Statement of Edward D. Cavanagh
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My name is Edward D. Cavanagh; and I am Professor of Law at St. John's University School of Law in New York City, where I have taught Antitrust since 1982. In addition to Antitrust, I teach Civil Procedure, Federal Courts, and Law and Economics. I wish to thank the Antitrust Modernization Commission ("AMC") for the opportunity to appear today and express my views on the future of antitrust. I would like to commend the Commissioners for undertaking this very important task of comprehensively reviewing the antitrust laws. I would also like to make clear that the views I express here today are my own and not necessarily those of any organization with which I am affiliated.

Introduction

In our increasingly globalized economy, competitiveness is the key to success. The antitrust laws promote competitiveness by preserving free markets and by outlawing unreasonable restraints of trade. Preservation of free markets, in turn, promotes aggressive competition, which serves to optimize consumer welfare. In *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4-5 (1958), the Supreme Court aptly described the role of the antitrust laws in maximizing consumer welfare:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. (Black, J.)

The Sherman Act is, indeed, the "Magna Carta of Free Enterprise." *Topco Associates, Inc.* v. *United States*, 405 U.S. 596, 610 (1972). Nevertheless, antitrust over the years has not been without its skeptics. The recent *Microsoft* litigation served as a lightning rod for criticism by those who view antitrust as an outmoded tool in today's fast-paced, high tech economy. My own view is that the antitrust laws over the years have proven adaptable to changes in the economic climate and remain vital to preserving free markets and maximizing consumer welfare.

I have been asked to address three issues today: (1) the continuing desirability of mandatory treble damages in private antitrust suits; (2) attorneys' fees in private antitrust actions; and (3) the wisdom of permitting prejudgment interest in private antitrust actions.

Summary

1. I do not believe that the case for across-the-board detrebling has been made. I would keep the current treble damages provisions in place and let Congress, as it has done, make exceptions to the rule of mandatory trebling where appropriate. I believe that leaving trebling to the court's discretion is a second-best solution.
2. I believe that the present asymmetric system for the award of attorneys' fees to prevailing plaintiffs, but not prevailing defendants, should be retained. I would oppose a "loser pays" regime. In measuring awards of attorneys' fees in common fund cases, the courts should focus on the benefits conferred to the plaintiffs.
3. I would not alter the current scheme for awarding prejudgment interest.

A. Treble Damages

1. Mandatory Trebling

Historically, mandatory trebling in private antitrust actions has served four interrelated goals: (1) compensation of victims; (2) deterrence; (3) forfeiture of ill-gotten gains; and (4) punishment.

First, trebling serves to provide adequate compensation for victims of antitrust violations. Antitrust violations are frequently difficult to detect and generally very expensive to prosecute. Trebling provides a powerful incentive to investigate, detect, and prosecute antitrust violations. Were single damages the sole award, private parties, given the uncertainties and high costs of antitrust litigation, would have little motivation to sue. Nor would single damages provide adequate compensation in all cases. In cases of horizontal price-fixing and division of markets, the accepted measure of damages is the overcharge - - the difference between the price paid for the goods in question and the price that would have prevailed but for the illegal conduct. The victim of price-fixing is thus not compensated for lost opportunity costs (the amount of money the eventual damage award could have earned if invested) by way of prejudgment interest, nor are business entities remunerated for losses caused by the diversion of company executives from normal business activities and other organizational disruptions necessitated by a lawsuit.

Moreover, the wrongdoer, in paying only overcharges, is insufficiently taxed for the harm caused by its illegal conduct when actual damages are limited to the amount of overcharges extracted from buyers. The overcharges, which are really transfers of consumer surplus from buyers to conspiring sellers, are only part of the damage inflicted by the illegal conspiracy. Horizontal restraints also create an inefficient allocation of resources, thereby causing a net loss to society as a whole, the so-called welfare triangle. The loss in allocative efficiency attributable to cartellization varies from case to case, depending on the nature of the restraint, the industry involved, and the scope of the conspiracy; and, in any event, this loss is difficult to quantify. Since it is impractical to measure damages based on the loss of allocative efficiency, trebling actual damages may serve as a surrogate measure, exacting from perpetrators a rough measure of the harm inflicted by their wrongdoing.

