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Why Antitrust Damage Levels Should Be Raised

By Robert H. Lande*

The conventional wisdom is that current antitrust damage levels are too high, lead to overdeterrence, and should be cut back. Although most agree that threefold damages are fine, at least for cartels,¹ the combination of treble damages to direct purchasers and another treble damages to indirect purchasers² typically is denounced as duplicative, a “mess,”³ or the equivalent of the use of “cluster bombs” on defendants.⁴ This article, however, will assert the opposite. This article will argue that, if the current antitrust damage levels are examined carefully, they do not even total treble damages, and overall are not high enough to deter antitrust violations optimally.

Perhaps this debate can first start with a point of general agreement. It cannot reasonably be disputed that the current antitrust damages system is a confusing, inefficient patchwork.⁵ The current

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¹ Some believe, however, that treble damages should be reserved for *per se* violations. See American Bar Association’s Antitrust Remedies Task Force Legislative Proposal, Discussion Draft (Feb. 2004) [hereinafter ABA Discussion Draft].

² *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) held that only direct purchasers can sue for damages. Many states, however, subsequently passed state “*Illinois Brick* repealer” legislation. See Ronald W. Davis, *Indirect Purchaser Litigation: ARC America’s Chickens Come Home To Roost On The Illinois Brick Wall*, 65 ANTITRUST L.J. 375 (1997).

³ Davis, *supra* note 2, at 395.

⁴ Richard A. Posner, *Antitrust In The New Economy*, 68 ANTITRUST L.J. 935 (2001).

⁵ Professor Spencer Weber Waller termed it “incoherent.” See Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHICAGO-KENT L. REV.

system is so illogical that it is easy to ridicule—indeed, no rational person ever would have designed it from scratch in its current form. So, it is not a surprise that many call for modification of some of the existing damages categories, for consolidation, simplification, and reform.⁶

Nevertheless, this article will show that, if it is examined carefully, the current antitrust “treble” damages remedy really only constitutes approximately single damages. Even the award of “treble” damages to both direct and indirect purchasers only equals double damages. Yet, a multiplier, such as three, is necessary if we are to deter anticompetitive behavior optimally. Far from being duplicative or excessive, the current total should be raised.

I. Crucial Questions

Moreover, there are two crucial questions that should be answered before the current antitrust damages system is changed. First, is there convincing evidence that, overall, the current combination of damage and fine levels is too high, that they constitute effective duplication or lead to overdeterrence?

This article will argue that the answer to this question clearly is “no.” There is no convincing evidence that the aggregate of direct purchaser damages, indirect purchaser damages, and the like produces damage levels so high that they have led to real duplication or overdeterrence.

Of course, lawyers for plaintiffs and defendants can give anecdotes cutting in different directions. Defendants’ lawyers can point to bad cases that received too much money,⁷ while plaintiffs’ lawyers can point to good cases that were dismissed or received far too little money. But, anecdotes from interested parties are not proof. Although I have been searching for more than a decade,⁸ I have never seen anyone analyzing the decisions of neutral finders of fact, including judges and juries, present a systematic pattern of evidence

207, 209 (2003).

⁶ See ABA Discussion Draft, *supra* note 1.

⁷ Many of these anecdotes are true. Surely there have been many antitrust cases where the awarded damages were too high and other cases where no damages whatsoever should have been awarded. See Waller, *supra* note 5, for a discussion of possible examples of each type of case.

⁸ I have been searching for this evidence ever since I started work on an earlier article on damages. See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages*, 54 OHIO STATE L.J. 115, 161-68 (1993).

demonstrating that, overall, the current damage levels either constitute effective duplication or lead to overdeterrence. Moreover, anyone seeking to change the current system should have the burden to show that currently there is a problem and that their solution can help fix this problem. This article will argue that not only has this burden not been met; if anything, the current overall damages level is too low.

There is a second question we also should ask: is there any convincing evidence that any of the reform or simplification ideas currently being proposed would do so without lowering the overall amounts awarded?

It is easy to simplify the existing antitrust damages system. If all we want is a simple, administratively efficient system without any confusion, complexities, duplication, or legal costs, this can be accomplished easily. We should repeal all of the antitrust laws.

Suppose, however, we believe that effective antitrust laws are beneficial for the economy on the whole, and that effective remedies are necessary to deter future offenses optimally. Also assume this article is able to show there is no evidence that the total of the existing damages and fines is duplicative or too large from the perspective of optimal deterrence. Suppose this article even is able to show that the overall total should be raised.

