# Re-Designing the American Antitrust Machine Part I: Treble Damages, Contribution and Claim Reduction

JOHN DEQ. BRIGGS*

Axinn

**Abstract**

This is the first in a contemplated series of articles, and eventually a book, about "the American Antitrust Machine" and how it might or should be reconsidered if it were built from the ground up in order to serve agreed competition policies with enforcement machinery, both public and private, designed to implement such policies in a complementary and coherent way. Most of the economies in the world, both developed and developing, have established or redesigned their competition policies and associate enforcement machinery just since the onset of the twenty-first century. The United States has felt no need to do so and the idea of doing so has never been seriously advanced.

This Part I addresses several singular features of the private damages recovery machinery in United States: treble damages, joint and several liability, contribution, and claim reduction. These topics have been the source of multiple articles and proposals over the years, but almost always in the somewhat narrow context of dealing with them in largely unconnected silos. None of the writings on this subject that the author has been able to uncover arise in the context of rethinking the entire corpus of American antitrust law and policy. Accordingly, this article

* Mr. Briggs is a partner in the law firm of Axinn, Veltrop & Harkrider, and co-chair of the firm's Antitrust and Competition Group, Managing Partner of the firm's Washington, DC office, and an Adjunct Professor of International Competition Law at The George Washington University Law School. He is also a former Chair of the American Bar Association's Section of Antitrust Law. He is deeply grateful to the substantial foundational work done on this article by Max Fischer-Zernin, a student at New York University Law School and a 2017 summer associate at the Axinn Law firm.

should not be viewed as a stand-alone proposal, but part of a far broader mosaic of change, the elements of which are alluded to herein, but which are not as yet fully developed.[1] Therefore, the proposals advanced in this paper are subject to change once the weaving of the larger fabric is underway and other voices are heard.

## I. Introduction

American antitrust law has a long and distinguished heritage, dating as it does from 1890, 1914, and a small but consequential number of individual tweaks since then. Most of the more than one hundred competition law regimes around the world owe a great deal to the American experience, and around the world the United States has been the chief "missionary" or "proselytizer" of antitrust as a worthy approach to regulating economic rivalry (and also economic activity) so as to maximize various different flavors or definitions of "consumer welfare."[2] In part, in response to that missionary work, the overwhelming number of these jurisdictions have given both executive and legislative attention to their competition policies and have sought to design systems of enforcement to achieve articulated twenty-first century competition policy goals to address cartels, mergers and joint ventures, distribution restraints, single firm conduct by a

[1] This article is in part an outcropping of an earlier collaboration with Donald I. Baker, a former Assistant Attorney General in charge of the Antitrust Division, and the author's teaching partner for several years at the George Washington Law School. Baker and Briggs, *Rethinking U.S. Antitrust Policy and Administration: Joining the Rest of the World in the 21st Century, Liber Americorum,* William E. Kovacic—An Antitrust Tribute, Vol. II by the Institute of Competition Law. That article represented the authors' initial writing on the discordant relationship between American antitrust law and the antitrust and competition laws and policies embraced almost everywhere else around the world. Additionally, I am influenced in various respects by the especially thoughtful and original article published almost fifteen years ago by Mr. Baker entitled, *Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?* 16 LOYOLA CONSUMER L. REV. 379 (2004) [hereinafter Baker, *Revisiting History*].

[2] Although important for later at Parts of this series of articles, it is not now my purpose to define or challenge the essential purpose(s) of the antitrust laws. It is widely accepted that "consumer welfare" is of paramount importance. What is somewhat less widely accepted is what that term actually means. The term literally blasted its way into antitrust in 1978 when Robert Bork published his seminal book, *The Antitrust Paradox,* which pulled together many of his other writings. That book contained the following, which has deservedly become at once influential, but also somewhat ambiguous and controversial: "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give." (p. 50). At its simplest, his answer to that question was that the Sherman Act had been adopted as a "consumer welfare prescription." (p. 66). This is today the received wisdom in the antitrust and economic community. But there seems to be no received wisdom as to is what that procrustean term actually means. *Compare, e.g.*, Werden, *What is Consumer Welfare?*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352032 *with* Orbach, *The Antitrust Consumer Welfare Paradox* (Work in Progress, 2010), http://migration.nyulaw.me/sites/default/files/ECM_PRO_064347.pdf.

dominant firm, conduct relating to the use and misuse of intellectual property and other instances of the accumulation or exercise of market power. Nearly all of the more than one hundred countries have modified or enacted legislation, created new administrative structures, and attempted to create relatively well thought out public enforcement regimes, sometimes complemented by private enforcement regimes.

Remarkably, save for generally embracing the American-based modern economic approach to mergers and joint ventures, virtually *none* of the competition regimes around the world have chosen to emulate the bulk of the most prominent features of American antitrust. This Part I of the American Antitrust Machine thus asks the reader to pause, look around the world, look at the domestic regime, and ask whether, no matter what the competition policy of the United States is or should be, if its administrative, procedural, and legal machinery were today being built from the ground up, would they even remotely resemble the machinery that is in place today, substantially unchanged for more than 100 years. My answer to this question is a resounding, "Of course not!"

It is with that thought much in mind that one might imagine an agreeable bipartisan national competition policy grounded in a shared objective to curtail the creation of market power by acquisitions and joint ventures, while at the same time addressing the existence of durable market power in sensible ways, whether that market power has come into existence through single firm conduct or concerted action. While it might appear otherwise, the proposals set forth herein are not intended to suggest hostility to a strong antitrust enforcement regime with complementary public enforcement and private enforcement. Quite the opposite. But as has become evident, the multiple encrustations that decade by a decade have found their way into mainstream administration and policy and now burden the entire system, have led to certain equilibrating tenancies that have, among other things, made much of antitrust less effective, less coherent and less bipartisan. These circumstances infect the law itself, but they are to a material degree the product of the probably unintended consequences arising out of administrative deficiencies and procedural machinery that, in many cases, have now outlived the rationale for their initial creation.

Somewhat more specifically, one can at least hope, if not expect, that the executive and legislative branches of American government are actually capable of considering and addressing a number of difficult but important twenty-first century competition issues, including but not limited to:

- What is or should be the main goal of competition policy in United States? Anything other than consumer welfare? And what does and should consumer welfare mean, expressed in a manner readily understandable by the judiciary.
- Whether domestic antitrust law should be governed by a fear of over enforcement or a fear of under enforcement. Over-enforcement might deter desirable competitive conduct at the cost of consumer welfare. Under-enforcement might bring into existence durable and persistent market power, also at the cost of consumer welfare. Is there a proper risk-balance capable of being managed by courts and agencies? How much over enforcement is tolerable? How much under enforcement is tolerable? Are there rooms in the house of antitrust where a policy tilt towards or away from under enforcement or over enforcement should be treated differently?
- Whether institutions that have become "too big to fail," should be considered "too big to exist." Is this a merger issue? A single firm growth issue? What if any circumstances should warrant such firms becoming subject to special laws or regulatory regimes apart from antitrust or in addition to antitrust? Can or should antitrust allow the breakup of such firms under certain circumstances?
- Whether it makes sense in the twenty-first century to accommodate two federal enforcement agencies and fifty individual state regimes, all with overlapping and similar authority, without any clear areas of any division of responsibilities or areas of preemption. Should mergers and acquisitions be subject only to one federal clearance process? Is there any place else in the world where local authorities can challenge a transaction cleared at the federal level? Does this make sense today?
- Should the federal enforcement regime be permitted to provide individual exemptions or bloc exemptions from the antitrust laws that would preclude private actions? Or is the existing Department of Justice (DOJ) and Federal Trade Commission (FTC) process for business review letters and opinion letters adequate or better, despite being nonbinding on private litigants.

