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DETREBLING ANTITRUST DAMAGES IN MONOPOLIZATION CASES

EDWARD D. CAVANAGH*

I. INTRODUCTION

This article examines the question of whether the statutory rule of mandatory treble damages[1] should continue to apply in monopolization cases brought under Section 2 of the Sherman Act.[2] The law of monopolization "has been a source of puzzlement to lawyers, judges and scholars."[3] Compared to Section 1 of the Sherman Act,[4] which has generated a plethora of case law and an emerging consensus on liability rules and remedies,[5] the law of monopolization remains largely undeveloped with respect to both liability rules and remedies. In the remedies arena, the conversation has focused principally on equitable relief—conduct remedies versus structural remedies[6]—and with good reason: the law has not

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[1] 15 U.S.C. § 15. The term "trebling" is used throughout to mean mandatory trebling, while "detrebling" is used to mean the elimination of mandatory trebling.

[2] *Id.* § 2.

[3] Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1623 (2005).

[4] 15 U.S.C. § 1 ("Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal.").

[5] This is not to suggest that liability rules under Section 1 are free of controversy. The rule of reason, the governing standard under Section 1, has been convincingly criticized for its jurisprudential shortcomings and lack of predictability. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12–14 (1984). The law of tying has become unsettled. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 34–35 (1984) (O'Connor, J., concurring); United States v. Microsoft Corp., 253 F.3d 34, 89–95 (D.C. Cir. 2001) (finding technological tying not subject to per se condemnation). The law with respect to resale price maintenance is in a state of flux. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

[6] Economist F.M. Scherer once likened conduct remedies to drug therapy and structural remedies to radical surgery. R. Craig Romaine & Steven C. Salop, *Slap Their Wrists?*

evolved much since the Supreme Court's decision in *Grinnell*[7] over forty years ago; but the playing field has changed drastically in that time with the emergence of a globalized high-tech economy. Lost in this conversation about equitable remedies is any discussion of monetary relief, including mandatory treble damages. Only recently have enforcement authorities analyzed the issue of monetary remedies in monopolization cases.[8] Nevertheless, treble damages remain an important weapon in the Section 2 arsenal, and it is the very potency of the treble damage remedy that has led to the Supreme Court's skepticism of private damage actions in monopolization cases and in antitrust cases generally. As a result, the availability of treble damages is driving substantive outcomes in monopolization cases. For example, the Supreme Court in *Trinko*,[9] concerned about the perverse incentives created by mandatory trebling, the high cost of error, the potential chilling of innovation, the enormous expense of monopolization litigation, and the inability of district judges to manage complex cases and reach the right decisions, dismissed the complaint at the pleading stage and, in so doing, significantly narrowed

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Tie Their Hands? Slice Them into Pieces? Alternative Remedies for Monopolization in the Microsoft Case, ANTITRUST, Summer 1999, at 15, 17. Conduct remedies may include (1) compulsory licensing; (2) sales to all customers on a non-discriminatory basis; (3) separate sales of now bundled products; and (4) creation of products that comply with industry standards as opposed to an individual company's proprietary standards. Structural remedies may include division of a monopolist along structural lines or division of a monopolist into two or more competing integrated companies. *See generally* Edward Cavanagh, *Antitrust Remedies Revisited*, 94 OR. L. REV. 147, 188–92 (2005).

[7] United States v. Grinnell Corp., 384 U.S. 563 (1966).

[8] *See* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) at 159–63 [hereinafter DOJ SECTION 2 REPORT] (expressing skepticism about the need for mandatory treble damages in monopolization cases and recommending further study of the range and level of monetary remedies—including civil fines—in monopolization cases), *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf; *but see* Statement of [FTC] Commissioners Harbour, Leibowitz and Rosch on the Issuance of Section 2 Report by the Department of Justice (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf (declining to join in, and criticizing, the DOJ Section 2 Report for, inter alia, placing the interests of dominant firms "ahead of the interests of consumers" in formulating enforcement standards under Section 2). The Commissioners' statements did not specifically address the treble damages issue. *But cf.* Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009) (withdrawing the Report), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245710.pdf.

The Antitrust Modernization Commission recommended, without specific discussion of monopolization cases, (1) retention of mandatory trebling in all Sherman Act cases and (2) that there is no need to grant enforcement agencies expanded authority to seek civil fines. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 245–48, 287–88 (2007) [hereinafter AMC REPORT], *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[9] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

the bases for liability in Section 2 cases.[10] Echoing these themes, the Court subsequently in *Twombly*[11] raised the bar for pleading antitrust claims generally.[12] Query whether the outcomes in *Trinko* and *Twombly* would have been different had the suits been for *actual* as opposed to *treble* damages.

Courts have often been reluctant to articulate the view that the availability of treble damages steers substantive outcomes in monopolization cases, although the Second Circuit came close in *Berkey*.[13] Nevertheless, antitrust scholars have long maintained that mandatory trebling has made courts hesitant to expand the scope of Section 2 and that where trebling "deters legitimate business conduct excessively, the courts will use measures within their control to correct the perceived imbalance."[14]

Analysis of the detrebling question begins with another question: whether, on balance, the policy goals that supported mandatory trebling when the antitrust laws were initially enacted still support mandatory treble damages in monopolization cases today. Were we writing on a

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[10] *Id.* at 411–16.

[11] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[12] *Id.* at 556–58.

[13] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 298 n.57 (2d Cir. 1979) ("The situation might be different in a Government equity action.").

[14] William E. Kovacic, Gen. Counsel, Fed. Trade Comm'n, Private Participation in the Enforcement of Public Competition Laws (May 15, 2003), *available at* http://www.ftc.gov/speeches/other/030514biicl.shtm. Kovacic (currently an FTC Commissioner) further posits:

> The courts will "equilibrate" the antitrust system in one of three ways. Judges will:
> — Construct doctrinal tests under the rubric of "standing" or "injury" that make it harder for the private party to pursue its case; or
> — Adjust evidentiary requirements that must be satisfied to prove violations; or
> — Alter substantive liability rules in ways that make it more difficult for the plaintiff to establish the defendant's liability. . . .
> Collectively, these developments have narrowed the scope of the U.S. antitrust system. Most of the critical judicial decisions in this evolution of doctrine have involved private plaintiffs pressing treble damage claims. Perhaps the most interesting area to consider the possible interaction between private right of action and the development of doctrine involves the fields of monopolization and attempted monopolization law. Litigation involving exclusionary conduct by IBM provides a useful illustration. In the late 1960s, the Department of Justice initiated an abuse of dominance case that sought, among other ends, to break IBM up into several new companies. By 1975, roughly 45 private suits had been filed against IBM alleging unlawful exclusionary conduct and seeking treble damages against IBM. The sum of all damage claims in the private cases exceeded $4 billion—a considerable amount at the time.

Id. (internal citations omitted). *See also* Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1089 (1986) ("It seems hard to imagine that the Supreme Court would have used the sweeping language of *Alcoa*, *Griffith*, *Lorain Journal*, and *Grinnell* had damages rather than injunctive relief been sought.") (internal citations omitted).

blank slate instead of nearly 120 years of experience under the antitrust laws, I would have serious misgivings about the mandatory treble damage remedy. I do not believe that trebling is necessary in every civil antitrust damage case. At the same time, I believe that trebling is absolutely critical in certain cases, for example, horizontal price-fixing and horizontal divisions of markets, where the conduct is typically covert and the behavior devoid of any consumer benefit.

However, we are not writing on a blank slate. The century-plus experience under the Sherman Act has created an antitrust ecosystem that could be seriously disrupted by a radical restructuring of antitrust remedies. In antitrust, as in physics, every action gives rise to an equal and opposite reaction.[15] Nowhere is this phenomenon more apparent than in the Supreme Court's recent decisions in *Trinko* and *Twombly*. Although the case for detrebling in monopolization cases is certainly not frivolous, the recent developments in *Trinko* and *Twombly* make the need for detrebling in monopolization cases less intense and the overall case for detrebling less appealing. Moreover, notwithstanding the admonition in *Trinko* that district courts be circumspect in adjudging monopolistic conduct, the potential devastating impact of monopolistic behavior on the economy remains sufficiently large, and the corresponding economic benefits derived from monopoly relatively small, to cast doubt on the wisdom of detrebling in monopolization cases.

