"not clear" whether such action would be successful.[49] Even if it could be done, the propriety of such action is debatable. Nevertheless, the weight to be given to this consideration should not be exaggerated. The problem would arise only where the government was not a party to the action—in a "private" suit—since otherwise a court can avoid an impasse by resorting to the provisions in the Rules for entering a default judgment against a disobedient party.[50] Even in the former situation it would seem that the natural reluctance of the judiciary and the executive to proceed to the point of open conflict would tend to make the courts amenable to assertions of privilege when strongly contended for by the executive, while minimizing the likelihood of the executive's absolute refusal to produce information which a court has ordered to be disclosed. The possibility that a court, in a rare case, might have to meet the enforcement problem unsuccessfully does not seem to be sufficient justification for a court, in every case, to "abdicat[e] an inherent judicial function of determining the facts upon which the admissibility of evidence in a case depends."[51]

PROOF REQUIREMENTS IN ANTI-TRUST SUITS: THE OBSTACLES TO TREBLE DAMAGE RECOVERY

Some prerequisites for private recovery under the treble-damage provisions of the anti-trust laws may be considered relatively well settled.[1] Injury must be to a "business or property" interest[2] and must be "proximately caused"[3] by a violation[4] of those laws. A creditor, for example, does not suffer a "direct in-

[49] 2 Moore, Federal Practice § 34.05, n. 1 (1st ed., 1938).

[50] United States v. Cotton Valley Operators Committee, 9 F.R.D. 721 (La., 1949), aff'd (by equally divided court) 18 U. S. L. Week 3297 (Apr. 25, 1950). It has been suggested that the public-private test (see text at note 40 supra) may be justified because of this consideration, Government Privilege against Disclosure of Official Documents, 58 Yale L.J. 993, 998 (1949).

[51] Zimmerman v. Poindexter, 74 F. Supp. 933 (Hawaii, 1947).

[1] Section 7 of the Sherman Anti-Trust Act, 26 Stat. 209 (1890), 15 U.S.C.A. § 15 (1941), is as follows: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, 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."

Section 4 of the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C.A. § 15 (1941), adds only that the defendant may be sued in the district in which "he has an agent."

[2] Glenn Coal Co. v. Dickinson Coal Co., 72 F. 2d 885 (C.A. 4th, 1934); Louisiana Farmers P. U. v. Great A. & P. Tea Co., 40 F. Supp. 897 (Ark., 1941); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). "While the antitrust laws are for the public benefit . . . an . . . action to recover damages is personal . . . and not for the benefit of the public. [Plaintiff] must seek personal pecuniary damages." Maltz v. Sax, 134 F. 2d 2, 5 (C.A. 7th, 1943). 1 Toulmin's Anti-Trust Laws § 20.8 (1949).

[3] Package Closure Corp. v. Sealright Co., 141 F. 2d 972 (C.A. 2d, 1944).

[4] Various activities prohibited by the anti-trust laws have led to recovery of treble damages: monopolization and conspiracies to monopolize, Eastman Kodak Co. v. Southern Photo Ma-

jury" to his business by illegal restraints on his debtor,[5] though a lessor entitled to a percentage of his lessee's profits is so harmed.[6] An injury to a corporation's "business or property" may justify recovery in the corporation's behalf,[7] but it is not at the same time actionable by stockholders, officers, and directors qua individuals, since individual business or property has not been injured.[8] The requirements of "direct injury" to "business or property" may be met although the parties are not competitors. Thus a sales agent whose position was eliminated by his employer's vertical expansion has recovered,[9] as have ultimate consumers injured by conspiratorial increases in price[10] and middlemen and retailers victimized by discrimination.[11] Needless to say, each successful plaintiff must have engaged in,[12] or must have intended to engage in,[13] some lawful business.