Then the issue becomes much more difficult. The goal then should become to design a damages system that will lead to at least as much deterrence as that provided currently, and at the same time is also more efficient, simpler, or saves administrative costs. If one does not include this deterrence requirement, however, then the ostensible quest for simplification could really just be a cleverly disguised way of reducing overall damage levels.⁹ And, as noted, this article will

⁹ See, for example, the first discussion item tentatively promulgated by the ABA Antitrust Section's Damages Task Force in February 2004. ABA Discussion Draft, *supra* note 1. It would create a federal indirect purchaser cause of action by changing the existing cause of action for direct purchasers into one that allowed for both direct and indirect purchaser suits, in one action, where the total damages paid was threefold. It contains a presumption that the indirect purchasers would obtain the recovery, but the direct purchasers could attempt to overcome this presumption.

If this proposal simply created a new federal damages provision, it would be desirable. A key question, however, is whether it might implicitly preempt existing state *Illinois Brick* repealer legislation. If so, it would have the effect of significantly lowering the overall deterrence offered by the current combination of direct and indirect purchaser laws. It would also be much simpler and more efficient, and mean that indirect purchasers, rather than direct purchasers, would be more likely to recover.

argue that this would be an undesirable outcome. If one wants to design a remedies system that achieves both a high degree of deterrence and simplicity, this is very difficult to do.

We probably are better off with even a complicated and flawed damages system that at least provides a moderate level of deterrence, than with a simpler system that would lead to completely inadequate deterrence. Moreover, if someone does come up with a "reform" or "simplification" proposal that is likely to have the effect of reducing the total damages awarded, we should ameliorate this downward effect.¹⁰ In fact, we should move in the opposite direction.

Under this proposal, all plaintiffs, combined, in states that currently do not have an *Illinois Brick* repealer, would recover the same as they do today in the aggregate. In these states different purchasers would be likely to recover: the indirect purchasers would be more likely to recover, instead of the direct purchasers who recover today. But, the total paid to purchasers in states without *Illinois Brick* repealers would not change.

By contrast, in states like California that currently have effective repealers, the total recovery would decrease dramatically if their laws were preempted. Under the current situation, nominal treble damages go to direct purchasers, and another nominal treble damages go to indirect purchasers. But, under this proposal, all purchasers, together, would only get nominal treble damages. So, for roughly half the states deterrence would diminish by approximately 50%.

Since deterrence would remain the same in roughly half the states, and be harmed by 50% in the other half, the overall effect of this proposal would be to significantly decrease overall deterrence. However, since this article will show in Part II that the existing "treble damages" are really equal only to single damages, and are not nearly large enough for optimal deterrence, this is an undesirable result.

An alternative way to view this is from the perspective of settlements, since most cases in this area settle. Instead of settlements in places like California of, for example, single damages for direct purchasers and another single damages for indirect purchasers, the ABA Discussion Draft would mean that there would only be one settlement, for single damages, which would be likely to go to the indirect purchasers. And, of course, these damages are only nominal, without adjustments for prejudgment interest, etc. Rather than raise the overall payouts to achieve optimal deterrence, this proposal would lower them.

The only ways to be sure that the Discussion Draft would not lead to a suboptimal level of deterrence would be to make absolutely certain that it would not preempt existing state laws, or to amend it in ways that ameliorate its downward effects on deterrence. For example, it should include a provision for prejudgment interest and some of the other proposals in *infra* note 10. As it was proposed, however, this "reform" or "simplification" proposal is likely to actually be a clever way to lower effective overall damage levels.

¹⁰ Beneficial reform provisions, which are likely to lead to more nearly optimal deterrence, include the following:

If this article is able to provide convincing evidence that the existing damages levels are, overall, too low, then we should devise ways to raise the existing damages payouts.¹¹

II. Does Real Duplication or Overdeterrence Exist?

Perhaps the most common criticism of the current system of multiple enforcers and multiple remedies is that it could lead to payouts that are more than three times damages, and that this would constitute duplication and overdeterrence. Many argue that, while treble damages are fine, the current combination of treble damages for direct purchasers, plus another three for indirect purchasers,¹² plus disgorgement, plus the effects of state enforcement actions,¹³ plus

1. Prejudgment interest should be awarded for direct purchasers, indirect purchasers, and in criminal fines.

2. The existing four-year Statute of Limitations should be raised to eight years, the approximate life of the average cartel. *See Lande, supra* note 8, at 130-34.

3. Include a provision that antitrust “damages” include the allocative inefficiency effects of market power, and a presumption that they are $\frac{1}{2}$ or $\frac{1}{4}$ as large as the transfer effects of market power. However, it might be appropriate only to permit State Attorneys General to sue for this damages item.

4. Include a presumption that “umbrella effects” occurred—that prices rose as much for firms in the relevant market that are not members of the cartel as they did for cartel members.

5. Provide that damages in class actions shall be figured on a class-wide basis, with damages awarded in proportion to the ratio of an individual’s purchases or sales to that of the entire class.