Were damages to be detrebled in monopolization cases with *Trinko* and *Twombly* firmly ensconced as the governing law, deterrence would be severely undermined. Absent the promise of treble damages, private plaintiffs would be disinclined to undertake the costs and the risks of litigating monopolization claims. Lack of private enforcement would tend to embolden dominant firms to engage in monopolistic behavior. For the same reasons, detrebling would undermine the compensatory function of antitrust: if plaintiffs do not sue, they cannot be compensated. Fewer private law suits means that fewer defendants would be punished for their unlawful conduct, assuming that government enforcers would pursue only the most egregious conduct.

II. THE RATIONALE FOR TREBLING

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.[16]

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[15] *See* Calkins, *supra* note 14, at 1089.

[16] *See* AMC REPORT, *supra* note 8, at 245–47; *see generally* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 783–88 (1987).

First, trebling is intended to assure that victims of antitrust violations will be fairly compensated.[17] Because of their typically covert nature, antitrust violations are often difficult to detect and very expensive to prosecute. Trebling creates a powerful incentive 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 sufficient compensation in all cases. 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] 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 defendant's wrongful conduct.[20] Victims of price fixing or monopolistic overcharges are thus not remunerated for lost opportunity costs through prejudgment interest,[21] nor are business entities repaid for losses incurred by diversion of company executives from normal business activities and other organizational disruptions caused by a lawsuit.[22]

Moreover, overcharges alone undertax 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. Acts of monopolization, as well as horizontal restraints on price or output, also create an inefficient allocation of resources, thereby causing a net loss to society as a whole, the so-called welfare triangle. The loss in allocative 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 scope of the conspiracy. Nevertheless, quantifying the loss in allocative 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.[23]

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[17] *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (noting treble damages "would provide ample compensation to victims of antitrust violations").

[18] *See* Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 451 (1985).

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

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

[21] The AMC considered and rejected a proposal to award successful plaintiffs prejudgment interest. *See* AMC REPORT, *supra* note 8, at 249.

[22] *See* Cavanagh, *supra* note 16, at 823–24.

[23] *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 118 (1993).

Similarly, trebling provides rough justice in cases involving unlawful exclusionary conduct by monopolists, where the measure of damages is lost profits.[24] Antitrust violations may so distort the market mechanism as to make recreation of the "but for" market, and thus reasonable estimates of lost profits, a complicated exercise.[25] While trebling may not precisely counterbalance the market distortions caused by monopolistic behavior in every case, it does provide plaintiffs a greater likelihood of full compensation and, hence, greater incentives to prosecute violators than would be the case if lost profits alone were the measure of recovery.[26]

Second, mandatory trebling serves to deter antitrust violations.[27] 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 attorneys general. 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.[28] Equally important, trebling insures that private actions will go forward even when the Antitrust Division or the Federal Trade Commission, for whatever reason, chooses not to act. As enforcement intensifies, the likelihood of apprehension and successful prosecution of antitrust violations increases; and illegal conduct is deterred. Here, the goals of compensation and deterrence are complementary: enhanced compensation of victims through mandatory trebling encourages enforcement by private attorneys general, and the added private enforcement strengthens overall deterrence. In addition, 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.[29] Such catastrophic consequences

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[24] *See, e.g.*, LePage's Inc. v. 3M Co., 324 F.3d 141, 164–66 (3d Cir. 2003) (involving monopolization through bundled rebates).

[25] *Id.* at 166 (noting the difficulties in reconstructing the "but for" market in monopolization cases).

[26] *See id.*

[27] Blue Shield of Va. v. McCready, 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).

[28] AMC REPORT, *supra* note 8, at 246–47.

[29] *See* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (holding no right of contribution among defendants in antitrust cases).

provide a 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.[30] That realization has led Congress to limit the civil liability of Leniency Program participants to actual damages.[31]

In addition, from a deterrence perspective, multiplying actual damages is necessary because some violations of the antitrust laws invariably go undetected.[32] Theoretically, 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.[33] A multiple is necessary to force the violator to equate liability with damages caused.[34] If the probability of detection and prosecution is one in five, then five is the appropriate multiple.[35] Under this view, trebling would be appropriate only where the probability of detection is one in three. Accordingly, trebling may be too low 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.[36] 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 antitrust violation.[37] Here, trebling provides not only rough justice but also a predictable, workable rule of law.

Third, trebling makes it unlikely that antitrust violators will profit from their wrongdoing.[38] In theory, trebling is not necessary to bring about disgorgement of ill-gotten gains because plaintiffs' actual damages would presumably correspond to defendants' actual illicit gains.

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[30] Scott D. Hammond, Acting Deputy Assistant Att'y Gen. for Criminal Enforcement, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Midwinter Leadership Meeting (Jan. 10, 2005) ("[T]he detrebling provision of the [Antitrust Criminal Penalty Enhancement and Reform] Act removes a major disincentive for amnesty applications and hence, will lead to exposure of more cartels. . . ."), *available at* http://www.usdoj.gov/atr/public/speeches/207226.pdf.

[31] Pub. L. No. 108-237, §§ 102–201, 118 Stat. 661, 661–70 (2004).

[32] *See* Easterbrook, *supra* note 18, at 454.

[33] *Id.* at 455, 458–60.

[34] *Id.* at 454–55.

[35] *Id.* at 455.

[36] *Id.* at 454.

[37] Cavanagh, *supra* note 16, at 787.

[38] Blue Shield of Va. v. McCready, 457 U.S. 465, 472–73 (1982).

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.[39] Without trebling, therefore, antitrust violators may not be sued and may well be able 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.

Fourth, the treble damages remedy has a punitive element.[40] In this respect, the treble damages remedy is not unique to antitrust. Punitive damages were imposed at common law in cases of intentional or malicious wrongdoing.[41] Moreover, Congress has chosen to impose multiple damages in certain instances, most notably for RICO[42] and insider trading violations,[43] both to punish and to discourage undesirable conduct.

III. THE CASE FOR DETREBLING

Detrebling in monopolization cases may be justified on the following grounds: (1) treble damages should be reserved for egregious behavior, and monopolies, unlike cartels, are not invariably anticompetitive;[44] (2) treble damages ought to be assessed only in those cases where the conduct is clearly wrong, but the line between lawful monopoly and unlawful monopolization remains blurred;[45] (3) treble damages create perverse incentives to sue, giving rise to false positives and chilling innovation;[46] and (4) treble damages are unnecessary in monopolization

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[39] Easterbrook, *supra* note 32, at 455.

[40] Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir. 1955) (trebling "presupposes a punitive purpose").

[41] 2 DAN B. DOBBS, LAW OF TORTS § 381, at 1062–66 (2001).

[42] 18 U.S.C. §§ 1961–1968.

[43] 15 U.S.C. § 78u(d)(2)(A).

[44] DOJ SECTION 2 REPORT, *supra* note 8, at 159–61.

[45] *See id.* at 161; *infra* note 118. However, concerns about the potential unfairness of subjecting a defendant to possible treble damages where conduct is close to the line, or at least not egregious, can be alleviated somewhat by steering such cases to FTC administrative proceedings where money damages are not at stake. A significant rationale for the creation of the FTC was to provide a forum where cutting edge cases could be brought and resolved without subjecting defendants to catastrophic damages judgments. On the other hand, in cases involving close calls on liability, even a lesser monetary penalty, such as disgorgement, may be harsh. While disgorgement is rarely sought by the FTC or the DOJ, it is still a threat. *See infra* notes 165–169 and accompanying text.

