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TREBLE DAMAGES: TO WHAT PURPOSE AND TO WHAT EFFECT?

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Introduction

A signature feature of the U.S. federal antitrust laws is the provision that automatically trebles damage awards to private plaintiffs.[1] This provision has faced harsh criticism over the past 100 years, especially during the height of the Chicago School analysis in the 1970s and 1980s.[2] Among other things, some have argued that the availability of treble damages deters competitive behavior that promotes efficiencies, encourages frivolous lawsuits, and forces unduly large settlements.[3] Partly in response to these concerns, Congress has created some limited exceptions to the treble damages liability rule.[4]

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1 *See* 15 U.S.C. § 15(a).

2 *See* William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J. OF LAW & ECON. 405, 405-13 (1985) (citing various critiques of treble damages action, and of private enforcement generally) (hereinafter *Breit & Elzinga*).

3 *Id.* at 430-35.

4 The National Cooperative Research and Production Act, 15 U.S.C. § 4303, limits recovery to actual damages for certain joint venture conduct that government agencies have reviewed and approved. Similarly, through the Export Trading Company Act, 15 U.S.C. §

Notwithstanding this criticism[5] and the limited statutory exceptions, the automatic treble damages provision continues to apply in the vast majority of U.S. cases. Indeed, mandatory treble damages are such a bedrock of the U.S. antitrust landscape that absent a political sea change – and none appears on the horizon – they are likely to remain part of U.S. antitrust law for our lifetimes. If anything, over the past three decades – the period of the fiercest criticism of treble damages – the penalties for antitrust wrongdoing in the United States have become even more severe. Antitrust defendants face a confluence of potential sanctions that can lead to catastrophic damages in a single matter. In addition to treble damages and attorneys' fees and costs paid to direct purchasers, antitrust defendants now may face additional damages (often treble damages) to indirect purchasers for the same conduct under the laws of many states.[6] Antitrust conspirators also face joint and several liability for all damages caused by the conspiracy in which they participate, with no right to contribution from co-conspirators.[7] Accordingly, a defendant can be held liable for three times the damages attributable to the sales

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4016(a), Congress has provided immunity from treble damages to export trading companies and their members that receive certificates of review from the Department of Commerce for activities within the ambit of the certificate.

5 *See, e.g.*, Richard A. Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 226-27, 231 (1976); *Breit & Elzinga*. Some academics have taken the contrary position that automatic treble damages are critical to the proper enforcement of the US antitrust laws or advocate only limited detrebling. *See, e.g.*, Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993) (hereinafter "*Lande*"); Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445 (1985) (hereinafter "*Easterbrook*").

6 In 1977, the Supreme Court held that the Sherman Act generally does not permit treble damages actions brought by indirect purchasers. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-56 (1977). Following that decision, many state legislatures passed statutes that permitted indirect purchasers to bring claims under state law, *e.g.*, CAL. BUS. & PROF. CODE § 16750(a) (California); NEB. REV. STAT. § 59-821 (Nebraska).

7 *See* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 645-46 (1981).

of *all* co-conspirators that were affected by the conspiracy. (Antitrust wrongdoers, however, are generally not liable for pre-judgment interest under the federal antitrust laws,[8] unlike in many other jurisdictions.)

Furthermore, those found guilty of criminal antitrust violations face a base fine of twenty percent of all commerce that is "affected" by the agreement – an amount that can greatly exceed overcharges associated with a defendant's own sales.[9] Finally, all of these financial penalties are in addition to possible heavy prison time – up to 10 years – for individuals involved in criminal antitrust violations.[10]

As more jurisdictions contemplate adopting or bolstering private antitrust enforcement schemes, the wisdom and efficacy of treble damages (or other forms of multiple damages) merit close evaluation. The U.S. Congress failed to engage in any such thorough analysis when it introduced treble damages. Jurisdictions contemplating new antitrust civil liability regimes, however, have the opportunity to draw lessons from over a century of the U.S. experience and modern-day economic learning about the pluses and minuses of multiple damages. Although, in some circumstances, multiple damages may play a salutary role in a system of antitrust remedies, careful analysis may show that multiple damages are inappropriate, at least as a "one size fits all" remedy.

