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The Continuing Need for Treble Damages

I want to thank the Commission and its staff for the opportunity to share my thoughts on the role and importance of treble damages in antitrust enforcement, and on potential proposals for reform. The rationale for treble damages, and potential problems that treble damages cause, have been the subject of discussion and debate for much of the 115-year history of the Sherman Act. The strength of the rationale has meant that, despite proposals for change as early as 1898, the treble damage remedy has remained intact. That rationale includes:

1. deterrence of violations,
2. depriving violators of the benefits of their illegal conduct,
3. adequate compensation of victims, and
4. incentivizing "private attorneys general" to uncover and pursue violations that are often difficult to detect and complicated and costly to pursue.

At the same time, the strength of the arguments against treble damages has meant that the debate has not gone away. Those arguments include:

1. unfairness,
2. over-compensation of victims who are said to receive a "windfall,"
3. inefficiencies caused by the chilling of desirable economic activity, and
4. the encouragement of bad lawsuits.

A. A Brief History of the Debate

Although treble damages have existed since the initial enactment of the Sherman Act,[1] it is worth noting that, as my fellow panelist Professor Edward Cavanagh has chronicled, the final bill introduced into the Senate actually contained only a double damages provision; the treble damages provision of the Act that eventually passed both Houses was added by Senator Hoar in committee, and was apparently lifted from the provisions of the 1623 British Act Against Monopolies.[2] The legislative history does not provide much guidance as to why treble damages were considered superior to double damages (except that they were larger).[3] However, it is clear that the purpose of multiple damages included both two traditional goals of tort liability—deterrence of violators and compensation for victims—and a third goal, focused on by Senator Sherman himself: deputizing plaintiffs as private attorneys general by creating effective incentives to pursue what was even then viewed as costly and complex litigation. The Supreme Court has characterized Congress' goals as threefold: (1) deterrence; (2) disgorgement; and (3) compensation. In *Blue Shield of Va. v. McCready*, the Court stated: "Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims."[4]

In the century since the passage of the Sherman Act, it has often been argued that the treble damages remedy should be eliminated or refined and that this could be done consistently with Congressional goals. In 1898 Representative William Greene proposed a change from treble to double damages. In 1908 Representative William Hepburn proposed that multiple damages be abolished altogether.[5] Thurman Arnold was a strong proponent of de-trebling, supporting such proposals as a member of the 1938-1941

[1] 15 U.S.C. § 15 provides for the trebling of damages in private antitrust actions. Treble damages were originally provided for by §7 of the Sherman Act, passed in 1890, and then incorporated into §4 of the Clayton Act in 1914. §7 was formally repealed as superfluous in 1955. Act of July 7, 1955, ch. 283, Pub. L. No. 137, 69 Stat. 282 (1955).
[2] Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV 777, 782; *see also* H.B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 155 (1954).
[3] *See generally* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (Earl W. Kintner ed., 1978).
[4] 457 U.S. 465, 470 (1982).
[5] Cavanagh, *supra* note 2, at 779 n.7.

Temporary National Economic Committee.[6] In the 1950s under the Eisenhower administration's National Committee to Study the Antitrust Laws, reformers focused primarily on making trebling discretionary with the court on a case-by-case basis.[7] The primary focus of criticism of treble damages during the first five or six decades following enactment of the Sherman Act was the potential unfairness to defendants and over-compensation of plaintiffs that multiple damages were seen as causing.

With the large increase in private antitrust suits in the 1960s, the debate intensified. Estimates of the number of private antitrust actions brought in the entire first half-century of antitrust law range from less than 200, to around 450.[8] That is less than half the number of suits brought in an average *year* in antitrust's second half-century. (It was the electrical equipment cases of the early 1960s that created the first real explosion in treble damages suits. In 1962, for example, 2,005 private antitrust suits were brought.[9]) By the late 1960's the increase in private antitrust suits led the Supreme Court to characterize such suits as "one of the surest weapons for effective enforcement of the antitrust laws."[10]

