Preface

This Handbook has a history. In 2010, the American Antitrust Institute (AAI) published *The International Handbook on Private Enforcement of Competition Law*.[1] This comparative law volume contained 11 original essays on private enforcement in the United States, where the bulk of the world's experience with private enforcement is located, and 19 essays on private enforcement in countries scattered around the rest of the world. As we edited the American essays, we realized that we had something surprisingly new and valuable on our hands.

Our treatment of the U.S. experience seemed to be the first resource in which practitioners explain in a systematic and highly detailed way how a private antitrust case is put together and pursued, canvassing practical, procedural, and substantive considerations from inception to final resolution. Step-by-step, in more or less chronological order, the collection of essays explains how a case moves from suspicion to proof and from complaint to trial, or more likely to dismissal or settlement, and nearly everything in between. It even deals with how claims are administered and how lawyers are compensated. It is simultaneously about law, economics, procedure, and practical life within the antitrust community, covering almost everything a serious antitrust student or an inexperienced antitrust practitioner would want to know. In short, it was a resource that the various editors wished we had encountered much earlier in our careers.

Naturally, then, we advised Edward Elgar that we would like to present an expanded and updated version of the collected American essays, to be tailored specifically to the American market. This Handbook is the result. The expansion and updating occurs in all the earlier chapters, which were revised by their original authors. Some important new cases intervened between books, especially relating to class actions, and these were incorporated, bringing the book current as of September 2011. But we also added new chapters by new authors, including on the role of economists and expert witnesses, settlement practice, cy pres remedies, and proposals for reform. The chapter on settlement practice, co-authored by an experienced plaintiff-side class action lawyer and an experienced defense-side class action lawyer, represents an entirely new contribution to the field; despite the fact that antitrust cases rarely go to trial, very little has previously been written about the strategic aspects of reaching settlement in an antitrust case.

While it is true that the resolution of private antitrust cases (prior to trial) is consistent and fairly predictable, the substantive and procedural law in the field is quite dynamic, and the student or practitioner who engages with this Handbook engages with private enforcement at a time when the field is arguably in a heightened state of flux. In the wake of the Supreme Court's October 2010 term, for example, some contend that two opinions

[1] The American Antitrust Institute, The International Handbook on Private Enforcement of Competition Law (Albert A. Foer & Jonathan W. Cuneo eds., 2010).

– *Wal-Mart Stores, Inc. v. Dukes*[2] and *AT&T Mobility LLC v. Concepcion*[3] – threaten to fundamentally alter the use of what has been the primary procedural mechanism for the private redress of widespread harm caused by antitrust violations: the Rule 23 class action. While the field thus will not hold still for a portrait painting, we use the remainder of this preface to sketch the broad contours of the private enforcement landscape.

* * *

It has been a mantra over the years that at least nine out of 10 antitrust cases in the United States are brought privately, rather than by a government agency. Indeed, in the AAI's 2008 *Transition Report on Competition Policy to the 44th President*, we stated that the number of private antitrust cases actually exceeds the number of U.S. government actions (civil and criminal) by more than 25 to 1.[4] However, we also wrote in 2008 that the number of private actions filed had "declined significantly since 1978," and the number of government actions had fallen "even more sharply (in percentage terms)."[5] Since 2008, the number of private actions, including class actions, has continued to decline dramatically, while the number of Justice Department antitrust investigations has declined to a lesser degree. And yet the number of cases filed by the Justice Department has actually increased. This requires some explication.

According to data provided by the Administrative Office of the U.S. Courts, the total number of private antitrust cases filed in federal district courts between 2008 and 2010 has declined annually in recent years, from 1,287 in 2008, to 792 in 2009, to 523 in 2010.[6] The 523 private antitrust cases filed in 2010 constitutes a 10-year low.[7] Antitrust class actions filed in federal court have also declined dramatically during the same period.[8] There were 767 antitrust class actions filed in 2008, 376 in 2009, and 202 in 2010.[9] The 202 antitrust class actions in 2010 likewise constitutes a 10-year low.[10]

---

[2] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

[3] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[4] The American Antitrust Institute, The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President 222 (Albert A. Foer ed., 2008), *available at* http://www.antitrustinstitute.org/content/next-antitrust-agenda.

[5] *Id.* (citing Sourcebook of Criminal Justice Statistics Online, Table 5.41.2007, http://www.albany.edu/sourcebook/pdf/t5412007.pdf).

[6] Sourcebook of Criminal Justice Statistics Online, Table 5.41.2010; Antitrust Cases Filed in U.S. District Courts, http://www.albany.edu/sourcebook/pdf/t5412010.pdf (citing the Administrative Office of the United States Courts, Judicial Business Annual Reports, for each applicable year).

[7] *See id.; but see infra* note 10. The average number of private antitrust cases filed in federal district court annually from 2001–2010 was 836. *See id.* The range of annual filings during that time was from 523 to 1,287. *See id.*

[8] LexisNexis, CourtLink, Nature of Suit Strategic Profile, Other Statutes – Antitrust (All Courts), http://lexisnexis.com/courtlink (available with subscription).

