Antitrust Modernization Commission
Attn: Public Comments
1120 G Street N.W., Suite 810
Washington, D.C. 20005

Dear sir or madam:

I am a partner and chairman of the antitrust practice group in the law firm of Shook, Hardy & Bacon L.L.P. and an adjunct professor of antitrust law at the University of Missouri - Kansas City School of Law. To assist the Commission with its deliberations concerning possible recommendations for modification of the treble damages remedy, I am sending under cover of this message a copy of an article that I will be publishing this Spring in a forthcoming issue of the UMKC Law Review, in which I demonstrate the need for reform of the antitrust treble-damages remedy. [**James R. Eiszner, *Antitrust Civil Damages Remdies: The Consumer Welfare Perspective,* 75 UMKC L. Rev. 375 (2006).**]*

My article concludes that consumers are likely being forced to bear significant costs for too much deterrence of so-called "hard core" antitrust violations -- violations (such as price-fixing, bid-rigging or customer or market allocation) that are subject to both criminal prosecution and civil damages actions. When the fines and damages that may be assessed for an antitrust violation, multiplied by the risk of detection of the violation, significantly exceed the profits that a violator will derive from committing the violation, there is too much deterrence. Because (1) developments such as corporate leniency programs have increased the detection and prosecution rates for "hard core" violations, (2) successful prosecutions make these violations attractive subjects for private litigation by a plaintiffs' bar eager to profit from the fruits of the criminal prosecution, and (3) antitrust defendants typically find it relatively easy to pass on some or all of the costs of excess deterrence to consumers, consumer welfare is injured by the availability of treble damages for this class of violations. The same cannot be said for violations that are rarely the subject of criminal prosecution -- monopolization claims, for example, under Section 2 of the Sherman Act; in those cases, the treble-damages remedy appears to work as it should, based on the data that are presently available. Consequently, I have concluded that Congress should amend the civil remedies for "hard core" violations to permit recovery of only single or perhaps double damages in those cases, while retaining the treble-damages remedy for those classes of violations that cannot be prosecuted criminally. Moreover, I advocate retaining joint and several liability in its current form, because it has the effect of amplifying the deterrent effect of the civil damages remedy in all cases without adversely affecting consumer welfare.

I respectfully request that this message and the attached article be treated as a public comment on Topic No. 2 of the Commission's July 10, 2006 Request for Public Comment concerning Civil Remedies. In addition, please do not hesitate to contact me if I can respond to your questions.

Very truly yours,

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*(I have been asked to advise the Commission that printed copies of the attached article and copyright information pertaining to this article can be obtained by contacting the UMKC Law Review at 816-235-1644.)

UMKC LAW REVIEW

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ANTITRUST CIVIL DAMAGES REMEDIES: THE CONSUMER WELFARE PERSPECTIVE

James R. Eiszner[*]

I. INTRODUCTION

It is undeniable that consumer welfare ought to be the touchstone of antitrust policy,[1] especially any policy relating to remedies.[2] Historically, discussion of antitrust damages remedies has focused on an important question related to consumer welfare: whether the treble damages remedy provided in the antitrust laws, standing alone, was adequate to deter antitrust violations.[3] That was the correct consumer welfare issue to address at a time when criminal antitrust violations were punished with minor fines.[4] With the advent of significant criminal fines for cartel behavior, however,[5] it is no longer

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[1] *See, e.g.,* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 57, 61-66 (1978) ("The language of the antitrust statutes, their legislative histories, the major structural features of antitrust law, and considerations of the scope, nature, consistency, and ease of administration of the law all indicate that the law should be guided solely by the criterion of consumer welfare. . . . The legislative history of the Sherman Act, the oldest and most basic of the antitrust statutes, displays the clear and exclusive policy intention of promoting consumer welfare.").

[2] *Cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) ("Treble-damages antitrust actions [under the Sherman Act] were first authorized . . . primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers[,]" and "[w]hen Congress enacted the Clayton Act in 1914, it 'extend[ed] the remedy under section 7 of the Sherman Act' to persons injured by virtue of any antitrust violation.").

[3] *See, e.g.,* Malcolm E. Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CAL. L. REV. 1319, 1321-37 (1973).

[4] *See id.* at 1321-23, 1335 (disregarding criminal penalties in assessing deterrent effect of treble damages, apparently because in the early 1970s when that article was written, "the [criminal] penalties for antitrust violations [were] relatively small" and "rarely imposed").

[5] *See generally* James F. Rill & John M. Taladay, *The DOJ's Application of the New Antitrust Criminal Penalty Enhancement and Reform Act: Raising the Stakes for Antitrust Offenders and Sweetening the Pot for Leniency Candidates*, 1-04 ANTITRUST REP. 2 (MB), at 29, 31 (2005) (describing "the 'bigger stick' provisions" of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which increase the maximum criminal antitrust fines from $350,000 to $1 million for individuals and from $10 million to $100 million for corporations, and maximum prison terms for Sherman Act Section 1 criminal violations from three to ten years).

appropriate to consider the consumer welfare aspects of the antitrust treble damages remedy on a stand-alone basis. The dramatic increase in criminal fines has an enormous impact on the deterrence calculus.[6] A further related development, the vast improvement in cartel detection by the U.S. antitrust enforcement authorities made possible by the fine increases,[7] also has changed the deterrence calculus for potential violators. These developments make it important to consider a new issue: whether the antitrust enforcement scheme now provides for *unneeded* deterrence, and if so, whether such over-deterrence has consumer welfare implications.

As set forth more fully below, there is a substantial likelihood that consumers are bearing significant costs for having too much deterrence for antitrust violations that can be the subject of both criminal prosecution and civil actions for treble damages. Consequently, it is important for Congress to amend the civil remedies for "hardcore" violations—that is, those (such as price-fixing or market allocation agreements) that are most likely to be prosecuted criminally. There is no compelling need to amend civil damages remedies for violations that cannot be prosecuted criminally. Nor is there a need for changes in the concept of joint and several liability, which serves somewhat to amplify the deterrent effect of the damages remedy in all cases without any adverse impact on consumer welfare.

II. THE PURPOSES OF THE ANTITRUST TREBLE DAMAGES REMEDY

Any discussion of the adequacy of the antitrust damages remedy must take into account the goals of that remedy. Section 4 of the Clayton Act provides to any person injured in its business or property by reason of a violation of the antitrust laws a right to sue for, and recover, treble damages.[8] This antitrust damages remedy exists for several purposes. One is to compensate victims of antitrust violations for their injuries caused by an antitrust violation.[9] Another is to promote the prosecution of lawsuits by private parties.[10] Lastly,

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[6] *See id.*

[7] *See id.* at 42-43 (describing criminal penalty amendments effected by Antitrust Criminal Penalty Enhancement and Reform Act of 2004 as "provid[ing] the greatest incentive for an antitrust co-conspirator to report illegal conduct since the issuance [by the U.S. Department of Justice] of the 1993 Leniency Policy" because they "remove[] the single-largest barrier to reporting illegal activity and significantly raise[] the stakes for any participant in a conspiracy").

[8] 15 U.S.C. § 15 (2006).

[9] *See Brunswick Corp.*, 429 U.S. at 485-86 ("[T]he treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.").

[10] Treble damages provide a reward to private plaintiffs who act as "private attorneys general" to vindicate the public interest in antitrust enforcement. Haw. v. Standard Oil Co, 405 U.S. 251, 262 (1972);

and related to the second point, damages serve to deter antitrust violations.[11]

No one can seriously contend that the current treble damages remedy is inadequate to compensate the direct victims of an antitrust violation; such plaintiffs recover three times their actual damages under the current treble damages regime. Moreover, there are no proposals, made herein or elsewhere, to limit antitrust damages below a compensatory level. The second goal, encouragement of private attorneys general, is merely another way of stating the third goal of deterrence: Congress did not intend to encourage antitrust litigation for the sake of litigiousness, but to detect and punish—and hence deter—antitrust violations.[12] Because compensation is not an issue with the current treble damages remedy and it is unlikely that any proposal to modify that remedy would result in plaintiffs getting less than their full damages, it is appropriate to focus on the deterrent effect of the current antitrust damages model.[13]

Deterrence is a meaningless concept if divorced from the policies it is meant to serve. Deterrence of antitrust violations is intended to enforce the policies that underlie our antitrust laws. While there are many debates about the goals of antitrust law, there is general agreement that a key goal of the antitrust laws is the protection of consumer welfare. As the Supreme Court has noted, consumer welfare is the touchstone of antitrust analysis.[14] Consequently, the antitrust damages remedy should exist to protect consumer welfare. But, as developed below, the current antitrust damages regime is not completely faithful to the protection of consumer welfare and should be revised to remain true to that purpose.

