CHAPTER 42

Antitrust Damages*

SCOPE

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

The lure of enormous money damages has made the private antitrust action popular and commonplace. If actual damages are proved, they are automatically trebled by the court. The amount of actual damages recoverable in a private antitrust action may be proved by a reasonable estimate. It is generally no defense that damages may have been "passed on" from the original purchaser to its customer. Moreover, under the doctrine of "fraudulent concealment" the statute of limitations imposes, in many cases, no real limit on the time period for which damages may be recovered. These factors have encouraged many claimants to attempt to sweep various common law tort claims under the antitrust rug.

The principal obstacles to large damage recoveries, once a violation is proven, do not involve calculation and proof of the amount of damages. In *Illinois Brick,* the Supreme Court put a noticeable limit on the extent of such recoveries when it held that an indirect purchaser could not recover antitrust damages. Then, in *Brunswick,* the Court further limited recovery by introducing the concept of antitrust injury, holding that the plaintiff's injury must be of the type which the antitrust laws were intended to prevent. With respect to calculation and proof of damages, more recent Supreme Court decisions in *Daubert* and *Kumho Tire,* which enhance the court's role as a gatekeeper to exclude irrelevant and unreliable expert testimony, and the increased willingness of courts to examine assumptions made in damages studies,

---

* This chapter was revised and updated in 2006 by Jeffrey Jacobovitz and Beth Jacob, partners at Schiff Hardin LLP. Mr. Jacobovitz is currently the Vice-Chair of the American Bar Association's Criminal Practice and Procedure Committee in the Antitrust Section. He was formerly a trial attorney in the Antitrust Section of the Federal Trade Commission. Ms. Jacob is a former New York State prosecutor and her practice focuses on complex civil litigation, trial practice, and intellectual property. Mr. Jacobovitz and Ms. Jacob were assisted by associates Jeanne Cho and Matthew Mock of Schiff Hardin LLP. This chapter was originally prepared by W. Donald McSweeney and John J. Voortman, partners at Schiff Hardin & Waite.

provide the principal counterweight to liberality in allowing proof of the amount of damages.

This chapter describes the principal damages considerations and principles that face the lawyer who counsels a client or litigates a treble damages action.

CROSS REFERENCE GUIDE

1. § 20.03[2][a], Alternatives to Litigation, Incentives and Disincentives for ADR, Costs of Litigation.

In antitrust litigation, exposure to escalating costs and damage awards in the millions of dollars requires careful consideration of ADR. The use of such methods vis-a-vis damage awards is discussed in § 20.03[2][a].

2. § 25.02[3], The Motion to Strike the Jury Demand in the Complex Case, The Jury System May Be Overwhelmed, Traditional Purposes of the Jury.

Determining the amount of damages (*see* § 42.02), and analyzing the necessary proof (*see* § 42.03), are oftentimes extremely complex matters. When too complex, the appropriate remedy may be to make a motion to strike the jury demand (*see* § 25.02[3]).

3. § 36.02[1], Subjects of Economic Testimony, Antitrust Injury and Damages; § 36A.02[4][b], Economist's Perspective, When to Retain an Economist, Damages Issue.

The economist, needless to say, can play a pivotal role in proving the nature, extent, and amount of damages (*see* § 42.10). Further use of the economist in this role is discussed in §§ 36.02[1] and 36A.02[4][b].

For additional information on the substantive aspects of antitrust law related to the discussion in Chapter 42, see

I. In von Kalinowski, Sullivan & McGuirl, Antitrust Laws and Trade Regulation (2d ed.):
   - Chapter 171, Damages in Private and *Parens Patriae* Antitrust Actions

II. In von Kalinowski et al., Antitrust Laws and Trade Regulation: *Desk Edition*:
   - § 10.12, Private Antitrust Actions, Damages

SYNOPSIS

§ 42.01 Right to Damages — Statutory Authorization

Section 4 of the Clayton Act provides the right of private plaintiffs to recover damages for violations of the antitrust laws:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any short period therein, if the court finds that the award of such interest for such period is just in the circumstances. . . .[1]

Section 1 of the Clayton Act identifies the "antitrust laws" as the Clayton Act,[2] the Sherman Act,[3] and Sections 73 through 76 of the Wilson Tariff Act.[4] Thus, Section 4 of the Clayton Act covers damages resulting from:

