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Before the Antitrust Modernization Commission
Hearing on Civil Remedies: Damages Multiplier,
Attorneys' Fees, and Prejudgment Interest

July 28, 2005

The Four Myths About Antitrust Damages

A myth is a story, tale, or legend that has never been proven. Myths are often repeated as if they were true and often are assumed to be true (frequently by self-interested parties). But by definition there is never any solid evidence that they are true.

By analogy, there might well be unicorns, dragons or abominable snowmen somewhere in the world. But until someone puts one on exhibit we are justified to call each only a myth. Similarly, this Commission should not make public policy decisions based upon myth, unless of course someone comes up with solid evidence proving that the myths actually are true. The principle myths of antitrust damages are that:

1. Antitrust violations give rise to treble damages.
2. There is "duplicative recovery" of antitrust damages because some defendants pay sixfold or more damages.

3. The size of the damages caused by antitrust violations is relatively modest, and payouts resulting from violations are out of proportion to these damages. This causes overdeterrence.

4. Treble damages can be eliminated for certain violations, such as rule of reason violations, without undermining optimal antitrust enforcement.

If I am correct in showing that these are myths, the Commission should not make policy recommendations building upon their purported truth. I will discuss each as time permits.

Myth #1. Antitrust violations give rise to treble damages.

If you examine antitrust's so-called "treble" damages remedy carefully, you will find that it really only amounts to approximately single damages. To understand why this is true we first have to define antitrust "damages" carefully. Then, to achieve optimal deterrence, we should multiply these correctly-defined damages by a number that is much larger than one because antitrust violations are difficult to detect and prove.

One of the most important reasons why actual treble damages are not awarded is because prejudgment interest is not available in antitrust cases. As Judge Easterbrook noted, "[T]he time value of money works in defendants' favor. Antitrust cases can be long-lived affairs. This one has lasted 14 years, 2-1/2 of which passed between the finding of liability and the award of damages. During all of the time, the defendants held the stakes and earned interest.... To deny prejudgment interest is to allow the defendants to profit from their wrong, and because 14 years is a long time the profit may be substantial."¹

A survey by Judge Posner found that the average cartel probably lasted for 6-9 years, with an additional 3-4 year lag before judgment.² If prejudgment interest were added to overcharges as they accrue, this factor by itself probably would mean that for cartel cases, so-called "treble" damages are really only approximately double damages.³

¹ See *Fishman et al. v. Estate Of Arthur M. Wirtz, et al.*, 807 F.2d 520 (7th Cir. 1986) (dissenting).

² Richard Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & Econ. 363, 381 (1970). More recent studies yield similar results. For example, John M. Connor, *Global Price Fixing* (2001), at 336, estimates that the vitamin cartel cases lasted an average of 7-8 years.

³ The precise value of this adjustment depends upon a number of factors. In 1993 I calculated that this factor, by itself, probably would reduce the nominal "treble damages" multiplier

Moreover, antitrust violations give rise to allocative inefficiency,⁴ a damage that never is awarded in antitrust cases.⁵

down to a true multiplier that was between 1.65 and 1.25. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio State L. J. 115, 134-36 (1993). Interest rates vary from year to year, however, and have been relatively low during the last decade. If this calculation were performed today it would yield a somewhat lower adjustment.

Recently the effect of the lack of prejudgment interest was calculated for the vitamin cases, in *Brief For Certain Professors of Economics as Amici Curiae In Support of Respondents in F. Hoffmann-La Roche LYD v. Empagran, S.A.*, No. 03-724 March 15, 2004. These Professors of Economics calculated that the effective payouts should have been multiplied by 2.25 to offset the lack of prejudgment interest. In other words, due to this factor alone, in the vitamins cases the nominal "treble" damages were really only on the average approximately 1.33 times single damages.

⁴ Market power cause allocative inefficiency, the "deadweight welfare loss triangle", and this is undesirable. To raise prices, a firm with market power reduces output from the competitive level. The goods no longer sold are worth more to would-be purchasers than they would have cost society to produce. This foregone production of goods worth more than they would cost to make is a pure social loss, and is termed "allocative inefficiency".

