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Treble Damages - Reward for Private Enforcement of Federal Anti-Trust Laws

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TREBLE DAMAGES—REWARD FOR PRIVATE ENFORCEMENT OF FEDERAL ANTI-TRUST LAWS

By CLYDE J. COOPER, JR.*

The average practitioner may be inclined to dismiss an article dealing with the institution of a suit under the Federal Anti-Trust laws on the erroneous assumption that such an article will be of interest only to the large corporation attorney. The right given to the private individual to sue for damage to his business through a violation of the anti-trust laws was intended primarily to give the small businessman a right of redress for unlawful and discriminatory practices of larger and more powerful competitors. For this reason, the average attorney representing the small businessman needs to have some knowledge of the anti-trust laws in order to be aware of possible violations which may affect the rights of his clients and still more important to know what redress is available for such a violation.

The scope of this article will be limited to a discussion of the general principles and problems involved in instituting a private suit for an alleged violation of Federal Anti-Trust laws. What constitutes such a violation is beyond the scope of this article. We will concern ourselves only with the procedure to be followed assuming there has in fact been such a violation.

The provisions granting the private plaintiff the right to sue for treble damages are contained in section 7 of the Sherman Act as modified by section 4 of the Clayton Act which provide:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The first problem is to determine what is included in the general term "anti-trust laws." Section 1 of the Clayton Act defines the term "anti-trust laws" to include all the provisions of the Sherman Anti-Trust Act and all the provisions of the Clayton Act as amended by the Robinson Patman Act. It does not include the Federal Trade Commission Act.[1] There is some doubt as to whether this definition is broad enough to include price discrimination included in section 3 of the Robinson Patman Act which was never made a part of the Clayton Act and is not specifically mentioned in section 1 of the Clayton Act. Furthermore, section 3 itself includes no provision giving a private right of action for damage sustained by a violation of section 3. Some

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[1] Proper v. John Bene, 295 F. 729 (1923).

cases [2] have held that since section 3 was not included in the term "anti-trust laws" as defined in the Clayton Act, treble damages are not recoverable thereunder. This position has also been taken in several law review articles.[3] The better reasoned view, however and probably the result which would be reached by the majority of courts today is expressed in the case of *Balian Ice Cream Company v. Arden Farms Company.*[4] The court said that although from the wording of section 3, it appears to be only a penal provision, it must be included as an anti-trust law under section 1 of the Caltyon Act. Further, that treble damages were recoverable although there was no specific statutory inclusion of section 3 in the treble damage provision of the Clayton Act. This result must follow from the obvious intent of the legislature as evidenced by the underlying theory of these acts—that is, to strengthen the effect of these acts by supplementing the government enforcement with the private civil action.

PURPOSE AND NATURE OF THE TREBLE DAMAGE PROVISION

The purpose of the treble damage provision is not only to redress an injury to an individual through prohibited practices but to aid in achieving the broad social object of the statute.[5] Another purpose is to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement.[6] The treble damage provision acts as an inducement to the private plaintiff since the suits are usually long and expensive and may endanger the business life of the plaintiff. Only the probability of recovering treble damages would induce the average businessman to undertake one of these suits which in many cases are brought against million dollar industries who employ a battery of lawyers to handle their defense.

Thus we see that the private treble damage suit is a "curious combination of public regulatory and private compensatory law." [7] Although, at first blush, it would appear that the treble damage provision is penal in nature, the Supreme Court has held that a treble damage action is not an action for a penalty but is remedial in nature.[8]

In 1955, the United States Supreme Court announced that treble damages are not a "windfall" but are income in the constitutional sense and must be included in the gross income of the recipient.[9]

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[2] Nat'l Used Car Mkt. Report, Inc. v. Nat'l Automobile Dealers Assn., 200 F. 2d 359 (1952).

[3] 50 HARV. LAW REV. 121; 85 UNIV. OF PENN. LAW REV. 306; 22 AM. BAR ASSO. J. 593, 649.