Having established the fact of direct injury to business or property, plaintiffs

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terials Co. 273 U.S. 359 (1927); price fixing, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1947); boycotts, Loder v. Jayne, 142 F. 1010 (C.C. Pa., 1906); blacklisting, Montague v. Lowry, 193 U.S. 38 (1904); resale price maintenance, Strauss v. Victor Talking Machine Co., 297 F. 791 (C.A. 2d, 1924); price discrimination, Bruices Juices, Inc. v. American Can Co., 87 F. Supp. 985 (Fla., 1949); illegal integrations, Roseland v. Phister Mfg. Co., 125 F. 2d 417 (C.A. 7th, 1942); acquisition of control of a competing corporation to remove it from the market, Ames v. American Telephone & Telegraph Co., 166 F. 820 (C.C. Mass., 1909); and illegal control of markets by means of license agreements, Victor Talking Machine Co. v. Kemeny, 271 F. 810 (C.A. 3rd, 1921). See Recovery of Treble Damages Under the Sherman Act, 38 Yale L. J. 503 (1929).

[5] Roseland v. Phister Mfg. Co., 125 F. 2d 417 (C.A. 7th, 1942), and cases cited.

[6] Camrel Co., Inc. v. Paramount Film Distributing Corp., C.C.H. Trade Reg. Serv. ¶ 57,233 (N.Y., 1944).

[7] A stock holder may sue for the benefit of the corporation, Pa. Sugar Refining Co. v. American Sugar Refining Co., 166 F. 254 (C.A. 2d, 1908); Ames v. A. T. & T. Co., 166 F. 820 (C.C. Mass., 1909). So, when the plaintiff is a corporation suing its officers or directors, it is not considered to be in pari delecti. Procedure in Private Suits under the Sherman and Clayton Acts, 32 Col. L. Rev. 335 (1932).

[8] Gerli v. Silk Ass'n of America, 36 F. 2d 959 (N.Y., 1929).

[9] Roseland v. Phister Mfg. Co., 125 F. 2d 417 (C.A. 7th, 1942).

[10] Chattanooga Foundry v. Atlanta, 203 U.S. 390 (1906).

[11] Bruices Juices, Inc. v. American Can Co., 87 F. Supp. 985 (Fla., 1949); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F. 2d 988 (C.A. 8th, 1945), cert. den. 326 U.S. 773 (1945), noted 44 Mich. L. Rev. 680 (1946); American Can Co. v. Ladoga Canning Co., 44 F. 2d 763 (C.A. 7th, 1930), noted 44 Harv. L. Rev. 867 (1931). See text at note 41 infra.

[12] Maltz v. Sax, 134 F. 2d 2 (C.A. 7th, 1943).

[13] "It is not necessary under the statute [Clayton Act] to aver an injury to a specific going business but . . . 'it is necessary to state facts showing an intention and preparedness to enter business.' " Triangle Conduit & Cable Co. v. National Electrical Products Corp., 152 F. 2d 398, 390 (C.A. 3d, 1945), quoting American Banana Co. v. United Fruit Co., 166 F. 261, 264 (C.A. 2d, 1908). In practice the difficulties involved in proof of damages by one who has not yet entered business may defeat a good claim, especially where the court only recognizes the loss-of-profits technique. Central Coal & Coke Co. v. Hartman, 111 F. 96 (C.A. 8th, 1901). Compare Wm. Goldman Theatres v. Loew's, Inc., 69 F. Supp. 103 (Pa., 1946).

are then faced with the difficult task of choosing a method of proving the extent of harm. Theoretically, one might assume that the measure of damages in any case should be the actual pecuniary losses suffered by the plaintiff, and that these should be measured by comparing actual with probable profits during the period of the wrong and adjusting for fluctuations not assignable to the defendant's conduct. But because situations arise in which the decline in net profits does not fully measure the extent of harm, damage claims based on a showing of unlawfully increased costs or decreased revenue have been approved. Which of the factors of loss—diminished net profit,[14] diminished gross revenue,[15] or increased costs[16]—a plaintiff ultimately relies on will depend on his estimation of the relative availability of evidence and the likelihood of recovery.[17]

Both the diminished revenue and lost profits methods involve an inference as to the amount of plaintiff's gross revenue and profits if defendant's illegal activities had not interfered.[18] In lightening plaintiff's burden of proving "what might have been," courts recently have permitted "probable and inferential proof" where none better was available.[19] Thus juries have been allowed to de-

[14] Bigelow v. RKO Pictures, Inc., 327 U.S. 251 (1946).

