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No Anti-Competitive Intent, No Treble Damages: A Proposal

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Law360, New York (January 17, 2017, 2:06 PM EST) -- The mandatory trebling of antitrust damages exposes businesses to antitrust claims that now regularly exceed $1 billion.[1] This staggering risk currently applies even to defendants that believed their conduct was pro-competitive and had no intent to restrain trade.[2] To protect against the unfair punishment of treble damages of businesses unaware that their conduct is illegal, courts should recognize a due process clause defense to the punitive two-thirds portion of treble damages.

Consider the hypothetical case of a new restaurant looking to hire chefs. The new restaurant does not know how much to offer, so it agrees to participate in an annual survey with other restaurants about what each plans to pay chefs the following year. The new restaurant now has better information and begins poaching chefs from rival restaurants by paying more.

After a few years of participating in the survey, with chef wages increasing citywide, the new restaurant is served with a class action claiming that the agreement to participate in the survey suppressed chef wages in the city. The chefs' counsel argues that surveys of future salary information are anti-competitive because they are outside the U.S. Department of Justice and Federal Trade Commission's "safety zone" for information exchanges between competitors.[3] At trial, expert witnesses debate whether pay would have been higher had the restaurants not exchanged wage information. The new restaurant testifies that it participated in the survey to compete more, not less, and would have paid its chefs less without knowing what other restaurants planned to pay. But this good-faith, pro-competitive intent is no defense under current law.

The jury, without being informed of mandatory trebling,[4] awards compensatory damages equal to any anti-competitive impact it finds — for example, chef wages lower than they would have been but for the challenged surveys. The new restaurant must pay triple that amount of compensatory damages. Even worse, with antitrust law's mandatory joint

and several liability, the new restaurant's damages exposure balloons to triple the suppressed wages of all chefs in the labor market, even chefs who never worked at the new restaurant.[5] All this punishment for conduct the new restaurant undertook in good faith and believed was pro-competitive.

Many lawmakers and academics have recognized this problem and pushed to detreble antitrust damages in particular circumstances, but have had limited success so far.[6] Courts should step in by enforcing the Fifth Amendment's due process clause to refuse to treble damages when a defendant lacked anti-competitive intent. This is an untested argument in the antitrust context, but it appears viable because due process already protects against excessive punitive damages and statutory penalties and against criminal antitrust monetary penalties for defendants lacking mens rea.

As a threshold matter, a due process defense to antitrust treble damages would apply only to the portion of damages considered punitive. Current case law supports treating as punitive some, if not all, of the two-thirds portion beyond compensatory damages. The U.S. Supreme Court has referred to the two-thirds portion as punitive in holding that "the punitive two-thirds portion of a treble-damage antitrust recovery must be reported by a taxpayer as gross income" for income tax purposes.[7] The leading antitrust commentators agree that the "two-thirds excess in a treble damages award operate[s] as the 'penalty' provision[] of antitrust."[8] Other commentators disagree, arguing the entire trebled award is compensatory because, for instance, antitrust law does not typically allow prejudgment interest.[9] And recently, the Supreme Court and lower courts have rejected arguments that the entire two-thirds excess of False Claims Act treble damages is punitive.[10] These opinions reason that False Claims Act treble damages may be necessary for full compensation because the qui tam relators receive up to 30 percent of the treble damages and plaintiffs do not receive prejudgment interest.[11] But even in those False Claims Act cases, lower courts held that a portion of the trebled amount was punitive and then considered constitutional challenges to that portion.[12] For antitrust treble damages, even if a court considers some part of the two-thirds excess compensatory, there is a punitive portion that due process should limit.

Protection against antitrust treble damages for defendants lacking anti-competitive intent finds support in due process's protection against excessive punitive damages and statutory penalties. When applied to an antitrust defendant lacking anti-competitive intent, trebling compensatory damages raises similar fairness concerns as punitive damages and even appears unconstitutional according to the due process "guideposts" that limit punitive damages.

Due process forbids a "grossly excessive" punitive damage award judged according to three limiting guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[13]

The first guidepost, the conduct's degree of reprehensibility, is the "most important indicium of the reasonableness of a punitive damages award."[14] Reprehensibility depends on factors such as the actor's intent, the victim's financial vulnerability, whether the harm was physical as opposed to economic, and whether the conduct was repeated or isolated.[15] The absence of these factors "renders any [punitive] award suspect," and even "[t]he existence of any one of these factors ... may not be sufficient to sustain a punitive damages award."[16] Because an antitrust defendant lacking anti-competitive intent would not have a reprehensible intent, and otherwise might only trigger the factor for repeated conduct, the punitive portion of treble damages would be constitutionally "suspect."

