Paper Trail: Working Papers and Recent Scholarship

Editor's Note: *Editor John Woodbury comments on a paper by Professors Lande and Davis that compares the cartel-related penalties imposed by the DOJ versus the settlements in forty private antitrust suits to conclude that the deterrent effect of these cases is generally larger than that from the DOJ efforts. Thus, the authors reason that the private suits complement DOJ enforcement in terms of establishing deterrence. Send suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.*

—William H. Page and John R. Woodbury

Recent Papers

Robert H. Lande & Joshua P. Davis, Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws (last revised Mar. 17, 2010)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693

In this working paper, the authors—Robert H. Lande (Venable Professor of Law, University of Baltimore School of Law) and Joshua P. Davis (Professor of Law and Director, Center for Law and Ethics, University of San Francisco School of Law) (hereafter LD)—note that "it may come as a surprise—even a shock—that a quantitative analysis of the facts demonstrates that private antitrust enforcement probably deters more anticompetitive conduct than the U.S. Department of Justice's anti-cartel program." (p. 2)

At the outset, it should be noted that this paper does not in fact assess the comparative deterrent effect of private antitrust enforcement and Justice Department (DOJ) antitrust enforcement. That would require evaluating the differential effect of DOJ actions vs. private actions on the incidence of antitrust violations. Of course, that would invariably be a complex and substantial undertaking, and it may not even be doable—and LD are well aware of these complexities.

Instead, this paper compares the cartel-related penalties imposed by the DOJ versus the settlements in forty private antitrust suits. That is, the paper is comparing inputs into deterrence, not outputs. To the extent that the deterrent effect is correlated with the penalties (as it surely is), we might infer that the effect of the settlements from private enforcement actions (or the DOJ fines) increases deterrence, although we don't know by how much. I will return to this topic a bit later.

With those caveats (which the authors would likely acknowledge, given the references to the difficulty of actually measuring deterrence), the paper's contribution is notable. It takes on the criticism that the forty cases were likely "nuisance" suits—by concluding that these suits had sufficient antitrust merit that they would not be considered nuisance suits—and that effort does help to better bullet-proof their comparisons. And if one attaches weight to the authors' conclusion that these suits were meritorious, then one could well conclude that because the settlements in these forty private antitrust cases were greater than those in the DOJ cartel cases, the deterrent effect of the former is greater than the larger. How much larger remains an open question. How rapidly does the deterrent effect increase with higher aggregate penalties?

Of course, the private actions would not be relevant—indeed, they would be harmful—if it were true that the current level of federal enforcement activity optimally deters cartel and other anti-competitive behavior. At least with respect to cartels, LD argue this is unlikely to be the case. The paper notes that that between 1992 and 2008, the DOJ filed 699 cases and won 645 cases—a success rate of over 90 percent.[1] As LD point out, the DOJ's success could be interpreted as a preference for avoiding false positives. This means that there are some cartels that are not prosecuted because, while the cases look worthy on the merits, they may be more expensive to litigate and/or be more difficult to "prove up" to a judge or jury. This strategy will lead to underdeterrence. As LD observe, "the high success rate of government litigation suggests that in the absence of private litigation, many bad actors would get away with violating the antitrust laws . . . [I]t holds the potential for the antitrust laws to go largely unenforced." (p. 31)[2]

Against that background, LD turn to estimating the penalties levied by the DOJ in price-fixing cases. That one is easy—between 1990 and 2007, the DOJ levied corporate fines totaling $4.16 billion, individual fines of $67 million, and restitution of $118 million.[3] In addition, these cases led to total jail time of 330 years and another 97 years of house arrest.

The first question they address is how to value the individual fines, jail time, and house arrest. Do they result in a different level of deterrence than a fine imposed on a corporation? One extreme argument might be that penalties imposed on individuals have no deterrent effect because the penalties imposed on corporations are sufficient to encourage firms to adopt internal controls to prevent criminal antitrust behavior. As LD point out, there will inevitably be instances where the price fixer is in fact not being a good agent of the firm. Or it may be that the price fixer is a good agent of the firm in that the firm will reward the price fixer for her efforts.[4]

After addressing more subtle versions of this issue, LD conclude that penalties imposed on individuals have "more of an impact than a similar penalty against a corporation and that a year of prison time is equivalent to a relatively large financial penalty." (p. 9) The rationale here is simple: a million-dollar fine (or an equivalent dollar sum that makes the convicted individual just indifferent to jail time) will be a larger proportion of that individual's wealth than will be the case for a million-dollar fine levied on the corporation.

To account for this potentially larger deterrent effect for individual penalties, LD triples the value of those individual penalties. While it's clearly arbitrary, if it is too high, then the comparison between the DOJ penalties and the private settlements will be tilted more towards DOJ. If it's too low, it would be tilted towards the private settlements, but LD subsequently show that for their results to be reversed, the multiplier would have to be implausibly high.

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[1] I am assuming that these cases were criminal cartel cases, but the paper is less than clear on this point.

[2] This key conceptual point should have been made far earlier in the paper than it currently is.