6. Every state should enact an effective *Illinois Brick* repealer. States with ineffective *Illinois Brick* repealers should strengthen them.

¹¹ *See* the suggestions described *supra* note 10.

¹² Indeed, in theory treble damages could be paid to several layers of indirect purchasers.

¹³ States are permitted to bring antitrust cases, perhaps due to Federalism concerns and a separation of powers idea, and perhaps for other reasons as well. For example, suppose the federal government, for philosophical reasons, decided to stop suing big businesses for antitrust violations. The states (and private plaintiffs) could help to fill the void, and would provide a counterbalance that would help avoid sharp swings in antitrust policy. Second, the federal enforcers’ judgment might be flawed, and a second opinion can be useful. Third, without state enforcers we would have to increase federal enforcement budgets commensurately, and this

criminal fines of double the gain or loss, leads to overall damages of sixfold, eightfold, or tenfold.¹⁴

However, the duplication argument is only a theoretical construct that has never occurred in the real world. I am not aware of even a single case where a cartel's total payouts have ever exceeded three times the damages involved—if these damages are figured properly. This is true because, if one examines antitrust's so-called "treble" damages remedy carefully, from the perspective of optimal deterrence, one will find that it is really at most only single damages.¹⁵ The "threefold damages" that the antitrust world takes for granted is a myth.

The starting place of a fair discussion of the correct overall level of antitrust damage awards should be the analysis promulgated by Professor William Landes.¹⁶ Landes convincingly showed that to achieve optimal¹⁷ deterrence¹⁸ the damages from an antitrust

might not occur. If federal budgets were not increased appropriately, antitrust enforcement would suffer significantly. Fourth, state enforcers sometimes might be better attuned to local facts than the federal enforcers. Fifth, from an organizational perspective, it is desirable to have an enforcement unit specifically protecting the consumers and economy of a particular state. Otherwise, these concerns could just get lost despite good intentions by the federal enforcers. For a more extended discussion of the benefits and costs of state antitrust enforcement see Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047 (1990).

¹⁴ See, e.g., Michael L. Denger, *A New Approach To Cartel Enforcement Remedies Is Needed*, ABA Spring Antitrust Meeting, at 15 (Apr. 24-26, 2002).

¹⁵ See Lande, *supra* note 8. This is just an approximation. This article calculated that antitrust's "treble" damages remedy probably was actually between 48% and 109% of actual damages. These figures also are just estimates. *Id.* at 160. See also Robert Pitofsky, *Antitrust At The Turn Of The Twenty-First Century: The Matter of Remedies*, 91 GEO L.J. 169, 171 (2002) ("Studies show that treble damages really amount approximately to single damages in most circumstances."). See also Joseph F. Brodley, *Antitrust Standing In Private Merger Cases: Reconciling Private Incentives And Public Enforcement Goals*, 94 MICH. L. REV. 1, n.91 (1995) ("In fact, treble damages turn out to be closer to single damages when current losses, litigation costs, and future recovery are discounted to present value."). See also *Carlson & Erickson Builders v. Lampert Yards*, 190 Wis. 2d 650, 667 (1995). For discussions of the deterrence and compensation nature of treble damages, see, e.g., Lande, *supra* note 8 (positing that "'treble damages' actually awarded are probably at most as large as the damages caused by the violation").

¹⁶ William M. Landes, *Optimal Sanctions For Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 (1983).

¹⁷ Professor Landes carefully designed his approach so that it would not be too strict or too lenient. His goal was not to deter all violations. He only wanted to

violation should be equal to the violation's "net harm to others," multiplied by the probability of detection and proof.¹⁹ This framework is almost universally accepted, even by those who are not of a Chicago School orientation.²⁰

The multiplier used in calculating antitrust damages should be larger than one because not all violations are detected and proven.²¹ From the perspective of optimal deterrence, if damages and fines only total actual damages, firms would be undeterred from committing violations. For this reason most agree that there should be some kind of multiplier. If we only catch and successfully prosecute 1/3 of all cartels, for example, then threefold damages are appropriate to achieve optimal deterrence.²² Of course, no one knows whether we catch more or less than 1/3 of all antitrust violations.²³ But, since a

deter violations when so doing would be efficient, and he wanted to permit efficient breaches of the antitrust laws. *Id.*

¹⁸ Professor Landes did not analyze compensation of victims. Even if we were concerned with compensation, however, it would make little difference in the outcome. *See* Lande, *supra* note 8, at 161-68. Moreover, there is widespread agreement over the need optimally to deter future violations, while the compensation argument is more controversial.

Currently, direct purchasers are compensated even if they pass some or most of the overcharges to their own customers. *See* *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). Indirect purchasers, however, only are compensated if their state has an effective *Illinois Brick* repealer.

