
Essay

**Antitrust Reformers Should Consider the
Consequences of Mandatory Treble
Damages: What the Admonition Against
Putting New Wine in Old Wineskins Can
Teach Us About Antitrust Reform**

**Henry J. Hauser, Tiffany L. Lee and Thomas G.
Krattenmaker[†]**

“[N]o one puts new wine into old wineskins. If he does, the wine will burst the skins—and the wine is destroyed, and so are the skins. But new wine is for fresh wineskins.” –Mark 2:22

INTRODUCTION

The debate over antitrust reform is reaching a crescendo. Several proposals have been introduced in Congress and state legislatures to expand the scope of substantive antitrust rules governing marketplace behavior.¹ Missing from the current discussion, however, is careful consideration of whether these new

[†] Henry J. Hauser is counsel at Perkins Coie LLP and an adjunct professor at the University of Colorado Law School. Tiffany L. Lee is counsel at Perkins Coie and a former assistant attorney general with the Washington State Office of the Attorney General. Thomas G. Krattenmaker is former dean of the William & Mary School of Law, former professor of law and associate dean at Georgetown University, and former assistant professor of law at University of Connecticut. The views expressed in this essay are those of the authors and are not representative of the views of Perkins Coie, its clients, or the authors' current or former academic affiliations. Copyright © 2022 by Henry J. Hauser, Tiffany L. Lee, and Thomas G. Krattenmaker.

We are grateful to Professor Steven C. Salop, Professor Samuel Weinstein, Bruce Sokler, Evan Slavitt, and Dayna Zolle Hauser for their very helpful criticisms of an earlier draft. We are also grateful to the Minnesota Law Review, and to Haley Wallace and Marine Loison for their careful edits and suggestions.

1. See, e.g., Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Cong. (2021); Platform Competition and Opportunity Act of 2021,

rules should incorporate a process for calculating antitrust damages that has remained essentially unchanged for over a century. As legislators grapple with antitrust reform, it is important to examine the implications of importing the existing mandatory treble damages framework to new causes of action. Failure to appreciate these effects creates a serious risk of undermining reformers' core objectives.

Mandatory treble damages incentivize private antitrust enforcement and deter anticompetitive conduct, but they also produce social and economic costs. We apply simple behavioral models to analyze two effects of mandatory treble damages on firms and judges. First, mandatory trebling can drive overinvestment in filing antitrust cases. Second, it may create a judicial bias against plaintiffs because judges, behaving as rational actors seeking to minimize error costs, have an incentive to avoid triple-magnitude Type I errors (erroneous rulings for plaintiffs) by leaning toward single-magnitude Type II errors (erroneous rulings for defendants).

Section 4 of the Clayton Antitrust Act requires U.S. courts to award successful plaintiffs "threefold the damages" they sustain.² This trebling requirement renders U.S. antitrust relief an anomaly in the nation's legal system and deviates from how other countries deter and punish anticompetitive conduct.³ Despite the significant impact mandatory treble damages have on antitrust recoveries, there is scant rigorous analysis of their impact on case filings or judicial decisions.

In this essay, we argue that legislators should consider the impacts of mandatory treble damages on filing incentives and judges before importing them from century-old antitrust laws into proposed reforms. Enacting new legislation without considering the implications of repurposing procedural baggage from old laws flouts the ancient adage against pouring new wine into

H.R. Res. 3826, 117th Cong. (2021); S. B. S933A, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

2. Sherman Antitrust Act, 15 U.S.C. § 15(a) (1914).

3. See, e.g., Council Directive 2014/104, 2014 O.J. (L 349); Bürgerliches Gesetzbuch [BGB] [Civil Code], § 249, last amended Oct. 1, 2013, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html [<https://perma.cc/LYF8-GF43>] (Ger.) (stating only that "a person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred").

old wineskins. Notably, not all antitrust violations trigger mandatory trebling today.⁴ This fact casts further doubt on the wisdom of applying mandatory treble damages to new antitrust causes of action without assessing alternatives. One possibility would be to reframe substantive reforms as amendments to Section 5 of the Federal Trade Commission Act, which does not provide for treble damages.⁵

Part I discusses the rationale and justifications for mandatory treble damages. Part II examines the criticisms of mandatory trebling and various proposals to improve the antitrust damages framework. Part III investigates the effects of mandatory treble damages on law firm incentives and case filings. Part IV analyzes the impacts of mandatory trebling on judges and case outcomes. Part V concludes by recommending that legislators take these effects into account when drafting and enacting antitrust reforms. In striking the right balance between deterring anticompetitive behavior and encouraging procompetitive activity, legislators would be wise to consider the effects that mandatory treble damages have on how legal resources are allocated to maximize returns on investment and how judges decide cases to minimize error costs.