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8 The only pre-judgment interest ever available to U.S. antitrust plaintiffs is the interest beginning from when the case was filed – not from the date of antitrust injury – and that interest is awarded only on a showing that the defendants engaged in dilatory or bad faith conduct during the litigation. *See* 15 U.S.C. § 15(a).

9 USSG § 2R1.1(d)(1).

10 *See* 15 U.S.C. §§ 1-3.

Determining whether multiple damages make sense is a complex exercise that is complicated by the many different types of conduct that multiple damages may reach and the myriad different circumstances under which such conduct is carried out, discovered, and prosecuted. The assessment is further complicated by the fact that multiple damages are not imposed in isolation. One cannot hope to reach an optimal rule without considering the question of multiple damages in the context of other remedial features of the relevant competition regime.

In determining whether to adopt multiple damages, dangers of both over and under-deterrence loom large. Many types of conduct that can violate the antitrust laws – such as exclusive distribution and bundled discounting – often benefit consumers by reducing prices, improving quality, or increasing output. Severe penalties may deter firms from engaging in behavior that benefits consumers for fear that a jury will determine after the fact (and perhaps erroneously) that, on the whole, the firm's conduct harmed competition more than helped it. Even if some conduct (such as price-fixing and market allocation) may seem to call for harsh penalties, whether all antitrust wrongdoers should *automatically* face multiple damages is another matter, particularly given the other severe penalties that wrongdoers face.

At the same time, there may be legitimate concerns that, given the difficulty and expense of uncovering and proving certain types of antitrust violations, multiple damages are necessary to ensure that plaintiffs have adequate incentives to bring antitrust cases and defendants are adequately deterred from engaging in antitrust wrongdoing in the first place. These concerns may be most valid – and multiple damages most appropriate – when unlawful conduct both lacks potential benefits for consumers and is difficult to uncover (*e.g.*, some price fixing and market allocation conspiracies).

It is beyond the scope of this paper to explore fully all of the factors that must enter into a thoughtful analysis whether to include multiple damages in a particular remedy system. We believe it is useful, however, to evaluate specific reasons for imposing multiple damages and how well those reasons withstand scrutiny. Doing so provides a good framework for the ultimate inquiry jurisdictions considering multiple damages ought to make: What are multiple damages intended to achieve and what real world effects – whether intended or unintended – are they likely to bring about?

Evaluating the Reasons for Treble Damages

Three reasons are often articulated for automatic multiple damages provisions: (a) treble damages are necessary to deter potential antitrust wrongdoers; (b) treble damages provide necessary incentives for private plaintiffs to bring antitrust suits (as "private attorneys general"); and (c) treble damages are necessary fully to compensate victims of anticompetitive conduct.[11] We briefly explore each of these reasons below.

Deterrence

One of the most prominent arguments for treble damages is that they are necessary adequately to deter anticompetitive conduct, and violations of the antitrust laws would increase markedly absent treble damages.[12] The argument goes that not all antitrust violations are caught, and that treble damages are necessary to ensure that wrongdoers that are caught are made an

[11] *See, e.g.*, ABA Antitrust Section, Monograph No. 13, Treble-Damages Remedy 16-21 (1986).

[12] *See, e.g.*, Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1051 (1986).

example to others and that the risk/reward calculation for firms contemplating anticompetitive behavior dictates against such behavior.[13]

The deterrence argument is appealing on its face, but close scrutiny raises questions. First, except for certain conduct that is per se illegal (*e.g.*, price fixing and market allocation), it is often very unclear *what* exactly treble damages are supposed to deter. The U.S. antitrust statutes are generally very broadly worded, and the U.S. courts have often failed to provide bright line interpretive rules, although the issue has been ameliorated somewhat by developments over the past two decades (particularly in the area of predatory pricing). Given the almost infinite variety of conduct that may bring about an antitrust challenge and the jury's broad fact-finding authority in the U.S. system, it generally will fall to the jury in close cases to determine whether particular conduct is anticompetitive on balance. (And, even when judges draw lines, it is often far from predictable how they will draw them.) Further, the alleged wrongdoer's intent generally plays little role in determining antitrust liability;[14] accordingly, the issue in many cases is whether a jury will determine after the fact that a firm's conduct on balance hurts consumers more than it helps them, or whether a defendant may be forced into a costly settlement because of what a jury might find.