- contracts, combination, and conspiracies in restraint of trade (Sections 1 and 3 of the Sherman Act and Section 3 of the Wilson Tariff Act);
- monopolizing and combining, conspiring, and attempting to monopolize (Section 2 of the Sherman Act);
- discrimination and brokerage agreements prohibited by the Robinson-Patman Act (Sections 2(a)–(f) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13);
- exclusive dealing, requirements contracts, and tying arrangements within Section 3 of the Clayton Act;
- mergers and acquisitions illegal under Section 7 of the Clayton Act; and
- interlocking directorates prohibited by Section 8 of the Clayton Act.

The Federal Trade Commission Act[5] is not one of the antitrust laws for purposes of Section 4 of the Clayton Act. Similarly, Section 4 does not allow

---

[1] 15 U.S.C. § 15(a). The complete text of the Clayton Act is reprinted in Antitrust Laws and Trade Regulation: Primary Source Pamphlet (Matthew Bender & Co., Inc. 2007).

[2] 15 U.S. C. § 12 *et seq.*

[3] 15 U.S.C. § 1 *et seq.*

[4] 15 U.S.C. §§ 8–11 (prohibiting trusts in restraint of import trade).

[5] 15 U.S.C. §§ 41–58.

recovery for violations of Section 3 of the Robinson-Patman Act[6] or of the Automobile Dealers' Day in Court Act.[7]

§ 42.02 Elements and Measures of Damages

A person or entity injured in "business or property" by an antitrust violation is entitled to recover "in full for the preventable and established loss sustained."[1] There is no "mechanical test or formula as regards the required proof."[2] The measure of the amount of damage will vary with the business or market involved and with the type of violation. For example, in cases of overcharges resulting from violations such as price fixing or monopolization, the measure of damages is typically the difference between the amount paid and the amount that would have been paid absent the violation.[3] An overcharged plaintiff who is also injured in other respects, such as through diminished sales because of the higher price it was forced to charge for its own products, may also recover lost profits.[4]

In tying cases, damages are also usually measured in terms of price, either the difference between the price paid for the tied product and the price that would have been paid in a free market,[5] or the difference between the total price paid for both the tied and tying product and the total price which would have been paid absent the violation.[6]

In cases in which a discharged employee has been held to have an antitrust

---

[6] 15 U.S.C. § 13a. *See* Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 78 S. Ct. 352, 2 L. Ed. 2d 340 (1958); Safeway Stores, Inc. v. Vance, 355 U.S. 389, 78 S. Ct. 358, 2 L. Ed. 2d 350 (1958); O'Connell v. Citrus Bowl, Inc., 99 F.R.D. 117 (E.D.N.Y. 1983).

[7] 15 U.S.C. §§ 1221–25. *See* Schnabel v. Volkswagen of Am. Inc., 185 F. Supp. 122 (N.D. Iowa. 1960).

[1] Albrecht v. Herald Co., 452 F.2d 124, 128 (8th Cir. 1971).

[2] Locklin v. Day-Glo Color Corp., 429 F.2d 873, 880 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *see also* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981).

[3] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396, 27 S. Ct. 65, 51 L. Ed. 241 (1906); New York v. Hendrickson Bros., 840 F.2d 1065, 1077 (2d Cir.), *cert. denied*, 488 U.S. 848 (1988). In monopoly cases, the damages may be limited to the portion of the difference in price attributable to a monopolist's anticompetitive conduct, where the monopoly itself is lawful. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

[4] *See* Kansas v. Utilicorp United, Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990).

[5] MCA Television Ltd. v. Public Interest Corp., 171 F.3d 1265 (11th Cir. 1999); Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 890 (10th Cir. 1997).

