DAMAGES, DETERRENCE, AND ANTITRUST—A COMMENT ON COOTER

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I

As an antitrust lawyer, I have a great deal more sympathy for economics and economic analysis of law than does Professor Blakey in his article on multiple damages.[1] I think Professor Cooter's article on punitive damages is full of good ideas.[2]

Professor Cooter's distinction between compensation and disgorgement is a valuable and important one. Professor Cooter uses that distinction to explain why different types of damage awards might be appropriate under different circumstances. For example, when the goal is to deter forbidden acts—such as, in the antitrust context, criminal or other *per se* offenses—disgorgement of the defendant's gain "provides the correct baseline for computing damages."[3] Compensation for victims' injuries, by contrast, might be the preferred benchmark where the goal is to provide incentives for optimal behavior under more ambiguous circumstances.

Compensation for victims' injuries is not always optimal, however, because of a discontinuity problem that can sometimes result in overdeterrence or, to use Professor Cooter's terminology, excessive internalization of harm. For this excessive internalization to occur, four conditions must be met: (1) the injurer's conduct (at least with respect to one variable attribute, such as duration) is valuable or desirable up to a point, but after that point the costs of the conduct exceed its benefits; (2) liability is imposed only after costs exceed benefits; (3) the damages cover all the costs incurred by the victim as a result of the conduct; and (4) the location of the line between desirable and undesirable—between liability and no liability—is uncertain. Under these conditions, even a simple, single-damages remedy could create excessive incentives to avoid harm and

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1. *See* G. Robert Blakey, *Of Characterization and Other Matters: Thoughts About Multiple Damages*, 60 LAW & CONTEMP. PROBS. 97 (Summer 1997).

2. *See* Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 LAW & CONTEMP. PROBS. 73 (Summer 1997).

3. *Id.* at 78.

could thus overdeter socially desirable conduct.[4]

This insight about overdeterrence can be applied to the antitrust context. Overdeterrence is undesirable with respect to most antitrust offenses, which are generally assessed under some form of rule of reason. Consider, for example, an information exchange through a trade association. Such exchanges are generally procompetitive, but as we move along a continuum, depending on the type of information exchanged and the way in which it is exchanged, the exchange could become anticompetitive and unlawful. Or consider a joint venture that rationalizes production facilities but at some point turns into an anticompetitive creation of market power, or an otherwise efficient vertical distribution arrangement that at some point excessively excludes rivals. If the line between procompetitive and anticompetitive, lawful and unlawful is uncertain, and the consequence of crossing the line is exposure to liability that is not limited to the costs incurred after the line is crossed, procompetitive conduct could be deterred, even by a regime limited to single damages.

It may be that antitrust jurisprudence implicitly recognizes this problem. In many cases, particularly those involving price overcharges, damages are measured only by the unlawful overcharge, not by the entire price charged—or cost imposed on—the victim. But in other cases, such as those involving exclusionary practices, the plaintiff is often permitted, as a practical matter, to recover for his entire loss. In these cases, courts do not always exclude from the damage recovery the harm the plaintiff would have suffered if the defendant had gone up to, but not crossed, the line of illegality.

II

At this point, one might be tempted to conclude that even single damages may be excessive in antitrust—at least in rule of reason cases—and, thus, that there should not be treble or punitive damages in such cases. Congress recently came to that conclusion with respect to certain research and production joint ventures.[5]

One obvious response, already recognized in the literature and by Professor Cooter, is that enforcement errors are likely to lead to suboptimal cost internalization.[6] In this analysis, enforcement errors include both the failure to detect unlawful conduct and false negatives in litigation challenging allegedly illegal conduct. Under-enforcement because of such errors will obviously diminish the deterrent effect of the antitrust laws, but it is not clear that false negatives are a more serious problem than false positives or that enforcement errors in general are more serious in antitrust matters than with respect to other torts. Whether under-enforcement is enough to answer the overdeterrence concern

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4. *See generally* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 39-40 (1983).

5. *See* National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, 107 Stat. 117 (1993); National Cooperative Research Act of 1984, Pub. L. No. 98-462, 99 Stat. 1815 (1984).

6. *See, e.g.*, Cooter, *supra* note 2, at 89; G. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1998).

fully is an empirical question to which I do not know the answer.

There is, however, another aspect of antitrust that distinguishes it from other torts and that might itself provide a basis to conclude that some form of multiple damages is needed to prevent underdeterrence. In the oridnary tort, the full extent of the loss from the tortious conduct can be described as a transfer from the plaintiff—or victim—to the defendant(s) or, to be more precise, a transfer from the set of all plaintiffs or victims to the defendant(s). The automobile accident victim, for example, bears the loss resulting from the tort, while the negligent driver reaps the benefits of his excessive speed or inadequate maintenance; similarly, the neighbors who have to breathe dirty air bear the loss from pollution, while the manufacturer benefits from skimping on pollution control measures; and so on.