[15] Although lost profits and increased costs were early considered elements of loss under the Sherman Act, recovery for diminished revenue was first permitted in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931). In a suit for damages by a plaintiff injured in a price war with other parchment paper manufacturers, the Supreme Court upheld a charge to the jury which bade them consider as an element of damages "the difference between the prices actually received and what would have been received but for the unlawful conspiracy." The method of establishing damages approved by the trial judge had been clearly differentiated in the circuit court from the loss of profits technique, and although recovery was there denied because of uncertainty as to the amount of damages, the method was approved on analogy with decisions in which the only injury shown was increased cost.

[16] Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F. 2d 988 (C.A. 8th, 1945).

[17] Since both increased costs and diminished revenues affect the calculation of net profits, a plaintiff must choose between net profits and the other elements of injury in estimating extent of damage. He may, of course, choose whichever is the larger. Wm. Goldman Theatres, Inc. v. Loew's, Inc., 69 F. Supp. 103 (Pa., 1946). Where in addition to any of these elements of loss, he has suffered a decline in the value of his property, he may count the decline as additional loss. If the decline is taken into account in estimating any of the above elements, it may not be counted again. Ibid., at 105. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

[18] The diminished-revenue method merely requires that the plaintiff establish what his gross revenue would have been if the defendant's illegal activities had not interfered, three times the difference between expected gross revenue and revenue actually received being the formula for determining damages. The loss-of-profits technique may also require a showing of putative costs since the usual formula calls for trebling the difference between estimated profits and profits actually received during the period of the wrong. As a practical matter, however, the showing of prospective costs seems to have been no more difficult than a showing of prospective gross revenue, and no decision has been lost by a plaintiff who has successfully established prospective gross revenue while failing to establish prospective costs. Those who have found it difficult to establish either prospective revenue or prospective costs have been permitted to fix amount of damages by comparison with a competing business.

[19] "Where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a

rive significant differences between actual and possible receipts from analysis of plaintiff's business data before the wrong complained of and from expert testimony as to the probable growth of plaintiff's business.[20] And in several cases, plaintiffs have simply presented juries with a mass of evidence as to past earnings, expenses, and profits, and left them to draw their inferences.[21] No definite rules have been announced which prescribe the number of years from which evidence of past earnings is to be drawn—profit histories of only one year have been allowed.[22] In justifying conjectural proof the courts frequently have said that since the defendant's wrong rendered acquisition of adequate data impossible, "only the fact and not the amount of damage need be certain."[23]

In addition, recent courts have tended to relax rules requiring a causal connection between the plaintiff's injury and the defendant's activities. Changes in market conditions may have contributed as substantially as the defendant's conduct to the plaintiff's business decline. While these uncertain factors have provided a barrier to many plaintiffs' claims,[24] recent explicit pronouncements by the Supreme Court require only a showing of expected profit or revenue losses to establish a prima facie case, and place upon the defendant the burden of establishing that portion of the total loss not attributable to defendant's unlawful activity.[25]

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just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as [upon] direct and positive proof.' " Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946), quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 564 (1931).

[20] Bigelow v. RKO Pictures, Inc., 327 U.S. 251 (1946).

[21] William H. Rankin Co. v. Associated Bill Posters (Charles A. Ramsay Co. v. Same), 42 F. 2d 152 (C.A. 2d, 1930). Donovan and Irvine, Proof of Damages Under the Anti-Trust Laws, 88 U. of Pa. L. Rev. 511, 515 (1940).

[22] William H. Rankin Co. v. Associated Bill Posters (Charles A. Ramsay Co. v. Same), 42 F. 2d 152 (C.A. 2d, 1930).

