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THE ROLE OF THE PRIVATE LITIGANT IN ANTITRUST ENFORCEMENT

Remarks of Everette MacIntyre
Commissioner, Federal Trade Commission

Before

Joint Meeting of the Antitrust Sections
Chicago Bar Association

And

Illinois State Bar Association

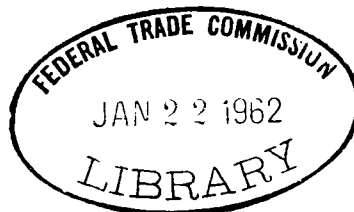
Antitrust Symposium

On

Private Antitrust Litigation

Chicago, Illinois

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THE ROLE OF THE PRIVATE LITIGANT IN
ANTITRUST ENFORCEMENT

Congress, when it enacted Section 7 of the Sherman Act ^{1/} and subsequently Sections 4 ^{2/} and 16 ^{3/} of the Clayton Act, had a broader object in view than merely making provision for the alleviation of individual grievances resulting from violation of the antitrust laws. In fact, it was the legislative intent that the individual, by securing redress for himself would thereby supplement governmental enforcement in the antitrust field.

The courts have taken judicial notice of the Congress' intent to provide:

". . . 'in the most comprehensive way . . . against combinations or conspiracies in restraint of trade or commerce' . . ." ^{4/}

and have recognized the legislative intent to give the private treble damage litigant an important role in the enforcement scheme of the antitrust laws, holding that:

". . . 'The treble damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute' . . ." ^{5/}

^{1/} 26 Stat. 210 (1890), repealed 69 Stat. 283 (1955), effective January 7, 1956.

^{2/} 15 U.S.C. 15; 38 Stat. 731 (1914) providing for treble damages.

^{3/} 15 U.S.C. §26; 38 Stat. 737 (1914) providing for injunctive relief.

^{4/} Karseal Corporation v. Richfield Oil Corporation, 221 F.2d 358, 365 (9th Cir., 1955).

^{5/} Ibid.

The Seventh Circuit has succinctly summarized the private litigant's role in the following terms:

" . . . This grant to persons damaged - a cause of action for treble damages - was for the purpose of multiplying the agencies which would help enforce the Act and therefore make it more effective." 6/

The Supreme Court has recognized ". . . the public interest in vigilant enforcement of the antitrust laws through the instrumentality of private treble-damage action . . ." 7/, and has also stated:

". . . Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party." 8/

This view of the quasi-public role of the treble damage litigant has been accepted by both the incumbent Assistant Attorney General in charge of the Antitrust Division, Lee Loevinger, 9/ and his predecessor, Robert A.

6/ Maltz v. Sax, et al., 134 F.2d 2, 4 (7th Cir., 1943), cert. denied 319 U.S. 772 (1943); see also Weinberg, et al. v. Sinclair Refining Co., 48 F. Supp. 203, 205 (E.D. N.Y., 1942), and Quemos Theatre Co., Inc. v. Warner Bros., Inc., et al., 35 F. Supp. 949, 950 (D. N.J. 1940).

7/ Lawlor, et al., Trading As Independent Poster Exchange v. National Screen Service Corp., et al., 349 U.S. 322, 329 (1955).

8/ Radovich v. National Football League, et al., 352 U.S. 445, 453 (1957).

9/ Loevinger, Private Action - The Strongest Pillar of Antitrust, III Antitrust Bulletin 167, 168 (1958).

Bicks,^{10/} the incumbent Mr. Loevinger going so far as to state that there is foundation for the belief that as between governmental enforcement and that of private parties, that private relief is both more desirable and more effective.^{11/}

In this connection he advised a Congressional Committee that:

" . . . Congress should enact a straightforward and unequivocal declaration of policy stating that primary reliance for antitrust enforcement is upon private action. . ." ^{12/}

The Federal Trade Commission recognizes that private antitrust actions supplement its own activities in the antitrust sphere, making it unnecessary for the Commission to take action in many instances. As a result, considerable savings are realized by the Government and the Commission is enabled to concentrate on hard core cases thus maximizing the effectiveness of its proceedings.^{13/}

^{10/} Robert A. Bicks, The Department of Justice and Private Treble Damage Actions, IV Antitrust Bulletin 5 (1959).