[6] Sports Racing, 131 F.3d at 890; Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir.), *cert. denied*, 459 U.S. 857 (1982).

claim, damages have been measured by lost salary and other benefits.[7]

The antitrust laws are intended to promote and protect competition, and antitrust violations cause injury to competition. Accordingly, the compensable injury to business or property in the largest number of cases is measured at least in part by the business's lost profits, or by the business's lost or diminished value.[8]

[1] Lost Profits

Where the measure of damages is lost profits, a plaintiff can recover both profits lost in the past and profits that will be lost in the future because of the violation.[9] The amount of lost profits can be shown in numerous ways, depending upon the nature of the business or market and the availability of data. One accepted method is to compare the plaintiff's profits during the period of the violation with profits earned before or after that period.[10] For such a comparison to be valid, the damages model must make appropriate adjustments for any factors other than the violation that may have impacted profits in either period.[11] Another approach compares the plaintiff's profits with those of a comparable firm or a market that was not subject to the antitrust violation.[12] Once again, there must be genuine comparability between the two situations, and adjustments must be made for significant differences.[13] A third, but by no means the last way to measure lost profits, is to calculate the estimated market share the plaintiff would have achieved absent the antitrust violation, then to apply the plaintiff's estimated profit margin

---

[7] Radovich v. Nat'l Football League, 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957); Province v. Cleveland Press Publishing Co., 571 F. Supp. 855, 865 (N.D. Ohio 1983); Bowen v. Wohl Shoe Co., 389 F. Supp. 572 (S.D. Tex. 1975); Kinzler v. New York Stock Exch., 62 F.R.D. 196 (S.D.N.Y. 1974).

[8] *E.g.*, Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1273–1274 (3d Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996); Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); Bonjorno v. Kaiser Aluminum & Chem. Corp., 518 F. Supp. 102 (E.D. Pa. 1981).

[9] Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 337–341, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971).

[10] *E.g.*, Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 378–379, 47 S. Ct. 400, 71 L. Ed. 684 (1927); New York v. Julius Nasso Concrete Corp., 202 F.3d 82, 88 (2d Cir. 2000).

[11] Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1222 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1560 (1998); Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1165 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988).

[12] *E.g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 257–258, 66 S. Ct. 574, 576–577, 90 L. Ed. 652 (1946); Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 794 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 876 (2003); Image Technical Servs., Inc., 125 F.3d 1195, 1221.

[13] Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 152 F.3d 588, 592–593 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 804 (1999).

to the volume of sales which that share would generate.[14]

[a] Discounting Lost Future Profits. The general rule of damages is that the loss of future income must be discounted to present value.

> As a rule, an allowance for future damages must be reduced to its present worth. Therefore, the amount awarded for damage to be suffered in the future is such sum as, being put at interest, will amount (at the dates the damage will be suffered) to the sum the jury finds the plaintiff will lose in the future by reason of the alleged tort or breach of contract.[15]

That rule is applicable to antitrust damage awards based on lost future profits.[16]

[b] Net vs. Gross Profits. The lost profits which may be recovered are net profits, not gross profits,[17] except to the extent gross profits are essentially the same as net profits.[18] In calculating recoverable loss of net profits from sales not made, at least to the extent that plaintiff's existing plant and equipment are sufficient to produce the extra product, only the "variable" or "marginal" costs, such as labor and raw material costs, that would have been required to produce the additional product to be sold are deducted from the selling price, and not the firm's average or overhead costs.[19] To the extent that additional investment is needed to obtain the revenue, the cost of borrowing the money must be deducted in the damages model.[20]

[2] Lost or Diminished Value of Business

Where a plaintiff has lost a business, or the value of the business has decreased due to an antitrust violation, the going-concern value or amount of diminishment

---

[14] Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d at 795.

[15] 22 Am. Jur. 2d, *Damages* § 678. *See* Chesapeake & Ohio Ry. v. Kelly, 241 U.S. 485, 36 S. Ct. 630, 60 L. Ed. 1117 (1916); The Long Island Savings Bank, FSB v. United States, 67 Fed. Cl. 616, 648 (2005).

[16] Eateries, Inc. v. J.R. Simplot Co., 346 F.3d 1225 (10th Cir. 2003); Arnott v. Am. Oil Co., 609 F.2d 873, 878 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980); Lehrman v. Gulf Oil Corp., 500 F.2d 659, 664 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

[17] Murphy Door Bed Co. v. Interior Sleep Sys., Inc., 874 F.2d 95, 103 (2d Cir. 1989); Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1580 (11th Cir. 1983); 2361 State Corp. v. Sealy Inc., 263 F. Supp. 845 (N.D. Ill. 1967). *See* S. Photo Materials, 273 U.S. at 379.

[18] Trabert & Hoeffer, Inc. v. Piaget Watch Corp., 633 F.2d 477 (7th Cir. 1980).

