

ANTITRUST MODERNIZATION COMMISSION
Hearing Regarding Civil Remedies Issues
(July 28, 2005)

Written Testimony of Stephen D. Susman
Regarding Treble Damages, Attorneys' Fees and Prejudgment Interest

I. Introduction

Twenty years ago I appeared on a panel at the Spring Meeting of the American Bar Association's Antitrust Section entitled "A Reassessment of Antitrust Remedies" to discuss the proposals to "reform" the antitrust laws. My co-panelists included Tom Rosch, who was then and is now one of the nation's leading antitrust practitioners on the defense side; Steve Cannon, who was then the Deputy Assistant Attorney General responsible for the Antitrust Division of the Department of Justice and is now the name partner in one of the country's top antitrust litigation boutiques; Steven Salop, who was then and is now a professor of antitrust law and economics at Georgetown; and the Hon. Frank Easterbrook, who was then and is now a Judge on the United States Court of Appeals for the Seventh Circuit.

As was the case when I appeared on that panel twenty years ago, I am a partner at Susman Godfrey in Houston, Texas. When I appeared on that panel in 1986, I had been representing plaintiffs and defendants in private antitrust cases for

almost twenty years; I have now been representing plaintiffs and defendants in private antitrust cases for almost forty years.

My response to the “reform” proposals that were being advanced in 1986 was reflected in the title of my article for that panel discussion that appears at 55 *Antitrust Law Journal* 59 – “If Ain’t Broke, Don’t Fix It!” As in 1986, my position today on the issue of whether to change the current law on treble damages and attorneys’ fees in antitrust cases is encapsulated by the title of my prior article. There is nothing broken about the treble damage and attorneys fee remedies under the antitrust laws, and there is no need to fix anything about them. In fact, the experience of the past twenty years of private antitrust litigation provides strong evidence that the decision to keep the law exactly as it was the last time these sorts of changes were proposed and considered was exactly right.

II. The Treble Damage Remedy is a Central Component of Antitrust Enforcement and Should be Retained in its Present Form.

Since 1890, the Sherman Act has allowed a prevailing plaintiff in an antitrust case to recover treble damages. The treble damage remedy serves to provide adequate compensation for the victims of antitrust violations, punish and deter wrongdoers, and ensure that there are adequate incentives for the pursuit of antitrust claims. A law that has successfully stood for one hundred and fifteen

years should not be changed without some good reason for changing it. I have yet to hear any good reason to change the treble damage provisions in the antitrust laws, and I know there are many good reasons for keeping them exactly the way they are.

Current suggestions for repealing the treble damage provisions of the antitrust laws share a common lineage with proposals that were advanced by in the 1980's. Thus, Judge Bork, who was among the proponents of changing the antitrust laws in the 1980's, has suggested in his submission to the Commission that treble damages should be eliminated in all antitrust cases, the Assistant Attorney General has suggested in his letter to the Commission a proposal for confining the treble damage remedy to cartel price fixing cases that directly echoes the proposals advanced by his predecessors in the Reagan Administration, and my co-panelist Professor Cavanagh has advocated making treble damages discretionary.

Anyone seeking to alter a legal framework that has been in place for more than a century ought to advance a compelling argument for making a change. Those who are now advocating the elimination of treble damages – like their predecessors who advanced the same arguments in the 1980's – have not done so. Judge Bork, for instance, has offered no support or citation for the contentions in

his memorandum to the Commission that treble damages should be eliminated because private plaintiffs are not constrained by the need for “skill[] in economic analysis” or to “use consumer welfare as their criteria for bringing or not bringing cases,” and that “trebling attracts bad lawsuits, lawyers interested only in the enormous cash awards, and compels even innocent businesses to settle rather than risk trial with potentially catastrophic damages.” *See* Robert H. Bork, Comments on the Status of the Antitrust Laws to the Antitrust Modernization Commission.