Trebling also serves to provide rough justice in cases involving group boycotts or predatory behavior where the measure of damages is lost profits. The antitrust violations may so distort the market mechanism as to make reasonable estimates of lost profits complicated, if not impossible. While trebling does not precisely counterbalance the market distortions caused by illegal conduct in every case, it offers the plaintiff a greater likelihood of full compensation for injuries suffered and hence greater incentives to prosecute violators than would be the case were single damages the sole basis of recovery.

Second, mandatory trebling deters antitrust violations. Because many antitrust violations are concealable and hence difficult to detect, the rewards for engaging in illegal conduct are potentially enormous. The resources of government enforcement agencies are limited and, in any event, frequently small in comparison to the resources of regulated industries. Trebling provides financial incentives for private parties to detect and prosecute conspiratorial conduct, thereby calling forth additional enforcement resources from the private sector. As enforcement intensifies, the likelihood of apprehension and successful prosecution increases, and illegal conduct is deterred. In this sense, the goals of compensation and deterrence are complementary; generous compensation of victims encourages enforcement by private attorneys general and the greater the enforcement, the greater the deterrence. Equally important, the impact of a treble damages award on an antitrust violator may be economically devastating and may be magnified in conspiracy cases, since a defendant under the rule of joint and several liability may be held responsible for all damages caused by its co-conspirators trebled. Such catastrophic consequences provide a powerful disincentive to engage in illegal activity. So devastating is the impact of a treble damages judgment that antitrust violators may fear civil antitrust liability even more than criminal sanctions, making them less likely to avail themselves of the Antitrust Division's Leniency Program. That realization has led Congress to limit the civil liability of Leniency Program participants to actual damages. Pub. L. No. 108-237, §§ 102-201, 118 Stat. 661, 661-670 (2004).

In addition, from a deterrence perspective, multiplying actual damages is necessary because some violations of the antitrust laws go undetected. Theoretically, a defendant, in evaluating potential liability, discounts damages caused by its illegal conduct by the probability of detection. A multiple is necessary to force the violator to equate 1iability with damages caused. If the probability of detection and prosecution is one in ten, then ten is the appropriate multiple. Under this view, trebling would be appropriate only where the probability of detection is one in three. Arguably, trebling is too low for concealable offenses such as price-fixing, and too high for unconcealed acts which may be illegal, such as tying and certain merger activity. However, this theoretical approach falters when one attempts to translate it into a legal rule. It would be impractical, if not impossible, to compute the likelihood of detection and hence the proper multiple for each industry for each antitrust violation. Here, trebling provides not only rough justice but also a predictable, workable rule of law.

Third, trebling not only assures adequate compensation for victims of antitrust violations and deterrence from future wrongdoing, but also makes it unlikely that perpetrators will profit from their wrongdoing. Fourth, the treble damages remedy has a punitive element. In this respect, the treble damages remedy is not unique. Punitive damages were imposed at common law in cases of intentional or egregious wrongdoing. Moreover, Congress has seen fit to impose multiple damages in certain instances, most notably for RICO and insider trading violations, both to punish and to discourage undesirable conduct.

The case for mandatory treble damages is powerful, but legislative developments over the last thirty years significantly affect the policy considerations supporting mandatory trebling and call into question the continuing need for that remedy. These legislative developments include: (1) enhancement of criminal penalties under the Sherman Act, raising the ceiling on individual fines to $1 million and on corporate fines to $100 million and increasing maximum jail time for convicted individuals to ten years; Pub. L. No. 108-237, § 215, 118 Stat. at 668. (2) alternative sentencing under 18 U.S.C.§ 3571(d) which permits fines of up to twice the gains to the wrongdoers or twice the loss to the victims against convicted violators; and (3) Congressional carve outs to treble damage liability in which only actual damages are awarded in cases involving research and production joint ventures and standard setting organizations. See 15 U.S.C. § 4303(a).

Enhanced criminal penalties, particularly the twice the gain/twice the loss proviso, make it difficult to justify mandatory trebling in the civil phase of antitrust cases from disgorgement and punishment perspectives, since by definition, disgorgement and punishment occur whenever an amount greater than the losses caused by the criminal conduct is imposed as a fine. Moreover, continued treble damage liability in the face of enhanced criminal penalties threatens to overdeter the business community and to chill possible procompetitive initiatives. Even apart from the enhanced criminal penalties, one could argue that from a deterrence prospective, trebling is unnecessary in the case of conduct that is open and notorious – as opposed to clandestine - because in such cases, there is no problem of detection. Thus, from the point of view of deterrence, actual damages should ordinarily be sufficient in cases involving agreements to restrain trade that are not clandestine is nature, such as bundling of goods, and non-price territorial restrictions in distribution, among others.

