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## Antitrust Treble-Damage Actions: Do They Work?

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For years courts have joined antitrust attorneys in espousing the importance of treble-damage actions for achieving adequate antitrust enforcement and for compensating victims of antitrust violations.<sup>1</sup> Their assertions, however, lack empirical support. No study has yet verified the deterrent and compensatory effects so freely attributed to treble-damage actions brought under section 4 of the Clayton Act<sup>2</sup> or compared their effectiveness to that of other means that might be used to enforce the antitrust laws. The limited evidence permitting an inference that treble-damage actions have an impact on anti-

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1. See, e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968); *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317-18 (1965); *Radovich v. National Football League*, 352 U.S. 445, 453-54, *rehearing denied*, 353 U.S. 931 (1957); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751-53 (1947); Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5, 8 (1959); Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958); cf. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 567-68 (1951). But see Statement of William R. Jentes, Twentieth Annual Spring Meeting of the Antitrust Law Section of the American Bar Association, Apr. 13, 1972 (asserting that effective antitrust policy cannot be achieved by the use of treble-damage actions and that it is *unjust* to allocate such actions to the Department of Justice and the Federal Trade Commission).

2. 15 U.S.C. § 15 (1964). The statute provides:

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

trust activity is too ambiguous to be useful. For example, clients frequently seek the advice of antitrust attorneys before acting, but the advice is frequently outweighed by other considerations or simply ignored.<sup>3</sup> Business executives regularly voice their fear of the treble-damage spectre,<sup>4</sup> but self-serving statements have little probative value. Few antitrust actions are instituted,<sup>5</sup> but that may reflect detection problems rather than a paucity of violations. Past paeans to the importance of treble-damage actions as a tool of antitrust enforcement thus may reflect only a belief that without them antitrust enforcement would be token, since criminal penalties for antitrust violations are relatively minor<sup>6</sup> and the Department of Justice files only about 40 cases each year.<sup>7</sup> Whatever the reason for the faith placed in treble-damage actions as a deterrent and compensatory mechanism, the fact is that adequate empirical evidence to justify or dispel such faith is presently lacking.

This empirical inadequacy derives from the fact that deterrence studies are difficult, if not impossible, to perform with satisfactory scientific accuracy.<sup>8</sup> The difficulties would be particularly acute in an empirical study of the deterrent force of antitrust treble-damage actions for two reasons. The number of undetected violations is unknown, and the frequency with which the same alleged violations are attacked in both private actions and criminal or civil antitrust suits instituted by the Department of Justice<sup>9</sup> would prevent the investigator from satisfactorily deter-

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3. The classic example was reported in an excellent description of the conspiracy among manufacturers of plumbing fixtures published by *Fortune* magazine in 1969. See *How Judgment Came for the Plumbing Conspirators*, *FORTUNE*, Dec. 1969, at 96. Executives of several companies met on various occasions, ostensibly for the sole purpose of representing their companies at meetings of the Plumbing Fixture Manufacturers Association. After going through the ritualistic formal meetings with their attorney present, they held secret rump sessions to discuss a detailed price-fixing scheme which lasted for several years. The conspiracy was discovered, and three individuals and three corporations were convicted of criminal violations of the antitrust laws by jury. Others pled *nolo contendere*.

4. See, e.g., *The Wall Street Journal*, Jan. 18, 1972, at 27, col. 3.

5. The Department of Justice instituted fewer than 20 antitrust cases in an average year between 1890 and 1970; and private plaintiffs were instituting fewer than 300 cases per year until 1965. See Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 366, 371 (1970). Even the latter figure is misleadingly high, since many plaintiffs may file separate actions based upon the same alleged violation by the same defendant.

6. Criminal penalties, it may be argued, are never "minor"; but relative to the criminal penalties for other illegal acts, the penalties for antitrust violations are small. Violation of the Sherman Act carries with it a maximum possible punishment of a \$50,000 fine and one year imprisonment. See 15 U.S.C. §§ 1-3 (1964).

7. See Posner, *supra* note 5, at 366.

8. See Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L.C. & P.S. 176, 180-81 (1952); cf. Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421 (1969).

9. The dual threats of criminal sanctions and civil suits have co-existed throughout the life of the antitrust laws, as both were contained in the original Sher-

mining the fraction of deterrent force contributed by private actions alone. But because treble-damage actions consume enormous amounts of scarce judicial and professional resources, and because effective antitrust enforcement is considered important to the smooth functioning of a competitive economy, some attempt should be made to determine whether such actions are performing their assigned tasks.

This Article constitutes an effort to begin the analysis that has long been neglected. Because of the foregoing limitations, the effort is necessarily speculative. I cannot, and do not pretend to, prove empirically that treble-damage actions are more or less effective than other private suits in achieving their respective purposes. Instead, my approach is to determine the factors that most likely comprise the deterrent force in treble-damage actions, to consider what factors might presently be undermining the deterrent and compensatory goals, and to examine alternatives that might avoid such weaknesses without introducing comparable ones.

## I

### THE TREBLE-DAMAGE ACTION AS A DETERRENT

Deterrence theory holds that the threat of punishment can dissuade potential criminals from engaging in criminal activity.<sup>10</sup> Its validity depends upon the extent to which men act as rational beings who, when selecting a course of action, engage in cost-benefit analysis; that is, it supposes that before acting, men consider on the one hand the possible benefits of criminal activity and the likelihood of success, and on the other hand the possible penalties and the likelihood of evading detection, prosecution, and punishment. Even if potential violators do make such calculations, when the potential benefits—discounted by the risk of total or partial failure—exceed the potential costs—discounted by the possibility of evading punishment—the undesirable conduct will not be prevented. Therefore, a determination of the deterrent force of treble-damage actions brought under section 4 of the Clayton Act requires an examination of the relevant potential costs, benefits, and risks a potential antitrust violator must consider.

#### A. *The Costs of Violating the Antitrust Laws*

Criminal penalties aside, the most obvious potential cost arising

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man Act. See Sherman Act § 7, 26 Stat. 209 (1890), as amended 15 U.S.C. § 15 (1964) (private actions); Sherman Act § 9, 15 U.S.C. § 1 (1964) (criminal actions). Furthermore, "The obvious purpose of the [damages] section was not only to provide redress for private wrongs but also to build into the act the feature of self-enforcement that had been typical in cases of restraint of trade at common law." H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 225 (1955).

10. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 11 (1968).

from an antitrust violation is the threat of having to pay treble damages. A prolonged antitrust violation in a national market may cost its victims millions of dollars.<sup>11</sup> If three times that amount were awarded as damages in a private action, the defendants could be driven into bankruptcy. Other potential costs include burdens of litigation—for example, attorneys' fees and time spent by employees in depositions—embarrassment due to public exposure, loss of business, delays in capital transactions, loss of influence in the business community, or loss of a job. Thus, even if the sum assessed as damages or paid in settlement were trivial, the circumstances attending the process leading to such a payment could comprise a substantial deterrent force.

Several considerations, however, tend to mitigate the deterrent force by reducing the potential cost and the risk that any significant penalty will be imposed.<sup>12</sup> Of the cost reductions, the largest is effected by section 162(g) of the Internal Revenue Code, which permits corporate defendants in private antitrust suits to deduct as a business expense the full amount of any settlement or judgment as long as the private suit was not preceded by a conviction or by a plea of guilty or *nolo contendere* in a criminal action based upon the same facts.<sup>13</sup> The deduction reduces the net penalty to approximately one-half the amount of the treble-damage award.<sup>14</sup> One-third of any payments made pursuant to a private action is deductible even when a preceding criminal prosecution results in conviction.

Of course, similar deductions are permitted for payments made pursuant to judgment or settlement in civil actions arising out of other illegal business activity. But most other conduct considered so undesirable as to warrant its being made criminal is zealously detected and vigorously prosecuted; deterrence is not left to private efforts. For example, criminal prosecutions, not only private suits for restitution, are relied on to deter fraud and embezzlement. In contrast,

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11. See, e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (damages trebled to \$4,239,609 awarded to a single plaintiff); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed per stipulation sub nom.*, *Wade v. Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962) (treble damages of \$4,400,000); *Trans World Airlines, Inc. v. Hughes*, 308 F. Supp. 679 (S.D.N.Y. 1969), *aff'd*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973) (treble damages of \$137,611,435.95 awarded to a single plaintiff).

12. See Parker, *Treble Damage Actions—A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483 (1971). Economist Parker discusses each of the three cost-reducing factors treated in this Article.

13. See INT. REV. CODE of 1954, § 162(g).

14. Because the rate at which corporate income is taxed is generally 48%, a deduction of \$1.00 from taxable income reduces the expense represented by that deduction to 52¢ or by approximately one-half.

criminal penalties are rarely imposed for antitrust violations,<sup>15</sup> thus placing substantial responsibility for deterrence on private litigation. Both the dearth of criminal prosecutions and the automatic trebling of damages suggest that in antitrust the private suit is the principal tool for both compensatory and deterrent purposes. As a result, the mitigation of damages engendered by the tax laws has a special impact on the cost of violating the antitrust laws.

The exclusion of interest from antitrust damage computations also reduces the potential cost of a violation. Courts have excluded both interest and an adjustment for inflation by interpreting the Clayton Act to allow recovery only of damages sustained at the time of injury.<sup>16</sup> As a result, antitrust violators have free use of any money they wrongfully obtain until the day they are forced to pay a judgment or settlement, and the cost of violating the antitrust laws is to that extent diminished.<sup>17</sup> Since, as a general rule, antitrust violations go undetected for substantial periods,<sup>18</sup> the cost of violating the antitrust laws can be considerably lower than the statute suggests.