[19] Trabert & Hoeffer, Inc. v. Piaget Watch Corp., 633 F.2d 477 (7th Cir. 1980); Todhunter-Mitchell Co. Ltd. v. Anheuser Busch, Inc., 375 F. Supp. 610 (E.D. Pa. 1974), modified, 383 F. Supp. 586 (E.D. Pa. 1974); N.W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493 (D. Del. 1971).

[20] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. at 503–504.

in market value is a proper measure of damage.[21] Of course, calculation of fair market value involves consideration of anticipated profits,[22] so lost profits and lost value are not entirely alternative measures.

It is well established that plaintiff cannot recover both lost *future* profits and the amount of decrease in the value of the going concern, for the going-concern value of the business is dependent largely, if not entirely, on expected future earnings. To permit recovery of both would be to duplicate damages.[23]

On the other hand, both lost *past* profits and the amount of decline in the value of the business or property may be recovered.[24] Where lost past profits have been recovered, however, the "but for the violation" value of the business that is compared against the existing value must not assume that the lost profits were left in the business or there will be duplication. Where the adverse impact of the violation on the business has not been fully reflected by lost past profits, but in addition, has decreased the ability of the business to operate profitably in the future (*e.g.*, by eroding the customer base), then plaintiff can recover the past lost profits *plus* the decrease in the value of the business compared to what it would have been but for the violation.[25]

As with lost profits, there is no single way to prove lost or diminished value of a business. It can be calculated based principally on valuation of anticipated profits. In *Central Telecommunications*, the Eighth Circuit approved a valuation of

---

[21] Cent. Telecomms., Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 730 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); Arnott v. Am. Oil Co., 609 F.2d at 886–887; Lehrman v. Gulf Oil Corp., 500 F.2d at 663–664.

[22] Eateries, Inc. v. J.R. Simplot Co., 346 F.3d at 1236–1237; Arnott v. Am. Oil Co., 609 F.2d at 886.

[23] Eateries, Inc. v. J.R. Simplot Co., 346 F.3d at 1236–1237; Arnott v. Am. Oil Co., 609 F.2d at 887; Greene v. Gen. Foods Corp., 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); Lehrman v. Gulf Oil Corp., 500 F.2d at 659; Albrecht v. Herald Co., 452 F.2d 124, 128 (8th Cir. 1971); Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969); Standard Oil Co. v. Moore, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958); Simpson v. Union Oil Co., 411 F.2d 897, 909–910 (9th Cir.), *cert. denied on this issue, rev'd on other grounds*, 396 U.S. 13 (1969) (suggests that only the decline in the value of the business and not future profits can be recovered).

[24] Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 175 F.3d 18, 27 (1st Cir. 1999); Ne. Tel. Co. v. AT&T, 651 F.2d 76, 95 n.30 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); Atlas Building Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); Bonjorno v. Kaiser Aluminum & Chem. Corp., 518 F. Supp. at 110–111.

[25] Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d at 81; Albrecht v. Herald Co., 452 F.2d at 126; Bonjorno v. Kaiser Aluminum & Chem. Corp., 518 F. Supp. at 110–112. *Cf.* Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

"ten times cash flow in Central's proposed third year of operations," for a business that never began operations.[26] In a case involving an unsuccessful bidder for a professional sports franchise who was held to be the victim of a Sherman Act violation, the Seventh Circuit joined other courts in endorsing a "yardstick" approach "linking the plaintiff's experience in a hypothetical free market to the experience of a comparable firm in an actual free market."[27] The particular damage measure approved in that case was a "lost appreciation in value" theory, which compared the increase in value enjoyed by successful bidder over ten years of ownership of the franchise with what could have been expected under the unsuccessful bidder's ownership and management.[28]

[3] Taxes

Taxes must be considered in connection with antitrust damages, in view of the goal of damages to put the injured party in the position it would have been in absent the violation. Generally, compensatory damages may constitute a return of capital, not taxable to the recipient, or taxable ordinary income, depending upon the nature of the injury suffered.[29] The portion of an antitrust damages award that is attributable to trebling is taxed as ordinary income.[30]

The impact of these basic principles upon calculation of damages has not been litigated frequently, except that the courts have shown a marked disinclination to allow damage calculations to become encumbered with the intricacies involved in tracing tax impact by reopening past tax years. In *Hanover Shoe,* the Supreme Court recognized that, because plaintiff would be taxed on the damages awarded, it would suffer a double deduction from taxation if the lost-profits damages awarded were calculated on an after-tax basis.[31] The Court also recognized that there would be a difference in the amount of taxes, depending upon whether they were taken into account as of the date of injury or as of the date of payment, due to factors such as differences in tax rates.[32] However, it approved "the rough result

---

[26] Cent. Telecomms., Inc. v. TCI Cablevision, Inc., 800 F.2d at 730.