^{11/} Statement of Lee Loevinger, Hearings Before a Subcommittee of the Select Committee on Small Business United States Senate on the Role of Private Antitrust Enforcement in Protecting Small Business. 85th Cong. 2d Sess. (1958), p.7.

^{12/} id. at 16.

^{13/} Statement of Hon. John Gwynne, Hearings Before a Subcommittee on Small Business United States Senate on the Role of Private Antitrust Enforcement in Protecting Small Business. 85th Cong. 2d Sess. (1958), p. 175.

Congressional sentiment, as well, runs strongly in favor of the supplemental enforcement of the antitrust laws afforded by the private litigant. Rep. Wright Patman, Chairman of the House Small Business Committee, in his statement supporting H.R. 10243 gave expression to this view in the following terms:

" . . . You and I have recognized that we need a strong and effective antitrust policy to preserve competition. We have recognized that a necessary and integral part of any such policy is full and effective enforcement of our antimonopoly laws. For many years it has been recognized that the Government alone is not able to provide all of the necessary enforcement. The help of all citizens is needed. We know that private parties will help in this endeavor if we afford them rightful opportunities. In other words, we can expect this help if we give them the right to proceed, and see to it that they are treated reasonably respecting recoveries of damages and costs of litigation." ^{14/}

The legislative intent to enlist the private individual in enforcement of the antitrust laws was largely unrealized until after World War II. As of 1940 in a half century of private litigation, only 175 cases of this nature had been filed and of these only 13 resulted in judgment. ^{15/} The

^{14/} Statement of Rep. Wright Patman Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives on H.R. 10243, August 6, 1958.

^{15/} Statement of Victor R. Hansen, Hearings Before a Subcommittee of the Select Committee on Small Business United States Senate on the Role of Private Antitrust Enforcement in Protecting Small Business. 85th Cong. 2d Sess. (1958), p. 122.

number of private suits in the period, according to one comment, assumed a comparatively futile insignificance taking into consideration the large number of businessmen and the extent of corporate consolidation by certain of their number.^{16/}

The private antitrust litigant, however, assumed importance after World War II; reported recoveries from 1945 to 1951 amounted to one and a half the number in the entire previous period.^{17/}

The statistics of the Administrative Office of the United States Courts for antitrust cases filed since 1941^{18/} graphically document this point. The first significant increase in the number of private actions filed took place in 1949 when the 162 suits filed registered an increase of 131.4% over the seventy private suits filed in 1942. Thereafter, in the period 1950 through 1961, there is a steady upward trend in private antitrust litigation, disregarding fluctuations in certain years. For example, the 378 private suits filed in 1961 showed an increase of 133.3% over treble damage litigation filed in 1949 and an increase of 440% over corresponding litigation in 1942. (See Appendix A).

^{16/} Fifty Years of Sherman Act Enforcement, 49 Yale L.J. 284, 296 (1939).

^{17/} Statement of Hansen, supra, p. 122.

^{18/} These statistics are the basis of a fiscal year ending in June.

The growing importance of private litigation is made even more obvious by comparing the number of private suits filed for various periods in the twenty-year interval between 1942 and 1961. The years 1942 through 1948 involving a period of seven years saw 397 private actions filed; in the next seven-year period, 1949-1955, 1,373 such actions were filed, while in the last six years, 1956-1961, private litigants initiated 1,541 antitrust suits.

Another comparison further drives home the indispensable role that the private suit has played in the antitrust field in recent years. In the twenty-year period 1942-1961, the United States Department of Justice filed 986 criminal and civil suits; in the last five years of the period, private parties initiated 1,314 actions. Private actions in the five-year period exceeded by 328, therefore, the total number of Government suits filed for the entire twenty-year interval. (See Appendix A.)