One additional factor may reduce damage awards and the cost of an antitrust violation by substantial amounts: when the judge informs the jury that the actual damages they fix will be trebled, the jury may reduce its estimate of actual damages. Or, if they consider the trebling provision to provide excessive punishment, they may resolve their doubts about the amount of damages or liability itself in favor of the defendant.<sup>19</sup> This tendency of juries to disregard statutory penalties they consider too harsh ("jury nullification") is a well-known phenomenon, the textbook example occurring in eighteenth century England, when juries frequently found criminal defendants innocent in the face of persuasive evidence of guilt because so many trivial offenses were punishable by death.<sup>20</sup> This well-documented phenomenon<sup>21</sup> may explain the poor won-lost record of private antitrust plaintiffs and undoubtedly lowers the cost of violating the antitrust laws.<sup>22</sup>

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15. See Posner, *supra* note 5, at 388-95.

16. See, e.g., *Trans World Airlines, Inc. v. Hughes*, 308 F. Supp. 679, 696 (S.D.N.Y. 1969), *aff'd*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973).

17. See Parker, *supra* note 12, at 486-92.

18. See note 94 *infra*.

19. The tendency referred to may be an actual tendency to decide facts in defendants' favor or, if juries generally tend to be prejudiced against large corporate defendants, it may only tend to mitigate that prejudice. But for substantial evidence that citizens who populate our juries at least on occasion begin with a predisposition for large corporate defendants, see text accompanying notes 56, 84, and 88 *infra*.

20. See Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 750-54 (1935).

21. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 312 (1966).

22. In 1964 plaintiffs won less than 5 per cent of the cases that went to judg-

*B. Risk-Enhancing and Risk-Reducing Factors*

The principal risk a potential antitrust violator must appraise is the likelihood of detection followed by litigation and liability for treble damages. One very significant increase in the risk of treble-damage liability occurred as a result of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>23</sup> in which the Supreme Court disallowed "passing-on" as a defense to such an action. The defendants had contended that any overcharge paid by plaintiffs as a result of the alleged violation was "passed on" to the plaintiffs' customers. As a result, defendants claimed, the plaintiffs were not, as required for recovery under the Clayton Act, injured in their business or property by the defendants' violations.<sup>24</sup>

The Court gave two reasons for disallowing the defense. First, the task of proving that plaintiffs would not have raised their prices absent the overcharge involves such voluminous evidence, such sophisticated and debatable economic arguments, and such extensive speculation that most defendants' chances of succeeding are too slight to warrant the burden their attempts would impose upon the courts.<sup>25</sup> Second, if allowed, the passing-on defense might be asserted all the way down the chain of consumption, leaving only individual consumers free of the force of its logic. Defendants might escape civil liability altogether and retain the fruits of their violations since "ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action."<sup>26</sup>

The Court could also have observed that allowing the passing-on defense would have lowered the risk of defendants being held liable and, as a result, the deterrent effect of treble-damage actions. The defense involves extensive discovery by both parties and substantially raises the plaintiffs' costs of litigating. Raising those costs increases the plaintiffs' incentive not to sue. Eliminating this costly defense the Court increased the likelihood that potential plaintiffs would be willing to assert their rights against an antitrust violator. The violator's risk of

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ment. The percentage increased in the next few years, when plaintiffs won about 17 per cent of the cases that went to judgment between 1965 and 1968. Many of these private suits were preceded by government actions which provided the private plaintiffs with prima facie evidence of the alleged violations, leaving only causation and damages to be proved. In still others the government investigated the alleged violations and made its results available to private plaintiffs. See Posner, *supra* note 5, at 372, 383; cf. J. GOULDEN, *THE SUPERLAWYERS* 40-41 (1971).

23. 392 U.S. 481 (1968).

24. See 15 U.S.C. § 15 (1964).

25. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 492-93 (1968).

26. *Id.* at 494.

being sued and held liable was further increased by allowing middlemen to sue because unlike consumers, they spend substantial sums of money for manufacturers' products and therefore have a substantial interest in trying to collect three times the amount of any illegal overcharge. Furthermore, they keep better records than most consumers and therefore will have a better chance to avoid evidentiary problems. Finally, they generally will be better equipped to bear the expenses of litigation before recovery.

These positive deterrent effects of *Hanover Shoe* have been diminished, however, by the reluctance of middlemen to take advantage of the invalidation of the passing-on defense. When middlemen believe they are not entitled to collect damages from defendants—when passing-on in fact occurred and only *Hanover Shoe* enables them to collect damages—compunctions arising from a sense of injustice, antipathy for antitrust laws, or fear of harming buyer-seller relationships will be strong. For example, in the antibiotics cases notice of settlement and of the establishment of a settlement fund was distributed to some 55,000 drug wholesalers and retailers, yet claims were filed by only 4,100 of them.<sup>27</sup> Thus, even with a fund already established and with the chance for easy money, less than 8 per cent of all middlemen who know of the fund took advantage of it. Furthermore, about 1,500 expressly excluded themselves from the class with letters expressing their indignation.<sup>28</sup> To the extent potential antitrust violators can discount the risk of liability due to fear or honesty among middlemen, *Hanover Shoe's* effectiveness in adding to the deterrent force of treble-damage actions is diminished.

The risk of treble-damage liability also is increased by section 5(a) of the Clayton Act which makes a final judgment or decree in any civil or criminal antitrust proceeding brought by or on behalf of the United States prima facie evidence against the defendants in later private suits

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27. See *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 746 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971).

28. A sample of the letters is as follows:

Any pharmacy claiming damages is, in my opinion, guilty of lying. All pharmacies base their retail prices for drugs on their costs, either using a fixed percentage or a professional fee. Either way, they do not suffer damages due to higher wholesale costs of these drugs. If anyone has a complaint, it would be the individual consumer, not the pharmacists.

*Id.* Furthermore, the Executive Director of the American Pharmaceutical Association wrote about the settlement offer to executives of state pharmaceutical associations and stated that his organization

has urged pharmacists not to submit claims against the settlement funds unless actual damage can be demonstrated [because] adverse public reaction could well result if pharmacists obtain a share of the settlement funds and do not pass amounts received on to patients.

*Id.* at 726.

against them "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."<sup>29</sup> The effectiveness of section 5(a) in promoting treble-damage judgments seems clear: between 1961 and 1963 more than 85 per cent of the reported treble-damage actions were preceded by a judgment for the Department of Justice.<sup>30</sup> This high correlation may also reflect a government policy to prosecute only those cases in which liability is clear. But confirmation of section 5(a) as an incentive to civil suit was provided by the Attorney General of California at the time of the electrical equipment cases, who stated that California would have been unable to sue for the several million dollars it collected if the civil cases had not been preceded by criminal convictions by the Department of Justice.<sup>31</sup>

The effectiveness of section 5(a) in raising the risk of treble-damage liability is flawed, however, by the infrequency with which the Department of Justice files antitrust actions.<sup>32</sup> Without a prior judgment for the Government to rely on, many potential plaintiffs remain unaided by section 5(a) and will consider it inadvisable to assert their rights. Other potential plaintiffs will reach a similar conclusion because of the proviso in section 5(a) which excepts consent decrees and nolo contendere pleas from the types of judgments that can be used as prima facie evidence.<sup>33</sup> The exception virtually swallows the rule: about 80 per cent of all civil antitrust judgments in the Government's favor are consent judgments,<sup>34</sup> and about 80 per cent of all criminal convictions are the product of nolo contendere pleas.<sup>35</sup> Thus, 20 per cent of the cases annually decided in favor of the Department of Justice provide the foundation for about 85 per cent of all private treble-damage actions.<sup>36</sup> The ease with which nolo contendere pleas and consent judgments are obtained re-

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29. 15 U.S.C. § 16(a) (1970).

30. See Posner, *supra* note 5, at 372.

31. See McHenry, *The Asphalt Clause—A Trap for the Unwary*, 36 N.Y.U.L. Rev. 1114 (1961).

32. See note 5 *supra*.

33. See 15 U.S.C. § 16(a) (1970). The proviso states, "That this section shall not apply to consent judgments or decrees in actions under section 15a of this title." Some plaintiffs have tried to convince the courts that nolo contendere pleas do not fall within the ambit of "consent judgments or decrees," but they have so far been unsuccessful. See *Armco Steel Corp. v. North Dakota*, 376 F.2d 206 (8th Cir. 1967); *City of Burbank v. General Elec. Co.*, 329 F.2d 825 (9th Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F.2d 412 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

34. See Posner, *supra* note 5, at 375. Between 1965 and 1969, 90 per cent of all civil antitrust judgments in favor of the Government were consent judgments.

35. *Id.* at 390. From 1965-1969, the most recent period for which data are tabulated, the actual percentage is nearly 90.

36. Yet another undesirable result flows from private plaintiffs' reliance upon government judgments: the adverse consequences of misallocation of government



duces the risk of a private action,<sup>37</sup> and, as a result, diminishes the deterrent effect of treble-damage actions.

Several other factors appear to strengthen the deterrent force of treble-damage actions by raising the risk of liability. One, the class action, permits several injured persons who would not have been able to litigate individually to pool their resources to some extent. This device increases the deterrent force of section 4, but it suffers certain major weaknesses. First, a court may, pursuant to Rule 23(b) of the Federal Rules of Civil Procedure, refuse to allow a class action to be maintained if it finds the class would be unmanageable.<sup>38</sup> Unfortunately, the least manageable class—one comprised of thousands of individual consumers—is likely to be the class most in need of assistance from these procedures.<sup>39</sup> And even if such a class were to meet judicial standards of manageability, its potential named plaintiffs might choose not to litigate. If the claims of the individual members are small, hundreds would have to participate actively in the action to provide attorneys with funds to cover out-of-pocket litigation expenses

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enforcement resources are increased. Richard Posner has recently suggested that the Antitrust Division's scarce resources have been misused when applied to tie-ins, exclusive-dealing arrangements, some resale price maintenance cases, and single-firm monopolization. See Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500, 500-29 (1971). To the extent that this criticism is valid, private enforcement through treble damage actions has to be criticized, since it basically parrots the practices of the Department of Justice.