[23] This is the customary rule. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 564 (1931). However, in Wm. Goldman Theatres, Inc. v. Loew's, Inc., 69 F. Supp. 103 (Pa., 1946), recovery was granted a theatre owner who was prevented from commencing operations by defendant's illegal operations. In perhaps the only decision of its kind, the court discusses the significance of three major factors—cost, selling price, and sales volume. Since plaintiff's business was a theatre, his costs and selling prices were relatively fixed, and his volume was determined by comparison with a neighboring theatre of similar location and reputation. The court pointed out that the relatively standardized character of the movie industry, as opposed to other industries, made it possible to consider these elements in determining the amount of plaintiff's interrupted revenue.

[24] Central Coal & Coke Co. v. Hartman, 111 F. 96 (C.A. 8th, 1911); Locker v. American Tobacco Co., 218 F. 447 (C.A. 2d, 1914); American Sea Green Slate Co. v. O'Halloran, 229 F. 77 (C.A. 2d, 1915).

[25] The jury may conclude "as a matter of just and reasonable inference from the proof of defendant's wrongful acts and their tendency to injure plaintiff's business, and from the evi-

In *Bigelow v. RKO Radio Pictures, Inc.*,[26] the Supreme Court approved an alternative method of establishing lost profits which may significantly ease the burden of proving "what might have been." There a theatre owner's evidence consisted of (1) a comparison of profits prior to the restraint with probable profits afterwards, and (2) a comparison of actual profits during the period of restraint with the profits of a comparable competing theatre owned by the defendant. The fact that the two methods established similar results strengthened the proof. This comparative method is most effective where the conduct complained of has barred the plaintiff's entrance into the field,[27] a situation in which alternative methods of proof are not otherwise available because the plaintiff lacks a history of revenue, cost, and earnings.

In cases where unlawful refusals to sell particular merchandise do not result in appreciable diminution of over-all profits, losses on the particular merchandise may measure damage. Thus in *Frey & Son, Inc. v. Welch Grape Juice Co.*[28] the defendant had sold plaintiff 190 cases of grape juice in 1911, but thereafter refused to supply him. Plaintiff's evidence as to previous gross profit per unit, less attaching costs, was considered relevant, and recovery was permitted despite the general increase in plaintiff's business after the refusal.[29]

It has frequently been stated that deprivations of monopoly profits are not compensable, and that a plaintiff must establish what his profits would have been in a "competitive" market.[30] Yet courts have realized that literal adher-

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dence of the decline in prices, profits, and values, not shown to be attributable to other causes, the defendants' wrongful acts had caused damage to the plaintiffs." Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946). Proof of Damages under the Anti-Trust Laws, 41 Ill. L. Rev. 462, 464 (1946). In placing the burden of uncertainty on the wrongdoer, the courts have followed a venerable common law principle which has been applied in trademark and admiralty cases, and the law of confusion of goods. Armory v. Delamire, 1 Strange 505 (1722). Developments in the Law—Damages, 61 Harv. L. Rev. 113, 187 (1947).

[26] 327 U.S. 251 (1946).

[27] In Wm. Goldman Theatres, Inc. v. Loew's Inc., 69 F. Supp. 103 (Pa., 1946). The case is noteworthy in its discussion of the elements which make one theatre comparable with another, a question which the Supreme Court treated most cavalierly in the *Bigelow* case.

Although proof of damages by the method of comparison was upheld in Theatre Inv. Co. v. RKO Radio Pictures, Inc., 72 F. Supp. 650 (Wash., 1947), the court considered the traditional methods of proving lost profits to be more reliable and only reluctantly authorized the method of comparison.

[28] 240 Fed. 114 (C.A. 4th, 1917), cert. den. 251 U.S. 551 (1919).

[29] Although a general increase in business during the period of the wrong will usually make it difficult to show loss of anticipated profits, in this case plaintiff's business upturn was helpful in establishing what he would have made on the boycotted merchandise.

