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Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System

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Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System

STEPHEN CALKINS*

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I. INTRODUCTION

*To every action there is always opposed an equal reaction: or, the mutual actions of two bodies upon each other are always equal, and directed to contrary parts.*¹

The principal theme of this article is simple: In a system of law, as in nature, changes do not occur in a vacuum. Changes to one part of a legal system may stimulate compensating adjustments elsewhere, and the equilibrium position will depend both on the initial action and on the legal system's reaction. Attention to the initial changes alone will conceal their likely ultimate consequences.

This article begins by presenting three examples of the legal system's equilibrating tendencies. The examples are drawn from criminal law (perhaps the field where these tendencies are most familiar), the Racketeer Influenced and Corrupt Organizations Act (RICO),² and torts. The article then explores the extent to which the antitrust treble damages remedy has shaped substantive and procedural antitrust law.³ The availability of treble damages has had an effect on substantive antitrust law, but not a unidirectional one; at times trebling has expanded the law's coverage, at times narrowed it. On procedural aspects of

1. I. NEWTON, *Mathematical Principles of Natural Philosophy*, LAW OF MOTION III (A. Motte trans. 1934).

2. 18 U.S.C. §§ 1961-1968 (1982).

3. This is not the first article to suggest a connection between the treble damages remedy and substantive and procedural antitrust law. I discussed the relationship in Calkins, *Illinois Brick and its Legislative Aftermath*, 47 ANTITRUST L.J. 967, 983 (1978). See also, e.g., HOUSE COMM. ON THE JUDICIARY, 98TH CONG., 2D SESS., STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY 27-33 (Comm. Print 1984) (prepared by G. Garvey) [hereinafter GARVEY STUDY]; 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 331b2 (1978).

antitrust law, however, the availability of treble damages has had a pronounced and more consistently limiting effect.

The final part of the article represents a slight digression from the article's principal theme. It reports and discusses information from the Georgetown data set concerning the use of motions to dismiss and motions for summary judgment in various kinds of antitrust cases. The Georgetown data and a review of recent authorities indicate that pretrial motions by antitrust defendants frequently are successful and play an important role in antitrust litigation. Even before the recent trio of Supreme Court cases supporting the regular use of summary judgment⁴ (which were decided after this article was drafted but are discussed herein), the suggestion in *Poller v. Columbia Broadcasting System*⁵ that "summary procedures should be used sparingly in complex antitrust litigation"⁶ was not the law.

Aspects of this final part of the article support the principal theme. One of the ways in which courts appear to have compensated for treble damages is by being more willing to dispose of cases prior to trial. Summary disposition may be more common in antitrust cases than it would be were there no treble damages, and thus these motions, too, represent a means of equilibration.

II. EXAMPLES OF EQUILIBRATING TENDENCIES OUTSIDE OF ANTITRUST

The equilibrating tendency of the legal system can be seen in numerous settings, including criminal law, civil litigation under the RICO statute, and tort law.

A. CRIMINAL LAW: THE CRIMINAL JUSTICE SYSTEM'S RESPONSE TO SEVERE SANCTIONS

Between the seventeenth and nineteenth centuries English law prescribed the death penalty for over 200 crimes, many of which were minor offenses by modern standards. Such minor crimes included the theft of five shillings from a shop, stealing goods worth one pound, stealing turnips, and associating with gypsies. Because of its extreme and disproportionate severity, the criminal law was known as the "Bloody Code."⁷

In response, juries, judges, prosecutors, and even complainants prevented application of the death penalty in numerous cases in which it was legally required. Jurors frequently refused to convict those accused of minor crimes for which the penalty was death. Jurors either granted an outright acquittal or found the accused guilty only of a lesser crime than the facts indicated. Evidence of this latter behavior, known as "pious perjury," can be found as early as the beginning of the eighteenth century.⁸

4. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986). These cases are discussed *infra* notes 362-401, 427-66 and accompanying text.

5. 368 U.S. 464 (1962).

6. *Id.* at 473.

7. A. KOESTLER, REFLECTIONS ON HANGING 7 (1957) (quoted in E. BERGLER & J. MEERLOO, JUSTICE AND INJUSTICE 116 (1963)).

8. I. L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 at 94 (1948). In the years 1731-1732,

Jurors frequently committed pious perjury. Sir Thomas Fowell Buxton, a nineteenth century reformer, studied the records of judicial proceedings at the Old Bailey and found that deliberate undervaluation "was largely responsible for the virtual suspension of many capital statutes."⁹ One remarkable instance involved a man who was indicted "for stealing 13³/₄ yards of lace, value 6 [pounds]" and found guilty of stealing 39s worth (one shilling less than the capital amount). Later he was indicted "for stealing 4¹/₂ yards of lace" and again found guilty of stealing 39 shillings worth. Finally, he was indicted for stealing 13¹/₂ yards lace. This last theft was from a shop, for which the capital amount was only five shillings. This time the jury set the value at under five shillings.¹⁰ After citing several similar cases, Sir Buxton asked, "Is there any man who doubts the reason of these strange and sudden fluctuations in the value of the property?"¹¹ He went on to say:

These are some few of the cases of this nature which I have selected; and I hold in my hand twelve hundred of a similar description . . . I, in the little leisure that I enjoy, have only been able to select so limited a number; but, if any gentleman wishes to enlarge his collection, he will find no difficulty in making that twelve hundred, twelve thousand. Now, observe: each of these cases involves the perjury of twelve men. I have confined myself to one species of crime out of a multitude—to one species of evasion out of a multitude—and to one court, the Old Bailey, without touching upon the remainder of England . . . And, thus restricted, I prove my point.¹²

In his landmark book, *Theft, Law and Society*, Jerome Hall cites early American cases with a similar pattern of jury behavior. In the 1815 case *State v. Bennett*,¹³ the court expressed its resignation to the practice: "However absurd it may appear" to allow juries "sworn to determine a case according to evidence" to find goods to be worth less than the capital amount even "when all the witnesses swear they are of much greater value," the practice has "been indulged in, until it has become the law of the land. The principle has been too long established, to be now called into question . . ."¹⁴

of the thirty-three persons indicted at the Old Bailey for stealing privately in shops to the value of five shillings, only one was convicted; twelve were acquitted while another twenty were found guilty but the value of the stolen property was found to be below the five shillings. Again, of fifty-two persons tried . . . for stealing to the value of forty shillings in dwelling houses, only six were convicted, twenty-three were acquitted and twenty-three convicted of larceny but not on the capital charge, the jury having found the stolen property to be below the value of forty shillings.

Id. at 329; see also J. HALL, *THEFT, LAW AND SOCIETY* 127-30 (2d ed. 1952).

9. 1 L. RADZINOWICZ, *supra* note 8, at 95; see also J. HALL, *supra* note 8, at 128-30 n.45.

10. J. HALL, *supra* note 8, at 129 n.45; 1 L. RADZINOWICZ, *supra* note 8, at 95.

11. J. HALL, *supra* note 8, at 129 n.45. Hall also cites many other legal scholars as acknowledging this behavior. *Id.* at 127-28 nn.42-44.

12. *Id.* at 130 n.45.

13. 5 S.C.L. (3 Brev.) 246 (Constitutional Court) (1815) (cited in J. HALL, *supra* note 8, at 128 n.44).

14. *Id.* Other American examples of "jury nullification" by convicting only for a lesser offense are set forth in H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 306-12 (1966); see also *McGuatha v. California*, 402 U.S. 183, 199 (1971) (cases where juries "simply refused to convict of the capital offense" where death penalty was "clearly inappropriate"). For defenses of "jury nullification," see M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* (1973) (jury serves important "recourse role") (reviewed and criticized by Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedi-*

Juries were not the only actors circumventing legislatively imposed death penalties. Judges also avoided the application of severe sanctions. Radzinowicz cites a blatant example of such a merciful act by a nineteenth century English judge as follows:

'Trying a prisoner at the Old Bailey on a charge of stealing in a dwelling-house to the value of forty shillings . . . a capital offence', Lord Mansfield 'advised the jury to find a gold trinket, the subject of the indictment, to be of less value. The prosecutor exclaimed, with indignation, "Under forty shillings, my Lord! Why the *fashion*, alone, cost me more than double the sum". Lord Mansfield calmly observed, "God, forbid, gentlemen, we should hang a man for *fashion's sake!*"'¹⁵

In addition to instructing jurors on the value of stolen goods, judges strictly construed statutes to sidestep the death penalty. As Livingston Hall put it,

[a] statute imposing a penalty which the court regards as disproportionately heavy for the acts committed can hardly escape a strict construction. It was with such statutes, taking away benefit of clergy, that the doctrine arose, and the history of the past four hundred years has amply proved that under such circumstances courts, juries, and even prosecutors will cooperate to defeat a clearly avowed "legislative will" by any available means.¹⁶

In *King v. Cook*¹⁷ a person was charged with the capital felony of stealing a cow. The court held that

since the stolen animal was only two and a half years old and had never had a calf, it was not a cow but a heifer. And because the relevant Acts mentioned both cow and heifer, it was held further that "the one must have been used in contradiction to the other; and therefore that the evidence did not support the indictment, and the prisoner was entitled to his acquittal."¹⁸

Judges also used procedural technicalities to avoid inappropriate application of the death penalty. Radzinowicz reports the existence of "abundant evidence of this tendency."¹⁹ One example from the *Annual Register* for 1800 is illustrative:

John Taylor had been arraigned and tried on the charge of uttering a forged note, in the name of Bartholomew Browne . . . of which the jury

ence, 62 CALIF. L. REV. 1289 (1974)); Scheffin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972) (nullification makes law responsive to public). For more general discussions of juries departing from legal rules, see Levine, *The Legislative Role of Juries*, 1984 AM. B. FOUND. RES. J. 605 (conviction rates for violating selective service laws higher during wartime and correlated with public approval of war); Meyers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC'Y REV. 781 (1979) (study of one county showed only limited departures from rules).

15. 1 L. RADZINOWICZ, *supra* note 8, at 94 n.49 (quoting J. CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* (3d ed. 1874)); see also T. GREEN, *VERDICT ACCORDING TO CONSCIENCE* 148-49, 278-87 (1985).

16. Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 763 (1935).

17. 1 Leach 105 (1774) (quoted in 1 L. RADZINOWICZ, *supra* note 8, at 87).

18. *Id.*

19. 1 L. RADZINOWICZ, *supra* note 8, at 100; see also T. GREEN, *supra* note 15, at 280; R. WINDEYER, *LEGAL HISTORY* 227 (1957).

found him guilty; but just as Baron Hotham was about to put on his black cap, and to pass sentence of death on the prisoner, one of the barristers, not retained on the trial, happening to turn over the forged note, saw it signed *Bartw. Browne*; throwing his eyes immediately on the indictment, perceived it written therein *Bartholomew Browne*. He immediately pointed out the circumstance to Mr. Garrow, counsellor for the prisoner, who rose up and stated the variance as fatal to the indictment; in which the judge concurred, and discharged the prisoner.²⁰

Such cases were typical. A wrong name for either the criminal or the victim, or other technical errors, could defeat an indictment.²¹

Even the prosecutors would participate. Radzinowicz quotes a case where the court told the prosecutor that if goods obviously worth a great deal more than the capital amount were set at a lower amount he could "save the prisoner's life." The prosecutor said, "God forbid I should take her life! I will value them" below the capital amount.²² If mitigation was the reaction of eighteenth and early nineteenth century jurors, judges, and prosecutors to the severity of criminal sanctions, abandonment of the death penalty for most crimes was the legislature's counterreaction. The legislature gradually adopted the view that severe sanctions prevented successful law enforcement, and by the middle of the nineteenth century most crimes were no longer capital.²³ The death penalty "remained only in cases of treason, murder, and piracy with violence."²⁴

An increase in indictments and conviction rates followed abolition of capital sanctions for most crimes.²⁵ As penalties began to reflect the severity of crimes, juries more regularly convicted defendants of committing the crimes of which they were accused. According to Hay, the rate increased from fifty to eighty percent, and the "incidence of committals not resulting in trials" went from twenty to ten percent.²⁶ According to Radzinowicz, "[a]lmost immediately after" repeal of the statute authorizing the death penalty for stealing from the person in the amount of twelve pence, "both prosecutions and convictions . . . began rapidly to increase."²⁷

20. 1 L. RADZINOWICZ, *supra* note 8, at 100 (emphasis added) (quoting 42 ANNUAL REGISTER, CHRONICLE 6-7 (Mar. 30, 1800)).

21. 1 L. RADZINOWICZ, *supra* note 8, at 101 n.71 (quoting MacKinnon, *The Law and Lawyers*, in 2 A. TURBERVILLE, JOHNSON'S ENGLAND 308 (1933)).

22. 1 L. RADZINOWICZ, *supra* note 8, at 95 (quoting Sir Fowell Buxton's 1821 speech against the death penalty for forgery, in PARLIAMENTARY DEBATE (1821) N.S. vol. 5, col. 944).

23. See L. RADZINOWICZ, *supra* note 8, at 330 (discussing pamphlet based on a speech given by Romilly in which he outlined the difficulties in imposing the death penalty for minor crimes); see also *id.* at 324 nn.6-8 (discussing pamphlet's publications).

24. R. WINDEYER, *supra* note 19, at 279.

25. Hay, *The Criminal Prosecution in England and Its Historians*, 47 MOD. L. REV. 1, 5 (1984); see also 1 L. RADZINOWICZ, *supra* note 8, at 502-03 (increase in prosecutions and convictions due partly to change in law and partly to other factors).

26. Hay, *supra* note 25, at 5.

27. 1 L. RADZINOWICZ, *supra* note 8, at 501. One might suggest that repeal of the death penalty for many offenses simply increased the amount of crime, and that this increase accounts for the greater number of prosecutions and convictions. The decline in acquittal rates and in convictions for lesser offenses than those charged, however, tends to support the view that repeal did lead to greater law enforcement. *Id.* at 502-03.

The increase in indictments and conviction rates was due, at least in part,²⁸ to the reduced need for pious perjury by jurors. A more liberal construction of statutes and a lessened insistence upon procedural exactitude also contributed to the change. After the death penalty was no longer applicable to most minor offenses,

[o]nly in exceptional cases involving ambiguous and equivocal statutes was the predominantly merciful interpretation so prevalent in the eighteenth century still adhered to. In all others a strict interpretation was followed, which neither narrowed nor broadened the scope of the statutes [T]he adopted interpretation, while remaining essentially strict, became less rigidly formal.²⁹

Based on this historical record, it seems clear that the legal system responded to a severe penal code by mitigating its sanctions. The mitigation was achieved by stretching the rules to favor defendants, and by the willing perjury of participants in the legal system. The legislature responded by lessening the law's severity, thus leading to a reduction in the various quasi-legal methods used to achieve a more humane result. The system was then able to operate without the mitigating constraints, and convictions increased.

B. RICO

The struggle of the courts to adjust liability to remedy, and the restrictions on their institutional freedom to do so, are illustrated by the continuing uncertainty about the appropriate scope of civil liability under the Racketeer Influenced and Corrupt Organizations Act (RICO).³⁰ RICO was enacted in 1970 as title IX of the Organized Crime Control Act.³¹ It was designed principally "to seek the eradication of organized crime" in legitimate business activities.³² In addition to the criminal penalties³³ and civil remedies³⁴ the government can seek, RICO authorizes any person injured "by reason of" a violation of the Act's substantive provisions to recover treble damages and attorney's fees.³⁵

The civil provisions of the RICO statute largely were ignored during the first decade after the statute's enactment.³⁶ Since 1980, however, as the plaintiffs' bar

28. Cf. Hay, *supra* note 25, at 9, 10 (larger police force also factor in increased prosecutorial activity).

29. 1 L. RADZINOWICZ, *supra* note 8, at 103.

30. 18 U.S.C. §§ 1961-1968 (1982).

31. Pub. L. No. 91-452, 84 Stat. 922 (1970).

32. *Id.*, 84 Stat. at 923 ("[Organized crime's] money and power are increasingly used to infiltrate and corrupt legitimate business [and] . . . seriously burden interstate and foreign commerce It is the purpose of this act to seek the eradication of organized crime in the United States").

33. 18 U.S.C. § 1963 (1982). Criminal sanctions include fines of up to \$25,000, imprisonment for up to 20 years, and forfeiture of interests acquired or maintained in violation of § 1962. See Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. L. REV. 225 (1981).

34. 18 U.S.C. §§ 1964(a), (b), (d) (1982). Civil remedies include divestiture of the violator's business interests, injunctions against future investments by violators in similar businesses, and dissolution of the enterprise. For analyses of these civil remedies, see Curnow & Matloff, *The Case for Divestiture to Private Plaintiffs under 18 U.S.C. Section 1964 (a)*, 21 CAL. W.L. REV. 302 (1985); Comment, *RICO and Equitable Remedies Not Available for Private Litigants*, 21 CAL. W.L. REV. 385 (1985).

35. 18 U.S.C. § 1964(c) (1982). RICO provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue therefore in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.*

36. See *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3277 n.1 (1985) (only nine private RICO

has become more familiar with RICO's treble damage remedy, civil RICO claims have proliferated. This proliferation has inspired courts to search with considerable imagination for ways to limit the reach of civil RICO.³⁷ The courts' attempts to limit RICO are partly due to a perception that RICO's penalties are excessive. They also reflect a belief that the proliferation of lawsuits, induced by the lure of treble damages, threatens to create a broad federal remedy for common law wrongs, which may be contrary to Congress' intent.

The effort to limit RICO has been encumbered by the breadth of the statutory language. Treble damages are authorized for "[a]ny person injured in his business or property by reason of a violation of" a provision making unlawful the use or investment of income "derived, directly or indirectly, from a pattern of racketeering activity" in the operation of an enterprise engaged in commerce.³⁸ "Racketeering activity" is defined to include violations of the federal mail fraud statutes and of the antifraud provisions of the federal bankruptcy and securities laws.³⁹ A "pattern" of such activity is defined to require "at least two" such acts

decisions were published throughout the 1970's); see also REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE A.B.A. SECTION OF CORPORATION, BANKING AND BUSINESS LAW 53a, 55 (1985) [hereinafter A.B.A. REPORT].

37. See, e.g., Warner Communications, Inc. v. Murdoch, 581 F. Supp. 1482, 1497 (D. Del. 1984) (expressing alarm about awarding "heavily punitive treble damages" for a "garden variety claim"). For critical reviews of these judicial efforts, see Note, *The Conflict over RICO's Private Treble Damages Action*, 70 CORNELL L. REV. 902 (1985); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982).

38. 18 U.S.C. § 1962 (1982) provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engage in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

39. 18 U.S.C. § 1961(1) (1982) provides:

"racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery) sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud),

within a decade.⁴⁰ As if to emphasize the expansiveness of the authorization, Congress wrote that “[t]he provisions of this title shall be liberally construed to effectuate its remedial purpose.”⁴¹

Conspicuously absent from the statutory requirements was any reference to organized crime.⁴² Nonetheless, several lower courts read a need to show a connection to organized crime into the statute.⁴³ This effort was founded in part on traditional statutory interpretation.⁴⁴ It also reflected a concern about remedy. As the trial court wrote in *Moss v. Morgan Stanley, Inc.*,⁴⁵ “there is nothing in the legislative history to suggest that Congress intended to create a private right of action for treble damages for violations of substantive statutes by ordinary business or parties.”⁴⁶ This reasoning, or at least the organized crime requirement it was to support, uniformly has been rejected at the appellate level as inconsistent with the statutory language and purpose.⁴⁷

Other courts attempted to limit the reach of civil RICO by circumscribing the compensable injuries. These courts emphasized the similarity between RICO’s language and that of section 4 of the Clayton Act, the statute on which RICO

section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigation), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or other wise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

40. 18 U.S.C. § 1961(5) (1982) provides that a “ ‘pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”

41. Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970).

42. Congress could not decide how to define such a requirement, and it was also worried about the constitutional implications of such a definition. See A.B.A. REPORT, *supra* note 36, at ch. 7.

43. *E.g.*, Noonan v. Granville-Smith, 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (RICO inapplicable in securities fraud action because organized crime not involved); Adair v. Hunt Int’l Resources Corp., 526 F. Supp. 736, 746-48 (N.D. Ill. 1981) (Organized Crime Control Act inapplicable in land fraud case where developers not involved with organized crime).

44. See Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (legislative history indicates Congress focused on problem of organized crime).

45. 553 F. Supp. 1347 (S.D.N.Y.), *aff’d on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

46. 553 F. Supp. at 1361; see also *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981) (“The civil remedies provisions of RICO were not designed to convert every fraud or misrepresentation action involving corporations who use the mails or telephones . . . into treble damages RICO actions.”).

47. See, *e.g.*, *Moss*, 719 F.2d at 21 (neither statutory language nor legislative history of RICO require proof or allegation of organized crime connection); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287, n.6 (7th Cir. 1983) (“well-established that RICO does not require proof that the defendant or the enterprise are connected with organized crime”); *Schacht v. Brown*, 711 F.2d 1343, 1356 (7th Cir.) (Congress intended to cut “deliberately broad swath . . . to reach the evil it sought”), *cert. denied*, 464 U.S. 1002 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982) (RICO suits not limited to contexts in which organized crime tie is alleged), *aff’d in part and rev’d in part*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983).

was based.⁴⁸ The more extreme of these attempts at circumscription imposed a requirement that "competitive injury" be shown. In fashioning this requirement, the court in *Bankers Trust Co. v. Feldesman*,⁴⁹ expressed its doubt that "Congress intended to sweep . . . ordinary injuries . . . within the dragnet of the treble damage remedy For example, it would seem illogical that a plaintiff suing under the federal securities laws could recover only one-third of the damages recoverable by a person suing under RICO for the identical injury."⁵⁰ This approach has also been rejected as inconsistent with the language and history of the statute.⁵¹

A larger number of courts borrowed the analytical approach of *Brunswick v. Pueblo Bowl-O-Mat, Inc.*,⁵² and allowed civil RICO recoveries only for "racketeering injury."⁵³ This effort was rebuffed by a 5-4 Supreme Court decision, *Sedima, S.P.R.L. v. Imrex Co.*,⁵⁴ as unworkable and inconsistent with the statutory language. The dissenters and those courts that had adopted this limitation viewed it as necessary to prevent the federalization of broad areas of common law wrongs as litigants, "lured by the prospect of treble damages and attorney's fees," freely invoke RICO and coerce settlements by defendants "facing a tremendous financial exposure in addition to the threat of being labelled a 'racketeer.'"⁵⁵

A few courts have even attempted to limit the scope of civil RICO by restricting the class of defendants against whom a civil RICO action can be brought. Reacting to what it perceived to be "extraordinary, if not outrageous"⁵⁶ uses of RICO's treble damages remedy "against respected and legitimate"⁵⁷ businesses, the Second Circuit in *Sedima* required a prior criminal conviction as a predicate to civil liability under the statute.⁵⁸ Not requiring a prior criminal conviction, the Second Circuit reasoned, "would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' [and] authorize the award of damages which are clearly punitive, including attorney's fees" ⁵⁹ The Supreme Court rejected this limitation also in its *Sedima* opinion.

48. *E.g.*, *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 494-96 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

49. 566 F. Supp. 1235 (S.D.N.Y. 1983), *aff'd on other grounds*, 741 F.2d 511 (2d Cir. 1984), *vacated sub nom. Bankers Trust Co. v. Rhoades*, 105 S. Ct. 3550 (1985) (mem.), *vacated on remand*, 779 F.2d 36 (2d Cir. 1985) (mem.).

50. 566 F. Supp. at 1241 (footnote omitted); *see also* *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980) ("[T]he purpose of the Act was to give law enforcement another tool with which to combat infiltration of legitimate businesses by racketeering influences and not to award treble damages for a breach of contract or common law fraud . . .").

51. *Sedima*, 105 S. Ct. at 3287.

52. 429 U.S. 477, 489 (1977). There, the Court held that plaintiffs suing for violations of § 7 of the Clayton Act must prove more than that they suffered injury as a result of the defendant's unlawful entry into the market; they must "prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.*

53. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 493 n.34 (2d Cir. 1984) (citing cases), *rev'd*, 105 S. Ct. 3275 (1985).

54. 105 S. Ct. 3275 (1985).

55. *Id.* at 3294 (Marshall, J., dissenting).

56. 741 F.2d at 487.

57. *Id.*

58. *Id.* at 496.

59. *Id.* at 500 n.49.

The RICO experience illustrates the lengths to which courts will go to prevent the imposition of sanctions they consider inappropriately severe. It also illustrates the limitations on a court's freedom to make adjustments. Appellate courts, most notably the Supreme Court in *Sedima*, have frustrated attempts to adjust RICO liability. Where statutory language and legislative intent are sufficiently clear, certain adjustments may be prevented.

The RICO equilibrating process continues, however. The Supreme Court in *Sedima* apparently invited Congress to narrow liability under civil RICO.⁶⁰ In addition, while blocking certain interpretive approaches designed to respond to the perceived pattern of misuse of the treble damage remedy, the Court suggested an alternative approach to limit liability. A gratuitous footnote explored the legislative history and suggested that the statutory requirement of a "pattern" of racketeering activity, which requires at least two such acts within a decade, should not be satisfied by "two isolated acts."⁶¹ This requirement had not previously been viewed as a significant limitation;⁶² indeed, the Court blamed the unexpectedly frequent use of civil RICO in part on "the failure of Congress and the courts to develop a meaningful concept of 'pattern.'"⁶³ Thus either through legislation, which is pending, or through judicial decisions, adjustments are likely to continue.⁶⁴

C. TORT LAW: ADJUSTMENTS TO THE SHIFT TO COMPARATIVE NEGLIGENCE AND ADOPTION OF MARKET SHARE LIABILITY

The common law tort system offers two examples of the legal system's equilibrating tendencies. The first concerns contributory and comparative negligence. The second concerns punitive damages, which are in great measure the common law equivalent of treble damages.

The tort system's equilibrating tendencies are vividly illustrated by the adjustments to the perception that the contributory negligence doctrine was unfairly severe and by the still-continuing readjustments to the shift from contributory to comparative negligence.⁶⁵ While not an example of a reaction to a penalty as such, the change illustrates how the modification of what is perceived to be a

60. 105 S. Ct. at 3287.

61. *Id.* at 3285 n.14; see *Paul S. Mullin & Assocs. v. Bassett*, 632 F. Supp. 532, 540-41 (D. Del. 1986) (some separation of predicate acts required, reviewing cases); *Modern Settings, Inc. v. Prudential-Bache Sec., Inc.*, 629 F. Supp. 860, 864 (S.D.N.Y. 1986) (since *Sedima*, courts "have stringently interpreted the 'pattern' requirement"). But *c.f.* *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1340, 1354 (5th Cir. 1985) (two acts of mail fraud could form a "pattern" even post-*Sedima*).

62. See ABA REPORT, *supra* note 36, at ch. 8.

63. 105 S. Ct. at 3287.

64. See H.R. 2943, 99th Cong., 1st Sess., 131 CONG. REC. H5442 (1985); Graham, *RICO Reform: Two Approaches Vie on the Hill*, *Legal Times*, June 2, 1986, at 1, col. 3 (prospects uncertain); see also *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985) (post-*Sedima* decision holding that only directly injured parties may bring RICO actions); *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985) ("enterprise" and "person" must be separate, reviewing cases); RICO Case Standing Order (N.D. Ohio Mar. 7, 1986) (Krenzler, J.) (requiring remarkably detailed 20 item "RICO case statements" demonstrating plaintiff's compliance with pleading rules); *Civil Rico Litigation after Sedima*, A.L.I.-A.B.A. VIDEO LAW REVIEW STUDY MATERIALS (1985).

65. For more extensive discussions of the shift to comparative negligence, see C. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* (1984); W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 67 (5th ed. 1984); H. WOODS, *THE NEGLIGENCE CASE: COMPARATIVE FAULT* (1978); Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299 (1980).

harsh, pro-defendant rule can lead to a series of perhaps unforeseen or unappreciated adjustments.

The common law doctrine of contributory negligence acted as a complete bar to recovery. As the court remarked in *Butterfield v. Forrester*, a case where the plaintiff rode "violently" into an obstruction placed in the road by defendant, "the accident appeared to happen entirely from [plaintiff's] own fault" because use of due care would have avoided it.⁶⁶ This causation analysis was unpersuasive—for instance, both tortfeasors would be liable to an injured bystander⁶⁷—but the doctrine remained. The legal system responded predictably to the perceived harshness of this rule.⁶⁸ As they had in criminal cases, juries apparently ignored instructions concerning contributory negligence.⁶⁹ The courts crafted exceptions to the doctrine, ruling that a plaintiff could recover despite his negligence where the defendant committed an intentional tort; was "willful," "wanton," or "reckless"; or had failed to use a "last clear chance" to avoid the accident.⁷⁰ Later, courts supplemented negligence with strict liability, and ruled that contributory negligence (as opposed to a voluntary assumption of risk) would not bar recovery.⁷¹

The same pressures that created exceptions to contributory negligence ultimately led to its repudiation.⁷² The change started at the end of the 1960's and continued through the 1970's and 1980's. Almost every state now has adopted some form of comparative negligence, either by statute or by court decision.⁷³

Commentators did not initially appreciate the consequences of the shift to comparative negligence. In 1941 Dean Prosser wrote that comparative negligence statutes "offer a fairly simple problem where only two parties are involved."⁷⁴ In 1953 he wrote that the "chief problem" in moving to comparative negligence "is one of some protection for the defendants, and some restraint upon the irresponsible jury, which will keep it within bounds and insure that the apportionment will in fact be made."⁷⁵ Leading articles on the subject gave

66. 11 East 60, 103 Eng. Rep. 926 (1809).

67. The example is Prosser's. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 394 (1941).

68. See Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189, 199-203 (1950) (describing doctrine as "harsh," "startling," and "crude").

69. See Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953) ("Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault.") (footnote omitted).

70. W. PROSSER & W. KEETON, *supra* note 65, at 462-68. The most commonly proffered justification for this last exception was that it was the defendants' failure to use that chance that actually had caused the accident, but this has long been acknowledged as unpersuasive. See W. PROSSER, *supra* note 67, at 410 ("The real explanation would seem to be a dislike for the defense of contributory negligence which has made the courts rebel at its application in many situations . . .").

71. RESTATEMENT (SECOND) OF TORTS § 524 comment a (1977) (Since the strict liability of one who carries on an abnormally dangerous activity is not founded on his negligence, the ordinary contributory negligence of the plaintiff is not a defense to an action based on strict liability.); *id.* § 402A comment n (1965) ("Since the liability with which this Section deals [strict products liability] is not based upon negligence of the seller, but is strict liability, the rule applied to strict cases (see § 524) applies.").

72. See generally Fleming, *Foreword: Comparative Negligence at Last—by Judicial Choice*, 64 CALIF. L. REV. 239 (1976); Woods, *The Trend Toward Comparative Fault*, TRIAL, Nov. 1984, at 16. For a defense of contributory negligence see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 156-57 (3d ed. 1986).

73. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 15 (1974 & Supp. 1981); H. WOODS, *supra* note 65, ¶ 1.11 (1978 & Supp. 1985).

74. W. PROSSER, *supra* note 67, at 407.

75. Prosser, *supra* note 69, at 508.

short shrift to the possibility of compensating changes.⁷⁶

Compensating adjustments, however, were inevitable. As Victor Schwartz recognized, "an enormous number of 'adjustments' must be made in the tort law once a form of comparative negligence has been adopted."⁷⁷ The sharp lessening of the "penalty" for plaintiff negligence removed the compulsion to avoid finding the plaintiff negligent.

This is not the place to chronicle the adjustment in the system, but it can be briefly summarized. Although the purported logic of the "last clear chance" doctrine—that defendant's fault really "caused" the accident⁷⁸—would seem to be unaffected by the change to comparative negligence, the doctrine has been largely abolished.⁷⁹ On the other hand, comparative negligence continues to be inapplicable to intentional torts.⁸⁰ Although the courts are split concerning the application of comparative negligence to various degrees of negligence short of intentional torts, the more recent decisions tend to apply the doctrine.⁸¹

Perhaps the most interesting adjustment has been in strict liability law. Under the *Restatement (Second) of Torts*, a defendant's liability is not premised on negligence.⁸² Facile logic might therefore suggest that the plaintiff's own negligence should not be "compared," since there is no defendant's negligence for comparison.⁸³ Moreover, some courts apparently feel constrained by statutory language making comparative negligence available only where contributory negligence could be asserted as a defense.⁸⁴ Nonetheless, slowly a majority of states have made the adjustment and are allowing courts and juries to consider the plaintiff's negligence.⁸⁵ The change from contributory to comparative negligence simply

76. See Mole & Wilson, *A Study of Comparative Negligence*, 42 CORNELL L.Q. 333, 604, 650 (1932) (discussion of "major change" that would result limited to burdens of proof); Turk, *supra* note 68, at 341-42 (referring to the "frictionless application" of comparative negligence, with "[n]o special difficulties" or "hidden pitfalls").

77. V. SCHWARTZ, *supra* note 73, at 37.

78. See *supra* note 70.

79. G. CHRISTIE, *CASES AND MATERIALS ON THE LAW OF TORTS* 452 (1983); H. WOODS, *supra* note 65, § 8:2, at 172-73. *But see* *Fountain v. Thompson*, 252 Ga. 256, 312 S.E.2d 788 (1984).