LePage's v. 3M,[15] is a good example of how this legal uncertainty can call into question the deterrence argument for automatic treble damages, at least outside the realm of *per se* illegal conduct. LePage's, a private label tape manufacturer, alleged that 3M had violated the antitrust laws by providing customers an above-cost discount on a bundle of products that included both

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13 *See, e.g., Easterbrook* at 455.

14 *See* United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001).

15 324 F.3d 141 (3d Cir. 2003).

private label and 3M's famous Scotch® brand tape. LePage's complained, among other things, that it could not match 3M's branded discounts because it supplied only private label tape. Even though the case law on packaged discounts was sparse – and Supreme Court precedent could be read to suggest that such discounts were legal so long as they were above cost[16] – *LePage's* was able to obtain over $68 million in trebled damages from the sales it allegedly lost to 3M as a result of the discounting.

There are many other examples when competitors – even successful competitors – have filed suits against larger rivals arguing that these larger rivals are offering illegal above-cost discounts to their customers.[17] In cases like these and others raising fairly novel issues, it is not obvious why the law would want to impose multiple damages, thereby creating powerful incentives for firms to refrain from conduct that may benefit consumers but raises legal risk and uncertainty. That is, the lack of bright line rules and fluid nature of potential liability in many realms of antitrust law mean that risk averse firms may shun certain potentially pro-competitive practices (such as some types of discounts and exclusive arrangements) because they may generate antitrust suits. The financial rewards from efficiency-enhancing behavior will sometimes just not be worth the costs of defending against lawsuits and potential treble-damage liability.

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16 *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-225 (1993) (predatory pricing plaintiff must prove that defendant priced below an appropriate measure of defendant's cost and was likely to recoup its losses after the plaintiff's exit).

17 For instance, in *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 951-53 (6th Cir. 2005), citing *LePage's*, the Sixth Circuit held that an airline with market power on a particular route may engage in "predation" if it expands capacity on that route in response to a rival's entrance, even though it prices above its average variable costs.

The arguments for treble damages become stronger with respect to the most egregious antitrust violations – criminal price fixing or market division. Even here, however, it is unclear how much marginal deterrence value treble damages add to the already severe criminal and civil penalties for such conduct in the United States. Of course, in jurisdictions that lack criminal penalties and the broad range of civil remedies available in the United States, multiple damages may play a much more central role in adequately deterring hardcore antitrust wrongdoing.

Finally, it is important to consider how treble damages may bear on the effectiveness of government leniency programs. The U.S. Department of Justice Leniency program, under which the first firm to report a criminal antitrust violation can obtain criminal immunity for the corporation and all of its employees, has been instrumental in leading to the discovery and effective criminal prosecution of massive cartels over the last two decades as well as successful civil actions to compensate victims. Leniency programs have proved similarly successful in many other jurisdictions, such as the European Union and Canada. Antitrust violators, however, may be reluctant to apply for a leniency program if the application – and resulting public admission of wrongdoing – can expose the violator to treble damage actions.[18]

The U.S. Congress sought to ameliorate this problem by enacting the Antitrust Penalty Enhancement and Reform Act of 2004.[19] Subject to certain conditions, the Act limits to single damages the civil exposure of antitrust violators that have received immunity from the Department of Justice and protects such parties from joint and several liability. This creates even

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[18] This potential chilling effect is not limited to civil liability in the jurisdiction where the applicant seeks leniency. Applicants may be reluctant to apply for the leniency program in one jurisdiction if the leniency application leaves them exposed to treble damages in another jurisdiction for injuries resulting from the same conspiracy.

