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# THE INCOHERENCE OF PUNISHMENT IN ANTITRUST

SPENCER WEBER WALLER\*

## INTRODUCTION

Antitrust began with the common law tort of restraint of trade but has long since separated itself from the rest of tort law, particularly in the area of punishment. Since the passage of the Sherman Act in 1890, the principal remedies for antitrust violations have been criminal penalties and private treble damage suits. Antitrust stands relatively unique in the American tort universe with its treble damage remedy, its lack of punitive damages, its rejection of *in pari delicto* defenses, the peculiar combination of joint and several liability, the lack of contribution, and the way that settlements are credited against the potential liability of the remaining defendants in a case.

What has happened over the past 110 years is that the level of criminal punishment, both in terms of imprisonment of individuals and fines for corporations, has increased dramatically along with the vigor of government criminal enforcement of the antitrust laws. On the private side, the vigorousness of private treble damage litigation has waxed and waned depending on a number of factors, including the degree of activity by the federal government bringing illegal activity to light as well as the expansion and contraction of both substantive theories of liability and of standing.

Recently, the addition of several new theories and new actors in the United States and abroad has dramatically increased the potential punishment for certain defendants in certain types of cases. The government now routinely seeks criminal fines equal to double the gain or double the loss stemming from the unlawful activity. Treble damage class actions on behalf of direct purchasers are almost certain to follow. Treble damage actions on behalf of indirect purchasers

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under state law in either state or federal court are equally almost certain to follow. Adding to the stew is the Federal Trade Commission (“FTC”), which has dramatically changed the landscape by successfully asserting a right to seek disgorgement in antitrust actions. State attorneys general are equally likely to sue, under some combination of state and federal law, on behalf of natural persons and state agencies injured by the unlawful activity. Finally, foreign governments are enforcing their own competition laws and foreign purchasers are increasingly seeking relief in U.S. courts in the form of treble damages for the same activity and for lesser damages in their own jurisdictions.

Prominent critics such as Judge Richard Posner have criticized the present system as amounting to the unleashing of “cluster bombs” against defendants.<sup>1</sup> Others have attacked the treble damage remedy as amounting to less than actual damages in the real world once such factors as lack of prejudgment interest, the time value of money, failure to account for societal welfare losses or umbrella effects, litigation costs, and tax effects are taken into account.<sup>2</sup>

Rather than reenter that debate about a phenomenon that is unlikely to change, I would like to address a different and less frequently addressed issue relating to a different form of incoherence in the present system of public and private antitrust enforcement. We have reached a point where certain conduct prohibited by the antitrust laws is indeed punished harshly, yet other violations of the laws are effectively immune from punishment because of an evolving system of government enforcement priorities, substantive changes in the standards of liabilities, and restrictive rules of standing and antitrust injury which place some violations beyond effective change. Even some per se violations of the rule are beyond the reach of any meaningful punishment. It is not that antitrust damages are necessarily too high or too low, it is that they vary dramatically and that there is no a priori way to predict where punishment in a particular case or for a particular defendant will come out. This is the real but overlooked incoherence of antitrust punishment.

This often-overlooked fact has implications far beyond the world of antitrust. Antitrust is far more estranged from the tort system than

1. Richard A. Posner, *Antitrust in the New Economy*, Address at AU/ABA Conference (Sept. 14, 2000), in 68 *ANTITRUST L.J.* 925 (2001).

2. Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 *OHIO ST. L.J.* 115 (1993).

most people acknowledge, even though antitrust violations are superficially similar to the types of business torts which generate the greatest amount of punitive damage awards. Unfortunately, the incoherence of the system of punishment in antitrust suggests that both sides of the tort reform debate must look elsewhere for support for their argument. The reality of punishment in antitrust makes it a poor model for those tort reformers arguing for fixed multiples of compensatory damages in place of jury-based punitive damages. Nor does it help those arguing that the present system of punitive damages provides a reasonably certain outcome approximating something close to treble compensatory damages in most cases.<sup>3</sup> The unpredictability and the occasional windfall that plagues the general tort world still exists in antitrust despite a congressional command that plaintiffs recover three times their damages. While we are all prepared to debate the definition and proof of damages in a complex business case, who would have thought that we would also have to debate the meaning of the term “three?”<sup>4</sup>

## I. THE BASIC STATUTORY SCHEME

The basic statutory scheme for antitrust is short and deceptively simple. The principal antitrust legislation could fit on a single sheet of paper if not a three-by-five note card. Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade.<sup>5</sup> Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and conspiracies to monopolize.<sup>6</sup> The Clayton Act specifies a handful of additional civil violations such as anticompetitive mergers, price discrimination, tying, and exclusive dealing contracts, which are increasingly interpreted as requiring the same type of proof as the basic Sherman Act offenses.<sup>7</sup> Section 5 of the FTC Act prohibits unfair methods of competition and authorizes the FTC to seek cease and desist orders in response to essentially any violation of the letter or spirit of the antitrust laws.<sup>8</sup>

3. See, e.g., Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997).

4. Compare Anthony D'Amato, *Aspects of Deconstruction: The Failure of the Word "Bird"*, 84 NW. U. L. REV. 536 (1990).

5. 15 U.S.C. § 1 (2000).

6. *Id.* § 2.

7. *Id.* §§ 13, 14, 18.

8. *Id.* § 45.

The Sherman Act makes a violation of the act a felony punishable by up to three years imprisonment for individuals and hefty fines for individuals and business entities.<sup>9</sup> Section 4 of the Clayton Act provides that those persons (natural and otherwise) injured in their business or property by reason of an antitrust violation may recover treble their damages plus attorneys' fees and costs.<sup>10</sup> A different part of the Clayton Act also provides for suits for injunctive relief.<sup>11</sup>

The vast majority of antitrust enforcement comes through private damage suits. Government enforcement focuses on several objectives, including: criminal prosecution of the hardcore (or per se) violations of section 1 of the Sherman Act such as price fixing, bid rigging, and market allocation schemes between competitors; seeking injunctive relief against anticompetitive mergers and joint ventures; and the occasional big-ticket civil, nonmerger suit best illustrated by the long running *Microsoft* litigation.<sup>12</sup>

The remainder is private litigation. Private litigation consists of two general types. Some of the largest cases are suits between large competitors seeking a strategic advantage through litigation.<sup>13</sup> These cases closely resemble ordinary business tort cases, albeit with the treble damage and attorneys' fees kicker.

The rest of the cases are more closely aligned with the core purposes of the antitrust laws. These cases typically are treble damage claims from direct purchasers<sup>14</sup> who were victims of price fixing or similarly per se unlawful conduct. Frequently, but not always, such civil suits are preceded by government criminal prosecutions of the defendants, enabling the plaintiffs to take advantage of a statutory provision making any verdict in a government antitrust case prima facie evidence in subsequent private litigation.<sup>15</sup> Again frequently, but not inevitably, the private follow-on litigation takes the form of

9. *Id.* §§ 1–2.

10. *Id.* § 15.

11. *Id.* § 26.

12. See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (final opinion on liability with case on remand regarding remedy).

13. See, e.g., *MCI v. AT&T*, 708 F.2d 1081(7th Cir. 1983); *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362 (M.D.N.C. 2002); *Pepsico, Inc. v. Coca-Cola Co.*, 114 F. Supp. 2d 243 (S.D.N.Y. 2000); see generally Arthur D. Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353 (1978) (discussing antitrust lawsuits between competitors, and labeling such conduct "the new antitrust strategy").

14. Under federal antitrust law, generally only direct purchasers have standing to bring treble damage claims. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 727–29 (1977).

15. 15 U.S.C. § 16(a).

multiple class actions brought by counsel working on contingency, which are consolidated under multidistrict litigation procedures and eventually settled. Depending on the timing (or existence) of the government criminal investigation, the civil case may well be settled before the criminal case because of the prima facie effect of the criminal verdict and the defendants' need to show restitution through settlement prior to criminal sentencing.<sup>16</sup> Particularly large and sophisticated victims frequently will opt-out of such settlements and pursue their own claims to verdict or separate settlement through retained counsel.

