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PRIVATE DAMAGE REMEDIES: TREBLE DAMAGES, FEE SHIFTING, PREJUDGMENT INTEREST

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INTRODUCTION

I appreciate the opportunity to present these views to the Commission. The private treble-damage remedy is an important feature of our antitrust enforcement system, and it deserves periodic reconsideration to ensure that it serves worthy purposes effectively. Treble damage awards comprise the energy source for the most prolific form of antitrust enforcement in the world – possibly the single most significant category of private enforcement of public law in the world – namely the U.S. private civil antitrust damages claim. Exposure to such claims has real consequences: although not a perfect deterrent, treble-damage awards that sometimes exceed a billion dollars help keep antitrust compliance on the business management dashboard. Attorney's fee awards in the hundreds of millions make a private treble-damage claim the holy grail of antitrust bar entrepreneurs. To a large extent, it seems the U.S. got what it wished for in enacting the private treble-damage remedy.

The private treble-damage remedy has been the subject of extensive study and commentary by many respected antitrust scholars and practitioners.[1] A variety of proposals have

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been put forth over the years to limit, eliminate, or to increase the damages multiple or modify other features of the system. In the first Reagan Administration, I helped formulate a detrebling proposal that was introduced as a bill in Congress at the request of the Administration.[2] This proposal has been echoed by others from time to time during the intervening years. In fact, as I discuss later in these remarks, the treble-damages provision is being repealed piecemeal through legislative action focused on specific types of business conduct.

My main point is simple: remedies over and above those that are available more generally within the private civil litigation system, designed for business conduct viewed by an earlier era as threatening and anticompetitive, are not likely to seem appropriate for those forms of conduct that are now understood – on the basis of sound economic analysis and empirical examination – to be beneficial in all but limited circumstances. There is already an established trend toward legislative detrebling for specific forms of conduct, and this trend likely will continue. The main question is whether it will occur on a general, uniform and consistent basis through thematic legislation, or whether it will continue to occur in an "ad hoc" manner through legislation addressed to specific forms of favored conduct.

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[1] Michael K. Block & J. Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?* 68 Georgetown Law Journal 1131 (1980).

[2] Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. & Econ. 445 (1985)(commenting on the earlier proposal and making one of his own). Other proposals for modification of the treble-damage remedy include "decoupling" – in which a defendant found liable pays at least some part of the damages to the U.S. Treasury or someone other than the plaintiff. These are small parts of a sizable and much broader literature on optimal deterrence and related economic analyses of law enforcement, to which Professors A. Mitchell Polinsky, Daniel L. Rubinfeld and Steven Shavell are especially prolific contributors. *See, e.g.,* a partial bibliography for Professor Polinsky listed at http://ideas.repec.org/e/ppo94.html (visited July 16, 2005).

HOW WELL DO TREBLE DAMAGES SERVE THEIR "PURPOSE"?

Despite lengthy and extensive experience with the treble-damage remedy, and despite numerous critical assessments, no clear consensus has emerged regarding the appropriate purposes of the treble damages remedy or the fit between the remedy and its objectives. All of the classic remedial purposes have been cited in support of treble damages: compensation for victims, deterrence of violations, and exemplary punishment for reprehensible conduct, perhaps even apart from its economic consequences. Often the remedy is justified simply as a spur to private litigation to enforce antitrust standards – the so-called "private attorney general" rationale. Since it isn't responsible to encourage litigation for its own sake under present conditions, the merit of the private attorney general rationale lies more in the idea of conserving public resources in pursuit of the other fundamental rationales for the remedy.

Another rationale, which might be termed the patch-kit rationale, has also emerged as a justification for treble damages; it is said that our civil litigation system works so slowly and inaccurately that the successful antitrust plaintiff rarely if ever receives a damage award that would represent even a compensatory amount. Trebling is supposedly needed to fix this flat tire in the litigation process and enhance the likelihood that it will at least provide compensatory damages, even though a true multiple damages remedy was intended by Congress. A comparison of the shortcomings of private antitrust litigation with those of other areas of law that employ private civil remedies evokes a host of questions about the fundamental character of our system of litigation, the validity of the patch-kit rationale and the logic of applying it to antitrust and to other areas of law that might be similarly characterized by systemic litigation flaws. Not the least of these questions is whether more radical reconsideration of the civil litigation system would be required by such pervasive inaccuracy.