80. H. WOODS, *supra* note 65, § 7.1; see Landes & Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. OF L. & ECON. 127 (1981) (intentional torts so lacking in justification that they cannot be overdeterred).

81. See Annot., 10 A.L.R. 4TH 946 (1981 & Supp. 1985).

82. See *supra* note 71.

83. See *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 763, 575 P.2d 1162, 1185, 144 Cal. Rptr. 380, 403 (1978) (Mosk, J., dissenting).

84. *E.g.*, *Bailey v. V & O Press Co.*, 770 F.2d 601 (6th Cir. 1985) (applying Ohio law); *Young's Mach. Co. v. Long*, 100 Nev. 692, 693, 692 P.2d 24, 25 (1984) (declining to apply comparative negligence to products liability actions where the comparative negligence statute applies to actions "in which contributory negligence may be asserted as a defense"); *Stearns v. Johns-Manville Sales Corp.*, 770 F.2d 599 (6th Cir. 1985) (Ohio comparative negligence statute not applicable to strict liability action because the statute, on its face, was limited to negligence actions). *But see* Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 179-80 (1974) (arguing that courts should apply comparative negligence in strict liability cases unless statute explicitly limits its application to negligence claims). Because of this factor, the change is being made most promptly and consistently in states that judicially adopted comparative negligence or that statutorily applied comparative negligence to strict liability actions.

85. *E.g.*, *Smith v. Goodyear Tire & Rubber Co.*, 600 F. Supp. 1561 (D. Vt. 1985) (evidence of passengers' failure to use seat belt admissible in strict liability action against the manufacturer); *Lippard v. Houdaille Indus., Inc.*, 2 Prod. Liab. Rep. (CCH) ¶ 10,821, at 29,285 n.1 (Mo. Ct. App. Dec. 3, 1985) (reviewing cases applying comparative fault doctrine to actions based on strict tort liability); see Annot., 9 A.L.R.4TH 633 (1981 & Supp. 1985); Comment, *Comparative Negligence and Strict Products Liability: Where Do We Stand? Where Do We Go?*, 29 VILL. L. REV. 695, 698-99 (1984). *But cf.* *Simpson v. General Motors Corp.*, 108 Ill.2d 146, 483 N.E.2d 1 (1985) (comparative negligence, as distinguished from

was too great not to change the meaning of strict liability. Other responses to the move to comparative negligence continue to evolve.⁸⁶

In contrast to the nominal absoluteness of the old contributory negligence rule (and, indeed, antitrust treble damages), the decision of a common law court to impose punitive tort damages is discretionary.⁸⁷ The capacity to tailor the penalty to the offense is built into the tort system. Only a showing of outrageous conduct, and not simple negligence, will justify punitive damages.⁸⁸

Unusual changes may call for unusual accommodations, however. Of particular interest is the recent response of the courts to the expansion of liability through "market share" and related theories. In *Sindell v. Abbott Laboratories*⁸⁹ the California Supreme Court responded to the plight of a class of DES-injured plaintiffs unable to identify the manufacturers of the drugs that injured them by creating a new "market share" theory of causation.⁹⁰ Under this theory, described by the dissent as "a new high water mark in tort law,"⁹¹ once a plaintiff named as defendants "the manufacturers of a substantial share of the DES which her mother might have taken,"⁹² she satisfied her burden of demonstrating causation. The burden of disproving causation would then be on the named defendants. This unprecedented step was justified, the court said, because the cost of injury should be borne by negligent defendants rather than innocent plaintiffs, and defendants are "better able to bear the cost of injury." In addition, imposing liability "will provide an incentive to product safety."⁹³ More recently, the highest courts of Michigan, Washington, and Wisconsin, while rejecting "market share" theories as such, have issued decisions apparently allowing DES-injured plaintiffs to overcome the impossibility of proving manufacturer-specific causation.⁹⁴

product misuse and assumption of risk, cannot be considered in apportioning liability in strict liability action). For a spirited critique, see Lambert, *Tom on Torts, Et Alia*, 28 ATLA L. REP. NO. 1, at 4, 9-10 (Feb. 1985). The change has occurred principally in products liability suits (as opposed to suits challenging abnormally dangerous activities), since products liability suits are much more common.

86. See *Vannoy v. Uniroyal Tire Co.*, 2 Prod. Liab. Rep. (CCH) ¶ 10,889, at 29,636-38 (Idaho Nov. 22, 1985) (fault of nonparties considered in strict liability cases); Annot., 16 A.L.R.4TH 700 (1982 & Supp. 1985) (assumption of risk); H. WOODS, *supra* note 65, chs. 9-13 (wrongful death, statutory violations, nuisance, person under disability, and multiple parties).

87. Compare 15 U.S.C. § 15 (1982) ("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") with W. PROSSER & W. KEETON, *supra* note 65, § 2, at 14 (punitive damages not matter of right; judge and jury always have discretion to decide if award warranted).

88. See W. PROSSER & W. KEETON, *supra* note 65, § 2, at 9-10. For discussion of the role of punitive damages in the tort system, see R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 172-90 (1980); Ellis, *Fairness & Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639 (1980); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976).

89. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

90. See generally Note, *Market Share Liability: An Answer to DES Causation Problem*, 94 HARV. L. REV. 669 (1981).

91. 26 Cal. 3d at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting) (arguing that the effect of the theory was "to guarantee that plaintiffs will prevail on the causation issue").

92. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

93. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

94. *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, cert. denied, 105 S. Ct. 123 (1984); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, cert. denied, 105 S. Ct. 107 (1984). But see *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d

These expansions of liability are being qualified by limitations on penalties, however. Although the *Sindell* court permitted the plaintiff to recover under a market share theory, a lower California appellate court subsequently held that the market share theory would not support an award of punitive damages.⁹⁵ Similarly, in its decision expanding liability the Wisconsin Supreme Court ruled that punitive damages would not be permitted.⁹⁶

D. CONCLUSION

The above discussions of criminal law, the law under the RICO statute, and tort law suggest that the legal system tends toward equilibrium positions. Sanctions and standards of liability are interrelated. Adjustments to the imposition and removal of unreasonably severe sanctions demonstrate this relationship.⁹⁷

Where a rule mandates a sanction that actors in the legal system perceive as unduly harsh, those actors will attempt to mitigate that sanction. The disproportionate severity of the criminal law's "Bloody Code" caused judges, jurors, and even prosecutors to circumvent it. Some apparently guilty defendants were released, while others were convicted of lesser offenses bearing more realistic punishments. When private RICO suits became popular many judges responded to the perceived inappropriate severity of RICO's "racketeering" stigmatization and treble damage penalties by limiting the reach of civil RICO. Appellate courts, constrained by the clarity of legislative intent, have rejected the lower

67, 70-76 (Iowa 1986) (rejecting various theories of recovery in DES case, and reviewing cases). In *Collins*, the Wisconsin Supreme Court refused to adopt the market share theory of liability set out in *Sindell*. The court's reluctance stemmed from the difficulty of defining and proving market share. 116 Wis. 2d at 189, 342 N.W.2d at 48. However, it concluded the defendant should pay for the injury if the plaintiff could prove the defendant produced or marketed the precise kind of drug consumed by her mother. The plaintiff may move against one manufacturer or more, provided she can prove this. 116 Wis. 2d at 193-94, 342 N.W.2d at 50. In *Abel*, the Michigan Supreme Court described its theory of liability as a "new DES-unique version of alternative liability." First, the plaintiff must show that all defendants acted tortiously. Second, she must prove that her injuries were caused by the conduct of one of the defendants. Finally, she must prove that her inability to identify the specific manufacturer is not her fault. 418 Mich. at 331-32, 343 N.W.2d at 173. The court limited the application of this theory to negligence cases, reserving consideration of the issue with regard to warranty or strict liability claims. 418 Mich. at 332, 343 N.W.2d at 173. In *Martin*, the Washington Supreme Court rejected the approaches of *Sindell*, *Collins*, and *Abel*, but crafted a new "market-share alternate liability." Under this theory, the plaintiff may proceed against one or more DES manufacturers by alleging (and later proving) that she was injured by DES and that the defendant(s) negligently produced or marketed DES of a type that was taken by the plaintiff's mother. 102 Wash. 2d at 604, 689 P.2d at 382. Each defendant will be responsible only for a share of injuries equal to its share of the relevant temporal and geographic market, but defendants will be presumed to have equal market shares—and bear the burden of proving they did not market in the relevant area or during the relevant time, or that their market shares are less than the presumed amount. 102 Wash. 2d at 605-06, 689 P.2d at 383.

95. *Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 883-90, 213 Cal. Rptr. 547, 550-54 (1985) (citing "basic fairness," "threat of overkill," and "individualized" nature of the punishment). *Contra Morris v. Parke Davis & Co.*, 573 F. Supp. 1324, 1325-30 (C.D. Cal. 1983) (punitive damages consistent with *Sindell* and "indispensable deterrent" to conduct endangering public health). Punitive damages were requested in *Sindell*, but that opinion does not address the propriety of awarding them.

96. *Collins*, 116 Wis. 2d at 202, 342 N.W.2d at 54 (punitive damages an "individualized punishment"); *cf. Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 604, 689 P.2d 368, 382 (1984) (not discussing punitive damages but justifying result solely in terms of cost spreading).

97. For speculation about the equilibrating effect of authorizing treble damages penalties for insider trading, Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (1984) (codified at 15 U.S.C. §§ 78a, 78c, 78o, 78t, 78u, 78ff (Supp. II 1984)), see Note, *Treble Damages, Deterrence, and Their Relation to Substantive Law: Ramifications of the Insider Trading Sanctions Act of 1984*, 20 VAL. U.L. REV. 575 (1986).

courts' initial efforts to limit civil RICO, but other efforts continue. Finally, to avoid the perceived harshness of barring all recovery for a contributorily negligent plaintiff, juries and judges regularly circumvented or limited the common law doctrine of contributory negligence. Judges approved jury findings apparently contrary to the facts, and crafted numerous exceptions to the doctrine. These examples demonstrate that where mandatory penalties seem inappropriate, the legal system will endeavor, subject to institutional constraints, to avoid their imposition.

The legal system also readjusts to the elimination of the inappropriate sanction. In criminal law, an increase in convictions followed the reduction in the "Bloody Code's" penalties. In tort law, the substitution of comparative for contributory negligence has led to the abolition of some of the previously crafted exceptions to contributory negligence. When a finding of liability results in an appropriate sanction, the legal system is more likely to find liability. The "market share" causation experiences similarly support this conclusion, as some courts have been willing to expand liability standards but only for a limited sanction.

The legal system's tendency toward equilibrium—its tendency to adjust liability standards in response to the changes in the perceived severity of sanctions—does not mean that changes will inevitably be nullified by compensating adjustments. Obviously, effective changes in sanction levels occur over time. This reflects the role of institutional constraints on the legal system, as illustrated by the RICO experience. It also reflects changes in beliefs about what constitutes an inappropriate sanction. The equilibrating tendency of the legal system produces short-run equilibrium. In the long run the views of the legal system's actors can change, and with that change may come a changed equilibrium position.

III. EQUILIBRATING TENDENCIES IN ANTITRUST LAW

Suits challenging violations of the federal antitrust laws may be filed by several categories of plaintiffs: the U.S. Department of Justice, the Federal Trade Commission, state attorneys general, and private parties and other purchasers of goods and services (including, in their capacity as purchasers, the federal government, state governments, and even foreign governments). The U.S. Justice Department may seek criminal penalties and actual damages; foreign governments may seek actual damages; state governments may seek treble damages for injuries suffered by the state government (or, in a *parens patriae* action, by natural persons residing in the state); private parties may seek treble damages; and each of these classes of plaintiffs, and the Federal Trade Commission, also may seek civil injunctions. This basic structure of enforcement, two federal enforcement agencies supplemented by treble damages actions, has remained constant.⁹⁸

98. There have been minor changes in the past decade. The level of criminal penalties was increased in 1974, *parens patriae* damages actions were authorized in 1976, and foreign governments were limited to actual damages in 1982. Violation of the Sherman Act currently is a felony for which a corporation may be fined up to \$1 million, and an individual may be fined up to \$100,000 and be imprisoned for up to three years. 15 U.S.C. § 1 (1982). Before 1974, a violation was a misdemeanor punishable by a fine of up to \$50,000 and imprisonment of up to one year. See Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, 88 Stat. 1706. The tax treatment of treble damages penalties has also changed. The tax code was amended in 1969 to provide that when a taxpayer has been convicted of a criminal antitrust violation

What has changed has been the volume of treble damages actions. Such suits were relatively unimportant until about 1950, but they have become increasingly common and currently represent the overwhelming majority of antitrust suits.⁹⁹

Since the end of the 1950's, commentators have speculated about whether the treble damages remedy may disadvantage antitrust plaintiffs by making it more difficult for them to prevail.¹⁰⁰ More recently, Professors Areeda and Turner have been identified with the view that the treble damages remedy has limited the reach of antitrust law.¹⁰¹ In particular, they suggest that the spectre of large damage awards may have dissuaded courts from extending monopolization law to relatively unblameworthy situations.

When a statute has both criminal and civil remedies, it might seem somewhat anomalous to ask whether the civil remedy has inhibited an expansive interpretation of the statute. Early Supreme Court cases featured verbal sparring about the interpretation of language that served a dual civil-criminal function.¹⁰² That

or has entered a plea of guilty or nolo contendere to a charged criminal violation, no deduction will be allowed for two-thirds of any judgment or settlement in a related private treble damages action. Pub. L. No. 91-172, § 902, 803 Stat. 487, 710 (1970) (codified at 26 U.S.C. § 162(g) (1982)); see A.B.A. ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS chs. 5-7 (2d ed. 1984 & Supp. 1986) [hereinafter ANTITRUST LAW DEVELOPMENTS].

99. See Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 373 (1970).

100. See Bicks, *The Department of Justice and Private Treble Actions*, 4 ANTITRUST BULL. 5, 13 (1959) ("It may well be that the low percentage of private plaintiff's verdicts is due, at least in part, to Courts' and jurors' inclinations to award no recovery at all when faced with the sometimes harsh alternative of penalizing unwitting violators with treble damages."); Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363, 363-64 (1954) ("It also seems that the mandatory trebling of any recovery has generated a natural reluctance in the courts to impose prodigious damages upon violators of the act . . . [T]his provision may have hindered, rather than aided, accomplishment of the statutory purpose.").

The effect of a change in an antitrust penalty was explored in an interesting paper by Ted Synder. E. Snyder, "Defensive Effort" and Efficient Enforcement: An Application to Antitrust (June 1984) (unpublished manuscript) (copy on file at the *Georgetown Law Journal*). He examined the experience of the Justice Department's Antitrust Division before and after the 1974 amendment of the Sherman Act that made violations felonies (instead of misdemeanors) and increased financial penalties and length of possible prison terms. Snyder found that the increase in penalties "significantly reduced the government's chances of success" in litigated cases. *Id.* at 3. Since this could have resulted from factors other than a change in the effective standard of proof (such as reduced violations or increased vigor of defense), it does not prove the thesis, but it tends to support it.

101. 2 P. AREEDA & D. TURNER, *supra* note 3, ¶ 331b2, at 150 ("[T]he availability of damages, and especially of treble damages, can limit the development of antitrust law. Not only may the courts hesitate to punish settled expectations, they may justifiably hesitate to apply the antitrust laws to such situations as blameless monopolies or oligopolies, even though antitrust policy might support equitable remedies alone in those situations.") (footnote omitted); see GARVEY STUDY, *supra* note 3, at 33 (relying on Areeda & Turner); Breit & Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 439 (1985) (same). Areeda and Turner also lament that "the lure of the treble damage bonanza, especially for lawyers in class actions, tends to trivialize antitrust litigation. Ordinary tort and contract claims are transformed into antitrust complaints." 2 P. AREEDA & D. TURNER, *supra* note 3, ¶ 331b2, at 150 (footnote omitted).

Although the discussion below focuses on enunciated standards of liability, trebling's effect also may have been felt in the unexplained application of those standards by judges or juries. The discussion of criminal law illustrated the way judges and juries may strive to achieve rough justice regardless of legal standards. The same sort of sometimes unexplained adjustments could flow from trebling. (Whether juries adjust for trebling depends in part on their awareness of it. This writer has not yet succeeded in measuring the effect of differing rules for disclosure to jurors.)

102. See *Northern Sec. Co. v. United States*, 193 U.S. 197, 358 (1904):

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by

sparing soon ended, however. As the Supreme Court recognized in *United States v. United States Gypsum Co.*,¹⁰³ "the [Sherman] Act has not been interpreted as if it were primarily a criminal statute."¹⁰⁴

In *Gypsum*, the Court explicitly adopted different standards for criminal and civil antitrust liability. Chief Justice Burger reasoned as follows:

With certain exceptions for conduct regarded as *per se* illegal . . . the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the border line of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.¹⁰⁵

Professor Areeda relies on *Gypsum* to argue that "punitive treble damages are sufficiently analogous to criminal sanctions to call for the same limitations," but acknowledges that this view has not been generally adopted by the courts.¹⁰⁶ Areeda and Turner and other commentators thus suggest the converse: that fear of overdeterrence has limited the reach of the antitrust laws, making lawful conduct that otherwise would be unlawful and causing plaintiffs to lose suits they otherwise would win. Antitrust law also could have been limited, at least recently, as a reaction to the sheer volume of litigation. Without the lure of treble damages, numerous lawsuits would not have been filed, or would have been filed

narrow, technical, or forced construction of words, exclude cases from it that are obviously within its provisions.

Justice Holmes, in dissent, remarked:

The statute of which we have to find the meaning is a criminal statute It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Id. at 401-02; see also *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 353 (1897) (White, J., dissenting):

The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled, by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration

103. 438 U.S. 422 (1978).

104. *Id.* at 439.

105. *Id.* at 440-41 (footnote omitted); cf. *Steadman v. SEC*, 450 U.S. 91, 106 (1981) (Powell, J., dissenting) (arguing unsuccessfully for a greater than preponderance of the evidence standard in SEC proceedings to bar association with investment advisors, in light of "the sensitivity that traditionally has marked our review of the Government's imposition upon citizens of severe penalties and permanent stigma.").

106. P. AREEDA, *ANTITRUST ANALYSIS* 59-60 (3d ed. 1981).

in different forums or for different causes of action. Moreover, because the complexity and burden of litigation presumably increase as a function of the stakes,¹⁰⁷ these treble damages actions may have exacerbated courts' impatience with antitrust suits. Courts may thus have limited antitrust law for several treble damages-related reasons.

The logic of this suggestion is seductive but open to question on several grounds. First, as mentioned in the RICO context, courts may feel obligated to remain faithful to legislative wishes. *Gypsum's* line between civil and criminal enforcement is relatively sharp, so the adoption of separate liability standards followed easily. The difference between treble and single damages is less pronounced. Perhaps that difference is not sufficiently great to make outcomes under a treble damages regime much different from what they would have been with only single damages. Second, much Supreme Court antitrust jurisprudence involved government suits, and the threat of treble damages may have been of less concern during the period when fewer private suits were filed.¹⁰⁸ Third, and most important, the incentive to file lawsuits provided by trebling has also given plaintiffs an incentive to seek to expand the coverage of the antitrust laws.¹⁰⁹ Only with trebling would some suits be filed, or at least filed as federal antitrust claims. Trebling can make worthwhile the pursuit of novel theories. Thus private enforcement through treble damages may have broadened rather than limited the antitrust laws.

In fact, trebling probably has both limited and expanded coverage, at different times and for different parts of the law. This is suggested by a review of major substantive and procedural antitrust standards—a review which, in order to cover most standards, necessarily will treat many only in an abbreviated fashion.

A. SUBSTANTIVE LAW

Before reviewing particular substantive antitrust standards, this article will compare standards under the antitrust laws to standards under the Federal Trade Commission Act,¹¹⁰ the closest approximation to a controlled experiment comparing antitrust law with and without treble damages. Section 5 of the FTC

107. Cf. Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 101-09 (1983) (noting that factors besides stakes also play a role; factors include events in the case, nature of participants, participant goals, and case processing and management).

108. See M. HANDLER, H. BLAKE, R. PITOFKY & H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATION* 128 (2d ed. 1983) [hereinafter *CASES AND MATERIALS ON TRADE REGULATION*].

109. Cf. I. STELZER, *PROCEDURES FOR PRIVATE ANTITRUST ENFORCEMENT IN THE UNITED STATES* 28-29 (1983) (multiple damages and use of contingent fee arrangements in Europe "would have the effect of extending the scope and reach of competition policy in Europe, and soon prompt a clarification of that policy") (footnote omitted). But cf. DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 1976 AM. B. FOUND. RES. J. 1273, 1275-77 (study of Chicago antitrust class actions showed that "the availability of large fees has not broadened the scope of antitrust enforcement measured in terms of the kinds of legal theories advanced").

110. The Federal Trade Commission Act is not defined as an antitrust law. 15 U.S.C. § 15 (1982); see *Rader v. Balfour*, 440 F.2d 469, 471 (7th Cir.) ("conduct which is declared unlawful by § 45 . . . need not be a violation of an antitrust law"), cert. denied, 404 U.S. 983 (1971); *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 350 (3d Cir. 1964) (FTC Act not an antitrust law), *aff'd on other grounds*, 381 U.S. 311 (1965). Comparison also could be made to the antitrust laws of foreign countries or certain states, see W. LIFLAND, *STATE ANTITRUST LAW* § 8.03[2] (1984) (minority of states authorize less than treble damages), but extraneous differences seem even greater than those between the FTC Act and the antitrust laws. See generally *id.* chs. 2-7 (review of substantive standards); *ANTITRUST LAW DEVELOPMENTS*, *supra* note 98, at 573-98 (discussion of foreign antitrust laws). One also could

Act declares unlawful "unfair methods of competition," and conduct may be condemned under section 5 without fear of treble damages recovery since there is no private right of action.¹¹¹ Under this statute the Commission may challenge conduct prohibited by the antitrust laws, but it also may attack unfair and anticompetitive practices not technically violating those laws.¹¹² Section 5 is an imperfect proxy for nontreble damages antitrust law, however, for four reasons: (1) section 5's language and legislative history color judicial interpretation of it; (2) the FTC's zealotry in enforcing section 5 and its interest in expanding the reach of that authority varies from time to time, and the institutional incentives affecting FTC enforcement policy differ significantly from those affecting private enforcement; (3) the latitude given the FTC in interpreting section 5 may depend substantially on the stature of that agency at any given time; and (4) rather than eliminating treble damages (and allowing recovery of actual damages), section 5 simply offers no private right of action. Nonetheless, comparison of FTC and antitrust law jurisprudence is useful to an understanding of the impact of treble damages.¹¹³

1. Comparison of Federal Trade Commission and Antitrust Law

Three things are uncertain: first, the extent to which section 5 standards differ from antitrust law; second, the extent to which this difference, if any, is attributable to the absence of private rights of action; and third, whether any such attributable difference would continue were there a private right to seek single damages.

The extent of the difference between section 5 and the antitrust laws used to be clear. Section 5 could be used to prohibit countless activities immune from antitrust challenge, or so language in Supreme Court decisions suggested.

Section 5 enforcement was first expanded to reach conduct that could lead to a violation of either the Sherman or Clayton Acts were it left unchecked.¹¹⁴ In

compare antitrust standards before and after the tax treatment of treble damages was changed, as discussed *supra* note 98.

111. 15 U.S.C. § 45 (1982); see ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 340-41.

112. See *FTC v. Indiana Fed'n of Dentists*, 106 S. Ct. 2009, 2016 (1986) (dictum) (standards of unfairness encompass not only practices that violate antitrust laws but also practices FTC determines against public policy); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (FTC empowered to proscribe unfair or deceptive practices); *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948) ("The Sherman Act and the Trade Commission Act provide the government with cumulative remedies against activity detrimental to competition"); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394 (1953) (FTC Act designed to "supplement and bolster" antitrust laws). The Commission also may directly enforce the Clayton and Robinson-Patman Acts. Since most FTC investigations question conduct suspect under the antitrust laws, FTC investigations will frequently be followed by private actions. Conduct may thus be challenged in separate proceedings both under the FTC Act and under the Sherman Act. Compare *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980) (FTC Act) with *In re Plywood Antitrust Litig.*, 655 F.2d 627 (5th Cir. 1981) (antitrust litigation), *cert. dismissed*, 462 U.S. 1125 (1983).

113. The discussion that follows briefly reworks ground already plowed by others generally more interested in FTC jurisprudence (that is, can or should the FTC Act cover more than the antitrust laws) than in the effect of treble damages in limiting antitrust jurisprudence. See, e.g., ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 279-83; Hobbs, *The Federal Trade Commission and the Federal Trade Commission Act*, in ANTITRUST ADVISOR 346-53 (3d ed. 1985). For a discussion more similar in focus to the current one, see E. Synder, *supra* note 101, ch. VI.

114. See *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 466 (1941) (FTC Act intended to reach illegal acts in their "incipiency"); *FTC v. Raladam Co.*, 283 U.S. 643, 647 (1931) (same); *FTC v. Gratz*, 253 U.S. 421, 435 (1920) (Brandeis, J., dissenting) (FTC should intervene before antitrust violation occurs).

FTC v. Motion Picture Advertising Service Co.,¹¹⁵ the Court wrote that the FTC Act was designed to fill the gaps in the Sherman and Clayton Acts and “to stop in their incipiency acts and practices which, when full blown, would violate those Acts.”¹¹⁶ The reach of section 5 was then extended to prohibit conduct that violated the “spirit” of the antitrust laws. In *Atlantic Refining Co. v. FTC*,¹¹⁷ the Commission condemned as a section 5 violation an agreement between Atlantic Refining and Goodyear under which Goodyear paid a commission in return for Atlantic’s promotion of Goodyear products to Atlantic’s wholesale and retail service stations. The Supreme Court affirmed, even though the agreement was not a tying arrangement and thus did not violate the antitrust laws, because it nonetheless had the “central competitive characteristic” of a tying agreement, “the utilization of economic power in one market to curtail competition in another.”¹¹⁸ This use of section 5 to reach the “spirit” of the antitrust laws was further refined in *FTC v. Brown Shoe Co.*¹¹⁹ In *Brown Shoe*, the Court upheld the Commission’s banning of Brown’s franchise program¹²⁰ even though the Commission had not shown an effect on competition as required by section 3 of the Clayton Act. It was enough that the program reduced buyer freedom and thus was in conflict with the “central policy” of the antitrust laws.¹²¹

The most capacious interpretation of section 5 is *FTC v. Sperry & Hutchinson Co.*¹²² In *Sperry & Hutchinson* the Supreme Court armed the Commission with the power to, as one commentator stated, “formulate and enforce competition policy on its own initiative.”¹²³ The Court declared that section 5 empowered the Commission to reach conduct that threatens competition even though it does not “infringe either the letter or the spirit of the antitrust laws.”¹²⁴

The breadth of this mandate has been called into question as a result of several recent decisions. In *E.I. du Pont de Nemours & Co. v. FTC*,¹²⁵ the Second Circuit restrained the Commission in its attempts to expand the scope of section

115. 344 U.S. 392 (1953).

116. *Id.* at 394-95.

117. 381 U.S. 357 (1965).

118. *Id.* at 369; *see also* *FTC v. Texaco, Inc.*, 393 U.S. 223, 230 (1968) (FTC can act where commerce “unfairly burdened”); *Shell Oil Co. v. FTC*, 360 F.2d 470, 479 (5th Cir. 1966) (FTC Act § 5 intended to defeat practices not specifically proscribed by antitrust laws), *cert. denied*, 385 U.S. 1002 (1967).

119. 384 U.S. 316 (1966).

120. *Brown Shoe* developed a franchise agreement whereby independent dealers who increased their purchase of Brown’s shoes were provided special benefits. *Id.* at 318-19.

121. *Id.* at 321. The Court in *Brown Shoe* went even further than the Second Circuit had gone a few years earlier in *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962). In *Grand Union*, the Court of Appeals agreed with the Commission’s decision that Grand Union’s inducement of promotional allowances had violated the spirit of § 2(d) of the Robinson-Patman Act. *Id.* at 99.

122. 405 U.S. 233 (1972).

123. *See* Averitt, *The Meaning of “Unfair Methods of Competition” in § 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 275 (1980).

124. 405 U.S. at 239. In this often quoted passage the Court stated:

[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

Id. at 244.

125. 729 F.2d 128 (2d Cir. 1984) *vacating In re Ethyl Corp.*, 101 F.T.C. 425 (1983).

5.¹²⁶ The Commission had held that while it was difficult to establish when consciously parallel activities violate section 1 of the Sherman Act, it was a "more manageable task" to proscribe such practices under section 5.¹²⁷ The Court of Appeals, however, held that the Commission did not have the power to prohibit conduct without some indication of oppressiveness, that is, an anticompetitive intent or an absence of an independent legitimate business purpose for the conduct.¹²⁸

In *Official Airline Guides, Inc. v. FTC*,¹²⁹ the Second Circuit reversed the Commission's order requiring the Reuben H. Donnelley Co., a monopolist airline guide publisher, to change its publication practices.¹³⁰ The Commission held that Donnelley's failure to list certain connecting flights was arbitrary, caused competitive injury, and violated section 5.¹³¹ The Second Circuit reversed the Commission, stating that Donnelley had the right to decide with whom it would deal. The court was unwilling to allow the Commission to "delve into . . . 'social, political, or personal reasons' for a monopolist's refusal to deal," and "to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition."¹³²

Thus, even though a section 5 action may be appropriate where a Sherman or Clayton Act violation is not, the Second Circuit requires the Commission to use the same analytical process that is used in applying the Sherman and Clayton Acts.¹³³ Recent FTC decisions follow this teaching and show a new hesitancy to extend section 5 beyond the antitrust laws.¹³⁴

On balance, then, are FTC standards more encompassing than antitrust standards? The answer is a cautious "yes." The Supreme Court has not endorsed the more rigorous scrutiny now being given, at least in the Second Circuit, to FTC orders. *United Air Lines, Inc. v. CAB*,¹³⁵ a Seventh Circuit decision upholding a

126. *Id.* The FTC held that four domestic producers of lead-based antiknock compounds had engaged in unfair methods of competition in violation of § 5. *In re Ethyl Corp.*, 101 F.T.C. 425 (1983). The business practices, which were independently and unilaterally adopted, were: (1) a uniform delivered pricing scheme, (2) giving advance notice of price increases, and (3) the use of a "most favored nation clause." Most favored nation treatment "promises that the buyer will receive the lowest price at which the same product is sold to any other customer." *Id.* at 428. The Commission declared that though the adoption of these practices was noncollusive, taken together they lessened competition in violation of § 5. *Id.* at 639-44.

127. *Id.* at 652.

128. 729 F.2d at 139.

129. 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

130. 630 F.2d at 928. The Reuben H. Donnelley Corp. published the "bible" of the airline guide industry. This guide listed flight schedules for Civil Aeronautics Board certified carriers only and did not include connecting schedules of noncertified carriers. The Commission charged that Donnelley had violated § 5 of the FTC Act because of these publishing policies, which resulted in a restraint of trade. *Id.* at 922-23.

131. *In re Reuben H. Donnelley Corp.*, 95 F.T.C. 1 (1980).

132. 630 F.2d at 927 (quoting *United States v. Colgate & Co.*, 250 U.S. 300 (1919)); *see also* Silcox, *Unfair Methods of Competition: The Courts Revive Proof of Injury to Competition in Antitrust Cases under § 5 of the FTC Act*, 29 ANTITRUST BULL. 423, 455 (1984).

133. The Ninth Circuit has taken a similar approach. *See Boise Cascade Corp. v. FTC*, 637 F.2d. 573 (9th Cir. 1980).

134. *See In re General Motors Corp.*, 103 F.T.C. 641, 701 (1984) (apply "'spirit' theory" with "great caution" to price discrimination cases); *In re General Foods Corp.*, 103 F.T.C. 204, 365-66 (1984) (requiring same "dangerous probability of success" for attempted monopolization cases brought under § 5 as under Sherman Act § 2, Commission said it should treat extension of § 5 "cautiously").

135. 766 F.2d 1107 (7th Cir. 1985) (Posner, J.).

Civil Aeronautics Board finding that the biased computerized reservations systems provided by airlines constituted unfair methods of competition, indicates the continued vitality of the traditional view.¹³⁶ The court reasoned that this form of conduct by a monopolist probably would be illegal ("whether rightly or wrongly") under traditional monopoly law, and thus could be prohibited by the CAB prior to an airline's achieving monopoly power. *United Air Lines* was a traditional "incipiency" opinion, and nothing prevents another court from writing a similar one in another FTC case.

Moreover, for purposes of this article's focus it matters less whether today the FTC enjoys different standards than whether it has enjoyed them from time to time. In fact, section 5 has been somewhat less constraining than the antitrust laws. While the litigated orders demonstrate this additional freedom, it is illustrated most sharply by the FTC's initiatives. Examples include the FTC's *Lockheed* consent order banning certain foreign payments,¹³⁷ its "shared monopoly" cereal lawsuit,¹³⁸ and its suit against the big oil companies.¹³⁹ More recently, Commissioner Terry Calvani has succumbed to the siren call of section 5 and is suggesting its use against lawyers who assist firms engaged in otherwise unilateral predatory conduct.¹⁴⁰ Section 5 thus seems to include within its reach violations of the antitrust laws, and a little more.