¹⁹ *See* Landes, *supra* note 16, at 666-68.

²⁰ *See* Lande, *supra* note 8 and accompanying text.

²¹ "Multiplication is essential to create optimal incentives for would-be violators when unlawful acts are not certain to be prosecuted successfully. Indeed, some multiplication is necessary even when most of the liability-creating acts are open and notorious. The defendants may be able to conceal facts that are essential to liability." Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. ECON. 445, 455 (1985).

²² If a cartel overcharges by \$1.00, but there is less than a one-in-three chance that it will be caught and convicted, then it would be rational for the cartel to attempt to break the law unless the penalty is \$3.00 or more. A full analysis of the issue, however, becomes very complicated. *See* Landes, *supra* note 16.

²³ Some might argue that there currently is overdeterrence—that today almost every anticompetitive cartel is caught and successfully prosecuted, and the current damage actions mean that innocent companies are being harassed and almost blackmailed by unscrupulous plaintiffs. For an insightful discussion of this issue, *see* Jonathan B. Baker, *New Horizons in Cartel Detection*, 69 GEO. WASH. L. REV. 824 (2001). If this were true, then a lower damages level would be appropriate.

The continued high number of Department of Justice ("DOJ") grand juries

multiplier of more than 1 is appropriate, and no one can demonstrate that antitrust should instead use a multiplier of 2 or 4, we usually assume, without much evidence,²⁴ that only 1/3 of all cartels are

indicates, however, that a lot of cartels still exist. As of February 2004, the DOJ had approximately 100 pending grand jury investigations, 50 of which involved suspected international cartel activity. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, STATUS REPORT: AN OVERVIEW OF RECENT DEVELOPMENTS IN THE ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM (2004), at <http://www.usdoj.gov/atr/public/guidelines/202531.htm> (last visited Apr. 27, 2004). The DOJ and a large number of grand juries clearly believe there are a lot of cartels that still exist. Between 1993 and 2002, the DOJ opened from 19 to 51 grand jury investigations per year, most of which resulted in convictions. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, WORKLOAD STATISTICS: FY 1991-2002, at <http://www.usdoj.gov/atr/public/12848.htm> (last visited Apr. 27, 2004). The following table shows the DOJ's success in prosecuting antitrust violations:

Total Criminal Cases	1993	'94	'95	'96	'97	'98	'99	2000	'01	'02
Filed	84	57	60	42	38	62	57	63	44	33
Won	73	51	65	38	40	64	48	52	38	37
Lost	3	4	2	5	1	1	2	-	2	1
Pending	-	-	-	-	-	17	24	35	39	34
Appeal Decisions	7	9	7	6	4	6	-	-	5	1

Id.

If there had been little or no effective price fixing during this period, the DOJ has been fooling a lot of grand juries, judges, and juries. During the last four years, over 80 years of imprisonment have been imposed on antitrust offenders, with more than 30 defendants receiving jail sentences of one year or longer. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, STATUS REPORT: AN OVERVIEW OF RECENT DEVELOPMENTS IN THE ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM (2004), at <http://www.usdoj.gov/atr/public/guidelines/202531.htm> (last visited Apr. 27, 2004). In 2002 defendants in cases prosecuted by the Antitrust Division were sentenced to a record number of jail days, more than 10,000 in all. *Id.* In 2003, the average jail sentence reached a record high of 21 months. *Id.*

²⁴ In 1986 the Assistant Attorney General for Antitrust, Douglas Ginsburg, estimated that the enforcers catch less than 10% of all cartels. See United States Sentencing Commission: Unpublished Public Hearings, 1986 volume, at 15 (July 15, 1986 Hearing). If he is correct, damages for cartels should be tenfold! However, the percentage of cartels that are caught and proven probably is much higher today. See Gary R. Spratling, *Detection and Deterrence*, 69 GEO. WASH. L. REV. 798, 817-23 (2001). There is, however, no evidence that it exceeds 1/3, so there is no

detected and proven, and therefore, a multiplier of 3 is appropriate.²⁵ Optimal damages therefore are assumed to be equal to the net harm to others times 3.

This, of course, leads to the question—what are the “net harms to others” from, for example, a cartel? These harms include the wealth transferred from consumers to the cartel caused by market power—which is, of course, the measure of damages in treble damages actions. But many other factors should also be included.

First, damages should be adjusted for the time value of money. There is extensive data which suggests that the average cartel probably lasts 7-8 years, with an additional 4 plus year lag before judgment.²⁶ Taking this factor into account, by itself, probably means that so-called “treble” damages are really only approximately double damages.²⁷

The allocative inefficiency harms from market power—the deadweight loss welfare triangle²⁸—are a second “net harm to others”

reason to believe that the treble damages remedy should be lowered. See Lande, *supra* note 8, at 115 n.1.