I don’t know whether Judge Bork has had any involvement in private antitrust litigation in the past two decades, but his views are completely at odds with my experience in the trenches. Consistent with Judge Bork’s statement that the substantive liability standards under current antitrust law has “very little need for ‘modernization,’” *id.*, it is impossible for an antitrust lawyer to stay in business bringing “bad lawsuits.” The allure of treble damages after trial does not create any significant marginal incentive for attempting to run the gauntlet of the direct purchaser rule and other antitrust standing requirements, the *Matsushita* standard, the series of Supreme Court cases limiting the scope of *per se* liability and liability for vertical restraints under Section 1 and liability for refusals to deal under Section 2, and the *Daubert/Kumho* standards on the admissibility of expert testimony, to name just a few of the obstacles to obtaining a meaningful recovery in a bad

antitrust lawsuit. Because of the well-defined and narrow substantive liability standards under current law, and because courts are perfectly willing to dispose of weak antitrust claims on motions to dismiss or for summary judgment, a private antitrust plaintiff who brings a case without the support of “skilled economic analysis” and without a sharp focus on how the challenged conduct has harmed consumers is going to lose its case and will stand no chance of recovering any damages at all.

Indeed, even the plaintiffs with strongest antitrust claims must expend enormous resources – in attorney time, document and data management costs, expert and consultant fees that can total millions of dollars, and the substantial executive and employee time that must be devoted to the case – to get their cases to trial. The prospect of a treble damage recovery provides a vital incentive for pursuing strong cases in the first place notwithstanding these enormous costs, but neither plaintiffs nor plaintiffs lawyers realistically expect to actually recover treble damages at the end of the day even in the strongest cases. Rather, as the research in this area by my co-panelist Professor Lande and others, and as my experience has borne out, nearly all antitrust cases that are not disposed of on motions to dismiss or for summary judgment settle before trial for some amount that represents a discount from the plaintiff’s single damages. Even after trial, when

the prevailing antitrust plaintiff benefits from a judgment for treble damages, settlements do not come close to approaching the treble damage level. It is only when the plaintiff prevails at trial and on appeal and is not able to reach a settlement before the appeals are exhausted and the judgment becomes enforceable that antitrust plaintiffs actually recover treble damages, and that situation is exceedingly rare.

Thus, the principal effect of the treble damage mechanism is to ensure that plaintiffs with strong antitrust claims can obtain recoveries that come closer to approximating their actual harm and that antitrust defendants that have violated the antitrust laws are forced to fund settlements that come closer to approximating the actual competitive harm caused by their conduct. Consistent the views on this issue that I have developed based on my experience, those who have studied the data in this area most closely – including Professor Lande, Professor Connor from Purdue University, and the lawyers, economists and academics who participated in the American Antitrust Institute Working Group on Remedies, each of whom has submitted detailed comments on this issue that I commend to the Commission – all have concluded that, if anything, the treble damage remedy does not provide an adequate deterrent to anticompetitive behavior because many antitrust violations go undetected and because the substantive antitrust laws do not allow plaintiffs to

recover damages that capture all of the competitive harms caused by violations of the antitrust laws. The fact that antitrust violations – and even the creation of price fixing cartels that expose their members to substantial criminal penalties in addition to the prospect of treble damages – remain widespread lends substantial support for that conclusion.

Nor is there any reason to limit the treble damage remedy to any category of cases. In his January 5, 2005 letter to the Commission, the Assistant Attorney General suggests that the Commission should study whether consumers would be better off if the treble damage remedy were limited to cases challenging price fixing cartels. This proposal directly parallels a proposal advanced by the Department of Justice in the 1980's. Under such a proposal, treble damages would not be available in any Section 2 case, case brought by a competitor challenging exclusionary conduct under Section 1 or Section 2, exclusive dealing case, vertical restraint case, group boycott case, sham litigation case, *Walker Process* or other patent-related case, or market allocation case. The substantive antitrust laws have defined all of these categories of conduct as antitrust violations, and there is no reason to provide the defendants who engage in these categories of anticompetitive conduct with a weaker deterrent or to provide the victims of these categories of anticompetitive conduct with an even lower chance of obtaining a full recovery for

the competitive injuries they have suffered and a weaker incentive to challenge the conduct in the first place.

According to the Assistant Attorney General, “given the fear of future treble damage exposure, companies may be reluctant to engage in conduct that would be procompetitive and beneficial to consumers.” But the facts suggest that what we really have is the opposite problem – *i.e.*, a situation in which the combined threats of governmental action and awards of treble damage and attorney fees in private litigation are not an adequate deterrent for even patently unlawful conduct. The notion that the antitrust laws deter companies from pursuing procompetitive conduct that benefits consumers is at odds with the fact that so many companies are willing to pursue mergers, joint ventures, pricing arrangements that are designed to exclude competition, and novel forms of agreements with competitors such as the Hatch-Waxman settlements between brand name and generic drug companies knowing full well that their conduct raises serious questions under the antitrust laws. At the same time, the many companies that take the time to receive and follow sound antitrust advice in structuring their relationships with other participants in their markets run little risk of being subjected to treble damages. It is only those companies that consciously disregard the law, or that consciously choose to engage in conduct that they know raises a serious risk of antitrust

liability, that face treble damages. By providing those companies with an incentive to obtain and follow sound antitrust advice, the treble damage remedy benefits consumers.