To what extent does that "little more" stem from the absence of a private right of action? Certainly this feature did not play a prominent role in the development of the expansive view of FTC jurisprudence. One searches Supreme Court cases in vain for a thoughtful discussion of why certain conduct should be prohibited only when private parties may not sue. Rather, the focus was on the peculiar legislative history of the FTC Act. The Act was a reaction to the "rule of reason" standard established by the Court in *Standard Oil Co. v. United States*.¹⁴¹ Congress enacted the FTC Act because it feared that the rule of reason was too narrow to control the trusts.¹⁴² As Senator Cummings said, "the words 'unfair competition' can grow and broaden and mold themselves to meet circumstances as they arise."¹⁴³ It was to this tradition and to the words themselves that the Court pointed in writing expansively about section 5.¹⁴⁴

Only recently have commentators and the Commission itself regularly focused on the absence of a private right of action. Areeda and Turner point to this as the only colorable justification for divergent standards (and would prefer that the distinction between evaluating conduct for damages and for injunctive relief be

136. The decision was based on § 411 of the Federal Aviation Act, "essentially a copy of section 5" of the FTC Act. *Id.* at 1112. See 49 U.S.C. § 1381 (1982).

137. *Lockheed Corp.*, 92 F.T.C. 968 (1978).

138. *Kellogg Co.*, [1970-1973 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 19,898 (FTC complaint filed 1972), *dismissed*, 99 F.T.C. 8 (1982).

139. *Exxon Corp.*, [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 20,388 (complaint announced July 17, 1973), *dismissed*, 98 F.T.C. 453 (1981).

140. T. Calvani, Remarks before the ABA Antitrust Section Annual Meeting (July 9, 1985), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,475 (1985); see also T. Calvani & R. Tritell, Invocation of United States Import Relief Laws as an Antitrust Violation, Remarks before the Fordham Corporate Law Institute (Oct. 3, 1985) (§ 5 covers unilateral import relief abuse).

141. 221 U.S. 1 (1911).

142. See ABA ANTITRUST SECTION, MONOGRAPH NO. 5, VOL. 1, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY 4 (1981).

143. 51 CONG. REC. 12,871 (1914).

144. *E.g.*, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972).

imported into the antitrust laws).¹⁴⁵ Other commentators calling for activist FTC approaches rely in part on this unique feature.¹⁴⁶ In *In re Ethyl Corp.*,¹⁴⁷ the Commission expressly relied on this distinction, advocating its approach as having "the advantage of not extending liability to private causes of action, resulting in treble damage liability, or creating a prima facie case in a private treble damages action."¹⁴⁸

The question of the proper weight to give words remains. Does the early absence of such language mean the point was unimportant? Was such language used in *Ethyl* to justify a decision that would have been made regardless? I think the absence of a private right of action made a difference. Consider the *Official Airlines Guides* case. It seems unlikely that such a limitless concept (a duty not to be arbitrary) would have been espoused in a Sherman Act case.¹⁴⁹ The *United Airlines* decision would have been far more difficult were treble damages at stake. Moreover, the risk of creating excessive recoveries has dissuaded the Department of Justice's Antitrust Division from filing certain lawsuits.¹⁵⁰ On balance, the FTC's freedom from private follow-on litigation has made a modest difference, for better or worse.

Would an effect also have been felt from the presence of only a single damages private right of action, as opposed to a right to treble damages? Given the modest difference between FTC and antitrust standards, and that only a portion of that difference can be attributed to the absence of a private right of action, it seems unlikely that such a difference in remedy would have caused much variance in substantive standards.

Comparison between FTC law and antitrust law thus provides only very modest support for the argument that the availability of treble damages has limited the reach of the antitrust laws. However, because of section 5's peculiar language, history, and enforcement mechanism, that comparison does not disprove the argument either.

2. Review of Antitrust Standards Arguably Affected by the Treble Damage Remedy

Which substantive antitrust law standards would be different were there no treble damages bonanzas? Court opinions and commentators suggest the following candidates.

Monopolization. Professors Areeda and Turner argue that the treble damages remedy has made courts reluctant to expand the reach of monopoliza-

145. 2 P. AREEDA & D. TURNER, *supra* note 3, ¶ 307, at 26; *see also* 6 P. AREEDA, ANTITRUST LAW ¶ 1436 (1986) (certain "facilitating practices" should be subject to injunction).

146. *See* Averitt, *supra* note 123, at 251 n.112; Reich, *The Future of Unfair Methods of Competition*, 50 ANTITRUST L.J. 801 (1982).

147. 101 F.T.C. 425 (1983), *rev'd sub nom.* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); *see supra* notes 125-28 and accompanying text.

148. 101 F.T.C. at 652.

149. *Cf.* Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 14 n.15, 16-17 n.19, *FTC v. Official Airline Guides, Inc.* (twice noting that finding a violation of § 5 would not expose respondent to a damage claim), *cert. denied*, 450 U.S. 917 (1981).

150. Interview with Thomas E. Kauper, former assistant attorney general for the Antitrust Division.

tion law.¹⁵¹ The suggestion has merit. It seems hard to imagine that the Supreme Court would have used the sweeping language of *Alcoa*,¹⁵² *Griffith*,¹⁵³ *Lorain Journal*,¹⁵⁴ and *Grinnell*¹⁵⁵ had damages rather than injunctive relief been sought.¹⁵⁶ To critics,¹⁵⁷ the recent narrowing of the monopolization offense is typified by two private suits, *Berkey Photo*¹⁵⁸ and *Telex*.¹⁵⁹ In addition, a federal court first accepted the Areeda-Turner invitation to tailor liability to relief in a monopolization case, by granting judgment n.o.v. for a defendant on all damage claims but reserving judgment on injunctive relief.¹⁶⁰ Finally, the principal virtue of the cost-based approach to predatory pricing claims is clarity, and those courts adopting this approach have done so in response to a perception that private litigation threatened to lessen competition.¹⁶¹ Thus, there is considerable support for the Areeda-Turner suggestion.

It would be a mistake, however, to overemphasize the role of treble damages in limiting monopolization law. One early expansive monopolization case, *Eastman Kodak Co. v. Southern Photo Materials Co.*,¹⁶² involved a private action where the plaintiff recovered treble damages.¹⁶³ In *United Shoe Machinery Corp.*,¹⁶⁴ another expansive monopolization opinion, Judge Wyzanski expressed his awareness of the treble damages remedy.¹⁶⁵ *United Shoe* involved an action

151. 2 P. AREEDA & D. TURNER, *supra* note 3, ¶ 331b2, at 150; see also Flynn, *Monopolization under the Sherman Act: The Third Wave and Beyond*, 26 ANTITRUST BULL. 1, 100 (1981) ("judicial concern for defendants subject to substantial treble damage liability . . . may be an unspoken but potent factor steering" court analysis in all but clearly unfair conduct cases).

152. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (certified to the Second Circuit in absence of quorum of six Supreme Court Justices qualified to hear case), *followed*, *American Tobacco Co. v. United States*, 328 U.S. 781, 811-14 (1946).

153. *United States v. Griffith*, 334 U.S. 100 (1948).

154. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

155. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

156. For other cases where injunctive relief was sought, see *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), *aff'd*, 417 U.S. 901 (1974); *International Boxing Club, Inc. v. United States*, 358 U.S. 242 (1959); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

157. See Flynn, *supra* note 151; Sullivan, *Monopolization: Corporate Strategy, the IBM Cases, and the Transformation of the Law*, 60 TEX. L. REV. 587, 604 (1982).

158. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

159. *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 927 (10th Cir.) (*per curiam*), *cert. dismissed*, 423 U.S. 802 (1975).

160. *SCM v. Xerox Corp.*, 463 F. Supp. 983, 998 (D. Conn. 1978) ("the need to harmonize the purposes of the patent and antitrust laws may well require recognition that some patent-related conduct creates antitrust liability only for prospective equitable relief, but not for treble damage remedies, at least in some circumstances"), *aff'd on other grounds*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). For criticisms of the suggestion that liability should depend on remedy, see *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404, 438 (S.D.N.Y. 1978) (no sharp dichotomy between suits in equity and damage claims on which to tailor liability to relief), *aff'd in part, rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Spivak, *Monopolization under Sherman Act, Section 2*, 50 ANTITRUST L.J. 285 (1981). *But see Berkey Photo*, 603 F.2d at 298 n.57 ("The situation might be different in a Government equity action.").

161. See *infra* part IV.C.6. See generally Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353; Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J. LAW & ECON. 247, 254 (1985) (discussing vagueness of antitrust criteria).

162. 273 U.S. 359 (1927).

163. The FTC lost a similar suit only three years earlier in *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924).

164. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

165. 110 F. Supp. at 345 n.2 (Supreme Court and Congress "are the only tribunals competent to con-

brought by the government; the case was followed by a private suit.¹⁶⁶ Perhaps the most controversial case limiting monopolization law, *United States v. Empire Gas Corp.*,¹⁶⁷ was a government case seeking equitable relief. Conversely, the most controversial case expanding monopolization law, *Lessig v. Tidewater Oil Co.*,¹⁶⁸ was a private treble damages action. Moreover, it was the FTC's 1980 decision in *du Pont*¹⁶⁹ that most clearly demonstrated that *Alcoa's* expansive approach has been narrowed. Cost-based pricing rules are now enshrined at the FTC,¹⁷⁰ and the Commission's attempt to use section 5 to expand monopolization law was rebuffed by the Second Circuit.¹⁷¹ Finally, *Aspen Skiing*¹⁷² reminds us that wronged private parties continue to seek, and occasionally find, treble damages relief.

How, then, would monopolization law differ were there no treble damages? Not as much as some have suggested. Single damages still would be available, so this would not be a world with Areeda-Turner's and the *SCM* district court's damageless violations.¹⁷³ Actual damages in a monopolization case can be substantial. Moreover, equitable relief can be far harsher and more economically harmful than damage awards. For example, the FTC has proposed imposing such drastic remedies as the mandatory licensing of a treasured trademark and the divestiture of brand names.¹⁷⁴ Finally, *Official Airline Guides*¹⁷⁵ demonstrates the reluctance of modern courts to sanction economic engineering in the name of antitrust.¹⁷⁶ "No fault" monopolization seems unlikely even were there no treble damages. The availability of treble damages seems to have affected monopolization law primarily by stimulating the filing of such a large number of suits that observers began to believe that nonmeritorious suits were being filed in part for strategic, anticompetitive purposes. Courts responded by beginning to terminate such cases in an early stage of litigation.¹⁷⁷ In the process, monopolization law may have become slightly less amorphous and protean, but it is still

sider whether . . . it is appropriate to read a statute having criminal and treble damage provisions as applying to the mere exercise of effective control of the market").

166. *Hanover Shoe v. United Shoe Mach. Corp.*, 245 F. Supp. 258 (M.D. Pa. 1965), *vacated in part on other grounds*, 392 U.S. 481 (1968).

167. 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); see NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 146-47 (1979) (criticizing decision).

168. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

169. *In re E.I. du Pont de Nemours & Co.*, 96 F.T.C. 650 (1980).

170. See, e.g., *In re International Tel. & Tel. Corp.*, 104 F.T.C. 280 (1984) (analytical approach based on cost-based rules and elements of intent, conduct and probability of success); *General Foods Corp.*, 103 F.T.C. 204 (1984) (same).

171. *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980) (monopolist airline schedule publisher did not have duty under FTC Act not to discriminate between competing carriers), *cert. denied*, 450 U.S. 917 (1981); see *supra* notes 129-32 and accompanying text.

172. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985).

173. See *supra* notes 145, 160.

174. See *In re Borden, Inc.*, 92 F.T.C. 669, 831 (1978) (continued use of trademark enjoined where necessary to dissipate illegally acquired and used monopoly power), *aff'd*, 674 F.2d 498 (6th Cir. 1982), *vacated and remanded for entry of consent order*, 461 U.S. 940 (1983); *In re Kellogg Co.*, [1970-1973 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 19,898 (FTC complaint filed 1972), *dismissed*, 99 F.T.C. 8 (1982).

175. *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

176. *But see United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

177. See *infra* part IV.c.

capable of being adapted to cover conduct that cries out for redress.¹⁷⁸

Horizontal Restraints. The classic expansive Supreme Court language condemning agreements whose purpose or effect is to affect price is found in criminal antitrust cases.¹⁷⁹ It seems unlikely, therefore, that trebling inhibited the development of antitrust law's treatment of horizontal restraints. In addition, the Supreme Court's recent qualifications of the per se ban against price fixing occurred in civil actions not involving treble damages claims.¹⁸⁰ This may suggest that the existence of the treble damages remedy played little part in the Court's decision to qualify the per se rule. This cannot be proven, of course. In recent years the Court has become very aware of treble damages,¹⁸¹ and the fear of overdeterrence or windfall losses may silently underlie some decisions. Nonetheless, the current reconsideration probably would have occurred even in a single-damages world. If anything, trebling may have expanded price-fixing law by providing an incentive for the entrenchment of the ban against maximum prices.¹⁸² Nor does the treble damages remedy appear to have limited the reach of the prohibition of horizontal market division or customer allocation. Although the essential Supreme Court cases, *Sealy*¹⁸³ and *Topco*,¹⁸⁴ are government injunctive cases, *Topco* was decided the same year as *Hawaii v. Standard Oil Co.*,¹⁸⁵ where the Court demonstrated concern about excessive use of treble damages. Given the contemporaneous focus on that issue, it seems unlikely that a treble damages suit would have been decided differently.

Four other horizontal restraint categories appear to be more likely candidates for demonstrating the impact of the treble damages remedy. First, the Supreme

178. *Cf. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847, 2861 (1985) (inference that monopolist deliberately discouraged customers from doing business with rival enough to support claim under Sherman Act § 2); *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1118 (5th Cir. 1984), *cert. denied*, 106 S. Ct. 420 (1985) (determining whether offense of attempted monopolization occurred based on case-by-case review of proximity and magnitude of harm and degree of apprehension).

179. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (conspiracy to fix prices violates Act "though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of the objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity"); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396 (1927) (Although only unreasonable restraints are prohibited by the Sherman Act, "it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable."); *Nash v. United States*, 229 U.S. 373, 378 (1913) ("the Sherman Act . . . does not make the doing of any act other than the act of conspiring a condition of liability").

180. *See National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984) (injunctive relief sought); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (injunctive relief and declaratory judgment sought). *But cf. Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (per se rule applied in injunctive action).

181. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737 (1977) (court concerned about new dimensions of complexity which would be added to treble damages suits if "pass-on" theories under § 4 of Sherman Act allowed).

182. *See Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1968) (complainant injured by liquor sellers' conspiracy fixing maximum resale prices awarded treble damages); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (fixing maximum as well as minimum resale prices by agreement or combination is per se § 1 Sherman Act violation). *But cf. Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (per se rule reaffirmed in injunctive suit).

183. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

184. *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

185. 405 U.S. 251, 263-64 (1972) (to allow states to recover treble damages for injury to general economy would risk duplicative recoveries).

Court's recent partial rejection of the intraenterprise conspiracy doctrine¹⁸⁶ likely resulted in part from the Court's dismay at the excessive use, or attempted use, of treble damages.¹⁸⁷ Chief Justice Burger explained that the Court's decision "will simply eliminate treble damages from private state tort suits masquerading as antitrust actions."¹⁸⁸ Crediting or blaming treble damages for this result is unfair, however, since it was in part in private treble damages cases that the doctrine was established.¹⁸⁹ If treble damages deserve partial responsibility for the doctrine's death, it also deserves partial responsibility for its birth and life.

The *Pick-Barth* doctrine¹⁹⁰ is the second category of horizontal restraints where treble damages probably played an important role. As the Fifth Circuit stated in the leading case rejecting the doctrine, "only if the defendant can gain an increment of monopoly through his unfair competition would the additional sanctions of the Sherman Act, including treble damages and criminal sanctions, be appropriately used to deter him. Single damages or equivalent injunctive relief is thought sufficient to compensate a firm for unfair competition."¹⁹¹ However, were it not for the lure of treble damages, these cases might not have been brought under the antitrust laws in the first place, for all of the *Pick-Barth* cases are private actions. Again, treble damages may deserve credit for both expansion and retreat.

The third part of horizontal restraint law likely to have been affected by treble damages is the confused area of group boycotts. The lower courts apparently reacted to the incessant stream of cases involving alleged boycotts by applying the per se rule only to certain types of concerted refusals to deal.¹⁹² The Supreme Court has tentatively endorsed these limitations on the per se rule.¹⁹³

186. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The intraenterprise conspiracy doctrine provided that liability under § 1 of the Sherman Act is "not foreclosed merely because a parent and its subsidiaries are subject to common ownership." *Id.* at 759.

187. For a review of the scores of intra-enterprise cases prior to *Copperweld* see ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 11-14.

188. *Copperweld*, 467 U.S. at 777.

189. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968) (summary judgment for defendant in treble damages case reversed; common ownership does not prevent Sherman Act from applying to separate corporations, and other conspiracies found); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) (treble damages awarded complainant injured by liquor sellers' conspiracy fixing maximum resale prices; common ownership and control does not prevent application of antitrust laws). *But cf.* *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) (dictum) (in government injunction action, Court said fact of common ownership does not protect against antitrust laws, citing *Kiefer-Stewart*); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947) (in government injunction action challenging series of acquisitions of taxicab companies and conspiracies among the acquired companies, Court said that "in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act"). Because the language in other cases is dicta or forms only alternative holdings, *Copperweld* cites *Kiefer-Stewart* at "the one case giving support to the intra-enterprise conspiracy doctrine." 467 U.S. at 763.

190. *See Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96, 102 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932) ("If a conspiracy is proven, the purpose or intent of which is by unfair means to eliminate a competitor in interstate trade and thereby suppress competition, such a conspiracy . . . is a violation of Section 1 of the Sherman Act."). *See generally* ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 53-54.

191. *Northwest Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 89 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

192. For a review of these cases, see ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 43-49.

193. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 105 S. Ct. 2613,

Moreover, *Fashion Originators' Guild*,¹⁹⁴ one of the early Supreme Court cases with expansive language, featured a challenge under the FTC Act. Since other important expansive Supreme Court boycott cases, *Klor's*,¹⁹⁵ *Radiant Burners*,¹⁹⁶ and *Silver*,¹⁹⁷ featured suits for treble damages, again it seems doubtful that trebling chilled the initial expansion of the law. Instead, it may have served as a tonic. Perhaps the recent retrenchment would have been prevented or delayed had trebling not stimulated so many suits, but again the remedy's net effect is uncertain.

Finally, the treble damages remedy may have had a significant effect on the development of conscious parallelism and data dissemination law. The delivered pricing cases were first brought under the FTC Act,¹⁹⁸ and most of the other important expansive Supreme Court cases featured government injunctive suits.¹⁹⁹ The cold water of *Theatre Enterprises*²⁰⁰ and *Matsushita*,²⁰¹ private treble damages cases, is in sharp contrast. Although courts have rebuffed the FTC's efforts to exploit section 5 to expand this part of the law,²⁰² the FTC's continued exploration of the bounds of illegality in this area²⁰³ suggests that

2621 (1985) (rule of reason applied instead of per se rule where challenged activity not likely to have predominantly anticompetitive effect); see also *FTC v. Indiana Fed'n of Dentists*, 106 S. Ct. 2009, 2018 (1986) ("the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor").

194. *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941).

195. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

196. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (per curiam).

197. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

198. *FTC v. National Lead Co.*, 352 U.S. 419 (1957); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided court sub nom. Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949).

199. See *United States v. Container Corp. of Am.*, 393 U.S. 333, 334 (1969) (conspiracy found where exchange of price information even though no agreement to adhere to price schedule); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948) (applied expansive principle that to find conspiracy it is not necessary to have express agreement; enough that concert of action is contemplated and defendants' actions conform to arrangement); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948) (applied expansive principle that when group of competitors enters into series of separate but similar agreements with competitors or others, strong inference arises that such agreements are result of concerted action); *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942) (participants in conspiracy expanded to include those who did not intend to participate in concert of action; "must be held to have intended the necessary and direct consequences of their acts"). But see *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) (classic definition of conspiracy as "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement" written in criminal case); cf. *Ambook Enters. v. Time Inc.*, 612 F.2d 604, 613-18 (2d Cir. 1979) (private treble damages conscious parallelism suit should continue), *cert. dismissed*, 448 U.S. 914 (1980); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977) (reversing dismissal of private treble damages suit), *cert. denied*, 434 U.S. 1086 (1978).

200. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

201. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1357 (1986) (ruling that summary judgment had been improperly granted, the Court said "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case"). For a discussion of the case, see *infra* part IV.B.4.

202. See *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) (relying in part on *Theatre Enterprises*); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980) (industrywide adoption of delivered pricing system using West Coast freight not per se violation of FTC Act).

203. Compare *American Soc'y of Internal Medicine*, 3 Trade Reg. Rep. (CCH) ¶ 22,242 (FTC advisory opinion April 19, 1985) ("relative value guides" would be illegal under rule of reason) with *United States v. American Soc'y of Anesthesiologists, Inc.*, 473 F. Supp. 147 (S.D.N.Y. 1979) ("relative value guides" upheld against per se rule attack).

antitrust law may have been limited by the worry about treble damages. It seems likely that the availability of treble damages has limited the expansion of the law concerning horizontal coordination short of actual agreements on price and output.

Vertical Restraints. The treble damages remedy currently seems to be limiting the breadth of antitrust law's condemnation of certain vertical restraints. The Supreme Court's recent attempt in *Monsanto*²⁰⁴ to draw some sharp lines between the types of conduct subject to the rule of reason and those subject to the per se rule appears to be a response to the treble damage remedy:

[I]t is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages If an inference of [a price-fixing] agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded In sum, "[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute."

Thus, something more than evidence of complaints [about price-cutting distributors] is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.²⁰⁵

Earlier developments in the vertical restraint area similarly indicate the limiting effect of the treble damages remedy. The doctrine of "patent misuse" illustrates this point. A finding of "misuse" resulted in unenforceability of a patent but not in exposure to treble damages, and a number of largely vertical practices were condemned as "misuse."²⁰⁶ The current Justice Department, appalled by the reach of this rogue doctrine, unrestrained by trebling's sobering companionship, has sought to limit patent misuse to cases where antitrust violations are also found.²⁰⁷ Indeed, most of the expansive Supreme Court language in the vertical restraint area appears in cases which, like *United States v. Arnold Schwinn & Co.*,²⁰⁸ did not involve treble damages.²⁰⁹ The Supreme Court re-

204. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

205. *Id.* at 763-64 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)) (footnote omitted).

206. *See Duplan Corp. v. Deering Milliken, Inc.*, 444 F. Supp. 648, 695 (D.S.C. 1977) (licensing program constituted patent misuse but not vertical restraint), *aff'd in part, rev'd in part*, 594 F.2d 979 (4th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980); ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 489; Hoerner, *Patent Misuse*, 53 ANTITRUST L.J. 641 (1984).

207. *See* S. 1841, 98th Cong., 1st Sess. tit. IV (1983) (would amend 35 U.S.C. § 271 so that listed activities not classified as patent misuse unless also antitrust violations); *see also* Delman, *Property Rights Theory and Patent-Antitrust: The Role of Compulsory Licensing*, 52 N.Y.U. L. REV. 977, 1005-13 (1977) (criticizing misuse doctrine).

208. 388 U.S. 365 (1977).

209. *E.g.*, *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373, 382 (1911)

versed its expansive approach in a private treble damages case, *Continental TV, Inc. v. GTE Sylvania Inc.*,²¹⁰ and followed scores of lower court decisions that had crafted exceptions to *Schwinn* in an effort to deny treble damages awards.²¹¹

Again, the possible limiting effect of treble damages should not be overstated. Absent treble damages, it is less likely that private litigants would seek antitrust remedies in cases like *Albrecht v. Herald Co.*²¹² and *Fortner Enterprises, Inc. v. United States Steel Corp.*,²¹³ two of the more extreme applications of vertical restraint law. The treble damages remedy, moreover, must share responsibility for current Supreme Court views with the dramatic changes in accepted economic learning that occurred in the decade prior to *GTE Sylvania*.²¹⁴ But trebling probably has contributed to the current limiting of vertical restraint law.

Jurisdictional Reach of the Antitrust Laws. A number of courts have ruled that the extraterritorial reach of the antitrust laws should be decided in particular cases at least in part through considerations of international comity.²¹⁵ Some courts regard these considerations as proper elements of the determination of subject matter jurisdiction; others regard review of these considerations as appropriate only in deciding whether to decline jurisdiction as a matter of discretion. Whatever the context, several of the factors to be weighed in evaluating comity considerations are likely to be affected by the size of the antitrust sanction, including the "[d]egree of conflict with foreign law or policy" and the "[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief."²¹⁶ Since foreign abhorrence of treble damages is legendary,²¹⁷ any balancing process weighing such factors could conceivably come out differ-

(*Dr. Miles* involved an (unsuccessful) attempt to enforce a contract with an anticompetitive restraint, rather than an attempt to recover treble damages for injuries caused by the restraint.) *But see Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969) (use of credit as tying product provides basis for finding of vertical restraint in treble damages suit); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (fixing maximum price is per se violation of antitrust law in treble damages suit); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (use of consignment agreement to engage in resale price maintenance violates antitrust laws in treble damages suit).

210. 433 U.S. 36 (1977). *GTE Sylvania* overruled the per se rule of *Schwinn* and held that a rule of reason standard must be used to review all nonprice vertical restraints. *Id.* at 58-59; *see also* *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.) (limiting restricted distribution law in treble damages case), *cert. denied*, 355 U.S. 822 (1957). *But cf.* *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960) (limiting tying law in government injunctive case), *aff'd per curiam*, 365 U.S. 567 (1961).

211. *See* A.B.A. Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intra-brand Competition (1977) (listing *pre-GTE Sylvania* cases).

212. 390 U.S. 145 (1968).

213. 394 U.S. 495 (1969).

214. *See GTE Sylvania*, 433 U.S. at 48 n.13 (listing articles critical of *Schwinn*); *see also* Williamson, *Commentary*, in R. Tollison, *THE POLITICAL ECONOMY OF ANTITRUST: PRINCIPAL PAPER BY WILLIAM BAXTER* ch. 5 (1980) (noting recent importance of economics while tracing trends in antitrust analysis). The difficulty of segregating the responsibility of economic learning for changes in antitrust also plagues the evaluation of trebling's effect on other standards.

215. *E.g.*, *Laker Airways Ltd. v. Pan American World Airways, Inc.*, 604 F. Supp. 280 (D.D.C. 1984); *ANTITRUST LAW DEVELOPMENTS*, *supra* note 98, at 529-31 (citing cases). *See generally* 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 6.21 (2d ed. 1981). *But cf.* *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-53 (D.C. Cir. 1984) (criticizing other courts' comity "balancing tests").

216. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *see also Laker Airways*, 604 F. Supp. at 292-93 (discussing factors in *Mannington Mills*).

217. *See* 404 PARL. DEB., H.L. (5th ser.) 562 (1980) (comments of Lord Mackay) (British companies should be protected from the "penal element" and "unjustified enrichment" of treble damages); *see also* 1

ently today than if only single damages were available.²¹⁸ However, given both the paucity of cases engaging in such a balancing process, and doubts about the frequency with which that process has affected outcomes even when used, it seems unlikely that many cases would be decided differently were there no treble damages.

The effect of trebling on the domestic jurisdictional reach of the antitrust laws is also ambiguous. In a series of private treble damages cases decided primarily during the past decade, the Supreme Court substantially relaxed the domestic jurisdictional limits, leading commentators to wonder whether the requirement of interstate effects continues to serve as a meaningful restriction.²¹⁹ It seems doubtful that government lawyers or private plaintiffs entitled only to single damages would have pushed the outer bounds of antitrust coverage so far.

The relaxation of the commerce requirement caused the courts to be "deluged with complaints" alleging that denial of medical staff privileges restrained trade.²²⁰ This wave may have crested, as some courts are becoming more reluctant to find jurisdictional requirements satisfied.²²¹ Although this may simply be a retreat from an overexuberant reading of the Supreme Court cases, it may be reinforced by concern about the availability of treble damages. For instance, the Seventh Circuit recently adverted to an antitrust damages request of \$13.5 million, before trebling, when it required the pleading of specific facts from which the requisite effect on commerce could be inferred.²²² Moreover, although many

J. ATWOOD & K. BREWSTER, *supra* note 215, § 4.18 (2d ed. 1981 & Supp. 1985) (reviewing foreign statutes aimed in part at neutralizing treble damages authority).

218. *Accord* GARVEY STUDY, *supra* note 3, at 41.

219. *McLain v. Real Estate Bd.*, 444 U.S. 232, 235 (1980) (injunctive relief also sought); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1980) (injunction and more than \$2 million sought); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 (1975) (injunctive relief and damages sought); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 190 (1974) (same); see P. AREEDA, *supra* note 106, at 133 (concluding that *McLain* requires interstate connections but suggests ease with which they are established); CASES AND MATERIALS ON TRADE DEREGULATION, *supra* note 108, at 160 (asking "[a]fter *McLain*, how much room is left for a jurisdictional defense given the Court's willingness to focus on the 'brokerage activity' as opposed to the 'effect on interstate commerce caused by the alleged conspiracy?'); Comment, *Expanding Federal Antitrust Jurisdiction: A Close Look at McLain v. Real Estate Board, Inc.*, 19 HOUSTON L. REV. 143 (1981) (Supreme Court should reconsider effect of *McLain* test and provide guidelines for narrowing scope of Sherman Act jurisdiction). See generally ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 24-28.

220. *Marrese v. Interqual, Inc.*, 748 F.2d 373, 381 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3501 (1985).

221. See, e.g., *Stone v. William Beaumont Hosp.*, 5 Trade Reg. Rep. (CCH) ¶ 66,932, at 61,798-800 (6th Cir. Jan. 30, 1986) (denial of physician staff privileges had only de minimis impact on interstate commerce); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985) (physician denied hospital admittance privileges filed antitrust action but complaint dismissed because physician failed to adequately allege challenged activities in interstate commerce); *Hayden v. Bracy*, 744 F.2d 1338, 1342-43 (8th Cir. 1984) (physician who claimed that other physicians at hospital combined to assert monopoly power in taking disciplinary action against him did not prove that alleged activity occurred in interstate commerce); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 927 (2d Cir. 1983) (physician denied hospital staff privileges failed to state claim because allegation that loss of revenue from out of state insurers insufficient to establish connection to interstate commerce). But see *El Shahawy v. Harrison*, 778 F.2d 636, 641 (11th Cir. 1985) (finding jurisdiction where alleged that "defendant's business activities have a substantial impact on interstate commerce").

222. *Seglin v. Esau*, 769 F.2d at 1280 n.6 ("it is 'hard to ignore the suspicion that the facts of this case have been forced into an antitrust mold to achieve federal jurisdiction'") (quoting *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1982)); see also *Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 417 n.10 (7th Cir. 1986) (affirming in relevant part sua sponte dismissal of physician's challenge to suspension of staff privileges, court noted such claims "may border on the frivolous"). For a commentator's lament that lower courts deciding medical staff exclusion cases are failing to follow Supreme Court teachings and are applying overly restrictive interstate commerce standards, see Note, *Sherman Act "Jurisdiction" in*

of these private suits seek injunctive relief, there may have been less of an unseemly "deluge" had treble damages not enticed plaintiffs.

Even if the possible current retrenchment finds support in concern about trebling, that would not demonstrate that trebling has limited the domestic jurisdictional reach of the antitrust laws. If the Supreme Court cases relaxing jurisdictional requirements (or other cases achieving the same doctrinal result) would not have been brought or pursued vigorously without the lure of treble damages, that remedy may have served to broaden the domestic jurisdictional coverage of the antitrust laws. The net effect is difficult to gauge.

Antitrust Exemptions. Trebling has at least increased the number of antitrust exemptions and has probably broadened them. If nothing else, horror stories about gargantuan penalties imposed on constituents attract notice on Capitol Hill,²²³ and the greater the damages threatened, the more cost-effective the hiring of high-priced lobbyists becomes. Without treble damages, there might well be no Local Government Antitrust Act of 1984,²²⁴ National Cooperative Research Act of 1984,²²⁵ Shipping Act of 1984,²²⁶ Export Trading Company Act of 1982,²²⁷ or, perhaps, Soft Drink Interbrand Competition Act,²²⁸ to mention only recently enacted exemptions.

Congressional concern about treble damages also may have buttressed judicial concern and have led to broader interpretations of antitrust exemptions than would otherwise have been adopted. This suggestion is best supported in connection with the state action exemption.²²⁹ The dissenting justices in *Cantor v.*

Hospital Staff Exclusion Cases, 132 U. PA. L. REV. 121 (1983). For an argument that frivolous staff exclusion cases can be decided easily on the merits without resort to jurisdictional barriers, see Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 DUKE L.J. 1071, 1142-44 (1984).

223. Cf. H.R. REP. NO. 965, 98th Cong., 2d Sess. 10-11 (antitrust damages exposure "may be of a different and potentially more harmful type than other legal risks confronting local governments"), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4602, 4611-12.

224. 15 U.S.C.A. §§ 34-36 (West Supp. 1986) (damages may not be recovered from local governments); see *supra* note 223. See generally ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 612 (supplement reviews statute).

225. 15 U.S.C.A. §§ 4301-4305 (West Supp. 1986) ("joint research and development ventures" subject only to rule of reason review, and when antitrust agencies notified in advance plaintiffs limited to actual damages); see S. REP. NO. 427, 98th Cong., 2d Sess. 25 (additional views of Sens. Hatch, Laxalt, Simpson, East, and Denton) (treble damages creates "bias in favor of litigation" that "has no place in the present context"), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3105, 3121.