²⁵ Few quarrel with three as the multiplier for cartel cases. Some would, however, lower the multiplier for rule of reason cases. See ABA Discussion Draft, *supra* note 1.

²⁶ See Lande, *supra* note 8, at 130-34.

²⁷ *Id.* at 134-36. These calculations showed that for 1972-1991, a period of relatively high inflation, this factor alone meant that “treble damages” were really only between 1.65 and 1.25 times actual damages. However, today’s lower interest rates would produce a lower adjustment.

²⁸ The reason why monopoly power causes a suboptimal use of societal resources is relatively straightforward:

To raise prices a monopoly reduces output from the competitive level. The goods no longer sold are worth more to would-be purchasers than they would cost society to produce. This foregone production of goods worth more than their cost is pure social loss and constitutes the “allocative inefficiency” of monopoly. For example, suppose that widgets cost \$1.00 in a competitive market (their cost of production plus a competitive profit). Suppose a monopolist would sell them for \$2.00. A potential purchaser who would have been willing to pay up to \$1.50 will not purchase at the \$2.00 level. Because a competitive market would have sold the widgets for less than they were worth to him, the monopolist’s reduced production has decreased the consumer’s satisfaction without producing any countervailing benefits for anyone. This pure loss is termed “allocative inefficiency.”

Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 433-34 n.17 (1988). See also E. MANSFIELD,

from cartels.²⁹ Yet, they apparently have never been awarded in an antitrust case.³⁰ This omission is significant. To oversimplify, Judge Frank Easterbrook made a number of standard assumptions and calculated that, due to the omission from damage awards of this factor alone, “[t]reble damages’ are really [only] double the starting point of overcharge plus allocative loss. . . .”³¹

Third, the umbrella effects of market power are another virtually unawarded damage from market power.³² For example, the Organization of Petroleum Exporting Countries (“OPEC”) never produced even 70% of the free world’s supply of oil.³³ Yet, when

MICROECONOMICS: THEORY AND APPLICATIONS 277-92 (4th ed. 1982) (providing an extended discussion and formal proof that monopoly pricing creates allocative inefficiency).

²⁹ See Lande, *supra* note 8, at 119-21. “[I]f the measure of liability is the excess of the monopoly price over the competitor price, times the number of units sold, it is necessary to include some multiplier in order to bring the allocative welfare costs of the violation home to the violator. Extracting the overcharge is not enough; the penalty must induce the putative offender to compare the allocative loss against any gains in productive efficiency, and that occurs when the sanction includes the full measure of the allocative loss.” Easterbrook, *supra* note 21, at 455.

³⁰ See David C. Hjelmfelt & Channing D. Strother, Jr., *Antitrust Damages For Consumer Welfare Loss*, 39 CLEV. ST. L. REV. 505 (1991). I am unaware of either a more recent article on the subject or any case where plaintiff has received damages for the allocative inefficiency harms of market power.

³¹ Easterbrook, *supra* note 21, at 455. Judge Easterbrook’s standard, yet simplified assumptions might, however, have resulted in too large an estimate. As he notes:

In the simple case of linear demand and supply curves, the allocative loss is half the monopoly overcharge, so a multiplier of 1.5 is in order. These curves doubtless are not linear, but legal rules must be derived from empirical guesses rather than exhaustive investigation. The multiplier of 1.5 thus may be a rough approximation of the lower bound. It takes care of the fact the nonbuyers do not recover damages. A further multiplier is necessary to handle the improbability of proving liability. As uncertainty and the difficulty of prosecution increase, so should the multiplier. From the violator’s perspective, “treble” damages really are double the starting point of overcharge plus allocative loss, and thus trebling the overcharge is appropriate when the change of finding and successfully prosecuting a violation is one in two.

Id. at 454-55.

³² See Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW para. 337.3 (Supp. 1992) for a discussion.

³³ See MOHAMMED E AHRARI, OPEC: THE FAILING GIANT 203 (1986).

OPEC raised prices, prices also increased for the oil sold by non-cartel members.³⁴ Moreover, the price of fuels that were partial substitutes for oil, such as coal, uranium, and natural gas, also rose.³⁵ The so-called “treble damages” multiplier should be adjusted for this factor as well to account for the net harms to others from anticompetitive activity.³⁶

Moreover, there are five more adjustments to the so-called “treble damages” multiplier that should be made to calculate the net harms to others from an antitrust violation.³⁷ These eight adjustments, combined, show that even those cases that supposedly award “treble damages” probably only really award damages equal to, at most, one times the actual harms caused by the violation.³⁸ As noted, however, from the perspective of optimal deterrence damages really should be at the threefold level. For this reason this article is titled, “Why Antitrust Damage Levels Should Be Raised.”