Antitrust is fundamentally different. To be sure, in many or maybe even most antitrust cases, the violation leads to a price increase; the price increase results in a transfer from buyers to sellers; and the buyers can recover the transfer as damages. In this respect, antitrust is no different from other torts. However, the essence of an antitrust violation is that there is a reduction of output in the market. The only unambiguous cost to society from an output reduction is the loss to the persons who did not buy the product because output was restricted. This is what economists call the "deadweight loss." As a general matter, the deadweight loss is not a cognizable injury compensable by antitrust damages.

Therefore, while one can play around with the numbers and concoct all sorts of hypotheticals, an antitrust regime in which purchasers and excluded competitors are limited to single damages would tend to undercompensate because it would not provide compensation for a significant part of the costs resulting from the antitrust violation. Thus, while single damages might achieve complete disgorgement (assuming no enforcement errors), the defendant faces a total damage exposure that is less than the total external or social costs of its antitrust violations if, as is likely, the uncompensated deadweight loss exceeds the excessive compensation attributable to the discontinuity problem.

Accordingly, notwithstanding the discontinuity problem, there might be a case for some kind of extra or multiple compensatory damages in antitrust cases in order to induce full internalization of antitrust injury, even with respect to conduct whose unlawfulness was not clear to the defendant. It, of course, does not follow that treble damages are the right amount. That, too, is an empirical question to which I do not know the answer.[7]

III

One other matter that has not yet been addressed by these authors warrants attention. When there are multiple or punitive damages, there will be situa-

7. Antitrust litigation is generally lengthy, and successful plaintiffs are not entitled to prejudgement interest. The term "treble damages" thus overtakes the present value and thus the deterrent effect, of the damage award.

tions in which a plaintiff who suffered a small loss is going to recover multiples of that loss. Recall the case of McDonalds and the hot coffee. The case involved a woman who went into McDonalds, bought a cup of hot coffee, and placed it between her legs on the seat of her car.[8] As she was attempting to add cream and sugar, the cup overturned, and the coffee severely burned her legs. She sued, and the jury awarded her $200,000 in compensatory damages and $2.7 million in punitive damages.[9]

The punitive damage award was very controversial, yet I suspect that the size of the award was not itself the cause of the controversy. The evidence reportedly showed that McDonalds knew the coffee was dangerously hot but nevertheless decided to serve it that way. There may thus be little dispute that McDonalds should have had to pay a substantial sum in excess of the actual damages as a deterrent against such conduct by McDonalds and others in the future.

There is, however, another issue about which there is likely to be less consensus and which therefore jeopardizes any regime in which damages are used to do more than compensate victims. That is the windfall that plaintiffs and plaintiffs' lawyers sometimes receive from punitive or multiple damages. I suspect it is the perception that plaintiffs and their attorneys sometimes receive undeserved, windfall damages, much more than a sense of concern for defendants, that erodes support for multiple or punitive damages.[10]

There may be a way to reconcile both the need for multiple damages to induce optimal cost internalization or otherwise further deterrence objectives, and the need to avoid jeopardizing the deterrence process by permitting windfall awards to plaintiffs. The solution may be to require the defendant to pay the government, rather than the plaintiff or her lawyer, the multiple damages in excess of the amount necessary to induce the bringing of the private lawsuit and compensate the victim.

Of course, if the excess is going to be paid to the government, maybe the government ought to bring the actions in the first place; that is, maybe the government ought to be permitted to recover civil penalties in antitrust and other tort proceedings. That possibility, however, raises a different set of issues that go beyond the scope of this comment.

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8. *See* Liebeck v. McDonald's Restaurant, No. CV-93-02419, 1994 WL 360309, at *1 (D.N.M. Aug. 18, 1994).

9. These were reduced by the court to $160,000 and $400,000, respectively, and the case subsequently settled.

10. There is a related concern that has special application in antitrust law. Some have suggested that the attraction of potentially huge treble damage awards and the length and time required for much antitrust litigation induces the filing of nonmeritorious damage actions or creates excessive incentives for private parties to settle rather than litigate antitrust claims. Mindful of these concerns, courts have adopted various legal requirements to screen out certain types of private claims. Some of these are manifest in standing rules or other limitations on private damage claims, but it may be that substantive antitrust doctrine has itself been distorted because of the concern about private damage actions.