[3] I assume that these are all inflation adjusted, but LD are silent on that point. I also would have thought that these would also be based on present discounted values, but apparently that's not the case. If, as LD suggest in an earlier paper, the payout to the DOJ was more rapid than the payout in the private suits, the apples-to-apples comparison of the payouts would show a smaller but unknown differential between the DOJ penalties and the private settlements, depending on the extent to which interest payments by defendants match their rate of time discounting. This does strike me as a potentially significant shortcoming of the study, although the authors claim that the adjustment would have only a small effect on any comparisons. Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 893 n.56 (2008).

[4] LD also address the question of whether the individual fines or jail time are an efficient deterrent to cartel behavior, but that discussion is tangential to their argument in this paper.

LD then turn to estimating the financial equivalent of jail time and house arrest. To develop estimates for this equivalent dollar amount, the authors used a variety of sources. These included value of life estimates (to determine how much a year in a life is worth) developed in the context of regulatory proceedings (such as the EPA's), compensation provided to the victims of 9/11 (or their families), awards in cases of wrongful imprisonment, and estimates made by antitrust experts (though only two such estimates) of the dollar-penalty equivalent of a price fixer serving a year in jail.[5]

LD settle on the high range of the estimates, equating a year in prison to a $2 million penalty and equating a year of house arrest to a $1 million penalty. As noted, to account for what LD regard as the higher deterrent effect of penalties levied on individuals than those levied on corporations, LD triples the penalties. After making these adjustments, LD calculate that the penalties levied by the DOJ as part of its anti-cartel effort totaled nearly $7 billion.

Based on a previous paper,[6] LD compare this $7 billion to the settlements or adjudicated damages reached in 40 of the largest antitrust cases (25 of which involved cartels and other per se claims) between 1990 and 2007. The authors restrict their focus to cases that generated $50 million in such payments. LD estimate that the recoveries in these private suits totaled between $18–19.6 billion, substantially more than the penalties levied by the DOJ. LD note that if the comparison is restricted to those 25 private cases involving cartel allegations, the damages recovery ranges between $9.2–10.6 billion, still significantly larger than the $7 billion in DOJ penalties. Even restricting the private cases to those that involved a DOJ action that resulted in a criminal penalty, the comparison remains favorable. The recovery in these 13 private cases generated $5.6–7 billion, very close to the DOJ penalties.

Thus, the authors conclude that the deterrent effect of these cases is generally larger than that from the DOJ efforts and so (more importantly) the private suits complement DOJ enforcement in terms of establishing deterrence.

Of course, a key question is whether the private suits are themselves meritorious. LD argue that the $50 million threshold should act to screen out nuisance suits (since $50 million is a sufficiently large figure for a firm to simply accede to a settlement rather than litigate.) And more than half of the cases involved settlements in excess of $100 million.

More generally, LD demonstrate that 85 percent of the 40 private cases had some "outside" validation on the merits. For example, as noted above, 13 of the cases were follow-ons to the criminal cartel cases of the DOJ, and so had some obvious merit. In 12 cases, the DOJ obtained civil relief. In 9 of the cases, the defendants lost at trial or in a closely related case. So it does appear that these were more than private nuisance actions. But LD make the point that about 40 percent of the cases were not related to any enforcement actions by the DOJ—these were otherwise "undiscovered" anticompetitive behavior.

LD's efforts to validate the merit of the private cases seem sensible. But while these cases seem to have merit, it's not the $50 million dollar screen that's helpful—it is the other validation measures. One can certainly imagine a corporation being willing to settle for a seemingly excessive amount because the reputational degradation of a long, drawn-out suit would not be worth the litigation effort. To take an admittedly extreme example, it seems unlikely that BP would have will-

[5] Indeed, the paper is worth reading if only to review these sources of the dollar value of life.

[6] *See* Lande & Davis, *supra* note 3.

ingly provided a $20 billion compensation fund to be administered by the federal government but for reputational issues.[7]

What is less obvious is whether the private settlements in fact generate the same deterrent effect as the DOJ penalties. Most obviously, the settlement may be excessive even though the case is meritorious. The currently unknowable variable is how far from optimal deterrence we are. If we are far short of the optimal level of deterrence, then the fact that the settlements are "excessive" considered in isolation (i.e., relative to the merits of the particular case) is irrelevant. Because the probability of detection and conviction of a "true" cartel may be quite low, the expected value of engaging in cartel behavior can only be deterred if the penalties for engaging in such behavior are high enough to offset the low probability of detection and conviction.

Still, the issue of overdeterrence lingers. The authors are clear that they are not addressing the issue of costs and benefits of private antitrust enforcement. Nonetheless, one assumption in the paper seems to be that the large private cases and the nuisance suits are unrelated. It isn't obvious why that would be true. One can certainly imagine that seemingly excessive settlements on meritorious cases will invite additional private cases of less merit but with a substantial expected value. If that were the case, then the deterrent effect of private suits would be lower and possibly even "negative." That is, the net effect of private suits may be overdeterrence.

The paper is worth the read. While not covering all of the deterrence bases, and sometimes confusing inputs with outputs, it still provides a counterweight to those who believe that private antitrust suits have no deterrent capabilities. ●

—JRW

[7] Of course, it's possible that BP determined that the odds of winning large class actions were low and so this was one way to possibly mitigate that threat. But there appears to be a fair amount of finger pointing on liability, and these are actions that would likely take many years to resolve.