The proposal by my co-panelist Professor Cavanagh to make detrebling discretionary, which he first set forth in his 1987 article in the *Tulane Law Review*, see Edward D. Cavanagh, *Mandatory Detrebling: An Idea Whose Time Has Come?*, 61 *Tulane L. Rev.* 777 (1987), is a serious proposal that is based on a thoughtful consideration of the competing policy interests and objectives at stake. Under Professor Cavanagh's proposal, courts would have the discretion to order less than treble damages in close cases. But Professor Cavanagh recognized that detrebling would decrease enforcement incentives, that automatic trebling has the advantage of simplicity and ease of application, that substantive limitations on antitrust standing and liability have limited the circumstances in which anyone could claim the treble damages are unfair, and that the Chicago School rationale for detrebling does not adequately appreciate the longstanding and well-recognized policy interests in deterrence and compensation underlying the antitrust laws. *Id.* at 845-46. For those reasons, Professor Cavanagh rightly cautioned that mandatory detrebling would be a "serious mistake." *Id.* at 847.

I believe that the discretionary detrebling proposed by Professor Cavanagh

also would be a serious mistake. Having each individual judge in each case determine which cases merit treble damages, and which do not, is a recipe for inconsistency. Moreover, insofar as that determination rests on a factual determination as to the seriousness of the violation, placing that decision in the hands of a judge rather than the jury would raise serious questions under the Seventh Amendment. And I do not believe that anyone has suggested making discretionary detrebling a jury issue. In short, there is no workable standard for differentiating between different categories of antitrust violations that could result in a discretionary detrebling approach that would serve any of the policy interests underlying the antitrust laws.

Another reason for rejecting these various proposals for eliminating treble damages in all or some circumstances is that such a change, like most significant changes in the law, would likely engender unintended consequences. One such consequence is the one I've already mentioned of providing antitrust defendants with a greater incentive to risk antitrust violations, and of providing antitrust plaintiffs with inadequate incentives to pursue many valid antitrust claims.

Another likely unintended consequence of eliminating treble damages under the federal antitrust laws, and one that I have not seen discussed in the literature, is the strong likelihood that plaintiffs would more often choose to pursue pendant state

law claims under state antitrust, unfair competition and business tort laws if they were unable to pursue treble damages under federal law. Antitrust cases in federal court often now include only federal antitrust claims, but the elimination of treble damages under federal law would provide a strong incentive for plaintiffs to also assert state antitrust and business tort claims that would allow for treble, or in some cases even punitive, damages. This would unnecessarily complicate and lengthen antitrust proceedings in federal court.

Because the law thankfully was not changed the last time proposals were being advanced to eliminate or modify the treble damage remedy, we can gain insight from what has happened over the past twenty years in deciding what to do today. One of the key presumptions underlying the prior wave of proposals was that the antitrust laws were putting American companies and the American economy at an unfair disadvantage vis-a-vis our European and Asian counterparts. No one could seriously make the same suggestion today, after the 1990's saw the longest sustained period of economic growth and productivity increases in the nation's history, and as antitrust enforcement officials throughout the world increasingly have adopted antitrust and competition laws that parallel our own antitrust laws.

Moreover, the past two decades have seen numerous private antitrust cases

that have led to substantial recoveries, by settlement or judgment, even under the strict standards for antitrust liability and standing that prevail under the Supreme Court's case law. Just a few examples include the Microsoft cases, the Nasdaq market makers litigation, the Brand Name Prescription Drugs Litigation, the private litigation challenging Hatch-Waxman litigation, the private litigation challenging the lysine and vitamins cartels, the Conwood tobacco case, the auction house litigation, and *LePages* and other recent cases challenging bundled discount programs and other exclusionary contracting arrangements used by dominant firms. Some antitrust practitioners and economists might debate the ultimate merits of and results in some of these cases, but hardly anyone would suggest that these cases did not raise serious claims under the antitrust laws. All of these case cases have played an important part in eliminating anticompetitive conduct, opening markets to greater competition, and shaping the current substantive scope of the antitrust laws. In most instances, these cases were the only vehicle whereby persons harmed by the challenged anticompetitive conduct could obtain any monetary recovery because the government enforcement agencies chose to defer to the private attorneys general altogether, or because monetary relief was not available in the related governmental proceeding. In many instances, important legal precedents have been established in private litigation.