On the other hand, legislation enhancing criminal penalties does not effect compensation of victims. Accordingly, the argument that treble damages are needed to provide sufficient incentives to litigate and to assure that antitrust victims are made whole remains valid.

The question, then, is whether, on balance, the policy goals that supported mandatory trebling when the antitrust laws were initially enacted, still support mandatory treble damages today. I do not believe that trebling is necessary in every civil antitrust damage case. On the other hand, I believe that trebling is absolutely critical in certain cases, for example, horizontal price-fixing and horizontal divisions of markets, where the conduct is typically covert, the behavior devoid of any consumer benefit, and the potential damage to the economy enormous. Accordingly, I would oppose across-the-board detrebling.

Given that treble damages are necessary in some, but not all, antitrust cases, the next question is how to delineate between cases where trebling is appropriate and cases where actual damages are sufficient. There is no easy answer to that question. Several approaches have been suggested: (1) trebling in *per se* cases, but not "rule of reason" cases; (2) trebling only in cases where criminal sanctions are appropriate; (3) trebling only where covert acts are involved; (4) detrebling where defendant has no reason to believe that its conduct is illegal; and (5) creating a sliding scale which limits the portion of damages that may be subject to trebling.

Each of these approaches has a fatal flaw.[1] The *per se*/rule of reason distinction is fraught with uncertainty, particularly in light of the fact the courts have narrowed the *per se* spectrum over time. Similar uncertainty arises if trebling turns on whether criminal sanctions are appropriate. Criminal sanctions are typically sought only where the offending conduct is egregious. Whether to pursue an antitrust violation criminally is left to the sound discretion of the prosecutor. Reasonable attorneys can and do disagree as to when conduct is sufficiently egregious to warrant criminal sanctions. Limiting trebling to cases where covert acts are involved may prove underinclusive. Significant competitive harm can be done where conduct is open, as *NCAA* and *Indiana Federation of Dentists* indicate. Similarly, making intent a prerequisite to trebling may prove underinclusive because that standard would not necessarily require trebling in horizontal price-fixing cases where intent is not an element of the violation. Exploring issues of intent would

[1] For a detailed discussion of possible approaches to detrebling and their flaws, see Edward D. Cavanagh, Detrebling Antitrust Damages: An Idea Whose Time Has Come? 61 Tul. L. Rev. 777, 825-45 (1987).

also serve to complicate and lengthen trials. Lastly, use of the sliding scale approach fails because determining the proper threshold for trebling may prove to be an impossible task. If the threshold is set too low, there are likely to be insufficient incentives for prosecution of meritorious suits. On the other hand, if the thresholds are too high, the “limitations” may prove meaningless.

An alternative to selective detrebling is to leave the question of multiplying damage awards to the sound discretion of the court. The advantage of this approach is that it allows the courts sufficient leeway to tailor the penalty to the gravity of the violation. The discretionary approach effectively addresses the problems created by the inflexibility of mandatory trebling. Fairness concerns can be taken into account. Large judgments which, if multiplied, would threaten to bankrupt defendants, would ordinarily not be multiplied. Nor would multiple damages be likely in cases where liability is based on a close question of fact or law, where the illegal acts have significant procompetitive potential, or where liability is founded on a novel theory or a reversal of prior precedent. Second, discretionary trebling would alleviate the perceived overdeterrence problem created by mandatory trebling, since the risk for defendants of "playing it close to the line" is reduced. Third, discretionary trebling would significantly reduce incentives to bring strike suits or otherwise engage in strategic use of antitrust because prospective plaintiffs could no longer use mandatory trebling as a lever to up the ante. Rather, plaintiffs would have incentives to sue only when they are truly injured. Absence of mandatory trebling would encourage a more realistic evaluation of claims and defenses in an action, thereby promoting settlement.

The advantages that arise from the flexibility of the discretionary approach, however, may be outweighed by the practical difficulties which inevitably arise in the application of multifactored tests. At least in the short run, differing standards may emerge in the lower courts as to when trebling is appropriate. Eventually, the Supreme Court would probably step in to provide a uniform standard; but in the meantime, at least some forum shopping would likely occur. This creates the spectre of federal “magnet courts” and may exacerbate rather than alleviate problems of unfairness. Differing standards for imposing multiple damages also would create uncertainty regarding settlement. When one is not sure whether single or treble damages will be imposed, it becomes difficult to evaluate in any meaningful way possible financial risks or gains.