- Should there continue to be mandatory trebling of damages for *all* antitrust violations? Why? Are there types of cases where treble damages should be eliminated altogether, such as complex rule of reason cases? Should victims of cartel activity get the benefit of the treble damages, or should those funds be treated in some other way, such as *cy pres*? In view of the stupendous increase in criminal penalties since 1890 should damages in cartel cases be trebled at all?
- Should arbitration agreements trump antitrust? Class actions? What about arbitration agreements that contain cost shifting clauses?
- Is there a role for limiting one-way attorneys' fees to certain types of cases? Should there be a loser pays rule in certain circumstances? Some countries have loser pays rules event by event (for example discovery motion by discovery motion)—is this rational and possible? Should the normal American rule of no cost shifting at all be brought to bear in antitrust cases as elsewhere, especially given the litigation financing enterprises that have developed overseas and now developed rapidly in this country to fund various firms pursuing claims?
- What if any other mechanisms should or might be utilized to encourage meritorious private litigation while discouraging baseless litigation? Should there be a different rule for follow-on cartel litigation than for other types of litigation?
- Are there areas of antitrust law where we should rely totally or mainly on public enforcement to the exclusion some or all of private enforcement?
- Whether digital monopolies based on powerful network effects should in some fashion be regulated, either under the antitrust laws or otherwise, and if so how?
- What if anything is the proper role for public antitrust in addressing the competitively consequential uneven regulation as between new technologically driven businesses (Uber, Airbnb, VRBO) and established rivals (taxicabs, hotels, B&Bs).
- Whether our sole national concern with regard to single firm conduct ought to be its actual or potential exclusionary impact on actual or potential rivals or whether antitrust should concern itself in some way, subject to manageable limiting principles, with exploitive conduct by firms with persistent market power largely blockaded to new entry?
- What is the proper role for class actions this century? Opt in? Opt out? Has the class certification process become so complex and cumbersome that it is almost

unmanageable? What is the point of class actions? To reimburse victims? To punish violators? To promote deterrence? To enrich the lawyers? Has the Supreme Court's distaste for class actions become the cause of the restriction of the scope of antitrust in the Supreme Court? Should antitrust class actions be limited to a relatively straightforward cartel cases rather than more complex conduct cases of the sort normally addressed under the rule of reason?

- What is the proper balance between intellectual property law and antitrust law? While the patent laws give patent holders the right to exclude others from making using or selling the patented device or process, antitrust law in the United States has developed principles requiring, in effect, compulsory licensing and judicially managed price controls; such principles have been rapidly embraced around the world; it is unclear whether this was an intended consequence or an unintended consequence. Should this be of concern to antitrust policy? Is it consistent with treaty obligations prohibiting mandatory licensing of intellectual property?
- Should the rule in federal cases barring indirect purchasers be aligned with what has now become the rule in most states allowing suits by indirect purchasers? Should courts be primarily concerned with liability and total damages and then allow direct and indirect purchasers in a follow-on administrative process to adjudicate how these total damages should be allocated?
- What if any, comity-based principles or policies should be adopted to avoid international friction, such as allowing convicted foreign nationals to serve their jail sentences at a facility in their home country?

Other regimes, most notably the Chinese, the United Kingdom and the Europeans (through the European Commission) have spent years[3] studying these matters and have tended to come to

[3] *See 2014 Directive of the European Commission regarding damages actions*, http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html . This Directive is the product of more than a decade of study and deliberation. In the end, the Directive rejected nearly all of the familiar features of American antitrust procedure governing the content and conduct of private actions. The Directive was the lineal descendent of the 2005 European Commission, *Green Paper* on *Damages actions for breach of the EC antitrust rules*, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672&from=EN, the 2008 *White Paper Damages actions for breach of the EC antitrust rules*, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0165&from=EN, and the very extensive 2008 *Commission Staff Working Paper*, http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf [hereinafer *Commission Staff*].

relatively clear points of view that are not consistent with the American approach, which itself was the product of a very different time when the Sherman Act was a misdemeanor, the maximum fine was $5,000, no funds were budgeted for enforcement of the antitrust laws and public enforcement was toothless in various ways and focusing often in fact on labor unions as unlawful combinations.[4] Since the advent of this century, most of the world's governments have addressed the matters above and more. In doing so, they have fled from many of the most familiar features of the American antitrust machine. Indeed, when the European Commission was deeply focused on encouraging private actions, many of the papers and speeches expressed a desire to create a viable damages remedy without the "excesses" of the American system[5] and without the "toxic cocktail"[6] of procedural benefits that flow to the claimants, and perhaps often to an even greater extent, their lawyers. The principal elements of this "toxic cocktail" seem to refer to many features of the American legal system, but especially:

- The mandatory award of one-way attorneys' fees for plaintiffs, but not for prevailing defendants, which is wholly inconsistent with the applicable rule in most all other countries.
- The wide open, expensive and extraterritorial documentary and deposition discovery available in cases brought in the courts of the United States, but not generally elsewhere; along with the openness of US courts to exercise vast extraterritorial jurisdictional discovery against foreign persons and companies even before any jurisdiction is established.[7]

---

[4] *See* John L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption,* 22 LOY. L.A. L. REV. 151, 161-64 (1988), http://digitalcommons.lmu.edu/llr/vol22/iss1/3.

[5] *See, e.g., Commission Staff supra* note 3, on antitrust damages, expressing concern with abuses and excesses associated with US style discovery, class actions, treble damages, one-way cost shifting and other related features ("US class actions in antitrust cases are characterized by a combination of features very specific to the US, including jury trial, one-way shifting of costs, treble damages, wide pre-trial discovery, contingent fees agreements and an opt-out mechanism.")

[6] At a George Washington University Law School Conference on Private Enforcement of Competition Law in February 2009, many European presenters described the American system as a "toxic cocktail." *See, e.g.,* Press Release, Europa, Green Paper on Consumer Collective Redress - Questions and Answers (Nov. 27, 2008), http://europa.eu/rapid/press-release_MEMO-08-741_en.htm (describing the following elements of American class actions as part of a "toxic cocktail": (1) contingency fees; (2) treble damages; (3) pretrial discovery; and (4) opt-out, as opposed to opt-in, class actions).

[7] Briggs & Bitton, *Heisenberg's Uncertainty Principle, Extraterritoriality and Comity*, 16 SEDONA CONF. J. 327, 328, 334-43 (Fall, 2015). On the subject of the extraordinary extraterritorial role of American courts with respect to jurisdictional discovery, see S. I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASHINGTON & LEE L. REV. 489 (2010).

- The existence of joint and several liability without any right of contribution or meaningful claim reduction.
- The fact that federal clearance of transactions or conduct does not preempt or preclude any or all of the individual states, or any individual, from attacking those transactions or conduct that have been approved or cleared at the federal level.
- The policy chaos that has ensued in the wake of the Supreme Court's decision in *Illinois Brick*,[8] which generated state legislative or judicial repealers such that indirect purchaser actions prohibited under the Sherman Act are nonetheless available under the laws of more than half of the states and are pursued in federal courts alongside the direct purchaser claims by virtue of diversity jurisdiction.[9]

Whether taken wholly together, in small clusters, or even individually, these uniquely American procedural features of our competition system have a powerful impact on the companies everywhere and also on the economy of the United States. The wealth transfers generated by this system are enormous. One result is that the lawyers have come to have a truly outsized role in the American economy, a role unlike and far grander than the role they play outside the United States. The purpose of this modest paper is to put some focus upon those features of private damage litigation that seem to be an essential component of any rethinking of American antitrust and competition law and policy. This paper will address these issues at a relatively high policy level while bearing in mind the far larger context set forth in these introductory pages.

Many able and thoughtful people have considered, and indeed written extensively, about particular aspects of these procedural features of American antitrust, but with one exception, little heed has been paid in recent decades to how the United States should build a competition

---

[8] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (prohibition on suits brought by indirect purchasers applies only to suits brought under the Federal Sherman Act, and not to lawsuits brought under state laws).

[9] Class actions brought on behalf of indirect purchasers now routinely find their way two federal courts as result of the Class Action Fairness Act (CAFA) and resulting removal procedures. And while indirect purchaser actions are now routine, the defendant still may not assert as a defense that the allegedly injured indirect purchaser passed on some or all of any overcharge to its customers. And so, while many states have repealed the holding of *Illinois Brick*, the holding of Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481 (1968) (prohibiting a passing on defense is like Schrödinger's cat, simultaneously alive and dead on a state-by-state basis). *See* ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 651-52 (8th ed. 2017).

regime if the framework established in 1890 and 1914 did not exist.[10] Even the unusually well-credentialed Antitrust Modernization Commission, which issued a lengthy report in 2007,[11] looked to the elements of domestic antitrust law piece by piece and element by element, and not as a coherent whole. Each plate of grass was put under a microscope and carefully examined. But the entire lawn was never examined from a higher perspective. And while the United States antitrust regime continues to be influential on the world stage, that influence has much to do with the applicability of modern economic principles to competition policy in a merger and acquisition setting, and little or nothing to do with the administrative principles and procedures that exist in these United States—whether to support the private damages regime, or to serve the multipolar competition regime. Indeed, we should listen to what foreign administrations and governments say about our antitrust regime (they credit United States for bringing antitrust to the world) but we would be wise to pay greater attention to what they do (they have voted with their feet through their legislatures and their executive branches to reject root and branch virtually all of the peculiar aspects of American antitrust summarized above).