## II. INCOHERENCE AT ITS CORE

The typical schizophrenic analysis of the rationale for treble damages goes something like this:

The treble damage remedy serves, of course, to compensate private persons for their injuries. Trebling those damages punishes the defendant for his violation. . . . Such awards generate a powerful incentive for injured persons to detect, disclose, attack, and end violations of the antitrust laws. Private enforcement thus increases the likelihood that a violator will be found out, greatly enlarges the penalties and thereby helps discourage illegal conduct. The statutory scheme thus supplements public enforcement, which is inevitably selective and not always likely to concern itself with local, episodic, or less than flagrant violations.<sup>17</sup>

Another set of recent commentators state more succinctly: “[t]he case for private enforcement thus rests on twin goals: deterrence and compensation.”<sup>18</sup> More law- and economics-oriented scholars focus mostly on the deterrence value of treble damages, normally analyze the appropriateness of treble damages in terms of overdeterrence or underdeterrence, and frequently reach differing conclusions depend-

16. Because of the pendency or likelihood of treble damages, courts rarely order separate restitution. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 792 (5th ed. 2002).

17. PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 149–50 (1978); see ABA SECTION OF ANTITRUST LAW, TREBLE-DAMAGES REMEDY 16–21 (1986) (noting that treble damages compensate victims, encourage enforcement, deter violations, deprive violators of fruits of unlawful gains, and punish violators).

18. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 912 (2000); see Malcolm E. Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CAL. L. REV. 1319 (1973) (analyzing treble damages exclusively in terms of deterrence and compensation). For a recent judicial statement of this twin pronged basis for antitrust treble damages, see *Andrx Pharmaceuticals, Inc. v. Biovail Corp. International*, 256 F.3d 799, 805 (D.C. Cir. 2001).

ing on the precise antitrust offense at issue.<sup>19</sup> Otherwise, most noted treatises and commentators echo the more pluralistic view of the goals of private treble damage remedies, but only occasionally put punishment at the forefront.<sup>20</sup> The case law is similarly diverse,<sup>21</sup> and the available historical materials simply do not shed any substantial light on the intent of the drafters.<sup>22</sup>

Deterrence and compensation are only two of the three legs of the antitrust treble damages stool. Although rarely discussed, such damages must also be considered an explicit form of punishment for the defendants. Treble damages are the *sole* damages for an antitrust violation. Separate punitive damages are *not* allowed based on the

19. See WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS (1986); HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 15.6 (1985); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 17 (2d ed. 1999); RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIALS 542-45 (2d ed. 1981); E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 3.02 (2d ed. 1994); Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: An Introduction and Framework*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 31-34 (Lawrence J. White ed., 1988); William Breit, *Efficiency and Equity Considerations*, 8 SW. U. L. REV. 539 (1976); cf. Herbert Hovenkamp, *Treble Damages Reform*, 33 ANTITRUST BULL. 233 (1988) (summarizing but critiquing the optimal deterrence model).

20. See, e.g., JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION 171-72 (2d ed. 2001); Clyde J. Cooper, Jr., *Treble Damages—Reward for Private Enforcement of Federal Antitrust Laws*, 32 DICTA 293, 294 (July-Aug. 1955); Alfred L. Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M. L. REV. 286 (1973); Dr. George S. Stigler et al., *Report of the Stigler Task Force on Productivity and Competition*, 2 ANTITRUST L. & ECON. REV. 13, 32-33 (1969); Lawrence Vold, *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 KY. L.J. 117 (1939-40).

21. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472-73 (1982) (discussing treble damages in terms of compensation, encouraging private enforcement, and deterrence); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343-44 (1979) (discussing compensation and deterrence); *Pfizer Inc. v. India*, 434 U.S. 308, 314 (1978) (discussing compensation, deterrence, and depriving violators of the fruits of their illegal conduct); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (discussing compensation, encouraging private enforcement, deterrence and depriving violators of the fruits of their illegal conduct); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977) (discussing compensation, deterrence, and punishment); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972) (encouraging private enforcement); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (discussing compensation and encouraging private enforcement); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968) (depriving violators of the fruits of their illegal conduct); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) (encouraging private enforcement).

22. ABA SECTION OF ANTITRUST LAW, *supra* note 17, at 18-19. It is interesting to note that Senator Sherman's original antitrust legislation contained a provision for double damages, which was criticized as inadequate, and that the Judiciary Committee amended the bill to provide for the current structure of treble damages, attorneys' fees, and costs. Why treble damages were considered adequate when double damages were not is not explained by anything other than arithmetic. Cf. THIS IS SPINAL TAP (MGM 1984) (guitar player of heavy metal band arguing that amplifier with dial running from one to eleven is louder than an equal power amplifier with dial running only to ten because "eleven is more.").

rationale that “the enhancement of damages in an antitrust case is the damages trebled.”<sup>23</sup> When states sue in their *parens patriae* capacity, the damages obtained may be deemed a “civil penalty” and deposited with the state as general revenues.<sup>24</sup>

The punishment rationale for treble damages even carries over into the tax treatment of antitrust damages. Any verdict or settlement in excess of actual loss is taxable as ordinary income. Thus, two-thirds of treble damages would be subject to ordinary income tax treatment.<sup>25</sup> Conversely, from a defendant’s perspective, when civil suits follow government action, amounts compensating for actual economic injury may be deductible, but the amount beyond compensatory damages—the punitive portion of the award—is not.<sup>26</sup>

One small recent example of the confusion over the fundamental purposes behind the treble damage remedy came in the Fifth Circuit’s recent decision in *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*,<sup>27</sup> which concerned whether an arbitration clause covering antitrust disputes would be enforceable given language barring punitive damages.<sup>28</sup> In *Investment Partners*, the owner of a photo processing franchise brought an antitrust suit against the franchisors in federal court.<sup>29</sup> The defendants sought to compel arbitration pursuant to an arbitration clause that both sides agreed governed the dispute in question.<sup>30</sup> The plaintiffs argued that the arbitration clause was void because the clause prohibited the award of “punitive damages” and thus the arbitrator could not award the required treble

23. *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1381 (8th Cir. 1983); see also *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996) (quoting *McDonald*); *Spence v. Southeastern Alaska Pilots’ Ass’n*, 789 F. Supp. 1014, 1029 (D. Alaska 1992) (citing *McDonald*). In reality, the issue is somewhat more complex because plaintiffs often can join antitrust claims with other statutory violations, business torts, and fraud claims which may permit the awarding of punitive damages. Whether a successful plaintiff may receive jury-based punitive damages instead of or in addition to the treble damages for the antitrust claim depends on the factual and evidentiary overlap of the claims. The various strategies for plaintiffs and defendants facing these issues is discussed in Geraldine Alexis & Andrea Deshazo, *Is Bifurcation Right for Your Case?*, 16 ANTITRUST 82 (Summer 2002).

24. 15 U.S.C. § 15e (2000).

25. *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

26. I.R.C. §§ 162(g), 186 (2000); 26 C.F.R. § 1.186(c)(1) (2000).

27. 298 F.3d 314 (5th Cir. 2002).

28. It appears that the parties sought to draft the broadest possible arbitration clause governing all potential disputes and did not have antitrust specifically in mind since traditional jury-based punitive damages are not available in antitrust cases. See Alexis & Deshazo, *supra* note 23.

29. 298 F.3d at 315.

30. *Id.* at 316.



damages for the antitrust issue being disputed.<sup>31</sup> Against a background that all doubts would be resolved in favor of arbitration, the court held that the punitive damage waiver did not bar treble damages and that the arbitration was thus not against public policy.<sup>32</sup>

The court struggled mightily against the Supreme Court's own language in allowing arbitration of certain antitrust disputes where the Court noted that, while the primary purpose of treble damages was remedial, "treble damages also play an important role in penalizing wrongdoers. . . ."<sup>33</sup> The Court dismissed other Supreme Court statements linking punishment and treble damages as essentially dictum arising in other contexts.<sup>34</sup> As a matter of logic, the best that the court can muster is to draw the distinction "from the standpoint of the parties' expectations when they entered the arbitration agreement, between statutory treble damages and common law punitive damages."<sup>35</sup> Even so, the court is forced to acknowledge that "antitrust treble damages may indeed be 'punitive' simply because they exceed the actual damages that have been inflicted on the victim. . . ."<sup>36</sup>

The *Investment Partners* decision may make sense as a pragmatic attempt to limit an opportunistic party from weaseling out of an agreement to arbitrate all its business disputes, but it runs counter to the intuition, history, and drafting of the antitrust laws and the consistent recognition of the pluralistic purposes of statutory treble damages as partially punitive in nature.

Punishment also seems to be at the forefront of those other limited American statutes that permit multiple damages. The RICO statute borrowed the treble damage remedy from antitrust with proponents arguing a similar combination of deterrence, compensation, and punishment.<sup>37</sup> Similarly, the False Claims Act has a treble damage provision premised at least in part on punishment of the defendant for past conduct.<sup>38</sup> Multiple damage provisions can also be

31. *Id.*

32. *Id.* at 318.

33. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

34. *Inv. Partners*, 298 F.3d at 317.

35. *Id.*

36. *Id.* at 318.

37. 18 U.S.C. § 1964(c) (2000); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1037–39, 1048 (1980).

38. 31 U.S.C. § 3729 (2000); see *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784–86 (2000.) *But see* Gregory G. Brooker, *The False Claims Act: Congress*

found in patent, trademark, labor law, consumer protection, and even landlord-tenant law premised on punishing either willful violations of the law or the exploitation of a particularly vulnerable type of plaintiff.<sup>39</sup>

While by no means considered the kind of activity normally condemned as *malum in se* under the criminal law, there is a lengthy and venerable tradition of recognizing at least certain hardcore antitrust violations as morally offensive and worthy of punishment. In the book of *Samuel* in the Old Testament there is a parable about a rich man with great flocks of sheep who killed the single sheep of a nearby poor competitor to serve to a traveler. When informed of this injustice, King David ordered the rich man killed but also ordered “four-fold” payment to the injured party.<sup>40</sup> Similarly, in ancient Greece, a ring of corn dealers convicted of fixing prices by cornering the market were sentenced to death.<sup>41</sup> Aristotle also mentions an instance where the dictator of Sicily punished a merchant who monopolized the iron ore market on the island with exile.<sup>42</sup> In medieval England, the common law prohibited engrossing, forestalling, and other early forms of price fixing and cornering, and even provided treble damages as the appropriate relief.<sup>43</sup>

The way the rest of the world in modern times views treble damages confirms their punitive nature. Most nations are reluctant to provide judicial assistance to private U.S. antitrust plaintiffs on the grounds that such treble damage litigation is quasi-criminal in nature and not traditional civil or commercial litigation meriting judicial aid pursuant to letters rogatory or the doctrine of comity.<sup>44</sup> Similarly, other nations have been reluctant to enforce U.S. antitrust judgments

*Giveth and the Courts Taketh Away*, 25 HAMLINE L. REV. 374, 387–88 (2002) (questioning punitive nature of treble damages under False Claims Act in *Vermont Agency* given previous treatment of the issue by the Court and Congress).

39. See, e.g., 15 U.S.C. § 1117 (2000) (trademarks); 35 U.S.C. § 284 (2000) (patents); see generally DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.12 (2d ed. 1993).

40. 2 *Samuel* 12:1-6 (quoted in Vold, *supra* note 20, at 118).

41. Lambros E. Kotsiris, *An Antitrust Case in Ancient Greek Law*, 22 INT’L LAW. 451, 454 (1988).

42. ARISTOTLE, POLITICS 57 (H. Rackham trans., Harvard University Press 7th ed. 1977). The moral force of this story is somewhat undercut by the fact that the dictator subsequently took over the operation of the monopoly for himself.

43. WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 18–52 (1965); Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955).

44. See *Gulf Oil Corp. v. Gulf Can. Ltd.*, [1980] 111 D.L.R. 3d 74 (Can. S. Ct.); *In Re Westinghouse Elec. Corp.*, [1977] 78 D.L.R. 3d 3 (Ont. High Ct.); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] A.C. 547 (H.L. 1977).

on comity grounds or to commit to do so pursuant to treaty because of its punitive nature.<sup>45</sup>

### III. REMEDIES AND ENFORCERS MULTIPLY

The blurry and conflicting rationales for treble damages did not matter much prior to the modern era of antitrust litigation. Until the 1960s, there were simply very few successful private antitrust plaintiffs or advantageous settlements.<sup>46</sup> It matters very much today because of the unintended and unexpected multiplication of enforcers and remedies.

One would expect punishment to be the primary goal of the criminal enforcement of the antitrust laws. The Antitrust Division of the Justice Department may bring either criminal or civil actions for violations of the Sherman Act. It typically limits criminal prosecution to so-called "per se" or "hardcore" violations of section 1 of the Sherman Act such as price fixing, bid rigging, market division, or customer allocation schemes among horizontal competitors.<sup>47</sup> Criminal prosecutions of other "restraints of trade" in violation of section 1 are possible but normally eschewed either for substantive antitrust policy (ambiguous or changing views of the effects on competition) or because of the impossibility of proof beyond a reasonable doubt. Criminal prosecutions under section 2 of the Sherman Act for monopolization or attempted monopolization are also possible but have not been undertaken for decades.<sup>48</sup>

Individuals convicted of Sherman Act violations may be imprisoned for up to three years.<sup>49</sup> Under the Federal Sentencing Guidelines, substantial prison terms are now routine, depending on the role of the individual in the unlawful conspiracy and the amount of commerce affected by the unlawful agreement.

45. See *British Nylon Spinners Ltd. v. Imperial Chem. Indus., Ltd.*, [1953] Ch. 19 All E.R. 780 (C.A. 1952); see also JAMES R. ATWOOD ET AL., *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 4.16 (3d ed. 1997) (discussing the enactment of blocking statutes in various countries barring the enforcement of treble damage awards).

46. MILTON HANDLER ET AL., *TRADE REGULATION* 106 (4th ed. 1997); Charles A. Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV. 17, 18-21 (1983).

47. ABA SECTION OF ANTITRUST LAW, *supra* note 16, at 737-38.

48. See *United States v. Dunham Concrete Prods.*, Crim. No. 1842 (E.D. La. 1969) (last criminal monopolization indictment discovered by author).

49. 15 U.S.C. §§ 1-2 (2000).

The fines for individuals and corporations heavily depend on the amount of commerce affected by the conspiracy. The fine is now a maximum of \$350 thousand for individuals and \$10 million for corporations,<sup>50</sup> or double the gain or loss caused by the illegal conduct.<sup>51</sup> The latter method of calculation for fines has produced guilty pleas calling for fines up to \$500 million dealing with lengthy global conspiracies for core products in the economy and a number of fines in excess of \$100 million.<sup>52</sup>

Where the government acts, private litigation normally follows. In this setting, private litigants are aided by section 5 of the Sherman Act, which states that a favorable verdict in a government antitrust action (either civil or criminal) is *prima facie* evidence in any subsequent private enforcement action. Since this means in most civil actions that a private plaintiff need only prove standing and damages, settlement normally follows or precedes the criminal verdict. For nonsettling defendants, the prospects are even bleaker unless they prevail on the merits. Antitrust violators are not entitled to contribution against fellow antitrust tortfeasors.<sup>53</sup> Moreover, as a result of joint and several liability, any settlements paid along the way are only deducted *after* damages are trebled,<sup>54</sup> leaving a sole nonsettling defendant potentially liable for a disproportionate share of the total damages.

Therefore, the question normally is not if, but when to settle. For example, the recent criminal price fixing case involving Sotheby's, the international auction house, was *preceded* by a \$512 million settlement of a private treble damage class action, presumably to avoid the *prima facie* effect of a guilty plea and the resulting loss of even further bargaining leverage by the civil defendants.<sup>55</sup> As in most criminal antitrust cases, the court at sentencing did not impose any further restitution.<sup>56</sup>

50. *Id.*

51. 18 U.S.C. § 3571(d) (2000).

52. Scott D. Hammond, *From Hollywood to Hong Kong—Criminal Antitrust Enforcement is Coming to a City Near You*, 14 LOY. CONSUMER L. REV. 567, 570 (2002)

53. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

54. See SULLIVAN & GRIMES, *supra* note 18, § 17.8B.

55. Christie's, Sotheby's competitor and coconspirator, was not charged in the government's criminal case because of its cooperation and participation in the corporate amnesty program. It remained, of course, a defendant in the private actions.

56. See Peter Sullivan, *Antitrust Around the World*, 2000 ANTITRUST REP. 1 (Oct. 2000). In most cases, it is the pending, rather than the settled private cases which provide the basis for not imposing formal restitution in the criminal case. See, e.g., *United States v. F. Hoffman-La Roche Ltd.*, Crim. No. 99-CR-184-R, Guilty Plea ¶ 8(b) (Filed May 20, 1999).