The imperfect fit between treble damages and each of these rationales has also been a topic of extensive analysis. If deterrence is the objective, there must be serious question about basing damages on a measure of profits lost by the victim, when it might seem more appropriate to focus on the illegally obtained profits reaped by the violator – the one who must be deterred. If the optimal deterrence level depends on likelihood of detection, it may seem logical to adopt a damage multiple greater than three for violations occurring in deep secrecy, and reducing the multiple for overt conduct. One can also speculate about why a treble damage remedy is needed for deterrent purposes at all, so long as Section 1 and Section 2 violations can be – and in the case of cartel violations, typically are – prosecuted criminally and punished with actual incarceration for individuals and criminal fines. With a clear Justice Department policy of prosecuting all criminal antitrust violations, the vivid examples of the pleas, convictions and fines successfully obtained pursuant to that policy over an extended period of time, and with criminal fines extending to twice the gain realized or loss inflicted, one might think criminal enforcement alone would come close to achieving effective deterrence. Then, too, the possibility of additional penalties under mail fraud, wire fraud, or other similar ancillary criminal statutes – especially those associated with covert behavior – further ups the ante for violators, at least at the serious end of the spectrum of illegal conduct represented by the covert cartel violations. Of course there are significant replies, rebuttals and qualifiers to each of these arguments.

Similar questions can be posed with respect to the other rationales: why compensate parties that have been able to pass on any damages they may have suffered? Perhaps the availability of treble damages overcompensates – alone or in combination with the "cluster bomb"[3] of other remedies, including equitable disgorgement, state suits (including those based

[3] Richard Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940 (2001).

on indirect-purchaser rights), etc. – or creates undesirable rent-seeking behavior by private litigants (and the bar).[4] It is possible that treble-damage claims unintentionally assume some of the characteristics of a wealth-transfer program that can be gamed to benefit the undeserving or the minimally deserving. This is a criticism that can also be levied at other bounty payment mechanisms, including the retributive and unwise legal methods that produced or at least inflamed the Salem Witch Trials and the Confiscation Cases during the Civil War and Reconstruction. Finally, if the treble-damages remedy is intended to be exemplary or punitive, one may question whether it is appropriate to view conduct such as garden-variety exclusive dealing or product bundling as sufficient to warrant such treatment – at least when such conduct is overt – even assuming that such conduct is correctly determined to be illegal under the Sherman Act.

So what is the correct way forward with regard to the treble-damage remedy? I would long hesitate before claiming that I could improve on the analysis already provided by leading thinkers who have written and spoken trenchantly on these issues. The best I can do is give a perspective based on my personal experience with antitrust enforcement in its various guises, and in a variety of roles in the policy and practice of antitrust.

THE RELATIONSHIP BETWEEN REMEDIES AND SUBSTANTIVE STANDARDS

Treble damages and the other key features of Clayton Act Section 4 are parts of an extensive and complex antitrust ecosystem. As such, the remedies are best understood and evaluated in relation to the other components of the system. Attitudes and prescriptions regarding remedies naturally tend to evolve in parallel with the substantive antitrust standards

[4] William J. Baumol and Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & Econ. 247 (1985).

that such remedies are intended to enforce. If there is a consensus that a particular type of competitive conduct is undesirable and should be enjoined, deterred, or punished, then there will be a tendency to search for procedural shortcuts to condemn such behavior and to increase the availability and severity of the applicable remedies. Conversely, where the competitive effects of business conduct come to be regarded as more ambiguous and potentially beneficial depending on circumstances, caution will pervade the assessment of such conduct, there will be a reluctance to shortcut meaningful analysis, and remedies may attract efforts at mollification or repeal.

Take cartel conduct as an example at one end of the spectrum. The so-called naked horizontal restraints are typically regarded as the most damaging and reprehensible of all the forms of anticompetitive conduct. It has been said that such conduct cannot be over deterred, since it has only harmful competitive effects. It is no surprise that there is widespread support to maintain the *per se* rule prohibiting such conduct, obviating the need for proof of market power or actual competitive effect, or that the magnitude and severity of the remedies prescribed and pursued have been escalating year by year. Last year saw a dramatic jump – more than trebling – in prescribed maximum incarceration periods and fines for criminal antitrust violations.