Somewhat relatedly, it is probably not unfair to say that we do not really have an agreed national competition policy in this country. No one voice speaks for competition policy. Indeed, apart from mergers, acquisitions and joint ventures (which are no small part of things) most of the law developed in the field comes from private actions. Also, the FTC and the DOJ have over significant periods of time been adversarial, with different underlying views as to what domestic competition policy should look like. This happens in a number of ways across a number of the constituent elements of competition law, but the schism was most dramatic at the tail end of the administration of George W. Bush when the DOJ embraced a set of enforcement guidelines for single firm conduct under Section 2 of the Sherman Act, which guidelines were totally rejected by the FTC as representing *its* enforcement policy. Almost immediately after the election of President Barrack Obama, the new administration abandoned the short-lived DOJ enforcement

[10] A partial exception to this is Baker, *Revisiting History, supra* note 1 by my teaching colleague and sometime co-author. His article, along with a lengthy period of time in Brussels, have had a material impact in generating for me an entirely new prism through which to observe the unique peculiarities of the American Antitrust Machine.
[11] For for a full copy of the report and it recommendations, see, *Antitrust Modernization Commission* 2007, http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

guidelines and set forth its own short and more aggressive views on the reach of Section 2 of the Sherman Act.[12]

And so the modest goal of this brief article is to suggest revisions to certain pieces of the "American Antitrust Machine." But these suggestions should neither be taken in a vacuum nor as the last word. Rather, they are some tiles understood to be pieces in the larger mosaic of a re-thought redesign of the American Antitrust Machine so as to accommodate the policy needs of this century. Much might remain more or less as it is; much should without doubt be changed.

## II. A Reminder of the Chronology of the Origins of so much of American Antitrust

It is useful to recall what has prompted material change to antitrust law or policy in the United States. For most of the last century or more, legislative change in antitrust policy has come about as a result of reaction to corporate or government excess, inadequacies in the coverage of the law, and sometimes random uninvited changes with substantial unintended consequences.[13] The Sherman Act of 1890 was clearly a reaction to corporate excess writ large. The oil trusts, the railroads and others had become monopolists and monopsonists. The victims were often farmers and others in the agricultural chain of distribution. Getting goods to market became expensive. So there was a strong federal legislative reaction.[14] But it was not until thirteen years later, in 1903, that modest funds were actually provided for the enforcement of the antitrust laws.[15] From

[12] Briggs, *In Reversal, DOJ now Targeting Monopolization – Antitrust Division disavows Bush policies, plans to enforce § 2 of the Sherman Act rigorously*, THE NATIONAL LAW JOURNAL (November 2, 2009). For further discussion of this, see *infra* note 23.

[13] The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a, that brought about premerger notification procedures, first in the United States, and then emulated differently around the world, is an example of a piece of legislation for which there was no particular demand, but that changed the character and substance of merger control worldwide forever. This seemingly modest procedural change brought merger control policy firmly within the grip of the federal agencies with only episodic involvement of the courts, and all but eliminating completely the role of the United States Supreme Court in establishing merger law or policy.

[14] Notably, several states already had versions of an antitrust act, but they covered only intrastate commerce.

[15] 21 Cong. Rec. 2569 (1890); S. Doc. No. 147, 57th Cong., 2d Sess. 166 (1903). *See also* Elzinga & Breit, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 65-66, 67 (1976); Garvey, *Report of The Comm. On the Judiciary, U.S. House of Representatives—Study of The Antitrust Treble Damage Remedy*, 98th Cong., 2d Sess. 6-8 (1984); I THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 167, at 7 (E. Kinter ed. 1978)[hereinafter LEGISLATIVE HISTORY].

1903 until 1933 antitrust matters were handled by someone with the title of “Assistant to the Attorney General.” And it was not until some years into The Great Depression, in 1933, that the Antitrust Division was established during the administration of President Roosevelt and Attorney General Homer S. Cummings.[16]

Meanwhile, the role of the courts and the common law in respect of antitrust became a source of material controversy. Judge William Howard Taft, in his 1898 circuit court opinion in *United States v. Addyston Pipe & Steel Co*.,[17] saw the common law as constraining judicial power. He did not see the courts is being at liberty to do decide “how much restraint of competition is in the public interest, and how much is not.” [18] By the time of the Supreme Court’s 1911 decision in *Standard Oil Co. v. United States*,[19] the notion of the common law as constraining judicial power had evaporated. This was part of the reason for the enactment of the Clayton Act and the Federal Trade Commission Act in 1914 during the administration of President Wilson. These enactments sought in some measure to limit the discretion of the courts by writing clear prohibitions on specific types of conduct. The fear of Congress was that without greater legislative control, the legality of any particular restraint would be determined by a judge’s individual opinion as an economist or sociologist rather than by a legislatively set legal standard.[20]

So, twenty-four years into the Sherman Act, it had become clear that while the government could separate a monopolistic trust into smaller viable parts, the law would not reach all restraints of trade, but only those which a court found to be unreasonable. Both the Clayton Act and the Federal Trade Commission Act filled in some of the interstices. The Clayton Act made illegal mergers that may substantially lessen competition or tend to create a monopoly, and also outlawed several specifically defined behavioral abuses, including tying arrangements, exclusive contracts, and price discrimination. The FTC Act was much broader and prohibited “unfair

[16] History of the Antitrust Division on the Department of Justice website. https://www.justice.gov/atr/history-antitrust-division.
[17] 85 Fed 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).
[18] *Id* at 284. *See generally*, First & Waller, *Antitrust’ s Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2547-49 (2013).
[19] 221 U.S. 1 (1911). Today, most Antitrust participants tend to think of this case as a sensible avoidance of prohibiting everything, but to Justice Harlan, who had joined Taft in the *Addyston Pipe* decision, *Standard Oil* involved inappropriate "judicial legislation." *Id.,* at 100. *See* First & Waller, *supra* note 18, at 2547-48.
[20] *See* S. Rep. No 62-1326 at 11 (1913), cited in First & Waller, *supra* note 18, at 2547-48.

methods of competition," a broad phrase that has been persistently undefined and controversial ever since.[21]

This regime has remained substantially in place for more than the last 100 years: two overlapping agencies, neither of whom preempts individual states or private parties and each of whom serve different masters. The FTC is an independent agency responsible and responsive in a variety of ways to Congress. The Antitrust Division, of course, is the part of the executive branch. Yet, putting aside criminal enforcement, both agencies do much the same thing and have vastly overlapping enforcement authority, yet they have been known quietly, or sometimes quite volubly, to squabble and quarrel not only with regard to which agency should handle what matters or industries but, more importantly, what competition policy in these United States actually should be.[22]

A stranger to the United States, well-informed in foreign competition policy – a modern day antitrust Alexis de Tocqueville—would surely be mystified by the administrative structure of the enforcement machinery in the United States and the exotic rules and procedures governing private damages cases. Whatever sense these elements it may have made more than 100 years ago, they seem to live on largely because the forces of the status quo in this area are so much

[21] Foer, *The Federal Antitrust Commitment: Providing Resources to Meet the Challenge*, The American Antitrust Institute, n. 4 and accompanying text. (1999). After several years of serious rumination, the FTC issued a one-page statement of enforcement principles that would govern its enforcement of § 5 of the FTC Act. The Chair of the FTC issued a multi-page dissent that has, at least for now, prove more influential than the one-page statement itself. Both documents are available here. https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act . The difficulty of providing limiting principles to broad notions of "fairness," has proved intractable in this country.

[22] This conflict played out most visibly in connection with the wide variance between the DOJ and FTC with regard to the enforcement of Section 2 of the Sherman Act. During the Bush years, the DOJ did not initiate a single § 2 case or, so far as the record discloses, commence any meaningful investigations with respect to single firm conduct. It did issue a highly controversial 215-page report articulating its enforcement priorities, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*. The Report, issued in September 2008, grew out of a joint project that began in 2006 between DOJ and the FTC, including a year-long series of joint hearings, with 29 separate panels and 119 witnesses covering a wide range of topics and perspectives. Despite the effort that went into it, the Report was not well received. The FTC declined to endorse it, and the majority of the FTC Commissioners issued a strongly-worded critique stating that, "if adopted by the courts," the Report "will be a blueprint for radically weakened enforcement of Section 2," and that the enforcement principles DOJ sets forth "would place a thumb on the scales in favor of firms with monopoly or near-monopoly power." Statement of Commissioners Harbour, Liebowitz, and Rosch On the Issuance of the Section 2 Report By the Department of Justice (Sept. 8, 2008) at 1, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf . *See generally* Briggs & Matheson, *The Supreme Court's 21st Century Section 2 Jurisprudence: Penelope or Thermopylae?* 11 SEDONA CONF. J. 137 (2010).

stronger than the forces for legislative change.[23] But the focus of this paper shall now shift back to some of the main aspects of American antitrust that drive private actions. The 1914 legislation is pertinent to this mainly because of the passage of Section 4 of the Clayton Act, which granted to "any person" the right to seek treble damages and attorneys' fees for injury to the plaintiff's "business or property" as a result of a violation of the Sherman Act.

