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ANTITRUST ENFORCEMENT BY PRIVATE PARTIES: ANALYSIS OF DEVELOPMENTS IN THE TREBLE DAMAGE SUIT

Recent years mark a startling animation of antitrust enforcement by private parties.¹ The private antitrust suit, despite its tender of trebled damages, was dormant for years.² As of 1940, a half century of private action had produced a mere 175 reported cases with judgment for plaintiff in only 13.³ But after World War II, the private antitrust claimant suddenly emerged from over fifty years of obscurity. Reported victories between 1945 and 1951 leaped to one and one half times the number compiled during the entire previous history of private antitrust litigation.⁴ Today, private actions are rapidly

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1. Private suits are authorized by § 4 of the Clayton Act which reads: “[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.” 38 STAT. 731 (1914), 15 U.S.C. § 15 (1946), superseding similar provisions in the Sherman Act, 26 STAT. 210 (1890) and 28 STAT. 570 (1894). Private suits for injunction are authorized by § 16 of Clayton.


2. For colorful description of the failure of private antitrust enforcement from its inception until 1940, see HAMILTON & TILL, ANTITRUST IN ACTION (TNEC Monograph 16, 1940) passim.

3. Comment, 18 U. of CHI. L. REV. 130, 138 (1950). The total amount of damages awarded from 1890 to 1940, $1,270,000, ibid., is more than quadrupled by reported awards in the last six years. See notes 225, 321-3 infra.

4. See Appendix II, 1064 infra.
multiplying: from 118 suits pending in United States District Courts in June 1947, the total as of last June had mounted to 367.5

The private antitrust suit is a curious combination of public regulatory and private compensatory law. While parties sue to enforce federal antitrust policy, recovery hinges upon a showing that violations cause injury to plaintiffs. Even where a valid cause of action exists, defenses common to civil litigation may bar suit; and special economic defenses are available for actions based on Robinson-Patman violations.

**PLAINTIFF'S CAUSE OF ACTION**

**The Violation**

Recent expansion of the substantive law of antitrust violations has broadened the range of activities subject to private attack. While price-fixing or pegging agreements have long been illegal per se under §1 of the Sherman Act,6 concerted refusals to deal are now equally unlawful.7 And Sherman Act "conspiracies" encompass a growing catalogue of business behavior, such as "consciously parallel" action of two or more defendants,8 or agreements between parent corporations and their subsidiaries.9 Since Sherman Act §2 "monopoly" proscriptions are now largely tested in terms of market control,10 a recent vastly narrowed concept of the relevant "market" may popularize

5. Cases newly commenced each year have climbed similarly. See Appendix I, p.1063 infra. Actually, the number of suits is even greater since figures do not include patent, copyright, trademark cases and counterclaims of any type. Ibid.


§ 2 for treble damage suits. Not only giants such as Alcoa or enterprises as vast and complex as the movie industry may now encounter § 2 challenge; the recent Supreme Court Lorain Journal decision 11 and the striking Gamco holding of the First Circuit 12 bring § 2 into focus on every enterprise meeting newly expanded interstate commerce tests. 13

Corresponding expansion has developed the Clayton Act. Under recent § 3 Supreme Court interpretations, exclusive dealing arrangements and tying sales seem unlawful whenever a substantial share of commerce in the relevant market is involved. 14 Recently-amended § 7 endangers mergers that may result in lessened competition. 15 And passage of the Robinson-Patman amendment in 1938 revived the dormant price discrimination provisions of § 2 of the Act. 16 In addition, the Robinson-Patman amendment outlaws a series of specific activities, such as "brokerage" concessions to direct buyers, and sellers' "proportionately unequal" advertising allowances or services to customers, 17 and makes buyers as well as sellers subject to prosecution and private suit. 18 Section 3 of Robinson-Patman, a criminal provision, outlaws some forms of price cutting and largely reiterates the price discrimination strictures of § 2. 19 Judicial interpretation of Robinson-Patman reveals the amendment as a catchall, with litigation turning up violations in all business contexts. 20 Moreover, as construed by the Supreme Court's Morton Salt decision, the price discrimination provisions come into play if the challenged


12. Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F.2d 484 (1st Cir. 1952) (refusal to renew dealer's lease on space in building which is center of local produce trade held an attempt to monopolize under § 2).

13. For expanded interstate commerce tests see pp. 1013-6 infra.


17. See note 23 infra.

18. Automatic Canteen Co. of America v. FTC, 194 F.2d 433 (7th Cir. 1952).

19. Rowe at 940 n.65.

20. Id. passim.
pricing creates merely "a reasonable possibility" of injury to competition, with injury to "competition" apparently construed as injury to individual competitors. And practices under other parts of the act are illegal per se, demanding no demonstration of competitive injury at all.

**Interstate Commerce**

Though Sherman Act boundaries extend to the full limits of Congressional power over interstate commerce, courts have been slow to read "commerce" requirements broadly for private plaintiffs. Interstate transactions or activities involving traditional channels of interstate commerce were long within the reach of private enforcement. And private parties could attack local activities found part of an interstate violatory scheme. But otherwise,

21. E.g., Morton Salt Co. v. FTC, 334 U.S. 37 (1948). See also American Can Co. v. Russellville Canning Co., 191 F.2d 38, 54 (8th Cir. 1951) (freight equalization which "conceivably might substantially lessen competition" held illegal price discrimination).


23. E.g., Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945) (brokerage); Elizabeth Arden, Inc., v. FTC, 156 F.2d 132 (2d Cir. 1946), crd, denied, 331 U.S. 895 (1947) ("proportionately equal" services). Cf. Elizabeth Arden Sales Corp. v. Gus Blass Co. 150 F.2d 988 (8th Cir. 1945), crd, denied, 326 U.S. 773 (1945) (same).


27. Where restraints were concerned with instrumentalities of commerce, the Sherman Act was held applicable, e.g., Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926) (combination of shippers fixing employees' wages and allocating work); even though the restraint aimed solely at local facilities used by interstate carriers, e.g., Bailey v. Pennsylvania R.R., 4 F.Supp. 785 (E.D. Pa. 1932) (local warehousing terminal); or at local transportation from one interstate carrier to another, e.g., Eastman v. Yellow Cab Co., 173 F.2d 874 (7th Cir. 1949) (conspiracy to limit cab licenses; cabs carry interstate passengers from one railroad station to another).

private attack against local activities, both at the beginning and end of interstate distribution processes, was circumscribed by courts' insistence that actionable restraints "directly affect" interstate commerce.29

In Mandeville Island Farms v. American Crystal Sugar Co.,30 however, the Supreme Court invoked the full extent of federal commerce power to aid Sherman Act plaintiffs injured in dealings prior to interstate distributions. The Act was held applicable to California refiners' price rigging in intrastate purchases from local California beet growers. Scuttling the "direct effect" test, the Court found that the refiners' illegal activities, despite their occurrence intrastate, "substantially affected" interstate commerce through the ultimate movement of sugar in interstate markets.31 But while the impact of the broader "substantial effects" test is already being felt,32 Sherman Act plaintiffs may still encounter difficulty where they are victims of illegal restraints at the end of interstate movement.33 For example, judicial conflict


31. Id. at 229, 234-5.


33. Courts demonstrate reluctance to grant relief:


(2) by finding "no public injury" because restraints arise in isolated transactions, e.g., Silverman v. Seifred, 1950-51 TRADE CASES ¶ 62,874 (N.D. Ill. 1951) (interstate dealer deprived of supplier's contract in local transaction thus forcing purchase of goods elsewhere at higher prices); Ruddy Brook Clothes, Inc. v. British Foreign & Marine Insurance Co., CCH TRADE REG. REP. CURRENT ¶ 67,244 (7th Cir. 1952) (insurance companies' concerted action in cancelling plaintiff manufacturer's insurance contracts pursuant to underwriter's report).

(3) by finding "no public injury" because restraints against plaintiff have no inter- state market effects where manufacturers selling interstate terminate local dealers' agency
may arise over Sherman Act applicability to sales by interstate defendants from local warehouses to plaintiffs in the same state.\textsuperscript{34} Well-established "flow of commerce" doctrines may be used, however, to extend the meaning of "interstate transactions" to encompass some activities at the end of interstate distribution.\textsuperscript{35}

Litigation under Clayton and Robinson-Patman provisions is subject to more stringent "commerce" requirements than Sherman Act suits.\textsuperscript{36} By the terms of the former acts, it is not sufficient that violations "affect" interstate commerce, they must involve transactions in interstate commerce.\textsuperscript{37} Thus, for example, an interstate supplier cannot be sued for sales that discriminate

contracts, \textit{e.g.}, Feddersen Motors, Inc. v. Ward, 180 F.2d 519 (10th Cir. 1950); Riedley v. Hudson Motor Car Co., 82 F.Supp. 8 (W.D. Ky. 1949); Neumann v. Bastian-Blessing Co., 70 F.Supp. 447 (N.D. Ill. 1947), and where interstate suppliers refuse to sell to local dealers, \textit{e.g.}, Shotkin v. General Electric Co., 171 F.2d 236 (10th Cir. 1948); McJunkin v. Richfield Oil Corp., 33 F.Supp. 466 (N.D. Cal. 1940); Abouaf v. Spreckels Co., 26 F. Supp. 830 (N.D. Cal. 1939), and where an interstate distributor combines with a local dealer to force local plaintiff dealer out of business, \textit{e.g.}, Arthur v. Kraft-Phenix Cheese Corp., 26 F.Supp. 824 (D. Md. 1938).

However, association of the restrained activity with radio, television, or transportation may bring restraints within the antitrust laws, Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949), note 32 supra; as may plaintiff's sales to interstate travelers, \textit{e.g.}, Munson v. Richfield Oil Corp., 91 F.Supp. 171 (S.D. Cal. 1950); \textit{Contra:} Dunkel Oil Corp. v. Anich, 1944-45 \textit{TRADE CASES} 57,305 (E.D. Ill. 1944).


35. \textit{E.g.}, Alabama Independent Service Station Association, Inc. v. Shell Petroleum Corp., supra note 34. And see cases cited note 40 infra.


37. While the plaintiff does not have to be engaged in interstate commerce, see \textit{e.g.}, Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949) (plaintiff local retailer alleges that defendant discriminates in favor of competing retailer in another state), the defendant must not only be engaged in, but must practice his restraints in interstate commerce, see \textit{e.g.}, Myers v. Shell Oil Co., 95 F.Supp. 570 (S.D. Cal. 1951) (complaint dismissed where sales are from interstate defendant's refinery located in plaintiff's state): Nachman v. Shell Oil Co., 1944-45 \textit{TRADE CASES} 57,361 (D. Md. 1945) (jury charge: if goods shipped to plaintiff from warehouse in same state, plaintiff can recover only if his order to interstate supplier were by phone to office in another state). Even if plaintiff sells in another state, his action against a local competitor will be dismissed where plaintiff's interstate sales are small (1%). Atlantic Co. v. Citizens Ice & Cold Storage Co., 178 F.2d 453 (5th Cir. 1949), \textit{cert. denied}, 339 U.S. 953 (1949).
in favor of purchasers competing with plaintiff, where the point from which
the supplier sells is in the same state as the
buyers. And relief is similarly
denied even though one of the purchasers may subsequently sell to interstate
travelers. But some court holdings expand the meaning of “transactions
in” interstate commerce to reach diametrically opposite results. These courts,
finding local warehouses a “temporary halting place” for goods, urge that
intrastate sales from warehouses to plaintiffs are part of the “flow” of inter-
state transactions. Anomalously, supposedly more stringent Clayton and
Robinson-Patman provisions thus allow suits in situations where adherence
to some narrow Sherman interpretations excludes them.

Cause

A private plaintiff must show that the defendants’ violations caused his
injury. “Legal cause” for the private suitor is, as in tort law, a catchall
concept subsuming several issues. Of course, plaintiff must show some physical
causation between violation and injury. But assuming the presence of

38. E.g., Lipson v. Socony Vacuum Corp., 87 F.2d 265 (1st Cir. 1937) (relief denied except where tank cars bringing oil into state deliver to plaintiffs directly); Myers v. Shell Oil Co., supra note 37; Nachman v. Shell Oil Co., ibid.; Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 81 F.Supp. 547 (S.D. N.Y. 1948), rev’d on other grounds, 178 F.2d 150 (2d Cir. 1949); Lewis v. Shell Oil Co., 50 F.Supp. 547 (N.D. Ill. 1943).


42. See statutes cited note 1 supra.

43. See e.g., James & Perry, Legal Cause, 60 YALE L. J. 761 (1951) passim; PROSSER, HANDBOOK OF THE LAW OF TORTS 311-75 (1941).

44. E.g., Milwaukee Towne Corp. v. Loew’s, Inc., 190 F.2d 561 (7th Cir. 1951) (no physical cause where injury arose from producer’s alleged refusal to license first run pictures, but plaintiff unable to show he requested first run films); Momand v. Universal Film Exchanges, Inc., 172 F.2d 37 (1st Cir. 1948) (where previous litigation adjudicated that only two counts of violation were valid, plaintiff’s evidence shows no damages specifically caused by these counts); Sager Glove Corp. v. Bausch & Lomb Optical Co., 149 F.2d 1 (7th Cir. 1945) (references to government suit against defendants concerning patented items irrelevant in complaint alleging violations in respect to unpatented items); Vance v. United States, 1950-51 TRADE CASES ¶62761 (S.D. N.Y. 1951) (complaint with allegations that injury results from illegal combination’s piracy of songs dismissed; piracy is not an antitrust violation, and piracy, not the violation, allegedly caused injury); McWhirter v. Monroe Calculating Machine Co., 76 F.Supp. 456 (W.D. Mo. 1948) (plaintiff, alleging illegal discounts given by defendant, unable to show that purchasers bought from defendant because of the discount); Hoffman v. Riverside & Dan River Cotton Mills, Inc.,
some physical causation, different types of fact contexts elicit varied court responses under labels of "cause" or "direct injury." Two distinct problems arise where antitrust plaintiffs have transacted business with violators of the antitrust laws: (1) injuries may result from causes other than the violation; and (2) the same activities that produce illegal restraints in one area of the economy may cause private injuries in another area. In addition, courts face the problem (3) of plaintiffs who do not deal with violators, but suffer losses stemming from the injuries of parties who do.

Where there is more than one cause of injury, the issue for trial is whether the comparative significance of the violation's causal role warrants attributing plaintiff's injury to it.43 Previously, courts frequently made this determination as a matter of law and stated conclusions of causal sufficiency in "direct-indirect" terminology.44 But now, where any reasonable inference of causal relation is possible, courts generally permit plaintiffs to reach juries.45 Bigelow v. RKO 48 definitively established the guiding principle. The Supreme Court ruled that plaintiff movie exhibitor was entitled to access to a jury on his showing of some causal relation between his losses and defendant distributors' illegal system of film release. In addition, the Court imposed on defendants the affirmative burden of proving the portion of loss not caused by violations.49

55 F.Supp. 13 (S.D. N.Y. 1944) (defendant shows that reason for alleged illegal refusal to sell was the "unsatisfactory" account of plaintiff).

45. Even though plaintiffs show some causal relation between violation and injury, other factors may concurrently cause injury as well, e.g., Fifth & Walnut v. Lecoe's, Inc., 176 F.2d 587 (2d Cir. 1949) (theatre troubles due more to location and type of patronage than to defendant's film distribution practices); Turner Glass Corp. v. Hartford-Empire Co., 173 F.2d 49 (7th Cir. 1949), 63 Harv. L. Rev. 907 (1949) (business losses probably due to depression); McWhirter v. Monroe Calculating Machine Co., 76 F.Supp. 456 (W. D. Mo. 1948) (war and shortages rather than defendant's practices probably account for decline in sales). For difficulties in proof created by manifold causation of injury, see Hamilton & Till, Antitrust in Action 84 (TNEC Monograph 16, 1940); Note, 64 Harv. L. Rev. 317 (1950) (discussed from viewpoint of damages). Consequently, the problem of "cause" may become one of evaluating the significance of the violation's influence on losses.

46. See cases cited in Comments: 44 Ill. L. Rev. 493, 497-8 nn.20, 23 (1949); 49 Yale L.J. 284, 297 n.83 (1939).

47. E.g., Bordouaro Brothers Theatres, Inc. v. Paramount Pictures, Inc., 176 F.2d 594 (2d Cir. 1949) (failure of one defendant's actions to coincide with those of other defendants does not show absence of cause where reasonable inference possible for jury); Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2d Cir. 1948) (refusal to dismiss complaint where plaintiff can conceivably show causal relation); Louisiana Protective Ass'n v. Great Atlantic & Pacific Tea Co., 131 F.2d 419 (5th Cir. 1942) (same; "no matter how improbable" that plaintiff can show cause he is entitled to go to the jury); Camrel Co. v. Paramount Film Distributing Corp., 1944-45 Trade Cases ¶ 57,233 (S.D. N.Y. 1944) (same).


49. "[T]he jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits, and values, not shown to be attribut-
However, despite the Bigelow rule, multiple causation may still produce judges' determination of "indirectness of cause," even though reasonable causal inferences seem present.60

Courts also deal with multiple causation problems in the guise of determining whether plaintiffs have suffered a "legal injury."61 For example, when plaintiffs allege that antitrust violations have defeated expected gains from projected contracts, courts may refuse to recognize the loss of anticipated profits as an "injury."62 They similarly find no "legal injury" when alleged violations thwart profit expectations from a business expansion which plaintiff is unequipped to effectuate.63 In fact, however, the "injury" in these situations is identical with the "injury" from lost profits on contracts already consummated, or lost profits of an equipped concern; i.e., the defeated expectations of gain. The difference lies in the relative significance of the violation's causal role in defeating profit expectations: loss of profits from contracts still in a negotiation stage, for example, may stem from influences, other than the violation, that might have prevented consummation in the first place.64 The

...able to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." Id. at 264 (emphasis added).