However, the explosion in private suits in the early 1960s, and the rise of the Chicago School of antitrust analysis, also led to intensified criticism of the treble damage remedy. Certain critics changed their focus from unfairness to defendants and over-compensation for victims, to the economic efficiency of antitrust enforcement.[11] Such critics pointed to the costs of such private actions; the possibility that they were being brought for strategic purposes to deter competitors; and the potential for over-deterrence, particularly in light of how many offenses had come to fall under the *per se* umbrella. (While many of those same concerns are reiterated today, it is worth noting that much of the growth in private actions in the 1960s and 1970s, and much of the impetus for

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[6] Albert A. Foer of the American Antitrust Institute has observed that Arnold actually distanced himself from the Committee's work. Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029, 1032 n.13.

[7] *See* Thomas E. Kauper, *The Report of the Attorney General's National Committee to Study the Antitrust Laws: A Retrospective*, 100 MICH. L. REV. 1867 (2002).

[8] *Compare* REPORT OF THE U.S. ATTORNEY GENERAL NATIONAL COMMISSION TO STUDY THE ANTITRUST LAWS 378 (1955) (stating that 175 suits had been brought) *with* Richard Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 371 (1970) (putting the number at 423).

[9] RICHARD A. POSNER, ANTITRUST LAW 46 (2d ed. 2001).

[10] *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing*, 381 U.S. 311, 316 (1968).

[11] *See, e.g.*, Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. & ECON. 445 (1985).

scholarly and practitioner comment, was fueled by vertical restraint actions, exemplified by dealer termination cases and other distribution-related disputes. At that time, vertical restraints—both price and non-price—were subject to *per se* rules,[12] which naturally made the maintenance and prosecution of such suits easier. Since 1977, however, and the Court's decisions in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[13] and *Monsanto Co. v. Spray-Rite Service Corp.*,[14] vertical non-price restraints are tested under rule of reason standards, along with maximum resale price maintenance cases.[15] Over-deterrence may be a greater risk in situations where a *per se* standard is being applied.[16])

In the 1980s several proposals centered on cases where violators were said not to intend to commit a violation, or where they committed rule of reason violations. For example, in 1982, the New York State Bar Association Antitrust Section recommended de-trebling for violators who "could not have known" their conduct was illegal.[17] Beginning in 1983, the Reagan administration's proposals for de-trebling led to considerable Congressional debate. The Administration's 1983 proposal, presented by Assistant Attorney General Baxter retained treble damages for *per se* violations, but be de-trebled damages for rule of reason cases.[18] The Reagan Administration's efforts culminated in the never-passed Antitrust Remedies Improvement Act of 1986,[19] which included several changes to private antitrust litigation: elimination of treble damages in all suits except those based on overcharges or underpayments; automatic payment of prejudgment interest in suits where trebling is not available; and statutory attorney fee shifting in "frivolous" suits.

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[12] Vertical price restraints were governed by *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) and *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), while non-price restraints were governed by *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).
[13] 433 U.S. 36 (1977).
[14] 465 U.S. 752 (1984).
[15] *State Oil Co. v. Khan*, 522 U.S. 3 (1997). And *Monsanto* limits the range of inferences that can be drawn when distributors are terminated following complaints by other distributors to a common supplier.
[16] *See* KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 58-60 (2003).
[17] Cavanagh, *supra* note 2, at 830.
[18] *Id*. at 825; *see also* Research Joint Ventures: Hearings before the Subcomm. on Investigations and Oversight of the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology, 98th Cong. 154, 159 (1983) (testimony of William F. Baxter); Hebert Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 251 n.176.
[19] S. 2162, H.R. 4250, 99th Cong. (1986).

The debate in the 1980s was aided by the significant data and scholarship generated by the Georgetown Conference on Private Antitrust Litigation, which was held in 1985. That conference analyzed some 2,357 private antitrust cases from 1973-1983 and its findings were the subject of much writing and debate.[20] While no consensus on trebling can really be said to have been reached as a result of the Conference's work, the findings and arguments that came out of that study remain an important part of the debate today.