III. THE OPTIMAL DETERRENCE MODEL

Consumers are harmed when an antitrust violator pays too little a penalty for its violation. In most cases, inadequate deterrence of antitrust violations results in wealth transfers from consumers to the antitrust violators. If a company knows that it can gain a million dollars from an antitrust violation

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Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969).

[11] "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct . . . ." Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981).

[12] *See Standard Oil Co.*, 405 U.S. at 262.

[13] In any event, it can be argued that deterrence is the key goal of the antitrust damages remedy. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the United States Supreme Court imposed a prohibition on standing for injured purchasers of a price-fixed product who did not purchase directly from the alleged price-fixers. *Id.* at 745-46. Although these purchasers were injured, the Court determined that granting them standing to seek compensation would undermine the deterrent effect of the antitrust laws, implicitly ruling that the compensation objective of the antitrust damages regime was subordinate to the deterrence objective. *Id.* at 745-47.

[14] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

and will only pay $100,000 in fines, penalties, and damages if it is caught, the company will decide to commit the violation even if there is an absolute certainty of getting caught. Assuming it is caught, it pays the $100,000 and pockets a net increase in profits, harming consumer welfare by $900,000. To the company, the fines, penalties, and damages are no more than a licensing fee to engage in a profitable transaction, the antitrust violation. It is therefore vitally important to consumer welfare that there be sufficient deterrence for antitrust violations.

Deterrence of antitrust violations depends on removing the motive for committing antitrust violations. Rational companies that commit antitrust violations enter into a calculus. Employees (including officers, directors, and agents) of companies who choose to engage in antitrust violations often do so because they believe violations will lead to more profit for their employers. If the likely costs of the violation outweigh or equal the likely profits, antitrust violations will be deterred; if the likely costs do not outweigh or equal the likely benefits, the profit-maximizing company will engage in the violation,[15] and consumer welfare will be harmed.

The adequacy of antitrust deterrence does not depend solely on removing the increased profits that are likely to result from the violation. The calculus by which a rational company determines whether to commit an antitrust violation is very much affected by the likelihood that the violation will be detected so that the punishment costs will be imposed.[16] If, for example, there is a one-in-five chance that the violation will be detected, the penalties must be five times greater than the anticipated increased profits in order for deterrence to be adequate.[17] Otherwise, companies will freely commit violations, based on the logic that they will profit from committing a violation four times out of five—the instances where they are not caught—and will have to pay the increased profits from an antitrust violation only in the one instance where they are caught. Consequently, the optimal deterrence model takes into account the risks of detection of violations: if the likely monetary costs of the violation (damages, fines, penalties, costs of defense, and the like), when

[15] Herbert Hovenkamp, *Antitrust Policy and the Social Cost of Monopoly,* 78 IOWA L. REV. 371, 375 (1993).

[16] The likelihood of increased profits is not absolutely certain. For example, for price-fixing conspiracies, the anticipated profits may not be achieved because of early detection of the conspiracy, because of cheating on the conspiracy by conspirators that forces other conspirators to lower their prices (and profits) or to abandon the conspiracy altogether, because non-conspirators undermine the conspiracy, or because the conspirators misjudge the demand curve they face. For purposes of the remaining discussion, however, it is assumed that antitrust violators can calculate the increased profits an antitrust violation is likely to yield.

[17] Hovenkamp, *supra* note 15, at 374 n.14.

multiplied by the likelihood of detection, is equal to the likely profits from the violation, a rational company will not have an incentive to violate the antitrust laws.[18]

The optimal deterrence model is designed to deter antitrust violations by countering the profit-maximizing calculus of rational companies.[19] It sets the monetary costs of being caught engaging in a violation equal to the harm caused by the violation—the increased profits from the violation—and then divides those profits by the probability of detection.[20] Ignoring for the moment the effect of criminal fines and assuming that the damages caused by the violation are equal to the profits from the violation,[21] the treble damages remedy presumes a one-in-three chance of detection.[22]

The one-in-three detection rate that underlies the treble damages remedy is based on an assumption that there are no criminal penalties. Yet many types of conduct that violate the antitrust laws are prosecuted criminally and are also the subject of civil damages actions.[23] As a result, the optimal deterrence model—and any discussion about deterrence—cannot focus solely on the treble damages remedy. It is meaningless to conclude that, standing alone, either criminal fines or treble damages constitute insufficient deterrence, if other remedies also apply and have a deterrent effect.[24] Companies that engage in profit-maximization will look at the *total* costs of getting caught in performing their risk-reward calculus. Consequently, while it may have been appropriate

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[18] *Id.* at 374-76.

[19] *Id.*

[20] *Id.* at 375.

[21] In the early years of the antitrust laws, it was not a good assumption that the single damages caused by a violation were equal to the profits derived from the violation because an antitrust violation could cause injuries to a wide variety of parties, including direct and indirect purchasers. Some injured parties did not sue for damages (which tended to distort the assumption by making damages too low) while direct and indirect purchasers often recovered duplicative damages (causing the damages to be too high). With the rise of the class action device, all direct purchasers harmed by a violation were much more likely to recover damages. The indirect purchaser rule, which allows only direct purchasers to recover damages, *see Ill. Brick Co.*, 431 U.S. at 745-46, and standing rules that limit duplicative recoveries by multiple plaintiffs, *see Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 543-45 (1983), have eliminated much of the risk of damages being too high. As a result, today, the assumption that single damages for a violation approximate the profits from the violation is likely a very sound one.

[22] *See* Hovenkamp, *supra* note 15, at 374 n.14.

[23] For example, Sections 1 and 2 of the Sherman Act make violations of those provisions a felony. 15 U.S.C. §§ 1, 2. Because intent is an element of these criminal offenses, *see* United States v. U.S. Gypsum Co., 438 U.S. 422, 435, 443 (1978), typically only cartel activity (i.e., conspiracies to fix prices, rig bids, allocate markets, or reduce output) where intent is easy to establish is the subject of criminal prosecution. *U.S. Gypsum Co.*, 438 U.S. at 443.

[24] RICHARD A. POSNER, ANTITRUST LAW 47 (2d ed. 2001).

to ignore criminal fines in years past when criminal fines were trivial, one may no longer look at just the deterrent effect of treble damages.[25] Moreover, the effect of joint and several liability, which makes an antitrust defendant liable for all damages, even if inflicted by one of its antitrust co-defendants,[26] must be treated as a cost of getting caught.

The optimal deterrence model, then, must look at the probability of detection of the antitrust violation multiplied by the total costs of being detected (criminal fines, penalties, treble damages, costs of defense, and the like) and compare the result with the anticipated profits from the antitrust violation. If the percentage chance of detection multiplied by the total costs of being detected is less than the increased profits of the violation, there is under-deterrence: an economically rational company will commit the violation, and consumer welfare will be harmed. If the percentage chance of detection multiplied by the total costs of being detected equals or slightly exceeds the increased profits from the violation, there is adequate deterrence. Too much deterrence occurs when the percentage chance of detection multiplied by the total costs of getting caught vastly exceeds the increased profits derived by the violation.

IV. CONSUMER WELFARE IMPLICATIONS OF OVER-DETERRENCE

While it is obvious and undeniable that too little deterrence of antitrust violations will harm consumers, little attention has been paid to the implications for consumers of too much deterrence. Yet, it is a vitally important question. If too much deterrence has no implications for consumer welfare, then sound antitrust policy would establish deterrence at very high levels and resolve all doubts about the adequacy of deterrence levels in favor of having too much deterrence. On the other hand, if deterrence has a cost to consumers, then too much deterrence harms consumer welfare (much like paying for too much insurance), and it becomes critical to ascertain whether there is too much antitrust deterrence. Consequently, if the antitrust remedial scheme is to remain true to the consumer welfare goal of antitrust law, a decision on appropriate deterrence levels depends on whether consumers end up paying for too much deterrence of antitrust violations.

How might consumers have to pay for deterrence of antitrust violations? An example illuminates the answer. Suppose that the probability of detection of an antitrust violation is one in two, that the profits from the violation are $100 million, and that treble damages apply. To be sure, the rational profit-maximizing company will be deterred from committing the violation. The company would essentially be paying $150 million

[25] *Id.*

[26] *See Tex. Indus., Inc.*, 451 U.S. at 646 ("joint and several liability . . . ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants" in the antitrust violation).