37. The electrical equipment conspiracy is one of the few examples where the court effectively rejected the offered pleas of nolo contendere. See C. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES—THE TREBLE DAMAGE ACTIONS* 7 (1973).

38. See FED. R. CIV. P. 23(b)(3)(D).

39. For example, a federal district court refused to permit a class action to be maintained on behalf of an alleged class of all bread consumers in metropolitan Philadelphia. See *Hackett v. General Host Corp.*, Civil No. 70-364 (E.D. Pa., Aug. 18, 1970). After the class action was denied the plaintiff attempted to appeal, but it was held that the denial is not a final appealable order within the meaning of 28 U.S.C. § 1291. See *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

A district court in Hawaii similarly rejected a class action on behalf of all gasoline purchasers in Hawaii. See *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 404 U.S. 251 (1972). And a class action was not permitted in the southern district of New York when the alleged class was all consumers of eggs in the United States. See *United Egg Producers v. Bauer Int'l Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970). See generally Donelan, *The Advantages and Disadvantages of a Class Suit Under New Rule 23, as Seen by the Treble Damage Plaintiff*, 32 A.B.A. ANTITRUST L.J. 264 (1966); Simon, *Class Actions Under Amended Rule 23*, 12 ANTITRUST BULL. 187 (1967); *Symposium on Antitrust Class Actions*, 41 A.B.A. ANTITRUST L.J. 229 (1972).

This discussion does not argue that consumer class actions should be made more manageable or that the courts have erred in declaring several consumer class actions unmanageable. It simply points out that in antitrust cases involving violations that injure millions of consumers, especially where each consumer's purchases are relatively small, class actions will often be unavailable and will therefore fail as a device for bolstering the deterrent force of private actions.

and most individuals would not consider the bother worth the possible benefits.<sup>40</sup> Indeed, it is classes like these that defendants can most easily drive out of the litigation process with tactics that force the individuals to expend large sums before recovering.<sup>41</sup>

Another procedural device designed to mitigate some of the problems which inhibit private antitrust litigation is 28 U.S.C. section 1407, which authorized the creation of a panel for multidistrict litigation.<sup>42</sup> The panel, created by Congress in response to the electrical equipment cases, was designed to benefit plaintiffs by preventing the duplication of discovery expense in multiple districts. However, the procedure has produced problems for the very parties it sought to benefit. When cases are consolidated in one district for pre-trial litigation, plaintiffs' attorneys from all over the country must travel to that district every time there is a hearing if they wish to ensure that their clients' interests are protected. Many attorneys are precluded from taking depositions and filing separate interrogatories as they would have done absent consolidation, and many attorneys lose the advantage they might have gained from familiarity with the procedures and court personnel of their own locales. Moreover, defendants are relieved of the burden of combat in several courts and of having simultaneously to satisfy discovery demands from several sources, thus enabling them to prepare better and cheaper defenses to all claims. Like other procedures which boost the risk of treble-damage liability, then, the multi-district panel has mixed effects on the deterrent force of private antitrust litigation.

The risk an antitrust violator must run of being sued and held liable for treble damages is further reduced by several barriers which confront the private antitrust plaintiff and reduce the probability that he will litigate or obtain a judgment in his favor. Some of these are unique to antitrust actions, but others are unique only in the sense that they are more difficult to overcome in antitrust actions than in other types of litigation.

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40. In addition, there may be pre-trial discovery which includes class members who are not named plaintiffs, a practice which can substantially increase the plaintiffs' attorneys' expenses and force class members to opt out of the litigation very early.

41. Perhaps the most damning but accurate assessment of class actions on behalf of consumers with small claims was made by Professor Handler, who stated:

The attorneys' fees—modest by antitrust standards—came to \$275,000. It is obvious that in such a case it is the attorneys, not the class members, who are the true beneficiaries and the real parties in interest. This plain fact is even more apparent in large antitrust settlements where many millions of dollars in fees are at stake and where much of the court's time is typically taken up with disputes that are significant only in terms of how those fees are to be divided.

Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 10 (1971).

42. 28 U.S.C. § 1407 (1968).

A threshold problem is the difficulty of uncovering antitrust violations. A carefully planned violation may escape detection not only because of the problems encountered in investigating any illegal activity, but also because antitrust theory gives plaintiffs little guidance in distinguishing the effects of illegal activity from the effects of legitimate competition, and because damaged individuals are often not knowledgeable enough to recognize that they have been illegally harmed.

The best example of the substantive imprecision of antitrust theory is the problem of conscious parallelism. Antitrust commentators<sup>43</sup> and courts<sup>44</sup> have grappled with this issue for years and still cannot decide whether parallel price actions not supported by overt agreements violate the Sherman Act.<sup>45</sup> Even if there were agreement on that issue, plaintiffs would still lack the means to determine when parallel price actions reflect legitimate competition and when they result from oligopolistic pricing.<sup>46</sup> Unlike the victim of fraud or embezzlement, the antitrust victim may never even suspect foul play, for he generally suffers only by paying a higher price than he would otherwise have paid for a product.<sup>47</sup> Moreover, if the victim is not a knowledgeable businessman, he may have no conception of what is proscribed by the antitrust laws. Finally, direct evidence of violators' intent to transgress the law—letters or office memoranda, for example—is rare. Most businessmen know enough not to put into writing price-fixing agreements and other clearly illegal contracts.<sup>48</sup>

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43. See Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

44. Compare *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) with *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) and *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

45. 15 U.S.C. §§ 1-7 (1964). Section 1 proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ."

46. The same kind of confusion surrounds several other areas of substantive antitrust laws. Compare, e.g., *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960) and *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963) with *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

47. This is especially true in price-fixing cases, which is particularly significant because most private suits are based upon price-fixing violations. See Guilfoil, *Private Enforcement of U.S. Antitrust Law*, 10 ANTITRUST BULL. 747, 748 (1965). Thus, the violations which are most likely to result in a successful damage suit are among the least likely for private persons to detect.

48. A recent account of an antitrust conspiracy stated that the conspirators constantly admonished each other not to keep written notes of records of the price-fixing agreements. See *How Judgment Came for the Plumbing Conspirators*, *FORTUNE*, Dec. 1969, at 96. Perhaps more important, however, is the recent brouhaha concerning I.T.T., since it removes any remaining doubt that corporate officers,

Even if they detect antitrust violations, several other factors encourage many potential plaintiffs not to sue: (1) fear of undermining beneficial relationships with important suppliers or buyers, (2) fear of protracted litigation involving substantial cash outlays and expenditures of time and effort, (3) antipathy for the antitrust laws or for "big government," and (4) anticipated problems of proving the violations and the amount of damages. These factors reduce both the risk that the plaintiff will sue and, by inducing plaintiffs to settle after they have filed but before settlement would otherwise be advisable, the risk that a defendant will bear the full treble-damage penalty for his antitrust violation.<sup>49</sup> As a result, each weakens the deterrent force of treble-damage actions.

The protracted and expensive nature of antitrust litigation has been documented. The average duration of treble-damage actions terminating in judgment in 1969 was approximately four years.<sup>50</sup> In comparison, in 1959, in New York the average civil case went to judgment in 10 months, and the average personal injury case went to trial in 30 months.<sup>51</sup> Even these latter figures are misleading because the delays they reflect were generally attributable to court congestion and other factors beyond the parties' control, especially in the personal injury cases which are often given low judicial priority.<sup>52</sup> In antitrust cases, on the other hand, the

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like any other persons, can and do resort to destruction of potentially damaging evidence under some circumstances. The company was accused by columnist Jack Anderson of having paid \$400,000 to the Republican party to defray convention costs in return for the Department of Justice's agreement to abandon antitrust actions previously filed against the company. See *TIME*, Mar. 13, 1972, at 19. After the accusation was made, Anderson sent an aide to the company's offices to further investigate, and the following account of the company's response was reported:

According to [the president of the company] and IIT Senior Vice President Howard Aibel, the Washington staff was ordered "to remove any documents that were no longer needed for current operation, as well as documents which, if put into Mr. Anderson's possession, could be misused and misconstrued by him so as to cause embarrassment to the people mentioned therein.

"Many sacks" full of such papers, Aibel testified, were then fed into the shredder. *TIME*, Mar. 27, 1972, at 28. See J. GOULDEN, *supra* note 22, at 288.

49. Of course, numerous considerations govern the decision to settle. I am suggesting nothing more than that there are several substantial inducements to unwise settlement in antitrust cases that are absent or that exist to a much smaller degree in other litigation.

50. See Posner, *supra* note 5, at 381. Interestingly, Posner observes that the incidence of highly protracted cases is greater in governmental than in private antitrust cases.

51. See H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* 7, 45-49 (1959); cf. M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* 54-55 (1964).