Within the last quarter-century, however, a wide variety of business conduct outside the cartel area was also considered anticompetitive if not reprehensible. Consider the Supreme Court's insistence in *United States v. Topco Associates*, 405 U.S. 596 (1972), on *per se* analysis of horizontal joint ventures, reinforced by its mocking prediction that if Congress chose the rule of reason as the correct mode of analysis, it would "leave courts free to ramble through

the wilds of economic theory".[5] Consider merger cases such as *United States v. Von's Grocery* Co., 384 U.S. 270 (1966), *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), and *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 580 (1967)("*Clorox*"), cases on vertical restraints and tie-ins such as *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and *United States v. Northern Pacific Ry. Co.*, 356 U.S. 1 (1958), not to mention agency statements on intellectual property licensing (the "nine no-no's").[6] Fire and brimstone treatment of such conduct sounds quaint nowadays, although these were regarded as leading precedents when I began practicing law the year before *Schwinn* was overruled.

With occasional dissent from various quarters and under certain circumstances, economic analysis now pervades judicial decision making and enforcement agency practice, and each of these forms of conduct, so richly condemned in our colorful early antitrust decisions, is now viewed as more ambiguous in both an economic and perhaps moral sense as well. *Broadcast Music Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), suggested very different answers to the questions addressed in *Topco*; the *per se* rule against vertical restraints was specifically overruled in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and *State Oil Co. v. Khan*, 522 U.S. 3 (1997), except with regard to vertical price agreements. Even in that area, however, the *per se* rule was substantially qualified in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984)(mere termination following price complaint insufficient to support application of *per se* rule), and *Business Electronics Corp. v. Sharp Electronics Corp.*,

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[5] 405 U.S. at 609 n.10.

[6] Bruce B. Wilson, Remarks Before the Annual Joint Meeting of the Michigan State Bar Antitrust Law Section and the Patent Trademark and Copyright Law Section (Sept. 21, 1972), excerpt printed in Trade Reg. Rep. (CCH) ¶50,146; *see also* Bruce B. Wilson, "Department of Justice Luncheon Speech Law on Licensing Practices: Myth or Reality?", Speech before the American Intellectual Property Law Association (Jan. 21, 1975).

485 U.S. 717 (1988)(*per se* rule against vertical price agreements applies only to the fixing of specific prices or price levels). Merger standards – enforced predominantly through agency practice with only occasional litigation and very little direct private enforcement – have evolved in light of *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), and agency endorsement of the empirically based microeconomic approach. These are of course the main examples. In almost every field of substantive antitrust analysis, conduct once viewed as harmful or even reprehensible is now viewed as potentially beneficial depending on specific facts and circumstances, and substantive standards have evolved in light of the new recognition.

Given that the shift in substantive antitrust analysis has been almost uniformly toward a more nuanced competitive analysis of private competitive conduct, it is appropriate that there should be a reexamination of the possibility that the treble damage remedy leads to over deterrence, overcompensation, excessive incentives to litigate, and inappropriate use of punitive sanctions. This same type of reexamination has already occurred with regard to procedural and evidentiary elements of the antitrust enforcement ecosystem. Standards for grant of summary judgment in antitrust cases have evolved as part of a broader judicial trend represented by Supreme Court decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Rules of standing have become more discriminating, as courts have increasingly appreciated the risk of chilling legitimate competitive conduct and the need to maintain close correlation between antitrust objectives, liability theory and principles of claim recognition (proximate cause might be a better term). *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)(formulating antitrust injury requirement); *Associated General*

Contractors Inc. v. California State Council of Carpenters, 495 U.S. 519 (1983)(synthesizing antitrust injury within a more comprehensive statement of antitrust standing principles).

Of equal significance, evidentiary standards for analyzing competitive effect and other microeconomic issues arising in antitrust litigation have been revolutionized, as the Supreme Court in the so-called *Daubert* cases[7] has required lower courts to act as a first screen against experts who attempt to use professional credentials to disguise folklore as scientific (including economic) learning. Although none of the decisions establishing this new lower-court role was an antitrust decision, I have previously argued that the *Daubert* line is in fact an extension of lessons learned in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)(rejecting expert report asserting that alleged decades-long predatory pricing conspiracy among Japanese consumer electronic products manufacturers had injured competition), and *Brooke Group v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993)(rejecting expert testimony that price-cutting by third-rank firm with eleven percent market share constituted "oligopolistic disciplinary pricing"). The *Daubert* cases have profoundly changed the manner in which economic expertise is applied to private antitrust litigation.[8]

ARE TREBLE DAMAGES EXCESSIVE AND IF SO, IN WHICH CASES?