[4] 94 F. Supp. 796 (1950); See also Hershel Calif. Fruit Products v. Hunt Foods, 119 F. Supp. 603 (1954).

[5] Franchon & Marco v. Paramount Pictures, 100 F. Supp. 84 (1951).

[6] Weinberg v. Sinclair Refining, 48 F. Supp. 203 (1942).

[7] 61 YALE LAW REV. 1011.

[8] City of Atlanta v. Chattanooga, 27 S. Ct. 65 (1903); New York Credit Men's Adjustments Bureau v. Bruno-New York, 120 F. Supp. 495 (1954).

[9] Comm. of Internal Revenue v. Wm. Goldman Theatres, 75 S. Ct. 473 (1955).

ADDITIONAL INDUCEMENTS TO THE PRIVATE PLAINTIFF

Clayton Act, Section 5

The private plaintiff in order to recover in a treble damage suit must prove not only a violation of the anti-trust law but he must further show that he has suffered some injury which is the proximate result of the aforementioned violation. This is no easy task as illustrated by the fact that the Federal Government in most cases spends many years gathering evidence, employing a whole fleet of investigators in order to prove only the first element, a violation of the anti-trust laws. The Congress apparently aware that the private plaintiff was not equipped to meet this heavy burden and to put real teeth in the anti-trust law passed Section 5 of the Clayton Act [10] which provides:

> A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or in behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; provided, this section shall not apply to consent judgments or decrees entered before any testimony has been taken.

In a leading case [11] the court had this to say about the historical background of the section:

> Section 5 of the Clayton Act was adopted in response to a recommendation by President Wilson that Congress agree in giving private individuals the right to found their anti-trust suits for redress upon the facts and judgments proved and entered in suits by the government where the government has sued the combinations complained of and won its suit.

The landmark case on the construction of this section of the Clayton Act is *Proper v. John Bene and Sons.*[12] This case states that there are five requirements which must be met before a government judgment or decree is admissible:

(1) *The judgment or decree must be final.* It must be a definite termination of the litigation, so far final that the rules of estoppel by judgment apply. For this reason, the issues and the parties must be the same in the subsequent action for treble damages.[13] It must be a final judgment by reason of failure to appeal

[10] 15 U.S.C.A. 16.

[11] Emich Motors Corp. v. G.M.C., 71 S. Ct. 408 (1950).

[12] Note 1 *supra.*

[13] DeLuxe Theatre Corp. v. Balaban & Katz Corp., 95 F. Supp. 983 (1951); Partmar Corp. v. Paramount, 74 S. Ct. 414 (1954).

within the statutory period or by reason of an affirmance of the appeal by the court of last resort.[14] A right to modify does not change the finality of the decree.[15] A consent decree or a plea of *nolo contendere* entered before testimony is not a determination of the issues and thus will not be prima facie evidence against defendants in any subsequent action for treble damages.[16] For this reason the majority of cases are settled by consent decrees in order to deter a possible treble damage suit based thereon.[17] However, a consent decree entered after a full consideration of the issues has been held admissible.[18]

(2) *It must have been rendered in a criminal prosecution or in a suit or proceeding in equity.* This reason is a further bar to the use of Federal Trade Commission decisions for the Federal Trade Commission as an investigating body rather than a judicial tribunal and its order has no binding effect until approved by the Circuit Court of Appeals.[19]

(3) *The prosecution, suit or proceeding must have been brought by or on behalf of the United States.* There has been no judicial construction of this requirement other than the *Proper v. John Bene* case.

(4) *It must have been instituted under the anti-trust laws.* Since the Federal Trade Commission Act is not an anti-trust law within definition of section 1 of the Clayton Act, it is not a proceeding under the anti-trust laws. It has been held that an action for a declaratory judgment that defendant had violated the anti-trust laws is not an action instituted under the anti-trust laws.[20]

(5) *It must be to the effect that the defendant has violated those laws.* This requirement needs no discussion.