While the original justification for inferential proof was the unavailability of evidence because of the "wrongdoer's misconduct," see id. at 265, the reasonable inference jury rule has become a general rule of pleading and appellate practice, see cases cited note 47 supra.


51. See e.g., Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) (court deals with multiple causation as ability to show "fact of damage"); Bausch Machine Tool Co. v. Aluminum Co. of America, 79 F.2d 2117 (2d Cir. 1935) (same). See [1950] U. OF ILL. LAW FORUM 659, 666: "this so-called 'fact of damage' is nothing more than a showing that the wrong complained of has caused injury or ... that it constitutes the proximate cause of plaintiff's injury." And see cases cited notes 52, 53 infra.


53. E.g., Triangle Conduit & Cable Co. v. National Electric Products Corp., 152 F.2d 398 (3d Cir. 1945) (complaint of exclusion from potential market dismissed where plaintiff's plant barely produces enough for his own needs).

54. In the Goodman case, supra note 52, the court, while speaking in terms of "injury" asserted the uncertainty of contract consummation as a ground for dismissal. Cf. Corey v. Boston Ice Co., supra note 52.
choice of treating the problem as one of "multiple cause," on the one hand, or "legal injury," on the other, may initially seem semantic. But the difference is significant. Since "legal injury" criteria are court-applied, they provide convenient means to circumvent the Bigelow rule requiring submission of causal issues to the jury whenever there is a reasonable inference that the violation caused injury.55

Illegal activities directed at one area of the economy may equally injure plaintiffs in other areas who transact business with the antitrust violators. Previously, sparse holdings indicated that private suits might be available to these plaintiffs.56 But the recent Ninth Circuit decision in Conference of Studio Unions v. Loew's, Inc.57 holds the contrary. In the Conference case, plaintiff labor union alleged that defendants, major studios and another union, had conspired to drive independent movie studios out of business. The alleged conspiracy took the form of contracts between the defendants whereby major studios agreed to deal with defendant union exclusively. In exchange, defendant union agreed to accept lower wages in work performed for the major studios, and to perform all of major studios' work before doing any for the independent studios. As a result of the conspiracy, plaintiff union claimed that it lost employment at the major studios.58 The Ninth Circuit affirmed dismissal of the complaint. It found that since plaintiff union's loss of employment did not result from the object of the conspiracy, impairment of competition among movie studios, the cause of the injury was "indirect."59 Since parties are frequently injured by violations directed elsewhere, the implications of the Ninth Circuit's rationale are far-reaching.60 However, lack of precedent

55. The use of court-applied "legal injury" criteria is similar to the use of the doctrine that damages are "speculative" to take cases away from the jury. See, e.g., First National Pictures v. Robison, 72 F.2d 37 (9th Cir. 1934) (inferences of damages "speculative" where exclusion from controlled market bars showing what business could make in free market); Victor Talking Machine Co. v. Kemeny, 271 Fed. 810 (3d Cir. 1921) (same). And see Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946). For the use of "legal injury" criteria for the same purpose in respect to another proximate cause issue, see notes 63-6 infra.

56. E.g., Roseland v. Phister Manufacturing Co., 125 F.2d 417 (7th Cir. 1942) (sales agent may recover from his employer for loss of employment resulting from employer's vertical integration); Klein v. Sales Builders, Inc., 1950-51 TRADE CASES ¶ 62,600 (N.D. Ill. 1950) (commission salesman's loss of income recoverable when caused by employer's giving illegal lower rates to chain stores), suit subsequently dismissed for failure to prove injury, 1950-51 TRADE CASES ¶ 62,950 (N.D. Ill. 1951).

57. 193 F.2d 51 (9th Cir. 1951).

58. The facts of the case are set out id. at 52-3.

59. Id. at 54-5.

60. E.g., the application of the Conference rule would have precluded recovery in cases cited note 56 infra; and the rule is used to bar suit where plaintiffs do not deal with violators, but suffer injury through dealings with parties injured in transactions with violators. See p. 1021 infra.
for the holding and presence of contrary doctrine may mitigate the impact of the Conference of Studio Unions ruling.\textsuperscript{61}

Plaintiffs who do not deal with the violators may suffer losses in business transactions with the violations' immediate victims. In Seaboard Terminal Corporation \textit{v.} Standard Oil of New Jersey,\textsuperscript{62} for example, plaintiff company, transacting business with a dealer victimized by a Sherman Act violation, sued the violators for profits lost from vanished transactions with the dealer. The court denied relief on grounds of "indirect cause," applying the same criteria later used in the dissimilar Conference of Studio Unions case: plaintiff's injury was not "designed as part of the conspiracy, but was merely a result of it." Other courts, in terms of "direct injury," deal with the same causal problem. The requisite "directness of injury" was held lacking, for example, in a number of suits by shareholders,\textsuperscript{63} officers,\textsuperscript{64} creditors,\textsuperscript{65} landlords,\textsuperscript{66} or attorneys\textsuperscript{67} of victimized businesses. Despite these barriers to plaintiffs who sustained losses through the antitrust injuries of intermediate parties, some recent decisions portend a contrary result. Recent successful actions by employees\textsuperscript{68} and a lessor\textsuperscript{69} of antitrust victims indicate hitherto unavailable actions for plaintiffs more remote on the causal chain.\textsuperscript{70} Since the physical causation between antitrust violations and injury may extend indefinitely,

\textsuperscript{61} For contrary holdings, see note 56 \textit{supra}. While the 9th Circuit found support in language of earlier decisions, \textit{every case} cited as authority by the court was irrelevant to the holding, for each concerned plaintiffs who did not themselves deal with violators. See cases cited notes 63-6 \textit{infra}.

\textsuperscript{62} 1 CCH \textit{Trade Reg. Rep.} \textsection{}1640.237 (D. N.Y. 1936).


\textsuperscript{64} \textit{E.g.}, Corey \textit{v.} Boston Ice Co., 207 Fed. 465 (D. Mass. 1913).

\textsuperscript{65} \textit{Cf.}, Loeb \textit{v.} Eastman Kodak Co., 183 Fed. 704, 709 (3d Cir. 1910).


\textsuperscript{67} \textit{Cf.} United Copper Securities Co. \textit{v.} Amalgamated Copper Co., 232 Fed. 574, 577 (2d Cir. 1916).

\textsuperscript{68} McWhirter \textit{v.} Monroe Calculating Machine Co., 76 F.Supp. 456 (W.D. Mo. 1948) (complaint upheld; judgment for defendant on merits). And \textit{cf.} cases cited note 56 \textit{supra}.

\textsuperscript{69} Camrel Co. \textit{v.} Paramount Film Distributors Corp., 1944-45 \textit{Trade Cases} \textsection{}57,233 (S.D. N.Y. 1944).

\textsuperscript{70} Since the actions by stockholders, creditors, and officers of a corporation all involved the possibility of a multiplicity of recoveries for the same injury, see, \textit{e.g.}, Loeb \textit{v.} Eastman Kodak Co., 183 Fed. 704, 709 (3d Cir. 1910), they are distinguishable from other possible actions by parties more removed along a single causal chain. Aside from suits where multiplicity arises, actual holdings seem evenly divided for suits by remote plaintiffs.

\textit{See Comment, 44 ILL. L. REV.} 493, 501-5 (1949) where, although the commentator confuses the problem of causation with "commerce" requirements for private suits, he indicates possibilities for extension of recoveries along a single chain of causation.
the problem is simply the desirability of cutting off recovery at some point along the causal chain. But courts, at least overtly, have not so handled the issue, and have determined recovery by resort to purely verbal criteria.

Relief

Injunctions. Courts, to halt actual or potential injuries caused by antitrust violations, may grant injunctive relief to private plaintiffs. Since the injunction aims to prevent future injuries, it may issue even though plaintiffs show only threatened rather than existing damage. Preliminary injunctions are available to maintain the status quo pending litigation. But preliminary relief will not be granted where it might alter the status quo or where material issues are in dispute. On the other hand, once litigation is concluded, courts may permanently enjoin defendants from engaging in violations. In the exercise of a broad equitable discretion, courts are free to tailor permanent injunctions to the needs of individual plaintiffs. However, the scope of the

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71. See James & Perry, Legal Cause, 60 YALE L.J. 761, 783 et seq. (1951). See also sources cited, id. at 784 n.86. And see Comment, 44 ILL. L. Rev. 493, 501-5 (1949).

72. 38 STAT. 737 (1914), 15 U.S.C. § 26 (1946). Where injunction and damage claims are joined, plaintiff is still entitled to a jury if the claim is "basically" for damages, e.g., Ring v. Spina, 166 F.2d 546 (2d Cir. 1948), cert. denied, 335 U.S. 813 (1948), and cases cited 166 F.2d at 550, and an award of injuction alone does not entitle plaintiff to attorney fees, see, e.g., Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951); Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir. 1923); Alden-Rochelle, Inc. v. ASCAP, 89 F.Supp. 888 (S.D. N.Y. 1948), but it does entitle him to costs, see e.g., Ring v. Spina, 84 F.Supp. 403 (S.D. N.Y. 1949); Midwest Theatres Co. v. Cooperative Theatres of Michigan, 43 F.Supp. 216, 225 (E.D. Mich. 1941).

73. While earlier, courts spoke in terms of a "dangerous probability" of harm to justify injunctions, e.g., Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927), injunctions are now granted if harm is simply threatened, e.g., Alden Rochelle v. ASCAP, 88 F.Supp. 888 (S.D. N.Y. 1948) (power to raise prices illegally and exclude competitor).


75. E.g., Martin v. National League Baseball Club, 174 F.2d 917 (2d Cir. 1949); Anderson-Friberg, Inc. v. Justin Clary & Son, Inc., 93 F.Supp. 75 (S.D. N.Y. 1951); Volk v. Loew's, Inc., 1950-51 TRADE CASES ¶ 62,784 (D. Minn. 1950); Tann v. Standard Oil Co., 1950-51 TRADE CASES ¶ 62,723 (N.D. Ill. 1950). Nor will a preliminary injunction issue if no irreparable injury will otherwise result, e.g., Reynolds International Pen Co. v. Eversharp, Inc., 63 F.Supp. 423 (D. Del. 1945). But even where irreparable injury is shown, the injunction must not disturb the status quo, see e.g., Warner Bros. Pictures, Inc. v. Gittone, 110 F.2d 292 (3d Cir. 1940). Appeal from a denial of preliminary injunction will be considered only in case of an abuse of discretion. Meiselman Theatres v. Paramount Film Distribution Corp., 180 F.2d 94 (4th Cir. 1950) (denial affirmed).

76. Courts apply usual equitable principles to private antitrust injunctions. See statute cited note 72 supra. And see Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). While discretion is broad, courts will not issue an injunction to compel a defendant patentee to grant a license, Andrea, Inc. v. Radio Corp. of America, 83 F.2d 474 (3d Cir.
injunction is scrupulously confined solely to the parties and issues before the court.\textsuperscript{77}

\textbf{Damages.} Once plaintiffs establish violations causing injury, they must demonstrate the amount of loss suffered.\textsuperscript{78} As damage yardsticks, they may select: (1) loss of profits;\textsuperscript{79} (2) increased costs;\textsuperscript{80} or (3) depreciation in value of business or property.\textsuperscript{81} When decline in value of business or property is not taken into account by either of the first two standards, it may be used concurrently with each.\textsuperscript{82} However, under any accepted standard, plaintiffs may not recover for damages that could have been avoided with due diligence.\textsuperscript{83}

\textsuperscript{77} See, e.g., Allen Bradley v. Local #3, 325 U.S. 797 (1945) (injunction modified); Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951) (same); Ring v. Authors' League of America, 186 F.2d 637 (2d Cir. 1951), cert. denied, 341 U.S. 935 (1951) (same). And see Revere Camera Co. v. Eastman Kodak Co., 81 F.Supp. 325 (N. D. Ill. 1948).


\textsuperscript{79} See note 97 infra. For cases prior to 1940 see Donovan & Irvine, supra note 78, at 517 n.30. While traditional lost profits recoveries are measured by anticipated earnings lost by the victim of a violation, one commentator interprets recent cases to indicate a possible additional measure based on the benefit the wrongdoer receives from his misconduct. See McConnell, supra note 78, at 668. Subsequent decisions lend additional support to this view. See Twentieth-Century Fox v. Brookside Theatre Corp., CCH Trade Reg. Rep. Current \textsection{}67,218 (8th Cir. 1952) (where plaintiff is forced by violation to surrender leasehold, evidence of profits of plaintiff's successor, one of the defendants, may go to jury); Fargo Glass & Paint Co. v. Globe American Corp., 1950-51 \textit{Trade Cases} \textsection{}62,945 (N. D. Ill. 1951) (loss of profits measured by net profits of defendant in territory illegally usurped).

\textsuperscript{80} See notes 87, 98 infra; Donovan & Irvine, supra note 78, at 517 n.28.

\textsuperscript{81} See notes 82, 91 infra; Donovan & Irvine, supra note 78, at 516 n.25.


\textsuperscript{83} E.g., American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951) (plaintiff could have prevented losses due to delays in delivery); Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 178 F.2d 150, 153 (2d Cir. 1949) (if business losses exceeded the amount of discrimination stemming from defendant's supplying a "demonstrator" to plaintiff's competitor, plaintiff cannot recover the excess, since his own hiring of a demonstrator could have prevented the additional loss). \textit{But cf.} Dean Milk v. American Processing & Sales Co., 1950-51 \textit{Trade Cases} \textsection{}62,777 (N. D. Ill. 1951) (plaintiff, suing for competitor's discrimination that draws off plaintiff's customers, does not have to meet discriminatory price).
While use of all other damage measuring rods is generally approved, lower court decisions in the early 40's leave the status of "increased cost" measurement open to question. Following the government proceeding in United States v. Socony Vacuum for violation of § 1 of the Sherman Act, gas jobbers sued Socony for increased costs of gas caused by Socony's unlawful stabilization of prices. When jobbers could not demonstrate that increased costs had not been passed on to their customers, courts denied relief. Since the requirement of showing that increased costs have not been passed on is equivalent to insistence on "lost profit" standard, these decisions in effect repudiate the "increased cost" yardstick. However, later holdings applying "increased cost" measure of damages indicate that the Socony rulings may have little remaining force.

Robinson-Patman plaintiffs may generally select damage measurements geared to specific violations. Where buyers sue on grounds of discriminatory price treatment or withholding of "proportionately equal" allowances or services, "general" damages may be measured by the precise amount of the discrimination or inequality. Generally, courts reason that the favoring of one

84. 310 U.S. 150 (1940).
86. The decisions leave open the question of whether the plaintiff, if he shows some injury, may then apply the "increased cost" yardstick, or whether the plaintiff can only recover for "lost profits." A similar problem arises with Robinson-Patman "general" damages. Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F2d 10 (2d Cir. 1949), would permit recovery only for the lost profits. For argument that "increased costs" measures should apply, see Comment, 18 U. of Chi. L. Rev. 130, 137-8 (1950).
87. E.g., Pfotzer v. Aqua Systems, Inc., 162 F.2d 779 (2d Cir. 1947) (purchaser recovers difference between monopoly contract price and reasonable price); cf. Alden-Rochelle v. ASCAP, 80 F.Supp. 883, 897 (S.D. N.Y. 1948) (excessive royalties, if shown, can be recovered). And see Robinson-Patman "general" damage cases using "increased cost" rationale, note 88 infra. Earlier decisions uniformly permitted "increased cost" recovery. See, e.g., Thomsen v. Cayser, 234 U.S. 66 (1917) (shippers paying unreasonable freight rates because of combination of ocean carriers recover difference between monopoly rates and reasonable rates); Peo v. Howell, 101 F.2d 353 (7th Cir. 1938) (purchaser recovers, from defendant who illegally corners grain market, difference between price paid and reasonable price).
88. Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 938 (8th Cir. 1945), cert. denied, 326 U.S. 773 (1945) (damages equal the difference between defendant's salary payment for "demonstrator" of plaintiff's competitor and for "demonstrator" of plaintiff); Bruce's Juices, Inc. v. American Can Co., 187 F.2d 919 (5th Cir. 1951), relocating denied, 190 F.2d 73 (5th Cir. 1951) (price discrimination), following dicta in Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 757 (1947) (denial of defense of antitrust violation in action on a note). But where "general" damages are granted they may be limited to the
buyer over another is akin to an “increased cost of business.” Consequently, they hold that a showing of discrimination or inequality itself demonstrates injury and that the “general” measures apply. Other courts, however, may defeat application of “general” damage yardsticks by requiring plaintiff to demonstrate an injury caused by the discrimination or inequality. In any event, Robinson-Patman plaintiffs may not only recover “general” damages, but may also sue concurrently under usual damage measures if the additional damages will not duplicate “general” damage recovery.

Plaintiff’s choice of alternative damage measures may allow private recoveries in the absence of injury. For example, “increased costs” measurement of damages may be applied even when plaintiffs have avoided loss by passing on costs to their customers. And in suits for unlawful refusals to sell, courts may permit recovery for lost profits on unobtainable items although losses may have been offset by gains from sales of obtainable substitutes. In addition, permissible Robinson-Patman “general damage” standards may bear no relation to actual loss: a discriminatory price or “proportionately unequal” allowance or service may enhance the favored recipient’s business position; disfavored buyers, however, suffer loss only to the extent that the enhanced position impinges on their business, and often

amount of the discrimination in excess of cost savings to the defendant from the discrimination. American Can Co. v. Russellville Canning Co., 191 F.2d 38, 56 (8th Cir. 1951). Robinson-Patman plaintiffs may also recover for “lost profits” instead of “general damages.” See American Cooperative Serum Ass’n v. Anchor Serum Co., 153 F.2d 907 (7th Cir. 1946), cert. denied, 329 U.S. 721 (1946).

89. E.g., Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 996 (8th Cir. 1945), cert. denied, 326 U.S. 773 (1945); Bruce’s Juices, Inc. v. American Can. Co., 87 F.Supp. 985, 990 n.9 (S.D. Fla. 1949), aff’d, 187 F.2d 919 (5th Cir. 1951) (lower court cites to “increased cost” cases as authority for “general” damages).

90. Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949). Cf. American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951). While Russellville has been considered inconsistent with cases allowing “general” damages, see Note, 4 STAN. L. REV. 304 (1952), this reading seems erroneous. As recognized by the court itself in Russellville, supra, at 55, the rule of “general” damages still applies in usual situations. But since the plaintiff in Russellville actually benefited from the change in pricing point which gave rise to the charge of discrimination, Russellville fails within the exception to the “general” damage rule for “extraordinary” situations. See Bruce’s Juices, Inc. v. American Can Co., 330 U.S. 743, 757 (1947). Sun Cosmetic Shoppe, on the other hand, is an explicit repudiation of the “general” damage rule, and furthermore, may only permit recovery of usual damages (if injury is shown) up to the amount of discrimination. Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., supra, at 153.


92. See sources cited note 87 supra.

it may not. In some extreme cases courts have revolted against injury-less recoveries that stem from fictional yardsticks and dismiss actions with judicial findings of "no injury." But generally, fictional measuring rods are accepted. Courts recognize that while fictional yardsticks may not gauge the extent of injury in many situations, strict adherence to required showings of the amount of injury sustained would preclude actions for a host of violations.

Under all damage standards, lack of precise proof of damage amounts no longer blocks private recoveries. Previously, under the guise of preventing damages that were "speculative," courts, by barring inferential proof of losses, created difficult evidentiary barriers for private suitors. But generally today, once plaintiff demonstrates some injury, juries may infer lost profits from past earning records of plaintiff's business or from current earning records of similar enterprises. And monopoly increases in costs to plaintiffs are


95. See discussion and cases cited in McConnell, supra note 78, passim.

96. See, e.g., Bausch Machine Tool Co. v. Aluminum Co. of America, 79 F.2d 217 (2d Cir. 1935) (inability of new business to show profits prior to defendant's illegal acts makes damages "speculative"); First National Pictures v. Robison, 72 F.2d 37 (9th Cir. 1934), cert. denied, 293 U.S. 609 (1934) (exclusion from controlled market gives no basis for calculating damages); Victor Talking Machine Co. v. Kemeny, 271 Fed. 810 (3d Cir. 1921) (same). But see Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 579 (1927). The doctrine continued to apply in circuit and lower courts until fairly recently, see, e.g., Finley v. Music Corp. of America, 66 F.Supp. 569 (S.D. Cal. 1946) (evidence of profits based on predecessor's operations before conspiracy is "speculative"); Bigelow v. RKO-Radio Pictures, 150 F.2d 877 (7th Cir. 1945), rev'd, 327 U.S. 251 (1946) (evidence of operation prior to conspiracy plus competitors' profits during conspiracy).

97. See, e.g., Bigelow v. RKO-Radio Pictures, Inc., 327 U.S. 251 (1946); Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951), cert. denied, 342 U.S. 969 (1952); Bordonaro v. Paramount Pictures, Inc., 176 F.2d 594 (2d Cir. 1949); William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738 (3d Cir. 1945) (remanding), 69 F. Supp. 103 (E.D. Pa. 1946), aff'd, 164 F.2d 1021 (3d Cir. 1948), cert. denied, 334 U.S. 811 (1948); Theatre Investment Corp. v. RKO-Radio Pictures, Inc., 72 F.Supp. 659 (W.D. Wash. 1947) (permitting, but disapproving comparison measure). And see recent cases cited note 79 supra. While the use of inferential proof was justified on the theory of not permitting the wrongdoer to benefit from the lack of certainty created because of his own deeds, see, e.g., Bigelow v. RKO-Radio Pictures, Inc., supra, at 265, at least one court permitted it independently of the "wrongdoer" rule, on the basis of the standardized operating costs and clear features of comparison in the movie industry. See William Goldman Theatres, Inc. v. Loew's, Inc., 69 F.Supp. 103, 107 (E.D. Pa. 1947).

Bigelow not only establishes acceptability of inferential proof, but also shifts the burden of proof: once plaintiff shows some injury, defendant must show what part of the injury is not due to the violation. See p. 1017 supra. And see, e.g., Bordonaro v. Paramount Pictures, Inc., 176 F.2d 594 (2d Cir. 1949); American Cooperative Serum Ass'n v. Anchor Serum Co., 153 F.2d 907 (7th Cir. 1946), cert. denied, 329 U.S. 721 (1946).

The leading Bigelow case evoked a storm of comment heralding the new rules for inferential proof, see sources cited note 49 supra, with one commentator regarding
demonstrable with inferential estimates of what market price would have been under competitive conditions. Despite these new rules, courts retain ample tools for dismissing plaintiffs whose proof is, in their opinion, unacceptable: "purely speculative" damages and failure to produce the best evidence available can result in dismissal; and courts may always resort to findings of "no injury" or "indirect cause." Tax considerations may govern a treble damage plaintiff's selection of damage measures. Recoveries are taxed in terms of the injury for which they compensate. Thus, for example, damages (or settlements) for lost profits are taxed as profits, i.e., at income tax rates. On the other hand, recoveries that simply replace a loss of permanent investment are not taxable at all. Should they exceed the loss, they are regarded as returns on capital and consequently are subject to capital gains tax rates. In addition, recoveries for loss of "good will" may also be accorded return of investment or capital gains treatment. Since different theories of recovery may produce different tax consequences, clever complaint drafting or cooperation


99. E.g., Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 83-4 (7th Cir. 1950), rev'd on other grounds, 340 U.S. 558 (1951) (damages based on accountant's own idea of reasonable returns with no basis in the particular business are "speculative"). And see cases cited note 96 supra.

100. E.g., Emich Motors Corp. v. General Motors Corp., supra note 99 (no business books presented in evidence); Alden-Rochelle v. ASCAP, 80 F.Supp. 888 (S.D. N.Y. 1948) (inter alia, lack of expert testimony). And see sources cited Donovan & Irvine, supra note 78, at 516 n.27.

101. See pp. 1016-21 supra.


103. See, e.g., Raytheon Production Corp. v. Commissioner, supra note 102; Swastika Oil & Gas Co. v. Commissioner, 123 F.2d 382 (6th Cir. 1941). And see Buck Glass Co. v. Hofferbert, 176 F.2d 250 (4th Cir. 1949) (refund of illegal royalty charges).

104. Cf. Raytheon Production Corp. v. Commissioner, supra note 102, at 113. And see cases cited note 106 infra.

105. See discussion of Durkee v. Commissioner, 162 F.2d 184 (6th Cir. 1947), in Magill, supra note 103, at 212.

106. Durkee v. Commissioner, 162 F.2d 184 (6th Cir. 1947); Farmers' & Merchants' Bank v. Commissioner, 59 F.2d 912 (6th Cir. 1932). For criticism of the "good will" criterion, see Magill, supra note 102, at 211-13.
in settlements may permit plaintiffs to retain recoveries undiminished, or subject to more lenient capital gains tax rates.  

**Attorney Fees.** Plaintiffs who win damage suits receive attorneys' fees as well as damage awards. The amount of attorney fee award to victorious damage plaintiffs rests in the discretion of the trial judge, and where plaintiffs are successful on appeal, the appellate court may award additional amounts. Among the factors considered by courts in awarding fees are: attorneys' time, responsibility and effort; the complexity of issues; prevailing rates for legal services in the local area; and the results of trial. All agreements between client and attorney outside of court are disregarded in the court's fee computation.

While fee awards theoretically rest in trial court discretion, recent holdings set ceilings on permissible amounts. In a recent unprecedented move, the Seventh Circuit in *Milwaukee Towne Corp. v. Loew's, Inc.*, feeling that past fee awards had been lavish, established a blanket rule to govern lower courts' fee computations. Beginning with the premise that the amount of damage awards was to bear no relation to fee computation, the court equivocally concluded that all fees in excess of 50 per cent of single damage recovery would be automatically considered an "abuse of lower court discretion." Apparently, fee awards are now suspect. The *Milwaukee Towne* case

107. But the taxpayer must show how recovery is allocated, e.g., Raytheon Production Corp. v. Commissioner, note 102 supra (in the absence of evidence of business' tax basis and amount of good will, recovery treated as income), for the determination by the Commissioner is presumed correct. See, e.g., Armstrong Knitting Mills v. Commissioner, 19 B.T.A. 318 (1930) (unfair trade practices settlement).

108. See statute cited note 1 supra. An award of injunction alone, even where originally joined with damage claim, does not entitle plaintiff to attorney fees. See note 72 supra.


110. See, e.g., Mandeville Island Farms v. American Crystal Sugar Co., CCH TRADE REG. REP. CURRENT ¶ 67,246 (9th Cir. 1952); American Can Co. v. Ladoga Canning Co., 44 F.2d 763 (7th Cir. 1930), cert. denied, 282 U.S. 699 (1930).

111. See, e.g., Twentieth Century-Fox v. Brookside Theatre Corp., 194 F.2d 846 (8th Cir. 1952) (with special emphasis on prevailing rates in the area); Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951) (same); Applebaum v. Paramount Pictures, Inc., 1950-51 TRADE CASES ¶ 62,944 (S.D. Miss. 1951).

112. See cases cited note 111 supra.

113. 190 F.2d 561 (7th Cir. 1951), cert. denied, 342 U.S. 509 (1952).

114. The court commented on the "delicate and embarrassing matter," noting that the "fabulous amount allowed" would "equal the total annual salary received by all members of the Supreme Court." Id. at 569-70.

115. Id. at 571.

116. *Ibid.* Fees in the case were reduced from $225,000 to $75,000.
has already been followed by the Eighth Circuit, as well as by some district courts.\(^\text{117}\)

**DEFENSES**

*“Pari Delicto” and “Unclean Hands”*

“Pari delicto” and “unclean hands” defenses may preclude damages and injunctions in private antitrust suits. The defense that plaintiff is “in pari delicto” (at equal fault) may bar legal redress for all parties whose injuries stem from an illegal undertaking.\(^\text{118}\) The “unclean hands” defense rests on broader grounds. Relief may be denied to plaintiffs whose own illegal activities have some significant relation to the subject matter of suit, including, of course, the situation where plaintiff and defendant are engaged in the same illegal transaction.

Recent decisions, however, practically banish these defenses from antitrust litigation. In a recent treble damage suit, *Kiefer-Stewart v. Seagram & Sons*,\(^\text{121}\) defendant liquor sellers conspired to fix maximum resale prices in sales to plaintiff wholesalers. Defendants urged that the maximum price fixing attempt, held a *per se* violation of §1 of the Sherman Act, was directed at reducing resale liquor prices to break through rates set by a minimum-price fixing conspiracy among plaintiff and other Indiana wholesalers.\(^\text{122}\) The Supreme Court upheld the trial court’s jury charge that plaintiff’s conspiracy with other wholesalers was no defense to the treble damage suit.\(^\text{123}\)

\(^{117}\) Twentieth Century-Fox v. Brookside Theatre Corp., 194 F.2d 846 (8th Cir. 1952). The court, in reducing a $150,000 award to $100,000, considered 40% of single recovery excessive. A factor apparently strongly influencing the 8th Circuit was the “shocking” nature of the award if it were to be paid out of plaintiff’s damages instead of by the defendant. The *Milwaukee Towne* case was cited with approval.


\(^{119}\) See, e.g., Eastman Kodak Co. v. Blackmore, 277 F.2d 694 (2d Cir. 1921); Bluefields S.S. Co. v. United Fruit Co., 243 Fed. 1 (3d Cir. 1917); cf. Tilden v. Quaker Oats Co., 1 F.2d 160 (7th Cir. 1924). *Pari delicto* defenses have been applied in private antitrust suits only where the parties were engaged, through conspiracy or contractual relationship, in the same illegal transactions. See cases cited in Comment, 46 ILL. L. REV. 654, 657 n.17 (1951). For the history and development of the defense that plaintiff violates the antitrust laws, see Lockhart, *Violation of the Antitrust Laws as a Defense in Civil Actions*, 31 MINN. L. REV. 507 (1947).

\(^{120}\) E.g., Maltz v. Sax, 134 F.2d 2 (7th Cir. 1943) (plaintiff cannot recover for injury to an illegal business); cf. Spencer v. Sun Oil Co., 94 F.Supp. 408, 412 (D. Conn. 1950) (relief by injunction against price cutters will not be granted to members of a retailers’ association who are involved in an illegal agreement to fix prices).

\(^{121}\) 340 U.S. 211 (1951).

\(^{122}\) Id. at 212.

\(^{123}\) Id. at 214. The Court’s holding was augured by the prior opinion in *Fashion Originators’ Guild v. FTC*, 312 U.S. 457 (1941) (purpose of combatting acknowledged tort of “style piracy” does not justify combination to boycott tortfeasor copyists).
Shortly thereafter, on the authority of the Kiefer-Stewart holding, the Tenth Circuit reheard Moore v. Mead Service Co., a treble damage suit under the Robinson-Patman Act, and reversed its prior decision which had upheld the interposition of a "pari delicto" defense. In the Moore case, the court had originally barred suit when it found that defendant, an out-of-town baker, had drastically reduced his local prices to break the plaintiff town baker's and retailers' conspiracy to exclude him from the local market.

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. When plaintiffs and defendants participate in the same violation, however, the defenses may possibly still be invoked. Under Robinson-Patman, for example, both parties to a discriminatory transaction equally violate the Act. But here as well, application of the defenses is doubtful. Lower courts, even prior to Kiefer-Stewart, developed rationales to bar the defenses when plaintiffs were ignorant of defendants' violation or proved "economic duress" that led to their

124. 190 F.2d 540 (10th Cir. 1951).
125. Id. at 541. The earlier opinion of the court is found at 184 F.2d 338 (10th Cir. 1950), remanded, 340 U.S. 944 (1951).
126. Moore v. Mead Service Co., 184 F.2d 338, 339 (10th Cir. 1950). Actually, the holding of the Moore case goes further in restricting defenses than does Kiefer-Stewart. In Moore, the retaliatory nature of the defendant's action was clearly found by the court, ibid., while the causal connection between plaintiff's alleged violation and Kiefer-Stewart's was not proved, see Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 182 F.2d 228, 233 (7th Cir. 1950). Moreover, the Kiefer-Stewart violation was per se illegal, thus barring inquiry into any reasonable justification for it. 340 U.S. 211, 214 (1951). For conflicting appraisal of the Moore and Kiefer-Stewart cases compare Note, 51 Col. L Rev. 523 (1951) (favorable; criticizing Moore before rehearing and reversal), with Comment, 46 Ill. L. Rev. 654 (1951) (opposed).
127. Following the Supreme Court rationale in Kiefer-Stewart, 340 U.S. 211, 214 (1951), the available recourse open to the defendant would seem to be a counterclaim. However, a separate suit can also be maintained. Mercoid Corp. v. Mid Continent Investment Co., 320 U.S. 661 (1944). But while such recourse is feasible in the Moore situation where defendant suffered discernible damages, see Petition for Certiorari for Plaintiff, pp. 3, 7, Moore v. Mead Service Co., 340 U.S. 944 (1951), it will not be practicable where defendant suffers little or no damage prior to his retaliation. And should defendant's proof burdens or damages be slighter than plaintiff's, the initial violator may still gain.
participation. Only where grant of an injunction might enhance a violating plaintiff's illegal position may defendants now be able to plead "pari delicto" or "unclean hands" successfully.

Statute of Limitations

Statute of limitations defenses play a significant role in barring private suits. Because there is no federal statute of limitations, private suits are governed by state statutes varying from one to ten years in length. Thus success of plaintiff's suit may rest on the fortuity of location and local interpretations of statutes never meant to govern federal antitrust litigation.

130. E.g., Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359 (1927) (plaintiff's compliance with defendant's illegal activities in order to obtain goods required for business); Ring v. Spina, 148 F.2d 647 (2d Cir. 1945) (plaintiff coerced into illegal agreement to protect a $50,000 investment already made); and see Robinson-Patman cases cited note 128 supra. The "economic coercion" argument is usually made in conjunction with expression of desire to uphold enforcement of the antitrust statute, see ibid., or the tendency "to hold those not actively engaged in promoting monopoly to be victims, rather than participants in antitrust violations," see Ring v. Spina, supra at 652, and cases cited therein.

131. See, e.g., Spencer v. Sun Oil Co., 94 F.Supp. 408, 412 (D. Conn. 1950), note 120 supra. And conceivably the holding of Maltz v. Sax, 134 F.2d 2 (7th Cir. 1943), note 120 supra, still retains vitality.


133. For applicable statutes with varying time periods in different states see Note, 60 YALE L.J. 553, 554 n.3 (1951). And see Hearings before Subcommittee of House Judiciary Committee on H.R. 3408, 82d Cong., 1st Sess. 117 (1951). For proposed amendments to antitrust laws to provide a uniform statute of limitations and for discussion of the proposals see id. passim. And see Hearings before Subcommittee of House Committee on the Judiciary on H.R. 7905, 81st Cong., 2d Sess. (1950); Hearings before Subcommittee of Senate Judiciary Committee on S. 1910, 81st Cong., 1st Sess. (1949); Note, 60 YALE L.J. 553, 556 et seq. (1951).

134. Since no state has a statute applicable to treble damage suits, Hearings before the Subcommittee of the House Judiciary Committee on H.R. 7905, 81st Cong., 2d Sess. 57 (1950), federal courts must select the state statute most compatible with the "nature" of the action. Confusion results, as even in the same state courts have applied different limitations to private suits. Compare Northern Kentucky Tel. Co. v. Southern Bell Tel. & Tel. Co., 1 F.Supp. 576 (E.D. Ky. 1932), aff'd, 73 F.2d 333 (6th Cir. 1934) (Sherman Act—1 year limitation), with Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 37 F.Supp. 728 (W.D. Ky. 1941) (Robinson-Patman Act—5 year limitation). For additional confusion created by the limitation problem, see sources cited note 133 supra.