[46] DOJ SECTION 2 REPORT, *supra* note 8, at 159–60; Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

cases because monopolistic conduct is typically overt and not clandestine, as is the case with cartel behavior.[47]

A. MONOPOLIES, NOT CARTELS

Cartel behavior is universally condemned as antithetical to consumer interests. As the AMC stated, "There is broad consensus that treble damages are appropriate for hard-core cartel conduct."[48] The situation with respect to Section 2 law is far less certain. Section 2 of the Sherman Act declares that "[e]very person who shall monopolize, or attempt to monopolize, or . . . conspire . . . to monopolize" shall be unlawful.[49] The statute does not prohibit the mere status of monopoly;[50] that is, the existence of a single dominant seller in a defined relevant market is not itself unlawful.[51] That is because the courts have determined that a firm that has played by the rules and whose dominance therefore stems from a superior skill, foresight, and business acumen should not be condemned under the antitrust laws.[52] Rather Section 2 condemns monopolists which have (1) gained their dominance unlawfully, such as through contracts in restraint of trade in violation of Section 1 of the Sherman Act,[53] or (2) become dominant lawfully but then have sought to maintain that dominant position by engaging in anticompetitive conduct.[54]

For over a century, the federal courts have struggled to develop a clear and predictable dividing line separating lawful monopoly from unlawful monopolization. Not surprisingly, that dividing line has proven to be difficult to draw. There is universal agreement that a monopoly achieved through anticompetitive conduct should be condemned. There is less agreement about what constitutes anticompetitive conduct necessary to condemn a monopoly. Historically, it is fair to say that dominant firms have been viewed by the courts with suspicion, which Learned Hand articulated in *Alcoa* in a few often-quoted sentences:

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[47] DOJ SECTION 2 REPORT, *supra* note 8, at 160–61. *See generally* Cavanagh, *supra* note 6, at 172. *But see infra* notes 131–33 (citing examples of covert monopolistic behavior).

[48] AMC REPORT, *supra* note 8, at 247. *See also Trinko*, 540 U.S. at 408 (noting that collusion among rivals is "the supreme evil of antitrust").

[49] 15 U.S.C. § 2.

[50] *See Trinko*, 540 U.S. at 407.

[51] *See id.*

[52] United States v. Alum. Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (*Alcoa*) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

[53] United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

[54] *See Trinko*, 540 U.S. at 407 ("[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.").

> [I]t is no excuse for "monopolizing" a market that the monopoly has been used to extract from the consumer more than a "fair" profit. The [Sherman] Act has wider purposes. Indeed, even though we disregard all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competitors is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.[55]

More recently, the Supreme Court in *Trinko* took a much more tolerant approach to monopolies. While acknowledging grave concerns in cases involving *concerted* action, the Court in *Trinko* emphasized that monopolies are not unlawful in themselves and further that monopolies are potentially *beneficial* to the competitive process:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[56]

Indeed, to compel Verizon to share with its rivals an infrastructure "uniquely suited to serve [its] customers . . . is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[57] Worse, forcing competitors to negotiate with each other "may facilitate the supreme evil of antitrust: collusion."[58] In short, monopolies do not present the same risks to the competitive process as cartels. That, in turn, suggests that (1) courts should not be too quick to condemn behavior by dominant firms, and (2) the specter of mandatory trebling may chill potentially beneficial competitive behavior.

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[55] *Alcoa*, 148 F.2d at 427.

[56] *Trinko*, 540 U.S. at 407. Most recently, in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109, 1122 (2009), the Court reiterated the point made in *Trinko* that mere possession of monopoly power is not unlawful unless accompanied by anticompetitive conduct.

[57] *Trinko*, 540 U.S. at 407–08.

[58] *Id.* at 408.

B. UNCERTAIN LIABILITY RULES

Given that the line between lawful monopoly and unlawful monopolization has proven difficult for the courts to draw, mandatory trebling where monopolization is found seems unduly harsh. It is one thing to mandate treble damages in horizontal price-fixing cases where defendants' conduct produces no measurable procompetitive benefits and imposes significant deadweight loss on society. It is quite another thing to impose treble damages in a monopolization case where a court, after weighing all of the evidence, concludes that defendant's conduct does produce procompetitive benefits but that those procompetitive benefits are outweighed by the anticompetitive effects of the conduct.

Historically, the courts identified specific categories of conduct as anticompetitive and, when coupled with monopoly power, sufficient to give rise to the offense of monopolization. The categories include, among others: (1) predatory pricing;[59] (2) monopolistic refusals to deal,[60] including refusal to provide rivals access to essential facilities; (3) exclusive dealing;[61] (4) leveraging;[62] and (5) predatory innovation.[63] The conduct-specific approach has come under attack for being hostile to efficiency; and at least with regard to leveraging and essential facilities, "greater specificity has come to be viewed by many as wrongheaded."[64]

More recently, courts and academic writers have sought to develop a bright-line, one-size-fits-all test under Section 2, a test "flexible enough to avoid errors and at the same time provide a degree of guidance beyond the simple notion of 'exclusionary.'"[65] In other words, the "search for the specific has become the search for the universal."[66] These tests include: (1) the profit-sacrifice test; (2) the "no economic sense" test; (3) the equally efficient rival standard; (4) the disproportionality standard; and (5) the balancing test.[67]

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[59] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[60] *See* Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[61] *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[62] *See* Eastman Kodak Co. v. Image Tech. Services, Inc., 504 U.S. 451 (1992).

[63] *See* C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340 (Fed. Cir. 1998); 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 269 (6th ed. 2007) ("[W]here the evidence indicates that the change [in product design] was grounded in anticompetitive motives that leave serious doubt about whether it is an improvement, a court might conclude that a purported innovation was predatory.").

[64] Kauper, *supra* note 3, at 1626.

[65] *Id.*

[66] *Id.*

[67] *See generally* Edward D. Cavanagh, Trinko*: A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?*, 59 MAINE L. REV. 111, 121–26 (2007); Andrew I. Gavil, *Exclusion-*

1. *Profit-Sacrifice Test*

The profit-sacrifice test is a bright-line standard designed to distinguish lawful aggressive competition by a dominant firm from conduct that is harmful to the competitive process. This test is simply an extension of the predatory pricing standard enunciated in *Brooke Group*[68] to cases involving non-price predation. Under this standard, the plaintiff must prove that the defendant engaged in exclusionary conduct by sacrificing short-term profits that would be subsequently recouped in the long term through the exercise of monopoly power.[69] The profit-sacrifice test has been the subject of extensive commentary, much of it critical.[70] The Achilles' heel of the profit-sacrifice test is its implicit assumption that for exclusionary behavior to violate Section 2, it must impose some cost on the monopolist and thereby be unprofitable in the short term. As the Antitrust Division pointed out in *Dentsply*, exclusion does not necessarily entail profit sacrifice because "exclusionary conduct can make a net positive contribution to profit at all times, by preserving ongoing monopoly profits."[71] Others have pointed out exclusionary conduct with no efficiency justification whatever may involve no profit sacrifice.[72]

On the other hand, some critics view the profit-sacrifice test as overinclusive.[73] The Department of Justice Section 2 Report has rejected this standard as a basis for Section 2 liability.[74]

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ary Distribution Strategies by Dominant Firms: Striking a Better Balance, 72 ANTITRUST L.J. 3, 52–65 (2004).

[68] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1992) (holding that a plaintiff in a predatory pricing case must prove that (1) defendant sold at prices below an appropriate measure of its costs; and (2) defendant had a dangerous probability of recouping its investment in below-cost prices).

[69] *See* Cavanagh, *supra* note 67, at 121–22.

[70] *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 268–72 (2003); Gavil, *supra* note 67, at 55–58; Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 155–58 (2005); Kauper, *supra* note 3, at 1642 (noting criticisms).