[30] In Victor Talking Machine Co. v. Kemeny, 271 Fed. 810 (C.A. 3d, 1921), appellant had sought to maintain both wholesale and retail prices by means of a licensing system. Kemeny, a retailer, refused to heed defendant's instructions and was boycotted. Concerning his attempt to compute as damages anticipated profits based on the illegally maintained prices, the court said: "Profits which the plaintiff could anticipate . . . were only such as he could earn lawfully in a competitive market. Such profits can not . . . be ascertained from profits which he had

ence to such a rule would erect an almost insurmountable evidentiary barrier, and recent cases have ignored it in fact. Thus, in *Story Parchment Co. v. Paterson Parchment Paper Co.*,[31] damages were awarded on the basis of a projection of prices existing before the activity complained of, although the defendants had always controlled the business, the price structure was clearly noncompetitive, and the plaintiff was an unestablished, probably undercapitalized organization whose success was at least conjectural.

Lack of agreement as to whether damages awarded under the anti-trust laws are punitive or compensatory has created special problems for plaintiffs in increased-cost situations. On the theory that the damage award is punitive, an increased cost passed on to purchasers might still measure damages; but if the award is to be considered compensatory in nature, a strict definition of "loss" might deprive the plaintiff of recovery.[32]

Prior to 1941, there was little question that illegally increased costs measured damages even though not shown to have been absorbed by the plaintiff. Thus a shipper charged discriminatory rates in *Thomsen v. Union Castle Mail S. S. Co.*[33] "was damaged within the meaning of the statute [Sherman Act] to the extent of . . . sums . . . paid . . ." in excess of reasonable rates, without consideration of actual pecuniary loss. However, a series of decisions growing out of

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earned under a system whose sole purpose was to maintain prices, restrict competition, and create monopoly." Ibid., at 819. However, in Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1917), the Supreme Court, in permitting a jury to consider evidence of past earnings gathered from a noncompetitive market, approved a charge to the jury which bade it reduce damages based on such evidence to damages which would have been suffered in "normal business." Ibid., at 377. How this is to be accomplished is the jury's secret, and, presumably, if an appellate court thinks that the reduction has not been proper, it may reverse. In any event, the harshness of the *Kemeny* rule is mitigated by the *Eastman Kodak* decision in cases where proper instructions have been given.

[31] 282 U.S. 555 (1931). See the circuit court's opinion in the *Story* case, 37 F. 2d 537 (C.A. 1st, 1930). Procedure in Private Suits under the Sherman and Clayton Acts, 32 Col. L. Rev. 335, 344 n. 63 (1932).

[32] "Plaintiffs are seeking, not compensation for damages suffered by defendant's illegal acts, but profits because of said acts. . . . The Sherman . . . and the Clayton Act[s] afford a cause of action for those suffering damages. In their provisions for damages they embody both punitive and compensatory damages but no recovery can be had unless a case for compensatory damages is made. In the event of compensatory damages, then automatically punitive damages follow." Clark Oil Co. v. Phillips Petroleum Co., 148 F. 2d 580, 582 (C.A. 8th, 1945), cert. den. 326 U.S. 734 (1945). Compare Haskell v. Perkins, 28 F. 2d 222 (N.J., 1928); Recovery of Treble Damages under the Sherman Act, 38 Yale L. J. 503 (1929). A good discussion of this problem may be found in Vold, Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory? 28 Ky. L. J. 117 (1940).

Even if the treble-damages provisions are compensatory rather than punitive, the rights of claimants injured by cost increases might remain unsettled. What constitutes injury under a compensatory statute might still be debated, and, as cases in other fields indicate, the concept of injury is subject to many interpretations. Compare Webb v. Portland Manufacturing Co., 3 Sumner 189 (C.C. 1st, 1838); Stratton v. Mount Herman Boys School, 216 Mass. 83, 103 Atl. 87 (1913).

[33] 166 Fed. 251 (C.A. 2d, 1908).

United States v. Socony-Vacuum Oil Co.[34] required a showing that costs which had increased as a result of market-wide price fixing agreements had not been passed on to consumers.

For example in *Leonard v. Socony-Vacuum Oil Co.*,[35] a factor which had undoubtedly influenced all the courts in the *Socony-Vacuum* group of cases was made explicit. Because every jobber's costs had been increased by the same amount, and because the wholesale market was highly competitive, it was said that the increased cost was passed on by all in the form of uniformly higher prices. The market-wide nature of the illegal cost increase was held to distinguish the case from price discrimination situations in which the inability of the plaintiff to pass on increased costs is readily apparent.