Since that time, there has been little official debate over trebling, but several developments have contributed to a renewed interest:

- **Illinois Brick:** In *California v. ARC America Corporation*[21] the Supreme Court upheld the *Illinois Brick* repealer statutes in various states, finding no conflict in the co-existence of differing state and federal rights of action. This Commission recently held hearings on this very topic, but for the purposes of today's discussion, the important point is that the ability of indirect purchasers in some states to also recover trebled damages[22] is a rallying point for opponents of treble damages who argue that they represent a "windfall" for plaintiffs.
- **Statutory exceptions to trebling**: The National Cooperative Research and Production Act of 1993[23] created a statutory exception to trebling for certain joint venture and collaborative research and development activities. The NCRA was recently expanded and amended by the Standards Development Organization Advancement Act of 2004,[24] which, inter alia, extended the trebling exception to certain qualified standards-setting organizations that register their activities with the DOJ and the FTC. That exception, and a

[20] *See* Symposium, *Private Antitrust Litigation*, 74 GEO. L.J. 999 (1986). See Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001 (1986), for a summary of the results of that study.
[21] 490 U.S. 93 (1989).
[22] For more on the complex set of judicial and legislative rules loosely referred to as the "*Illinois Brick* repealers," see, for example, Attorney General Mark J. Bennett and Ellen S. Cooper, Testimony Concerning Indirect Purchaser Actions Before the Antitrust Modernization Commission (June 17, 2005), *available at* http://www.amc.gov/commission_hearings/pdf/Bennett_Cooper.pdf.
[23] 15 U.S.C. § 4303 (1993).
[24] Pub. L. No. 108-237, 118 Stat. 661 (2004).

similar exception in the Export Trading Company Act of 1982,[25] are often cited as evidence that trebling can and should be further limited. On the other hand, these laws were themselves limited to specific situations and included countervailing requirements (e.g., registration). Moreover, these laws were passed largely without any persuasive evidence that firms were actually being over-deterred from productive activities. Indeed, antitrust actions prior to this amendment with respect to anti-competitive conduct occurring in such bodies, did not appear to have been either controversial or a threat to their legitimate operations.

B. The Focus of the Current Debate

The historical debate defines the broad contours of the issue before this Commission. The starting place is the four grounds on which treble damages are typically justified:[26]

1. **Trebling deters violators**. The question of deterrence has always been at the center of the debate on trebling, since trebling acts as an enforcement multiplier. It has been argued that a rational firm deciding whether to violate the antitrust laws will assess the cost of the violation as the expected fines and punishments, discounted by the probability of their imposition. The difficulty of detection and proof, combined with short-term and strategic advantages that may flow from the illegal conduct, mean that single damages will be insufficient to effectively deter antitrust violations.
2. **Trebling deprives violators of the fruits of their illegal acts**. Given the complexity of damages proof, as well as the short-term or strategic advantages of the violation, trebling helps insure that violators do not retain any profits from their anti-competitive acts.

[25] 15 U.S.C. § 4016(a) (1982).
[26] *See* ABA ANTITRUST SECTION, MONOGRAPH NO. 13, TREBLE-DAMAGES REMEDY 16-21 (1986).

3. **Trebling compensates victims**. In a perfect world where all antitrust damages were provable and recoverable (together with prejudgment interest that fairly reflected the costs to the victim of the amount and time period of the loss), trebling would not be necessary to adequately compensate victims of antitrust violations**.** However, some damages are not recoverable (e.g., for statute of limitations reasons, or because they are considered "speculative") and damages that are recoverable may be difficult to prove. Moreover, there is no provision for prejudgment interest that matches the loss of a particular plaintiff. As a result, without multiple damages many victims would not be fully compensated even if they sued and won. It is also the case that without treble damages some victims who now sue would not sue at all, and for that reason would be left uncompensated.
4. **Trebling encourages private enforcement of the antitrust laws**. Treble damages give private plaintiffs an increased incentive to take the risks and expend the resources necessary to bring claims. Such incentive is important because private enforcement is an indispensable augmentation of necessarily selective public enforcement.