[71] Reply Brief for the United States at 3 n.3, United States v. Dentsply Int'l, Inc., No. 03-4097 (3d Cir. May 14, 2004).

[72] *See* Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 983–87 (2005).

[73] *See, e.g.*, Elhauge, *supra* note 70, at 274–79 (sacrificing short-term profits for long-term competitive gain is a virtue); DOJ SECTION 2 REPORT, *supra* note 8, at 41–42.

[74] DOJ SECTION 2 REPORT, *supra* note 8, at 42 ("The Department believes that a profit-sacrifice test that asks whether conduct is more profitable in the short run than other less-exclusionary conduct the firm could have undertaken raises serious concerns and should not be the test for Section 2 liability.").

2. *"No Economic Sense" Test*

Like the profit-sacrifice test, the "no economic sense" test attempts to provide a bright-line, objective standard for identifying unlawful exclusionary conduct under Section 2. Under this standard, advocated by the government, at least initially, in *Trinko*, exclusionary conduct is unlawful "if the conduct would not make economic sense for the defendant but for the elimination or softening of competition."[75] Two variations of the "no economic sense" test have been articulated. The first, like the profit-sacrifice test, asks whether the conduct at issue is more profitable than conduct that did not have the same or greater exclusionary effects by comparing the non-exclusionary profits from the conduct at issue to alternative, legal conduct.[76] If the non-exclusionary profits are greater, then the conduct would make economic sense and it would be lawful; but if the non-exclusionary profits are less, the conduct would make no economic sense.[77] A second version of the test simply asks whether the conduct in question added *any* profit to a company, apart from its exclusionary effect.[78] If the answer to that question is yes, the conduct would be lawful irrespective of whether alternative conduct would have been more profitable and regardless of the harm to competition.[79]

Antitrust scholars have criticized the "no economic sense" test. Jonathan Jacobson and Scott Sher assail its use in exclusive dealing cases, noting the difficulty in separating economic benefit to defendants from exclusionary impact on rivals.[80] Andrew Gavil faults the second version of the test for refocusing the Section 2 inquiry away from defendant's exclusionary conduct and toward its benefits by crediting

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[75] Brief for the United States and the Federal Commission as Amici Curiae Supporting Petitioner, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, No 02-682 (May 2003) [hereinafter *Trinko* Amicus Brief], *available at* http://www.usdoj.gov/atr/cases/f201000/201048.htm.

[76] DOJ SECTION 2 REPORT, *supra* note 8, at 39.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Jacobson and Sher articulate their criticism as follows:

> The application of the no economic sense test to exclusive dealing is therefore unintelligible. In most cases, there is no way to separate the economic benefit to the defendant from the exclusionary impact on rivals. The relevant question for exclusive dealing is not whether it "makes economic sense" (because it so frequently does), but whether, on balance, the specific arrangements at issue are likely to raise prices, reduce output, or otherwise harm consumers. The no economic sense test declines that inquiry.

Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 ANTITRUST L.J. 779, 781 (2006).

efficiency gains but ignoring what may be significant anticompetitive effects on rivals and consumers.[81]

Recognizing the flaws of the "no economic sense" test, the Department of Justice Section 2 Report does not embrace it as a liability standard in all Section 2 cases.[82] Nevertheless, the Department "believes that the test may sometimes be useful in identifying certain exclusionary conduct" and that, in any event, it may "serve as a valuable counseling tool" by encouraging firms to think through the ramifications of pursuing certain business conduct.[83]

3. *Equally Efficient Rival Standard*

Judge Richard Posner has urged that conduct is unlawfully exclusionary where it "is likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor."[84] Like the profit sacrifice test, this standard borrows from the law of predatory pricing and provides a safe harbor for lower-cost sellers who undersell higher-cost rivals. In other words, exclusionary practices that eliminate a less efficient rival do not give rise to Section 2 liability.[85] If a plaintiff is an equally efficient or more efficient competitor and can prove that the challenged practice is likely to exclude, the burden then shifts to the defendant to prove that its practice is, on balance, efficient.[86]

Critics have assailed this test as underinclusive, observing that entry of a less-efficient firm can stimulate price competition if the incumbent firm is charging monopoly prices and that, in any event, proof of comparative efficiency is difficult to measure in a judicial setting.[87] Comparative efficiency is especially difficult to ascertain in tying cases where multiple products are involved and a firm is equally efficient with re-

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[81] According to Professor Gavil:

> [I]t seemingly would credit any efficiency gains to the monopolist as a complete defense to charges of monopolization. It would disregard the amount of those gains and the degree to which the challenged conduct also may have resulted in significant anticompetitive effects on rivals and consumers. There would be no "weighing" or "balancing." It would also shift the burden of pleading and producing evidence of gains from defendant to plaintiff.

Gavil, *supra* note 67, at 52–53.

[82] DOJ SECTION 2 REPORT, *supra* note 8, at 43.

[83] *Id.*

[84] RICHARD A. POSNER, ANTITRUST LAW 194–95 (2d ed. 2001).

[85] *Id.* at 196 ("It would be absurd to require the firm to hold a price umbrella over less efficient entrants. . . . [P]ractices that will exclude only less efficient firms, such as the monopolist's dropping his price nearer to (but not below) his costs, are not actionable, because we want to encourage efficiency.").

[86] *Id.* at 195.

[87] Gavil, *supra* note 67, at 58–61.

spect to one product but not others.[88] Similar difficulties arise in exclusive dealing cases, where efficiencies may arise in distribution—rather than the manufacture—of the product.[89] The Department of Justice Section 2 Report has acknowledged the foregoing difficulties with this test but has nevertheless concluded that "whether conduct has the potential to exclude, eliminate, or weaken the competitiveness of equally efficient competitors can be a useful inquiry and may be best suited to particular pricing practices."[90]

4. *Disproportionality*

Professors Areeda and Hovenkamp have defined exclusionary conduct as conduct that creates, maintains, or enlarges monopoly power by impairing opportunities of rivals, and either (a) does not benefit consumers at all; or (b) is not necessary to attain the particular benefits produced; or (c) produces consumer harms that are disproportional to the resulting benefits.[91] Unlike the "no economic sense" test, the Areeda/Hovenkamp approach begins with an analysis of defendant's market power and the anticompetitive effects of its conduct. Only then does the analysis turn to the procompetitive benefits for consumers.

Accordingly, the test contemplates some weighing of procompetitive benefits against anticompetitive effects. However, only that conduct which produces anticompetitive effects that are *disproportional* to procompetitive benefits is condemned. This approach is easier to administer than the balancing approach used by many courts, which requires the judge to assess alleged anticompetitive restraints under a preponderance of evidence standard.[92] In addition, this standard minimizes the risk of ex post condemnation of conduct that had minor adverse effects on competition.[93] For these reasons the Department of Justice has endorsed the disproportionality test in the absence of a conduct-specific rule.[94] Critics have identified at least two problems that arise with the disproportionality test. First, what constitutes "disproportionality"? Close calls would obviously go for defendant; but courts are

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[88] *See* DOJ SECTION 2 REPORT, *supra* note 8, at 44.

[89] *Id.*

[90] *Id.* at 45.

[91] 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651a (3d ed. 2008).

[92] *See infra* notes 101–105 and accompanying text.

[93] DOJ SECTION 2 REPORT, *supra* note 8, at 45.

