

The Private Antitrust Remedy: Lessons from the American Experience

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I. INTRODUCTION

The treble damage remedy has been a centerpiece of private antitrust enforcement since the enactment of the Sherman Act in 1890.¹ Aware that government resources were limited, Congress created the private right of action as a complement to public enforcement to assure the detection and prosecution of antitrust offenders.² The private right of action has proven to be a very potent weapon in the civil enforcement arsenal.³ It is the very potency of the private remedy, however, that has made the private right of action a target of criticism by defendants and, more recently, the courts.⁴ Indeed, in the last decade, the private remedy has been the subject of a full-scale siege in the federal courts.

Ironically, at the very time the private antitrust remedy is seemingly in eclipse in the United States, antitrust enforcement authorities in Europe⁵ and elsewhere are contemplating adoption of the private right

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1. The provision for mandatory trebling is currently housed in section 4 of the Clayton Act, 15 U.S.C. § 15 (2006).

2. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (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 the victims of antitrust violations.").

3. See *Blackburn v. Sweeney*, 53 F.3d 825, 829 (7th Cir. 1995) ("Treble damages are a potent remedy.").

4. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-559 (2007) (citing sources emphasizing the high cost of discovery in antitrust litigation); *Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 882-83 (2004) (warning that where an industry is regulated, costly private antitrust litigation may be unjustifiable in that industry because it risks "chill[ing] the very conduct the antitrust laws are designed to protect")

5. See *Commission Green Paper on Damages Actions for Beach of the EC Antitrust Rules*,

of action.⁶ As in the United States, neither the European Commission nor the competition authorities in member states have the resources to detect and prosecute all antitrust transgressions so as to promote a “competition culture” in Europe.⁷ This Article examines the private remedy through the lens of the American system and offers some observations about the American experience that may prove useful in designing private remedies schemes in antitrust regimes abroad.

II. THE PRIVATE RIGHT OF ACTION IN THE UNITED STATES

This Part will summarize the elements of the private right of action in the United States, followed by an explanation of the objectives it seeks to accomplish.

A. Features

Under section 4 of the Clayton Act,⁸ “any person injured in his business or property by reason of anything forbidden in the antitrust laws” may sue for recovery in federal court. Section 4 further provides that: (1) the litigants are entitled to a trial by jury; (2) any damage award from the jury is automatically trebled by the court; and (3) a prevailing antitrust plaintiff (but not a prevailing defendant) is entitled to reasonable attorneys’ fees as well as treble damages.⁹ Under section 5 of the Clayton Act, a final decree in favor of the government in any public enforcement proceeding “shall be *prima facie* evidence” in any subsequent private action on the same claim.¹⁰ In addition, the parties are entitled to broad pretrial discovery under the Federal Rules of Civil Procedure, which authorize discovery of “any matter, not privileged relevant to any claim or defense.”¹¹ Finally, many antitrust actions are brought as class actions.¹² As a result, defendants’ financial exposure

COM (2005) 672 final (Dec. 19, 2005), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf (identifying obstacles and potential solutions to improve damage actions under competition law); Andrew I. Gavil, *The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience*, 4 J. COMPETITION L. & ECON. 177, 184 (2008) (“The Green Paper is focused on private competition law actions by injured parties.”).

6. John Pheasant, *Private Antitrust Damages in Europe: The Policy Debate and Judicial Developments*, 21 ANTITRUST 59, 59 (2006) (“There is widespread support in Europe for the principle that legal and natural persons who suffered loss as a result of an antitrust infringement should be entitled to recover damages to compensate them for that loss.”).

7. *Id.* at 59.

8. 15 U.S.C. § 15 (2006).

9. *Id.*

10. *Id.* § 16.

11. FED. R. CIV. P. 26(b)(1).

12. FED. R. CIV. P. 23.

may increase significantly. At the same time, the class action mechanism permits an efficient resolution of multiple claims that is binding on all class members.

B. The Rationale from the Private Treble Damages Remedy

Mandatory treble damages are a key ingredient of the private right of action under the United States antitrust laws. The merits of mandatory trebling have been debated extensively over the last century,¹³ most recently by the Antitrust Modernization Commission, which concluded that the treble damages remedy should be retained in all antitrust cases.¹⁴ Historically, mandatory trebling in private antitrust actions has served four interrelated goals: (1) compensation of victims; (2) deterrence; (3) forfeiture of ill-gotten gains; and (4) punishment.¹⁵

1. Compensation

First, trebling assures that victims of antitrust violations will be fairly compensated.¹⁶ Public enforcement actions generally do not provide any monetary recovery for individual losses.¹⁷ Furthermore, even the most diligent enforcers are unable to uncover all antitrust violations. Because of their typically covert nature, antitrust violations are frequently difficult to detect and very expensive to prosecute. Trebling creates strong incentives for private parties to investigate, detect, and prosecute antitrust violations.¹⁸

If antitrust recoveries were limited to actual damages, private parties would have little motivation to sue, given the unpredictability and high costs of antitrust litigation. Nor would actual damages provide

13. For a summary of that debate, see Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 783–88 (1987) [hereinafter Cavanagh, *Detrebling Antitrust*].

14. See ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATION 245–48, 287–88 (2007), available at www.amc.gov [hereinafter AMC REPORT].