In 1958, the increasing significance of the private litigant's role in suppressing unfair methods of competition received a set-back when the Supreme Court in Nashville Milk Co. v. Carnation Company,^{19/} and in Safeway Stores, Inc. v. Vance,^{20/} by five to four decisions, held that Section 3 of the Robinson-Patman Act was not one of the

^{19/} 355 U.S. 373 (1958).

^{20/} 355 U.S. 389 (1958).

antitrust laws coming within the scope of Sections 4 and 16 of the Clayton Act. As a result, private parties may not sue for redress for injuries stemming from violation of Section 3 of the Robinson-Patman Act, prohibiting sales at prices for the purpose of destroying competition or eliminating a competitor. Consequently, enforcement of Section 3 is presently limited to Government criminal action.

Justice Douglas, speaking for the dissenting minority of four, argued that the majority has "[resolved] all ambiguities against the grant of vitality to §3" and forgotten that the treble damage technique has been designed as an effective method of deterring violation of the Clayton Act,^{21/} and concluded that the opponents of the Robinson-Patman Act had achieved in the Court what they could not do in the Congress.^{22/}

Representative Patman, the author of the Robinson-Patman Act, immediately introduced H.R. 10243 designed to expressly redefine the "antitrust laws" so as to include Section 3 of the Robinson-Patman Act within their scope by an amendment to Section 1 of the Clayton Act.

In his argument in support of the bill, Mr. Patman stressed the fact that governmental action to enforce §3 had not been effective, the Department of Justice having

^{21/} Nashville Milk Co. v. Carnation, supra, at 387.

^{22/} id. at 388.

little sympathy for this Act as a criminal law against predatory pricing practices.^{23/}

Evidently, Mr. Patman felt that the decisions in the Nashville and Safeway cases, supra, had deranged the statutory scheme for the enforcement of the antitrust laws, for he summed up his statement in favor of H.R. 10243 with the argument that:

"We have strengthened the antitrust laws to prevent undue concentration in American industry resulting from mergers and consolidations. The results of concentration are equally bad whether obtained by the way of mergers or by the way of monopolistic practices. . . . Some small businessmen are saying today that we are preventing them from selling out to large concerns, but on the other hand, are permitting large concerns to discriminate in prices and run small business concerns out of business."^{24/}

Obviously, Mr. Patman introduced H.R. 10243 because he felt that the small businessman as a private litigant has a vital role to play in assuring the unfettered competition which is the object of the antitrust laws.

On this point, it may be noted that Lee Loevinger, then a prominent member of the private antitrust bar, endorsed S. 3079, 85th Cong. 2nd Sess., which paralleled

^{23/} Statement of Rep. Patman Before Antitrust Subcommittee of the House Committee on the Judiciary, op. cit. supra, note 14.

^{24/} ibid.

the provisos of H.R. 10243, noting in this connection the dissent's argument that the majority decision in the Nashville and Safeway cases, supra, had in effect repealed Section 3.^{25/}

The surge of private antitrust enforcement beginning in the post World War II period and continuing to the present, however, resulted primarily from prior governmental action,^{26/} and it is clear from the statutory scheme as a whole that it was the legislative intent that this should be the case for by Section 5 of the Clayton Act^{27/} Congress provided that a judgment or decree in behalf of the United States entered after the taking of testimony would be prima facie evidence of the issues decided in the Government action.

Clearly, prior to the enactment of this section, President Wilson urged the Congress to facilitate the partnership of governmental and private enforcement of the antitrust laws when he advocated:

" . . . giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit. . . . It is not fair that the

^{25/} Statement Lee Loevinger, op. cit. supra, note 11, pp. 22, 30.

^{26/} Statement Victor R. Hansen, op. cit. supra, note 15, pp. 122, 141.

^{27/} 38 Stat. 731, 15 U.S.C. §16.

private litigant should be obliged to set up and establish again the facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience." 28/

As of 1952 approximately ninety per cent of private suits filed followed government action and although the percentage had declined somewhat by 1958, 76% to 78% of private antitrust action could still be traced to successful government suits. 29/

The Federal Trade Commission is desirous of supporting this additional form of antitrust enforcement whenever possible, and has expressly recognized its obligation to facilitate private enforcement by Commission proceedings. In this connection, the Commission ruled recently in H. P. Hood & Sons, Inc., 30/ that evidence should not be put in camera merely because treble damage actions might arise therefrom, stating in pertinent part:

"Certainly the exposure of the respondent to possible treble damage actions is not the type of injury which would constitute 'good cause' for

28/ Woodrow Wilson, Special Address Delivered at a Joint Session of Congress January 20, 1914, Messages and Papers of the Presidents Vol. XVI, Bureau of National Literature, Inc., p. 7918.