III. Other Considerations

Most damage cases are settled by negotiation, with the plaintiffs, of course, asking for “treble damages.”³⁹ However, the analysis in Part II demonstrates that the starting point for these negotiations is only 1/3 as high as it should be. Instead of starting at real treble damages and negotiating down to, for example, single damages, the parties have actually been starting at roughly single damages and then negotiating down to perhaps only 1/3 of the violation’s true damages. For this reason most settlements lead to inadequate deterrence.

³⁴ *Id.*

³⁵ See GEORGE L. PERRY, *THE UNITED STATES, IN HIGHER OIL PRICES AND THE WORLD ECONOMY: THE ADJUSTMENT PROBLEM* 102 (Edward R. Fried & Charles L. Schultze eds., 1975).

³⁶ It probably would be practical, however, only to account for allocative inefficiency occurring within the relevant market that is the subject of the antitrust violation.

³⁷ The omitted five factors are: (1) effects of the Statute of Limitations; (2) uncompensated plaintiffs’ attorneys’ fees and costs; (3) the uncompensated value of plaintiffs time spent pursuing the case; (4) the costs of the judicial system; and (5) tax effects. See Lande, *supra* note 8, at 129-158.

³⁸ *Id.* at 158-60.

³⁹ Very few antitrust damages actions result in a verdict. See John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices: Implications For Reform Of The Sentencing Guidelines* (2004) (draft article, on file with the author).

Some antitrust violations also result in criminal fines.⁴⁰ If these were added to the totals from the private damages actions, the actual overall level of payouts would rise dramatically,⁴¹ but would still rarely reach the true threefold level.⁴² The criminal penalties imposed almost always utilize the statutory maximum of “twice the gross gain or twice the gross loss,”⁴³ which the DOJ almost always approximates as 20% of the defendant’s affected sales instead of double the actual gain or loss.⁴⁴ However, the supposed standard of 20% of defendant’s affected sales often is negotiated downwards substantially,⁴⁵ and is not adjusted to present value.⁴⁶ Nevertheless, including criminal fines of double the actual gains or losses could raise the effective deterrent on hard core cartels from a nominal three or six (if damages to both direct and indirect purchasers were awarded) up to as much as a nominal eightfold damages.⁴⁷ This

⁴⁰ See generally Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693 (2001).

⁴¹ In addition, many *per se* and rule of reason antitrust cases do not lead to criminal fines. This analysis, however, ignores the deterrent effects of jail sentences, which can sometimes be significant.

⁴² This conclusion only considers the costs and benefits to the cartel that occur within the United States. International considerations would complicate the analysis. There is no foreign regime with damage and fine provisions as tough as those of the United States. Moreover, if European fines were considered as a cost to the cartel, then in fairness we also should include the overcharges to European consumers. Doing this would make the total underdeterrence even greater for international cartels. See Brief of Amici Curiae of Professors Darren Bush, et al., *Empagran, S.A. v. F. Hoffman-LaRoche, Ltd.* (Mar. 15, 2004) (No. 03-724), available at 2004 WL 533933.

⁴³ 18 U.S.C. § 3571(d) (1994). Bruce H. Kobayashi, *Antitrust, Agency and Amnesty*, 69 GEO. WASH. L. REV. 715, 724 (2001).

⁴⁴ Kobayashi, *supra* note 43, at 720-721.

⁴⁵ *Id.* at 724-25.

⁴⁶ *Id.* at 722-28. See also 18 U.S.C. § 3571(d); Spratling, *supra* note 24, at 803-08. See generally Baker, *supra* note 40.

⁴⁷ One even could ask why we do not just use criminal sanctions and other federal prosecutions. This also brings up the issue of the extent to which we trust “big brother” in Washington to take care of us. The DOJ’s dramatic shift in the *Microsoft* case under the Bush administration to a stance that was far less aggressive illustrates how political antitrust prosecutions sometimes can be. Moreover, the Clinton administration initiated the programs that are leading to huge fines against large international companies. See Baker, *supra* note 40, at 700-01. Who can predict what future administrations will do? In addition, criminal antitrust violations must, of course, be proven to a much more stringent standard.

figure should then be adjusted downward by the factors discussed earlier, however, which would bring the true total down to approximately treble damages.

Considering the necessary adjustments, however, I have never heard of even a single example of a cartel really paying more than threefold damages and fines in total.⁴⁸ Moreover, I have never even heard of a single example of a cartel paying even true treble damages. I challenge the reader to produce even a single real world example of the sixfold or eightfold damages of lore! But, the catch is that a neutral party—a judge, a jury, or an administrative agency—should be the one to conclude that the damages were actually sextuple or octuple. Defense lawyers almost always assert that their clients never raised prices, so even a \$1 settlement would constitute an infinite ratio of damages to actual injury.⁴⁹ But plaintiffs would, of course,

We want anticompetitive actions deterred optimally even if we are not sure enough to put someone in jail.