52. Indeed, court congestion was the subject of the study conducted by Zeisel, Kalven and Buchholz cited in note 51 *supra*.

lengthy interval between filing and judgment generally results from the parties' own actions and the complex nature of the issues. Antitrust litigation is protracted because the parties are actively litigating, not merely awaiting a trial date. This same high level of pre-trial activity makes antitrust litigation prohibitively expensive. Not only do plaintiffs pay out considerable sums of cash prior to any recovery, but they may incur such expenses as nonproductive salary payments to employees who spend days doing nothing but sifting through old files, copying documents, preparing for depositions, being deposed, and answering interrogatories. The result is that costs for most antitrust plaintiffs "will run an absolute minimum of \$5,000 in the smallest of cases and to considerable thousands beyond that in the larger cases."<sup>53</sup>

The effect of protracted and complex litigation upon plaintiffs' attorneys can indirectly increase the pressure on plaintiffs to back out. Multiple sets of interrogatories, motions to produce, requests for admission, and depositions noticed by the defendants' attorneys can keep plaintiffs' attorneys too busy to prepare their other cases. Since plaintiff's attorneys work on a contingent fee basis and must forego income for their antitrust efforts—and for their other work—as long as the protracted litigation continues, their breaking point may precede their clients', thus becoming another factor inducing the plaintiffs to back out. It is no accident that plaintiffs' attorneys refer to antitrust litigation as "a war of attrition."<sup>54</sup>

Another factor which lowers the risk of treble-damage liability is that potential plaintiffs may be reluctant to bring certain types of antitrust actions. For example, defense counsel in the antibiotics cases<sup>55</sup> received letters from many potential plaintiffs praising the defendants and castigating those who attacked them.<sup>56</sup> In the plumbing fixture cases plaintiffs' counsel found it common for wholesalers or plumbing

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53. Alioto, *The Economics of a Treble Damage Case*, 32 A.B.A. ANTITRUST L.J. 87, 93 (1966).

54. *Id.* at 92. See Hoffman, *Proof of Damages in Private Litigation*, 36 A.B.A. ANTITRUST L.J. 151 (1967).

55. The antibiotics cases are roughly 150 private suits initiated against various manufacturers of pharmaceutical drugs in which the plaintiffs alleged antitrust violations surrounding the defendants' use and sale of tetracycline. The civil actions were filed after criminal proceedings had been initiated. The defendants were convicted by the trial court, but the court of appeals reversed and was upheld by the Supreme Court. See *United States v. Chas. Pfizer & Co.*, 426 F.2d 32 (2d Cir. 1970), *aff'd*, 404 U.S. 548 (1972). In spite of this, the defendants have settled the bulk of the class actions for \$85,341,215. See *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 731 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971).

56. These letters are presently in the possession of the law firm of Donovan, Leisure, Newton & Irvine in New York City.

subcontractors who may have been harmed by the alleged violations to refuse to join in the action or to express some hesitancy before doing so on the ground that their business relationships with the defendants might be jeopardized.<sup>57</sup>

Potential defendants also know that many plaintiffs will not sue, will settle cheaply, or will lose at trial because of problems of proof. Problems of proof, of course, confront all plaintiffs, but the problems generally are substantially greater in antitrust cases than in many other lawsuits. The problems begin, for example, with the need to prove a price-fixing conspiracy with nothing but pricing patterns and other circumstantial evidence. But the most difficult problem is that even if he can prove a violation, the plaintiff must still prove that the violation injured him and the amount of the injury. The task is formidable, for the plaintiff can only speculate as to what would have occurred under the conditions that would have prevailed absent the antitrust violation.<sup>58</sup> Because of the multifarious variables affecting such basic business decisions as pricing policies, these claims cannot be proved with specificity. The result is a trial based on massive circumstantial evidence involving statistical analysis, economic theory, expert testimony, voluminous transaction data—including not only prices, but discounts, rebates, shipping costs, precise product descriptions and, in conspiracy cases, expense accounts, travel vouchers, and diaries—and a thorough understanding of the business methods of the industry in question. Furthermore, the elapsed time between the violation and the suit based upon it is likely to be several years, resulting in loss of records, unavailability of witnesses and other time-spawned problems of proof that most other litigants do not face.<sup>59</sup>

Even when injured persons decide to sue, many will not be permitted to do so. Section 4 of the Clayton Act establishes only three threshold requirements: the plaintiff must allege that the defendants engaged in conduct forbidden by the antitrust laws, that he was injured, and that his injury occurred by reason of the defendants'

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57. During the two years during which I worked as one of the myriad plaintiffs' counsel in the plumbing fixture cases, I received several calls from members of the various alleged classes of plaintiffs (consumers, contractors, plumbing contractors, builder-owners, for example) asking about the nature of the litigation and concluding that the risks to their relationships with their suppliers did not warrant joining the fray.

58. For excellent overviews of the various problems which arise in the proof of damages, including analyses of many cases in this area, see Lanzillotti, *Problems of Proof of Damages in Antitrust Suits*, 16 ANTITRUST BULL. 329 (1971); Erickson, *Costs and Conspiracy: Use of Cost Data in Private Antitrust Litigation*, 14 ANTITRUST BULL. 347 (1969); Hoffinaw, *infra* note 73; Commeut, *Proof Requirements in Anti-Trust Suits: The Obstacles to Treble Damage Recovery*, 18 U. CHI. L. REV. 130 (1950).

59. See note 94 *infra*.

conduct.<sup>60</sup> Although nowhere has the Supreme Court expressly or implicitly created any additional qualifications to maintain suit under the statute, the lower courts have dismissed many suits on the ground that the plaintiffs lacked "standing" under the Clayton Act.<sup>61</sup> The courts have never precisely defined this standing requirement. Some have equated it with proximate cause, but most have held that plaintiffs must do more than meet the proximate cause standard.<sup>62</sup> No careful analysis has been done, and sonorous, conclusory tests have resulted, the "target area"<sup>63</sup> and "direct-indirect"<sup>64</sup> being the most popular. But regardless of the test employed, and without knowing whether the court has developed it because of antipathy for treble-damage suits generally, fear of multiple recoveries, or fear of purely speculative damages, it is clear that many courts have refused to allow certain groups—e.g., shareholders of injured corporations,<sup>65</sup> creditors of injured debtors,<sup>66</sup> lessors of injured lessees,<sup>67</sup> and patentees whose licensees have been injured<sup>68</sup>—to sue and recover treble damages. These judicially created limitations on the class of potential antitrust plaintiffs further reduce a potential defendant's risk of liability and thus lower the deterrent effect of treble-damage actions.

Thus, both the potential cost and the risk of treble-damage litigation and liability are lower than one would at first imagine. In addition, however, there is a major analytic flaw in the application of present

60. See 15 U.S.C. § 15 (1964).

61. See, e.g., *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. and Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967).

62. Compare, e.g., *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956) and *SCM Corp. v. Radio Corp. of America*, 276 F. Supp. 373 (S.D.N.Y. 1967), *aff'd*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) with *Fields Prods., Inc. v. United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971) and *Billy Baxter, Inc. v. Coca Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

63. See, e.g., *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955).

64. See, e.g., *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958); *Peter v. Western Newspaper Union*, 200 F.2d 867 (5th Cir. 1953).

65. See, e.g., *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963); *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958).

66. See, e.g., *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963).

67. See, e.g., *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); *Lieberthal v. North Country Lanes, Inc.*, 221 F. Supp. 685, 690 (S.D.N.Y. 1963); *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

68. See, e.g., *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

deterrence theory to antitrust violators which, perhaps more than anything else, raises doubts that private treble-damage actions effectively deter antitrust violations.

### C. *Identifying the Target of Antitrust Sanctions*

The major problem with applying deterrence theory to treble-damage actions is that one does not deter corporations. If the threat of treble-damage liability is to be effective, it must deter individual human beings—specifically, those who make the decisions for corporations. Since corporate officers almost never pay the judgments entered against their corporation, however, corporate penalties can have only secondary deterrent effects on those who violate the antitrust laws. Rational analysis of existing antitrust enforcement cannot be undertaken until this fact is recognized.<sup>69</sup>

Treble-damage actions would have direct deterrent effect if managers were faced with the threat of having to pay personally some portion of the damages awarded. But plaintiffs know that, except in rare cases, corporations have far more extensive assets than the individuals who manage them, making suits against such individuals superfluous. Moreover, victory against the corporation requires only circumstantial evidence, whereas victory against a manager requires the plaintiff to show the particular individual's participation in the violation. Finally, if, as is commonly true, the corporation insures its officers against losses due to litigation over their management of the business or agrees to indemnify them for any such losses, or if the managers at their own expense have obtained insurance from outside sources, no direct threat arises from treble-damage actions. Only secondary effects which might result from suits against corporations—e.g., a manager's fear of losing his job or his good reputation for having subjected the company to extensive liability—comprise the deterrent force against individuals.

There is good reason to suspect, however, that these secondary effects impinge less on antitrust violators than on those found responsible for other antisocial or illegal conduct. Undercutting nearly all secondary effects in antitrust is the fact that neither the business community nor the general public seems to consider antitrust violations as

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69. But see Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693 (1973), where the authors argue for an increase in criminal penalties for corporations. Strangely enough, the authors mention the possibility of assessing fines against managers but move on to consider fining companies without recognizing that a major shift in deterrence theory must be assumed in order to make that shift. That is, they assume that individuals will be deterred in direct proportion to the size of the fines their companies must pay. *Id.* at 708-13. No evidence is adduced to support that proposition.



blameworthy as other tortious or criminal acts. Antitrust laws are so vague and antitrust theory so complex that a businessman can—often with good cause—convince himself and his friends that he just did not understand the illegal nature of his actions.<sup>70</sup> Nor are the statutory penalties imposed for antitrust violations calculated to convince the public or the business community of the seriousness of the violations. Although criminal laws supposedly play an important educational role in reinforcing moral beliefs,<sup>71</sup> that educational role is ill served in antitrust law. The criminal sanctions are infrequently invoked;<sup>72</sup> and on the few occasions when they are, defendants are usually allowed to plead *nolo contendere*.<sup>73</sup> When guilty pleas or judgments are obtained, the defendants almost never serve time in prison.<sup>74</sup> Considering the potential for injury to the public, the penalties for antitrust violations are relatively small.<sup>75</sup> In short, potential antitrust violators have less cause to worry about their reputations, standing in the business community, or ability to find jobs because of their violations than they would if they obtained the same personal benefit by embezzlement, pickpocketing or fraud. And the potential benefits to managers who violate the antitrust laws are extensive: higher salaries, prestige derived from managing successful companies, added income through stock dividends and other management participation.<sup>76</sup>

I know of no empirical study which traces the careers of all managers who have been responsible for or convicted of antitrust violations, although such a study would be useful in measuring the effectiveness of secondary deterrents.<sup>77</sup> But there is one example, the electrical conspiracy,<sup>78</sup> which adequately demonstrates the weakness of sec-

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70. Cf. Clabault, *The Professional Manager and the Enigma of Antitrust*, 10 ANTITRUST BULL. 717 (1965).