I. THE CASE FOR MANDATORY TREBLE DAMAGES

Under Section 7 of the Sherman Antitrust Act of 1890,⁶ as amended by Section 4 of the Clayton Antitrust Act of 1914,⁷ “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”⁸ For more than a century, mandatory treble damages have been a key characteristic of U.S. antitrust laws. However, the drafters of the Sherman Antitrust Act did not initially envision requiring courts to award treble damages to successful plaintiffs. Rather, the “original proposal

4. See Federal Trade Commission Act, 15 U.S.C. § 45.

5. See Susan A. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, ANTITRUST SOURCE 1, 34 (2009) (discussing the advantages of applying Section 5 of the Federal Trade Commission Act to “frontier” cases that “involve new forms of anticompetitive conduct that fall outside traditional categories of conduct that have long been subjected to conventional antitrust analysis” due in part to the “lack of provision” for treble damages).

6. Sherman Antitrust Act, 15 U.S.C. § 1.

7. Clayton Antitrust Act, 15 U.S.C. § 12.

8. *Id.* § 15.

. . . merely allowed recovery of the amount of actual enhancement in price.”⁹ The draft legislation “was successively amended to authorize double-damages”¹⁰ after Senator John Sherman argued that damages “should be commensurate with the difficulty of maintaining a private suit” and revised again to require three-fold recovery in a version that Senator George Hoar of the Judiciary Committee subsequently circulated.¹¹ Due to the sparse legislative history, the extent to which Congress debated the tradeoffs between single, double, and treble damages remains unclear.

Most likely, mandatory treble damages were imported from the seventeenth century British Statute of Monopolies, which entitled plaintiffs to “recover three times so much as the damages that he sustained” when “hindered, grieved, disturbed, or disquieted, or his goods or chattels any way seized, attached, distrained, taken, carried away or detained by occasion or pretext of any monopoly.”¹² The Sherman Antitrust Act’s architects, including Senator John Regan, believed that the United States similarly needed legislation to “give an adequate remedy” to private parties harmed by monopolistic arrangements.¹³ Congressman John Floyd echoed this sentiment in the debate surrounding the incorporation of treble damages in Section 4 of the Clayton Antitrust Act, remarking that antitrust law would be “of little value and practically useless . . . unless we supplement it and lend to private litigants the aid of this great Government.”¹⁴ In perhaps the most extensive analysis of treble damages to date, Professor George Garvey reported to the U.S. House of Representatives in 1984 that “at the time of its adoption in 1890 and in subsequent interpretations, the treble damage suit has been perceived as a vehicle for punishing the violator, deterring misconduct, and compensating the victim.”¹⁵

9. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 530 n.20 (1983) (citing 21 CONG. REC. 1765, 2455, 3145 (1890)).

10. *Id.*

11. George E. Garvey, *Study of Antitrust Treble Damages Remedy: Report to the Committee on the Judiciary, U.S. House of Representatives, 98th Cong., 2d Sess.* 7 (1984).

12. Statute of Monopolies of 1623, 21 Jac. 1, c. 3, at ¶ 4 (Eng.).

13. Garvey, *supra* note 11, at 7.

14. *Id.* at 8.

15. *Id.* at 1.

