Chapter 15: The Civil Suits

Introduction

Earlier chapters have recounted how low antitrust fines were prior to 1990 and how these fines have grown in the 1990s in the case of price fixing. This chapter will demonstrate that civil settlements for price fixing have grown apace. In part, the increased size of criminal and civil financial sanctions reflects the growth in the size of corporations and the markets that they exploited. In order to deter managers from contemplating the formation of future price fixing conspiracies, the penalties must be pegged to the size of the injuries that would be caused. However, there is evidence that the harmfulness of price fixing infractions has increased. The proportion of discovered cartels prosecuted since 1995 been international cases, and they are larger markets than the national or regional cartels discovered in prior years. Combined with the newly assertive stance of antitrust agencies and the expanded opportunities for private suits, fines and settlements have increased faster than the size of the affected markets.

Private antitrust suits provide deterrence complementary to public prosecutions. Civil class-action suits are a vehicle especially suitable for permitting small buyers – small firms or consumers – to win relief for the damages caused by price-fixing conspirators. The conspirators in cases brought in the late 1990s were mainly large, powerful corporations in highly concentrated industries. Their great wealth and access to legal resources generally brings a David-and-Goliath aspect to antitrust class actions. Yet, there are many legal commentators that have disparaged their use in treble damage cases.

In part, the debate over the desirability of class-action treble-damages suits reflects a wider debate on the social benefits of treble damages themselves. Some believe triple damages to be unnecessarily high to deter (Easterbrook 1986), while others argue that plaintiffs rarely receive more than single damages (Lande 1993). From a financial benefit/cost perspective, companies will be deterred from joining cartels only if the expected financial losses (the total fines and settlements multiplied by the expected probability of conviction) exceed the expected financial gains from price fixing (see Chapter 2). If plaintiffs really do get closer to single damages, then civil settlements alone provide virtually no deterrence because only a small portion of all conspiracies are discovered and prosecuted.[1] Moreover, buyers who had to exit a market because of cartel-elevated prices are rarely compensated (Page 1996).

Another issue that troubles critics of class-action suits is the large size of the legal fees and the incentives they might give for lawyers to file frivolous suits. Calkins (1997:441) suggests that the rise in successful government prosecutions make the need for supplemental deterrence from civil cases much less justifiable. However, in Chapter 13, it was shown that the typical criminal fine imposed was one-fifth to one-half of the best estimate of actual overcharges, so the need for supplemental civil punishment would appear to be still strong. At present discovery rates, total penalties should amount to triple to quintuple the damages caused.

This chapter focuses on the civil cases generated by the lysine, citric acid, and vitamins cartels. Federal class-action suits were filed in the United States and Canada by direct buyers in each case and are fairly well documented. Some of the members of the federal class opted out of the purposed settlements, and many of them settled by means of private negotiation. Much less is known about the opt-out settlements because terms of the settlements typically include non-disclosure clauses. Indirect buyers of these products launched suits in several U.S. states and Canadian provinces with varying degrees of success. One *parens patriae* action by large number of state attorneys general was successfully concluded. Finally, related suits for fraud and mismanagement were decided in the lysine case. The global cartels chosen for inclusion in this book will allow the full panoply of civil actions to be illustrated.

The Federal Lysine Case[2]

The FBI raid on ADM's headquarters on the night of June 27, 1995 alerted buyers of lysine and law firms to the possibility of a treble-damages suit. Some feed manufacturers contacted their retained law firms, and in other cases law firms contacted lysine buyers to offer their services. The identity

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1 A couple of writers of industrial-organization textbooks, themselves experienced forensic economists, have speculated that as few as 10% of all price-fixing conspiracies are investigated or prosecuted. An informal survey by Frederick Warren-Boulton (conveyed to the author) revealed that experienced antitrust defense counsel believed the same. Bryant and Eckard (1991) find the probability of detection to be 13 to 17%.

2 For an annotated list of sources for this section, see Connor (2000: Appendix A). A description of the events of late June to August 1995 can be found in Chapter 13 above.

of two of ADM's co-conspirators soon became known through pithy press releases by Heartland Lysine in Chicago and Biokyowa in St. Louis that denied wrongdoing and pledged cooperation with government investigators. On June 28th the *Wall Street Journal* reported on its front page that subpoenaed and seized documents found at ADM's offices showed "score sheets" of "sales targets" and the actual monthly sales of the world's three largest producers of lysine.

ADM's troubles with civil litigants began quickly to mount. By November 1995, ADM was facing 11 private treble-damages suits by lysine buyers, more than 30 stockholders' suits alleging "material mismanagement" of the company, and 30 private antitrust suits by buyers of citric acid or corn sweeteners, some of which combined two of the products. Several of the shareholders' suits sought structural reforms of ADM's governance structure. Among the demands were a smaller board and more board members that meet a stricter definition of outsiders. The board as it was constituted in 1995 was described by the *Washington Post* as ". . . handcuffed by company insiders, family members, cronies, and friends of the powerful chairman." Also open to criticism was the advanced age of many board members; nine of the 17 were 69 years or older in January 1996. By February 1996, the number of private suits against ADM alleging price fixing or related management failures had risen to 85.

In early 1996, the many plaintiffs in the lysine treble-damages suits were certified as a single federal class. U.S. Judge Milton Shadur in Chicago was assigned the task of certifying the class, arranging for its representation, managing pre-trial discovery, and approving of any pre-trial settlement deals offered to class members. Judge Shadur had many original ideas about how to expedite antitrust class-action suits. In February, he told the law firms representing plaintiffs that he had decided to *auction* the right to act as lead counsel for the class. The low bidder would be the winner. In order to further minimize the size of class counsel's fees, Shadur refused to accept bids based on the traditional percentage contingency fee. The winner of the unprecedented auction was the Philadelphia law firm of Kohn Swift and Graf. The firm's bid was a sliding scale capped at $3.5 million for any settlement agreement equal to or above $25 million for class members.