226. 46 U.S.C.A. §§ 1701-1706, 1715 (West Supp. 1986) (broadening shipping's antitrust immunity and eliminating certain private rights of action); see H.R. REP. NO. 53, pt. 1, 98th Cong., 1st Sess. 45-46 (1983) (letter to Walter B. Jones, Chairman of House Committee on Merchant Marine and Fisheries, from Drew Lewis, Secretary of Transportation, arguing that ocean carrier agreements "should be clearly immune from the antitrust laws, without any danger of application of antitrust penalties" (Feb. 5, 1982)), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 167, 210-11.

227. 15 U.S.C. §§ 4001-4021 (1982) (Certification of Review for export trading activities would limit injured parties to single damages and create presumption of legality); see H.R. REP. NO. 637, pt. 1, 97th Cong., 2d Sess. 15 (certification designed to reduce "chilling" effect of antitrust laws"), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2431, 2437. See generally ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 572-73 (reviewing certificate program).

228. 15 U.S.C. §§ 3501-3521 (1982) (special standard for vertical restraints by soft drink licensors); see H.R. REP. NO. 1118, 96th Cong., 2d Sess. 4 (bill "responds to . . . concerns of prolonged antitrust damage liability"), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 2373, 2376.

229. See S.P. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 728-29 (1974) (suggesting need to limit awards of treble damages against states); Note, *Antitrust Treble Damage as Applied to Local Government Entities: Does the Punishment Fit the*

*Detroit Edison Co.*²³⁰ and *City of Lafayette v. Louisiana Power & Light Co.*²³¹ expressed dismay at the liability threatening municipalities. The Court in *Lafayette* reserved judgment on the questions of remedy.²³² While recent broad readings of the state action exemption²³³ were not necessarily responsive to fears about remedy, some of those readings surprised commentators looking only at the logic of the Court's previous interpretations.²³⁴ The perceived treble damages problem undoubtedly played a role. More recently, this perceived problem may have influenced the Court's decision to preserve the immunity from shippers' private treble damages actions for rates duly submitted to the Interstate Commerce Commission and lawful under the Interstate Commerce Act.²³⁵ It also may have played, or will play, a role in broadening other exemptions.²³⁶

Defendant?, 1980 ARIZ. ST. L.J. 411, 420 ("severity of treble damages may act as a disincentive for courts to impose antitrust liability on municipalities"). These two writers, and Areeda & Turner, called for judicial limiting of damage recoveries from public actors. See 1 P. AREEDA & D. TURNER, *supra* note 3, ¶ 217a3. As with other parts of antitrust law—such as jurisdictional reach—it is conceivable that trebling's stimulus for novel private suits may have offset any chilling effect on courts considering whether to expand the part of the economy subject to antitrust. Most of the leading Supreme Court cases limiting the state action exemption, however, probably would have been filed even if there were no treble damages. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (injunction sought); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980) (same); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (antitrust counterclaim). But see *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (treble damages class action). It thus seems likely that the net effect of trebling has been to expand the exemption.

230. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 615 (1976) (Stewart, J., dissenting).

231. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 440 (1978) (Stewart, J., dissenting) (warning of "staggering costs" that "would assure bankruptcy for almost any municipality"); *id.* at 443 (Blackmun, J., dissenting) ("the prospect of insolvency for petitioner cities would so threaten the welfare of their inhabitants").

232. *Lafayette*, 435 U.S. at 401-02.

233. *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985); *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984).

234. See J. Briggs & S. Calkins, *Antitrust Update 1984-1985: Remarks to the Conference Board's Annual Antitrust Program 28-29* (Mar. 7, 1985) (incorrectly predicting the plaintiff would win in *Southern Motor Carriers*) (unpublished monograph on file at *Georgetown Law Journal*); Campbell, *Supreme Court Update—State Action Immunity from Antitrust Law*, 53 ANTITRUST L.J. 429, 432 (1984) (incorrectly predicting the plaintiff would win in *Town of Hallie*).

235. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 106 S. Ct. 1922 (1986). In *Square D* the Court declined to overrule *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), thus rejecting invitations from the Solicitor General, 106 S. Ct. at 1927, and Judge Friendly, writing for the court of appeals below, 760 F.2d 1347, 1349 (2d Cir. 1985) ("much of the reasoning of *Keogh* seems outdated," but "if there is to be an overruling, that task is for the Supreme Court"). *Keogh* had immunized rates in properly filed tariffs from treble damages suits by shippers, but not from government suits for injunctions, forfeiture, or criminal sanctions. 260 U.S. at 161-62; see also *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 453 (1945) (government could sue). *Square D's* upholding of the *Keogh* immunity was nominally based on principles of stare decisis, 106 S. Ct. at 1930-31, but the Court took pains to emphasize the limited extent of that immunity. The Court pointed to the "critical distinction" between complete immunity and "a far more limited non-availability of the private treble-damages remedy." *Id.* at 1929-30 n.28. "*Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation." *Id.* at 1929. This emphasis on treble damages in a decision preserving an immunity of questionable merit suggests the result might have been different had only single damages been available. See generally Velvel, *'Keogh' Remains—but So Do Doctrine's Limits*, *Legal Times*, July 14, 1986, at 26 (*Square D* Court doubted wisdom of immunity).

236. Cf. *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979) (nonstatutory labor exemption would limit plaintiff to injunctive relief where employer-union agreement was illegal if the defendant could not have foreseen that the agreement would violate the labor laws, the illegal agreement was closely related to the objectives of collective bargaining, and the object of the agreement was not more restrictive than reasonably necessary), *vacated sub nom.* *International Longshoremen's*

B. PROCEDURAL AND REMEDIAL LAW, OTHER THAN SUMMARY JUDGMENT
AND MOTIONS TO DISMISS

Several nonsubstantive parts of antitrust law may have developed differently were there no trebling.

1. *In Pari Delicto*

Although *Perma Life Mufflers, Inc. v. International Parts Corp.*²³⁷ rejected the *in pari delicto* defense in private antitrust actions, five Justices endorsed this defense where a plaintiff equally and voluntarily participates in the challenged conduct.²³⁸ Trebling influenced the five justices to recommend preserving this part of the defense. To Justice Harlan it seemed “bizarre . . . to pay violators three times their losses in doing what public policy seeks to deter them from doing.”²³⁹ Justice Marshall could not “agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress—in the form of treble damages—from a partner who is no more responsible for the existence of the illegality than the plaintiff.”²⁴⁰ Moreover, as recognized by one court, the interest in preventing windfall gains “justifies application of the complete involvement defense to an action for treble damages,” but not to an action seeking injunctive and declaratory relief.²⁴¹ Thus, it appears that the treble damages remedy has played a role in the development of this doctrine and may play a role in the future.

2. Class Actions

In the absence of treble damages, fewer class action damages requests would “shock the conscience” and be rejected for sheer oppressiveness.²⁴² Although

Ass'n v. Consolidated Express, Inc., 448 U.S. 902 (1980), *modified*, 641 F.2d 90 (3d Cir.), *mandamus denied*, 451 U.S. 905 (1981).

237. 392 U.S. 134 (1968).

238. 392 U.S. at 146 (White, J., concurring); *id.* at 147-48 (Fortas, J., concurring in the result); *id.* at 149 (Marshall, J., concurring in the result); *id.* at 154 (Harlan, J., concurring in part and dissenting in part).

239. *Id.* at 154 (Harlan, J., concurring in part and dissenting in part).

240. *Id.* at 151 (Marshall, J., concurring in the result). Since the Supreme Court just last term incorporated the *Perma Life* rejection of the *in pari delicto* defense, including the exception for equal culpability, into securities law, *Eichler v. Berner*, 105 S. Ct. 2622 (1985), one could argue that trebling was irrelevant to the equal-culpability exceptions. On the other hand, the Court's familiarity with the exception may explain its adoption into securities law.

241. *THI-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 996 (9th Cir. 1980); *see also General Leaseways v. National Truck Leasing Ass'n*, 744 F.2d 588, 597 (7th Cir. 1984) (Posner, J.) (*in pari delicto* defense rejected in injunctive action, but there would be a “very serious” problem were the plaintiff “seeking damages measured by the loss of cartel profits”); *cf. Florists' Nationwide Telephone Delivery Network v. Florists' Tel. Delivery Ass'n*, 371 F.2d 263, 271 (7th Cir.) (same “independent equitable consideration” might require different outcomes for damages and injunctive relief aspects of treble damages case defended on grounds of “unclean hands”), *cert. denied*, 387 U.S. 909 (1967).

242. As the Ninth Circuit said in *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), “the amount of a recovery in a lawsuit is not ordinarily of concern where a wrong has been inflicted and an injury suffered. But when 2000 are joined in an action in which each is jointly and severally liable, the liability is increased in geometric progression. Such an award would shock the conscience.” 508 F.2d at 234. *See Arth Main St. Drugs v. Beer Distribs., Inc.*, 26 Fed. R. Serv. 2d (Callaghan) 87, 90 (N.D. Ind. 1978) (trebled recovery “might well bankrupt many of the present and potential defendants”); *Hooley v. Red Carpet Corp. of Am.*, 1975 Trade Cas. (CCH) ¶ 60,2895, at 66,112 (D. Or. April 1, 1975) (certification denied where size of potential liability might “result in some or all of the defendants opting for a settlement with some or all of the plaintiffs whether they were guilty of the

without trebling the legal standards would not necessarily be different, those standards, as applied, would likely lead to some different outcomes. It follows, therefore, that class actions would be more easily certified were there no trebling.

3. Proof of Damages

Ever since *Bigelow v. RKO Radio Pictures, Inc.*,²⁴³ antitrust courts have accommodated imperfections in plaintiffs' proof of damages. With good reason, Richard Posner has labeled *Bigelow* as the stimulus for the surge of private antitrust actions.²⁴⁴ In recent years, however, courts have qualified *Bigelow* by insisting that plaintiffs show a "fair degree of certainty" as to the fact of injury,²⁴⁵ as opposed to the amount. Some courts have limited *Bigelow* even more directly by requiring a careful "segregation" between injuries caused by lawful conduct and those resulting from unlawful conduct or, in some cases, even among injuries caused by different illegal activities.²⁴⁶ In *MCI Communications Corp. v. American Telephone and Telegraph Co.*,²⁴⁷ for instance, the Seventh Circuit explained that careful segregation was required to avoid forcing a defendant "to pay treble damages for conduct that was determined to be entirely lawful."²⁴⁸ In general, courts have apparently begun to scrutinize damages claims more rigorously.²⁴⁹ While proof is still in short supply, it seems that trebling has contributed to the modifications of the *Bigelow* standards.

plaintiffs' allegations or not"). *But see* *Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 150 (E.D. Pa. 1976) (possible "staggering liability" did not affect superiority of class action).

243. 327 U.S. 251, 264 (1946) (evidence sufficient to enable jury to "make a just and reasonable estimate of the damage"); *see also* *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate").

244. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 373-74 (1970).

245. *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 407-08 n.193.

246. *See* *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1160-69 (7th Cir.) (jury may not make reasonable and principled estimate of damages when plaintiff improperly attributes all losses to defendant's illegal acts despite presence of significant other factors), *cert. denied*, 464 U.S. 891 (1983); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979) ("a purchaser may recover only for the price increment that 'flows from' the distortion of the market caused by the monopolist's anticompetitive conduct"), *cert. denied*, 444 U.S. 1093 (1980); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 434 (N.D. Cal. 1978) (since plaintiff not able to isolate impact of each of defendant's acts, no basis for jury to determine "what effect on damages would be if one or more of defendant's challenged acts found lawful"), *aff'd*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). For discussion of these issues, see J. Shenefield, *Shifting Requirements for Proof of Damages and Standards for Injunctive Relief*, Remarks Before the 18th Annual New England Antitrust Conference in Boston, Mass. (Nov. 2-3, 1984); Comment, *Segregation of Antitrust Damages: An Excessive Burden on Private Plaintiffs*, 72 CALIF. L. REV. 403 (1984).

247. 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

248. 708 F.2d at 1163.

249. *See, e.g., MCI Communications*, 708 F.2d at 1160-69 (separate trial on damages ordered where first jury had no way to adjust award to reflect dismissal of several claims for failure to prove unlawful competition); *Southern Pac. Communications Co. v. American Tel. & Tel. Co.*, 556 F. Supp. 825, 1073-75 (D.D.C. 1982) (judgment for defendants where evidence insufficient to provide reasonable basis for determining amount of damages), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1721 (1985); *Ways & Means, Inc. v. IVAC Corp.*, 506 F. Supp. 697 (N.D. Cal. 1979) (ruling plaintiffs' damage study inadmissible and granting summary judgment for defendant in part because of inadequacy of proof of damages); *Breit & Elzinga*, *supra* note 101, at 420-22 (courts recently have required "more rigorous estimates of damages").

4. Standing

Plaintiffs would find standing rules more hospitable in a single-damages world. It is here that we see most unequivocally a limiting consequence of the treble damages remedy.²⁵⁰ The role of the treble damages remedy in limiting standing is clear not just from references to it in decisions limiting standing—although such decisions have attached significance to trebling with unusual consistency over time—but from comparison of antitrust standing principles with related legal concepts and from the focus on trebling in current antitrust standing principles themselves. Although “narrow” standing rules currently may be gaining support from the focus on consumer welfare as the principal or sole antitrust concern,²⁵¹ such rules also owe their existence in part to trebling.

Treble damages have long been featured in standing decisions. The first “direct injury” case, *Ames v. American Telephone & Telegraph Co.*,²⁵² warned that “[a] construction of the act which makes the defendant liable to sextuple damages is certainly to be avoided.”²⁵³ Perhaps the leading “target area” opinion, *Calderone Enterprise Corp. v. United Artists Theatre Circuit, Inc.*,²⁵⁴ cautioned that “if the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit . . . would result in an over-kill.”²⁵⁵ Numerous other decisions reflect similar worries about treble damages. The concern is variously cast in terms of “potentially ruinous liabilities,”²⁵⁶ unfair “windfalls,”²⁵⁷ and an inundation of plaintiffs lured by treble damages.²⁵⁸ In a moment of judicial candor,

250. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 773-74 (1977); Breit & Elzinga, *supra* note 101, at 413-22; GARVEY STUDY, *supra* note 3, at 29-30; Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 31 (1971). See generally Blecher, *The New Antitrust*, 54 ANTITRUST L.J. 43 (1985) (recognition of private right to seek divestiture in *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), is in response to perceived federal nonenforcement of antimerger laws). For purposes of this subsection, “standing” includes the related concepts of “antitrust injury,” see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), “fact of damage,” see ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 387-92, and the *Illinois Brick* limitation, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

251. See Breit & Elzinga, *supra* note 101, at 414-15; Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 CHI. L. REV. 467, 471 (1980).

252. 166 F. 820 (C.C.D. Mass. 1909).

253. *Id.* at 824.

254. 454 F.2d 1292 (2d Cir. 1971) (Mansfield, J.), *cert. denied*, 406 U.S. 930 (1972).

255. *Id.* at 1295; see *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970) (plaintiff's burden to show damages directly caused by, or business within “target area” of, defendant's illegal act), *cert. denied*, 401 U.S. 923 (1971); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 55 (9th Cir. 1951) (first target area case explaining that damages should be “withheld from those who seek the windfall of treble damages because of incidental harm”).

256. See, e.g., *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 586-87 (3d Cir. 1979) (because of “potentially ruinous liabilities,” courts should be reluctant to permit treble damage action to have punitive impact that “may unduly cripple a defendant and lead to an overall deleterious effect upon competition”); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975) (referring to “potentially disastrous recoveries”).

257. *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 55 (9th Cir. 1951). Reference also is made to “speculative damages,” e.g., *Pitchford v. PEPI Inc.*, 531 F.2d 92, 107-08 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976), which presumably would be less unacceptable were they one-third as large.

258. See *In re Industrial Gas Antitrust Litig.*, 681 F.2d 514, 519-20 (7th Cir. 1982) (stressing importance of “avoidance of excessive treble damages litigation”), *cert. denied*, 460 U.S. 1016 (1983). See generally Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977).

Judge Guy, now of the Sixth Circuit but then on the District Court in Detroit, explained that "one might reach a different conclusion in matters of this nature depending upon where one starts."²⁵⁹ In denying standing, Judge Guy said that his decision was

predicated on that line of authority that holds in general that the Anti-Trust Laws are being over-used today, and that they are used in many instances in which traditional common law or other statutory forms of action would suffice, and that the principal reason they are being used in that regard is because of the triple-damage remedies that they afford. They afford plaintiffs not only an additional bite at an apple, but a much larger bite at an apple. And they provide considerable leverage because of that factor.²⁶⁰

By its terms, the Supreme Court's current approach to standing makes trebling important.²⁶¹ For example, the Court requires consideration of the "risk of duplicate recoveries,"²⁶² which is exacerbated with trebled damages; avoidance of unnecessary complexity of litigation,²⁶³ a problem that is eased when the stakes are less high; and the speculativeness of the claimed damages,²⁶⁴ which is also of less concern when multiple damages are not available. Treble damages also played a central role in two other decisions that limited standing, *Illinois Brick*²⁶⁵ and *Hawaii v. Standard Oil*.²⁶⁶ These decisions turned on the dual risks of duplicate recoveries and of burdening the legal system with complex litigation.²⁶⁷ Both of these risks would be reduced if there were no trebling. The

259. *J.F. Reed Co. v. K Mart Corp.*, 1982-1 Trade Cas. (CCH) ¶ 64,499, at 72,770 (E.D. Mich. 1981), supplemented, 1982-1 Trade Cas. (CCH) ¶ 64,500 (E.D. Mich. 1981).

260. 1982-1 Trade Cas. (CCH) ¶ 64,499 at 72,768. Ironically, the precise (if ignoble) reason why Congress added § 2(c) of the Robinson-Patman Act, the statutory provision at issue, probably was to protect persons such as the plaintiff in *J.F. Reed*, a manufacturer's sales representative who was terminated at the insistence of a large buyer demanding a discount. Cf. Edward Joseph Hruby, 61 F.T.C. 1437, 1447-48 (1962). See generally *General Motors Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,165 (FTC June 21, 1984).

261. See *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 542-44 (1983). For the reception given the case and the Court's rather different standing decision the preceding year in *Blue Shield v. McCready*, 457 U.S. 465 (1982), see *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (11th Cir. 1985), cert. denied, 106 S. Ct. 1513 (1986); Note, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions*, 72 CALIF. L. REV. 437 (1984); Note, *More Trouble with Treble: The Effects of McCready and Associated General Contractors on the Antitrust Standing Opinions of the Federal Courts of Appeals*, 10 J. CORP. L. 463 (1985); Note, *Private Antitrust Standing: A Survey and Analysis of the Law After Associated General*, 61 WASH. U.L.Q. 1069 (1984).

262. 459 U.S. at 544.

263. *Id.* at 543-44.

264. *Id.* at 542. Other factors include the causal connection between the violation and the harm, the nature of the alleged injury, the directness of the injury, and the existence of victims with superior potential standing claims, the weighing of all of which probably would be different were damages single. For a review of (and alternative ways of counting) the *Associated General Contractors* factors, see *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), cert. denied, 465 U.S. 1024 (1984).

265. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

266. 405 U.S. 251 (1972). Conceivably, trebling played a role in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), but that decision makes little of the issue and the reasoning of the opinion, at least read narrowly, would be equally applicable to single damages.

267. See, e.g., Calkins, *supra* note 3; *Recent Developments in Antitrust Standing, Class Action Law Explored at ALI-ABA Seminar*, Antitrust & Trade Reg. Rep. (BNA) No. 852, at A-4, A-5 (Feb. 23, 1978) (*Illinois Brick* based "on the belief that 'trial courts cannot cope with the kinds of problems raised by difficult cases'").

holdings of both *Illinois Brick* and *Hawaii v. Standard Oil* are limited to cases where damages are sought.²⁶⁸

Cases adopting expansive views of standing when only injunctive relief is sought further suggest the importance of trebling. Recent decisions have held that competitors may seek to enjoin mergers for which they could not recover damages²⁶⁹ and that associations may seek injunctive relief for members who would have to sue individually for damages.²⁷⁰ Since belief in equilibrating tendencies leads one to expect broader standing for injunctive relief than even for single damages, the marked difference in the approach to standing for injunctive relief and for treble damages does not prove that standards in a single-damage world would be more relaxed than at present, but the difference is suggestive.

The final reason to believe that trebling constricts standing is the strictness of antitrust standing standards.²⁷¹ In *Associated General Contractors*, the Court explained that standing is rooted in common law causation,²⁷² but the difference between standing in an antitrust case and a tort case is breathtaking. In antitrust suits, licensors, franchisors, and lessors who are foreseeably injured by illegal conduct are regularly denied standing,²⁷³ in tort law, "there are quite remarkable events which have been taken in stride by various courts as within the boundaries of the jury's permission to find foreseeability" (and thus causation).²⁷⁴ In torts, the courts cheerfully find that numerous defendants have "proximately caused" an accident and that numerous plaintiffs should be allowed to recover for a single wrong.²⁷⁵ In antitrust cases courts search for "the appropriate antitrust enforcer," a member of the "select class of plaintiffs that can impose the deterrent sting of treble damages at the smallest cost of enforcement."²⁷⁶ Finally, and very important, in torts "proximate cause . . . is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence in each particular case."²⁷⁷ In antitrust, standing is decided as a matter of law, on a principled basis, by the court.²⁷⁸ It is incon-

268. See ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 404.

269. See *Monfort, Inc. v. Cargill, Inc.*, 761 F.2d 570, 573 (10th Cir. 1985) (competitor had standing in § 16 injunction case, despite lack of proof of actual injury), *cert. granted*, 106 S. Ct. 784 (1986); *White Consol. Indus. v. Whirlpool Corp.*, 612 F. Supp. 1009, 1032 (N.D. Ohio) (standing established by "sufficient showing of potential or threatened antitrust injury"), *vacated on other grounds*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F. Supp. 1326, 1331 & n.5 (E.D. Mich.) (standing established where "substantial likelihood that plaintiff's competitive position would be harmed"), *aff'd*, 753 F.2d 1354, 1358 (6th Cir.), *cert. dismissed*, 105 S. Ct. 1115 (1985).

270. *Mission Hills Condominium Ass'n M-1 v. Corley*, 570 F. Supp. 453 (N.D. Ill. 1983); see 2 P. AREEDA & D. TURNER, *supra* note 3, ¶ 335e.

271. The Supreme Court acknowledged the strictness of antitrust standing in a recent RICO decision. See *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3286-87 (1985).

272. 459 U.S. at 531-35.

273. See ANTITRUST LAW DEVELOPMENTS, *supra* note 98, at 397; 2 P. AREEDA & D. TURNER, *supra* note 3, ¶ 341.

274. W. PROSSER & W. KEETON, *supra* note 65, at 300. See generally Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1744 (1985) (causation is viewed as having little substantive content).

275. W. PROSSER & W. KEETON, *supra* note 65, at 266-68.

276. *In re Industrial Gas Antitrust Litig.*, 681 F.2d 514, 520 (7th Cir. 1982) (Bauer, J.) (emphasis added).

277. *Healy v. Hoy*, 115 Minn. 321, 323, 132 N.W. 208, 209 (1911), *quoted in* W. PROSSER & W. KEETON, *supra* note 65, at 321.

278. *E.g.*, *Nishimura v. Dolan*, 599 F. Supp. 484, 494 (E.D.N.Y. 1984); *Zenith Radio Corp. v. Matsu-*

ceivable that the award of treble damages was not a key factor in the evolution of these dissimilar approaches.

IV. MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS TO DISMISS

The treble damages remedy appears to have caused courts to view motions for summary judgment and motions to dismiss for failure to state a claim more favorably. This remedy's effect can be seen in judicial language, legal standards, and comparative results.

The Georgetown Project data base provides a unique opportunity to explore the use of these pretrial motions in antitrust cases. The following discussion will not only examine the impact of trebling on the use of these motions, but also explore more generally the use of these motions. The data indicates that even before *Matsushita*,²⁷⁹ pretrial motions for summary judgment and motions to dismiss for failure to state a claim were highly successful and played an important role in antitrust litigation—contrary to the suggestion of *Poller v. Columbia Broadcasting System*,²⁸⁰ the “lessons” of which continued to be recited regularly.²⁸¹ A consistent, if sometimes unspoken, recent theme is that disposal of antitrust cases prior to trial is encouraged.

The discussion will proceed as follows. First, to put the data in context, I will review the learning on summary judgment and motions to dismiss for failure to state a claim (hereinafter “motion to dismiss”). This survey will focus both on understandings as of the completion of this study's empirical work and, for completeness and to avoid being misleading, on the impact on those understandings of the trio of 1986 Supreme Court summary judgment cases. Second, findings from the data will be presented or, where the information is recorded on accompanying tables, highlighted. Finally, I will appraise these findings.

A. CONVENTIONAL WISDOM ON MOTIONS TO DISMISS

1. In General

The motion to dismiss²⁸² is scorned by the leading civil procedure authorities. The following discussion from Wright and Miller is typical:

The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Rule 8 indicates that a complaint need only set out a generalized statement of facts from which defendant will be able to frame a responsive pleading. Few complaints fail to meet this liberal standard and become subject to dismissal.²⁸³

shita Elec. Indus. Co., 513 F. Supp. 1100, 1158 n.70 (E.D. Pa. 1981) (Becker, J.), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 106 S. Ct. 1348 (1986).

279. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1357 (1986)

280. 368 U.S. 464 (1962).

281. *See infra* part IV.B.

282. FED. R. CIV. P. 12(b)(6).

283. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 598 (1969) (footnotes omitted); *see also* *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2555 (1986) (with shift to notice pleading, summary judgment has served former function of motions to dismiss); 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 12.07[2.-5] (1985) (“generally disfavored”); 27 FEDERAL PROCEDURE, L. ED. § 62:465, at 575 (1984) (“looked on with disfavor by the courts, and . . . granted sparingly and with care”) (footnotes omitted). The same lack of affection is shown for the motion for judgment on the pleadings,

Charles Wright cites a 1962 sampling for the Advisory Committee on Civil Rules that "suggests that [rule 12(b)] motions are made in only about 5% of all cases, and that in fewer than 2% of all cases do such motions lead to a final termination of the action."²⁸⁴ The leading Supreme Court discussion of the standard for dismissing complaints continues to be *Conley v. Gibson*,²⁸⁵ in which the Court, speaking through Justice Black, held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."²⁸⁶

However, whatever past experience indicates, it may not accurately forecast the future. Concern about litigation excesses has been widely noted.²⁸⁷ The effects of this concern are reflected in the recent amendments to the Federal Rules of Civil Procedure, particularly rule 11,²⁸⁸ and in the emergence of rule 68 as a

FED. R. CIV. P. 12(c), which may be filed once pleading has been completed, but otherwise is indistinguishable from motions to dismiss. See, J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 294-95 (1985) (issues in motion to dismiss and motion for judgment on the pleadings identical).

284. C. WRIGHT, THE LAW OF FEDERAL COURTS 432 (4th ed. 1983); see also A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 8 (1984) (motion to dismiss "is a wonderful tool on paper, but have you ever looked at the batting average of rule 12(b)(6) motions? I think it was last effectively used during the McKinley administration"). In addition to motions to dismiss for failure to state a claim, rule 12(b) authorizes motions to dismiss for "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process," and "(7) failure to join a party under Rule 19 [joinder of persons needed for just adjudication]." FED. R. CIV. P. 12(b).

Motions to dismiss may be more commonly used in class actions. Of the 120 class actions for damages filed in the federal district court for the District of Columbia from July 1, 1966, to December 31, 1972, that had not been consolidated or transferred, 81 had reached some kind of disposition by the end of 1972. Motions to dismiss for failure to state a claim were granted in 16 (13.3% of total, 19.8% of 81), and motions to dismiss on other grounds (lack of jurisdiction, voluntary dismissal, improper party, want of prosecution, etc.) were granted in 17 cases (14.2% of total, 21.0% of 81). STAFF OF SENATE COMM. ON COMMERCE, 93D CONG., 2D SESS., CLASS ACTION STUDY 8-9 (Comm. Print 1974) [hereinafter CLASS ACTION STUDY].

285. 355 U.S. 41 (1957).

286. *Id.* at 45-46; see, e.g., *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.")

287. See generally Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643 (1985). But cf. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1984, at 173 (1986) (study found "no evidence to support the often cited existence of a national 'litigation explosion' in the state trial courts").

288. See FED. R. CIV. P. 11 advisory committee's note. Rule 11 was amended in 1983 because it had "not been effective in deterring abuses," and amendment was needed to "reduce the reluctance of courts to impose sanctions." *Id.* The signature of an attorney on a complaint now constitutes a certification that he has read the complaint and "that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." FED. R. CIV. P. 11. According to the advisory committee's note, this language "stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances." FED. R. CIV. P. 11 advisory committee's note. Where a paper is signed in violation of this requirement, the court "shall impose . . . an appropriate sanction, which may include . . . a reasonable attorney's fee," upon the lawyer who signed the paper, the client, or both. FED. R. CIV. P. 11.

Courts in antitrust and other cases have responded to the amendment by imposing sanctions with some regularity. See, e.g., *Westmoreland v. CBS*, 770 F.2d 1168 (D.C. Cir. 1985) (when party in libel suit

more potent force.²⁸⁹ Inevitably, the concern over litigation excesses is changing thinking about motions to dismiss.²⁹⁰

2. In Antitrust Cases

At one time antitrust complaints were held to a more stringent standard than

sought to hold nonparty witness in contempt for refusing to permit deposition to be videotaped, rule 11 required sanctions); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (sanctions required where competent attorney would have concluded that antitrust claim "was destined to fail"); *Monument Builders, Inc. v. American Cemetery Ass'n*, 629 F. Supp. 1002, 1012-13 (D. Kan. 1986) (requiring plaintiff and attorneys to pay attorneys' fees incurred in having antitrust claim dismissed); see also A. MILLER, *supra* note 284, at 17 (remarks by reporter to the advisory committee that although "shall often means may; not here—shall means shall" in rule 11); Schwarzer, *Sanctions under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985) (reviewing standards); Strasser, *Sanctions: A Sword Is Sharpened*, Nat'l L.J., Nov. 11, 1985, at 1, col. 2 (examples of increasing use); cf. Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986) (reversing award of sanctions for filing civil rights complaint, court said sanctions should be assessed where a complaint "is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith"); Seglin v. Esau, 769 F.2d 1274, 1280-81 n.6 (7th Cir. 1985) ("the bar is now put on notice that in the future this court will not tolerate such groundless pleading").

The 1983 amendment of rule 11 was part of a program of changes designed to reduce the burden of litigation. Included in the program were amendments to rule 7 (to make clear that rule 11 applies to pleadings), rule 16 (among other things, to authorize sanctions against parties and attorneys interfering with judicial management of litigation), and rule 26 (to encourage judges to limit unnecessary discovery, and to require certification, subject to possible sanction, of the propriety of discovery requests and responses. See *Amendments to the Federal Rules of Civil Procedure*, 97 F.R.D. 165 (1983); A. MILLER, *supra* note 284 (reviewing and critiquing amendments). See generally Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions about Power*, 11 HOFSTRA L. REV. 997 (1983) (questioning the power to issue such rules). Three years earlier Congress amended 28 U.S.C. § 1927 to add attorneys' fees to the costs a lawyer may be ordered to satisfy personally when caused by dilatory litigation practices. See H.R. CONF. REP. NO. 1234, 96th Cong., 2d Sess. 8 (1980). More recently, the Federal Judicial Center contributed the MANUAL FOR COMPLEX LITIGATION (2d ed. 1985) to the effort to reduce the burden of litigation. See Panel Discussion, *Charting a New Course for Complex Cases: The New MANUAL FOR COMPLEX LITIGATION, SECOND*, 54 ANTITRUST L.J. 417 (1985) (reviewing MANUAL).

289. Rule 68 provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer the offeree must pay the costs incurred after the making of the offer." FED. R. CIV. P. 68; see *Marek v. Chesny*, 105 S. Ct. 3012 (1985) (defining "costs" to include attorney's fees whenever the underlying statute does); see also *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure* (1984), reprinted in 102 F.R.D. 407, 423 (1984) (proposed amendment to rule 68 "designed to encourage early settlements, avoid protracted litigation, and thus reduce the current enormous delay and expense that marks dispute resolution in federal courts"). See generally Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REF. 425 (1986) (questioning wisdom of further amendment).

290. For a recent impressionistic suggestion that courts have started requiring a "new fact pleading," particularly in securities fraud, civil rights, and conspiracy cases where litigation volumes have been high, see Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 436 (1986) (partially criticizing this trend and recommending expanded use of summary judgment instead). In a particularly reflective discussion, Judge Newman of the Second Circuit suggests that if judges thought about fairness to the legal system as well as to the parties in a particular action—as they should—then

I doubt that we should retain our current rule that a pleading should remain in court if any conceivable set of facts might support its allegations. We need not return to the days of Chitty's pleadings, but we could insist that complaints contain assertions of the essential facts. When the claim survives dismissal, I doubt that discovery should be routinely permitted Once discovery is complete, I doubt that we should confine the use of summary judgments as rigidly as we now do.