The most salient rationale for mandatory trebling is that it incentivizes private antitrust enforcement and deters anticompetitive conduct.¹⁶ The U.S. Supreme Court has recognized that “Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.”¹⁷ Commentators have similarly noted that by “allowing plaintiffs to treble their damage awards, Congress sought to provide the private sector with the incentive to function as a self-policing system.”¹⁸ In this way, treble damages “provide otherwise remediless small consumers”¹⁹ with “a powerful financial incentive to enforce the antitrust laws.”²⁰

Relatedly, private antitrust litigation serves as an effective deterrent to potential wrongdoers. The Supreme Court articulated this rationale in *Mitsubishi Motors*, noting that the “treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.”²¹ In accord, antitrust scholar Robert Lande highlights the “crucial role” that treble damages play in “detering anticompetitive behavior.”²²

An additional justification for treble damages is that they are necessary to fully compensate victims of antitrust violations.²³ According to Professor Nicolas Cornell, “treble damages

16. See *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472–73 (1982) (discussing in dicta that treble damages encourage private enforcement and deterrence); *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968) (discussing in dicta that treble damages encourage private enforcement); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) (discussing in dicta that treble damages encourage private enforcement).

17. *Am. Soc’y of Mech. Eng’rs, v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)).

18. Arthur D. Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353, 1353.

19. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 530 n.20 (1983) (citing 21 CONG. REC. 1765, 2455, 3145 (1890)).

20. PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 303(d) (4th ed. 2020).

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

22. Robert H. Lande, *Class Warfare: Why Antitrust Class Actions Are Essential for Compensation and Deterrence*, ANTITRUST MAG. 81, 84 (2016).

23. See Malcolm E. Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973).

may be more truly compensatory than traditional common-law damages, which typically undercompensate victims significantly.²⁴ Indeed, it has been argued that a damage multiplier in antitrust cases may more accurately reflect the harm to victims due to the time value of money and typically long timeline of antitrust litigation.²⁵

However, none of these rationales account for the fact that no other federal statute regulating marketplace behavior *requires* treble damages,²⁶ or that Section 5 of the Federal Trade Commission Act does not even provide for a private right of action, much less treble damages.²⁷ These justifications similarly fail to explain why the United States—despite the global proliferation of antitrust laws over the last several decades—is the only antitrust jurisdiction in the world that requires judges to award treble damages.²⁸ Finally, these rationales do not address why treble damages are necessary to incentivize private enforcement in light of the widespread availability of class actions, which did not exist at the time of the initial (1890) or subsequent (1914) injection of treble damages into antitrust law.

24. Nicolas Cornell, *Competition Wrongs*, 129 YALE L.J. 2030, 2047 (2020).

25. See Robert H. Lande, *The Four Myths About Antitrust Damages, Prepared Statement Before the Antitrust Modernization Commission Hearing on Civil Remedies: Damages Multiplier, Attorneys' Fees, and Prejudgment Interest*, at 3 (citing *Fishman v. Est. of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (Easterbrook, J., dissenting) (“[T]he time value of money works in defendants’ favor. Antitrust cases can be long-lived affairs.”)).

26. The Racketeer Influenced and Corrupt Organizations (RICO) Act requires treble damages in most cases, but this statute is better understood as addressing organized crime as opposed to marketplace behavior. See 18 U.S.C. § 1961. Treble damages are available in certain patent infringement cases at the court’s discretion but are not mandatory. See 35 U.S.C. § 284 (“The court may increase the damages up to three times the amount found or assessed.”).

27. See Federal Trade Commission Act, 15 U.S.C. § 45.

28. See Kentaro Hirayama, *Japan: Antitrust Litigation*, GLOB. COMPETITION REV. (Apr. 21, 2021), <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2021/article/japan-antitrust-litigation> [<https://perma.cc/9DXM-2U9F>]; Consumer Rights Act 2015, Schedule 8: Private Actions in Competition Law, 2015 c. 15, ¶ 5 (Eng.); Dennis Waelbroeck, Donald Slater & Gin Evan-Shoshan, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, ASHURT at 84, (Aug. 31, 2004), https://ec.europa.eu/competition-policy/system/files/2021-04/damages_actions_claims_for_damages_infringements_study_comparative_report.pdf [<https://perma.cc/87TA-WYH4>]. For an analysis that takes a similar approach to evaluating several facets of antitrust procedures, see Evan Slavitt, *Time to Remove Treble Damages from Antitrust Class Actions*, LAW360 (Sept. 28, 2020), <https://www.law360.com/articles/1313368> [<https://perma.cc/Q4WE-VWQW>].