During the period February to April 1996, there was little movement discernable in the government's criminal case against ADM and the other alleged members of the cartel. At this point, Michael Andreas and Terrance Wilson had been informed by the DOJ that they would be indicted, but no formal filing had been made and both men were refusing to plea bargain. No ADM insider except the discredited Mark Whitacre was willing to provide useful information to the government. The officers of the Asian cartel members were similarly tight-lipped, and besides most of them could not be deposed because they resided in Japan or South Korea. Although ADM hired the top-notch Washington law firm of Williams & Connelly to defend it against criminal charges in March, there was very little movement visible in the criminal case either. Even with a couple of resignations, the board was still very much the creature of Dwayne Andreas who was resisting settlement. Without a resolution of the criminal case, a civil settlement seemed less likely.

However, there were some signs that ADM was less resolute in opposing a civil settlement. In February, ADM stated publicly that it was willing to consider settling out of court. At about the same time, it became known that ADM had created a special reserve fund to pay suitors should the need arise. A key factor from ADM's point of view was the fact that a civil settlement requires no admission of guilt, nor can it be used as evidence in a criminal trial. From Dwayne Andreas' point of view, compared with a criminal guilty plea, approving a civil deal was by far the lesser of the two evils. Besides, it might help repair his eroding support of ADM's Board of Directors; by April the Directors' special committee was urging ADM's management to plea-bargain with the DOJ.

The likelihood of a deal on the lysine treble-damages suddenly increased in April 1996. On the 12th of that month, ADM, Ajinomoto, and Kyowa Hakko jointly announced that they had offered to pay the federal class of lysine buyers the sum of $45 million ($25 million from ADM and $10 million each from the other two). The law firm of Kohn Swift and Graf had spent only two or three months in negotiations for their 150 plaintiffs. Of course, any settlement above $25 million was equally lucrative to class counsel because of the cap on their fees. The fixed fee brought about the result Judge Shadur had wanted: a swift settlement with a minimum of fuss. The legal fees for class counsel were extremely low by historical standards.[3] No economic experts had been hired and no depositions taken of ADM officials – all standard procedure in civil negotiations. Legal experts considered a settlement offer at this early stage of discovery almost unprecedented. A major gap in the plaintiffs' knowledge was created by the too-early settlement: plaintiffs could not listen to the tapes. Even more critical a factor for the plaintiffs' decisions to consider an early deal was the uncertainty in early 1996 as to whether ADM would plead guilty, be indicted by the DOJ for criminal price fixing, or if indicted be found guilty. In other words, despite the mounting evidence that the DOJ intended to convict ADM, many plaintiffs calculated that there was a good chance they would get nothing in the future.

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3 After two more defendants paid another $4 to $5 million, legal fees were only 7% of settlement amounts, or about a third the conventional rate.

Judge Shadur set a "fairness hearing" for July 15, 1996. The purpose of the hearing was to hear arguments about whether the proposed settlement amount was fair and reasonable for the plaintiffs. The defendants' offer implied an estimated overcharge on lysine of $15 million of the "affected period." Defendants proposed that purchases for 1994 and the first half of 1995 would be the criterion for distributing the damages awards. As U.S. sales of dry lysine were about $250 million during that 18-month period, the three largest members were suggesting that lysine prices had risen by only about 6% during the apogee of the cartel's power. This overcharge percentage is quite low by historical standards (Connor and Lande 2005). Moreover, two months later these defendants would plead guilty to price fixing for a period of almost three years. The additional sales implied by the longer conspiracy period means that the overcharge rate was a pitifully low 3% of purchases.

A split developed within the federal class. The larger lysine customers generally reacted negatively to what they believed was a small offer. In some cases, these firms had prepared overcharge estimates in hours. Several of them took the advice of their own counsel and had an independent estimate of the overcharge prepared by a professional economist.[4] The smaller members of the class were generally satisfied or at least tempted by the offer. Also, smaller companies often have to worry more about keeping smooth relations with big suppliers of a hot product like lysine; accepting the defendant's first offer would be seen as more courteous than demanding more.

Working under great time pressure and with very limited information, the plaintiffs' expert calculated that the lysine overcharge was closer to $150 million than the $15 million proposed by ADM *et al*. There were several reasons for the larger plaintiffs' estimate. They believed that the conspiracy began at the Mexico City meeting in October 1992 (a position that would be taken by the DOJ in its criminal indictments later in the year). The earlier starting date than the one preferred by the defendants implied a lower pre-conspiracy price (Connor 2000, White 2000). Anecdotal evidence on lysine costs of production also suggested a non-conspiracy price of $0.66 to $0.70 per pound. The longer time period also increased the affected sales totals for the cartel. Despite its flaws, the plaintiffs' analysis was probably the best that could be done with monthly average selling prices as the sole available information from the defendants.

The yawning disparity in overcharge estimates had little effect on Judge Shadur's inexorable drive for a tidy settlement process. At the July fairness hearing, he signaled his intention to approve the $45 million

[4] The present author prepared such an analysis for the law firm of Dickstein Shapiro. Williams & Connelly hired two former chief economists of the DOJ to critique the analysis, Lawrence J. White and Frederick Warren-Boulton.

settlement for the federal class, and that decision was made final on July 19, 1996. However, on that day 33 companies, convinced that the amount was too low, opted out of the class. Although only about one-fifth of the number of class plaintiffs, the 33 represented a much greater share of lysine purchases. Most, if not all, went ahead and settled through private negotiations over the next year.

