



U.S. CHAMBER

Institute for Legal Reform

Private Antitrust Remedies

*An Argument Against
Further Stacking the Deck*

.....
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Institute for Legal Reform

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Introduction and Executive Summary

A new populist movement has catapulted antitrust onto center stage in today's public policy debates. A recent House staff report embodies the central tenets of that movement, proposing legislation that would revamp antitrust doctrine and private antitrust remedies.¹

The House Antitrust Report (the Report) claims that antitrust doctrine is too permissive, that federal antitrust enforcement is too lax, and that the result is undue market concentration and tepid competition.² It urges Congress to expand the scope of antitrust liability by subordinating economic analysis of consumer welfare to various social values traditionally addressed by non-antitrust policy measures.³ And it calls on the federal antitrust agencies to enforce this new pro-plaintiff regime by suing U.S. companies for a broad range of routine business practices that, for good reason, are lawful under existing antitrust doctrine.⁴

These populist proposals for amending substantive antitrust law are deeply problematic. They would exalt the interests of individual competitors over consumers' interests in vigorous competition by inducing companies across the economy to pull competitive punches, lest juries find them liable for acting "unfairly" towards their rivals.⁵ Because such proposals will play a central role in antitrust policy debates

for some time, they warrant deep and skeptical scrutiny.

This paper, however, focuses on a related but distinct topic that the House Antitrust Report discusses in its final pages: the procedural and remedial dimensions of antitrust litigation brought by private plaintiffs rather than federal or state authorities.⁶ "In recent decades," the Report says, "courts have erected significant obstacles for private antitrust plaintiffs," thereby "undermin[ing] private enforcement of the antitrust laws."⁷ To "address these concerns," the Report calls for "[e]liminating court-created standards for 'antitrust injury' and 'antitrust standing'"; "[r]educing procedural obstacles to litigation, including through eliminating forced arbitration clauses"; and "[l]owering the heightened pleading requirement introduced in *Bell Atlantic Corp. v. Twombly*."⁸

Such proposals rest on a fundamental misconception that the decks in private antitrust litigation are somehow stacked

against plaintiffs. But quite the opposite is true: U.S. antitrust law privileges plaintiffs over defendants in ways that find no counterpart elsewhere in the law.

“The United States is unique in the world insofar as private enforcement of the antitrust laws vastly outstrips public enforcement. There are roughly ten private federal cases for every case brought by the Department of Justice or Federal Trade Commission.”⁹ The reason is straightforward. The U.S. system of private antitrust remedies, including automatic punitive (treble) damages, gives plaintiffs’ lawyers overwhelming incentives to bring weak cases and pressures defendants to settle them. And the unusually liberal class action mechanisms available in the United States magnify these perverse incentives for litigiousness.

It would disserve American consumers to eliminate the procedural protections that curb the worst excesses of this regime, which imposes major costs on the U.S. economy. Because today’s regime is overdeterrent by design, it already discourages firms on the margin from engaging in procompetitive behavior that a court or jury might misconstrue as anticompetitive. And it saddles private

enterprise with major costs—settlement payouts, lawyers’ fees, and insurance premiums—that companies across the economy pass through to consumers in the form of higher prices.

Over the decades, broad bipartisan majorities of the Supreme Court—led by such “liberal” Justices as Thurgood Marshall and David Souter—have construed the antitrust laws to check the most blatant abuses by plaintiffs’ lawyers. These are the very same judicial “obstacles” to liability that the House Antitrust Report proposes to abolish. But the Report cites no basis—and there is none—for undoing these consensus Supreme Court decisions and thereby tilting the antitrust playing field even more sharply against U.S. businesses and consumers.

This paper is divided into two parts. The first part summarizes the current regime for private antitrust remedies in the United States, explains how it systematically benefits plaintiffs at trial and in settlement negotiations, and compares it to the less pro-plaintiff regime for non-antitrust litigation. The second part then critiques specific proposals for stimulating even more antitrust litigiousness in the United States.

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Private Antitrust Remedies Compared With Private Non-Antitrust Remedies

The antitrust laws enable private plaintiffs to recover damages for antitrust violations. In principle, compensatory damages for antitrust violations are appropriate and uncontroversial to the extent they make eligible plaintiffs whole, just as tort law, in principle, appropriately makes plaintiffs whole for violations of common law negligence principles.

