-screening gate.[13] The data do not allow much room for these kinds of interpretations, underlying once again the importance of using the Administrative Office's reports as only a beginning point for asking statistical question about the incidence of private antitrust enforcement.

IV. CONCLUSION

Caution must again be urged with respect to the interpretation of these quite loosely reported and presented data. Overall, the inferences that I would defend most stoutly from the Administrative Office's data are these: In statistical terms, the incidence of private antitrust enforcement in the United States has been relatively stable since the mid-1980s, with aggregate annual new filings typically in the range of 600-900. Resolution by trial — whether jury or bench — remains a rare last resort, averaging often less than 1 percent a year. As a broad rule of thumb, a quarter of cases settle and the other three-quarters are involuntarily dismissed at the motion to dismiss or summary judgment stage — a ratio that has not been strongly affected over recent decades by case law developments or other factors. The numbers have dipped in the last couple of years; how long this trend of long-term stability continues remains to be seen.

12 Table C-4 in the Administrative Office's annual reports contains these data.

13 To be clear, the U.S. Courts' data are far from sufficient to resolve the overall issue of the effect of *Twombly* on dismissal rates or the quality of pleadings — matters already discussed in a divided literature, much of it focusing on particular substantive areas other than antitrust. See Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 Va. L. Rev. 2117 (2015) (empirically assessing the effects of *Twombly* and *Iqbal* on employment discrimination and civil rights cases). See also Gregory G. Wrobel, Michael J. Waters & Joshua Dunn, *Judicial Application of the Twombly/Iqbal Plausibility Standard in Antitrust Cases*, 26-FALL-ANTIRUST 8 (2011) ("Courts dismissed one or more antitrust claims in 74 percent of decisions (annual rates of 73 to 76 percent), and denied dismissal of one or more antitrust claims in 41 percent (annual rates of 39 to 46 percent and trending somewhat higher for 2008-2011)."); See also, Hubbard, *supra* n. 4 (reporting that "rates of dismissal with prejudice have held steady, motions to dismiss remain uncommon, and settlement and filing patterns have not changed appreciably in the wake of Twombly and Iqbal"); David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1246-48 (2013) (collecting empirical studies on the effects of Twombly and Iqbal).

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