The chronology set forth above and below is somewhat central to the points addressed in this paper. In 1914, and for some decades thereafter, there was no Antitrust Division; federal funding for violations of the antitrust laws was nonexistent, and then limited; the maximum penalty for a violation was $5,000, and a violation was a misdemeanor, not a felony. It was in these circumstances that treble damages and one-way attorneys' fees came into existence, and were engrafted onto a common-law tort regime that did not at the time provide for contribution (although ny and large it now does). More than 100 years ago, this was understandable since absent the "private attorney general" there was the possibility of little no enforcement at all.

There was a clear and obvious need to encourage private litigation. Indeed, American antitrust began in a unique way, first with a private enforcement regime, which then evolved into a public enforcement regime. Every other country began with a somewhat more focused sense of the purpose of competition policy, enforced by public administrative and enforcement machinery. Only relatively recently have other nations come to begin to embrace a complementary private enforcement regime, although not one that even remotely resembles the American model.

The following chronology of the handling of violations of the Sherman Act serves to aid in providing foundational focus as to why some change in certain procedural aspects of the private damages regime are worthy of discussions about modernization and change:

[23] The matter of the dual or multipolar enforcement it is well beyond the scope of this Part I, and will be addressed in subsequent Parts of this series. Subject to further thought and reading, it might considerable sense to propose elimination of this dual and multipolar enforcement system in favor of a system that would permit a single government institution to speak for United States competition policy, including in some circumstances to the exclusion of private parties and individual states (i.e., federal preemption of transactions and conduct "cleared" by federal authorities).

**1623:** Treble damages (and also double costs) for a private party injured by a monopoly first established by § 4 of the English Statute of Monopolies, 21 Jac. I, c. 3.[24]

**1890:** Sherman Act: misdemeanor provides for $5,000 maximum penalty. Section 7 of the original Act is the source of the treble damages, costs, and attorney's fees language now found in Section 4 of the Clayton Act.

**1898:** *Addyston Pipe* establishes the common law as the constraint on judicial discretion.

**1903:** Funding provided for the enforcement of Federal antitrust law.

**1911:** *Standard Oil* largely eliminates the common law as a constraint on judicial discretion.

**1914:** Clayton Act and Federal Trade Commission Act enacted, expanding and defining certain conduct subject to the Antitrust laws.

**1933:** Antitrust Division is established.

**1955:** Sherman Act: maximum penalty increased from $5,000 to $50,000.

**1966:** Revisions to Federal Rules of Civil Procedure give birth to modern class actions.

**1974**: Sherman Act misdemeanor changed to felony; maximum fine increased from $50,000 to $1 million.

**1984**: Sentencing guidelines and alternative fines come into play providing for criminal fines of "double the gross gain or loss" arising from the violation, thereby making illusory the "maximum" fine established by the Sherman Act.

**1990**: Statutory maximum fine increased to $10 million (although in view of the 1984 adoption of the sentencing guidelines and alternative fines, this statutory maximum was somewhat illusory).

**2004**: Statutory maximum fine increased to $100 million (for the same reason, this was and is also illusory).

**2017**: The three largest fines consented to by antitrust defendants who pled guilty were: $925 million, $650 million and $550 million.[25]

**2000-17:** Because of the "double the gross gain or loss" feature that came into play in 1984, there have been some 30 fines in excess of $100 million since 2000. Fourteen of those fines exceeded $200 million; five range from $500 million to $925 million. Nearly all of the

---

[24] The English Statute of Monopolies is described as the original source of the Anglo-American patent law. The original text is available at https://www.ipmall.info/sites/default/files/hosted_resources/lipa/patents/English_Statute1623.pdf.

[25] https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

companies involved have been foreign enterprises and the cartels have been mostly international in scope.[26]

The circumstances described immediately above cannot be looked at in isolation, but must be viewed also in light of similar developments around the world. Fines imposed by competition authorities outside of the US, most notably the European Commission have become enormous and need to be taken into account when thinking about shareholder punishment, corporate punishment, deterrence and allied issues. During the five-year period from 2013 to 2017, European Commission fines amounted to about €8.5 billion.[27] During the five-year period from 2012 to 2016 (the most comparable timeframe available) the total of criminal fines imposed by the Antitrust Division was about $7.4 billion.[28]

While there are no reliable statistics to correlate payments in civil litigation with criminal fines, the anecdotal evidence, based often on my own experience and those of colleagues, is that there is roughly a one to one correlation between civil payments and U.S. criminal payments. Deeper research may prove otherwise, but for purposes of this paper, I shall assume such a correlation as a general proposition, recognizing the likelihood of non-trivial variation on a case to case basis, perhaps especially where the leniency program serves to limit a criminal fine.

Separately, the overwhelming bulk of very large private treble damage actions today are follow-on class actions brought in the wake of publicity surrounding a domestic or foreign investigation into potential cartel activity. Class actions are usually filed almost instantly in the wake of a regulatory filing by a public company revealing that the company is under investigation by one or another competition authority. To be sure, more often than not, such announcements of

[26] *Id.* In nearly all of these cartel cases involving foreign multinational corporations, part of the plea agreement between the company and the DOJ was that certain executives agreed to go to jail in the United States, typically for an agreed period of time -- all subject to judicial approval, virtually never withheld. The overwhelming number of individual participants in a corporate cartel who are serving jail time in US prisons over the last decade have been foreign nationals. In every case these are citizens of nations who represent this country's most important trading partners and closest allies (e.g., Japan, South Korea, the UK, Taiwan), and in no cases are these citizens of countries with whom the United States has troublesome relationships (China, Russia, Turkey, Iran). *Compare* the companies identified in the materials cited above *with* the DOJ's jail time statistics, https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts

[27] http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

[28] https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

investigation are often a precursor of the filing of an information or indictment, almost always followed by a negotiated resolution of the criminal proceeding and an agreement to pay a fine, often an enormous fine. Nearly all the fines ranging from less than $10 million to more than $900 million received by the Antitrust Division over the last decade have been fines that were consented to without any trial after extensive government investigations.

And in essentially all such cases, of course, the main issue for class action plaintiffs, their counsel and the defendants is to establish and agree upon some measure of damages for which the case can settle. These settlements often result in minimal payments (often under $10) to individual class members and payments of tens of millions of dollars to class counsel. These follow-on treble damage class-action price fixing cases nearly always settle. They represent the overwhelming bulk of civil antitrust litigation today.

## III. Nothing is the Same as it was Other than a Variety of Principles that Were Put in Place When Everything was Different

### *1. Treble Damages: Background*

When Senator Sherman's bill was referred to Judiciary Committee, Senator Hoar added the treble damages provision, Section 7 of the original Sherman Act,[29] likely modeled after a somewhat similar provision in the 1623 English Statute of Monopolies.[30] These provisions were thought needed to encourage private actions, particularly since, as mentioned in the chronology above, the Department of Justice received no antitrust funding until 1903 and could only impose a $5000 corporate fine for each violation. For a long time, until the 1970s and early1980s at least, there was not an enormous amount of controversy surrounding treble damages. Class actions had not fully developed; the whipsaw impact of no contribution or claim reduction had not developed into the art form it later became, criminal penalties were still extremely low by today's standards, and foreign penalties were nonexistent. In the circumstances, treble damages

[29] *See* H. Thorelli, THE FEDERAL ANTITRUST POLICY 212 (1955); K. Elzinga & W. Breit, THE ANTITRUST PENALTIES 64, 65-66 (1976); Garvey, *supra* note 15; LEGISLATIVE HISTORY *supra* note 15, at 8.
[30] *See supra* note 25 for a link to the full text.

represented the principal source of deterrence and "punishment" for corporations, while criminal penalties were thought to serve that goal for individuals.

