

Bates White Fifth Annual Antitrust Conference

June 2–3, 2008 | Washington, DC

Best Practices for Presenting Economic Evidence

Dr. B. Douglas Bernheim
Partner, Bates White, LLC
Professor of Economics, Stanford University

Overview

- Central tension in testimony by economic experts:
 - An economic expert must form his or her opinion based on appropriate analytic methods, according to the standards of the economics profession
 - Analyses using sophisticated tools that go beyond the understanding of judges and juries may be viewed with suspicion

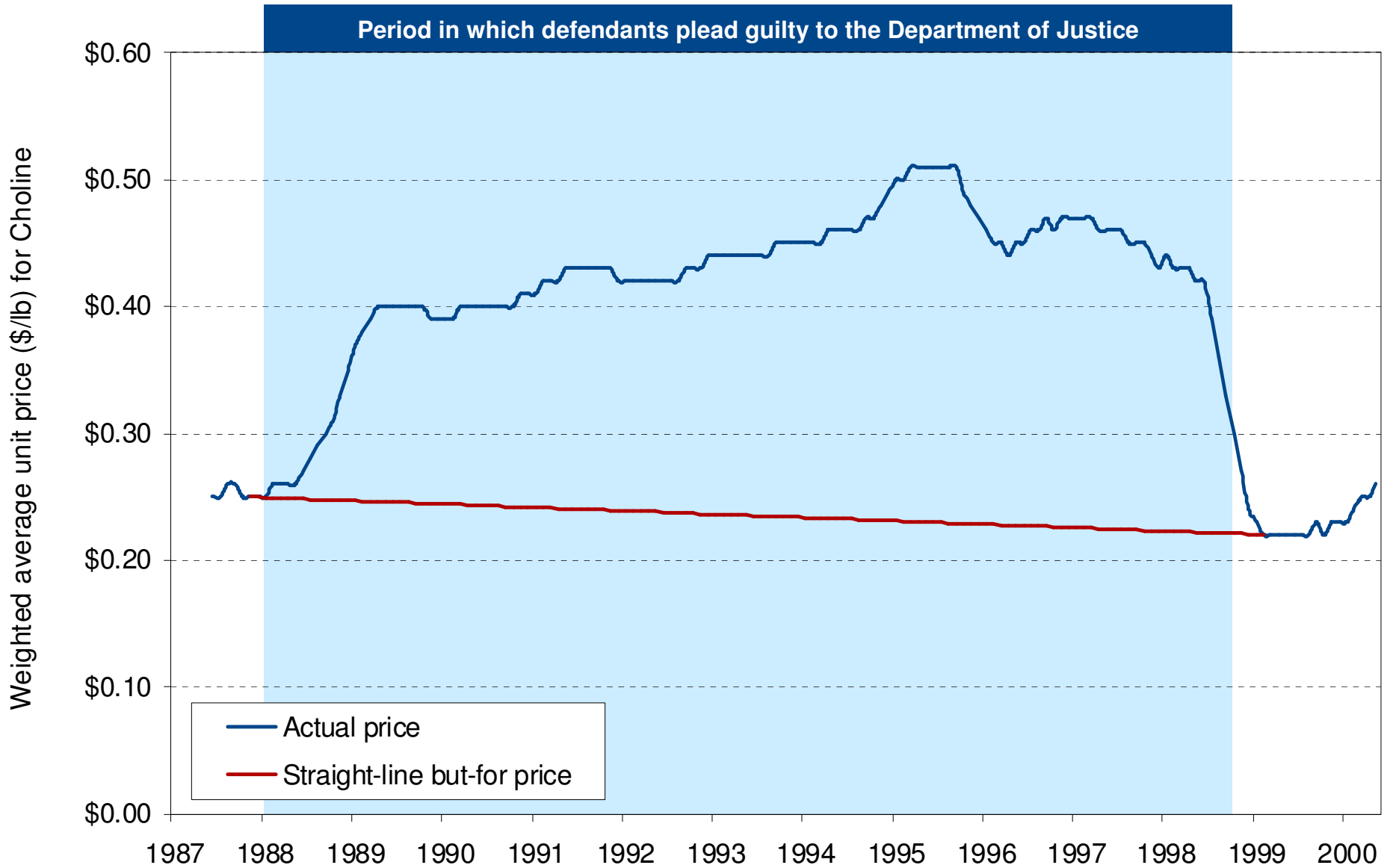
Overview

- My perspective:
 - The “black box & trust me I’m qualified” approach is ill-considered
 - Fact finders are capable of understanding the basics of complex matters if experts act as teachers and use appropriate pedagogical methods
 - The teaching mode fosters reciprocal trust
 - The core teaching principle: seeing is believing. Find the simple patterns that allow the fact finder to see the central considerations that drive the complex results.
 - The core strategy: make simple and complex analyses work together.