"Tolling Provision"—Statute of Limitations

Section 5 of the Clayton Act contains another provision which was designed for the sole purpose of helping the private plaintiff. This is the so-called "tolling provision" which provides that all applicable statutes of limitations are tolled or suspended during the pendency of government anti-trust actions where the latter were based in whole or in part on any matter complained of and were brought against the same parties who are the subjects of subsequent anti-trust suits by private plaintiffs. Thus, the private plaintiff can wait without fear of being barred by the statute of limitations until the government has decided the case and then institute his own action armed with the government decree or judgment to make out his prima facie case. As soon as the government decree or judgment becomes final, the Statute of Limitations will begin to run anew. The pendency of a government suit

[14] Twin Prts. Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (1939).
[15] Leanio Amus. Corp. v. Loews, 117 F. Supp. 747 (1953).
[16] Alden-Rochelle, Inc., A.S.C.A.P., 3 F.R.D. 157 (1942).
[17] 40 A.B.A.J. 1061, Dec. 1954.
[18] Homewood Theatre, Inc. v. Loews, 110 F. Supp. 398 (1952).
[19] Note 1 *supra.*
[20] Volk v. Paramount Pic., 91 F. Supp. 902 (1950).

ends (1) when final judgment has been entered after trial and appellate proceedings are concluded, (2) when final judgment is entered by consent of the parties.[21] During World War II, Congress passed an act suspending the statute of limitations applicable to violations of the anti-trust laws from October 10, 1942 until June 30, 1946. Although from a reading of the law it appears to apply only to suits instituted by the government, it has been held that both government suits and private treble damage suits were within the ambit of this law.[22] Now that we know that the applicable statute of limitations is going to be tolled during a government action, the next logical step is to determine which is the applicable statute of limitations. In the very early case of *Chattanooga Foundry and Pipe Works v. City of Atlanta*,[23] Justice Holmes decided that the treble damage suit was not a penal action but a civil remedy for private damage and that since such actions were not subject to any federal statute of limitations, the state statute governed. This well settled rule was ably stated in a very recent case.[24]

> It is well settled that there is no federal statute of limitations governing actions under anti-trust laws and that the statute of limitations of the state in which the action is commenced are applicable.

Some problems have been encountered in determining which statute of limitations in the state where the action is commenced is applicable. The case of *Hoskins Coal and Dock Corp. v. Truax Traer Coal Company*[25] held that state decisions determine the character of an anti-trust action for the purpose of applying a statute of limitations. Our own Judge Knous in a sharp criticism of this case said:

> The *Hoskins* case held not only that state statute of limitations govern the time within which actions may be commenced under the treble damage provisions of the Federal anti-trust laws, but that state law also determines the nature and impact of such actions and thus is decisive as to which of perhaps several conceivable statutory periods of limitations governs. It seems to the court that if the rule announced in *Hoskins* case is carried to its logical conclusion, a private anti-trust suit based upon identical facts, might be characterized as penal in one state, as remedial in another, as compensatory in a third, as punitive in a fourth, as an action to enforce a forfeiture in a fifth, or perhaps a hybrid of these in a sixth, and so on. The weight of authority is against such a result.[26]

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[21] Barnett v. Warner Bros., Inc. 112 F. Supp. 5 (1953).
[22] Reed v. Appleton-Century-Crofts, Inc., 112 F. Supp. 279 (1953).
[23] Note 8 *supra*.
[24] Note 15 *supra*.
[25] 191 F. 2d 912 (1951).
[26] Wolf Sales Co. v. Rudolph Wurlitzer, 105 F. Supp. 509 (1952).

He goes on to hold that the cause of action created and granted by these acts is to be determined by the federal decisions which have universally held the action to be remedial. Since no state has a statute of limitations applicable to treble damage suits, the federal courts will select the one most compatible with the nature of the action as determined by federal decisions [27] which we have seen is to the effect that the nature of the action is remedial.