II. CRITICISMS OF MANDATORY TREBLE DAMAGES

Mandatory trebling has been criticized on four main grounds. First, mandatory treble damages may systematically bias judges against plaintiffs. Second, the lure of treble damages can encourage frivolous lawsuits. Third, they may in some instances deter procompetitive conduct. Fourth, and relatedly, mandatory trebling may be draconian.

With regard to the first criticism, some commentators believe that treble damages “might cause some judges to favor defendants when they formulate substantive antitrust rules, measure ambiguous factual situations against these rules, devise appropriate standing rules, or compute damages.”²⁹ According to Professor Stephen Calkins, it “seems clear . . . that without trebling, procedural antitrust law would be more hospitable to plaintiffs.”³⁰ Specifically, he argues that “substantive and procedural aspects of competition law . . . could well be different because of the existence of the private treble damages remedy”³¹ due to the fact that “treble damages actions may have exacerbated courts’ impatience with antitrust suits.”³² Drawing a contrast with European Union law, which does not provide for treble damages but has civil fine authority that U.S. agencies lack, Calkins notes that “whereas the European Court of Justice presumes dominance from a 50 percent share and has found dominance below that level[,] U.S. courts seem to be motivated to seek easy ways to dispense with private treble damage cases.”³³ For example, U.S. “courts [may] have adjusted to the treble damages remedy by being relatively more willing to keep cases from going to trial.”³⁴

In the same vein, former Federal Trade Commission (FTC) Chairman William Kovacic has stated that requiring “mandatory treble damages for all offenses” may cause judges to

29. Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 117 (1993); *see also* Comment, *Recovery of Treble Damages Under the Sherman Act*, 38 YALE L.J. 503, 514 (1929) (“It is possible that the tripling of the damages makes a court less ready to grant recovery.”).

30. Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1140 (1986).

31. Stephen Calkins, *Reflections on Matsushita and “Equilibrating Tendencies”: Lessons for Competition Authorities*, 82 ANTITRUST L.J. 15, 20 (2018).

32. Calkins, *supra* note 30, at 1083.

33. Calkins, *supra* note 31, at 28 (emphasis omitted).

34. Calkins, *supra* note 30, at 1140.

“[a]djust requirements that must be satisfied to prove violations” and “[a]lter substantive liability rules that make it more difficult for the plaintiff to establish the defendant’s liability.”³⁵ Professor Garvey echoes this perspective, theorizing that “[m]andatory trebling may . . . have an adverse effect on plaintiffs”³⁶ because judges could “have an aversion to imposing a threefold penalty when the law or facts are unclear.”³⁷ Similarly, in “intellectual property-laden industries,” Professor Daniel Crane notes that judges “often act with extra caution in applying antitrust law” for fear of impairing “the incentives for disclosure and innovation.”³⁸ According to Professor Crane, this “sometimes excessive caution” stems from the “heavy artillery” of treble damages and the judges’ desire to avoid the “risk of chilling design innovation, one of the very things that both antitrust and patent law seek to stimulate.”³⁹

Some judges have referenced treble damages when denying antitrust standing to plaintiffs. The *Calderone* court warned that “the lure of a treble recovery, implemented by the availability of the class suit . . . would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress.”⁴⁰ *In re Industrial Gas Antitrust Litigation* employed similar logic. There, the Seventh Circuit held that a plaintiff whistleblower who was terminated and subsequently blacklisted for refusing to participate in a conspiracy to fix prices and allocate markets failed to demonstrate antitrust standing, noting that “the conflicting interests of deterrence through private antitrust enforcement and redress for injury must be bal-

35. William E. Kovacic, Chairman, Fed. Trade Comm’n, Private Participation in the Enforcement of Public Competition Laws, Public Statement at the British Institution of International & Comparative Law’s Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue (May 15, 2003), <https://www.ftc.gov/news-events/news/speeches/private-participation-enforcement-public-competition-laws> [<https://perma.cc/8B4Q-GWQ2>].

36. Garvey, *supra* note 11, at 32.

37. *Id.* at 2.

38. Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 715 n.177 (2010) (citing *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1308 (11th Cir. 2003)).