[9] *Id.*

[10] *Id.* The combined average number of antitrust class actions filed in federal court annually from 2001–2010 was 407. *See id.* The range of annual filings during that time was from 202 to 767. *See id.* It bears noting, however, that data concerning class action filings is often flawed in

Assuming that the number of private cases is somehow related to the number of government cases, it is probably more useful to focus on the Antitrust Division of the Department of Justice (DOJ or the Antitrust Division) rather than the Federal Trade Commission (FTC) or the states as the best indicator of government activity that private cases are likely to track. That is because litigated judgments in cases brought by the DOJ constitute prima facie evidence of violations in private follow-on actions, while FTC actions have no collateral estoppel effect in subsequent antitrust actions.[11] Moreover, even without the benefit of this rule, private actions are more likely to follow Antitrust Division cases because the Division brings more cases involving claims of price-fixing and other per se violations of Section 1 of the Sherman Act, claims in which follow-on private plaintiffs can more easily establish a prima facie case as compared to a rule of reason case. There is no reason to believe that cases initiated by the states lead to many follow-on private cases; on the contrary, state cases are frequently follow-on actions themselves.

According to its workload statistics, the Antitrust Division initiated a total of 208 investigations in 2008, 214 in 2009, and 158 in 2010.[12] The 158 investigations in 2010 constitutes a 10-year low.[13] In 2008 and 2009, respectively, 76 of the 208 investigations, or 37 percent, and 92 of the 214 investigations, or 43 percent, concerned Sherman Act Section 1 conduct.[14] In 2010, 53 of the 158 investigations, or 34 percent, concerned Section 1 conduct.[15] It bears noting, however, that fluctuations in the number of investigations initiated do not necessarily correspond to fluctuations in the number of cases filed by the Antitrust Division. For example, the Division filed 19 civil cases – a 10-year high – in 2008, and it filed 14 civil cases – a runner-up to the 10-year high – in 2010.[16] Likewise,

---

one important respect. Because a great many class actions will be consolidated before the Judicial Panel on Multidistrict Litigation (JPML) and resolved prior to trial, a count of class action *filings* will necessarily include overlapping and duplicate class actions that should properly be conceived as a single class action that is pursued in a single MDL proceeding. *See* The American Antitrust Institute, *supra* note 5, at 229 n.35 (citing Emery G. Lee II & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Advisory Comm. on Civil Rules* (April 2008), http://www.fjc.gove/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf (electing to eliminate overlapping and duplicate proceedings that were consolidated in MDL proceedings for purposes of calculating class action statistics in a report to the Federal Judicial Center)). This point is elucidated in § 1.01 of Chapter 1 of this Handbook, which notes that, in 2010, 137 class actions concerning a range of specified products were ultimately consolidated into just five class action proceedings before the JPML. To the degree that the data discussed *supra* in notes 7–8 and accompanying text includes overlapping and duplicate class action filings, it too may be flawed.

[11] *See* 15 U.S.C. § 16.

[12] U.S. Dep't of Justice, Antitrust Div. Workload Statistics FY 2001–2010 1, http://www.justice.gov/atr/public/workload-statistics.pdf.

[13] *See id.* Figures do not include business reviews or premerger notifications, but do include investigations initiated as a result of premerger notifications. The average number of total investigations initiated annually from 2001–2010 was 234. *See id.* The range of total investigations initiated annually during that time was from 158 to 283. *See id.*

[14] *Id.*

[15] *Id.* A substantial majority of the remaining investigations concerned Clayton Act Section 7 conduct. *See id.*

[16] *Id.* at 5.

the Division filed a 10-year high of 72 criminal cases in 2009, and a runner-up to the 10-year high – 60 criminal cases – in 2010.[17] Thus, while the number of investigations initiated by DOJ seems to be declining as of 2010, the Division's "percentage-of-cases-filed-per-investigation" was higher in 2010 than in any of the previous 10 years, and it filed as many or more combined civil and criminal cases than in any of the previous 10 years other than 2009.

Why is the number of private antitrust cases in decline over the last few years while the combined number of civil and criminal cases filed by the Antitrust Division, to which private plaintiffs may "follow on," is on the rise?

One answer is that private enforcers, contrary to the perceptions of some, do not always follow an easy trail blazed by government enforcers. As Professor Robert Lande ably illustrates in the Introduction to this Handbook, oftentimes private plaintiffs "stand alone" rather than "follow on," or the government may follow a trail blazed by private plaintiffs. This helps to explain why trends in private enforcement do not always lag trends in public enforcement.