The second guidepost limits the ratio between punitive and compensatory damages. The Supreme Court

explained, “When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.’”[17] Thus antitrust treble damages’ two-to-one ratio of punitive to compensatory damages may be unconstitutional when compensatory damages are “substantial,” which courts have characterized as around $1 million.[18]

The third guidepost considers the civil penalties authorized in comparable cases, which is no limitation to trebling antitrust damages since trebling is mandated by statute.[19]

The due process limitation on statutory penalties, although too lenient to invalidate treble damages, helpfully shows both that due process’s protection against monetary penalties extends beyond punitive damages and that the degree of protection depends on the context. Antitrust damages are distinct from statutory penalties in ways that merit stricter due process protection. Legislatures impose statutory penalties in defined amounts and with the ability to recover for public harm beyond any particular person’s injury.

The Supreme Court recognized a due process limitation on statutory penalties in St. Louis, I. M. & S. R. Co. v. Williams.[20] Williams allowed a $75 statutory penalty for a 66 cent overcharge on a railroad fare, explaining that statutory penalties violate due process only if they are “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”[21] Lower courts have upheld statutory penalties even when the amount is unrelated to the injury caused by the violation, relying on Williams’ statement that “‘the Legislature may adjust [a penalty] amount to the public wrong rather than the private injury.’”[22] Lower courts justify more leniency towards statutory penalties than punitive damages because defendants have notice of a statutory penalty’s amount, legislatures have discretion to account for public wrong beyond private injury in determining penalty amounts, and there is no jury discretion to protect against.[23]

Antitrust treble damages are more akin to punitive damages than defined-amount statutory penalties. Unlike statutory penalties, antitrust damages and punitive damages are limited to particular plaintiffs’ injuries — harm to the public more broadly cannot be considered.[24] Antitrust treble damages also do not afford defendants the notice offered by defined-amount statutory penalties. By defining only the treble multiplier, not the maximum amount, Congress exposed defendants to unknown and potentially bankrupting damages even for conduct defendants believed was pro-competitive. This unknown risk is the same concern underlying the limit on excessive punitive damages: “‘Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty.’”[25]

Further support for limiting the punitive two-thirds portion of antitrust treble damages comes from due process’s prohibition of criminal antitrust monetary penalties for defendants lacking anti-competitive intent. In United States v. U.S. Gypsum Co., 438 U.S. 422 (1978), the court held that a mens rea of intentionally or knowingly causing anti-competitive effects is necessary for criminal antitrust monetary penalties.[26] A primary concern animating that holding was the risk of “overdeterrence” of “salutary and pro-competitive conduct” that would be “shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding ... criminal punishment for even a good faith error of judgment.”[27] That same concern applies to the staggering risk of civil antitrust treble damages, which regularly exceed the possible criminal monetary penalties limited to $1 million for a natural person and $100 million for a corporation.[28] The Supreme Court has justified limiting punitive damages by citing their similarity to criminal monetary punishments.[29] Courts should similarly limit antitrust treble damages by incorporating the requirement that defendants intended the anti-competitive effect.

Antitrust treble damages are a punishment unfair to apply to a defendant that lacked anti-competitive intent. The unfairness of mandatory trebling weighs on the entire antitrust litigation process, pressuring defendants to settle cases they may have won simply because the liability exposure is not worth the risk.[30] Regular settlements also impede development of robust case law that could provide the business community needed guidance about the parameters of acceptable competitive conduct. Courts can ameliorate these problems by enforcing the due process clause to protect business from antitrust treble damages when their challenged conduct lacked any anti-competitive intent.

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[1] Recent judgments exceeding $1 billion after trebling include In re Urethane Antitrust Litigation, No. 04-md-1616 (D. Kan. 2013) ($1.2 billion) and Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002) ($1.05 billion). There are many more pending cases claiming trebled damages exceeding $1 billion.

[2] Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (explaining that "a good intention" will not save an otherwise objectionable restraint of trade); 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (emphasis added)).

[3] See U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care at 50–51 (Aug. 1996).

[4] See U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc., No. 95-CV-1231, 2007 WL 851868, at *2 (D.D.C. Mar. 14, 2007) (collecting cases).

[5] See generally Edward D. Cavanagh, Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?, 40 Vand. L. Rev. 1277, 1284 (1987) (explaining damages exposure caused by mandatory trebling combined with joint and several liability and other factors).