In addition, to the extent that the legislature directs that certain factors he taken into account, such as willfulness of the conduct or knowledge that the acts were illegal, new issues are interjected into antitrust lawsuits which may tend to lengthen the discovery period and the time for trial, and thus increase the cost of litigation. Introduction of discretionary trebling gives parties leeway for tactical maneuvering, foot-dragging and overreaching, not available under mandatory trebling nor under the other bright-line proposals discussed above.

Lastly, in a discretionary scenario, the decision to treble may well turn on the judge’s attitude toward the antitrust laws, rather than on the nature of the conduct. That is clearly not the case where trebling is mandatory.

A final alternative is to accept the *status quo*: mandatory trebling except where Congress has specifically carved out certain conduct and limited liability for that conduct to actual damages. *E.g.*, 15 U.S.C. § 4303(a) (joint ventures and standard setting); see also Pub. L. No. 108-237, §§ 102-201, 118 Stat. 661, 661-670 (2004) (actual damages for parties who had been granted amnesty in criminal proceedings). In the future, Congress might consider permitting indirect purchaser suits limited to actual damages as a way out of the *Illinois Brick* thicket. This approach, while not perfect, does provide the simplicity, certainty and predictability that are missing in the above-discussed alternatives. Equally important, from a process perspective, mandatory trebling comes before the AMC with a 115 year history. That history creates a strong presumption in favor of mandatory trebling. Accordingly, opponents of mandatory trebling have a heavy burden to overcome. To date, that burden has not been met. Were the AMC to conclude that mandatory trebling is no long necessary, I believe that the issue of multiple damages should be committed to the sound discretion of the court.

2. Success Rates For Antitrust Plaintiffs

The Commission has asked how often antitrust plaintiffs receive a settlement or award treble their actual damages. This is an area where some empirical research would be useful. My sense is that it is very difficult for antitrust plaintiffs to win cases in federal court these days, particularly where there is no prior government enforcement action. Most cases are resolved prior to trial by motion to dismiss or summary judgment. Plaintiffs do fare better when prior government actions against the same defendants are successful. These private follow-on actions tend to settle prior to trial. Treble damage awards following trial are infrequent, and I suspect that settlements providing for treble actual damages are rare, if not virtually non-existent.

3. Treble Damages and the Courts

The AMC also has asked whether the availability of treble damages has led the courts to narrow their interpretation of substantive antitrust provisions. If this phenomenon occurs, I do not think that it occurs often. One instance where this might have happened is in the *Hydrolevel* case. *Hydrolevel Corp. v. American Society of Mechanical Engineers,* 635 F.2d 118, 124-25 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982). There, defendant trade association argued that because of the treble damage exposure in antitrust cases, it could not be held liability for the acts of its members on the theory that the members acted with apparent authority; ratification of the agents acts must be shown. The trial court agreed with the trade association, but the Second Circuit emphatically rejected that argument and concluded that apparent authority was sufficient to bind the principal. *Id.* The Supreme Court affirmed. There may be other, better examples. Still, I think the practice is rare because courts have more direct ways of limiting antitrust damages by, for example, invoking remittitur, instead of reducing damages by manipulating substantive law.

B. Attorneys' Fees

Under the section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), antitrust plaintiffs who prevail at trial are entitled to reasonable attorneys' fees. Section 4 is asymmetric; prevailing defendants are *not* entitled to attorneys' fees. Nevertheless, Congress has authorized awards of attorneys' fees to prevailing defendants in joint venture and standard setting cases, 15 U.S.C. § 4304 (a)(2), and in *parens patriae* cases, 15 U.S.C. § 15c (d)(2), provided the court finds that the plaintiffs acted vexatiously or in bad faith. Moreover, where antitrust defendants can establish that the suit against them was baseless, they may seek sanctions under Rule 11 of the Federal Rules of Civil Procedure, which may include an award of attorneys' fees. Fed. R. Civ. P. 11. In addition, under the common fund doctrine, an attorney who has successfully obtained a settlement on behalf of a class of plaintiffs may recover attorneys' fees from the fund so created. *Skelton v. General Motors Corp.*, 661 F.Supp. 1368, 1375 (N.D. I11. 1988).