39. *Id.*

40. *Calderone Enter. Corp. v. United Artists Theatre Cir.*, 454 F.2d 1292, 1295 (2d Cir. 1971).

anced against the avoidance of excessive treble damages litigation.”⁴¹

A second criticism of mandatory treble damages is that they incentivize the filing of more than the optimal number of antitrust lawsuits. The “Chicago School of thought has derided the treble damages remedy available in private antitrust actions, fearing that it promotes frivolous suits.”⁴² Professors Phillip Areeda and Herbert Hovenkamp similarly caution that “excessive awards only encourage increasingly marginal suits.”⁴³ In an impassioned critique of treble damages, former FTC Commissioner J. Thomas Rosch blasted treble damage class actions as “almost as scandalous as the price-fixing cartels that are generally at issue.”⁴⁴

Turning to the third criticism, scholars and judges have expressed a concern that mandatory trebling may deter procompetitive conduct. According to Professor Edward Cavanagh, the “threat of treble damages . . . deters good as well as bad conduct and may deny society the benefits of procompetitive business practices.”⁴⁵ Professor Garvey also acknowledged this critique that “treble damage suits may, as the result of uncertainty in the law, deter socially beneficial conduct.”⁴⁶

With regard to the fourth criticism, and relatedly, some see treble damages as a draconian penalty that “bears no necessary relationship to the victim’s harm or the perpetrators’ benefits and may drive the wrongdoer out of business.”⁴⁷ In *Mid-West Paper Products*, Third Circuit Judge Arlin Adams dubbed treble damages a potentially “destructive force” and cautioned against

41. *In re Indus. Gas Antitrust Litig.*, 681 F.2d 514, 519–20 (7th Cir. 1982).

42. Seth Konopasek, *Treble, Treble Toil and Trouble: The New Per Se Rule as a Protection Against the Curse of the “Supreme Evil,”* 12 WM. & MARY BUS. L. REV. 497, 535 (2021).

43. AREEDA & HOVENKAMP, *supra* note 20, at § 656(c).

44. J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Antitrust Modernization Commission Remarks at the ABA Antitrust Modernization Commission Conference, at 9–10 (June 8, 2006), https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-modernization-commission-remarks/rosch-amc20remarks.june8.final.pdf [<https://perma.cc/9V7W-C5M3>].

45. Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 801 (1987).

46. Garvey, *supra* note 11, at 2.

47. Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 VAND. L. REV. 1277, 1282 (1987).

“permitting ‘overkill’ recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition.”⁴⁸ Similarly, in *Black and Decker*, Fourth Circuit Judge J. Harvie Wilkinson III bemoaned that “what we confront in antitrust law is a perfect storm of treble damages, large discovery costs, and relaxed pleading standards.”⁴⁹ In addition, “other nations have been reluctant to enforce U.S. antitrust judgments on comity grounds or to commit to do so pursuant to treaty because of its punitive nature.”⁵⁰

Commentators have proposed various solutions to address these criticisms. Professor Cavanagh suggests that an “intermediate approach would be to give the courts discretionary authority to impose up to treble damages” depending on the type of conduct at issue. This framework would allow judges to “impose actual damages, treble damages, or an amount in between.”⁵¹ For example, “hardcore price fixing would call for treble damages,” but “[e]xclusionary conduct occasioned by illegal tying would ordinarily result in actual damages,” and “[p]redatory pricing or other abuse of dominance might call for double damages.”⁵²

Another proposal is to adjust the multiplier based on the “concealability of the illegal behavior.”⁵³ This approach is based on the idea that optimal deterrence is achieved when damages account for the cost and likelihood of detecting illegal conduct. For their part, Professors Areeda and Hovenkamp appear sympathetic to an approach that would limit treble damages to “well-defined offenses that are not readily detected [and] provide for single damages in other cases.”⁵⁴ Judge Richard Posner has sim-

48. *Mid-West Paper Prods. Co. v. Cont'l Grp.*, 596 F.2d 573, 586–87 (3d Cir. 1979).

49. *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 444 (4th Cir. 2015).

50. Spencer Weber Waller, *Private Law, Punishment and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 215–16 (2003) (referencing the “blocking statutes” in several countries that prevent courts from enforcing treble damage awards).

51. Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOYOLA U. CHI. L.J. 629, 644 (2010).