For example, suppose widgets cost \$1.00 in a competitive market (their cost of production plus a competitive profit). Suppose a monopolist would sell them for \$2.00. A potential purchaser who would have been willing to pay up to \$1.50 would not purchase at the \$2.00 level. But because a competitive market would have sold the widgets for less than they were worth to the purchaser, the monopolist's reduced production has decreased the consumer's welfare without producing any countervailing benefits for the monopolist or for anyone else. This pure loss is termed "allocative inefficiency". For an extended discussion and formal proof that supracompetitive pricing creates allocative inefficiency see Edwin Mansfield, *Microeconomics: Theory And Applications* 277-92 (4th ed. 1982).

How important is this omission? Judge Easterbrook made a number of standard assumptions and calculated that the allocative inefficiency effects of market power are probably on average around half as large as the transfer effects.⁶ He concluded that due to the omission from antitrust damages awards of this factor alone, "'Treble damages' are really [only] double the starting point of overcharge plus allocative loss..."⁷

⁵ See David C. Hjelmfelt & Channing D. Strother, Jr., *Antitrust Damages For Consumer Welfare Loss*, 39 Clev. St. L. Rev. 505 (1991). I am unaware of either a more recent article on the subject or any antitrust case where plaintiff received damages for the allocative inefficiency harms of market power.

⁶ Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. Econ. 445, 455 (1985). Other reasonable analysts believe that the ratio is higher, or lower, than Judge Easterbrook's estimate. See Lande, *supra* note 3, at 152.

⁷ See Easterbrook, *supra* note 6, at 455. Judge Easterbrook noted that for administrative simplicity it would be necessary to make reasonable yet simplified assumptions:

"In the simple case of linear demand and supply curves, the allocative loss is half the monopoly overcharge, so a multiplier of 1.5 is in order. These curves doubtless are not linear, but legal rules must be derived from empirical guesses rather than exhaustive investigation. The multiplier of 1.5 thus may be a rough approximation of the lower bound. It takes care of the fact the nonbuyers do not recover damages. A further multiplier is necessary to handle the improbability of proving liability. As uncertainty and the difficulty of prosecution increase, so should the multiplier. From the violator's perspective, "treble" damages really are double the starting point of overcharge plus allocative loss, and thus trebling the overcharge is appropriate when the chance of finding and successfully prosecuting a violation is one in two." *Id.* at 454-55.

You probably can see where I am going. Adjusting the so called "treble" damage awards for their failure to include allocative inefficiency effects reduces the effective damage multiplier level from 3 down to 2 -- but so would adjusting for the failure to award prejudgment interest. So, what would happen if we were to make both adjustments at once?

Moreover, there are six more adjustments⁸ to the so-called "treble" damages multiplier that should be made to calculate the true "net harms to others" from an antitrust violation (the "net harm to others" benchmark comes from the standard optimal deterrence model⁹). When all eight appropriate adjustments are combined, awarded antitrust damages probably are only really equal to approximately one times the actual harms caused by the violation.¹⁰

⁸ The omitted factors are: (1) "umbrella" effects of market power; (2) effects of the Statute of Limitations; (3) uncompensated plaintiffs' attorneys' fees and costs; (4) the uncompensated value of plaintiffs' time spent pursuing the case; (5) the costs of the judicial system; and (6) tax effects. See Lande, *supra* note 3, at 129-158.

⁹ Damages from an antitrust violation should consist of the "net harm to others other than the offender," multiplied by the probability of detection and proof. See William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 656 (1983).

¹⁰ In 1993 I calculated that, from an optimal deterrence perspective, antitrust's "treble" damage remedy probably only amounted to between .68 and 1.09 times actual damages. See Lande, *supra* note 3, at 159-160. These results should be

However, standard optimal deterrence theory says that the multiplier should be larger than one because not all antitrust violations are detected and proven. If damages are not greater than one, potential violators would have an incentive to engage in anticompetitive conduct. As observed by Judge Easterbrook, "[M]ultiplication is essential to create optimal incentives for would-be violators when unlawful acts are not certain to be prosecuted successfully."¹¹

No one knows the percentage of antitrust violations that are detected and proven. In 1986 the Assistant Attorney General for Antitrust, Douglas Ginsburg, estimated that no more than 10% of cartels were detected.¹² The Antitrust Division's amnesty program almost certainly has resulted in a larger percentage of cartels being detected today,¹³ but there is no reason to believe that the detection and proof rate for

approached with caution, however, in light of all the uncertainty involved in the necessary empirical estimates. The important point is not whether antitrust's "treble" damages actually are equal to .68, or to 1.09, times actual damages. The crucial point is that they are much more likely to be the equivalent of single damages than treble damages.