15. See Edward D. Cavanagh, *Detrebling Antitrust Damages in Monopolization Cases*, 76 ANTITRUST L.J. 97, 100 (2009).

16. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (noting that treble damages “would provide ample compensation to victims of antitrust violations”).

17. *But see* Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c–15h (2006), which provides that state attorney generals may sue *parens patriae* on behalf of consumers who are natural persons and have been injured by price-fixing. However, the *parens patriae* provision of Hart-Scott-Rodino was largely thwarted by the subsequent Supreme Court ruling in *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 734 n.14 (1977), which held that only direct purchasers could recover for illegal overcharges imposed by antitrust violators, thereby precluding consumer recoveries in most cases.

18. See Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. & ECON. 445, 451 (1985) (arguing that creating incentives to find and prosecute violations is essential).

sufficient compensation in all cases. To illustrate, in horizontal cases affecting price, the normal measure of damages is the overcharge—the difference between the price paid for the goods in question and the price that would have prevailed had there been competition.¹⁹ Additionally, in cases involving monopolistic overcharges, the measure of damages is the difference between the price paid and the price that would have prevailed but for the defendant's wrongful conduct.²⁰ Victims of price-fixing or monopolistic overcharges are thus not repaid for all economic losses suffered because of the antitrust violations, including lost opportunity costs and prejudgment interest,²¹ nor are business entities compensated for losses incurred by diversion of company executives from normal business activities and other organizational disruptions caused by a lawsuit.²²

More importantly, overcharges alone tend to under-tax the antitrust violator for the harm caused by its illegal conduct because the overcharges, which are really transfers of consumer surplus from victimized buyers to conspiring sellers, are only part of the harm inflicted by the illegal conduct.²³ Horizontal restraints on price or output, as well as monopolistic behavior, create an inefficient allocation of resources, thereby causing a net loss to society as a whole and creating the so-called welfare triangle.²⁴ The loss in efficiency attributable to cartelization varies from case to case, depending on a number of factors including the nature of the restraint, the industry involved, and the time-frame and scope of the conspiracy. Nevertheless, quantifying loss in efficiency is a difficult real world exercise. Here, mandatory trebling may serve as a surrogate measure of actual damages, providing antitrust victims with rough justice.²⁵

Similarly, trebling provides rough justice in cases involving concerted refusals to deal with unlawful exclusionary conduct by monopolists, where the measure of damages is normally lost profits.²⁶ Antitrust violations typically distort the market mechanism so as to make re-creation of the “but for” market and thus reasonable estimates

19. See *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

20. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.3d 263, 297–98 (2d Cir. 1979).

21. The Antitrust Modernization Commission considered but ultimately rejected a proposal to award prejudgment interest to prevailing plaintiffs. AMC REPORT, *supra* note 14, at 249.

22. See Cavanagh, *supra* note 15, at 101.

23. *Id.*

24. *Id.*

25. See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 118 (1993).

26. See, e.g., *LePage’s, Inc. v. 3M Co.*, 324 F.3d 141, 164–66 (3d Cir. 2003) (en banc), *cert. denied*, 542 U.S. 953 (2004) (claims arising for monopolization through bundled rebates).

of lost profits a difficult task.²⁷ While trebling may not precisely counterbalance the market distortions caused by unlawful conduct in every case, it does provide plaintiffs a greater likelihood of meaningful compensation and hence greater incentives to prosecute violators than would be the case if lost profits alone were the measure of recovery.²⁸

2. Deterrence

Second, mandatory trebling serves to deter antitrust violations.²⁹ Because many antitrust violations are concealable and hence difficult to detect, the benefits from engaging in illegal conduct are potentially enormous. Mandatory trebling creates significant incentives for private parties to enforce the antitrust laws as private attorney generals. In enacting the antitrust laws, Congress recognized that the government lacked sufficient resources to detect and prosecute all antitrust violations and that mandatory trebling would increase prosecution of antitrust violators and enhance the overall goals of antitrust enforcement.³⁰

Equally important, trebling ensures that private actions will go forward even when the Antitrust Division, the Federal Trade Commission, or state enforcers, for whatever reason, choose not to act. As enforcement efforts expand, the likelihood of identifying and successfully prosecuting antitrust violations increases, and illegal conduct is thereby deterred. In these circumstances, the goals of compensation and deterrence are complementary. Enhanced compensation of victims through mandatory trebling encourages enforcement by private attorney generals and the added private enforcement strengthens overall deterrence.

Furthermore, the impact of a treble damages award on an antitrust violator may be economically devastating and may be magnified in conspiracy cases, since a defendant under the rule of joint and several liability may be held responsible for all damages caused by its co-conspirators trebled.³¹ Such catastrophic consequences provide a

27. *Id.* at 166 (noting the difficulties in reconstructing the “but for” market in section 2 cases).

28. *Id.*

29. *Blue Shield of Va. v. McCreedy*, 457 U.S. 465, 472 (1982); *see generally* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 *GEO. L.J.* 1001, 1017–20 (1986) (explaining that modifying the treble damages remedy would lessen the disincentive to engage in questionable business conduct because potential defendants would be less likely to be sued and would face lower penalties if they were sued and lost).