29/ Robert A. Bicks, The Department of Justice and Private Treble Damage Action. IV Antitrust Bulletins, 7 (1959).

30/ Docket 7709.

secretary this evidence. Placing documents 'in camera' for this reason would constitute a direct attempt to frustrate and defeat the will and intent of Congress. In enacting Section 4 of the Clayton Act (15 U.S.C. 15), . . . Congress intended that such private suits would supplement and bolster the antitrust enforcement efforts of government prosecution. . . ."

"Thus, in our view the secretion of evidence for the purpose of frustrating possible treble damage plaintiffs would be opposed to the public interest and the clearly expressed will of Congress. Our efforts should be directed to aiding, not hindering, private enforcement of the antitrust laws." (emphasis supplied.)

The two single areas of the economy which most dramatically exemplify the interaction of private and governmental enforcement in the antitrust field are possibly the movie industry and the manufacture of heavy electrical equipment.

In the case of the movie industry, the decree secured by the Government in United States v. Paramount Pictures³¹ generated a great deal of private enforcement activity and, in fact, the assertion has been made that all of the private movie litigation followed successful Government antitrust proceedings.^{32/} The fact that plaintiffs were able to use the Paramount decrees as prima facie evidence in their own

^{31/} 66 F. Supp. 323 (S.D. N.Y. 1946), 70 F. Supp. 53 (S.D. N.Y. 1947), modified and remanded 334 U.S. 131 (1948), 85 F. Supp. 881 (S.D. N.Y. 1949).

^{32/} Comment, Antitrust Enforcement By Private Parties: Analysis of Developments In The Treble Damage Suit, 61 Yale L. J. 1010, 1060 (1952).

suits resulted in the filing of hundreds of treble damage actions against the Paramount defendants.^{33/}

The following figures for a seven-year period best document the extent to which private enforcement has supplemented governmental action to correct restrictive practices in the movie industry.

Treble Damage Actions in the Motion
Picture Industry 34/

<u>Year</u>	<u>Suits Filed</u>	<u>Suits with Damage Claims</u>	<u>Amount of Claims</u>
1951	55	51	\$ 94,829,101
1952	86	76	116,505,366
1953	67	59	248,074,460
1954	38	33	55,349,000
1955	42	31	61,329,750
1956	30	22	50,929,000
1957	33	25	21,838,707

Private suits have been successful in securing alteration of practices in the movie industry and in adjudicating exhibitors' rights.^{35/} Further, private suits have been influential in inducing the movie industry to comply with Government decrees.^{36/}

^{33/} Conant, Antitrust in the Motion Picture Industry, University of California Press, p. 199 (1960).

^{34/} Id. p. 179.

³⁵ Comment, 61 Yale L. J. op cit. supra, note 32, at 1045, 1046.

^{36/} Id. at 1046, quoting testimony of H. Graham Morrison, Assistant Attorney General in Charge of the Antitrust Division Hearings on H.R. 3408 Subcommittee on Study of Monopoly Power of the House Judiciary Committee, at p. 12.

The recent Government victory in the so-called "Philadelphia" or electrical equipment price fixing cases, which consisted of twenty related proceedings involving as defendants twenty-nine separate companies, as well as certain of their employees and officers,^{37/} completed February 1961,^{38/} has already given rise to a very large number of private damage actions, and the end is by no means in sight.