(50% of $100 million trebled) for a ticket to a lottery that paid $100 million. In this scenario, double damages would be a sufficient deterrent: no profit-maximizer pays $100 million (50% of $100 million doubled) for a lottery ticket to win $100 million.

In our hypothetical, if treble damages are available and there are no criminal fines to consider, the company that gets caught pays $50 million in extra deterrence costs. If the violator alone bore the cost of deterrence, one could argue that the violator ought to suffer the costs of too much (or adequate, but unsuccessful) deterrence, on the theory that any doubts about the adequacy of deterrence should be resolved against the wrongdoer. In reality, however, the violator company will not face a perfectly horizontal demand curve (as in a perfectly competitive market):[27] it will pass on some or all of that $50 million in extra deterrence costs to consumers. As a result, consumer welfare will be harmed. Indeed, unless a firm competes in a perfectly competitive market—a market where antitrust violations are typically rare and easily detectable—consumers will always be harmed if treble damages are more than adequate deterrence because some portion of the excess deterrence costs will be shifted by the defendant company to consumers in the form of higher prices.

One must consider the possibility, however, that deterrence is costless because all violations are deterred as a result of the over-deterrence. If that were so, then there would be no fines or damages because there would be no violations against which to assess such remedies, and hence, there would be no pass-on of any fines or damages to consumers. This argument elevates theory over reality. If the optimal deterrence model worked in all cases, there would be merit to the argument. But the reality is that the theory behind the optimal deterrence model does not always work. In rule of reason antitrust cases, even an economically rational company can misjudge the reasonableness of its actions. Monopolists may have been caught up in the *Cellophane* trap[28] and believed they were not

[27] *See generally Ill. Brick Co.*, 431 U.S. at 750 & n.3 (Brennan, J., dissenting) (citing RICHARD A. POSNER, ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS 147-49 (1974)); PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 421-22, 429-36 (13th ed. 1989) (discussing the imperfectly competitive markets).

[28] In *United States v. E.I. du Pont de Nemours & Co.* (commonly known as the *Cellophane* Case), the United States Supreme Court held that a defendant that produced 75% of all cellophane sold in the United States did not possess monopoly power because its products accounted for less than 20% of a larger market (which the Court defined to be the relevant product market) consisting of all flexible wrapping materials. 351 U.S. 377, 379, 399-400, 404 (1956). Because the Court "apparently determined the size of the relevant market, as defined by the number and availability of substitutes, with reference to a supra-competitive (monopoly) price rather than the

monopolists. Companies may miscalculate the profits to be derived from an antitrust violation, either because they have incorrectly estimated the demand curve for their products so that the prices of their goods can be elevated much more (or much less) than predicted or because the violation is detected quickly before many profits are earned. Moreover, not all businesses act because of a profit motive: for example, businesses can commit violations out of hubris or act out of competitive zeal.[29] For these reasons, the optimal deterrence model—even if set at extraordinary levels of deterrence—will not deter all violators. Because violations will be committed, consumers will pay the costs of too much deterrence (and those costs will be higher as the monetary deterrence grows higher).

Even setting aside the notion that all violations can be deterred, it could still be argued that one should disregard the costs of over-deterrence to consumers. The argument is two-pronged. The first prong is that if there is too much deterrence, then few companies will commit antitrust violations: consumers do not suffer when antitrust violations do not occur. As for those violations that do occur, then the second prong applies: it is true that consumers will pay for the cost of over-deterrence when the violator raises prices to pay for its fines and treble damages, but at the same time these consumers will also benefit from the too-high damages awarded against the company. In other words, the higher deterrence costs passed on by the violator are simply paid by the consumers who received the very damage awards that caused the over-deterrence, so that the over-deterrence problem is self-correcting.

The self-correcting argument does not ameliorate the concerns that consumers are harmed by too much deterrence of antitrust violations, for several reasons. First, the argument ignores the fact that deterrence does not consist solely of treble damages that are awarded to consumers. Criminal fines have grown increasingly in size and now constitute a substantial portion of the monetary deterrence for antitrust violations.[30] Criminal

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lower competitive price[,] . . . [it] held that the defendant had no market power when in fact it had substantial market power"—producing what has come to be known as the *Cellophane* Fallacy. *See* Gene C. Schaerr, Note: *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 YALE L.J. 670, 677 (1985). "The analytic error that produces this fallacy is a failure to count the market power a firm has already exercised (in raising its price above the competitive level), and instead counting only the market power the firm has not yet used." *Id.*

[29] *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST COMPLIANCE: PERSPECTIVES AND RESOURCES FOR CORPORATE COUNSELORS 29-36 (2005).

[30] For example, since 1997, the Antitrust Division of the U.S. Department of Justice (the "Antitrust Division") has collected nearly $3 billion in criminal fines. During that time frame, federal prosecutors obtained more than fifty corporate fines of $10 million or more; nine of these fines equaled or exceeded $100 million, and one totaled

fines are not paid to consumers but to the government. Thus, a corporate antitrust violator can pass the costs of the fines to consumers in the form of higher prices, but consumers receive no monetary benefit from the criminal fines.

Second, even if all antitrust monetary deterrence consisted of damages that are returned to consumers—in other words, even if one ignores the large criminal fines in the equation—the problem is still not self-correcting. The consumers who pay for the costs of the damages in the form of increased prices (current purchasers) are not necessarily the consumers who recovered the damages (the purchasers during the time of the antitrust violation).[31] Moreover, where the monetary recovery for the antitrust violation comes from a settlement, as opposed to a judgment, a substantial amount of the recovery goes to the plaintiff's attorneys. Most antitrust cases, like other cases, are settled. Where the case is a class case, plaintiffs typically recover fees under the equitable fund doctrine.[32] Typical equitable fund doctrine fee awards range from one-sixth on the very low end to 40% of the recovery on the very high end, with most awards in the 25%-33% range (after expenses of prosecuting the action are paid). Thus, one-quarter to one-third of the class recovery, plus the costs of prosecuting the class case, is not returned to consumers but goes to class counsel. Few single-plaintiff antitrust cases are settled with a provision that the defendants will pay the plaintiff's costs and fees; the settling plaintiff must pay counsel out of the recovery, typically a contingency fee of one-quarter to one-third of the recovery. Consequently, the self-correcting argument lacks merit because it ignores the fact that substantial portions of a recovery are not returned to the consumers who must pay for some or all of the monetary deterrence (e.g., fines, damages, fees) in the form of higher prices.

In short, consumers do pay the cost of any over-deterrence of antitrust violations that may exist. And where over-deterrence exists because criminal fines apply to the conduct, consumers pay more of the

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$500 million. Scott D. Hammond, Deputy Assistant Att'y Gen. for Crim. Enforcement, Antitrust Div., U.S. Dep't of Justice, An Update of the Antitrust Division's Criminal Enforcement Program, Remarks Before the Am. Bar Ass'n Section of Antitrust Law Cartel Enforcement Roundtable 7 (Nov. 16, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/213247.htm. By contrast, prior to 1994, the largest fine that the Antitrust Division had obtained for a single Sherman Act offense totaled $6 million. *Id.* at 8.

[31] Conversely, if the antitrust defendant prevails and is not liable for any damages, it may nonetheless incur substantial costs of defending the action. Those costs of successfully defending the lawsuit may be passed on to consumers without any countervailing monetary benefit being derived by any class of consumers. Thus, a policy which encourages plaintiffs to bring antitrust actions of dubious merit may itself have consequences for consumer welfare.

[32] *See* Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 392-93 (1970); City of Detroit v. Grinnell Corp., 495 F.2d 448, 469-70 (2d Cir. 1974).

cost than where deterrence exists only in the form of damages. Because criminal fines have risen dramatically, the costs of over-deterrence borne by consumers have proportionately increased. Antitrust policymakers must therefore be particularly vigilant to ensure that consumers are not being harmed by too much deterrence for conduct that can be the subject of both criminal prosecution and civil damages suits. In the discussion that follows, the consumer welfare aspects of two important concepts of civil antitrust remedies are analyzed. First, the discussion focuses on the question of whether consumers are helped or harmed by treble damages. Second, consumer welfare aspects of the concept of joint and several liability are considered.

V. EVALUATING THE CONSUMER WELFARE IMPLICATIONS OF TREBLE DAMAGES

Can a case be made that antitrust remedies are more than adequate such that treble damages should be reduced in order to improve consumer welfare? As discussed below, compelling reasons exist to believe that consumers are bearing the cost of more than adequate protection against antitrust violations, at least in cases involving conduct subject to criminal prosecution.