General support for treble damages (and also to a meaningful degree, mandatory one way attorneys' fees) was relatively widespread, including at the Supreme Court, and rested on several basic propositions, mainly: (1) the perceived need for a bounty to encourage private individuals to enforce the law out of a concern that the government couldn't or wouldn't; (2) compensation of victims; (2) deterrence of violators; (3) forfeiture of ill-gotten gains; and (4) punishment for wrongdoing.[31] No consideration was given to the enormity of the criminal penalty for the same conduct, much less the more or less concurrent and huge penalties for the same conduct. Likewise, no consideration was given to shareholders and why it was that shareholders should bear the cost of the misconduct of corporate officers.

Treble damages were widely accepted until the 1970s, when criticism began to grow, culminating in the work of many economists, especially William Breit and Kenneth Elzinga, whose critique focused on the inefficiency of private action, the over-expansion of antitrust coverage, and the misuse of private actions, among other things.[32] In general, treble damages have been criticized on fairness grounds because they:

- create disproportionate individual liability,
- impair the ability of defendants to compete after the judgment,
- create uncertainty in the law; and
- encourage frivolous litigation.

But there have developed far more serious issues since the onset of the twenty-first century.

[31] *See, e.g.*, Blue Shield of Virginia v. McCready, 457 U.S. 465, 472-73 (1982) ( "Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to victims of antitrust violations."); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572-73 (1982) (deterrence of anticompetitive acts is a principal purpose of the private antitrust action); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977) (private remedy not only compensates victims but also punishes wrongdoers and deters future violations).

[32] Breit and Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J. L. & ECON. 329 (October 1974); Breit & Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J. L. & ECON. 405, 413 (May 1985). *See also* Breit and Elzinga, *Attitudes Toward Risk and Antitrust Penalties*, 85 HARVARD L. REV. 693 (February 1973) and Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353 ("compensation assumption of treble damages obsolete; private suits exploited to achieve non-compensatory objectives").

Especially given the enormous fining penalties around the world, treble damages are subject to the further criticisms that they: amount to over deterrence; punish shareholders rather than culpable actors; incentivize baseless suits and the use of antitrust suits towards anticompetitive ends; and generate obscene levels of legal fees as a “reward” for achieving trivial recoveries for class members. In combination with other familiar procedural rules unique to the American view of the antitrust (joint and several liability; the lack of contribution; the absence of claim reduction; the ubiquity of opt-out private treble damage class actions; and the bizarre handling of direct and indirect purchaser lawsuits in federal courts,[33] among other things), treble damages are an important cog in the antitrust machine that makes a public company’s defense of a significant class action antitrust suit a practical impossibility. These are the main features of the American antitrust and competition regime that represent the “toxic cocktail” and the “American excesses” that the European Commission and other regimes have gone to such great lengths to avoid.
Recognizing some of these criticisms (many of the criticisms advanced here are of more recent vintage), Congress has on at least four occasions entertained de-trebling.[34] None of these enactments has had any perceptible impact on the problems associated with treble damages and its allied features.

More recently, the Supreme Court has issued decisions unusually critical of the American antitrust regime. The key decisions in chronological order are: *Trinko,*[35] *Twombly,*[36] *Credit Suisse*[37] and *linkLine*.[38] While each of these cases was decided on a relatively unique set of facts, they suggest (but do not expressly assert) a bias against private treble damages actions for something of a potpourri of reasons, including: (1) fear of false positives; (2) lack of confidence in judges and juries to achieve correct outcomes; (3) the inability of federal judges to manage

[33] Indirect purchasers have no standing to bring damage actions under the Sherman Act, but they do have such standing under a majority of the laws of the several states. A "passing on" defense is not available in connection with claims brought under the Sherman Act, but may be available in connection with claims brought under state law. *See* note 9 *supra.*

[34] In 1952 a bill was introduced in Congress to de-treble antitrust damages, but it received little or no attention. H.R. 4597, 83d Cong., 1st Sess. (1953). Much later, in the 1980s, and as part of the effort to reform the antitrust laws during the Reagan administration, Congress passed three laws creating narrow carve-outs for particular categories of defendants: National Cooperative Research Act of 1984 (15 U.S.C. §§ 4301-4305), the Local Government Antitrust Act of 1984 (15 U.S.C. §§ 34-36) and the Export Trading Company Act of 1982 (15 U.S.C. §§ 4001-4021).

[35] Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, 540 U.S. 398, 407-08 (2004).

[36] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[37] Credit Suisse Securities, LLC v. Billing, 551 U.S. 264 (2007).

[38] Pacific Bell Telephone Co. v. linkLine Communications, Inc., 129 S. Ct. 1109 (2009).

antitrust litigation in a cost effective manner; and (4) a preference for regulation over judicial intervention in certain regulated industries, especially securities.[39] To be sure, these criticisms spring as much from features in our civil justice that are uniquely American, as much as from antitrust-centric features of the system.[40] Yet these criticisms arise in the context of antitrust cases, not other civil cases, and that is where they resonate the most.

### *2. Treble Damages: Past Looks at Whether to Change or Retain*

It is not the purpose of this paper to excavate and put under a microscope all of the multiple past efforts at treble damages reform. It is sufficient to observe for now that there have been many such efforts advancing nearly as many flavors of de-trebling as the mind can imagine:[41]

- detrebling only in 'per se' cases;
- detrebling when defendant has no reason to believe conduct was unlawful;
- detrebling in class actions;

[39] *See* Briggs, *The Incredible Shrinking Scope and Scale of American Antitrust*, 1976-2007 at 24-29, Paper presented to The Sedona Conference (October 25-26, 2007). Especially surprising was the Court's opinion by Justice Breyer in *Credit Suisse*, in which the court seemed almost to go out of its way to criticize the American antitrust regime. What the Court said about antitrust, while in context limited to regulated securities markets, nonetheless doubtless resonates with all critics of antitrust, class actions, treble damages, the lack of contribution and the American antirust regime in general. What the Court said was this:

> [A]ntitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate different fact patterns consistently. The result is an unusually high risk that different courts will evaluate similar fact patterns differently.
>
> . . .
>
> [T]hese factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes, i.e., results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids . . . but also a wide range of joint conduct that the securities law permits or encourages.

551 U.S. at 281-82.

[40] *See* Cavanaugh, *The Private Antitrust Remedy: Lessons from the American Experience,* 41 LOY. U. CHI. L.J. 629, 638-40 (2010).

[41] The only modern material change is that successful leniency applicants can completely avoid treble damages in follow-on private litigation. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note).

- trebling only when specific intent to violate the antitrust laws is proven trebling only when covert acts are involved;
- trebling damages to defendants but awarding plaintiffs only actual damages (de-coupling damages from the remedy);
- trebling only up to a certain amount and permitting only actual damages beyond that amount; permitting plaintiff the option of pursuing either treble or actual damages at the risk of facing liability for attorneys' fees if unsuccessful in seeking treble damages; trebling when overcharges or undercharges are involved; and
- permitting up to treble damages at the discretion of the court and various combinations of these things.

A representative but certainly non-exhaustive sampling of the literature is in the margin.[42] Virtually all of these writings tend to examine treble damages in something of a silo or a vacuum, sometimes considering at the same time contribution and claim reduction, but never trying to be imagine a twenty-first century antitrust regime afresh. A notable partial exception to this, focused on private antitrust enforcement, is the especially thoughtful paper of former Assistant Attorney General Donald Baker.[43]

The modern justification (as set forth in the Antitrust Modernization Commission Report)[44] is that treble damages serve five “related and important” goals: (i) deterring anticompetitive conduct; (ii) punishing violators; (iii) forcing disgorgement of the benefits from those violators; (iv) providing full compensation to victims; and (v) providing an incentive for victims to act as “private attorneys general.” Putting aside that the third and fourth justifications are two ways of stating largely the same thing, the fact is that none of these justifications should carry very much

---

[42] Antitrust and Trade Regulation Committee of the Association of the Bar of the City of New York, *City Bar Report on Treble Damages*, (1985) at 668-69; A. Neale & D. Goyder, ANTITRUST LAWS OF THE USA 436 (3d ed. 1980) (discretionary trebling would ease possible unfairness of mandatory trebling); I. Millstein, *The Georgetown Study of Private Antitrust Litigation—Some Policy Implications* 14 (Nov. 8, 1985) (Georgetown Conference Draft) (In rule of reason cases mandatory trebling is inappropriate the penalty should be either actual damages or at most trebling in the court's discretion, with a discretionary interest factor added from the time of suit.); Salop and White, *Symposium: Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001 m (April, 1986); Eiszner, *Antitrust Civil Damages Remedies: The Consumer Welfare Perspective*, 75 UMKC L. REV. 375, 9-10, 11, (2006); the 2007 Report of the Antitrust Modernization Commission, 244 (recommending no change to treble damages), http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

[43] Baker, *Revisiting History*, *supra* note 1.