To date, possibly the most significant of these actions were the twelve suits on purchases totaling more than \$750,000,000, filed in the District Court for Southern New York by forty-four plaintiffs on December 4, 1961, against twenty-one makers of heavy electrical equipment involved as defendants in the preceding Government criminal suits in Philadelphia.^{39/}

The importance of this suit in enforcing adherence to the antitrust laws and advancing the public interest is readily apparent from the identity of the plaintiffs who are forty-four investor-owned electrical utilities, serving fourteen eastern states and such metropolitan areas as Boston, Baltimore, Hartford, Providence, Cleveland,

^{37/} CCH Trade Reg. Rep. Paragraph 8801 (1961).

^{38/} Wall Street Journal, December 5, p. 3.

^{39/} Ibid. and BNA ATRR, No. 21, p. A7, December 5, 1961.

Toledo, Cincinnati, Indianapolis and Richmond, Va.^{40/}
Obviously these suits, if successful, could have the effect
of both raising the dividends on plaintiffs' stock and
lowering prices to consumers in these areas.

The plaintiff utilities, alleging they had been
overcharged because of conspiracies dating from 1948 relating
to prices of electrical equipment, did not specify the amount
of damages in the complaint pending additional information
to be secured in the course of pretrial.^{41/} It has, however,
been estimated the damages involved in these suits could
run into ten figures.^{42/}

A striking feature of the treble damage actions filed
on December 4, 1961, is the fact that all plaintiffs in
that case are members of an "Antitrust Investigation Group"
organized by more than one hundred and fifty investor-owned
utilities to combine their investigative efforts.^{43/} The
legislative intent to supply an ancillary force of private
investigators to supplement the Department of Justice in
law enforcement has been obviously realized in this
instance.

^{40/} Wall Street Journal, December 5, p. 3.

^{41/} Ibid.

^{42/} BNA, ATRR No. 21, A-7, December 5, 1961.

^{43/} Id., at A-8.

The treble damage actions filed December 4, 1961, were the largest in the series of more than one hundred and sixty damage actions growing out of the Federal suits,^{44/} but the preceding actions against the Philadelphia defendants are of considerable importance. For example, a public utility district in the State of Washington sued three of the major defendants, Westinghouse, General Electric and Allis Chalmers, for \$25,000,000. Other treble damage actions have been filed from coast to coast by municipalities and utilities, including the cities of Philadelphia, Pennsylvania, and Ft. Pierce, Florida, the State of New Jersey, eleven rural Ohio cooperatives, the Northwest Electric Power Cooperative of Kansas City, the Los Angeles Department of Water and Power; and in Illinois, by the Commonwealth Edison Co. of Chicago.^{45/} In many of the suits, the damages for which recovery was sought were unspecified, but the potential drain on defendants is obviously grievous.

In the period 1952 to the latter part of 1958, plaintiffs in private actions won eight out of seventeen cases for injunctive relief; in the same interval, plaintiffs in private treble damage actions gained decisions in twenty

^{44/} Wall Street Journal, December 5, 1961, p. 3.

^{45/} BNA, ATRR, No. 1, A-6, 7, July 18, 1961.
BNA, ATRR, No. 2, B-2, 3, A-16, July 25, 1961.
BNA, ATRR, No. 3, A-14, August 1, 1961.
BNA, ATRR, No. 11, A-6, September 26, 1961.
BNA, ATRR, No. 21, A-7, December 5, 1961.

cases as compared to a loss of one hundred and twenty-four; the ratio of victories for the period was, therefore, approximately 6 to 1 in favor of defendants. The Government, on the other hand, from 1953 to the end of 1958, had a record of thirty-one victories to thirty-nine defeats, resulting in a 60-40 ratio in favor of defendants.^{46/} Nevertheless, the private suit may have greater deterrent effect on prospective antitrust violators because the potential recoveries from treble damage litigation is more nearly related to the harm done, if not to the profits derived by the antitrust violator, than are the fines levied as a result of Government action. The real sanctions of Government action, it has been noted, are the stigma of criminal prosecution and the inconvenience of operating under injunctive order.^{47/}

In this connection, the District Court for the Southern District of New York, in an opinion denying defendant's motion to enter a nolo contendere plea, expressly held that the purpose of permitting treble damage actions was punitive, stating:

^{46/} Blicks The Department of Justice and Private Treble Damage Actions, op. cit. supra, note 10, at 11-12.