Given this profound transformation of the antitrust ecosystem since the wholesale adoption of empirically based microeconomics as the fundamental template for analysis, one

[7] Weisgram v. Marley Co., 528 U.S. 440 (2000); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); General Elec. Co. v. Joiner, 522 U.S. 136 (1997); Daubert v. Merrell Pharm., Inc., 509 U.S. 579 (1993).

[8] Abbott B. Lipsky, Jr., *Antitrust Economics -- Making Progress, Avoiding Regression*, 12 Geo. Mason L.Rev. 163 (2003).

would expect to observe continuing support for the treble damage remedy with regard to substantive violations still regarded as among the most serious and damaging. Hence, I would encourage our decision-makers to think long and hard before considering any radical revision to the private treble-damage claim as it is applied to covert cartel conduct. Changes intended to address the ”cluster bomb” aspect of the remedies applied to cartel conduct -- as identified by Judge Posner – may well be in order, but I do not understand the problems of multiple remedies and overlapping jurisdiction (whether it involves overlapping jurisdiction among different agencies or between courts and agencies at the federal level, or between enforcement instrumentalities at the federal and state level) to be the focus of this panel.

Focusing on the specific issue of trebling and mandatory payment of attorney's fees, however, there is a tenable case for reform with regard to competitive conduct recognized as potentially beneficial or only harmful in specific and limited circumstances. Applying a damage multiple and a fee-shifting provision to antitrust litigation has had the demonstrable effect of encouraging private supplementation of public enforcement, thereby enhancing whatever deterrent, compensatory and exemplary remedial effects the system would have otherwise produced, *ceteris paribus*. But for modes of conduct that only rarely justify remedy, the danger of these litigation subsidies is that they will over deter or appear to the marketplace actor to over deter, thus creating an undesirable chilling effect for legitimate competitive conduct. Treble damages and mandatory fee-shifting are less likely to be appropriate outside the narrow range of conduct considered seriously harmful in all or virtually all circumstances.

I would invite the Commission to focus on two related issues in fashioning its study and in considering its recommendation with regard to the remedial – as opposed to the jurisdictional and procedural – aspect of the treble-damage remedy. First, it should be

recognized that the antitrust ecosystem has been engaged in a kind of spontaneous and uncoordinated detrebling exercise since the very outset of the era of empirical microeconomics in antitrust. In a variety of specialized areas where identifiable forms of competitive conduct lead to recognizable benefits, Congress has enacted a number of detrebling reforms.

The first in this line was the Export Trading Company Act of 1982 ("ETCA"), which in Title III provided for an "Export Trade Certificate of Review" for certain export–related joint conduct. Such certificates were issued by the Department of Commerce upon application. In any subsequent antitrust action, conduct under an issued certificate was subject only to actual damages including loss of interest, and mandatory fee-shifting in favor of the winning litigant – meaning that fee-shifting works both ways in antitrust litigation involving conduct under an Export Trade Certificate. The ETCA also contained Title IV, known as the Foreign Trade Antitrust Improvement Act of 1982, an important although still controversial law concerning the application of antitrust law to international parties and conduct.[9]

Title III of the Export Trading Company Act of 1982 became something of a model for subsequent efforts to protect other favored patterns of competitive conduct. Impelled by some of the same fears about antitrust litigation and rising threats to U.S. productivity growth

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[9] Although not strictly relevant to the issue we are discussing today, the relationship between the two titles is interesting. Assertions of U.S. antitrust jurisdiction and application of U.S. antitrust enforcement mechanisms to international business conduct raise a wide variety of complex and important issues, and had come under serious study and discussion as the evolution of the global economy began to produce increasing numbers of cases raising such issues. Many of these issues came to the fore and achieved some form of resolution in Title IV, the FTAIA. However, it was the perceived frustration of the business community regarding antitrust threats to the ability to form joint ventures for the purpose of facilitating exports – coupled with some intense fears about the capacity of U.S. firms to withstand the challenge of foreign competitors – that produced the immediate legislative impetus for the Act, primarily through Title III. This was the first significant form of detrebling of antitrust damages that I could identify.