[27] Fishman v. Estate of Wirtz, 807 F.2d 520, 551 (7th Cir. 1986).

[28] Fishman v. Estate of Wirtz, 807 F.2d at 547, 551.

[29] Thomson v. Comm'r, 406 F.2d 1006, 1008 (9th Cir. 1969).

[30] Thomson v. Comm'r, 406 F.2d 1006, 1008–1009. Amounts paid to settle an antitrust claim will not be taxable if they can be shown to represent a return of capital, such as through evidence that actual damage to capital equals or exceeds the amount of the payment. In the absence of such evidence, the tax authorities will take the position that the portion of the settlement amount attributable to the claim for trebling is includable in gross income. 406 F.2d at 1009–1010 (citing Rev. Proc. 67-33, 1967-35 I.R.B. 4).

[31] Hanover Shoe, Inc. v. United States Mach. Corp., 392 U.S. at 503.

[32] Hanover Shoe, Inc. v. United States Mach. Corp., 392 U.S. at 503.

of not taking account of taxes for the year of injury but then taxing recovery when received," due to the complications involved in the opposite course.[33]

Showing similar reluctance to allow damages calculations to become embroiled in complex prior-year tax recomputations, one court altogether excluded from damages the claimed lost benefits of an investment tax credit.[34]

From the defendant's point of view, tax issues can play a significant role in strategic decisions when faced with both criminal and civil litigation arising from the same alleged violations. Generally, the entire payment in satisfaction of an antitrust judgment or settlement is deductible by the defendant.[35] However, if the payment to satisfy a judgment or to settle a filed action is made by a defendant who is convicted after trial or pleads guilty or *nolo contendere* to an indictment or information, only one-third of the payment may be deducted.[36] That difference in treatment militates in favor of trying the criminal case, if there is a prospect that it can be won, to permit full deduction of amounts paid to settle the civil litigation.

[4] Interest

[a] Prejudgment Interest. Prejudgment interest can be obtained only as provided in a 1980 amendment to Section 4 of the Clayton Act.[37] The amended statute permits a discretionary award of simple interest on the actual damages from the time of the service of the complaint to the date of the judgment if plaintiff shows dilatory conduct by defendant. Prejudgment interest is not available on any other ground and is not available at all for the period prior to serving the complaint. The prohibition on other prejudgment interest does not preclude recovery of interest that is part of the damages actually incurred by the plaintiff, such as interest paid on loans necessitated by the antitrust violation.[38]

Although it is clear that prejudgment interest is not available except in the circumstances specified in Section 4 of the Clayton Act, in some cases plaintiffs have been permitted to recover an element of damages that closely resembles interest. The Fifth Circuit approved awards including "lost opportunity costs," rejecting defendants' contentions that such an element of damages was economi-

---

[33] Hanover Shoe, Inc. v. United States Mach. Corp., 392 U.S. at 503.

[34] *In re* IBM Peripheral EDP Devices Antitrust Litig., 459 F. Supp. 626, 630 (N.D. Cal. 1978).

[35] Flintkote Co. v. United States, 7 F.3d 870, 871 (9th Cir. 1993).

[36] 26 U.S.C. § 162(g).

[37] 15 U.S.C. § 15(a).

[38] Pac. Gas & Elec. Co. v. Howard P. Foley Co., 1993 U.S. Dist. LEXIS 21414 (N.D. Cal. July 27, 1993); Minpeco, S.A. v. Hunt, 718 F. Supp. 168, 180 (S.D.N.Y. 1989).

cally indistinguishable from interest.[39]

[b] Postjudgment Interest. Postjudgment interest in antitrust cases, as in other federal cases, is governed by 28 U.S.C. § 1961,[40] which provides for interest "from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgement."