52. Cavanagh, *supra* note 45, at 644.

53. Joseph Gregory Sidek, Comment, *Rethinking Antitrust Damages*, 33 STAN. L. REV. 329 n.66 (1981).

54. AREEDA & HOVENKAMP, *supra* note 20, at § 656(c).

ilarly suggested limiting treble damages to instances where violators can conceal their illegal behavior.⁵⁵ Under this proposal, treble damages would apply to price-fixing and bid-rigging cartels that are difficult for regulators and consumers to detect, whereas single damages would apply to conduct that is more easily observed, such as tying, bundling, exclusive dealing, refusals to deal, predatory pricing, monopoly maintenance, and attempted monopolization.⁵⁶

III. EFFECT OF TREBLE DAMAGES ON CASE FILINGS

Scholars, practitioners, politicians, and judges have articulated compelling rationales for mandatory treble damages as well as cogent criticisms. However, behavioral economics has never been leveraged to help us understand how mandatory trebling impacts case filings, judges, and substantive outcomes. Applying simple behavioral models, we show that mandatory treble damages can incentivize society to overinvest in filing antitrust cases and underinvest in bringing other types of cases, such as employment, privacy, securities, product liability, and civil rights litigation. This results in firms filing and litigating a greater number of frivolous antitrust cases than would be the case absent treble damages, and a greater proportion of frivolous antitrust cases relative to non-antitrust cases. As a result, more antitrust cases than are socially optimal are filed, and fewer than the socially optimal number of cases in other important areas of the law are filed.

Simple behavioral modeling demonstrates how resources are allocated between filing antitrust cases and bringing other types of cases. The following equations represent how firms are expected to allocate resources between antitrust and other cases when damages are symmetrical:

- $u_i(\text{antitrust})$ signifies the expected compensation, likely in the form of a contingency fee, that a law firm expects to receive from spending an additional “ i ” hours filing and litigating antitrust cases.

55. RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 226–27, 231 (1976).

56. These proposals also have the benefit of consistency with other federal statutes like the RICO Act that require treble damages for violations that are notoriously difficult to detect and prove.

- $u\text{-}i(\text{other})$ signifies the expected compensation, likely in the form of a contingency fee, that a law firm expects to receive from spending an additional “i” hours filing and litigating other types of cases.
- p signifies the probability of success in the case, which is roughly related to the objective merits of the case.

Where $u\text{-}i(\text{antitrust}) * p(\text{antitrust}) < u\text{-}i(\text{other}) * p(\text{other})$, the law firm shifts its resources from filing antitrust cases to filing other types of cases.

Where $u\text{-}i(\text{antitrust}) * p(\text{antitrust}) > u\text{-}i(\text{other}) * p(\text{other})$, the law firm shifts its resources from filing non-antitrust cases to filing antitrust cases.

However, because antitrust law requires judges to award treble damages, $u\text{-}i(\text{antitrust})$ and $u\text{-}i(\text{other})$ are not symmetrical. Therefore:

- In antitrust cases, $u\text{-}i = \text{damages} * 3$.
- In other types of cases, $u\text{-}i = \text{damages}$.

The law firm resource allocation equation must be adjusted to account for mandatory trebling in antitrust cases:

Where $\text{damages} * 3 * p(\text{antitrust}) < \text{damages} * p(\text{other})$, the law firm shifts resources from filing antitrust cases to filing other types of cases.

Where $\text{damages} * 3 * p(\text{antitrust}) > \text{damages} * p(\text{other})$, the law firm shifts resources from filing antitrust cases to filing non-antitrust cases.

These equations are simplified below by dividing by “damages”:

Where $3 * p(\text{antitrust}) < p(\text{other})$, the law firm shifts resources from filing antitrust cases to filing non-antitrust cases.

Where $3 * p(\text{antitrust}) > p(\text{other})$, the law firm shifts resources from filing non-antitrust cases to filing antitrust cases.