The amounts that the opt-outs received may never be known because all parties are generally sworn to secrecy. Moreover, the one defendant with a fiduciary responsibility to tell its shareholders how much it had to pay, ADM, decided that the small size of the settlement was not "material." However, an enterprising reporter did get one plaintiff's lawyer to talk off the record in a March 1997 piece. The opt-outs that pursued their damages later reportedly received about $20 million. This lawyer also characterized the lysine plaintiffs who remained in the class as "dumb as rocks," which may be taken to mean that the opt-outs did significantly better in their compensation than those that remained in the class. The major factor that explains the superior recovery by the opt-outs is that they settled after the lysine defendants pleaded guilty.

More than a year later the wisdom of the lysine settlements was still being debated in the pages of *The National Law Journal*. Noted columnist, Columbia Law School professor John C. Coffee, cited the lysine case as the egregious example of the flaws in allowing law firms to bid for the right to represent class-action plaintiffs. The biggest problem is that of perverse financial incentives. Auctions for fixed fees leaves the winner ". . . with little incentive to maximize the recovery for the class." Coffee cites four pieces of evidence supporting his contention that the lysine settlement was "a study in class action pathology." (1) As a rule, private settlements vastly exceed the criminal fines, but in lysine just the opposite happened. (2) The rapidity of "the race to settlement . . . was unusual and did little to benefit the class." That is, patience would have been rewarded. (3) The recovery rate (claimed to be 7% by class counsel but closer to 3% in reality) cannot be meaningfully compared to the averages of all antitrust class actions "because most private settlements . . . have the opportunity to piggyback on a criminal conviction." (4) Although the legal fees were modest (about 7% of recovery) in the lysine case, class members do not want to minimize fees, they want to maximize recovery. In a retrospective assessment of the lysine civil settlement after the conclusion of the Chicago criminal trial, the *Illinois Legal Times* (October 1998) called the $45 million "unreasonable."

How class counsel should be appointed by a supervising judge is still an issue. Often, a judge appoints the first law firm to file if the judge deems the firm competent to handle several, sometimes thousands of plaintiffs. Alternatively, the competing plaintiffs' counsel may negotiate one of their number to become lead counsel for the class prior to certification, a sort of nomination process. Both of these methods may be criticized for failing to match the best possible firm to the task at hand, and neither addresses the perceived problem of excessive legal fees. Auctioning the right to represent is not in itself a bad idea, so long as the firms bidding are well qualified. Rather, the main problem is one of incentives for the winning firm. An auction that awards the lead-counsel position to the firm offering the lowest *percentage* fee makes much more sense because it forces firms to calculate their costs relative to expected revenues; winners will tend to be low-cost firms or those willing to accept lower profits. The monetary incentive to get the greatest recovery for their clients remains, as does an incentive to compromise to save time.

The Federal Citric Acid Case

At first the government's investigation of the citric acid cartel moved more slowly than the lysine investigation. Since June 1995 the DOJ's Antitrust Division office in San Francisco handled the probe, but it did not have nearly as much evidence as had been collected for lysine. Some suspicious documents on "target sales" had been obtained in the files at ADM's and Cargill's headquarters, and brief references to a citric cartel had been picked up in Whitacre's tapes of the lysine meetings. However, Terrance Wilson and Barrie Cox, who had handled the citric acid conspiracy for ADM, said nothing of value to investigators for more than a year. It was only when ADM's cooperation was secured by August 1996 that depositions started producing solid evidence of the conspiracy. ADM was the first member of the citric acid cartel to crack, and its co-conspirators took months to cave into prosecutors' demands.

In the lysine case, ADM, Ajinomoto, and Kyowa negotiated on a common front with counsel for the federal class; talks began in February 1996 and came to fruition in April. However, in citric acid, the first references to efforts to negotiate a settlement appear only in May 1996. Moreover, it seems that ADM was moving ahead in talks with plaintiffs with little coordination with its Swiss co-conspirators.

Fewer civil suits were filed against ADM *et al.* in citric acid than in the lysine case. In November 1995 there were seven. Movement in consolidating the scattered suits into one federal class was slow. The class was not certified in San Francisco until late 1996. Thus, it came as a surprise when ADM suddenly announced that it had reached a settlement with U.S. citric acid buyers on September 27, 1996. Changes within ADM may have contributed to its *volte-face*. Just two weeks before, ADM's board had undergone its second shake-up, bringing the total resignations to eight since

June 1995. ADM proposed to pay $35 million to the federal class soon after it was certified. It would take several more months for the European members of the cartel to make their offers. About four weeks later, ADM and the DOJ announced ADM's guilty plea and a greatly reduced fine of $30 million for its role in the citric acid cartel. Barrie Cox's substantial cooperation with the DOJ and the fact that ADM was the first to confess were key elements in the decision to award a large fine discount.

As in the lysine case, a split soon developed between large and small buyers of citric acid. Kenneth Adams, an attorney representing four of the largest users of citric acid, paid defense attorneys an indirect compliment when he slammed the DOJ's wording of ADM's guilty plea. Most evidence points to the citric acid conspiracy beginning during the first half of 1991 (see Chapter 5). However, after negotiations by defense attorneys the government's wording of the October plea agreement vaguely stated that the cartel began operating only "at least as early as" January 1993. Not only did this shorten the collusive period by 18 to 24 months, but the later date also implied that the "pre-conspiracy" price was arguably much higher than that implied by an earlier initial date. What may have appeared to DOJ negotiators as a minor concession had a great impact on the estimated overcharge and on ADM's civil liability.

If the cartel began to raise citric acid prices as late as January 1993 as the defendants claimed, then the cartel's sales volume was about 2.6 billion pounds through 1995, and the but-for-price could have been as high as $0.74 per pound. This scenario results in a global monopoly overcharge by the citric acid cartel of approximately $105 million during 1993-1995. If, on the other hand as the evidence suggests, the cartel began to raise prices around July 1991, then the volume it sold was about 3.7 billion pounds and the but-for price was close to $0.62 per pound. Under this scenario, the global overcharge rises to $573 million – more than quintuple the overcharge implied by the later date.