30. AMC REPORT, *supra* note 14, at 246–47.

31. *See Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (no right of contribution among antitrust defendants).

powerful disincentive to engage in illegal activity. So devastating is the impact of a treble damages judgment that antitrust violators may fear civil antitrust liability even more than criminal sanctions, making them less likely to avail themselves of the Antitrust Division's Leniency Program.³² That realization led Congress to limit the civil liability of Leniency Program participants to actual damages.³³

Moreover, from a deterrence perspective, multiplying actual damages is necessary because some violations of the antitrust laws invariably go undetected.³⁴ In theory, a defendant, in weighing the potential rewards of illegal behavior against the concomitant risk of detection and prosecution, discounts the gains from its illegal conduct by the probability of detection.³⁵ A multiple is necessary to force the violator to equate liability with damages caused.³⁶ For example, if the probability of detection and prosecution is one in six, then six would be the appropriate multiple.³⁷

Under this view, trebling would be appropriate only where the probability of detection is one in three. Accordingly, trebling may be too low a multiple for concealable offenses such as price-fixing, and may be too high for unconcealed acts which may be illegal, such as product bundling and certain merger activity.³⁸ However, this theoretical approach does not translate easily into a legal rule because it would be impractical, if not impossible, *ex ante* to compute the likelihood of detection—whether one in three, one in ten, or one in twenty—and hence the proper multiple for each industry for each

32. See Scott D. Hammond, Acting Deputy Assistant Att'y Gen., An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program (Jan. 10, 2005), available at www.usdoj.gov/atr/public/speeches/207226.htm (detailing recent developments and improvements within the Antitrust Division's Criminal Enforcement Program). Under the Corporate Leniency Policy, a corporation is entitled to immunity from criminal prosecution under the following conditions: (1) the corporation is the first entity to report the wrongdoing to the Antitrust Division; (2) upon learning of the wrongdoing, the corporation took prompt action to terminate its participation; (3) the corporation cooperates with the Antitrust Division; (4) the admission is corporate and not just individual in nature; (5) where possible the corporation makes restitution to injured parties; and (6) the corporation is not the ring leader in the conspiracy. See DEP'T OF JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY (1993), available at <http://www.justice.gov/atr/public/guidelines/0091.pdf>. A similar policy exists for individuals. See DEP'T OF JUSTICE, ANTITRUST DIV., LENIENCY POLICY FOR INDIVIDUALS (1994), available at www.justice.gov/atr/public/guidelines/lenind.htm.

33. Standards Dev. Org. Advancement Act of 2004, Pub. L. No. 108-237, §§ 102-201, 118 Stat. 661, 661-70 (2004).

34. See Easterbrook, *supra* note 18, at 454.

35. *Id.* at 455, 458-60.

36. *Id.* at 454-55.

37. *Id.* at 455.

38. *Id.* at 454.

antitrust violation.³⁹ Here, trebling provides not only rough justice but also a predictable, workable rule of law that can be easily administered by the courts.

Finally, deterrence is significantly enhanced through the class action mechanism.⁴⁰ It is one thing for a defendant to be sued by a single plaintiff for a single overcharge. It is quite another for a defendant to be sued by a plaintiff on behalf of tens of thousands of similarly situated victims of antitrust violations. A defendant facing treble damage liability to a large class of plaintiffs is much more apt to think twice about pursuing an illegal course of conduct.

3. Disgorgement

Third, trebling makes it unlikely that antitrust violators will profit from their wrongdoing.⁴¹ Theoretically, trebling is not necessary to bring about disgorgement of ill-gotten gains because plaintiffs' actual damages would presumably correspond to defendants' actual illicit gains. However, the reality is that plaintiffs are unlikely to invest the time and money in prosecuting a lengthy, complicated, and expensive civil antitrust claim if their recovery is limited to actual damages.⁴² Without trebling, therefore, antitrust violators may not be sued and may be more likely to reap the benefits of their illegal conduct. Trebling, on the other hand, assures that antitrust violators will be denied the fruits of their misconduct, even if all the victims of their wrongdoing do not come forward to claim their rightful share of damages.⁴³

4. Punishment

Fourth, the treble damages remedy has a punitive element.⁴⁴ In this respect, the treble damage remedy is not unique to antitrust. Punitive damages were imposed at common law cases of intentional or malicious wrongdoing.⁴⁵ Moreover, Congress has chosen to impose multiple damages in certain instances, most notably for RICO⁴⁶ and insider

39. Cavanagh, *supra* note 15, at 103.

40. FED. R. CIV. P. 23.

41. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472–73 (1982).

42. Easterbrook, *supra* note 18, at 455.

43. *See* Cavanagh, *supra* note 15, at 124–25 (expressing the view that the Antitrust Division should institute more actions seeking disgorgement to compensate for a dearth of private civil monopolization cases).

44. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir. 1955) (trebling “presupposes a punitive purpose”).

45. DAN B. DOBBS, *LAW OF TORTS* § 381, at 1062–66 (2001).

46. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2006).

trading violations,⁴⁷ both to punish and to discourage undesirable conduct.⁴⁸

II. THE PRIVATE REMEDY UNDER ATTACK

Historically, the Supreme Court has given effect to the broad remedial purposes of the private right of action in antitrust cases.⁴⁹ More recently, in *Bell Atlantic Corp. v. Twombly*,⁵⁰ and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*,⁵¹ the Supreme Court changed its tune and now clearly views the private action with skepticism. Four themes articulating this skepticism emerge from *Trinko* and *Twombly*: (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 antitrust litigation in a cost-effective manner; and (4) a preference for regulation over judicial intervention.⁵²

Trinko cautions that the “cost of false positives counsels against an undue expansion of § 2 liability” under the Sherman Act.⁵³ The Court expressed concern that Verizon’s failure to provide services required by the Telecommunications Act may be unrelated to alleged antitrust exclusion:

One false-positive risk is that an incumbent LEC’s [Local Exchange Carrier] failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. Amici States have filed a brief asserting that competitive LECs are threatened with “death by a thousand cuts”—the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort

47. 15 U.S.C. § 78u (d)(3)(A) (2006).