The other federal government antitrust enforcer is the FTC. The FTC's historic remedy in the competition area has been its power to seek cease and desist orders under section 5 of the FTC Act, which prohibits "unfair methods of competition" or "unfair or deceptive acts or practices."<sup>57</sup> The Supreme Court has interpreted the FTC Act as encompassing any violation of the letter or spirit of the antitrust laws, as well as an ill-defined general unfairness power, which the FTC has not sought to use to extend the boundaries of antitrust in recent years.<sup>58</sup>

The FTC also has obtained disgorgement of unlawful profits under section 13(G) of the FTC Act, a power that it had traditionally used in consumer protection cases, but only recently applied to its competition cases as well.<sup>59</sup> Disgorgement seeks to recover the unlawful gain enjoyed by the defendant, thus distinguishing it from restitution, which seeks to restore the original position of the victim of the wrongdoing.<sup>60</sup> Disgorgement thus becomes the principal weapon the FTC has to obtain monetary relief in an antitrust case not involving contempt of court or violation of some prior administrative or judicial decree.

The remaining governmental enforcer is at the state rather than the federal level. The attorneys general of the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and other United States dependencies and territories each enforce their own state or territorial level antitrust laws.<sup>61</sup> Most of these laws track the substance of the Sherman Act fairly closely, but each state has different exemptions, procedures, and remedies. The Supreme Court is quite clear that the states (and territories) are normally free to grant greater or lesser rights than the federal antitrust laws without preemption being an issue.<sup>62</sup> One important difference is that federal

57. 15 U.S.C. § 45 (2000). The FTC also enforces consumer protection laws under the same statutory framework. *See generally* STEPHANIE KANWIT, FEDERAL TRADE COMMISSION (2002).

58. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239–40 (1972).

59. *See* *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36 (D.D.C. 1999), *amended on other grounds*, 99 F. Supp. 2d 1 (D.D.C. 1999).

60. The FTC has only used disgorgement in two competition cases and has not yet defined the remedy in a comprehensive way. The agency, however, has sought public comments on potential guidelines for the use of this remedy in its antitrust cases. *See* Press Release, FTC, FTC Seeks Public Comments on the Use of Disgorgement as a Remedy for Competition Violations (Dec. 20, 2001), at <http://www.ftc.gov/opa/2001/12/disgorgefrn.htm>.

61. For a survey of the substance and procedures of each such law, see ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES (2d ed. 1999).

62. *California v. ARC Am. Corp.*, 490 U.S. 93, 103 (1989).

antitrust law permits suit for treble damages *only* for direct purchasers—those who dealt directly with the unlawful price fixers or monopolists—while a substantial number of states permit suits by indirect purchasers under state antitrust law.<sup>63</sup>

The states also frequently bring suit under the federal antitrust laws. First, the states purchase an enormous amount of goods and services. Where they are victims of antitrust violations in their capacity as purchasers they are entitled to treble damages like any other private plaintiff.<sup>64</sup> Second, the states have been granted *parens patriae* powers to sue on behalf of any natural persons in their jurisdiction who have been injured by reason of any antitrust violation.<sup>65</sup>

The states have come under tremendous criticism for their more activist posture. Critics have argued that the states are merely free riders on federal enforcement efforts or, when the states pursue a separate agenda, they are doing so for narrow partisan political reasons unrelated to sound antitrust and competition policy.<sup>66</sup>

The states understandably disagree. Their ability to sue on their own behalf and on behalf of their citizens is enshrined in federal legislation. Their ability to enact their own state antitrust statutes and empower their officials and private parties to sue under them flows from their sovereign status under the Constitution. The states also dispute the free rider label, pointing to important antitrust litigation where either the states acted before the federal government, or where the federal government took no action at all.<sup>67</sup> They point to the efficiency-enhancing aspects of pooling resources and of collective investigation and prosecution of nationwide cases.<sup>68</sup> Finally, the states have long argued that the state attorneys general are more sensitively attuned to the issues affecting the citizens of their states than the federal antitrust agencies could ever be. They can therefore better

63. See ABA SECTION OF ANTITRUST LAW, *supra* note 61.

64. 15 U.S.C. § 15 (2000).

65. *Id.* § 15(c).

66. Posner, *supra* note 1, at 940–41.

67. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (antitrust suit by nineteen states against insurance companies, following decision by the DOJ not to accept states' invitation to investigate the industry); see also Carole R. Doris, *Another View on State Antitrust Enforcement—A Reply to Judge Posner*, 69 ANTITRUST L.J. 345 (2001).

68. See The National Association of Attorneys General, *About NAAG*, at [http://www.naag.org/naag/about\\_naag.php](http://www.naag.org/naag/about_naag.php) (describing as one of its goals the promotion of cooperation and coordination on interstate legal matters to foster a more responsive and efficient legal system for state citizens).

represent the public interest even at the risk of coming under the sway of interest groups representing competitors of a potential antitrust defendant.

The final enforcers in our global economy are foreign governments and their citizens. Such persons have limited rights to sue in the United States courts for injuries suffered as buyers in the United States market. Recoveries for competitive injury outside the United States have almost always been rejected by United States courts.<sup>69</sup> Instead, a growing number of nations have created their own competition laws or begun to vigorously enforce existing laws including private rights of action.

Typical examples are the competition laws of the European Union and Canada. The EU has enterprise-only liability, no criminal sanctions, but fines reaching up to 10 percent of the annual turnover of firms violating the EU competition provisions.<sup>70</sup> While no fine to date has reached this level, fines in the hundred of millions of euros have been imposed on a scale roughly equal to the United States in certain international cartel cases.<sup>71</sup> Private rights of action, including class actions, exist in several of the member states, although they are infrequently used.

Canada, which enacted its first competition statute a year before the Sherman Act, has criminal provisions for the kind of hardcore cartel and bid rigging violations prosecuted in the United States and a limited but expanding private right of action.<sup>72</sup> Here too, the government has devoted the most resources to cartel cases and has imposed significant fines often in the same international cartel cases where the U.S. and EU have already taken action. The first class action in a competition case was filed recently but dismissed on the merits.<sup>73</sup>

As a result of so many enforcers, punishment has taken on a greater significance. What has changed is not just that total punishment has increased, but that it has increased in an unpredictable, erratic, and somewhat random fashion, leaving some types of viola-

69. See Spencer Weber Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523 (2002).

70. See JAMES R. ATWOOD ET AL., *ANTITRUST AND AMERICAN BUSINESS ABROAD* ch. 16 (3d ed. 2001).

71. See Samantha Mobley & Maitena Arakistain, *How the European Commission Sets Cartel Fines*, 14 ANTITRUST 24 (2000).

72. ATWOOD, *supra* note 70, ch. 17.

73. See [2001] *Chadha v. Bayer, Inc.*, 200 D.L.R. 4th 309 (Ont. Sup. Ct.).

tions subject to a stunning multiple set of fines and damages far in excess of treble damages, and other types of violations subject to virtually no criminal or civil liability whatsoever.

#### IV. GOLDBLOCKS AND THE THREE BEARS: WHICH PUNISHMENT IS JUST RIGHT?

The full weight of antitrust enforcement is brought to bear when the Department of Justice brings a criminal action or the FTC obtains disgorgement,<sup>74</sup> the states bring their own treble damage actions under the federal and state antitrust laws, direct purchasers sue for treble damages under the federal antitrust laws, indirect purchasers sue under state law, and foreign governments and private parties bring the available actions in the U.S. and abroad. Any lesser combination obviously imposes less total liability on the culpable defendants. Without private enforcement actions, a defendant could well escape all liability if the government chooses, for whatever reason, not to proceed in a particular matter. Which scenario imposes the “right” amount of punishment through civil damages and criminal fines is obviously a heavily value-laden determination. What is most interesting is how little doctrinal differences separate these three potential scenarios, and how antitrust lacks a coherent theory of punishment to account for these differences.<sup>75</sup>

##### A. *Punishment Beyond Treble Damages*

Through the aggressive use of a corporate amnesty program and heavy cooperation between national competition authorities, the Department of Justice investigated and prosecuted a cartel of vitamin manufacturers in the late 1990s, the largest known international cartel in history. The worldwide conspiracy to fix the prices and allocate markets in the bulk vitamins industry, in violation of section 1, spawned a wide range of litigation, including criminal prosecution by the DOJ, private cases in federal and state courts, and various gov-

74. By tradition a federal government investigation case is brought by one but not both of the antitrust agencies although there is no legal bar to simultaneous enforcement actions.

75. The following case descriptions are adapted from Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?*, in ANTITRUST LAW IN NEW YORK STATE 3 (2d ed. 2002) (exploring these scenarios in greater detail along with other examples of the haphazard nature of antitrust enforcement by differing coalitions of plaintiffs).



ernmental cases around the world.<sup>76</sup> In the end, a coalition of state attorneys general, some not even originally litigants, were also able to obtain substantial settlements from the defendants.