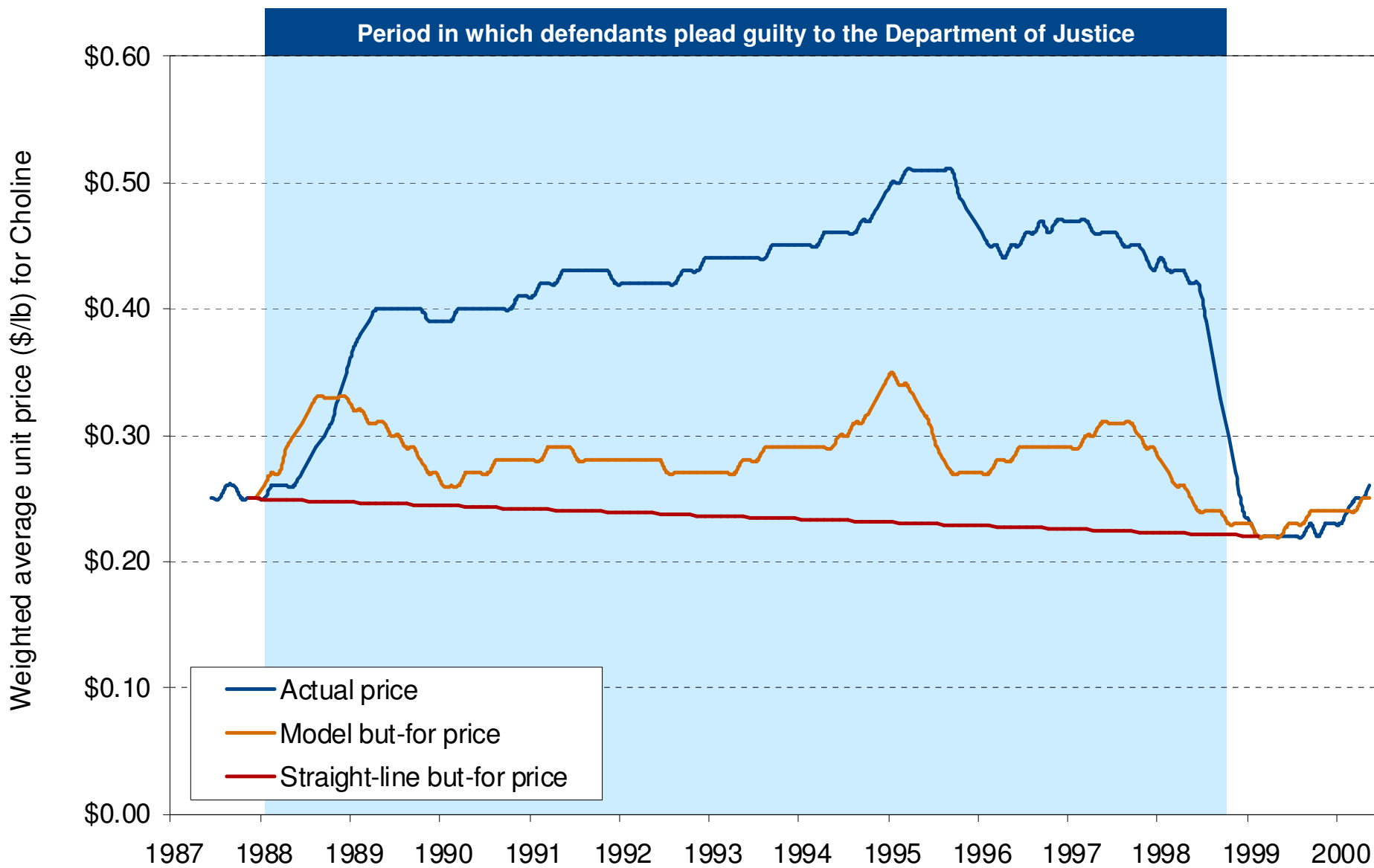
Overview

- Two examples
 - Easy case: the complex analysis matches natural intuition
 - Challenging case: the complex analysis seems to contradict natural intuition

The easy case—price fixing in the vitamins industry



More sophisticated economic analysis can be used to corroborate what the judge or jury's eyes have already allowed them to conclude



Challenging cases arise when the truth, and often the appropriate economic analysis, is counterintuitive

- Context: should a judge grant a permanent injunction barring a new drug that infringes on the patents of an existing drug, with which it would compete?
 - Economics (cost) is an aspect of the public interest
- General presumption: entry and competition lead to lower prices
- In this instance, the therapeutic expenses were primarily reimbursed by Medicare. Due to ASP reimbursement environment, entry was likely to compete prices up, rather than down.
- How do we explain to a judge or jury that in some settings entry and competition may lead to higher prices?