48. See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1383 (Fed. Cir. 2007) (treble damages intended to punish as well as deter).

49. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). (“The act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”).

50. 550 U.S. 544 (2007).

51. 540 U.S. 398 (2004).

52. See Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 28–30 (2008) [hereinafter Cavanagh, *Twombly*] (elaborating on these themes as they are developed in *Trinko* and *Twombly*).

53. *Trinko*, 540 U.S. at 414.

investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs.⁵⁴

The Court further noted that even under the best of circumstances, the application of the antitrust laws “can be difficult” and that the mistaken inference of anticompetitive effect “[is] especially costly, because [it] chill[s] the very conduct the antitrust laws are designed to protect.”⁵⁵ *Twombly* emphasizes the need to avoid false positives, refusing to condemn conduct “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”⁵⁶

Second, *Trinko* expresses a lack of confidence in the court system to achieve correct outcomes in exclusionary conduct cases.⁵⁷ The Court points out that Verizon’s failure to comply with the technology sharing requirements under the Telecommunications Act may be difficult for an antitrust court to evaluate “not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex and constantly changing interaction” of the parties.⁵⁸ Accordingly, identifying exclusionary behavior would prove a “daunting task” for “generalist” antitrust courts.⁵⁹

Trinko also suggests that antitrust courts are ill-equipped to handle the day-to-day supervision of the implementation of a “highly detailed decree.”⁶⁰ At the very least, antitrust intervention in the telecommunications field is likely to lead to costly “interminable litigation.”⁶¹ *Trinko* urges judicial self-restraint, concluding that the Sherman Act “does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”⁶²

Third, *Twombly* expresses skepticism about the ability of federal judges to manage litigation, and pessimism about the usefulness of the Federal Rules as a tool to promote cost-efficient litigation that yields just outcomes.⁶³ The Court gives short shrift to any argument that

54. *Id.*

55. *Id.* at 414.

56. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

57. *Trinko*, 540 U.S. at 414.

58. *Id.*

59. *Id.*

60. *Id.* at 415.

61. *Id.* at 414.

62. *Id.* at 415–16.

63. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

baseless claims in federal court can be eliminated by careful case management, control of discovery, summary judgment, or carefully crafted jury instructions:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries;” the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no “reasonably founded hope that the [discovery] process will reveal relevant evidence” to support a § 1 claim.⁶⁴

The *Twombly* approach represents a marked departure from its ruling a decade earlier in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,⁶⁵ wherein Chief Justice Rehnquist, writing for the Court, categorically rejected judicially created enhanced pleading standards in favor of summary judgment and judicial control of discovery as vehicles to eliminate infirm claims.⁶⁶

Pessimism about the efficacy of judicial management under the Federal Rules of Civil Procedure may be linked to Judge Easterbrook’s 1989 law review article in which he observed that courts are virtually powerless to control the costs of discovery.⁶⁷ That assessment, which was questionable even in 1989, is certainly not accurate today. Although it is true that parties control the claims to be presented *in the first instance*, courts—contrary to Judge Easterbrook’s statement—are not powerless. Indeed, the Federal Rules encourage active case management by the courts. For example, Rule 16 permits courts *sua*

64. *Id.* (citations omitted).

65. 507 U.S. 163, 168–69 (1993).

66. *Id.* Chief Justice Rehnquist wrote:

Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. *In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.*

Id. (emphasis added).

67. Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 638 (1989).

sponte to dismiss claims lacking merit.⁶⁸ Courts may also order targeted discovery with respect to limited issues with a goal of entertaining a summary judgment motion at an early stage in a lawsuit.⁶⁹

Nor is it true that courts have no control over the discovery process. With the 1983 Amendments, the Federal Rules began to establish the case management model for the judge. Rule 26(g)(1)(B)(iii) was added to limit discovery to that which is proportional to the needs of the case.⁷⁰ Where the cost of discovery outweighs its benefits, the party seeking such discovery faces mandatory sanctions.⁷¹ Similarly, a party can be sanctioned for seeking discovery that is redundant or not cost-effective.⁷²

It is simply not possible that the Court in *Twombly* was unaware of these developments under the Federal Rules. Similarly, it is highly unlikely that the Court was unaware of empirical research demonstrating that discovery abuse leading to excessive pretrial costs was not a problem in the vast majority of cases filed in the federal courts.⁷³ The real question is why the Court conveniently chose to ignore these developments.