[94] *See Trinko* Amicus Brief, *supra* note 75, at 14; *see also* DOJ SECTION 2 REPORT, *supra* note 8, at 46 ("[I]n general, the Department believes that, when a conduct-specific test is not applicable, the disproportionality test is likely the most appropriate test identified to date for evaluating conduct under section 2.").

likely to differ on whether to draw the line at 60-40, 80-20, or 90-10.[95] A disproportionality standard is therefore likely to create confusion and unpredictability in the case law.[96] Second, economic theory is of little help in determining disproportionality.[97] Judicial assessments of conduct are likely to be based on philosophical, ideological, or other values, not economics.[98] The Justice Department also acknowledges that "the disproportionality test is not without its difficulties and may not be easy to apply in some instances," given that the means of anticompetitive exclusion "are myriad."[99] Still, the Justice Department views the disproportionality standard as preferable to a more open-ended balancing test.[100]

B. BALANCING TEST

A fifth source of guidance for rules on exclusionary conduct comes from the D.C. Circuit's opinion in *Microsoft*.[101] In that case, the court of appeals articulated an analytical framework applicable to all Section 2 cases: (a) the plaintiff must establish that the monopolist engaged in conduct having an anticompetitive effect; (b) the plaintiff must also establish antitrust injury, that is, harm to the competitive process and not simply harm to a particular competitor; (c) once the plaintiff has established anticompetitive effect and antitrust injury, the monopolist may come forward with procompetitive justifications for its conduct; (d) if the monopolist fails to come forward with justification for its acts, leaving the plaintiff's claims unrebutted, it is liable under Section 2; (e) if the monopolist asserts a procompetitive justification, the burden is on the plaintiff to prove that, on balance, the anticompetitive effects of the conduct outweigh the precompetitive benefits.[102]

Professor Robert Pitofsky has argued that a balancing test is preferable to any single-factor test:

> Finally, let me touch upon several of the reasons that have been advanced in favor of a simplified or single factor test. First, it has been suggested that more lenient enforcement under Section 2 makes sense (i.e., fewer false positives) because in the end monopoly prices will invite new entry, and the innovation and other consumer advantages introduced by monopolists will contribute to consumer welfare. I regard

[95] Gavil, *supra* note 67, at 63–65.

[96] *Id.* at 64 (noting "'disproportionality' is hardly an inherently certain formula").

[97] *Id.* at 63–65.

[98] *Id.*

[99] DOJ SECTION 2 REPORT, *supra* note 8, at 45.

[100] *Id.* at 46.

[101] United States v. Microsoft Corp., 253 F.3d 34, 50–80 (D.C. Cir. 2001).

[102] *Id. But see* Elhauge, *supra* note 70, at 268–72, 315–30 (noting problems with open-ended balancing).

> that as a direct challenge to the fundamental insight of Section 2 which is that unreasonably exclusionary behavior by monopolists undermines the incentives of the victim of the exclusion and often its ability to compete on the merits, and may even undermine incentives of the monopolists to compete in procompetitive ways. The point is fairly clear in the legislative history of Section 2 and all but the most recent scholarship and case law. Another suggestion is that the balancing approach is too complicated to be imposed by judges of limited competence. That is a challenge to a broad range of antitrust enforcement including rule of reason balancing under Section 1 and merger analysis under Section 7. Unless we are to move to a system where there is nothing but a *per se* legal and *per se* illegal categorizing, balancing efforts under some form of rule of reason are unavoidable.[103]

The balancing approach is subject to the same criticisms as the disproportionality standard in that (1) it may be difficult for the courts properly to weigh anticompetitive effects and procompetitive benefits; and (2) courts in implementing the balancing test are likely to reach outcomes based on political or social values, not economics.[104] The Department of Justice, stressing the challenges to the courts in administering the balancing test and, specifically, the difficulties in assessing dynamic effects that may benefit consumers significantly, has rejected the balancing approach.[105]

The Supreme Court in *Trinko* did not embrace any of these tests, but the opinion suggested that conduct-specific doctrines were generally not an adequate foundation for imposing liability for monopolization. In particular, *Trinko* raised doubts about the viability of two conduct-specific doctrines in monopolization law: (1) the essential facilities doctrine,[106] and (2) monopoly leveraging.[107] After ruling that the essential facilities doctrine did not pertain because the Telecommunications

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[103] Robert Pitofsky, Standards for Exclusionary Behavior Under Section 2 of the Sherman Act, Comments to the Antitrust Modernization Commission (Sept. 29, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Pitofsky.pdf

[104] Gavil, *supra* note 67, at 63–65. Concern about predictability of this test was a principal reason that the Antitrust Division rejected this approach. *See* DOJ SECTION 2 REPORT, *supra* note 8, at 38 ("Given the open-ended nature of this effects-balancing test and the inherent uncertainty in predicting its outcome, the Department does not believe that it should be the general test for analyzing conduct under section 2.").

[105] *See* DOJ SECTION 2 REPORT, *supra* note 8, at 38 ("Although consumer welfare should remain the goal of enforcement efforts, that objective is likely better served by a standard that takes better account of administrative costs and the benefits of dynamic competition for economic growth.").

[106] *See, e.g.*, MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1153 (7th Cir. 1983) (AT&T's refusal to permit MCI long distance to interconnect with AT&T's network violates Section 2); United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912) (finding joint refusal to provide access to an essential facility violates the Sherman Act).

[107] *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992).

Act[108] mandated Verizon to share its infrastructure with prospective rivals in local phone service, the *Trinko* majority took a gratuitous swipe at the essential facilities concept, noting that "[w]e have never recognized such a doctrine."[109] After seemingly embracing the theory of monopoly leveraging in *Kodak v. Image Technical Services*, the Court in *Trinko* summarily dismissed it in a footnote.[110]

In addition, the Court limited the reach of Section 2 in cases involving exclusionary behavior by dominant firms, holding that *Aspen Skiing*,[111] "is at or near the outer boundary of § 2 liability."[112] The Court in *Trinko* did not overrule *Aspen* but rather underscored the unique facts there that resulted in a finding for the plaintiff: (1) the existence of a long-term and profitable business arrangement between plaintiff and defendant prior to termination; (2) defendant's refusal to sell lift tickets to plaintiff, even at full retail price; and (3) the absence of any business justification for defendant's conduct, all of which revealed a "distinctly anticompetitive bent."[113] The Court found that these unique facts limited *Aspen*'s precedential value to cases involving similar facts.[114] The clear implication is that after *Trinko*, a finding of Section 2 liability based on *Aspen* would be rare.

Trinko aside, conflict has emerged among the lower courts with respect to several significant Section 2 doctrines, including: (1) bundled discounts,[115] (2) refusals to license patented or copyrighted goods,[116] and (3) predatory innovation.[117] Given the uncertainty in the law, it

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[108] Pub. L. 104–105, 110 Stat. 56 (1996).

[109] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 411 (2004). *But see* Elhauge, *supra* note 70, at 261 n.20 (observing that the doctrine is recognized by all thirteen courts of appeals).

[110] *Trinko*, 540 U.S. at 415 n.4.

[111] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[112] *Trinko*, 540 U.S. at 409.

[113] *Id.*

[114] *Id.*

[115] *Compare* LePage's Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003) (finding bundled discounts exclusionary), *with* Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008) (finding bundled discounts not unlawful when prices are not below a fair measure of costs).

[116] *Compare In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322 (Fed. Cir. 2000) (noting patentee has absolute right not to license), *with* Image Tech. Servs. Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997) (stating refusal to license may be exclusionary).

[117] *See* United States v. Microsoft Corp., 253 F.3d 34, 84–94 (D.C. Cir. 2001) (noting that complexities of distinguishing between lawful innovation and unlawful exclusion); but *see* C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340 (Fed. Cir. 1998) ("innovation" is just a tool of exclusion).

seems unduly harsh to put businesses at risk of treble damages for conduct which may well enhance the competitive process.[118]

C. PERVERSE INCENTIVES

In addition to its harshness, mandatory trebling in monopolization cases may create perverse incentives for plaintiffs to bring Section 2 actions for conduct that is either not harmful or, on balance, procompetitive.[119] Presumably, baseless claims can be disposed of expeditiously through the Rule 11 process.[120] More troublesome are those cases, described above, where the legality of the conduct is uncertain. Simply put, the lure of treble damages may lead private plaintiffs to bring cases that ought not to have been brought. In turn, that may lead to false positives, i.e., false condemnation of lawful conduct. As the Court in *Trinko* observed, cautioning against expanding the scope of Section 2 liability:

> Under the best of circumstances, applying the requirements of § 2 "can be difficult" because the means of illicit exclusion . . . are myriad. Mistaken inferences and the resulting false condemnations "are especially costly, because they chill the very conduct the antitrust laws were designed to protect." The cost of false positives counsels against an undue expansion of § 2 liability.[121]

That argument applies with equal force to mandatory trebling in monopolization cases. Treble damages encourage questionable Section 2 suits, magnify the cost of error, chill procompetitive behavior, and may stifle innovation.