[44] *See id.* at 246.

weight today. If we had no antitrust laws in this country, and we felt the need (as we should) to have effective and coherent antitrust laws and competition policies, it seems highly improbable that a treble damage remedy or many of the other features of our system would be enacted today. Put as simply as possible:

- The enormous criminal fines in the United States and the even larger civil penalties overseas, plus the prospects for criminal incarceration of individuals provides massive deterrence in connection with cartel cases and the shrinking category of *per se* cases.
- Punishing violators is and should be a worthy goal. Our criminal justice system in antitrust does precisely that.
- Treble damages do not "force the disgorgement of benefits" from violators any more than the massive criminal penalties, which are supposedly based on "double the gross gain or loss" engendered by the violation as a whole. The combination of criminal penalties and single damages seem more than up to the task. [45]
- Treble damages provide much more than full compensation to victims, virtually none of whom pay their own attorney's fees either. Actual single damages, plus prejudgment interest, plus attorney's fees in certain circumstances would provide full compensation to victims, while at the same time avoiding perpetuating the enormous incentive that companies and counsel have to recast ordinary tort lead into antitrust gold, as has been so successfully and spectacularly done from time to time.[46]
- Single damages in most cases, and certainly in all follow-on cartel cases, provides a powerful incentive or follow-on private actions. Indeed, lawyers in the plaintiff's bar have to arm wrestle each other to bring these cases and reap the attorney's fee benefit of them. There was a great need in 1894 "private attorneys general" because there was no Antitrust Division and there was almost no funding for enforcement of the antitrust laws. To hark back to the 1890 rationale provides no insight into the role that competition policy or Antitrust should be playing in the United States today during the first quarter of the twenty-first century.

[45] The question of the desirability of mandatory one-way attorneys' fee shifting is much bound up with the topic of this paper, but will be separately addressed in a separate Part of the series.
[46] *See, e.g., Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003).

### *3. Treble Damages: A Way Forward*

My proposition is that the American antitrust regime *in toto*, but especially insofar as private damages remedies are concerned, needs to be rethought and rebuilt from the ground up taking into account the circumstances of today both in our own country, and around the world. The question should not be, as it so often has been presented, how can we "fix" this or that aspect of the system or how can we tinker with the system to make it in some subjective way somewhat "better." The question should be how the entire edifice should be redesigned from the ground up. What should be kept? What should be discarded? What should be kept but modified? What should be added? In a parliamentary system, this kind of thinking and re-thinking has happened throughout the modern world just since the turn of the current century. Our federal system, combined with powerful proponents of the status quo, makes even talking about redesigning American antitrust difficult, much less taking the idea seriously. Nonetheless, I shall dive into the topic and be brief.

First of all, there seems to be no current justification for the regime in which all damages are trebled in all Antitrust cases. If any rule today makes sense, it would be a rule against mandatory trebling in all or most cases. There is certainly no basis for imposing treble damages on those who have already paid multiple damages in connection with criminal fines. In this country, the enhanced criminal penalties (especially jail time for individuals) has had a remarkable impact on deterrence. One need only look at the nationalities of those incarcerated to appreciate that very few American companies or American executives seem to be involved in cartels. Furthermore, the allure of treble damages and attorneys' fees it is without doubt the source of scores of baseless lawsuits. The allure of mandatory trebling and mandatory one-way attorney's fees might even be thought of as an "attractive nuisance."

And then there are the follow-on price fixing and other cases. There is surely no need for an army of "private attorneys general" to feed off of the carcasses of those companies who have paid hundreds of millions of dollars in fines to the American, European and other worldwide authorities beyond a single damage remedy. And while it is beyond the scope of this paper, it is not altogether clear that successful antitrust plaintiffs should not be, in some fashion responsible for their own attorney's fees just as tort plaintiffs are.

As we have seen in the chronology above, the American antitrust regime began with private enforcement as its principal, and for a while only, tool. Our courts, our antitrust policymakers, and especially the lawyers and economists who make a handsome living off of the system, likely look fondly at the entire system and do not wish seriously to entertain the realistic possibility of an altogether different regime. Yet in increasingly less subtle ways, the private enforcement system seems to weaken and undermine important aspects of competition policy. This is probably due to the *in terrorem* impact of treble damages, class actions and all of their associated paraphernalia. For many enterprises, becoming enmeshed in protracted private treble damage class-action matters can be an existential threat to the enterprise and its shareholders. As mentioned *supra* notes 36-39 and accompanying text, the Supreme Court seems to have narrowed the applicability of Section 2 of the Sherman Act in recent years in no small part because of the unreliability of the antitrust litigation system not to mention its various excesses. But this tendency in the Supreme Court to shape the law so as to avoid the practical consequences of the private damage system goes back much further. As former Assistant Attorney General Baker wrote almost fifteen years ago:

> Mandatory trebling can distort judicial decision-making on substantive and procedural questions because it necessarily makes judges more reluctant to impose liability in close cases and to erect narrower standing rules. In *Illinois brick Co. v. Illinois,* the Supreme Court articulated a concern about the risk of *double* recovery, but the reality that any double recovery would be *six-fold* recovery was, I am sure, a key reason why the majority was willing to adopt a much narrower standing rule that applies in modern tort law, [Citation omitted; emphasis in original] [47]

The Federal Trade Commission, too, has perhaps pulled its enforcement punches in certain cases in order to prevent the respondent from becoming subjected to the withering impact of follow-on private litigation fueled by the governing rules of *res judicata* and *collateral estoppel* as applied

[47] Baker, *Revisiting History*, *supra* note 1, at 384-85.

in antitrust. Different commissioners have had different views about this, but the main point is that public enforcement officials need to think about the potentially horrific consequences of public enforcement given the nature of the private class action treble damage regime.[48]

There has developed in recent decades a strong view in many circles that antitrust should almost never concern itself with single firm conduct except where conduct by a monopolist or a near a monopolist has excluded or seriously threatened to exclude actual or potential rivals. These are the shorthand principles undergirding monopolization and attempts to monopolize. Concern about exclusion of a rival by a dominant firm is of interest and focus to competition regimes around the world. But also of concern to competition regimes around the world, but not to the current competition regimes in this country, is exploitive conduct by a monopolist or a dominant firm. One suspects, without knowing for sure, that views about the applicability of antitrust law to such exploitive conduct might be different if the conduct were not likely to be subjected to potentially existential private treble damage class-action proceedings. Indeed, one might wonder whether concerns with single firm conduct might best in many cases be limited to government action, and not necessarily subjected to private damages action other than by excluded rivals.

This initial thinking about the role of treble damages, taken in the context of where it came from, how it developed, and its direct and indirect effects on the development and enforcement of Antitrust Law in recent decades brings me to a relatively straightforward series of propositions:

- Eliminate treble damages in all cartel cases where the private action flows from a government investigation or prosecution. It requires no treble damage incentive to bring such cases and those who bring them do nothing to "earn" an abnormally generous recovery. Single damages plus prejudgment interest should be more than

[48] *See In the Matter of U-Haul Int'l, Inc. and AMERCO*, FTC File No. 081-0157 (June 9, 2010), http://www.ftc.gov/os/caselist/0810157/100609uhaulstatement.pdf. The FTC vote approving the complaint and proposed settlement order was 5-0. Chairman Leibowitz and Commissioners. Kovacic and Rosch, issued a joint separate statement noting that Congress gave the FTC authority under Section 5 of the FTC Act to stop unfair methods of competition beyond the antitrust laws, but it is not itself an antitrust law and does not on its own terms create treble damages liability. https://www.ftc.gov/news-events/press-releases/2010/06/u-haul-and-its-parent-company-settle-ftc-charges-they-invited.

enough to make victims whole, which ought to be the principal objective given the massive deterrence features now in place through public enforcement worldwide.