[5] Inflation

In a period of inflation, the value of the dollars lost, when they were lost, will be greater than the value of the same number of dollars at the time of a later judgment.[41] Nevertheless, no upward adjustment in the amount of the damage award can be made for inflation; treble damages are sufficient.[42]

[6] Trebling and Punitive Damages

The actual damages determined to result from an antitrust violation must be trebled.[43] The court has no discretion to refuse to do so.[44]

Still, treble damages are the extent of the enhanced damage award in an antitrust case. It is improper to allow a plaintiff to recover punitive damages along with treble damages on an antitrust claim.[45] However, if a tort claim is pled, the plaintiff may seek punitive damages.

---

[39] Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 996–997 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 986 n.20 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).

[40] Locklin v. Day-Glo Color Corp., 429 F.2d at 877.

[41] *See* § 36A.02[4] *above*.

[42] Locklin v. Day-Glo, 429 F.2d at 876; Law v. NCAA, 5 F. Supp. 2d 921, 934–935 (D. Kan. 1998); Colorado v. Goodell Bros., Inc., 1987 U.S. Dist. LEXIS 14549 (D. Colo. Feb. 17, 1987) (no inflation adjustment in "antitrust action, where treble damages are awarded . . . . Plaintiffs are not entitled to yet another bite at the apple.").

[43] 15 U.S.C. § 15(a). However, under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, a party who applies for and receives amnesty from government prosecution of antitrust violations, will be liable only for actual damages in any subsequent, related private litigation. This "de-trebling" of damages is meant to be an incentive to corporations to self-report any antitrust violations.

[44] Locklin v. Day-Glo Color Corp., 429 F.2d at 878; Refuse & Envtl. Sys., Inc. v. Indus. Servs. of Am., 732 F. Supp. 1209, 1213 (D. Mass. 1990), *aff'd in part and rev'd in part on other grounds*, 932 F.2d 37 (1st Cir. 1991).

[45] Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1331–1332 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997); Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580, 582 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945).

§ 42.03 Degree and Preciseness of Proof Required for Fact vs. Amount of Damage

Virtually every court that discusses antitrust damages introduces the subject of amount of damages with statements such as that damages "need not be computed with 'mathematical certainty' and recovery will not be denied where the evidence 'afford[s] a reasonable basis for estimating [plaintiff's] loss.' "[1] A long line of Supreme Court and other opinions has accepted the premise that a defendant whose wrong has caused the situation which necessitates an estimate of damages cannot complain of imprecision in the estimate.[2]

"Amount" of damages must be distinguished from "fact" of damage. Although there are statements in some opinions suggesting that a plaintiff is allowed similar leeway in establishing that it has in fact suffered some injury (distinguished from the quantification of that injury),[3] the overwhelming weight of authority follows the Supreme Court's pronouncement in *Story Parchment Co.*:

> there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.[4]

---

[1] Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1330 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997).

[2] *E.g.*, J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565–567, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981); Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931); McClure v. Undersea Indus., Inc., 671 F.2d 1287, 1289 (11th Cir.), *reh'g denied*, 685 F.2d 1309 (11th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983); Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n, 666 F.2d 1130, 1146 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); City of Mishawaka, v. Am. Elec. Power Co., 616 F.2d 976, 987 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 457 (5th Cir. 1979); Locklin v. Day-Glo Color Corp., 429 F.2d 873, 880 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); M & H Tire Co., Inc. v. Hoosier Racing Tire Corp., 560 F. Supp. 591, 607 (D. Mass. 1983), *rev'd on other grounds*, 733 F.2d 973 (1st Cir. 1984); Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289, 309 (D. Colo. 1969).

[3] Delaware Valley Marine Supply Co. v. Am. Tobacco Co., 184 F. Supp. 440, 444 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962); Noerr Motor Freight v. E. Railroad Presidents Conference, 155 F. Supp. 768, 834 (E.D. Pa. 1957), *aff'd* (without comment on this issue), 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961).

[4] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. at 562. *See* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. at 565–567; Mostly Media, Inc. v. U.S. West Commc'ns., 186 F.3d 864, 865–866 (8th Cir. 1999); MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1161 (7th

(Footnote continued on page 42-13)

While the requirements of proof may be eased, the amount of damages remains

(Text continued on page 42-13)