On the other side of the ledger, critics raise four basic problems with treble damages, each of which has been raised in the responses to this Commission's call for topics:

1. **Trebling is simply unfair**. Trebling punishes violators who believed they were complying with the law, particularly in those areas of antitrust law where doctrine and analysis remain somewhat murky. Critics who cite unfairness often point to the unavailability of contribution for antitrust joint tortfeasors as exacerbating this problem.
2. **Trebling over-compensates**. Treble damages are alleged to act as a "windfall" for private plaintiffs.
3. **Trebling leads to economically inefficient deterrence**. Critics argue that treble damages produce inefficient deterrence in several ways: (a) Some

allege that there are types of antitrust violations which, while prohibited conduct, actually produce a net benefit to society. A commonly cited example is predatory pricing. Treble damages are said to ignore optimal efficient deterrence by punishing these "efficient offenses" equally;[27] (b) The enforcement costs to society of private antitrust actions are significant, but trebling encourages private plaintiffs to ignore those costs; (c) Treble damages encourage inefficient precaution. Firms are forced to over-spend to stamp out every last possible antitrust violation, thereby spending more on precautions than the cost of the harm avoided; (d) Treble damages are so harsh that firms refrain from engaging in perfectly legal, competitive conduct that is "close to the line," rather than risk exposure to private suits.

4. **Trebling encourages bad lawsuits and perverse incentives**. Treble damages are alleged to promote what Judge Robert H. Bork calls "bad lawsuits," lawsuits that either compel innocent companies to settle, or are used strategically by competitors to achieve anti-competitive ends. Some have even argued that they create a kind of moral hazard, by encouraging firms to "pursue" antitrust injury by dealing with monopolists or violators, knowing they will be compensated.[28]

Proposals to address these perceived problems include:

- Private enforcement of the federal antitrust laws should be itself cut back or eliminated. Government enforcement is more judicious and with increased resources could provide sufficient enforcement of the laws.[29]
- Treble damages should be abolished. Single damages would suffice in light of the other penalties to which violators are exposed.[30]

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[27] William Breit & Kennth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 410 (1985); *see also* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 (1983).
[28] *See, e.g.*, WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM 36-39 (1986).
[29] *See, e.g.*, Letter from Thomas D. Morgan, Professor, The George Washington University Law School, to the Antitrust Modernization Commission (Sept. 28, 2004).
[30] *See, e.g.*, Letter from Judge Robert H. Bork, to the Antitrust Modernization Commission.

- Trebling should occur on a case-by-case basis at the Court's discretion. The damage multiple should equal each violator's subjective probability of detection and could be measured case-by-case.
- Damages should be decoupled, with single damages awarded to plaintiffs and punitive damages then paid to the government. This would maintain the deterrent effect of trebling, but eliminate the perverse incentives and bad lawsuits induced by trebling.[31]
- The damage multiplier should be eliminated in favor of actual damages in suits brought by competitors.[32]
- Treble damages should be limited to hardcore violations (e.g., to cartels only, or to § 1 claims only, or to *per se* violations only, or to only those cases where scienter can be proven). Trebling is simply unfair for those violations that are not clearly known to be illegal ex ante by the violator.

C. Analysis

Generally speaking, wholesale reform of treble damages is neither warranted nor advisable.

1. Treble damages <u>do</u> serve an important role in deterring anti-competitive behavior.

Treble damages remain a component of an antitrust regime that appears, on the whole, to under-deter. The support for that belief is well-known to the Commission, to antitrust practitioners, and to antitrust scholars alike: Despite a series of factors that should be increasing the deterrent effect of the antitrust laws on potential violators, anti-competitive behavior remains prevalent and recidivism persistent.

Increased deterrence should be coming from a number of quarters. For example, it is difficult to overestimate the changes that have occurred in criminal enforcement in recent years. We have gone from a world where almost no one went to jail, and fines leveled against firms and individuals were negligible, to a world where corporate

[31] *See, e.g.*, A. Mitchell Polinsy, *Detrebling Versus Decoupling Antitrust Damages, Lessons from the Theory of Enforcement*, 74 GEO. L.J. 1232 (1986).
[32] *See, e.g.*, Easterbrook, *supra* note 11.

managers face a felony conviction, jail time, and fines of up to $1 million, and where firms pay fines of more than $100 million.