The analysis begins with the fact that, for conduct that is subject to both criminal prosecution and civil actions, treble damages are supplemented by criminal fines. As noted, profit-maximizers look at the *total* costs of being detected. Criminal fines have risen dramatically, and companies can now face fines of up to $100 million.[33] Companies simply cannot ignore fines of this magnitude.

But how does this affect the deterrence calculus? The issue is somewhat problematic since criminal fines are based on a deterrence calculus but use a proxy—20% of the amount of commerce affected[34]—for the likely costs of getting caught (i.e., the anticipated profit from the violation divided by the risks of detection). This may or may not be an accurate proxy. Unless the aggregate overcharge—the total amount by which the violation raises the prices of goods—when divided by the risk of detection yields a result that approximates 20% of the amount of affected commerce, criminal fines may either be inadequate or create over-deterrence. Assume a situation where a $100 million line of commerce is affected by price-fixing that raises prices by 1% ($1 million in aggregate). Unless the risk of detection is one in twenty, imposition of a fine of $20 million (20% of the amount of affected commerce) is either inadequate and

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[33] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 661, 668 (2004) (codified as amended at 15 U.S.C. §§ 1-3 (2005)).

[34] United States Sentencing Commission, *Guidelines Manual* §§ 2R1.1(d)(1), 8C2.4(a)-(b) (2005), *available at* http://www.ussc.gov/2005guid/glcover.pdf.

harmful to consumers because of that inadequacy (which would be the case if the risk of detection is smaller than one in twenty) or too great and harmful to consumers because of its over-deterrent effect (which would be the case if the risk of detection is greater than one in twenty and the violator is able to pass on some or all of the fine to consumers in the form of higher prices).[35]

Economics, at least in its present state of development, can only estimate a single rate of detection for all violations in a given category, but economists can estimate overcharges in any specific case. It might facilitate the evaluation of the adequacy of deterrence if the federal sentencing guidelines were amended to eliminate the use of 20% of the affected line of commerce as a proxy for the overcharge resulting from an antitrust violation and instead base criminal fines on the actual overcharge. But this is not practical. Criminal proceedings are ill-suited for determining the precise harm caused by the violation. Antitrust prosecutors and probation officers are not well-versed in proving overcharges, and in many cases the criminal charges are resolved by a plea so that there is no adversary proceeding to determine the overcharge.[36] The company entering the plea has no incentive to act as a protector of consumer welfare—it merely wants to get the charges behind it—and, in any event, it may not be the best party to vindicate consumer welfare since it has shown little regard for consumer welfare by engaging in the violation.

The effect of criminal fines on antitrust deterrence is therefore difficult to evaluate. This compounds the difficulty of assessing the adequacy of a civil treble damages remedy. Given these difficulties, it makes sense to begin by analyzing the effect of the treble damages remedy standing alone and then to evaluate the additional effect of criminal fines as deterrence. As noted above,[37] if one ignores joint and several liability,

[35] The example should not be interpreted to suggest a view on whether criminal fines impose costs on consumers for too much deterrence. Resolution of that issue will depend on the profitability on average of cartel behavior, a subject beyond the scope of this paper. The example merely assumes a 1% overcharge, which may or may not be accurate.

[36] The criminal penalties available to antitrust prosecutors include an alternative maximum fine of twice the higher of the harm caused by, or benefits derived from, the violation. 18 U.S.C. § 3571(d). But this maximum is almost never used because of the need for the prosecution to prove the harm caused or benefits gained beyond a reasonable doubt. *See* United States v. Booker, 543 U.S. 220, 244 (2005). It is only used in plea agreements where the pleading defendant will not dispute the prosecution's calculation of harm caused by (or benefit received from) the violation. Considering the consumer welfare effects resulting from the operation of this provision in antitrust cases, it might be preferable to amend the statute to provide that this alternative maximum fine may not be applied to antitrust cases at all.

[37] *See supra* Part II.

treble damages are designed so that, standing alone, they will be adequate deterrence if the risk of detection is one in three. If it can be determined that the risk of detection of a "hardcore" antitrust violation (i.e., a violation that can be prosecuted criminally) is one in three, one can safely conclude that the combination of treble damages and criminal fines provides too much deterrence and that consumer welfare is adversely affected. The critical issue then becomes establishing the risk of detection.

A. Calculating the Risk of Detection

The risk of detection is not easy to calculate. There is no secret registry for antitrust violations that can be checked against the statistics for successful criminal antitrust prosecutions and successful civil antitrust claims and counterclaims. By definition, there is no way to count undetected violations—they are undetected. But it is possible to compute detection rates by using facts about antitrust violations that *are* detected.

In particular, the durations of detected conspiracies are very informative.[38] If there are many long-lived conspiracies and few short-lived ones, the risk of detection is likely to be quite low; in contrast, many short-lived conspiracies and few long-lived ones imply a high rate of detection. From the distribution of conspiracies with short and long lives, it is thus possible to compute a rate of detection.[39] An objection to the use of econometrically determined rates of detection is that companies seeking to determine whether a violation will be profitable may not use these detection rates in their profit calculations. Few companies employ serious econometricians, and it is doubtful that any would use them for this purpose. The fact remains that these statistics are available to the public (including potential antitrust violators) and, indeed, are used in antitrust compliance programs to persuade company employees that antitrust violations will not benefit the company.

While the treble damages remedy has remained unchanged, there have been substantial changes in detection rates for antitrust cartel behavior over time. The earliest information comes from the late 1980s, when the Antitrust Division

[38] The discussion that ensues focuses on conspiracies, violations that appear to be hardest to detect because they are secretive. As discussed later, the detection rates for violations that are not prosecuted criminally (e.g., rule of reason violations, monopolization violations, merger violations) are very high because they are not secretive. A party injured by a tying violation or by an exclusive dealing violation is extremely likely to know about the practice that is causing the injury, whereas a party injured by price-fixing or market allocation conspiracies is much less likely to know about the practice or the injury.

[39] *See* Peter G. Bryant & E. Woodrow Eckard, Jr., *Price Fixing: The Probability of Getting Caught*, 73 REV. ECON. & STAT. 531 (1991).

of the U.S. Department of Justice stated that one in ten antitrust violations of a criminal nature was detected and punished.[40] This detection rate of 10% was criticized at the time as unduly low.[41] The issue of whether the 10% detection rate was high or low, however, quickly became moot. By the early 1990s, the detection rate for cartel behavior was estimated to be much higher, ranging from a low estimate of 25% to a rate that was in excess of 80%.[42] As discussed below, there is reason to believe that these statistics are out of date and that the chances of detection of cartel behavior are substantially higher.

Several factors explain why the detection rate for cartel behavior cannot be anywhere near 10%—or even 25%—today. First, the Department of Justice's Antitrust Division has revised its Corporate Leniency Policy in significant ways since the last detection rates were estimated. Amnesty programs substantially increase the risk of detection of criminal antitrust violations because the amnesty candidate self-reports the violation in order to avoid payment of a large criminal fine. Prior to the 1993 revision to the Corporate Leniency Policy,[43] amnesty applications averaged one per year.[44] By 2003, the average rate of amnesty applications exceeded one per month,[45] more than a twelve-fold increase. By 2004, the rate of amnesty applications exceeded two per month.[46] While not every

[40] *See* Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?*, 27 AM. CRIM. L. REV. 331, 342 (1989).

[41] *Id.* at 348-49.

[42] *Id.* (suggesting the detection rate was between 25% and 33%); *see* Bryant & Eckard, *supra* note 39, at 535 (estimating probability of detection above 65%). It should be noted that Bryant and Eckard determined the detection rate to be between 13% and 17% *per year*. Bryant & Eckard, *supra* note 39, at 535. They also determined that the average conspiracy has a duration of between 5.23 and 7.27 years. *Id.* at 533. This means that the average conspiracy has a chance of detection no less than 65% and as high as 100% during its lifetime. *See id.* Because the applicable statute of limitations is four years for civil treble damages actions, *see* 15 U.S.C. § 15b, and five years for criminal antitrust violations, *see* 18 U.S.C. § 3282, the annual detection rate should be multiplied by four when evaluating the deterrent effect of the treble damages remedy and by five when evaluating the deterrence created by antitrust criminal fines.

[43] The Antitrust Division's Corporate Leniency Policy, as revised in 1993, is *available at* http://www.usdoj.gov/atr/public/guidelines/0091.htm.