The attorneys' fees issue entails a two-part analysis: (1) should the present asymmetric system be retained? (2) how should fee awards be measured?

I believe that the present one-way fee structure should be retained. The award of attorneys' fees is an important incentive for bringing a private antitrust action. Elimination of that right may chill the institution of meritorious antitrust claims, particularly in cases where defendants have far deeper pockets than plaintiffs, a not uncommon scenario in antitrust cases. Nor should prevailing defendants be permitted to recover attorneys' fees as a matter of right. A winner take all approach likewise may discourage meritorious antitrust suits. As noted above, antitrust plaintiffs already face an uphill battle to win antitrust cases; a loser pays scheme introduces one more risk factor for antitrust plaintiffs to consider.

The harder question is how to measure fee awards. The courts have utilized two principal approaches to measurement of fee awards: the lodestar multiplier method, see *Lindy Bros. Builders, Inc. v. American Radiator and Std. Sanitary Corp.*, 487 F.2d 161 (3d Cir.1973), and the percentage recovery method, see *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The lodestar method is designed to mimic the market for legal services; the lodestar is calculated by determining the hours of legal services and multiplying those hours times a reasonable hourly rate. While the lodestar method does closely resemble the manner in which many firms bill, it is cumbersome and expensive to administer. The percentage recovery method by contrast is simple to administer but far less objective than the lodestar method. Some courts employ both, using the percentage method and then employing the lodestar measurement as a check.[2]

Courts must pay particular attention to the issue of fee measurement in common fund cases. Whereas in statutory cases, the fee award is paid directly by defendants in addition to the treble damages judgment, in common fund cases, the award is paid out of the settlement fund. Thus, every dollar that goes to attorneys is one less dollar for the plaintiffs. Accordingly, courts must carefully monitor the size of fee awards in common fund cases to assure that the plaintiffs and not the plaintiffs' attorneys are the true beneficiaries of a given antitrust action.

There is a growing awareness in the courts that antitrust class action suits are fee-driven. The 2003 Amendments to the Federal Rules of Civil Procedure permit courts to consider proposed fee structures as a factor in appointing class counsel. Fed. R. Civ. P. 23 (g)(1)(c)(ii). In at least one antitrust case, the selection of class counsel turned on a competitive bidding process focused on proposed attorneys' fees. See *In re Auction House Antitrust Litigation,* 197 F.R.D. 71 (S.D.N.Y. 2000). In addition, the Class Action Fairness Act of 2005 requires the courts to scrutinize fee awards granted in class action settlements involving non-monetary consideration to assure that class members receive real value in return for the attorneys' fees paid. Pub. L. 109-2, § 3. At the end of the day, the guiding principle for courts in making fee awards should be benefit conferred on the

[2] For a detailed discussion of measuring attorneys' fess, see Edward D. Cavanagh, Attorneys' Fees in Antitrust Litigation: Making the System Fairer, 57 Fordham L. Rev. 51, 75-100 (1988).

plaintiffs. Both the lodestar method and the percentage recovery method are useful tools in measuring benefit conferred.

C. Prejudgment Interest

Historically, prejudgment interest was not permitted in antitrust suits. In 1980, section 4(a) of the Clayton Act was amended to allow courts to award prejudgment interest in cases where litigants acted in bad faith or engaged in dilatory tactics. 15 U.S.C. § 15(a). Proponents of prejudgment interest argue that such awards are necessary to make the plaintiff whole, especially in lengthy, complex antitrust actions. While I recognize the time-value of money, I oppose any change in the status quo. First, the trebling of an antitrust award provides, among other things, a rough approximation of prejudgment interest. To permit prejudgment interest on top of treble damages would arguably be double counting. Second, allowing prejudgment interest as a matter of right would add yet another layer of complexity to antitrust suits and add to both their costs and length. Third, imposition of prejudgment interest would make it much more difficult for the parties in an antitrust action to engage in risk/award analysis. On the other hand, a basic treble damages model is simple, clear and predictable.

Related to, but separate from, the prejudgment interest inquiry is the question of whether a plaintiff should be permitted to have a treble damage judgment adjusted upwardly to reflect the loss of purchasing power due to inflation. The statute is silent on this question. Some courts, however, have permitted such adjustments. See, e.g., *Law v. NCAA*, 185 F.R.D. 324, 345-48 (D.Kan. 1999). For the same reasons that routine awards of prejudgment interest are not allowed, I believe that present value adjustment should not be permitted.