It was only in 1974 that the Congress made monopolization a felony rather than a misdemeanor, punishable by up to three years in prison and fines up to $350 thousand for individuals, and up to $10 million for corporations. Then, in 1987, the Criminal Fine Improvements Act[33] provided that fines may be increased to twice the gain from the illegal conduct or twice the loss to the victims. At the end of that same year, the United States Sentencing Guidelines were adopted, resulting in more uniform (and generally harsher) sentences for violators. Prior to the 1990s, however, very few individual violators served time in prison, and the average sentence in the 1980s was only about five months. Then, in the 1990s, the average sentence rose to eight months, and in the last five years the average sentence has been over twelve months, rising as high as twenty-one months in fiscal 2003.[34] Last year alone, forty-two new criminal cases were brought by the DOJ, and twenty violators were sentenced to jail, to terms averaging over one year.[35]

Criminal fines have risen in a similarly dramatic fashion. On average, for the first ninety years of antitrust enforcement, total criminal fines imposed roughly doubled each decade. But the 1990s saw an astonishing $1.8 billion in fines imposed—a roughly fifteen-fold increase over the 1980s.[36] And criminal fines in the first five years of our own decade have already totaled $1.06 billion. The Department of Justice has also used threats of the double the gain or loss provision to secure extraordinary plea agreements in cases involving hardcore price fixing—from *Archer Daniels Midland* to the *Vitamins Cases*.[37] These increases in criminal enforcement show no signs of abating. Just last year, the Antitrust Criminal Penalty Enhancement and Reform Act increased fines to $100 million for corporations, and $1 million for individuals, and increased the maximum jail sentence to 3-10 years.[38] The Department of Justice's Leniency Policy and Amnesty

[33] 18 U.S.C. 3571(d) (1987).
[34] Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 172 (2002); *see also* Scott D. Hammond, Remarks before the Midwinter Leadership Meeting of the American Bar Association, (Jan. 10, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/207226.htm.
[35] Antitrust Division Workload Statistics, *available at* http://www.usdoj.gov/atr/public/workstats.htm.
[36] ANDREW I. GAVIL ET AL, ANTITRUST LAW IN PERSPECTIVE 1017 (2002).
[37] Hammond, *supra* note 34.
[38] Pub. L. No. 108-237, 188 Stat. 661 (2004).

Program, as revised in 1993-4, continues to create yet additional deterrent effect, adding as it has an extremely valuable detection tool.[39]

Notwithstanding these developments in criminal enforcement, we have seen anti-competitive conduct flourish in recent years. Meanwhile, the leniency program has averaged nearly two applicants per month[40]—strong proof that while the program is working, antitrust violations continue apace. The primary lesson of these facts is that despite extraordinary increases in criminal enforcement, firms continue to find it profitable and rational to violate the antitrust laws. That they do so makes a strong prima facie case for retaining treble damages.

Given the evidence of continued violations, despite significant increases in enforcement, what role do treble damages play? Treble damages are, of course, a damages multiplier. Because detection and prosecution of antitrust laws remains imperfect, this multiplier continues to be necessary. For example, it is not uncommon that criminal investigations involve cartel behavior spanning many years. Given the extended duration of some of these offenses, the probability of their detection and prosecution is clearly perceived as greatly less than one. (That could be used to argue, although I do not, that in some situations the multiplier should in fact be increased.) At any rate, in an environment where increasing deterrence is still insufficient, reducing this multiplier would appear to be a mistake.

It is, of course, impossible to quantify what precise damage multiplier would provide optimal deterrence. The predicted exposure for a violator that is caught must be at least the expected benefits of the illegal conduct multiplied by the inverse of the probability of detection and the inverse of the probability of proof if the violation is detected, further increased by the possibility that some portion of the damages may be unrecoverable for the statute of limitations reasons, the possibility that certain strategic advantages may flow from the illegal conduct, and the possibility that the violator's cost of capital may exceed any prejudgment interest rate applied.

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[39] Scott D. Hammond, Cornerstones of an Effective Leniency Program, Address before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm

[40] Hammond, *supra* note 34.