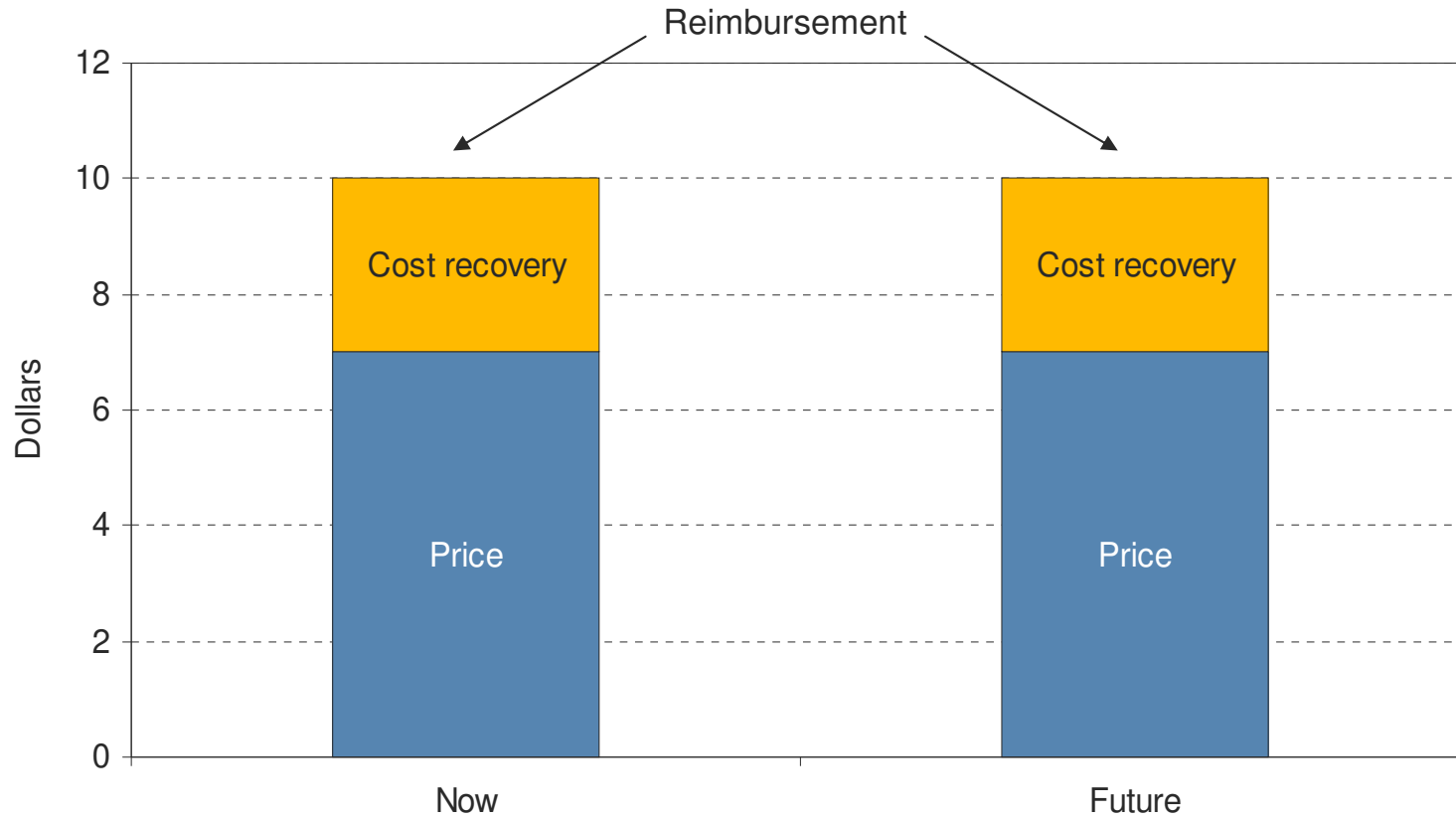
Strategies for challenging cases

- Teach:
 - Clearly explain the institutional setting and how it is different than standard markets
 - Describe the incentives faced by each of the relevant parties
 - Simple numerical examples, graphs, and analogies are useful
- Seeing is believing:
 - Use real-world facts
 - Provide key evidence from discovery materials