The defendants are manufacturers of bulk vitamins, which are used in the production of a wide variety of food products, such as animal feed, soft drinks, and breakfast cereal. All of the corporate defendants and a number of individuals pleaded guilty in some twenty-five different criminal cases to charges of criminal price fixing. Hoffman-La Roche alone agreed to pay a record \$500 million and BASF agreed to pay \$225 million.<sup>77</sup> Total U.S. criminal fines imposed on all the defendants exceeded \$1 billion.<sup>78</sup> In light of the pending and contemplated treble damage suits, restitution was waived in the guilty pleas with the defendants.<sup>79</sup>

The corporate defendants in the DOJ prosecutions were also named in a number of private cases brought in federal district courts around the country by large companies that bought directly from the vitamin manufacturers for use in the preparation of animal feed and food for human consumption. The federal cases were consolidated in a multidistrict class action in the District of Columbia.

Seven of the defendants entered into a settlement agreement agreeing to pay approximately \$1.05 billion, plus \$122 million in counsel fees.<sup>80</sup> Three of the defendants—BASF, Hoffman-La Roche, and Rhone-Poulenc—were responsible for paying \$900 million of the total figure. Although Rhone-Poulenc was a defendant and paid substantial damages in the civil settlement, the company was not charged in the criminal prosecution because of its cooperation under the DOJ amnesty program.<sup>81</sup> Several hundred plaintiffs have opted-out of the settlement and the settlement figure was reduced pursuant

76. See *Crawford v. F. Hoffman La Roche Ltd.*, 267 F.3d 760 (8th Cir. 2001) (removed to district court on defendant's motion; complaint originally filed in Arkansas state court); *In re Vitamins Antitrust Class Actions*, No. 99-197, 2000 U.S. Dist. LEXIS 8931 (D.D.C. 2000); *XF Enters., Inc. v. BASF Corp.*, No. 99-3693, 1999 U.S. Dist. LEXIS 16834 (E.D. Pa. 1999) (defendant removed the case to district court, and upon plaintiff's motion, the case was remanded back to Philadelphia County Court of Common Pleas).

77. See *Vitamin Cartel Investigation Nets Four More Former Executives*, 78 ANTITRUST & TRADE REG. REP. 408 (2000).

78. Hammond, *supra* note 52, at 572.

79. *United States v. F. Hoffman-La Roche Ltd.*, Crim. No. 99-CR-184-R, Guilty Plea (Filed May 20, 1999).

80. *In re Vitamins Antitrust Litigation*, 209 F.R.D. 251, 255 n. 7 (D.D.C. 2002).

81. See Press Release, Department of Justice, *F. Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel* (May 20, 1999), at <http://www.usdoj.gov/opa/pr/1999/May/196at.htm>.

to a formula in the settlement agreement.<sup>82</sup> To ensure that the settling plaintiffs are not shortchanged vis-à-vis the opt-outs, the settlement agreement contains a most-favored nations clause that requires a settling defendant to pay the settlement class additional money if a settling defendant agrees to pay any opt-out claimant proportionally more than the money made available to the members of the class with respect to any vitamin product.<sup>83</sup>

A number—although not all—of the corporations named as defendants in the DOJ and private federal actions were also sued in private actions in state courts in some fifteen states and the District of Columbia, based on the same alleged facts underlying the federal actions.<sup>84</sup> The plaintiffs were for the most part indirect purchasers and their claims were based on state law.<sup>85</sup> These suits were brought in states that allow indirect purchaser claims.<sup>86</sup> None of the plaintiffs in the private federal actions are plaintiffs in any of the state court actions.

The attorneys general of twenty-two states, Puerto Rico, and the District of Columbia eventually entered into proposed settlement agreements totaling \$340 million with six leading vitamins manufacturers that were also named as defendants in the private, state court actions brought in fifteen states and the District of Columbia.<sup>87</sup> Those

82. *In re* Vitamins Antitrust Class Actions, No. 99-197, 2000 U.S. Dist. LEXIS 8931 (D.D.C. 2000) at \*20–\*29.

83. Twelve of the defendants in the federal actions, who also had plead guilty to the DOJ charges, did not join in the settlement of the multidistrict federal action. In May 2000, the D.C. district court denied most of their motions to dismiss, which were based in part on arguments that claims by indirect purchaser plaintiffs (who constitute a small percentage of the plaintiff class) under state law were legally insufficient.

84. *Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760 (8th Cir. 2001) (case removed to district court on defendant's motion; complaint originally filed in Arkansas state court); *Greene v. F. Hoffman-LaRoche, Ltd.*, No. 99-197, 2001 WL 849928 (D.D.C.) (case removed from the state court in Tennessee to the district court in District of Columbia); *Valerie Ciardi v. Hoffmann-LaRoche, Ltd.*, No. 99-3244, 2000 Mass. Super. LEXIS 615 (2000) (Mass. Sup. Ct.); *Anile Pharmacy, Inc. v. Hoffman-LaRoche, Inc.*, No. 99-197, 2000 U.S. Dist. LEXIS 11348 (D.D.C. 2000) (removed to district court upon defendant's motion; plaintiff moved to remand the case to the Circuit Court of Hancock County, West Virginia); *XF Enters., Inc. v. BASF Corp.*, No. 99-3693, 1999 U.S. Dist. LEXIS 16834 (E.D. Pa.) (defendant removed the case to district court, and upon plaintiff's motion, the case was remanded back to Philadelphia County Court of Common Pleas).

85. *Valerie Ciardi v. Hoffmann-LaRoche, Ltd.*, No. 99-3244, 2000 Mass. Super. LEXIS 615 (2000) (Mass. Sup. Ct. 2000).

86. *Id.*

87. See Press Release, Office of the California Attorney General, Attorney General Lockyer Announces \$80 Million Antitrust Settlement Involving Alleged International Vitamins Price-Fixing Scheme (Oct. 10, 2000), at <http://www.caag.state.ca.us/newsalerts/2000/00-129.htm> [hereinafter Press Release, \$80 Million Antitrust Settlement]; Press Release, Office of the Vermont Attorney General, Attorney General Sorrell Announces Historic Settlements In

companies collectively account for 80 percent of the world vitamins market and included Roche, BASF, and Rhone.<sup>88</sup> The litigation continues against the smaller nonsettling vitamins manufacturers.

Twenty-three of the participating jurisdictions would receive a predetermined share of a \$118 million pool to compensate for damages to consumers.<sup>89</sup> The attorney general in each jurisdiction would decide how that state's allocation would be distributed.<sup>90</sup> An additional \$107 million would be deposited in a business settlement fund to reimburse damaged businesses in each of these twenty-three jurisdictions.<sup>91</sup> A separate settlement agreement, in the amount of \$85 million, was reached with California.<sup>92</sup> Finally, \$30 million would be used to reimburse forty-seven state governments—all twenty-four parties to the settlement agreements plus twenty-three more—for overcharges on direct and indirect state purchases of products containing vitamins.<sup>93</sup>

Outside the United States, these same defendants were the target of much government litigation, but few private actions to date. In the European Union, the vitamin defendants were fined an additional 855.22 million euros with Hoffman-La Roche, as the principal conspirator, alone paying a fine of 462 million euros.<sup>94</sup> BASF's fine in Europe was 296.16 million euros, exceeding its fine in the United States criminal proceedings.<sup>95</sup> In Canada, the various defendants entered guilty pleas and paid fines of nearly Can\$100 million (approximately US\$68 million) with Roche paying Can\$48 million of that total (approximately US\$32.6 million).<sup>96</sup> Similar but smaller

Antitrust Suits Against International Price-Fixing Cartel (Oct. 10, 2000), at <http://www.state.vt.us/atg/press10102000.htm>.

88. See Press Release, \$80 Million Antitrust Settlement, *supra* note 87.

89. Wolfram & Waller, *supra* note 75, at 39.

90. For instance, the Illinois AG has indicated that nonprofit charitable groups that promote health and nutrition would receive the majority of its share while the New York AG has said that the majority of its share would fund programs concerning prenatal care, nutrition, and hunger.

91. Wolfram & Waller, *supra* note 75, at 39.

92. Press Release, \$80 Million Antitrust Settlement, *supra* note 87.

93. *Id.*

94. *EU Fines Eight Companies for Roles in Vitamin Cartels*, 81 ANTITRUST & TRADE REG. REP. 483 (2001).