2. Treble damages also play an important role in accomplishing the goal of disgorgement.

The goal of requiring an antitrust violator to disgorge the fruits of its illegal conduct is, of course, closely related to the goal of deterring anti-competitive conduct. As suggested above, predictable disgorgement is the lower bound of what is required for effective deterrence. Disgorgement is not, of course, directly correlated with any damages measure—damages are calculated based on the harm to, or overcharge paid by, victims (or at least those victims permitted under Illinois Brick to sue), whereas disgorgement is calculated based on the benefit to the violator of the illegal conduct. Nevertheless, for the reasons discussed in the context of the goal of deterrence, it appears that some form of multiple damages is required to achieve disgorgement.

3. Treble damages play an important role in compensating victims of antitrust violations.

Antitrust enforcement by private plaintiffs seeks to compensate the victims of anti-competitive behavior. There are several reasons to think that, despite treble damages, many antitrust victims are more likely to be under-compensated than over-compensated.

One should not underestimate the difficulty of private litigation. First, the time to trial can be exceedingly long and enormously costly, even ignoring the time that will have expired between the actual violation and the filing of a complaint. Judicial dockets are notoriously overloaded, including with criminal cases which, because of the Speedy Trial Act, take precedence over civil actions.[41] Even with the assistance of prior government enforcement actions[42] such as in the *Vitamins Cases*, or as in the Department of Justice's actions in *Visa Check/Master Money Antitrust Litigation*, literally years can pass before a result is achieved that can provide compensation to private plaintiffs. Apart from the costs of delay, there is the difficulty and risk associated with any case, especially rule of reason cases, and especially absent prior government enforcement

[41] 18 U.S.C. §§ 3161-3174 (2000).

[42] § 5A of the Clayton Act requires courts to give prima facie effect in civil cases to prior determinations of liability in government actions where collateral estoppel would apply, and makes clear that courts are permitted to apply offensive collateral estoppel. *See* 15 U.S.C. § 16(a).

action. Trebling damages is necessary to compensate them for the risks and the costs they assume in bringing actions.

It has also been argued that treble damages are not in fact treble damages at all. I know that my fellow panelist Professor Robert Lande has addressed the issue in detail, and argued that treble damages are never actually equal to three times the harm caused by an antitrust violation, due to a series of factors including the statute of limitations, lack of prejudgment interest, and others.[43] If, then, as he argues, nominal treble damages are not even truly treble damages, and many suits settle for nominal single damages, we are looking at systematic under-compensation of victims. These and other factors explain why the FTC elects to pursue equitable monetary remedies in the form of restitution and disgorgement. In so doing, the FTC has indicated its belief that private enforcement may sometimes be insufficient to adequately compensate victims and to deprive violators of their gains.[44]

Critics who argue that treble damages over-compensate victims often point out that the threat of treble damages spurs settlement by defendants. It is certainly the case that trebling is a powerful motivation for settlement. However, treble damages spur settlements in cases that should be settled, putting compensation in the hands of victims sooner, avoiding the time value of money effects that drag down compensation, and reducing the costs to the judicial system and to society of antitrust litigation. While it is true that defendants may be compelled by treble damages to settle where in a world of single damages they might litigate, it is also the case that plaintiffs may be able to settle where in a world of single damages settlement offers would be far too low for them to consider settlement.

Critics also maintain that trebling over-compensates because it sometimes rewards plaintiffs who do not have valid antitrust claims. But there is no proof that what

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[43] Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993).

[44] The FTC pursued disgorgement in *FTC v. Mylan Labs, Inc.*, 62 F. Supp. 2d 25, 36-37 (D.D.C.), *revised and reaffirmed in pertinent part*, 99 F. Supp. 2d 1, 4-5 (D.D.C. 1999), which the Commission described as follows: The FTC seeks monetary remedies "when it anticipates that other remedies are likely to fail to accomplish fully the purposes of the antitrust laws." FEDERAL TRADE COMMISSION, POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES, July 25, 2003, *available at* http://www.ftc.gov/os/2003/07/disgorgementfrn.htm. Note that courts have held that the FTC's policy does not affect the standing of private plaintiffs. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D 12 (D.D.C. 2001), *review declined by* 289 F.3d 98 (D.C. Cir. 2002).

are sometimes called Type 1 errors, or what the Court has called "false positives"[45]—that is, situations where a defendant is incorrectly found to have committed a violation—are common in private antitrust suits under current law.