¹¹ Easterbrook, *supra* note 6, at 455.

¹² See United States Sentencing Commission: Unpublished Public Hearings, 1986 volume, at 15. (July 15, 1986 Hearing).

¹³ See Gary R. Spratling, *Detection and Deterrence*, 69 GEO. WASH. L. REV. 798, 817-23 (2001).

other types of antitrust offenses has improved in recent years.

We might assume, for example, that only 1/3 of all antitrust violations are detected and proven.¹⁴ If so, then a true damages multiplier of 3 is appropriate. But it should be emphasized that this multiplier is separate from the prejudgment interest point and other points made earlier.¹⁵ Yet, damage levels currently are only approximately singlefold.¹⁶

14 I have never seen any reliable evidence that the detection and proof rate for any type of antitrust offense is even as large as one-third.

¹⁵ Judge Easterbrook noted in *Fishman et al. v. Estate Of Arthur M. Wirtz, et al.*, 807 F.2d 520, 584 (7th Cir. 1986) (dissenting) "Is this [lack of prejudgment interest] small beer, to be made up by the trebling of the damages? Hardly. Any erosion of the trebling on account of a denial of interest undermines the deterrent force of the antitrust law. Trebling makes up for the fact that antitrust violations are hard to detect and prove.... The expected damages are the deterrent. Today's decision reduces that deterrent.... The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders. We should allow, indeed require, such awards."

¹⁶ Moreover, if antitrust "treble" damages are really only single damages, then there is no reason to believe that, on the whole, injured antitrust plaintiffs are overcompensated. In fact, consumer plaintiffs are, on the whole, probably compensated only approximately between 1.10 and .63 times their losses from price fixing when they receive "treble" damages. See Lande, *supra* note 3, at 162, for the appropriate calculations.

Myth #2. There is "duplicative recovery" of antitrust damages because some defendants pay sixfold or more damages.

Surely you often have heard variations of the argument that the combination of treble damages for direct purchasers, plus another treble damages for indirect purchasers, plus disgorgement, plus the effects of actions by State Attorneys' General, plus criminal fines of twofold damages, can lead to overall damages of sixfold, eightfold, or even more.¹⁷

However, the duplication argument is only a theoretical one that has never occurred even once in the real world. There has never been even a single case where a cartel's total payouts have been shown to exceed 3 times the damages involved.¹⁸ Moreover, if you read the critics carefully, they

¹⁷ See, e.g., Michael L. Denger, *A New Approach To Cartel Enforcement Remedies Is Needed*, ABA Spring Antitrust Meeting, at 15 (Apr. 24-26, 2002).

¹⁸ There often is "duplicative" litigation in the sense that the same defendants often are sued both by direct and indirect purchasers. But there has never been a case of sixfold recovery.

Besides, the correct issue should be one of foreseeable harm, and a manufacturer that plans to participate in a cartel, for example, should foresee that the increased prices will be passed on not only to the direct purchaser but (probably with additional mark-up) to indirect purchasers as well. It is correct to hold the violator responsible for all the foreseeable harm it causes.

always say that duplicative recovery "could" happen.¹⁹ But they never show that it "has" happened.²⁰ *Illinois Brick*²¹ is more than 25 years old, but defendants' nightmare scenario has never even happened even one time.

I challenge critics of the current system to show this Commission a real world example of the sixfold damages of lore. This Commission, however, should rely only upon the conclusions of judges, juries, or Commissions. Respectfully, this Commission should not just take defendants' word for their assertions.²² After all, defendants' lawyers typically

¹⁹ See, for example, Prepared Statement of Michael L. Denger, presented at the June 27 AMC Hearing, page 6-8.