71. See H. PACKER, *supra* note 10, at 65; Andenaes, *supra* note 8, at 179; Cramton, *supra* note 8, at 424-27.

72. See Posner, *supra* note 5, at 385.

73. *Id.* at 390.

74. *Id.* at 391. The figures are astounding. From the enactment of the Sherman Act in 1890 to the close of 1969, only 8 men have served prison time for antitrust violations when labor problems were not intimately involved.

75. See Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 535 (1970).

76. Of course, to the extent that managers are shareholders, they pay some portion of treble-damage judgments and settlements against their companies.

77. On April 19, 1973 I spoke with three attorneys in the Antitrust Division, none of whom knew of any such study's existence.

78. The so-called "electrical conspiracy" involved plaintiffs who were, for the most part, public utilities which had purchased equipment from the defendant manufacturers at prices allegedly inflated by a price-fixing conspiracy. Roughly 1,900 private actions were initiated after the Government obtained criminal judgments, but most were settled after a few early trials. See, e.g., *Commonwealth Edison Co. v. Allis-*

ondary deterrent forces. The electrical conspiracy was probably the most famous antitrust case of the last several decades, not only because it involved vast amounts of money and major corporations like Westinghouse and General Electric, but also because 30 individuals received jail sentences—although most were suspended.<sup>79</sup> Even though criminal penalties were imposed and the violations cost the companies millions of dollars, the individuals who made the illegal decisions bore little of the impact. Westinghouse, for example, imposed absolutely no disciplinary treatment upon the individuals responsible for and convicted of the violations.<sup>80</sup> General Electric, which did demote or ask for the resignation of several of its employees, kept others at their prior positions.<sup>81</sup> Almost all who were asked to resign by General Electric were able to find high-paying jobs with other companies quite easily and quickly.<sup>82</sup> The smaller companies involved apparently took no punitive action.<sup>83</sup> Shareholder proposals seeking mandatory resignation of all individuals involved in the conspiracy were overwhelmingly rejected at the companies' annual meetings.<sup>84</sup> Officers directly involved in the price-fixing meetings even felt free to justify their behavior by saying, for example, "I can't help but feel we all tried to do a decent job, and we had to protect ourselves against influences which were inimical to our business and the business of our customers."<sup>85</sup> Apparently sharing this sympathetic view, the nation's newspapers gave violations, convictions and sentences of individuals only limited coverage.<sup>86</sup> In short,

[i]n the eyes of the business community neither the executives who were discharged nor the conspirators who kept their jobs became managerial or social pariahs. In fact, as one might have expected, a considerable community of sympathy built up for the discharged executives.<sup>87</sup>

In Senate hearings held concerning the conspiracy, certain Senators—members of the body which had passed the legislation under which

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Chalmers Mfg. Co., 335 F.2d 203 (7th Cir. 1964). Total settlement payments in the neighborhood of \$600,000,000 were made to plaintiffs. See Halper, *The Unsettling Problems of Settlement in Antitrust Damage Cases*, 32 A.B.A. ANTITRUST L.J. 98, 99 (1966). For an interesting and exhausting account of the electrical equipment conspiracy see C. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES—THE TREBLE DAMAGE ACTIONS* (1973).

79. See J. HERLING, *THE GREAT PRICE CONSPIRACY* 223 (1962).

80. See C. WALTON & F. CLEVELAND, *CORPORATIONS ON TRIAL: THE ELECTRIC CASES* 103 (1964).

81. See J. HERLING, *supra* note 79, at 259, 285.

82. Cf. *id.* at 259.

83. *Id.* at 311.

84. *Id.* at 257-84.

85. C. WALTON & F. CLEVELAND, *supra* note 80, at 94.

86. See J. HERLING, *supra* note 79, at 290.

87. *Id.* at 310-11.

these individuals were prosecuted—did all they could to restore the prestige of and trust in the individual and corporate defendants.<sup>88</sup>

Thus, despite the fact that several managers of major corporations had blatantly violated a per se rule, had been convicted as criminals, and had caused their companies to be liable for millions of dollars in private damages, they either did not lose their jobs or, if they did, were easily able to find comparable jobs elsewhere without losing the support of the business community. If the secondary deterrent effects are so slight when the individuals are criminally convicted, when the damage payments made by the companies number in the hundreds of millions of dollars, and when the case receives a relatively great amount of publicity for an antitrust case, those flowing from a treble-damage action—discounted by the risk of judgments—must be even less.

In summary, therefore, it appears improbable that private antitrust actions are an effective deterrent. It may be that further deterrence can be obtained only at a cost that makes it undesirable—a proposition I shall examine shortly—but that is a considerably different proposition than the claim that treble-damage actions effectively deter antitrust violations.

## II

### TREBLE DAMAGES AS COMPENSATION

Several factors indicate that treble-damage actions serve their compensatory function even less well than they fulfill their deterrent potential. First, many persons go uncompensated because the factors discussed in the preceding section prevent injured persons from filing antitrust suits or cause those who do file to lose, to give up, or to settle for paltry amounts. More importantly, however, damages awarded in private antitrust suits are often paid to persons who either were not injured or were injured to a lesser extent than the payments indicate, even when the trebling factor is discounted. In such cases the damages are punitive, not compensatory. Such a result may obtain, for example, from application of the decision in *Hanover Shoe*. When the passing-on defense fails as a matter of law, the middlemen plaintiffs who passed on all or part of the overcharge to their customers receive nothing short of a windfall when they collect from violators. In *Hanover Shoe* itself, all of the \$4,239,609 awarded as damages may have been a windfall; and if the previously quoted middleman in the antibiotics cases<sup>89</sup> was correct, the entire settlement fund pro-

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88. See *id.* at 314-17.

89. See text accompanying note 28 *supra*.

vided for his fellow businessmen was also a windfall. The same seems true of the entire recovery in both the electrical equipment cases and the plumbing fixture cases. Furthermore, *Hanover Shoe* may have another adverse effect on achieving the compensatory goal of treble-damage actions: when middlemen collect, consumers who were actually injured are likely to be prevented from suing because of an extension of the *Hanover Shoe* reasoning.<sup>90</sup> In *Mangano v. American Radiator & Standard Sanitary Co.*<sup>91</sup> the court held that the alleged class of home buyers in the United States did not have a cause of action under the antitrust statutes against the manufacturers of plumbing fixtures because they had bought a different product than that manufactured by the defendants—homes rather than just plumbing fixtures. The home buyers would therefore be unable to prove that the overcharges on plumbing fixtures were passed on to them through the wholesalers, plumbing subcontractors, general contractors, and home sellers. Where similar reasoning is applied, damaged consumers will be compensated only if the windfall-receiving middlemen use their windfalls to lower their prices in the future and the injured consumers make additional purchases from them. The possibility of both occurring seems remote. Thus, the major factor strengthening the deterrent force of treble-damage actions—the *Hanover Shoe* decision—may undermine its compensatory function.<sup>92</sup>

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90. Consumers have fared so poorly in antitrust litigation that Professor Posner was able to state in 1969: "I know of no antitrust class action in which individual (as opposed to institutional) consumers have been permitted to recover, although such recovery would be permitted under a recent settlement proposal [in the antibiotics cases]." Posner, *supra* note 43, at 1590 n.73. His observation is supported by an assertion made to the court by the settling plaintiffs in the antibiotics cases: "This is the first time that individual consumers—those who actually paid the overcharge caused by a defendant's antitrust violations—will participate in an antitrust settlement." *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 728 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971). But even in the one case where consumers recovered, only 38,000 out of an estimated class of more than ten million consumers filed claims against the settlement fund created for their class.

91. *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Co.*, 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom. Mangano v. American Radiator & Standard Sanitary Co.*, 438 F.2d 1187 (3d Cir. 1971).

92. One writer has proposed a system which would permit consumers to collect in spite of *Hanover Shoe* if the consumers could prove that the overcharges were passed on, but the burden would be on the consumers to show that they were passed on, rather than on the middlemen to show that they were not. See McGuire, *The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe*, 33 U. PITT. L. REV. 177 (1971). This approach offers greater recovery possibilities to injured consumers; but when one considers the mammoth task involved in proving that overcharges were passed on, it seems unlikely that the theory can be effectuated. Specifically, the task is identical to that involved in proving an antitrust violation, causation, and damages; but consumers will not have hotel meet-

Consumers may not receive compensation even if they are members of a class in whose favor judgment has been entered or a settlement fund created. Many will not receive notice no matter how extensive the attempt made to provide it.<sup>93</sup> Others will not have records of their purchases and will not file claims because they feel unsubstantiated claims are unfair or because some proof is required for participation in the distribution. Many, even with proof available, will not consider it worthwhile to file claims for a few dollars or will consider the defendants victims of persecution. The most recent example of these problems of antitrust compensation occurred in the antibiotics cases, where in spite of notice published in every daily newspaper in the nation and in spite of the widespread use of tetracycline by persons numbering in the tens of millions, only 38,000 consumers filed claims against the settlement fund created for a national class of all tetracycline consumers.