It is clear, however, that the cost increase in the *Leonard* case would tend to reduce output and profits for the entire group of wholesalers. Output of a particular jobber would remain at the reduced level until some competitors were forced to leave the industry. While it might be difficult to calculate the decreased profit suffered by an individual firm, statements that wholesalers as a group could not have been injured by the cost increase are clearly false. And since other courts had found that the fact rather than the amount of lost profit was the significant element,[36] recoveries might have been justified although the precise extent of injury was uncertain.

In any event, the *Socony-Vacuum* series of cases ignored previous Sherman Act decisions refusing to require actual pecuniary loss[37] and erroneously sought

[34] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), noted 89 U. of Pa. L. Rev. 683 (1941). Defendants were convicted of conspiring to fix the price of gasoline sold to Midwest jobbers by manipulating the spot market price. Following judgment in this case, jobbers who claimed that they had been injured by the price increases manipulated by the conspirators sued for treble damages. See for example, Clark Oil Co. v. Phillips Petroleum Co., 148 F. 2d 580 (C.A. 8th, 1945); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F. 2d 967 (C.A. 7th, 1943); Leonard v. Socony-Vacuum Oil Co., 42 F. Supp. 369 (Wis., 1942); Twin Ports Oil Co. v. Pure Oil Co., 119 F. 2d 747 (C.A. 8th, 1941).

[35] 42 F. Supp. 369 (Wis., 1941).

[36] Bigelow v. RKO Pictures, Inc., 327 U.S. 251 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 561 (1931). See text at note 23 supra.

[37] Peto v. Howell, 101 F. 2d 353 (C.A. 7th 1938) (a purchaser may recover from a defendant who illegally cornered the grain market in Chicago the difference between the reasonable price and the price he had to pay); Strauss v. Victor Talking Machine Co., 297 F. 791 (C.A. 2d, 1924) (measure of damages is the difference between the price a retailer was compelled to pay as a result of a boycott and the reasonable price); Monarch Tobacco Works v. American Tobacco Co., 165 Fed. 774 (C.C. Ky., 1908) (measure of damages is the difference between the price the plaintiff was compelled to pay because of the illegal combination and the price he should have paid); Thomsen v. Cayser, 243 U.S. 66 (1917), discussed in text at note 33 supra; United States Tobacco Co. v. American Tobacco Co., 163 Fed. 701 (C.C. N.Y., 1908) (excessive price charged for licorice paste less the reasonable price is the measure of damages); Loder v. Jayne, 142 Fed. 1010 (C.C. Pa., 1906) (plaintiff who was injured by a boycott may recover the difference between the price paid and the price it would have paid the defendant); Chattanooga Foundry Co. v. Atlanta, 203 U.S. 390 (1906) (plaintiff, the ultimate consumer, who was injured by an illegal price increase, may recover the difference between what it paid and what it would have paid if not for the unlawful combination).

support in cases arising under the Interstate Commerce Act.[38] In these latter decisions shippers injured by rate discriminations were refused damages based on the amount of rebates paid to competing shippers because the increases had been borne by the public. Ignored was the general language of later Interstate Commerce cases which undermined the decisions relied on even when they are restricted to their peculiar facts. Thus, in *Adams v. Mills*,[39] a shipper was allowed to recover where, instead of rate discrimination by means of the rebate device, the railroads had simply forced the injured party to pay a higher rate than his competitors. The court considered lack of evidence as to increase absorption by the plaintiff immaterial, remarking that "if the defendants exacted from them an unlawful charge, the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to [recovery] from the wrongdoer."[40]

Principles analogous to those announced in these later Interstate Commerce cases have been adopted in price discrimination decisions under the anti-trust laws.[41] It has generally been held that the plaintiff in such a case may claim damages for loss of profits or for the amount of the discriminatory price difference, without question as to whether increased costs had been passed on to the consumer. In *Elizabeth Arden Sales Corp. v. Gus Blass Co.*,[42] damages were sought on evidence that the defendant had paid one-half the salary of plaintiff's clerk who sold defendant's product, while it paid the full salary of the clerk of a competing firm. The defense that plaintiff had not attempted to show loss of profits was disposed of on the grounds that he had "suffered a direct loss in the increased cost of operation . . . to the extent of the difference in the allowances arbitrarily made."[43] Furthermore, "to relieve the seller of the obligation to equalize such a discrimination through readily determinable general damages, where no special damages exist or are claimed, would be to weaken the effectiveness of the statute."[44] Earlier decisions under the Interstate Commerce Act relied on in the *Socony-Vacuum* cases were held inapplicable.