and innovation that helped support the 1982 Act, in 1984 Congress enacted the National Cooperative Research Act ("NCRA"), 15 U.S.C. §4301-06. Although the NCRA has many similar themes – excessive antitrust litigation risks chill desirable conduct and therefore require legislative mollification -- the mechanism chosen was somewhat different from that of the ETCA. Rather than require beneficiaries to obtain a certificate of review from the Department of Commerce or some other agency, detrebling and a form of reciprocal fee shifting become available to applicants who simply notify the Justice Department of their qualifying joint venture under the statute. The statute also requires such ventures to be evaluated under the rule of reason. The NCRA was extended to joint research and production ventures in 1993 and the statute was renamed the National Cooperative Research and Production Act.

The second and related point regarding this spontaneous evolution of remedies reform is that the central theme of each reform involves the protection of specific types of horizontal joint ventures from application of the treble-damages remedy. Joint venture doctrine is the point of maximum conflict between two major antitrust concerns: on one hand, there continues to be a broad consensus regarding the need to attack true cartel activity, but there is also a recognition that legitimate joint ventures should be permitted. As *Topco* illustrates, there are difficult tradeoffs to be made in fashioning the rules that define the difference between cartels and legitimate joint ventures. The strongest case for limitation of treble damage remedies is likely to be found in this area. For overt legitimate behavior the threat of treble damages is still likely to provide a significant disincentive to action. I needn't detain this group of experienced enforcers and practitioners with descriptions of the length, expense and disruption of treble-damage litigation. I believe that the perceived unfairness of subjecting joint ventures that

stay well back from the line of cartel activity is what has served to motivate support for previous detrebling efforts.

It is of course possible that overt cooperative behavior might in some circumstances constitute a disguised cartel, or that a particular restraint associated with cooperative conduct might be so unrelated to the main legitimate purpose of the cooperation that it would deserve condemnation through application of an abbreviated competitive analysis. But there is a question whether treble damages are required to ensure that such overt but nevertheless "sham" cartels – or restraints far too broad to qualify as "ancillary" – are struck down. Although the enforcement agencies have been vocal in more recent years regarding their recognition of the potential procompetitive benefits of joint ventures, a look at the actual enforcement record reveals that horizontal joint ventures are frequently subjected to lengthy and intense scrutiny. Even if such investigations do not result in complaint, the process by which this conclusion is reached can itself pose a significant disincentive to similar conduct in the future.

It is certainly possible to let public opinion take its course and allow detrebling to overtake additional specific areas of concern as they are identified one-by-one. These might include a variety of specific areas in which it is possible to define specific modes of beneficial conduct and assure that they are subjected to more limited remedies when they do step over the line of illegality. On the other hand, antitrust has always lived uncomfortably with sector-by-sector or other piecemeal legislative approaches to modification of antitrust standards. There is value in preserving the antitrust laws as a general mandate for common-law judicial development of rules for competitive conduct. Arguably this structure makes it possible to resist specially-pled calls for relief from antitrust standards in circumstances where political enthusiasm may have outrun the best substantive justification for legislative change.

What would a generalized reform look like? A number of potential distinctions have been proposed to define the line between conduct deserving of the most severe remedies, and conduct deserving of more limited remedies. Perhaps treble damages and fee-shifting should be limited to *per se* offenses. Or, perhaps treble damages should be available only where an antitrust violation leads to a provable increase in prices (or decrease in the event of monopsonistic conduct). Perhaps only *per se* illegal horizontal agreements should produce liability for treble damages, or perhaps only lawsuits by consumers – as distinct from competitors – should be eligible.

If the Commission decides to recommend some reform of the treble-damages remedy, the most logical focus would appear to be in the joint venture area. Secrecy is one of the most insidious characteristics of cartel conduct, and where it is absent, the rationale for damages above and beyond those characteristic of our civil litigation system seem to carry least justification. Overt collective conduct would be a plausible candidate for detrebling and there may be others.