95. *Id.*

96. *Canadian Court Levies \$1 Million Fine in Vitamins Price Fixing Conspiracy Case*, 78 ANTITRUST & TRADE REG. REP. 349 (2000); *Canadian Court Levies \$5.2 Million Fine in Vitamins Price-Fixing Conspiracy Case*, 78 ANTITRUST & TRADE REG. REP. 259 (2000).

enforcement actions have taken place or are pending in Australia, Japan, Mexico, Switzerland, and Korea.<sup>97</sup>

When all is said and done, the *Vitamins* defendants will be well punished for one of the most serious and long-running price fixing schemes in history. But how will that punishment stack up to the treble damage norm? Estimating a ratio between total punishment and harm is difficult to calculate but the ratio appears to be well over three to one. If the amount of commerce and the amount of harm reported in the plea agreement is close to accurate, then the defendants (except the cooperating Rhone-Poulenc) have already paid, through the criminal fine, double the damages caused. With the prima facie effect of the criminal plea, the plaintiffs in the direct and indirect purchaser suits and the states had little incentive to give much of a settling discount. The total civil settlements approach 150 percent of the criminal fine, suggesting that the settling defendants have paid the settling plaintiffs approximately treble damages on top the double damages fine to the government. This is with the unknown amount of opt-out liability (minus any offsets specified in the settlement agreements) and liability against nonsettling defendants.

While the fines paid to the foreign governments and in foreign private actions are calculated on the basis of the effects in those jurisdictions, such actions are in large part another type of follow-on suit once the conduct was detected and punished in the United States. The amounts paid are thus part of the total punishment paid by the defendant. With such fines totaling approximately another \$1 billion, the total ratio of punishment to harm begins to approach seven to one. Even adjusted for the lack of prejudgment interest, possible payments of attorneys' fees beyond what defendants were required to cover, and uncompensated dead weight loss to society, tax effects, and the waiver of restitution in the guilty pleas,<sup>98</sup> one is likely to end with a ratio of substantially higher than three to one.

97. See Press Release, Commerce Commission, Commission Says BASF, Roche, and Rhone Were Price Fixing, but NZ Limitation Period and International Jurisdiction Issues Prevent New Zealand Court Action (May 2001), at [http://www.comcom.govt.nz/publications/display\\_mr.cfm?mr\\_id=772](http://www.comcom.govt.nz/publications/display_mr.cfm?mr_id=772); Press Release, Japanese Fair Trade Commission, Warnings Against Daiichi Pharmaceutical Co., Ltd. & Eisai Co., Ltd. (April 5, 2001), available at <http://www.jftc.go.jp/e-page/press/2001/20010405vitamin.pdf>; *Federal Court Imposes Record \$26M Penalties Against Vitamin Suppliers*, available at [http://203.6.251.7.accc.Internet/media/search/view\\_media.cfm?RecordID=267](http://203.6.251.7.accc.Internet/media/search/view_media.cfm?RecordID=267) (Mar. 1 2001) (describing record fine in Australia of Roche, BASF, and other participant in vitamins cartel).

98. See Lande, *supra* note 2 (analyzing all the potential offsets to treble damages that render them effectively equal to compensatory damages alone). All the offsets identified by Lande are not as strongly applicable in the *Vitamins* setting. Few if any damages were lost to

### B. *This One Is About Right*

Not all government/private antitrust litigation has the look and feel of a rugby scrum, with plaintiffs piling on the guilty defendants for lawful and arguably late hits. On occasion, the various parties cooperate from the start—or reach a unified stance once the litigation proceeds—and obtain a global resolution.

#### 1. Mylan

In 1998 and 1999, the FTC, thirty-two states, the District of Columbia, and a number of direct and indirect purchasers sued Mylan Laboratories, Inc., the second largest generic drug manufacturer in the U.S. Mylan was charged with monopolizing the production of two antidepressant drugs by obtaining exclusive rights over their key ingredients. Mylan allegedly raised the price of each product by 1,900 percent or more. The products were sold to state Medicaid programs, wholesalers, retail pharmacy chains, and other customers.

The FTC sought equitable relief, including a permanent injunction barring Mylan from engaging in conduct that violates FTC Act section 5(a), rescission of certain enabling license agreements and restitution,<sup>99</sup> and disgorgement<sup>100</sup> in an amount exceeding \$120 million plus interest.

On the same day that the FTC filed its suit against Mylan, the state attorneys general of fifteen states filed a parallel suit against Mylan, in the same court, based on the same underlying conduct.<sup>101</sup>

statute of limitations problems. Managerial costs to the plaintiffs were minimal in view of the successful government case and the early settlement of the civil cases. “Umbrella” effects appeared to be incidental since the cartel encompassed the vast majority of worldwide vitamin production and little substitution took place.

99. The equitable remedy of restitution requires that the wrongdoer restore the injured person to the status quo ante. The injured person is entitled to the difference between the price it paid before the illegal conduct and the price it paid after the conduct. In the case of an anticompetitive overcharge, there can be multiple layers of buyers, direct and indirect, from the manufacturer. This is due, of course, to the possibility of margins being added at each level of a multi-level system of distribution. See Ivy Johnson, Note, *Restitution on Behalf of Indirect Purchasers: Opening the Backdoor to Illinois Brick*, 57 WASH. & LEE L. REV. 1005 (2000).

100. The equitable remedy of disgorgement, unlike restitution, does not aim primarily to compensate the victims of wrongful acts; instead, it is intended to deny the wrongdoer of his or her unjust enrichment and to serve as a deterrent. It wrests ill-gotten gains from the hands of the wrongdoer. Disgorgement would equal the amount of the alleged overcharge by the manufacturer to the first buyer in the distribution chain. The FTC sought disgorgement under § 13(b) of the FTC Act, a provision under which disgorgement had previously been ordered in consumer protection cases, but not in competition cases.

101. *Alaska v. Mylan Laboratories, Inc.*, No. 98 CV 03115, Complaint (D.D.C., complaint filed Dec. 22, 1998).

Eventually seventeen additional states and the District of Columbia joined the case. The states sued in their *parens patriae* capacity under both federal and state law on behalf of natural persons, and also in their sovereign capacity on behalf of each state's general economy and as injured purchasers or reimbursers under state Medicaid and other programs. The states sought, among other remedies, a permanent injunction, treble damages, appropriate relief under applicable state statutes, and other equitable relief under federal law, including disgorgement and restitution.

On November 29, 2000, the FTC approved a settlement with Mylan, which at the insistence of the defendant also included *all fifty* states and the District of Columbia, and a variety of other purchasers (including insurance companies, but not direct purchasers), in which Mylan agreed to pay \$147 million to settle the suits.<sup>102</sup> Mylan agreed to pay \$100 million into a fund to compensate injured consumers and state agencies, plus \$8 million in legal fees.<sup>103</sup> An additional \$35 million will be used to settle private suits by large institutional buyers, such as insurance companies, and the remaining \$4 million will cover additional legal costs.<sup>104</sup> Mylan further agreed to injunctive relief. The agreement does not cover several additional suits brought by certain alleged direct buyers of the drugs at issue.

Some twenty-five additional private actions were filed shortly thereafter against Mylan in federal and state courts around the country.<sup>105</sup> The claims were essentially the same as those in the FTC and state actions. Plaintiffs included alleged direct purchasers, such as drug wholesalers, health care delivery systems, managed health care companies, and pharmacists, and indirect purchasers, such as consumers (filing in some twenty putative class action suits), third-party payors, pharmacies, and health centers. Virtually all of the federal and state cases against Mylan and its co-defendants have been coordinated for pretrial proceedings in the District of Columbia federal district court in order to avoid duplicating discovery already produced in the FTC's and states' actions. The plaintiff class of direct purchasers has been certified by the District Court and the D.C. Circuit recently denied the defendants request for interlocutory

102. The court approved the settlement in February 2002. *In re* Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369 (D.D.C. 2002).

103. *Id.* at 373.

104. *Id.* at 394, 399.

105. See *In Re* Lorazepam & Clorazepate Antitrust Litig., 208 F.R.D. 1 (D.D.C. 2002); *In Re* Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12 (D.D.C. 2001).

appeal of that decision.<sup>106</sup> While previous settlement discussions failed, some future settlement is expected, which would involve a further payout by Mylan and the codefendants.

## 2. Nine West

The recent litigation by the FTC, the states, and consumers against the U.S. shoe company Nine West Group for minimum resale price maintenance highlights another offshoot of the trend toward multiple actions relating to the same conduct. In this case, the tension was not between federal and state enforcement. Instead, the case explored the tension between state *parens patriae* enforcement and proposed class actions by consumers. Competing actions sought to represent the interests of consumers of Nine West shoes—the case brought by state attorneys general, acting on behalf of the natural citizens of their states, and the proposed class actions brought by the consumers themselves. Unlike in the *Mylan* litigation, there was no issue of duplicative recovery of damages as between the States and the FTC, because the FTC sought only injunctive relief.