⁴⁸ Even the cartels that have paid the most in history—the Vitamin cartels—have paid less than one times their overcharges in damages and fines total, and this does not even adjust for lack of prejudgment interest. *See* Brief of Amici Curiae of Professors Darren Bush, et al. at 4, *Empagran, S.A. v. F. Hoffman-LaRoche, Ltd.* (Mar. 15, 2004) (No. 03-724) (“This research demonstrates that the international vitamin cartel generated the largest total of antitrust fines and penalties in history, which are calculated to be between \$4.4 and \$5.6 billion. But the cartel’s monopoly profits in all areas of the world were \$9 to \$13 billion.”), *available at* 2004 WL 533933.

Not surprisingly, others disagree with this conclusion. Professor Waller calculated that for the total of damages and fines, for both the United States and abroad, “the total ratio of punishment to harm begins to approach seven to one. Even adjusted for the lack of prejudgment interest [and the other factors noted in Lande, *supra* note 8]. . . one is likely to end with a ratio of substantially higher than three to one.” Waller, *supra* note 5, at 221-25. The amicus brief, however, used more recent information.

Defendants no doubt would assert that still a different ratio was appropriate. But, the crucial point is that no judge, jury, or other neutral fact finder has ever found facts that support the assertion that the total payouts in the vitamins cartels exceeded three times its damages.

⁴⁹ Under this view many or most private cases are rent-seeking blackmail involving greedy, unscrupulous plaintiff lawyers. Surely this does occur, and many people can give examples that, in their opinion, qualify as “legalized blackmail.” Although judges are supposed to prevent this from occurring, they often lack the resources or expertise to identify these situations. Anecdotes from non-neutral parties, however, are not proof of a pattern.

Out of fairness, moreover, a counter-anecdote might be instructive. The NASDAQ class action litigation settled for \$1.027 billion, plus interest, which

make very different assertions. Respectfully, defendants (like plaintiffs) are not neutral sources.⁵⁰

This same challenge has been issued in many public fora to many defense lawyers over the years, but none has ever been able to name even one real case involving actual damage levels that exceeded the threefold level for a cartel or monopoly. Yet, only a pattern of such evidence might justify damages reform that lowered the overall levels of antitrust damages.

Instead, the following scenario is more typical. Assuming that plaintiff can get the class certified, defendants might negotiate a settlement with direct purchasers of, say, nominal single damages. They might also negotiate a settlement with indirect purchasers (from many of the 25 or so states that permit indirect purchaser suits) that

was distributed to more than a million class members. According to plaintiffs' attorney, this represented roughly single damages. The total of attorneys' fees, litigation expenses, class notice costs, and settlement administration expenses was \$131 million. Payments to victims totaled \$896 million in cash, not coupons or discounts. This was 87% of the total settlement. Atypically, this was a case where the private plaintiffs took the lead and the government followed. There would have been no deterrence, no compensation, and no beneficial future effects on the market, if not for the actions of the plaintiffs and their lawyers. See Arthur M. Kaplan, *Antitrust As A Public-Private Partnership: A Case Study of the NASDAQ Litigation*, 52 CASE W. RES. L. REV. 111, 129 (2001).

For an overview of "numerous scenarios in which defendants that engaged in illegal activity receive no punishment whatsoever for their conduct" see Waller, *supra* note 5, at 230-33.

⁵⁰ How might some respond to my challenge to provide even a single cartel—let alone a pattern of cases—where the total effective overall payouts have exceeded three times the damages caused by the cartel? They might say the following, which the author has heard in a variety of forms from defendant counsel on many occasions: "My clients did not try to fix prices, and even if they tried, they never succeeded, and at least not in an effective way. The cartel failed to affect price levels because effective collusion is so difficult in our industry. I have an economist who will so testify (in fact, I have several). It is true that we settled the case for millions or even hundreds of millions of dollars, but we did this just to avoid a crazy judge and/or jury. Therefore, in my case the real, effective multiplier was much more than three. In fact, it was infinity because, as I already told you, we did not affect price levels at all."

There is, of course, a crucial problem with this argument. These are only the opinions of defense counsel, not of judges or juries. Respectfully, we cannot just take their word for their assertions. This is especially true when their clients were sent to jail for price fixing. Moreover, we know that some of their clients keep trying to fix prices, risking significant jail terms, fines, and private damages actions. Are these otherwise rational business people crazy? Or is collusion often profitable?

aggregate to no more than $\frac{1}{2}$ of actual nationwide damages. To this should be added the criminal fines that, for a cartel, often are negotiated down to 1 or $1\frac{1}{2}$ times the supposed damages.⁵¹ These appear to total roughly treble damages for the cartel: $1 \& \frac{1}{2} \& (1 \text{ or } 1\frac{1}{2}) =$ roughly 3. However, after adjustments are made for lack of prejudgment interest and the other factors described earlier, the effective total is likely to be much less than treble damages. Indeed, it certainly is not sixfold or eightfold, and probably only is single damages.