[19] Pub. L. 109-279, Title II, June 22, 2004, 118 Stat. 665 (2004).

greater incentives for wrongdoers to apply for leniency and effectively increases the potential penalties for wrongdoers that do not obtain leniency.

Providing Incentives to Private Plaintiffs

Another reason proffered for automatic treble damages is that they are needed to ensure that "private attorneys general" enforce the antitrust laws when the government does not do so, perhaps because it fails to uncover or chooses not to prosecute the unlawful conduct.[20] Some have argued that plaintiffs' attorneys will not bring the most difficult antitrust cases – *i.e.*, those requiring the most resources and the most likely to be lost in court – absent automatic treble damages. Otherwise, the argument goes, the risk of losing will outweigh the rewards of winning the suit and plaintiffs will not take that risk.

It is important to recognize, however, that the force of this rationale will vary widely depending on the specific circumstances. Multiple damages are probably best suited to cases involving clear harm to consumers when the plaintiffs did not have the advantage of a government prosecution, yet were nonetheless able to uncover cartel behavior. Multiple damages may also be appropriate in cases involving very small damages that may provide insufficient incentives for plaintiffs to sue. Many (if not most) of the civil antitrust cases filed in the United States, however, follow government cartel prosecutions, and allege the same conspiracy against the same defendants as does the government. In those cases, the government has generally done most of the heavy work in uncovering and investigating the cartel. Furthermore, any defendants pleading guilty or convicted of participating in the cartel, are precluded from arguing that they did not partake in the conspiracy. Accordingly, the main issues

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[20] *See, e.g.*, Edward D. Cavanaugh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 807-08 (1987).

in such "follow-on" cases typically are whether the court will certify a class of plaintiffs; whether a particular plaintiff was injured; and, if so, the damages attributable to the cartel. Although plaintiffs must devote time and resources and face litigation risk in contesting such issues, it is questionable whether treble damages are truly necessary to create adequate incentives to bring litigations that follow government prosecutions.

This is particularly true given that, even aside from treble damages, the U.S. antitrust laws provide incentives to plaintiffs to bring suit not found in many other U.S. statutes and tort remedy systems.[21] Perhaps most importantly, the Sherman Act requires that defendants pay the attorneys' fees and costs incurred by successful plaintiffs.[22] Defendants are jointly and severally liable for all damages caused by the conduct with no right of contribution from other defendants;[23] defendants cannot raise the defense of unclean hands;[24] and cannot seek a credit for overcharges that a direct purchaser plaintiff passed on to its customers.[25] Once again, however, to make a sensible determination on the question of multiple damages, jurisdictions outside the United States need to consider multiple damages in the context of other features of their system of remedies.

Fully Compensating Victims

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21 Notably, there is an extraordinarily active class action bar in the United States that pursues other statutory claims (*e.g.* securities or employment claims) for which treble damages are not an available remedy.

22 *See* 15 U.S.C. § 15(a).

23 *See* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 645-46 (1981).

24 *See* Perma Life Mufflers, Inc. v. Intn'l Parts Corp., 392 U.S. 134, 139-40 (1968), *overruled on other grounds by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

25 *See* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489- 94 (1968).

A final common rationale for automatic treble damages is that they are necessary adequately to compensate victims for the full extent of their injuries. One observer has posited that once one subtracts the court costs, and the "umbrella" damages inflicted by antitrust violation (*i.e.*, when the violators' competitors raise their own prices in response to anticompetitive behavior), the treble damages remedy often actually provides only no more than a single damages remedy.[26] In the United States, that antitrust plaintiffs are generally not entitled to pre-judgment interest is also an important consideration. Indeed depending on the age of the alleged wrongdoing and the time required to resolve the litigation, treble damages may exceed an award of actual damages plus pre-judgment interest only marginally or not at all. Accordingly, absent pre-judgment interest, treble damages sometimes may serve an important objective of depriving wrongdoers of the time value of ill-gotten gains that pre-judgment interest would have captured.[27]

Putting aside the lack of pre-judgment interest in the United States, however, that treble damages are usually – or even frequently – necessary fully to compensate victims of antitrust wrongdoing is not self-evident. Calculating antitrust damages is not simply a matter of collecting and tabulating invoices (such as lost wages or hospital bills). Rather, it typically requires complex economic models to demonstrate a "but for" world in which the antitrust violation did not occur. The accuracy of these models is almost inevitability a subject of heated dispute among the parties. U.S. courts have typically resolved these damage proof issues by

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[26] *See, e.g.*, *Lande* at 118-19.