But private antitrust remedies in the United States extend far beyond the relief available in ordinary civil litigation. For example, if plaintiffs succeed in proving negligence or breach of contract, they generally collect compensatory damages equal to their harm. In unusual circumstances, tort plaintiffs can collect punitive damages as well, but only if they can successfully argue that the defendant behaved egregiously. Attorneys' fees in ordinary civil litigation are also subject to the "American Rule"—with rare exceptions, each side is expected to pay its own lawyers no matter who wins.

The U.S. system of antitrust remedies departs from that baseline litigation regime in two significant respects, both of which greatly advantage plaintiffs.

Automatic Punitive Damages

With narrow exceptions, any plaintiff that prevails on any theory of liability under federal antitrust law is automatically entitled to "threefold the damages by him sustained."¹⁰ In other words, two-thirds of

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“As antitrust law has evolved since the Sherman Act of 1890, it has come to address a broad range of competitive conduct that is not categorically anticompetitive and is thus properly subject to the full “rule of reason” rather than any “per se” prohibition.”

every private antitrust award takes the form of punitive damages, over and above what is needed to make the plaintiff whole. Of course, sometimes punitive damages are appropriate for their deterrent value—for example, where a given category of conduct (1) often escapes detection or (2) never has redeeming social value. And sometimes antitrust cases involve such conduct: for example, naked price-fixing cartels often elude detection and have no redeeming social value. Such cartels exemplify conduct that is “per se” unlawful and, indeed, is subject to criminal as well as civil penalties.

The problem is that prevailing antitrust plaintiffs always recover treble damages, even when the defendant’s conduct was open rather than covert, and even when it was not clearly unlawful when it was undertaken. As antitrust law has evolved since the Sherman Act of 1890, it has come to address a broad range of competitive conduct that is not categorically

anticompetitive and is thus properly subject to the full “rule of reason” rather than any “per se” prohibition.¹¹ Such cases require a judge or jury to scrutinize the context and economic effects of the defendant’s conduct and consider not only the extent of any competitive harm, but also any countervailing benefits. This appropriately nuanced approach applies today to an extraordinary array of conduct, including joint ventures,¹² trade association activities,¹³ vertical restraints,¹⁴ and virtually any claim of monopolization under Section 2 of the Sherman Act, such as exclusive dealing.¹⁵

A defendant’s conduct in such cases generally lacks the features that could possibly justify punitive damages. In most, there was nothing surreptitious about the defendant’s conduct; indeed, it may have been common knowledge to everyone in the relevant business community. Like defendants in many negligence cases, defendants in rule-of-reason antitrust cases could not have predicted with any reasonable degree of certainty that their conduct would later be deemed unlawful. “The line between winning and losing may be exceedingly fine in such cases,”¹⁶ but “no matter how close the case, the winner gets a bounty and the loser gets a penalty” in the form of treble damages.¹⁷

The leading antitrust treatise describes that outcome as “an embarrassment to antitrust policy,” given “the law’s usual discomfort with imposing unforeseen liability.”¹⁸ Moreover, “[t]he practical effect of mandatory trebling is to tilt the settlement process in the plaintiff’s favor because mandatory trebling so inflates the defendant’s cost of losing and the plaintiff’s value of a victory in a rule of reason case.”¹⁹

One-Way Fee-Shifting

In contrast to the American Rule that governs most U.S. civil litigation, any prevailing antitrust plaintiff is also entitled to recover attorneys' fees from the defendant.²⁰ In complex antitrust cases that go to trial, each party can incur tens of millions of dollars in attorneys' fees. If the ultimate verdict is for the plaintiffs, the defendant is saddled not only with its own

multi-million-dollar legal bill, but also with the plaintiffs'. And this fee-shifting mechanism is an entirely one-way ratchet: "[t]he successful defendant gets nothing" even if it prevails.²¹ This arrangement "simply echoes and enhances the effect of mandatory trebling" and "further tilts the risk evaluation and settlement process in favor of the plaintiff."²²



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Expanding Private Antitrust Remedies Would Be Unnecessary and Counterproductive

There is no basis for suggestions that private antitrust remedies are not strong enough and need to be turbocharged by new pro-plaintiff legislation.²³ The regime for U.S. private antitrust remedies is already aggressively pro-plaintiff when compared to remedies available in comparable non-antitrust cases.