[44] James M. Griffin, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, The Modern Leniency Program After Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Remarks before the Am. Bar Ass'n Section of Antitrust Law Annual Meeting 7 (Aug. 12, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201477.pdf.

[45] *Id.*

[46] R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Securing the Benefits of Global

amnesty application results in the detection of antitrust activity,[47] the Corporate Leniency Policy is a major generator of cases for the Antitrust Division.[48] Moreover, in the last few years, there have been significant improvements in the Corporate Leniency Policy, including the enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which was designed to increase the detection rate by providing a greater inducement for self-reporting of criminal antitrust violations by limiting *civil* liability for amnesty candidates.[49] Amnesty programs have spread to other jurisdictions outside the United States,[50] a development that surely has increased the incentives to self-report, which in turn increases the risk of cartel detection. Lastly, the Antitrust Division has recently developed new "cartel profiling" techniques to expand the detection of cartels apart from the Corporate Leniency Policy.[51] Consequently, the detection rate has undoubtedly improved since 2004.

The detection rate has significantly increased since the late 1980s because of improvements in law enforcement techniques—and, in particular, the Corporate Leniency Policy—a result for which the antitrust enforcement agencies deserve a great deal of praise. Congress also has impacted the detection rate by raising the maximum criminal fines for

Competition, Address Before the Tokyo American Center 6 (Sept. 10, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/205389.htm.

[47] There are instances where amnesty applicants have self-reported an antitrust violation that has already been detected by the Antitrust Division or self-reported by another amnesty applicant. *See, e.g.*, Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 179 (3d Cir. 2006). These instances may be more than offset by other cases where a company that does not qualify for amnesty because it does not self-report before the Antitrust Division has detected a violation nevertheless gets some reduction in its sentence because it self-reports another violation of which the Antitrust Division was not aware and which therefore qualifies it for amnesty as to that violation. *See* Scott D. Hammond, Deputy Assistant Att'y Gen. for Crim. Enforcement, Antitrust Div., U.S. Dep't of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Remarks before the 54th Annual Am. Bar Ass'n Section of Antitrust Law Spring Meeting (Mar. 29, 2006), http://www.usdoj.gov/atr/public/speeches/215514.htm.

[48] Griffin, *supra* note 44, at 7.

[49] Pub. L. No. 108-237, 118 Stat. 665-69. Section 213 of the Act limits the civil liability of any company that obtains corporate leniency from the Antitrust Division to the single damages that are attributable solely to that company's own conduct for any violation of Section 1 of the Sherman Act (or any state law corollary to Section 1) to the extent that such conduct is covered by a currently effective leniency agreement and that the company provides certain cooperation to the plaintiff asserting the civil claim. In other words, the statute suspends the operation of the treble damages and joint and several liability provisions for conduct covered by the successful amnesty application of a cooperating antitrust defendant.

[50] Pate, *supra* note 46, at 9-10.

[51] Hammond, *supra* note 47, at 9-10.

antitrust violations.[52] The connection between detection rates and fines is not immediately obvious, yet a connection exists. As the size of criminal fines grows, the temptation to self-report violations and obtain amnesty (or leniency) increases, thereby enhancing the detection rate. Indeed, empirical research confirms that the detection rate improves as the financial punishment for engaging in the conduct increases.[53] Consequently, because criminal fine levels have increased since the Antitrust Division proffered its 10% detection rate in 1989, that detection rate is inaccurately low today.[54]

Given these developments, it is highly likely that detection rates for criminal antitrust violations exceed one in three. If one looks at the treble damages remedy alone, there is too much deterrence for criminal violations. But treble damages are not the only penalty to be considered in the optimal deterrence model: a company contemplating committing a criminal violation must surely consider the cost of criminal fines, which can be up to $100 million. Clearly, there is over-deterrence of criminal antitrust conduct. Moreover, this over-deterrence has substantial adverse implications for consumer welfare. The over-deterrence includes substantial criminal fines that are not paid to consumers but for which consumers pay when those fines are passed on by the violators. It is vitally important to consumers that the treble damages remedy be reduced to double or, more likely, single damages in order to mitigate the adverse effects on consumer welfare of this substantial over-deterrence.

B. Treble Damages and the Myth of Under-Deterrence

While the conclusion is clear that treble damages should be reduced for cartel behavior to enhance consumer welfare, it has nevertheless been argued by some that existing antitrust remedies provide *insufficient* deterrence for cartel behavior. The most significant of these arguments is premised on the fact that not all jurisdictions have competition laws and many that do fail to provide remedies with any meaningful deterrent effect.[55] While the argument presents some fascinating issues for global antitrust policy, it

[52] *See supra* note 33 and accompanying text.

[53] Jeroen Hinloopen, *Cartel Stability with Time-Dependent Detection Probabilities* (Tinbergen Inst. Discussion Paper, No. TI 2003-104/1, Nov. 2003), http://www.tinbergen.n1/discussionpapers/20104.pdf.

[54] *See* POSNER, *supra* note 24, at 45 (providing summary of average antitrust criminal fines from 1890 to 1999; the average in the 1980s was $368,000; the average in the 1990s was $4,778,000). In 2005, average criminal fines exceeded $20 million. *See* Hammond, *supra* note 47.

[55] *See, e.g.*, John M. Connor, *Optimal Deterrence and Private International Cartels* (May 22, 2005) (unpublished research paper submitted to Antitrust Modernization Commission), http://www.ageconpurdue.edu/staff/connor/papers/optimal_deterrence_8-1-05.pdf.

is not a meaningful argument that deterrence is insufficient under the U.S. antitrust laws. This argument exalts form over substance. The purpose of antitrust deterrence under U.S. law is to protect the welfare of American consumers. Yet if the U.S. penalties for U.S. antitrust violations are increased above levels needed to deter violations that affect the United States in order to deter violations in other jurisdictions, then consumers in the other jurisdictions will be better off and U.S. consumers will be worse off because U.S. consumers will pay the cost of deterrence for the entire world (to the extent that cartel defendants do not absorb these costs). American consumers essentially will pay for deterrence that they do not need but that people in other countries could use. The contention that U.S. antitrust laws must provide deterrence for the globe is a political argument for subsidy, not an economic argument for increasing (or perhaps maintaining) the fines, damages and penalties available under U.S. antitrust law.[56] Lastly, this argument ignores the fact that U.S. antitrust enforcement agencies are promoting the enactment of competition legislation abroad, an effort that is relatively costless to U.S. consumers, yet increases deterrence of conduct that U.S. antitrust laws cannot reach.[57]

There are other arguments that deterrence of cartel activity is inadequate because cartel activity is hard to detect. In general, these take a simplistic approach: cartels are secretive so they must be hard to detect. But this approach ignores the incredible inducements that the Department of Justice's Corporate Leniency Policy provides to encourage self-reporting (and hence detection) of cartel activity, discussed above.[58] Moreover, there is econometric evidence that, despite the covert nature of cartels, the detection rates have risen substantially.[59]

Any contention that deterrence levels are too low because of low detection rates must also account for the significant possibility that use of

[56] The argument also assumes that U.S. antitrust laws never apply to foreign sales. In many international cartel cases, however, settlements that resolve private litigation provide for recovery based on both U.S. purchases and foreign purchases, largely because the buyer-plaintiff demands recovery on its foreign purchases as a condition for the settling defendants to do future business with it.

[57] Moreover, foreign antitrust enforcement regimes that have not traditionally permitted damages remedies are now considering implementing them. For example, the European Union has solicited public comment on a proposal to permit damages actions for European competition law violations. *See* EU Press Release IP/05/1634, Competition: Commission Launches Consultations on Facilitating Damages Claims for Breaches of EU Competition Law (Dec. 12, 2005), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1634&format=HTML&aged=0&language=en&guilanguage=en.

[58] *See* Bryant & Eckard, *supra* notes 39, 42 and accompanying text.

[59] *See supra* Part V.A.

these detection rates may actually understate the deterrent effect of treble damages. An imbalance in the detection statistics probably exists insofar as those rates relate to incorrect positive identifications or incorrect non-identification of conspiracies. The risk of detection inherently includes situations where the cartel is detected but not punished: if a cartel is caught but not punished, it will be treated no differently than a cartel that goes undetected.[60] On the other hand, because cartels may be inferred from circumstantial evidence,[61] there may be many cases where a non-existent cartel is punished.[62] Similarly, rules on inferring the scope of a conspiracy (including the geographic, product, and temporal scope) are very generous to plaintiffs, such that there may be many instances where civil plaintiffs recover damages for injuries that did not occur. Thus, while the detection rate takes into account those situations where a conspiracy exists but is not punished, there are no statistics to reflect situations where plaintiffs are awarded treble damages for non-existent injuries from a non-existent cartel or where plaintiffs recover damages for injuries that they suffered as well as for injuries they did not suffer.[63] This tends to understate the deterrent effect of treble damages.