²⁰ *Id.* See also the other presentations at the June 27 AMC Hearing on Indirect Purchasers Actions. If even one such example existed surely one of the learned witnesses on these 2 panels would have discussed it.

²¹ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

²² For example Mike Denger (one of the nation's leading defense attorneys, who represented one of the defendants in the vitamins cartels cases) testified at the June 27, 2005 AMC Hearing that on the whole "it is not unlikely that the [vitamins] defendants paid fines, settlements and litigation expenses from U.S. criminal and civil litigation which, in the aggregate, averaged over 100% of their U.S. sales." See Denger, *supra* note 19 at 7 (footnote omitted).

It is difficult to critically evaluate Mr. Denger's assertion, however, because these cases involved a number of different vitamin products, over different time periods, each with their own overcharges. One would have to compare Mr. Denger's assessments of specific products, time periods, and overcharges with those of the plaintiffs in these cases. This would be a particularly difficult task because, with only one exception, no court has ever ruled on these issues. We would

claim that their clients never raised prices at all.²³ If this were true, even a \$1 settlement would constitute an infinite percentage damages. But plaintiffs say virtually the opposite. This Commission should make policy recommendations

have to compare potentially contradictory plaintiff and defendant allegations - not the most satisfactory method of analysis.

Moreover, Mr. Denger did not adjust his calculations for antitrust's lack of prejudgment interest. This factor alone would reduce Mr. Denger's 100% figure down to approximately 44%! See *Brief For Certain Professors of Economics as Amici Curiae In Support of Respondents in F. Hoffmann-La Roche LYD v. Empagran, S.A.*, note 3, *supra*. In other words, if Mr. Danger had added prejudgment interest to the overcharge figures in his calculations, he would have found that the cartel paid 44% of its U.S. sales, not 100%.

Significantly, a 44% payment equals only slightly more than the 38% mark-up that the jury calculated in the only vitamins cartel case overcharge determined by a neutral third party. *In Re Vitamins Antitrust Litigation, Animal Science Products v. Chinook Group*, Misc. No. 99-0197 TFA, M.D.L. No. 1285 (choline chloride cartel jury verdict).

Thus, the vitamins cases clearly do not qualify as an example of "duplication" or excessive payouts by defendants.

²³ See, for example, the opening statement given by Kurt Odenwald, who represented DuCoa in *In Re Vitamins Antitrust Class Action*, Misc. 99-197, Trial Transcript, May 29, 2003 (morning session) at 244:

"Equally as important, I think the evidence is going to show that the efforts by those who did meet for the purpose of reaching an agreement to restrict prices or to allocate markets simply did not succeed. The conspiracy, as it is alleged with regard to pricing, never really came together. It never really came together."

that are based only upon the objective findings of neutral third parties.

I have issued this challenge to many defendant lawyers, in public fora and in writing,²⁴ but none has ever been able to demonstrate that there has been even one real case involving actual duplicative damages paid by a cartel. Moreover, from a public policy perspective, anyone wanting to change the current damages system should have the burden of presenting not just an isolated example, but a pattern of such evidence. Only a pattern, based upon reliable, neutral evidence, might justify damages reform.²⁵

The following scenario is instead much more typical:

Assuming that plaintiff can get the class certified - no easy task - defendants negotiate a settlement with direct purchasers of nominal single damages, followed by settlement with indirect purchasers (from many of the 30 or so states that permit these suits) that aggregate to no more than 1/3 of

²⁴ See Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 Loyola Consumer L. Rev. 329, 341-43 (2004). Much of the analysis in this Testimony is based upon this article.

²⁵ For example, on June 14, 2005 Richard M Steuer submitted to the AMC the Report of the ABA Antitrust Section's Remedies Task Force. Page 2 of this Report states in boldface that one of the "key features" of their proposal is: "There would be no duplicative recovery under the new cause of action." Because there has never been duplicative recovery, this should not be counted as a significant benefit.

actual damages. To this should be added the criminal fines.²⁶ The criminal fines are based upon the presumption that cartels raise prices by an average of 10% of affected sales (this result is then adjusted by a complex formula, and then the final figure often is negotiated significantly downwards.²⁷) The next Section of this Testimony will, however, demonstrate that 10% of sales is much less than the average cartel overcharge. For this reason criminal fines amount on the whole to less than one times the overcharge.