Fourth, *Trinko* expresses a distinct preference for regulation over antitrust intervention.⁷⁴ The Court urges that the greater the regulatory overlay, the less appropriate the use of antitrust intervention.⁷⁵ *Trinko* reasons that in certain cases “regulation significantly diminishes the likelihood of major antitrust harm.”⁷⁶ The Court further concludes that antitrust intervention in highly regulated industries is likely to lead to duplicative enforcement and liability.⁷⁷ Finally, *Trinko* maintains that regulators rather than generalist courts are best suited to supervise and evaluate complicated decrees.⁷⁸

III. LESSONS FROM THE AMERICAN EXPERIENCE

68. FED. R. CIV. P. 16.

69. FED. R. CIV. P. 56.

70. FED. R. CIV. P. 26(g)(1)(B)(iii).

71. FED. R. CIV. P. 26(g)(3).

72. *Id.*

73. See Wayne D. Brazil, *Civil Discovery; How Bad Are The Problems?*, 67 A.B.A. J. 450, 456 (1981) (summarizing a 1979 American Bar Association study on discovery abuses).

74. *Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004).

75. *Id.*

76. *Id.*

77. *Id.* at 411–13.

78. *Id.* at 414–15.

What can be learned from the American experience with the private antitrust remedy? As a threshold matter, it is readily apparent that the American model for private antitrust enforcement is viewed with considerable skepticism abroad. At the George Washington University Law School Conference on Private Enforcement of Competition Law in February 2009, a surprising number of European presenters described the American system as a “toxic cocktail.”⁷⁹

The American private remedy system in antitrust is not perfect, but to characterize it as a “toxic cocktail” is both harsh and misleading. The term is harsh because it suggests that the American private remedy is without benefit. As demonstrated above,⁸⁰ that suggestion is patently false; the private remedy is in many respects salutary. The term is misleading in that it suggests that private recovery regimes are inherently defective. Again, that is simply not the case. Indeed, the principal concerns with the private antitrust remedy in the United States identified by the Supreme Court in *Trinko*⁸¹ and *Twombly*⁸² would seem to stem primarily from features of a civil justice system that are uniquely American: (1) notice pleading; (2) broad pretrial discovery; and (3) jury trials.⁸³ Courts abroad have administered private remedies for centuries without such procedural features and surely could design a system of private antitrust enforcement that would not necessitate adoption of these mechanisms. Accordingly, procedural differences may immunize antitrust regimes in the EU and elsewhere from many of the problems experienced by American courts in administering the private antitrust remedy.

A. Substantive Issues

That immunity, however, is not complete. Antitrust enforcers abroad will have to address at least five important, largely substantive issues: (1) false positives; (2) enhanced damages; (3) private actions versus

79. See e.g., Press Release, Europa, Green Paper on Consumer Collective Redress – Questions and Answers, Nov. 27, 2008, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO//08/741&format=HTML> (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).

80. See, *supra* notes 13–48 and accompanying text (discussing the rationale for the private treble damages remedy).

81. *Trinko*, 540 U.S. at 414.

82. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 559 (2007).

83. See Gregory P. Olsen, *International Developments: Enhancing Private Antitrust Litigation in the EU*, 20 ANTITRUST 73 (Fall 2005) (noting that liberal discovery rules, jury trials, and contingency fees appear to be the source of perceived “excesses” of the American system) (quotations omitted).

regulation; (4) early identification and elimination of baseless claims; and (5) the desirability of some form of class action recovery. In addition, foreign enforcers must address at least two procedural issues: (1) access to proof and (2) access to legal counsel.

1. False Positives and False Negatives

Unquestionably, any private enforcement regime must seek to minimize false positives—those cases in which individuals are mistakenly prosecuted—also known as Type I error. Such cases may chill aggressive competition and innovation. *Trinko*⁸⁴ and *Twombly*⁸⁵ underscore the costs of false positives to the competitive process and to the civil justice system. Both cases, however, are silent on the issue of false negatives—those cases in which wrongdoers mistakenly escape punishment—also known as Type II error. Failure to bring cases that should be brought and thus allowing wrongdoers to escape punishment surely harms competition. Simply put, the cost of false negatives is at least as great as the cost of false positives. Yet, both *Trinko* and *Twombly* appear to say that the system must at times tolerate certain anticompetitive conduct in order to avoid false positives.⁸⁶

An effective system of private remedies must account for both false positives and false negatives. Where there is a private right of action, the risk of false positives cannot be eliminated without sacrificing deterrence; but, as discussed below, it can be minimized by providing a mechanism for early legal challenges to a claim and by policing damage awards and avoiding those awards that are windfalls to successful plaintiffs. The mere possibility that error will creep into the system should not effectively veto an otherwise sound enforcement policy.

2. Multiple Damages

Critical to any scheme of private antitrust remedies is a properly calibrated system for setting the appropriate level of money damages. The first question is whether the private remedial scheme should provide for actual or multiple damages. If multiple damages are appropriate, the second question is what multiple should be applied to actual damages.

a. Multiple or Actual Damages

84. *Trinko*, 540 U.S. at 414.

85. *Twombly*, 550 U.S. at 557–58.

86. *See Trinko*, 540 U.S. at 414 (noting both the high cost of antitrust litigation and the difficulty that courts have in evaluating the merits of exclusionary behavior).