- Perhaps allow some multiple of single damages (perhaps 1.5x) at the discretion of the court where the conduct at issue has been uncovered by the plaintiff or the plaintiff's counsel without material assistance from any government investigation, foreign or domestic. In such cases, however, it might be quite appropriate to have funds in excess of actual damages be used for two separate purposes: (a) payment of reasonable attorneys' fees and reimbursement of the client for costs actually incurred, and (b) use of the funds in the same way that funds are used in class action cases where the fund is not exhausted by claimants: *Cy Pres.*
- Eliminate treble damages in cases involving single firm conduct, but allow for prejudgment interest in such cases.
- Eliminate treble damages in all rule of reason cases, including: patent settlement cases, cases arising out of standard essential patents; distribution cases, tying cases, and cases involving mergers and joint ventures—but allow for prejudgment interest in all cases going back four years prior to the time of the filing of suit, and perhaps longer in a limited number of unusual circumstances.
- Whether and under what circumstances the existing mandatory loser pays attorneys' fees should be modified will be the subject of a subsequent Part of this series.

The animating rationale for these proposals is simple. It does not seem plausible to suggest that we would to enact in this country the existing private treble damages recovery scheme and all of the class action/no contribution/no claim reduction baggage that accompanies it if we were writing on a clean slate. Once upon a time, treble damages provided an inducement for law enforcement that would not likely otherwise take place and that was greatly needed. Today, the private action machinery in this country does not seem in any meaningful way to produce law enforcement that would not take place even in the absence of mandatory treble damages.[49] In the

[49] In truth, it seems intuitively probable that the dominant factor generating the filing of private actions is the lure of mandatory fees for the attorneys. To the extent that the fees bear a strong relationship to treble damages (in other words, where the legal fees would be far greater for the same conduct if the damages were trebled than if they were not trebled), troubling issues are raised about whether the penalty in any way fits the infringement.

rare case where such is the circumstance, some discretionary multiplier of damages, perhaps 1.5 times, might be appropriate.

### ***4.*** *Joint and Several Liability, Contribution and Claim Reduction: Basic Background and Summary of Main Issues*

The defendants' joint and several liability for injury caused to a plaintiff by concerted action has been a fixture of antitrust liability essentially from the beginning of time. This is because antitrust conspiracy cases sound in tort and at common law joint tortfeasors were jointly and severally liable.[50] Where liability is joint and several, a plaintiff may collect his judgment from one or more of the liable conspiring defendants in whatever proportion is desirable or practicable. Joint and several liability has a lengthy history and, by itself, is unobjectionable.

Contribution is not allowed in antitrust cases. Contribution is a mechanism that mitigates the perceived unfairness in allowing the claimant to collect 100% of his judgment against a liable defendant who may have been responsible for none of the claimant's injury or who may be very small, or who may have played little or no role in a conspiracy. Contribution thus requires an allocation of the damages in some administrable fashion. The issue in the American antitrust regime is not how to manage or administer contribution, it is how to justify and manage the *absence* of any right of contribution. The common law rule against contribution for joint tortfeasors in the United States seems to have come from the English case of *Meriwether v. Nixan.*[51] However Great Britain abrogated the common law bar to contribution among joint tortfeasors by statute in 1935.[52] Without mentioning this background, the Supreme Court did not close the issue on contribution until *Texas Industries Inc*. v. *Radcliff Materials Bank.*[53] Until then there had been a conflict among the circuits with respect to the rule on contribution. The rationale of the decision in meaningful part was that any change to the traditional, existing rule

---

[50] *See* Angland, *Joint and Several Liability, Contribution, and Claim Reduction*, 3 ISSUES IN COMPETITION LAW AND POLICY 2369, 2370 and nn. 3, 4 and cases cited therein (ABA Section of Antitrust Law 2008), http://ssrn.com/abstract=152-8007.
[51] 101 Eng. Rep. 1337 (K. B. 1799).
[52] The Law Reform (Married Women and Tortfeasors) Act. 25 & 26 Geo.5, ch. 30, § 6(1)(c)(1035).
[53] 481 U.S. 630 (1981).

was for Congress, not the courts, to make.[54] Despite holding hearings in the wake of the Supreme Court's decision,[55] and despite a considerable body of scholarly writing critical of the absence of contribution,[56] Congress has declined to legislate in the area.[57]

Closely related to the matter of contribution is a matter of so-called "claim reduction." Current law of allows only the actual amount of various settlements to be subtracted from a plaintiff's total damages *after* trebling. It is this cocktail of joint and several liability, no contribution, and limited claim reduction that creates the devastating "whipsaw" effect enjoyed by plaintiffs and their counsel in negotiations with defendants. This "whipsaw" effect - conjoined with mandatory treble damages, class actions, and mandatory one-way attorney's fees, is extraordinary powerful and surely explains not only the high volume of private antitrust litigation in this country, but also the substantial and recurring efforts of foreign claimants to find a way to bring their claims in the United States so as to take advantage of the uniquely favorable substance and procedure of the American Antitrust Machine. In actual operation these circumstances incentivize baseless litigation; force unwarranted settlements; incentivize courts to embrace increasingly narrow readings of statutory rights and statutory coverage; undermine public confidence in the importance of competition law and policy while generating confusion about the goals of competition law and policy, and otherwise bend the arc of antitrust in ways that undermine the important goals of antitrust as mentioned in various portions of the preceding discussion of treble damages.

As a result of this cocktail of features, similarly situated defendants may pay vastly different amounts and defendants collectively face incentives to settle for more than the sum of their expected liabilities at trial. In the words of one commentator, "Defendants frequently face a Hobson's choice: either pay some amount to settle, even though they believe in their innocence,

[54] *Id* at 646.
[55] *See, e.g.*, Hearings, *infra* note 58.
[56] *See* the various authorities collected *supra* note 50 and *infra* note 61.
[57] While declining engagement on nearly all matters antitrust, Congress did, some thirteen years ago, reconfirmed the applicability of the rule of joint and several liability in antitrust cases when it passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)(section 214 provides that nothing therein "shall be construed to . . . [a]ffect in any way, the joint and several liability of any party to a civil action . . . other than that of the antitrust leniency applicants and cooperating individuals.")

or try the matter and risk uncapped liability. For many firms, the risk of a catastrophic judgment is unacceptably high, and they choose to settle, regardless of their culpability."[58]

For example, suppose that there are five companies who have pled guilty to participating in a cartel with some impact in the United States. In most cases, [59] the guilty plea establishes jurisdiction and liability. So everything else is all about damages. For simplicity, let us assume that each of the five companies has paid a fine in the United States of $100 million, or about 20% of the volume of commerce affected. Assume further that a similar fine of $100 million was also paid by each firm in Europe, and that similar but slightly lesser fines have been paid in Brazil, South Africa, China and elsewhere. In these circumstances, the total fines for each company could easily be in the vicinity of $400 million worldwide if not more. Let us further presume that one or more individuals (more likely than not foreign nationals) from each firm pleading guilty agreed to serve 12 to18 months in a U.S. prison. In this hypothetical, which is certainly not atypical, we have perhaps $2 billion in worldwide fines against all of the five cartelists plus 10 to12 individuals serving time in US prisons.

Unlike any other country in the world, American antitrust law and competition policy presumes that these circumstances represent insufficient punishment and inadequate deterrence. Accordingly, the American antitrust regime encourages, indeed applauds, the private treble damage class-action machinery that lies atop the public enforcement worldwide.

The follow-on private litigation will be brought on behalf of at least two classes: direct purchasers and indirect purchasers of the cartelized product. As already stated, this paper presumes, based on decades of personal experience and collected anecdotal information, and in the absence of reliable empirical information, that the total recovery in follow-on private litigation, on average, will roughly equal the criminal fine paid in the United States. Under the hypothetical above, another $400 million would be required to settle the private litigation.

[58] *Individual Treble Damage Liability: Hearings on S. 1300 Before the Senate Committee on the Judiciary*, 99th Cong. 1st Sess. 31-32 (1985) (prepared statement of Ira M. Millstein)[hereinafter Hearings]. *See also Antitrust Damage Allocation: Hearings Before the Subcommittee on Monopolies and Commercial Law of the House committee on the Judiciary*, 97th Congress 1st and 2d Sess. 141 (1981-1982) (prepared statement of Robert Taylor).

[59] While I am presenting this hypothetical in the context of a cartel case, the principles are broadly similar in cases that do not involve cartels, but that involve two or more parties with a ledge to conspire toward some anticompetitive end.

In addition, there would be a separate award of attorneys' fees, which would not come out of the settlement amount (as would be the case in a normal substantial tort case). Let us presume for the sake of discussion that the total attorneys' fees awarded would be less than one third, but "only" amount to 25% of the settlement amounts, or another $100 million. This amount would go to the scores of plaintiffs' lawyers whose principal, perhaps sole, role in the case was to file a class action complaint, make a claim for damages, and eventually settle with all defendants. It is this follow-on litigation that calls into play what defendants might call the five-pronged monster. In our hypothetical, we presumed that each of the five cartelists had a roughly equal share of the cartelized market. If they had a judgment sharing agreement, they would all logically agree to share equally in any outcome. And if there were a rule in favor of contribution, they would end up sharing roughly equally in the financial outcome of the case. And if the pre-treble damage claim were reduced by the amount of any settlement, there would be a plausible tendency towards somewhat equal shares for settlements. But that is not the way it happens.