Recently, in Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912 (7th Cir. 1951), cert. denied, 342 U.S. 947 (1952), and in Schiffman Bros., Inc. v. Texas Co., 20 U.S.L. WEEK 2526 (7th Cir. May 13, 1952), the court selected the Illinois two-year limitation for "statutory penalties" rather than the five-year limitation governing "all civil actions not otherwise provided for" to govern a treble damage suit.
The harshness of short state limitation periods is somewhat mitigated by liberal antitrust venue provisions that may permit plaintiffs to shop for more favorable forums. But choice is restricted by many state statutes that preclude actions in a state's courts if suit is barred in the forum where the cause of action arose. While short limitation periods in some states thus preclude private action, federal statutes lengthen periods of defendants' liability. The wartime statute, suspending the running of limitations from 1942 to 1946, has uniformly been applied to private antitrust suits. And government suits, during the pendency of the action, toll limitations on private suits against defendants for the same violation. Consequently, liability of some defendants under longer state limitation periods may reach back for almost two decades.

Cost Savings and “Good Faith Meeting of Competition”

Robinson-Patman defendants may utilize two statutory avenues for justification of discriminatory treatment. A proviso of §2(a) legalizes price differentials “which make only due allowances in the cost of manufacture, sale or delivery resulting from the differing methods or quantities” in which

rested on the court's acceptance of Illinois courts' classification of similar Illinois actions as "penal," whereas the characterization of the private antitrust suit is actually a federal question. See Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885, 890 (4th Cir. 1934). For conflicting federal decisions as to the "civil or penal nature" of the private antitrust suit see Vold, Are Threefold Damages Under the Antitrust Act Penal or Compensatory?, 28 Ky. L. J. 117, 147-8, 152 (1940), where the commentator concludes that the weight of authority considers the action “civil.” Recent decisions support this conclusion. See, e.g., Winkler-Koch Engineering Co. v. Universal Oil Products Co., 100 F.Supp. 15 (S.D. N.Y. 1951); Christensen v. Paramount Pictures, Inc., 95 F.Supp. 446 (D. Utah 1950).


Plaintiffs may also attempt to mitigate harsh time limitations by seeking application of the federal equitable doctrine relating to “fraudulent concealment,” i.e., that in cases falling within “fraudulent concealment,” limitations do not run until fraud is discovered. See Winkler-Koch Engineering Co. v. Universal Oil Products Co., 100 F.Supp. 15 (S.D. N.Y. 1951). Contra: Burnham Chemical Co. v. Boran Consol. Ltd., 170 F.2d 569 (9th Cir. 1948), cert. denied, 336 U.S. 924 (1949); Suckow Borax Mines Consol. v. Borax Consol. Ltd., 81 F.Supp. 301 (N.D. Cal. 1948), aff'd, 185 F.2d 196 (9th Cir. 1950), cert. denied, 340 U.S. 943 (1951). And see Note, 60 Yale L. J. 553, 557-8 n.16.


139. 38 Stat. 731 (1914), 15 U.S.C. § 16 (1946). But even though limitations do not run during the pending government action, a plaintiff may still bring suit at the same time.
goods are "sold and delivered."\textsuperscript{140} The burden of proving the seller's cost saving rests on defendant, whether charged with granting \textsuperscript{141} or receiving \textsuperscript{142} discriminatory treatment. The requirements of the defense, however, have never been clearly articulated.\textsuperscript{143} And although the FTC recently approved in part a respondent's cost defense, "made in good faith and in accordance with sound accounting principles,"\textsuperscript{144} treble damage defendants have yet to use the defense successfully.\textsuperscript{145} The future offers little hope for change. Courts, possibly going beyond FTC requirements,\textsuperscript{146} may demand the unfeasible task of accounting proof which justifies price concessions to each \textit{individual} buyer.\textsuperscript{147} While the cost defense is thus available in theory to treble damage defendants, it may well prove illusory in fact.\textsuperscript{148}


\textsuperscript{141} FTC v. Morton Salt Co., 334 U.S. 37, 44 (1948).

\textsuperscript{142} Automatic Canteen Co. of America v. FTC, 194 F.2d 433 (7th Cir. 1952).

\textsuperscript{143} See case discussion, Rowe at 962-4. \textit{Compare} note 148 infra.

\textsuperscript{144} Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 394 (1948), rev'd on other grounds, 191 F.2d 786 (7th Cir. 1951), \textit{cert. granted}, 342 U.S. 940 (1952).


\textsuperscript{146} FTC counsel, however, have adopted the "individual buyer cost study" theory of the Bruce's Juices case, note 147 infra. See Briefs of Counsel Supporting the Complaints, pp. 38-9, Champion Spark Plug Co., FTC Dkt. No. 3977 (pending); pp. 20-21, Electric Auto-Lite Co., FTC Dkt. No. 5624 (pending).


\textsuperscript{148} \textit{Compare} "Nevertheless, the utterances of the Commission over fifteen years and the development in cost analysis during that time indicate that for many producers and distributors a successful cost defense is now practicable," Note, 65 HARV. L. REV. 1011 (1952), \textit{with} Edwards, \textit{Comments and Discussion}, CCH ROBINSON-PATMAN ACT SYMPOSIUM 57, 60 (1947) ("the allocation of joint cost . . . is a matter of business policy, not a matter of fact . . . we are in danger of erecting the FTC into a sort of an orthodox cost accounting faculty"). Dr. Edwards is Director of the Bureau of Industrial Economics of the FTC. See also statements of FTC Commissioner Mason, \textit{Progress of the Federal Trade Commission}, CCH ANTITRUST LAW SYMPOSIUM 50, 54 (1951). For the accuracy of one of Dr. Edwards' earlier predictions, \textit{compare} Edwards, \textit{The Struggle for Control of Distribution}, 1 J. MARKETING 212, 216 (1937) ("The pursuit of discrimination into the labyrinths of cost accounting will produce a clash of accounting orthodoxies reminiscent of the theological disputes of the early churchmen"), \textit{with} the battle of the accounting
“Good faith meeting of competition” also excuses a seller’s price discrimination. Only last year the Supreme Court in the Standard Oil of Indiana case overruled FTC contentions and held “meeting competition” a full defense to a price discrimination charge. The ambiguity of the decision, however, leaves defendants with little guide to the essentials of a successful defense.

While undercutting a competitor’s price apparently is never defensible, the opinion gives no indication of how differences in trade acceptability of competing products will affect decision on “meeting” a price. And while the Supreme Court implied that a defendant can meet only “lawful” prices and must meet them in “good faith,” it supplied no criteria for testing “good faith.” Subsequent litigation has not defined the utility of the meeting competition defense to the treble damage defendant.

**Practical AIDS to Plaintiffs**

*The Federal Rules*

_Pleading and Discovery._ Liberalized pleading under the Federal Rules facilitates plaintiffs' litigation tactics. Impressed by the severity of triple damages, courts formerly held plaintiffs to pleading requirements whose

experts, quoted in American Can Co. v. Russellville Canning Co., 191 F.2d 38, 51-2 (8th Cir. 1951) (to one C.P.A., defendant's accounting system was "a well conceived, carefully operated and very well organized system." Another C.P.A. had seen "none as crazy as this.").

149. For discussion, see Rowe at 955-72 and sources there cited. As in the case of the cost defense, note 140 supra, "meeting competition" may be unavailable to a § 3 defendant. "Proportionally equal" clauses defendants, however, can probably utilize the defense. See Standard Oil Co. v. FTC, 340 U.S. 231, 241 (1951); Elizabeth Arden, Inc. v. FTC, 156 F.2d 132, 133 (2d Cir. 1946), _cert. denied_, 331 U.S. 805 (1947).

150. 340 U.S. 231 (1951). For full discussion, see Rowe at 955-72. More recent dicta, however, may require defendants to prove absence of "injury to competition," although the Supreme Court deemed this irrelevant once the requirements of "meeting competition" were met. 340 U.S. at 250. See Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786, 790 (7th Cir. 1951), _cert. granted_, 342 U.S. 940 (1952); Standard Brands, Inc., 189 F.2d 510, 515 (2d Cir. 1951).

151. See notes 150 _supra_ , 152-6 _infra_.

152. See 340 U.S. at 242, 249, 250; Samuel H. Moss v. FTC, 155 F.2d 1016 (2d Cir. 1946).

153. For FTC recognition of this factor, see FTC v. Standard Brands, 189 F.2d 510, 513 n.7 (2d Cir. 1951); Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 356-7 (1948), _revd_, 191 F.2d 785 (7th Cir. 1951), _cert. granted_, 342 U.S. 940 (1952).

154. 340 U.S. at 238, 242, 244, 246, 247 n.14, 250.

155. _Id._ at 231, 247 n.14. The FTC, subsequent to the Supreme Court decision, once more took up the cudgels against Standard Oil of Indiana, invalidating its "meeting competition" defense apparently on grounds of insufficient "good faith." Modified Order 4389, March 28, 1952, partly quoted in FTC Release, March 29, 1952.

stringency assumed the protective character of criminal prosecutions. With the advent of the Federal Rules, however, new court attitudes have arisen. Complaints may now be short and simple fact statements which must serve only to (1) inform the court of its jurisdiction, and (2) enable defendants to prepare responsive pleadings. Consequently, under current pleading rules, plaintiffs can initiate suits with little specific evidence.

Once pleadings are filed, the Federal Rules authorize depositions, interrogatories, and motions to produce documents, thus permitting private litigants to engage in extensive "fishing expeditions." Boundaries for the evidence hunt are set only by liberal judicial standards of relevancy and undue hardship, and by the ability of plaintiffs to finance discovery. But

159. See cases cited note 158 supra.
160. See, e.g., Commercial Laundry, Inc. v. Linen Supply Ass'n of Greater New York, 1948-49 TRADE CASES ¶ 62,339 (S.D. N.Y. 1948) (where several defendants, motion to make allegations only against identifiable parties sustained); McCain v. Socony-Vacuum Oil Co., 64 F.Supp. 12 (W.D. Mo. 1945) (motion for more definite statement denied where defendants are able to prepare responsive pleadings).
161. "[A]nybody who feels that he has been treated wrongly for a few dollars can file one of those complaints in 10 minutes....[I]nvestigating the case before you bring the suit just does not happen. The investigation is made, under the Federal rules, after you file your complaint and then you get your information." Testimony of Kenneth Royall, Hearings before the Subcommittee on the Study of Monopoly Power of the House Judiciary Committee on H.R. 3408, 81st Cong., 2d Sess., pt. 3, p. 68 (1951). And see cases cited note 158 supra. But cf. Mebco Realty Holding Co. v. Warner Bros. Pictures, Inc., 44 F. Supp. 591 (D. N.J. 1942) (discovery rules do not justify starting treble damage action without stating a "good case").
166. "I tell them [prospective suitors] that if they do not have $25,000 for the taking of depositions under the Federal rules, at least $25,000 just for costs and transcripts and traveling expenses, that they had better drop the suit...." Testimony of Thurman Arnold, Hearings before a Subcommittee of the Senate Judiciary Committee on S. 1910, 81st Cong., 1st Sess. 3 (1949). Mr. Arnold's estimate is probably exceptional since one commentary,
while liberal discovery provisions are a boon to plaintiff's evidence procurement, they possess one significant drawback: in the hands of some defendants, exhaustive inquiry may be turned upon plaintiffs as weapons of delay and harassment.\textsuperscript{167}

\textit{Intervention.} To minimize the proof and cost burdens of independent private litigation, private parties frequently seek to secure injunctive relief by intervening in government antitrust actions.\textsuperscript{168} Since government decrees often affect the competitive status of many non-participants in government suits, private parties have attempted to assert an interest and participate in decree formulation, modification, or enforcement, either to secure favorable decree provisions\textsuperscript{169} or to compel compliance with a decree already entered.\textsuperscript{170} However, private parties cannot intervene "of right."\textsuperscript{171} And while inter-

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167. "They asked for his files ... and then the lawyer ... began going through 7,000 letters line by line, asking what was meant by that. ... The interrogatories fall into some 15 divisions ... and the small-business concern is called upon to answer some 17,000 questions, which would absorb its whole staff for a great deal more than a year. ..." Testimony of Walton Hamilton, \textit{Hearings before a Subcommittee on the Study of Monopoly Power of the House Judiciary Committee, 81st Cong., 1st Sess. 290-91} (1949). For excellent discussion of abuse of discovery, see \textit{Comment, Tactical Use and Abuse of Depositions under the Federal Rules}, \textit{59 Yale L.J.} 117 (1949). The author concludes that whereas abuse is not widespread, its most frequent occurrence is in complex litigation such as antitrust suits. \textit{Id.} at 127. See also \textit{Speck, Use of Discovery in United States District Courts, 60 Yale L.J.} 1132, 1152-3 (1951). Courts have taken some steps in antitrust suits to meet abuses. See, \textit{e.g.}, Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co., \textit{11 F.R.D.} 156 (S.D. N.Y. 1951) (depositions likely to extend over one year).


169. See, \textit{e.g.}, \textit{United States v. Bendix Home Appliances, 10 F.R.D.} 73 (S.D. N.Y. 1949) (unsuccessful attempt to have terms of consent decree operate to prevent institution of suits against intervenors for collection of royalties); \textit{Partmar Corporation v. United States, 338 U.S.} 804 (1949) (unsuccessful attempt to secure injunction against restrictive contracts in distribution and use of movie films, and to secure particular divestiture).

170. See \textit{e.g.}, \textit{United States v. Paramount Pictures, Inc., 75 F.Supp.} 1002 (S.D. N.Y. 1948) (unsuccessful attempt to have motion picture exhibitors and distributors adjudged in contempt of government decree); \textit{United States v. Vehicular Parking, Ltd., 7 F.R.D.} 336 (D. Del. 1947) (successful attempt to obtain license under decree provision authorizing defendants to grant licenses at reasonable royalties).

171. Since \$16 of the Clayton Act gives no statutory right to intervene in government antitrust actions, \textit{Allen Calculators, Inc. v. National Cash Register Co., 322 U.S.} 137
vention is discretionary, courts are reluctant to grant it. When parties seek favorable decree provisions through participation in decree formulation or modification, courts generally deny intervention to prevent “interference” with the overall relief sought by the government. And although some courts permit intervention after decrees are entered where the decree specifically authorizes private participation, others may even strike the authorization in order to block private intervention. As long as courts interpret the existence of the independent private antitrust action as indicating a Congressional intent to separate private and government litigation, private parties' attempts to intervene in government suits will most likely fail.

Class action and Joinder. Courts do permit plaintiffs to pool resources through “spurious” class actions or permissive joinder. Since the “spurious” class action adjudicates only for those before the court, it has the same effect as

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(1944), and since parties rarely have property in the hands of the court, most attempts of private suitors to intervene “of right” have been based on FED. R. CIV. P. 24(a)(2), permitting intervention where a party is bound by a judgment and is inadequately represented. Courts have uniformly held that private suitors fulfill neither of the requirements. See, e.g., Allen Calculators, Inc. v. National Cash Register Co., supra; United States v. ASCAP, 11 F.R.D. 511 (S.D. N.Y. 1951); United States v. General Electric Co., 95 F. Supp. 165 (D. N.J. 1950).

172. FED. R. CIV. P. 24(b) provides for permissive intervention where (1) there is a conditional statutory right to intervene; or (2) a question of law or fact common with the issue before the court. Since there is no statutory right to intervene, private suitors seek to invoke FED. R. CIV. P. 24(b)(2).


174. See, e.g., consent decree provisions authorizing private parties to apply to court in United States v. Hartford Empire Co., 65 F.Supp. 271, 276 (D. Ohio 1946) and United States v. National Lead Co., 53 F.Supp. 513, 535 (S.D. N.Y. 1945). In United States v. Vehicular Parking, Ltd., 7 F.R.D. 336 (D. Del. 1947), where a government judgment required defendants to grant licenses at reasonable royalties, the decree did not specifically authorize intervention but the court had retained jurisdiction and granted a private suitor’s petition to intervene for a license. The court asserted that jurisdiction had been retained for that purpose and noted that more recent similar decrees contained specific authorizations. While private suitors have attempted to utilize the Vehicular Parking case as authority for intervention generally, they have failed. See, e.g., United States v. Bendix Home Appliances, 10 F.R.D. 73 (S.D. N.Y. 1949), United States v. Paramount Pictures, Inc., 75 F.Supp. 1002 (S.D. N.Y. 1948).


177. See FED. R. CIV. P. 20 (joinder), 23(a)(3) (spurious class action).
permissive joinder. For use of either device, plaintiffs must demonstrate a "common question of law or fact." In addition, the "spurious" class suit requires that "common relief" be sought, and for joinder, injuries must arise from the "same transaction or series of transactions." Recently, in Kainz v. Anheuser-Busch, the Seventh Circuit definitely upheld "spurious" class suits and permissive joinder for private antitrust claimants. Liquor retailers had sued their supplier under the Robinson-Patman Act for discrimination in prices and services in favor of other retailers. Reversing the district court's dismissal of both class action and joinder, the Seventh Circuit held that (1) individual damage claims, although differing in amounts, were requests for the same type of relief and thus fulfilled the "common relief" requirement of the class suit; and (2) even though violations arose from different transactions between retailers and Anheuser-Busch, the alleged discrimination lasting over a three year period presented a "common question of law and fact" arising from the same series of transactions. Thus, while each party must of course still prove the cause and amount of his individual injury, antitrust plaintiffs may freely join forces in litigation to gain the advantages of pooled testimony and avoid duplication of cost and effort.

178. Schatte v. International Alliance etc., 183 F.2d 685, 687 (9th Cir. 1950); Weeks v. Barco Oil Co., 125 F.2d 84, 88-80 (7th Cir. 1941). And see 3 Moore, FEDERAL PRACTICE ¶ 23.10 at pp. 3442, 3465 (2d ed. 1948).