Newman, *supra* note 287, at 1650-51.

other complaints,²⁹¹ and motions to dismiss antitrust complaints enjoyed a warm reception by the courts. In part this was a response to the perceived greater complexity and burden of antitrust cases,²⁹² which, as discussed above, is indirectly related to trebling. The warm reception was also a direct response to trebling.²⁹³ As a 1939 student note explained:

Whether triple damages are punitive in nature has been disputed, but pleading requirements at any rate have assumed the same protective character that is typical of criminal prosecutions. Not only must the complaint allege violation, injury and proximate cause, but it must do so with enough specification to warn the defendant of the particular offense and convince the court that a cause of action has been stated, since the remedy is drastic and must be strictly construed. The degree of particularity is intermediate between the requirements of a criminal indictment and equitable bill.²⁹⁴

As all antitrust litigators know, this rigorous approach to antitrust complaints gradually died out, or at least courts asserted it did.²⁹⁵ The same pleading standards are said to apply in antitrust as in other cases.²⁹⁶ Indeed, support can be found for the proposition that more relaxed standards apply to pleadings in antitrust cases, because of the difficulty of proof.²⁹⁷ As the Supreme Court said in *Rex Hospital*,²⁹⁸ "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."²⁹⁹ This is a "concedely rigorous standard."³⁰⁰

There has been little empirical work exploring the effect of the relaxed plead-

291. See McElroy, *Federal Pretrial Procedure in an Antitrust Suit*, 31 Sw. L.J. 649, 679 (1977) (old view required actual detail in pleadings).

292. See *New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp.*, 16 F.R.D. 203, 205-06 (S.D.N.Y. 1954) (burden of triple damages antitrust actions has been matter of great concern to courts; insufficiently specific complaints may create "bottomless sea of interrogatories, depositions, and pre-trial proceedings" on irrelevant issues); see also Dawson, *The Place of the Pleading in a Proper Definition of the Issues in the "Big Case"*, 23 F.R.D. 430 (1958).

293. 2A J. MOORE & J. LUCAS, *supra* note 283, ¶ 8.17[3].

294. Note, *Fifty Years of Sherman Act Enforcement*, 49 YALE L.J. 284, 297 (1939) (citations and footnotes omitted). The writer added that "requirements of pleading and proof are occasionally eclipsed by the hazards of normal trial procedure, which may withhold a victory almost won [citing 11 plaintiff trial victories that were reversed]. Under the circumstances it is not at all surprising that prospective litigants hesitate to take the risk." *Id.* at 298 & n.93.

295. See Note, *Adequacy of Notice Pleading Reasserted in Second Circuit Private Antitrust Suits*, 58 COLUM. L. REV. 408, 410 (1958) (warning that a "probable result [will be] an increase in the number of strike suits and private fishing expeditions undertaken with a bare suspicion of antitrust violations"); Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1033-34 (1952).

296. See McElroy, *supra* note 291, at 679; *New Home Appliance Center v. Thompson*, 250 F.2d 881, 883 (10th Cir. 1957) (liberal pleading standards as applicable to antitrust cases as any other case; under these standards complaint need not plead detailed facts or state particular theories for recovery). See generally Clark, *Comment on Judge Dawson's Paper on the Place of the Pleading in a Proper Definition of the Issues in the "Big Case"*, 23 F.R.D. 435 (1958); Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45 (1957).

297. See 2A J. MOORE & J. LUCAS, *supra* note 283, ¶ 8.17[3].

298. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976).

299. *Id.* at 746 (quoting *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962)); see *Radovich v. National Football League*, 352 U.S. 445, 453 (1957) ("test as to sufficiency . . . is whether 'the claim is wholly frivolous' ") (quoting *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271, 274 (1923)).

300. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976).

ing standard. In 1961, Fred Freund relied on a handful of cases to conclude that "it is a signal feat for a party permanently to enjoy the fruits of a dismissal for failure to state a claim."³⁰¹ This continues to be the accepted wisdom.³⁰² Indeed, one noted plaintiffs' antitrust lawyer has claimed that, at least until the Supreme Court's decisions in *McCready* and *Associated General Contractors*, "lawyers who counsel potential plaintiffs tell them, 'Don't worry. I can draft a complaint that will get you into court and will allow you to engage in sufficient discovery so we can determine whether the defendant has done anything wrong.'"³⁰³

Benjamin DuVal's investigation of Chicago class actions conflicts with this generally accepted wisdom. DuVal reviewed all antitrust treble damages actions filed in the Northern District of Illinois from July 1, 1966, through June 30, 1973, that were not subsequently transferred out of the district. DuVal found that 10.8% of all terminated nonclass action suits and 17.3% of all terminated class action suits were "involuntarily dismissed."³⁰⁴ DuVal cautioned that his numbers were small. He also speculated that the greater success of defendants in class suits may be attributable to the tenuous nature of many class actions where lawyers are lured by the prospect of rich rewards or hope to coerce settlement of nonmeritorious suits, or to judges' interest in dismissing class suits to avoid requiring the giving of notice.³⁰⁵

Four recent Supreme Court opinions suggest that the Court may ease the standard for granting motions to dismiss in antitrust suits. In a footnote, wholly unnecessary to the result, Justice Stevens for the Court in *Associated General Contractors* said that the lawfulness of defendant's conduct might have been "evident" had the trial court required plaintiff to describe the antitrust violation "with particularity."³⁰⁶ He added that "[c]ertainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."³⁰⁷ In *Reiter v. Sonotone Corp.*,³⁰⁸ the Court noted that its decision that consumers may recover for overcharges "need not result in administrative chaos, class-action harassment, or 'windfall' settlements if the district courts exercise sound discretion and use the tools available."³⁰⁹ The Court admonished district courts to

301. Freund, *The Pleading and Pre-Trial of an Antitrust Claim*, 18 A.B.A. ANTITRUST SEC. REP. 15, 18 (1961).

302. See P. AREEDA, ANTITRUST ANALYSIS 96 (3d ed. 1981) ("courts seem to allow . . . unsupported complaints to stand long enough to permit the plaintiff access to discovery").

303. Susman, *Standing in Private Antitrust Cases: Where is the Supreme Court Going?*, 52 ANTITRUST L.J. 465, 466 (1983). Susman added, "No longer is it possible to give that assurance to a potential plaintiff." *Id.*

304. DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 1976 AM. B. FOUND. RES. J. 1273, 1306-07, 1342. Just under half of the "involuntarily dismissed" cases were dismissed for failure to state a claim. These figures combine DuVal's numbers for "clustered" and "unclustered" cases. Looking only at "unclustered" cases, 10% of nonclass cases were involuntarily dismissed.

305. *Id.* at 1307. A Senate Commerce Committee study of class actions also found a higher than average number of dismissals for failure to state a claim. See CLASS ACTION STUDY, *supra* note 284.

306. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

307. *Id.*

308. 442 U.S. 330 (1979).

309. *Id.* at 345.

“be especially alert to identify frivolous claims brought to extort nuisance settlements”³¹⁰ Finally, in *Monsanto*³¹¹ and *Matsushita*³¹² the Court expressed concern about allowing juries to award treble damages based on ambiguous evidence of conspiracies. These cases are invitations for lower courts to require more specificity in antitrust complaints—specificity that might be unnecessary were the stakes less high and the controversy less complex.

As shown below, this invitation apparently is being accepted and, indeed, was being accepted even before it was issued.³¹³ For example, in *Havoco of America, Ltd. v. Shell Oil Co.*,³¹⁴ Judge Pell, affirming the dismissal of an antitrust complaint, observed that “if the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility.”³¹⁵ Similarly, in *Sutliff, Inc. v. Donovan Cos.*,³¹⁶ Judge Posner cited *Associated General Contractors* and wrote that “the heavy costs of modern federal litigation, especially antitrust litigation, and the mounting caseload pressures on the federal courts, counsel against launching the parties into pretrial discovery if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint.”³¹⁷

B. CONVENTIONAL WISDOM AND NEW TEACHING ON SUMMARY JUDGMENT

1. Conventional Wisdom in General

Rule 56, which provides for summary judgment, is deceptively simple. Any party may move for partial or complete summary judgment, and

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is *entitled to a judgment as a matter of law*.³¹⁸

A motion may be granted in part or in full.³¹⁹ By a 1963 amendment, when a motion is

made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his re-

310. *Id.*

311. *Monsanto Co. v. Spray-Rite Corp.*, 465 U.S. 752, 763-74 (1984) (affirming plaintiff jury verdict but finding court of appeals applied incorrect standard). *Monsanto* is discussed *supra* text accompanying notes 204-05 and *infra* notes 456, 458 and accompanying text.

312. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1357 (1986) (reversing denial of summary judgment). *Matsushita* is discussed *infra* part IV.B.4.

313. Current cases provide little support for Wright and Miller's assertion that “[t]he current trend is toward greater liberality in pleading antitrust claims.” 5 C. WRIGHT & A. MILLER, *supra* note 283, § 1228, at 40 (Supp. 1986).

314. 626 F.2d 549 (7th Cir. 1980).

315. *Id.* at 553 (citation omitted).

316. 727 F.2d 648 (7th Cir. 1984).

317. *Id.* at 654; *see also* Seglin v. Esau, 769 F.2d 1274, 1283 (7th Cir. 1985) (affirming dismissal; “plaintiffs are required to be more specific as to the facts of the interstate commerce nexus before we will compel defendants to engage in protracted, expensive antitrust discovery”).

318. FED. R. CIV. P. 56(c) (emphasis added).

319. *See* FED. R. CIV. P. 56(d) (judgment may issue for less than entire relief requested).

sponse, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.³²⁰

When the affidavit(s) of the nonmoving party show why he cannot present essential facts by affidavit, "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had"³²¹

Buried within the unpretentious words of the first part of the rule quoted above lie some of the most troublesome issues in the law:

(1) What is a question of "fact," as opposed to a question of "law"? It is routinely said that a court hearing a motion for summary judgment should not resolve disputed fact issues, but may (and perhaps should) resolve disputed issues of law.³²² But which issues involve fact, which involve law? Particularly troubling are "mixed questions of fact and law," or, as they are also described, questions requiring the application of legal standards to facts. The customary illustration is taken from negligence law. How fast a defendant traveled is a question of fact; whether traveling at that speed is negligent is a mixed question of fact and law.³²³ Although most commentators agree that both determining speed and deciding whether that speed is negligent should be considered fact questions (and thus answered by the jury in a jury case),³²⁴ there is less agreement on other issues of mixed fact and law.³²⁵

320. FED. R. CIV. P. 56(e). This provision was added in 1963 to overcome a line of cases denying summary judgment whenever a "well-pleaded" complaint set forth a cause of action. The advisory committee said denial of summary judgment in this situation was inappropriate because "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." FED. R. CIV. P. 56(e) advisory committee's note. However, the advisory committee cautioned that the amendment was not "designed to affect the ordinary standards applicable to the summary judgment motion Where the evidentiary matter in support of the motion does not establish the absence of genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." *Id.*; see also Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 HARV. L. REV. 801, 825-28 (1964) (views of reporter to advisory committee).

321. FED. R. CIV. P. 56(f).

322. *E.g.*, 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, at 84-85, 104 (2d ed. 1983) (under the rule, "the judge cannot summarily try the facts," but summary judgment should not be denied just because difficult questions of law exist; delay only postpones facing problem and increases costs).

323. See generally W. PROSSER & W. KEETON, *supra* note 65, § 37 ("the existence of negligence in a particular case is sometimes said to be a mixed question of law and fact").

324. *E.g.*, *id.*; see Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1876-77 (1966) (jury rather than judge normally decides whether undisputed historical facts will be characterized as negligence).

325. Cf. Asbill & Snell, *Summary Judgment under the Federal Rules—When an Issue of Fact is Presented*, 51 MICH. L. REV. 1143, 1144 (1953) (to decide whether genuine issue of material fact exists judge balances potential positive effects of full evidentiary trial against cost of lengthy trial and possibility of use of threat of trial to coerce settlement); Schwarzer, *Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 471 (1984) (test should be "whether the disputed issue, as a matter of precedent or policy, should be decided by the jury or by the court"); Weiner, *supra* note 324, at 1918-19 (same). Separating issues of fact from issues of law is further complicated by the constitutional right to a jury trial. See generally Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CALIF. L. REV. 1, 7-22 (1981) (discussion of seventh amendment jury trial requirement). The same distinction, between issues of law and fact, torments analysis of Rule 52(a), which provides that appellate courts shall not set aside "[f]indings of fact . . . unless clearly erroneous." See Pullman-Standard v. Swint, 456 U.S. 273, 288-90 & n.19 (1982) (referring to "vexing nature of the distinction between questions of fact and questions of law," the Court declined to address "the much-mooted

(2) What facts are material? Facts are material if they make a difference.³²⁶ If the law is not clear, however, it takes great courage to say that any fact could not make a difference.

(3) What is a "genuine issue" of material fact, or, perhaps more important, how convincingly must a movant prove the absence of a "genuine issue"? Several courts have further complicated the question by embellishing the words of the rule by stating, for instance, that summary judgment must be denied if the "slightest doubt" over the facts at issue remains.³²⁷ Such glossing of the rule has fallen from favor.³²⁸ The seriously difficult problem is how to resolve cases where nonmovants have not shown a genuine issue as of the date of decision, but might be able to create one through discovery or at trial. In the civil rights case *Adickes v. S.H. Kress and Co.*,³²⁹ the Court suggested that the movant had to show the impossibility of evidence creating a genuine issue of fact.³³⁰ This approach, however, has not been widely accepted.³³¹ Difficulty nonetheless arises whenever plaintiffs plan to develop evidence not yet available to them.³³²

These troublesome issues are more challenging in some kinds of cases than in others. Thus much effort has been expended discussing what are the most appropriate (or likely, which may not be the same thing) situations for summary judgment. Summary judgment is said to be most likely to be used in four types of cases: (1) small cases, where little is at stake;³³³ (2) cases involving simple facts;³³⁴ (3) cases turning on documents, rather than on witnesses;³³⁵ and (4)

issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact," although it noted that some Supreme Court decisions support independent review by appellate courts of such questions, and there is "substantial authority" in the circuits "on both sides of this question"). See generally Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of Pullman-Standard v. Swint*, 58 TUL. L. REV. 403, 425 (1983) (advocating an approach based on policy considerations); Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEX. L. REV. 157, 170-86 (1985) (criticizing Supreme Court's handling of the question and advocating a "functional approach").

326. E.g., Note, *Summary Judgment under Federal Rule of Civil Procedure 56—A Need for a Clarifying Amendment*, 48 IOWA L. REV. 453, 454 (1963); see also Schwarzer, *supra* note 325, at 480 (material facts those that will affect outcome and not those that may affect outcome); see also *infra* note 394.

327. E.g., 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2725, at 97-98.

328. E.g., Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 712 (1984) (most courts now "take a neutral position neither favoring or disfavoring the grant of the motion"); Rogers, *Summary Judgments in Antitrust Conspiracy Litigation*, 10 LOY. U. CHI. L.J. 667, 686 (1979) (lower courts not following "requirement that all inferences of conspiracy be conclusively disproved for summary judgment to issue").

329. 398 U.S. 144 (1970).

330. *Id.* at 157-61.

331. See Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 76-78 (1977) (*Adickes* suggestion "strained"); Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774, 782 n.33 (1983) (*Adickes* "seemed to muddle the understanding of the nature of the movant's initial burden").

332. See generally Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 762-64 (1974) (discussing flexible approach allowing opposing parties who have reasonable chance of success to get to trial).

333. Cohen, *Summary Judgment in the Supreme Court of New York: A Factual Study of Rule 113*, 32 COLUM. L. REV. 830, 854 (1932); Sandler & Corderman, *Winning a Summary Judgment*, LITIGATION, Spring, 1984, at 15; cf. Note, *Factors Affecting the Grant or Denial of Summary Judgment*, 48 COLUM. L. REV. 780, 784 (1948) (one study showed summary judgment likely granted when amount contested is smaller; absent further study, such proposition is conjecture).

334. See Kennedy, *The Federal Summary Judgment Rule—Some Recent Developments*, 13 BROOKLYN L. REV. 5, 11 (1947) (summary judgment will be denied where facts are complicated); Note, *supra* note 333, at 784 (complex cases generally require full trial).

335. See Cohen, *supra* note 333, at 854 ("summary judgment is most readily applied to actions in

bench trials, where the traditional and constitutionally required deference to a jury is not a factor.³³⁶

On the other hand, summary judgment is said to be unlikely to be used in the converse situations, and in five additional types of cases, where: (1) credibility is critical;³³⁷ (2) the nonmovant has unequal access to facts, or for some other reason requires discovery;³³⁸ (3) the legal issues are complicated;³³⁹ (4) court dockets are not crowded, so trial time need not be conserved;³⁴⁰ and (5) the court is in the Second Circuit.³⁴¹ Litigators are warned that unsuccessful motions cause delay, expose facts and strategy to the opposition, and may create bad law;³⁴² judges are warned that summary judgment orders suffer an uncommonly high rate of reversal,³⁴³ although some dissent from the latter proposition has been voiced.³⁴⁴

As for actual frequency of use, many commentators suggest that the summary judgment motions "are put to little use except in cases that depend on documentary evidence or on [a] determination of a question of law in a case involving

which the evidence is almost entirely documentary and less effective in actions in which the documentary evidence is rare").

336. J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 440 (1985) ("extreme deference of judges to jury trial"); see Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612, 613-14 (1971) (in cases not subject to jury trial, summary judgment may be granted where there is no dispute over evidentiary facts); Note, *supra* note 333, at 784 ("where the judge himself, rather than a jury, would find the facts at the trial, he may be less hesitant to dispense with a formal trial"); cf. Bogart, *Summary Judgment: A Comparative Critical Analysis*, 19 OSGOODE HALL L.J. 552, 578-79 (1981) (summary judgment not appropriate in negligence cases due to "great respect for the role of the jury in these cases").

337. *E.g.*, 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2730, at 237-38 (summary judgment inappropriate because credibility inquiry involves determination of party's state of mind from factual differences over which reasonable persons may differ).

338. *E.g.*, Louis, *supra* note 328, at 720 (summary judgment traditionally denied in state of mind cases).

339. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) ("summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import") (footnote omitted); 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2725, at 85-88 ("the resolution of complex questions of law frequently requires a more concrete factual development than may be obtained through summary proceedings," although the difficulty of the legal issue does not by itself bar summary judgment); A. MILLER, *supra* note 284, at 8 ("If it is a serious case, a complicated case, the kind of case that breaks your back, you are swimming upstream against the current if you try to grant the [summary judgment] motion.") (citing *Poller*).

340. Hays, *The Use of Summary Judgment*, 28 F.R.D. 126, 133 (1962); Note, *Use of Summary Judgment by Type of Case*, 36 MINN. L. REV. 515, 518 (1952).

341. See C. WRIGHT, *supra* note 284, at 668-69 (Second Circuit cases generally follow views of Judge Frank, a leading critic of summary judgment).

342. See generally Sandler & Corderman, *supra* note 333, at 15 (discussion of strategy underlying use of summary judgment motions); Stamper, *Rule 56: Using Summary Judgment Motions*, LITIGATION, Spring, 1981, at 36 (same).

343. See *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1145 (5th Cir.) ("fatality rate in summarily disposing of litigation . . . is high indeed"), *cert. denied*, 414 U.S. 1116 (1973); Fellmeth & Papageorge, *A Treatise on State Antitrust Law and Enforcement: With Models and Forms*, in *Antitrust and Trade Reg. Rep.* (BNA) No. 892, Supp. No. 1, at 45 (Dec. 7, 1978) ("[i]n antitrust cases, a summary judgment for defendants is difficult to sustain"); Pollak, *Liberalizing Summary Adjudication: A Proposal*, 36 HASTINGS L.J. 419, 420 (1985); Sonenshein, *supra* note 331, at 775 n.5 (reversal rates in several jurisdictions exceed 50%); see also Neubauer, Snyder & Nolan, *Judges Compare Courts*, LITIGATION, Spring, 1985, at 15 (comment of District Judge Gadbois) (summary judgment is "a high-risk judicial decision, as we all know"); *id.* (comment of District Judge Aspen) ("very difficult" to enter a summary judgment "that is going to hold up" because "there is always some issue of fact or some question as to intent . . . that is going to require some type of evidentiary hearing").

344. See Schwarzer, *supra* note 325, at 467 & n.9 (summary judgment affirmed by Ninth Circuit in 63% of decisions from January, 1979, to June, 1983; overall rate of affirmance varied between 69%-71%).

undisputed facts³⁴⁵ Other observers, however, detect a trend toward increased use of summary judgment.³⁴⁶ The few empirical studies of the use of summary judgment generally confirm that it is used only in a small percentage of cases, but find that, when summary judgment is sought, movants enjoy healthy success rates.³⁴⁷

The most important summary judgment study is probably the one conducted by William McLauchlan. McLauchlan examined all of the cases filed in the Eastern Division of the Northern District of Illinois during the 1970 fiscal year.³⁴⁸ Summary judgment was sought in 4.0% and granted in 2.3% of all cases.³⁴⁹ Motions were granted 51.6% of the time,³⁵⁰ or in 58.7% of the cases in which a motion was filed.³⁵¹ Defendants generally fared much better than plaintiffs; only 24.0% of plaintiff's motions were granted, whereas 62.1% of defense motions were granted.³⁵² Summary judgment motions played a particularly important role in contract cases, where they were sought in 7.4% of the cases.³⁵³ Motions were granted in 63.6% of these cases.³⁵⁴ Excluding contract cases, summary judgment was granted in only 2.0% of all cases.

McLauchlan also randomly sampled all reported federal cases from 1938-1968 in which a motion for summary judgment or a motion to dismiss for failure to state a claim was made.³⁵⁵ Motions were granted in 58.3% of the cases in which

345. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 274 (3d ed. 1985); see also Hays, *The Use of Summary Judgment*, 28 F.R.D. 126, 126-27 (1960) ("all of the surveys of reported decisions have revealed that by far the larger number of motions for summary judgment are denied"); A. MILLER, *supra* note 284, at 8 (rules 12(b)(6) and 56 are "toothless tigers").

346. See Louis, *supra* note 328, at 709-11 (increased use of summary judgment in cases involving actual malice determination); Sandler & Corderman, *supra* note 333, at 15 ("summary judgments are creeping into favor").

347. Cohen, *supra* note 333, at 836 (of 250 summary judgment motions studied, 139 were granted); Guiber, *Summary Judgments—Tactical Problems of the Trial Lawyer*, 48 VA. L. REV. 1263, 1271-72 (1962) (Fourth Circuit affirmed 27 summary judgment motions between 1938-1961 while reversing only 14); McDonald, *The Effective Use of Summary Judgment*, 15 SW. L.J. 365, 384-85 (1961) (of 1,249 summary judgment motions made in 86 district courts in 1960, 71% were granted); McLauchlan, *An Empirical Study of the Federal Summary Rule*, 6 J. LEGAL STUD. 427, 436 (1977) (summary judgment motion granted in 310 of 531 cases); Note, *supra* note 340, at 518-19 (29 summary judgments granted in Minnesota federal district courts during 1948-1949; 11 were denied). See generally Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467 (1958). But see Hays, *supra* note 340, at 126-27 ("all of the surveys of reported decisions have revealed that by far the larger number of motions for summary judgment are denied"); cf. Grossman, Kritzer, Bumiller, Sarat, McDougal & Miller, *Dimensions of Institutional Participation: Who Uses the Courts, and How?*, 44 J. POL. 86, 105 (1982) (A study of sample of "middle range disputes" ending in 1978 in five federal district courts revealed that the percentage of cases with trials ranged from 3.3% (in Philadelphia) to 11.2% (in New Mexico) and the percentages of cases decided on "motions" (considered to be a "rough index" of "judgments by the court") ranged from 17.9% (in Philadelphia) to 28.8% (in Los Angeles). In each district, a majority of dispositions were "dismissals," which was considered to be a "rough index of settlements."). Summary judgment, as such, was found to have been used in a substantial number of cases only in a Senate Commerce Committee study of class actions. That study found that defendants won these motions in 11 (9.2%) of 120 unconsolidated, untransferred class actions filed in federal district court between mid-1966 and the end of 1972, and plaintiffs individually or as a class won summary judgment in 12 cases (10%). CLASS ACTION STUDY, *supra* note 284, at 10.

348. McLauchlan, *supra* note 347.

349. *Id.* at 449-57.

350. *Id.* at 453.

351. *Id.* at 451.

352. *Id.*

353. *Id.* at 451.

354. *Id.*

355. *Id.* at 435-49. McLauchlan grouped summary judgment motions and motions to dismiss for fail-

they were made; including partial grants, that figure rises to 73.4%.³⁵⁶ When analyzed by type of action, summary judgment was least important in statutory cases, where motions were granted in only 50.4% of cases where motions were filed; including partial grants, that figure rises to 71.6%.³⁵⁷ McLauchlan speculates, probably correctly, that these figures are biased upward because his sample included trial and appellate decisions, and only grants are appealable.³⁵⁸ Defendants were more likely to move than plaintiffs; only 21.7% of the sampled cases involved only motions made by plaintiffs.³⁵⁹ Plaintiffs also were less successful. They won 54.3% of their motions, and won or partially won 62.9%, whereas defendants won 70.0% and won or partially won 73.9%.³⁶⁰

Since approximately 40% of his sample were appellate cases, McLauchlan assumed that losing parties appeal approximately 40% of the time. Appellate courts affirmed 51.4% of the cases. The affirmance rate varied among the circuits, from 37.5% in the First Circuit to 73.3% in the Fourth Circuit.³⁶¹ However, because McLauchlan reviewed only a handful of cases per circuit (8 and 15 in First and Fourth Circuits, respectively) conclusions cannot be made with statistical confidence.

2. *Celotex* and *Anderson*

The Supreme Court reaffirmed the importance of summary judgment in a provocative trio of cases decided this year.³⁶² Their central lesson is that "summary judgment . . . is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole."³⁶³ Correctly interpreted, the cases do little more than endorse standards already being applied by the more thoughtful courts, but the cases are susceptible to misinterpretation. Moreover, since many summary decisions turn less on precise phrasings of legal standards than on attitudes toward the motion,³⁶⁴ the three cases' celebration of

ure to state a claim under the heading "summary judgment." Both motions are treated in similar fashion here.

356. *Id.* at 437.

357. *Id.*

358. *Id.* at 436. Martin Louis reviewed the 243 motions for summary judgment reported in 28 U.S.C.A. (West Supp. 1973) under FED. R. CIV. P. 56, at 35-66 and found that defendants were successful 45% of the time, plaintiffs 43%. Here, defendants filed 69% of all motions. Louis, *supra* note 332, at 745 n.4. McLauchlan responded that these results were statistically significant only at the .8 level, which is not normally considered an acceptable level of confidence. McLauchlan, *supra* note 347, at 442 n.65.

359. *Id.* at 442.

360. *Id.* at 441.

361. *Id.* at 446-49.

362. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986). Although in this work as presented in November, 1985, the legal standards governing summary judgment were discussed principally to provide a context within which to evaluate empirical results that obviously were obtained before these opinions were issued, failure to account for these cases would make the article's discussion incomplete and misleading. Moreover, as is seen *infra*, *Matsushita* provides important support for this article's "equilibrating" thesis.

363. *Celotex*, 106 S. Ct. at 2555; *cf. Summary Judgment*, Wall St. J., July 18, 1986, at 12, col. 1 (editorial hailing *Anderson* as a "less-noticed decision that will have a wide impact in the nation's courtrooms, perhaps even marking the beginning of the end of the litigation explosion").

364. *Cf.* 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2725, at 12 (Supp. 1986) (decisions are case-by-case).

summary judgment may be more important than any reformulation of standards.

The holdings of the two nonantitrust cases, which will be discussed here, are simple and the cases should have been noncontroversial. Both concern the determination of whether a "genuine issue" exists.³⁶⁵ In *Celotex Corp. v. Catrett*,³⁶⁶ a defendant in an asbestos products liability suit moved for summary judgment more than a year after receiving the complaint. It argued that no evidence connected the decedent with its asbestos, and that the plaintiff's interrogatory answers failed to identify any witnesses who could provide such a connection.³⁶⁷ The trial court granted summary judgment but was reversed by a divided court of appeals, which wrote that rule 56 imposed upon the movant a "burden of coming forward with proof of the absence of any genuine issues of material fact."³⁶⁸ Since the defendant had offered no evidence, the court reasoned, summary judgment must be denied, and since it found the defendant's moving papers "patently defective,"³⁶⁹ it did not evaluate the plaintiff's evidence. The Supreme Court reversed, ruling that in a proper case a moving party not bearing the ultimate burden of proof may rely on the record to show the absence of a genuine dispute about a material fact.³⁷⁰

This is an unremarkable, sensible holding, and indeed no Justice disagreed,³⁷¹ even though it might appear inconsistent with some authorities.³⁷² Although language in the opinion could be read to suggest that defendants may require plaintiffs to prove their cases simply by filing unsupported motions,³⁷³ a careful reading of the opinion and of Justice White's essential concurring opinion makes

365. See *supra* text accompanying notes 327-32.

366. 106 S. Ct. 2548 (1986).

367. *Id.* at 2551.

368. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985) (footnote omitted).

369. *Id.* at 184.

370. 106 S. Ct. at 2553-54.

371. 106 S. Ct. at 2556 (Brennan, J., dissenting) ("I do not disagree with the Court's legal analysis."). See generally *id.* at 2561 (Stevens, J., dissenting on other grounds). For analyses considerably more thoughtful than the Court's, but reaching the same result, see *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 258 (3d Cir. 1983), *rev'd on other grounds sub nom.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

372. 6 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 56.15[3], at 56-480 (moving defendant "has the burden of producing evidence, of the necessary certitude, which negates the opposing party's (plaintiff's) claim"); see also *FED. R. CIV. P.* 56 advisory committee's note to 1963 amendment ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."); Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 *HARV. L. REV.* 801, 827 (1964) (nonmovant "need not come forward in any way if the moving party has not supported his motion to the point of showing that the issue is sham"); cf. *Louis*, *supra* note 332, at 758 (movant's submission must either (1) be sufficient to support a finding that an essential element of nonmovant's case is absent, or (2) show that nonmovant lacks or cannot obtain sufficient evidence to prevail). Compare 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2739, at 525 (nonmovant need not respond if "movant fails to meet his burden of showing the absence of any genuine issue of material fact") with *id.* § 2727, at 130-31 ("movant may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent," but movant "cannot sustain his burden merely by denying the allegations").

373. 106 S. Ct. at 2552-53:

the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

clear the limited nature of the holding.³⁷⁴

The other nonantitrust case, *Anderson v. Liberty Lobby, Inc.*,³⁷⁵ involved a libel action against columnist Jack Anderson. To prevail at trial, plaintiff would have to prove "actual malice" with "convincing clarity."³⁷⁶ When ruling on a defense motion for summary judgment, should the trial court's analysis subsume this standard, thereby granting the motion unless it finds a "genuine issue" as to whether actual malice could be shown *with convincing clarity*? The court of appeals, speaking through Judge Scalia, answered in the negative.³⁷⁷ The Supreme Court sensibly disagreed.³⁷⁸ The purpose of summary judgment is to look behind the pleadings to learn whether trial is necessary,³⁷⁹ and the necessity of trial can be determined only in light of the applicable law.³⁸⁰

Anderson has importance outside libel law because the Court announced, with varying phrasings, a generally applicable test for determining the existence of a "genuine issue."³⁸¹ That test, according to the Court's first phrasing, asks whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."³⁸² The Court said this standard "mirrors the standard

374. See *id.* at 2553 (movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact") (citation omitted); *id.* at 2555 (White, J., concurring) ("[T]he movant must discharge the burden the rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case It is the defendant's task to negate, if he can, the claimed basis for the suit."). The dissent disagreed only with the application of the Court's fairly-read principles to the particular facts of the case. Apparently the plaintiff had informed the defendant of her intention to call a Mr. Hoff as a witness connecting decedent with defendant's asbestos, but this information was not included in plaintiff's response to the summary judgment motion. *Id.* at 2560 & n.7 (Brennan, J., dissenting). Because defendant agreed at oral argument that plaintiff's naming of a witness would prevent summary judgment unless defendant could show the witness' testimony would not raise a genuine, material issue of fact, *id.* at 2556 (White, J., concurring), Justice Brennan argued that remanding was a "waste of time." *Id.* at 2560 n.7. The majority and Justice White, following the lead of the court of appeals, "declined to address either the adequacy of the showing made by respondent . . . or the question whether such a showing, if reduced to admissible evidence, would be sufficient." *Id.* at 2555 (opinion of Court); see *id.* at 2556 (White, J., concurring) (court of appeals found it unnecessary to address respondent's assertion that she had revealed sufficient evidence to defeat motion for summary judgment). Nor is it likely that defendants will file bare bones motions for summary judgment seeking to put plaintiffs to their proofs. Not only would this be inconsistent with the holding of *Anderson*, but lack of a basis for such a motion might expose lawyers to sanctions under rule 11. See *infra* note 288. To guard against this, to increase chances of success, and to educate the court on the merits of the case, summary judgment motions should continue to present full discussions.

375. 106 S. Ct. 2505 (1986).

376. *Id.* at 2508.

377. 746 F.2d 1563, 1570-71 (D.C. Cir. 1984) (to apply the "convincing clarity" standard at that stage would require an impermissible weighing of the evidence).

378. 106 S. Ct. at 2514.

379. FED. R. CIV. P. 56 advisory committee's note to 1963 amendment ("The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.").