The private plaintiff will find still other aids to his cause in the Federal Rules of Civil Procedure. By using the simplified pleading requirements and the discovery devises, such as interrogatories and depositions, the heavy burden of proof which he carries upon his shoulders may be lightened considerably. It has been held that private plaintiffs may join forces in settling their grievances through the devices of the spurious class action and permissive joinder.[28]

If the reasonable, prudent plaintiff will take advantage of these aids so generously given to him by the federal government, the task of collecting his treble damages will be lessened and the treble damage suit will become what Congress intended to be a real danger signal in the path of any would-be violator of the Federal Anti-Trust Laws.

PARTIES—WHO MAY SUE

The treble damage provisions state that "any person who has been injured in his business or property may sue." The term "person" is defined as including "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any country." [29]

It has been held that the United States is not a person within the meaning of the act.[30] This conclusion is based primarily on the fact that the United States is not specifically mentioned in the defining provision. Also, the separation in the act of the treble damage provisions for private plaintiffs and the provisions containing the remedies afforded the government is further evidence of the intention not to give the federal government a right to sue for treble damages.

However, it has been held that the word "person" includes a state of the United States. This result seems sound in view of the fact that since a state cannot prosecute for violations it would be without a remedy if not included as a person in the definition.[31]

It has been held that an incorporated city may sue for treble damages under this section [32] but that a trade association whose

[27] Hearings on H.R. 7908, 81st Congress (1950)—quoted in 61 YALE LAW REV. 1030 (note).

[28] Kainz v. Anheuser-Busch, 1950-51 Trade Cases, Sec. 62, 928 (N.D. Ill. 1951).

[29] 15 U.S.C.A. 7 and 12.

[30] U.S. v. Cooper Corp., 312 U.S. 603 (1941).

[31] Georgia v. Evans, 62 S. Ct. 972 (1942).

[32] City of Atlanta v. Chattanooga, 27 S. Ct. 65 (1903).

members have been injured cannot sue since the association is not the real party in interest.[33] The definition does not include a stockhloder who sues for damage to his corporation, a creditor for damage to his debtor's business or an officer or director for injury to business of the corporation.[34] An assignee of a claim can sue if he can show that his assignor was entitled to relief.[35] The claim is held assignable on the theory that although the action is for a wrongul act and therefore tortious, the acts declared to be unlawful do not affect the persons but the business or property of the assignor, and the cause is therefore not *ex delicto* but comes within an exception of the general rule against assignment of a cause in action arising out of tort.[36]

There is a split of authority as to whether the claim survives. A majority of the courts hold that since the claim is for damage to property it does survive,[37] while others hold it to be a personal right of action which does not survive.[38]

PARTIES—WHO MAY BE SUED

Generally, any person or corporation who is a party to, participates, or conspires in a violation of the anti-trust laws will be held liable. Corporations will be held liable for violations of their officers or directors acting for or on behalf of the corporation.[39] Likewise, the directors and officers will be held liable for any of the violations of the corporation in which they participate, authorize, or acquiesce.[40] A state is not a corporation so as to render it liable to a treble damage suit, and even if it were, the federal courts would have no jurisdiction by virtue of the 11th amendment to the Federal Constitution.[41] Section 6 of the Clayton Act exempts labor unions and their members from charges of violation of the anti-trust laws predicated on the organizations pursuit of legitimate objects. This has been interpreted to mean that "such an organization shall not be held to be an illegal combination or conspiracy in restraint of trade in itself merely because of its existence and operation. But, there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade." [42]

In summation, it can be fairly said that the anti-trust laws do not confine their protection to consumers or to purchasers or

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[33] Nat'l Cal. Monument Dealers Ass'n v. Interment Ass'n of Cal., 120 F. Supp. 93 (1954).

[34] Roseland v. Phister Ffg. Co., 124 F. 2d 417.

[35] Note 33 *supra*,

[36] Momand v. 20th Cent. Fox, 37 F. Supp. 649.

[37] Moore v. Backas, 78 F. 2d 571; Imperial Film Exchange v. Gen. Film Co., 244 F. 985.