[27] Of course, treble damages are a blunt instrument for dealing with the issue concerning the time value of money because, unlike pre-judgment interest, they are not tailored to the length of time between antitrust injury and recovery.

permitting plaintiffs wide latitude to prove their theory of damages,[28] cabined by the requirement that the theory adequately account for the facts of the case and distinguish damages flowing from lawful and unlawful conduct.[29] Particularly given the plaintiff-friendly way in which damages are often calculated, it is difficult to see why treble damages are necessary to avoid widespread under-compensation of U.S. plaintiffs, especially since prevailing plaintiffs are entitled to attorneys' fees and costs.

The inherent difficulty in assessing whether victims of antitrust violations are generally under- or over-compensated suggests that the question of multiple damages may best be resolved on a case-by-case basis rather than through a uniform rule. Although some might argue that a remedy regime should always err on the side of overcompensating a victim, there are inefficiencies from over-compensation that can redound to the harm of both consumers and the economy as a whole. Indeed, in extreme cases the weight of the various sanctions can severely disable a wrongdoer or put it out of business, thereby depriving consumers of output and competition going forward.

Further, it is impossible to divorce the question of remedies from the procedural and substantive standards that govern antitrust litigation. Over the past decades, the U.S. courts have imposed heightened evidentiary,[30] antitrust injury,[31] and standing[32] requirements on plaintiffs

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28 *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969).

29 *See* Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1056-57 (8th Cir. 2000).

30 *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596 (1986) (holding that theory of antitrust conspiracy must make economic sense to withstand summary judgment).

31 *E.g.*, Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344-45 (1990).

seeking to bring antitrust claims. In addition, in certain areas (most notably predatory pricing), the courts have imposed strict substantive standards for recovery.[33] Although it is very difficult to determine how much of this movement towards restricting private actions is attributable to the judicial concern about over-deterrence from treble damages awards, it seems likely that treble damages have played a role.[34] Accordingly, the treble damages remedy in some instances may have the unintended consequence of *limiting* the circumstances under which plaintiffs can recover.

Conclusion

Congress provided little explanation for the automatic treble damages provision of the Sherman Act in 1890. Jurisdictions considering whether to include multiple damages as part of a remedy system are well advised to examine with a critical eye the reasons that have been put forward over the years to explain why victims of antitrust violations – unlike victims of other statutory violations or torts – should automatically receive multiple damages as well as the arguments against mandatory multiple damages.

At bottom, a sensible determination requires evaluation of how multiple damages interplay with other features of a jurisdiction's system of competition remedies and how those features bear on the objectives of and likely effects from imposing multiple damages. In many cases, the most appropriate solution may be to permit multiple damages on case-by-case basis

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[32] *See, e.g.*, Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983)

[33] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993)

[34] For a thorough discussion of how the treble damages may bear on substantive U.S. antitrust law, see Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1088-98 (1986).

rather than making them mandatory, perhaps similar to the tradition of awarding punitive damages in tort cases as a matter of discretion. Discretionary multiple damages would facilitate in appropriate cases the objectives of mandatory treble damages – such as deterrence, incentives for "private attorneys general," and full victim compensation – while addressing the problems that can arise from automatically multiplying damages. To be sure, case-by-case evaluation of multiple damages may raise concerns about unpredictability. But those concerns could be lessened over time as courts develop common law principles or legislatures enact specific statutory guidelines to guide courts in determining whether to impose multiple damages in specific cases.