179. See note 177 supra. There is no right, however, to bring suit on behalf of the public interest. E.g., Revere Camera Co. v. Eastman Kodak Co., 81 F.Supp. 325 (N.D. Ill. 1948). And while the "common question" itself creates the class, 3 Moore, op. cit. supra note 178, at 3443, plaintiff must adequately represent the class. See, e.g., Weeks v. Barco Oil Co., 125 F.2d 84 (7th Cir. 1941) (class action dismissed for inadequate representation); Rio Haven, Inc. v. National Screen Service Corp., 11 F.R.D. 509 (E.D. Pa. 1951) (class action dismissed when record shows members of class whose interests are antagonistic to plaintiff's). But dismissal of the class suit does not dismiss plaintiff's personal claim. Farmers' Cooperative Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101 (8th Cir. 1942).

180. 194 F.2d 737 (7th Cir. 1952).


182. 194 F.2d at 743. In so ruling, the court criticized Farmers' Cooperative Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101 (8th Cir. 1942) (differing damage claims do not constitute "common relief" sought) as nullifying class action provisions for all except injunction suits. For additional criticism see 3 Moore, op. cit. supra note 178, at 3455.

183. 194 F.2d at 743.


185. Once a class action is begun, additional parties may intervene, providing they meet requirements for suit. See, e.g., Bascom Launder Corp. v. Telecoin Corp., 9 F.R.D.
Venue and Forum Non Conveniens

Special antitrust venue privileges permit plaintiffs to cut costs by a judicious choice of venue from many possible forums. Litigants may sue in any district where the "defendant resides or is found or has an agent." Plaintiffs' forum selection is further widened by interpretations of other statutes that permit suit where corporations are licensed to do business, even though no actual business is done.

Section 1404(a) of the Judicial Code, however, may frustrate plaintiff's choice of forum. Held applicable to private antitrust litigation, permits defendants to move for transfer to another district on grounds of "convenience of parties and witnesses" or in "the interests of justice."

677 (S.D. N.Y. 1950). The difficulty of counsel's handling a large group and bars against counsel's solicitation of all parties able to intervene may impede the utility of class actions. Counsel, however, may suggest that complaining parties themselves organize a solicitation committee. For discussion of the usefulness of class action and joinder in private antitrust suits, see Daniel, Enforcement of the Sherman Act by Actions for Treble Damages, 34 VA. L. Rev. 901, 924-5 (1948). But see the scepticism of the court in Kainz v. Anheuser-Busch, Inc., 194 F.2d at 794 (voluminous proceedings, complicated issues).

186. See note 1 supra. In addition, Clayton's § 12 gives private suitors wide leeway for venue and service against corporations: "[A]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 38 STAT. 736 (1914), 15 U.S.C. §22 (1946).


190. In considering transfer, courts weigh the location of parties, witnesses, and evidence; facilitation of a speedy trial; and hardships on parties. See, e.g., Glassfloss Corp.
While decisions conflict on whether transfer may be made to a district where venue would not have been proper, the recent Third Circuit holding in *Paramount Pictures, Inc., v. Rodney* validates such transfer where venue is proper for some defendants, and the others waive the issue. However, 1404(a) cannot be used to bar suit by defendant's transfer to a forum with a shorter statute of limitations. Where limitations bar suits in the requested forum, courts either deny the transfer or construe the request for transfer as a waiver of statute of limitation defenses in the new forum. In any event, courts require a strong showing of "convenience" to defeat antitrust plaintiffs' special venue privileges. On the other hand, a recent Second Circuit interpretation of 1404(a), holding that plaintiff cannot effect transfer to a forum in which he could not have served defendant with process, has practically destroyed *forum non conveniens* as an aid to plaintiff's litigation strategy.

**Prior Litigation**


193. E.g., Fifth & Walnut, Inc. v. Loew's, Inc., 76 F.Supp. 64 (S.D. N.Y. 1948) (motion to dismiss under *forum non conveniens* denied where defendant's tardy objection has caused limitations to expire in the convenient forum).


196. Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950); Note, 60 YALE L.J. 183 (1951). However, the broad provisions for venue under Clayton, see note 186 supra, that initially permit plaintiff a wide choice of forum where defendant does interstate business, mitigates the impact of the Foster-Milburn holding.

while the government action is pending, and consequently allows plaintiffs to wait in order to avail themselves of government judgments.\textsuperscript{198} While prima facie aid from a judgment is usually confined to proof of violation (since the government action rarely settled issues bearing on proof of cause and private injury), § 5 aid may in some cases extend to proof of cause. In a recent treble damage suit against General Motors and its financing affiliate, for example, the Supreme Court, construing for the first time § 5's application to a criminal antitrust judgment, held the prior judgment against defendants determinative not only of the issue of illegal conspiracy, but also of its “effectuation by coercion.”\textsuperscript{199} Thus, technically at least, plaintiff's causal proof was materially eased.\textsuperscript{200} In any event, however, a § 5 judgment does not relieve the plaintiff of the necessity of preparing his proof nor does it shift the burden of proof; the judgment is admissible simply as an evidentiary item that may be rebutted.\textsuperscript{201}

Despite its value in some individual suits,\textsuperscript{202} § 5's utility is strictly limited by its unavailability. Most government actions result in nolo contendere pleas or consent decrees before testimony is taken, and thus do not provide judgments that qualify under § 5.\textsuperscript{203} And when government actions are fully con-

\textsuperscript{198} See statute cited note 197 supra.

\textsuperscript{199} Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 570-71 (1951).

\textsuperscript{200} For the effects of the Emich case in extending to proof of cause the prima facie presumption accorded by Section 5, see Note, 61 Yale L. J. 417, 423-4 (1952).

\textsuperscript{201} “Being prima facie evidence, the judgment is not conclusive in this case. It is merely sufficient evidence . . . to put these defendants to their proof.” Charge to the jury, quoted in Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 76 (7th Cir. 1950), rev'd on other grounds, 340 U.S. 558 (1951). Once the defendant comes forward with evidence, as he usually does, the burden of going forward shifts back to the plaintiff. Hearings before the Subcommittee on Study of Monopoly Power of the House Judiciary Committee on H.R. 7905, 81st Cong., 2d Sess. 12 (1950). Consequently, from the standpoint of trial preparation, the plaintiff must do precisely the same amount of work as if there had been no prior judgment. Id. at 4.

\textsuperscript{202} Once a judgment is introduced, its influence on juries may go far beyond the prima facie effect dictated in court instructions. See, e.g., Testimony of Jerrold G. Van Cise, Hearings before the Subcommittee on Study of Monopoly Power of the House Judiciary Committee on H.R. 7905, 81st Cong., 2d Sess. 52 (1950): “Today, if I can introduce in evidence before a jury a Government judgment, whether you call it prima facie or conclusive, it is going to be considered conclusive by the jury.” To similar effect see Testimony of Kenneth Royall in Hearings [before the same committee] on H.R. 3408, 82d Cong., 1st Sess. 42 (1951). But see Note, 61 Yale L. J. 417, 425 n.33 (1952).

\textsuperscript{203} Consent decrees entered before testimony is taken are not admissible under § 5 by the terms of the section itself, 38 Stat. 731 (1941), 15 U.S.C. § 16 (1946), and courts treat pleas of nolo contende as “consent decrees” for § 5 purposes. See, e.g., Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366, 370-9 (D. Minn. 1939), aff'd, 119 F.2d 747 (8th Cir. 1941), cert. denied, 314 U.S. 644 (1941). A judgment rendered on facts stipulated for the purpose of the instant case is similarly non-admissible under the section. Ulrich v. Ethyl Gasoline Corp., 2 F.R.D. 357 (W.D. Ky. 1942).

Of the civil cases filed between 1935 and 1950, 134 were settled by consent decree and only 37 were tried. Timberg, Equitable Relief under the Sherman Act [1950] U. of Ill. Law Forum 629, 630 (1950). While no comparable statistics are available for nolo con-
tested, trials may take years.\footnote{204} Moreover, a judgment does not become “final” for § 5 purposes until appeals are exhausted and decrees are finally altered on remand.\footnote{205} Consequently, § 5 may assist only those who are willing to wait out the protracted government suit. And when government action concludes, there is still no guarantee of § 5 aid: issues ultimately settled in the government suit may not be those crucial to plaintiff’s case,\footnote{206} or the necessary presence of some defendants in the private suit who were not parties to the government action may altogether preclude admission of the prior judgment.\footnote{207}

ground” material. Moreover, courts’ factual determinations may also be
influenced in plaintiff’s favor: frequent references in court opinions to
defendants’ prior defeats indicate that previous decisions are not without
effects. In some cases, prior judgments, unqualified under § 5, come in
through the back door of judicial notice: in the recent Milgram v. Loew’s,
Inc. decision, for example, the Third Circuit, over a vehement dissent,
took notice of defendant’s defeat in the government litigation against the
movie industry as indicating its “proclivity” to violate the antitrust laws. However, other courts may rebel against sly interjection of prior decisions
and bar them as prejudicial to defendants. But even with these doors
closed, prior adjudications may still aid plaintiff’s proof through the operation
of stare decisis, since previous decisions may, without burden on plaintiffs,
settle difficult questions of law.

Entirely aside from the influence of judgments, prior actions through
revelation of information lessen the proof obstacles of treble damage claimants. While FTC and Antitrust Division files are not open to private liti-
gants’ inspection, their contents nevertheless spill out in government liti-
gation. Actions not only reveal violations to prospective plaintiffs but


212. 192 F.2d 579 (3d Cir. 1951).

213. “The past proclivity of these defendants to unlawful conduct may be of some significance here. . . . Viewing the facts of this case in the light of the specific finding in the Paramount case, the inference of conspiracy here is strengthened.” Id. at 584. The decree had apparently been excluded by the district court. See id. at 593 n.5. For other references to Paramount’s “proclivity” to violate, see Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 190 F.2d 951, 958 (2d Cir. 1951); Benal Theatre Corp. v. Paramount Pictures, Inc., 9 F.R.D. 726, 735 (N.D. Ill. 1949).

214. Cf. cases cited note 206 supra, striking irrelevant and prejudicial portions of complaints.


216. The story of Burnham Chemical Co. v. Borax Consolidated, Inc., 170 F.2d 569 (9th Cir. 1948) provides a classic example of the way government actions reveal violations and potential evidence to private suitors. See Hearings before a Subcommittee of the Senate Judiciary Committee on S. 1910, 81st Cong., 1st Sess. 24 et seq. (1949). The
also provide valuable sources of information. In addition, prior suits save private time and effort by schooling subsequent litigants in tested pleading and trial techniques.\textsuperscript{217} Prior private actions may, of course, serve the same function.

**Impact of Private Antitrust Action**

The impact of the private action is primarily a variable of the ability and willingness of parties to sue. Initially, the prospect of halting injury and/or securing lucrative recoveries and reimbursement for attorney fees stimulates parties to act. But high costs, difficult evidence problems, and fear of trade reprisals may counterbalance these incentives to suit. From the interplay of these curbs and incentives private antitrust attacks emerge in completely unpredictable fashion.

**Movie Industry**

Movie cases comprise over 25 per cent of the total private suits in the past eight years\textsuperscript{218} and the ratio is currently rising.\textsuperscript{210} Generally, movie litigation follows a stock pattern established by successful government and private actions under the Sherman Act: local exhibitors sue national film distributors (who may also own local theatres) alleging, among other things, that defendants in combination refused to grant plaintiff first run films, or

origin of movie litigation shows a similar dependence upon the publicity value of prior government actions. See testimony of Thurman Arnold, \textit{id.} at 38; letter from Louis Nizer, \textit{id.} at 43-4. The extent to which private suits follow successful government actions is a clear index of their value for potential private litigants. See p. 1019 infra.

217. "Cases brought in widely separated parts of the country have . . . [complaints] exactly the same including typographical errors . . . There are cases where an ex-Judge attorney injects in his civil case the very decree in the Government antitrust case in which . . . [he] previously appeared for the Government." Testimony of Kenneth Royall, \textit{Hearings on H.R. 3408, supra} note 202, at 44-5. For publishers' circularization of attorneys with successful briefs, pleadings, etc., see \textit{bid}.

218. The estimate is based on reported suits (official and unofficial) from 1944 to 1951. See Appendix II, p. 1064 infra.

219. Of the 367 private antitrust suits (excluding patent litigation and counterclaims) pending in United States District Courts in June 1951, see Appendix I, p. 1063 infra, 129 cases were pending against the movie industry, see \textit{Hearings on H.R. 3408, supra} note 202, at 109-11, thus making the latest available ratio of movie litigation to total private suits approximately 33\%. The present jump of private suits to beyond the 150 mark, see Report of conversation with Sidney Schreiber, counsel for the Motion Picture Association of America, dated April 18, 1952, in Yale Law Library, suggests that today's ratio may be even higher. However, since a considerable portion of movie litigation occurs in Illinois, see, e.g., \textit{Variety}, December 5, 1951, p. 5, col. 3 (31 suits pending in the Northern District alone), the ratio may be cut by the recent decision in Hoskins Coal & Dock Corp. v. Trux Traer Coal Co., 191 F.2d 912 (7th Cir. 1951), \textit{cert. denied}, 72 Sup. Ct. (1952), holding a 2 year statute of limitations applicable to private antitrust suits. See note 134 supra.
supplied plaintiff with other films only after unreasonable "clearances." Plaintiffs demonstrate injury by measuring their profits against those of comparably situated theatres receiving the desired films or "clearance," and generally seek to infer defendants' illegal combination from their uniform treatment of the plaintiff. And, wherever possible, plaintiffs invoke § 5 of the Clayton Act to introduce the prior government decree against distributors to assist in establishing defendants' Sherman Act offense.

Local exhibitors have been eminently successful in their actions against film distributors. Plaintiffs have secured injunctions or damages in over fifty per cent of reported movie cases in which final disposition occurred, the damage awards ranging from $60,000 to $1,125,000. And the high

\[220. \text{See, e.g., Milwaukee Towne Corp. v. Loew's, Inc., } 190 \text{ F.2d } 561 \text{ (7th Cir. 1951) (run); Theatre Investment Corp. v. RKO-Radio Pictures, Inc., } 72 \text{ F.Supp. } 650 \text{ (W.D. Wash. 1947) (clearance). Other charges include fixing admission prices through film licensing agreements, e.g., ibid.; block booking, e.g., Garbose v. Giles Co., } 183 \text{ F.2d } 513 \text{ (1st Cir. 1950). While the overwhelming majority of plaintiffs have been movie exhibitors, on some occasions others have sued film distributors and producers. See e.g., N.Y. Times, January 4, 1952, p. 18, col. 2 (suits by Screenwriters' Guild against film companies charging that anti-communist employment policy constitutes an illegal conspiracy); Camrel Co. v. Paramount Film Distributing Corp., } 1944-45 \text{ TRADE CASES } \| 7,233 \text{ (S.D. N.Y. 1944) (lessor of theatre for reduced rental and market value of theatre due to deprivation of first run film); Brownlee v. Malco Theatres, Inc., } 1950-51 \text{ TRADE CASES } \| 62,911 \text{ (W.D. Ark. 1951) (prospective purchaser of theatre for inability to buy because of conspiracy). And while defendants have usually been the major film producers and distributors, some attacks have been levied at independent theatre chains, see e.g., Auburn Capitol Theatre Corp. v. Schine Chain Theatres, Inc., } 83 \text{ F.Supp. } 872 \text{ (S.D. N.Y. 1949), and manufacturers of movie advertising accessories, see Lawlor & Panzer v. National Screen Service Corp., } 99 \text{ F.Supp. } 180 \text{ (E.D. Pa. 1951).}

\[221. \text{See movie cases cited note 97 supra.}

\[222. \text{See e.g., Milgram v. Loew's, Inc., } 192 \text{ F.2d } 579 \text{ (3d Cir. 1951); Theatres Investment Co. v. RKO-Radio Pictures, Inc., } 72 \text{ F.Supp. } 650 \text{ (W.D. Wash. 1947). While courts, in some instances, have willingly made inferences of conspiracy from uniform action of defendants in their treatment of the plaintiff, see cases cited supra, the uniformity has been frequently justified as arising from defendants' natural business responses. See, e.g., Windsor Theatre Co. v. Walbrook Amusement Co., } 189 \text{ F.2d } 797 \text{ (4th Cir. 1951); Fanchon & Marco v. Paramount Pictures, Inc., } 100 \text{ F.Supp. } 184 \text{ (S.D. Cal. 1951); McLendon v. Loew's, Inc., } 1948-49 \text{ TRADE CASES } \| 62,234 \text{ (N.D. Tex. 1948).}


\[224. \text{Of the 43 cases against film distributors and producers appearing in official and unofficial reports from 1944 to the present, 17 have gone to final disposition with judgment for plaintiff in nine and judgment for defendant in eight.}

\[225. \text{Reported cases in which damages, attorney fees, or injunctions were awarded are: Applebaum v. Paramount Pictures, Inc., } 1950-51 \text{ TRADE CASES } \| 62,944 \text{ (S.D. Minn. 1951) ($150,000 damages; $40,000 fees); Bail v. Paramount Pictures, Inc., } 169 \text{ F.2d } 317 \text{ (3d Cir. 1948), (remanded for damages and injunction), } 81 \text{ F.Supp. } 212 \text{ (W.D. Pa. 1948) (injunction), modified, } 176 \text{ F.2d } 426 \text{ (3d Cir. 1949); Bigelow v. RKO-Radio Pictures,}
degree of plaintiff success warrants the inference that favorable settlements are frequent as well.\textsuperscript{226} But insofar as numerical plaintiff victories are concerned, past litigation may present only a preview of coming events, for claims against the movie industry are currently rising to new heights. In successive years prior to 1951 pending suits had totaled 100, with roughly fifteen suits being terminated and commencing each year.\textsuperscript{227} By June of 1951, however, industry spokesmen reported 129 cases pending; and by April of 1952, pending suits had climbed beyond the 150 mark.\textsuperscript{228}

Individually, successful private suits have secured alteration of movie industry practices. Many private actions concern illegal practices that have generally ceased since the government litigation, and consequently serve primarily to compensate injured plaintiffs. But even here, plaintiff victories definitively adjudicate a specific theatre's right to first run film or shorter clearance periods.\textsuperscript{229} Other private suits seek to determine similar rights.