C. Proposals for Reforming the Damages Multiplier

As the foregoing analysis suggests, it is highly likely that consumers are paying too much for unneeded deterrence of antitrust violations that can be the subject of

[60] It is sometimes contended that every instance of anti-cartel litigation which yields no verdict for the plaintiff or the prosecutor should be treated as an undetected cartel. To be sure, in some civil and criminal cases, juries sometimes fail to find the existence of a cartel when one clearly existed. But it is equally certain that there are many instances where suits are brought alleging cartels that never existed.

[61] *See, e.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984); Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1300 (11th Cir. 2003); In re: Citric Acid Litig., 191 F.3d 1090, 1093-94 (9th Cir. 1999).

[62] *Cf. Williamson Oil Co.*, 346 F.3d at 1300 ("The problem with this reliance on circumstantial evidence, however, is that such evidence is by its nature ambiguous, and necessarily requires the drawing of one or more inferences in order to substantiate claims of illegal conspiracy. Over time, courts have become attuned to the economic costs associated with using circumstantial evidence to distinguish between altogether lawful, independent, consciously parallel decision-making within an oligopoly on the one hand, and illegal, collusive price fixing on the other.").

[63] This is not an argument that treble damages are unneeded because cartel behavior does not occur. Rather, the argument is that errors occur in identifying and punishing cartel behavior and that the errors that result in the failure to identify real cartels are included in the detection rate whereas the errors that result in the identification and punishment of cartels that were never in existence are not included. One potential solution to this imbalance may be to adjust the treble damages remedy, while another might be to alter rules that permit easy inferences of conspiracies or conspiracy scopes.

both criminal prosecution and an antitrust damages suit. But the treble damages remedy should not be changed so as to provide double or single damages in *all* cases. Such a simple approach would be wrong for two conceptually related but independent reasons.

First, the analysis to this point has focused on detection rates and punishments for cartel activity. But there are many other types of antitrust violations—tying, exclusive dealing, and monopolization, to name just a few—that are not subject to criminal penalties because they are not typically prosecuted as crimes but only as civil offenses. The fact that these violations are not normally subject to criminal fines means not only that criminal fines have no deterrent effect in these circumstances but also that these violations are less likely to be detected as a result of the Antitrust Division's leniency program, which is premised on leniency for the criminal consequences of the violation. As a result, reducing treble damages for *all* antitrust violations based on detection rates and deterrence levels for *criminal* violations would likely result in under-deterrence for those antitrust violations that are typically challenged only by civil claims. One possible solution to this problem is to leave the damages multiple where it is—trebling actual damages for all violations. But this approach means that consumers pay for too much deterrence for criminal violations in order to have enough deterrence for violations that are not prosecuted criminally.

Second, there may be good reason to believe that there is no equilibrium point for optimal deterrence. Professor Hovenkamp argues with some force that every *violation*—not just every *category* of violation—has a different detection rate unique to it. As a result, firms that are profit-maximizers (and irresponsible) will shift their conduct to violations that are harder to detect.[64] No one could seriously contest the fact that each violation has its own individual risk of detection: one need merely compare the likelihood of detection of a conspiracy to rig bids where a seller solicits the bids from suppliers in a room and insists they prepare and submit bids in the seller's presence, on the one hand, with the likelihood of detection of a conspiracy to rig bids where the seller provides a long lead time for

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[64] *See* Herbert Hovenkamp, *Antitrust Damages Reform*, 33 ANTITRUST BULL. 233 (1988). There are some limitations on Professor Hovenkamp's theory. Not all companies seek to profit from conduct regardless of its illegality. Indeed, legal compliance programs by companies have grown increasingly important and effective. Nevertheless, it must be conceded that violations of even the most rigorous compliance programs occur, so that Professor Hovenkamp's theory has some merit. The theory is on less solid ground for antitrust violations that are criminal in nature. In such cases, the deterrence is not purely monetary, and companies need to weigh the possibility that their employees may be imprisoned. No company is in a position to direct its employees to expose themselves to jail so that the company may seek profit opportunities.

submission of bids and the bidders all live in the same neighborhood, on the other hand.

Professor Hovenkamp's theory has implications for reform of the damages multiplier. Clearly, the multiplier must be set at a level sufficient to at least offset the detection rate. But, as shown above,[65] too much deterrence comes at a cost to consumer welfare. At the same time, careful consideration of Professor Hovenkamp's theory would counsel that, even if it is impractical to establish a damages multiplier based on the detection rate for each violation, it is preferable to have damages multipliers for categories of violations. Detection rates are likely to be common for categories of violations. Most criminal antitrust violations—price-fixing, market allocation, and bid-rigging—are secretive in nature. In contrast, most antitrust violations that are not prosecuted criminally are open; for example, customers know when they are coerced by an illegal tying arrangement, and competitors quickly learn that they are foreclosed from a market by an exclusive dealing arrangement. At first blush, criminal cartel behavior would seem to be much more difficult to detect than non-criminal antitrust violations that are conducted openly. The results of the Corporate Leniency Policy of the Antitrust Division, however, make such a conclusion somewhat doubtful. All that can safely be said is that the detection rates for criminal cartel behavior as a whole are likely similar (because they are all secret but subject to the Corporate Leniency Policy) while the detection rates for non-criminal violations—which are open and not subject to the Corporate Leniency Policy—are also likely similar as a group. Two separate averages of two groups, each containing similar conduct which is dissimilar to the conduct in the other group, will be more accurate than a single average of all the conduct in both groups.

Taking into account the implications of both of the foregoing problems (the fact that large criminal fines significantly impact the deterrence calculus for criminal conduct but not for purely civil violations and the lack of an equilibrium for a single optimal level of deterrence for all categories of violations), there is a solution that is consistent both with consumer welfare and with the notion that treble damages should serve to encourage private parties to enforce the antitrust laws.[66] Specifically, Congress should provide that the treble damages remedy is available only in civil cases asserting claims for conduct that has not been the subject of a criminal antitrust prosecution or amnesty award by the Antitrust Division of the Department of Justice. Where conduct has been the subject of prosecution by the Antitrust Division (or is about to be the subject of prosecution because of the amnesty application), damages

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[65] *See supra* Part III.

[66] *See supra* note 10 and accompanying text.

should be limited to actual damages or perhaps double damages.[67]

This solution would minimize consumer welfare costs resulting from too much deterrence of cartel activity. It would reduce antitrust treble damages only for conduct that (1) has actually been detected by the Antitrust Division and (2) is likely to be prosecuted criminally. As noted above,[68] consumers currently bear more of the cost of deterrence for violations that are subject to criminal prosecution than they bear for purely civil violations. Moreover, the likelihood of over-deterrence is greatest for conduct that is subject to both criminal prosecution and civil damages actions. Therefore, a reduction of permissible damages for such conduct is most likely to reduce the cost of deterrence to consumers without resulting in too little deterrence of cartel conduct.

This proposal also provides some mitigation of, but does not entirely obviate, the problem caused by a lack of an equilibrium point for deterrence of all antitrust violations. It would apply different damages multiples to two categories of conduct—cartel conduct that is the subject of both criminal fines and civil damages and conduct that is subject only to civil damages actions. Each category of conduct has different detection rates (cartels are secretive; other violations are open) and different levels of monetary deterrence (cartels are exposed to criminal fines and civil damages; other violations are subject only to civil damages). Providing different damages levels for each category of similar conduct reduces the problem of a lack of deterrence equilibrium. The problem will never be resolved fully absent an ability to compute a detection rate for each antitrust violation and a flexible damages remedy that bases the damages multiplier for each violation on the detection rate for that specific violation, an event that seems unlikely.