U.S. buyers of citric acid accounted for just about one-third of global purchases of citric acid during the affected period. Thus, if the plea agreement date of January 1993 is accepted, they suffered injuries of about $35 million. On the other hand, the better supported commencement date of July 1991 yields U.S. price fixing injuries of about $191. Because ADM held approximately 29% of the U.S. market, its settlement offer in September was predicated on an implied U.S. cartel overcharge of about $40 million (very close to the $35 million low estimate).

On December 9, 1996 the other large members of the citric acid cartel offered to settle with the plaintiffs. The amounts offered were proportional to ADM's offer and their share of U.S. sales. Haarmann & Reimer/Bayer offered to pay $46 million, Hoffmann-La Roche $5.7 million, and Jungbunzlauer International $7.6 million. Taking a page out of

ADM's book, none of the three "Swiss" firms had as yet pleaded guilty. Such pleas would not be entered until January or March 1997. Meanwhile, plaintiffs in the class were mightily tempted to take what seemed like a generous offer totaling $96 million. However, if the plaintiffs accepted, they would be misled by the late commencement date and the low but-for price.

ADM's $30 million government fine announced in October 1996 was a terribly poor guide to civil damages because it had received a huge discount for cooperation. Haarmann & Reimer also got a hefty discount. The cartel overcharge implied by their prediscount fines must be at least $227 million. Under alternative conspiracy periods and but-for prices, the estimated overcharge rises to well over $300 million. Lawyers representing federal class plaintiffs claimed $400 million.

In July 1997 the U.S. District Court in San Francisco approved a settlement of $86.2 million for the remaining members of the federal class. The total was slightly reduced from the four companies' initial offer because five large buyers had opted out of the class. Nevertheless, the striking fact is that class plaintiffs received compensation that is at most *one-third* of the overcharges imposed on them by the citric acid cartel.

Five companies withdrew from the federal class settlement in July 1997. Procter & Gamble, Kraft Foods, Quaker Oats, Unilever, and Schreiber Foods had purchased $350 million in citric acid from 1991 to 1995. Back in November 1996, the opt-outs' counsel had reacted with pique to ADM's low-ball offer to his clients and the poor guidance the DOJ had provided plaintiffs with the wording of ADM's guilty plea:

> "The Justice Department has allowed the facts to be covered up . . . It is clear what ADM and the DOJ got out of the [criminal] deal – reduced civil liability for Archer Daniels and a record settlement for the Justice Department." (*Bloomberg News* November 28, 1996).

A year and a half later, the three Swiss companies in the citric acid cartel settled with the opt-outs. While the terms of privately settled treble damages claims are normally kept confidential, some information came to light that allows reasonable inferences to be made as to the settlement size. ADM as a public company is required to report developments that materially affect its profits. Civil settlements previously made by ADM in lysine were deemed nonmaterial, but it did report the amount it paid to P&G, Kraft, Quaker, and Schreiber. The payment was $36 million. Assuming that ADM paid in proportion to its U.S. market share, all four conspirators must have ponied up about $89 million. Given that these four opt-outs purchased 15 to 20% of all U.S. citric acid during the conspiracy period, the recovery rate for the opt-outs was three to five times higher than that for the federal class. More importantly, the opt-outs received a settlement that was definitely above single damages and probably close to double damages.

Confirmation of high recovery rates for the opt-outs came in a statement made at a 1998 press conference by the CEO of Roche Holdings, Franz B. Humer. He said that Roche had paid $10 million to settle U.S. civil suits in citric acid. It is public knowledge that of that $10 million $5.7 million was paid to the federal class. By subtraction, $4.3 million was paid to the opt-outs. Given their relative shares of U.S. market purchases, it is clear that from Humer's statement the opt-outs settled at a rate three to four times higher than the federal class.

Finally, a settlement with indirect buyers of citric acid in California was announced in July 1999. Most of the buyers were small food processors that purchased citric acid from chemical wholesalers. The plaintiffs' lawyer stated that the overcharge by sellers was 10 to 17% of sales; his clients were compensated at the rate of 27% of the value of their purchases, or about double the overcharge. Again, these plaintiffs got a settlement rate that was five or six times better than the federal class, though like the opt-outs they had to wait a couple of years longer to get paid. In total, U.S. settlements were $200 to $250 million.

The Federal Corn Sweeteners Cases

As mentioned above, ADM's plea agreement in October 1996 granted immunity from criminal prosecution for price fixing in the market for HFCS.[5] However, the government's investigation of price fixing by the other leading producers of HFCS continued for two years after the ADM deal. In August 1999, the DOJ announced that it had closed its criminal investigation of price fixing sometime during the first half of the year. The DOJ's abandonment of the criminal investigation may have been a pragmatic decision based on possessing only circumstantial evidence insufficient to prove price fixing beyond a reasonable doubt in a jury trial. The FBI's sound and video tapes contain incriminating statements by Michael Andreas and Terrance Wilson, both of whom reportedly refused to talk during their civil depositions in the HFCS case.

In September 1996, the plaintiffs got a small break. CPC International agreed to settle for $7 million. As is typical of negotiated settlements,

5 On the other hand, one tape made by Whitacre reportedly has Michael Andreas saying that his counterpart at Cargill would not participate with ADM in overt price fixing. All of Whitacre's tape recordings were ordered to be released to civil plaintiffs by the Appeals Court of the 7th Circuit Court on June 19, 2000. ADM, James Randall, and other ADM employees had resisted their release for years.

the first company to settle is often not one of the leaders (CPC was third or fourth in the industry), and plaintiffs are willing to settle for relatively low rates. An early settlement also helps finance the costs of plaintiffs' counsel. However, CPC's motive for settling may have been rather mundane. In December 1997, CPC International underwent the fashionable route of dismemberment and refocusing. CPC split itself into a consumer-products food company renamed Best Foods and an industrial-ingredients unit called Corn Products International. Settlement was a precondition for this restructuring plan to meet with investor approval.