^{47/} Loevinger Private Action - The Strongest Pillar of Antitrust, op. cit. supra, note 9, at 168-169.

" . . . Another purpose in permitting an injured party to recover threefold his actual damage was that substantial verdicts against the wrongdoer would constitute punitive sanctions - to act as a deterrent against a repetition of the offense and to serve as a warning to potential violators." (Emphasis supplied.) 48/

and Judge Hansen stated in an appearance before Congress on the same point that private recoveries by heightening the financial penalty increased the deterrent value of both civil and criminal Government actions. 49/

The amount of treble damages assessed in certain of the movie cases highlights the punitive and deterrent aspect of private litigation as a method of antitrust enforcement; plaintiffs, who as of 1952 had been successful in securing damages in over fifty per cent of the reported cases in which there had been final disposition, amassed damages in amounts from \$60,000 to \$1,125,000 ^{50/}e.g. Milwaukee Towne Corp. v. Loew's, Inc., et al. (\$941,000 damages); 51/

48/ United States v. Standard Ultramarine and Color Co.,
137 F. Supp. 167, 171 (S.D. N.Y. 1955).

49/ Hansen Statement op. cit. supra, note 15, at 141.

50/ Comment, 61 Yale L. J. 1010, op.cit. supra, note 32,
at 1044.

51/ 190 F.2d 561 (7th Cir. 1951), cert. denied 342 U.S.
909 (1952).

Twentieth Century Fox Film Corp., et al. v. Brookside Theatre Corp. (\$1,125,000 damages); ^{52/} Theatre Investment Co. v. RKO Radio Pictures, Inc., et al. (\$60,000 damages). ^{53/}

High damage assessments, near the million mark, in private damage suits, of course, are not confined to litigation concerning the movie industry; for example, in Kiefer-Stewart Co. v. Seagram & Sons, ^{54/} a suit involving the liquor industry, plaintiff recovered damages of \$975,000; in The Sager Glove Corporation v. Bausch & Lomb Optical Co., et al. ^{55/} a suit in the optical industry, plaintiff secured a like amount.

Private suits in the heavy electrical equipment field, of course, bid fair to surpass the amount of damages previously recovered in all other segments of the economy.

The punitive aspect of treble damage litigation is not limited to the mere recovery of damages by plaintiffs. The amount of attorneys' fees recovered by plaintiffs in certain actions suggests that this item too is of sufficient weight

^{52/} 194 F.2d 846 (8th Cir. 1952), cert. denied 343 U.S. 942 (1952).

^{53/} 72 F. Supp. 650 (Wash. N.D. 1947).

^{54/} 340 U.S. 211 (1951), reversing 182 F.2d 228 (7th Cir. (1950)).

^{55/} 1950-51 Trade Cases, Paragraph 62, 956 (N.D. Ill. 1951).

to have cautionary effect.^{56/} For example, the Ninth Circuit, while remanding a case for further consideration of damages ruled as follows on the item of attorney's fees:

"While it is the duty of this Court 'to protect against vicarious generosity in the matter of attorneys' fees' . . . we cannot say as a matter of law that in a case like this, tried at great length below; argued twice on this appeal; and now to be reversed partially so that a new trial must be had below on the issue of damages, that before counsel for appellees obtain satisfaction of judgment for their client that \$195,000 is too large a sum, or a figure that would shock the conscience . . . When [the amount recovered by plaintiffs] . . . is determined, finally, the sum heretofore awarded as attorneys' fees may be too large, or conceivably too small. . . .^{57/}

The costs involved in defending treble damage actions is another form of financial punishment to which defendants are subjected in private actions. A 1952 survey of defense counsel indicated that in cases where the damages claimed exceeded \$150,000, this being the case in over one-half the cases filed, defense costs ranged from \$17,000 to

^{56/} Twentieth Century Fox Films Corp., et al. v. Brookside Theatre Corp., supra (\$100,000 attorney fees); Milwaukee Towne Corp. v. Loew's Inc., et al., supra (\$75,000 attorney fees); Kiefer Stewart Co. v. Seagram & Sons, supra (\$50,000 attorney fees); The Sager Glove Corporation v. Bausch & Lomb Optical Co., et al., supra (\$132,000 attorney's fee).