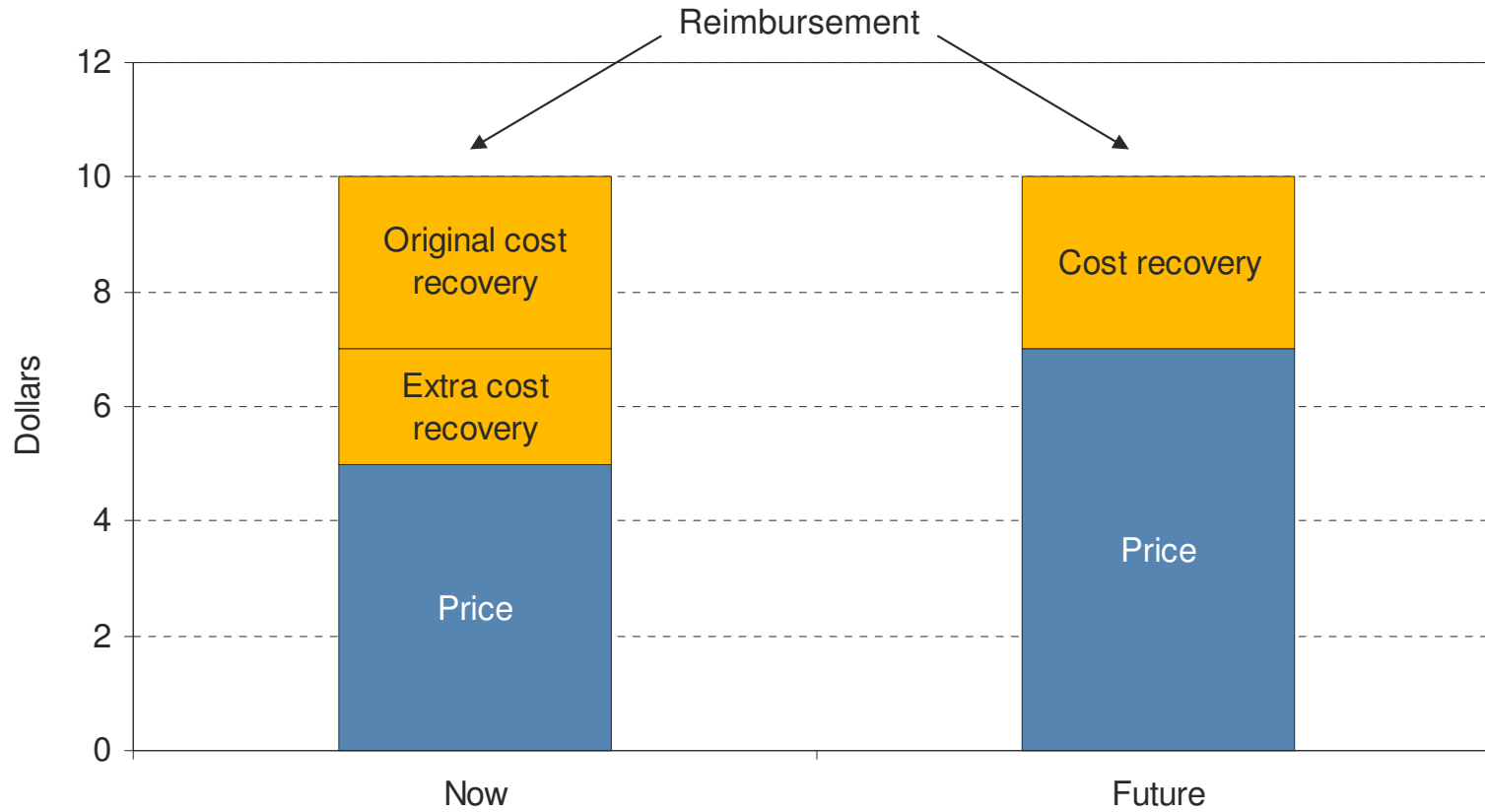
Simple numerical example demonstrating incentives

	Drug 1	Drug 2
Provider's acquisition cost per unit	\$8.00	\$8.00
Inherited ASP per unit	\$10.00	\$11.00
Payment (ASP+6%) per unit	\$10.60	\$11.66
Provider cost recovery (payment minus acquisition cost) per unit	\$2.60	\$3.66