Plaintiffs in the civil case persevered against the remaining four defendants. They believed that they had compelling economic evidence of substantial price increases in corn sweeteners for 1989-1994 that could not be explained by competitive market forces. The defendants hired battalions of pedigreed lawyers and squads of economic experts to defend themselves.

Termination of the criminal case initially strengthened the hands of the four defendants in the civil treble-damages case and encouraged them to delay settling. Cargill was delighted that they would not be indicted by the government. A company spokesperson said:

> "We're proud of our reputation for integrity. Our commitment to ethical behavior paid off with the conclusion of the sweetener investigation."

Cargill's statement proved to be too optimistic. *Nine years* after the FBI raid on the HFCS companies' offices, the remaining four defendants threw in the towel. In March 2004, with a trial fast approaching Cargill and American Maize broke ranks with the other two sweetener manufacturers and settled for $28 million. This was obviously a sweetheart deal designed to get ADM and Staley to settle, because under the legal principle of joint and several liability it left the two largest defendants exposed to nearly all of the billions of dollars in trebled damages alleged by plaintiffs. In June and July 2004, ADM and Staley (a Tate & Lyle subsidiary) agreed to pay $575 million to settle the suit. Assuming that the defendants had a 50:50 chance of losing at trial, the $611 million they paid was a reasonable outcome. I estimate that the trebled damages would have reached $4 to $6 billion, so in 1989-1994 dollars the defendants paid as little as 10% of their maximum exposure.

The Vitamins Cases

United States of America

Private treble damages suits filed in the United States resulted in the largest antitrust settlements in history. Scores of class actions were filed in many federal courts around the United Sates, and these were consolidated in one principal action[6] that was argued in the U.S. District Court for the District of Columbia in 1999 to 2003. This consolidated suit had approximately 4,000 plaintiffs, firms that had purchased bulk vitamins in the United States directly from the major manufacturers. Most were manufacturers of animal feeds, foods, pharmaceuticals, or vitamin premixes; some were farmers or farm cooperatives; and some were chemical wholesalers. Not all eligible buyers registered as plaintiffs.

Chief Judge Thomas Hogan was in charge of ruling on dozens of issues that came before the Court. One decision he made was to split off the main suit *Vitamins Antitrust Litigation* and create three other groups with somewhat different issues: the niacin and biotin group (with defendants Lonza, Degussa, Nepera, Reilly, Sumitomo, and Tanabe), the choline chloride group (BASF, Akzo Nobel, Chinook, Bio-Products-Mitsui, Du-Coa, and UCB), and E Merck.

Each of the defendants had retained a couple of law firms, and the federal class was represented by scores of law firms. At least 500 lawyers feasted on fees that would top $250 million (Boies 2004:254). In May 1999 plaintiffs' firms chose three among them to act as co-lead counsel. One was well known litigator David Boies II (Donovan 2005). His firm had been mostly circumstantial evidence for more than a year and had been one of the first to file a complaint. Boies (2004) relates that Roche first offered to settle in December 1998, five months before their guilty pleas were announced. He also claims that he offered the Big Three a settlement offer of $400 million in April 1999, but at the meeting of plaintiffs' firms one month later he was told to settle for a minimum of $550 million. Roche and BASF were eager to accept, but Rhone-Poulenc was unwilling to pay at the same rate as the other two. A settlement agreement with the Big Three defendants was reached in about six months, which is very quick compared to most large treble damages cases. With the last-minute addition of the three largest Japanese defendants, Boies presented a

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6 *In re Vitamins Antitrust Litigation* dealt with the Big Six defendants and their products. Prosecution of the "Little Twelve" and some of the smallest products (vitamins B3, B4, B9, and H) proceeded on separate tracks.

preliminary agreement for $1.17 billion to Judge Hogan on November 3, 1999. Fees of $123 million were added later.[7] The proposed settlement was hailed by many as the largest antitrust class-action sum in history. Later, Boies and company were able to obtain a further $225 million from the 12 smaller, but recalcitrant defendants.

Boies' (2004) inside account of the settlements reveals that the lead counsel of the federal class aimed at extracting at most single damages from the vitamins defendants (p. 250). However, the proposed class settlement amount was only about 18% of direct purchases of bulk vitamins in the 1990s and 51% of estimated overcharges.[8] Several of the largest buyers were dissatisfied with the amount negotiated by class counsel, partly because they believed that the overcharges were at least twice as high as represented by class counsel. Thus, in March 2000 about 300 companies formerly in the federal class decided to opt out of the main settlement. They then filed separate law suits (often called "direct actions") to recover treble damages.

Direct-action plaintiff's lawyers pressed the defendants to get as much information as possible to prosecute their claims. Most of the details about the scope of discovery requests are confidential and must be inferred from expert's reports that have come to light. Defendants' ended up divulging a great deal of financial and economic information to the plaintiffs (Bernheim 2002a, 2002b). Hundreds of thousands of transactions of vitamins products were revealed. Monthly prices from as far back as 1980 and as recently as 2003 were made available for scores of specific grades of bulk vitamins; these dates extended far beyond the longest guilty-plea periods. Internal data on plant locations, production capacities, quantity of output, input costs, and sales to various locations were given to plaintiffs for the purpose of expert analyses.[9] Scores of depositions were taken. From

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7 These fees, as a share of the anticipated $1.17 billion, would have been a low 10.5%; adding the additional $225 million, the ratio would have been 8.8%. However, the reduced payout to the rump class after the opt-outs fled raised the fee rate to above 50%.

8 Less than six months is insufficient time to obtain the type of data under discovery that would have allowed accurate economic estimates of the overcharges. Moreover, the initial settlement did not allow for price fixing that may have occurred in the 1980s. Class counsel claimed that the settlement was 23% sales (Boies 2004:254).