Some other possible answers double as the recurring themes that are found throughout the remainder of this Handbook. Such themes may help to further explain the dramatic decline in private actions and private class actions after 2008, and to fill in the contours of our existing private enforcement landscape. These include:

(1) Judicial opinions that raise threshold hurdles for plaintiffs in pursuing their claims in court.[18]
(2) A whipsaw effect, from the costs of litigation continually going up while the odds of winning are continually going down, and an altered cost/benefit analysis necessary to justify a contingent fee case, leading to fewer cases being filed.
(3) Changed dynamics of class action filings after the Class Action Fairness Act of 2005.
(4) More stringent litigation hurdles for plaintiffs, including a rigorous class certification hearing where merits issues may be resolved, and heightened expert admissibility standards under *Daubert*[19] and Rule 702 of the Federal Rules of Evidence.[20]
(5) The judiciary's decreasing reliance on per se rules of illegality (reflected in Supreme Court opinions like *Leegin*[21]).[22]

---

[17] *Id.* at 7.

[18] This is particularly evident with respect to pleading requirements after the Supreme Court's opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), but other judicial opinions have hindered private plaintiffs in the areas of standing, antitrust injury, burden of production, and burden of proof. *See* Andrew I. Gavil, Professor of Law, Howard University School of Law, *Then and Now: Have We Lost Faith in the Antitrust Private Right of Action?*, Presentation at the American Antitrust Institute 4th Annual Future of Private Antitrust Enforcement Conference, slide 7 (Dec. 7, 2010) (citing *Brunswick, Illinois Brick, Matsushita, Sylvania, BMI, Brooke Group, Trinko*, and *Leegin*), *available at* http://www.antitrustinstitute.org/~antitrust/sites/default/files/GAVIL%20slides.pdf.

[19] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

[20] Gavil, *supra* note 18, at slide 7.

[21] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[22] Gavil, *supra* note 18, at slide 7.

(6) The judiciary's increasing deference to regulation (reflected in Supreme Court opinions like *Trinko*[23]).[24]

Still other possible answers are doubtless available to the willing researcher. As Professor Gavil has noted in discussing the above, there are trends reflected in the Supreme Court's rhetoric that go well beyond the last three years or even the last 10 years.[25] We encourage readers to seek clearer answers to these kinds of questions, and to appreciate the macro complexities attending this dynamic area of the law.

* * *

Apart from helping readers to appreciate the macro complexities of private antitrust enforcement, it is our hope that this Handbook will go a very long way toward unraveling all the important micro complexities in the field. After Professor Lande's Introduction, which examines the benefits of private antitrust enforcement by reference to an empirical study of 40 large, private cases,[26] the ensuing 15 chapters attempt to follow a more or less chronological order, each answering a question:

What acts constitute violations of U.S. antitrust law?
What investigative and other activities typically occur before a complaint is filed?
What parties are entitled to pursue an antitrust claim?
What decisions are involved in the initiation of a private action?
How are claims aggregated, and what is the current state of class action law?
What types of motions typically arise during the pre-trial phase?
How is evidence obtained?
What role do economists and expert witnesses play?
How are damages proved and other remedies obtained?
How is antitrust litigation funded?
How do private and public enforcement efforts interact?
What are the strategic and practical considerations associated with settlement?

---

[23] Verizon Commc'ns, Inc. v. Law Offices of Curtis. V. Trinko, LLP, 540 U.S. 398 (2004).

[24] Gavil, *supra* note 18, at slide 7.

[25] Gavil, *supra* note 18, at slides 3–4 (comparing the Court's language in 1979 in *Reiter v. Sonotone* Corp., 442 U.S. 330, 344–45 (1979) ("Congress created the treble damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") with the Court's language in 2004 in *Trinko*, 540 U.S. at 414 ("Against the slight benefits of antirust intervention here, we must weigh a realistic assessment of its costs. . . . The cost of false positives counsels against an undue expansion of § 2 liability.")).

[26] An updated study reviewing an additional 20 such cases will be available on AAI's website, www.antitrustinstitute.org, prior to the publication of this Handbook. Apart from this work by Professor Lande and Professor Joshua P. Davis of the University of San Francisco School of Law, the amount of empirical information about private enforcement is surprisingly slight. We call your attention to a new book, highly critical of private enforcement, Daniel A. Crane, The Institutional Structure of Antitrust Enforcement (2011), which provides both empirical and anecdotal information.

What happens after there is a fund to distribute?
What happens when there are still funds left over?
What types of proposals have been made to reform the current system?

The Handbook is a product of the American Antitrust Institute, a 501(c)(3) research, education, and advocacy organization founded in 1998.[27] The co-editors are Albert A. Foer, President of the AAI, a former senior FTC official, lawyer, and business leader; and Randy M. Stutz, Director of Special Projects for the AAI, an antitrust lawyer formerly with a national law firm. We have been blessed with the strong administrative assistance of Sarah Frey, the AAI's Manager of Communications. We are most indebted, of course, to the various authors whose names appear in the list of contributors. We also want to thank a variety of volunteers who helped us with the editing of specific chapters: Kevin Kim, Evan Schultz, Edmond Wybaillie, Ke Li, Flavia Fortes, Nigel Barella, Niranjan Adhikari, and Benjamin Van Rompuy.

Albert A. Foer and Randy M. Stutz
Washington D.C., October 21, 2011

[27] For more, see the AAI website, www.antitrustinstitute.org.