Thus, the “duplication” or “overdeterrence” argument is only theoretical. No proponent of antitrust damages “reform” has ever cited a real world example. *A fortiori*, there is no reason to think that a pattern of such cases exists. However, true treble damages, even for rule of reason cases,⁵² should be our goal. Accordingly, this article is titled, “Why Antitrust Damage Levels Should Be Raised.”

⁵¹ See sources cited *supra* notes 23, 24, and 46 and accompanying text.

⁵² It has sometimes been proposed that damages should be detrebled for rule of reason violations. See, e.g., ABA Discussion Draft, *supra* note 1. Such a regime, however, would lead to less deterrence than currently exists. It would also be more complicated and lead to less business certainty in light of the current uncertain line between *per se* and rule of reason antitrust violations.

The rationale behind this proposal might be the idea that *per se* violations are much more likely to be anticompetitive than rule of reason cases, and that overdeterrence is much less of a serious risk for *per se* cases. See generally Baker, *supra* note 23. This surely is true. However, if rule of reason situations lead to antitrust violations and they also cause harms in addition to their transfer effects—they are likely to cause allocative inefficiency and umbrella effects, they should be adjusted to present value, etc. So, a multiplier is still appropriate for rule of reason situations.

The multiplier of three is used, presumably, because antitrust violations frequently are hard to detect and prove to be anticompetitive. Rule of reason cases on average probably are easier to detect, but they are much, much harder to prove than *per se* cases. There is therefore no reason why the same overall multiplier should not be used.

One could even make a respectable argument that treble damages are more important in rule of reason cases. Treble damages probably were adopted in part to provide an incentive for private litigants to find and prove violations. Lande, *supra* note 8, at 122-29. Rule of reason cases are tremendously risky, protracted, and expensive. Abolishing treble damages in rule of reason cases could effectively destroy rule of reason private antitrust enforcement. The number of monopolization cases, vertical cases, etc. could decrease tremendously.

Moreover, treble damages lead to greater attention by firms to the possible antitrust consequences of their actions. This leads to fewer violations. Even if “treble damages,” when examined properly, are really single damages, if a firm

IV. Conclusions

Most of the antitrust community concedes that damages should be trebled to achieve optimal deterrence, but then laments that the combination of threefold damages to direct purchasers and another treble damages to indirect purchasers is excessive. This conclusion, however, is based upon a myth. Antitrust's so-called "treble" damages are really only single damages. Even if a case actually yielded "treble" damage payouts to both direct and indirect purchasers, when viewed correctly this would be the equivalent of overall payouts that did not reach the threefold level.

This article is not asserting that the current antitrust damages system is perfect or even that it is logical. Nor is this article defending every antitrust verdict in every individual case; surely, many are unjustified or excessive. This article started, moreover, by admitting that the current system is inefficient. The antitrust community should, of course, attempt to devise ways to make it simpler, more efficient, and more equitable. But, it must also make sure that the quest for "reform" is not a clever subterfuge or marketing device for a plan to lower the overall damages levels.

In the name of "reform," we should raise the overall antitrust damage levels, not lower them. In reality, today the total damages plus fines paid by cartels and monopolies never exceed three. More often, the real effective total is only singlefold damages or less. In light of the fact that the current damages starting points are too low, the burden should be on those who propose reforms to demonstrate that their proposals would not cut back the overall award levels. Damage reform proponents should first have to demonstrate that their proposal will not lower the overall level of damages awarded. Only then could their proposal be considered an honest simplification or efficiency proposal.

The current illogical and inefficient system of damages should

thinks they might have to pay treble damages, this could deter them from engaging in anticompetitive conduct. Single damages combined with an unknown and uncertain, but significantly less than 100% probability of detection and litigation would provide a positive incentive to violate the law.

Moreover, criminal penalties are irrelevant in rule of reason cases, so the private payouts have to supply all the necessary deterrence. In *per se* cases, by contrast, some of the optimal deterrence will be supplied by the criminal penalties.

Instead of lowering damages for rule of reason cases, we should keep damages at three for rule of reason cases, and raise the levels for *per se* cases—so that damage awards in *per se* cases truly are trebled. *See supra* note 10 and accompanying text (providing suggestions on how this could be accomplished).

of course be reformed. But, we also should be sure not to lower its overall levels. In fact, if we are truly interested in deterring antitrust violations optimally, we should raise them.