[38] Haskell v. Perkins, 28 F. 2d 222.

[39] Cape Cod Food Products v. Nat'l Cranberry Ass'n, 119 F. Supp. 242 (1954).

[40] *Ibid.*

[41] Lowenstein v. Evans, 60 F. 808.

[42] Duplex Printing Press Co. v. Deering, 41 S. Ct. 172.

to competitors or to sellers, and do not immunize any of the outlawed acts because they are done by any of the groups specified. The acts are comprehensive, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.[43]

A good example of this rule is the case of *Mandeville Island Farms v. American Crystal Sugar Company.*[44] In that case, certain refiners constituting the only practical market for sugar beets entered into an agreement to pay the sellers uniform prices for the beets. The court held that the purchasers had violated the anti-trust laws and that sellers as well as purchasers were intended to be protected from the illegal acts forbidden in the anti-trust laws.

JURISDICTION AND VENUE

The treble damage provisions, section 4 of the Clayton Act and section 7 of the Sherman Act, provide that suits by private persons must be brought in the federal courts. The jurisdiction is based on a right created by federal law and does not depend on amount in controversy [45] or diversity of citizenship.[46] Since the anti-trust laws are based on the power of Congress to regulate interstate commerce, the basis for the jurisdiction of the federal courts is that the alleged violations were interstate in character.[47] What acts constitute interstate commerce, is a complete subject within itself and beyond the scope of this paper. In general it may be said that any conduct directly or indirectly affecting interstate commerce is within the ambit of the acts. This applies to acts committed wholly intrastate if their affect is to burden interstate commerce. In a recent case [48] for an alleged violation of the Sherman Act, the court said:

> Where the type of restraints forbidden by the act arise in course of intrastate or local activities, but actual or threatened effect upon interstate commerce is shown, the question is whether the effect is sufficiently substantial and adverse to congressional policy to constitute a forbidden consequence, and if so, the restraint must fall and injuries become remedial under the act including the treble damage provision. The exact point where interstate commerce end and intrastate commerce begins is unnecessary.

It should be noted that there is a difference in the commerce requirements in the different acts. The Sherman Act applies only to restraints of interstate commerce and to those local restraints which have a substantial and adverse effect upon interstate com-

[43] Mandeville Island Farm v. Amer. Crystal Sugar Co., 68 S. Ct. 996 (1947).
[44] *Ibid.*
[45] Sprague Elec. Co. v. Cornell-Dubiler Elec. Corp., 62 F. Supp. 1 (1945).
[46] Christian v. International Ass'n of Machinists, 7 F. 2d 481 (1925).
[47] Brosious v. Pepsi Cola Co., 155 F. 2d 99 (1946).
[48] Note 43 *supra.*

merce. The Clayton Act and Robinson Patman Acts apply only if defendant is engaged in commerce and commits the prohibited acts in the course of such commerce.[49]

Section 7 of the Sherman Act provides that the action may be brought in the district in which the defendant resides or is found. Section 4 of the Clayton Act enlarges this definition by adding "or has an agent." In the case of the individual defendant service must be had in the district in which suit is brought.[50]

In the case of the corporate defendant, Section 12 of the Clayton Act provides that any suit against a corporation may be brought not only where the corporation is an inhabitant but also in the district wherein it may be found or transacts business and process may be served in the district of which it is an inhabitant or wherever it is found. Section 12 gives a wider scope of service of process upon a corporation than on an individual defendant,[51] in that the corporation does not have to be served in the district wherein suit is instituted.