As discussed above,⁸⁷ the case for multiple damages in private antitrust actions is compelling. First, many antitrust violations are covert; hence, they are difficult to detect and prosecute. Second, antitrust violations may so dislocate competitive conditions as to make re-creation of a “but for” market as a yardstick for damages impossible. In that regard, multiple damages may provide rough justice for injured plaintiffs.⁸⁸ Third, antitrust litigation is both complex and costly, making it an even riskier enterprise than other forms of litigation. Multiple damages provide an incentive to undertake the enhanced risk of litigating private antitrust suits. Fourth, multiple damages provide a higher degree of deterrence than actual damages. Fifth, some types of antitrust violations, such as horizontal price-fixing, serve no purpose other than to destroy competition and therefore should be punished.⁸⁹

On the other hand, multiple damages may be harsh in those cases where the conduct is (1) open or not covert, (2) not clearly illegal but rather close to the line, and (3) potentially beneficial to the consumer.⁹⁰ These insights have created some dissent about mandatory trebling in the United States.⁹¹ Here, there are two schools of thought: one would eliminate enhanced damages altogether; the other would eliminate enhanced damages selectively.⁹² The former concept is radical and without significant mainstream support. Selective enhancement, however, does have broader appeal.

Nevertheless, the supporters of selective enhancement of damages have failed to come forward with a coherent, workable, and fair mechanism for damage enhancement. One approach is to limit enhanced damages to cases falling within the *per se* category.⁹³ That category, however, has been significantly narrowed by the courts and

87. See *supra* notes 13–48 and accompanying text (discussing the rationale for treble damages in private antitrust actions).

88. But see WOUTER P.J. WILS, *THE OPTIMAL ENFORCEMENT OF EC ANTITRUST LAW: A STUDY IN LAW AND ECONOMICS* 19 (Kluwer ed. 2002).

The trebling of damages could be looked at favorably as compensating for less than unitary probability of apprehension, but it is too crude a method to serve that function. It appears to overstate the likelihood of apprehension for concealable offenses such as price fixing, and to understate it for other easily detectable offenses, including most exclusionary practices.

Id.

89. See, e.g., Cavanagh, *Detrebling Antitrust*, *supra* note 13 (arguing that the treble damages remedy is problematic in some cases but that it must not be abandoned because it ensures that the antitrust laws are vigilantly enforced).

90. *Id.* at 794–98.

91. *Id.* at 787.

92. *Id.*

93. *Id.* at 825–26.

continues to shrink with each passing year. A second approach would be to have enhanced damages only where conduct is covert. In this scenario, conduct that is open—tying arrangement, bundled discounts, exclusive dealing—would give rise to actual damages only.⁹⁴ This approach ignores the fact that overt conduct can also have pernicious effects on competition that are as devastating as covert conduct.⁹⁵ A third approach would leave enhancement to the discretion of the courts on a case-by-case basis. In short, determining where to draw the line between actual and enhanced damages is no easy task. No consensus has emerged on where to draw the line and, largely for that reason alone, initiatives to modify or eliminate treble damages have run aground in the United States.

Equally important, the mandatory trebling requirement is not without virtue. It provides a simple, efficient, predictable rule of damages that is easy for the courts to administer. In marked contrast, a rule of discretionary enhancement would lengthen private litigation, add to its costs, and perhaps introduce an element of unfairness to the process of measuring damages.⁹⁶ Mandatory trebling has been a key element in a remedies regime that has evolved over the last 120 years in the United States and created a delicate antitrust ecosystem. If that ecosystem is modified by elimination of mandatory trebling, the private enforcement system may suffer significantly.

b. Amount of the Multiplier

Assuming that enhancement is desirable, the next question is how large the multiplier should be. The extent to which the American experience with mandatory trebling is helpful here is unclear. Although there is some common law precedent for trebling, the American concept of treble damage is rooted as much in a sense of rough justice as it is in legal theory. A multiplier of four or more would be unacceptably draconian. This leaves us with a choice of double or treble damages or something in between.⁹⁷

Query whether double rather than treble damage would adversely impact private enforcement. In theory, reducing damages by one-third would lessen deterrence. However, the fact remains that in the United

94. *Id.* at 831–32.

95. *See* *United States v. Microsoft Corp.*, 253 F.3d 34, 73–74 (D.C. Cir. 2001) (stating that Microsoft’s deal with Apple “must be regarded as anticompetitive” because its exclusive contract with Apple “has a substantial effect in restricting distribution of rival browsers” and serves to protect Microsoft’s monopoly because it reduces the usage share of rival browsers).

96. *See* Cavanagh, *Detrebling Antitrust*, *supra* note 13, at 841.

97. *Id.* at 839.

States very few antitrust cases are litigated to verdict and judgment.⁹⁸ Most cases settle for amounts that more closely approximate actual damages than treble damages. Moreover, double damages provide nearly the same incentives to sue for private plaintiffs as trebling.

An intermediate approach would be to give the courts discretionary authority to impose up to treble damages.⁹⁹ Under this model, the court would be free to impose actual damages, treble damages, or an amount in between.¹⁰⁰ Ordinarily, hardcore price fixing would call for treble damages.¹⁰¹ Exclusionary conduct occasioned by illegal tying would ordinarily result in actual damages under this approach.¹⁰² Predatory pricing or other abuse of dominance might call for double damages. This approach may add to the cost of antitrust litigation by necessitating a penalty phase in every case and also make antitrust litigation even less predictable. On the other hand, it is a fairer rule because it permits the courts to consider the facts peculiar to each case.¹⁰³ Thus, none of these approaches are perfect. Enforcement authorities must make a careful assessment of each model before adopting a remedies regime.