380. Justice Rehnquist, joined by Chief Justice Burger, argued in dissent that the Court's refinement of the summary judgment standard in libel cases would change few outcomes and create unnecessary confusion. 106 S. Ct. at 2521-23 (Rehnquist, J., dissenting). Justice Brennan's dissent challenged the Court's various phrasings of the standards generally applicable in summary judgment cases. 106 S. Ct. at 2519 (Brennan, J. dissenting).

381. In a marvelous if slightly unfair analogy, Brennan likened the Court's exercise to a child's game of "telephone" in which, with each restating, "the original understanding is increasingly distorted." 106 S. Ct. at 2518-19 (Brennan, J. dissenting).

382. *Id.* at 2510.

for a directed verdict . . . which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict."³⁸³ Both of the leading treatises make the same comparison,³⁸⁴ as has the Court before.³⁸⁵ The *Anderson* standard applies only after there has been "ample opportunity for discovery,"³⁸⁶ and, as is discussed below but is not explicit in the opinion, the standard must be applied with sensitivity and with a careful consideration of the interaction of rule 56(c), which authorizes summary judgment, and rule 56(f), which governs cases where nonmovants cannot yet support their claims.³⁸⁷

Although *Celotex* and *Anderson* do not greatly change summary judgment doctrine, they perform an important pruning function, removing some of the misleading judicial supplementations to the rule. For instance, the court in *Adickes*³⁸⁸ said a moving defendant had to prove facts that were inconsistent with the plaintiff's theory (specifically, in that case, that no police officer was in the store in question),³⁸⁹ and some courts still seem to regard this as good law.³⁹⁰ Even Justice Brennan, dissenting in *Celotex*, rejects this approach.³⁹¹ It is enough for a moving defendant to show that plaintiff will not be able to prove its case at trial.

Similarly, numerous cases say that summary judgment should be denied un-

383. *Id.* at 2511. The Court's test in *Anderson* is virtually identical to one endorsed by all nine justices in *Matsushita*: "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" 106 S. Ct. at 1356 (citing *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)); *accord* 106 S. Ct. at 1363 (White, with Brennan, Blackmun & Stevens, JJ., dissenting) (agreeing on test).

384. 6 J. MOORE, W. TAGGART & J. WICKER, *supra* note 372, ¶¶ 56.02[10], 56.04[2] (theories underlying both motions are "essentially the same" and "essence of both motions is that there is no genuine issue of material fact to be resolved by the trier of the facts," although mechanics of the motions differ and burden on movant may be different); 10 C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2713.1 (theory and basic determination the same, although courts may be more reluctant to grant summary judgment because it comes relatively early, and courts should not decide summary judgment by anticipating a ruling on a judgment n.o.v. motion); *see also* Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L.R. 72, 79 (1977) (summary judgment should be granted "if and only if the evidence before the court would justify a directed verdict if presented at trial"); Schwarzer, *supra* note 325, at 481, 484 (1984) (genuine dispute if evidence sufficient to get to jury).

385. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983).

386. 106 S. Ct. at 2511 n.5.

387. Justice Brennan, in dissent, points to the Court's rephrasing of its test to ask whether the evidence "is so one-sided that one party must prevail as a matter of law," *id.* at 2512, and worries that judges are being invited to replace juries. *Id.* at 2519 (Brennan, J., dissenting). He also questions the consistency of this with the summary judgment clichés repeated by the Court: "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial," *id.* at 2511 (opinion of the Court); *Anderson*

by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 2513 (opinion of the Court) (citation omitted). Justice Brennan is correct that there is a tension between giving great deference and asking whether there is only one reasonable conclusion, but this tension is inevitable whenever a directed verdict or summary judgment is sought.

388. 398 U.S. 144 (1970).

389. *Id.* at 157.

390. *E.g.*, *Lee v. Flintkote Co.*, 593 F.2d 1275, 1281-82 & n.37 (D.C. Cir. 1979) (movant had to prove exclusive selling rights not awarded).

391. 106 S. Ct. at 2558-59 (Brennan, J., dissenting); *cf. supra* note 331.

less it is "quite clear what the truth is."³⁹² *Anderson* and *Celotex* redirect attention from "truth" to the plaintiff's case, although courts are still warned to be cautious.³⁹³ Courts are reminded that "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment."³⁹⁴

Another example of judicial rule-supplementing concerns issues of "state of mind." It is said that summary judgment often is inappropriate in such cases.³⁹⁵ *Anderson* explains that rule 56 applies in a "state of mind" case just as in any other, and a plaintiff that has enjoyed ample discovery may not rest on its pleading in the face of a properly supported motion even where the evidence is in the defendant's possession.³⁹⁶

The most important contribution of these cases to summary judgment doctrine will be their refocusing of attention on rule 56(f), the provision to be used when nonmovants cannot present sufficient evidence. Rule 56(f) resolves the tension between the *Anderson* directed verdict test and the superficially puzzling statement in *Celotex* that the nonmoving party need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgment."³⁹⁷ Where a nonmovant has had insufficient opportunity for discovery, under rule 56(f) a court should deny summary judgment.³⁹⁸ Where a diligent nonmovant has acquired significantly probative information supporting its theory but the information is inadmissible, a court should deny summary judgment where the

392. *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 467 (1962) (quoting *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)); see also 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2725, at 102 ("only in clear cases"); *id.* § 2727, at 124 (movant held to "stringent standard"; before summary judgment, "it must be clear what the truth is") (footnote omitted).

393. *Anderson*, 106 S. Ct. at 2513-14 ("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.") (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), a leading case supporting the principle that summary judgment may be inappropriate in complicated, important cases).

394. 106 S. Ct. at 2510; cf. *supra* note 326.

395. 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2730, at 238 (state of mind often can be determined only by drawing inferences as to which reasonable persons may differ); see also *Poller*, 368 U.S. at 473.

396. 106 S. Ct. at 2514. This discussion also clarifies the confusion created by the footnote in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), stating that proof of actual malice "does not readily lend itself to summary disposition." *Anderson* explains that this was simply an acknowledgment of the Court's reluctance to create special procedural rules over and above the constitutional protections for defendants in libel actions. 106 S. Ct. at 2514 n.7.

397. 106 S. Ct. at 2553-54 (adding that "Rule 56 does not require the nonmoving party to depose her own witnesses"); see *id.* at 2556 (White, J., concurring) ("if respondent has named a witness to support her claim, summary judgment should not be granted without *Celotex* somehow showing that the named witness' possible testimony raises no genuine issue of material fact"). Although rule 56 is not altogether clear on the question, the leading authorities had thought that summary judgment motions must be supported and opposed by relying on admissible evidence, 6 J. MOORE, W. TAGGART & J. WICKER, *supra* note 372, ¶ 56.11 [1.-8] (should not consider material not admissible or otherwise usable at trial); 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2721, at 40, § 2722, at 49, § 2727, at 156, § 2738, at 470 (court may consider any material admissible or usable at trial, but only admissible portion of deposition may be introduced), but that rule 56(f) explanations for inability to produce evidence may cite other sources, 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2740, at 530 (rule 56(f) affidavit need not contain evidentiary facts). As was explained by the reporter to the advisory committee when rule 56 was amended, "[u]nder Rule 56(f) the adversary need not even present the proof creating the minimal doubt on the issue of fact which entitles him to a full trial; it is enough if he shows the circumstances which hamstring him in presenting that proof . . ." Kaplan, *supra* note 372, at 826.

398. Cf. *Celotex*, 106 S. Ct. at 2554 (premature motions should be handled under rule 56(f)).

nonmovant can demonstrate a reasonable chance of perfecting the information.³⁹⁹ Where a nonmovant identifies a witness whose testimony will provide significantly probative evidence, and the movant cannot rebut this, summary judgment should be denied.⁴⁰⁰ But there is no need to proceed to trial where the plaintiff's evidence has been assembled and would not support a jury verdict.

This sharper focusing of the summary judgment inquiry should make courts less hesitant to grant motions. Moreover, *Celotex* and *Anderson*, together with the third case in the trio, signal an end to Supreme Court hostility toward summary judgment motions.⁴⁰¹ More than any doctrinal change, this new receptivity—this legitimization of the motion—will be their most important legacy.

3. Conventional Wisdom in Antitrust Cases

Prior to *Matsushita*, commentators and courts expressed three views of the use of summary judgment in antitrust cases. Some writers believed that summary judgment is particularly inappropriate in antitrust cases. Others believed that antitrust cases pose no special obstacles to the use of summary judgment. A few writers were beginning to argue that summary judgment is particularly desirable in antitrust cases.

The confusion over the proper role of summary judgment in antitrust cases is in part a matter of semantics. In a much quoted passage from the majority opinion in *Poller v. Columbia Broadcasting System*,⁴⁰² Justice Clark wrote that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."⁴⁰³ Does this language mean that summary judgment should not be used frequently in antitrust cases because "motive and intent play leading roles" in such cases, or does it mean that summary procedures have little use in those antitrust (and other) cases in which motive and intent happen to play leading roles? Logic would suggest the latter, and the Court reinforced logic six years after *Poller* in *First National Bank v. Cities Service Co.*⁴⁰⁴ In *Cities Service*, the Court declined to read basic summary judgment principles out of antitrust cases.⁴⁰⁵ Nonetheless,

399. A court should be especially hesitant to grant summary judgment where a nonmovant's information is inadmissible only because it is hearsay, since such information may be admitted where there are adequate "circumstantial guarantees of trustworthiness" and "the interests of justice" would be served by its admission, FED. R. EVID. 803(24). These interests may be difficult to determine early in a proceeding.

400. Of course, this is a key difference between summary judgment and a directed verdict. Whenever the demeanor of a witness may be material, courts will be more hesitant to grant summary judgment. See *Catrett v. Johns-Manville*, 756 F.2d 181, 188 n.2 (D.C. Cir. 1985) (Bork, J., dissenting); Currie, *supra* note 384, at 79 n.39.

401. Cf. A. MILLER, *supra* note 284, at 8 (speaking in 1984, Professor Miller told a judicial workshop that summary judgment is "not really an effective screen. The Supreme Court has told you people time and time again: 'Oh, summary judgment is wonderful device, but maybe you shouldn't grant it in any serious case.'").

402. 368 U.S. 464 (1964).

403. *Id.* at 473 (footnote omitted). The Court continued: "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" *Id.*

404. 391 U.S. 253 (1968).

405. *Id.* at 289-90. The Court wrote that rule 56(e) makes clear that

a party cannot rest on the allegations contained in his complaint in opposition to a properly

the felicitous words of *Poller* are ambiguous and acquired a charmed life of their own.

Justice Clark's statement in *Poller* is regularly quoted by commentators and judges, some of whom seem to adhere to the view that summary judgment is inappropriate in antitrust cases. Professors Wright, Miller, and Kane state that antitrust cases "are by their very nature poorly suited for disposition by summary judgment."⁴⁰⁶ Commerce Clearing House's Trade Regulation Reporter states that summary judgment "is used in antitrust cases, but not to the same extent as in other lawsuits."⁴⁰⁷ Von Kalinowski writes that "[t]he Supreme Court has indicated that summary judgment should be granted sparingly in complicated cases, particularly antitrust cases."⁴⁰⁸ Thus, *Poller*'s words have been given prescriptive, as well as descriptive, effect.

Even before *Matsushita*, both uses of *Poller* came under assault. At various times during the past fifteen years commentators have discerned a trend toward increased use of rule 56 in antitrust cases.⁴⁰⁹ Some commentators have expressly advocated increased reliance on summary judgment in antitrust cases.⁴¹⁰ The force of this assault has shifted the conventional view concerning the appropriateness of antitrust summary judgments toward equality with nonantitrust cases.

For some, moreover, the pendulum has swung past the point of equality.

supported summary judgment motion To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it.

Id. For discussion of *Cities Service's* limiting of *Poller's* expansive holding, see 2 P. AREEDA & D. TURNER, *supra* note 3, ¶ 316; Rogers, *supra* note 328, at 686; Sonenshein, *supra* note 331, at 790-91; Note, *Conscious Parallelism: The Business Judgment Defense in a Summary Judgment Context*, 35 HASTINGS L.J. 115, 118-19 (1983).

406. 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 322, § 2732.1, at 313; *accord, e.g.*, *Tiftarea Shopper, Inc. v. Georgia Shopper, Inc.*, 786 F.2d 1115, 1116 (11th Cir. 1986) (per curiam) (summary judgment should be used sparingly in antitrust cases because of factual nature).

407. 2 Trade Reg. Rep. (CCH) ¶ 9196, at 15,455 (1971).

408. 10 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION 113-5 (1985); *see also* R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 598 (2d ed. 1981) ("*Poller* has set the tone of antitrust litigation. Courts are quite unwilling to grant summary relief, for either side, unless the case is overwhelming.>").

409. *See* GARVEY STUDY, *supra* note 3, at 30 (quoting Robert Pitofsky); Schwarzer, *Techniques for Identifying and Narrowing Issues in Antitrust Cases*, 51 ANTITRUST L.J. 223, 226-27 (1982) (courts becoming more "sophisticated and understanding"); Lifland, *Antitrust*, 172 N.Y.L.J., July 19, 1974, at 1, col. 1 ("[A]s I look to what the district courts are doing—obviously they can't overrule the Supreme Court's decision in *Poller*—but they certainly are ignoring it and avoiding it. So you're getting lots of summary judgment dispositions in private treble damages cases.>").

410. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 288, ¶ 21.34 (mentioning survey of issues in antitrust cases where summary judgment granted); NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, *supra* note 167, at 68-70 (rule 56 viewed "as compatible with more effective use of summary adjudication"); *see also* 2 P. AREEDA & D. TURNER, *supra* note 3, ¶ 316 (summary judgment appropriate in many antitrust cases); *Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation*, 90 F.R.D. 208, 226 (1981) (courts should be receptive in complex cases); Blecher & Carlo, *Toward More Effective Handling of Complex Antitrust Cases*, 1980 UTAH L. REV. 727, 751 ("[t]he court should not be opposed to granting summary judgment on some issues"); Rogers, *supra* note 328, at 689 ("the judiciary should be urged to realistically and effectively use summary judgments to scale down and simplify the complex, interminable antitrust litigation that plagues the federal courts"); Withrow & Larm, *The "Big" Antitrust Case: Twenty-five Years of Sisyphean Labor*, 62 CORNELL L. REV. 1, 30-36 (1976) (when used correctly, summary judgment speeds resolution of complex antitrust cases). *See generally* Marcus, *supra* note 290, at 484-91 (calling for more flexible use of summary judgment).

These authorities point to the treble damages remedy (and the related complexity of litigation) as reasons why summary judgment has an especially important role in antitrust cases. This view had its genesis in Justice Harlan's dissent in *Poller*. He argued that, "having regard for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand of the trial courts, there is good reason for giving the summary judgment rule its full legitimate sweep in this field."⁴¹¹ Justice Harlan's dissent has been cited with increasing frequency in the past decade.⁴¹² The most prominent pre-*Matsushita* judicial endorsement of the favored status of antitrust cases for summary judgment is the Seventh Circuit's decision in *Lupia v. Stella D'Oro Biscuit Co.*,⁴¹³ but there are other examples.⁴¹⁴ As in Justice Harlan's *Poller* dissent, the focus in these opinions is the appropriateness of summary judgment in complex antitrust cases where treble damages are at stake.

Although there has been much discussion of the use of summary judgment in antitrust cases, there have been few empirical studies. McLauchlan's sampling of all reported federal cases between 1938 and 1968 found that summary judgment motions were granted outright in 54.2% of the antitrust cases where sought; including partial grants, that figure rises to 68.5%.⁴¹⁵ Comparable figures for all cases were 58.3% and 73.4%.⁴¹⁶ Antitrust's "win ratio" for outright grants was higher than the comparable figure of 50.4% for all statutory actions.⁴¹⁷ McLauchlan attributed this difference to the supposed amenability of per se violations to summary treatment.⁴¹⁸

DuVal's study of Chicago class actions examined the frequency with which

411. *Poller*, 368 U.S. at 478 (Harlan, J., dissenting).

412. A Westlaw search for citations to Justice Harlan's dissent revealed six appellate decisions dated 1978 or later and only one dated earlier. Seven of the 12 district court cases were dated 1976 or later. (Search request: *Poller* /s Dissent)

413. 586 F.2d 1163 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979). In *Stella D'Oro*, the Seventh Circuit said

[t]he very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also . . . the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way.

Id. at 1167.

414. See, e.g., *In re Municipal Bond Reporting Antitrust Litig.*, 672 F.2d 436, 440 (5th Cir. 1982) ("strong argument can be made, in an appropriate case, for the particular applicability of the summary procedure in antitrust litigation."); *Ralph C. Wilson Indus., Inc. v. American Broadcasting Co.*, 598 F. Supp. 694, 699 (N.D. Cal. 1984) ("Given the enormous expenditure of time and other resources commonly necessary in antitrust cases, the complexity of the issues and general inexperience of jurors in this area, as well as the need for uniformity and foreseeability in interpretations of the antitrust laws, the court should . . . be particularly alert to granting summary judgment in appropriate cases.")

415. McLauchlan, *supra* note 347, at 440.

416. *Id.* at 438.

417. *Id.*

418. *Id.* at 439. Others have pointed to per se rules as accounting for many antitrust summary judgments. See 6-PART 2 MOORE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.17[5], at 56-741 to 56-742 (2d ed. 1985) (summary judgment proper where defendant has committed per se violation of antitrust laws; otherwise, parties should go to trial); see also 10 J. VON KALINOWSKI, *supra* note 408, § 113.02, at 113-5.

summary judgment was granted in antitrust cases.⁴¹⁹ Summary judgment was granted in only seven, or 3.7%, of the 191 terminated cases in his sample—once for a plaintiff and six times for defendants. Excluding class actions, in which it was never granted, summary judgment was granted in 5.0% of all terminated cases.⁴²⁰

Finally, use of summary judgment in antitrust cases was included in a study for the A.B.A. Antitrust Section conducted by National Economic Research Associates, Inc.⁴²¹ After reviewing all private antitrust suits pending in the Southern District of New York during part or all of 1973-1978, the study reported that "summary judgment and other motions" by defendant—apparently including involuntary motions to dismiss—represented 13% of all terminated cases, compared to the 81% of all terminations accounted for by settlements and voluntary dismissals.⁴²² Only 2.5% of all cases were tried.⁴²³

Only defendants won on summary judgment motions.⁴²⁴ When viewed by type of case, summary judgment occurred most frequently in cases where the primary violation was boycotting (5 out of 31 cases), exclusive dealing (3 of 24), price discrimination (2 of 17), dealer predatory pricing (1 of 8), horizontal mergers (1 of 8), patent technology abuses (1 of 8), and dealer termination (2 of 24).⁴²⁵

This modest amount of empirical work suggests that *Poller* never entirely succeeded in discouraging parties from seeking, or trial courts from granting, summary judgment. The importance of summary judgment in antitrust litigation also was supported by the surprisingly large number of Supreme Court decisions upholding or ordering summary judgment.⁴²⁶ However, those cases principally reflect plaintiff (typically government) victories, a pattern very different from the Georgetown data set.

4. *Matsushita*

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,⁴²⁷ the Supreme Court changed some common conceptions about the role of summary judgment in antitrust cases. *Matsushita* is a difficult, confusing case with unique, almost

419. DuVal, *supra* note 304.

420. *Id.* at 1304, 1306 (data computed from charts separating "clustered" and "unclustered" cases).

421. NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., A STATISTICAL ANALYSIS OF PRIVATE ANTITRUST LITIGATION: FINAL REPORT (1979).

422. *Id.* at 44.

423. *Id.*

424. *Id.* at B23.

425. *Id.*

426. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 335-36 (1982) (district court should have ordered partial summary judgment in maximum-fee per se price fixing); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 136 (1969) (partial summary judgment for government affirmed; "[t]he joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field"); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 299 (1968) (summary judgment for defendant affirmed); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 7 (1958) (summary judgment for government in tying case affirmed); *United States v. W.T. Grant Co.*, 345 U.S. 629, 630-32 (1953) (summary judgment for defendants in moot Clayton Act case affirmed); *United States v. United States Gypsum Co.*, 340 U.S. 76, 82, 83-88 (1950) (summary judgment for government on price fixing liability affirmed); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947) (judgment on pleadings for government in tying case affirmed); *Associated Press v. United States*, 326 U.S. 1, 22, 23 (1945) (summary judgment for government affirmed).

427. 106 S. Ct. 1348 (1986).

bizarre, facts that will make it always distinguishable, but with language that will find wider application.⁴²⁸ The case provides important support for the thesis of this article, that there is an equilibrating tendency in antitrust law.

Matsushita was the quintessential overblown antitrust case. The published opinions of the trial court "would fill an entire volume of the *Federal Supplement*."⁴²⁹ By the time the court granted summary judgment for defendants in 1981,⁴³⁰ the record had ballooned so that the "essence of the evidence" filled forty volumes.⁴³¹ Judge Becker, who ruled much of the evidence inadmissible and granted summary judgment, said the "enormous record . . . may be the largest summary judgment record ever developed."⁴³² To manage this record he required plaintiffs to file a "final pretrial statement" detailing every fact they hoped to prove at trial, and all evidence that would be offered to prove these facts. The final pretrial statement was to have preclusive effect: except for good cause, no other facts or evidence could be offered at trial.⁴³³ Plaintiffs' final pretrial statement totaled 11,500 pages, not counting a 6,000 page appendix that cross-referenced 250,000 pages of documents.⁴³⁴

The Third Circuit largely reversed the summary judgment. In *In re Japanese Electronic Products Antitrust Litigation*,⁴³⁵ an opinion anticipating much of the Supreme Court's opinions in *Anderson* and *Celotex*, the Third Circuit ruled that defendants could win summary judgment without introducing evidence, simply by showing that plaintiffs had failed to establish a prima facie case—a standard "closely analogous" to that for directed verdict.⁴³⁶ However, the Third Circuit concluded that the admissible evidence, which included much of the evidence excluded below, would support a plaintiffs' jury verdict.⁴³⁷ The Supreme Court in turn reversed,⁴³⁸ disagreeing not so much with the Third Circuit's legal standard as with its application.

428. For a brief but thoughtful discussion of the implications of *Matsushita* for predatory pricing law, see Calvani & Lynch, *Predatory Pricing After Matsushita*, ANTITRUST, June, 1986, at 22.

429. 106 S. Ct. at 1351.

430. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1333-34 (E.D. Pa. 1981), *aff'd in part and rev'd in part sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 319 (3d Cir. 1983), *rev'd*, 106 S. Ct. 1348 (1986). The district court had previously granted defense motions for summary judgment on claims under the Antidumping Act of 1916. 494 F. Supp. 1190, 1245 (E.D. Pa. 1980), *aff'd in part and rev'd in part sub nom. In Re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 319 (3d Cir. 1983), *rev'd on other grounds*, 106 S. Ct. 1348, 1352 n.3 (1986). The Supreme Court declined to review the Antidumping Act decision because those claims were not included in the questions presented for review. 106 S. Ct. at 1352 n.3.

431. 106 S. Ct. at 1351.

432. 513 F. Supp. at 1121.

433. *Id.* at 1130-31; see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 946-60 (E.D. Pa. 1979) (Pretrial Order No. 154) (requiring final pretrial statements). Appendix B to the Pretrial Order sets forth Judge Becker's delightful "Time Out" rule. This rule allowed each side's "Designated Whistler" three pretrial opportunities to visit the offices of opposing lead counsel, blow a court-issued whistle three times, and thereby halt all proceedings for a week. These time outs were to be invoked "[f]or no good cause shown," defined as "family events . . . laziness, genuine ennui (pronounced NUE); drunkenness; firm events, such as annual dinner dance or outing; and anything else which helps attorneys to keep their sanity during the course of these proceedings." *Id.* at 959 & n.*. In Pretrial Order No. 154, Judge Becker threatened to invoke the time out rule himself "if conditions do not improve." *Id.* at 956.

434. 513 F. Supp. at 1130.

435. 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

436. *Id.* at 258.

437. *Id.* at 259.

438. 106 S. Ct. at 1362.

More so than with most cases, *Matsushita* can be understood only in light of the plaintiffs' unusual theory. The audacity of the claim is stunning. Plaintiffs claimed that since the 1960's twenty-one firms, including some of the largest Japanese television manufacturers and their affiliated trading companies, conspired to fix artificially high prices in Japan and artificially low prices in the United States, to the detriment of the plaintiffs, domestic United States competitors.⁴³⁹ As part of this conspiracy, plaintiffs alleged, defendants (1) agreed to stabilize prices in Japan; (2) limited each Japanese producer to only five American distributors; (3) with Japan's Ministry of International Trade and Industry, fixed minimum prices, referred to as "check prices," for U.S. sales; and (4) undercut these "check prices" with a number of secret rebate schemes.⁴⁴⁰ These steps assertedly injured plaintiffs by boosting profits in Japan to subsidize U.S. sales, and by minimizing competition in the United States market between Japanese manufacturers in order to facilitate predation against U.S. manufacturers.⁴⁴¹

The Supreme Court considered the scenario preposterous, as have others.⁴⁴² The Court reasoned that single-firm predatory pricing is "rarely tried, and even more rarely successful,"⁴⁴³ and such a large number of actors would make successful predation "incalculably more difficult."⁴⁴⁴ The Court also reasoned that the fact that the two leading firms in the U.S. market continue to be American, and together enjoy a 40 percent market share, reflects the apparent failure of the scheme after its alleged operation for two decades.⁴⁴⁵ The Court saw this as "strong evidence" of the absence of a conspiracy.⁴⁴⁶ Finally, the Court saw no need to be overly concerned with such a conspiracy to predate, because it could reap benefits (and harm U.S. consumers) only by converting to a clearly unlawful, challengeable conspiracy to charge artificially high U.S. prices.⁴⁴⁷

The Court measured this alleged scheme against a standard very similar to that espoused by the Third Circuit and almost identical to one the Court would later adopt in *Anderson*: "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" ⁴⁴⁸ All nine Justices subscribed to this test,⁴⁴⁹ differing only on its application. The five-member majority noted that plaintiffs could not recover for price-fixing in Japan,⁴⁵⁰ or for agreements increasing U.S. prices (thus benefitting

439. *See id.* at 1353; 723 F.2d at 306-11.

440. 106 S. Ct. at 1353; 723 F.2d at 306-11.

441. 106 S. Ct. at 1353; 723 F.2d at 311.

442. *See* 6 P. AREEDA, *supra* note 145, ¶ 1435, at 217 n.12 (a "peculiar" and "unlikely" scenario); Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 26-27 (1984) (theory "does not make sense").

443. 106 S. Ct. at 1357-58. For the implications of the Court's espousal of this view for predatory pricing law, see Calvani & Lynch, *supra* note 428.

444. 106 S. Ct. at 1358.

445. *Id.*

446. *Id.* at 1359.

447. *Id.* at 1360.

448. *Id.* at 1356 (citing *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

449. *See* 106 S. Ct. at 1363 (White, J., dissenting) ("I agree that '[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."').

450. *See id.* at 1354 (alleged supracompetitive pricing in Japan not a cognizable claim).

plaintiffs),⁴⁵¹ and said that, in any event, the claim “simply makes no economic sense” and thus the evidence reviewed by the court of appeals would not support a jury verdict for the plaintiffs.⁴⁵²

Read broadly, *Matsushita* results in the wholesale transplantation of *Monsanto*'s principles—originally crafted for use in a vertical restraint case after trial on the merits—for use in all antitrust summary proceedings.⁴⁵³ *Matsushita* cites *Monsanto* as saying that “courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct.”⁴⁵⁴ Similarly, the *Matsushita* Court wrote that

[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto* . . . we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy [citing *Monsanto* and *Cities Service*]. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence “that tends to exclude the possibility” that the alleged conspirators acted independently.⁴⁵⁵

This reliance on *Monsanto* is somewhat unfair, because the referenced discussions are closely tied to concerns peculiar to vertical cases.⁴⁵⁶ However, *Cities Service* holds that when an action (there a refusal to deal) is no more likely to have resulted from a conspiracy than from other factors (there “overwhelming” evidence of a substantial fear of nationalization) the action has no “probative force” and alone is not sufficient to support a finding of conspiracy.⁴⁵⁷ If *Matsushita* means no more than this, or that summary judgment will be granted when-

451. See *id.* at 1354, 1356 (alleged conspiracies, other than that to monopolize American market by predatory pricing, would have benefitted plaintiffs).

452. *Id.* at 1356, 1361-62. The case was remanded to the court of appeals to permit it “to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so.” *Id.* at 1362. The four dissenters showed greater credulity toward plaintiffs' claims, criticizing the majority for assuming that the defendants operated as profit maximizers. *Id.* at 1365 (noting defendants had patiently incurred substantial U.S. losses). The dissent found sufficient evidence to support a jury verdict. *Id.* at 1366-67.

453. This transplantation had already begun. See *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 281 n.11 (4th Cir. 1986) (*Monsanto* applied to affirm summary judgment in group boycott case); cf. *Fisher v. City of Berkeley*, 106 S. Ct. 1045, 1049 (1986) (*Monsanto* cited in decision upholding rent control program imposed unilaterally by city).

454. 106 S. Ct. at 1360. *Monsanto* is discussed *supra* text accompanying notes 204-05.

455. 106 S. Ct. at 1357 (quoting *Monsanto*, 465 U.S. at 764).

456. Cf. *Special Issue on Distribution After Monsanto*, 30 ANTITRUST BULL. (1985) (no discussion of implications for purely horizontal cases); Hutchinson, *Antitrust 1984: Five Decisions in Search of a Theory*, 1984 SUP. CT. REV. 69, 112-23 (same). According to the current peculiar state of vertical restraint law, even very severe nonprice restraints are likely to be lawful and expressly sanctioned by United States v. *Colgate & Co.*, 250 U.S. 300, 305-07 (1919) (manufacturer may refuse to sell to distributors who sell at too low a price), and *Continental TV, Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-58 (1977) (reversing per se rule against vertical restraints on retail locations, as such restrictions “are widely used in our free market economy” and have “economic utility”). However, vertical price agreements (which can be almost indistinguishable from lawful nonprice agreements) are per se illegal. In *Monsanto*, the Court warned that “[i]f an inference of such a [a vertical price-fixing] agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.” 465 U.S. at 763.

457. 391 U.S. at 277-80; see also *Matsushita*, 106 S. Ct. at 1356 (summarizing *Cities Service*).

ever a rational (or reasonable) factfinder would have to find for the defendant, the Court added nothing to the basic summary judgment standard.

But *Matsushita* may mean something more. The apparently referenced discussion in *Monsanto*, unlike that in *Cities Service*, recognized that the conduct at issue (dealer complaints) had probative force.⁴⁵⁸ For vertical restraint policy reasons the Court was simply unwilling to let complaints alone support a conspiracy finding. Perhaps *Matsushita* will impart a similar hesitancy to allow other conspiracy cases, or even nonconspiracy antitrust cases, to proceed.⁴⁵⁹

In dissent, Justice White worried that the Court's language "suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff."⁴⁶⁰ He wrote that such a proposition is not supported by *Monsanto* and would be "overturning settled law."⁴⁶¹ As noted above, in one sense he is right. *Monsanto* can also be read, however, as an example of a broader concern about the consequences of treble damages. In *Monsanto* the Court stated that "[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would . . . inhibit management's exercise of its independent judgment."⁴⁶² The Court noted that it is important clearly to distinguish unlawful vertical price restraints because they "are subject to per se treatment and treble damages."⁴⁶³ *Monsanto* thus can be read to suggest that treble damages should make courts slightly more hesitant to entrust cases to a jury. So read, its lesson supports a similar implication in *Matsushita*.⁴⁶⁴

The context of this caution makes clear that it is not to be applied unthink-

458. *Monsanto*, 465 U.S. at 764 n.8.

459. Moreover, a footnote apparently intended to restate previously announced principles includes language likely to be misinterpreted: "We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto* . . . establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." 106 S. Ct. at 1362 n.21. This should *not* prevent ambiguous evidence from supporting a conspiracy finding; the first sentence should be read only in light of the second. Antitrust conspiracies routinely are inferred from such ambiguous evidence as unexplained secret meetings, unnatural identity of prices or parallelism of certain conduct, and geographically adjacent conspiracies. See 6 P. AREEDA, *supra* note 145, ¶¶ 1416-1427 (1986). The Court could not mean to change so much settled law so casually.

460. 106 S. Ct. at 1363-64 (White, J., dissenting).

461. *Id.* at 1364.

462. *Id.* at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

463. 465 U.S. at 763.

464. Although the *Matsushita* dissent complains that the majority invites trial judges to weigh the evidence, 106 S. Ct. at 1363-64, some evaluation is an inevitable part of deciding motions for summary judgment and directed verdict. The genuine dispute between the majority and the minority concerns the appropriate breadth of the jury's discretion and the persuasiveness of the plaintiffs' case.