Without the prospect of treble damages – and attorneys fee awards, which I'll discuss in a moment – many of these cases would not have been brought in the first place, and consumers and the economy in general would be the worse for it. The treble damage award should be preserved to ensure that the next generation of significant antitrust cases will be brought, and so that I can have the opportunity to appear on another panel in 2025 to discuss this issue again.

III. The Attorneys' Fee Provisions Under Current Law Should Remain in Place.

As with the treble damage remedy, the attorneys' fee remedy in private antitrust cases has remained in place since 1890 and remains a vital component of private antitrust enforcement. I frankly don't see how anyone could seriously question that point. The fact is, the typical antitrust plaintiff is a financially strapped company or a consumer or class that can only afford to take on a case on a contingent fee basis. Even with the prospect of treble damages and attorneys' fees, there are very few firms that are willing and able to take on the risks of pursuing a major antitrust case. Eliminating the attorneys' fee remedy would thus prevent many valid antitrust claims from being brought in the first place.

It is important to bear in mind that attorneys' fees are available only to antitrust plaintiffs who prevail at trial and successfully enforce a judgment. Most

antitrust cases, like most cases, settle before that point, and I am not aware of any case in which the prospect of an attorneys' fee award under the antitrust laws has played a significant role in determining whether a case settled or in determining the amount of any settlement. More importantly, the prospect of an attorneys' fee award does not create an incentive to bring an antitrust case that lacks merit, because both clients and plaintiffs' lawyers know that attorneys' fees are available only when you prevail at trial.

Nor is there any reason for modifying current law to expand the circumstances in which a prevailing defendant may obtain a fee award. Under current law – in both antitrust and every other area except contractual fee-shifting agreements in which the parties agree in advance that the prevailing party in any dispute will recover a fee – prevailing defendants may recover their fees only as a sanction against frivolous cases, and that sanction is awarded only very rarely. That is exactly as it should be. Any other rule would create an enormous and completely unwarranted incentive against bringing meritorious cases, and thus would cause harm to consumers and competition.

**IV. Prejudgment Interest, Cost of Capital or Opportunity Cost Damages
Would Allow Successful Antitrust Plaintiffs to Obtain Full
Compensation for their Harms.**

As I stated at the outset of my testimony, my general view is that the remedial provisions of the antitrust laws are not broken and do not need to be fixed. Consistent with that position, I do not believe that the current limitations on the availability of prejudgment interest, and on awards of cost of capital or opportunity cost damages that would replicate prejudgment interest, are a critical problem in private antitrust actions. Nonetheless, I would favor amending the current law to allow prejudgment interest. Although many courts now move antitrust cases along much more quickly than they did in the past, it still is not uncommon for an antitrust case to remain pending for five years or more, or for an antitrust damage award to be based in part on competitive injuries that occurred five or ten years before the entry of judgment. Disallowing prejudgment interest serves no conceivable policy interest, while it allows defendants to profit from their illegal acts and creates the very real possibility that many plaintiffs will be inadequately compensated for their competitive injuries.

IV. Conclusion

The remedial framework for private antitrust litigation has remained intact

for one hundred and fifteen years, and has served consumers and the economy very well. For decades, private antitrust litigation has fostered economic growth and benefitted consumers by deterring defendants from engaging in anticompetitive conduct and compensating the victims of anticompetitive conduct that has occurred in the past. There is no evidence that the current remedial framework has led to overdeterrence or overcompensation, and there is no reason to pursue changes to the treble damage and attorneys' fee provisions that would significantly change the incentives that antitrust plaintiffs and defendants face. Such a change would likely lead to unintended consequences that could cause significant harm to consumers and the economy and unnecessary additional burdens on the already overburdened judicial system. Accordingly, the treble damage and attorneys' fee provisions in the antitrust laws should not be changed, and the only change that should be seriously considered in this area is the possibility of allowing the recovery of pre-judgment interest in all cases to ensure that the prevailing plaintiffs in antitrust cases receive adequate compensation for their injuries.