3. Private Action Versus Regulation

As discussed above,¹⁰⁴ *Trinko* and *Twombly* express skepticism about the ability of judges to achieve correct outcomes in antitrust cases and a preference to have certain antitrust issues addressed through regulation rather than by the courts. The Supreme Court's advocacy of regulation over private antitrust enforcement seems anomalous given the widespread recognition that regulation creates costly inefficiencies. It is particularly anomalous in light of the federal government's shift toward deregulation in transportation, communication, and energy distribution, which began over thirty years ago and continues to this day.¹⁰⁵

98. See, e.g., *Antitrust Damage Allocation: Hearing Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 8, 246 (1981) (statement of Hubert L. Will, Senior U.S. District J. of the Northern District of Illinois) ("Something over 90 percent—actually 92 percent of all civil cases and roughly 89 percent of antitrust cases—are settled."); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 N.D. L. REV. 1247, 1292 (2009) ("From 1979 to 2000, only 3.17% of all cases filed in federal court went to trial.").

99. See Cavanagh, *Detrebling Antitrust*, *supra* note 13, at 838.

100. *Id.* at 838–41.

101. *Id.* at 839.

102. *Id.*

103. *Id.* at 838–41.

104. See *supra* notes 50–78 and accompanying text (discussing the Supreme Court's skepticism of private antitrust actions).

105. See, e.g., The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (codified as amended in scattered sections of 15, 18 and 47 U.S.C.) (deregulating local phone service).

More fundamentally, the Supreme Court's professed lack of confidence in the judiciary¹⁰⁶ is suspect. There is no body of data supporting the view that courts are inept on antitrust issues. On the contrary, the courts have shown over the years to be equal to the task. The same is true of antitrust regimes abroad. The private right of action provides individuals and entities an important avenue of relief that should not be foreclosed.

4. Combating Baseless Litigation

Given the burdens of antitrust litigation, both as to the cost to litigants and the greater demands on judicial time, it is imperative that a litigation system have a reliable mechanism for weeding out baseless claims as well as claims that while not baseless, cannot possibly succeed at trial. Rule 11 of the Federal Rules of Civil Procedure is designed to police baseless claims.¹⁰⁷ Among American litigators, the reaction to Rule 11 is decidedly mixed. Some feel that it works well; others believe that it impairs civil litigation.¹⁰⁸

In *Twombly*, the Supreme Court made clear its lack of confidence in Rule 11 as a screen for meritless cases.¹⁰⁹ Rather, the Supreme Court would prefer to dismiss cases on the merits where the allegations in the complaint do not allege facts that make out a "plausible" antitrust violation.¹¹⁰ Post-*Twombly*, the courts are still trying to decode the cryptic term "plausible,"¹¹¹ a task that will likely take years. In the meantime, the lower courts have been empowered, if not emboldened,

106. See *Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) (noting that applying section 2 "can be difficult").

107. FED. R. CIV. P. 11.

108. See, e.g., Tamar Lewin, *A Legal Curb Raises Hackles*, N.Y. TIMES, Oct. 2, 1986, at D1. Lewin summarizes the debate between sanctions skeptics led by then-Chief Judge Jack B. Weinstein (arguing that sanctions have "become another way of harassing the opponent and delaying the case") and sanctions advocates, such as Arthur Miller ("Rule 11 is a useful weapon against unnecessary litigation."). *Id.* (quotations omitted).

109. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 559 (2007).

110. *Id.*

111. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In *Iqbal* the Supreme Court explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556). The Court then enunciated a two-step procedure for determining the sufficiency of the complaint. *Id.* at 1949–50. First, courts should assume that factual allegations are true; mere conclusory allegations "are not entitled to the assumption of truth." *Id.* at 1950. Second, applying judicial experience and common sense, the court must ascertain whether the well-pleaded factual allegations are plausible, that is, whether they would permit the court to draw a reasonable inference that the defendant is liable. *Id.* at 1949–50.

to dismiss antitrust claims at the motion to dismiss phase¹¹²—a point at which the court knows *least* about the merits of the case.

In Europe, shifting of attorneys' fees under the "loser pays" standard provides a strong deterrent to baseless litigation. Still, it is critical that courts have the power to dismiss insubstantial, though not baseless, claims at the outset of the case. Dismissal prior to trial, however, is a potent weapon that must be exercised with great care. Courts must be mindful that antitrust cases are complex and often difficult to prove and be careful to ensure that meritorious claims have their day in court. The United States, under *Twombly*, which was an effort to ease the financial burdens of defending antitrust suits and to avoid false positives, seems to have tilted the playing field decidedly in the defendant's favor.¹¹³ Antitrust regimes abroad must be careful to strike a balance between the right to prosecute a claim and the right to be free from insubstantial claims.

5. Representative Litigation

Given that adoption of a private antitrust enforcement scheme is likely to increase the workload of the courts, some form of representative litigation is desirable to ensure that civil dockets remain manageable.