[6] See W. Stephen Cannon, A Reassessment of Antitrust Remedies: The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications, 55 Antitrust L.J. 103, 106–09 (1986) (providing history of legislative attempts and successes to reform mandatory treble damages).

[7] Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 427, 429 (1955) (emphasis added) (explaining also that because "recovery for actual damages is taxable," so should be "the additional amount extracted as punishment for the same conduct which caused the injury."); see also In re N.M. Natural Gas Antitrust Litig., 607 F. Supp. 1491, 1506 (D. Colo. 1984) (characterizing two-thirds excess as punitive damages and disregarding it when evaluating sufficiency of settlement amount).

[8] Phillip E. Areeda & Herbert J. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their

Application ¶¶ 303, 656 (4th ed. 2013) ("[B]oth the criminal sanction and the two-thirds excess in a treble damages award operate as the 'penalty' provisions of antitrust. Both are in excess of what is thought necessary to correct the monopolized market or compensate the injured plaintiff[.]").

[9] See, e.g., Robert H. Lande, Are Antitrust "Treble" Damages Really Single Damages?, 54 Ohio St. L.J. 115, 118 (1993); see also 15 U.S.C. § 15(a) (allowing prejudgment interest only if defendant delayed the litigation).

[10] Cook Cnty. v. U.S. ex rel. Chandler, 538 U.S. 119, 130–32 (2003); U.S. ex rel. Drakeford v. Tuomey, 792 F.3d 364, 387–90 (4th Cir. 2015); United States v. MedQuest Assocs., Inc., No. 3:06-cv-1169, 2011 WL 5027504, at *7 (M.D. Tenn. Oct. 21, 2011), rev'd sub nom. and on other grounds by U.S. ex rel. Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707 (6th Cir. 2013).

[11] Cook Cnty., 538 U.S. at 130–32; U.S. ex rel. Drakeford, 792 F.3d at 388.

[12] U.S. ex rel. Drakeford, 792 F.3d at 388–90 (punitive portion was the two-thirds excess minus the portion paid to the qui tam relator); MedQuest Assocs., 2011 WL 5027504, at *7 (punitive portion was one half of total trebled amount).

[13] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)).

[14] State Farm, 538 U.S. at 419 (citing Gore, 517 U.S. at 575).

[15] Id.

[16] Id.

[17] Id. at 425.

[18] Id. at 426; see also Lompe v. Sunridge Partners, LLC, 818 F.3d 1041, 1068–70 & n.28 (10th Cir. 2016) (explaining State Farm's and lower courts' interpretation of "substantial" damages).

[19] 15 U.S.C. § 15(a).

[20] St. Louis, I. M. & S. R. Co. v. Williams, 251 U.S. 63, 67 (1919).

[21] Williams, 251 U.S. at 67.

[22] Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 909–10 (8th Cir. 2012) (quoting Williams, 251 U.S. at 66) (emphasis added); see also Centerline Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008).

[23] Capitol Records, 692 F.3d at 907–10; Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 586–88 (6th Cir. 2007).

[24] Compare Capitol Records, 692 F.3d at 909–10 (justifying deference to statutory penalty amounts by explaining "the Legislature may adjust its amount to the public wrong rather than the private injury") with Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) ("[T]he Constitution's Due Process Clause

forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties[.]") and Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (requiring proof of injury causally linked to plaintiff that is "injury of the type the antitrust laws were intended to prevent").

[25] State Farm, 538 U.S. at 417 (quoting Gore, 517 U.S. at 574) (emphasis added) (alteration omitted).

[26] United States v. U.S. Gypsum Co., 438 U.S. 422, 444–46 (1978). Although Gypsum specified that its analysis did not address the rule that civil antitrust violations do not require mens rea, that referred simply to proving a violation occurred. Id. at 436 n.13. More should be required before trebling damages.

[27] Id. at 441–42 & n.18.

[28] 15 U.S.C. § 1.

[29] State Farm, 538 U.S. at 417; see also Gore 517 U.S. at 574 n.22 ("The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil penalties." (citation omitted)).

[30] See, e.g., Donald I. Baker, Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?, 16 Loy. Consumer L. Rev. 379, 384 (2004); Jeffrey M. Perloff et al., Antitrust Settlements and Trial Outcomes, 78 Rev. Econ. & Stat. 401, 408 (1996); Edward D. Cavanagh, Detrebling Antitrust Damages: An Idea Whose Time Has Come?, 61 Tul. L. Rev. 777, 809-10 (1987).