A corporation is said to be "found" within a district whenever there is some agent or representative upon whom service can be made.[52]

The test as to "transacting business" in a given district is whether the corporation is in fact, in the ordinary and usual sense, transacting business therein of any substantial nature.[53] The presence of a salesman soliciting business in the district was held sufficient under the above test.[54] On the other hand, a corporation whose wholly owned subsidiary distributed the former's product in the district, was held not to be "transacting business" in the district.[55] The only conclusion that can be drawn from the many cases on the point is that in each case, whether or not the corporation is transacting business will depend on the particular facts of that case. The courts are not at all consistent on the point. In the case of a corporate defendant, Section 1391(c) of the Judicial Code of 1948 permits corporations to be sued in any judicial district in which they are incorporated or licensed to do business. This section has been held to apply to suits brought under the anti-trust laws.[56]

Section 1404 of the Judicial Code permits transfer of venue for the convenience of parties and witnesses in the interest of justice. This section also applies to anti-trust suits.[57]

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[49] Note 33 *supra.*

[50] Oranbe Theatre Corp. v. Rayhertz Amus. Corp., 139 F. 2d 871 (1914).

[51] Thornburn v. Gates, 225 F. 613.

[52] Ware-Kramer Co. v. Amer. Tobacco Co., 178 F. 117.

[53] Eastman Kodak Co. of N.Y. v. Southern Photo Materials Co., 47 S. Ct. 400 (1948).

[54] *Ibid.*

[55] Mebco Realty Holding Co. v. Warner Bros. Pictures, Inc., 44 F. Supp. 591 (1942).

[56] Gambiner Theatrical Enterprises v. Nat'l Theatres Corp., 103 F. Supp. 712 (1952).

[57] Cinema Amus., Inc. v. Loews, Inc., 85 F. Supp. 319 (1949).

DEFENSES—PARI DELICTO AND UNCLEAN HANDS

Until recently the defenses of *pari delicto* (equally at fault) and "unclean hands" were good against a private plaintiff suing for treble damages.[58] However, the recent case of *Moore v. Mead Service Company*[59] casts grave doubts on the use of these doctrines. In that case, an agreement was entered into by the plaintiff, a baker, and the local retailers whereby it was agreed that the latter would buy only the plaintiff's bread if he would keep his bakery in the town. The defendant, a competitor, upon learning of this agreement reduced the price of his bread being sold in the town where plaintiff's bakery was located. As a result, the plaintiff brought suit alleging a violation of the Robinson Patman Act. The trial court held that the conduct of the plaintiff was a bar to his recovery. On appeal, this decision was reversed by the United States Supreme Court upon the basis of its recent holding in the case of *Kiefer-Stewart Company v. Joseph E. Seagram.*[60] The Supreme Court in that case had held that plaintiff's own conduct in engaging in a price fixing agreement was no bar to his recovery. In 61 Yale Law Review 1029, the author states, "These decisions, barring the *pari delicto* defense even where plaintiff's illegal activities actually provoke the defendant's violation, leave little room for future application of the defenses in private suits." It would seem under these rulings, that the defendant's only recourse would be a counterclaim or a separate suit of his own.[61]

DAMAGES

One of the most difficult tasks in making out a successful case for treble damages is the task of proving the amount of damage suffered as a result of the defendant's wrongful conduct. In the very early cases, the courts adhered to the common law rules of damages and required the private plaintiff to prove his damages with reasonable certainty. As a result, very few plaintiffs were successful in proving the extent of damage suffered. The first leading case to depart from this rigid common law requirement of certainty of proof was *Story Parchment Company v. Paterson Parchment Paper Company.*[62] In that case, the Supreme Court said that the defendant was not entitled to complain because the plaintiff could not prove his damages "with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." With the obstacle of "common law certainty of proof" removed from their path, the number of successful plaintiffs showed a sharp increase.

The most important, as well as the most liberal case decided to date, is the case of *Bigelow v. RKO Pictures.*[63] In that case,

[58] Maltz v. Sax, 134 F. 2d 2 (1943).
[59] 190 F. 2d 540 (1951).
[60] 340 U.S. 211 (1951).
[61] For an excellent discussion of these two cases see: 46 ILL. LAW REV. 654.
[62] 282 U.S. 555.
[63] 66 S. Ct. 574 (1946).

comparison of a movie exhibitor's receipts before and after the alleged unlawful acts commenced afforded sufficient basis for the jury's computation of damages, since the wrongful activities had prevented the plaintiff from making any more precise proof of the amount of damages.