4. There is insufficient evidence that, as a general proposition, treble damages under current law deter efficient behavior.

Finally, it is often alleged that treble damages deter efficient behavior. With the exception of Robinson-Patman violations, neither logic nor evidence supports that theory.[46] Take, for example, the proposal to limit treble damages to *per se* violations. Such a measure would clearly leave some anti-competitive and inefficient conduct under-deterred. That is because *per se* violations, as compared to rule of reason violations, simply don't map neatly onto what we recognize as efficient versus inefficient conduct. The *per se* rule can best be understood as an administrative rule the Court has created for those cases where it is experienced enough to accept a presumption of competitive harm solely from the proof of particular conduct. There is no reason to think that future violations will not be harmful merely because they don't fall into that category. In fact, recent experience has made all too clear that rule of reason violations *do* harm consumer welfare. Both *Visa Check/Master Money Antitrust Litigation* and *United States v. Microsoft* were rule of reason cases where the proof established significant harm to competition and to consumers.

More generally, the suggestion that treble damages are deterring efficient conduct by firms hasn't been supported by any real evidence. To be sure, there will be cases in the antitrust area, like any other area of the law, where bad or confused substantive law creates bad results. But it is speculative at best to conclude that over-deterrence as the result of treble damages is a substantial problem. The solution to bad substantive antitrust law is good substantive antitrust law, not changes to antitrust remedies; fortunately, that has been the focus of the courts.

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[45] *Verizon Communications v. Trinko, LLP*, 540 U.S. 398, 414 (2004).

[46] For commentary making a similar argument with regard to the Reagan Administration proposals discussed *supra* Part I, see Stephen D. Susman & John B. McArthur, *If it ain't broke, don't fix it!*, 55 ANTITRUST L.J. 59 (1986).

5. What about class actions?

The modern class action device, obviously, was unknown when the Sherman and Clayton Acts were passed. It was not until 1938 and the adoption of the Federal Rules of Civil Procedure and the merger of law and equity that class actions for damages became possible at all. And it was not until the 1966 amendments that Rule 23 and the class action took on their modern form. Since that time, class actions have of course become a pervasive tool for vindicating the rights of plaintiffs who individually have insufficient incentive to bring suit. Clearly, there is no dearth of class actions in many areas of law: consumer fraud, mass torts, securities, shareholder actions, employment law, products liability, and discrimination. Indeed, the Judicial Conference adopted Rule 23(f) of the Federal Rules of Civil Procedure in large part as a response to the pervasiveness and power of class actions—particularly their power to force settlements.[47] It is for this reason that the value of trebling as an incentive to private antitrust actions may not be as persuasive in the area of class actions. This is particularly true for private class actions that follow a guilty plea in a government criminal proceeding. In such cases, the incentive to sue is generally present, and the risk and cost of doing so is generally considerably less. In addition, the already large exposure created by a class action, coupled with treble damages, may effectively preclude a defendant from trying a close case. There are, however, still important questions of deterrence (and, to a lesser extent, of full compensation for victims given the complexity of damage calculations and limitations on damages which may be real but speculative) that require study before any change should be made.

6. Conclusion

Trebling is a necessary element of the modern antitrust system. The Commission should not recommend any broad changes to the trebling of damages in private antitrust actions. Despite developments in enforcement, the facts on the ground suggest our system under-deters. Eliminate trebling, and you eliminate a major part of the risk for violators. You eliminate a powerful incentive for private plaintiffs to augment criminal and civil enforcement by government agencies. In short, you eliminate a required element of

[47] *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.).

antitrust deterrence. Nevertheless, the problems posed by treble damages are not trivial and some reform (e.g., in the area of class actions) is worth consideration.