9 Bernheim (2002: xxi-xxii) calculates that all plaintiffs incurred overcharges of $2.103 billion in current dollars ($3.507 billion in damages converted to 2002 dollars). Of that total, 47% was imposed on the direct-action plaintiffs and 53% on the remaining buyers. In addition, during the possible 1985-1989 collusive episodes damages for the opt-outs amounted to a further $209 million (2002 dollars) or an additional 21%; because of the greater lapse of time from the 1980's episode, the damages were an additional $465 million (in 2002 dollars) or 28%. Class plaintiffs made no claims of damages from collusion in the 1980s.

the time that plaintiffs' law firms first met to organize, three years elapsed until their expert's analysis was prepared.

In motions made to Judge Hogan, plaintiffs also attempted to obtain relevant records of written submissions by the defendants to the Canadian and EU antitrust authorities (Spratling and Arp 2005: 39-40). One set of documents was the amnesty applications made by some of the defendants. Both the Canadian and EU governments opposed turning over these documents. Judge Hogan ruled that the European Commission must provide the submissions, but the Canadian government did not. As a result of these and other discovery motions, Canada and the EU amended their leniency-program rules to permit entirely *oral* leniency applications and witness interviews.[10] These policies are consistent with U.S. practice.

The direct-action plaintiffs represented 75% of all plaintiffs' bulk vitamin purchases during the conspiracies of the 1990s (Denger 2005). Thus, the opt-outs were generally much larger buyers than those remaining in the federal class after March 2000. Counsel for most of these opt-outs later outlined the terms of settlement (Greene 2005). He asserted that his clients received a settlement of almost $2 billion. Thus, as a percentage of their nominal purchases in the 1990s the opt-out firms' settlement was about 77%.[11] This compares to the 15 to 18% received by the buyers who stayed in the federal class. That is, the opt-outs recovered *five times* as much per dollar purchased than the remaining members of the class.[12] Denger (2005:7) extrapolates these data to all the opt-outs and suggests a recovery of $3.6 to $4.3 billion.[13] Together with the recovery and fees of the federal class (mentioned above), direct purchasers were paid $4.2 to $4.9 billion.

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[10] The EC prefers written submissions by companies applying for leniency (Spratling and Arp 2005:40-41). The oral applications are transcribed by the EC and are reviewed and certified by counsel for the applicant. The EC maintains that these transcripts are Commission documents, not company documents, and are hence not discoverable by U.S. litigants. The discoverability of "paperless" leniency applications is still in doubt.

[11] However, as a percentage of nominal dollar purchases for the *extended* 1985-1999 conspiracy period, the opt-outs recouped only 61%. Comparing the $2 billion to the present value of the affected commerce of the cartels would further lower the percentage.

[12] One of the largest opt-outs was Tyson Foods. In fiscal years 2002-2004 the company's distributions from various settlements were so large ($306 million) that they had to be reported in their annual stockholders' reports. Similarly, arch price fixer ADM reported distributions of $175 million.

[13] Denger hints that the remaining opt-outs got from three to five times what they would have received ($350 million) had they remained in the federal class. This follows from his statement that the recovery of direct buyers from the Big Six defendants alone was $3 to $4 billion and the known $225 million from the smaller defendants. Legal and experts' fees exceeded $250 million.

Although Boies and the other class counsel may be open to criticism for negotiating a sweetheart deal with the Big Six without full information, they assiduously during 2000-2004 in pursuing many of the Little Twelve remaining defendants. Except for two financially weak firms in the vitamin B4 cartels, plaintiffs obtained much higher settlements per dollar of sales by exploiting the legal rule of joint and several liability (Boies 2004: 255-260). Although he may exaggerate, Boies asserts that the four vitamin B3 suppliers paid out 63% of their U.S. cartel sales.; that in 2002 Sumitomo agreed to an amount equal to 82% of its cartel revenues; and that E. Merck's $50-million settlement was 89% of the company's affected sales. The most lucrative victory for the vitamins plaintiffs was in a jury trial that was held because Mitsui refused to admit that it had managerial control over its 100%-owned subsidiary, vitamin B4 producer Bio-Products. With strong economic testimony by the plaintiffs' expert and a poor showing by Mitsui's legal team, the jury decided that Mitsui owed all the remaining trebled damages ($114 million).

Canada, Australia, and the United Kingdom

The most successful private suits were launched in Canada. Canadian courts began authorizing substantial recoveries in the late 1990s. The vitamins litigation was settled in the Supreme Court of British Columbia in April 2005 (for BC residents only) and in Ontario Superior Court (for the rest of Canada) in March 2005. There were 20 corporate defendants. Unlike the United States, the courts consider three groups of plaintiffs simultaneously: direct buyers, indirect commercial buyers, and consumers. Including fees but excluding prejudgment interest, the settlement aggregated to C$127 ($US 105) million on total Canadian affected sales of C$870 million (14.5%). The award was strongly affected by an analysis of a University of British Columbia economist that concluded that Canadian overcharges were 12 to 16% of affected sales. The settlement was by far the largest private antitrust suit in Canadian legal history. Approximately 75% of the funds were distributed to direct buyers and 17% to indirect buyers; the latter was handled through a *cy pres* process by giving the funds to selected consumer and trade associations.

In Australia, a class action was filed in 1999 against the three largest vitamin makers on behalf of buyers of eight animal-grade bulk vitamins. In July 2006 an historic settlement of US $23 million was announced; in addition, contingency legal fees of $8 million were awarded.