Aside from the weakness of the precedents relied on, criticism may be di-

[38] See for example Pa. R. Co. v. International Coal Mining Co., 230 U.S. 184 (1913).

[39] 286 U.S. 397 (1932).

[40] Justice Holmes' statement in Southern Pacific Co. v. Darnell Taenzer Lumber Co., 245 U.S. 531 (1918), is equally illuminating: "The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damages that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regards to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events." Ibid., at 533–34.

[41] Cases cited note 11 supra.

[42] 150 F. 2d 988 (1945), cert. den. 326 U.S. 773 (1945).

[43] Ibid., at 996.

[44] Ibid., at 997.

rected at the *Socony-Vacuum* cases for their misinterpretation of the role treble-damage actions play in the enforcement of the anti-trust laws. Rules, evidentiary or otherwise, which emphasize the compensatory rather than the punitive nature of these actions ignore their historical and legislative purposes. The very fact of the "times three" formula demonstrates their punitive characteristics.[45]

Indeed, it can be said that without the treble damage sanction, the meagre nature of the criminal penalties arising from governmental actions would render the anti-trust laws nugatory. For example, the *Socony-Vacuum* case, which cost $200,000 and took four years to prosecute, resulted in a fine of only $65,000 divided among seventeen defendants.[46] While it is true that treble-damage actions are usually brought in the wake of Justice Department victories, such actions, when they are successful, materially increase the factors deterring violation of the anti-trust laws. That such was the intention of Congress cannot be doubted.

To what extent have the intentions of Congress been met? One hundred seventy-five treble-damage actions were reported during the first fifty years of Sherman Act enforcement. Plaintiffs were successful in only thirteen of these, recovering $1,270,000.00, while decisions awarding an additional $12,756,000.00 were overruled by appellate courts.[47] Although these facts do not support an inference of judicial hostility to treble-damage actions, the vagaries in proof of damage rules outlined above may display judicial hesitancy to support the sanction.

Many reasons for the paucity of successful actions may be suggested; it is clear, however, that the uncertain state of the law relating to proof of damages is an important factor. The rule of the *Bigelow* case giving the plaintiff the benefit of a presumption that his business decline is due to the defendant's activities; recent tendencies to ignore the requirement that in estimating lost profits comparison be made with a competitive market; the general relaxation of the certainty rule in favor of the plaintiff—all of these may be expected to encourage claimants who now find the outcome of a suit for treble damages too uncertain to warrant action in the courts. What is now needed is a further crystallization of these rules, and a forthright acknowledgment of the purpose of the anti-trust laws in the lower federal courts.

[45] Fifty Years of Sherman Act Enforcement, 49 Yale L. J. 284 (1939); Vold, Are Threefold Damages Under the Anti-Trust Laws Penal or Compensatory?, 28 Ky. L. J. 117 (1940).

[46] Fifty Years of Sherman Act Enforcement, 49 Yale L. J. 284, 298 (1939).

[47] Suits in which nonwritten opinions were rendered likewise showed a small number of successful actions. Thus, of the forty-one private suits pending during 1938, one was disposed of by judgment, two by consent, confession, or compromise, thirty-six were dismissed, discontinued, withdrawn, or nonsuited; and one was otherwise disposed of. Annual Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1938, 233. It is apparent that although favorable judgments were not granted in most cases, many satisfactory settlements out of court could have been made. Donovan and Irvine, Proof of Damages Under the Anti-Trust Laws, 88 U. of Pa. L. Rev. 511, 526 (1940).