All else equal, firms thus have an incentive to file antitrust cases that have one-third the objective probability of success compared to other types of cases. This results in two outcomes that are undesirable from a societal standpoint. First, the monetary incentive of treble damages encourages overinvestment in antitrust litigation and underinvestment in other types of cases by bringing a greater number and proportion of antitrust cases with less objective merit relative to other types of cases. Second, judges that encounter a higher number and proportion of frivolous antitrust cases relative to other types of cases are conditioned over time to view antitrust theories and cases with greater skepticism, thus undervaluing these cases. This creates a higher bar for all antitrust plaintiffs, for meritorious and frivolous claims alike. As Professor Arthur Austin cautions, “[o]ver the long run, a constant stream” of frivolous antitrust lawsuits “will have an adverse cumulative effect, ultimately engendering a negative reaction in the judiciary.”⁵⁷ Specifically, “judges will develop a bias against the antitrust laws as a credible means of monitoring competition. The net result is the undermining of legitimate and responsible complaints, including those of governmental agencies responsible for protecting the public interest.”⁵⁸

IV. EFFECT OF TREBLE DAMAGES ON JUDGES AND CASE OUTCOMES

Mandatory treble damages in antitrust cases may also bias judges against antitrust plaintiffs. Under a theory of behavioral economics, judges, as rational actors, seek to minimize error costs. We expect rational actors to make decisions in part by balancing the probability and magnitude of Type I errors (false positives, or incorrect rulings for plaintiffs) against Type II errors (false negatives, or incorrect rulings for defendants). In the judicial context, these decisions take the form of orders on motions to dismiss, orders on motions for summary judgment, and substantive rulings in bench trials. As shown below, the specter of mandatory trebling alters a judge’s rational calculus by tripling

57. Arthur D. Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353, 1368 (1979).

58. *Id.*

the economic magnitude of Type I errors. In turn, this may give rise to a judicial bias against antitrust plaintiffs.

The following equations represent how error costs can impact judicial decisions:

- $p(I)$ signifies the probability of a Type I error (erroneous ruling for plaintiffs).

$p(II)$ signifies the probability of a Type II error (erroneous ruling for defendants).

- $m(I)$ signifies the magnitude or cost of a Type I error.
- $m(II)$ signifies the magnitude or cost of a Type II error.

For non-antitrust cases that do not provide for mandatory treble damages, a judge's calculus can be expressed as:

Where $p(I) * m(I) > p(II) * m(ii)$, a judge has an incentive to reduce error costs by ruling for defendants.

Where $p(I) * m(I) < p(II) * m(ii)$, a judge has an incentive to reduce error costs by ruling for plaintiffs.

The economic magnitude of a judicial mistake is a function of the damages available or required in a given lawsuit. Therefore, $m(I)$ and $m(II)$ can be expressed as a function of damages:

- $m(I) = f-I$ (damages).
- $m(II) = f-II$ (damages).

The equations representing how error costs impact judicial decisions can be rewritten as follows:

Where $p(I) * f-I$ (damages) $>$ $p(II) * f$ (damages), a judge has an incentive to reduce error costs by ruling for defendants.

Where $p(I) * f-II(\text{damages}) < p(II) * f(\text{damages})$, a judge has an incentive to reduce error costs by ruling for plaintiffs.

These equations can be simplified by dividing by $f(\text{damages})$:

Where $p(I) > p(II)$, a judge has an incentive to reduce error costs by ruling for defendants.

Where $p(I) < p(II)$, a judge has an incentive to reduce error costs by ruling for plaintiffs.

This expresses the intuitive concept that where the probability of incorrectly ruling for plaintiffs is greater than the probability of incorrectly ruling for defendants, a judge is more likely to rule for defendants, and vice versa.

Now, consider how mandatory trebling in antitrust lawsuits impacts these variables and incentives. In antitrust cases, the magnitude of a Type I error is to $3 * \text{damages}$.⁵⁹ The economic magnitude of a Type I error in antitrust cases may be expressed as:

$$m(I\text{-antitrust}) = f(\text{damages}) * 3.$$

The economic magnitude of a Type I error in other types of cases remains the same:

$$m(I\text{-other}) = f(\text{damages}).$$

This asymmetry alters a judge's incentive to minimize error costs as follows:

59. One may argue that the magnitude of a Type II error in antitrust cases should also be expressed as $3 * f(\text{damages})$, since this is the difference between what a meritorious antitrust plaintiff receives when a judge commits no error, and what that same plaintiff receives when the same judge commits a Type II error. However, this rationale overlooks the fact that an antitrust plaintiff has suffered single damages, not treble damages. Therefore, the appropriate expression of the magnitude of a Type II error in antitrust cases is the difference between actual damages and no recovery, or $f(\text{damages})$.