The Supreme Court said that:

> While the jury may not render a verdict based on speculation or guesswork, even where the defendant by his own wrong has prevented a more concise computation, the jury may make a just and reasonable estimate of the damages based on relevant data, and in such circumstance may act on *probable* and *inferential* as well as upon direct and positive proof.

Furthermore, the court held that justice and public policy require that a wrongdoer shall bear the risk of uncertainty which his own wrong has created and which prevents precise computation of damages. However, even with this liberal rule the plaintiff will be required to present the best evidence possible of his injury.[64]

The type of damage suffered by the private plaintiff will generally fit into one or more of these three general classifications: (1) loss of profits, (2) increased costs, (3) depreciation in value of business or property. If the case reaches the jury, it will take into account both the damages which were inflicted on existing property and the damages which were sustained by being unable to make profits which reasonably could be anticipated but for defendant's wrongdoing. The jury will calculate the damages, if any, or loss of profits upon the basis of single and not treble damages. The trebling of the amount is a matter for the court.[65]

In summation it can be said that although the private plaintiff will not be required to meet that standard of proof required in most civil suits, he must at least show circumstantial evidence which reasonably supports an inference of conspiracy in violation of the acts.

ATTORNEY'S FEE

The successful, private plaintiff is not only allowed to recover treble damages, but he is also allowed an award for reasonable attorney's fees. In a recent case [66] the court set forth the considerations which govern the award of counsel's fee: "A losing defendant must pay what it would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing successful client would pay a willing successful lawyer." In that case, counsel had spent 597 hours on the case and was awarded a fee of $35,000.

The awarding of counsel's fees is a matter for the court and

[64] Central Coal & Coke Co. v. Hartman, 111 F. 96.
[65] Cape Code Food Products v. Nat'l Cranberry Assn., 119 F. Supp. 900 (1954).
[66] *Ibid.*

not to be considered by the jury. In this respect the court has been very liberal as illustrated by the following cases:

	Damages Before Trebling	Attorney's Fee
1. *Straus v. Victor Talking Machine Co.*, 297 F. 791	$ 23,894.71	$ 30,000
2. *Ranklin Co. v. Assoc. Bill Posters of the U.S*, 42 F. (2d) 152	101,000.00	50,000
3. *Emich Mtrs. v. G.M.C.*, 181 F. (2d) 70	412,000.00	250,000
4. *Amer. Can v. Bruce's Juices*, 87 F. Supp. 985	60,000.00	40,000
5. *Milwaukee Town v. Loews, Inc.*, 190 F. (2d) 561	313,858.00	75,000
6. *20th Cent. Fox v. Brookside Theatre*, 194 F. (2d) 846	375,000.00	100,000
7. *Bordonanos Bros. Theatres v. Paramount*, 113 F Supp. 196	7,500.00	4,500

RECENT TRENDS

There is a move underway in the Congress to limit the recovery of the private plaintiff to compensatory damages only, with treble damages allowed only in the discretion of the judge for wilful violations.[67] Furthermore, the Attorney General has said he will not oppose the change.[69] One of the chief arguments in favor of a change is that the anti-trust laws are uncertain and therefore it is difficult to avoid violating them, even with the best intentions, and therefore it is unjust to levy treble damages for what may be an innocent violation. Hence, the penalty of treble damages should only be imposed for wilful violations subject to the discretion of the judge.

In answer to this contention, it may be said, that with every decision the law is becoming more certain. Furthermore, the absence of the treble damage provision would greatly reduce the deterent effect of the anti-trust laws, since only the incentive for treble damages prompts most of the suits. It should be noted that the strongest advocate of this new change is the movie industry which has suffered the most from the treble damage provision.

[67] H.R. 4597, 83rd Congress—quoted in 40 A.B.A.J. 1061 (1954).

[69] Hearings on H.R. 4597, May 6, 1953, p. 59—quoted in 40 A.B.A.J. 1061 (1954).

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