\textsuperscript{226} Because the movie industry is flooded with claims, see p. 1046 infra, with frequent plaintiff victories and high cost of defense, see pp. 1046, 1059-60 infra, it is evident that movie defendants are more willing to settle than are defendants in other antitrust litigation. The proclivity to settlement is amply borne out by attempts to establish arbitration systems in the industry: "Distrib lawyers reported that the volume of such antitrust contests is steadily increasing despite an extensive effort to induce exhibitors to try arbitration rather than engage in costly litigation." Variety, December 5, 1951, p. 5, col. 3. Apparently a recent attempt to establish arbitration shows more promise. See Variety, April 23, 1952, p. 3, col. 3. However, arbitration may suffer a setback if courts follow the holding in Mission Theatres, Inc. v. Twentieth Century-Fox Film Corp., 1950-51 TRADE CASES ¶ 62,702 (W. D. Mo. 1950) (determination that "clearance" is reasonable by arbitration tribunal is not res judicata in court attack). But the decision may be distinguished on the grounds that there plaintiff's predecessors and not the plaintiff were parties to the arbitration. For recommendations on arbitration to settle movie disputes, see testimony of Abram F. Myers, \textit{Hearings on H.R. 3408}, supra note 202, at 120 et seq.

\textsuperscript{227} Variety, December 5, 1951, p. 5, col. 3.

\textsuperscript{228} See note 219 supra.

\textsuperscript{229} And once the adjudication is effected, continued violations permit the suitor access to the court for injunction (if not already granted), e.g., Bigelow v. RKO-Radio Pictures, Inc., 192 F.2d 579 (2d Cir. 1951) and Bigelow v. RKO-Radio Pictures, Inc., 72 F.Supp. 650 (D. Wash. 1947).
where exhibitors are still in unfavored playing positions. And drive-in theatres, once excluded from the recently adopted system of competitive bidding for first run film, have newly secured the right to bid. The exclusion of suburban theatres has similarly been halted.

Successful private movie litigation also influences industry compliance with provisions of government decrees. Government decrees against film distributors and producers establish a new code of business for the movie industry. While laurels for industry adherence to these new standards cannot be neatly apportioned to defendants' good faith or threats of future government and private suits, it is clear the private actions play a significant role in inducing compliance. Terrific financial punishment meted out in costs of defending litigation and huge freshly won damage awards plus the spectre of over $350,000,000 worth of current claims against defendants are potent reminders of prohibited conduct.

Oil Industry

Major oil producers have also been subject to a substantial number of private attacks. The successful 1940 government prosecution in United States v. Socony-Vacuum set off well over forty private suits against oil companies, with each plaintiff gasoline distributor repeating the proven


234. "Since the movie companies were in litigation, for instance, they are very much in favor of eliminating this triple-damage provision. . . . [Because of the triple damage suit] we see a real cooperative effort on the part of the movie industry to try to be cautious . . . to be sure that they do not violate an antitrust law." Testimony of Graham H. Morison, Assistant Attorney General in charge of the Antitrust Division, Hearings on H.R. 3408, supra note 202, at 12.

235. "Indicating the costs involved is the fact that Universal alone sets aside $400,000 every three months for its defense of the various antitrust charges. Companies figure that merely the paper work involved in each suit, excluding any possible damage awards, sets them back $25,000." Variety, December 5, 1951, p. 5, col. 3. For costs of defense generally see p. 1059 infra.

236. See cases cited note 225 supra.


238. Suits against major oil companies comprise about 6% of the total private suits from 1944 to 1951. See Appendix II, p. 1064 infra.

239. 310 U.S. 150 (1940).
government charge that companies, by concertedly buying up “distress”
gasoline in the market, had pegged prices in violation of § 1 of the
Sherman Act. However, in sharp contrast to movie litigation, for example,
the series of actions following the Socony decision resoundingly flopped. Plain-
tiffs were unable to meet the newly formulated court tests requiring the
showing that increased costs of gas had not been passed on to customers.

Aside from the ill-fated price fixing suits immediately following the Socony-Vacuum case, oil companies have been victims of other frequent claims
pressed by gas station operators. Generally, charges have been levelled at
plaintiff’s own suppliers for price fixing, price discrimination, or the
tying of other products to sales of gas. Other private suits have struck the
suppliers of competitors for alleged “predatory pricing” in local retail gas
wars. While most complaints have been upheld, station operators have
met considerable difficulty in alleging facts that fulfill antitrust “commerce”
requirements: the local market in which gas retailers operate or the

240. See, e.g., cases cited note 85 supra. In Clark Oil v. Phillips Petroleum Co.,
56 F.Supp. 569 (D. Minn. 1944), aff'd, 148 F.2d 580 (8th Cir. 1945), cert. denied, 326 U.S.
734 (1945), 16 companion cases were, by stipulation, concluded with the instant decision;
and in Farmers’ Cooperative Oil Co. v. Socony Vacuum Oil Co., 43 F.Supp. 735 (N.D.
Iowa 1942), aff'd, 133 F.2d 101 (8th Cir. 1942), an association of distributors unsuccessfully
attempted a representative action for its 700 members. Apparently, sporadic attacks
based on the 1940 Socony case are still being levelled against oil companies at this late
(motion for separation of issues).

241. See p. 1023 supra; cases cited note 239 supra.

fixed so low the plaintiff forced to operate at a loss).

243. E.g., Lipson v. Socony Vacuum Corp., 87 F.2d 265 (1st Cir. 1937) (complaint
upheld in part); Tann v. Standard Oil Co., 1950-51 TRADE CASES ¶62,500 (N.D. Ill.
1951) (motion on interrogatories); Myers v. Shell Oil Co., 93 F.Supp. 670 (S.D. Cal.
1951) (dismissed); Nachman v. Shell Oil Co., 1944-45 TRADE CASES ¶57,361 (D. Md.
1945) (verdict for defendant); Lewis v. Shell Oil Co., 50 F.Supp. 547 (N.D. Ill. 1943)
(dismissed); Weinberg v. Sinclair Refining Co., 48 F.Supp. 203 (E.D. N.Y. 1942) (com-
plaint upheld); Midland Oil Co. v. Sinclair Refining Co., 41 F.Supp. 436 (N.D. Ill. 1941)
(complaint upheld); Alabama Independent Service Station Association, Inc. v. Shell

244. E.g., Munson v. Richfield Oil Corp., 91 F.Supp. 171 (S.D. Cal. 1950) (complaint
upheld).

245. E.g., Spencer v. Sun Oil Co., 94 F.Supp. 403 (D. Conn. 1950) (judgment for
defendant). Close gasoline retail competition has also produced suits among competitors,
e.g., Dunkel Oil Corp. v. Anich, 1944-45 TRADE CASES ¶57,306 (E.D. Ill. 1944) (boycott
to keep competitor closed nights and force his prices up; dismissed). Other charges have
been levelled at large oil companies for monopolization of oil production, see e.g., Coast
v. Hunt Oil Co., 20 U.S.L. WEEK 2494 (5th Cir. April 10, 1932) (dismissal affirmed), and
for discrimination in deliveries, see e.g., Stephenson v. Sun Oil Co., Civil No. 28039
(N.D. Ohio, pending).

246. See, e.g., Myers v. Shell Oil Co., 93 F.Supp. 670 (S.D. Cal. 1951); Dunkel Oil
location of suppliers' refineries and storage plants in plaintiff’s own state are frequent grounds for dismissal of suit.

Automobile Distribution
Automobile manufacturers have faced sporadic attacks by private suitors claiming illegal revocation of auto distribution franchises. In 1941, the Justice Department obtained a criminal conviction against General Motors and GMAC, its financing subsidiary, for “conspiring” to coerce auto dealers to finance exclusively through GMAC. Franchise revocation was one of the major means of coercion. Plaintiffs, in the flurry of private suits induced by the government action, were uniformly unsuccessful. In the seven suits against General Motors, for example, only four plaintiffs reached juries. The one plaintiff jury verdict was subsequently reversed by the Seventh Circuit, which in turn was reversed by the Supreme Court, and a new trial was ordered. No subsequent action has occurred.

Patents
Private antitrust suits frequently involve patents. While the monopoly conferred by a patent is itself immune from antitrust proscriptions, patent

247. See oil cases cited note 38 supra.
248. Suits in the automobile industry comprise about 6% of the total private suits from 1944 to 1951. See Appendix II, p. 1064 infra.
249. United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941).
250. Id. at 398.
251. With the exception of a plaintiff’s judgment in the Emich case which was subsequently reversed, see note 253 infra, reported decisions fail to show a single successful suit against automobile manufacturers and distributors. See, e.g., F.L. Mendez & Co. v. General Motors Corp., 161 F.2d 695 (7th Cir. 1947); Reidley v. Hudson Motor Car Co., 82 F. Supp. 8 (D. Ky. 1949). Apparently, in the absence of an “interstate” conspiracy, such as that found in the General Motors case, auto manufacturers and distributors are generally insulated from private antitrust attack for cancellation of franchises or discrimination of various kinds because of plaintiff local dealer’s usual inability to show any injurious effects on the public automobile market. See, e.g., Feddersen Motors, Inc. v. Ward, 180 F.2d 519 (10th Cir. 1950); Hill v. Linton, 1950-51 TRADE CASES ¶ 62,683 (N.D. Ill. 1950); Reidley v. Hudson Motor Car Co., supra.
253. Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev’d, 340 U.S. 558 (1951); Note, 61 YALE L. J. 417 (1952).
254. Communication to Yale Law Journal from Henry F. Herbermann, attorney for General Motors Corp., dated December 28, 1951, in Yale Law Library. Despite plaintiffs' failures in the General Motors cases, defendants were forced to make considerable financial outlay. With the exception of one case which never ran beyond pleading stages, cost of defense ran “into six figures” for each suit. In the Emich case itself, defendant introduced testimony of over 200 witnesses from all parts of the country, and, of course, the cost of bringing them to the place of trial was “tremendous.” Ibid.
255. Claims involving patents represent about 17% of the total private suits from 1944 to 1951. See Appendix II, p. 1064 infra.
holders may nevertheless use it in ways that violate the antitrust laws. Private suits against such abuse have primarily been directed at: (1) licensing agreements that illegally fix prices or force other products on licensees, or prevent licensees from using other goods competing with the licensed item; (2) the threatening or bringing of infringement suits against competitors or their customers where patents do not in fact extend to items sued upon; and (3) the pooling of patent rights to create combinations in restraint of trade. Of course, claimants may themselves initiate antitrust actions for illegal patent use, but just as often, antitrust attack arises as a counter-claim to patent holders' suits for infringement or royalties.

Here, since defenses may raise complex issues of patent validity and scope


259. This is the most frequent charge of patent "abuse." It generally arises in counter-claims to infringement suit where the defendant attempts to show either (1) that the patentee's patent is invalid or (2) that its scope does not extend to the counterclaimant's product. In either event, since a successful defense to the infringement suit contains these same elements, the private antitrust counterclaim requires little additional proof. See, e.g., Master Metal Strip Service, Inc. v. Protex Weatherstrip Manufacturing Co., 169 F.2d 700 (7th Cir. 1948), cert. denied, 335 U.S. 898 (1948) (judgment for counterclaimant); Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp., 150 F.2d 69 (2d Cir. 1945), cert. denied, 326 U.S. 757 (1945) (judgment of infringement for patentee); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 142 F.2d 549 (7th Cir. 1944) (judgment for antitrust claimant); Hartford-Empire Co. v. Ochar-Nester Glass Co., 7 F.R.D. 564 (E.D. Mo. 1947) (motion). However, on some occasions, the private suit will arise directly, see, e.g., Makegood Manufacturing Co. v. Mit Clip Co., 1948-49 TRADE CASES ¶ 62,424 (S.D. N.Y. 1949), aff'd, 180 F.2d 654 (2d Cir. 1950) (cause transferred); Forgett v. Charles Scharf, 181 F.2d 754 (3d Cir. 1950), cert. denied, 340 U.S. 825 (1950) (complaint reinstated); in other instances, the antitrust claim will be joined with request for a declaratory judgment of non-infringement, or that defendant's patents are invalid and plaintiff's are valid, see, e.g., Magnetic Engineering & Manufacturing Co. v. Dings Magnetic Separator Co., 86 F.Supp. 13 (S.D. N.Y. 1949) (motion); Reynolds International Pen Co. v. Eversharp, Inc., 5 F.R.D. 382 (D. Del. 1946) (motion).


261. See note 259 supra.
equally applicable to the antitrust cause of action, antitrust counterclaims easily follow.

Private attacks based on illegal patent use have been highly successful, with claimants victorious in half their reported suits. While a few claimants have struck at restraints involving basic industrial processes such as oil cracking or hydraulic gas distribution systems, successful suits against patent misuse are frequently concerned with violations of lesser national significance. Litigation by "launderette" operators, for example, has resulted in breakup of tying agreements that had forced them to buy other products when leasing patented washing machines; illegal tying clauses on butter printing machinery have been eliminated; and attempts to expand patent control over unpatented weather stripping or furnace thermostats have likewise been stymied. On the other hand, many actions directly affect manufacture and sale of popular consumer goods such as ball point pens, films, or woolens. And in the related field of unlawful copyright use, private suitors have enjoined the attempts of authors and composers to create a monopoly, based on transfer of all non-dramatic performing rights to a single association. In sum, the effects of this patent litigation on specific goods and practices are scattered through the economy.

Professional Sports

Until recently, suits involving practices in organized baseball were uniformly dismissed. Courts, adhering to the Supreme Court's ruling in the
1922 *Federal Baseball Club* case,\(^{271}\) held that baseball was not “trade or commerce” within the meaning of antitrust statutes.\(^{272}\) But in 1949, the Second Circuit's *Gardella v. Chandler* decision\(^{273}\) defied a history of baseball exemption. Gardella, a former major league ball player, sued baseball officials for their concerted action in suspending him from organized baseball when he left his ball club to play elsewhere. In reversing the lower court's dismissal of the complaint, the Second Circuit neatly side-stepped previous “commerce” holdings to find that baseball's association with radio and television subjected the industry to antitrust proscriptions.\(^{274}\) Subsequently, defendants, apparently unwilling to gamble on testing the new “commerce” holding, settled the *Gardella* case and two similar claims filed shortly afterward.\(^{275}\)

But with “commerce” bars down, other parties pressed claims against the industry. Radio stations, for example, challenged an industry rule preventing competing broadcasts.\(^{276}\) These suits and subsequent Justice Department pressure induced modification of the rule.\(^{277}\) Currently, pending suits strike directly at the cornerstones of baseball organization: (1) an action by a minor league ball club for industry refusal to permit hiring of Mexican players challenges the tight self-regulation exercised by organized baseball;\(^ {278}\) and (2) claims similar to Gardella's challenge the reserve clause of baseball employment contracts.\(^ {279}\) However, nothing has yet crystallized baseball's antitrust status. Latest developments are the refusals of two lower courts to follow the *Gardella* “commerce” rulings.\(^ {280}\) With these cases on appeal,\(^ {281}\)

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275. Gardella had claimed $300,000 in damages. Subsequent claims by Martin and Lanier were for $1,000,000 and $1,500,000 respectively. See Martin v. National League Baseball Club, 174 F.2d 917 (2d Cir. 1949) (denial of temporary injunction). While the precise amounts of settlement are not known, they have been thought considerable. See *Hearings before the Subcommittee on the Study of Monopoly Power of the House Judiciary Committee*, 82d Cong., 2d Sess. 3 (1952).

276. See N.Y. Times, April 15, 1952, p. 32, col. 5 reporting cases of TriCity Broadcasting Co. v. Cincinnati Reds, and Liberty Broadcasting Co. v. 13 major league clubs (denial of temporary restraining order).

277. See *Hearings*, supra note 275.


281. See N.Y. Times, April 16, 1952, p. 35, col. 7, reporting the staying of the *Prendergast* suit until determination of the *Toolson* and Kovalski reserve clause cases on appeal in the 9th and 5th circuits respectively.
and others currently pending against the industry, definitive court adjudications seem likely in the near future.\textsuperscript{282}

Regulated Industries

A substantial portion of private suits have struck at practices in regulated industries.\textsuperscript{283} As indicated by successful actions, regulation does not provide an industry with a \textit{per se} exemption from antitrust proscriptions.\textsuperscript{284} However, courts frequently dismiss private suits in deference to the primary jurisdiction of regulating agencies where the agency is competent to deal with the subject matter and award the requested relief. Since the "competence" of an agency in any situation is governed by the statutes under which it operates, the primary jurisdiction rule produces different results in different fields.\textsuperscript{285} The Supreme Court, for example, has just explicitly ruled out Sherman Act suits against shippers for fixing of rates by conference

\textsuperscript{282} Apparently, private suits in the baseball world have opened up other sports to antitrust attack. See N.Y. Times, April 17, 1952, p. 39, col. 6, reporting Peller v. International Boxing Club (conspiracy forcing fighters' managers to cancel bout promoted by plaintiff). And see United States v. International Boxing Casino of New York, Inc., Civil Action No. 74-81, CCH \textsc{Trade Reg. Rep. Current} \textsuperscript{66,022} (S.D. N.Y. 1952).

\textsuperscript{283} Cases in public regulated areas comprise about 8\% of the total reported (official and unofficial) private suits from 1944 to 1951. See Appendix II, p. 1064 infra.

\textsuperscript{284} See, \textit{e.g.}, Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945); United States v. Borden Co., 308 U.S. 188 (1939). And see cases cited notes 287-9 infra. For general discussion of the application of antitrust law in public regulated industries, see Note, 64 \textsc{Harv. L. Rev.} 1154 (1951).