What actually happens is that the first defendant approached has a strong incentive to settle at the most favorable agreeable price in order to be the beneficiary of an obvious first mover advantage. Normally, the second settling defendant would have a similar incentive, but would expect to play a somewhat more than the first settling defendant. And so on. So what might actually happen, and what actually often happens, is that the first settling defendant with the favorable settlement price. Let us assume for the sake of discussion that the settlement is $20 million. And remember, we are assuming that the total settlements will roughly equal $400 million. Let us assume again that the second settling defendant settles for $30 million; and the third for $40 million and the fourth for $50 million. These four settlements together total $140 million. If we assume actual overcharges of $200 million, and if the plaintiffs were willing to settle on a basis to make themselves whole (putting to one side attorney's fees), the fifth defendant would settle for $60 million. But that is not what happens either. If the overcharges were $200 million, then total treble damages would come to $600 million, plus, as we have presumed, attorneys' fees of $100 million. If there were a judgment in that amount ($700 million), that claim would be reduced by the $140 million collected in settlements. This means that at any trial, the fifth defendant would be exposed to liability of $700-140 million, or $460 million. This is an illustrative example of the whipsaw effect in action. But a further wrinkle is that the plaintiff need not actually sue all five of the cartelists, but could simply sue one of them and hold that defendant accountable for the entire $700 million. In such circumstances, and absent a private judgment sharing agreement, the defendant would be unable to recoup anything from its fellow cartelists by way of contribution or otherwise.

There are multiple writings on these topics collecting cases, debating the pros and cons of each of these features, recommending various sorts of changes.[60] Each of the five prongs on this powerful pitchfork have their attackers and defenders. Joint and several liability is defended on various grounds, but mainly it seems on the ground that it has been part of the common law for a long time and therefore should not be eliminated because it facilitates a remedy for injured parties.[61] The case against contribution seems based on several factors, principally: severe hostility to wrongdoers; the purported strong deterrence impact; the powerful incentive to settle thus provided on the part of defendants accused; and the cost and complexity of dealing with any rule allowing for contribution to the disadvantages to plaintiffs and to the entire federal judicial system .[62]

The case for contribution is grounded on principles of fairness; the cruelty of whipsaw settlements; the potential adverse effect of a no contribution scheme (especially coupled with joint and several liability) on the ability of a targeted firm to compete; the amplification of uncertainty in competition law; the promotion of baseless litigation; more effective deterrence;

[60] Among the most readable of these are Angland, *supra* note 50*;* Cavanaugh, *Contribution, Claim Reduction, and Individual Treble Damage responsibility: Which Path to Reform of Antitrust Remedies*, 40 VAND. L. REV. 1277 (November, 1987); Antitrust Modernization Commission Report and Recommendations at 251-56 (2005), http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm; *Report on Contribution and Claim Reduction by the Section of Antitrust Law to the Antitrust Modernization Commission* (December 14, 2005), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at-comments/2005/12-05/contribution_claim_comm.authcheckdam.pdf.
[61] Angland, *supra* note 50 (collecting cases at n. 4 and making the observation that "[a]t common law, joint and several liability applied only where the misconduct by the various wrongdoers combined to produce an indivisible harm (collecting authorities)." Antitrust courts generally do not state that joint and several liability is limited to jointly caused harm. *Id.*
[62] Cavanaugh, *supra* note 60, at 1296-1300.

and the relatively minimal actual costs within the judicial system of managing a contribution rule. [63]

Although there has been relatively little consideration given to addressing claim reduction other than in the context of simultaneously addressing contribution,[64] a proposal for claim reduction without contribution was proposed as part of the Reagan Administration's 1986 antitrust legislative package, but went nowhere.[65]

### 5. *Joint and several liability, Contribution and Claim Reduction: A Way forward*

As I have tried to emphasize, this paper is just a first and tentative step in the direction of trying to consider whether, to what extent and in what ways our entire American antitrust machinery ought to be reconsidered and restructured to achieve coherent competition policy goals that align national competition policy goals with public and private enforcement. The private damages recovery system is a non-trivial part of that machinery, but the abuses and excesses engendered by that system have damaged, and continue to threaten to damage, the willingness of courts and sometimes perhaps agencies to attack market power in a variety of ways, including for mistrust of the system as a whole and the concomitant fear of unleashing destructive private treble damage actions upon firms in industries whose functioning and competitiveness might be impaired by the very system that was intended to maintain competition and prevent its diminution in various ways.

### A. *Contribution*

The rule against contribution is a rule that has long outlived its purposes. The rationale for keeping it in place has had nothing to do with sound competition policy, but rather with

[63] *Id.* at 1288-96. *See also* the Antitrust Modernization Commission Report, *supra* note 60, at 251-55 and Annex A (proposing that Congress enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants).
[64] Cavanaugh *supra* note 60, at 248 and accompanying text.
[65] S. 2162, 99th Congress 2nd Sess. § 401 (1986) and S. 539, 100th Congress 1st Sess. (1987); HR 1155, 100th Cong., 1st Sess. (1987). An especially detailed and useful discussion of various considerations surrounding claim reduction without contribution may be found at Cavanaugh, *supra* note 60, at 1323-26.

legislative technicality. Since the 1890 Congress did not provide for contribution, and since subsequent congresses have provided for contribution with respect to certain statutes, the Supreme Court in *Radcliff* was reluctant to make a rule that it saw as a congressional obligation. Relatedly, the Supreme Court felt that the administration of the many different types of contribution that could be envisioned should not be for courts, but rather for a legislative body. These were reasonable and rational considerations at the time and that same logic might carry the day even today in the context of a contested legal setting.

But the task of this paper is neither to legislate nor to excavate centuries of legal precedent, but to ask and try to answer the question whether, writing on a clean slate, we would today embrace the current rule. It seems to me that we would not, and we should not. That said, there is certainly room for reasonable debate as to how contribution should be administered. My answer is that it should be administered as altogether simply as possible. Contribution should be available against settling as well as non-settling co-conspirators with reference to some measure of their share of commerce affected by the conduct. This could be a simple market share calculation, or a calculation more directed at market share vis-à-vis the plaintiff. As a policy matter, it seems to make sense to have a judicially administrable approach that can be based almost completely on objective facts so that courts do not have to have separate mini-trials assigning blame here or there.

Ideally, such a system would approximate how the defendants themselves would negotiate a judgment sharing agreement if they were to have one *ex ante*. My experience with judgment sharing agreements, albeit limited, is consistent with this. All such agreements with which I am familiar have resulted in agreements that would result in a judgment sharing arrangement that would be based upon the parties' market share(s) of the relevant product in the relevant geographic area(s). This was the approach embraced by the Antitrust Modernization Commission a decade ago in one of the relatively small number of areas where material change was recommended. It was a sensible change and should be part of any establishment of a new, twenty-first century antitrust law and competition policy regime in the United States[66]

---

[66] *See* Antitrust Modernization Commission Report and Recommendations, *supra* note 60, at 251-55 and Annex A, http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

### *B. Claim Reduction*

Claim reduction is also appropriate as it would reduce the remaining liability of the non-settling defendants by the amount of the settlement or the ratable share of liability of the settling defendant(s), whichever is greater. This would ensure that non-settling defendants are not made worse off, in the form of liability potentially greatly disproportionate to their relative contribution to the anticompetitive conduct, as result of settlements between the plaintiffs and other defendants.[67]

## IV. Conclusion

I appreciate that the notion of eliminating mandatory treble damages and the rules against contribution and claim reduction will be unwelcome in many quarters. But in the longer view, there is reason to believe that eliminating the excesses of the system, coupled with other modifications that would make antitrust law and competition policy clearer and more robust, could have real long-term benefits for consumer welfare and for society as a whole. Subsequent Parts to this series will address the bulk of the issues identified in the early part of this paper, which taken together amount to a complete rethinking of our statutory, administrative, and procedural regime. At the very least, the question of how to design and administer a public antitrust and competition regime and a complementary private enforcement regime is worthy of as much attention in this country as it has received from parliaments and executive branches in most all of the other countries of the world.

[67] *See id.* nn.79, 80 and accompanying text.