Petitioners' focus on the use of summary judgment in antitrust cases for equilibrating reasons obliquely suggests that the *Matsushita* Court supported this rationale. Petitioners asserted that the Third Circuit's decision

unravels in one stroke what years of case law and scholarly work have only recently accomplished—the use of summary judgment as a meaningful tool for managing large and complicated antitrust cases. This result directly undermines the decisions . . . which have recognized that because of the enormous burden that complex antitrust cases often place on the judiciary, and the chilling effect which vexatious treble damage actions can have on competition, such cases need to be carefully managed by the district courts—and that summary disposition may often be the best tool for achieving this end.

ingly to every antitrust case. *Matsushita* urged courts to scrutinize predatory pricing rigorously, because antitrust law is intended to encourage price competition and because predatory pricing is likely to fail. This makes for an "unusually one-sided" balancing. More commonly, concern about overdeterrence "must be balanced against the desire that illegal conspiracies be identified and punished."⁴⁶⁵ But because much of the grist of the antitrust mill is ambiguous conduct, and because defendants can so facily characterize almost any conduct as procompetitive, the equilibrating lesson of *Matsushita* will not be easily cabined.⁴⁶⁶ It can be expected to extend to summary judgments in other kinds of antitrust cases, and also to motions to dismiss and for directed verdicts.

C. FINDINGS FROM THE GEORGETOWN DATA SET

The Georgetown data set provides a rich, though flawed, collection of information on the use of summary motions in antitrust cases. The strengths and weaknesses of the data set were described by others at the conference, although points of particular relevance to this article's discussion are also noted herein. To make available the findings of the data set concerning summary motions, what follows in this section and the accompanying tables is a detailed presentation of information on the use of these motions in varying kinds of private antitrust cases. Some of this is of only tangential relevance to the principal theme of the article, and is presented for general information only.

Findings from the data set also support the article's principal theme, however, in several ways. First, the information shows that summary motions are unexpectedly common in antitrust cases, including jury cases, apparently because the stakes are high. Second, the information suggests that some recent changes in antitrust law that may have resulted, in part, from a reaction to the spectre of trebling have made courts more hospitable to summary motions. Third, the information demonstrates that defendants have unexpectedly good success in particular cases where antitrust stakes are high (in class actions and where requested damages are large).

Two econometric models were formulated to help explain the circumstances under which pretrial motions for dismissal and motions for summary judgment are granted.⁴⁶⁷ In model I, the dependent variable (the number of cases in which

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 17, *Matsushita*.

465. 106 S. Ct. at 1360.

466. Cf. *SCM Corp. v. Railinc Corp.*, No. 82 C 7583 (N.D. Ill. June 6, 1986) (LEXIS, Trade library, Dist file) (in granting defendant's motion for summary judgment on Sherman Act § 1 charge, the court interpreted *Matsushita* to mean that the "burden" on nonmoving plaintiffs "is particularly heavy in § 1 actions where the permissible inferences to be drawn from ambiguous facts are limited"). But cf. *Marsann Co. v. Brammal, Inc.*, 788 F.2d 611, 612, 613 n.1 (9th Cir. 1986) (in reversing summary judgment in Sherman Act § 2 predatory pricing case, the court noted that *Matsushita* "discusses only the amount of evidence required to allow a factfinder to infer the existence of a conspiracy punishable under section 1").

467. David Tyler, Jr. (M.S. in Economics, University of London; J.D. expected 1987, Wayne State University) and George Spasoff (M.A. in Economics, Wayne State University, 1985), organized the data and helped formulate and prepare the frequency tables and econometric models from the Georgetown Private Antitrust Litigation Project for this article. The data base was analyzed at Wayne State University on the Michigan Terminal System (MTS). All data processing (frequency counts, cross tabulations, bivariate measures of association for categorical variables, and regression equations) was performed on the Statistical Analysis System (SAS). Although the research began by preparing econometric models, problems in organizing the data required running regressions more than once. By the time the most

one or more defense motions to dismiss for failure to state a claim were granted) was regressed on twenty-one independent variables. In model II, the dependent variable (the number of cases in which one or more defense pretrial motions for summary judgment were granted) was regressed on twenty-two independent variables. Both regression models were estimated using logit analysis, and excluded cases that were pending or on appeal, or whose file was lost or outcome was unknown.

Descriptive statistics on the use of motions to dismiss and motions for summary judgment also were developed. The data set shows that the most important motions are defendants' motions for summary judgment and motions to dismiss for failure to state a claim. Accordingly, unless otherwise specified the data presented herein are limited to these two defendants' motions. The findings are reported in tables following the article. With few exceptions, these tables employ a common format. Information is provided both about *cases* in which motions were filed or granted and about *motions* filed or granted. Using summary judgment in dealer termination suits as an example (see table 11), the tables report (1) the total number of dealer termination suits; (2) dealer termination suits with one or more summary judgment motions filed, by number and (3) as a percentage of all dealer termination suits (it is to this figure that "use"—that is, by courts—refers); (4) cases with one or more summary judgment motions granted, by number, (5) as a percent of all dealer termination suits, and (6) as a percent of all dealer termination suits with one or more motions filed (success rate "by case"); (7) the number of summary judgment motions filed in dealer termination suits; and (8) summary judgment motions granted in dealer termination suits, by number, and (9) as a percentage of motions filed (success rate "by motion").

Two important caveats should be noted at the outset. First, perhaps because many sample sizes are limited, many differences are not statistically significant. For most data, confidence levels have been determined, and where differences are statistically significant this is noted.⁴⁶⁸ For descriptive purposes, some differences that are not statistically significant also are noted. Second, except for the two econometric models and unless otherwise specified, all figures are based on total cases in the data set, some of which are still pending. This does not materially affect success rates by motion, but it may mean that the importance of these motions in disposing of cases is somewhat understated, particularly for recent years.

The following pages highlight, discuss, and bring additional information to bear on the data in the tables. The most important information reported only in the text and footnotes concerns changes over time for particular kinds of cases. The reader should be aware that for many categories the number of cases per year is very small.

recent models were formulated, some of the descriptive information reported in tabular form had been collected. Thus, these models are not examples of econometrics at its purest level. Moreover, some variables, such as jury demand, were included primarily because "conventional wisdom" would expect a relationship.

468. Confidence levels were calculated by Alan Penskar, Wayne State University Law School class of 1988.

1. Frequency

If the data set is a fair guide, prospects for a plaintiff seeking summary relief are bleak (table 1). Plaintiffs' motions for summary judgment, partial summary judgment, or something called "no substantive issue of fact in dispute" (which appears to be summary judgment) were filed in only 95 of 1946 cases (4.9%) and were granted or partially granted in only 16 (0.8%), for a success rate (by case) of 16.8%. Plaintiffs filed only 53 motions specifically for summary judgment; 7 such motions were granted (13.2%) and 2 were partially granted.⁴⁶⁹ No longer is there merit—if there ever was—in the suggestion that the simplicity of per se rules accounts for the unexpectedly high use of summary procedures in antitrust cases.⁴⁷⁰

For defendants, the picture is much brighter (table 2). Pretrial "motions for dismissal" of one kind or another (including summary judgment) were granted or partially granted in 900 cases. This would be 46.2% of the data set's 1,946 cases, but obviously it involves double counting.

Motions to dismiss for failure to state a claim were granted in 142 cases (7.3%),⁴⁷¹ and granted or partially granted in 179 cases (9.2%). If one adds grants and partial grants of defense motions for lack of standing, "plaintiffs" motions to dismiss counterclaims, and "plaintiffs" motions to dismiss for failure to state a claim (the last two of which probably should have been included in defense motions), motions to dismiss for failure to state a claim were granted, as a practical matter, in 170 cases (8.7%) and were granted or partially granted in 216 cases (11.1%). By comparison, fewer than 6% of all cases were tried. Success rates for motions to dismiss for failure to state a claim also were quite high. Motions were granted in 44.0% of cases in which they were filed and were granted or partially granted in 55.4%.

Summary judgment may be somewhat less important than motions to dismiss. What the questionnaire calls "summary judgment" was granted for defendants in 4.2% of all cases⁴⁷² and was granted or partially granted in 5.3%. Motions were successful in 53.6% of the cases in which they were made and successful or partially successful in 68.0%. If one adds to defense "summary judgment" motions those defense motions labeled "no issue" and "no substantive issue," which appear to be summary judgment motions, and defense motions for partial summary judgment, one finds motions being granted for defendants in 6.9% of all cases and granted or partially granted in 9.1%.

Given the traditionally expressed hostility toward summary relief in antitrust cases, both sets of results are somewhat surprising. The importance of motions

469. The data set also reveals grants or partial grants of plaintiffs' motions for "dismissal" in 11 cases, of plaintiffs' motions for "dismissal of counterclaim" in 7 cases, of plaintiffs' motions to dismiss for "failure to state claim" in 8 cases, and of "other" pretrial motions for dismissal in 15 cases. The second and third of these probably should be considered defense motions, since plaintiffs facing antitrust counterclaims were to be regarded as defendants.

470. See *supra* note 418.

471. For all cases except those still pending or on appeal, whose outcome is unknown, or whose file is missing, motions to dismiss were filed in 16.8% of the cases and granted in 7.9%. Success rates were 47.0% (by case) and 51.5% (by motion).

472. For all cases except those still pending or on appeal, whose outcome is unknown, or whose file is missing, defense summary judgment motions were filed in 8.0% of all cases and granted in 4.5%. Success rates were 55.6% (by case) and 50.2% (by motion).

to dismiss for failure to state a claim is especially remarkable. The frequency with which motions are filed and granted is much higher than the figures suggested for all cases by Charles Wright; however, the frequency with which they are granted is comparable to results in the Chicago antitrust class action study.⁴⁷³ The summary judgment figures also are surprising. Although summary judgment was granted in fewer cases than were dismissals, it was granted in a higher percentage of cases (4.2%) than McLauchlan found was average (2.3%). Success rates were only just below McLauchlan's averages. Since high quality information about current use of summary procedures outside of antitrust cases is lacking, one cannot be certain that these procedures are used more commonly in antitrust cases than elsewhere. But it seems unlikely that they are used less commonly.

2. Over Time

Defendants have been markedly more successful in winning summary relief in recent years. In both regressions, the parameter coefficients for date of last docket entry, the nearest approximation for decision date, were positive and statistically significant (1% confidence level for summary judgments, 5% confidence level for dismissals).

Dismissal for failure to state a claim was ordered at less-than-average rates before 1980 (although the differences were not statistically significant), except for cases with last docket entries in 1977, the year of *Illinois Brick* (table 3). From 1980 to 1983, the last complete year surveyed, motions were filed in increasing numbers (in 25% of all cases ending in 1982-1983). Although success rates were somewhat inconsistent, motions were granted in increasing percentages of cases, rising to 11.2% of all cases ending in 1982 (significant at 5% confidence level) and 15.6% of all cases ending in 1983, the year of *Associated General Contractors* (significant at 1% confidence level). There is a sharp drop in all percentages for cases with last docket entries in 1984. This appears to be an aberration,⁴⁷⁴ but it was only partially caused by inclusion of pending cases.⁴⁷⁵

Table 4 shows spurts in success rates and frequency of granting summary judgment in 1976 and in 1978 (success rate significantly high at 5% confidence level). The latter almost certainly reflects the important 1977 Supreme Court

473. See *supra* notes 283-84, 304-05 and accompanying text. Conceivably, the numbers from the data set are inflated because motions are being granted with leave to amend, which merely delays the litigation. None of the data disclose whether leave to amend was given. Moreover, as Prof. Joseph Brodley reminded me at the conference, complete dismissal and dismissal only of a small part of an interrelated case are very different. However, my perusal of recent antitrust cases and preliminary returns from a sampling of reported decisions for cases in the data set confirm that most dismissals seem to terminate lawsuits or major parts of lawsuits.

474. My research assistant reviewed all antitrust decisions in the second half of 1984 reported by Commerce Clearing House. Of 26 cases deciding motions to dismiss, motions were granted or partially granted in 18 cases, denied in 8, and allowed 15 days to amend in one. Thirty-nine opinions decided defense motions for summary judgment, with motions granted or partially granted in 29, motions denied in 16, and motion deferred pending completion of discovery in 2. There were 8 decisions of plaintiffs' motions for summary judgment, with 2 granted (one of which was partial) and 6 denied (one of which was partial). Totals exceed the number of cases because a single opinion may both grant and deny motions.

475. When pending cases and cases still on appeal, and cases without files or with unknown outcomes, are excluded, motions to dismiss were filed in 20.0% of the cases with last docket entries in 1984 and granted in 6.2% of them. Success rates are 31.0% by case (9 of 29) and 32.6% by motion (14 of 43). Only the last figure is significantly lower than for cases ending earlier.

decisions.⁴⁷⁶ In the 1980's, except for 1982,⁴⁷⁷ defendants enjoyed success rates of 50% or more, filed motions in increasingly large percentages of cases, and saw summary judgment being granted in increasingly large percentages of all cases (6.0% for 1983 cases—significant at a 5% confidence level—and 8.3% in 1984—significant at a 1% level).⁴⁷⁸

3. By Court

Differences among the five jurisdictions—and particularly between San Francisco and the other four—are striking (tables 5-7). Summary procedures play a more important role in the more active antitrust courts. Plaintiff or defense motions to dismiss for lack of standing or for complete or partial summary judgment were granted in 20.2% of San Francisco's 485 cases, 12.5% of New York's 666, 12.1% of Chicago's 571, 10.2% of Kansas City's 88, and 7.4% of Atlanta's 136.⁴⁷⁹

It is understandable that the more active antitrust courts might be more receptive to summary procedures. Exposure to many antitrust cases should improve a court's ability to identify unmeritorious claims and to identify disputes of fact that are not genuine or not material. This experience also may heighten a court's interest in limiting the burden of antitrust cases on judicial resources.

San Francisco stands out as unusually receptive to summary dispositions. This may be a legacy of the IBM litigation,⁴⁸⁰ or it may reflect the admonitions of Judge Schwarzer.⁴⁸¹ Contrary to some suggestions, New York also is quite

476. *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

477. Perhaps the 1982 dip is explained by the pro-plaintiff Supreme Court decisions in *Blue Shield v. McCready*, 457 U.S. 465 (1982), *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982), and *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

478. Defense summary judgment motions were filed in 19.3% of the completed cases with known outcomes and located files with last docket entries in 1984, and these motions were granted in 11.7% of such cases (statistically significant at 1% confidence level). Success rates were 60.7% (by case) and 60.9% (by motion).

479. San Francisco's 20.2% is statistically significant at a 1% confidence level. Because of the influence of this high percentage, each of New York's, Chicago's, and Atlanta's figures is low to a statistically significant extent. The numbers in the text are useful for comparisons but probably reflect some double counting since motions to dismiss and motions for summary judgment may be entered in the same case. The data set records that motions for "lack of standing" were filed in 37 of the 1,946 cases (1.9%), were granted in 43.2% of the cases in which motions were filed (or 46.3% of the motions were granted), and were granted in 0.8% of the 1,946 cases. This seems like severe undercounting; the researchers probably categorized standing motions as motions to dismiss or for summary judgment. Accordingly, statistics for "standing" motions are not further analyzed. They are included here because no defense motions for summary judgment are recorded for the 88 Kansas City cases, whereas 4 motions for lack of standing, 3 of which were granted, are recorded.

480. *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd*, 636 F.2d 1188 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981). Responding to the question of whether such complex antitrust cases should be tried to a jury, the foreman in the *IBM* case responded sarcastically: "If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that." 458 F. Supp. at 447. In light of the foreman's statement and the jury's trouble throughout the trial in "grasping the concepts," the judge struck the jury demand. *Id.* at 447-48.

481. Judge Schwarzer, a judge in the Northern District of California, is a leading advocate of the increased use of summary judgment. See W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* § 2-3(B), at 37-53 (1982) (procedures for narrowing and limiting issues); Schwarzer, *supra* note 325, at 493 (use of summary judgment motions needs to be raised "to a more informed, sophisticated and productive level").

receptive to summary procedures. Perhaps in response to the perceived Second Circuit hostility to antitrust summary judgment, however, motions to dismiss appear partially to substitute for summary judgment.

4. By Demand/Damages

The limitations of the data cast doubt on any conclusions concerning use of summary procedures in cases of differing dollar magnitudes. The best information reveals only damages claimed in complaints, and this is available for less than half the sample. As Susman noted at the conference, the more sophisticated antitrust plaintiffs usually choose their damage figures later in the proceedings.⁴⁸² Moreover, the dollar figures reflected in the attached tables have not been adjusted for inflation. Since summary procedures have assumed increased importance in recent years, and more recent cases should have somewhat higher demands because of inflation, the causal nature of any connection between high demands and use of summary procedures is uncertain.

Nonetheless, it seems safe to conclude that defense motions for summary dismissal are being granted with regularity at all dollar levels. The conventional wisdom, that summary procedures are used primarily in low dollar cases, is not supported. In the summary judgment regression, the parameter coefficient for damages claimed in the complaint was positive although it would be significant only at a 15% confidence level; in the motion to dismiss regression it was negative but not significant. Tables 8-9 reveal use of summary motions at each of six arbitrarily chosen levels of claimed damages. Summary judgment was ordered *most* frequently at \$500,001-\$1,000,000 (10% confidence level), whereas dismissal was ordered *least* frequently at the next lowest damage level (\$100,001-500,000) (5% confidence level). Results at the highest dollar level (more than \$5 million) differ with statistical significance from other cases only in that the success rate (by motion) for motions to dismiss was unusually high. Thus, summary procedures seem to be used, if anything, more regularly when the dollars at issue are large than when they are small.

5. By Plaintiff's Business Relationship to Defendant

Defendants had greatest success winning dismissal of suits brought by stockholders and state or local governments (table 10). They had greatest success winning summary judgment against terminated dealers and stockholders, and least success against final customers or end users and against companies to which defendant was a supplier (table 11).

In both regressions, the parameter coefficients for stockholders were positive and significant. Five of the six motions for summary judgment were granted (significant at 5% confidence level), and all other measures of success were high, although the differences were not significant. Presumably shareholders have an unusually serious standing problem. Also presumably on standing grounds, defendants were quite successful in having suits by employees or former employees dismissed. However, the differences are not significant and defendants had only

482. S. Susman, Remarks at Georgetown Conference on Private Antitrust Litigation (Nov. 9, 1985).

average success in obtaining summary judgments.⁴⁸³ By all measures, defendants did well in suits brought by state or local governments. The success rate for motions to dismiss was significantly high (5% confidence level).

Summary judgment was granted in an unusually large number of terminated dealer cases (1% confidence level, and the parameter coefficient was positive and significant), which may reflect the maligned character of these suits. However, dismissals were granted in a below-average percentage of cases, although the difference is not statistically significant. For the general category of suits by distributors and dealers, defendants enjoyed above average success in winning summary judgment, but below average success seeking motions to dismiss. None of the differences are significant. These defense motions were granted with much greater regularity in the 1980's than before.⁴⁸⁴

Dismissal also was ordered more frequently than average in suits brought by competitors, particularly competitors making the same product, which might seem to support claims that these tend to be suits of questionable merit,⁴⁸⁵ but the difference is not significant. Moreover, the relatively high rate at which these cases are dismissed is accounted for only by increased filings of such motions; the success rate (by motion) is low (10% confidence level for same product competitor suits). Dismissals played especially important roles in suits ending in 1980 and in 1983.⁴⁸⁶ Summary judgment was used only at average rates in competitor suits, but the importance of summary judgment in these cases has increased in recent years.⁴⁸⁷

Finally, summary motions have been relatively unimportant in suits brought by (a) final customers or end users, and (b) companies to whom defendants were suppliers. By most measures, defendants have done poorly in seeking summary judgment; success rate (by motion) against final customers or end users is significantly low (10% confidence level), and use against these persons and against companies to whom defendants are suppliers is below average (although not significantly). In the regression, the parameter coefficient for the former is negative and significant. Suits by these categories of plaintiffs also are dismissed at below average rates, although the differences are not significant. Perhaps summary motions are relatively unimportant in these suits because courts view the suits as likely to have merit, or as too fact dependent. Surprisingly, over time, one sees only a modest (and not significant) spurt for cases ending in 1977, the year of *Illinois Brick*.

483. Motions to dismiss were granted in 6 of the 48 cases brought by employees or former employees, 3 with last docket dates 1975-1976, and 3 with last docket dates 1982-1983. The two employee cases in which defendants won summary judgment had last docket dates of 1981 and 1984.

484. In suits by terminated dealers, dismissals and summary judgments were used significantly more frequently (10% confidence level) in 1981-1983 than in other years. In suits by dealers, distributors, and agents, summary judgment was used significantly more frequently in 1983 (10% confidence level) and 1984 (5% confidence level) than in other years, and dismissal was used significantly more frequently in 1982 (1% confidence level) than in other years.

485. See, e.g., Easterbrook, *supra* note 442, at 33-36 (antitrust litigation frequently used to raise rival's costs).

486. Seven of 10 motions were granted in 6 of the 30 suits ending in 1980; 17 of 23 motions were granted in 12 of the 44 suits ending in 1983. These success rates are significantly higher than in other years (confidence levels range from 1% to 10%). Use in 1983 was significantly higher (1% confidence level) than in other years.

487. In 1980 and 1983, all measures of use and success were significantly higher than in other years (confidence levels range from 1% to 10%).

6. By Statute and Alleged Illegal Practice

Tables 12-15 report information about defendants' motions to dismiss and motions for summary judgment by the primary alleged illegal practice and by the antitrust statutes allegedly violated. Patterns here are hard to detect, and one fears a certain amount of miscategorization or unhelpful categorization. For instance, the clear winner in use of summary motions was "Sherman Act Unspecified Sections." Small sample sizes also plagued many of the categories. For instance, there were only 12 "naked cartel" cases and 33 "monopolization" cases. But certain observations can be made when one also considers changes over time for each category.

Predatory pricing. Recently, defendants enjoyed relatively high success in predatory pricing cases, where the impact of the Areeda-Turner revolution seems clear. For the entire sample of 84 predatory pricing cases, motions to dismiss were granted at slightly less than average rates. However, these statistics are burdened by the 26 cases with last docket entries before 1978, in none of which were motions filed. Motions to dismiss were filed in 11 (24.4%) of the 45 cases with last docket entries 1980-1983 and granted in five (11.1%) of those cases. Use in these years was significantly greater (5% confidence level) than in other years.

Predatory pricing defendants did considerably better than other antitrust defendants in winning summary judgments, but there were few cases and the differences are not statistically significant. Indeed, summary judgment only recently became a factor in these cases. Motions were filed in only 2 cases ending before 1983, but 8 motions were filed in 5 cases (out of a total of 21) ending in 1983-1984. Four of the 8 motions were granted in 3 of the 5 cases.

Defendants' greater success in recent years may be attributable to the rise of cost-based pricing rules. As one of their principal virtues, these rules have increased the ability of courts to dispose of troublesome cases on summary motions.⁴⁸⁸

Robinson-Patman Act. Defendants did quite well in Robinson-Patman Act cases, but the differences are not statistically significant.⁴⁸⁹ Overall, motions to dismiss were granted in 8.0% of all Robinson-Patman cases (versus 7.3% average), but success rates were slightly below average. Summary judgment was granted in 5.4% of all cases (versus 4.2% average), despite only average or slightly above average success rates. In both regression models, the parameter coefficients for Clayton Act section 2 (the Robinson-Patman Act) were positive but not statistically significant.

488. See *Jays Foods, Inc. v. Frito-Lay, Inc.*, 614 F. Supp. 1073, 1084 (N.D. Ill. 1985) (applying cost-based tests to disputed evidence to grant summary judgment for defendant thereby avoiding trial that was "optimistically estimated to last six weeks" and "would expose Frito-Lay to treble damages"), *reconsideration denied*, 635 F. Supp. 103 (N.D. Ill. 1986); P. Joskow, *Comments on Pitofsky*, in *ANTITRUST LAW AND ECONOMICS* 201-02 (O. Williamson ed. 1980) (Areeda-Turner rule was adopted to dispose of cases, not because it represents "a triumph of economic efficiency").

489. Lessons based on "principal alleged violations" are uncertain, since separate records were kept for "price discrimination" and something called "vertical price discrimination." "Price discrimination" saw comparatively few dismissals (4.8%) but comparatively frequent summary judgments (also 4.8%), whereas "vertical price discrimination" saw frequent dismissals (8.0%) and average use of summary judgment (4.0%). None of the differences between these figures and comparable ones for the rest of the sample are statistically significant.

Changes over time seem dramatic. Dismissals were relatively infrequent until 1979 when they started being granted with ever-increasing frequency through 1983; use in 1980-1983 was significantly greater (1% confidence level) than in other years. Similarly, summary judgment became important in Robinson-Patman Act cases starting only with cases that ended in 1980; success rates (by case) for cases ending in 1980-1983 were significantly higher (5% confidence level) than in other years.⁴⁹⁰

Monopolization. Defendants in Sherman Act section 2 cases have also fared much better recently. Overall, motions to dismiss Sherman Act section 2 cases were somewhat, but not significantly, less important than in other cases, and they were significantly less successful. Motions for summary judgment were more important than in other cases (10% confidence level). Motions to dismiss were filed and granted in significantly more cases (1% confidence level) ending in 1982-1983 than in other years. Summary judgment was not granted in the sample's Sherman Act section 2 cases ending before 1976, but it has been granted regularly since then.

Sherman Act section 1. Use of summary motions in Sherman Act section 1 cases was about average. This is unremarkable since that section was cited in many of the sample's cases. However, success rates for motions to dismiss were significantly higher than for other cases. When viewed over time, again cases ending in 1982-1983 stand out, here for the significantly higher frequency with which motions to dismiss were filed (1% confidence level) and granted (5% confidence level).

"Vertical price fixing or squeeze." The tables indicate that summary motions were granted less frequently in "vertical price fixing or squeeze" cases than in other cases, but the differences in use are not statistically significant. Motions to dismiss were filed significantly less frequently (5% confidence level). Summary judgment motions were significantly less successful (5% confidence level).

"Horizontal price-fixing and market allocation." Figures for the 333 cases with this as the primary violation are about average for summary judgment and somewhat below average for motions to dismiss. None of the differences are statistically significant.

"Exclusive dealing or tying." Success rates for motions to dismiss cases in which Clayton Act section 3 was allegedly violated were much lower than for other cases (1% confidence level). For summary judgment, the data show average success rates but a somewhat (although not significantly) below average rate of motion filing. Similarly, for motions to dismiss exclusive dealing or tying cases, both use and success rates were below average, although not significantly. Use of summary judgment in these cases was average.

Over time, these measures also seem consistent. After a not significant spurt of activity for cases ending in 1976, dismissals of exclusive dealing/tying complaints occurred with regularity in 1980-1983; success rates were significantly higher (5% confidence level) than in earlier years. Clayton Act section 3 cases showed a similar pattern, although none of the differences are significant. Sum-

490. In cases in which "price discrimination" was the principal violation alleged, dismissals were numerous in cases ending in 1982-1983, and summary judgment was common starting only with cases ending in 1980.

mary judgment also showed a spurt of use for exclusive dealing/tying cases ending in 1976-1978 (5% confidence level), but there was little other use until 1984, when 7 motions were filed in 6 of the 35 cases (a significantly high rate of filing at a 10% confidence level), and 3 motions (in 3 cases) were granted. The 1984 activity may reflect the Supreme Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*.⁴⁹¹ The Clayton Act section 3 cases show the same 1976-1978 spurt, although here it is not significantly greater than in other years, and significantly greater use in 1981-1983 than in other years.

Refusal to deal. Motions to dismiss in refusal to deal cases met with significantly less success than in other cases (10% confidence level), but otherwise overall results are not markedly different. Motions to dismiss were granted regularly in refusal to deal cases starting with cases with last docket entries in 1979. Dismissal was used with significantly greater frequency (1% confidence level) for cases ending in 1982-1983. On the other hand, the only significant change over time in use of summary judgment in refusal to deal cases is that in 1984 defendants' motions enjoyed significantly greater success (10% confidence level). This may reflect the Supreme Court decision in *Monsanto v. Spray-Rite Service Corp.*⁴⁹²

Dealer Termination. By every measure—frequency of filing and granting motions, and success rates—defendants seemed to do unusually well in winning summary judgment in suits where “dealer termination” was the primary offense. However, the sample is small and the differences are not statistically significant. Use of summary judgment has been significantly greater (1% confidence level) for suits ending in 1981-1984. (Only 3 motions were filed in suits ending before 1980.) However, for motions to dismiss, use and success rates are about average and show no trend over time.

Mergers. Courts dismissed the 119 Clayton Act section 7 cases with somewhat, but not significantly, greater frequency than in other cases (8.4% versus 7.3% average), and summary judgment was granted at average rates. More frequent use of dismissals would not be surprising, given the problems of showing standing to challenge mergers and acquisitions.⁴⁹³

Inducing government action. Motions to dismiss suits challenging the petitioning of government were granted at a significantly high rate (10% confidence level). However, motions were filed in only 2 of 9 such cases, so this success rate may be deceptively high. The coefficient for this variable was positive but not statistically significant in the regression model for motions to dismiss, the only one for which a coefficient could be computed. No motions for summary judgment were filed.

491. 466 U.S. 2 (1984).

492. 465 U.S. 752 (1984).

493. *Cf. Cargill, Inc. v. Monfort, Inc.*, 106 S. Ct. 784 (1986) (granting certiorari to review competitor's standing). Data concerning “principal alleged illegal practice” are more confusing, however. Motions to dismiss were filed in 25.0% of the “asset accumulation or patent accumulation” cases (significant at 10% level) and granted in 9.4%, but they were filed in only 6.6% of the “horizontal merger/joint ventures” cases (significant at 1% level) and were granted in 3.3%. Success rates for motions to dismiss both kinds of cases were higher than average, but not significantly. Success rates for summary judgment motions in both kinds of cases were significantly lower than in other cases. But although summary judgment was ordered less frequently in these cases than in others, the differences are not statistically significant.

7. Countersuits and Crossclaims

Countersuits and crossclaims, which are notoriously frivolous, were dismissed in 13% of the cases in which they were filed. Although the difference between this experience and that of other cases is not statistically significant, in the comparable regression the parameter coefficient for this variable is positive and significant. No motions for summary judgment were filed in these cases.⁴⁹⁴

8. Jury Suits

Although commentators suggest that summary procedures are used more frequently in nonjury cases, antitrust litigation does not fit this pattern. Instead, summary procedures are used more frequently in jury cases than nonjury cases (tables 16-17). Summary judgment was ordered more commonly in jury suits (10% confidence level), and motions to dismiss were granted more commonly but not significantly so. In both regression models the coefficients for jury demand were positive, although not statistically significant.

9. Class Actions

Defendants had better success in obtaining summary decisions in class action cases than in other cases, but the differences are not statistically significant. Where a class action had been requested, motions to dismiss were filed in 17.7% of the cases and granted in 8.5%. Where classes were certified and either not appealed or appealed unsuccessfully, defendants filed for summary judgment in 10.7% of the cases and were successful in 7.1%. In both regressions, the parameter coefficients for these variables were positive but not statistically significant. Sixty percent of the motions to dismiss and 46% of the motions for summary judgment were granted.⁴⁹⁵

10. Appeals Over Time

An overwhelming majority of summary dispositions are affirmed if appealed (tables 18-19). This is contrary to the conventional wisdom. Of 57 appeals of dismissals for failure to state a claim, only 9 were granted (15.8%) and 5 were partly granted (total: 24.6%). Of 49 appeals of grants of summary judgment, 10 were granted (20.0%) and 5 were partly granted (total: 30.1%).

This is not a new development. Rather, it is only recently (looking at the data set's years, 1973-1984) that plaintiffs have started winning. Only 1 of the 18 appeals from dismissals in cases ending in 1973-1979 was granted, and of 11 appeals from defense summary judgments, only 1 was granted.

D. DISCUSSION

The most important finding in this article is that summary judgments and dismissals for failure to state a claim appear to be ordered as frequently in anti-

494. Motions to dismiss were filed in 11 (23.9%) and granted in 6 (13.0%) of the 46 countersuits or cases based on cross-claims, for a success rate (by case) of 54.5%. Comparable percentages for all cases are 16.6%, 7.3% and 44.0%.

495. Only cases where classes were certified were considered when examining summary judgment because more often than not certification will have been decided before the summary judgment motion.

trust cases as in other cases, and they may be ordered even more frequently. Even in jury cases—indeed, *especially* in jury cases—courts regularly granted these defense motions. Summary judgments and dismissals for failure to state a claim each were ordered in more antitrust cases than went to trial, and grants of both kinds of motions usually were affirmed if appealed. Further, both kinds of summary dismissals were ordered with significantly greater frequency in recent years. The role of these procedures is quite one-sided, however; plaintiffs have had much less success than defendants in obtaining summary orders.

This relatively frequent use of summary orders takes on particular significance when considered in light of traditional judicial hostility to summary procedures in antitrust suits. Given the enunciated standards for reviewing these motions during the survey's time period, and given the complexity of many antitrust suits, one would expect summary procedures to have been used relatively rarely, but this is not the case.

This unexpected finding can be explained, at least in part, by the treble damages remedy. A number of courts recently have suggested that the *in terrorem* effect of the treble damages remedy makes summary procedures particularly appropriate in antitrust suits. The Supreme Court's decisions in *Monsanto* and *Matsushita* are consistent with this suggestion. The empirical findings that use of summary procedures remains constant or rises with increasing damages requests, and is as great or greater in class action suits as in other ones, also supports this conclusion. Conventional wisdom would predict a decline with increasing complexity, and complexity should be associated with high damage requests and class status. Apparently, some courts want to prevent finders of fact from deciding high-stakes cases.⁴⁹⁶

Courts appear more willing to grant defense motions for summary relief when the costs of erroneous plaintiff verdicts are relatively high. A good example of this is provided by the recent Supreme Court decision in *Bose Corp. v. Consumers Union of United States, Inc.*⁴⁹⁷ At issue was the distinction between facts and law that is so important in summary judgment, although the particular context involved the scope of review under rule 52(a) of the *Federal Rules of Civil Procedure*. The Court said:

A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point the reasoning . . . crosses the line between application of those ordinary principles of logic and common experience . . . into the realm of a legal rule Where the line is drawn varies according to the substantive law at issue. Regarding certain largely factual questions in some areas of the law the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.⁴⁹⁸

496. On the use of summary procedures in complex, high stakes cases, see generally Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1971); Schwarzer, *supra* note 325; Weiner, *supra* note 324.