Nine West holds that *parens patriae* actions are superior to consumer class actions. But the law's answer as to who may lead the chase in these circumstances—the states—still begs the question of who gets the money. Leaving that question to the states may result in a different resolution than if it is left to the class action plaintiffs and their counsel. In this case, the settlement agreement between the defendants and the states provides for distribution of the settlement figure to fund women's health, educational, vocational, and safety programs under the *cy pres* principle.<sup>107</sup> If the private actions had been allowed to take precedence over the states' actions, however, the distribution of a settlement fund would undoubtedly have been different.

In March 2000, the FTC simultaneously filed a complaint and entered into a consent decree with Nine West Group, settling charges under section 5 of the FTC Act that the company had engaged in illegal resale price fixing with certain dealers to maintain minimum

106. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002).

107. For a discussion on the *cy pres* principle, see Susan Beth Farmer, *More Lessons From the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361 (1999).

prices on its shoes.<sup>108</sup> The FTC complaint charged that in 1998 Nine West fixed, raised, and stabilized retail prices of its brands of shoes.<sup>109</sup> The FTC's consent order is injunctive only. It prohibits Nine West from directly or indirectly fixing the price at which its dealers advertise or sell its shoes.<sup>110</sup> The FTC did not seek or obtain disgorgement, restitution, or any other form of monetary relief.

Before the FTC complaint, but after the FTC and the states had begun their investigations, some twenty-five proposed class actions were filed in federal court by and on behalf of consumers who bought Nine West shoes after January 1, 1988, against Nine West Group, Inc. and ten department store chains that sell its women's shoes. The actions were consolidated in March 1999 in the Southern District of New York.<sup>111</sup> In January 2000, the federal district court denied a motion to dismiss by Nine West and the ten department store chain defendants that sell Nine West shoes.<sup>112</sup> But then counsel for the proposed class conditionally agreed to withdraw their claims in view of the proposed settlement agreement between Nine West and the states.<sup>113</sup>

On the same day that the FTC entered into a proposed settlement with Nine West, the attorneys general of the 50 states, the District of Columbia, and the U.S. territories, commonwealths, and possessions, simultaneously filed a complaint and entered into a proposed settlement agreement on their own behalf, in their sovereign capacity, and in their *parens patriae* capacity, under section 4(c) of the Clayton Act, on behalf of their (natural person) citizens who purchased Nine West products during the relevant period. The settlement agreement provides for injunctive relief and for the payment to the states of \$34 million in damages to fund women's health, educational, vocational, and safety programs. The settlement resolved all claims against the defendants—Nine West and ten retailers—on behalf of residents of the plaintiff states for antitrust

108. FTC, NINE WEST GROUP, INC.: ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT, at <http://www.ftc.gov/os/2000/03/9westan.htm>.

109. FTC COMPLAINT, at <http://www.ftc.gov/os/2000/03/9westcomp.htm>; Press Release, FTC, Nine West Settles State and Federal Price Fixing Charges (March 6, 2000), at <http://www.ftc.gov/opa/2000/03/ninewest.htm>.

110. FTC DECISION AND ORDER, at <http://www.ftc.gov/os/2000/03/9west.do.htm>.

111. *Gruen v. Nine West Group Inc.*, No. 99 Civ. 0245, 1999 U.S. Dist. LEXIS 20682 (S.D.N.Y. 1999).

112. *In re Nine West Shoes Antitrust Litigation*, 80 F. Supp. 2d 181 (S.D.N.Y. 2000).

113. Counsel for the proposed class also represented that Nine West was prepared to pay them \$800,000 in attorneys' fees.



violations related to the sale of Nine West shoes during the relevant period.<sup>114</sup> Because of the relatively small amount of money sought and the large number of consumers, cy pres distribution, rather than a de minimis distribution to hundreds of thousands of consumers, appeared to be the logical remedy.<sup>115</sup> The claims stated in the states' complaint were substantially similar to the claims in the private actions and ultimately counsel for the private actions agreed to the cy pres settlement in lieu of further litigation.

*C. This One Is Too Small: Nobody Has Been Enforcing These Antitrust Laws*

Rounding out the panoply of possibilities in the area of antitrust enforcement are the numerous scenarios in which defendants that engaged in illegal activity receive no punishment whatsoever for their conduct. Some unlawful conduct simply will never be detected and other conduct will go unchallenged for failure of proof. But the peculiarities of antitrust enforcement mean that many provable and observable violations will go unchallenged. At the federal level, enforcement priorities change from administration to administration, or with appointment of a new Assistant Attorney General or FTC chair. For ideological reasons, budgetary constraints, and staff workloads, cases may never be brought that would have been a front-burner issue at another time.

Any drop or change in the composition of governmental cases is reflected in the amount and nature of private litigation. The knowledge of the existence of a federal grand jury (or FTC investigation) is virtually all that is required for the filing of a good faith class action price fixing case. Without the criminal investigation and eventual prosecution, private counsel on contingent fee have to make the difficult choice to invest their more limited resources to uncover and document hardcore antitrust violations that have been carefully concealed by the defendants, and confront the harsh possibilities of Rule 11 sanctions.

For cases involving a rule of reason, rather than per se theory of liability, a governmental case is almost a prerequisite to private damage suits since private plaintiffs and counsel will rarely have the

114. *Florida v. Nine West Group*, 00 Civ. 1707, Final Judgment and Consent Decree (Dec. 14, 2000).

115. See *Farmer*, *supra* note 107.

resources or inclination to develop the full market definition, market power, economic, and factual analysis necessary to proceed with such cases. Moreover, the courts have been ruthless in using theories of standing, direct purchasers theory, and antitrust injury to winnow out such claims on procedural rather than substantive grounds.<sup>116</sup> Faced with such obstacles not found in other substantive areas of the law, competent plaintiff counsel will simply prefer to invest their time and resources in per se antitrust violations or other areas of the law where the case has a higher expected return to them and their clients.

It is obviously difficult to discuss or document the cases that are never brought. However, the short answer is that federal governmental enforcement beyond the hardcore price fixing, market division, and market allocation cases is sporadic and entirely dependent on presidential politics and antitrust ideology.

For example, resale price maintenance cases (vertical price fixing), although per se illegal since the beginning of the twentieth century,<sup>117</sup> were simply abandoned by the Reagan administration because of ideological concerns that such practices may enhance efficiency, regardless of their legal status. A handful of federal government cases began to trickle back into the system during the first Bush administration and during the Clinton years, with the current Bush administration not yet returning to this area of antitrust enforcement. Enforcement of this area of the law revived with the states acting in cooperation with the FTC during the Clinton era and has continued through various multistate task forces, regardless of federal involvement.

Antitrust ideology sometimes is far more important than party politics. Neither federal agency has meaningfully enforced the price discrimination provisions of the Robinson-Patman Act for decades. A consensus simply has developed that the Act runs counter to the core procompetitive message of the rest of the antitrust laws, and that while repeal is not politically feasible, enforcement can safely be left to injured private parties who find it worth their while to sue for their own damages.

Ideological swings also appear to be the most powerful explanations for the large monopolization cases as well. The unique political,

116. Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437 (2001) (discussing private enforcement of antitrust laws in light of restrictive Supreme Court and lower court decisions).

117. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).

economic, and high-tech concerns of the Clinton administration begat the government's *Microsoft* case which would have been inconceivable in a prior administration. The current administration's rush to settle the suit on substantially less stringent terms than its predecessor strongly suggests that the suit would not have been brought or brought in a dramatically more limited form. Yet without the government case and the prima facie effect of its victory, few if any of the subsequent private suits would have been brought.

Even in the private cases that are brought, a strong argument exists that a true treble damage remedy is illusory for most plaintiffs. Professor Robert Lande, in a detailed and thoughtful article from 1988, discussed all the factors that reduce the statutory availability of treble damages to something less than even compensatory damages in the real world for the average plaintiff.<sup>118</sup> Lande adjusted the treble damage baseline for such factors as the lack of prejudgment interest, the effects of the statute of limitations, uncompensated attorneys' fees and costs, other litigation costs to plaintiffs such as management time and business disruption, costs to the judicial system in handling antitrust cases, umbrella effects of market power, allocative inefficiency costs of market power, and tax effects.<sup>119</sup> He concludes that the average award is between 43 percent of the actual damages and 1.49 times the actual damages, thus for the most part below actual damages, let alone the supposed treble damage norm.<sup>120</sup> While Professor Lande's calculations are a complex blend of different assumptions and estimates, they strongly indicate that even a successful recovery might not approach the treble damages we assume are the norm.