D. OVERT BEHAVIOR

Whereas conspiratorial conduct is generally covert, single-firm conduct is often open to public view.[122] From a deterrence perspective, multiple damages are justified in conspiracy cases because their clandestine nature makes them difficult to detect; therefore, at least some antitrust conspiracies are likely to fly under the enforcement radar. Trebling,

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[118] *See* AREEDA & HOVENKAMP, supra note 91, ¶ 656c ("[Treble] damages are punitive, and punishment is inappropriate when novel principles are established, the law is unclear or even where the liability determination rests on a close and uncertain economic factual determinations." (citations omitted)).

[119] *See, e.g., Trinko*, 540 U.S. at 408–11 (finding "Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court . . . .").

[120] *See* Fed. R. Civ. P. 11.

[121] *Trinko*, 540 U.S. at 414 (citations omitted).

[122] *See* AMC REPORT, *supra* note 8, at 248 (noting "the probability of detection is close to 100%"); DOJ SECTION 2 REPORT, *supra* note 8, at 160–61.

from a deterrence perspective, would be the appropriate multiple if the likelihood of detection and punishment of cartels were one in three.[123] The same argument for multiple damages cannot be made with respect to single-firm behavior that is overt—bundled discounts, refusals to deal, and certain exclusionary behavior. Thus, a principal rationale for trebling in Section 1 cases is less compelling in Section 2 cases.

IV. AN ASSESSMENT OF DETREBLING IN MONOPOLIZATION CASES

A. IS MONOPOLIZATION TRULY A LESSER THREAT TO COMPETITION THAN CARTELS?

The linchpin of the detrebling argument for monopolization cases is that cartels are the supreme evil and that single-firm conduct, where violative of the antitrust laws, creates harm of a lesser magnitude. This argument is nourished both by Justice Scalia's express characterization of collusion as the "supreme evil" and by his observation in *Trinko* that monopolies are generally benign and that "monopoly power" is "an important element of the free market system" because "[t]he opportunity to charge monopoly prices —at least for a short period—is what attracts 'business acumen' in the first place."[124]

Justice Scalia's position, however, proves too much. First, it makes little sense to compare the relative evils of cartels and monopolies. Both are toxic to the marketplace. Justice Scalia is correct that cartels offer only deadweight loss to society and that there is little or no efficiency in a cartel's striving to achieve monopoly. It is also true that a lawfully acquired monopoly, i.e., a monopoly gained without exclusionary behavior, creates efficiencies (at its inception) as well as inefficiencies (in its outcomes). Justice Scalia, however, does not discuss monopolies that are unlawfully acquired. That omission is significant because monopolies obtained by exclusionary behavior may be even worse than cartels because they may create the kind of stability and durability that cartels seek but rarely achieve and, in addition, may be even more effective in creating deadweight loss. Indeed, the goal of any cartel is to function as the ideal monopolist.

Second, while Justice Scalia is correct that mere possession of monopoly power is not unlawful, he fails to establish the linkage between the goals of monopoly and innovation. The thrust of his argument is that courts must not be too quick to condemn monopoly because to do so

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[123] *See* Cavanagh, *supra* note 16, at 787.
[124] *Trinko*, 540 U.S. at 407.

would chill innovation. Surely, "the hope of achieving some competitive advantage is an essential spur to innovation."[125] Justice Scalia, however, does not speak merely of competitive advantage but rather of monopoly power.[126] Equally important, Justice Scalia's presumptions would not apply to Verizon—the monopolist in *Trinko*—which achieved its dominance through government regulation, not by superior market performance.[127] In any event, he does not address the optimal level of monopoly power necessary to spur innovation.

Third, while Justice Scalia underscores the importance of avoiding false positives, that is, allowing monopolization cases to proceed where there is no harm to competition, he says nothing about the need to avoid false *negatives*, that is, failure to entertain monopolization suits where there is harm to competition.

Justice Scalia simply concludes, *ipse dixit*, that the benefits from innovation outweigh the harm from monopolies. The Sherman Act, however, does not provide that innovation is a trump card, excusing any and all anticompetitive conduct by monopolists.

B. MONOPOLIZATION CAN BE COVERT

As discussed above,[128] multiple damages in antitrust cases are justified from an economic perspective where conduct is covert and chances of detection are less than 100 percent. As further discussed above,[129] this argument for multiple damages is less persuasive where the alleged antitrust violation is open and the likelihood of detection is 100 percent, as is arguably the case where certain exclusionary practices by dominant firms are at issue. Nevertheless, it would be unwise to eliminate trebling in monopolization cases on that basis. As a threshold matter, not all monopolistic conduct is overt. Like cartel conduct, some monopolistic behavior takes place in the dark. Patent fraud is a primary example of Section 2 conduct that is carried out covertly.[130] In addition, some of the

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[125] Gavil, *supra* note 67, at 42–43.

[126] *Id.*

[127] *Id.* at 43.

[128] *See supra* notes 32–37 and accompanying text.

[129] *See supra* note 122 and accompanying text.

[130] *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

exclusionary conduct in *Microsoft*[131] and *Unocal*[132] was unquestionably covert. Moreover, even if all monopolistic behavior were overt, the probability of detection and prosecution may still be less than 100 percent, creating a situation where a damage multiple would be appropriate. As Judge Frank Easterbrook has pointed out, the offensive conduct in *NCAA*[133] went on openly for some thirty-five years before being condemned by the court.[134] Nor does the fact that the conduct is overt lessen the sting of the violation. Microsoft was able to inflict substantial harm to the competitive process through its overt—as well as its covert—monopolistic behavior.[135] Finally, even where monopolistic behavior is open, an aggrieved party, facing lengthy and costly litigation with an uncertain outcome, may be reluctant to sue even for treble damages. *A fortiori*, that person would not sue if the recovery were limited to actual damages.

C. UNCERTAINTY AND PERVERSE INCENTIVES

Unquestionably, imposition of treble damages in cases where the law ex ante is unclear may produce harsh results in particular cases. It is equally true that the availability of treble damages may lead private plaintiffs to bring monopolization cases that ought not to have been brought. Indeed, *Trinko* is a prime example of a case that should never have been filed. Not only was the standing of the plaintiff law firm dubious, but it is also clear that the defendant had been amply punished by administrative proceedings before the Federal Communications Commission and the New York State Public Service Commission.[136]

Nevertheless, detrebling at this point in time would not be a wise solution to the problems of uncertainty and perverse incentives arising in private monopolization actions because the courts have already addressed these concerns by tightening pleading rules and liability standards in private actions. The unifying themes in the recent spate of private actions decided by the Supreme Court and lower courts since *Trinko* are: (1) fear of false positives; (2) lack of confidence in federal

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[131] United States v. Microsoft Corp., 253 F.3d 34, 74 (D.C. Cir. 2001) (explaining that "Microsoft took steps 'to maximize the difficulty with which applications written in Java could be ported from Windows to other platforms, and vice-versa'") (citations omitted).

[132] Decision and Order, Union Oil Co. of Cal., FTC Docket No. 9305, 2005 WL 2003365 (Aug. 2, 2005) (consent decree), *available at* http://www.ftc.gov/os/adjpro/d9305/0508 02do.pdf.

[133] NCAA v. Bd. of Regents, 468 U.S. 85 (1984).