Pursuing Deterrence, Not Overdeterrence

Advocates of expanding private antitrust remedies begin with the premise that “private enforcement deters anticompetitive conduct” and conclude, in the words of the Report, that legal “obstacles” to recovery by “private antitrust plaintiffs” should be eliminated to maximize deterrence.²⁴ But even if the premise is true,²⁵ the conclusion would not

follow. The Report appears to assume that the more deterrence the law provides, the better, and that any “obstacles” to private recovery should thus be removed.²⁶ But that position ignores the consequences of overdeterrence, including the prospect that firms will respond to the threat of draconian penalties in ways that reduce the threat of liability but that ultimately harm consumers.

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separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain:

One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.²⁷

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent.

Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S.

regime is already overdeterrent, in that it subjects firms to unusually severe liability risks even for overt conduct subject to the rule of reason. If anything, Congress should consider aligning private antitrust remedies with remedies for analogous common law torts by, for example, limiting treble damages and one-way fee-shifting to cases involving hard-core violations that may elude detection, such as price-fixing cartels. In all events, Congress should not make a bad situation worse by ratcheting up the level of overdeterrence.

That, however, is precisely what the Report advocates. It reflects the ascendant populist strain in American antitrust rhetoric, which claims that “Chicago School” conservatives in the 1970s and 1980s “ushered in a new ideology” that hobbled effective antitrust enforcement.²⁸ The Report implies that today’s procedural guardrails against antitrust litigation abuse arise from the same political movement, and it advocates overruling half a century of judicial precedent. Among other legislative proposals, the Report calls for (1) “[e]liminating court-created standards for ‘antitrust injury’ and ‘antitrust standing’” recognized in *Brunswick* and similar cases;²⁹ (2) “[l]owering the heightened pleading requirement introduced in *Bell Atlantic Corp. v.*

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Twombly”;³⁰ and (3) “eliminating forced arbitration clauses.”³¹ Each of those proposals is misconceived.

The Need To Show “Antitrust Injury”

Although one would not know it from reading the Report, *Brunswick* was authored not by a conservative Justice over a liberal dissent, but by noted liberal Justice Thurgood Marshall for a unanimous Court.³² The case illustrates why antitrust injury is a necessary gating criterion for a private antitrust suit. The defendant was a manufacturer of bowling equipment. When some of its bowling-center customers fell into financial distress and defaulted on their equipment payments, the defendant acquired those centers rather than letting them close. The plaintiffs—rival bowling centers—sued on the ground that “by acquiring the failing centers [the defendant] preserved competition, thereby depriving [them] of the benefits of increased concentration.”³³ And they sought damages “designed to provide them with the profits they would have realized had competition been reduced” in the absence of the defendant’s acquisitions.³⁴ The Court unanimously held that such suits are “inimical” to the fundamental purpose of the antitrust laws: “the protection of competition, not competitors.”³⁵

Brunswick was unanimous because it was obviously correct. Yet, the House Antitrust Report explicitly calls on Congress to overturn *Brunswick* with new legislation and abolish the “antitrust injury” requirement. The predictable result of such legislation would be a flood of new competitor suits designed to prop up retail

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prices. That outcome would benefit plaintiffs and their lawyers but harm American consumers.

The Logic of *Twombly*

Like *Brunswick*, *Twombly* was not the work of the Court’s conservative wing; the author of the majority opinion was Justice David Souter, and the vote was 7-2. And, contrary to the House Antitrust Report’s mischaracterization, *Twombly* did not introduce a “heightened pleading requirement”³⁶ for antitrust cases. Instead, it applied the default pleading standard of Rule 8(a)(2) of the Federal Rules of Civil Procedure—not the heightened Rule 9(b) pleading requirement applicable to fraud and certain other claims—to allegations that the *Twombly* defendants entered into an

illegal market-allocation agreement.³⁷ The Court held that Rule 8(a)(2) requires a plaintiff to plead non-conclusory factual “allegations plausibly suggesting,” and “not merely consistent with,” an unlawful agreement rather than lawfully independent business decisions.³⁸ This holding is unexceptional and follows largely as a matter of logic from the general principle that, to survive a motion to dismiss, a complaint must contain “more than labels and conclusions[] and a formulaic recitation of the elements of a cause of action.”³⁹

As *Twombly* recognized, it is particularly important to apply this general pleading standard to antitrust complaints; otherwise, nothing beyond complete speculation would entitle plaintiffs’ lawyers to impose massive discovery costs on businesses throughout the economy. “[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support [an antitrust] claim.”⁴⁰ Again, the futility of the exercise would not deter plaintiffs’ attorneys because “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases.”⁴¹ That, however, is the wasteful regime the House Antitrust Report urges Congress to impose on American business and ultimately on consumers.