Lastly, the proposal is true to the congressional purpose to use the damages remedy to encourage private plaintiffs to act as private attorneys general to vindicate the antitrust laws. Congress wanted to supplement the enforcement actions of the Antitrust Division by inducing private plaintiffs to bring suit to enforce the antitrust laws in situations where the Antitrust Division lacked the resources or knowledge to bring suit itself. The proposal reduces the incentive of private parties to bring antitrust damages actions only in cases where the Antitrust Division has acted, either by bringing a prosecution or

[67] Based on the detection rates for cartel activity, single damages seem to be most appropriate. The only reason why use of double damages would be appropriate is that use of single damages would reduce the attractiveness of the Corporate Leniency Policy. As noted previously, by statute, amnesty applicants are already liable for single damages for the conduct that is the subject of the amnesty application. If all parties to cartel behavior were exposed only to single damages, there would no longer be any special reduction of civil liability for amnesty applicants, making the Corporate Leniency Policy less attractive.

[68] *See supra* Part IV.

granting amnesty. There will continue to exist a substantial incentive—treble damages—for private parties to enforce the antitrust laws in cases where the Antitrust Division has not acted.

The proposal may affirmatively improve the rate of private antitrust damages suits for conduct where the Antitrust Division has not acted by making such cases more attractive to the plaintiff antitrust bar. As matters currently stand, given a choice between taking a contingency fee for a treble damages action against cartel activity that has already been detected and prosecuted by the Antitrust Division and a treble damages action involving conduct unknown to the Antitrust Division where the private plaintiff must build its own case with little guarantee that it can establish liability, no rational antitrust plaintiffs' lawyer would take the latter. Thus, by providing greater incentives to sue where the Antitrust Division has not acted, the proposal is likely to improve the detection and prosecution of antitrust violations in general.

VI. THE CONSUMER WELFARE IMPLICATIONS OF JOINT AND SEVERAL LIABILITY

A critical aspect of the civil remedial scheme for antitrust violations is the concept of joint and several liability. Antitrust violations are torts, and co-conspirators that engage in cartel behavior are jointly and severally liable for the full amount of damages caused by the cartel.[69] A defendant that pays the full amount of the damages caused by the cartel has no claim against its co-conspirators for contribution.[70] Joint and several liability thus does not expand the amount paid by the conspirators in total damages, but only impacts who pays those damages. Focusing on the deterrent effect of treble damages without considering the deterrent effect of joint and several liability misses the critical question. Deterrence is based on self-interest—the removal of the individual company's profit motive for entering into the antitrust violation. Because joint and several liability impacts which individual companies pay treble damages, the deterrent effect of treble damages can be meaningfully assessed only in conjunction with the deterrent effect of joint and several liability.

The consumer welfare implications of joint and several liability are complex and frequently misunderstood. The joint and several liability rule presents three potential consequences for consumer welfare: one is conditional and slightly negative and two are unquestionably positive.

By making a defendant in a multiple-defendant antitrust case—most often a cartel case—liable for the full amount of the damages caused by the conspiracy, joint and several liability magnifies to some

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[69] *See generally* ABA Antitrust Section, Monograph 11, CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION 4 (1986) (collecting cases).

[70] *Tex. Indus., Inc.*, 451 U.S. at 639-40, 642-46.

extent the deterrent effect of the damages remedy. An economically rational conspirator that is considering whether to engage in a price-fixing conspiracy must consider the prospect that it will be liable for the entire amount of the damages caused by the conspiracy. This would seem to be an enormous deterrent effect at first glance. Superficially, the company's cost-benefit calculus for determining whether to enter into a price-fixing arrangement would appear to focus on whether *its* anticipated *individual* profits from price-fixing would exceed the risk of detection multiplied by the entire profits to be earned by the conspirators *collectively*. But on closer analysis, that logic fails. Just as there is a chance that a company will pay damages for the entire injury caused by the conspiracy, there is a chance that the company will pay nothing at all (if the plaintiff elects to recover its entire damages from another conspirator). It is only where the plaintiff is likely to elect to recover a disproportionately large share of the damages from a particular company that joint and several liability has a magnifying effect that is positive to consumer welfare.

A company is likely to pay a greater proportion of total damages than its market share represents where it is financially sound and where it has a market share that is larger relative to its co-conspirators. Plaintiffs tend to collect judgments (or seek more in settlement) from defendants who are able to pay. Moreover, the plaintiffs' antitrust bar tends to pursue a settlement strategy of picking off defendants with small market shares first, typically settling on the basis of some percentage of sales, then pursuing defendants with larger market shares from whom they demand (and often get) a larger payment (both in absolute terms and as a percentage of sales). Thus, any economically rational company contemplating price-fixing would likely expect that it will pay a disproportionately large percentage of any damages caused by the conspiracy (if the conspiracy is detected) when it has a large share of the market impacted by the price-fixing relative to its co-conspirators. This magnifies the deterrent effect of antitrust damages with little cost to consumer welfare. The only cost is that smaller companies can expect that they may pay a disproportionately small share and may be less deterred by antitrust damages. This cost is likely one that is worth incurring because firms with larger market shares are precisely the firms that are critical to the success of an antitrust conspiracy, and consumer welfare is enhanced by the fact that joint and several liability increases the deterrent effect of damages on these firms.

Second, the magnifying effect of joint and several liability has a potential negative effect on consumer welfare if certain conditions are met. We begin with the proposition that consumers are harmed if a company that did not violate the antitrust laws is coerced into settling an antitrust case. It cannot be seriously contested that consumers are somewhat hurt by such a settlement: uninjured past consumers get a windfall, but the company must recoup that settlement amount by charging higher prices to current consumers (although, concededly, to the extent that the past consumers are identical to the future consumers, the windfall offsets some of that harm). Many have argued that joint and several liability coerces small, innocent companies to pay substantial sums of money in settlement to avoid the possibility that they are ultimately held liable for the entire amount of damages. This argument has only superficial appeal: such companies run a small risk that the entire amount of the judgment will be collected from them—a risk that is smaller than the chance that plaintiffs will collect all their judgment from the larger companies. Consumer welfare is implicated negatively only where counsel for the small company fails to perceive that the risks of its client paying the full amount of all damages caused by the conspiracy are more than offset by the possibility that others will be forced to pay the full amount.[71] This is likely to be a rare occurrence.

The final effect of joint and several liability is unquestionably a positive one for consumers. Joint and several liability provides the antitrust plaintiff with flexibility as to collection of a judgment. This is important to the consumer welfare implications of over-deterrence. The harm to consumers from over-deterrence increases as the industry demand curve becomes more vertical.[72] This harm can be abated somewhat by careful selection of the antitrust defendants from whom the judgment is collected. An example illustrates the point. Suppose there are three companies in a market that is not perfectly competitive and that a plaintiff has obtained a large antitrust judgment from these companies. If it collects the judgment in proportion to the defendants' respective market shares, each of the defendant companies will have an incentive to pass the costs of the verdict on to consumers. But if the plaintiff collects half of the judgment from each of two of the three defendants and nothing or merely a nominal amount from the third, only two companies in the industry will have an incentive to pass on the cost of the judgment to consumers. The third has no such incentive, and its presence in the market will tend to deter the other two companies from raising prices to pass on the cost of the judgment to consumers.

If one searches for sources of over-deterrence that hurt consumers, one must look beyond joint and several liability. Joint and several liability magnifies deterrence without harming consumers, and

[71] This is so because of the size of the company, putting entirely to the side the fact that the small company might be innocent. Moreover, plaintiffs rarely make settlement demands that do not take into account the possibility that the particular defendant might be able to persuade a jury of its innocence, making the threat to consumer welfare even more remote.

[72] *See* SAMUELSON & NORDHAUS, *supra* note 27 and accompanying text.

indeed is also an important tool to protect consumers from the effects of over-deterrence. It is in consumers' interests that joint and several liability be retained as a weapon in the arsenal of an antitrust plaintiff.

VII. OTHER IMPLICATIONS FOR REFORM

It is highly likely that consumers are paying for unnecessary deterrence of cartel behavior and that consumer welfare requires a reduction in the treble damages remedy for violations where the Antitrust Division has begun a prosecution for the conduct (or the conduct is the subject of a leniency application to the Antitrust Division). This proposal will require an amendment to Section 4 of the Clayton Act, an amendment that will greatly benefit consumers.

There are several other implications for reform from the analysis in this article. One is that Congress should not attempt any reductions in criminal fines. Reducing the amount of potential criminal fines would only reduce the attractiveness of the Antitrust Division's Corporate Leniency Policy, which in turn would reduce the detection rate for antitrust violations. Further, eliminating all criminal fines might imply that criminal enforcement of the antitrust laws is unnecessary. But in fact, criminal enforcement of the antitrust laws is vital to deterrence and consumer welfare. Criminal enforcement of the antitrust laws offers the possibility of jail sentences for individuals who engage in violations. Fear of incarceration is a significant deterrent for many individuals ("I am not going to jail so that this organization can make more money"). Compared to fines, the costs of jail sentences to consumers are relatively minimal. Although jail sentences require society to pay the costs of incarceration, those costs likely pale in comparison to the price increases consumers must pay so that corporate violators can recoup monies paid in civil damages and settlements. While it might be possible to have criminal sanctions for individuals with no penalties for organizations, such an approach is impractical because it implies that organizations are immune from criminal antitrust enforcement, which has unacceptable political consequences and likely undercuts deterrence.