[134] Easterbrook, *supra* note 18, at 457–58.

[135] *Microsoft*, 253 F.3d at 59–64 (explaining OEM license restrictions).

[136] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 403–04 (2004).

judges to manage discovery in a cost-effective manner and resolve correctly difficult antitrust issues; (3) concerns that erroneous decisions in favor of plaintiffs are especially costly because they chill innovation; (4) a preference for regulation, not the judicial process, to decide when a monopolist's conduct is unlawfully exclusionary and to implement and supervise highly detailed decrees; (5) concerns that the high costs of discovery and potentially enormous treble damage liability enable strategic behavior by plaintiffs to squeeze higher settlements from defendants; (6) fear of interminable litigation; and (7) the need for courts to exercise self-restraint in deciding monopolization cases.[137]

In *Twombly*,[138] the Supreme Court openly questioned the ability of federal judges to manage complex antitrust litigation and expressed pessimism about the utility of the Federal Rules of Civil Procedure as a tool to promote cost-effective litigation that yields just outcomes.[139] The Court gave short shrift to any argument that infirm claims in federal courts 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.[140]

The Court's solution to the difficulties in managing complex antitrust claims is to choke-off those claims at the motion to dismiss stage before significant time and money has been invested in the matter by the parties and the courts.

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[137] *Id.* at 408, 414–15; Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007); Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008); MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124 (9th Cir. 2004); Greco v. Verizon Commc'ns Inc., 2005-1 Trade Cas. (CCH) ¶ 74,748 (S.D.N.Y. 2005).

[138] *Twombly*, 127 S. Ct. 1955.

[139] *Id.* at 1967.

[140] *Id.* (citations omitted).

In light of these developments in the courts, detrebling across the board in Section 2 cases at this time would effectively eviscerate the private remedy for monopolization. No rational plaintiffs would commit to the cost and the risk of prosecuting a monopolization case if the remedy were limited to actual damages.

Finally, concerns about unfairness and perverse incentives in treble damage actions would appear to be overblown, given the realities of today's enforcement landscape. The Antitrust Division has not brought a monopolization action in over seven years.[141] Private monopolization actions are rare and plaintiffs' successes rarer still. Detrebling would further discourage monopolization actions at a time when litigants need more—not less—incentive to sue.

V. ALTERNATIVES TO DETREBLING IN MONOPOLIZATION CASES

A. DISCRETIONARY TREBLING

An alternative to detrebling in monopolization cases, or even across the board, would be to eliminate mandatory trebling and to leave the issue of imposing multiple damages to the sound discretion of the courts.[142] The advantage of discretionary trebling would be that courts could take into account the facts of a particular case and limit claims to actual damages where trebling would be unfair, harsh, or create perverse incentives.[143] For example, on the *Trinko* facts, a court might say that, given the extensive prior regulatory proceedings and fines, trebling would be inappropriate. Discretionary trebling would also discourage courts from dismissing antitrust damage actions out of hand without a careful review of the merits simply because an adverse treble damages judgment could have a devastating impact on a defendant. Discretionary detrebling would provide a more balanced approach to private enforcement of Section 2 by accommodating concerns about lack of enforcement, on the one hand, and concerns about false positives, on the other hand. The option of detrebling may lead courts to loosen pleading and

[141] The FTC, on the other hand, has been much more active in the monopolization arena during the same period. *See* Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008), *rev'g* FTC Docket No. 9302 (Feb. 2, 2007) (final order), *available at* http://www.ftc.gov/os/adjpro/d9302/070205/finalorder.pdf; Decision and Order, Union Oil Co. of Cal., FTC Docket No. 9305, 2005 WL 2003365 (Aug. 2, 2005) (consent decree), *available at* http://www.ftc.gov/os/adjpro/d9305/050802do.pdf. In addition, the FTC has undertaken an investigation of the microprocessor industry. Stephen Labaton, *In Turnabout, Antitrust Unit Looks at Intel*, N.Y. TIMES, June 7, 2008, at A1.

[142] *See* Cavanagh, *supra* note 16, at 838–41.

[143] *Id.*

liability standards in Section 2 cases and retreat from the *Twombly* and *Trinko* holdings. If so, then, on balance, antitrust enforcement would benefit from discretionary detrebling.

While the discretionary detrebling approach has curb appeal, it is not without significant potential downsides. A discretionary rule may lead to arbitrariness in that courts that are skeptical of the value of antitrust may be inclined to detreble as a matter of policy, and those courts that are proponents of antitrust may treble in all cases. A discretionary rule may lead to inconsistency in application among various courts as well. Arbitrariness and inconsistency together may encourage forum shopping. The problems of consistency and forum shopping would be most acute in the early days of a discretionary regime but would probably ease over time as the courts strive to develop uniform standards for trebling. However, the longer that process takes, the more troubling the discretionary standard becomes from a fairness perspective.

Apart from concerns about consistency and forum shopping, a discretionary detrebling rule would also tend to increase the length, cost, and complexity of antitrust trials, creating a "penalty phase" in every case as parties developed proof on whether or not treble damages should be imposed.[144] Moreover, for a federal judiciary whose ability to arrive at correct outcomes in antitrust cases has been recently questioned by the Supreme Court, substituting a penalty phase for mandatory trebling simply increases the probability of error. Nor, in the final analysis, is it realistic to expect that detrebling will cause the courts to beat a hasty retreat from the *Twombly* and *Trinko* holdings. Mandatory trebling was but one of the many considerations that drove those decisions.

B. INDIRECT PURCHASER SUITS

Indirect purchaser suits[145] comprise a discrete set of antitrust cases where detrebling on a limited basis might effectively address the procedural nightmare that has arisen in the wake of the Supreme Court's decisions in *Hanover Shoe*[146] that a defendant may not escape treble dam-

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[144] *See* AMC REPORT, *supra* note 8, at 248.

[145] Although issues involving indirect purchaser suits are normally associated with price-fixing conspiracies, similar issues also arise in monopolization cases. *See, e.g., In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98 (D.C. Cir. 2002); *In re* Warfarin Sodium Antitrust Litig., 214 F.3d 395 (3d Cir. 2000); *In re* Terazosin Hydrochloride Antitrust Litig., 335 F. Supp. 2d 1336 (S.D. Fla. 2004); *In re* Wellbutrin SR/Zyban Antitrust Litig., 281 F. Supp. 2d 751 (E.D. Pa. 2003). Indeed, *Hanover Shoe*, the seminal case on indirect purchaser issues, was a monopolization case. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

[146] *Id.*

age liability by proving that an antitrust victim passed on overcharges to its customers, and in *Illinois Brick*[147] that indirect purchasers are not "injured" within the meaning of the antitrust laws and may not sue for treble damages. Congress has declined to repeal *Illinois Brick*, but many state antitrust laws allow indirect purchasers to sue.[148] Not surprisingly, many state-based indirect purchaser suits have found their way back into federal court through diversity[149] or supplemental jurisdiction;[150] and the Supreme Court in *ARC America*[151] held that federal courts can hear such suits. Other indirect purchasers chose to bring their claims in the plaintiff-friendly confines of state court. The resulting emergence of multiparty, multistate, multijurisdictional indirect purchaser suits has been a millstone around the neck of the civil justice system.

Solutions to the *Illinois Brick* dilemma have proved elusive. Procedurally, Congress appears to have made some inroads in containing the sprawl of indirect purchaser suits under state law and other state-based claims by enacting the Class Action Fairness Act of 2005 (CAFA),[152] which expanded the scope of federal subject matter jurisdiction based on diversity and thereby made it easier to remove state law-based class action suits to federal court.[153]

Still, there is no consensus on how to address the indirect purchaser dilemma under substantive antitrust law. The AMC,[154] after much debate and over vigorous dissents, proposed overruling both *Illinois Brick* and *Hanover Shoe*. That proposal has not gotten traction with lawmakers, but another proposal by Professor Andrew Gavil might.[155] Gavil's approach differs from that of the AMC in three significant ways: (1) he would *not* overrule *Hanover Shoe*, thereby assuming that the direct purchaser—the one with the greatest incentive to sue and the fewest obstacles to recovery—would not be subject to the defendant's pass-on defense; (2) suc-

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[147] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[148] For a collection of state statutes permitting indirect purchaser suits, see Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 2 n.4 (2004).