^{57/} Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d 1, 34 (9th Cir. 1960), cert. granted, 7 L. Ed. 2d 22 (1961).

\$250,000 and even where settlements were effected, defendant's expenses could run into five figures.^{58/}

The impact of private enforcement is, therefore, much wider than would be indicated merely by the statistics relating to cases in which plaintiffs have recovered subsequent to litigation,^{59/} for the threat of high damages, attorneys' fees and the expenses of defending a suit are undoubtedly of critical importance in providing incentive for a large number of settlements.

" . . . The inescapable investment of time, effort and money in any antitrust case is so great that . . . it is not only improper but economically suicidal for any lawyer to get either himself or his client committed to litigation unless he is reasonably convinced in his own mind on an objective appraisal of the evidence and the law that there is a better than even chance of prevailing." ^{60/}

The foregoing considerations, although originally directed to the filing of private suits are, of course, equally pertinent to the defense's determination of the advisability of settling private litigation.

^{58/} Comment, 61 Yale L. J., op cit. supra, note 32, at 1060.

^{59/} Ibid. at 1059.

^{60/} Loevinger, Handling a Plaintiff's Antitrust Damage Suit, IV Antitrust Bulletin 29, 37 (1959).

The private antitrust suits, however, do more than merely duplicate Government work.^{61/} For private litigation frequently adjudicates practices not covered by Government decrees^{62/} and in some instances help close the breach left by necessarily incomplete Government policing of decrees.^{63/}

Possibly, the unique contribution of the private suit to antitrust enforcement is its preventive function in gray areas which are neither clearly unlawful or lawful. Indictment under criminal action in such cases is unlikely and in these areas the threat of treble damage suits more than the possibility of Government action, deters business from carrying out the proposed acts. A leading member of the private antitrust bar has estimated that for every act or practice actually resulting in actual private litigation hundreds of others had been considered and rejected because of the fear of treble damage claims.^{64/}

^{61/} Hansen Statement, op. cit. supra, note 15, at 141.

^{62/} Comment, 61 Yale L. J., op cit. supra, note 32, at 1061.

^{63/} Hansen Statement, supra, at 141.

^{64/} Communication to Yale Law Journal from Jerrold S. Van Cise, January 2, 1952, cited by Comment, 61 Yale, L. J., supra, at 1061.

Many of the benefits flowing from private enforcement of the antitrust laws as opposed to Government enforcement are therefore intangible. For example:

". . . The method of freedom is the method of private action, as opposed to the tendency of government enforcement to become authoritarian . . . It seems indisputable that law enforcement through private action is both more flexible and less authoritarian than enforcement by a central government agency." 65/

There can obviously be no entirely objective estimate of the degree to which the public interest has benefited from private litigation. That benefit, however, has been substantial, even though the extent to which private proceedings have furthered the objectives of the antitrust laws may never be fully known.

65/ Loevinger, Private Action - The Strongest Pillar of Antitrust, op cit. supra, note 9, at 168.

APPENDIX A *

Antitrust Cases Commenced

<u>Fiscal Year</u> <u>June</u>	<u>Total</u>	<u>U.S. Dept. of Justice</u>		<u>Private</u>
		<u>Civil</u>	<u>Criminal</u>	
1942	105	35	----	70
1943	104	24	40	40
1944	75	12	13	50
1945	56	20	9	27
1946	101	18	15	68
1947	108	33	11	64
1948	115	19	18	78
1949	228	39	27	162
1950	233	42	34	157
1951	262	37	16	209
1952	293	20	12	261
1953	244	16	16	212
1954	194	21	10	163
1955	258	33	16	209
1956	281	30	24	227
1957	244	38	18	188
1958	325	33	22	270
1959	315	23	42	250
1960	315	60	27	228
1961	441	42	21	378

* Sources: Annual Reports of the Director of the Administrative Office of the United States Courts 1960 and 1961; House Doc. 240, 85th Cong.