An important private antitrust case captioned *Provimi v. Roche Products* came before the English High Court (Olsen 2005). Provimi is part of a German company that purchased bulk vitamins in Germany and the UK, while Roche Products is a UK subsidiary of Roche Holdings of Switzerland. In its 2003 ruling the high court said that EU law permits the plaintiff to seek compensation for damages on its German purchases in a UK court on the theory that Roche Products' conduct in the UK implemented the cartel throughout Europe. This decision might make UK courts the fora of choice for European victims of international cartels, so long as the buyer has some connection with the UK (Joshua 2005). The UK has liberal discovery rules that favor plaintiffs in cartel cases.

Indirect Purchasers' Cases

In a famous verdict in 1977, in the case called *Illinois Brick*, the U.S. Supreme Court decided that in federal price fixing cases indirect buyers of a cartelized product would have no standing. The principal reason for this decision was "conservation of judicial resources." The Court was concerned that with extensive chains of buying-selling relationships between manufacturers and the final consumers, the courts would be overwhelmed with damage claims by multiple categories of indirect buyers (farmers, wholesalers, retailers, consumers). Moreover, the Court doubted the feasibility of apportioning the direct overcharges among successive stages of a marketing channel because calculating the extent of pass-through by industries is not without economic uncertainties. The Court was also worried that multiple claimants for the same cartel overcharges might distort the Congressional intent that treble damages would deter the formation of future cartels. If direct buyers of some input did secure treble damages from a cartel, those who purchased from the direct buyers might argue that all or most of that first-stage overcharge was passed on in the form of higher prices to the next buyers. The possibility of direct buyers being sued by indirect buyers would lower the incentive for direct buyers to bring treble-damages suits in the first place, reasoned the Court, thus reducing cartel deterrence by private suits.

The economic models of overcharge pass-on do display some complexities. Under the simplest possible assumptions (constant returns to scale in production, a homogeneous product, and a linear demand schedule), buyers with no market power must pass on 100% of an increase in the price of an input (Harris and Sullivan 1979). Total pass-through of a cartel price increase will also occur in industries that sell according to a cost-plus contract. On the other hand, if the direct buyer is a monopolist, it will pass on only 50% of the overcharge to its customers. Oligopolies will display pass-through rates between 50 and 100%, depending on their degree of market power. Finally, pass-through rates are affected by the degree of product differentiation (Cotterill *et al*. 2000). A powerful intermediate buyer of a highly differentiated product can pass on *more than 100%* of a price-fixing mark-up.

Although indirect buyers of cartelized products have no standing in federal antitrust suits, the Supreme Court has consistently recognized the rights of the states to permit indirect-purchaser suits under their state antitrust laws. Nowadays about half the states permit such suits. They are usually class actions and sometimes are filed in one state for indirect buyers in 20 or more states. Not all these states follow the treble-damages rule; some allow only single damages; and Alabama permits claims on the basis of $500 per transaction.

Indirect-purchaser antitrust suits are not widely reported by the mainstream press. From ADM's annual reports, it is known that in 1999 ADM faced 74 state-level class actions alleging damages by indirect buyers of lysine, citric acid, or corn sweeteners. Some of these cases were decided on terms that were costly for the cartels. For example, a suit by 20 feed manufacturers in San Francisco County Superior Court netted the plaintiffs in 1997 a recovery of $50,000 each plus 17% of the value of purchased lysine. The 17% figure was considered by local lawyers who were interviewed to be very high by historical standards in the state; most such suits are settled for one third that recovery rate or lower. Another class-action suit brought by indirect buyers of lysine in Michigan was settled in April 1997 for $2.1 million. However, a suit brought by buyers of citric acid in Alabama went badly for the plaintiffs when appealed to the state's Supreme Court.

The only recourse in federal courts for indirect buyers injured by price fixing conspiracies is for the attorney general of their state to bring a *parens patriae* case for them. In the case of the lysine and citric acid cartels, no such suits were filed, nor were any pre-trial negotiations announced. However, in 1999 a large group of attorneys general began negotiations with the six largest vitamin manufacturers seeking damages for indirect purchasers of bulk vitamins who were overcharged by cartelization.[14]

In early October 2000, a settlement between the Big Six vitamin makers and 24 attorneys general was widely publicized in the U.S. and European press. The six vitamin companies agreed to pay the 24 states $305 million. Commercial indirect buyers doing business in those states will file compensation claims and receive shares of a pool of $198 million. Because it is infeasible for households to file individual claims, they will be compensated indirectly by appropriate state programs. For example,

[14] The present author advised the attorneys general on the size of the overcharge and other economic matters.

New York State announced that it would use the consumer portion for grants to nonprofit organizations and local governments for programs related to prenatal care, child nutrition, and alleviation of hunger. These settlements were by far the largest ever made under state indirect-purchaser antitrust laws. However, persons doing business in or living in most states received no compensation. Moreover, the $305 million, while an impressive amount, is under the most conservative assumptions of pass-through at most one-third the trebled indirect overcharges.

Effectiveness of Civil Penalties

One of the recurring themes of this book is the great escalation in monetary sanctions faced by price fixers since 1995. Not only have public prosecutors secured ever-larger fines on cartel participants, but civil settlements have also become more costly for companies. The total recovery by U.S. buyers from the three global cartels in lysine, citric acid, and vitamins reached $5 to $6 billion. This total is roughly five times the U.S. government's antitrust fines of $1.11 billion. The combined total of public and private monetary sanctions in the United States accounted for 90% of all monetary sanctions worldwide. Despite the growth of antitrust enforcement outside the United States, American penalties are still by far the harshest in the world, and private actions deserve most of the credit.

Simply as a historical trend, these three cases have taken private price fixing settlements to a new, exalted plane. In their comprehensive study of federal private antitrust cases, Elzinga and Wood (1988) reported on the settlement amounts for a sample of 49 cases in a confidential survey with 285 usable responses. Their sample tended to include a high proportion of middle-sized law suits and spanned all categories of antitrust infractions. The average total settlement in these cases was $1.45 million, including a few awards made to defendants. Prior to the vitamins settlements, only about ten private settlements had breached the $100-million mark Connor (2001: Table 15.1). Previous record holders include *Brand Name Prescription Drugs* (net recovery of $723 million in 1999) and *NASDAQ Market Makers* ($1,123 million in 1999).