All of this together means that the sum of direct damages, indirect damages and criminal fines appears to total almost treble damages for the cartel: approximately $1 + 1/3 +$ less than 1 = between 2 and 3 times the overcharge.

However, as noted above, after appropriate adjustments are made for the lack of prejudgment interest and the other factors noted earlier, these "treble damages" are likely to amount to only approximately single damages. Certainly not sixfold or eightfold damages. The "duplicative recovery" or "overdeterrence" argument is only theoretical, and should be ignored.

²⁶ Of course, not all collusion cases result in criminal fines.

²⁷ See John M. Connor & Robert H. Lande, *Optimal Cartel Fines*, at Section I (Draft, 2005) (revised version of draft available, under the title of *How High Do Cartels Raise Prices? Implications For Reform of the Antitrust Sentencing Guidelines*, at www.antitrustinstitute.org)

Myth #3. The damages caused by antitrust violations are relatively modest, and payouts resulting from violations are out of proportion to these damages. This causes overdeterrence.

Some suggest that the anticompetitive effects of even hard core collusion are quite modest.²⁸ Some assert in effect that most cartels have so many problems raising prices significantly for a sustained period, and collapse so quickly, that their damage to the economy usually is ephemeral. And, of course, there is virtually unanimous agreement that cartels are the poster children for the "evil" that the antitrust laws are supposed to prevent, and that the other antitrust offenses are not nearly as anticompetitive or as damaging to our economy. If policymakers believe that even cartel damages are on the average relatively small, then when they design the overall optimal remedy system they should of course err on the side of laxity. If the harms from occasional antitrust violations - even cartels - are quite small, then little would be lost by having a very lenient remedies system, while the fear of overdeterrence would become relatively greater.

²⁸ *Id.* at Section II.

The United States Sentencing Commission cartel penalties are based upon a presumption that cartels raise prices by 10%.²⁹ However, in a recent study my co-author, Dr. John Connor, and I identified about 200 serious social-science studies of cartels. These contained 674 observations of "average" overcharges.³⁰ Our primary finding is that the median overcharge for all types of cartels has been an average of 25%; 17-19% for domestic cartels, and 30-33% for international cartels. The average overcharge for all types of cartels over all time periods was even higher: 49%.³¹

We also assembled a sample where the cartel overcharges were determined by neutral third parties; judges, juries, and Commissions. We looked for every final verdict that we could find in a United States collusion case. These results showed a similar pattern: an average median overcharge of 21.6%, and an average mean overcharge of 30.0%.³²

Thus, both median and mean cartel overcharges are two or three times as high as the level presumed by the U.S. Sentencing Commission. Our results show that cartels cause

²⁹ *Id.*

³⁰ *Id.* at Section III

³¹ *Id.* In this sample, 79% of the overcharges were larger than the 10% presumption contained in the Sentencing Commission's Guidelines; 60% were above 20%.

³² *Id.* at Section IV.

substantially more harm than was commonly realized. Our results also imply that the existing level of cartel fines will do little to deter most cartels. Total payouts by cartels should be higher than the cartel's damages by a large multiplier (*i.e.*, three³³). Yet they are, on the average, much lower than this. The existing cartel penalty levels should be raised significantly.

Myth #4. Treble damages can be eliminated for certain violations, such as rule of reason violations, without undermining optimal antitrust enforcement.

It has been proposed that damages should be detrebled for rule of reason violations or for other categories of antitrust violation.³⁴ Such a regime, however, would lead to underdeterrence. It also would be more complicated and lead to less business certainty in light of the current uncertain line between *per se* and rule of reason antitrust violations.

³³ See the discussion of the multiplier issue under Myth #1, *supra*.

³⁴ For citations and a discussion of ten detrebling options see Edward D. Cavanaugh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777 (1987). See also Richard A. Posner, *Antitrust Law* 272-73 (2nd Ed. 2001).