\textsuperscript{285} Thus, for example, where regulatory bodies are "competent" to establish rates, once such rates are approved by the commission, they cannot be subsequently called "illegal" in court action under antitrust laws. See, \textit{e.g.}, Keogh v. Chicago \& Northwest R.R. Co., 260 U.S. 156 (1922) (dismissal of action for overcharge on railroad rates); American Cooperative Serum Association v. Anchor Serum Co., 153 F.2d 907 (7th Cir. 1946), \textit{cert. denied}, 329 U.S. 721 (1946) (damages allowed for discriminatory pricing only prior to price lists becoming operative on filing with the Secretary of Agriculture). Even where approval of the attacked activity has not been given by the regulatory body, the scope of the regulatory statute may in some cases preclude antitrust suits, see, \textit{e.g.}, Far East Conference v. United States, 342 U.S. 570 (1952) (charge of rate fixing in shipping by conference agreement dismissed), while in other instances court action may be stayed pending determination by the commission of what a lawful rate should have been, see, \textit{e.g.}, Keith Railway Co. v. American Association of Railroads, 64 F.Supp. 917 (N.D. Ill. 1946) (conspiracy to reduce mileage allowances to owner-lessee of tank cars). However, recent decisions indicate that even where rates are subsequently declared illegal by the regulatory commission, antitrust court actions will still be dismissed either because (1) rates on file are presumed lawful until changed or (2) the subsequent declaration of illegality has no bearing on what rates should have been at the time the cause of action arose. See, \textit{e.g.}, McClellan v. Montana-Dakota Utilities Co., CCH \textsc{Trade Reg. Rep. Current} \textsuperscript{67,250} (D. Minn. 1952) (discriminatory rates by carriers of natural gas); Interstate Natural Gas Co. v. Southern California Gas Co., 102 F.Supp. 685 (S.D. Cal. 1952) (same). For further variations on regulatory body "competence" see notes 287, 289 infra.
agreement. On the other hand, damage claims against airlines’ conspiracies to drive competitors out of business have been recently entertained by courts, with the accompanying request for injunction referred to an administrative tribunal. And private suits have also been entertained, for example, against railroad rate discrimination, and territorial division of markets by competing power companies.

**Labor**

Although the Clayton and Norris-La Guardia Acts exempt “labor disputes” from antitrust proscriptions, unions have nevertheless been victims of successful private antitrust attacks. In some instances, antitrust immunity has been pierced when courts found that the “union” was a business association rather than a labor group. Thus, for example, organizations composed of boat owners and fishermen selling their catch on a pro rata basis were enjoined from a strike aimed at compelling purchasers to pay higher prices.

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287. SSW, Inc. v. Air Transport Ass’n of America, 191 F.2d 658 (D.C. Cir. 1951) (action for treble damages sustained since CAB is not competent to award damages for antitrust violations, but damage suit stayed until request for injunction is heard by commission since CAB can issue cease and desist order). In Slick Airways, Inc. v. American Airlines, Inc., 1950-51 TRADE CASES ¶ 62,899 (D. N.J. 1951), the court upheld the complaint for triple damages, but in contrast to the *Air Transport case supra*, proceeded to hear the damage claim immediately, arguing that CAB had no authority to disapprove the driving of a competitor out of business. See also Hawaiian Airlines, Ltd. v. Trans-Pacific Ltd., 78 F. Supp. 1 (D. Hawaii 1948) (charge of illegal combination of shipping company and airlines immediately heard by court since neither CAB nor Maritime Commission could award damages or hear both defendants).


290. See 38 STAT. 738 (1914), 29 U.S.C. § 52 (1946); 47 STAT. 71 (1932), 29 U.S.C. § 105 (1946). Section 20 of the Clayton Act exempted enumerated activities called “labor disputes” from the operation of the antitrust laws. However, in Duplex Printing Press v. Deering, 254 U.S. 443 (1921), the Supreme Court narrowly read the § 20 exemption to apply only to disputes between an employer and his own employees. Subsequently, in United States v. Hutcherson, 312 U.S. 219 (1941) (government prosecution against carpenters’ union engaged in a jurisdictional strike), the Court interpreted Norris La-Guardia as having expanded the definition of exempted “labor disputes” beyond the bounds of employer-employee relations and consequently greatly increased § 20’s antitrust immunization. For private antitrust litigation in the labor field prior to the *Hutcherson* case, see Comments: 49 YALE L.J. 518, 530-1 (1940); id. at 298 n 92 (1939); 38 YALE L.J. 505 n 23 (1929).
for fish.\textsuperscript{291} Other cases follow the leading 1945 \textit{Allen Bradley} decision\textsuperscript{292} which enjoined a conspiracy of unions and employer groups directed at fixing prices and excluding employers' competitors from the market.\textsuperscript{293} Apparently encouraged by these new gaps in labor immunity, private plaintiffs have sought to disguise traditional "labor disputes" in the antitrust language of successful suits. But attempts to narrow further labor's exemption have thus far failed.\textsuperscript{294}

\textbf{Other Areas}

Many private suits defy neat classification, since they strike at all sectors of the economy and run the entire gamut of antitrust violations. Robinson-Patman plaintiffs have secured judgments against their suppliers, involving, for example, discriminatory discounts and freight equalization,\textsuperscript{295} and cosmetics manufacturers' discriminatory furnishing of demonstrator services or allowances.\textsuperscript{296} Sherman Act claimants have prevailed in suits charging con-

\begin{itemize}
\item \textsuperscript{291} Columbia River Packers Ass'n, Inc. v. Hinton, 315 U.S. 143 (1942); Hawaiian Tuna Packers, Ltd. v. International Longshoremen's and Warehousemen's Union, 72 F. Supp. 562 (D. Hawaii 1947). The successful private suit in the \textit{Hinton} case pioneered the pathway for subsequent government actions based on the \textit{Hinton} theory. See, \textit{e.g.}, United States v. Local 33 of the International Fishermen and Allied Workers of America, Cr. No. 21379 (S.D. Cal. 1950) (fish industry); United States v. Local 36 of the International Fishermen & Allied Workers of America, 177 F.2d 320 (9th Cir. 1949), \textit{cert. denied}, 339 U.S. 947 (1950) (fish industry); United States v. Milk Haulers & Dairy Workers Union Local 916, 1950-51 \textit{TRADE CASES} \textsection 62,887 (S.D. Ill. 1951) (milk industry).
\item \textsuperscript{292} 325 U.S. 797 (1945).
\item \textsuperscript{293} \textit{Id.} at 809. See, \textit{e.g.}, Philadelphia Record Co. v. Photo Engravers, 155 F.2d 799 (3d Cir. 1946) (agreement between union and commercial photo engravers' association that union would do no commercial work for plaintiff photo engraver without permission of association); Anderson-Friberg v. Justin R. Clary & Son, Inc., 98 F.Supp. 75 (S.D. N.Y. 1951) (conspiracy between local stone cutters' union and dealers to exclude out-of-state plaintiff's granite from local market). The \textit{Allen Bradley} doctrine has also paved the way for government action. See United States v. West Texas-New Mexico Chapter, National Electrical Contractors' Ass'n, Cr. No. 45,500 (W.D. Tex. 1950) (jury verdict of not guilty).
\item \textsuperscript{294} Schatte v. International Alliance, 182 F.2d 158 (9th Cir. 1950) (charge by losing union in jurisdictional dispute that employer and other union had conspired to force plaintiffs out of work); Mitchell v. Gibbons, 172 F.2d 970 (8th Cir. 1949) (attempt of plaintiff cab company to defeat union organizational activities by leasing cabs to drivers and alleging drivers are "independent businessmen" within the \textit{Hinton} rule); East Texas Motor Freight Lines v. International Brotherhood of Teamsters, 163 F.2d 10 (5th Cir. 1947) (employer charge that union's successful secondary boycott of employer's customers was an illegal conspiracy within \textit{Allen Bradley} rule); New Broadcasting Co. v. Kehoe, 94 F.Supp. 113 (S.D. N.Y. 1950) (employer charge that union suasion of employer's patrons to boycott was illegal conspiracy within \textit{Allen Bradley} rule).
\item \textsuperscript{296} Elizabeth Arden Sales Corp. v. Gus Blass, 150 F.2d 988 (8th Cir. 1945), \textit{cert. denied}, 326 U.S. 773 (1945).
\end{itemize}
spiracies to fix liquor and sugar beet prices and to monopolize a wholesale tobacco outlet. Suits currently pending reflect a similar diversity of charges and parties. Competitors of sellers, invoking long-dormant section 3 of the Robinson-Patman Act, have charged predatory pricing of dairy products and halvah. Retailers now claim price discrimination in sales, for example, of pens and liquor. News distributors and fireworks manufacturers are charged with concerted refusals to sell. And manufacturers of shoe repair items and processed yarn are under fire for alleged price fixing conspiracies in their respective fields.

**Evaluation**

While inflated concepts of “violation” and “interstate commerce” permit attack on an ever-growing range of business activity, the compensatory nature of the private suit limits the class of plaintiffs eligible to sue. True, fictional damage measures may permit suits, in a few instances, by parties who suffer no injury at all. And current atrophy of defenses enables actions by even those who themselves violate the antitrust laws. But restrictive cause and injury interpretations may still preclude automatically all private attacks for some violations.

New trends, however, lessen plaintiffs' proof obstacles. Inferential proof can now demonstrate cause and damages, and the adoption of fictional absolute damage standards eliminates the necessity, in some cases, of tracing the violation’s complete effects on plaintiff’s business. Damages from price discrimination, for example, may be provable by reference to the discrimination alone. And the results of prior successful government proceedings come in via § 5 of the Clayton Act or the back door of judicial notice. Government

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303. See, e.g., notes 52, 63-6, 85 supra. Of course, restrictive interpretations may not always preclude all actions, but may make proof so difficult that actions become unfeasible. See, e.g., note 85 supra (purchasers forced to show that increased monopoly costs have not been passed on); note 90 supra (Robinson-Patman plaintiffs unable to use "general" damage yardsticks). Compare Note, 63 HARV. L. REV. 907, 909 (1950).
litigation, moreover, provides private parties with leads and sources of evidence. Nevertheless, private antitrust suits may still create special evidentiary difficulties. Proof problems of course vary with each suit, but plaintiffs may be forced to produce a plethora of complex market data to establish the existence of the antitrust violation. Or issues may require presentation of evidence of illegal practices scrupulously concealed behind facades of business legitimacy.\(^\text{304}\)

Cost burdens resulting from complex litigation, moreover, may impede the institution of private suits. True, plaintiffs may economize costs through joint action and judicious choice of forum. But evidence procurement, while facilitated by broad discovery provisions and devices for utilization of prior government proceedings, still results in substantial expense.\(^\text{305}\) And expert testimony and antitrust legal talent come high.\(^\text{306}\) Moreover, suits may drag on interminably as defendants, faced with triple liability and adverse public relations, litigate to the hilt or perhaps seek deliberate delay to exhaust

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\(^\text{304}\) See generally, Testimony of Walton Hamilton, *Hearings on H.R. 7905*, supra note 202, at 59-60; Testimony of Milton Handler, *id.* at 2 et seq.; Hamilton & Till, [*Antitrust in Action* 83](TNEC Monograph 16, 1940). The amount of proof utilized in some government cases indicates that in certain areas private actions independent of prior government suits would simply be impossible, see, *e.g.*, FTC v. Cement Institute, 333 U.S. 683, 687 (1948) (100,000 page record compiled in three years of FTC hearings on basing-point system). And see *Annual Report, op. cit. supra* note 204, at 44 (antitrust patent suit involving 6,000 patents), especially since even the Antitrust Division, with recourse to FBI and grand jury investigations, see *Antitrust Law Enforcement by the Federal Trade Commission and the Antitrust Division*, supra note 203, at 55-61, may be unable to solve evidence procurement problems, see *id.* at 61. But even where prior government decrees are available for use, the abnormal length of private litigation would indicate the complexity of proof problems involved. See note 307 infra. For problems of courtroom presentation of complex antitrust issues see generally, McAllister, [*The Big Case: Procedural Problems in Antitrust Litigation*, 64 *Harv. L. Rev.* 27 (1950)].

\(^\text{305}\) For costs of discovery see note 166 supra. While investigatory costs for plaintiffs are not available, the high cost of defending suit, see notes 235 supra, 329, 332 infra, and government estimates of FBI investigation expenses averaging $100,000 per suit, see *Hearings on H.R. 3408*, supra note 202, at 10, indicate that in some instances investigation expenses may simply prohibit private suits.

\(^\text{306}\) “The more you get into this field, the more you recognize that this is not the area of general practice. . . . [The antitrust bar] is probably the highest paid bar, the most lucrative practice. . . .” Testimony of Graham H. Morison, Assistant Attorney General in charge of the Antitrust Division, *Hearings on H.R. 3408*, supra note 202, at 17. And see Applebaum v. Paramount Pictures, Inc., 1950-51 *Trade Cases* ¶ 62,944 (S.D. Miss. 1951) (compensation in form of reasonable attorney fee for plaintiff’s counsel should be higher than ordinary legal compensation). But *cf.* Milwaukee Towne Corp. v. Loew’s, Inc., 190 F.2d 561, 570 (7th Cir. 1951). While high priced expert testimony is not a prerequisite to private suit, its absence, especially in proof or damages, may be fatal to plaintiff’s case. See *e.g.*, note 100 supra.

\(^\text{307}\) The median time from filing to disposition of private antitrust cases was (for the years 1947-1949) 22 months as compared to a median of less than 10 months for all tried civil cases. And government and private suit antitrust trials are over five times the length of usual civil litigation. See *Annual Report, op. cit. supra* note 204, at 43-4.
plaintiffs' finances. Private antitrust remedies may thus be simply unavailable to potential plaintiffs whose damages are relatively minor or whose financial standing is weak.

Private claimants must also face the danger of trade reprisals, especially acute where antitrust violators control a potential plaintiff's limited sources of supply. Reprisals here may take the form, for example, of boycotts or delivery delays. On the other hand, reprisals can occur among competitors as well. Strong competitors can threaten to "intensify" competition, or, where patents are concerned, harry plaintiffs with costly infringement litigation. Since the line between subtle reprisal and justified business practice is difficult to draw, victims have little chance of subsequent legal redress.


309. While no detailed data has been collected on the extent to which a fear of reprisal discourages suit, correspondents indicate that it has played a potent role. Aluminum fabricators report that they are so "dependent upon the good will of their supplier . . . they can hardly afford to inspire antagonism." See, e.g., Communications to the Yale Law Journal from Eugene Dynner of Metal Trims, Inc., dated January 10, 1952, and from Arnold Troy of Eastern Metal Products Co., dated February 1, 1952, in Yale Law Library. Tire retailers express similar views, see, e.g., Communication to Yale Law Journal from George J. Burger of the National Federation of Independent Business, dated December 19, 1951, in Yale Law Library. Some commentators rate fear of reprisals as the most significant deterrent of private antitrust suits. See, e.g., Testimony of Walton Hamilton, Hearings before the Subcommittee on the Study of Monopoly Power of the House Judiciary Committee, 81st Cong., 1st Sess. 293 (1949); Vold, Are Threefold Damages Under the Antitrust Act Penal or Compensatory?, 28 Ky. L. J. 117, 141 (1940). However, their assertions are unsupported. For argument that triple damages are, in part, compensation for the future reprisals to which suitors expose themselves, see Vold, supra at 140 et seq.

310. See sources cited note 309 supra. For discussion of the various forms that suppliers' economic reprisals may assume, see Hamilton & Tell, Antitrust in Action 47 (TNEC Monograph 16, 1940) (cancellation of long term business agreements, credit refusals, delivery delays, obstacles to return of goods).

311. Ibid. (price cutting, pressure put on suppliers or purchasers). And see Communication to the Yale Law Journal from Raymond P. Lipe of Defiance Sparkplug Corp., dated December 19, 1951, in Yale Law Library (withdrawal of complaints by eight small sparkplug manufacturers because of fear of reprisal by competitor). The aluminum fabricators, for example, are in the precarious position of competing with their supplier who is also engaged in fabricating. See Communication to the Yale Law Journal from Arnold Troy of Eastern Metal Products Co., dated February 1, 1952, in Yale Law Library.

312. See, e.g., United States v. Economic Concentration and Monopoly, Staff Report to the Monopoly Subcommittee of the House Small Business Committee pursuant to H. Res. 46, 79th Cong., (1946) for the use of threats of infringement suits to demolish competition in tungsten carbide production, pp. 217, 218, manufacture and sale of glassware, pp. 225, 227, and in manufacture and sale of lamp making machinery, p. 232.
Consequently, plaintiffs may remain inactive or seek enforcement through protective anonymity of complaints voiced with the Justice Department or Federal Trade Commission.\textsuperscript{313}

When private suits are brought, however, they are potent weapons of antitrust enforcement. One immediate outcome of successful private suits is injunctive relief that, though strictly limited to the parties before the court,\textsuperscript{314} halts violations causing existing or potential injuries to particular plaintiffs. Although suits for injunctions raise much the same legal issues as damage claims, they do not provide the attraction of triple recoveries and attorney fee awards. Consequently, the injunction action lacks the popularity of the damage suit, and requests for injunctions are frequently joined with damage claims rather than pursued alone. But while only ten injunctions were granted in private suits (excluding antitrust counterclaims and patent litigation) from 1947 to 1951,\textsuperscript{315} their impact has nevertheless been felt. Where injured plaintiffs, for example, have been unable to prove the amount of their damages, injunctions have issued to halt violations.\textsuperscript{316} And where injury is threatened rather than actual, injunction suits have provided relief—a result that no damage claim could effectuate.\textsuperscript{317} Moreover, injunctions, once given, have apparently been sufficient to halt injury, for reported cases reveal only a single attempt to invoke contempt sanctions for violations enjoined since 1944.\textsuperscript{318}

In damage suits, plaintiffs' victories punish antitrust violators with huge assessments of triple damages and attorney fees. Actions terminated between 1947 and 1951 produced fifteen damage awards for plaintiffs.\textsuperscript{319} While

\textsuperscript{313}Former Attorney General Clark estimated that 90% of the cases filed by the Antitrust Division originate in private complaints. See TIMBERG, THE ANTITRUST LAWS FROM THE POINT OF VIEW OF A GOVERNMENT ATTORNEY 36-7 (1949). For procedure involved and information desired in filing private complaints, see id. at 37. Complaints to the Antitrust Division will probably receive even closer attention in the future, for special procedures to expedite handling of complaints have recently been instituted in local antitrust offices. See 20 U.S.L.W. 2333 (February 5, 1952).