Lande's project, however, seeks to prove a somewhat different point from this Article. First, Lande specifically eschews a punishment perspective focusing on the familiar deterrence and compensation rationales for treble damages. Second, he seeks to show that antitrust damages systematically "underdeter" and undercompensate in comparison to the statutory treble damage remedy. His work is also based in the realities of the late 1980s, when the current world of multiple enforcers and punishments was just beginning to take shape.

118. Lande, *supra* note 2.

119. *Id.* at 118.

120. *Id.* at 163, 166-67. Lande's conclusions are echoed in an earlier less elaborate evaluation of the punitive and compensatory elements of actual treble damage awards. See Parker, *supra* note 20, at 290-92; Alfred L. Parker, *Treble Damage action—A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483 (1971).

The world has evolved to a place where it is impossible to predict when total punishment will exceed, meet, or even come close to either the treble damage norm or Lande's more pessimistic outcomes. Because of this unpredictability, outright incoherence permeates the antitrust laws.

## V. THE PUNISHMENT GAP

From a punishment perspective, there are too many options to even model the average monetary punishment for an antitrust defendant in relation to the gains enjoyed or the losses caused. As a practical matter the range runs from zero to the multiple in the *Vitamins* litigation, since it is hard to imagine total punishment on a global basis much greater than the facts of that case.

Whether the conduct is detected in a timely fashion, which federal agency brings the case, whether the case is civil or criminal, whether the agency seeks disgorgement, restitution, or injunctive relief, whether there is a final judgment with prima facie effect, whether the states weigh in as plaintiffs as purchasers or as *parens patriae*, whether there are direct purchaser business plaintiffs who sue separately, whether indirect purchasers may bring their actions under state antitrust laws, whether there are significant opt-outs from any of the class actions, and whether defendants essentially buy global peace by including for settlement purposes all states and other potential plaintiffs not yet in the picture are all factors which must be weighed.

The multitude of potential plaintiffs and recoveries does, however, promote regression away from the extremes and toward some middle ground. Only in garden-variety price fixing cases is it nearly certain that all potential plaintiffs will bring actions. Even here, it is only the FTC or the DOJ (and in the real world the DOJ as the exclusive federal criminal enforcer) who will be involved. At the other end of the spectrum, having so many enforcers creates incentives and rewards that suggest it is relatively rare that serious anti-competitive conduct will escape all notice and not be subject to some litigation. Tilting the system slightly toward the high end is the ability of potential plaintiffs to observe a litigation or investigative success and then bring a later (but not time-barred) action of their own. What is most troublesome is the wide ground in the middle, where total monetary punishment ranges from the nominal to the hundreds of millions of dollars without a convincing rationale or a means of predicting the difference.

In *Vitamins*, the full fury of the antitrust laws was unleashed because of the happy coincidence of price fixing being universally condemned by all the parties in the United States and abroad coupled with the incentive to bring enforcement actions. In contrast, cases like *Mylan* only occurred because the Pitofsky-led FTC sought to test the limit of the Commission's restitution powers under section 13(G). Without the will to do so, the total punishment would have been significantly reduced and some of the follow-on cases may never have seen the light of day. *Nine West* was the product of the FTC and the states revitalizing the enforcement of the antitrust laws against vertical price fixing, a practice left unchallenged under the Regan administration. All of these cases represent core violations of the Sherman Act with very little to distinguish them, except dumb luck, in the total punishment meted out at the end of the day.

Hoffman-La Roche, the ringleader in the *Vitamins* cartel, has now plead and allocuted to the full factual predicate charged in the government information for its decade-long price fixing scheme. Since charge bargaining is severely limited under the Federal Sentencing Guidelines, and since sentencing is based on actual conduct, Hoffman's agreed fine of \$500 million suggests actual gain or loss caused of approximately \$250 million for the U.S. market then doubled under the alternative fine statute. Hoffman has paid or will pay approximately an additional \$500 million in civil damages in the class action settlement and to opt-out plaintiffs, over \$100 million to the states, and over \$500 million more in fines to foreign governments. Based solely on harm to the US market Hoffman will have paid in excess of *six times* the harm it caused (or its gain), a rather high price in comparison to the formal availability of treble damages to a successful plaintiff. Roche's total monetary punishment would have been even greater if it had not received a reduction in the fine called for by the Sentencing Guideline for its future cooperation.<sup>121</sup> At least one of its coconspirators, Rhone-Poulenc paid a hefty, but substantially lower, multiple of total punishment than Roche because of the classic prisoner's dilemma effect of its decision to report the conspiracy and cooperate with the government under the corporate amnesty program.

In contrast, *Mylan* paid \$147 million for as close to total global peace as it could muster. The FTC has no statutory means of extract-

121. *United States v. F. Hoffman-La Roche Ltd.*, Crim. No. 99-CR-184-R, Guilty Plea ¶ 11 (filed May 20, 1999).

ing multiple fines or damages from a defendant, but it was successful in pressing its claim for disgorgement, which would be equal to the amount unlawfully gained by the defendant. By agreement, this was divided up between the states' claims for treble damages for direct purchases by the states themselves, and the indirect purchasers' claims brought by natural persons. Even those states which never sued or those which could not have sued under state and federal antitrust law received nominal payments in the name of total settlement and peace. Also separate was the settlement for alleged direct purchases by third-party payors. Both states and private parties also received attorneys' fees and costs.

Even this substantial amount of agreed disgorgement is likely to be on the low side to the extent that the bargaining between the parties over the settlement reflected any discount for the legal risk the FTC bore on appeal for relying on its novel theory of disgorgement and its voluntary decision to share the disgorgement pie with the other plaintiffs. The global settlement also strongly suggests that the total payments were a pragmatic reflection of the total resources Mylan could pay and still remain a solvent, ongoing concern.<sup>122</sup> While Mylan's total liability remains unresolved in the private class actions, it is by no means clear that at the end of the day Mylan's punishment adds up to anywhere near the statutory treble damages, even allowing for a degree of multiple recovery by both direct and indirect purchasers.

Strangely enough, Nine West may well be the only defendant whose punishment approximated the statutory norm. While it agreed to only injunctive relief with the FTC, it also settled its liability to both the states and the private plaintiffs with a single lump-sum settlement. Subject to any discount for litigation risk, this amount does not appear to be subject to other significant discounts. The legal theory and the remedies sought were not novel, the plaintiffs were all well-funded, experienced litigants with no suggestion they were in it just for a quick kill. There was little incentive to settle for much below the treble damage norm, especially with settlement with the FTC dependent on doing the right thing with the other plaintiffs. With the states winning the argument over private counsel for the legal right to represent natural plaintiffs, and private counsel essentially withdrawing from the field, the agreed settlement will be

122. See *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 394 (D.D.C. 2002).

distributed on a *cy pres* basis to women's groups as opposed to small payments or a fluid recovery through the private class action process. While this makes analyzing the question of compensation difficult, it does not affect the punishment value of the settlement, which is the same regardless of how it is distributed.

There are countless permutations on this theme. Some defendants may justifiably feel they have whipsawed into multiple and draconian payments in comparison to similarly situated antitrust violators. Others may walk away nearly scot-free for similar conduct. A multiplicity of actors in the United States, and increasingly around the world, ensures the result of this game is rarely zero, but the final outcomes of the cases work against any consistency or logic in how we punish antitrust violations.

### CONCLUSION

Antitrust long ago diverged from its common law torts roots. It substituted a statutory treble damage remedy and a statutory exception from the American rule for attorneys' fees for the normal rules otherwise applicable in civil litigation. Normal theories of contribution have been explicitly rejected and deductions for settlements paid only occur after, not before trebling. The drafters of these provisions and doctrines believed they were creating a powerful weapon to punish particular types of anticompetitive business behavior. Additional penalties and enforcers have been created or empowered to better enter the fray.

The results in the modern world are not perverse as much as they are random, with certain conduct and defendants punished far in excess of the specified treble damage baseline, while other, similar conduct goes virtually unpunished. The continuing debate over deterrence and compensation has only partially explained these distinctions. It is time for increased attention to traditional notions of punishment and a greater reconnection to the tort world to take their rightful place at the table to guide a return to a coherent theory of antitrust damages.