When the antitrust plaintiff is a corporation which sues and obtains payment through judgment or settlement, the wrong individuals often benefit from the payment. Because antitrust violations are often not detected or sued upon until years after the violations occur,<sup>94</sup> the corporation's stock may change hands many times before an action is filed and settlement achieved or judgment rendered. While the shareholders at the time of the violation were the ones who were damaged by a decline in dividends or in the value of their stock, the new shareholders will be the beneficiaries of the higher dividends and appreciated value that reflect the payments made by defendants pursuant to treble-damage suits. Even when the proper parties do collect damages, the amount frequently will represent far less than full compensation. For example, the courts' refusal to take into account interest lost by plaintiffs and the present state of the tax laws can greatly affect the antitrust plaintiff's ability to obtain compensation for his losses.<sup>95</sup> Moreover, between 25 and 50

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ings and, more important, government evidence and investigatory help in their attacks on middlemen.

93. For example, in the antibiotics cases notice was provided to the national class of consumers by publication in every newspaper of general circulation throughout the country. The cost was roughly \$130,000. See *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 724-25 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971). Nevertheless, large numbers of citizens do not read daily newspapers, go on vacation and miss their daily newspaper, or are otherwise prevented from seeing the notice. In addition many persons probably will not have read the notice even if they see it.

94. Consider the following gaps in years between the start of illegal combinations in a few important industries and the institution of suit by the Government: Powder—35; Oil—24; Tobacco—17; Shoe Machinery—12; Glucose—11; Steel—10; Farm Machinery—10; Anthracite Coal—16. See Comment, *Fifty Years of Sherman Act Enforcement*, 49 YALE L.J. 284, 292 n.49 (1939).

95. See text accompanying note 12 *supra*.

per cent of each payment is likely to be paid to each plaintiff's attorneys. Another substantial fraction may go to the attorneys who won the battle for representation of the national or regional class. Another portion serves only as salary payments for the many hours spent by the plaintiffs' employees in gathering and giving evidence. Yet another only returns the plaintiffs' out-of-pocket payments for expenses incurred before settlement of judgment. Some of these expenses may be reduced if the case goes to judgment, because the Clayton Act permits the court to award costs and reasonable attorneys' fees.<sup>96</sup> But the contingent fee agreed on frequently exceeds what the courts are willing to award as reasonable fees,<sup>97</sup> and not only do very few private antitrust cases go to trial, but plaintiffs win less than 20 per cent of those that do.<sup>98</sup>

In short, compensation is rarely obtained under the present system of treble-damage actions. It may be that the present limited effects are the best we can achieve and are worth the costs. Before accepting that conclusion, however, some alternatives should be considered.

### III

#### ALTERNATIVES TO THE PRESENT SCHEME

Any of three alternatives to the present treble-damage system might better effectuate the deterrent and compensatory goals of antitrust regulation: (1) Judicial interpretation of the existing statutory structure to reduce barriers to successful treble-damage suits; (2) Amendment of the existing statutory structure to impose monetary sanctions on the individuals responsible for antitrust violations by corporations; (3) Modification of the existing statutory structure to allow the government to preempt private suits and sue for the total damages attributable to any violation. Combinations of these approaches are also possible, and treble-damage actions could be eliminated altogether. But it is worthwhile to begin with a careful look at each of the three enumerated alternatives.

##### *A. Improvement Through Judicial Modification*

As *Hanover Shoe* demonstrates, the courts can have a substantial influence on the deterrent and compensatory effectiveness of tre-

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96. See 15 U.S.C. § 15 (1964).

97. Since plaintiffs are bound by their contingent fee contracts with their attorneys, and since defendants must pay only the reasonable fees ordered by the court, plaintiffs may end up paying substantially larger sums for fees than are covered by the court's award.

98. See note 22 *supra*.

ble-damage actions.<sup>99</sup> Although that decision was particularly significant, it by no means stands alone as a symbol of the Supreme Court's willingness to make treble-damage actions more effective.<sup>100</sup> And the courts can do even more to improve deterrence and achieve compensation by increasing the likelihood that violators will have to disgorge any profit derived from their violations.

Two approaches designed to accomplish such a result have already been suggested: *parens patriae* actions and actions based upon a theory of damage to the general economy of the governmental unit acting as plaintiff. Under the *parens patriae* approach the governmental body—usually a state through its attorney-general—claims it has a quasi-fiduciary relationship with its citizens which permits it to recover damages in their behalf. Whether the state would then choose to or be required to attempt to distribute the recovered funds to its citizens who were actually injured is unclear, primarily because recovery has never been permitted. These actions have been attempted by several states<sup>101</sup> but have thus far been rejected by each court to examine their validity.<sup>102</sup> The second device, actions based upon a theory of damage to the general economy, is actually an indirect method of asserting the *parens patriae* claim.<sup>103</sup> The device was first employed in 1945, when the Supreme Court in *Georgia v. Pennsylvania Railroad*<sup>104</sup> sustained the state's right to sue as *parens patriae* for injunctions under the antitrust laws. Last term, however, the Court held in *Hawaii v. Standard Oil Co.*<sup>105</sup> that states cannot sue

99. See text accompanying notes 22-28 *supra*.

100. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, rehearing denied, 401 U.S. 1015 (1971); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

101. See, e.g., the following complaints: *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972); *Illinois v. Automobile Mfrs. Ass'n, Inc.*, Civil No. 69 C 2194 (N.D. Ill., filed Oct. 25, 1969); *New Jersey v. American Motors Corp.*, Civil No. 69 C 2041 (N.D. Ill., filed Oct. 3, 1969); *Kansas v. American Radiator & Standard Sanitary Corp.*, Civil No. 69-75 (E.D. Pa.), *motion for leave to amend denied*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,013 (E.D. Pa. 1969); *Detroit v. American Bakeries Co.*, Civil No. 33,046 (E.D. Mich., filed July 7, 1969); *Michigan v. Chas. Pfizer & Co.*, Civil No. 69 C 179 (N.D. Ill. 1969).

102. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *California v. American Radiator & Standard Sanitary Corp.*, Civil No. 68-2277 (E.D. Pa. 1969); *Handy v. General Motors, Inc.*, 69-1548-R (C.D. Calif. 1969). The Supreme Court has not considered the propriety of *parens patriae* actions.

103. See Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 14 (1971).

104. 324 U.S. 439 (1945).

105. 405 U.S. 251 (1972).

for damages to the general economy, primarily because such damages are not ascertainable. Unless the Court is willing to reconsider this decision, the second device will be unavailable to private plaintiffs.

One other device might be used to allow plaintiffs to collect on behalf of individuals who will never attempt to claim the amounts due them: the so-called "fluid class." Under this device a class action is permitted by the court, and the class recovery is based upon the total estimated damage caused the class by the antitrust violation. If individual class members do not file enough claims against the class fund to deplete it entirely, the excess is distributed to some "fluid class"—for example, future purchasers of products from the defendants. This approach has been adopted by two trial courts but was recently rejected by the Court of Appeals for the Second Circuit.<sup>106</sup>

The primary obstacle to judicial legitimation of *parens patriae* suits and fluid classes is that neither device is justified by the premises upon which it purportedly rests. *Parens patriae* suits have historically been allowed to protect the interests of infants, idiots, and lunatics.<sup>107</sup> But these individuals

. . . are *legally* incapable of protecting their own interests because the law denies them the *capacity* to bring suit. Furthermore, since the type of power which the States can exercise over such individuals may deprive them of generally held constitutional rights, elemental considerations of civil liberty mandate that this branch of *parens patriae* not be expanded.<sup>108</sup>

Individual victims of antitrust violations may have difficulty in vindicating their small claims for damage, but their legal capacity to do so is intact. Many victims of tortious acts or statutory violations are unable to recover their damages because of some procedural problem, ignorance of their rights, or the minuteness of their claims. Yet it is improbable that even proponents of *parens patriae* antitrust actions would argue that the states should employ *parens patriae*

106. See *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,482 (S.D.N.Y. Feb. 2, 1971), ¶ 73,699 (S.D.N.Y. May 5, 1971).

107. For a thorough discussion of the differences between antitrust *parens patriae* claims and traditional *parens patriae* claims, see Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193 (1970). See also Handler, *supra* note 108, at 12-15. But see Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970); 15 ST. LOUIS U.L.J. 311 (1970).

108. Malina & Blechman, *supra* note 107, at 214.



to sue on behalf of all these uncompensated citizens. The two situations do not seem distinguishable in principle.

A similar problem exists with the fluid class. Rule 23 of the Federal Rules of Civil Procedure does not permit the use of class action procedures to create or enlarge substantive rights.<sup>109</sup> Since the only provision for private antitrust actions is section 4 of the Clayton Act, and since that provision allows recovery only by persons who have been injured in their business or property, using class-action procedures to permit state collection of damages that the state government did not suffer might fail as an enlargement of the substantive rights created by the Clayton Act.<sup>110</sup>

In short, it will be difficult for the courts to take the steps which will most substantially increase the deterrent and compensatory effectiveness of treble-damage actions without doing violence to established legal doctrine. Smaller steps, however, could be taken by the courts and others to aid private plaintiffs. For example, the United States Supreme Court could reject or limit the section 4 "standing" requirement glossed onto that statute by the lower courts. The lower courts could accept fewer *nolo contendere* pleas, thus increasing the opportunity for civil plaintiffs to benefit from the *prima facie* rule of section 5(a). The Antitrust Division of the Justice Department could take more cases to trial rather than settling for a consent decree. But these possibilities offer little hope, because even if they were effectuated<sup>111</sup> they would make only minor improvements in deterrence and compensation.<sup>112</sup>

### B. Making Managers Responsible

The most effective deterrent to antitrust violations may flow from legislation or procedures ensuring that individual managers who decide

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109. See 28 U.S.C. § 2072 (1970). See also *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941).