If over-deterrence for cartel conduct exists, as seems highly likely, because direct purchasers can currently recover treble damages for cartel conduct, the fact that many state laws provide damages, trebled or otherwise, for indirect purchasers only compounds the consumer welfare costs of over-deterrence.[73]

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[73] In *Illinois Brick Co. v. Illinois*, the Supreme Court held that only overcharged direct purchasers had standing to bring a federal antitrust complaint pursuant to Section 4 of the Clayton Act. 431 U.S. at 745-46. In response to *Illinois Brick*, several states either passed *Illinois Brick* "repealer" statutes or left in place statutes that expressly permitted indirect purchasers to recover damages pursuant to state antitrust laws. In re Vitamins Antitrust Litig., 259 F. Supp. 2d 1, 2 (D.D.C. 2003)

Cartelists are exposed to damages under these indirect purchaser laws and must pass on the costs of any indirect purchaser recoveries to consumers, magnifying the harm to consumer welfare without adding any needed deterrent effect.

Congress should pass legislation that will preempt state indirect purchaser actions without regard to whether or not the conduct has been (or likely will be) the subject of a criminal prosecution or amnesty grant by the Antitrust Division.[74] In many cases, indirect purchaser actions have no remedial effect,[75] but they clearly impose costs on antitrust violators which are passed on to consumers. Indirect purchaser actions serve no meaningful purpose but only compensate plaintiffs' attorneys at a cost that is ultimately borne by consumers. Preemption should also extend to the various legal claims that the plaintiffs' bar has invented to recast indirect purchaser claims (such as unjust enrichment, disgorgement, and consumer fraud), either to avoid a state-law indirect purchaser prohibition or to supplement a permitted indirect purchaser claim.[76] These claims

(suggesting that as of March 2003, when that decision was rendered, "Nineteen states . . . and the District of Columbia [had] passed (or already had in place) *Illinois Brick* repealer statutes that permitted indirect purchasers to collect damages in private antitrust lawsuits."). The Supreme Court upheld these repealer statutes in *California v. ARC America Corp.*, 490 U.S. 93 (1989), holding that state indirect purchaser laws were not preempted by federal law. *Id.* at 101-03. The fact that some states, but not others, permit indirect purchaser recoveries raises additional consumer welfare effects; a monetary recovery by indirect purchasers in states that provide for such relief may be passed on in the form of higher prices to *all* consumers in all states.

[74] Most, but not all, indirect purchaser cases involve conduct that is prosecuted criminally by the Antitrust Division. Thus, it might at first glance make sense to preempt indirect purchaser actions only for cartel conduct. But because indirect purchaser actions are almost always filed only where a federal direct purchaser class action has been filed (presumably because counsel for the indirect purchaser plaintiff seeks a free-ride off the efforts of the direct purchasers to develop the liability case), indirect purchaser actions do not serve to improve detection of antitrust violations.

[75] *See, e.g.,* Pearman v. Crompton Corp., Case No. 9192 (Tenn. Cir. Ct., Claiborne Cty. June 21, 2005) (Order Granting Final Approval of Settlement) (on file with author) (ordering cy pres distribution of class settlement because cost of distribution of settlement exceeds recovery); In re Carbon Fiber Cases, Nos. JCCP 4212, 4216, 4222 (Cal. Super. Ct., San Francisco Cty. Dec. 20, 2005) (Order Conditionally Approving Settlement Class and Granting Motion for Preliminary Approval of Settlement) (on file with author) (same).

[76] *See, e.g.,* In re Microsoft Corp. Antitrust Litig., 401 F. Supp. 2d 461, 464 (D. Md. 2005) (unjust enrichment under South Carolina law); In re Microsoft Corp. Antitrust Litig., 241 F. Supp. 2d 563, 565 (D. Md. 2003) (unjust enrichment under Kentucky law); Vacco v. Microsoft Corp., 793 A.2d 1048, 1063-67 (Conn. 2002) (Connecticut Unfair Trade Practices Act); In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365, 1379-80 (S.D. Fla. 2001) (unjust enrichment under common law of all states and District of Columbia); Abbott Labs., Inc. v. Segura, 907 S.W.2d 503, 505-07 (Tex. 1995) (Texas Deceptive

pose no less a threat to consumer welfare than do indirect purchaser claims.

Arguments about the supposed injustice of the indirect purchaser prohibition—that direct purchasers get full recovery yet have passed on some of the damages to the indirect purchasers—do not change this conclusion. These arguments fail to consider that competition in most cases forces the direct purchasers to pass on some of their recovery to their customers.

Finally, joint and several liability does not cause over-deterrence. It benefits consumers by protecting them from over-deterrence and by magnifying the deterrent effects of the antitrust damages remedy without harming consumer welfare. Congress should do nothing to change the rule of joint and several liability.

VIII. CONCLUSION

The remedies for antitrust violations have important consumer welfare effects. Too little deterrence encourages companies to engage in antitrust violations because they are profitable transactions even after all the fines and damages are paid. The result is that, even after the effects of the damages and fines are considered, wealth is transferred from consumers' pockets to antitrust violators. But the consumer welfare effects of too much deterrence must also be considered. When the fines and damages for an antitrust violation multiplied by the likelihood of detection significantly exceed the profits from a violation, there is too much deterrence. In such a case, companies competing in industries that are not characterized by perfect competition—the vast majority of companies—can pass along some or all of the costs of the unneeded deterrence to consumers. Absent price regulation of antitrust violators, a result that is inconsistent with a competitive market, little can be done to prevent this pass-on of the costs for unneeded deterrence except to reduce the amount of deterrence to an appropriate level so that there is nothing to pass on.

To the extent that there is too much deterrence, consumers pay more than is useful, much like paying for a million-dollar home insurance policy when destruction of the home and its contents would never result in a claim anywhere near the million-dollar coverage. It is in consumers' vital interests to keep deterrence at an appropriate level. There is significant evidence to suggest that consumers are paying for too much deterrence for antitrust violations that are prosecuted criminally. But it seems equally likely that if treble damages are lowered for all antitrust violations to avoid these costs for unneeded deterrence of criminal antitrust cartel behavior, consumers

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Trade Practices-Consumer Protection Act). *See generally* Elkins v. Microsoft Corp., No. 2001-431, 2002-2 Trade Cas. (CCH) ¶ 73,864, at 95,157-58 (Vt. Nov. 1, 2002) (collecting "decisions . . . [that] go in both directions" in which plaintiffs sought to escape indirect purchaser limitations by asserting claims "under a consumer protection act, an unfair trade practices act or the like").

will suffer from inadequate deterrence of antitrust violations that are not potentially subject to criminal prosecution. This predicament can best be resolved by reducing the level of damages for conduct that has been the subject of criminal prosecution or an amnesty grant by the Antitrust Division and retaining treble damages for all other antitrust violations. Moreover, joint and several liability for antitrust damages should be retained.

The proposed changes to the treble damages remedy require political courage. Advocating reductions in any damages for price-fixing could be viewed by some as being soft on crime. But criminal fines are intended to punish and deter crimes, and no changes to criminal fines for antitrust violations are proposed. Most importantly, the antitrust laws are designed to protect consumer welfare, and when the current treble damages remedy is viewed through a consumer welfare lens, the proposed changes are more akin to victim protection: consumers are paying for too much deterrence of cartel crimes under the present antitrust damages regime. We would not hesitate to condemn an insurer who induced homeowners to buy more insurance than would be sufficient to cover their losses. Yet the current state of affairs with regard to civil antitrust remedies requires consumers, in effect, to do just that. Congress deserves high praise for raising criminal fines and supporting the Corporate Leniency Policy, efforts that have helped to punish and deter antitrust violations. But those actions have had some side effects—creating too much deterrence of criminal antitrust conduct at a high and unnecessary cost to consumers. Congress should ensure that the antitrust laws protect consumer welfare by reducing damages for cartel behavior, at least where there is evidence that the Antitrust Division has already detected the cartel conduct.

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