[149] 28 U.S.C. § 1332(a)(1).

[150] *Id.* § 1367.

[151] Cal. v. ARC America Corp., 490 U.S. 93, 101–02 (1989).

[152] Pub. L. No. 109-2, § 9, 119 Stat. 4 (2005).

[153] *See* Emery G. Lee III & Thomas Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (Fed. Judicial Ctr. Apr. 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf (concluding that diversity filings for state-based claims have increased dramatically since the enactment of CAFA).

[154] AMC REPORT, *supra* note 16, at 267.

[155] *See* Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, *infra* this issue, 76 ANTITRUST L.J. 167 (2009).

cessful plaintiffs would be entitled to "overcharges" as a measure of actual damages; and (3) the Gavil approach would have a simple, predetermined allocation of damages between direct and indirect purchasers.[156]

I applaud Professor Gavil's creativity and share his skepticism regarding whether the AMC approach actually benefits indirect purchaser plaintiffs. My one point of departure from Gavil is that I would favor recovery by indirect purchasers of the actual (as opposed to treble) amount of passed-on overcharges. This quibble may be academic because, at the end of the day, most indirect purchaser suits are settled and, accordingly, a predetermined apportionment of damages between direct and indirect purchasers may prove efficient and workable.

C. Civil Penalties in Monopolization Cases

Professor Harry First makes an interesting case for expanding Section 2 remedies to include imposition of civil penalties.[157] Long a staple of EU enforcement in abuse of dominance cases, civil fines would be cheap and easy to administer.[158] Unlike equitable remedies, civil fines do not require judicial monitoring nor do they entail judicial efforts to restructure an industry. Civil penalties are also flexible in that they can be imposed as a standalone sanction or as part of a broader conduct decree.[159]

Given the panoply of remedies already available in monopolization cases, one can legitimately question the need for an additional sanction in the form of civil penalties.[160] In its Section 2 Report, the Department of Justice states that the introduction of civil fines on top of existing injunctive and treble damage remedies could chill procompetitive business conduct and concludes "[t]he possibility of additional substantial fines from governmental enforcement may discourage firms from engaging in conduct that would not violate the antitrust laws . . . ."[161] However, as discussed above, it is the very power of this potentially devastating array of remedies in monopolization cases that has led the Supreme Court to raise the bar for plaintiffs in getting past the motion

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[156] *Id.* at 187–88.

[157] Harry First, *The Modern Case for Antitrust Civil Penalties*, *infra* this issue, 76 ANTITRUST L.J. 127 (2009).

[158] *Id.* at 152.

[159] *Id.* at 165.

[160] *Id.* at 127–28.

[161] DOJ SECTION 2 REPORT, *supra* note 8, at 162. The Report does suggest that the civil fines might be an appropriate remedy if the treble damages remedy were eliminated and recommends that this approach be given further study.

to dismiss phase in antitrust cases.[162] Courts may very well feel more comfortable imposing civil penalties in a very narrow band of monopolization cases than in imposing treble damages. More importantly, civil penalties may be a vehicle for accelerating re-entry of the Antitrust Division into monopolization enforcement. Without significant enforcement activity by the Department of Justice, the addition of civil penalties will have little impact.

D. DISGORGEMENT

No less intriguing than Professor First's civil penalty proposal is Professor Einer Elhauge's essay on disgorgement as a remedy in monopolization cases.[163] Unlike civil penalties, which would require legislative authorization, disgorgement is currently available as part of the remedies package in monopolization cases.[164] Yet, disgorgement is rarely sought.[165] The traditional explanation for lack of disgorgement claims is that disgorgement is an element of the treble damages remedy and, hence, government action seeking disgorgement would be redundant.[166] Nevertheless, as Professor Elhauge points out, that explanation is no longer sufficient because "the adequacy of private actions seems increasingly dubious, especially in monopolization cases."[167]

The dearth of private civil monopolization cases would seem to create a golden opportunity for the Antitrust Division to pick up the slack in enforcement, but the Antitrust Division has proved even more reluctant than the private bar in Section 2 cases.[168] Professor Elhauge may be correct that at least part of the explanation for the Antitrust Division's paralysis in monopolization enforcement is the concern that, after a lengthy and expensive trial that is successful on liability issues, the equitable remedies imposed by the court would be "unwise or ineffective."[169] Were that the case, one would to expect to see more Section 2 cases in which the Justice Department has sought disgorgement. That has not happened.[170]

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[162] *See supra* notes 9–12 and accompanying text.

[163] Einer Elhauge, *Disgorgement as an Antitrust Remedy*, *supra* this issue, 76 ANTITRUST L.J. 79 (2009).

[164] *Id.* at 79–80.

[165] *Id.* at 81.

[166] *Id.* at 82.

[167] *Id.* at 83.

[168] *Id.* at 86. However, that may change with the new administration.

[169] *Id.* at 87.

[170] *See* DOJ SECTION 2 REPORT, *supra* note 8, at 159. The FTC, on the other hand, has sought disgorgement. *See* FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 36–37 (D.D.C.), *modified*, 99 F. Supp. 2d 1, 4–5 (D.D.C. 1999).

Perhaps Elhauge's thesis on lack of enforcement is only a partial explanation. It would appear, especially after reading Assistant Attorney General Thomas Barnett's "tiger" speech,[171] that the Antitrust Division's inertia ran deeper than mere fear of failure in showcase litigation. It seems that the Justice Department had embraced the view that monopolists are generally benign and not deserving of sanction.[172] If that were the case, the disgorgement remedy would be unlikely to jump start Section 2 enforcement at the Justice Department at this point in time. That said, there has been a change in administrations and with that change, perhaps a new perspective on Section 2 enforcement and remedies, including disgorgement.

Going forward in the new administration, both the Antitrust Division and the FTC need to send a message that Section 2 is still vital and will be enforced by detecting and prosecuting acts of monopolization and attempted monopolization. This is no easy task. The agencies must be selective in building their dockets and bring cases that have curb appeal, while avoiding weak cases, like *Trinko* and *Twombly*, that have given the courts license to run roughshod over Section 2 standards. Finally, the agencies must litigate these cases aggressively in order to resurrect monopolization law and deter future violations of Section 2.

VI. CONCLUSION

The treble damages remedy has been in place for nearly 120 years. With that longevity comes a presumption of legitimacy.[173] Opponents of mandatory trebling face a heavy burden of proof to change existing law. The case for change both with respect to treble damages generally and with respect to treble damages in monopolization cases only has not been made. Moreover, it is unlikely that limiting claims in monopolization cases to actual damages will result in more thoughtful and nuanced judicial opinions in Section 2 cases.

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[171] *See* Thomas O. Barnett, *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, *supra* this issue, 76 ANTITRUST L.J. 31 (2009).

[172] *See* Cavanagh, *supra* note 67, at 127.

[173] In the *AMC Report*, Commissioner Jonathan Jacobson describes it as follows:

> We have had a treble damage remedy for 117 years. It started as section 7 of the Sherman Act; in 1914, it was made section 4 of the Clayton Act. For a statute that has been a cornerstone of antitrust enforcement for that length of time, the burden to show a need for change is a particularly heavy one. The Commission had extensive hearings on the subject. There is extensive literature on the subject, which the Commission reviewed. No commenter identified a single example of a serious injustice occasioned by an actual award of improvident treble damages. That alone is compelling evidence that radical change is unwarranted.

AMC REPORT, *supra* note 8, at 414 (separate statement of Commissioner Jacobson).