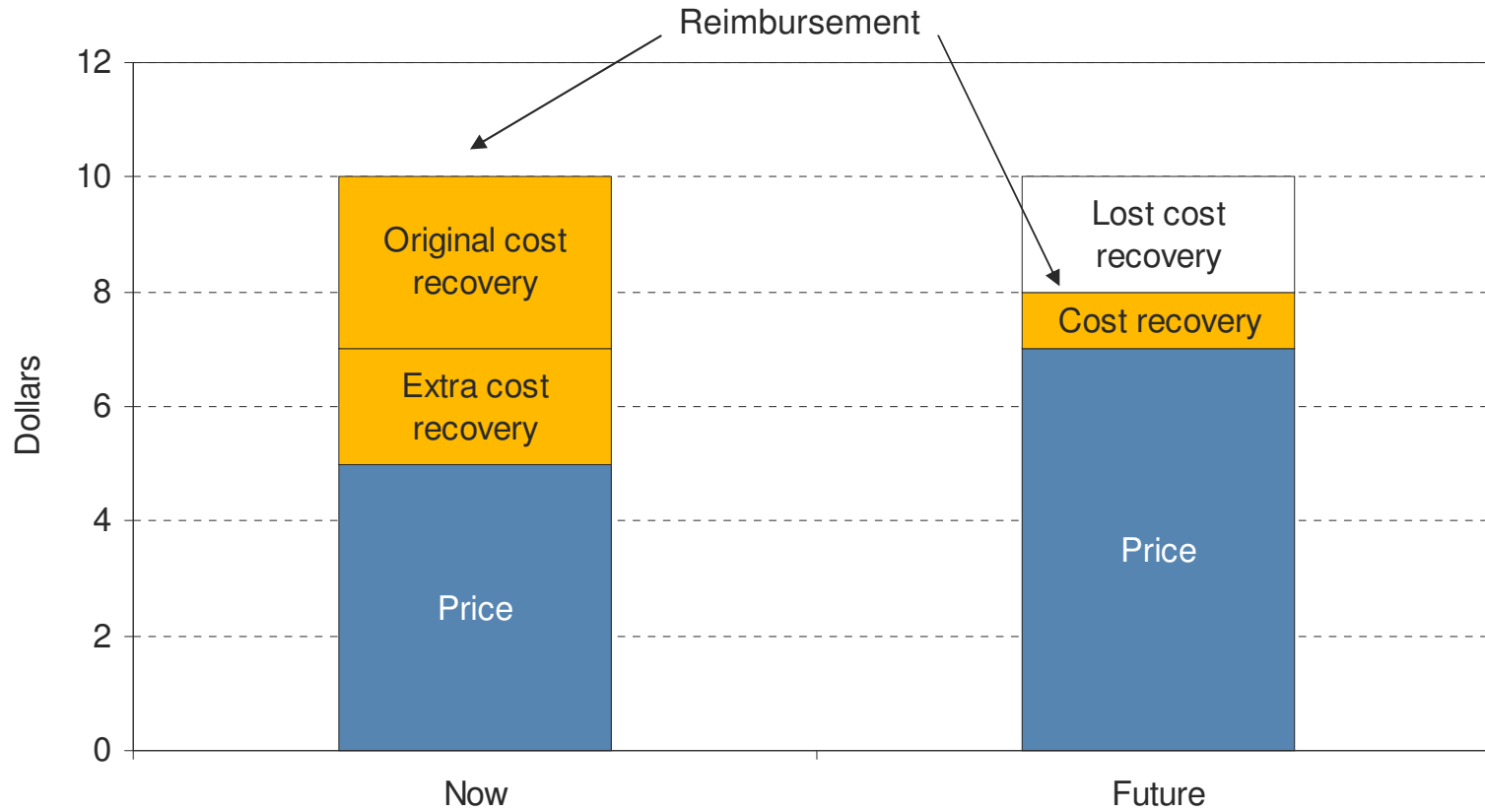
Graphics depicting incentives



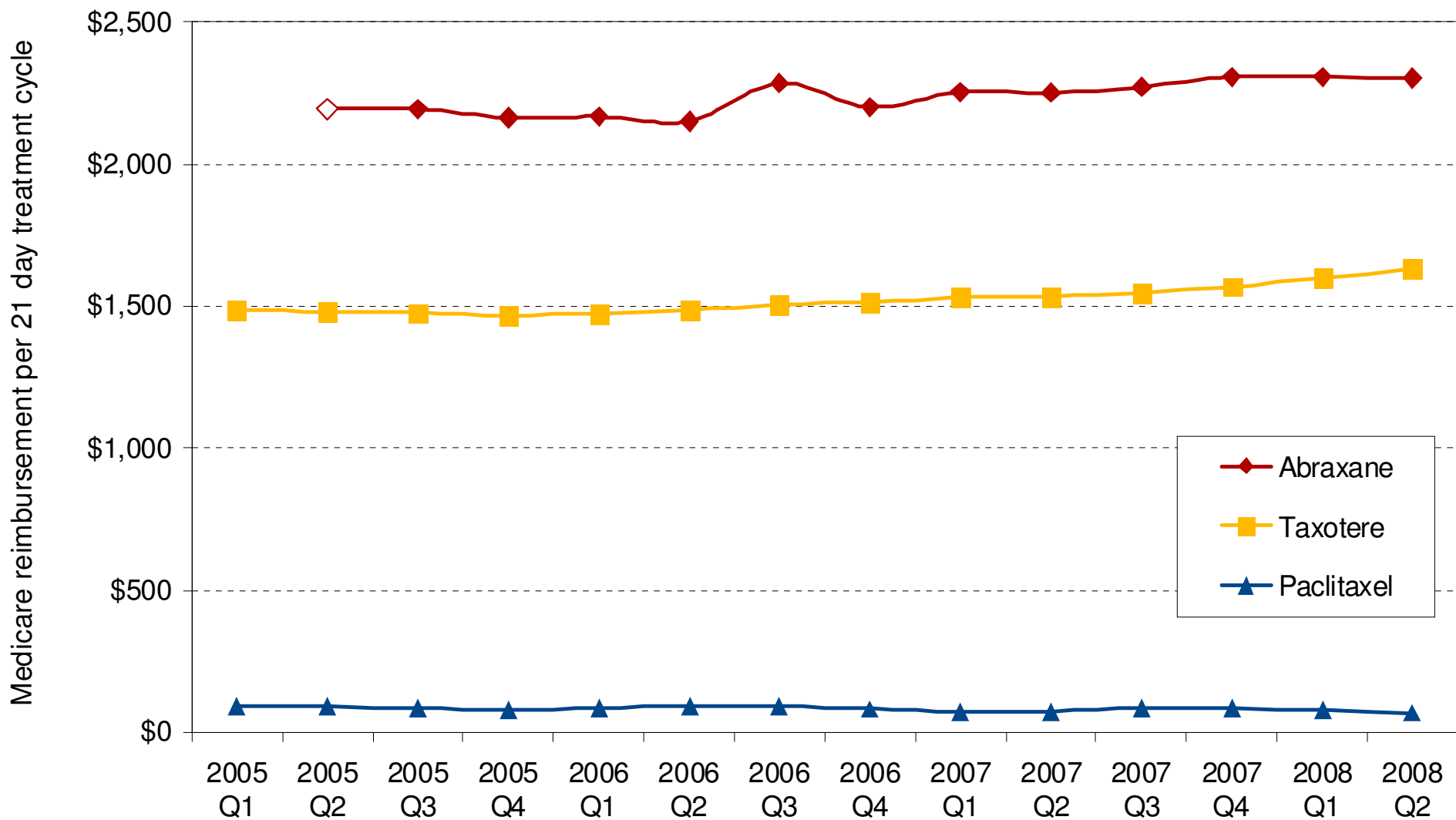
Graphics depicting incentives



Graphics depicting incentives

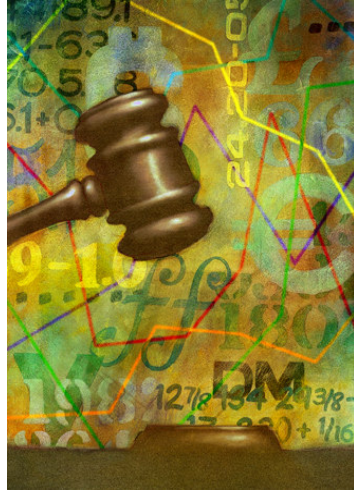


Example of a “benchmark” illustrating counterintuitive incentives and dynamics



Notes: This figure is constructed using Medicare reimbursement data from CMS multiplied by the following dosages: Abraxane: 260mg/m² per 21 days; Paclitaxel: 175mg/m² per 21 days; Taxotere: 100mg/m² per 21 days.





Bates White Fifth Annual Antitrust Conference

June 2–3, 2008 | Washington, DC

Best Practices for Presenting Economic Evidence

Dr. B. Douglas Bernheim
Partner, Bates White, LLC
Professor of Economics, Stanford University