The Value of Private Arbitration

The Report further calls for abolition of pre-dispute arbitration clauses, which are generally applicable only to plaintiffs in contractual privity with the defendants

they wish to sue. According to the Report, such clauses “allow [defendants] to evade the public justice system—where plaintiffs have far greater legal protections—and hide behind a one-sided process that is tilted in their favor.”⁴² That claim is wrong in several respects.

FIRST

Nearly one hundred years after passage of the Federal Arbitration Act of 1925,⁴³ private arbitration has proven itself as a fair, less expensive, and speedier alternative to the court system for adjudicating business disputes of all kinds, including antitrust claims. Indeed, recent research suggests that consumers tend to fare better, and receive compensation far sooner, when they proceed via arbitration rather than in court.⁴⁴ In all events, the process is hardly “tilted in ... favor” of antitrust defendants.⁴⁵

SECOND

The supposedly “greater legal protections” the Report attributes to court-based antitrust litigation operate mainly to the benefit of plaintiffs’ attorneys, not their clients. It is true that arbitration commonly lacks key features endemic to antitrust litigation, such as massive discovery

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“ But those features do not make traditional multi-year court litigation fairer than arbitration; they make it more costly for defendants, more conducive to forced settlements, and thus more likely to bestow a contingency fee windfall on plaintiffs’ attorneys.”

burdens for defendants and one-way fee-shifting for plaintiffs’ lawyers. But those features do not make traditional multi-year court litigation fairer than arbitration; they make it more costly for defendants, more conducive to forced settlements, and thus more likely to bestow a contingency fee windfall on plaintiffs’ attorneys. Restricting the availability of arbitration would enable plaintiffs’ lawyers to bring more meritless suits and, by forcing companies to settle them for substantial sums, would increase their costs of doing business and ultimately raise the price of goods and services economy-wide.

THIRD

Contractual arbitration provisions do not enable anyone “to evade the public justice system”⁴⁶ even where they apply. No matter what provisions private parties agree to, defendants remain fully accountable, in court, to two federal

antitrust agencies and 50-plus state AGs, all of which appear eager to build on the new wave of antitrust cases they have recently brought against some of America’s largest companies.

The Report suggests, without citation, that eliminating arbitration clauses is necessary anyway because even though antitrust authorities can hold wrongdoers accountable in federal court, they are “susceptible to capture by the very monopolists that they [are] supposed to investigate.”⁴⁷ No one familiar with the theory of “capture” or with America’s antitrust enforcers would make such a claim. “Capture” is a phenomenon associated with industry-specific regulators, not the generalist antitrust litigators who lead and staff the U.S. Department of Justice’s Antitrust Division, the Federal Trade Commission, and state AGs’ offices. Those litigators have strong incentives to bring aggressive cases against prominent defendants, both to gain professional experience and to make a name for themselves. Such experience and reputation are especially valuable for antitrust enforcers who wish someday to transition to private law firms. If anything, antitrust enforcers are more likely to be prodded into marginal litigation by a target’s rivals than to be argued into submission by the target itself.

Conclusion

Private litigation will continue playing a central role in the enforcement of U.S. antitrust law. But antitrust plaintiffs already enjoy advantages in private litigation that are unparalleled in other areas of U.S. civil liability.

Those advantages have spawned litigation abuses even against the backdrop of today's substantive antitrust doctrine, and the economy-wide costs of those abuses will only increase if, as the populists propose, Congress expands the scope

of substantive antitrust liability. As America begins to rebuild its post-pandemic economy, now is not the time to stack the litigation decks even more lopsidedly against private enterprise.