Moreover, rule of reason violations, like cartels, also cause harms in addition to their transfer effects – they also cause allocative inefficiency, they should award prejudgment interest, etc.³⁵ As shown under Myth #1, *supra*, the “treble damages” awarded for rule of reason violations probably are really only approximately single damages.

Yet, a multiplier substantially greater than one is equally appropriate for rule of reason situations.³⁶ The multiplier of three is used, presumably, because antitrust

³⁵ Antitrust violations can also lead to less short term consumer choice and lower long terms innovation. These can at times be more important to consumer welfare than the price effects of anticompetitive behavior. See Neil W. Averitt & Robert H. Lande, *Consumer Choice: Implementing A New Paradigm for Antitrust*, (unpublished draft, 2005); Robert H. Lande, *Consumer Choice As The Ultimate Goal of Antitrust*, 62 U. Pitt. L. Rev. 503 (2001).

Moreover, injunctive relief can also be more important than monetary damages to, or recoveries by, consumers. See, for example, *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003), *aff'd*, 396 F. 3d 96 (2d Cir. 2005) “Lead Counsel also claim that their requested fee is justified if one considers the massive economic benefits of the injunctive relief. They assert that their requested fee is “reasonable, and indeed conservative” because it is only 2.14% of the total settlement (\$ 3,383,400,000 in compensatory relief plus \$25,076,000,000 in injunctive relief). I agree that the substantial injunctive relief here should inform my decision on awarding fees, and it has.” (citations omitted)

³⁶ “Indeed, some multiplication is necessary even when most of the liability-creating acts are open and notorious. The defendants may be able to conceal facts that are essential to liability.” See Easterbrook, *supra* note 6, at 455.

violations frequently are hard to detect and prove to be anticompetitive. Rule of reason cases on average are much easier to detect, but they are much harder to prove than *per se* cases.³⁷

Treble damages were adopted in part to provide an incentive for private litigants to find and prove violations.³⁸ Rule of reason cases are tremendously difficult factually, risky, protracted, and expensive. Abolishing treble damages in rule of reason cases could effectively destroy rule of reason private antitrust enforcement.³⁹ The number of uncontested rule of reason violations would be likely to increase tremendously.⁴⁰ There is no reason why the same overall multiplier should not be used. It is even possible that treble damages are more important for rule of reason cases.

³⁷ See *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982): "Treble damages make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit under the antitrust laws." (quotation marks omitted).

³⁸ *Id.* See also Lande, *supra* note 3, at Section II.

³⁹ Compared to *per se* cases, plaintiff-oriented attorneys are today tremendously reluctant to rule of reason cases because the prospects of victory are so low and uncertain. And this is true under the current regime, which awards treble damages!

⁴⁰ For these reasons, detrebling damages as a way of creating a partial exemption or immunity also is unwise. If an offense harms competition and violates the antitrust laws it should give rise to actual treble damages.

Moreover, treble damages lead to greater attention by firms to the possible antitrust consequences of their actions. This leads to fewer violations. Even though "treble" damages, when examined properly, are really single damages, if a firm thinks they might have to pay treble damages, this could deter them from engaging in anticompetitive conduct. Single damages combined with an unknown and uncertain, but significantly less than 100% probability of detection and successful litigation, could provide a positive incentive to violate the law.

Moreover, criminal penalties are irrelevant in rule of reason cases, so the private payouts have to supply all the necessary deterrence. In many *per se* cases, by contrast, some of the optimal deterrence will be supplied by the criminal penalties.

Conclusions

The arguments in favor of lowering antitrust damages are based upon myth. Before recommending that damage levels be lowered in any way, this Commission first should demand solid evidence of duplication and overdeterrence, as opposed to hypotheticals or self-serving conclusions. If the Commission decides to recommend any changes in this area, it should instead recommend that damage levels be changed so that they actually are at the threefold level for all types of antitrust

cases. To help accomplish this the Commission should recommend that prevailing plaintiffs receive the current damage levels and also prejudgment interest, starting when the antitrust damages first occur. The Commission also should recommend higher criminal antitrust fines.