The settlements connected to the three global cartels in this book are not only absolutely large, they are large relative to their U.S. affected commerce. To try to compare the recovery rates of various price-fixing conspiracies, the recovery amounts are divided by the sales of the defendants during their respective conspiracies. Such data are difficult to assemble, but a sample of 10 U.S. cases was found that were filed in the years 1976-1994 (Connor 2001: Table 16.2). These data make clear the vital precedent set by the recoveries in the lysine, citric acid, and vitamins cases. Prior to 1996, recovery rates for federal class-actions were typically quite low, averaging only 3% of sales. By contrast, recovery rates for injured buyers of the lysine, citric acid, and vitamins cartels ranged from 16 to 70%.

However, these settlements are not so impressive when they are measured against the damages caused. Recall that the U.S. overcharges of the 1992-1995 lysine cartels were $80 million; in 1996-1999 the direct purchases were paid at most $92 million or 115% of the overcharges. The buyers of price-fixed citric acid may have done better, receiving about $246 million on overcharges of $160 to $245 million (100 to 154%). The most vaunted case of all was vitamins, in which the huge settlements returned $4.2 to $4.9 billion to direct purchasers. Yet, these settlements amounted to only 175 to 250% of the U.S. overcharges in nominal dollars and were much lower when measured in adjusted dollars. The problem is that prejudgment interest is not awarded to plaintiffs that win private actions. When one takes into account that the vitamins buyers were overcharged in the mid 1990s but had their money returned ten years later, then the settlements are worth only 100% of the money that was stolen. Money not only depreciates over time, it also has an opportunity cost as financial capital (Connor 2006b).

The purpose of single damages is to provide monetary compensation for economic injuries. The purposes of treble damages are also treble: to compensate victims, to give private parties an incentive to search for and ascertain the size of monopoly profits being made by price fixers (thereby leveraging the powers of government antitrust prosecutors), and to deter future violations by inflicting memorable punishment on perpetrators. In practice, the punitive and deterrent functions of private settlements are not being served by class actions.

These findings are important because there are arguments being advanced by thoughtful writers on the subject that treble-damage awards are passé. Rakoff (1992) argues that the entire concept of *corporate criminal* liability is a relatively new American concept in the law that is built on dubious logic. The increasing use of corporate criminal indictments was largely a response to the necessity for punitive fines for large companies, levels that could not be attained with civil charges. Rakoff argues that the U.S. Sentencing Guidelines for organizations made civil treble damages unnecessary or excessive, given the harsh sentences mandated by the Guidelines. It should be noted that Rakoff was writing before there had been any experience with actual implementations of the Guidelines. Since then, the DOJ has habitually sought substantial downward departures from punishments suggested by the sentencing guidelines for the vast majority of price fixing defendants.

It is true that serious price fixing exposes corporations to highly punitive fines if the legal limits are adhered to literally. The government can impose felony fines up to *double* the overcharges on direct buyers; private plaintiffs can ask for *treble* those same overcharges; attorneys general can seek *treble* damages from price fixing for their residents who were indirect buyers in about half the states. In total, cartel defendants theoretically have liability for up to *eight* times their overcharges. This does sound excessive.

But rarely are the prosecutorial planets so aligned. What a literal reading of the law implies and what actually has occurred in practice are quite different things. In the cases studied most closely in this book, most corporate conspirators paid well under single damages in government fines. After discounting, fines never approach double overcharges. Plaintiffs who remained in federal class actions never received monetary recoveries above single damages. Even counting the more generous recoveries extracted later by class opt-outs, civil recoveries properly adjusted for the time value of money typically are below half of the treble damages specified by the Sherman Act. As for consumers and intermediate buyers, *parens patriae* suits have been initiated by the attorneys general of less than half the states, and the few instances of state treble-damages awards to indirect buyers seem to involve mostly small settlements. In sum, because the burden of proof is on prosecutors and plaintiffs and because indirect buyers have no standing to sue in federal courts, most corporate price fixers in practice now face only about double damages, not the eight-times damages theoretically justified by law in felony cases. Only the most obdurate defendant who becomes the last to settle might expect to disgorge treble the illegal profits made from price fixing. Moreover, the courts will see to it that guilty parties will not be inconvenienced by fines or settlements which might cause bankruptcy.

In assessing the appropriateness of the size of private settlements, one has to keep in mind the fact that global cartels typically sell most of their overpriced products outside the United States and Canada. As a rough rule of thumb, the lysine, citric acid, and vitamins cartels did about 25 to 35% of their business in North America. Unless they maintain a buying office in the United States or Canada, offshore buyers of cartelized products seem to have no standing to join private plaintiffs that purchased in the jurisdiction. Therefore, if a corporation is prosecuted for global price fixing and pays, for example, criminal and civil penalties equal to double the monopoly overcharge, these penalties may amount to only one-third of the conspirator's illicit profits. Injured buyers who made purchases outside of North America have no rights to seek compensation in civil legal proceedings in U.S. courts. The vast geographical scope of global cartels severely undercuts the deterrence power of even harsh monetary sanctions in North American jurisdictions.

Finally, it must be remembered that the probability of being snared by antitrust officials in any jurisdiction is certainly less than 100%. Some antitrust scholars have hazarded that the historical probability of being detected and prosecuted for price fixing is around 10 to 20%. The rebirth of global price fixing in the 1990s may have been influenced by the even smaller chances of being prosecuted outside North America. Global cartel managers often made a point of meeting as much as possible outside the United States. Not only are antitrust traditions not as well developed in Europe and Asia, the business cultures in those regions mean that buyers are likely to be less sensitive to or more resigned to collusive behavior on the part of their suppliers.