497. 466 U.S. 485 (1984). See generally Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (questioning expansive reading of *Bose*).

498. *Id.* at 501 n.17; cf. *Miller v. Fenton*, 106 S. Ct. 445, 453-54 (1985) (voluntariness of a confession should be treated as a question of law to avoid frustrating a federal right).

Bose was a first amendment case, so the comparison to antitrust litigation is imperfect. But the Supreme Court's recognition that the stakes of litigation should affect the latitude courts give juries suggests that trebling increases the use of summary procedures.⁴⁹⁹

Additional support for the proposition that trebling has increased the use of summary procedure is provided by reviewing the nature of the cases that account for the increased use of these procedures in the 1980's.⁵⁰⁰ Summary procedures are now being used frequently in predatory pricing cases, where courts have turned to objective tests. And very recently, they are being used regularly in price discrimination suits, where *J. Truett Payne Co. v. Chrysler Motors Corp.*⁵⁰¹ has offered an easy route to the resolution of cases (by showing that disputed issues are not material). Defendants also have enjoyed very recent success in tying/exclusive dealing cases, where the increased clarity following *Jefferson Parish* has enabled courts to decide cases as a matter of law, and in refusal to deal and dealer termination cases, which may reflect *Monsanto's* limiting of jury discretion. Defendants' recent successes in winning dismissal also can be explained by *Brunswick*, *Illinois Brick*, and *Associated General Contractors*. Thus, several changes in antitrust law, some of which may have been affected by the treble damages remedy, have made summary procedures more readily available. It therefore seems likely that reduction of the stakes, by detrebling, would tend to reduce the granting of antitrust defense motions to dismiss and motions for summary judgment.

V. CONCLUSION

Where mandatory penalties are perceived as inappropriately severe, the legal system will try, subject to institutional constraints, to prevent or reduce the frequency of their imposition. This article reviewed evidence of this "equilibrating tendency" in criminal law, Racketeer Influenced and Corrupt Organizations Act law, and torts. The legal system reacted vigorously to circumvent the sanctions of the criminal law's "Bloody Code." Although RICO's treble damages sanctions are considerably milder, courts often perceive them to be inappropriately severe and thus are experimenting with ways to limit the reach of RICO. Similarly, the tort law system has sought with considerable success to nullify the perceived negative implications of contributory negligence. The article also reviewed the legal system's readjustment to the reduction of severe sanctions (reform of the criminal code) or to their elimination (the substitution of comparative for contributory negligence).

499. It also is interesting to note the very high success rate (1% confidence level) of motions to dismiss suits challenging the inducing of government action, which often implicate the First Amendment.

500. At the conference, Prof. Richard Schmalensee suggested testing the "equilibrating tendencies" hypothesis by seeing whether summary motions were granted significantly less commonly in horizontal price fixing or market division cases, which he presumed would be the cases in which trebling is regarded as least inappropriate. If that is the test, it fails. Although summary procedures are used somewhat less frequently in these cases, the differences are not statistically significant. The defect in Prof. Schmalensee's test is that private plaintiffs' lawyers are aware both of per se rules and of the increasing judicial suspicion of vertical cases. Accordingly, many lawsuits are inaccurately described in pleadings as horizontal price fixing or market division cases. Prof. Schmalensee's test could be conducted only on accurately described cases.

501. 451 U.S. 557 (1981).

Against this background, the article explored the probable effect of the treble damages remedy on substantive and procedural antitrust law. The mandatory nature of that remedy and its apparently perceived severity would suggest that the antitrust system has made adjustments to the penalty by reducing the breadth of the antitrust laws. There is a countervailing tendency, however; that remedy also may have induced private plaintiffs to pursue some theories that otherwise would have been ignored. An admittedly speculative review of trebling's probable effect on substantive antitrust law suggested that the effect has not been unidirectional; were there no trebling some substantive antitrust standards would be broader and some narrower. It seems clear, however, that without trebling, procedural antitrust law would be more hospitable to plaintiffs.

The final part of the article focused in greater detail on motions for summary judgment and motions to dismiss for failure to state a claim in antitrust cases. Findings from the Georgetown Project's data set concerning these motions were presented. It was shown that summary procedures are used with at least as much regularity in antitrust cases as in other cases, and that use of these motions has increased in recent years. The frequency with which these motions are granted is partly a function of trebling. One of the ways in which courts have adjusted to the treble damages remedy is by being relatively more willing to keep cases from going to trial.

What does this tell us about the consequences of any legislation to eliminate the treble damages remedy? Existing legal standards would not instantly change. Indeed, Congress might insist that legal standards be preserved. The RICO experience shows that statutory mandates cannot always be overcome, or at least not easily, by equilibrating forces. However, over time, adjustments would come about. Suits could be expected to shift to state courts or feature alternative, nonantitrust grounds of illegality. There would likely be fewer opportunities to expand the law, but also less pressure to limit access to the courts. Gradual easing of procedural barriers to suits, especially standing rules, could be expected, and plaintiffs would have greater success reaching trial. Perhaps, although this is difficult to predict, the enforcement agencies might have more success in advocating novel theories of illegality. What is clear is that changing the penalty almost certainly would give rise to at least partially compensating adjustments in substantive and procedural antitrust standards. Changes short of complete elimination of treble damages, such as have been proposed,⁵⁰² would result in similar but weaker adjustments.

502. S. 1300, 99th Cong., 2d Sess. (1986), *reprinted as reported*, S. REP. NO. 320, 99th Cong., 2d Sess. 4 (1986) (claim reduction); S. 2162, 99th Cong., 2d Sess. (1986) (limiting treble damages to persons "overcharged or underpaid").

MODEL I. DEFENSE PRETRIAL MOTIONS GRANTED

Dependent Variable : Cases with one or more motions to dismiss for failure to state a claim granted.
 Intercept Coefficient : -3.1422
 Model Chi-Square : 28.25 with 21 D.F. with P-Value = 0.1333
 No. Independent Variables : 21
 No. Cases * : 1,737

Independent Variable	Parameter Coeff.	Std. Error	Chi-Square	P-Test
Jury Demand**	0.1068	0.1939	0.30	0.5817
No. Defendants Named in Suit	0.0129	0.0096	1.82	0.1776
Crossclaim or Counterclaim	0.7641	0.4561	2.81	0.0939
Plaintiff's Bus. Relation to Defendant (Competitor, Same Product)	0.2987	0.2210	1.83	0.1765
(Terminated Dealership)	-0.2266	0.3502	0.42	0.5175
(Final Customer or End User)	-0.3207	0.3982	0.65	0.4206
(Employee or Former Employee)	0.5910	0.4604	1.65	0.1993
(Lessee)	1.2779	0.8187	2.44	0.1186
(Franchisee)	0.8562	0.6653	1.66	0.1981
(Stockholder)	1.2856	0.7188	3.20	0.0737
Alleged Violation (Sherman Act § 2)	-0.2273	0.1913	1.41	0.2347
(Clayton Act § 2)	0.0641	0.2355	0.07	0.7854
(Horizontal Price Fixing)	-0.1076	0.2720	0.16	0.6924
(Predatory Pricing)	-0.4230	0.5386	0.62	0.4323
(Exclusive Dealing or Tying)	-0.0633	0.2961	0.05	0.8305
(Refusal to Deal)	0.0574	0.2590	0.05	0.8246
(Vertical Price Fixing)	-0.6306	0.5297	1.42	0.2339
Inducing Government Action	0.5681	1.1118	0.26	0.6093
Damages Claimed in Complaint	-0.0007	0.0012	0.33	0.5652
Date of Last Docket Entry	0.0737	0.0310	5.63	0.0176
Class Action Requested	0.2420	0.2824	0.73	0.3915

* Excluding those cases with missing files, missing values, or unknown outcomes, and cases pending or on appeal.

** Defined as a dummy variable with 1 = Jury demand by plaintiff, defendant or both
 0 = No jury demand

MODEL II. DEFENSE PRETRIAL MOTIONS GRANTED

Dependent Variable : Cases with one or more defense motions for summary judgment granted
 Intercept Coefficient : -4.8187
 Model Chi-Square : 59.24 with 22 D.F. with P-Value=0.0000
 No. Independent Variables: 22
 No. Cases* : 1,737

Independent Variables	Parameter Coeff.	Std. Error	Chi-Square	P-Test
Jury Demand**	0.1623	0.2708	0.36	0.5490
Plaintiff's Bus. Relation to Defendant (Competitor, Same Product)	-0.1096	0.3059	0.13	0.7201
(Terminated Dealership)	0.5648	0.3403	2.75	0.0970
(Final Customer or End User)	-1.3478	0.7573	3.17	0.0751
(Employee or Former Employee)	-0.0347	0.7763	0.00	0.9643
(Stockholder)	1.9766	0.7150	7.64	0.0057
Alleged Violation				
(Sherman Act § 2)	0.2457	0.2528	0.94	0.3311
(Clayton Act § 2)	0.3229	0.2885	1.25	0.2631
(Horizontal Price Fixing)	0.3386	0.3274	1.07	0.3010
(Predatory Pricing)	-0.2791	0.6341	0.19	0.6597
(Exclusive Dealing or Tying)	-0.0497	0.3913	0.02	0.8989
(Refusal to Deal)	0.0267	0.3369	0.01	0.9368
(Vertical Price Fixing)	-0.3800	0.6163	0.38	0.5374
Damages Claimed in Complaint	0.0006	0.0004	2.14	0.1434
Date of Last Docket Entry	0.1377	0.0444	9.61	0.0019
No. of Depositions Noticed by Plaintiff	-0.0039	0.0083	0.22	0.6384
No. of Depositions Noticed by Defendant	-0.0077	0.0126	0.38	0.5380
No. of Inter. Noticed by Plaintiff	0.1108	0.0609	3.31	0.0689
No. of Inter. Noticed by Defendant	-0.0512	0.0689	0.55	0.4572
No. Requests Prod. Documents by Plaintiff	0.0500	0.0702	0.51	0.4764
No. Requests Prod. Documents by Defendant	0.1746	0.0790	4.88	0.0271
Class Action Certified***	0.5771	0.6039	0.91	0.3393

* Excluded those cases with missing files, missing values, or unknown outcomes, and cases pending or on appeal.

** Defined as a dummy variable with 1 = Jury demand by plaintiff, defendant or both
 0 = No jury demand

*** Defined as a dummy variable with 1 = Class certified and either not appealed or affirmed
 0 = Other cases

TABLE 1: PLAINTIFFS' PRETRIAL MOTIONS FOR DISMISSAL

	Total Cases	Cases with 1+ motions filed	Cases with 1+ motions filed (% of total)	Cases with 1+ motions granted (#)	Cases with 1+ motions granted (% of total)	Cases with 1+ motions granted (% of cases with 1+ motions filed)	Cases with 1+ motions granted or partially granted (#)	Cases with 1+ motions granted or partially granted (% of total)	Cases with 1+ motions granted or partially granted (% of cases with 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)	Motions granted or partially granted (#)	Motions granted or partially granted (% of motions filed)
Dismissal	1946	20	1.0%	11	0.6%	55.0%	11	0.6%	55.0%	21	11	52.4%	11	52.4%
Dismissal of Counterclaim	1946	21	1.1%	7	0.4%	33.3%	7	0.4%	33.3%	23	8	34.8%	8	34.8%
Failure to State Claim	1946	24	1.2%	5	0.3%	20.8%	8	0.4%	33.3%	27	5	18.5%	8	29.6%
No Substantive Issue of Fact in Dispute	1946	21	1.1%	2	0.1%	9.5%	3	0.2%	14.3%	23	2	8.7%	3	13.0%
Summary Judgment	1946	50	2.6%	7	0.4%	14.0%	9	0.5%	18.0%	53	7	13.2%	9	17.0%
Partial Summary Judgment	1946	24	1.2%	4	0.2%	16.7%	4	0.2%	16.7%	25	4	16.0%	4	16.0%
Other	1946	53	2.7%	13	0.7%	24.5%	15	0.8%	28.3%	62	15	24.2%	17	27.4%

TABLE 3: DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM, BY DATE OF LAST DOCKET ENTRY

All Cases	1946 ^a	Total Cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
1973	28	323	2	16.6%	142	7.3%	44.0%	489	232	47.4%	
1974	97	9	6	9.3%*	6	3.6%	50.0%	2	1	50.0%	
1975	137	15	7	10.9%**	7	6.2%	66.7%	16	11	68.8%	
1976	151	25	10	16.6%	10	5.1%	46.7%	22	8	36.4%	
1977	160	24	13	15.0%	13	6.6%	40.0%	33	12	36.4%	
1978	179	28	9	15.6%	9	8.1%	54.2%	36	19	52.8%	
1979	215	24	13	11.2%**	13	5.0%	32.1%	33	12	36.4%	
1980	172	26	12	15.1%	12	7.0%	46.2%	32	20	62.5%*	
1981	201	34	15	16.9%	15	7.5%	44.1%	36	17	47.2%	
1982	152	38	17	25.0%***	17	11.2%**	44.7%	62	35	56.5%	
1983	167	41	26	24.6%***	26	15.6%***	63.4%***	63	37	58.7%*	
1984	242	45	10	18.6%	10	4.1%*	22.2%***	61	37	60.0%***	
								73	15	20.5%***	

^aIncludes 7 cases for which the last docket entry was in 1985 and 38 cases not recorded as having a last docket entry dated 1973-1985.

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 4: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, BY DATE OF LAST DOCKET ENTRY

All Cases	1946 ^a	Total Cases (#)	Cases w. 1+ motions filed (#)	(% of total)	Cases w. 1+ motions granted	(% of total)	Cases w. 1+ motions granted	(% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	153	153	82	7.9%	82	4.2%	53.6%	225	112	49.8%	
1973	2	2	0	7.1%	0	0	—	2	0	—	
1974	5	97	3	5.2%	3	3.1%	60.0%	7	3	42.9%	
1975	3	137	1	2.2%***	1	0.7%***	33.3%	3	1	33.3%	
1976	10	151	6	6.6%	6	4.0%	60.0%	12	7	58.3%	
1977	8	160	3	5.0%	3	1.9%	37.5%	11	3	27.3%	
1978	10	179	9	5.6%	9	5.0%	90.0%**	14	11	78.6%***	
1979	13	215	6	6.0%	6	2.8%	46.2%	13	6	46.2%	
1980	16	172	9	9.3%	9	5.2%	56.3%	20	11	55.0%	
1981	15	201	8	7.5%	8	4.0%	53.3%	24	12	50.0%	
1982	14	152	6	9.2%	6	3.9%	42.9%	22	7	31.8%*	
1983	15	167	10	9.0%	10	6.0%**	66.7%	30	15	50.0%	
1984	37	242	20	15.3%***	20	8.3%***	54.1%	61	34	55.7%	

^aIncludes 7 cases for which the last docket entry was in 1985, and 38 cases not recorded as having a last docket entry dated 1973-1985.

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 5: PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT, BY DISTRICT

	Total Cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	1946	50	2.6%	7	0.4%	14.0%	53	7	13.2%
Atlanta	136	7	5.1%***	0	0.0%	0.0%	8	0	0.0%
New York	666	16	2.4%	3	0.5%	18.8%	17	3	17.6%
Chicago	571	5	0.9%***	0	0.0%	0.0%	5	0	0.0%
Kansas City	88	1	1.1%	0	0.0%	0.0%	1	0	0.0%
San Francisco	485	21	4.3%**	4	0.8%	19.0%	22	4	18.2%

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 6: DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM, BY DISTRICT

	Total Cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	1946	323	16.6%	142	7.3%	44.0%	489	232	47.4%
Atlanta	136	15	11.0%**	3	2.2%***	20.0%*	29	7	24.1%**
New York	666	106	15.9%	55	8.3%	51.8%*	140	75	53.6%*
Chicago	571	115	20.1%**	45	7.9%	39.1%	170	73	42.9%
Kansas City	88	16	18.2%	6	6.8%	37.5%	16	6	37.5%
San Francisco	485	71	14.6%	33	6.8%	46.5%	134	71	53.0%

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 7: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, BY DISTRICT

	Total Cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	1946	153	7.9%	82	4.2%	53.6%	225	112	49.8%
Atlanta	136	15	11.0%*	6	4.4%	40.0%	21	11	52.4%
New York	666	35	5.3%***	18	2.7%***	51.4%	43	19	44.1%
Chicago	571	32	5.6%***	18	3.2%	56.3%	49	28	57.1%
Kansas City	88	0	0.0%***	0	0.0%***	—	0	0	—
San Francisco	485	71	14.6%***	40	8.2%***	56.3%	112	54	48.2%

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 8: DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM, BY DAMAGES CLAIMED (FROM COMPLAINT)

	Total Cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	812 ^a	147	18.1%	67	8.3%	45.6%	238	119	50.0%
\$1-10,000	36	3	8.3%	2	5.6%	66.6%	7	3	42.9%
\$10,001-100,000	106	23	21.7%	9	8.5%	39.1%	30	12	40.0%
\$100,001-500,000	194	22	11.3%***	9	4.6%**	40.9%	32	16	50.0%
\$500,001-1,000,000	111	17	15.3%	9	8.1%	52.9%	32	22	66.7%*
\$1,000,001-5,000,000	168	40	23.8%**	17	10.1%	42.5%	66	24	36.4%**
More than \$5,000,000	197	42	21.3%	21	10.7%	50.0%	71	42	49.2%*

^aOnly cases with damages claimed on complaint.

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 9: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, BY DAMAGES CLAIMED (FROM COMPLAINT)

	Total Cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	812 ^a	65	8.0%	40	4.9%	61.5%	105	52	49.5%
\$1-10,000	36	0	0.0%***	4	3.8%	57.1%	9	5	55.5%
\$10,001-100,000	106	7	6.6%	8	4.1%	50.0%	28	13	46.4%
\$100,001-500,000	194	16	8.2%	9	8.1%*	69.2%	18	11	61.1%
\$500,001-1,000,000	111	13	11.7%	8	4.8%	66.7%	19	10	52.6%
\$1,000,001-5,000,000	168	12	7.1%	11	5.6%	64.7%	31	13	41.9%
More than \$5,000,000	197	17	8.6%						

^aOnly cases with damages claimed on complaint.

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 10: DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM, BY PLAINTIFFS' PRIMARY BUSINESS RELATIONSHIPS

	Total cases (number)	Cases w. 1+ motions filed (number)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted (number)	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (number)	Motions granted (number)	Motions granted (% of motions filed)
All Cases	1946	323	16.6%	142	7.3%	44.0%	489	232	47.4%
Competitor, Same Product	433	89	20.6%**	41	9.5%	46.1%	124	58	46.8%
Competitor, Similar or Substitute Product	124	23	18.5%	11	8.9%	47.8%	31	14	45.2%
Supplier	68	10	14.7%	4	5.9%	40.0%	14	6	42.9%
Dealer, Agent or Distributor	487	78	16.0%	30	6.2%	38.5%	117	56	47.9%
Terminated Dealership	195	31	15.9%	11	5.6%	35.5%	37	13	35.1%
Company to Whom Defendant is a Supplier	203	33	16.3%	14	6.9%	42.4%	56	23	41.1%
Final Customer or End User	157	26	16.6%	10	6.4%	38.5%	52	23	44.2%
Employee or Former Employee	48	11	22.9%	6	12.5%	54.5%	15	7	46.7%
State or Local Government	21	5	23.8%	3	14.3%	60.0%	14	10	71.4%**
Other	90	18	20.0%	12	13.3%**	66.7%	28	18	64.3%
Licensee	15	5	33.3%*	0	0.0%	0.0%	6	0	0.0%**
Lessee	9	3	33.3%	2	22.2%	66.7%	6	4	66.7%
Franchisee	23	3	13.0%	3	13.0%	100.0%	6	6	100.0%**
Stockholder	14	4	28.6%	3	21.4%	75.0%	11	6	54.5%

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 11: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, BY PLAINTIFFS' PRIMARY BUSINESS RELATIONSHIPS

	Total cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	1946	153	7.9%	82	4.2%	53.6%	225	112	49.8%
Competitor, Same Product	433	36	8.3%	19	4.4%	52.6%	57	23	40.4%*
Competitor, Similar or Substitute Product	124	6	4.8%	3	2.4%	50.0%	7	3	42.9%
Supplier	68	5	7.4%	3	4.4%	60.0%	5	3	60.0%
Dealer, Agent or Distributor	487	42	8.6%	26	5.3%	61.9%	68	37	54.4%
Terminated Dealership	195	22	11.3%*	15	7.7%***	68.2%*	38	24	63.2%*
Company to Whom Defendant is a Supplier	203	11	5.4%	6	3.0%	54.5%	14	7	50.0%
Final Customer or End User	157	9	5.7%	3	1.9%	33.3%	13	3	23.1%*
Employee or Former Employee	48	3	6.3%	2	4.2%	66.7%	6	3	50.0%
State or Local Government	21	2	9.5%	2	9.5%	100.0%	2	2	100.0%
Other	90	9	10.0%	4	4.4%	44.4%	11	4	36.4%
Licensee	15	1	6.6%	1	6.6%	100.0%	1	1	100.0%
Lessee	9	0	0.0%	0	0.0%	—	0	0	—
Franchisee	23	0	0.0%	0	0.0%	—	0	0	—
Stockholder	14	3	21.4%	3	21.4%	100.0%	6	5	83.3%**

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 12: DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM, BY ANTITRUST STATUTES ALLEGEDLY VIOLATED

	Total cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	1946	323	16.6%	142	7.3%	44.0%	489	232	47.4%
Sherman Act Section 1	1461	252	17.2%	105	7.2%	41.7%*	385	172	44.7%***
Sherman Act Section 2	910	168	18.5%*	61	6.7%	36.3%***	249	95	38.2%***
Sherman Act Unspecified	144	28	19.4%	15	10.4%*	53.6%	40	22	55.0%
Clayton Act Section 2	352	66	18.8%	28	8.0%	42.4%	107	47	43.9%
Clayton Act Section 3	216	41	19.0%	10	4.6%	24.4%***	62	18	29.0%***
Clayton Act Section 7	119	17	14.3%	10	8.4%	58.8%	30	15	50.0%
Clayton Act Section 8	11	3	27.3%	2	18.2%	66.7%	4	2	50.0%
Clayton Act Other Section(s)	512	86	16.8%	29	5.7%***	33.7%**	131	55	42.0%
Clayton Act Unspecified	123	25	20.3%*	15	12.2%	60.0%**	31	19	61.3%

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 13: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, BY ANTITRUST STATUTES ALLEGEDLY VIOLATED

	Total cases (number)	Cases w. 1+ motions filed (number)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted (number)	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (number)	Motions granted (number)	Motions granted (% of motions filed)
All Cases	1946	153	7.9%	82	4.2%	53.6%	225	112	49.8%
Sherman Act Section 1	1461	119	8.1%	64	4.4%	53.8%	174	86	49.4%
Sherman Act Section 2	910	77	8.5%	46	5.1%**	59.7%	119	64	53.8%
Sherman Act Unspecified	144	13	9.0%	7	4.9%	53.8%	20	9	45.0%
Clayton Act Section 2	352	36	10.2%	19	5.4%	52.8%	48	26	54.2%
Clayton Act Section 3	216	15	6.9%	8	3.7%	53.3%	23	12	52.2%
Clayton Act Section 7	119	8	6.7%	5	4.2%	62.5%	11	6	54.5%
Clayton Act Section 8	11	0	0.0%	0	0.0%	—	0	0	—
Clayton Act Other Section(s)	512	51	10.0%*	26	5.1%	51.0%	77	35	45.5%
Clayton Act Unspecified	123	11	8.9%	6	4.9%	54.5%	15	8	53.3%

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 14: DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM, BY PRIMARY ALLEGED ILLEGAL PRACTICE

	Total cases (number)	Cases w. 1+ motions filed (number)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted (number)	Cases w. 1+ motions granted (% of total)	Motions filed (number)	Motions granted (number)	Motions granted (% of motions filed)
All Cases	1946	323	16.6%	142	7.3%	489	232	47.4%
Horizontal Price Fixing and Market Allocation	333	51	15.3%	22	6.6%	70	28	40.0%
"Naked cartel"	12	3	25.0%	1	8.3%	3	1	33.3%
Merger/Joint among horizontal competitors	61	4	6.6%***	2	3.3%	7	4	57.1%
Asset Accumulation or Patent Accumulation	64	16	25.0%*	6	9.4%	28	14	50.0%
Price Discrimination	147	26	17.7%	7	4.8%	42	12	28.6%
Predatory Pricing	84	12	14.3%	5	6.0%	14	6	42.9%
Exclusive Dealing or Tying	225	40	17.8%	15	6.7%	58	23	39.7%
Refusal to Deal	282	47	16.7%	20	7.1%	65	24	36.9%*
Vertical Price Discrimination	50	8	16.0%	4	8.0%	20	16	80.0%***
Vertical Price Fixing or Squeeze	101	9	8.9%**	5	5.0%	16	6	37.5%
Dealer Termination	101	15	14.9%	5	5.0%	24	11	45.8%
Inducing Government Action	9	2	22.2%	2	22.2%	8	7	87.5%***
Other	122	24	19.7%	13	10.7%	32	19	59.4%
Restraint of Trade	41	10	24.4%	6	14.6%*	15	11	73.3%***
Boycott	11	2	18.2%	0	—	2	0	—
Monopolization	33	7	21.2%	1	3.0%	7	1	14.3%

* Significant at 10% confidence level.
 ** Significant at 5% confidence level.
 *** Significant at 1% confidence level.

TABLE 15: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, BY PRIMARY ALLEGED ILLEGAL PRACTICE

	Total cases (number)	Cases w. 1+ motions filed (number)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted (number)	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (number)	Motions granted (number)	Motions granted (% of motions filed)
All Cases	1946	153	7.9%	82	4.2%	53.6%	225	112	49.8%
Horizontal Price Fixing and Market Allocation	333	28	8.4%	15	4.5%	53.6%	37	15	40.0%
"Naked Cartel"	12	2	16.7%	0	0.0%	0.0%	2	0	0.0%
Merger/Joint venture among horizontal Competitors	61	4	6.6%	2	3.3%	50.0%	13	2	15.4%**
Asset Accumulation or Patent Accumulation	64	4	6.3%	0	0.0%	0.0%	5	0	0.0%*
Price Discrimination	147	12	8.2%	7	4.8%	58.3%	17	10	58.8%
Predatory Pricing	84	7	8.3%	5	6.0%	71.4%	11	6	54.5%
Exclusive Dealing or Tying	225	21	9.3%	10	4.4%	47.6%	28	11	39.3%
Refusal to Deal	282	19	6.7%	13	4.6%	68.4%	36	16	44.4%
Vertical Price Discrimination	50	3	1.5%	2	4.0%	66.7%	3	2	66.7%
Vertical Price Fixing or Squeeze	101	7	6.9%	3	3.0%	42.9%	16	3	18.8%**
Dealer Termination	101	10	9.9%	6	6.0%	60.0%	14	8	57.1%
Inducing Government Action	9	0	0.0%	0	0.0%	—	0	0	—
Other	122	9	7.4%	6	4.9%	66.7%	13	9	69.2%*
Restraint of Trade	41	2	4.9%	2	4.9%	100.0%	3	3	100.0%
Boycott	11	0	0.0%	0	0.0%	—	0	0	—
Monopolization	33	3	9.1%	1	3.0%	33.3%	5	1	20.0%

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 16: DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM, BY JURY DEMAND

	Total Cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	1946	323	16.6%	142	7.3%	44.0%	489	232	47.4%
All Jury Demand Cases	1193	204	17.1%	90	7.5%	44.1%	321	155	48.3%
Jury Demand by Plaintiff	1147	197	17.2%	85	7.4%	43.1%	309	145	46.9%
Jury Demand by Defendant	43	7	16.3%	5	11.6%	71.4%**	12	10	83.3%****
Jury Demand by Both Parties	3	0	0.0%	0	0.0%	—	0	0	—

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 17: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, BY JURY DEMAND

	Total Cases (#)	Cases w. 1+ motions filed (#)	Cases w. 1+ motions filed (% of total)	Cases w. 1+ motions granted	Cases w. 1+ motions granted (% of total)	Cases w. 1+ motions granted (% of cases w. 1+ motions filed)	Motions filed (#)	Motions granted (#)	Motions granted (% of motions filed)
All Cases	1946	153	7.9%	82	4.2%	53.6%	225	112	49.8%
All Jury Demand Cases	1193	104	8.7%**	58	4.9%*	55.8%	160	82	51.3%
Jury Demand by Plaintiff	1147	99	8.6%*	54	4.7%	54.5%	150	73	48.7%
Jury Demand by Defendant	43	5	11.6%	4	9.3%*	80.0%*	10	9	90.0%***
Jury Demand by Both Parties	3	0	0.0%	0	0.0%	—	0	0	—

* Significant at 10% confidence level.

** Significant at 5% confidence level.

*** Significant at 1% confidence level.

TABLE 18: PLAINTIFFS' APPEALS OF PRETRIAL DISMISSALS FOR FAILURE TO STATE A CLAIM, BY DATE OF LAST DOCKET ENTRY

All Cases	1946 ^a	Cases w. 1+ Appeals (number)	Cases w. 1+ Appeals Granted (number)	Cases w. 1+ Appeals Granted (% of Cases)	Cases w. 1+ Appeals Granted or Partially Granted (number)	Cases w. 1+ Appeals Granted or Partially Granted (% of Cases w. 1+ Appeals)	Appeals Filled (number)	Appeals Granted (number)	Appeals Granted (% of Appeals)	Appeals Granted or Partially Granted (number)	Appeals Granted or Partially Granted (% of Appeals)
1973	28	0	0	—	0	0.0%	0	0	0.0%	0	0.0%
1974	97	3	0	0.0%	0	0.0%	3	0	0.0%	0	0.0%
1975	137	4	1	25.0%	1	25.0%	4	1	25.0%	1	25.0%
1976	151	4	0	0.0%	0	0.0%	4	0	0.0%	0	0.0%
1977	160	3	0	0.0%	0	0.0%	3	0	0.0%	0	0.0%
1978	179	2	0	0.0%	0	0.0%	2	0	0.0%	0	0.0%
1979	215	3	0	0.0%	0	0.0%	3	0	0.0%	0	0.0%
1980	172	8	5	62.5%	5	62.5%	8	5	62.5%	5	62.5%
1981	201	5	1	20.0%	2	40.0%	6	2	33.3%	3	50.0%
1982	152	3	0	0.0%	0	0.0%	3	0	0.0%	0	0.0%
1983	167	7	0	0.0%	1	14.3%	10	0	0.0%	2	20.0%
1984	242	8	0	0.0%	2	25.0%	10	0	0.0%	2	20.0%
		51	8	15.7%	12	23.5%	57	9	15.8%	14	24.6%

^a Includes 7 cases for which the last docket entry was in 1985 and 38 cases not recorded as having a last docket entry

TABLE 19: PLAINTIFFS' APPEALS OF PRETRIAL GRANTS OF SUMMARY JUDGMENT, BY DATE OF LAST DOCKET ENTRY

All Cases	1946 ^a	Total Cases (#)	Cases w. 1+ Appeals (#)	Appels Granted (#)	Cases w. 1+ Appeals Granted (#)	Appels Granted w. 1+ Appeals (%)	Cases w. 1+ Appeals Granted (#)	Appels Granted w. 1+ Appeals (%)	Appels Filed (#)	Appels Granted (#)	Appels Granted (%)	Appels Granted or Partially Granted (#)	Appels Granted or Partially Granted (%)
All Cases	1946 ^a	1946	44	10	14	22.7%	14	37.8%	49	10	20.0%	15	30.1%
1973	28	28	0	—	0	—	0	—	0	—	—	0	—
1974	97	97	0	—	0	—	0	—	0	—	—	0	—
1975	137	137	0	—	0	—	0	—	0	—	—	0	—
1976	151	151	2	0	0	0.0%	0	0.0%	2	0	0.0%	0	0.0%
1977	160	160	1	0	0	0.0%	0	0.0%	1	0	0.0%	0	0.0%
1978	179	179	2	0	0	0.0%	0	0.0%	2	0	0.0%	0	0.0%
1979	215	215	4	1	1	25.0%	1	25.0%	6	1	16.7%	1	16.7%
1980	172	172	0	—	0	—	0	—	0	—	—	0	—
1981	201	201	14	4	7	28.6%	7	50.0%	14	4	28.6%	7	50.0%
1982	152	152	6	2	2	33.3%	2	33.3%	8	2	25.0%	2	25.0%
1983	167	167	5	1	2	20.0%	2	40.0%	6	1	16.7%	3	50.0%
1984	242	242	9	2	2	22.2%	2	22.2%	9	2	22.2%	2	22.2%

^a Includes 7 cases for which the last docket entry was in 1985 and 38 cases not recorded as having a last docket entry