Endnotes

- 1 Majority Staff of Subcomm. on Antitrust, Commercial & Admin. Law of the H. Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets* 9-10 (2020) ("House Antitrust Report" or "the Report").
- 2 See, e.g., *id.* at 6-7, 20-21, 391-92.
- 3 See *id.* at 20-21, 391-99.
- 4 See *id.*
- 5 See generally Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, 54 Rev. Indus. Org. 651 (2019).
- 6 See House Antitrust Report at 403-05.
- 7 *Id.* at 403-04.
- 8 *Id.* at 404-05 (footnotes omitted) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).
- 9 Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 673, 675-76 (2010).
- 10 Clayton Act § 4(a), 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws ... shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."); see also 15 U.S.C. § 12(a) (defining "[a]ntitrust laws").
- 11 See generally Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 85-87 (2018).
- 12 See, e.g., *Texaco Inc. v. Dagher*, 547 U.S. 1, 5-7 & n.1 (2006).
- 13 See, e.g., *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 769-81 (1999).
- 14 See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).
- 15 See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).
- 16 Donald I. Baker, *Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?*, 16 Loy. Consumer L. Rev. 379, 384 (2004). The author of this article was a career antitrust attorney at the Department of Justice before he was appointed to lead its Antitrust Division in 1976-77.
- 17 *Id.*
- 18 2A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 330b2 (4th ed. 2014).
- 19 Baker, *supra* note 16, at 384.
- 20 See note 10, *supra* (quoting Section 4 of the Clayton Act).
- 21 Baker, *supra* note 16, at 386. An exception to this general rule arises only when a plaintiff's case is so frivolous that it qualifies for Rule 11 sanctions.
- 22 *Id.*
- 23 Quite apart from its proposals for expanding private remedies, the House Antitrust Report also recommends in passing that Congress direct the FTC to promulgate "'unfair methods of competition' rules" and "[t]rigger[] civil penalties and other relief for violations" of them. House Antitrust Report at 403. That proposal is also misconceived because, among other considerations, the prospect of private civil liability is already more than sufficient to deter anticompetitive conduct for the reasons discussed.
- 24 *Id.* at 403-04.
- 25 Cf. Crane, *supra* note 9, at 677 (arguing that "the time lag between the planning of [a] violation and the legal judgment day is usually so long that the corporate managers responsible for the planning have left their corporate employer before the employer internalizes the cost of the violation"); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 415 (2014) ("[C]ritics of class actions contend that litigation or settlement classes fail to accomplish ... deterrence goals" because

- "many corporate defendants view class judgments and settlements as a cost of doing business, subsidized by insurers or passed along to consumers.").
- 26 House Antitrust Report at 403-04.
- 27 William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 261 (13th ed. 2015) (paragraph break omitted); *see also* *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993).
- 28 Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J.F. 960, 965-70 (2018); *see also* Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. Chi. L. Rev. 495 (2020) (explaining that populists vastly overstate the role of the Chicago School in shaping antitrust doctrine).
- 29 House Antitrust Report at 404 & n.2537 (footnote omitted) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)).
- 30 *Id.* at 405.
- 31 *Id.* at 404.
- 32 Similarly, the follow-on antitrust standing case that the Report (at 404 & n.2538) also encourages Congress to overrule, *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), was an 8-1 decision authored by Justice Stevens.
- 33 429 U.S. at 488.
- 34 *Id.*
- 35 *Id.* (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).
- 36 House Antitrust Report at 405.
- 37 550 U.S. at 554-58 & n.3.
- 38 *Id.* at 557. Two years later, the Court applied the same pleading standard to a non-antitrust case, underscoring (in case there were any doubt) that *Twombly* represents no special pleading rule for antitrust cases. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
- 39 550 U.S. at 555. In *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), the Supreme Court likewise predicated class certification on a showing by class counsel that damages can be measured classwide. The House Antitrust Report characterizes that requirement as an "undue limit[] on class action formation." House Antitrust Report at 404. But even the dissenting Justices—who would have dismissed certiorari as improvidently granted—noted that the majority opinion "br[o]k[e] no new ground on the standard for certifying a class action." 569 U.S. at 41 (Ginsburg & Breyer, JJ., dissenting).
- 40 550 U.S. at 559-60 (internal brackets and quotation marks omitted).
- 41 *Id.* at 559.
- 42 House Antitrust Report at 404.
- 43 9 U.S.C. § 1 *et seq.*
- 44 *See generally* Nam D. Pham & Mary Donovan, ndp | analytics, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration* (Nov. 2020), <https://instituteforlegalreform.com/wp-content/uploads/2020/11/FINAL-Consumer-Arbitration-Paper.pdf>.
- 45 The Report asserts that "arbitration clauses ... tend to suppress valid claims and shield wrongdoing." House Antitrust Report at 404. But it cites only a single statistic that, it says, "seems to confirm" that claim: "although Amazon has over two million sellers in the United States, Amazon's records reflect that only 163 sellers initiated arbitration proceedings between 2014 and 2019." *Id.* But the Report identifies no basis for assuming that the "right" number of arbitration proceedings would be higher. That "only" 163 third-party sellers initiated arbitration proceedings against Amazon does not even logically suggest that arbitration is insufficient to protect the rights of plaintiffs with legitimate claims.
- 46 *Id.* at 404.
- 47 *Id.* at 403.



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