Where $p(\text{I-antitrust}) * f(\text{damages}) * 3 > p(\text{II-antitrust}) * f(\text{damages})$, the judge has an incentive to reduce error costs by ruling for defendants.

Where $p(\text{I-other}) * f(\text{damages}) * 3 < p(\text{II-other}) * f(\text{damages})$, the judge has an incentive to reduce error costs by ruling for plaintiffs.

These equations can be simplified:

Where $p(\text{I-antitrust}) * 3 > p(\text{II-antitrust})$, a judge has an incentive to reduce error costs by ruling for defendants.

Where $p(\text{I-other}) < p(\text{II-other})$, a judge has an incentive to reduce error costs by ruling for plaintiffs.

Therefore, we would expect a judge seeking to minimize the economic magnitude of error costs to rule for defendants in an antitrust case with triple the objective probability of success, and triple the objective merit, compared to cases without mandatory treble damages, such as in other areas of the law.

This results in two outcomes that are undesirable from a social and antitrust enforcement standpoint. First, judges have a greater incentive to rule in favor of antitrust defendants compared to defendants in other areas of the law in cases with similar objective merit, which presents equity concerns.⁶⁰ Second, over time, defensive rulings will result in the development of caselaw that is unfavorable to antitrust plaintiffs, further raising the bar for all antitrust plaintiffs. Both effects support the

60. One could question whether the effects discussed in Part III (more antitrust cases being filed than is socially optimal) and Part IV (greater proportion of defense rulings) cancel out. However, these effects do not cancel each other out for two reasons. First, more antitrust cases being filed than is socially optimal means that fewer meritorious cases in other areas of the law are filed than is socially optimal. This is due to the fact that firms must decide how to allocate finite resources between cases, as discussed in Part III. Even if those additional antitrust cases are all dismissed, there is a net harm to society because some meritorious cases in other areas of the law that would have been brought absent the lure of mandatory antitrust treble damages are never filed. Second, the judicial bias toward Type II errors that results from mandatory treble damages impacts both meritorious cases that would have been filed absent mandatory treble damages and frivolous cases that would not have been filed absent mandatory trebling. In other words, meritorious cases may be unfairly subject to a judicial bias.

views of Professors Garvey and Calkins that without mandatory trebling, “antitrust law would be more hospitable to plaintiffs.”⁶¹

CONCLUSION

Mandatory treble damages have been a hallmark of U.S. antitrust laws for more than a century. On the one hand, they serve an important role in incentivizing private enforcement and deterring anticompetitive conduct. On the other hand, mandatory trebling may systematically bias judges against plaintiffs, encourage frivolous lawsuits, deter procompetitive conduct, and unfairly punish defendants.

To be clear, we have no quarrel with antitrust law. On the contrary, we believe that antitrust is a bulwark of an open market economy that brings wealth to countries and increases the freedoms of its citizens. Nor do we have a view for or against proposals to amend and extend antitrust rules. Indeed, it would be striking if a law written for the United States of 1890 remained fully adequate to preserve and facilitate competition in today’s economy.

However, given the learnings of the last century, we believe that today’s reformers risk seriously undercutting their objectives if they reflexively import the procedural mechanism of trebling damages into the substance of new legislation. Specifically, behavioral models suggest that mandating treble damages can cause lawyers to file more than the socially optimal number of antitrust cases and judges to undervalue meritorious ones. Both effects may create a judicial bias against antitrust plaintiffs that undermines legitimate efforts to invigorate antitrust laws through substantive reform.

Therefore, we implore legislators to think twice before pouring new wine into old wineskins. Reformers might consider recasting their substantive antitrust changes as amendments to Section 5 of the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce” but does not provide for private rights of action or mandatory treble damages.⁶² This could enable legislators to extend antitrust law without unintentionally creating incentives for overinvestment in antitrust litigation, or for courts to water down these reforms through narrow judicial interpretations.

61. Calkins, *supra* note 30, at 1140.

62. See Federal Trade Commission Act, 15 U.S.C. § 45.