\textsuperscript{314}See cases cited note 77 supra. One commentator suggests increasing the enforcement effect of private injunction suits by framing decrees to protect the entire public in the light of what the individual trial revealed. See Hearings before the Subcommittee on Study of Monopoly Power of the House Judiciary Committee, 81st Cong., 1st Sess. 295-6 (1949).

\textsuperscript{315}See Appendix I, p. 1063 infra. Figures prior to 1947 are not available.

\textsuperscript{316}E.g., Ring v. Spina, 84 F.Supp. 403 (S.D. N.Y. 1949); Alden Rochelle, Inc. v. ASCAP, 80 F.Supp. 888 (S.D. N.Y. 1948); Finley v. Music Corp. of America, 66 F. Supp. 569 (S.D. Cal. 1946). And similarly, an injunction may be awarded where damage awards were precluded by primary jurisdiction of a regulating agency. Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945).

\textsuperscript{317}E.g., Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951).

\textsuperscript{318}See Bigelow v. RKO-Radio Pictures, Inc., 78 F.Supp 250 (N.D. Ill. 1948), aff'd, 170 F.2d 783 (7th Cir. 1948) (film distributors held in contempt for creating "dead time" between end of first run in their theatres and subsequent runs in other theatres).

\textsuperscript{319}See Appendix I, p. 1063 infra.
amounts, of course, varied with each suit. Many reached staggering proportions: seven damage awards were in excess of $100,000, with at least two hedging the $1,000,000 mark. Totals for awards prior to 1947 and subsequent to 1951 are not available. But reported cases indicate that earlier judgments produced equally impressive sums, and recent 1952 verdicts climb to even higher levels. Moreover, attorney fee awards add considerably to defendants' financial attrition. In no reported instance since 1946 have fees fallen below $19,000; and a recent fee award hit an all-time high of $132,000.

The large number of settlements in private suits, however, makes plaintiffs' judgments an unrevealing index of the impact of the private antitrust action. Prospects of long and costly antitrust litigation are probably a powerful inducement for both parties to settle. And the threat of triple liability and unfavorable publicity militates even more strongly for defendants' compromise. Correspondence from nineteen law firms litigating private antitrust suits indicates that, exclusive of movie litigation, 25 per cent of all actions filed are eventually settled out of court. Thus, it may be conservatively estimated that in the past five years private plaintiffs have secured some satisfaction in 106 actions, besides the 28 in which they obtained damages or injunctions.

320. Ibid.
321. Kiefer-Stewart v. Seagram & Sons, 340 U.S. 211 (1951) ($975,000 damages; $50,000 attorney fees); Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951) ($941,514.30 damages; $75,000 attorney fees). For other reported damage amounts from 1947-1951, see American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919 (5th Cir. 1951) ($180,000 damages; $35,000 attorney fees). Fargo Glass & Paint Co. v. Globe American Corp., 101 F.Supp. 460 (N.D. Ill. 1951) ($118,000 damages). And see movie cases cited note 225 supra.
322. See movie cases cited note 225 supra. And see smaller amounts awarded in American Cooperative Serum Ass'n v. Anchor Serum Co., 153 F.2d 907 (7th Cir. 1946) ($13,350 damages; $2,500 attorney fee); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir. 1945) ($3,030 damages).
323. Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp., 194 F.2d 846 (8th Cir. 1952) ($1,125,000 damages; $100,000 attorney fee); Sager Glove Corp. v. Bausch & Lomb Optical Co., 1950-51 TRADE CASES ¶ 62,956 (N.D. Ill. 1951) ($975,000 damages; $132,000 attorney fee).
324. Ibid.
325. See Appendix III, p. 1065 infra. Of course, settlement experience varies widely with different firms and clients. As contrasted, for example, to defendants' apparent readiness to settle in movie litigation, see note 226 supra, others have evidenced a strong antipathy towards compromise in treble damage suits, see, e.g., Communication to YALE LAW JOURNAL from Henry F. Herbermann, counsel for General Motors Corp., dated December 28, 1951, in Yale Law Library, especially when suits have already begun, see, e.g., Communication to YALE LAW JOURNAL from Gerhard A. Gesell, dated December 31, 1951, in Yale Law Library. For settlement prior to institution of suit see note 327 infra.
326. The figure is obtained by calculating 25% of the 423 cases terminated in United States District Courts between 1947 and 1951. See Appendix I, p. 1063 infra. Actually, however, the computations are extremely conservative for extrapolation to all suits since settlements in movie litigation probably occur with much greater frequency than in other areas. See note 226 supra.
And this, of course, does not include the apparently numerous occasions on which parties threatening private antitrust action secured desired modification of conduct or financial redress.\textsuperscript{327} But while many settlements doubtless occur, their precise extent and scope are unknown. Defense counsel do indicate, however, that settlement payments are generally far less than damages claimed.\textsuperscript{328}

Costs of defense impose additional financial punishment on defendants in private suits. Legal and investigatory expenses in defending private antitrust suits vary with the type of suit, location of trial, and the speed of disposition. But in any event, costs seem startlingly high. In cases where more than $150,000 is claimed as damages, probably representing over one half the total private suits, defense counsel indicate that average costs per firm range from $17,000 to $250,000.\textsuperscript{329} While movie companies report that “paper work” alone averages $25,000 for each defense.\textsuperscript{330} And even where settlements are effected, defendants’ expenses may run into five figures.\textsuperscript{331} Moreover, the huge cost of maintaining suit undoubtedly gives rise to still another expenditure for defendants facing several actions: the “buying off” of nuisance claimants who harry defendants in the wake of successful government antitrust proceedings.\textsuperscript{332}

In fact, private antitrust enforcement largely rests on prior government action. All of the movie litigation and approximately two-thirds of other private suits have followed successful government antitrust proceedings.\textsuperscript{333}

\textsuperscript{327} “We can say with assurance . . . that the great bulk of bona fide treble damage claims are settled—and in our experience reasonably to the satisfaction of the claimants—before suit is brought. The great uncertainties involved in applying the law to treble damage facts makes settlement rather than litigation almost mandatory in most situations. In other words, the courts’ records on treble damage actions are of little significance,” Communication to the \textit{Yale Law Journal} from Jerrold G. Van Cise, dated January 2, 1952, in Yale Law Library. (Emphasis added.) But see Appendix III, p. 1065 \textit{infra}.

\textsuperscript{328} See Appendix III, p. 1065 \textit{infra}.

\textsuperscript{329} \textit{Ibid}.

\textsuperscript{330} See note 235 \textit{supra}.

\textsuperscript{331} See Appendix III, p. 1065 \textit{infra}.

\textsuperscript{332} While apparently frequent settlements for less than one per cent of damages claimed would seem to indicate successful nuisance claims in many instances, see Appendix III, p. 1065 \textit{infra}, the following remarks to the contrary are also typical of many general replies from counsel: “Our practice has been in almost all situations strongly to urge our clients to litigate, not to settle . . . [for] nuisance value. I think you will find very few plaintiffs who will take a settlement by the payment of a nuisance amount [since] litigation of treble damage cases is very expensive.” Communication to the \textit{Yale Law Journal} from Gerhard A. Gesell, dated December 31, 1951, in Yale Law Library. However, when nuisance claims do occur and defendants choose to resist them, legal and investigatory expenses may still be considerable. Since suits may be filed and discovery procedures commenced with ease, see p. 1033 \textit{supra}, the nuisance claim may not be spotted until litigation is well under way, see, e.g., Shotkin v. General Electric Co., 169 F.2d 825 (10th Cir. 1948) (case dismissed after one year of dragging through plaintiff’s “groundless” motions and dilatory tactics), and even when spotted may be impossible to halt without defense expenditures.

\textsuperscript{333} See Appendix III, p. 1065 \textit{infra}.
But while private suits usually follow government activity, they do more than duplicate government work. Thus, for example, private suits after government actions frequently adjudicate practices not covered by government decrees, or, in some instances, serve partially to fill the breach left open by inadequate government policing of decrees. And of course, to the extent that private suits do occur, they augment the financial impact and consequently the deterrent value of both civil and criminal government actions.

Independently of government suits, private enforcement has achieved some success in limited areas. Its most striking solo accomplishment has probably been in patent cases, where private suits have continued the government trend toward restricting the scope of the patentee's monopoly. In addition, in both professional athletics and labor-management conspiracies, for example, private action has laid the groundwork for attainment of antitrust objectives where previous government attacks failed. And conversely, independent suits have pursued a host of violations in minor sectors of the economy not target of strategic government attack.

Significantly, however, the effects of private enforcement extend far beyond immediate parties in government and private suits. Since even a wholly successful defense of a single action entails considerable costs, the threat of private antitrust attack is a potent deterrent to potential violators. And when the impact of private suits becomes cumulative, as in the movie industry, the lesson for all businessmen is striking. In fact, private enforcement has introduced a prophylactic note of caution into business practice, as evidenced by the current liaison between antitrust lawyers and business. Letters from counsel, for example, report the frequent consideration and rejection of proposed business practices bordering on illegality by clients who wish to avoid treble damage liability.334

But while the private action does enforce antitrust laws, it may produce undesirable results as well. Because of the threat of subsequent triple damage attacks following litigated government actions, defendants in government suits can try the validity of their practices only at the risk of incurring severe financial punishment. At the same time, since there is no limit on the number of private suits, cumulative actions may strike hard at a defendant's single misstep. In the light of uncertainties of antitrust proscriptions, both results

334. The following is typical of several replies: "Clients frequently ask counsel to advise as to the legality under the antitrust laws of some proposed act or practice which is not clearly violative of the antitrust laws, but which cannot unqualifiedly be said to be lawful. Indictment under the criminal sections of the antitrust laws is unlikely in these borderline cases. Under such circumstances, we find that the threat of treble damage suits, even more than the possibility of Government action, deters businessmen from carrying out the proposed acts or practices. It is our estimate that for every act or practice which results in an actual treble damage claim there are hundreds of others which were once considered for action by businessmen and were rejected by them because of the fear of treble damage claims." Communication to the Yale Law Journal from Jerrold G. Van Cise, dated January 2, 1952, in Yale Law Library.
seem unduly harsh. In addition, private suits may create windfalls, for triple
damage awards and fictional damage measures shape recoveries in excess of
actual loss. And prospects of such recoveries have produced, according to
some defense counsel, a class of racketeer lawyers who thrive on pressing
groundless claims in hopes of quick settlement with defendants unwilling to
face substantial litigation costs.\footnote{335}

Despite its defects, however, the private suit fulfills a needed function in
antitrust enforcement. Clearly, antitrust laws are not entirely self-enforcing
through private initiative. Dependence on prior government suits and the
sporadic and unpredictable impact of private attack makes the action ill-adapted
to effect a planned approach to antitrust problems. Nevertheless, the
effects of private suits in halting existing violations, in aiding government
enforcement, and in creating a powerful deterrent to future violations, define
its newly won significance in antitrust enforcement.\footnote{336} True, a sufficient
government antitrust program might conceivably achieve effective enforce-
ment without the defects of private action. But government activity is already
hamstrung by insufficient funds.\footnote{337} And with private suits absent, present
Antitrust Division appropriations would have to be more than quadrupled to
plug the gap.\footnote{338} Moreover, to the extent that private suits operate independently
of government enforcement, they provide a continuing police action against
violations irrespective of any momentary government apathy. And, of course,
the antitrust damage suit always offers an otherwise unavailable redress to
parties victimized by violations.

\footnote{335. See, e.g., Letter from Louis Nizer, Hearings on S.1910, supra note 216, at 42, 44.}
\footnote{336. "[W]e have, for the first time since the history of the enactment of the [anti-
trust laws], begun to see the development of private litigation under the triple damage
statute, which is of substantial help. It already is a deterrent." Testimony of Graham H.
Morison, Hearings on H.R. 3408, supra note 202, at 15.}
\footnote{337. While appropriations to the Antitrust Division have risen considerably over those
in past years, see Antitrust Law Enforcement by the Federal Trade Commission and the
Antitrust Division, supra note 203, at 50-1, lack of funds is still cited as one of the "out-
standing basic weaknesses" in the antitrust program. Id. at 75-6.}
\footnote{338. See Testimony of Graham H. Morison, Assistant Attorney General in charge of the
Antitrust Division, Hearings on H.R. 3408, supra note 202, at 15.}
## APPENDIX I.

**COMMENCEMENT, TERMINATION, AND DISPOSITION OF PRIVATE ANTITRUST CASES IN UNITED STATES DISTRICT COURTS, FISCAL YEARS 1947-1951**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Pending at beginning of year</th>
<th>Pending at close of year</th>
<th>Commenced</th>
<th>Terminated</th>
<th>No judgment</th>
<th>Judgment for defendant</th>
<th>Judgment for plaintiff</th>
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<tr>
<td>1947</td>
<td>137</td>
<td>118</td>
<td>62</td>
<td>81</td>
<td>68</td>
<td>11</td>
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<td></td>
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<tr>
<td>1948</td>
<td>118</td>
<td>147</td>
<td>75</td>
<td>46</td>
<td>32</td>
<td>9</td>
<td>5: injunction</td>
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<td></td>
<td></td>
<td></td>
<td>1 damages $50-100,000</td>
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<td></td>
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<td></td>
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<td></td>
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<td>1949</td>
<td>147</td>
<td>226</td>
<td>159</td>
<td>80</td>
<td>58</td>
<td>13</td>
<td>9: 3 injunctions</td>
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<td></td>
<td></td>
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<td>plus other relief</td>
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<td></td>
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<td>1952</td>
<td>367</td>
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<td>90**</td>
<td>—</td>
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</tbody>
</table>

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*All information is from the Administrative Office of the United States Courts, see Communications to the Yale Law Journal, dated April 23 and January 5, 1952, in Yale Library. Figures do not include private antitrust counterclaims or patent, trademark, and copyright litigation.

**Figure as of April 1952 (reports incomplete).
## Appendix II

### Analysis of Private Antitrust Suits Reported (Official and Unofficial) From 1944 to 1951

<table>
<thead>
<tr>
<th>Disposition</th>
<th>No Determinative Ruling</th>
<th>Complaints Upheld***</th>
<th>Damages Awarded***</th>
<th>Injunctions Awarded</th>
<th>Judgment for Defendant</th>
<th>Complaints Dismissed***</th>
<th>Total Suits Reported</th>
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</thead>
<tbody>
<tr>
<td>57</td>
<td>26</td>
<td>18</td>
<td>10</td>
<td>40</td>
<td>29</td>
<td>180</td>
<td></td>
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<tr>
<td>17% of total</td>
<td>24% of total</td>
<td>8%</td>
<td>6%</td>
<td>6%</td>
<td>32%</td>
<td>100%</td>
<td></td>
</tr>
</tbody>
</table>

*Figures are based on cases reported in official Federal reports and the CCH Trade Cases and Trade Regs. Rep. 1944-1951. Private antitrust counterclaims and patent, copyright, and trademark antitrust litigation are included.

**And not subsequently appearing in the reports.

***Includes awards of both damages and injunction in single suit. Injunction figures immediately below include awards only of injunction alone.
### Appendix III.

**QUESTIONNAIRE RETURNS BY DEFENSE COUNSEL IN PRIVATE ANTITRUST SUITS**

<table>
<thead>
<tr>
<th>A. Disposition of Claims (threatened and litigated)</th>
<th>B. Average Legal and Investigatory Expense per Suit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled before filing</td>
<td>Where litigation concluded</td>
</tr>
<tr>
<td>1</td>
<td>$17,000-25,000 3 firms reporting</td>
</tr>
<tr>
<td>Dropped before filing</td>
<td>25,000-50,000 3</td>
</tr>
<tr>
<td>13</td>
<td>100,000 or more 4 (1 firm reporting $250,000)</td>
</tr>
<tr>
<td>14</td>
<td></td>
</tr>
<tr>
<td>Settled after filing</td>
<td>Where settlements made</td>
</tr>
<tr>
<td>20</td>
<td>$15,000 1 firm reporting</td>
</tr>
<tr>
<td>Judgment for plaintiff</td>
<td>20,000 1</td>
</tr>
<tr>
<td>7</td>
<td>50,000 1</td>
</tr>
<tr>
<td>Judgment for defendant</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td></td>
</tr>
<tr>
<td>Unaccounted for or pending</td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>81</td>
</tr>
<tr>
<td>Total claims reported</td>
<td>95**</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>C. Existence of Prior Government Suit</th>
<th>D. Ratio of Amount of Settlement to Amount Claimed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claims made after government actions</td>
<td>20% 1 firm reporting</td>
</tr>
<tr>
<td>39</td>
<td>10% 1</td>
</tr>
<tr>
<td>Claims where no prior government actions</td>
<td>5% 1</td>
</tr>
<tr>
<td>23</td>
<td>1% or less 5</td>
</tr>
<tr>
<td>Claims unaccounted for</td>
<td></td>
</tr>
<tr>
<td>33</td>
<td></td>
</tr>
</tbody>
</table>

*Summary of replies to questionnaires sent to over 90 firms representing defendants in private antitrust suits throughout the country. Of 29 replies received, 19 were sufficiently specific for utilization in summary. Tabulations do not include litigation in which film producers or distributors were defendants, since it was necessary to exclude movie litigation to avoid duplication of replies for the same cases. Replies providing general rather than specific data are discussed throughout the Comment.

**2 class suits and 4 joinder actions representing a total of 293 claims are computed as 6 single suits rather than as separate claims for purposes of tables A and C. Figures from these actions do not appear in tables B and D.*