American style class actions probably do not offer an appropriate template.¹¹⁴ Unlike their European counterparts, American class action attorneys are entrepreneurs. Attorneys investigate and uncover wrongdoing; attorneys then seek clients and not vice versa.¹¹⁵ Moreover, American class action attorneys typically operate on a contingency fee basis.¹¹⁶ Once a class has been certified by the court, members are bound by any judgments unless they opt-out of the class.¹¹⁷ In Europe, contingency fees have been strongly resisted.¹¹⁸ Moreover, "loser pays" schemes are the norm in Europe, and that

112. See, e.g., *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 908-09 (6th Cir. 2009); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007); *Bailey Lumber & Supply Co. v. Ga. Pac. Corp.*, No. 1:08CV1394 LG-JMR, 2009 WL 2425973, at *3 (S.D. Miss. Aug. 6, 2009); *Sun Microsystems, Inc. v. Versata Enter., Inc.*, 630 F. Supp. 2d 395, 403-04 (D. Del. 2009); *Synergetics USA, Inc. v. Alcon Labs., Inc.*, No. 08 CIV. 3669(DLC), 2009 WL 435299, at *4-5 (S.D.N.Y. Feb. 23, 2009) (all holding that plaintiff failed to state a claim under *Twombly*).

113. See Cavanagh, *Twombly*, *supra* note 52, at 33.

114. See Olsen, *supra* note 83, at 73.

115. *Id.* at 75.

116. *Id.*

117. *Id.*

118. *Id.*

approach would simply not mesh well with an American style “opt out” class mechanism.¹¹⁹

However, the concept of “collective action”¹²⁰ lawsuits is not unknown in Europe. A remedial scheme featuring an “opt in” class that also obligated class members to pay a proportionate share of attorneys’ fees if the action were unsuccessful could work in Europe.¹²¹ Designated consumer groups, rather than representatives assembled by an entrepreneurial attorney, could represent injured consumers.¹²² Much like the American class action, a collective action could make it cost-effective to litigate when individual claims are relatively small, thereby denying offending defendants from retaining their ill-gotten gains.

B. Procedural Issues

The American experience also sheds light on the two most pressing procedural issues relating to the private antitrust remedy: access to both proof and attorneys.

1. Access to Proof

Access to proof is a key component of a private right of action for antitrust violations. In the typical antitrust case, there is an asymmetry of information, usually favoring the defendant, especially where covert activity is involved. In the United States, this asymmetry is addressed by pretrial discovery in order to provide equal access to proof. However, pretrial discovery is largely alien to civil law regimes.¹²³

Although the concept of greater pretrial discovery in European civil litigation “is neither radical nor particularly novel,”¹²⁴ resistance to enlarged discovery rights in private antitrust action is firmly embedded in the European litigation culture.¹²⁵ Opponents of pretrial disclosure see no need for special rules in antitrust cases and fear that adoption of discovery rules across the board would prove both costly and disruptive.¹²⁶ Yet, without some form of pretrial discovery, the

119. *Id.*

120. *See, e.g.*, Press Release, Europa, *supra* note 80 (observing that 13 European countries (France, Germany, Finland, Sweden, Denmark, Bulgaria, Greece, the Netherlands, Italy, Spain, Portugal, Austria and the UK) have introduced “collective redress schemes”).

121. Olsen, *supra* note 83, at 75.

122. *Id.*

123. Pheasant, *supra* note 6, at 59.

124. *Id.* at 60.

125. *Id.*

126. *Id.*

prospects for successful private actions are bleak, except for those cases that follow government enforcement actions.¹²⁷ This is not to say that the American system of broad pretrial disclosure is necessary. A more limited discovery regime could prove adequate. An approach that could work is a system of court-ordered discovery of documents relevant to the claim and defenses in private actions.¹²⁸

2. Access to Attorneys

The United States-based contingency fee system, wherein an attorney represents a plaintiff but gets paid only if successful, does not mesh well with the European system where the loser pays the prevailing party's attorneys' fees. Moreover, the loser pays system, itself, may well chill meritorious claims, given the unpredictability of litigation outcomes generally and the complexity of antitrust cases in particular. While the United States contingency fee model has been criticized for stirring up baseless litigation,¹²⁹ the loser pays regime may be attacked for being inhospitable to meritorious antitrust suits.

In short, something has to give in the traditional European litigation system if the private right of action is to have any meaningful impact on antitrust enforcement. Elimination of the loser pays scheme seems out of the question. Still, some compromise measures may work. For example, successful plaintiffs might be awarded an attorneys' fee premium.¹³⁰ Another approach might be to require a losing antitrust plaintiff to pay the attorneys' fees of successful defendants only when the court finds that the claims asserted are baseless. Without some adjustment in current litigation practices of European courts to permit access to attorneys by private antitrust plaintiffs, the private right of action may never get off the ground.

IV. CONCLUSION

The continuing debate over the merits of the private antitrust remedy in the United States provides valuable lessons to regimes abroad that are weighing the pros and cons of a private remedies scheme. Writing on a blank slate, these regimes have a unique opportunity to learn from the American experience and to make a quantum leap forward in global antitrust enforcement. The private right of action is an important and

127. *Id.*

128. *Id.*

129. Walter Olson, IBA Report: Contingency Fees as an Incentive to Excessive Litigation (on file with author).

130. *Id.*

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effective weapon in preserving free markets, in detecting and punishing antitrust violators, and in deterring future violations. The key task is to extract the positive elements from the American system while at the same time avoiding its shortcomings. In the process, competition authorities will have little choice but to sample the “toxic cocktail” and may very well conclude that it is not so toxic after all.¹³¹

131. *See supra* note 80 and accompanying text (referring to the U.S. combination of contingency fees, punitive damages, pre-trial discovery and opt-out class actions as a “toxic cocktail”).