110. For a general discussion of the several reasons why fluid classes cannot be justified under existing statutes, see Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 34-42 (1972); Address by Michael Malina, Twentieth Annual Spring Meeting of the Antitrust Law Section of the American Bar Association, Apr. 13, 1972. Those same arguments militate against the holding in *Hanover Shoe*, however, because that holding also permits recovery by persons who have not been injured in their business or property. If one were to argue that "injured" means injured in law rather than in fact both *Hanover Shoe* and fluid classes would succeed in increasing plaintiffs' chances for treble-damage recovery.

111. It is unlikely, for example, that the Antitrust Division would renounce its traditional policy of heavy reliance upon consent decrees, since Division policy-makers have always believed that such reliance is necessary to attack more violations without spreading scarce resources too thin.

112. The elimination of the "standing" requirement, for example, would only allow indirectly damaged persons to sue; but few of them would have the inclination to do so, and fewer still would have the ability to prove damages or causation.

to violate the antitrust laws will pay for their transgressions.<sup>113</sup> The first step toward achieving this direct deterrence would be enactment of legislation proscribing indemnification and insurance contracts which allow corporate executives to pass on the cost of their antitrust violations. The second step would be to require the individual managers to pay some portion of treble-damage judgments, or to increase the frequency of criminal prosecutions and the size of fines imposed upon the managers.

If the non-criminal approach were chosen, managers would have to be named as parties in private suits; but as I have already suggested, there are special problems, of proof, for example, that arise only with individual defendants.<sup>114</sup> It would be necessary, therefore, to provide incentives to sue individual managers. For example, the law could be amended to allow only double damages if no individual managers are sued and held liable, and to allow treble damages only if at least one individual manager is sued and held liable. However, it appears impossible to create a system by which private plaintiffs could and would obtain damages from individual managers without having prior government judgments to rely on. Therefore, two steps must be taken. First, the government must *always* sue individual managers when it sues a corporation; and second, judges in treble-damage actions must be given the discretion to require individual managers found responsible for corporate violations of antitrust laws to pay certain portions of any judgments—for example, at least two years' salary or X per cent of the single damages awarded, whichever is smaller.<sup>115</sup> Moreover, if the government would, as part of its consent decrees, require individual managers to pay a civil penalty, direct deterrence would be further increased.

Of course, the arguments raised against the use of criminal sanctions can be asserted against a requirement that individuals pay substantial sums in civil judgments. For example, the antitrust law may be argued to be so unclear in defining what is proper conduct that it is unjust to brand businessmen as criminals when they violate the antitrust laws,<sup>116</sup> and equally unjust to impose penalties that are

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113. See text accompanying notes 69-88 *supra*.

114. See text accompanying notes 69-70 *supra*.

115. An undesirable effect of requiring the government to sue individual managers in every antitrust case will be an increase in the government's costs of prosecuting antitrust violations. My recommendation is made with the hope that Congress would recognize the increased cost and increase the Antitrust Division's budget accordingly.

116. See FREUND, *STANDARDS OF AMERICAN LEGISLATION* 222 (1917); Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 *STAN. L. REV.* 197 (1965); Kadish, *Some Observations*

as severe a sanction as would be a short term in prison or paying a modest fine. But these arguments must be ignored if the deterrent force of treble-damage actions is to be increased, for one fact is clear: individuals, not corporations, are deterred, and individuals are deterred only if they believe their illegal acts are likely to result in burdens that outweigh the potential benefits.<sup>117</sup>

In choosing individual defendants, the government and private plaintiffs alike need not limit their choice to those managers who have intentionally violated per se rules. Every person is held to a standard of reasonable care by the law applicable to virtually every tort. Many have no idea that this is the standard by which their conduct will be judged, and many have no idea what is considered "reasonable" in relation to, for example, owning a swimming pool, maintaining a public sidewalk, allowing guests to ride in one's automobile, and myriad other situations. Yet we hold individuals liable in tort whenever they violate their duty to act reasonably, without allowing them to defend on the grounds they did not know the content of that duty. Granted, the antitrust laws are more abstruse than the reasonable man standard, but managers are supposed to have some expertise, and they have lawyers to advise them. Furthermore, they receive compensation for watching their companies' affairs. Therefore, managers directly responsible for antitrust violations not amounting to per se violations should still be held liable.

Similarly, managers who are responsible for pricing policies and other policies underlying particular antitrust violations should be sued and required to pay damages even if they did not order the actions which constituted the violations. Just as corporate directors have been held to owe a duty of due care to their shareholders,<sup>118</sup> corporate managers (whether directors or officers) should be held to owe a duty of due care to the public to prevent antitrust violations.

If one still wishes to argue that it is unjust to penalize managers for violating the antitrust laws, he should consider the injustice that is presently perpetrated in every antitrust case in which the corporation, not the manager, pays damages or a fine. In each such case the real persons who pay are the shareholders and the consuming public

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*on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

117. [I]n discussions on the introduction of new economic regulations, the question of the feasibility of effective enforcement should occupy a central place. And if it is found that such policing is not feasible, that the law will in effect reward dishonesty, the lawmakers should think twice and three times before legislating it—no matter how fine it looks on paper.

Andenaes, *supra* note 8, at 185-86.

118. See, e.g., *Bates v. Dresser*, 251 U.S. 524 (1920).

(through higher prices and tax deductions by the corporation). Yet the only sin of the shareholders is that they have elected Boards of Directors who have carelessly (perhaps) hired managers who violated the law. Even if "justness," rather than deterrence and compensation, were the basis for allocating the costs of antitrust violation, the manager, not the shareholders and the public, would still be the appropriate choice.

The system I have just proposed may overcome another objection which can be made requiring the managers to pay some portion of treble-damage judgments: the difficulty of "clearly identifying those responsible for anticompetitive behavior." It extends liability to managers who were responsible for the activity involved even if they did not directly and intentionally cause the violation. This should have the effect not only of ensnaring those who actually caused the violations but of fostering internal finger-pointing among management, increasing the likelihood of catching the real culprits.

There are substantial reasons for preferring this proposal to simple increases in criminal fines. Increases in criminal fines may make jury nullification more likely because juries could more easily conclude that the punishment is too harsh for such a minor infraction of the law as an antitrust violation. But more important, to be an effective deterrent, increased criminal fines must be routinely imposed. This seems unlikely to occur. In the past, the government has sought criminal sanctions against individuals very rarely, and increasing the criminal penalties is likely to decrease the usage even further. Finally, the burden of proof in criminal cases is far more difficult to meet than in civil cases. Consequently, fewer individuals are likely to be convicted of criminal violations than would be held liable in civil proceedings. Since negligence in performing managerial duties does not suffice for conviction, many managers who would be held civilly liable will not be convicted even if tried.

### *C. Selective Government Preemption*

Presently, a governmental entity can sue for damages it has suffered in its proprietary capacity but not for damages on behalf of its citizens who have been injured individually.<sup>119</sup> I have already suggested that it would be unwise for the courts to rely on *parens patriae* theories to allow suits by the government on behalf of its citizens.<sup>120</sup> But Congressional authorization for such suits presents

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119. See Clayton Act § 4A, 15 U.S.C. § 15a (1970); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 93 S. Ct. 2291 (1973); *cf. Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

120. See text accompanying notes 101-108 *supra*.

different considerations.

The desirability of such an amendment to the antitrust laws has already stirred some controversy. In 1969, for example, Richard Posner suggested that the Sherman Act be amended to authorize suits by the United States for the total damages attributable to any alleged conspiracy and for an additional civil penalty. The entire judgment would be paid into the Treasury; and where the Government sued, the procedure would displace all private suits.<sup>121</sup> On the other hand, in 1972 Milton Handler observed that although Congress could enact a statute authorizing the Government to require an accounting of all unlawful profits, "[t]hus far, that body has wisely refrained from imposing any such needlessly draconian penalty."<sup>122</sup> When testifying before the Senate Judiciary Committee concerning a proposed consumer protection bill that would involve the Department of Justice in suits on consumers' behalf, the then-head of the Antitrust Division, Richard McClaren, stated that the Department was not equipped to assume such a massive task.<sup>123</sup> From that testimony Professor Handler argues that a statute making the Department responsible for pursuing individuals' antitrust damage claims would be "a promise which cannot conceivably be kept."<sup>124</sup> Professor Posner's proposal solves this problem, however, by permitting the government to preempt private suits rather than eliminating them altogether. If the government were not to sue, private plaintiffs could proceed on their own.

The fact remains, however, that the Department would be unlikely to employ the preemption privilege under existing circumstances. The basic problem is one of insufficient resources. For years the lack of sufficient funds allocated to the Antitrust Division has been cited as one of the principal weakness in antitrust enforcement.<sup>125</sup> If

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121. See Posner, *supra* note 43, at 1590.

122. Handler, *supra* note 110, at 41.

123. Statement on S. 3201 by Richard W. McLaren before the Senate Judiciary Committee, 92d Cong., 2d Sess. (1970).

124. Handler, *The Shift from Substantive to Procedural Innovation in Anti-Trust Suits*, 71 COLUM. L. REV. 14 (1971).

125. Antitrust Law Enforcement by the Federal Trade Commission and the Antitrust Division, Department of Justice, H.R. REP. NO. 3236, 81st Cong., 2d Sess. 75-76 (1951). Similarly, Professor Posner has stated:

It is fashionable nowadays to exhort institutions to re-examine the priorities under which they operate. Never has the Antitrust Division had greater reason to head this exhortation. The rapid growth of the economy in recent years has not brought a corresponding increase in the resources of the Division.

Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500 (1971). He then proceeds to note that the total number of employees in the Division, and also the total number of its professional employees, have remained unchanged since 1962, while the gross national product has grown by more than a third. *Id.* at 500 n.2.

the insufficient funding reflects society's or Congress' desire that the antitrust laws go unenforced, it is unlikely that passage of a statute permitting the Division to sue for damages would be accompanied by an appropriation large enough to make such suits possible on a regular basis. If, on the other hand, the insufficient resources reflect only a priority system for scarce governmental funds, the problem can be overcome. The Division can argue to Congress that the income from damages will allow the Division to more than pay its own way. Alternatively, the Division could ask that some percentage of whatever income it generates be reserved for Division use. If such a litigating fund were made available, Congress would not have to raise appropriations and the Division could still hire outside help—lawyers, economists, and others—to process antitrust damage claims when other matters occupy the Division staff. If the Division were insufficiently funded after the amendments are enacted, post-amendment enforcement would be identical to pre-amendment enforcement. The Division would be unable to exercise the preemption privilege, and private parties would litigate when they wish. The possibility of insufficient funds is not, therefore an argument against the amendments, but a danger to their effectiveness.

Substantial problems would, however, accompany a governmental preemption privilege. The government, once it has chosen to sue for consumers' damages, may be less able and tenacious than private attorneys; for example, if there are settlement negotiations, government lawyers may be less skilled than private antitrust attorneys in performing the poker-playing role. Furthermore, private plaintiffs sometimes succeed in dragging in new defendants and extending the time period of the violation, thus increasing the amount of damages to be recovered, all after the government has obtained a conviction and provided private plaintiffs with some *prima facie* evidence. These benefits may be lost if the preemption privilege is exercised. Surely private parties will not find it profitable to sue only for the limited amounts attributable to the extended periods and added defendants once the government has collected the bulk of the damages, even if the preemption statutes were to permit it.

Worse yet, the political process might impinge upon the litigation process. Recently, the past Attorney General and Assistant Attorney General in charge of the Antitrust Division were accused of settling a suit because of political pressure from the White House.<sup>126</sup> Similarly, Congress and the White House have been alleged to wield substantial power to influence the course of theoretically independent bodies assigned to regulate the economic process.<sup>127</sup> Thus, there is

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126. See note 48 *supra*.

127. L. KOHLMEIER, *THE REGULATORS* (1969).

at least some chance that if the Division were to sue for consumers' losses amounting to millions of dollars, political pressures could force settlements and further reduce present deterrence and compensation.

The most obvious problem with allowing the government to collect and keep damages awarded for harm suffered by individuals is that none of the individuals thus preempted will receive compensation. But since consumers almost never are compensated, the only potential plaintiffs who stand to lose are middlemen—*i.e.*, institutional consumers. Middlemen, however, will be able to continue to sue for damages when only they and not the general public have been harmed. The government will not be likely to exercise preemption unless a large region or even the whole nation is involved, and even then only if it thinks the persons actually damaged—most likely individual consumers—will be unable to sue successfully. Furthermore, because of *Hanover Shoe* middlemen have been able to collect for injuries they never suffered. Since compensation does not justify *Hanover Shoe* awards, the government should be able to collect what amount to civil penalties rather than allowing random individuals to be sweepstakes winners. Furthermore, since middlemen-plaintiffs almost always wait for and rely upon government actions for prima facie evidence of liability, and the public thus pays for efforts which are often the sine qua non of private collection, it seems only fair that the public should reap the rewards.

Government suits for damages in cases involving the nation or large regions will also avoid duplication and a drain of judicial resources. Cases like the electrical equipment cases, the plumbing fixture cases and the antibiotics cases which require judges to spend full-time efforts for years will be avoided. The panel for multidistrict litigation, which requires the time and efforts of several judges, will have its workload greatly reduced. Class action problems, infighting among plaintiffs' attorneys, years of motion practice, rooms of documents, costly discovery and other inefficient uses of scarce resources will be obviated. Because recovery of damages will be more rapid, deterrence should to that extent increase.

Unfortunately, the system does not solve all the problems of antitrust regulation. Specifically, some who have profited from violations will not bear any liability for damages, and others who have, in fact, been injured will. For example, if a judgment is obtained against a corporation, shareholders whose stock appreciated or who received large dividends because of antitrust violations will not have to disgorge their profits unless they still hold stock when judgment day arrives. If new shareholders are of record—shareholders who paid the violation-inflated stock price but reaped no benefits from the vio-

lation—they will pay. This problem occurs in any suit involving corporations, but the time lag between violation and judgment in antitrust litigation exacerbates it.<sup>128</sup> In addition, part of the cost of violation will be borne by the tax-paying public, for they pay the amount which the corporation is allowed to deduct, an amount which depends upon whether the damage action is preceded by a criminal conviction. Depending upon the particular circumstances of the suit, one of these groups may get off lightly; but they will pay.

Thus, if a Posner-type amendment is adopted, and if political problems make it ineffective, we may end up with less deterrence and compensation than we presently have. But if the amendment is adopted and is very effective, we may find large numbers of consumers and innocent shareholders paying for large judgments. Of course, under the present system consumers and innocent shareholders are joined by tax-payers in paying for private plaintiffs' victories—often for uninjured plaintiffs. At least under the Posner proposal the public gets money in return for what it pays out, since the judgment funds would go into the Treasury's coffers.

One variation of the Posner proposal that should at least be mentioned is a system which would permit preemption by the Antitrust Division first and, if it chose not to preempt, by each of the state governments in which the defendants did business. The state governments' preemption would not prevent duplication, but it would provide a vehicle for collecting damages for consumers, thereby increasing indirect deterrence and indirect compensation.

#### *D. Eliminating Actions for Damages Against Corporations*

The problems of the present treble-damage scheme and of the proposals discussed above suggest that it is at least worthwhile to consider eliminating damage actions. If damage actions for antitrust violations were eliminated, deterrent efforts would have to focus upon individual managers. This could be done in several ways. More criminal actions would increase deterrence, as would longer and more frequent imposition of prison sentences. Larger fines based upon the nature and the amount of harm caused should have additional deterrent force. More innovative penalties might also help. Managers who violate the antitrust laws could be forbidden from accepting a managerial or other position in certain industries for specified periods of time. Unlike the present scheme, such a system could bring relatively quick punishment, proportional to the offense, and certain to be painful, all of which are theoretically crucial to effective deterrence.

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128. See note 94 *supra*.



There are, of course, objections to these proposals. First, many persons might consider it unfair to penalize individual managers severely for violations of laws almost totally lacking in clear guidelines. I have already given one response: if we are interested in deterrence, we must face up to the fact that individuals, not corporations, are deterred. Any penalty imposed upon corporations deters antitrust violation only to the extent that it indirectly imposes some burden on managers. Moreover, if the question is one of fairness, we must ask if it is fair to penalize new shareholders, future consumers, and the tax-paying public for violations dictated and carried out by corporate managers. I contend it is not; but that is precisely what the present system and, to a lesser extent, the Posner proposal accomplish.

Abandoning damage actions does raise the same political problems which would plague the Posner proposal, and to a greater degree. Since private parties would not be permitted to sue if the government chose not to act, the Antitrust Division would be the sole source of antitrust enforcement. It would therefore need substantially larger appropriations than Congress seems willing to pass, and it would be subject to pressure from the White House, and perhaps from Congress, both on specific cases and on enforcement policy generally. But even now antitrust deterrence depends upon government action, since most actions by private plaintiffs follow on the heels of some government proceeding.

#### *E. In Anticipation of Rebuttal*

The foregoing observations may be challenged on the ground that treble-damage actions are both necessary and able to provide sufficient deterrence and compensation and that the burden is on the critic to prove that the present system is, in fact, not working well and to prove that another system will definitely be better. I see no good reason to grant that assumption. As I have already observed, there is no more proof that the present system is satisfactory than that it is unsatisfactory. All that exists is the theory that the present threat of treble damages is a good deterrent and that compensation will be adequately served by treble-damage actions under the present system. But the foregoing analysis has shown that the threat is never one of treble damages, that the risk of incurring substantial costs from violating the antitrust laws is considerably lower than one might suspect, and that compensation is rarely achieved. Thus, in comparing the existing system with all other possible theories for antitrust enforcement, I see no good reason to favor the existing system. The

proper approach is to evaluate the likely success of each theory and to opt for that which appears most likely to be successful.

It may also be asserted that many, if not most, of the problems raised with respect to antitrust actions are problems which plague all private plaintiffs. Even if that is true, I have asserted that those problems are more serious in the average antitrust case than in other litigation and deserve special treatment. The real issue, one which has lain dormant too long, is what that special treatment ought to be.

### CONCLUSION

The complexity of the antitrust laws has created substantial problems for antitrust enforcement. Criminal penalties have been criticized as unfair and have been rarely employed. On the other hand, civil suits have been inadequate in part because the substantive law necessitates vast amounts of circumstantial evidence to prove liability, causation and damages. More effective antitrust enforcement and compensation for antitrust violations may therefore remain elusive until lawyers, judges, and economists manage to clarify the substantive law so that a businessman can understand it and most injured plaintiffs can successfully employ it. Until then, antitrust enforcement and compensation can be improved only by candidly recognizing the weaknesses of the present enforcement system. There are many, but the major ones include an apparent failure to recognize that individuals rather than corporations are deterred, infrequent compensation for those injured and a substantial propensity to creat windfalls.

While some of the lesser weaknesses of our current antitrust system—for example, some of the unnecessary barriers to plaintiffs' recovery—can be eliminated by the courts, the major ones require assistance from Congress. I have suggested, for example, that the courts should be empowered to require individual defendants to pay some portion of damages awarded against their corporations when responsibility for the violations rests with those individuals; and Richard Posner has suggested that the Department of Justice should be permitted to preempt private actions and sue for all damages resulting from a particular violation. Finally, even abolition of actions for treble damages should be considered as an alternative to the present system. Although there would be substantial drawbacks, some of the present inequities and inefficiencies would be eliminated. In sum, I have suggested that for too long lawyers and judges have uncritically assumed that the present antitrust enforcement scheme serves the admittedly desirable goals of compensation and deterrence. My purpose has been to begin an appraisal of that proposition.